

U.S. Customs and Border Protection

8 CFR PARTS 103, 212, 217, AND 286

CBP DEC. 22-07

IMPLEMENTATION OF THE ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION (ESTA) AT U.S. LAND BORDERS

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

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This rule amends Department of Homeland Security (DHS) regulations to implement the Electronic System for Travel Authorization (ESTA) requirements under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, for noncitizens who intend to enter the United States under the Visa Waiver Program (VWP) at land ports of entry. Currently, noncitizens from VWP countries must provide certain biographic information to U.S. Customs and Border Protection (CBP) officers at land ports of entry on a paper I-94W Nonimmigrant Visa Waiver Arrival/Departure Record (Form I-94W). Under this rule, these VWP travelers will instead provide this information to CBP electronically through ESTA prior to application for admission to the United States. DHS has already implemented the ESTA requirements for noncitizens who intend to enter the United States under the VWP at air or sea ports of entry.

DATES: This rule is effective May 2, 2022. Comments must be received on or before May 2, 2022.

ADDRESSES: You may submit comments, identified by docket number, by the following method:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2021-0014.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received

will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Due to relevant COVID–19-related restrictions, CBP has temporarily suspended its on-site public inspection of submitted comments.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Participation

II. Executive Summary

III. Background

A. Visa Waiver Program

1. Current CBP Processing of VWP Travelers at Land Ports of Entry
2. Current CBP Processing of VWP Travelers at Air and Sea Ports of Entry

B. Expanding ESTA to Land Ports of Entry

1. Obtaining a Travel Authorization
2. Travel Authorization
3. Timeline for Obtaining a Travel Authorization
4. Required ESTA Data Elements
5. Scope of Travel Authorization
6. Duration
7. Events Requiring New Travel Authorization
8. Fee

9. Judicial Review

C. Discussion of Regulatory Changes

1. 8 CFR Part 103
2. 8 CFR Part 212
3. 8 CFR Part 217
4. 8 CFR Part 286

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

1. Procedural Rule Exception
2. Foreign Affairs Function Exception

B. Executive Orders 13563 and 12866

1. Purpose of Rule
 2. Population Affected by Rule
 3. Costs of Rule
 4. Benefits of Rule
 5. Net Impact of Rule
- C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act of 1995
E. Executive Order 13132
F. Executive Order 12988 Civil Justice Reform
G. Paperwork Reduction Act
H. Privacy Interests

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim final rule. U.S. Customs and Border Protection (CBP) also invites comments on the economic, environmental, or federalism effects that might result from this regulatory change. Comments that will provide the most assistance to CBP will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. Written comments must be submitted on or before May 2, 2022. CBP will consider those comments and make any changes appropriate after consideration of those comments.

II. Executive Summary

The Visa Waiver Program (VWP) permits eligible citizens and nationals from 40 participating countries to apply for admission to the United States at ports of entry for periods of 90 days or less for business or pleasure without first obtaining a nonimmigrant B-1, B-2, or B-1/B-2 visa. The Department of Homeland Security (DHS) is amending its regulations to require VWP travelers applying for admission at U.S. land ports of entry to receive a travel authorization via the Electronic System for Travel Authorization (ESTA) from CBP prior to applying for admission to the United States.

A travel authorization via ESTA is a positive determination of eligibility to travel to the United States under the VWP. Travelers without a travel authorization must have a visa issued by a U.S. Embassy or Consulate for admission to the United States.

Currently, VWP travelers applying for admission at U.S. land ports of entry must complete a paper I-94W Nonimmigrant Visa Waiver Arrival/Departure Record (Form I-94W) prior to admission that provides biographical and travel information to CBP. Through this in-

terim rule, instead of completing a paper Form I-94W at land ports of entry, VWP travelers must now provide this information electronically to CBP via ESTA.

DHS has already instituted the ESTA program at air and sea ports of entry. On June 9, 2008, DHS published an interim final rule (IFR), “Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program,” in the **Federal Register** (73 FR 32440) (hereafter, “ESTA Air and Sea IFR”) announcing the creation of the ESTA program for nonimmigrant visitors traveling to the United States by air or sea under the VWP. After a thorough review of the comments received, on June 8, 2015, DHS published in the **Federal Register** (80 FR 32267) a final rule titled “Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program and the Fee for Use of the System” (hereafter, “ESTA Air, Sea, and Fee Final Rule”).¹ Specifically, DHS amended title 8 of the Code of Federal Regulations (CFR) to provide that VWP travelers applying for admission at U.S. air and sea ports of entry must receive a travel authorization from CBP via ESTA. *See* 8 CFR 217.5 (ESTA regulations). The ESTA regulations set forth the general requirements, the time frame for obtaining a travel authorization, the required data elements, the duration of a travel authorization, and the fee for obtaining a travel authorization. With the implementation of ESTA, VWP travelers who arrive at air and sea ports of entry are no longer required to complete a paper Form I-94W.

This interim rule expands the requirements of ESTA to land ports of entry. Specifically, it extends the electronic collection of the information requested on paper Form I-94W to VWP travelers who intend to travel to the United States by land. For these travelers, all the ESTA requirements in 8 CFR 217.5 are identical to air and sea travelers, except for the time frame for receiving a travel authorization.

As provided in 8 CFR 217.5(b), air and sea VWP travelers must receive a travel authorization prior to embarking on a carrier for travel to the United States. Under this interim rule, however, VWP travelers intending to travel to the United States by land must instead receive a travel authorization prior to application for admission to the United States. The different time frames take into account the fact that travel by land is often by privately owned vehicle or on foot and not by carrier, as is usually the case when people travel to the United States by air or sea.

To expedite the admission process, DHS encourages VWP travelers who intend to travel to the United States by land to apply for a travel

¹ On August 9, 2010, DHS published an IFR in the **Federal Register** (75 FR 47701) to establish a fee for ESTA.

authorization at least 72 hours in advance of their anticipated arrival at a U.S. land port of entry. By submitting an ESTA application well in advance of anticipated arrival at a land port of entry, a traveler will be able to minimize the likelihood that he or she will be found to be inadmissible under the VWP upon arrival at the port of entry and prevent a potentially long wait time at the border while his or her application is under review.

Implementing ESTA at land ports of entry will expedite the admission of VWP travelers and reduce traveler delays, especially when VWP travelers apply for a travel authorization in advance of travel. A travel authorization will be valid at all ports of entry. Therefore, if a VWP traveler already has a valid travel authorization obtained for air or sea travel, the traveler will not need to obtain another travel authorization for admission at a land port of entry.

Following the implementation of ESTA at U.S. land ports of entry, all VWP travelers are required to complete the electronic version of the paper Form I-94W (*i.e.*, an ESTA application) instead of the paper Form I-94W.

As discussed in Section IV(B) of the Background section, “Executive Orders 13563 and 12866,” and detailed in the complete regulatory assessment entitled “Regulatory Assessment for the Implementation of the Electronic System for Travel Authorization (ESTA) at U.S. Land Borders Interim Final Rule,” available at docket number USCBP-2021-0014, this rule will provide immediate benefits to VWP travelers and to CBP. This rule will produce a consistent, modern VWP admission policy, strengthen national security through enhanced traveler vetting, expedite entry processing at land ports of entry, collect Form I-94W information electronically, and reduce inadmissible traveler inspections, generating time and cost savings for CBP and VWP travelers.

III. Background

A. Visa Waiver Program

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security, in consultation with the Secretary of State, may designate countries for participation in the VWP if certain requirements are met. See 8 U.S.C. 1187(c)(2). The INA also sets forth requirements for continued eligibility and termination of VWP status.

Eligible citizens and nationals of VWP countries may apply for admission at a U.S. port of entry as nonimmigrant visitors for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant B-1, B-2, or B-1/B-2 visa. These travel-

ers, however, must comply with applicable regulations and be admissible under statutory and regulatory requirements.² Other nonimmigrant visitors who are not from VWP countries, or visitors from VWP countries who are traveling for purposes other than business or pleasure, must obtain a visa from a U.S. Embassy or Consulate and generally must undergo an interview by consular officials overseas in advance of travel to the United States.

1. Current CBP Processing of VWP Travelers at Land Ports of Entry

The way in which a VWP traveler is processed at a land port of entry depends on the documentation the traveler presents upon application for admission. In some cases, the VWP traveler may be referred to secondary processing. Generally, in secondary processing, the traveler must complete a paper Form I-94W and pay a \$6.00 processing fee. CBP estimates that the paper Form I-94W takes 16 minutes (0.2667 hours) to complete.³

In secondary, once a VWP traveler completes the paper Form I-94W, a CBP officer enters the traveler's passport and paper Form I-94W information into an internal database and collects the traveler's biometric data (*i.e.*, fingerprints and photograph). CBP uses the data collected on the paper Form I-94W to populate a database of crossing history and admission status in the United States. This database stores the admissions and departures of travelers entering or leaving the United States. The CBP officer also checks the visitor's personal information against lost and stolen passport databases, government watch lists, and other DHS resources. Based on this information, as well as an interview with the traveler, the CBP officer determines whether or not the traveler is admissible to the United States. If admissible, the CBP officer stamps the traveler's paper Form I-94W and passport, provides the traveler with the departure portion of the paper Form I-94W ("I-94W Departure Record") and grants the traveler admission to the United States for a period of up to 90 days ("90-day VWP admission period").⁴

² For VWP travelers arriving at the United States at air and sea ports of entry, the ESTA requirements as set forth in 8 CFR 217.5 apply. ESTA requirements are described in detail in Section III(B) of the Background section of this document.

³ Source: U.S. Customs and Border Protection. *Supporting Statement for Paperwork Reduction Act Submission 1651-0111: Arrival and Departure Record (Forms I-94, I-94W) and Electronic System for Travel Authorization (ESTA)*. February 12, 2019. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201810-1651-001. Accessed May 22, 2019.

⁴ Generally, admitted VWP visitors must surrender the I-94W Departure Record when leaving the United States. This allows CBP to accurately record traveler departures. However, admitted VWP travelers are not required to surrender the Form I-94W Departure Record when departing the United States for Canada or Mexico for a trip of less than

The processing of a VWP traveler at a land port of entry may be different if the traveler is within a current 90-day VWP admission period (meaning, the traveler has been processed and admitted into the United States under the VWP within the last 90 days, with or without a current ESTA travel authorization), or if the traveler has a current ESTA travel authorization, but is not within a current 90-day VWP admission period.

In the former case, where the traveler is within a current 90-day VWP admission period, the traveler may generally be processed at CBP's primary inspection. This is because the information typically gathered during secondary processing was already captured earlier through either the traveler's ESTA application (if he or she first arrived in the United States by air or sea) or the Form I-94W (if he or she first arrived in the United States by land). This scenario typically occurs when a VWP traveler who has already been admitted into the United States takes a brief excursion into Canada or Mexico, and then seeks to re-enter the United States to resume his or her visit.

In the latter case, when a VWP traveler has a valid ESTA travel authorization, but is not within a current 90-day VWP admission period, the traveler must go to secondary processing and pay the \$6.00 processing fee, but he or she does not need to complete the paper Form I-94W because CBP already has the traveler's relevant information through his or her ESTA application.

If a traveler is refused admission to the United States under the VWP, he or she can visit the nearest U.S. Embassy or Consulate to apply for a nonimmigrant B-1, B-2, or B-1/B-2 visa. This visa would cost a traveler approximately \$302 in fees and time costs to obtain.⁵

30 days. These travelers may retain their I-94W Departure Record so that when they resume their visit to the United States, via a land port of entry, they are not required to complete another paper Form I-94W. They may be readmitted into the United States for the balance of time remaining on their 90-day VWP admission period.

⁵ The fees to obtain a nonimmigrant B-1, B-2, or B-1/B-2 visa include a \$160.00 U.S. Department of State fee for DS-160: Online Nonimmigrant Visa Application processing and an estimated \$40.00 in photo, courier, and other miscellaneous expenses. The time cost to obtain a nonimmigrant B-1, B-2, or B-1/B-2 visa is approximately \$102, based on the estimated 5-hour time burden to obtain a nonimmigrant B-1, B-2, or B-1/B-2 visa (including the time spent completing Form DS-160: Online Nonimmigrant Visa Application, traveling to a U.S. Embassy or Consulate for the nonimmigrant B-1, B-2, or B-1/B-2 visa interview, waiting for the interview, and undergoing the interview) and a VWP traveler's hourly time value of \$20.40. CBP bases the \$20.40 hourly time value for VWP travelers on the U.S. Department of Transportation's (DOT) hourly time value of \$20.40 for all-purpose, intercity travel by surface-modes, except high-speed rail. For the purposes of this analysis, CBP assumes that the DOT time value, reported in 2015 U.S. dollars, would be the same for 2019. Source of visa processing fee cost: U.S. Department of State. "Fees for Visa Services." Available at <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/fees-visa-services.html>. Accessed May 7, 2018. Source of photo cost: U.S. Department of State. Supporting Statement for Paperwork Reduction Act Submission: 1405-0015, Application for Immigrant Visa and Alien Registration

The overall U.S. admission refusal rate for VWP travelers at land ports of entry is low. From fiscal year (FY) 2013 to FY 2017, CBP recorded 4.0 million VWP traveler arrivals at U.S. land ports of entry, with 99.9 percent of arrivals resulting in admissions to the United States and 0.1 percent resulting in refusals based on paper Form I-94W processing.⁶

2. Current CBP Processing of VWP Travelers at Air and Sea Ports of Entry

A nonimmigrant noncitizen arriving at a U.S. air or sea port of entry under the VWP must obtain a travel authorization via ESTA prior to embarking on a carrier for travel to the United States. If the traveler does not have a travel authorization, he or she must hold an unexpired visa issued by a U.S. Embassy or Consulate. *See* Section 217(a) of the INA, 8 U.S.C. 1187(a). *See also* 8 CFR part 217. The relevant history regarding this ESTA requirement is set forth below.

In response to the events of September 11, 2001, Congress enacted the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-53 (9/11 Act). To address aviation security vulnerabilities of the VWP, section 711 of the 9/11 Act required the Secretary of Homeland Security, in consultation with the Secretary of State, to develop and implement a fully automated electronic travel authorization system for VWP travelers visiting the United States. The system would collect biographical and other information the DHS Secretary deems necessary to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. *See* 8 U.S.C. 1187(h)(3)(A). Prior to the establishment of ESTA, VWP travelers could board planes to the United States and be found inadmissible upon arrival at CBP inspection. By establishing ESTA, DHS is able to identify whether the traveler is likely to be admissible upon arrival before the traveler embarks on travel to the United States.

DHS established the electronic equivalent of the paper Form I-94W process at air and sea ports of entry as set forth in the ESTA Air and

(Form DS-230). August 3, 2018. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201808-1405-001. Accessed December 20, 2018. Source of other fees: CBP estimates. Source of VWP traveler's hourly time value: U.S. Department of Transportation, Office of Transportation Policy. The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update). "Table 4 (Revision 2—2016 Update): Recommended Hourly Values of Travel Time Savings." September 27, 2016. Available at <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf>. Accessed June 11, 2018.

⁶ Email correspondence with CBP's Office of Field Operations on April 24, 2015 and May 17, 2018.

Sea IFR (73 FR 32440), published on June 9, 2008, and in the ESTA Air, Sea, and Fee Final Rule (80 FR 32267), published on June 8, 2015. ESTA provides for an electronic collection of the information required on the paper Form I-94W in advance of travel. ESTA fulfills the statutory requirements described in section 711 of the 9/11 Act.

DHS stated in the ESTA Air and Sea IFR that the development and implementation of the ESTA program would eventually allow DHS to automate the requirement that VWP travelers complete a paper Form I-94W prior to being admitted to the United States. *See* 73 FR 32440 at 32443. While the ESTA Air and Sea IFR established the regulations for ESTA, section 711 of the 9/11 Act required DHS to announce implementation of a mandatory ESTA system by publication of a notice in the **Federal Register** no less than 60 days before the date on which ESTA would become mandatory for all VWP travelers. On November 13, 2008, DHS published such a notice in the **Federal Register** (73 FR 67354) announcing that ESTA would be mandatory for all VWP travelers traveling to the United States seeking admission at air and sea ports of entry beginning January 12, 2009. At that point, DHS began an informed compliance period during which VWP travelers who arrived without prior ESTA authorization were not refused admission on that basis, but were instead permitted to complete the paper I-94W upon arrival in the United States. As of June 29, 2010, however, VWP travelers have been required to receive a travel authorization through the ESTA website, <https://www.cbp.gov/esta>, prior to boarding a conveyance destined for a U.S. air or sea port of entry. *See* 80 FR 32267 at 32285. Travelers who do not receive authorization through ESTA may still apply for a nonimmigrant B-1, B-2, or B-1/B-2 visa issued by a U.S. Embassy or Consulate.

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Public Law 111-145, was enacted. Section 9 of this law, the Travel Promotion Act of 2009 (TPA), mandated that the Secretary of Homeland Security establish a fee for the use of ESTA and begin assessing and collecting the fee.

On August 9, 2010, DHS published an interim final rule “Electronic System for Travel Authorization (ESTA); Travel Promotion Fee and Fee for Use of the System” in the **Federal Register** (75 FR 47701) (hereafter, “ESTA Fee IFR”) announcing that beginning September 8, 2010, a \$4.00 ESTA operational fee would be charged to each ESTA applicant to ensure recovery of the full costs of providing and administering the system and an additional \$10.00 Trade Promotion Act (TPA) fee would be charged to each ESTA applicant receiving travel

authorization through September 30, 2015.⁷ See 8 U.S.C. 1187(h)(3)(B), as amended, and 8 CFR 217.5(h).

In response to the request for comments in the ESTA Air and Sea IFR and the ESTA Fee IFR, DHS received a total of 39 submissions. Most of these submissions contained comments providing support, voicing concerns, highlighting issues, or offering suggestions for modifications to the ESTA program. After review and analysis of the comments, on June 8, 2015, DHS published the ESTA Air, Sea, and Fee Final Rule in the **Federal Register** (80 FR 32267) with two substantive regulatory changes. The first change allows the Secretary of Homeland Security to adjust travel authorization validity periods on a per country basis from a general validity period of two years, to a three-year maximum or to a lesser period of time. The second change concerns the TPA fee. In accordance with Section 605 of the Consolidated and Further Continuing Appropriations Act of 2015, DHS extended the end date for assessment of the Travel Promotion Act fee to September 30, 2020. DHS also removed a specific reference to the Pay.gov payment system in order to allow for flexibility in how CBP may collect ESTA fees.

The ESTA Air, Sea, and Fee Final Rule also outlines the various operational changes DHS has implemented since the ESTA program's inception based on the experience DHS gained from operating the ESTA program. For example, VWP travelers who provide an email address to DHS when they submit their application will receive an automated email notification indicating that their travel authorization will expire soon. DHS has also updated the information on the ESTA website to address some of the comments. Finally, DHS has also revised some of the ESTA questions to make them more understandable, removed one of the questions, and added some new questions to improve the screening of travelers before their travel to the United States.⁸ All these changes took effect on November 3, 2014.

For more details regarding ESTA and the fees associated with ESTA, please see: ESTA Air and Sea IFR; ESTA Fee IFR; and ESTA Air, Sea, and Fee Final Rule. Additional information may also be found on the ESTA website at <https://esta.cbp.dhs.gov>.

⁷ On February 9, 2018, section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115–123, extended the sunset provision of the travel promotion fee through September 30, 2027. On December 20, 2019, section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116–94, increased the travel promotion fee from \$10 to \$17. CBP will be publishing a separate rule to reflect these legislative changes.

⁸ The ESTA application and the paper Form I–94W are covered by OMB Control Number 1651–0111. The updated questions and additional questions were described in various notices regarding the extension and revision of information collection 1651–0111 requesting public comments published in the **Federal Register** on November 26, 2013 (78 FR 70570), February 14, 2014 (79 FR 8984), December 9, 2014 (79 FR 73096), June 23, 2016 (81 FR 40892), and August 31, 2016 (81 FR 60014).

B. Expanding ESTA to Land Ports of Entry

From FY 2013 to FY 2017, CBP recorded 4.0 million VWP traveler arrivals at U.S. land ports of entry, with 99.9 percent of arrivals resulting in admissions to the United States and 0.1 percent resulting in refusals based on paper Form I-94W processing. Of the total arrivals, approximately 3.1 million (77.8 percent) were distinct, meaning that they corresponded to VWP travelers required to complete new paper Form I-94Ws and undergo related processing. These distinct travelers were either taking their first trip to the United States by land or they lacked valid Form I-94W Departure Records. The remaining 888,000 arrivals (22.2 percent) were non-distinct, meaning that they corresponded to VWP travelers making repeat visits to the United States using an initial, valid Form I-94W Departure Record.⁹

This interim final rule (hereafter “ESTA Land IFR”) amends title 8 of the CFR to implement ESTA for noncitizens who intend to travel to the United States under the VWP by land. These travelers must now submit an ESTA application instead of the paper Form I-94W. The rule requires each noncitizen traveling to the United States by land under the VWP to obtain from CBP a travel authorization via ESTA prior to application for admission to the United States. With this expansion of ESTA, all VWP travelers will be required to have a travel authorization in advance of applying for admission to the United States.

As summarized in the Executive Summary and in Section IV(B), “Executive Orders 13563 and 12866,” this rule has many benefits. In addition to fulfilling a statutory mandate, ESTA serves the twin goals of promoting border security and legitimate travel to the United States. ESTA increases national security and provides efficiencies in the screening of international travelers by vetting subjects of potential interest before admittance into the United States. The ESTA Land IFR also generates various additional benefits to foreign travelers and DHS (particularly CBP).

VWP travelers intending to arrive at U.S. land ports of entry will benefit from ESTA, especially when the traveler already has a travel authorization or applies for a travel authorization before traveling to the United States. By implementing ESTA at land ports of entry, travelers will no longer have to complete the paper Form I-94W at the land port of entry. This will shorten the admission process at U.S. land ports of entry for both VWP travelers and DHS. Travelers who already have an ESTA travel authorization that is still valid will not

⁹ Travelers with a valid Form I-94W Departure Record are those who departed the United States for Canada or Mexico for a trip of less than 30 days.

have to obtain a new travel authorization or complete the paper Form I-94W when entering at a land port of entry. VWP travelers will also save time by obtaining a travel authorization in advance of travel, which may prevent them from spending time and money to travel to a U.S. land port of entry and possibly be refused admission.

ESTA enables DHS to determine whether a noncitizen is eligible to travel to the United States under the VWP and to identify potential grounds of inadmissibility before the VWP traveler applies for admission at a U.S. land port of entry. By making these determinations before the noncitizen embarks on travel to the United States, DHS will likely be able to reduce the number of noncitizens arriving at U.S. ports of entry who are determined to be inadmissible upon arrival. In turn, this will reduce the number of inadmissible noncitizens that DHS must process for appropriate refusal or removal proceedings upon arrival. Furthermore, by implementing ESTA at land ports of entry, DHS will also likely reduce wait times for other international travelers arriving at U.S. ports of entry. With reduced wait times, DHS will better allocate existing resources towards screening passengers at U.S. ports of entry, thereby facilitating legitimate travel.

As explained more fully in section III(B)(1), “Obtaining a Travel Authorization,” as a result of this interim final rule, VWP travelers entering the United States at land ports of entry must receive an ESTA travel authorization prior to application for admission to the United States. This time frame is different from the time frame applicable to VWP travelers entering the United States at air and sea ports of entry. VWP travelers entering the United States at air and sea ports of entry must have a travel authorization prior to boarding a carrier destined for the United States. The different time frames take into account the fact that travel by land is often more spontaneous, and sometimes last minute, and often not by a carrier. DHS will not require land carriers (such as bus and rail companies) to screen passengers or necessitate a travel authorization in advance of arrival to a U.S. land port of entry. Other than the different time frames, the ESTA procedures and requirements for VWP travelers arriving at land ports of entry will be the same as the procedures and requirements for VWP travelers arriving at air or sea ports of entry as provided in 8 CFR 217.5. These procedures and requirements are explained below.

1. Obtaining a Travel Authorization

VWP travelers obtain the required travel authorization by electronically submitting to CBP, via the ESTA website (<https://esta.cbp.dhs.gov>), an application consisting of biographical and other

information specified by the Secretary of Homeland Security. The ESTA application captures all data elements included on the paper Form I-94W. To apply for a travel authorization, a traveler should select the “Apply” feature on the ESTA web page, enter his or her biographical and travel information as prompted by the fields marked with a red asterisk (the mandatory data elements), enter the optional data elements, if known, and submit the application information. A third party (such as a commercial carrier, travel agent, visa service provider, or relative) may submit an ESTA application on a traveler’s behalf. For each travel authorization, the traveler must pay a fee.

CBP will use information included in a traveler’s ESTA application to determine the eligibility of the noncitizen to travel to the United States and whether the visitor poses a law enforcement or security risk.¹⁰

CBP will check information submitted by the traveler, or on behalf of a traveler, in his or her ESTA application against all appropriate databases, including lost and stolen passport databases and appropriate watch lists. CBP may deny the traveler’s ESTA application if: (1) A noncitizen does not provide the required information; (2) a noncitizen provides false information; (3) any evidence exists indicating ineligibility to travel to the United States under the VWP; or (4) the travel poses a law enforcement or security risk. Consistent with section 711 of the 9/11 Act, the Secretary, acting through CBP, retains discretion to revoke a travel authorization determination at any time and for any reason. *See* 8 U.S.C. 1187(h)(3)(C)(i). If a noncitizen’s travel authorization application is denied, the noncitizen may still apply to obtain a visa to travel to the United States from an appropriate U.S. Embassy or Consulate.

To verify that the ESTA application has been approved and a travel authorization has been issued, the traveler must return to the ESTA website to view his or her ESTA status. CBP requires a minimum of two hours to make an ESTA application determination. While most determinations will generally be made in approximately two hours, there is no guarantee that an application will be processed in that time frame and some determinations may take longer. In most cases, the applicant will receive an ESTA decision within 72 hours. An applicant may contact the ESTA Help Desk at the Traveler Communications Center by telephone at 1-202-325-5120 for assistance in processing his or her pending application.

DHS recommends that travelers apply for a travel authorization early in the travel planning process, rather than waiting until the traveler is approaching the port of entry. By planning ahead, a trav-

¹⁰ *See* 8 U.S.C. 1187(h)(3).

eler who is unable to obtain a travel authorization will still have time to apply for a nonimmigrant B-1, B-2, or B-1/B-2 visa from a U.S. Embassy or Consulate before travel.

2. Travel Authorization

A travel authorization is a positive determination that a noncitizen is eligible to travel to the United States under the VWP during the period of time the travel authorization is valid. A travel authorization is not a determination that the noncitizen is ultimately admissible into the United States. That determination is made by a CBP officer only after an applicant for admission is inspected by a CBP officer at a U.S. port of entry. In addition, ESTA is not a visa or a process that acts in lieu of any visa issuance determination made by the Department of State.

3. Timeline for Obtaining a Travel Authorization

Each VWP traveler arriving at a U.S. land port of entry must have a travel authorization prior to application for admission at a land port of entry. A VWP traveler who does not have a valid travel authorization at the time he or she applies for admission to the United States at a land port of entry will be ineligible for admission under the VWP.

If a VWP traveler arrives at a U.S. land port of entry without a valid travel authorization and wants to apply for one, the traveler will be permitted to withdraw his or her application for admission, return to Mexico or Canada, submit an ESTA application there, and await receipt of a travel authorization in Mexico or Canada before returning to a U.S. port of entry. Receipt of a travel authorization will take at least two hours from the time that it is submitted. If the traveler's ESTA application is approved, the traveler may return to a U.S. land port of entry to seek admission. If the traveler's ESTA application is not approved, the traveler is not eligible to seek admission to the United States under the VWP. In such a case, the traveler may apply for a nonimmigrant B-1, B-2, or B-1/B-2 visa from a U.S. Embassy or Consulate and then reapply for admission to the United States.

It should be noted that because VWP travelers arriving at U.S. land ports of entry will need to have a travel authorization prior to application for admission, rather than prior to boarding a carrier, land carriers transporting VWP travelers are not responsible for confirming that the VWP traveler is ESTA-compliant. For example, this interim rule would not require bus companies to confirm that their passengers are ESTA-compliant or to transmit any ESTA data elements on behalf of these travelers to CBP.

4. Required ESTA Data Elements

The current ESTA regulations provide that ESTA will collect such information as the Secretary deems necessary to issue a travel authorization as reflected on the ESTA application. *See* 8 CFR 217.5(c). This information is included on the ESTA website. VWP travelers arriving at land ports of entry will have to provide these same data elements. The ESTA website also includes some optional data elements. This data should be provided, if known.

5. Scope of Travel Authorization

Consistent with section 711 of the 9/11 Act, a travel authorization does not restrict, limit, or otherwise affect the authority of CBP to determine a noncitizen's admissibility into the United States during inspection at a port of entry.

6. Duration

The same general rule and exceptions regarding the duration of a travel authorization as set forth in 8 CFR 217.5(d) will apply to a travel authorization issued for travel to air, sea, and land ports of entry. DHS will notify an individual with an approved ESTA authorization at the email address he or she provided in the application when his or her ESTA expiration date is approaching. Subject to certain exceptions, each travel authorization will generally be valid for a period of two years from the date of issuance, meaning a noncitizen may travel to the United States repeatedly within a two-year period without obtaining another authorization.

7. Events Requiring New Travel Authorization

The events requiring a new travel authorization as set forth in 8 CFR 217.5(e) and summarized below are the same regardless of whether the travel authorization was issued for travel to U.S. air, sea, or land ports of entry.

A VWP traveler must obtain a new travel authorization approval if any of the following conditions occurs: (1) The noncitizen is issued a new passport; (2) the noncitizen changes his or her name; (3) the noncitizen changes his or her gender; (4) the noncitizen changes his or her country of citizenship; or (5) the circumstances underlying the noncitizen's previous responses to any of the ESTA application questions requiring a "yes" or "no" response (eligibility questions) have changed.

8. Fee

The TPA mandated that the Secretary of Homeland Security establish a fee for the use of ESTA and begin assessing and collecting the fee. DHS implemented the fee requirements of the TPA in the ESTA Fee IFR and ESTA Air and Sea Final Rule. VWP travelers applying for a travel authorization to travel to U.S. air and sea ports of entry must pay a \$4.00 ESTA operational fee and an additional \$10.00 Travel Promotion Act fee through September 30, 2020.^{11 12}

This same fee will apply to VWP travelers arriving at U.S. land ports of entry. For a detailed discussion about this fee, see the ESTA Fee IFR and the ESTA Air and Sea Final Rule.

It is important to note that a noncitizen may travel to the United States repeatedly within the validity period using the same travel authorization, regardless of the mode of transportation used. Therefore, VWP travelers who intend to arrive in the United States at a land port of entry and already have a travel authorization that is still valid will not need to apply for a new travel authorization or pay another ESTA fee.

However, a VWP traveler arriving at U.S. land ports of entry will still have to pay the \$6.00 I-94W fee provided for in 8 CFR 103.7(d)(5), unless he or she is entering within a current 90-day VWP admission period. This fee covers processing costs, including those involved in collecting traveler fingerprints.¹³ Although the collection of the I-94W data elements will now be done electronically through ESTA, travelers at the land border will continue to receive a printed departure record. This printed departure record is equivalent to the departure portion of the paper Form I-94W. This document will be stamped by the CBP officer who processes the traveler's admission and should be retained by the traveler while he or she is in the United States. VWP visitors who depart from the United States via a land port will generally be required to surrender this document upon

¹¹ If the ESTA application is denied, the applicant will be refunded the \$10.00 Travel Promotion Act fee. The fee was originally authorized by the TPA through September 30, 2015, but was extended through September 2020 by the Consolidated and Further Continuing Appropriations Act of 2015.

¹² On February 9, 2018, section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115-123, extended the sunset provision of the travel promotion fee through September 30, 2027. On December 20, 2019, section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116-94, increased the travel promotion fee from \$10 to \$17. CBP will be publishing a separate rule to reflect these legislative changes. CBP has not yet begun collecting the higher fee, but will do so after the fee rule has been published.

¹³ Travelers arriving by air and sea pay the same fee; however, the fee is included in the price of the carrier tickets and is not collected separately upon arrival.

leaving the United States.¹⁴ CBP will enter the departure information manually into the appropriate CBP database.¹⁵ The \$6.00 fee supports CBP's efforts in issuing these departure records and entering the departure information.

9. Judicial Review

Section 711 of the 9/11 Act amended section 217 of the INA to provide that no court shall have jurisdiction to review an eligibility determination under the electronic travel authorization system. *See* INA section 217(h)(3)(C)(iv), 8 U.S.C. 1187. Accordingly, a determination under ESTA will be final and, notwithstanding any other provision of the law, is not subject to judicial review.

C. Discussion of Regulatory Changes

DHS is amending parts 103, 212, 217, and 286 of title 8 of the CFR, as set forth below, in order to expand the ESTA requirements to VWP travelers arriving at U.S. land ports of entry and to update the regulations.

1. 8 CFR Part 103

Section 103.7(d)(5) of the DHS regulations (8 CFR 103.7), titled "Form I-94W," enumerates the \$6.00 fee associated with the issuance of Form I-94W. The paragraph is revised to incorporate a definition of "issuance" that reflects the new procedure involved in electronically collecting the traveler's information, then using that information to print a departure record for VWP travelers entering the United States at land ports of entry. The new provision will now clarify that "the term 'issuance' includes, but is not limited to, the creation of an electronic record of admission or arrival/departure by DHS following an inspection performed by a CBP officer, which may be provided to the nonimmigrant as a printout or other confirmation of the electronic record stored in DHS systems."

2. 8 CFR Part 212

Section 212.1 of the DHS regulations (8 CFR 212.1), titled "Documentary requirements for nonimmigrants," refers to the Visa Waiver Pilot Program. On October 30, 2000, the Visa Waiver Permanent

¹⁴ Admitted VWP travelers will not be required to surrender the printed departure record when departing the United States for Canada or Mexico for a trip of less than 30 days. These travelers may retain their printed departure record so that when they resume their visit to the United States, CBP will not have to print another departure record and the traveler may be readmitted into the United States for the balance of time remaining on his or her I-94W Departure Record.

¹⁵ This process differs from the departure process at air and sea ports of entry where departure information is received and recorded electronically.

Program Act, Public Law 106–396, established the VWP as a permanent program and replaced the Visa Waiver Pilot Program. Therefore, this section is amended to remove the reference to the “Visa Waiver Pilot Program” and refer instead to the “Visa Waiver Program.”

3. 8 CFR Part 217

Section 217.1 of the DHS regulations (8 CFR 217.1), titled “Scope,” refers to the Visa Waiver Pilot Program. This section is amended to remove the reference to the “Visa Waiver Pilot Program” and instead refer to the “Visa Waiver Program (VWP).”

Section 217.2 of the DHS regulations (8 CFR 217.2) describes the eligibility requirements to travel under the VWP. Specifically, § 217.2(b)(1) provides that in addition to meeting all the requirements for the “Visa Waiver Pilot Program,” each applicant must possess a valid, unexpired passport issued by a designated country and present a completed, signed Form I–94W. This provision is amended to delete the reference to Form I–94W and add the new requirement to obtain a travel authorization via ESTA. Also, the paragraph is amended to delete the reference to the “Visa Waiver Pilot Program” and refer instead to the “Visa Waiver Program.”

This rule also makes non-substantive amendments to § 217.2 to make the regulation current, correct, and consistent. Specifically, §§ 217.2(a), (c), and (d) and 217.3(b) are amended to delete the references to the “Visa Waiver Pilot Program” and refer instead to the “Visa Waiver Program (VWP).” These provisions are also being updated by replacing the legacy Immigration and Naturalization Service position title (“immigration officer”) with the current DHS position title (“CBP officer”).

Section 217.5 (8 CFR 217.5) sets forth the requirements for ESTA. In particular, § 217.5(a) requires nonimmigrant noncitizens intending to travel by air or sea to the United States under the VWP to receive a travel authorization prior to boarding a carrier destined for the United States. This provision is amended to require nonimmigrant noncitizens intending to travel by land to the United States under the VWP to obtain a travel authorization prior to application for admission to the United States at a land port of entry.

Section 217.5(b) specifies the time frames for obtaining a travel authorization through ESTA for VWP travelers arriving at air and sea ports of entry. The paragraph is amended to also specify the time frame for obtaining a travel authorization for VWP travelers arriving at land ports of entry, *i.e.*, prior to application for admission to the United States. Current § 217.5(c) provides that the DHS Secretary may collect certain information to issue a travel authorization and

refers to the Form I–94W. When the ESTA program is implemented at U.S. land ports of entry, DHS will no longer require VWP travelers to complete the Form I–94W. Therefore, the paragraph is amended by removing the references to the Form I–94W and referring instead to ESTA.

Current § 217.5(g) provides that once ESTA is implemented as a mandatory program, 60 days following publication by the Secretary of a notice in the **Federal Register**, citizens and eligible nationals of countries that participate in the VWP must comply with the requirements of this section. It further provides that as new countries are added to the VWP, citizens and eligible nationals of those countries will be required to obtain a travel authorization prior to traveling to the United States under the VWP. This language is outdated because it has been overtaken by the following events. First, the Secretary published the referenced notice in the **Federal Register** on November 13, 2008 (73 FR 67354), and ESTA was implemented as a mandatory program for VWP travelers arriving at air and sea ports 60 days later. Second, this interim final rule expanding ESTA to VWP travelers arriving at land ports of entry will be effective 30 days after publication. Third, the provision about new countries is now fully covered by the general provision about travel authorization in § 217.5(a). Therefore, the outdated language is deleted.

4. 8 CFR Part 286

Part 286 of the DHS regulations (8 CFR part 286) concerns immigration user fees. Specifically, § 286.9 describes the fee for processing applications and issuing documentation at land border ports of entry. This section will be amended to delete the references to the “Visa Waiver Pilot Program” and refer instead to the “Visa Waiver Program.”

IV. Statutory and Regulatory Requirements

A. *Administrative Procedure Act*

1. Procedural Rule Exception

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** (5 U.S.C. 553(b)) and provide interested persons the opportunity to submit comments (5 U.S.C. 553(c)). However, the APA provides an exception to this prior notice and comment requirement for “rules of agency organization, procedure, or practice” 5 U.S.C. 553(b)(A). This interim final rule is a procedural rule promulgated for efficiency purposes that falls within this exception.

This rule is procedural because it merely changes the method of submission for an existing reporting requirement for nonimmigrant

noncitizens pursuant to existing statutes and regulations. *See* 8 U.S.C. 1103, 1184 and 1187. *See also* 8 CFR 212.1, 299.1, and 8 CFR parts 2 and 217. The rule merely changes the manner in which noncitizens seeking admission to the United States under the VWP, at ports of entry along the land border, present information to DHS and does not alter the rights or interests of those noncitizens as they seek admission to the United States. Such arriving noncitizens will no longer be required to complete and submit the paper Form I-94W. Instead, all required information will be submitted to DHS electronically through the ESTA website. In addition, this rule neither affects the substantive criteria by which CBP officers inspect noncitizens upon arrival nor the nature of the information at CBP's disposal.

2. Foreign Affairs Function Exception

This interim final rule is also exempt from the rulemaking provisions of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as it involves a foreign affairs function of the United States. This rule advances the President's foreign policy goals and directly involves relationships between the United States and its noncitizen visitors.

ESTA is an integral part of the administration of the VWP, a program that involves an inherently foreign affairs function of the United States. Specifically, the VWP, which is administered by DHS in consultation with the Department of State, enables eligible citizens or nationals of designated countries to travel to the United States for tourism or business for stays of 90 days or less without first obtaining a visa, provided they meet certain requirements. Among other things, a traveler must have a valid authorization through ESTA. As part of the ESTA screening process, CBP reviews available information regarding ESTA applicants to determine whether they present a concern to U.S. national security or law enforcement (to include immigration enforcement) interests. Accordingly, any rulemaking actions undertaken to implement ESTA at land ports of entry are exempt from APA notice and comment requirements. However, DHS is interested in receiving public comments on this interim final rule and, therefore, is providing the public with the opportunity to comment without delaying implementation of this rule.

B. Executive Orders 13563 and 12866

Executive Orders (EOs) 13563 ("Improving Regulation and Regulatory Review") and 12866 ("Regulatory Planning and Review") direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory ap-

proaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this rule. Although this rule is not subject to the requirements of Executive Orders 13563 and 12866 due to the foreign affairs exception, DHS has reviewed this interim final rule to ensure its consistency with the regulatory philosophy and principles set forth in those Executive orders. DHS has also prepared a regulatory impact assessment to help inform stakeholders of the impacts of this rule, which DHS has summarized below. The complete assessment can be found in the public docket for this rulemaking at *www.regulations.gov*.

1. Purpose of Rule

This rule will extend the regulatory requirements of ESTA to the land environment per the 9/11 Act. For VWP travelers arriving at U.S. land ports of entry (POEs), all the ESTA requirements currently in 8 CFR 217.5 will remain the same as the requirements for VWP travelers arriving at air and sea ports, except for the time frame for obtaining the travel authorization. Under the ESTA Land IFR, VWP travelers intending to travel to the United States by land must receive a travel authorization prior to application for admission to, rather than prior to embarking on a carrier destined for, the United States. These travelers may obtain the required travel authorization by submitting an electronic application to CBP through the ESTA website (<https://esta.cbp.dhs.gov/esta/>) and paying the ESTA application fee, which consists of an operational fee and Travel Promotion Act (TPA) fee valid until FY 2021.¹⁶ The ESTA application serves as an electronic version of the paper Form I-94W, asking for the same biographical, personal, and trip-related information currently requested on the paper Form I-94W as well as several additional security-related questions not on the paper Form I-94W but typically asked during paper Form I-94W processing. CBP will use the ESTA application information to assess a traveler’s likely admissibility and

¹⁶ As previously stated, on February 9, 2018, section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115-123, extended the sunset provision of the travel promotion fee through September 30, 2027. On December 20, 2019, section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116-94, increased the travel promotion fee from \$10 to \$17. See 8 U.S.C. 1187(h)(3)(B), as amended, and 8 CFR 217.5(h). CBP will be publishing a separate rule to reflect these legislative changes. This analysis does not capture these changes.

any potential risks to the United States. Based on this assessment, CBP will either grant or deny an ESTA travel authorization, which will generally take two hours for CBP to complete. If CBP grants an ESTA travel authorization, the authorization will generally be valid for a period of two years from the date of issuance (barring revocation), meaning that the VWP traveler granted the authorization may travel to the United States repeatedly within a two-year period without obtaining another authorization. If CBP denies an ESTA travel authorization, CBP will refer the VWP traveler denied the authorization to a U.S. Embassy or Consulate to apply to obtain a visa, like in the current paper Form I-94W environment.

If a VWP traveler arrives without an advance ESTA travel authorization, CBP will generally advise the traveler to complete the ESTA application in an area outside of the U.S. land POE. In this case, the traveler may be permitted to withdraw his or her application for admission, and once withdrawn, travel back to either Canada or Mexico, apply for the ESTA authorization there, and typically wait two hours to receive his or her authorization status. Once approved, the traveler can then return to a U.S. land POE to apply for admission.

In addition to fulfilling a statutory mandate, this rule will strengthen national security through enhanced traveler vetting, streamline Form I-94W processing through automation, reduce inadmissible traveler arrivals, and produce a uniform VWP admission policy in all U.S. travel environments, which will benefit VWP travelers, CBP, and the public.

2. Population Affected by Rule

This rule will affect VWP travelers, CBP, and the public. Due to numerous factors that affect travel, CBP uses two different projection methods to estimate the population of VWP travelers affected by this rule over a 10-year period of analysis spanning from FY 2019 to FY 2028. Under these methods, CBP estimates that VWP travelers will submit between 3.2 million and 4.1 million ESTA applications for land admission during the period of analysis, though CBP will deny about 3,200 to 4,100 of these applications and related travel authorizations (see Table 1).¹⁷ These denials will be higher with ESTA's

¹⁷ Note that the estimates in this table are based on historical VWP traveler arrivals prior to FY 2019. Poland officially joined the VWP on November 11, 2019 (see 84 FR 60316 (November 8, 2019)), and Croatia officially joined the VWP on December 1, 2021 (see 86 FR 54029 (September 30, 2021)), so these estimates do not account for VWP travelers from Poland or Croatia. A small number of temporary business or pleasure visitors from Poland and Croatia who would now be eligible for the VWP (and subject to this rule) enter the United States at land POEs each year.

enhanced vetting, though the extent is unknown.¹⁸ Given ESTA's existing requirements in the U.S. air and sea environments, some of the application figures in Table 1 may correspond to travelers who already have valid ESTA travel authorizations first obtained for travel to the United States by air and sea that will allow them to avoid completing travel authorizations with this rule. However, the number of such travelers is unknown.

TABLE 1—PROJECTED ESTA APPLICATIONS WITH RULE

Fiscal year	Method 1 (primary estimate)—with rule			Method 2—with rule		
	ESTA application approvals	ESTA application denials	Total ESTA applications	ESTA application approvals	ESTA application denials	Total ESTA applications
2019	323,504	324	323,828	349,190	350	349,540
2020	323,504	324	323,828	359,317	360	359,677
2021	323,504	324	323,828	371,894	372	372,266
2022	323,504	324	323,828	385,281	386	385,667
2023	323,504	324	323,828	398,381	399	398,780
2024	323,504	324	323,828	411,926	412	412,338
2025	323,504	324	323,828	425,932	426	426,358
2026	323,504	324	323,828	440,413	441	440,854
2027	323,504	324	323,828	455,870	456	455,843
2028	323,504	324	323,828	470,870	471	471,341
Total	3,235,040	3,240	3,238,280	4,068,591	4,073	4,072,664

Note: Estimates may not sum to total due to rounding.

CBP plans to conduct extensive outreach on ESTA's requirements in the land environment prior to the effective date of this rule through electronic messaging, informational bulletins, and travel partner meetings.¹⁹ Nevertheless, some VWP travelers may not be fully aware of this rule's requirements when traveling to the United States via land. CBP estimates that 4 percent of the projected ESTA applications in FY 2019 will correspond to VWP travelers who arrive to U.S. land POEs without advance ESTA travel authorizations. CBP believes that this share will decrease to 1 percent of annual ESTA applications for FY 2020 through FY 2028 due to the time and costs associated with arriving without an ESTA travel authorization and increased knowledge of ESTA's requirements.²⁰ As shown in Table 2,

¹⁸ Source: Email correspondence with CBP's Office of Field Operations on March 16, 2016.

¹⁹ Source: Correspondence with CBP's Office of Field Operations on November 26, 2018.

²⁰ Source: Email correspondence with CBP's Office of Field Operations on September 11, 2018.

CBP projects that 42,000 to 51,000 VWP travelers will arrive to U.S. land POEs without advance ESTA travel authorizations over the period of analysis. CBP believes that the vast majority of these arrivals will occur at U.S. land POEs along the northern border based on the relatively high volume of VWP traveler arrivals at those POEs.²¹

TABLE 2—PROJECTED ARRIVALS OF VWP TRAVELERS AT U.S. LAND POES WITHOUT ADVANCE ESTA TRAVEL AUTHORIZATIONS

	Method 1 (primary estimate)—with rule	Method 2—with rule
Fiscal year	Total VWP traveler arrivals without advance ESTA travel authorizations	Total VWP traveler arrivals without advance ESTA travel authorizations
2019.....	12,953	13,982
2020.....	3,238	3,597
2021.....	3,238	3,723
2022.....	3,238	3,857
2023.....	3,238	3,988
2024.....	3,238	4,123
2025.....	3,238	4,264
2026.....	3,238	4,409
2027.....	3,238	4,558
2028.....	3,238	4,713
Total.....	42,095	51,214

Note: Estimates may not sum to total due to rounding.

With this rule, CBP anticipates that the nearly 3,200 to 4,100 VWP travelers with ESTA application and travel authorization denials between FY 2019 and FY 2028 will forgo travel to the United States under the VWP altogether because they will be refused admission at U.S. land POEs without travel authorizations. These ESTA denials will result in 3,200 to 4,100 fewer distinct and total VWP traveler arrivals than projected in the absence of this rulemaking. CBP assumes that these ESTA denials will only affect the number of distinct arrivals anticipated with this rule and not the number of non-distinct arrivals. CBP estimates that the number of non-distinct arrivals of VWP travelers with valid departure coupons that generally allow for the avoidance of secondary processing and Form I-94W fee payments with this rule will be the same number projected without this rule,

²¹ About 90 percent of VWP land traveler admissions between FY 2013 and FY 2017 occurred at U.S. land POEs along the northern border. Sources: Email correspondence with CBP's Office of Field Operations on May 17, 2018, and correspondence on November 26, 2018.

ranging from 1.0 million to 1.3 million over the period of analysis (see Table 3). The remaining 3.6 million to 4.6 million VWP land traveler arrivals projected with this rule will represent distinct arrivals requiring CBP’s primary and secondary processing and Form I–94W fee payments (see Table 3). In total, VWP land traveler arrivals are expected to reach 4.7 million to 5.9 million during the period of analysis with this rule (see Table 3). To the extent that the application denials with this rule are greater than projected, the number of total arrivals will be fewer than shown in Table 3.

TABLE 3—PROJECTED ARRIVALS OF VWP TRAVELERS AT U.S. LAND POES WITH RULE

Fiscal year	Method 1 (primary estimate)—with rule			Method 2—with rule		
	Distinct arrivals	Non-distinct arrivals	Total arrivals	Distinct arrivals	Non-distinct arrivals	Total arrivals
2019.....	363,528	103,824	467,352	392,392	112,068	504,460
2020.....	363,528	103,824	467,352	403,771	115,318	519,089
2021.....	363,528	103,824	467,352	417,904	119,354	537,258
2022.....	363,528	103,824	467,352	432,948	123,651	556,599
2023.....	363,528	103,824	467,352	447,668	127,855	575,523
2024.....	363,528	103,824	467,352	462,889	132,202	595,091
2025.....	363,528	103,824	467,352	478,628	136,696	615,324
2026.....	363,528	103,824	467,352	494,901	141,344	636,245
2027.....	363,528	103,824	467,352	511,727	146,150	657,877
2028.....	363,528	103,824	467,352	529,126	151,119	680,245
Total.	3,635,280	1,038,240	4,673,520	4,571,954	1,305,757	5,877,711

Note: Estimates may not sum to total due to rounding.

This rule’s impact on CBP operations depends on its changes to VWP traveler arrivals and processing, whereas its effect on the public depends on its ability to deter otherwise inadmissible VWP travelers from traveling to the United States.

3. Costs of Rule

CBP will sustain ESTA-related maintenance, operation, and administration costs with this rule’s implementation; however, CBP believes that the ESTA application fee collected from VWP travelers in the air, sea, and land environments will completely offset the ESTA Land IFR’s costs to the agency. Thus, this rule will not introduce any unreimbursed costs to CBP. Instead, VWP travelers required to complete an ESTA application will bear all the direct costs of this rule. As stated earlier, this rule will require applicable VWP travelers to

submit an ESTA application, pay the accompanying ESTA application fee, and receive a travel authorization in advance of admission at a U.S. land POE. Each ESTA application will take a VWP traveler an estimated 23 minutes (0.3833 hours) to complete,²² at a time cost of \$7.82.²³ Depending on whether CBP approves or denies an application and travel authorization, VWP travelers must also pay a \$4.00 operational fee, a \$10.00 Travel Promotion Act fee (for approved applications only until FY 2021), and typically a foreign transaction fee with their ESTA application.²⁴

VWP travelers who arrive to U.S. land POEs without advance travel authorizations will incur time, travel, toll, and internet access expenses to travel to/from Canada and Mexico to apply and wait for an ESTA travel authorization. These travelers will sustain a \$36.72 additional CBP processing time cost, a \$5.78 additional Canadian or Mexican entry processing time cost, a \$4.30 travel cost, and a \$40.80 authorization wait time cost while traveling to/from Canada or Mexico to apply and wait for an ESTA travel authorization. Approximately 20 percent of the population of VWP travelers projected to arrive to a U.S. land POE without an advance ESTA travel authorization (see Table 2) will also sustain a toll cost of \$3.50. Additionally, of the VWP travelers projected to arrive to a U.S. land POE without an advance ESTA travel authorization (see Table 2), an estimated 28 percent will pay a \$2.00 fee to use an internet-accessible computer to apply and wait for their ESTA travel authorization. Considering these advance ESTA travel authorization and wait time costs and the number of VWP travelers projected to arrive without advance ESTA travel authorizations under this alternative, CBP estimates that these authorization requirements will introduce a total undiscounted

²² Source: U.S. Customs and Border Protection. *Supporting Statement for Paperwork Reduction Act Submission 1651-0111: Arrival and Departure Record (Forms I-94, I-94W) and Electronic System for Travel Authorization (ESTA)*. February 12, 2019. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201810-1651-001. Accessed May 22, 2019.

²³ \$20.40 hourly time value \times 0.3833-hour time burden to complete ESTA application = \$7.82 (rounded). CBP bases the \$20.40 hourly time value for VWP travelers on the U.S. Department of Transportation's (DOT) hourly time value of \$20.40 for all-purpose, intercity travel by surface-modes, except high-speed rail. For the purposes of this analysis, CBP assumes that the DOT time value, reported in 2015 U.S. dollars, would be the same for 2019. Source: U.S. Department of Transportation, Office of Transportation Policy. *The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update)*. "Table 4 (Revision 2—2016 Update): Recommended Hourly Values of Travel Time Savings." September 27, 2016. Available at <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf>. Accessed June 11, 2018.

²⁴ When CBP applies the average foreign currency transaction fee rate to the ESTA application and TPA fees, the full ESTA application cost is \$14.42 for travelers granted travel authorizations through FY 2020.

cost of \$4.2 million to VWP travelers between FY 2019 and FY 2028 according to CBP’s primary estimation method.

In total, VWP travelers will sustain \$49.1 million in undiscounted time, fee, and other costs from this rule over the period of analysis under Method 1, CBP’s primary estimation method. In present value terms, this cost to VWP travelers, which represents the total cost of the rule, will measure \$38.5 million (using a 7 percent discount rate; see Table 4). On an annualized basis, the cost of this rule will equal \$5.1 million under the primary estimation method, as shown in Table 4 (using a 7 percent discount rate).

TABLE 4—TOTAL MONETIZED PRESENT VALUE AND ANNUALIZED COSTS OF RULE, FY 2019–FY 2028

[2019 U.S. dollars]

	3% Discount rate		7% Discount rate	
	Present value cost	Annualized cost	Present value cost	Annualized cost
Method 1 (Primary Estimate).....	\$43,929,986	\$4,999,936	\$38,529,526	\$5,126,858
Method 2	53,652,846	6,106,554	46,527,106	6,191,040

Note: The estimates in this table are contingent upon CBP’s expectations of the population affected by the rule and the discount rates applied.

4. Benefits of Rule

ESTA’s Form I–94W automation, advance-vetting and travel authorization denials, and uniform VWP admission policy will offer benefits (including cost savings) to VWP travelers, CBP, and the public. VWP travelers will experience 24 minutes (0.4 hours) of time savings per distinct arrival from avoided paper Form I–94W processing burdens,²⁵ at a time cost saving of \$8.16.²⁶ Travelers denied travel authorizations who choose to forgo travel to the United States under the VWP will save 136 minutes (2.2667 hours) in avoided Form I–94W completion time and inadmissible inspection time,²⁷ at a time

²⁵ Sources: U.S. Customs and Border Protection. Supporting Statement for Paperwork Reduction Act Submission 1651–0111: Arrival and Departure Record (Forms I–94, I–94W) and Electronic System for Travel Authorization (ESTA). February 12, 2019. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201810-1651-001. Accessed May 22, 2019; email correspondence with CBP’s Office of Field Operations on November 30, 2012.

²⁶ Based on the assumed hourly time value for VWP travelers of \$20.40. \$20.40 hourly time value × 0.4 hours saved from forgone paper Form I–94W application and certain secondary processing time burdens = \$8.16 (rounded).

²⁷ This includes the time it takes to complete a paper Form I–94W (16 minutes, or 0.2667 hours) and complete an inadmissible traveler inspection (120 minutes, or 2 hours). For the purposes of this analysis, CBP assumes that this time burden includes any time burdens incurred at a U.S. land POE as an inadmissible VWP traveler. This average time burden is

cost saving of \$46.24, and \$6.00 in avoided Form I-94W fee costs.²⁸ Together with the savings from Form I-94W automation and travel that does not occur as a result of denied travel authorizations, VWP travelers will enjoy \$29.8 million in undiscounted, monetized cost savings from this rule over the period of analysis under the primary estimation method. VWP travelers will also enjoy non-quantified benefits from this rule's uniform admission policy in all U.S. travel environments, which may prevent some travelers from being denied boarding on air or sea carriers because they do not have an ESTA travel authorization.

Similar to VWP travelers, CBP will enjoy 8 minutes (0.1333 hours) of time savings per distinct arrival from this rule's Form I-94W automation,²⁹ at a time cost saving of \$11.58.³⁰ CBP will also save 120 minutes (2 hours) in avoided traveler inspection time per inadmissible traveler inspection avoided through ESTA's implementation in the land environment,³¹ at a time cost saving of \$173.74.³² Overall, this rule's Form I-94W automation and forgone arrivals by those denied travel authorizations will offer \$42.7 million in undiscounted, monetized cost savings to CBP between FY 2019 and FY 2028 under the primary estimation method. Note that these are not budgetary savings—they are savings that CBP will dedicate to other agency mission areas, such as improving border security or expediting the processing of travelers. In addition to these monetized benefits, ES-

greater than the time burden for VWP travelers who simply arrive to a U.S. land POE without an advance ESTA authorization because general inadmissibility examinations, such as those for travelers who are outright inadmissible due to reasons such as criminal history, outstanding warrant, or an expired passport, typically require examinations that are more thorough and require added processing time. Source: Email correspondence with CBP's Office of Field Operations on March 16, 2016, correspondence on November 26, 2018, and email correspondence on May 23, 2019.

²⁸ Based on the assumed hourly time value for VWP travelers of \$20.40. \$20.40 hourly time value × 2.2667 hours saved from forgone inadmissible arrival time burdens = \$46.24 (rounded).

²⁹ Sources: U.S. Customs and Border Protection. *Supporting Statement for Paperwork Reduction Act Submission 1651-0111: Arrival and Departure Record (Forms I-94, I-94W) and Electronic System for Travel Authorization (ESTA)*. February 12, 2019. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201810-1651-001. Accessed May 22, 2019; email correspondence with CBP's Office of Field Operations on November 30, 2012.

³⁰ \$86.87 fully loaded hourly wage rate for CBP officers × 0.1333 hours saved per distinct VWP traveler arrival = \$11.58 (rounded). CBP bases the \$86.87 hourly wage on the FY 2019 salary, benefits, and non-salary costs (*i.e.*, fully loaded wage) of the national average of CBP officer positions. Source of wage rate: Email correspondence with CBP's Office of Finance on June 1, 2018.

³¹ Source: Email correspondence with CBP's Office of Field Operations on March 16, 2016, correspondence on November 26, 2018, and email correspondence on May 23, 2019.

³² Based on the fully loaded hourly wage rate for CBP officers of \$86.87. \$86.87 fully loaded hourly wage rate for CBP officers × 2 hours saved per inadmissible traveler inspection avoided = \$173.74 (rounded).

TA’s advance and robust traveler screening process will offer the benefit of strengthened national security, which the public will enjoy.

In total, this rule will offer undiscounted cost savings totaling \$72.5 million between FY 2019 and FY 2028 under the primary estimation method. When discounted, these savings will measure \$54.5 million in present value and \$7.2 million on an annualized basis (using a 7 percent discount rate; see Table 5). This rule will also strengthen national security and introduce a uniform VWP admission policy in all U.S. travel environments, providing non-quantifiable benefits to travelers and the public. These estimates vary according to the projection method and discount rate applied.

TABLE 5—TOTAL MONETIZED PRESENT VALUE AND ANNUALIZED BENEFITS (COST SAVINGS) OF RULE, FY 2019–FY 2028
[2019 U.S. dollars]

	3% Discount rate		7% Discount rate	
	Present value benefit	Annualized benefit	Present value benefit	Annualized benefit
Method 1 (Primary Estimate).....	\$63,692,790	\$7,249,260	\$54,479,874	\$7,249,260
Method 2	79,452,253	9,042,940	67,252,192	8,948,784

Note: The estimates in this table are contingent upon CBP’s expectations of the population affected by the rule and the discount rates applied.

5. Net Impact of Rule

Table 6 summarizes the monetized and non-monetized costs and benefits of this rule to VWP travelers, CBP, and the public. As shown, the total monetized present value net benefit (or net cost saving) of this rule is \$16.0 million, while its annualized net benefit totals \$2.1 million according to CBP’s primary estimation method (using a 7 percent discount rate). In addition to these monetized impacts, this rule will strengthen national security through its advance and more robust traveler screening process and produce a uniform VWP admission policy in all U.S. travel environments, though these benefits are unmeasured. These estimates vary according to the projection method and discount rate applied.

TABLE 6—NET BENEFIT OF RULE, FY 2019–FY 2028
[2019 U.S. dollars]

	3% Discount rate		7% Discount rate	
	Present value	Annual-ized	Present value	Annual-ized
Method 1 (Primary Estimate)				
<i>Total Cost:</i>				
Monetized.....	\$43,929,986	\$4,999,936	\$38,529,526	\$5,126,858
Non-Monetized, but Quantified...	.....	.....	.....	.....
Non-Monetized and Non-Quantified .....	.....	.....	.....	.....
<i>Total Benefit, Incl. Cost Savings:</i>				
Monetized (Cost Saving).....	63,692,790	7,249,260	54,479,874	7,249,260
Non-Monetized, but Quantified...	.....	.....	.....	.....
Non-Monetized and Non-Quantified	Strengthened national security and uniform VWP admission policy.		Strengthened national security and uniform VWP admission policy.	
Monetized (Net Cost Saving) ...	\$19,762,805	\$2,249,324	\$15,950,348	\$2,122,403
Non-Monetized, but Quantified .....	.....	.....	.....	.....
Non-Monetized and Non-Quantified.....	Strengthened national security and uniform VWP admission policy.		Strengthened national security and uniform VWP admission policy.	
Method 2				
<i>Total Cost:</i>				
Monetized.....	\$53,652,846	\$6,106,554	\$46,527,106	\$6,191,040
Non-Monetized, but Quantified...	.....	.....	.....	.....
Non-Monetized and Non-Quantified .....	.....	.....	.....	.....
<i>Total Benefit, Incl. Cost Savings:</i>				
Monetized (Cost Saving).....	79,452,253	9,042,940	67,252,192	8,948,784
Non-Monetized, but Quantified...	.....	.....	.....	.....
Non-Monetized and Non-Quantified	Strengthened national security and uniform VWP admission policy.		Strengthened national security and uniform VWP admission policy.	
Monetized (Net Cost Saving)	\$25,799,407	\$2,936,386	\$20,725,086	\$2,757,744
Non-Monetized, but Quantified .....	.....	.....	.....	.....
Non-Monetized and Non-Quantified.....	Strengthened national security and uniform VWP admission policy.		Strengthened national security and uniform VWP admission policy.	

Note: The estimates in this table are contingent upon CBP’s expectations of the population affected by the rule and the discount rates applied. Estimates may not sum to total due to rounding.

C. Regulatory Flexibility Act

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

D. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB).

OMB-approved collection 1651-0111 will be amended to reflect the new applicants that will be using the ESTA website as a result of this interim final rule. CBP estimates that this rule will result in an additional 323,828 respondents (ESTA applicants) annually and an

additional 124,123 burden hours.³³ Of the 323,828 new ESTA respondents, CBP estimates that 323,504 will receive a travel authorization and 324 will not. Collection 1651–0111 will be revised to reflect the new total annual estimates for ESTA as follows:

Estimated number of annual respondents: 23,333,828.

Estimated number of annual responses: 23,333,828.

Estimated time burden per response: 23 minutes (0.3833 hours).

Estimated total annual time burden: 8,943,856 hours.

These respondents include new and repeat ESTA applicants. Only new applicants or applicants whose authorization has expired will be required to pay the ESTA fee. The additional 323,828 ESTA applicants introduced with this rule will pay the ESTA fee, which will result in an additional estimated cost of \$4,530,352 for this collection of information. This cost is based on the additional number of respondents granted a travel authorization through ESTA annually (323,504) multiplied by (×) the \$14.00 ESTA fee to apply and receive a travel authorization = \$4,529,056, plus the additional number of respondents denied a travel authorization through ESTA (324) multiplied by (×) the \$4.00 ESTA operational fee = \$1,296, for a total of \$4,530,352.³⁴

OMB-approved collection 1651–0111 will also be revised to reflect the elimination of CBP’s paper Form I–94W for land travelers, which is an additional result of this rule. The current approved number of estimated annual respondents for the paper Form I–94W of 941,291 will be removed. Respondents will now be categorized under “ESTA” on the collection because the paper Form I–94W data will now be collected electronically through ESTA.

H. Privacy Interests

DHS published an ESTA Privacy Impact Assessment (PIA) for the interim final rule announcing ESTA at air or sea ports of entry on June 9, 2008. Additionally, at that time, DHS prepared a separate System of Record Notice (SORN) that was published in conjunction with the IFR on June 9, 2008. DHS has updated these documents since that time and the most current ESTA PIA and SORN are available for viewing at: <https://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

³³ CBP uses the number of ESTA applications projected in FY 2019 under Method 1 of the regulatory impact analysis for this estimate because it is CBP’s primary estimation method.

³⁴ These costs do not account for foreign transaction fees that respondents may incur with their ESTA application.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passport and visas, Reporting and recordkeeping requirements.

8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

8 CFR Part 286

Air carriers, Immigration, Maritime carriers, Reporting and recordkeeping.

Amendments to the Regulations

For the reasons stated in the preamble, DHS is amending 8 CFR parts 103, 212, 217, and 286 as set forth below.

PART 103—IMMIGRATION BENEFIT REQUESTS; USCIS FILING REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112–54; 125 Stat. 550; 31 CFR part 223.

■ 2. Amend § 103.7 by revising paragraph (d)(5) to read as follows:

§ 103.7 Fees.

* * * * *

(d) * * *

(5) *Form I-94W*. For issuance of Form I-94W or other Nonimmigrant Visa Waiver Arrival/Departure record at a land border port-of-entry under section 217 of the Act: \$6.00. The term ‘issuance’ includes, but is not limited to, the creation of an electronic record of admission or arrival/departure by DHS following an inspection per-

formed by a CBP officer, which may be provided to the nonimmigrant as a printout or other confirmation of the electronic record stored in DHS systems.

* * * * *

**PART 212—DOCUMENTARY REQUIREMENTS:
NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN
INADMISSIBLE ALIENS; PAROLE**

■ 3. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108–458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110–229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115–218.

Section 212.1(q) also issued under section 702, Pub. L. 110–229, 122 Stat. 754, 854.

§ 212.1 [Amended]

■ 4. Amend § 212.1 by removing the word “Pilot” from the heading and text of paragraph (i).

PART 217—VISA WAIVER PROGRAM

■ 5. The authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

§ 217.1 [Amended]

■ 6. Amend § 217.1 by removing the word “Pilot” and removing the parenthetical “(VWPP)” and adding in its place “(VWP)”.

■ 7. Amend § 217.2 as follows:

■ a. Remove the word “Pilot” wherever it appears; and

■ b. Revise paragraphs (b)(1) and (c)(2).

The revisions read as follows:

§ 217.2 Eligibility.

* * * * *

(b) * * *

(1) *General.* In addition to meeting all of the requirements for the Visa Waiver Program specified in section 217 of the Act, each applicant must possess a valid, unexpired passport issued by a designated

country and obtain a travel authorization via the Electronic System for Travel Authorization (ESTA) as provided in § 217.5.

* * * * *

(c) * * *

(2) *Applicants arriving at land border ports of entry.* Any Visa Waiver Program applicant arriving at a land border port of entry must provide evidence to the CBP officer of financial solvency and a domicile abroad to which the applicant intends to return. An applicant arriving at a land border port of entry will be charged a fee as prescribed in § 103.7(d)(5) of this chapter for issuance of Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form. A round-trip transportation ticket is not required.

* * * * *

§ 217.3 [Amended]

- 8. Amend § 217.3(b) by removing the word “Pilot”.
- 9. Amend § 217.5 as follows:
 - a. Revise paragraphs (a), (b), and (c); and
 - b. Remove and reserve paragraph (g).

The revisions read as follows:

§ 217.5 Electronic System for Travel Authorization.

(a) *Travel authorization required.* Each nonimmigrant alien intending to travel by air, sea, or land to the United States under the Visa Waiver Program (VWP) must, within the time specified in paragraph (b) of this section, receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP via the Electronic System for Travel Authorization (ESTA), from CBP. In order to receive a travel authorization, each nonimmigrant alien intending to travel to the United States by air, sea, or land under the VWP must provide the data elements set forth in paragraph (c) of this section to CBP, in English, in the manner specified herein, and must pay a fee as described in paragraph (h) of this section.

(b) *Time*—(1) *Applicants arriving at air or sea ports of entry.* Each alien falling within the provisions of paragraph (a) of this section and intending to travel by air or sea to the United States under the VWP must receive a travel authorization via ESTA prior to boarding a carrier destined for travel to the United States.

(2) *Applicants arriving at land ports of entry.* Each alien falling within the provisions of paragraph (a) of this section and intending to travel by land to the United States under the VWP must receive a travel authorization via ESTA prior to application for admission to the United States.

(c) *Required elements.* CBP will collect such information as the Secretary deems necessary to issue a travel authorization as reflected in the ESTA application.

* * * * *

PART 286—IMMIGRATION USER FEE

■ 10. The authority citation for part 286 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1356; Title VII of Public Law 110–229; 8 CFR part 2.

§ 286.9 [Amended]

■ 11. Amend § 286.9(b)(2) as follows:

■ a. Remove the word “Pilot”; and

■ b. Add the words “, as prescribed in § 103.7(d)(5) of this chapter,” after “Form I–94W”.

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, April 1, 2022 (85 FR 18967)]

8 CFR PART 258

PROCEDURES FOR DEBARRING VESSELS FROM ENTERING U.S. PORTS

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Immigration and Nationality Act (INA) requires the Department of Homeland Security (DHS) to debar from entering U.S. ports any or all vessels owned or chartered by an entity found to be in violation of certain laws and regulations relating to the performance of longshore work by nonimmigrant crew members. This docu-

ment proposes to amend DHS regulations to set forth the procedures regarding the debarment of such vessels from entering U.S. ports.

DATES: Comments must be received on or before June 13, 2022.

ADDRESSES: Please submit comments, identified by docket number, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number [USCBP–2022–0016].

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>. Due to relevant COVID–19-related restrictions, CBP has temporarily suspended its on-site public inspection of submitted comments.

FOR FURTHER INFORMATION CONTACT: R. Joseph O’Donnell, Jr., Fines, Penalties and Forfeitures Division, Office of Field Operations, U.S. Customs and Border Protection, at 202–344–1691 or joseph.r.odonnell@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the notice of proposed rulemaking. The Department of Homeland Security (DHS or Department) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposal.

Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

II. Background

A. Purpose and Legal Authority

The Immigration and Nationality Act (INA) (Pub. L. 82–414, 66 Stat. 163 (1952)), as amended, addresses whether nonimmigrants

may be admitted into the United States and, if so, under what conditions. Section 258 of the INA prohibits alien crew members (classified as nonimmigrants under INA 101(a)(15)(D)) from entering the United States in order to perform longshore work, subject to certain statutory exceptions. *See* 8 U.S.C. 1288; *see also* 8 U.S.C. 1101(a)(15)(D) and 1184(f). Longshore work is defined as any activity in the United States or in U.S. coastal waters relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go. *See* INA 258(b)(1) (8 U.S.C. 1288(b)(1)). Longshore work does not include the loading or unloading of certain cargo including oil and hazardous substances and materials for which the Secretary of Transportation has prescribed regulations governing cargo handling or storage; the manning of vessels and the duties, qualifications, and training of the officers and crew of vessels carrying such cargo; and the reduction or elimination of discharge during ballasting, tank cleaning, and handling of such cargo.¹ *See* INA 258(b)(2) (8 U.S.C. 1288(b)(2)). DHS regulations implementing this statutory prohibition are set forth in title 8 of the Code of Federal Regulations (CFR) parts 251 and 258.

The INA authorizes DHS and the Secretary of Labor to investigate violations of and enforce the INA provisions relating to the performance of longshore work by nonimmigrant crew members. Specifically, DHS is authorized to issue a fine for the illegal performance of longshore work and is required, upon notification of a violation from the Secretary of Labor, to debar any vessel owned or chartered by the violating entity from entering U.S. ports for a period not to exceed one year. *See* INA 251(d) and 258(c)(4)(E)(i) (8 U.S.C. 1281(d) and 1288(c)(4)(E)(i)); 8 CFR 258.1(a)(2). DHS has delegated to U.S. Customs and Border Protection (CBP) the authority to enforce and administer INA provisions relating to longshore work, including the authority to issue a fine and debar a vessel. *See* DHS Delegation No. 7010.3(B)(11) (Revision No. 03.1).

Although the regulations (8 CFR part 280) specify the procedures CBP will follow prior to imposing a fine for a violation of the INA, including how an entity may contest or seek mitigation of a fine, there currently are no regulations that specify the procedures for debarring vessels. This was illuminated in 2009 and 2010, when CBP received a notification of violation from the Secretary of Labor. CBP served the violating entity (identified in the notification received from the Secretary of Labor) a letter by registered mail indicating CBP's intent to debar the vessels owned or chartered by the violating entity. CBP

¹ *See, e.g.*, 49 CFR part 176.

provided the violating entity with the opportunity to request mitigation, meet with CBP, and present evidence and any briefs in support of the request for mitigation. CBP considered all of the relevant evidence and determined an appropriate debarment, which was communicated to the violating entity in writing by registered mail. In order to establish consistent, fair, and transparent debarment procedures, DHS proposes amending 8 CFR part 258 to set forth the debarment procedures. The proposed procedures generally codify the steps CBP took in its 2009 and 2010 debarments, which were the only times CBP has conducted debarments, while clarifying and formalizing the process and procedures for both CBP and the violating entity subject to the debarment.

B. INA Exceptions Authorizing Longshore Work by Nonimmigrant Crew Members

Subject to certain exceptions, nonimmigrant crew members are prohibited from performing longshore work in the United States or in U.S. coastal waters. *See* INA 258 (8 U.S.C. 1288); 8 CFR 258.1 and 8 CFR 258.2. The exceptions are (1) the prevailing practice exception; (2) the State of Alaska exception; and (3) the reciprocity exception. *See* 8 U.S.C. 1288(c)–(e); 8 CFR 258.2.² Prior to the performance of longshore work under any of the exceptions, the vessel master or agent who uses nonimmigrant crew members must comply with regulations and procedures of both the Department of Labor (DOL) and CBP. If the Secretary of Labor determines that the entity has failed to follow DOL regulations regarding these statutory exceptions and that a violation has occurred, the DOL will notify CBP as set forth below.

DOL Procedures and Enforcement

Pursuant to DOL regulations, in order to invoke either the prevailing practice exception (under certain circumstances) or the State of Alaska exception, the vessel master or agent who uses nonimmigrant crew members must file an attestation with the Secretary of Labor prior to the performance of any longshore work.³ *See* 20 CFR 655.510 and 655.530–655.541. The attestation must specify which exception

² The exceptions are set forth in the Department of Labor regulations in title 20 of the CFR. For information on the reciprocity exception, *see* 20 CFR 655.500(a)(1)(i). For information on the prevailing practice exception, *see* 20 CFR 655.510. For information on the State of Alaska exception, *see* 20 CFR 655.530–655.541.

³ An attestation is required in order to invoke the prevailing practice exception when there is no collective bargaining agreement or when the Secretary of Labor has announced that an attestation is required to use an automated self-unloading conveyor belt or vacuum-actuated system. *See* 8 U.S.C. 1288(c)(1)(A)(i) and 1288(c)(1)(B); 20 CFR 655.500(b)(2), 655.510(a), and 655.520.

the vessel master or agent is invoking, contain the required attestation elements, and be accompanied by facts and evidence demonstrating that the particular exception is applicable. *See* 20 CFR 655.510 and 655.533.

The Secretary of Labor has the authority to investigate alleged violations of the INA relating to the performance of longshore work, including any violations arising out of an attestation. *See* 20 CFR 655.600 and 655.605. If the Secretary of Labor investigates an alleged violation and makes a final determination that the vessel master or agent has failed to meet a condition attested to or has misrepresented a material fact in an attestation, the Secretary must notify CBP of the violation. INA 258(c)(4)(E)(i) and 258(d)(5)(A) (8 U.S.C. 1288(c)(4)(E)(i) and 1288(d)(5)(A)). The Secretary of Labor may also impose a civil monetary penalty for each nonimmigrant crew member with respect to whom there has been a violation of the INA. INA 258(c)(4)(E)(i) (8 U.S.C. 1288(c)(4)(E)(i)); 20 CFR 655.620.

CBP Procedures and Enforcement

After filing any necessary attestation with the Secretary of Labor, the owner or master of a vessel intending to invoke one of the exceptions must deliver to CBP the Passenger List and Crew List (CBP Form I-418 or its electronic equivalent), indicate that nonimmigrant crew members will perform longshore work, and specify under which exception the work is permitted. *See* 8 CFR 251.1(a)(2) and 258.3. A vessel owner or operator must also submit any documentation required pursuant to 8 CFR 258.2. In order to rely on the exceptions that require an attestation, the vessel master or agent must present to CBP the notification received from the Secretary of Labor that the required attestation has been accepted. 8 CFR 258.2(b)(2)(iii).

Upon notification of a violation from the Secretary of Labor that the vessel master or agent has failed to meet a condition attested to or has misrepresented a material fact in an attestation, CBP is required to debar any vessel or vessels owned or chartered by the violating entity from entering U.S. ports for a period not to exceed one year. INA 258(c)(4)(E)(i) and 258(d)(5)(A) (8 U.S.C. 1288(c)(4)(E)(i) and 1288(d)(5)(A)).

Additionally, CBP may investigate violations of the INA relating to longshore work and may impose a monetary fine on an owner, agent, consignee, master, or commanding officer who permits nonimmigrant crew members to perform longshore work in a manner inconsistent with the INA. INA 251(d) (8 U.S.C. 1281(d)); 8 CFR 258.1(a)(2).

III. Proposed Amendments

This document proposes to add to the regulations the procedures CBP will follow in order to debar vessels from entering U.S. ports after receiving a notification of a violation from the Secretary of Labor pursuant to 8 CFR part 258. The relevant details are provided below.

Part 258

8 CFR part 258 sets forth the regulations regarding the limitations on the performance of longshore work by nonimmigrant crew members. Section 258.1 sets forth the general prohibition of nonimmigrants performing longshore work, other than pursuant to the specified exceptions, and provides definitions. Section 258.2 describes the exceptions under which nonimmigrant crew members may perform longshore work in the United States. Section 258.3 describes the actions a master or agent of a vessel must take in order to rely on one of the exceptions.

In this document, DHS proposes to add a new § 258.4, which will outline procedures for debarring vessels following notification from the Secretary of Labor, including how CBP determines the debarment and how the violating entity may request mitigation. In general, the proposed debarment procedures would require CBP to issue a notice of intent to debar, which would be served on the violating entity. CBP would also provide an opportunity for the violating entity to file an answer, submit documentary evidence, and request a mitigation meeting with CBP. The proposed procedures also require CBP to issue a final order of debarment. The details of proposed § 258.4 are set forth below.

A. Definitions Applicable to CBP's Debarment Proceedings

Proposed paragraph (a) sets forth definitions for the following terms for purposes of CBP's debarment proceedings: Good cause, mitigation, and mitigation meeting. Good cause, for purposes of extending the deadline for filing an answer in CBP's debarment proceedings, would include instances in which the violating entity is experiencing technical difficulties affecting its ability to receive, process, or transmit relevant information or data; natural disasters that affect the violating entity's ability to retrieve, process, or transmit relevant information or data; or, other instances in which CBP, in its discretion, determines an undue hardship warrants an extension of the deadline for filing an answer. A mitigation meeting, for purposes of CBP's debarment proceedings, would be a personal appearance before a designated CBP official in which representatives of the violating entity can provide information and explain why CBP should

mitigate the debarment. Mitigation in a debarment proceeding would mean determining the length of the debarment, the ports covered by the debarment, and the vessels subject to the debarment. It does not include revocation of the requirement to debar.

B. Notice of Intent To Debar

Proposed paragraph (b) sets forth the procedures pertaining to the issuance of a notice of intent to debar and specifies the information to be included in such notice and the rights of the violating entity. It provides that CBP will cause the notice of intent to debar to be served on the entity subject to the debarment by a method that demonstrates receipt by the addressee, such as certified mail with return receipt or express courier delivery, and provides that the date of service is the date of receipt.

It further provides that the notice of intent to debar will include the following information: The proposed period of debarment, not to exceed one year; the ports covered by the proposed debarment; a brief explanation of CBP's reasons for the proposed debarment; and the applicable statutory and regulatory authority for the proposed debarment. The notice will also notify the entity subject to the proposed debarment that it may file an answer and request a mitigation meeting and will set forth the procedures for doing so. The notice of intent to debar will also notify the violating entity that in the absence of a timely filed answer, the proposed debarment will become final 30 days after service of the notice of intent to debar.

C. Answer; Request for Mitigation Meeting

Proposed paragraph (c) covers the procedures relating to filing an answer and supporting documentation with CBP and requesting mitigation and a mitigation meeting. It provides that all notifications and correspondences between CBP and the violating entity with respect to the debarment proceedings will be done in writing and transmitted using certified mail or express courier.⁴ It further provides that an entity that receives a notice of intent to debar will have 30 days from service of the notice to file an answer with CBP, but permits CBP, in its discretion, to extend the deadline for filing an answer up to an additional 30 days upon a showing of good cause.⁵ It

⁴ A notice of intent to debar will debar only one violating entity. If there is more than one violating entity, separate notices will be issued to each.

⁵ Good cause, for purposes of extending the deadline for filing an answer, includes: Technical difficulties or natural disasters that affect the violating entity's ability to receive, process, or transmit relevant information or data; or other instances in which CBP, in its discretion, determines an undue hardship on the violating entity warrants an extension of the deadline for filing an answer.

further provides that the answer must be filed by the entity identified in the notice of intent to debar, or its authorized representative. The answer must be dated, typewritten or legibly written, signed under oath, and include the address at which the entity, or its authorized representative, desires to receive further communications. The answer must set forth specific reasons why the proposed debarment should be mitigated and state whether a mitigation meeting is requested.⁶ It further specifies that a mitigation meeting will be conducted if the entity subject to the proposed debarment requests one or if directed at any time by CBP.⁷

Proposed paragraph (c) also provides that if an entity requests mitigation, it must submit to CBP both an answer and documentary evidence in support of the request for mitigation. The entity is also permitted to file a brief in support of any arguments made. If a mitigation meeting is requested, the entity may present evidence in support of any request for mitigation at that time. CBP can require that the answer and any supporting documentation be in English or be accompanied by an English translation, certified by a competent translator.⁸

D. Disposition of Case

Proposed paragraph (d) states how CBP will determine a final order of debarment for each case. Specifically, proposed paragraph (d) states that if an entity that receives service of a notice of intent to debar does not timely file an answer or if the entity admits the allegations and does not request mitigation or a mitigation meeting, the proposed debarment will automatically become a final order of debarment 30 days after service of the notice of intent to debar. If CBP grants a good cause extension to the deadline for filing an answer, but no answer is timely filed, the proposed debarment will automatically become a final order of debarment when the time for filing an answer expires. If an entity timely files an answer that requests mitigation or a mitigation meeting, CBP will determine a

⁶ A violating entity may mitigate its length of debarment by showing that a specific period of debarment would have a negative impact on the U.S. economy and/or U.S. citizens/consumers. Examples of this would include showing that a specific period of business activity (*i.e.*, fishing season) would be negatively impacted if a vessel were debarred, or that a vessel will be transporting produce or a type of perishable consumer good to the United States within a specific time frame for which debarment would be detrimental.

⁷ The violating entity may request a mitigation meeting to mitigate the length of the debarment period, the ports covered by the debarment, and the number of vessels subject to the debarment.

⁸ *See, e.g.*, 8 CFR 204.1(f)(3), 274a.2(b)(1)(i)(A). *See also* 8 CFR 1003.33 (Department of Justice Executive Office for Immigration Review's rule on documents submitted to the immigration court).

final debarment and will issue to the entity a final order of debarment in writing. No appeal from a final order of debarment will be available.

E. Debarment

Proposed paragraph (e) states that CBP will determine a proposed debarment or a final debarment by considering the information received from the Secretary of Labor in the notice of violation, any evidence or arguments timely presented by the entity subject to the debarment, and any other relevant factors.⁹ Other relevant factors include, but are not limited to, the entity's previous history of violations of any provision of the INA, the number of U.S. workers adversely affected by the violation, the gravity of the violation, the entity's efforts to comply in good faith with regulatory and statutory requirements governing performance of longshore work by nonimmigrant crew members, the entity's remedial efforts and commitment to future compliance, the extent of the entity's cooperation with the investigation, and the entity's financial gain/loss due to the violation. CBP will also consider the potential financial loss, injury, or adverse effect to other parties, including U.S. workers, likely to result from the debarment, including whether the debarment is likely to result in the loss of job opportunities for U.S. workers.

CBP will submit final orders of debarment to all U.S. ports of entry, prohibiting entry of the violating entity's vessel(s) during the debarment. CBP will send a notice of final order to each violating entity. CBP will also send a notice of final order to any entity that has submitted a request to CBP of interest in the debarment proceeding.

F. Notice of Completion of Debarment and Record

Proposed paragraph (f) states that upon completion of the debarment, CBP will send a notice to all interested parties, including the entity subject to the debarment and the relevant U.S. ports of entry, that the entity subject to the debarment has completed the debarment and is once again permitted to enter U.S. ports. Additionally, proposed paragraph (g) states that CBP will keep a complete record of the debarment proceedings. CBP will retain the records for 5 years, after which the records will be sent to the National Archives. Records retention and access to records will conform to the Records Retention Schedule and Freedom of Information Act.

⁹ The information received from the Secretary of Labor, evidence or arguments timely presented by the entity subject to the debarment, and any other relevant factors that CBP considers in its determination of the debarment will be disclosed in its final determination of debarment to the violating entity.

IV. Statutory and Regulatory Analysis

A. Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation.

Pursuant to section 258 of the INA, CBP is required to debar vessels. This rule does not create that requirement. Rather, this proposed rule would codify and clarify existing practice, with some exceptions, that CBP follows in carrying out that requirement. Accordingly, even without this rule, CBP still has the authority to debar vessels. This rule is being proposed to avoid confusion and to have, in writing, a clear and consistent process for the debarment of vessels.

CBP has debarred vessels in only two instances in the agency’s recorded history, in 2009 and 2010. As described above, the proposed rule would generally codify the procedures CBP followed when debarring vessels in 2009 and 2010, with changes only to the type of mail service CBP uses to serve notices of intent to debar. The process CBP follows for debarring vessels is not changing as a result of this rule. Therefore, this rule has no economic impact on violating entities.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). As explained above, pursuant to section 258 of the INA, CBP is required to debar vessels. This rule does not create that requirement. Rather, this proposed rule would codify and clarify the existing procedures, with some exceptions, that CBP follows in carrying out that requirement. These procedures are seldom used as CBP has debarred vessels in only two instances—in

2009 and in 2010. Furthermore, CBP is generally adopting existing practices, and costs to violating entities would not change as a result of this rule. Therefore, CBP certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget. There is no information collection associated with this proposed rule, so the provisions of the PRA do not apply.¹⁰

V. Signing Authority

This proposed regulation is being issued in accordance with 19 CFR 0.2(a) pertaining to the Secretary of Homeland Security's authority (or that of his delegate) to approve regulations that are not related to customs revenue functions.

List of Subjects in 8 CFR Part 258

Aliens, Longshore and harbor workers, Reporting and recordkeeping requirements, Seaman.

Proposed Regulatory Amendments

Amendments to the Regulations

For the reasons stated in the preamble, DHS proposes to amend part 258 of title 8 CFR (8 CFR part 258) as set forth below.

PART 258—LIMITATIONS ON PERFORMANCE OF LONGSHORE WORK BY ALIEN CREWMEN

- 1. The authority citation for part 258 continues to read as follows:
Authority: 8 U.S.C. 1101, 1103, 1281; 8 CFR part 2.
- 2. Add § 258.4 to read as follows:

§ 258.4 Debarment of vessels.

(a) *Definitions.* The following definitions apply throughout this section:

¹⁰ The required DOL attestations are covered by OMB Control Number 1205-0309.

Good cause, for purposes of extending the deadline for filing an answer, include: Technical difficulties or natural disasters that affect the violating entity's ability to receive, process, or transmit relevant information or data; or other instances in which CBP, in its discretion, determines that an undue hardship on the violating entity warrants an extension of the deadline for filing an answer.

Mitigation in a debarment proceeding means determining the length of the debarment, the ports covered by the debarment, and the vessels subject to the debarment. It does not include revocation of the requirement to debar.

Mitigation meeting is a personal appearance before a designated CBP official in which representatives of the violating entity can provide information and explain why CBP should mitigate the debarment.

(b) *Notice of intent to debar*—(1) *Issuance of notice*. Upon receipt of a notice of violation from the Secretary of Labor pursuant to section 258 of the Immigration and Nationality Act (8 U.S.C. 1288(c)(4)(E)(i)), CBP will serve a notice of intent to debar on the entity subject to the notice of violation, as provided in paragraph (b)(3) of this section.

(2) *Contents of notice*. The notice of intent to debar will include the following:

- (i) The proposed period of debarment, not to exceed 1 year;
- (ii) The ports covered by the proposed debarment;
- (iii) A brief explanation of the reasons for the proposed debarment;
- (iv) The statutory and regulatory authority for the proposed debarment;
- (v) A statement that the entity subject to the debarment may file an answer and request a mitigation meeting pursuant to paragraph (c) of this section;
- (vi) The procedures for filing an answer and requesting a mitigation meeting, including the date by which the answer must be received and the address to which it may be submitted; and
- (vii) A statement that in the absence of a timely filed answer, the proposed debarment will become final 30 days after service of the notice of intent to debar.

(3) *Service*. The notice of intent to debar will be served by a method that demonstrates receipt, such as certified mail with return receipt or express courier delivery, by the entity identified in the notice of violation received from the Secretary of Labor. The date of service is the date of receipt.

(c) *Answer; request for mitigation meeting*—(1) *General*. Any entity upon which the notice has been served, or its authorized representative, may file with CBP an answer that indicates the specific reasons

why the proposed debarment should be mitigated and whether a mitigation meeting is requested. CBP must receive the answer within 30 days from the date of service of the notice of intent to debar.

(2) *Procedures*—(i) *Form*. The answer must be dated, typewritten or legibly written, signed under oath, and include the address at which the entity or its authorized representative desires to receive further communications. CBP may require that the answer and any supporting documentation be in English or be accompanied by an English translation certified by a competent translator.

(ii) *Supporting documentation required*. In addition to an answer, any entity responding to a notice of intent to debar must submit documentary evidence in support of any request for mitigation and may file a brief in support of any arguments made. The entity may present evidence in support of any request for mitigation at a mitigation meeting.

(iii) *Mitigation meeting*. A mitigation meeting will be conducted if requested by the entity subject to the proposed debarment in accordance with the requirements of this section, or if directed at any time by CBP.

(iv) *Good cause extension*. CBP, in its discretion, may extend the deadline for filing an answer up to an additional 30 days from the original receipt of CBP's notice upon a showing of good cause. Upon receipt of a request to extend the deadline for filing an answer, CBP will respond to the request for an extension within 5 business days by certified mail or express courier.

(d) *Disposition of case*—(1) *No response filed or allegations not contested*. If no answer is timely filed or the answer admits the allegations in the notice of intent to debar and does not request mitigation or a mitigation meeting, the proposed debarment specified in the notice of intent to debar automatically will become a final order of debarment 30 days after service of the notice of intent to debar. If CBP grants a good cause extension pursuant to paragraph (c)(2)(iv) of this section, and no answer is timely filed, the proposed debarment automatically will become a final order of debarment when the time for filing an answer expires.

(2) *Answer filed; mitigation meeting requested*. If an answer is timely filed that requests mitigation and/or a mitigation meeting, CBP will determine a final debarment in accordance with paragraph (e) of this section.

(3) *Unavailability of appeal*. The final order of debarment is not subject to appeal.

(4) *Notice of final order of debarment*. (i) CBP will issue to the entity subject to the debarment a final order of debarment in writing.

(ii) CBP will send notice, by certified mail or express courier, to all interested parties, including the relevant U.S. ports of entry, that the entity subject to the debarment is debarred and stating the terms of the debarment.

(e) *Debarment*—(1) *Generally*. In determining a proposed debarment and a final debarment, CBP will consider the information received from the Secretary of Labor, any evidence or arguments timely presented by the entity subject to the debarment, and any other relevant factors.

(2) *Other relevant factors*. Other relevant factors include, but are not limited to, the following:

(i) The previous history of violations of any provision of the INA by the entity subject to the debarment;

(ii) The number of U.S. workers adversely affected by the violation;

(iii) The gravity of the violation;

(iv) The efforts made by the entity subject to the debarment to comply in good faith with the regulatory and statutory requirements governing performance of longshore work by nonimmigrant crewmen;

(v) The remedial efforts by the entity subject to the debarment;

(vi) The commitment to future compliance by the entity subject to the debarment;

(vii) The extent of cooperation with the investigation by the entity subject to the debarment;

(viii) The extent of financial gain/loss to the entity subject to the debarment due to the violation; and

(ix) The potential financial loss, injury, or adverse effect to other parties, including U.S. workers, likely to result from the debarment.

(f) *Notice of completion of debarment*. Upon completion of any debarment, CBP will send notice, by certified mail or express courier, to all interested parties, including the entity subject to the debarment, and the relevant U.S. ports of entry, that the entity subject to the debarment has completed the debarment and is once again permitted to enter U.S. ports.

(g) *Record*. CBP will keep a record of the debarment proceedings which includes, but is not limited to, the materials exchanged between CBP and the parties. Records will be retained in accordance with CBP's Records Retention Schedule and Freedom of Information Act.

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

19 CFR PART 177**MODIFICATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF BELTS**

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of belts.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of belts under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 8, on March 2, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 26, 2022.

FOR FURTHER INFORMATION CONTACT: Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 8, on March 2, 2022, proposing to modify one ruling letter pertaining to the tariff classification of belts. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N025677, dated May 2, 2008, CBP classified two belts in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." CBP has reviewed NY N025677 and has determined the ruling letter to be in error. It is now CBP's position that the two belts are properly classified, in heading 6117, HTSUS, or heading 6217, HTSUS, depending on whether the backing fabric is knit or not knit. If the backing fabric is knit, then the subject belts are classified in subheading 6117.80.95, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other." If the backing fabric is not knit, then the subject belts are classified in subheading 6217.10.95, HTSUS, which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N025677 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H249992, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

Attachment

HQ H249992

April 8, 2022

OT:RR:CTF:FTM H249992 PJG

CATEGORY: Classification

TARIFF NO.: 6117.80.95; 6217.10.95

Ms. CHERRY LIN

TOM'S TOY INTERNATIONAL (HK) LTD.

ROOM 604-6, CONCORDIA PLAZA

1 SCIENCE MUSEUM ROAD

TST EAST, KOWLOON, HONG KONG

RE: Modification of NY N025677; Classification of Belts

DEAR Ms. LIN:

This is in reference to New York Ruling Letter (NY) N025677, dated May 2, 2008, issued to you concerning the tariff classification of two Santa Claus Costumes (Item Nos. CL181 and CL182) under the Harmonized Tariff Schedule of the United States ("HTSUS"). Item No. CL181 is an adult unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt, leg coverings (referred to as "boot covers" in the ruling)¹, eyeglasses without lenses, a wig and a beard. Item No. CL182 is a child's unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt, and leg coverings (also referred to as "boot covers" in the ruling).² This decision only concerns the classification of the belts for Item Nos. CL181 and CL182.

In NY N025677, U.S. Customs and Border Protection ("CBP") classified the belts for both costumes in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." We have reviewed NY N025677 and find it to be in error regarding the tariff classification of the belts. Accordingly, for the reasons set forth below, NY N025677 is modified.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on March 2, 2022, in Volume 56, Number 8, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

In NY N025677, CBP classified two Santa Claus costumes, specifically, Item Nos. CL181 and CL182. CL181 is an adult unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt, leg coverings (referred to as "boot covers" in the ruling), eyeglasses without lenses, a wig and a beard. Item No. CL182 is a child's unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt and leg coverings (also referred to as "boot covers" in the ruling). The belts are composed of polyester fabric that has

¹ The classification of the leg coverings has been modified under separate cover. See Headquarters Ruling Letter ("HQ") H249079, dated August 25, 2021.

² See *supra* note 1.

been coated, covered or laminated on the exterior surface with a polyvinyl chloride (“PVC”) cellular plastic. Each of the belts incorporates a buckle and grommets for adjusting the belt’s fit.

ISSUE:

Whether the belts for Item Nos. CL181 and CL182 are classified under heading 3926, HTSUS, as “articles of plastics,” heading 6117, HTSUS, as knitted “Other made up clothing accessories,” heading 6217, HTSUS, as not knitted or crocheted “Other made up clothing accessories,” or heading 9505, HTSUS, as “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof.”

LAW AND ANALYSIS:

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

The 2022 HTSUS provisions under consideration are as follows:

3926 Other articles of plastics and articles of other materials of headings 3901 to 3914:

* * *

6117 Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories:

* * *

6217 Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212:

* * *

9505 Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:

Note 1 to Chapter 61, HTSUS, states that the “chapter only applies to made up knitted or crocheted articles.”

Note 1 to Chapter 62, HTSUS, states that the “chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 6212).”

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to 61.17 provides, in relevant part, as follows:

The heading covers, *inter alia*:

* * *

(4) **Belts of all kinds (including bandoliers) and sashes (e.g., military or ecclesiastical)**, whether or not elastic. These articles are included here even if they incorporate buckles or other fittings of

precious metal or are decorated with pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

* * *

The EN to 62.17 provides, in relevant part, as follows:

The heading covers, *inter alia*:

* * *

(3) Belts of all kinds (including bandoliers) and sashes (e.g., military or ecclesiastical), of textile fabric, whether or not elastic or rubberised, or of woven metal thread. These articles are included here even if they incorporate buckles or other fittings of precious metal, or are decorated with pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

* * *

Note 3 to Chapter 95, HTSUS, states that “[s]ubject to [the exclusions to Chapter 95, HTSUS], parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.” We note that neither the top nor the pants in Item Nos. CL181 and CL182 were classified in Chapter 95, HTSUS. Therefore, the belts would also not be classified as an accessory to an article of heading 9505, HTSUS, and are not classifiable in subheading 9505.90.60, HTSUS, as originally determined in NY N025677.

Since the subject belts are composed of a polyester fabric backing that has been coated, covered or laminated on the exterior surface with PVC cellular plastic, we must resolve whether the merchandise is properly classified as knitted “Other made up clothing accessories” of heading 6117, HTSUS, as not knitted or crocheted “Other made up clothing accessories” of heading 6217, HTSUS, or as “articles of plastics” of heading 3926, HTSUS. Heading 5903, HTSUS, provides for the classification of “[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902.”

Note 2 to Chapter 59, HTSUS, states that heading 5903 applies to “[t]extile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular).” Note 2(a)(1)-(5) to Chapter 59, HTSUS, provide exceptions to this rule. The relevant exception in this instance is Note 2(a)(5) to Chapter 59, HTSUS, which precludes from classification in heading 5903, HTSUS, “[p]lates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes” and states that these articles are properly classified in Chapter 39, HTSUS. As previously noted, the subject belts are constructed of PVC cellular plastic with a textile fabric backing. Therefore, we must determine whether the fabric is present merely for reinforcing purposes. While the textile fabric on the subject belts provides reinforcement to the plastic exterior, which may otherwise stretch or tear easily, it is also present to make the belt look more aesthetically pleasing than if it was constructed only of a plastic shell. Therefore, the subject belts are not classifiable in heading 5903, HTSUS.

Next, we must determine whether the subject belts are classifiable in Chapter 39, HTSUS. Note 2(p) to Chapter 39, HTSUS, excludes “[g]oods of section XI (textiles and textile articles)” from classification in Chapter 39, HTSUS. Therefore, we must consider whether the subject belts are classifiable as goods of Section XI, HTSUS.

In Section XI, HTSUS, there are two possible headings that are applicable to the subject belts, specifically, heading 6117, HTSUS, which provides for knitted “Other made up clothing accessories,” and heading 6217, HTSUS, which provides for not knitted or crocheted “Other made up clothing accessories.” The classification of the subject belts in heading 6117 or heading 6217, HTSUS, is consistent with the ENs to 61.17 and 62.17, which indicate that these headings cover belts of all kinds, even if they incorporate buckles. Since the subject belts are classifiable in either heading 6117 or 6217, HTSUS, (depending upon whether they are knit) they are not classifiable in Chapter 39 because they are “[g]oods of section XI (textiles and textile articles).”

Classification of the subject belts under heading 6117 or 6217, HTSUS, will depend on whether the construction of the backing fabric is knit or not knit, which is information that we do not currently possess. If the backing fabric is knit, then the subject belts are classified in subheading 6117.80.95, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.” If the backing fabric is not knit, then the subject belts are classified in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.”

HOLDING:

By application of GRI 1 and 6, depending on whether the backing fabric is knit or not knit, the belts for Item Nos. CL181 and CL182 are classified under heading 6117, HTSUS, or heading 6217, HTSUS. Specifically, they would be classified in subheading 6117.80.95, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other,” or in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.” The 2022 column one, general rate of duty for both of these subheadings is 14.6 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N025677, dated May 2, 2008, is MODIFIED.

Sincerely,

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER, MODIFICATION OF ONE RULING LETTER, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF MECHANICALLY ADJUSTABLE BED BASE

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

ACTION: Notice of revocation of one ruling letter, modification of one ruling letter, and revocation of treatment relating to the tariff classification of mechanically adjustable bed bases.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter and modifying one ruling letter concerning tariff classification of mechanically adjustable bed bases under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 43, on November 3, 2021. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 26, 2022.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the

importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 43, on November 3, 2021, proposing to revoke one ruling letter and modifying one ruling letter pertaining to the tariff classification of mechanically adjustable bed bases. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N244209, CBP classified a mechanically adjustable bed base in heading 9403, HTSUS, specifically in subheading 9403.90.80, HTSUS, which provides for “[o]ther furniture and parts thereof: [p]arts: [o]ther: [o]ther”. Similarly, in NY N284490, CBP classified a mechanically adjustable bed base in heading 9403, HTSUS, specifically in subheading 9403.50.90, HTSUS, which provides for “[w]ooden furniture of a kind used in the bedroom: [o]ther: [b]eds: [o]ther”. CBP has reviewed NY N244209 and NY N284490 and has determined the ruling letters to be in error. It is now CBP's position that the mechanically adjustable bed base is properly classified, in heading 9403, HTSUS, specifically in subheading 9403.20.00, HTSUS, which provides for “[o]ther furniture and parts thereof: [o]ther metal furniture: [h]ousehold: [m]echanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N244209, modifying NY N284490, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) H294085, set forth as an attachment to

this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 7, 2022

ALLYSON MATTANAH

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H294085

April 7, 2022

OT:RR:CTF:CPMMA H294085 AJK

CATEGORY: Classification

TARIFF NO: 9403.20.0035

MR. STEVEN A. COHEN
DIRECTOR
AMERICAN SIGNATURE INC.
4300 E 5TH AVENUE
COLUMBUS, OH 43219

RE: Revocation of NY N244209; Modification of NY N284490; Classification of Mechanically Adjustable Bed Base

DEAR MR. COHEN:

This letter is in reference to your New York Ruling Letter (NY) N244209, dated August 16, 2013, concerning the tariff classification of mechanically adjustable bed bases. In NY N244209, U.S. Customs and Broder Protection (CBP) classified the merchandise in subheading 9403.90.8041, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which is the provision for metal parts of furniture. We have reviewed the aforementioned ruling and have determined that the classification of mechanically adjustable bed bases in subheading 9403.90.8041, HTSUSA, was incorrect.

We have also reviewed NY N284490, dated April 4, 2017, concerning the tariff classification of a mechanically adjustable bed base in subheading 9403.50.9045, HTSUSA, which provides for wooden bedroom furniture, and have determined that the ruling was incorrect. For the reasons set forth below, we revoke one ruling letter and modify one ruling letter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 43, on November 3, 2021. One comment was received in response to this notice.

FACTS:

The subject merchandise was described in NY N244209 as follows:

Illustrative literature describes the merchandise as the “rize Adjustable Bed Series.” This series consist of: (1) the {classic} adjustable motion power base, (2) the {relaxer} adjustable motion power base, and (3) the {contemporary} adjustable motion power base.

Additional product information provided by means of the internet for the “rize Adjustable Bed Series” indicates: the classic features a steel leg balance support frame, and has a hard-wire remote control allowing for upper and lower body positioning; the relaxer features a steel leg balance support frame with locking rolling casters, and has a wireless hand remote control allowing for the elevating of one’s head and feet, three pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles; and the contemporary features a steel leg balance support frame with locking rolling casters, modern modular (cushion/comfort) deck support, and has a wireless hand remote control

allowing for multiple support preferences, four pre-set memory positioning, one touch auto-flat positioning and two-zone body massage with variable styles.

The subject merchandise was described in NY N284490 as follows:

Item M9X632 is identified as the “Queen Adjustable Base.” The item is a powered adjustable bed base, which consists of a foam frame that is covered over in non-woven grey mesh and is supported on metal legs. This item measures 59.06 inches wide (from side to side) by 78.74 inches long (from foot to head) by 14.96 inches high.

Moreover, we found additional information regarding the merchandise in NY N284490 by the means of the internet. The merchandise is composed of fabric, foam, electrical components, packaging, plastic, steel, and wood. In terms of value, the electrical components compose 45 percent, and the steel part comprises 32 percent of the merchandise. In terms of weight, however, the steel part predominates by 53 percent and the wood composes 23 percent of the product.

ISSUES:

1. Whether the mechanically adjustable bed bases are classified in sub-heading 9403.90.8041, HTSUSA, as parts of furniture.
2. If not parts of furniture, whether the essential character of the merchandise is imparted by the steel component in subheading 9403.20.0035, HTSUSA, as metal furniture, or by the wooden slats in subheading 9403.50.9045, HTSUSA, as wooden bedroom furniture.

LAW AND ANALYSIS:

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

GRI 3(b) states, in pertinent part:

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

* * * * *

The HTSUS provisions at issue are as follows:

- 9403: Other furniture and parts thereof:
- 9403.20.00: Other metal furniture
 - Household:
 - Other:

9403.20.0035:	Mechanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm
9403.50:	Wooden furniture of a kind used in the bedroom:
	Other:
9403.50.90:	Other
9403.90:	Parts:
	Other:
9403.90.80:	Other

Note 2 to chapter 94, HTSUS, provides, in pertinent part:

2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

* * * * *

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

ENs to GRI 3(b) provides as follows:

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

The General EN to chapter 94 provides, in pertinent part:

For the purposes of this Chapter, the term “furniture” means:

- (A) Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

The Parts EN to chapter 94 provides, in pertinent part:

This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings.

EN 94.03 provides, in pertinent part, as follows:

The heading includes furnitures for:

- (1) Private dwellings, hotels, etc., such as : ... beds (including wardrobe beds, camp-beds, folding beds, cots, etc.)....

* * * * *

1. Whether the mechanically adjustable bed bases are classified in subheading 9403.90.8041, HTSUSA, as parts of furniture.

There is no dispute that the mechanically adjustable bed bases are furniture or parts thereof classified in heading 9403, HTSUS, which includes beds. See EN 94.03. The General EN to chapter 94 explains that “furniture” means any movable articles that are designed to be placed on the floor or ground and are used, mainly with a utilitarian purpose, to equip private dwellings. Note 2 of chapter 94 states that heading 9403, HTSUS, includes articles and parts that are designed to be placed directly on the floor or ground only. In the instant case, the mechanically adjustable bed bases are utilized to place mattresses on top of the bed bases and are placed directly on the floor to furnish bedrooms. Accordingly, the subject merchandise constitutes furniture, not parts thereof, within the scope of HTSUS.

In NY N244209, CBP classified the mechanically adjustable bed bases under subheading 9403.90.80, HTSUS, as parts of furniture. This classification, however, was incorrect. The Parts EN to chapter 94 provides that “[chapter 94] only covers parts ... of the goods of heading[] ... 94.03 ..., when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings.” The mechanically adjustable bed bases, however, are imported as complete articles and thus, are not identifiable as parts. Therefore, the mechanically adjustable bed bases are, *prima facie*, classified in heading 9403, HTSUS, as beds.

2. If not parts of furniture, whether the essential character of the merchandise is imparted by the metal component in subheading 9403.20.0035, HTSUSA, as metal furniture, or by the wooden slats in subheading 9403.50.9045, HTSUSA, as wooden bedroom furniture.

The mechanically adjustable bed bases are composite goods that are composed of various components, including fabric, steel, wood, plastic, and electrical components. Accordingly, the classification of the merchandise is determined by the application of GRI 3(b), which applies to composite goods. To classify under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the essential character of the merchandise. “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). Generally, the physical measures of bulk, quantity, weight or value are considered to determine the constituent material that imparts the essential character of the merchandise. See ENs to GRI 3(b). Accordingly, the classification of the merchandise is determined by the heading in which the component that imparts the essential character is classified.

In the instant case, the steel part of the mechanically adjustable bed bases unequivocally predominates by role, weight, and value. First, the steel com-

ponent forms the legs and frames of the bed bases, which provide support and structure of the merchandise. Absent the steel part, the merchandise would be rendered useless as it would not be able to perform the functions of a bed base—to support a mattress and equip bedrooms. Because the steel legs and frames are the parts that establish the structure and functionality of the bed bases, they are essential to the role of the merchandise. Second, the steel component predominates by weight. In regard to the merchandise in NY N284490, the steel component outweighs all other materials as the weight of the steel comprises 53 percent of the total weight. In addition, the value of the steel is the highest among the primary components. In NY N284490, the electrical components compose 45 percent of the total value whereas the steel part comprises 32 percent only. As such, the electrical components have the *de facto* highest value. In relation to the merchandise as furniture, however, the electrical components are mere ancillary parts because the mechanical adjustment and other mechanical features of the merchandise do not effectively contribute to the furniture’s utilitarian purpose to equip private dwellings. Thus, when deducing the value of the electrical components, the steel part predominates by value in addition to the weight of the merchandise. Although a comprehensive list of components was not provided in NY N244209, the description of the merchandise therein demonstrates that the components of the bed bases are substantially similar to those described in NY N284490. Hence, the essential character of the mechanically adjustable bed bases is imparted by the steel component.

According to the steel part, which imparts the essential character of the merchandise, the mechanically adjustable bed bases are classified in subheading 9403.20.00, HTSUS, as metal furniture—specifically, in subheading 9403.20.0035, HTSUSA, which provides for “[m]echanically adjustable bed or mattress base” and wholly describes the entire subject merchandise as mechanically adjustable bed base. In NY N312925, dated July 29, 2020, CBP classified a substantially similar item, which consisted of metal, plastic and textile, in subheading 9403.20.0035, HTSUSA, as mechanically adjustable bed base. Analogous to the instant case, we found that the metal component imparted the essential character of the merchandise because it predominated by value and provided the structure, shape, and functionality of the merchandise. Accordingly, the instant mechanically adjustable bed bases are classified in subheading 9403.20.0035, HTSUSA.

Pursuant to GRI 3(b), the mechanically adjustable bed base is classified in heading 9403, HTSUS, as “[o]ther furniture and parts”.

As noted above, we received one comment in response to the notice of the proposed revocation. The comment was submitted in support of the modification of NY N284490, as the commenter agrees that the mechanically adjustable bed base is properly classified in subheading 9403.20.0035, HTSUSA.

HOLDING:

By application of GRI 3(b), the mechanically adjustable bed base is classified in heading 9403, HTSUS, specifically subheading 9403.20.0035, HTSUSA, which provides for “[o]ther furniture and parts thereof: [o]ther metal furniture: [h]ousehold: [m]echanically adjustable bed or mattress base, not foldable, having the characteristics of a bed or bed frame, of a width exceeding 91.44 cm, of a length exceeding 184.15 cm, and of a depth exceeding 8.89 cm”. The 2021 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N244209, dated August 16, 2013, is hereby revoked. In addition, NY N284490, dated April 4, 2017, is modified.

Sincerely,

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

CC: Ms. Jill A. Cramer
Mowry & Grimson, PLLC
5335 Wisconsin Avenue NW
Suite 810
Washington, DC 20015



PROPOSED MODIFICATION OF 15 RULING LETTERS AND THE REVOCATION OF TREATMENT RELATING TO THE APPLICABILITY OF SUBHEADING 9817.00.96, HTSUS TO CERTAIN FOOTWEAR PRODUCTS FOR MEN AND WOMEN

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

ACTION: Notice of proposed modification of 15 ruling letters and the revocation of treatment relating to the applicability of subheading 9817.00.96, Harmonized Tariff Schedule of the United States (HTSUS) to certain men's and women's footwear.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that CBP intends to modify **15** New York ruling letters pertaining to the applicability of subheading 9817.00.96, HTSUS to certain men's and women's footwear. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed action are invited.

DATES: Comments must be received on or before May 27, 2022.

ADDRESSES: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Trade, Regulations & Rulings, Attn: Teresa Frazier, Commercial and Trade Facilitation Division, 10th Floor, 90 K St. NE, Washington, DC 20229-1179. Due to the COVID-19, pandemic CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Teresa Frazier at (202) 325-0139.

FOR FURTHER INFORMATION CONTACT: Teresa M. Frazier, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, via email at teresa.m.frazier@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to section 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify 15 ruling letters and revoke the treatment of the applicability of subheading 9817.00.96, HTSUS to certain men's and women's footwear. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) N138598, dated January 14, 2011; NY N178242, dated September 1, 2011; NY N132915, dated December 15, 2020; NY N127775, dated November 9, 2010; NY N127777, dated November 9, 2010; NY N134664, dated December 15, 2010; NY N136836, dated December 29, 2010; NY N144018, dated February 16, 2011; NY N132897, dated December 15, 2010; NY N123943, dated October 20, 2010; NY N176157, dated August 15, 2011; NY N113676, dated August 4, 2010; NY N132897, dated December 15, 2010; NY N142316, dated Febru-

ary 9, 2011; and NY N172498, dated July 15, 2011 (see “Attachments A-O”), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

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

We reviewed 15 rulings that classified certain shoes as articles for the handicapped in subheading 9817.00.96, HTSUS and find them to be incorrect. These 15 rulings (see “Attachments A-O”) should be modified in accordance with *Sigvaris, Inc. v. United States*, 899 F.3d 1308 (Fed. Cir. 2018).

Pursuant to 19 U.S.C. § 1625(c)(1), CBP intends to modify the affected 15 ruling letters, and any other ruling not specifically identified to reflect the analysis contained in the proposed ruling letter, pursuant to HQ H319308, which is set forth as “Attachment Q” to this notice. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: _____, 2021

Sincerely,

MONIKA R BRENNER

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N138598

January 14, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.9065, 6404.19.9060,
9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated December 14, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Lindsey, Collette, and Flute styles are women's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. The Flute Lycra and Refresh styles are also women's below-the-ankle shoes that have outer soles made of rubber or plastic and uppers of predominantly textile material. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Lindsey, Collette, and Flute styles of footwear will be 6403.99.9065, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 % ad valorem.

The applicable subheading for the Flute Lycra and Refresh styles of footwear will be 6404.19.9060, HTSUS, which provides for footwear with outer soles of rubber/plastics, leather or composition leather and uppers of textile materials: footwear with outer shoes of rubber or plastics: other: other: valued over \$12.00/pair: for women. The rate of duty will be 9% ad valorem.

Regarding your claim of duty-free treatment under 9817.00.96, HTSUS, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities.

Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying “The Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in 9817.00.96, HTSUS, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT B

N178242

September 1, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6040, 6403.99.9031,
9817.00.96

MR. DAVID M. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE, 25TH FLOOR
NEW YORK, NY 10022-4877

RE: The tariff classification of footwear from China

DEAR MR. MURPHY:

In your letter dated August 1, 2011, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for and most typically purchased by people with diabetes. You provided samples of three diabetic shoe styles along with their respective laboratory reports which identify the upper component materials of each shoe by percentage.

The "Champion X" and "Edward X" styles are described by you as men's "athletic-style" shoes that do not cover the ankle and have outer soles of rubber or plastics and uppers of predominantly leather material; 85.97% and 61.44%, respectively. You provided F.O.B. values of \$21.98 - \$22.98 and \$20.77 - \$21.77/pair, respectively.

The "Lucie X" style is described by you as women's "athletic-style" shoe that does not cover the ankle and has an outer sole of rubber or plastic and upper of predominantly leather material; 54.89%. You provided an F.O.B. value of \$18.18/pair.

All three styles have Velcro® hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

You suggest that the "Champion X" and "Edward X" styles be classified under subheading 6403.99.6075, HTSUS, which provides for in pertinent part, footwear that is not athletic. We agree with your suggested classification only to the eighth digit. Additional U.S. Note 2, HTSUS, defines athletic footwear as "tennis shoes, basketball shoes, gym shoes, training shoes and the like, whether or not principally used for such athletic games or purposes."

The applicable subheading for the "Champion X" and "Edward X" styles of footwear will be 6403.99.6040, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; other: other: for men, youths and boys: tennis shoes, basketball shoes, gym shoes, training shoes and the like, for men: other. The rate of duty will be 8.5 percent ad valorem.

You suggest that the "Lucie X" style be classified under subheading 6403.99.9065, HTSUS, which provides for in pertinent part, footwear that is not athletic. We agree with your suggested classification only to the eighth

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT C

N132915

December 15, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.9065, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated November 11, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Breeze, Susie, Paradise, Move, and Walk styles are women's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. Except for the Paradise and Walk shoes which have a conventional buckle and lace-up closure, respectively, the other shoes have hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Breeze, Susie, Paradise, Move, and Walk styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of

trade for these shoes is Doctor Comfort, which markets itself as carrying “The Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT D

N127775

November 9, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated October 14, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Leader, Wing, Classic, Captain and Justin styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. With the exception of the Leader style which has a buckle closure, all have lace closures. The shoes are available in full or half sizes and a choice of three widths. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Leader, Wing, Classic, Captain and Justin styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of

trade for these shoes is Doctor Comfort, which markets itself as carrying “The Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT E

N127777

November 9, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.9065, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated October 14, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Lulu, Kristin, Betsy, Wave, and Delight styles are women's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. All of the shoes have hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Lulu, Kristin, Betsy, Wave, and Delight styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The Finest Quality Diabetic Footwear Period!" Also, while there is no way to

verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT F

N134664

December 15, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.9065, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated November 22, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Spirit, Spirit Plus, Spirit X, Betty, and Lily styles are women's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. Except for the Betty shoe which has a hook and loop closure, the other shoes have a combination hook and loop and lace-up closure or strictly a lace-up closure. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Spirit, Spirit Plus, Spirit X, Betty, and Lily styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of

trade for these shoes is Doctor Comfort, which markets itself as carrying “The Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT G

N136836

December 29, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 6403.99.9065,
9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated November 22, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Beachcomber, Stallion and Robert styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. The Patty and Laura styles are women's shoes that are also below the ankle and have outer soles made of rubber or plastic and uppers predominantly of leather. With the exception of the Beachcomber style which has a hook and loop closure, all of the other styles have lace-up closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Beachcomber, Stallion and Robert styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

The applicable subheading for the Patty and Laura styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical

impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The Finest Quality Diabetic Footwear Period!" Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as "therapeutic articles" in CBP's interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining "they are not used in procedures which remove or lessen the disease which caused the underlying condition."

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI
Director

National Commodity Specialist Division

ATTACHMENT H

N144018

February 16, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.40.6000, 6403.91.6075,
6404.19.9060, 9817.00.96

MR. DAVID M. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. MURPHY:

In your letter dated December 21, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Ranger, Protector and Boss styles are men's boots that cover the ankle but not the knee, have outer soles made of rubber or plastic and have uppers predominantly of leather. With the exception of the Ranger style which has a Velcro® closure, all of the other men's styles have lace-up closures. The Protector boot includes a protective metal toe-cap. The Annie and Annie X styles are women's shoes that are below-the-ankle and have outer soles made of rubber or plastic and uppers predominantly of textile. You state that the Annie X is virtually identical to the Annie and that the only difference is that the Annie X provides additional depth for hard to fit diabetic feet. They both have Velcro® closures. You further state that the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Protector style of footwear will be 6403.40.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear, incorporating a protective metal toecap: other. The rate of duty will be 8.5 percent ad valorem.

The applicable subheading for the Ranger and Boss styles of footwear will be 6403.91.6075, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: covering the ankle: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

The applicable subheading for the Annie and Annie X styles of footwear will be 6404.19.9060, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: footwear with outer soles of rubber or plastics: other: other: valued over \$12.00/pair: for women. The rate of duty will be 9 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The Finest Quality Diabetic Footwear Period!" Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as "therapeutic articles" in CBP's interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 - KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining "they are not used in procedures which remove or lessen the disease which caused the underlying condition."

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,
ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT I

N132897

December 15, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated November 11, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Mike, Patrick, Eric, Frank and Fisherman styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. With the exception of the Patrick and Eric styles which have lace-up closures, the other styles have hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Mike, Patrick, Eric, Frank and Fisherman styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The

Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT J

N123943

October 20, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated September 17, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Scott, William, William X-depth, Champion, and Champion-Plus styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Scott, William, William X-depth, Champion, and Champion-Plus styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The

Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT K

N176157

August 15, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6402.99.9005, 6403.99.6040,
6403.99.9031, 9817.00.96

MS. TRACEY TOPPER GONZALEZ
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE, 25TH FLOOR
NEW YORK, NY 10022-4877

RE: The tariff classification of footwear from China

DEAR MS. GONZALEZ:

In your letters dated December 21, 2010 and July 20, 2011, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for and most typically purchased by people with diabetes. You provided illustrations of five diabetic shoe styles along with their respective laboratory reports which identify the upper component materials of each shoe by percentage.

The "Performance" style shoe is described by you as a men's "athletic-style" shoe that does not cover the ankle and has an outer sole of rubber or plastics. You state that the upper is 59.01% rubber/plastics. The shoe features a bungee lace closure and a foxing or a foxing-like band. You provided an F.O.B. value of \$18.88 - \$19.28/pair.

The "Endurance" and "Endurance Plus" styles are described by you as men's "athletic-style" shoes that do not cover the ankle and have outer soles of rubber or plastics and uppers of predominantly leather material; 68.46% and 71.95%, respectively. You provided F.O.B. values of \$21.11 - \$21.78 and \$18.84 - \$19.16/pair, respectively.

The "Victory" and "Victory Plus" styles are described by you as women's "athletic-style" shoes that do not cover the ankle and have outer soles of rubber or plastic and uppers of predominantly leather material; 69.20% and 71.88%, respectively. You provided F.O.B. values of \$20.06 - \$20.78 and \$19.37 - \$20.09, respectively.

With the exception of the "Performance" style, they all have either lace-up or Velcro® hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

You suggest that the "Performance" style shoe be classified under subheading 6402.99.9031, Harmonized Tariff Schedule of the United States (HTSUS), which provides for in pertinent part, footwear that is not athletic. We agree with your suggested classification only to the eighth digit. Additional U.S. Note 2, HTSUS, defines athletic footwear as "tennis shoes, basketball shoes, gym shoes, training shoes and the like, whether or not principally used for such athletic games or purposes."

The applicable subheading for the "Performance" style of footwear will be 6402.99.9005, HTSUS, which provides for other footwear with outer soles

and uppers of rubber or plastics: other footwear: other: other: not having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements) is rubber or plastics; footwear which has a foxing or a foxing like band; valued over \$12/pair: tennis shoes, basketball shoes, gym shoes, training shoes and the like. The rate of duty will be 20 percent ad valorem.

You suggest that the “Endurance” and “Endurance Plus” styles be classified under subheading 6403.99.6075, HTSUS, which provides for in pertinent part, footwear that is not athletic. We agree with your suggested classification only to the eighth digit. Additional U.S. Note 2, HTSUS, defines athletic footwear as “tennis shoes, basketball shoes, gym shoes, training shoes and the like, whether or not principally used for such athletic games or purposes.”

The applicable subheading for the “Endurance” and “Endurance Plus” styles of footwear will be 6403.99.6040, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; other: other: other: for men, youths and boys: tennis shoes, basketball shoes, gym shoes, training shoes and the like, for men: other. The rate of duty will be 8.5 percent ad valorem.

You suggest that the “Victory” and “Victory Plus” styles be classified under subheading 6403.99.9065, HTSUS, which provides for in pertinent part, footwear that is not athletic. We agree with your suggested classification only to the eighth digit. Additional U.S. Note 2, HTSUS, defines athletic footwear as “tennis shoes, basketball shoes, gym shoes, training shoes and the like, whether or not principally used for such athletic games or purposes.”

The applicable subheading for the “Victory” and “Victory Plus” styles of footwear will be 6403.99.9031, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; other: other: other: for other persons: valued over \$2.50/pair: other: tennis shoes, basketball shoes, gym shoes, training shoes and the like, for women: other. The rate of duty will be 10 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer’s specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with “heat-moldable inserts” which are intended to be heated and molded to accommodate each of the wearer’s feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying “The Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medi-

care) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT L

N113676

August 4, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 6403.99.9065,
6404.19.9060, 9817.00.96

MR. DAVID M. MURPHY
MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. MURPHY AND MR. KHORSANDI:

In your letter dated July 1, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin. Samples were submitted by Sandi Siegel of M.E. Dey & Co., Dr. Comfort's customs broker.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Brian, David and Douglas styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. The women's shoes are also below the ankle and have outer soles made of rubber or plastic. The Maggy and Merry Jane styles have uppers predominantly of leather and the Merry Jane – Lycra feature textile (Lycra) uppers. The shoes do not have foxing or foxing-like bands. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Brian, David and Douglas styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

The applicable subheading for the Maggy and Merry Jane styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

The applicable subheading for the Merry Jane – Lycra style footwear will be 6404.19.9060, HTSUS, which provides for footwear with outer soles of rubber/plastics, leather or composition leather and uppers of textile materials: footwear with outer shoes of rubber or plastics: other: other: valued over \$12.00/pair: for women. The rate of duty will be 9% ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been

constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The Finest Quality Diabetic Footwear Period!" Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as "therapeutic articles" in CBP's interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 - KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining "they are not used in procedures which remove or lessen the disease which caused the underlying condition."

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI
Director

National Commodity Specialist Division

ATTACHMENT M

N132897

December 15, 2010

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.99.6075, 9817.00.96

MR. MICHAEL J. KHORSANDI
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. KHORSANDI:

In your letter dated November 11, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Mike, Patrick, Eric, Frank and Fisherman styles are men's shoes that do not cover the ankle, have outer soles made of rubber or plastic and have uppers predominantly of leather. With the exception of the Patrick and Eric styles which have lace-up closures, the other styles have hook and loop closures. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the Mike, Patrick, Eric, Frank and Fisherman styles of footwear will be 6403.99.6075, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The

Finest Quality Diabetic Footwear Period!” Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as “therapeutic articles” in CBP’s interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 – KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining “they are not used in procedures which remove or lessen the disease which caused the underlying condition.”

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT N

N142316

February 9, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6403.91.9045, 6403.99.6075,
6403.99.9065, 6404.11.9020, 9817.00.96

MR. DAVID M. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: The tariff classification of footwear from China

DEAR MR. MURPHY:

In your letter dated January 6, 2010, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin.

Dr. Comfort shoes are said to be specially adapted for, and most typically purchased by, people with diabetes. The Brian X is a man's shoe that does not cover the ankle, has outer soles made of rubber or plastic and has uppers of predominantly leather. External surface area measurements provided state the uppers are made of 54 percent leather and 46 percent textile. The shoe also has a strap with a hook and loop closure across the instep. The Maggy X and the Sunshine styles are below the ankle, women's shoes with leather uppers and a strap across the instep that is secured with hook and loop closures. The outer soles are rubber or plastic. The Vigor is an above the ankle, lace up hiking boot with a strap near the top that is secured with a hook and loop closure. The upper is leather and the outer sole is made of rubber or plastic. The Comfort Plus style shoe is a man's lace-up athletic shoe with a textile upper and a rubber or plastic outer sole. You suggest classification of the Comfort Plus footwear under subheading 6404.19.9030 Harmonized Tariff Schedule of the United States (HTSUS) which provides for footwear with outer soles of rubber/plastics, leather or composition leather and uppers of textile materials: other: other: valued over \$12.00/pair: for men. Based upon the athletic type styling features including a lace front, padded collar, and ventilation holes, the shoe will be classified elsewhere. Each of the styles is valued over \$12. In your letter you state the packaging of the articles at the time of importation indicates that these articles are for the handicapped and that the inserts are included with the shoes. The shoes provide the essential character for classification purposes.

The applicable subheading for the woman's Vigor hiking shoe will be 6403.91.9045, HTSUS, which provides for footwear with outer soles of rubber/plastics, leather or composition leather and uppers of leather: other footwear: covering the ankle: other: other: for other persons: other: for women: other. The rate of duty will be 10% ad valorem.

The applicable subheading for the Brian X style of footwear will be 6403.99.6075, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: other: other: other: for men, youths and boys: other: other: for men: other. The rate of duty will be 8.5 percent ad valorem.

The applicable subheading for the Maggy X and the Sunshine styles of footwear will be 6403.99.9065, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: other footwear: not covering the ankle; not welt footwear; for other persons: valued over \$2.50/pair: other: for women: other. The rate of duty will be 10 percent ad valorem.

The applicable subheading for style the Comfort Plus will be 6404.11.9020, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: footwear with outer soles of rubber or plastics: tennis shoes, basketball shoes, gym shoes, training shoes and the like: other: valued over \$12/pair: for men: other. The rate of duty will be 20% ad valorem.

Regarding your claim of duty-free treatment under HTSUS 9817.00.96, this footwear goes beyond being simply extra adjustable and convenient. The copies of the design patterns, etc., submitted by you show they have been constructed by the maker according to the importer's specifications, most notably, but not exclusively, with extra depth in the toe box and forefoot. You also state that each style is imported with "heat-moldable inserts" which are intended to be heated and molded to accommodate each of the wearer's feet.

Headquarters Ruling Letter 964169 - JFS, June 26, 2001, et al, indicates that diabetes blood sugar monitors for home use are presumed to be for the use or benefit of persons suffering from a permanent or chronic physical impairment which substantially limits one or more major life activities. Although diabetes monitors are also often used by those with borderline diabetes who are asymptomatic, a diabetic using these shoes clearly has a foot problem caused by the diabetes.

On the other hand, while blood sugar monitors are only of use to diabetics, the shoes in question would be useful to others with various foot problems. However, those other problems might well be permanent or chronic and substantially limit the major life activity of walking. Also, the channel of trade for these shoes is Doctor Comfort, which markets itself as carrying "The Finest Quality Diabetic Footwear Period!" Also, while there is no way to verify, for each style, the percentage of the purchasers (if eligible for Medicare) who receive reimbursement from Medicare under the Therapeutic Shoe Bill, each purchaser will receive certification that the style meets the specific physical requirements of the statute.

Although the styles are covered by the Therapeutic Shoe Bill, we agree that they are not excluded as "therapeutic articles" in CBP's interpretation of HTSUS, Chapter 98, Subchapter 17, US Note 4-b-iii. For example, Headquarters Ruling Letter 561940 - KSG, February 7, 2001, did not exclude ophthalmic surgical microscopes, explaining "they are not used in procedures which remove or lessen the disease which caused the underlying condition."

On that basis we agree that a secondary classification will apply for the footwear in HTSUS 9817.00.96, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

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

If you have any questions regarding the classification of these items in 9817.00.96, HTSUS, contact National Import Specialist J. Sheridan at (646)-733-3012. If you have any questions regarding the ruling contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT O

N172498

July 15, 2011

CLA-2-64:OT:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6406.99.3060, 9817.00.96

MR. DAVID M. MURPHY

MS. TRACEY TOPPER GONZALEZ

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP

399 PARK AVENUE, 25TH FLOOR

NEW YORK, NY 10022

RE: The tariff classification of shoe inserts from China

DEAR MR. MURPHY AND MS. GONZALEZ:

In your letter dated June 22, 2011, you requested a tariff classification ruling on behalf of Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, WI.

The product is described as the "Elite" style of footwear inserts designed specifically for use by diabetics and exclusively used in Dr. Comfort footwear. An engineering drawing showing the "Dr. Comfort" logo molded into the center of the insole was submitted with your letter. The Elite inserts are made from EVA rubber and plastic components that provide the essential character of these footwear inserts/insoles. They are customizable through a heat molding process by a physician to fit the diabetic patient's foot exactly. The Elite inserts may be imported in bulk, without footwear, and are available in full and half sizes with a minimum of three widths to assure a proper fit. As Medicare covers the expense of three pairs of inserts for diabetics, after importation, two additional pairs of inserts will be added to each box of footwear sold if requested by the customer. One pair of Elite inserts imported with each imported pair of Dr. Comfort shoes are the subjects of New York rulings N113676 dated August 4, 2010, and N123943 dated October 20, 2010.

Regarding these Elite inserts, you propose a secondary classification in 9817.00.96, HTSUS. As in Headquarters Ruling Letter H024976, March 23, 2009, the determination of whether a part of an article for the handicapped is "specially designed or adapted" for use in that article is dependent on the information provided when, as here, it is not clear from the nature of the part itself.

When the Elite inserts are imported separately from the footwear, the applicable subheading will be 6406.99.3060, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts of footwear, removable insoles, heel cushions and similar articles; of rubber or plastics. The rate of duty will be 5.3% ad valorem.

From the information you have provided, we agree that a secondary classification will apply for the Elite inserts, whether or not imported in bulk, in 9817.00.96, HTSUS, as parts which were specially designed or adapted for use in articles which were specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind.) The rate of duty will be free.

Note that the requirement that you prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the Inter-

national Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions specifically regarding the classification in 9817.00.96 of this item, contact National Import Specialist J. Sheridan at 646-733-3012. If you have any other questions regarding the ruling, contact National Import Specialist Stacey Kalkines at (646) 733-3042.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

HQ H319308

March , 2022

OT:RR:CTF:VS H319308 tmf

CATEGORY: Classification

MR. MICHAEL J. KHORSANDI
MR. DAVID M. MURPHY
MS. TRACEY TOPPER GONZALEZ
GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP
399 PARK AVENUE
NEW YORK, NY 10022

RE: Articles for the handicapped; Subheading 9817.00.96; Footwear for men and women

DEAR MR. KHORSANDI, MR. MURPHY AND MADAME TOPPER GONZALEZ:

This is in reference to fifteen rulings issued to your law firm on behalf of your client, Rikco International, LLC, d/b/a/ Dr. Comfort, Mequon, Wisconsin, concerning the tariff classification of various styles of footwear under the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, in the following 15 ruling letters (New York (NY) N138598, dated January 14, 2011; NY N178242, dated September 1, 2011; NY N132915, dated December 15, 2020; NY N127775, dated November 9, 2010; NY N127777, dated November 9, 2010; NY N134664, dated December 15, 2010; NY N136836, dated December 29, 2010; NY N144018, dated February 16, 2011; NY N132897, dated December 15, 2010; NY N123943, dated October 20, 2010; NY N176157, dated August 15, 2011; NY N113676, dated August 4, 2010; NY N132897, dated December 15, 2010; NY N142316, dated February 9, 2011; and NY N172498, dated July 15, 2011), New York found the merchandise to be articles of the handicapped within subheading 9817.00.96, HTSUS.

We have reviewed these rulings and find them to be in error regarding the applicability of subheading 9817.00.96, HTSUS. For the reasons set forth below, we are modifying these 15 rulings which approved the applicability of heading 9817, which provides for “articles for the handicapped” to various styles of footwear.

FACTS:

In the 15 rulings, the various shoe styles at issue are claimed to be specially adapted for, and were stated to be most typically purchased by people with diabetes. Some of the shoes are women’s and men’s shoes, or women’s and men’s “athletic-style” shoes, that do not cover the ankle and have outer soles shoes made of rubber or plastics, with uppers predominately of leather or textile materials. Some of the shoes close by velcro hook and loop, buckle, or lace-up closures. One ruling describes the articles as men’s boots that cover the ankle, with one style having a protective metal toe-cap. Another ruling describes the article as an above the ankle, lace up hiking boot with a strap near the top that is secured with a hook and loop closure. Another style of shoe has a strap with a hook and loop closure across the instep. The rulings indicate that the footwear goes beyond being simply extra adjustable, but that the shoes are constructed with extra depth in the toe box and forefoot. The styles are also imported with “heat-moldable inserts” which are intended

to be heated and molded to accommodate each of the wearer's feet. The packaging of the shoes at the time of importation indicates that the articles are for the handicapped.

ISSUE:

Whether the styles of shoes are eligible for duty-free treatment under subheading 9817.00.96, HTSUS, as "articles specially designed or adapted for the handicapped."

LAW AND ANALYSIS:

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

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other. Subheading 9817.00.96 excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

Accordingly, eligibility within subheading 9817.00.96, HTSUS, depends on whether the merchandise is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions. *See* subheading 9817.00.96, HTSUS; U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

In *Sigvaris, Inc. v. United States*, 227 F. Supp 3d 1327, 1336 (CIT 2017), *aff'd*, 899 F.3d 1308 (Fed. Cir. 2018), the U.S. Court of International Trade ("CIT") explained that "specially" means "to an extent greater than in other cases or towards others" and "designed" means something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural."

The term "blind or other physically or mentally handicapped persons" includes "any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. This list of exemplar activities indicates that the term "handicapped persons" is to be liberally construed so as to encompass a wide range of conditions, provided the condition substantially interferes with a person's ability to perform an essential daily task. While the HTSUS does not establish a clear definition of substantial limitation, in *Sigvaris*, 227 F. Supp 3d at 1335, the CIT explained that "[t]he inclusion of the word 'substantially' denotes that the limitation must be 'considerable in amount' or 'to a large degree.'"

We must first evaluate "for whose, if anyone's, use and benefit [the shoes are] specially designed," and then, whether "those persons [are] physi-

cally handicapped []." *Sigvaris*, 899 F.3d at 1314. The Court of Appeals for the Federal Circuit ("CAFC") clarified in *Sigvaris*, 899 F.3d at 1314–15 that to be "specially designed," the merchandise "must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others" and adopted the five factors used by U.S. Customs and Border Protection ("CBP"): (1) physical properties of the article itself (*e.g.*, whether the article is easily distinguishable in design, form and use from articles useful to non-handicapped persons); (2) presence of any characteristics that create a substantial probability of use by the chronically handicapped, so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; (3) importation by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; (4) sale in specialty stores that serve handicapped individuals; and (5) indication at the time of importation that the article is for the handicapped.

Looking to the court's analysis in *Sigvaris*, 899 F.3d 1308, CBP must first examine for whose use and benefit the subject merchandise is "specially designed," and whether such persons are physically handicapped. In other words, we must consider whether such persons are suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities.

With regard to the first two factors to consider in determining whether an article is "specially designed," *i.e.*, the physical properties of the article and any characteristics of the article that easily distinguish it from articles useful to the general public. In this case the various styles of shoes do not possess any features that are distinguishable from features found in mainstream shoes useful for the general public. In fact, the subject shoes possess similar and/or identical features as other mainstream shoes we found during our research. Indeed, while granting subheading 9817.00.96, HTSUS, treatment to the various shoe styles, the New York rulings acknowledged that "the general public can benefit from footwear that can accommodate swollen feet or those in need of orthotic inserts," and "would be useful to others with various foot problems"

The shoes in the 15 rulings do not have any features which are "specifically designed or adapted" for the handicapped. Rather, the general public would likely want to wear these shoes since they possess the same features and resemble substantially similar shoes in mainstream retail stores. Although the importers may claim the shoes are for persons with diabetes, we do not believe any of the shoes in the 15 rulings have any significant adaptations that would benefit the handicapped community. While heat moldable inserts may have been directed at diabetic patients at one point in time, these are common to all who seek more comfort due to conditions such as flat feet, plantar fasciitis, foot fatigue, or to better absorb shock. In addition, we reviewed the internet marketing for the shoes at issue and they are not available through channels solely for diabetic patients, but they are available to anyone seeking more comfortable shoes. Many members of the public, and not just the elderly, would seek the athletic shoes at issue, or the hiking boots, for example. In addition, we do not find any of the shoes meet any of the five factors outlined in the *Nairobi Protocol, Annex E, to the Florence Agreement*, found in T.D. 92–77, *supra*.

In sum, none of the shoe styles would likely be sold exclusively to the handicapped. Accordingly, these footwear styles are not adaptive articles of subheading 9817.00.96, HTSUS.

HOLDING:

The various shoes identified in the 15 aforementioned ruling letters are ineligible for subheading 9817.00.96, HTSUS, which provides for as “articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons . . . other.”

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy of this ruling, it should be brought to the attention of the CBP officer handling the transaction.

Sincerely,

MONIKA R. BRENNER,

Chief

Valuation and Special Programs Branch

U.S. Court of Appeals for the Federal Circuit

RED SUN FARMS, Plaintiff-Appellant v. UNITED STATES, FLORIDA TOMATO
EXCHANGE, Defendants-Appellees

Appeal No. 2020–2230

Appeal from the United States Court of International Trade in No. 1:19-cv-00205-
JCG, Judge Jennifer Choe-Groves.

Decided: April 14, 2022

JAMES P. DURLING, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, argued for plaintiff-appellant. Also represented by JAMES BEATY, DANIEL L. PORTER. Also argued by DEVIN S. SIKES, Akin Gump Strauss Hauer & Feld LLP, Washington, DC; JEFFREY M. WINTON, Winton & Chapman, PLLC, Washington, DC.

DOUGLAS GLENN EDELSCHICK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also argued by ROBERT K. KIEPURA. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, FRANKLIN E. WHITE, JR.; EMMA T. HUNTER, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

MARY JANE ALVES, Cassidy Levy Kent USA LLP, Washington, DC, argued for defendant-appellee Florida Tomato Exchange. Also represented by JAMES R. CANNON, JR., ULRIKA K. SWANSON, JONATHAN M. ZIELINSKI.

Before DYK, PROST, and TARANTO, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TARANTO.

Opinion dissenting-in-part and concurring-in-part filed by *Circuit Judge* DYK.

TARANTO, *Circuit Judge*.

This is one of several appeals argued together to this panel, all arising out of an antidumping duty investigation to determine whether fresh Mexican tomatoes were being imported into the United States and sold at less than fair value. The history of the proceedings is described in our two accompanying precedential opinions in *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, No. 2020–2232, and *Bioparques de Occidente v. United States*, No. 2020–2265. In this case, we reverse and remand.

I

A

“Red Sun Farms” is the trade name under which various identified entities do business. These entities are “U.S. producers of fresh to-

matoes grown in the United States, U.S. importers and resellers of fresh tomatoes from Mexico, and foreign producers and exporters of fresh tomatoes from Mexico.” Appellant’s Br. 3; *see also* J.A. 21 (summons).

The complaint in this case was filed against the United States in the Court of International Trade (“Trade Court”) on December 26, 2019. It begins: “1. Plaintiff Red Sun Farms (Naturbell SPR DE RL, San Miguel Red Sun Farms SPR DE RL DE CV, Agricola El Rosal SA DE, Jem D International Michigan Inc., and Red Sun Farms Virginia LLC, collectively d/b/a Red Sun Farms) by and through its counsel, states the following claims against the Defendant, the United States.” J.A. 24. The caption on the complaint is simply “Red Sun Farms, Plaintiff, v. United States, Defendant.” *Id.* After beginning with the identification of “Red Sun Farms” with the above quote, the complaint thereafter uses the singular “Plaintiff.” *See* J.A. 24–36. Like the Trade Court, we will follow that usage—which, however, raises issues to be addressed on remand, as we will discuss.

The complaint followed the filing, on November 25, 2019, of the summons that commenced the Trade Court case. J.A. 21–23. The summons includes the same caption and formulation relating “Red Sun Farms” to five identified entities as does the later complaint, but the summons, while twice referring to “Plaintiff” (singular), also twice refers to “Plaintiffs” (plural). J.A. 21. The corporate disclosure statement filed with the summons states: “Plaintiff and its member companies are not publicly-owned.” Form 13 Corporate Disclosure Statement, *Red Sun Farms v. United States*, No. 1:19-cv-00205 (Ct. Int’l Trade Nov. 25, 2019), ECF No. 3.

In the Trade Court, the government flagged the issue of who precisely brought this action. In its March 2020 motion to dismiss, the government observed, with respect to the five identified entities doing business as “Red Sun Farms,” that “[i]t is unclear whether all of these parties possess standing or can be considered real parties in interest” and reserved its right to raise additional arguments on the subject. J.A. 62 n.1. In April 2020, in a discovery filing, the government noted the varying singular/plural usage by Red Sun Farms and stated that “Plaintiff Red Sun Farms actually consists of several companies, which are” the five identified in the quote above. J.A. 180 n.1. We note that, in this court, Red Sun Farms, in its certificate of interest (Form 9 in this court), used the same formulation quoted above from the complaint, *i.e.*, “Red Sun Farms ([the identified five entities], collectively d/b/a Red Sun Farms),” to designate “all entities represented by

the undersigned counsel in this case.” Certificate of Interest, *Red Sun Farms v. United States*, No. 2020–2230 (Fed. Cir. Sept. 16, 2020), ECF No. 3.

B

On the merits, Red Sun Farms presented seven claims in the complaint. All claims challenge aspects of the final determination resulting from Commerce’s continued investigation. See *Fresh Tomatoes from Mexico: Final Determination of Sales at Less than Fair Value*, 84 Fed. Reg. 57,401 (Oct. 25, 2019) (*Final Determination*). The claims fall into three categories: (1) that Commerce improperly selected new respondents in its continued investigation; (2) that Commerce committed timing and procedural errors in reaching its final determination; and (3) that Commerce utilized flawed methodologies to calculate dumping margins, the all-others rate, and cash deposit rates in the final determination. Red Sun Farms alleged in the complaint that the Trade Court had jurisdiction under 28 U.S.C. § 1581(c) because Red Sun Farms challenged a final determination resulting from a continued investigation under 19 U.S.C. § 1516a(a)(2)(B)(iv).

The government moved to dismiss on grounds of ripeness, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. The Trade Court granted the government’s motion and dismissed the complaint with prejudice on ripeness grounds because the 2019 suspension agreement remained in place, and there had been accordingly no final antidumping order issued based on the *Final Determination*. *Red Sun Farms v. United States*, 469 F. Supp. 3d 1403, 1408–10 (Ct. Int’l Trade 2020). Red Sun Farms appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II

Like the appellants in *Bioparques de Occidente v. United States*, No. 2020–2265 [hereafter “*Bioparques*”], Red Sun Farms challenges the *Final Determination* published by the Department of Commerce on October 25, 2019. The Trade Court held in this case, as it did in the *Bioparques* case, that these challenges were premature because no final antidumping order had issued. Today we reverse that holding in *Bioparques*, and we do the same in this case, relying on our opinion in *Bioparques*—which applies because Red Sun Farms’ interests include the present, concrete interests of exporters bound by the suspension agreement at the center of *Bioparques*. Red Sun Farms’ claims are not premature.

As to statutory jurisdiction, this case differs from *Bioparques*. There, we hold that jurisdiction exists based on §§ 1516a(g)(3)(A)(i) and 1516a(a)(2)(B)(i); and we do not reach the issue of jurisdiction

based on §§ 1516a(a)(2)(A)(i) and 1516a(a)(2)(B)(iv). Here, Red Sun Farms invokes only the latter basis of statutory jurisdiction. We hold, in agreement with Red Sun Farms, that the Trade Court has statutory jurisdiction on that basis.

A

Under § 1516a(a)(2)(A)(i)(I), “[w]ithin thirty days after. . . the date of publication in the Federal Register of . . . notice of *any* determination described in clause . . . (iv) . . . of subparagraph (B),” “an interested party who is a party to the proceeding in connection with which the matter arises may commence an action” in the Trade Court by filing a summons, to be followed by a complaint within 30 days thereafter (emphasis added). Clause (iv) of subparagraph (B) reads:

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

* * *

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.

§ 1516a(a)(2)(B)(iv) [hereafter “B(iv)”. As explained in *Bioparques*, § 1673c covers agreements to suspend an investigation, § 1673c(c); continued investigations, § 1673c(f)(3); and procedures relating to final determinations in those continued investigations, *id.* As also explained in *Bioparques*, Congress gave not only domestic-industry entities but also the exporter signatories (if they are significant enough together) the right to demand a continued investigation after publication of a suspension agreement. § 1673c(g). See *Bioparques*, slip op. at 17.

The government agrees that Commerce’s *Final Determination* in the present matter is a “final determination resulting from a continued investigation which changes the size of the dumping margin.” Oral Arg. at 1:22:40–1:23:02; see also Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,608, 56,615 (Nov. 1, 1996) (*Preliminary Determination*) (setting prelimi-

nary dumping margins); *Final Determination*, 84 Fed. Reg. at 57,402 (changing the size of those margins). And the government does not dispute that Red Sun Farms served its summons within 30 days of publication of the *Final Determination* and served its complaint within 30 days thereafter. The government nevertheless disputes the applicability of B(iv).

The government's argument is that any challenge under B(iv) must include a timely challenge to the suspension agreement itself—to a “determination by” Commerce “to suspend an antidumping duty . . . investigation.” § 1516a(a)(2)(B)(iv). According to the government, even if the challenger's only grievance is with the final determination in the continued investigation, it cannot challenge that final determination under B(iv) unless it filed an action within 30 days of the publication of the suspension agreement at issue. It is not enough, says the government, that the challenger filed its B(iv) action within 30 days of the publication of the final determination that follows that agreement. In this matter, it is undisputed that Red Sun Farms did not file an action within 30 days of publication of the 2019 Agreement.

We have not ruled on the proper interpretation of B(iv), so the government bases its argument on *Usinas Siderúrgicas de Minas Gerais, S/A v. United States*, 201 F. Supp. 2d 1304 (Ct. Int'l Trade 2002). There, the Trade Court concluded that B(iv) covers only actions that allege that the suspension agreement should not have been executed or that it is defective in light of a final determination's alteration of margins or reasoning underlying the agreement, and it determined that B(iv) actions must be brought within 30 days of publication of the suspension agreement. *Id.* at 1312. The *Usinas* court reasoned that the statute, through its “including” language, “close[ly] reference[s]” the underlying suspension agreement, so that a challenge to the final determination can be brought only as part of a challenge to the suspension agreement itself. *Id.*

Usinas is not precedent for this court, and we conclude that the *Usinas* court read B(iv) too narrowly. A final determination in a continued investigation that changes the dumping margins after the conclusion of the suspension agreement, like the *Final Determination* here, is a “determination described in clause . . . (iv) . . . of subparagraph (B).” § 1516a(a)(2)(A)(i). And “any” such determination may be reviewed by filing a summons within 30 days of that determination's publication (followed by a complaint within 30 days thereafter). *Id.* The language of subparagraph (A) directly applies to these types of determinations, in which Commerce's calculation of dumping margins has changed, creating a different set of circumstances from those on which the suspension agreement was based.

The language of B(iv), on which the *Usinas* court relied, does not support a contrary conclusion. The court in *Usinas*, agreeing with the government, ruled that the “including” term could have (and therefore had to be given) a meaning under which the words following “including” identify a component part of what is identified in the words preceding “including.” *Usinas*, 201 F. Supp. 2d at 1310–13 (using “illustrative,” “component part,” and similar terms to identify this interpretation). But that meaning makes no linguistic sense in B(iv). A final determination in a continued investigation is not naturally described as a part of a “determination . . . to suspend”; they are not even made at the same time or in the same Commerce document or announcement. Indeed, the particular final determinations identified in B(iv) qualify only if they embody *changes* in the premises of the earlier-made “determination . . . to suspend.” A whole/part meaning makes no sense in B(iv), unlike in B(i) or B(ii), which refer to a final affirmative determination as including a negative “part” (and vice versa) of the single Commerce announcement, with no gap in time of publication.

As the court in *Usinas* recognized, “including” in legal settings can have an “expansive” meaning, 201 F. Supp. 2d at 1311, under which a provision as a whole encompasses both what comes before and what comes after the word. Here, such a meaning is supported by the language with which subparagraph B begins: “The determinations which may be contested under subparagraph (A) clause are as follows” The “including” phrase of B(iv) is naturally understood as identifying something as being “includ[ed]” among the “determinations which may be contested under subparagraph (A),” not (unnaturally) as “includ[ed]” within the “determination . . . to suspend.” Accordingly, not only the text of subparagraph (A) but also the text of subparagraph (B) supports Red Sun Farms’ interpretation.

This interpretation also fits with other pertinent aspects of the statute. *See, e.g., Merit Mgmt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892–93 (2018) (considering “[t]he language of [the provision at issue], the specific context in which that language is used, and the broader statutory structure”). Congress expressly authorized both domestic-industry entities and exporter signatories (the latter if significant enough together) to trigger a continued investigation, § 1673c(g), and the disputed “including” clause of B(iv) specifically refers to final determinations resulting from such continued investigations that change the premises existing when the suspension agreement was executed. The B(iv) provision thus clearly contemplates a scenario (among others) in which exporter signatories,

having just signed the suspension agreement, are interested *only* in obtaining a correct final determination—whether to give them a reason to withdraw from the agreement or, conversely, to avoid termination of a satisfactory suspension agreement because it is deemed not to adhere to statutory requirements based on a new incorrect final determination (e.g., of higher dumping margins).

The government argues that the Mexican signatories could have challenged the suspension agreement within 30 days of its publication and that such a challenge would have served as a placeholder, allowing them to amend their complaints later to challenge a final determination in the continued investigation once such a final determination was published. Oral Arg. at 1:38:42–1:40:10. But the question is not what could be done, but what must be done. And not only does the government’s interpretation conflict with the text of the statute, as just discussed, but the government has not identified any reason why Congress should be understood to have imposed such a placeholder-filing requirement when the interested party is not yet aggrieved by anything and will become aggrieved only later if it sees flaws in a final determination that are worth trying to correct through litigation. Nor has the government identified any support in the legislative history; in fact, no party has presented to us any argument based on legislative history.

The filing requirement urged by the government also would be an awkward fit with the timing requirements of the statute. The government’s interpretation would require parties that *might* later want to challenge a final determination in a continued investigation—without even knowing the results of that determination—to file a challenge to the suspension agreement within 30 days of the agreement’s publication. Of course, it is conceivable that a final determination might issue within that very brief period, despite the work needed to resume an investigation that has been suspended and arrive at a final determination. But the government has supplied no sound basis for concluding that Congress was acting on the assumption that a final determination would issue in that period or otherwise in time for it to be evaluated before the end of the 30-day period from the publication of the suspension agreement. Indeed, Congress allowed for 20 days after the publication of a suspension agreement for domestic-industry entities or exporter signatories just to file a request for continued investigation, § 1673c(g), and for 75 days after the preliminary determination for Commerce to make a final determination, which may be further extended to 135 days, see § 1673d(a)(1)–(2). Here, the *Final Determination* was published on October 25, 2019, which is 31 days after the September 24, 2019

publication of the suspension agreement. *Final Determination*, 84 Fed. Reg. at 57,402 n.8. Red Sun Farms did not know the results of the continued investigation, let alone have time to evaluate it, within 30 days of the agreement's publication.

We hold that an affirmative final determination in a continued investigation may be challenged under § 1516a(a)(2)(A)(i)(I) within 30 days of the publication of the final determination under § 1516a(a)(2)(B)(iv), which provides the Trade Court jurisdiction under 28 U.S.C. § 1581(c). On the record before us, those provisions support Trade Court jurisdiction over Red Sun Farms' challenge to the *Final Determination*. The dismissal must therefore be reversed, and the case remanded.

B

On remand, the Trade Court should address issues raised by the naming of "Red Sun Farms" as the lone "Plaintiff" in the caption of the case. The summons and complaint use "Red Sun Farms" as the collective litigation name of the group of the five identified domestic and foreign producers, exporters, and importers, which, the filings assert, use "Red Sun Farms" as their trade name in conducting business; but the summons also refers to the five companies as "Plaintiffs." We note here some issues raised by these facts, and the others recited above. We do not decide which ones need to be addressed and resolved on remand, whether other issues need to be addressed and resolved, and what consequences might follow.

One issue is whether the five entities doing business under the Red Sun Farms name are actually already plaintiffs in this case and should be named in the caption. If so, the question might arise whether some of the five entities (for example, perhaps the domestic producers) might lack standing. If the five entities are not yet parties, a question might arise whether they can be made parties.

Another issue is whether Red Sun Farms is itself an entity with legal capacity to sue. USCIT Rule 17(b)(3) states that for non-corporations, capacity to sue is determined "by the law of the appropriate state, except that . . . a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws." Regarding the first clause, state law appears to differ on use of a trade name when bringing suit. Compare, e.g., *America's Wholesale Lender v. Pagano*, 866 A.2d 698, 700 (Conn. App. Ct. 2005) ("Because the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on

the court.”), *with Sam’s Wholesale Club v. Riley*, 527 S.E.2d 293, 296 (Ga. Ct. App. 1999) (“A corporation conducting business in a trade name may sue or be sued in [its] trade name.” (quoting *Carrier Transicold Div. v. Southeast Appraisal Resource Assocs.*, 504 S.E.2d 25, 26 (Ga. Ct. App. 1998))). If Red Sun Farms lacks capacity to sue under appropriate state law, the question arises whether it has capacity to sue under the “except that” clause of USCIT Rule 17(b)(3) as a partnership or other unincorporated association suing to enforce substantive rights under Title 19 of the U.S. Code. We note, finally, that if capacity to sue is missing, a question could arise about whether the defect is jurisdictional. *See generally* 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1559 (3d ed.).

III

We reverse the Trade Court’s decision and remand for further proceedings consistent with this opinion and our decision in *Bioparques*.

The parties shall bear their own costs.

REVERSED AND REMANDED

RED SUN FARMS, Plaintiff-Appellant v. UNITED STATES, FLORIDA TOMATO EXCHANGE, Defendants-Appellees

Appeal No. 2020–2230

Appeal from the United States Court of International Trade in No. 1:19-cv-00205-JCG, Judge Jennifer Choe-Groves.

DYK, *Circuit Judge*, concurring-in-part and dissenting-in-part.

I join part II.B of the majority opinion, but I respectfully dissent from the majority's holding that 19 U.S.C. § 1516a(a)(2)(B)(iv) (“B(iv)”) provides a basis for jurisdiction. Subsection B(iv) on its face, in the context of the statute as a whole, and given its history, permits challenges to a final determination resulting from a continued investigation only if the appealing party has previously filed a challenge to the suspension agreement. Both the Trade Court in *Usinas Siderúrgicas de Minas Gerais, S/A v. United States*, 201 F. Supp. 2d 1304 (Ct. Int'l Trade 2002), which has “expertise in addressing antidumping issues and deals on a daily basis with the practical aspects of trade practice,” *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1274 (Fed. Cir. 2002), and the government on appeal agree.

I

Subsection B(iv) was originally enacted in 1979. The Trade Agreements Act of 1979 for the first time permitted Commerce to enter into suspension agreements, *see* S. Rep. 96–249, at 67–68 (1979), and provided for judicial review of such agreements in subsection B(iv), *see* Pub. L. No. 96–39, § 1001, 93 Stat. 144, 301 (1979). Congress “narrowly circumscribed” Commerce’s “authority” to enter into suspension agreements, S. Rep. 96–249, at 71, allowing only those agreements that were “in the public interest, [could] be effectively monitored by the United States, and me[t] specific criteria,” *id.* at 68. In particular, the statute authorized agreements that “eliminate[d] completely the injurious effect of exports to the United States of [the subject] merchandise,” but only so long as Commerce could show:

(A) the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented, and

(B) for each entry of each exporter the amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries of the exporter examined during the course of the investigation.

19 U.S.C. § 1673c(c)(1)(A), (B). These provisions reflected Congress's desire to allow Commerce to enter into suspension agreements eliminating the injurious effects of exports—the type of agreement at issue here—only when the agreement remedied price discrimination determined to exist in antidumping proceedings, thus “serv[ing] the interest[s] of the public and the domestic industry affected.” S. Rep. 96–249, at 71.

To ensure such symmetry, Congress required Commerce to publish its affirmative preliminary dumping determination together with the suspension agreement, making issuance of a preliminary determination prerequisite to Commerce's suspension decision. *See* § 1673c(f)(1)(A) (“If the administering authority determines to suspend an investigation . . . it shall . . . publish notice of [the] suspension . . . and issue an affirmative preliminary determination . . . with respect to the subject merchandise, unless it has previously issued such a determination in the same investigation.”); *see also* S. Rep. No. 96–249, at 68 (“Upon accepting an agreement, [Commerce] would publish notice in the Federal Register of the suspension together with notice of an affirmative preliminary determination, unless such a determination has already been made during an investigation.”).

If a suspension agreement were alleged to be inconsistent with any of the statutory requirements, Congress provided interested parties two routes to challenge the agreement—either in an administrative proceeding before the International Trade Commission (“ITC”), *see* § 1673c(h)(1), or in the Trade Court under subsection B(iv). Given that the statutory grounds for challenging suspension agreements were failure to remedy discrimination, it appears likely that Congress primarily contemplated challenges to agreements by domestic producers. As originally enacted, subsection B(iv) authorized Trade Court review of suspension agreements by providing:

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

* * *

A determination by the administering authority, under section [1671c or 1673c] of this Act, to suspend an antidumping duty or a countervailing duty investigation.

93 Stat. at 301.

The statute was amended in 1984 to incorporate the underlined language:

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

* * *

(iv) A determination by the administering authority, under section [1671c or 1673c] of this title, to suspend an antidumping duty or a countervailing duty investigation, *including any final determination resulting from a continued investigation which changes the size of the dumping margin or net subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.*

Pub. L. No. 98-573, § 623, 98 Stat. 2948, 3041 (1984) (emphasis added).

II

The genesis of the 1984 amendment is clear enough. Subsection B(iv) as originally enacted did not account for the fact that the 1979 version of § 1673c permitted suspended investigations to be continued within 20 days of a suspension agreement's publication at the request of (1) the foreign exporter-subjects, or (2) domestic industries and related labor unions, trade, and business associations, *see* 93 Stat. at 168; § 1673c(f)(3), (g), and that these final determinations might affect the validity of the suspension agreement. For example, continued investigations and their resulting final determinations could give rise to situations in which a final determination reduced the dumping margin so that the domestic producers' grounds for challenging the suspension agreement were eliminated, giving rise to a problem that could be resolved by appealing the final determination.

Congress accordingly amended subsection B(iv) to permit challenges in the same proceeding to the suspension agreement and the final determination, incorporating the "including" language at issue here. The connection between the final determination and the suspension agreement is evident from the language of the provision itself. The amendment did not enable the Trade Court's review of all final determinations—it limited review only to those final determinations that altered the size of the dumping margins (or reasoning) in effect at the time of the suspension agreement's execution. It permitted parties to challenge the changes reflected in the final determination, for example a higher or lower dumping margin that might affect the validity of the suspension agreement. Since a final determination does not go into effect until it is embodied in an antidumping order, the only purpose of allowing a challenge to the final determination before that order issues is because the final determination could affect

the suspension agreement. The Trade Court in *Usinas* reached the same conclusion:

The focus of [subsection B(iv)] is thus on Commerce's determination to suspend the investigation. Judicial review . . . is effectively limited to those cases where it is alleged that the assumptions underlying the suspension determination—i.e., Commerce's findings in the preliminary determination—have changed so as to (arguably) render some aspect of the suspension determination defective.

201 F. Supp. 2d at 1312.

It is difficult to think that subsection B(iv) was designed to enable an importer to challenge the final dumping margin so that it could decide whether to withdraw from a suspension agreement. The legislative history discloses no such purpose, and the entire focus of the Congressional concern was with agreements that failed to sufficiently remedy dumping, not with agreements that were overly restrictive.

III

Nonetheless, the majority holds that a party with standing to bring a subsection B(iv) action may challenge the final determination resulting from a continued investigation without first challenging the suspension agreement itself. Maj. Op. 11. As discussed above, the language and history of the statute contradict any such notion. While it is true that depending on context, the term “including” may be expansive, nothing here suggests that Congress intended a reading that would allow freestanding challenges to a final determination unrelated to the suspension agreement itself. To the contrary, Congress limited the types of challenges that can be brought to these determinations “by ‘close reference’ to the underlying suspension agreement.” *Usinas*, 201 F. Supp. 2d at 430.

The majority also suggests that the statute's use of the word “determinations” in describing “[t]he determinations which may be contested under subparagraph (A),” shows that it would be “unnatural[]” to read subsection B(iv)'s including clause as being limited to the “determination . . . to suspend.” Maj. Op. 9. But the use of the word “determinations” in the introductory language simply refers to the multiple determinations listed in subsections B(i)–(viii), it does not show that subsection B(iv) contains multiple independently-challengeable determinations.

So too, nothing in § 1516a(a)(2)(A)'s timing requirements supports the majority's approach. The statute requires that a party seeking to challenge a suspension agreement file a summons “[w]ithin thirty

days after” publication of “notice of any determination described in [subsection B(iv)],” § 1516a(a)(2)(A), a provision included in the 1979 version of the statute, *see* 93 Stat. at 301. The majority contends that interpreting subsection B(iv) to require a challenge to the final determination within 30 days of the suspension agreement presents an “awkward fit” because parties seeking to challenge a final determination in a continued investigation will not “know the results of the continued investigation, let alone have time to evaluate it, within 30 days of the agreement’s publication.” Maj. Op. 10, 11. But there is no awkward fit. A final determination reached after a continued investigation necessarily postdates the publication of a suspension agreement. The statute’s requirement that parties file a summons “[w]ithin thirty days after” publication of “notice of any determination described in [subsection B(iv)]” simply means that an interested party must first challenge the agreement for failing to satisfy the statutory requirements within 30 days of its publication, and may later amend that complaint to challenge the final determination. To be sure, domestic producers or importers might like to know the outcome of the final determination in deciding whether to challenge the suspension agreement. But under either the majority’s reading of the statute or my reading, it is simply too late to challenge the suspension agreement if it has been more than 30 days since the agreement’s publication.

For these reasons, I would refrain from holding that the Trade Court has jurisdiction under § 1516a(a)(2)(B)(iv) to hear Red Sun Farms’ claims and would affirm the decision of the Trade Court.¹

¹ Having relied on jurisdiction under subsection B(iv), Red Sun Farms cannot amend its complaint to allege jurisdiction under subsection B(i) because it did not timely comply with the NAFTA notice requirements under § 1516a(g)(3)(B).

CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., ASOCIACION DE PRODUCTORES DE HORTALIZAS DEL YAQUI Y MAYO, SISTEMA PRODUCTO TOMATE, Plaintiffs-Appellants v. UNITED STATES, FLORIDA TOMATO EXCHANGE, Defendants-Appellees

Appeal No. 2020–2232, 2020–2299, 2020–2300

Appeals from the United States Court of International Trade in Nos. 1:19-cv-00203-JCG, 1:19-cv-00206-JCG, 1:20-cv-00036-JCG, Judge Jennifer Choe-Groves.

Decided: April 14, 2022

DEVIN S. SIKES, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by SPENCER STEWART GRIFFITH, YUJIN KIM MCNAMARA. Also argued by JAMES P. DURLING, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington DC; JEFFREY M. WINTON, Winton & Chapman PLLC, Washington, DC.

DOUGLAS GLENN EDELSCHICK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also argued by ROBERT R. KIEPURA. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, FRANKLIN E. WHITE, JR.; EMMA T. HUNTER, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

MARY JANE ALVES, Cassidy Levy Kent USA LLP, Washington, DC, argued for defendant-appellee Florida Tomato Exchange. Also represented by JAMES R. CANNON, JR., ULRIKA K. SWANSON, JONATHAN M. ZIELINSKI.

Before DYK, PROST, and TARANTO, *Circuit Judges*.

DYK, *Circuit Judge*.

Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C.; Consejo Agrícola De Baja California, A.C.; Asociación Mexicana de Horticultura Protegida, A.C.; Asociación de Productores de Hortalizas del Yaqui y Mayo; and Sistema Producto Tomate (collectively “CAADES” or “the growers”) appeal a final decision of the Court of International Trade (the “Trade Court”). The Trade Court dismissed CAADES’s claims as either being moot or not ripe, though characterizing the dismissal as being for failure to state a claim.

We hold that we have jurisdiction over CAADES’s challenges to the government’s termination of the parties’ 2013 suspension agreement (“the 2013 agreement”) and the 2019 suspension agreement (“the 2019 agreement”) and that those claims are not moot. However, on the merits we conclude that the 2013 agreement’s termination was not invalid for failing to comply with statutory termination requirements or because of allegedly improper political influence and that the 2019 agreement is not invalid on grounds of duress.

As for CAADES’s claims that the October 2019 final antidumping determination is invalid, we conclude that the challenge is not pre-

mature and that the Trade Court has jurisdiction to hear those claims. We remand for further proceedings pursuant to our opinions in *Bioparques de Occidente v. United States*, No. 2020–2265, and *Red Sun Farms v. United States*, No. 2020–2230.

BACKGROUND

I. History of the Tomato Investigations and Suspension Agreements

This appeal arises out of a less-than-fair-value investigation concerning fresh tomatoes from Mexico. In April 1996, the Department of Commerce (“Commerce”) began an antidumping duty investigation to determine whether Mexican tomatoes were being imported into the United States and sold at less than fair value. After Commerce issued a preliminary affirmative dumping determination, Commerce and the exporters responsible for substantially all of the imports of fresh tomatoes from Mexico negotiated and entered into a 1996 agreement (pursuant to 19 U.S.C. § 1673c(c)) that suspended the investigation, terminated the collection of cash deposits or bonds, and ended the suspension of liquidation of entries of the subject tomatoes.

So began a cycle in the more-than-two decades that followed, in which old agreements were terminated and new agreements were executed. The growers withdrew from the 1996 suspension agreement in 2002, which led to a new agreement that same year, then withdrew from the 2002 agreement in 2007, which led to a new agreement the following year, then withdrew from the 2008 agreement in 2013, which led to a new agreement the same year. The terms of the parties’ past suspension agreements were similar—the one notable exception being that the 2013 agreement was the first to include a clause permitting either party to withdraw from the agreement at will upon ninety days’ notice. Previous agreements permitted only the growers to withdraw from the agreement without cause.¹ For the first time, the agreement, in section VI.B, provided: “The signatories *or the Department* may withdraw from this Agreement upon ninety days written notice to the other party.” J.A. 353 (emphasis added).

II. Commerce’s Termination of the 2013 Agreement

In November 2018, the Florida Tomato Exchange (“FTE”)—a group representing U.S.-based tomato growers and distributors—sent a letter to Commerce requesting that Commerce terminate the 2013 suspension agreement under section VI.B’s withdrawal clause and re-

¹ The majority of the grower-signatories remained the same during the 1996–2013 suspension agreement proceedings.

sume the antidumping investigation. The FTE alleged that the agreement had not effectively eliminated dumping. Forty-eight members of Congress, led by Florida Senator Marco Rubio, subsequently signed on to a February 1, 2019, letter that also urged Commerce to terminate the agreement for the same reasons.

Five days later, Commerce notified the Mexican growers that it intended to withdraw pursuant to section VI.B, and indicated that it would resume its antidumping investigation if the parties failed to reach a new agreement by May 7, 2019. When the parties missed that deadline, Commerce resumed its investigation and re-imposed cash deposit requirements on imported Mexican tomatoes. During the resumed investigation, Commerce issued a July 2019 preliminary dumping determination. CAADES alleges that the cash deposit requirements resulted in severe financial strain for many of its members, causing several of them to go out of business. It was under these alleged financially-strained conditions that CAADES and the agreement's other signatories negotiated a new suspension agreement.

On September 19, 2019, more than seven months after Commerce withdrew from the 2013 agreement, the parties executed a new agreement. Like past agreements, the 2019 agreement suspended the underlying antidumping investigation and terminated Commerce's cash deposit requirement, and the signatories agreed to sell the imported subject tomatoes at or above a minimum reference price. It also allowed both the government and the Mexican growers to withdraw at any time with ninety days' notice. No party has withdrawn from the 2019 agreement.

III. Commerce's Continued Investigation

Section 1673c(g) of Title 19 provides that Commerce may continue a suspended investigation "within 20 days after the date of publication of the notice of suspension" at the request of the foreign exporters or an interested party, which includes domestic manufacturers, producers, and wholesalers. *See* § 1677(9)(C). After the 2019 agreement took effect, the FTE asked Commerce to continue its antidumping investigation pursuant to § 1673c(g). Commerce did so, and in October 2019, it issued a final affirmative determination that increased the dumping margins for all of the subject Mexican growers and exporters over the dumping margins reflected in the July 2019 preliminary determination. An antidumping duty order incorporating these new rates could not issue while the 2019 agreement remained in place, but such an order would issue immediately if either Commerce or the signatories withdrew from the agreement. *See* § 1673c(i)(1)(C).

These combined events led CAADES to file three separate complaints in the Trade Court,² each of which raised identical claims that fall into three categories: (1) a challenge to Commerce’s decision to terminate the 2013 agreement for allegedly violating 19 U.S.C. § 1673c(i)’s statutory requirements³ and for being based on improper political influence, and a related challenge alleging that the resumption of the investigation following this improper termination was invalid (counts 1–3); (2) a challenge to the validity of the 2019 agreement on grounds of duress (count 4); and (3) a challenge to Commerce’s final affirmative determination for failing to abide by statutory deadlines, unlawfully calculating final margins, and depriving the growers of individual rates (counts 5–7). CAADES’s complaints asked the Trade Court to declare the final determination and the 2019 agreement unlawful, null, and void, and to reinstate the 2013 agreement. The government moved to dismiss on grounds of mootness, ripeness, and for failure to state a claim upon which relief can be granted.

The Trade Court granted the government’s motion and dismissed CAADES’s complaints “for failure to state a claim.” J.A. 4. Despite the Trade Court’s characterization of its dismissal as being for failure to state a claim, it concluded that the claims with respect to the 2013 and 2019 agreements “became moot” when CAADES “voluntar[ily] sign[ed]” the 2019 agreement, “a new agreement which superseded the [] 2013 Suspension Agreement.” J.A. 17. According to the Trade Court, CAADES’s decision to voluntarily enter into the 2019 agreement “undercut[] [CAADES’s] assertion that Commerce unlawfully terminated the 2013 Suspension Agreement.” *Id.* The Trade Court also held that CAADES could not challenge the 2019 agreement while at the same time “receiv[ing] its benefits and protections.” *Id.* With respect to the final determination, the Trade Court characterized the challenge as not ripe for review because a duty order incorporating the increased dumping margins would “have no effect so long as the 2019 Suspension Agreement is in place.” J.A. 19. CAADES appeals. The Trade Court had jurisdiction under the residual provision of § 1581(i)(1)(D), and we have jurisdiction to review the Trade Court’s final decision pursuant to 28 U.S.C. § 1295(a)(5).

² CAADES’s complaints are identical in all respects except for the alleged jurisdictional grounds. Two of the complaints alleged that the Trade Court had jurisdiction under 28 U.S.C. § 1581(c) because the claims were reviewable under 19 U.S.C. § 1516a(a)(2)(B)(iv). All of the complaints alleged that the Trade Court had jurisdiction under 28 U.S.C. § 1581(i)(4) (now 28 U.S.C. § 1581(i)(1)(D)).

³ CAADES’s challenge also relied on Commerce’s regulation, 19 C.F.R. § 351.209(a), which is no different from the statute itself.

DISCUSSION

We review the Trade Court's dismissal of the complaints de novo. *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000) (citing *Ponder v. United States*, 117 F.3d 549, 552 (Fed. Cir. 1997)). In doing so, "we must take all of the factual allegations in the complaint as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)).

I. 2013 Termination Claims

A. Jurisdiction

We first address the claim that the 2013 agreement was improperly terminated. Neither party challenges our jurisdiction under 28 U.S.C. § 1295(a)(5) or the Trade Court's jurisdiction under 28 U.S.C. § 1581(i)'s residual clause, but we must nonetheless address this issue given our "special obligation to 'satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower court[.]'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

Each of CAADES's three complaints alleged that § 1581(i)(4)'s residual jurisdiction clause (now codified as § 1581(i)(1)(D)) authorized the Trade Court's review of Commerce's termination of the 2013 agreement. That provision grants the Trade Court jurisdiction to hear "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement" of the trade laws. § 1581(i)(1)(D).

Residual jurisdiction under § 1581(i) is not available if the determination the plaintiff seeks to challenge is already reviewable by the Trade Court under § 1516a(a), or by a binational panel under § 1516a(g). § 1581(i)(2)(A), (B). The issue then, is whether either of those provisions permits the Trade Court's review of Commerce's decision to terminate a suspension agreement.

In prior, related preliminary injunction proceedings, the Trade Court held that it had jurisdiction to hear CAADES's challenges to the termination of the 2013 agreement under the residual clause in § 1581(i)(1)(D) because "the particular agency action at issue [was] Commerce's withdrawal from the 2013 Suspension Agreement," "§ 1516a does not identify Commerce's decision to withdraw from a suspension agreement as reviewable," and the challenge "pertain[ed] to the administration and enforcement of a matter" arising out of the trade laws. *Confederacion de Asociaciones Agricolas del Estado de Sinaloa v. United States (CAADES I)*, 389 F. Supp. 3d 1386, 1394–95 (Ct. Int'l Trade 2019).

We agree with the Trade Court’s reading of the statute. A decision by Commerce to terminate a suspension agreement is absent from the list of reviewable determinations identified in § 1516a(a)(2)(B). The termination of a suspension agreement is not a “determination . . . to suspend an antidumping duty . . . investigation,” nor is it a “final determination resulting from a continued investigation” under § 1516(a)(2)(B)(iv). So too, a decision to terminate a suspension agreement is not reviewable by a binational panel under § 1516a(g), as that list of reviewable determinations refers back to § 1516a(a)(2)(B). *See* § 1516a(g)(1)(A), (B). We have jurisdiction under the residual provision.

B. Mootness

The Trade Court held that CAADES’s challenges to the government’s termination of the 2013 agreement are moot because the court lacked the ability to reinstate the 2013 agreement after the parties voluntarily entered into the 2019 agreement. On appeal, CAADES contends that its challenges to the 2013 agreement’s termination are not moot because the Trade Court retained the ability to reinstate the 2013 agreement if the 2013 agreement was improperly terminated.

The mootness doctrine arises from Article III’s limit on the exercise of federal judicial power to live cases and controversies. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016). Moot cases are those in which “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). A case becomes moot and must be dismissed only when “it is impossible for a court to grant any effectual relief whatever’ to [the plaintiff] assuming it prevails.” *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). If “there is any chance” a court can grant the plaintiff’s requested relief if it prevails on the merits, no matter how “uncertain or even unlikely” that chance may be, the “suit remains live.” *Id.*

We reject the Trade Court’s characterization of the claims as moot; if the growers were to prevail on their claims relating to the termination of the 2013 agreement and their contentions concerning the appropriate relief, the Trade Court could reinstate the 2013 agreement. *See CSC Sugar LLC v. United States*, 413 F. Supp. 3d 1318, 1326 (Ct. Int’l Trade 2019) (vacating amendment to suspension agreement because notice and comment process “substantially prejudiced” the challenger). The government did not sustain its “heavy” burden to establish mootness, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633

(1953)), and it was improper for the Trade Court to dismiss these claims on grounds of mootness.

C. The Merits

We next consider the merits of CAADES's claims that the 2013 agreement was improperly terminated. The Trade Court appears to have concluded that CAADES failed to state a claim for improper termination of the 2013 agreement because the 2019 agreement was a replacement agreement that superseded the 2013 agreement and barred any challenge to the 2013 agreement. We note that the terms of the 2019 agreement do not state that the parties surrendered their ability to sue for improper termination of the 2013 agreement by entering into the 2019 agreement. But we need not decide whether entering into the 2019 agreement implicitly foreclosed CAADES's challenges to the 2013 agreement's termination because those challenges independently fail on the merits.

1

In support of its argument that the government improperly terminated the 2013 agreement, CAADES contends that the government lacked the authority to terminate the 2013 agreement because it failed to make "either of the determinations required by . . . 19 U.S.C. § 1673c(i), and by 19 C.F.R. § 351.209(a)" prior to termination. J.A. 74. Section 1673c(i) provides that Commerce "shall" withdraw from a suspension agreement if it finds that the agreement "is being, or has been, violated, or no longer meets the requirements of" § 1673c(b) or (c),⁴ and if the agreement also fails to meet the requirements of § 1673c(d).⁵ The requirements of the regulation, § 351.209(a), are no

⁴ The 2013 agreement was issued pursuant to § 1673c(c), which requires agreements eliminating injurious effect to satisfy the following factors:

(1) General rule

If the administering authority determines that extraordinary circumstances are present in a case, it may suspend an investigation upon the acceptance of an agreement to revise prices from exporters of the subject merchandise who account for substantially all of the imports of that merchandise into the United States, if the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise and if—

(A) the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented, and

(B) for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all less-than-fair-value entries of the exporter examined during the course of the investigation.

⁵ Section 1673c(d) applies to all suspension agreements and imposes the following requirements:

(d) Additional rules and conditions

different. Termination is required if the agreement fails to remedy price discrimination found by the agency in a preliminary or final determination.

But Commerce here based its withdrawal from the 2013 suspension agreement not on § 1673c(i), but on section VI.B of the 2013 agreement. The government’s “general authority to make[] contracts” includes the “power to choose with whom and upon what terms the contract[] will be made . . . unless Congress has placed some limit on it.” *Arizona v. California*, 373 U.S. 546, 580 (1963), *abrogated in part on other grounds by California v. United States*, 438 U.S. 645, 673–74 (1978); *see also United States v. Winstar Corp.*, 518 U.S. 839, 884 (1996) (“[T]he Government’s practical capacity to make contracts . . . [is] ‘the essence of sovereignty’ itself.” (quoting *United States v. Bekins*, 304 U.S. 27, 51–52 (1938))). In the Trade Agreements Act of 1979, Congress “narrowly circumscribed” Commerce’s “authority” to enter into suspension agreements, S. Rep. 96–249, at 71 (1979), but it did not “fetter [Commerce’s] discretion” to control the content of such agreements “in clear and unequivocal terms,” *Arizona*, 373 U.S. at 581, apart from the requirement that the agreement provide appropriate remedies for the dumping. *See* § 1673c(b)–(d).

Section 1673c(i) mandates Commerce’s withdrawal from a suspension agreement in certain circumstances, but it does not limit Commerce’s ability to contract for the right to withdraw under other circumstances. There is no other provision or policy in the antidumping statute that suggests the government lacks the authority to contract for the ability to withdraw from a suspension agreement, and CAADES cites no such provision or policy. Thus, this is not a situation in which a government contract is impermissible because it conflicts with the provisions or policies of a governing statute. *See, e.g., Chamber of Com. v. Reich*, 74 F.3d 1322, 1338–39 (D.C. Cir. 1996).

This court previously rejected an identical challenge to Commerce’s withdrawal from the 2013 agreement in reviewing the Trade Court’s denial of a preliminary injunction in a related proceeding. *See In re Confederacion de Asociaciones Agricolas del Estado de Sinaloa*, 781 F. App’x 982 (Fed. Cir. 2019). There, CAADES sought to prevent the government from ordering the suspension of the liquidation of entries of Mexican tomatoes, resuming its antidumping investigation, and requiring cash deposits or bonds for imports following the 2013 agree-

The administering authority may not accept an agreement under subsection (b) or (c) of this section unless—

- (1) it is satisfied that suspension of the investigation is in the public interest, and
- (2) effective monitoring of the agreement by the United States is practicable. . . .

ment's termination.⁶ *See id.* at 984. After the government published notice that it intended to terminate the suspension agreement and resume its antidumping investigation, the growers filed suit in the Trade Court, challenging the agreement's termination. In upholding the Trade Court's denial of the growers' request for a preliminary injunction, we concluded that the "petitioners [were] unlikely to succeed on the merits of their challenge" to the 2013 agreement's termination in part because § 1673c(i)'s requirements apply only when Commerce bases its withdrawal from a suspension agreement on § 1673c(i). *Id.* at 986. The panel concluded that the government was not required to comply with § 1673c(i) because "Commerce stated that it was basing its withdrawal from the suspension agreement on the withdrawal provision," (section VI.B) "not on [§ 1673c(i)]." *Id.* Similarly here, we see no reason why Commerce's withdrawal from the suspension agreement pursuant to the agreement's terms exceeded its authority or was otherwise statutorily improper.

2

CAADES also challenges Commerce's termination of the 2013 agreement on the ground that the government's decision was based on improper political influence. That improper influence, according to CAADES's complaints, stemmed from the FTE's November 2018 letter requesting that Commerce terminate the suspension agreement because it was ineffective, as well as the February 2019 letter from Senator Rubio and forty-seven other members of Congress urging Commerce to terminate the agreement for the same reason.⁷

There is no impropriety in considering an interested party's public request for agency action. *See, e.g., Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 835 F.3d 1377, 1386 (11th Cir. 2016). Nor is there impropriety in legislators urging an agency to take action on the merits based on the ineffectiveness of a prior agency action to remedy a particular problem that affects their constituents. Under these circumstances, the Supreme Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), expressly forecloses a

⁶ During the preliminary injunction hearing at the Trade Court, the growers conceded that Commerce's withdrawal from the 2013 Agreement was proper. *CAADES I*, 389 F. Supp. 3d at 1396 n.1 ("Judge: Do you believe that there is a basis for any party to withdraw from the Suspension Agreement, just on voluntary withdrawal? Mr. Koslowe: Yes, there is. And we don't challenge that. The Agreement itself says on 90 days written notice either side can withdraw. Judge: And there doesn't have to be a violation, or—? Mr. Koslowe: Nope. Judge:—a finding that it doesn't meet the requirements of the Act? Mr. Koslowe: No." (citing TRO and PI Hr'g Oral Arg. at 10:05–10:30)).

⁷ CAADES's complaints pled that the "pressure placed on [Commerce] by Senator Rubio's letter and the fact that FTE (representatives of the domestic industry) wanted to pressure the Mexican Growers to agree to a suspension agreement more favorable to FTE's interests," J.A. 71, were impermissible.

challenge based on alleged political influence. This is particularly so where, as here, the face of the agency decision does not identify that it was motivated by any improper consideration.

Department of Commerce concerned the Secretary of Commerce's decision to "reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. The Secretary attributed the agency's decision to reinstate the question to a December 2017 "request of the Department of Justice" to Commerce that "sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act." *Id.* But the "administrative record show[ed] that DOJ's request to add a citizenship question originated not with the DOJ, but with the Secretary himself." *Id.* at 2594 (Breyer, J., concurring in part). It revealed "that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen"; and "subsequently contacted the Attorney General himself to ask if DOJ would make the [voting-age data] request." *Id.* at 2574 (majority opinion). The challengers' complaint also alleged that, although not the disclosed basis for its decision, the agency's action was in part motivated by the partisan political benefits that the question would have on 2020 redistricting.

The Supreme Court held that Commerce's decision was invalid because it relied on a DOJ request when in fact that request was solicited by Commerce itself. *Id.* at 2575–76. The Court's decision thus rested on its determination that the agency's reasoning was pretextual. *Id.* at 2575 ("[W]e cannot ignore the disconnect between the decision made and the explanation given.").

With regard to the allegation that Commerce's decision was based on political motivation, the Court first explained its reluctance to look behind the face of an agency's decision, recognizing that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Id.* at 2573 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)). That an agency's decision might have been based on "other unstated reasons" is not a reason to invalidate it. *Id.*

Second, the Court explained that speculation about alleged improper political influence is not a ground for invalidating agency action:

[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected

by political considerations or the presence of Presidential power.” Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Id. (internal quotations and citations omitted).

In the present case, the complaints supply no basis for a determination of pretext like the one in *Department of Commerce*. Nor was Senator Rubio’s letter an improper communication. The congressional letter, which apparently expressed the same concerns as the FTE letter, is a familiar form of officeholder communication to an agency based on the merits of a proposed agency action. It does not constitute an attempt to influence agency action by considerations other than the merit or lack of merit of the proposed action and the effects on interested parties.⁸ So too, there is also nothing on the face of the agency decision to suggest that it was based on any impropriety. Speculation as to improper motive provides no basis to look behind Commerce’s stated reason for withdrawal. We conclude that there is no plausible claim upon which the Trade Court could have granted CAADES’s requested relief, and we affirm the dismissal of counts 1 and 2.

II. 2019 Agreement Claims

We turn to the claims concerning the 2019 agreement, which CAADES argues is voidable on grounds of duress.

A. Jurisdiction

The government and the FTE argue that, while § 1516a(a)(2)(B)(iv) (“subsection (B)(iv)”) grants jurisdiction over challenges to Commerce’s “determination . . . to suspend an antidumping duty . . . investigation,” the challenges were not timely because § 1516a(a)(2)(A) requires parties seeking to challenge a suspension agreement under subsection (B)(iv) to file a summons “[w]ithin thirty days after the date of publication in the Federal Register of” notice of the suspension agreement, “and within thirty days thereafter a complaint.” Oral Arg. 24:33–24:45; FTE Br. 13–14. Commerce published notice of the 2019 agreement on September 24, 2019, and CAADES filed its earliest summons on November 22, 2019, outside of the thirty-day limit.

But this is not a subsection (B)(iv) challenge to Commerce’s “determination . . . to suspend an antidumping duty . . . investigation.” The

⁸ Even assuming that, under statute, Commerce was obligated to place this letter in the record, CAADES has not shown that this error was harmful.

“true nature” of CAADES’s challenges is not to Commerce’s “determination . . . to suspend,” but rather to the actions allegedly undertaken by Commerce to coerce CAADES to execute the agreement. *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008) (“[W]e must look to the true nature of the action in a district court in determining jurisdiction.”). Because these challenges are not properly characterized as subsection (B)(iv) challenges, we conclude that CAADES’s duress claims are properly within the residual jurisdiction provision and are not time-barred.

A. Mootness

To the extent that the Trade Court held that CAADES’s duress claims were somehow moot, we conclude that they were not. Here, as with the 2013 agreement termination challenge, success on the merits would lead to meaningful relief.

A. The Merits

The Trade Court appears to have held that CAADES could not challenge the suspension agreement while continuing to accept its benefits. We need not address the Trade Court’s theory because we conclude that CAADES has failed to allege a cognizable claim for duress.

The Trade Court’s obligation to accept the complaints’ allegations of duress as true does not excuse the requirement that those allegations comprise “a plausible legal theory.” *Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1361 n.4 (Fed. Cir. 2016) (citing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425–26 (2014)). To render the agreement invalid for duress, CAADES was required to show that “(1) it involuntarily accepted [the government’s] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the government’s] coercive acts.” *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000)).

That CAADES felt “forced” to sign the 2019 agreement, J.A. 60, and that several Mexican growers went out of business while the cash deposit requirement was imposed may satisfy the “involuntary” and “no other alternative” requirements. But CAADES also had an obligation to plead facts showing that its entry into the 2019 agreement was coerced.

When a party claims that the government has committed the allegedly coercive act, proof of coercion requires “[s]ome wrongful conduct” on the part of the government beyond “[e]conomic pressure” or “the threat of considerable financial loss.” *Freedom NY*, 329 F.3d at

1330 (quoting *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1042–43 (Ct. Cl. 1976)); see also *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1158–59 (Fed. Cir. 1987) (holding that illegal action by the government in violation of a statute or regulation may support allegations of duress); *Sys. Tech. Assocs., Inc. v. United States*, 699 F.2d 1383, 1387–88 (Fed. Cir. 1983) (same); *David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct. Cl. 1981) (same). Specifically, the party must show either government “action in violation of a statute or regulation,” “breach of an express provision of [a] contract without a good-faith belief that the action was permissible,” or a violation of the “covenant of good faith and fair dealing implicit in every contract.” *Freedom NY*, 329 F.3d at 1330.

The alleged coercion here was the resumption of the investigation, which according to CAADES was unlawful because the termination of the 2013 agreement was not in accordance with the statute or was a breach of contract.⁹ As we have discussed, the government’s termination of the 2013 agreement did not violate a statute or regulation. Nor was it invalid on grounds of improper political influence. So too, the government’s termination of the 2013 agreement did not breach any of the 2013 agreement’s express contractual provisions because the at-will termination clause permitted “[t]he signatories or the Department [to] withdraw . . . upon ninety days written notice to the other party.” J.A. 353 (emphasis added).

There is therefore no plausible claim upon which the Trade Court could have found coercion or granted CAADES’s requested relief, and we affirm the dismissal of count 4.

II. Claims as to the Final Dumping Determination

In counts 5–7 of the complaints, CAADES also challenges the final determination resulting from Commerce’s continued investigation. The Trade Court held that these claims were not ripe for review until a final antidumping order had issued. In *Bioparques de Occidente v. United States*, No. 2020–2265, we today conclude that materially identical challenges are justiciable “under Supreme Court authority—in particular, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007),” and in *Red Sun Farms v. United States*, No. 2020–2230, we conclude that the Trade Court has statutory jurisdiction over such challenges.

In count 3, CAADES also challenges Commerce’s resumption of the antidumping investigation following the 2013 agreement’s termination. There is no independent jurisdiction over challenges to that

⁹ CAADES did not plead that the government breached the duty of good faith and fair dealing in terminating the contract.

interim decision.¹⁰ See § 1516a(a)(1), (2)(a), (b); 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8361 (2d ed.) (“[J]udicial review is available only for ‘final’ agency actions.”); see also *Automated Merch. Sys., Inc. v. Lee*, 782 F.3d 1376, 1380–81 (Fed. Cir. 2015) (agency decision to initiate or continue proceedings cannot be reviewed until issuance of final order); *Gov’t of People’s Republic of China v. United States*, 483 F. Supp. 2d 1274, 1281 (Ct. Int’l Trade 2007) (holding appellants could challenge Commerce’s decision to initiate an investigation after publication of the final determination). We accordingly affirm the Trade Court’s dismissal of count 3, reverse the dismissal of counts 5–7, and remand for further proceedings.

CONCLUSION

For the foregoing reasons, we conclude that the Trade Court had jurisdiction over CAADES’s challenges to the termination of the 2013 agreement and the 2019 agreement, and that those claims are not moot. On the merits, we hold that CAADES’s challenges as to termination of the 2013 agreement were properly dismissed for failure to state a claim. We also hold that CAADES’s claims that the 2019 agreement was invalid for duress failed to state a claim upon which relief can be granted. We affirm the dismissal of counts 1–4. We reverse the Trade Court’s holding that CAADES’s challenges to the final determination were not yet ripe for review and find that the Trade Court has jurisdiction to hear these claims. We remand for proceedings consistent with this opinion and our opinions in *Bioparques de Occidente v. United States*, No. 2020–2265, and *Red Sun Farms v. United States*, No. 2020–2230.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COSTS

No costs.

¹⁰ Congress contemplated that decisions such as “a preliminary affirmative antidumping . . . determination or a decision to exclude a particular exporter from an antidumping investigation,” would be reviewable “only in connection with the review of the final determination.” H.R. Rep. No. 96–1235, at 48 (1980).

BIOPARQUES DE OCCIDENTE, S.A. DE C.V., AGRICOLA LA PRIMAVERA, S.A. DE C.V., KALIROY FRESH LLC, Plaintiffs-Appellants v. UNITED STATES, FLORIDA TOMATO EXCHANGE, Defendants-Appellees

Appeal No. 2020–2265, 2020–2266, 2020–2267

Appeals from the United States Court of International Trade in Nos. 1:19-cv-00204-JCG, 1:19-cv-00210-JCG, 1:20-cv-00035-JCG, Judge Jennifer Choe-Groves.

Decided: April 14, 2022

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Before DYK, PROST, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

In 1996, the U.S. Department of Commerce initiated an investigation into whether fresh tomatoes from Mexico were being sold in the United States at less than fair value. After the International Trade Commission (ITC) made a preliminary determination of injury to a domestic industry from the sale of such tomatoes, Commerce made a preliminary determination that the tomatoes were being, or were likely to be, sold in the U.S. at less than fair value. On the day Commerce issued its preliminary dumping determination, exporters accounting for substantially all exports of fresh tomatoes from Mexico (“the Mexican parties”) signed an agreement with Commerce to suspend the investigation. Pursuant to that 1996 Agreement, and 2002, 2008, and 2013 successor agreements, the signatories were required, among other things, to sell their products in the U.S. at minimum “reference” prices.

In the spring of 2019, Commerce withdrew from the 2013 Agreement, as authorized by its terms, and resumed the investigation. But the parties soon executed a new agreement (the 2019 Agreement), which suspended the investigation, set higher minimum reference prices, required (generally speaking) that the dumping margin of each signatory’s individual entries not exceed 15% of the dumping margin of its entries examined during the investigation, and provided

for compliance reviews based on regular submissions of information from the Mexican parties. Shortly after the execution of the 2019 Agreement, however, domestic tomato producers asked Commerce to continue the investigation, which it did, as required by statute upon receipt of such requests. Commerce then reached a final determination that fresh tomatoes from Mexico were being, or were likely to be, sold in the U.S. at less than fair value, and it calculated estimated dumping margins, and the ITC made a final determination of material injury to a domestic industry. An antidumping duty order based on the final determination has not issued, however, because the 2019 Agreement remains in effect.

The present appeals arise from three complaints filed in the U.S. Court of International Trade (Trade Court or USCIT) challenging Commerce's termination of the 2013 Agreement, continuation of the investigation, and final determination. Each of the three complaints was filed jointly by the firms we will call "Bioparques" collectively—Bioparques de Occidente, S.A. de C.V. and Agrícola La Primavera, S.A. de C.V., which are Mexican exporters of fresh tomatoes and signatories to the 2019 Agreement, and Kaliroy Fresh LLC, which is a U.S. importer of fresh tomatoes from Mexico. Each complaint asserted a different statutory basis of jurisdiction. The Trade Court dismissed all claims under USCIT Rule 12(b)(1) for want of the case or controversy required by Article III of the Constitution. It held that (a) Bioparques's claims regarding the termination of the 2013 Agreement became moot upon the execution of the 2019 Agreement and (b) Bioparques's claims regarding the final determination in the continued investigation were not ripe because Bioparques suffered no concrete injury until an antidumping duty order based on that determination issued, which had not occurred and could not occur while the 2019 Agreement was in force. *Bioparques de Occidente, S.A. de C.V. v. United States*, 470 F. Supp. 3d 1366 (Ct. Int'l Trade 2020). Bioparques appeals.

We hold as follows. As to Bioparques's challenge to the termination of the 2013 Agreement, we rely on the opinion we issue today in *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, No. 2020–2232 to conclude that Bioparques has stated no plausible challenge to that termination, so this challenge must be dismissed under USCIT Rule 12(b)(6). As to Bioparques's challenges to Commerce's final determination in the continued investigation (both the results and the process), we draw two conclusions. First, we conclude that this challenge presents a case or controversy that is justiciable under Article III of the U.S. Constitution. Second, we conclude that the Tariff Act of 1930 provides jurisdiction for the

Trade Court to review the final determination at issue here even before an antidumping duty order has been published. We remand to the Trade Court to address the merits of Bioparques's claims regarding the final determination.

I

A

The Tariff Act of 1930 allows Commerce to initiate an investigation to determine whether imported merchandise is being sold in the U.S. at less than fair value (dumped). Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.). After Commerce initiates an investigation into some defined class of imported goods, the ITC is to determine whether there is a “reasonable indication” that a U.S. industry is materially injured or threatened with material injury, or the establishment of an industry in the U.S. is materially retarded, due to non-negligible amounts of the imports. 19 U.S.C. § 1673b(a)(1).¹ If the ITC’s determination is affirmative, Commerce is to make a preliminary determination of whether there is a “reasonable basis to believe or suspect” that the subject merchandise is being sold, or is likely to be sold, at less than fair value. § 1673b(b)(1)(A). If Commerce’s preliminary determination is also affirmative, Commerce then is to calculate the estimated weighted average dumping margins, *i.e.*, the amount by which the normal value (roughly, home-country value) of the merchandise exceeds the export price (roughly, U.S. price), and it orders the posting of a cash deposit or bond for each entry based on those margins, as well as the suspension of liquidation (the final computation of duties) of entries subject to the determination. § 1673b(d)(1), (2).

Ordinarily, Commerce then continues the investigation and, within 75 days of the preliminary determination, makes a final determination of whether the merchandise is being, or is likely to be, sold in the U.S. at less than fair value. § 1673d(a)(1). If it finds such sales, it calculates estimated weighted average dumping margins for each exporter individually investigated and an estimated all-others rate for those not individually investigated. § 1673d(c)(1)(B). The ITC then makes its final injury determination. § 1673d(b)(1). If both determinations are affirmative, Commerce issues an antidumping duty order that directs customs officers to assess an antidumping duty equal to the margins calculated in the final determination. § 1673d(c)(2); § 1673e(a).

¹ Hereafter we generally (though not always) cite sections of Title 19 without including “19 U.S.C.” Other statutory citations include the U.S. Code title number.

These appeals concern a congressionally authorized departure from that ordinary course of proceedings. If Commerce determines that “extraordinary circumstances” are present, it may suspend an investigation upon the execution of a suspension agreement, pursuant to § 1673c(c), with “substantially all” exporters of the subject merchandise (defined as not less than 85% of exporters by value or volume, *see* § 1673c(c)(1); 19 C.F.R. § 351.208(c)). The agreement must eliminate the injurious effects of the sales at issue and ensure that the amount by which the normal value of the merchandise exceeds the export price does not exceed 15% of the dumping margin of the less-than-fair-value entries examined during the investigation. § 1673c(c)(1)(B). Once the agreement is executed, Commerce releases the cash deposits or bonds and terminates the suspension of liquidation. § 1673c(f). Within 20 days of the publication of a suspension agreement, however, if continuation of the investigation is requested either by “an exporter or exporters accounting for a significant proportion of exports to the United States of the subject merchandise” or by another designated “interested party” (specifically, any of various domestic-industry entities), Commerce “shall continue the investigation” and proceed toward a final determination. § 1673c(g).² But even if the final determination in the continued investigation is affirmative, Commerce may not issue an antidumping duty order as long as the suspension agreement remains in force and continues to meet statutory requirements. § 1673c(f)(3)(B).

B

Commerce initiated an investigation in April 1996 to determine whether fresh tomatoes from Mexico were being sold in the U.S. at less than fair value. Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 18,377 (Apr. 25, 1996). After the ITC made a preliminary determination of injury to a U.S. industry in May 1996, Commerce issued a preliminary determination finding a reasonable basis to believe that imported tomatoes from Mexico were being sold, or were likely to be sold, in the U.S. at less

² Besides the specified exporters, the statute authorizes “an interested party described in subparagraph (C),(D), (E), (F), or (G) of [§ 1677(9)] which is a party to the investigation” to request continuation. § 1673c(g)(2). The first four referred-to provisions address “domestic like product” entities—manufacturers, producers, and wholesalers of a domestic like product, unions or similar worker groups, and certain associations such as trade associations. § 1677(9)(C), (D), (E), (F). The fifth provision refers to a coalition or trade association of processors (with or without producers or growers) of “a processed agricultural product” when an investigation involves a (domestic) industry engaged in producing such a product. § 1677(9)(G); *see* § 1677(9)(4)(A), (E). We hereafter refer to the five groups as “domestic-industry entities” for simplicity.

than fair value. Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,608 (Nov. 1, 1996) (*Preliminary Determination*). Pursuant to § 1673b(d)(1)(A), Commerce calculated an “estimated weighted average dumping margin” for each exporter that was individually investigated and an “estimated all-others rate.” Because the three plaintiffs before us here were not individually investigated, they were subject to the all-others rate.

On the same day, Commerce announced that it had signed a suspension agreement (the 1996 Agreement) pursuant to § 1673c(c) with exporters accounting for substantially all exports of fresh tomatoes from Mexico. Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618 (Nov. 1, 1996). One signatory to the agreement was Asociación Mexicana de Horticultura Protegida, A.C. (AMHPAC), of which, it is undisputed before us, Bioparques de Occidente and Agricola la Primavera are members. The 1996 Agreement suspended the anti-dumping investigation, authorized the release of the cash deposits or bonds and the termination of suspension of liquidation, and required that exporters sell their tomatoes in the U.S. at or above specified reference prices. *Id.* at 56,618–19. The reference prices were calculated as the average of the lowest average monthly prices in the U.S. market in 1992–1994. *Id.* at 56,620–21 (Appendix A).

In May 2002, a significant percentage of Mexican signatories provided notice of their withdrawal from the agreement, and as a result the Agreement no longer covered substantially all imports of fresh tomatoes from Mexico. Commerce terminated the Agreement pursuant to § 1673c(i)(1), announced its intention to suspend liquidation and to require deposits under § 1673b(d)(1)(B) based on the 1996 preliminary-determination rates, and resumed the investigation. But in December 2002, another suspension agreement was reached. Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 67 Fed. Reg. 77,044 (Dec. 16, 2002). The sequence repeated itself in 2008 and 2013, leading to the 2008 and 2013 Agreements.

On February 6, 2019, Commerce notified the Mexican signatories of its intent to withdraw from the 2013 Agreement. On May 7, 2019, Commerce withdrew from the 2013 Agreement, resumed the anti-dumping investigation, ordered a suspension of liquidation, and required cash deposits based on the 1996 preliminary-determination rates. In resuming the 20-year-old investigation, Commerce selected as mandatory respondents a new group of Mexican exporters, includ-

ing Bioparques de Occidente. Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation, 84 Fed. Reg. 49,987, 49,988 (Sept. 24, 2019).

When Commerce withdrew from the 2013 Agreement, several associations of individual Mexican fresh tomato growers (including AM-HPAC) sued in the Trade Court and asked for a preliminary injunction against the withdrawal and investigation resumption. In June 2019, the Trade Court denied the request for insufficient showings of irreparable harm and likely success on the merits. *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, 389 F. Supp. 3d 1386 (Ct. Int'l Trade 2019) (CAADES). In July 2019, we then denied mandamus relief from the Trade Court's denial. *In re Confederacion de Asociaciones Agricolas del Estado de Sinaloa, et al.*, 781 F. App'x 982 (Fed. Cir. 2019). We agreed that success on the merits was unlikely, noting that Commerce was permitted to withdraw under the termination clause of the 2013 Agreement. *Id.* at 987.

On September 19, 2019, Commerce announced that the parties had signed a new suspension agreement (the 2019 Agreement). Fresh Tomatoes from Mexico: Suspension of Antidumping Duty Investigation, 84 Fed. Reg. at 49,987–89. The 2019 Agreement set higher reference prices, while retaining each signatory's obligation not to exceed its dumping margin examined during the investigation by 15%, and imposed monitoring and inspection to assess compliance with the Agreement's requirements. *Id.* at 49,990–94. The Agreement also allowed either Commerce or the Mexican signatories to withdraw without penalty. *Id.* at 49,994. After the 2019 Agreement was signed, the plaintiffs in CAADES stipulated to dismissal.

Commerce then received timely requests to continue the investigation under § 1673c(g) from domestic tomato growers Florida Tomato Exchange and Red Sun Farms. Commerce therefore continued the investigation. On October 25, 2019, it published its final determination that tomatoes from Mexico were being, or were likely to be, sold in the U.S. at less than fair value. Fresh Tomatoes from Mexico: Final Determination of Sales at Less than Fair Value, 84 Fed. Reg. 57,401 (Oct. 25, 2019) (*Final Determination*). Commerce calculated a dumping margin of 30.48% for Bioparques de Occidente and Agricola La Primavera and a 20.91% all-others rate. *Id.* at 57,402. The ITC published its determination of material injury to a U.S. industry on December 12, 2019. Fresh Tomatoes from Mexico, 84 Fed. Reg. 67,958 (Dec. 12, 2019). But no antidumping order issued because the 2019 Agreement remained in force and valid. *See Final Determination*, 84 Fed. Reg. at 57,403 (“Commerce will not issue an antidumping duty order so long as . . . [t]he 2019 Agreement remains in force . . .”).

Between November 2019 and February 2020, Bioparques filed three very similar complaints challenging Commerce's withdrawal from the 2013 Agreement and its *Final Determination*: USCIT Nos. 19–00204, 19–00210, and 20–00035. Bioparques alleged that Commerce lacked authority to withdraw from the 2013 Agreement and continue the investigation, that Commerce's examination of Bioparques as a new respondent in an allegedly compressed investigation violated Bioparques's due process rights, that Commerce committed timing and procedural errors in reaching its final determination, and that Commerce used incorrect methodologies to calculate the rates in its final determination. Bioparques requested that the Trade Court declare the 2019 *Final Determination* invalid and vacate Commerce's withdrawal from the 2013 Agreement.

The complaints asserted different bases for jurisdiction. In No. 19–00210, Bioparques invoked § 1516a(g)(3)(A)(i), addressing final determinations involving free trade area countries, which, if applicable, would support Trade Court jurisdiction under 28 U.S.C. § 1581(c). J.A. 60–68. In No. 19–00204, Bioparques invoked § 1516a(a)(2)(A) and § 1516a(a)(2)(B)(iv), which, if applicable, also would support Trade Court jurisdiction under 28 U.S.C. § 1581(c). J.A. 51–59. Finally, in No. 20–00035, Bioparques asserted jurisdiction under 28 U.S.C. § 1581(i)(4) (now 28 U.S.C. § 1581(i)(1)(D)), the residual clause covering actions arising out of laws “providing for . . . administration and enforcement” of tariffs and duties. J.A. 69–76.

The government moved to dismiss under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim upon which relief could be granted. S.Appx. 113–15. On September 11, 2020, the Trade Court issued identical decisions in all three cases, dismissing the complaints under Rule 12(b)(1). *Bioparques de Occidente, S.A. de C.V. v. United States*, 470 F. Supp. 3d 1366 (Ct. Int'l Trade 2020). The court held that Bioparques's claims regarding the *Final Determination* did not “present an actual case or controversy” because Bioparques (as a member of AMHPAC) was a signatory to the still-in-force 2019 Agreement, which prevented an antidumping duty order from being issued, meaning that Bioparques was suffering “no concrete or particularized injury” from the *Final Determination*. *Id.* at 1372. For that reason alone, and not for want of fitness of the issues for adjudication, the court held this challenge “unripe.” *Id.* The court then held that the challenges to Commerce's termination of the 2013 Agreement became moot when Bioparques (via its representatives) signed the superseding 2019 Agreement. *Id.* at 1373. Addressing both challenges, the court added that it could not “condone Bioparques' litigation strategy in reaping

the benefits of the 2019 Suspension Agreement while bringing an after-the-fact challenge to the final determination that currently has no impact and demanding that the court resurrect the 2013 Suspension Agreement when the claims here are not yet (and may never be) ripe.” *Id.* Having held that the claims were, respectively, unripe and moot, the court did not reach other issues, such as whether the claims regarding the *Final Determination* were timely filed. *Id.*

Bioparques timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

We need not separately analyze Bioparques’s challenges to the termination of the 2013 Agreement and negotiation of the 2019 Agreement. In *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, No. 2020–2232, we today conclude that materially identical challenges, though not moot in a jurisdictional sense, state no plausible claim on which relief can be granted and must therefore be dismissed under Rule 12(b)(6). That holding controls our disposition of the same issue in this case. This aspect of Bioparques’s complaint must be dismissed, leaving Bioparques’s challenges to the *Final Determination* for separate consideration.

III

A

The Trade Court granted the Rule 12(b)(1) motion to dismiss on the ground that Bioparques’s challenges to the *Final Determination* do not currently present a justiciable case or controversy, as required by Article III for subject matter jurisdiction. We review such a dismissal de novo. *See, e.g., Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016) (Trade Court’s jurisdictional dismissal reviewed de novo); *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1348 (Fed.Cir. 2015) (ripeness dismissal reviewed de novo); *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (non-justiciability dismissal reviewed de novo); *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1350 (Fed. Cir. 2010) (lack of jurisdiction, lack of standing, and non-justiciability present legal questions decided de novo). At the motion to dismiss stage, we “must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant.” *Hutchinson*, 827 F.3d at 1359 (citation omitted).

The Trade Court relied solely on its determination of no justiciable case or controversy in deeming Bioparques’s challenge to the *Final Determination* to be not jurisdictionally ripe, correctly not finding any

lack of fitness of the issues for judicial review. *Bioparques* 470 F. Supp. 3d at 1372–73. We therefore limit our discussion to the determination that Bioparques lacks a present, concrete interest required for justiciability. We reverse that determination, concluding that Bioparques’s interest is adequate under Supreme Court authority—in particular, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). Although there might be additional bases for deeming Bioparques’s interest constitutionally adequate, we need not so decide. Our conclusion applying *MedImmune* to the present circumstances suffices to hold that the challenge to the *Final Determination* here is justiciable and, accordingly, ripe for adjudication.³

For a dispute to present a justiciable case or controversy, it must be “definite and concrete, touching the legal relations of parties having adverse legal interests”; and . . . ‘real and substantial’ and ‘admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’” *MedImmune*, 549 U.S. at 127 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). In *MedImmune*, the plaintiff was paying ongoing royalties for a license to a patent and sought a declaratory judgment that the patent was invalid or not infringed. *Id.* at 121–22. The Court recognized that there was undisputedly a justiciable concrete controversy between the parties—legal liability for patent infringement would continue or end, depending on the outcome—subject only to one possible objection raised by the patent holder. *Id.* at 128. The objection was that the plaintiff, by agreeing to the terms of the license, had purchased an “insurance policy, immunizing it from suits for infringement,” and that it should not be able to “enjoy[] its immunity while bringing a suit” to challenge the patent. *Id.* at 134–35.

The Supreme Court rejected that objection. It held that, to establish a justiciable case or controversy under Article III, a patent licensee is not required to terminate the license before seeking a declaratory judgment that the licensed patents are invalid or not infringed. *Id.* at 137. The Court also rejected a requirement that, for justiciability of a declaratory-judgment challenge, the plaintiff must have a “reasonable apprehension of imminent suit.” *Id.* at 132 n.11. The Court determined that there was a justiciable case or controversy even though the plaintiff’s own acts (*i.e.*, remaining in the agreement and

³ The close relationship among the Article III case-or-controversy doctrines, such as ripeness and justiciability, is well recognized. *See, e.g.*, *MedImmune*, 549 U.S. at 128 n.8; *Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005); 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3529 & n.6 (3d ed. 2021). Here, the government identifies the controlling issue when it argues: “[W]hether the issue is one of standing or one of ripeness, Bioparques’s claims are non-justiciable because appellants suffer no real or present or concrete injury.” Gov’t Br. at 40.

paying royalties) “eliminate[d] the imminent threat of harm.” *Id.* at 128. In other words, as this court has subsequently explained, a licensee is “not required to cease its contract payments,” thereby opening itself to greater liability, “in order to resolve its disputed contract rights.” *Apple Inc. v. Qualcomm Inc.*, 992 F.3d 1378, 1383 (Fed. Cir. 2021) (finding *MedImmune* inapplicable where “the validity of the challenged patents” would not affect the plaintiffs’ “ongoing royalty obligations”); *Apple Inc. v. Qualcomm Inc.*, 17 F.4th 1131, 1134 (Fed. Cir. 2021) (similar); see *MedImmune*, 549 U.S. at 130–32 (discussing *Altwater v. Freeman*, 319 U.S. 359 (1943)).

The Court in *MedImmune* also considered and rejected the patent owner’s invocation of the common-law rule that “a party to a contract cannot at one and the same time challenge its validity and continue to reap its benefits.” 549 U.S. at 135. The Court explained that the plaintiff was not repudiating the contract, but instead was “asserting that the contract, properly interpreted, d[id] not prevent it from challenging the patents, and d[id] not require the payment of royalties” because if either the patent was invalid or there was no infringement, the licensee need not pay royalties at all. *Id.*; see also *id.* at 123–24. The Court applied to the dispute between private parties before it the principle recognized in government-private disputes: “where threatened action by *government* is concerned,” a plaintiff is not required to “expose himself to liability before bringing suit to challenge the basis for the threat.” *Id.* at 128–29; see also *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 981 F.3d 1360, 1371 (Fed. Cir. 2020).

In this case, we conclude, the 2019 Agreement is no more a bar to justiciability than was the patent license in *MedImmune*. The Trade Court deemed the dispute over the *Final Determination* non-justiciable because, as long as the 2019 Agreement is in force and governs Bioparques, no antidumping duty order based on the *Final Determination* may issue; and the court said that it could not condone Bioparques’s “litigation strategy” of “reaping the benefits of the 2019 Suspension Agreement” while at the same time bringing a challenge to the *Final Determination*. *Bioparques*, 470 F. Supp. 3d at 1372–73. But the Supreme Court rejected a materially analogous objection to justiciability in *MedImmune*—where the plaintiff was complying with the patent license, thereby forestalling an assertion of liability that would (non-speculatively) occur if the plaintiff stopped paying royalties. Under *MedImmune*, which allowed the plaintiff to challenge the basis for patent liability without withdrawing from the license agreement, Bioparques need not withdraw from the 2019 Agreement, ex-

posing itself to greater liability (through the issuance of an antidumping order), in order to challenge the basis for antidumping liability under Commerce's *Final Determination*.

The particularized, concrete interest Bioparques has in challenging the *Final Determination* is far from speculative. In particular, Bioparques alleges errors by Commerce that, if proved, could result in a negative determination on dumping and consequent automatic termination of the 2019 Agreement. See § 1673c(f)(3)(A) (explaining that, if the final determination by either Commerce or the ITC is negative, “the agreement shall have no force or effect and the investigation shall be terminated”). The agreement would similarly be terminated if the revised antidumping margins were found to be de minimis, see § 1673d(a)(4), defined as less than 2 percent ad valorem, § 1673b(b)(3). Thus, like the licensee in *MedImmune*, who was paying royalties to practice the patent but could have stopped without liability upon a favorable adjudication of invalidity or non-infringement, see 549 U.S. at 135, Bioparques could avoid the burdens of both the 2019 Agreement (with its minimum reference prices and other obligations) and antidumping duties upon a favorable adjudication of the challenges to the *Final Determination*.

Even if Bioparques's challenges to the *Final Determination* were to succeed only in reducing, but not eliminating, antidumping duties, Bioparques still would have a plausible, particularized interest in its challenge. Partial success in litigation would alter the level of duties that is the crucial comparator in Bioparques's decision whether to remain in the 2019 Agreement—a decision that the Trade Court and the government recognize Bioparques is free to make “for any reason, or for no reason at all.” *Bioparques*, 470 F. Supp. 3d at 1373; Gov't Br. at 16 (explaining that Bioparques may “withdraw from the agreement with no change to the signatory status” of other AMHPAC members). Neither the Trade Court nor the government in this case cites authority establishing that, or providing a persuasive reason why, the interest in altering the legal landscape in this way is insufficient for a justiciable controversy. The Trade Court and the government (and the Florida Tomato Exchange) assert that Bioparques must give up the current protection of the 2019 Agreement in order to challenge the *Final Determination*, but that assertion is counter to *MedImmune*, as we have explained.

Congress itself recognized that exporters, necessarily including signatories, have an interest in a final determination in a continued investigation after execution of a suspension agreement. The Tariff Act provides that, after publication of a suspension agreement, not only specified domestic-industry entities but also “an exporter or

exporters accounting for a significant proportion of exports . . . of the subject merchandise” may request that the investigation be continued and that, upon receipt of such a request, Commerce must in fact continue the investigation—the object of which is to reach a final determination. § 1673c(g). This provision rests on the evident premise that signatories to a suspension agreement—who must, for the agreement to be proper under § 1673c(c), account for “substantially all” exports—are among those who have a concrete interest in securing a correct final determination even if the suspension agreement is still in force.

We hold, therefore, that Bioparques has presented a justiciable case or controversy under Article III in its challenge to the *Final Determination*. We reverse the Trade Court’s determination that the challenge is not ripe.

B

We next consider whether statutory jurisdiction exists over Bioparques’s challenge to Commerce’s *Final Determination*—specifically, whether the Tariff Act of 1930 provides such jurisdiction where no antidumping duty order has issued. The question was presented to the Trade Court, but that court did not reach it, instead dismissing for lack of jurisdiction on constitutional grounds. Because we reverse the Trade Court’s constitutional conclusion, we reach the issue of statutory jurisdiction.

Bioparques asserted alternative statutory bases for the Trade Court’s jurisdiction over the challenge to Commerce’s *Final Determination* before the entry of an antidumping duty order. It asserted jurisdiction based on §§ 1516a(g)(3)(A)(i) and 1516a(a)(2)(B)(i); and it also asserted jurisdiction based on §§ 1516a(a)(2)(A)(i) and 1516a(a)(2)(B)(iv), as well as on 28 U.S.C. § 1581(i)(4) (now 28 U.S.C. § 1581(i)(1)(D)). We reach only the first ground here. It has not been disputed that this jurisdictional basis, if present, suffices for Bioparques to obtain the relief it seeks if it proves its case.

Under 28 U.S.C. § 1581(c), the Trade Court has “exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930.” Section 516A, codified as 19 U.S.C. § 1516a, provides for judicial review of some determinations in antidumping duty proceedings (and countervailing duty proceedings, not at issue here). And it sets timing rules—which are generally jurisdiction-limiting—governing when challenges may be brought. *See* 28 U.S.C. § 2636(c) (barring a challenge to a reviewable determination in 19 U.S.C. § 1516a unless it is commenced within the time specified in

that section); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986)(determining that the Trade Court lacked jurisdiction where the complaint was not timely filed under 19 U.S.C. § 1516a).

One of the “[r]eviewable determinations” discussed in § 1516a is a “[f]inal affirmative determination[] by the administering authority and by the Commission under section . . . 1673d of this title, including any negative part of such a determination.” § 1516a(a)(2)(B)(i) (ellipsis where § 1671d, concerning countervailing duties, appears) [hereafter “B(i)”. The referred-to § 1673d addresses affirmative final determinations in antidumping duty investigations, *i.e.*, final determinations that the subject merchandise is being, or is likely to be, sold in the U.S. at less than fair value, § 1673d(a)(1), like the *Final Determination* published here. But it is not disputed before us that, in most antidumping proceedings, such an affirmative final determination under B(i) may be challenged only during a defined period—starting on the date of publication of an antidumping duty “order based upon” that affirmative final determination and ending 30 days later. *See* § 1516a(a)(2)(A)(i)(II) (emphasis added). And no such order has been issued based on the *Final Determination* here because of the 2019 Agreement, a fact that would block review here if that prerequisite applied.

But special rules are available for review of antidumping duty determinations involving free trade area (FTA) countries, of which Mexico is one.⁴ “Determination” under the FTA rules is defined to include, among others, a B(i) determination. § 1516a(g)(1)(B). Further, a B(i) determination is reviewable under § 1516a(a) if “neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the [United States-Canada Free-Trade Agreement] or article 10.12 of the [United States-Mexico-Canada Agreement].” § 1516a(g)(3)(A)(i). And, of particular importance here, FTA-country antidumping duty review actions are not subject to the rule for non-FTA countries (not disputed here, as noted above) that a party cannot challenge an affirmative final antidumping duty determination until after an antidumping duty *order* has been published. Reviewability of an FTA country affirmative final determination requires no such order; the period of review is defined

⁴ When Bioparques’s complaint was filed, a “[f]ree trade area country” was defined to include Canada and Mexico for such time as the North American Free Trade Agreement (NAFTA) was in force. *See* 19 U.S.C. §§ 1516a(f)(8), (10) (2006). NAFTA has since been replaced by the United States-Mexico-Canada Agreement (USMCA). The statute was amended in 2020 to define a “[r]elevant FTA country” as Canada and Mexico for such time as the USMCA is in force. 19 U.S.C. § 1516a(f)(9).

with reference only to “the date on which notice of *the determination* is published in the Federal Register.” § 1516a(a)(5)(A) (emphasis added). Specifically, the period for filing begins on the 31st day after the day of publication of the determination (not an order based on it), *id.*, with a summons due within the next 30 days and a complaint due 30 days after the summons, § 1516a(a)(2).⁵

Here, Bioparques has argued for jurisdiction under B(i) based on the special provisions available in the FTA context. And neither the government nor the Florida Tomato Exchange has offered evidence or argument that any jurisdictional prerequisite has not been met. It is undisputed that no binational panel was sought, and there has been no dispute about the timeliness of Bioparques’s summons and complaint. J.A. 45–46; J.A. 60–68. Nor has the timeliness of notice been challenged before us. *See supra* n.5; Bioparques Br. at 16. In this appeal, the parties dispute only whether the *Final Determination* is a B(i) final affirmative determination.

The text of B(i) makes plain that it is. The provision allows for review of “[f]inal affirmative determinations by the administering authority and by the Commission under section . . . 1673d of this title, including any negative part of such a determination.” § 1516a(a)(2)(B)(i). The clause does not exclude a final affirmative determination from review just because it was reached in a continued investigation, as opposed to an investigation never interrupted by a suspension agreement. Section 1673d itself, to which this clause refers, is broadly titled “[f]inal determinations” and similarly does not exclude final determinations in continued investigations from the definition of “final determinations.” The government has noted that § 1673c, which provides for continued investigations and final determinations in such investigations, is not identified in clause B(i). Gov’t Br. at 52. But § 1673c itself makes clear that “[w]here [the] investigation is continued,” a “final determination by the administering authority or the Commission” is a final determination “*under section 1673d of this title.*” § 1673c(f)(3) (emphasis added). So the *Final Determination* comes with B(i)’s coverage of § 1673d.

The government agreed at oral argument that nothing in the language of B(i) excludes from its coverage a final affirmative determination made in a continued investigation in the suspension-agreement setting. Oral Arg. at 1:30:53–1:31:30. But it suggested that

⁵ A special notice rule also applies in the FTA context. “[T]he party seeking to commence review [must] provide[] timely notice of its intent to commence such review to” three sets of parties—the “United States Secretary” and “relevant FTA [country] Secretary” (both defined by reference to the USMCA); all interested parties to the proceeding in connection with which the matter arises; and the administering authority or the Commission, as appropriate—within a specified period. § 1516a(g)(3)(B); § 1516a(a)(5); § 1516a(f). We do not determine the precise meaning of this requirement or whether it is jurisdictional.

we should hold such a final determination in a continued investigation to be silently excluded from the plain-meaning coverage of B(i) because such a final determination is mentioned elsewhere in the list of reviewable determinations. Specifically, under § 1516a(a)(2)(B)'s declaration that what "follows" are reviewable decisions, clause (iv) covers a "determination . . . to suspend" an antidumping duty investigation, "including any final determination resulting from a continued investigation which changes the size of the dumping margin . . . at the time the suspension agreement was concluded." But that mention is not enough to override the plain meaning of B(i). The language of B(i) provides no hook for the suggested exclusion. And there is no conflict between the two provisions; nor has any other basis been presented to us that explains why the same Commerce decision might not be covered by more than one review provision.⁶ In short, we have been shown no sufficient basis to do anything but follow the plain language of B(i), which covers the *Final Determination* here.

We hold that an affirmative final determination in a continued investigation that involves exports from an FTA country is reviewable under § 1516a(g)(3)(A)(i) as a determination under § 1516a(a)(2)(B)(i), which provides the Trade Court jurisdiction under 28 U.S.C. § 1581(c). On the record before us, those provisions support Trade Court jurisdiction over Bioparques's challenge to the *Final Determination*.

IV

For the foregoing reasons, we affirm the dismissal of Bioparques's challenge to the termination of the 2013 Agreement, reverse the determination that Bioparques's challenge to the final determination did not present a justiciable case or controversy, and remand for further proceedings consistent with our determinations about the availability of statutory jurisdiction.

The parties shall bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

⁶ The government agrees that, although the FTA-specific review provision, § 1516a(g)(1)(B), lists as reviewable the determinations identified in clause (i) but not those identified in clause (iv) of § 1516a(a)(2)(B), the FTA-specific provision does not occupy the field of review for FTA-country parties, which may separately invoke the general provisions, including § 1516a(a)(2)(B)(iv), if their terms are satisfied. Gov't Br. at 50–51.

U.S. Court of International Trade

Slip Op. 22–33

RISEN ENERGY CO., LTD., Plaintiff, and TRINA SOLAR ENERGY CO., LTD. et al., Consolidated Plaintiffs, and SHANGHAI BYD Co., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SUNPOWER MANUFACTURING OREGON, LLC, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 20–03743
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final determination in the 2017–2018 antidumping administrative review of crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People’s Republic of China.]

Dated: April 4, 2022

Gregory S. Menegaz and Alexandra H. Salzman, DeKieffer & Horgan, PLLC, of Washington, D.C., argued for plaintiff Risen Energy Co., Ltd. Also on the brief were J. Kevin Horgan and Judith L. Holdsworth.

Ronald M. Wisla, Lizbeth R. Levinson, and Brittney R. Powell, Fox Rothschild LLP, of Washington, D.C. for plaintiff-intervenor Anji DaSol Solar Energy Science & Technology Co., Ltd.

Jeffrey S. Grimson, Sarah M. Wyss, and Bryan P. Cenko, Mowry & Grimson, PLLC, of Washington, D.C. for consolidated plaintiffs and plaintiff-intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd.

Jonathan M. Freed, Trade Pacific PLLC, of Washington, D.C. argued for consolidated plaintiffs Trina Solar Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Trina Solar (Hefei) Science & Technology Co., Ltd., and Changzhou Trina Hezhong Photoelectric Co., Ltd. Also on the brief was Robert G. Gosselink.

William E. Perry and Adams C. Lee, Harris Bricken Sliwoski, LLP, of Seattle, WA for consolidated plaintiffs Shenzhen Sungold Solar Co., Ltd. and Wuxi Tianran Photovoltaic Co., Ltd.

Craig A. Lewis, Hogan Lovells US LLP, of Washington, D.C. argued for consolidated plaintiff and plaintiff-intervenor Shanghai BYD Co., Ltd. and plaintiff-intervenors Canadian Solar Inc., Canadian Solar International Limited, Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., CSI Cells Co., Ltd., and Canadian Solar (USA) Inc. Also on the brief were Jonathan T. Stoel and Lindsay K. Brown.

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

OPINION AND ORDER

Kelly, Judge:

Before the court are several Rule 56.2 motions for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Commerce") final determination in its 2017–2018 administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China") ("Solar Cells from China"). Pl.'s Mot. For J. on Agency R., Apr. 29, 2021, ECF No. 62 ("Risen's¹ R. 56.2 Mot.") and accompanying Pl.'s R. 56.2 Memo. in Supp. of Mot. for J. Upon Agency R., Apr. 29, 2021, ECF Nos. 63, 64 ("Risen's Br."); Pl.-Intervenor's 56.2 Mot. for J. on Agency R., Apr. 29, 2021, ECF No. 65 ("Anji DaSol's R. 56.2 Mot."); R. 56.2 Mot. for J. on Agency R. of Consol. Pls. & Pl.-Intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., and Jingao Solar Co., Ltd. (collectively, "JA Solar"), Apr. 29, 2021, ECF No. 66 ("JA Solar's R. 56.2 Mot.") and accompanying Memo. of Points and Authorities in Supp. of R. 56.2 Mot. for J. on Agency R. of Consol. Pls. & Pl.-Intervenors [JA Solar], Apr. 29, 2021, ECF No. 67 ("JA Solar's Br."); Consol. Pls.' R. 56.2 Mot. for J. on Agency R., Apr. 29, 2021, ECF No. 68 ("Trina's² R. 56.2 Mot.") and accompanying Memo. in Supp. Mot. of Trina for J. on Agency R., Apr. 29, 2021, ECF Nos. 69, 70 ("Trina's Br."); Consol. Pls.' 56.2 Mot. for J. on Agency R., Apr. 29, 2021, ECF No. 71 ("Shenzen and Wuxi's R. 56.2 Mot."); Consol. Pl.

¹ Commerce selected Risen Energy Co., Ltd. as a mandatory respondent, Memo. Re: Resp't Selection, PD 101 bar code 3830533–01, (May 6, 2019) ("Resp't Selection Memo."), and subsequently determined that Risen (Wuhai) New Energy Co., Ltd.; Zhejiang Twinsel Electronic Technology Co., Ltd.; Risen (Luoyang) New Energy Co., Ltd.; Jiujiang Shengchao Xinye Technology Co., Ltd.; Jiujiang Shengzhao Xinye Trade Co., Ltd. Ruichang Branch; Risen Energy (Hong Kong) Co., Ltd.; and Risen Energy Co., Ltd. (the "Risen Entities") were affiliated and treated the entities as a single collapsed entity for the purpose of the dumping margin calculation. Affiliation and Single Entity Status of [the Risen Entities] PD 411 bar code 3938677–01 (Jan. 31, 2020). Commerce refers to the Risen Entities collectively as "Risen" in the preliminary and final decision memoranda, but issued questionnaires to, and received responses from, Risen Energy Co., Ltd., which Commerce applied to all the Risen Entities. *See, e.g.*, Request for Information, [ADD] Admin. Review, Risen Energy Co., Ltd. [Solar Cells from China], PD 103 bar code 3830975–01 (May 7, 2019); Letter Re: [Solar Cells from China] Risen Case Br., PD 446 CD 464 bar codes 3954395–01, 3954393–01 ("Risen's Admin. Br."). Risen Energy Co., Ltd. ("Risen") challenges Commerce's final determination independently. Compl., Oct. 28, 2020, ECF No. 7.

² Commerce determined that Trina Solar Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; Trina Solar (Hefei) Science & Technology Co., Ltd.; and Changzhou Trina Hezhong Photoelectric Co., Ltd. (collectively, "Trina") were affiliated and treated the entities as a single collapsed entity for the purposes of Commerce's dumping margin calculation. Memo. Re: Affiliation and Single Entity Status of [Trina] PD 410, bar code 3938672–01 (Jan. 31, 2020).

and Pl.-Intervenors Shanghai BYD. Co., Ltd. (“Shanghai”) and Canadian Solar, et al.’s³ R. 56.2 Mot. for J. on Agency R., Apr. 29, 2021, ECF No. 72 (“Shanghai’s and Canadian Solar’s R. 56.2 Mot.”) and accompanying Consol. Pl. and Pl.-Intervenors [Shanghai] and [Canadian Solar’s] Memo. in Supp. of R. 56.2 Mot. for J. on Agency R., Apr. 29, 2021, ECF No. 72–2 (“Shanghai’s and Canadian Solar’s Br.”); *see generally* [Solar Cells from China], 85 Fed. Reg. 62,275 (Dep’t Commerce Oct. 2, 2020) (final results of [ADD] admin. review and final deter. of no shipments; 2017–2018) (“*Final Results*”) and accompanying Issues and Decision Memo., A-570–979, Sept. 28, 2020, ECF No. 49–5 (“*Final Decision Memo.*”); Order on Consent Mot. to Consol. Cases, Dec. 16, 2020, ECF No. 44 (consolidating Ct. Nos. 20–03757, 20–03761, 20–03797, 20–03802, 20–03804 and 20–03743).

Plaintiff, consolidated plaintiffs, and plaintiff-intervenors (collectively, “Plaintiffs”) challenge Commerce’s selection of Malaysia as the primary surrogate country, certain surrogate values for inputs, the surrogate financial ratio calculations, and the partial application of adverse facts available as unsupported by substantial evidence and contrary to law. *See* Risen’s Br.; JA Solar’s Br.;⁴ Trina’s Br.; Anji DaSol’s R. 56.2 Mot.;⁵ Shenzhen and Wuxi’s R. 56.2 Mot.;⁶ Shanghai’s and Canadian Solar’s Br. at 11–13.⁷ Shanghai, Canadian Solar, Shenzhen, Wuxi, JA Solar, and Anji DaSol also challenge Commerce’s calculation of the separate rate as unsupported by substantial evidence and contrary to law. Shanghai’s and Canadian Solar’s Br. at 5, 13; *see* Shenzhen and Wuxi’s R. 56.2 Mot.; Anji DaSol’s R. 56.2 Mot.; JA Solar’s Br. at 8. For the following reasons, Commerce’s selection of Malaysia as the primary surrogate country and its calculation of the surrogate financial ratios are sustained. Commerce’s decision to value silver paste using the Malaysian import value, its valuation of Risen’s EVA and backsheet, its use of partial facts available with an adverse inference to value the missing factor of production information, and its separate rate calculation are remanded for reconsideration or additional explanation consistent with this opinion.

³ Canadian Solar Inc., Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Cells Co., Ltd.; and Canadian Solar (USA) Inc. are collectively identified as “Canadian Solar.”

⁴ Incorporating the arguments contained in Risen’s and Trina’s briefs.

⁵ Incorporating the arguments contained in JA Solar’s Br. and arguments from other consolidated plaintiffs common to the claims raised in Shanghai’s complaint.

⁶ Incorporating the arguments contained in Risen’s Br., Trina’s Br., JA Solar’s Br., and Shanghai’s and Canadian Solar’s Br. and arguments from other consolidated plaintiffs common to the claims raised in Risen’s, Trina’s, Canadian Solar’s and Shanghai’s complaints.

⁷ Incorporating the arguments contained in Risen’s and Trina’s briefs challenging the rates received as mandatory respondents.

BACKGROUND

On March 14, 2019, Commerce initiated an administrative review of the ADD order covering Solar Cells from China for a period of review covering December 1, 2017 through November 30, 2018. *Initiation of [ADD] and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 9,297, 9,299 (Dep't Commerce Mar. 14, 2019) (“*Initiation Notice*”); *see also* [*Solar Cells from China*], 85 Fed. Reg. 7,531 (Dep't Commerce Feb. 10, 2020) (prelim. results of [ADD] admin. review and prelim. deter. of no shipments; 2017–2018) (“*Prelim. Results*”) and accompanying Prelim. Decision Memo at 1, A-570–979, Jan. 31, 2020, PD 409 bar code 3938660–01 (“Prelim. Decision Memo.”).⁸ Commerce limited its individual examination to two mandatory respondents, Trina and Risen. Prelim. Decision Memo. at 1–2, 4–5; *see also* Resp't Selection Memo. at 4–5.

Commerce published the *Final Results* on October 2, 2020, selecting Malaysia as the primary surrogate country, explaining that Malaysia is economically comparable to China, a significant producer of comparable merchandise, and has the best information to value the respondents' factors of production. Final Decision Memo. at 31; *Final Results*. Commerce calculated the overhead, general and administrative expenses, and profit ratios using non-proprietary financial statements from Hanwha Q Cells (“Hanwha”), because Hanwha's financial statements identify it as a producer of subject merchandise during the period of review, do not show evidence of countervailable subsidies, and have been audited. Prelim. Decision Memo. at 27–28; Final Decision Memo. at 31, 39. Between the *Preliminary Results* and the *Final Results*, Commerce adjusted its surrogate financial ratios to reflect certain financial statement notes. Final Decision Memo. at 47; Memo Re: Allegations of Ministerial Errors in the Final Results at 5, PD 501 bar code 4060860–01 (Nov. 2, 2020) (“Ministerial Error Memo.”).

Despite Trina's and Risen's responses to numerous supplemental questionnaires, the record was still missing factor of production information from Trina's and Risen's unaffiliated suppliers. Final Decision Memo. at 10. No party disputes that the factor of production information from the non-cooperative, unaffiliated suppliers is miss-

⁸ On January 8, 2021, Commerce filed indices to the public and confidential administrative records underlying Commerce's *Final Results*. These indices are located on the docket at ECF Nos. 49–2 and 49–3. All references to documents from the public and confidential record are identified by the numbers assigned by Commerce in the January 1st indices, *see* ECF Nos. 49–2 & 49–3, and preceded by “PD” or “CD” to denote public or confidential documents, respectively.

ing from the record. *Id.* Commerce concluded that the non-cooperative unaffiliated suppliers, Trina, and Risen failed to cooperate to the best of their abilities, warranting the use of partial adverse facts available to fill in the missing factor of production data. *Id.* Between April 29, 2021 and November 19, 2021 parties fully briefed the issues.⁹ On January 19, 2022 the court heard oral argument. *See* Order, Dec. 3, 2021, ECF No. 93; Closed Remote Oral Argument, Jan. 19, 2022, ECF No. 109.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended,¹⁰ 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Selection of Malaysia as the Surrogate Country

Commerce reasonably chose Malaysia as the primary surrogate country to use in calculating normal value as record evidence supports its determination that Malaysia is economically comparable, a significant producer of comparable merchandise, and has the best data with which to value the factors of production. Commerce addresses Plaintiffs’ arguments that Bulgaria is economically comparable to China and a significant producer of comparable merchandise, Romania is a significant producer of comparable merchandise, and the record evidence detracting from its determination.

When Commerce determines whether and to what extent merchandise “is being, or is likely to be sold in the United States at less than fair value,” Commerce compares the “normal value” of the merchandise to the U.S. price. 19 U.S.C. § 1677b(a). Normal value is the price

⁹ Def.’s Opp. To Pls.’ R. 56.2 Mot. For J. Upon Agency R., Sept. 24, 2021, ECF Nos. 79, 80 (“Def.’s Br.”); Pl.’s Reply Br., Nov. 5, 2021, ECF Nos. 83, 84; Reply Br. of Consol. Pls. and Pl. Interveners [JA Solar] in Supp. of R. 56.2 Mot. for J. on Agency R., Nov. 5, 2021, ECF No. 85; Pl-Intervenor’s Reply Br., Nov. 5, 2021, ECF No. 86; Reply Br. of Consol. Pl. and Pl.-Intervenor [Shanghai and Canadian Solar], Nov. 5, 2021, ECF No. 87; Pl. Trina’s Reply to Def.’s Resp. to Trina’s Mot. for J. on Agency R., Nov. 5, 2021, ECF No. 88; Joint Appendix, Nov. 19, 2021, ECF Nos. 89, 90.

¹⁰ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

for which a producer or exporter sells the subject merchandise in the ordinary course of trade in its home country or, in certain circumstances, a third country. *Id.* § 1677b(a)(1). In a non-market economy (“NME”), Commerce bases normal value not on sales, but on “the value of the factors of production utilized in producing the merchandise . . . [together with] an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” *Id.* § 1677b(c)(1). Commerce shall value the factors of production “based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.” *Id.* Moreover, to the extent possible, Commerce shall use “the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the [NME] country, and (B) significant producers of comparable merchandise.” *Id.* § 1677b(c)(4).

Commerce prefers to “value all factors in a single surrogate country.” 19 C.F.R. § 351.408(c)(2). In selecting a primary surrogate country, Commerce considers (1) the potential surrogate countries’ economic comparability with the NME country, (2) whether the potential surrogate countries produce comparable merchandise, (3) whether the potential surrogate countries that produce comparable merchandise are significant producers of comparable merchandise, and (4) the quality and availability of the factor of production data for the countries. Import Admin., U.S. Dep’t Commerce, *[NME] Surrogate Country Selection Process*, Import Administration Policy Bulletin 04.1 (Mar. 1, 2004), available at <https://enforcement.trade.gov/policy/bull04-1.html> (last visited Mar. 30, 2022) (“Policy Bulletin”). Economic comparability is determined by the Office of Policy Enforcement and Compliance (“Office of Policy”) which assembles a list of countries that are economically comparable. Policy Bulletin at 2; see also Memo Re: Request for Economic Development, Surrogate Country and Surrogate Value Comments and Information at 1, PD 166 bar code 3872206-01 (July 31, 2019) (“Surrogate Value Memo.”); Prelim. Decision Memo. at 15-16; *Antidumping Methodologies in Proceedings Involving [NME] Countries*, 72 Fed. Reg. 13,246, 13,246-247 (Dep’t Commerce Mar. 30, 2017) (surrogate country selection and separate rates). The statute does not define what a “significant” or “comparable” producer of subject merchandise is, but Commerce’s practice is to “determine whether merchandise is comparable on a case-by-case basis” “and evaluate whether production is significant based on characteristics of, and trade in comparable merchandise.” Prelim. Decision Memo. at 16; see also Policy Bulletin at 2-3.

A country qualifies as a producer of comparable merchandise if identical merchandise is produced in the country. Prelim. Decision Memo. at 16; *see also* Policy Bulletin at 2. Where there is no evidence that a country produces identical merchandise, Commerce evaluates whether merchandise is comparable by examining the “similarities in physical form and the extent of processing or on the basis of production factors (physical and non-physical) and factor intensities.” Prelim. Decision Memo. at 16; *see also* Policy Bulletin at 2–3. If more than one country is a significant producer of merchandise comparable to the subject merchandise and is economically comparable to the NME, Commerce selects “the country with the best factors data” as the surrogate country.¹¹ Policy Bulletin at 4; *see also* Prelim. Decision Memo. at 14. Commerce may also consider other countries on the record that are not economically comparable “that are significant producers of comparable merchandise if the record provides [Commerce] with adequate information to evaluate them.” Surrogate Value Memo. at Att. I p. 2.

Commerce’s surrogate country selection must be supported by substantial evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Id.* at 488. In providing its explanation, Commerce must articulate a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The court will “uphold [an agency’s] decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 286 (1974). An agency’s decision is arbitrary when, *inter alia*, it deviates from an established practice followed in similar circumstances and does not provide a reasonable explanation for the deviation. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003); *see also SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

Commerce selects Malaysia as the primary surrogate country because Malaysia is economically comparable to China, a significant producer of identical merchandise, and has the best factors data. Final Decision Memo. at 31. The Office of Policy identified Brazil, Kazakhstan, Malaysia, Mexico, Romania, and Russia as countries

¹¹ In assessing the factors data Commerce’s practice is to use “review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of . . . review, and publicly available data.” Policy Bulletin at 4.

economically comparable to China based on per capita GNI data from the 2017 World Development Report. Prelim. Decision Memo. 15–16; Surrogate Value Memo. at Att. I. Commerce determined that Malaysia, Brazil, Kazakhstan, Mexico, Romania, and Russia are significant producers of comparable merchandise and Malaysia as a significant producer of identical merchandise based on export data from UN Comtrade. Prelim. Decision Memo. at 16–17. Commerce reasonably explains that Malaysia has the best factors data because Malaysia is the only country on the record that produces both solar cells and solar modules and has a complete financial statement from a producer of both solar cells and solar modules. Final Decision Memo. at 31. After examining the import data submitted by the parties, Commerce determined that the import data for Malaysia, Brazil, Bulgaria and Romania are publicly available, contemporaneous with the review period, represent broad-market averages, tax- and duty-exclusive, and input specific. Prelim. Decision Memo. at 17. In support of its selection of Malaysia as the primary surrogate country, Commerce emphasizes that the surrogate data from Malaysia will contain imports of inputs from Hanwha¹² for the purpose of the production of subject merchandise. *See* Final Decision Memo. at 31. Furthermore, Commerce explains that the quality of the financial statement is a significant consideration in the selection of the surrogate country because Commerce relies on the financial statement to calculate the surrogate financial ratios accounting “for over 30 percent of total normal value.” *Id.*

Although Risen proposes an alternative, it fails to show why Commerce’s decisions are unreasonable. Commerce declined to find Bulgaria economically comparable to China explaining Bulgaria’s 2017 per capita GNI was \$7,760, falling outside of the per capita GNI range of economically comparable countries.¹³ Prelim. Decision Memo. at 15–16; *see* Surrogate Value Memo. at Att. I. Commerce published the Surrogate Value Memo. on July 31, 2019 and invited interested parties to comment on the surrogate country list and submit information to rebut, clarify, or correct the list before August 12, 2019, explaining that the surrogate country would be announced in the preliminary results. Surrogate Value Memo. at 1. No party submitted the 2018

¹² Hanwha is a large Malaysian company whose sole line of business is the production of solar cells and solar modules. Final Decision Memo. at 31–32.

¹³ Risen argues that Commerce should have considered Bulgaria economically comparable because the Office of Policy issued a new surrogate country list based on the 2018 GNI data containing Bulgaria and a majority of the review period occurred in 2018. Risen’s Br. at 36. Risen points to no law or practice requiring that Commerce change the surrogate country upon receipt of a new surrogate country list from the Office of Policy.

GNI data because it was not available at the time. *See* Resp. to Request for Surrogate Value Information at 2, Ex. 16, PD 220, bar codes 3891946–01, -16 (Sept. 19, 2019) (“Trina’s SV Submission”) (placing the 2018 GNI data on the record. In *Fresh Garlic from [China]*, 85 Fed. Reg. 2,400 (Dep’t Commerce Jan. 15, 2020) (prelim. results, prelim. rescission and final rescission, in part, of the 24th [ADD] Admin. Review; 2017–2018) (“*Fresh Garlic*”) and accompanying Issue and Decision Memo. A-570–831, Jan. 8, 2020 bar code 3928012–01 (“Fresh Garlic Prelim.”), Commerce requested information and comment from parties on the potential surrogate countries using the 2017 and 2018 GNI data on August 24, 2019 and September 9, 2019.¹⁴ *Fresh Garlic Prelim.* at 4. Commerce’s decision to determine economically comparable countries using the 2017 and 2018 GNI data in *Fresh Garlic* is distinguishable from this review because in this review the 2018 GNI data was not available until after the period to submit information and comments on the surrogate country list had already closed. *Compare* Surrogate Value Memo. at 1 (“Comments on the [surrogate country] list itself and information to rebut, clarify or correct it are due by 5:00 pm EST on August 12, 2019”) with *Fresh Garlic Prelim.* at 4, 4 n. 26 (“On August 28 and September 9, 2019, Commerce requested information and comments from interested parties relating to the selection of a surrogate country” in *Fresh Garlic*, placing the 2018 GNI data on the record on August 28, 2019). Therefore, Commerce’s decision to find Bulgaria economically comparable to China in this review is not arbitrary.

Commerce reasonably rejects Risen’s and Trina’s arguments that Bulgaria is a significant producer of subject merchandise. Commerce explains that evidence showing Malaysia produced both solar cells and solar modules is vital to its selection of Malaysia as the surrogate country. Final Decision Memo. at 31–32. The record evidence shows that Bulgaria is not a significant producer of solar cells or solar modules. *See id.* at 32. Commerce points to surveys on the record from the International Energy Agency and the U.S. Department of Energy which did not identify Bulgaria as a producer of solar cells or solar modules. *Id.* Furthermore, Commerce points to the financial statements for New Energy Systems¹⁵ indicating that its “main business

¹⁴ In *Fresh Garlic*, the Office of Policy provided a list of economically comparable countries based on the 2017 and 2018 GNI data and Commerce relied on both the 2017 and 2018 GNI data to select a surrogate country. *Fresh Garlic Prelim.* at 4, 28. The 2018 GNI list contained Bulgaria. *Id.*

¹⁵ New Energy Systems is a Bulgarian company which Risen and Trina argue produce subject merchandise. Final Decision Memo. at 31–32; *see* Trina’s Surrogate Value Submission at Ex. 14, PDs 232–234 bar codes 3891946–13–15 (Sept. 19, 2019).

lines involve water heaters, boilers, collectors and trade in heating goods” which Commerce does not consider to be comparable to solar cells and solar modules. *Id.* Therefore, Commerce’s determination that Bulgaria could not be the primary surrogate country, because it is not a significant producer of comparable merchandise, is supported by substantial evidence.

Commerce reasonably concludes that Romania is not a significant producer of comparable merchandise. Although Commerce determined that Romania was a significant producer of comparable merchandise in the *Prelim. Results* based on export data from UN Comtrade, *see* Prelim. Decision Memo. at 16–17, it explains in the Final Decision Memo. that record evidence indicates that Romania does not produce solar cells or modules. Final Decision Memo. at 32–33 (Romania was not identified as a solar cell or solar module producer in surveys by the International Energy Association and the U.S. Department of Energy). It is apparent from Commerce’s explanation that, to the extent possible, it preferred to select a primary surrogate country that produced both solar cells and modules, rather than a surrogate country that exported them. *See id.* at 31. Plaintiffs fail to explain why Commerce’s preference is unreasonable. Furthermore, despite determining that Bulgaria and Romania were not significant producers of comparable merchandise, Commerce reviewed available financial statements from Bulgaria and Romania on the record. *Id.* at 31–32. Commerce found that data for both countries was missing or incomplete; therefore, the information for those countries could not constitute the best available data.¹⁶ *See id.* at 31–33.

Although Commerce’s reasoning could be clearer, it is reasonably discernible that Commerce considered and addressed the National Renewable Energy Laboratory’s Crystalline Silicon Photovoltaic Module Manufacturing Costs and Sustainable Pricing: 1H 2018 Benchmark and Cost Reduction Map (“NREL Report”) placed on the record by Trina. *See* Final Decision Memo. at 22–23, 31, 33; *see also* Trina’s Rebuttal to Petitioner’s Comments on the Selection of Surrogate Values at Ex. 2, PD 244, bar code 3894536–01 (Sept. 26, 2021) (“NREL Report”). Plaintiffs contend that Commerce failed to address the NREL Report demonstrating that Malaysian surrogate values are not the best available information because their use results in production costs much higher than costs reported by the NREL Report both globally and in Malaysia. Trina’s Br. at 26–32; Risen’s Br. at

¹⁶ Commerce notes that there is no Romanian financial information on the record and one Bulgarian financial statement from New Energy Systems. Final Decision Memo. at 31–33. Commerce reviewed the Bulgarian financial statement and determined that the English translation is incomplete and does not mention solar cells. *Id.* at 31–32.

8–14. Explaining its decision to rely on the Malaysian import value for silver paste, Commerce states that it “evaluated the respondents’ benchmark comparisons and finds them unpersuasive.” Final Decision Memo. at 22. Commerce elaborates by addressing each benchmark placed on the record, one of which is the NREL Report. *Id.* at 23. Commerce again references the NREL Report in its explanation regarding the quality of the available data. *Id.* at 32 (“we are similarly unconvinced by Risen’s and Trina’s other contentions that the data of Bulgaria or Romania are of higher quality” explaining that the NREL Report emphasizes the importance of polysilicon as an input). It is discernible from Commerce’s explanation that it reviewed and considered the NREL Report, yet when viewing the record as a whole, selected Malaysia because it had the best available data.

The alleged unreliability of the Malaysian import value for silver paste does not render Commerce’s selection of Malaysia as the primary surrogate country unreasonable. Trina argues that the value for silver paste is unreliable, a factor weighing against selecting Malaysia as the primary surrogate country. Trina’s Br. at 38. Commerce explains that there are over 200 inputs involved in the production of the subject merchandise and the Malaysian data was superior to other data on the record. *See* Final Decision Memo. at 31. It is reasonably discernible from Commerce’s explanation that Commerce bases its primary surrogate country selection on the overall quality and availability of the data, rather than data for an individual input. *See id.*

The statute and Commerce’s regulation support its selection of Malaysia despite the alleged unreliability of silver paste. Both allow Commerce to select a primary surrogate country that is appropriate for most of the inputs and select additional surrogate countries if data from the primary surrogate country is unreliable or unavailable. *See* 19 U.S.C. § 1677b(c)(2)(B); 19 C.F.R. § 351.408(c)(1). Although the Malaysian import value for silver paste may be unreliable, all parties agree that silver paste is a relatively minor input for the subject merchandise. Final Decision Memo. at 31; Trina’s Br. at 20–21; Risen’s Br. at 10. Therefore, in this case, it would not be unreasonable for Commerce to select a primary surrogate country and select another surrogate country for silver paste. *See SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351 (Fed. Cir. 2020) (upholding Commerce’s primary surrogate country selection but remanding due to the aberrancy of one input). Indeed, Commerce reasonably relies on a secondary surrogate country to value solar glass, explaining that Romania’s

HTS classification was more specific than Malaysia's HTS classification.¹⁷ Final Decision Memo. at 26–27.

II. Surrogate Values

Plaintiffs challenge Commerce's surrogate value for silver paste, EVA and backsheet. Plaintiffs argue that the Malaysian import value for silver paste is not the best available information to value silver paste because it is unreliable. Trina's Br. at 18–25; Risen's Br. at 8–28. Risen argues that Commerce's Malaysia HTS valuation of its EVA and backsheet are not supported by substantial evidence and arbitrary. Risen's Br. at 32–35. Defendant argues that the Malaysian import value for silver paste is the best available information to value silver paste because Commerce values factors of production from a single surrogate country unless the data is unavailable or unreliable and the Malaysian value is not aberrant or unreliable. Def.'s Br. at 33–39. Defendant argues that Commerce's valuation of EVA and backsheet is not arbitrary and is supported by substantial evidence. *Id.* at 27–30. For the following reasons, the court remands Commerce's surrogate values for silver paste, backsheet, and EVA for reconsideration or further explanation consistent with this opinion.

A. Silver Paste

Plaintiffs challenge Commerce's decision to rely on the Malaysian import value for silver paste arguing the import value is unreliable because it is aberrant, does not reflect the commercial reality of solar cell and module production in China, and the Malaysia HTS classification is not specific to silver paste. *See* Risen's Br. at 8–28; Trina's Br. at 18–25. Defendant argues that Commerce's choice of the Malaysian import value for silver paste is reasonable. Def.'s Br. at 33–39.

Commerce values the factors of production from the primary surrogate country and resorts to a secondary surrogate country only if data from the primary surrogate country is unavailable or unreliable. 19 C.F.R. § 351.408(c)(1)–(2). Commerce disregards aberrational data because it is unreliable. *Antidumping and Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997) (final rule) (“We agree that ‘aberrational’ surrogate input values should be disregarded,” citing as an example *Certain Cased Pencils from [China]*, 59 Fed. Reg. 55,625, 55,630 (Dep't Commerce Nov. 8, 1994) (final deter. of sales at less than fair value) (disregarding Indian input

¹⁷ Plaintiffs argue that Bulgaria should have been selected as the primary surrogate country because it has the best input data for solar glass. Trina's Br. at 36; Risen's Br. at 38. Commerce explains that Bulgaria is not economically comparable, does not have a producer of subject merchandise, and the financial statement on the record is incomplete. Final Decision Memo. at 31–32.

values because they were aberrational, valuing the inputs with Pakistani import statistics)). In determining whether an input's surrogate value is aberrational, Commerce "typically compares the prices for an input from all countries found to be at a level of economic development comparable to the NME whose products are under review from the [period of review] and prior years." Final Decision Memo. at 21. Commerce disregards "small-quantity import data . . . when the per-unit value is substantially different from the per-unit values of larger quantity imports of that product from different countries." *SolarWorld*, 962 F.3d at 1358.

Commerce fails to provide a sufficient justification for its conclusion that the Malaysian import value for silver paste is reliable in light of detracting evidence that the value is aberrant. UN Comtrade Import Data for HTS 711590 for each of the economically comparable potential surrogate countries identified by Commerce is reproduced below. See Risen Rebuttal Surrogate Values at SVR-2, PDs 242–243 bar codes 3894478–01, -02 (Sept. 26, 2019) ("Risen's SV Rebuttal"); Risen's Br. at 13; Final Decision Memo. at 22 n.91 ("Percentage of Total Quantity" and "Total" calculated by the court).

Country	Trade Value (USD)	Total Import Quantity (KG)	Average Import Value (USD/KG)	% of Total Quantity
Mexico	42,909,979.00	320,755	133.78	83.54%
Malaysia	478,950,097.00	56,578	8,645.31	14.73%
Brazil	336,519.00	6,179	54.46	1.61%
Kazakhstan	76,862.00	347	221.50	0.09%
Russia	632,695.00	106	5,968.82	0.03%
Romania	No import quantity			
Total	522,906,152.00	383,965		100%

Commerce explains that although the Malaysian import value for silver paste is higher than other countries on the record, it is not aberrant because it is comparable to the Russian import value of silver paste. Final Decision Memo. at 21. However, the Russian data is the smallest quantity of import data on the record (.03%) and its per-unit value (\$5,968.82/KG) is substantially higher than the per-unit value of three other countries with larger import quantities (Mexico, Brazil, and Kazakhstan). Commerce cannot rely upon the Russian import value for silver paste as that value itself represents a small-quantity, large per-unit seemingly aberrational value. See *SolarWorld*, 962 F.3d at 1358. Nor can Commerce rely on the Malaysian

historical import value data it placed the record to support its determination because it failed to provide parties an opportunity to submit factual information in response to that data. See 19 C.F.R. § 351.301(c)(4). Although Defendant correctly asserts that Commerce may place information on the record at any time, Def.'s Br. at 37, Commerce is required to provide parties with an "opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by [Commerce] by a date specified by the Secretary."¹⁸ 19 C.F.R. § 351.301(c)(4). Commerce placed the historical import value data on the record after the record closed and did not reopen the record, denying the parties an opportunity to submit information to rebut, clarify, or correct the information.¹⁹ See *id.* § 351.302(d) (explaining Commerce will reject untimely filed information); *Id.* Appendix IV to Part 351. If Commerce wishes to continue using the historical import value data on remand, it can reopen the record for parties to place additional information on the record rebutting, clarifying, or correcting the historical import value data placed on the record by Commerce, consistent with its regulation.²⁰ *Id.* § 351.301(c)(4).

Commerce also fails to provide a sufficient justification for its conclusion that the Malaysian import value for silver paste is reliable in light of detracting evidence that the value is not reflective of the commercial reality of solar cell and module production. Commerce's "surrogate value must be as representative of the situation in the NME country as is feasible" and result in a dumping margin as accurate as possible. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Nation Ford Chem. Co. v.*

¹⁸ Risen argues it was improper for Commerce to place the historical import value data on the record. Risen's Br. at 19–20. Risen is incorrect. See 19 C.F.R. § 351.301(c)(4).

¹⁹ 19 C.F.R. Appendix IV to Part 351 provides the approximate deadlines for parties in antidumping administrative reviews; however, the actual deadline for a review segment may be set by the Secretary. 19 C.F.R. Appendix IV to Part 351 at n.1. Commerce required parties to place surrogate value information on the record for consideration in the *Preliminary Results* by September 9, 2019 and rebuttal comments by September 16, 2019. Surrogate Value Memo. at 2. Commerce placed the historical Malaysian silver paste import values on the record in conjunction with the *Preliminary Results* on January 31, 2020 and did not reopen the record for the submission of additional factual information. See Factor Valuation Memo. at Att. I, PR 426 bar code 3939852–01 (Jan. 31, 2020). Contrary to Defendant's argument, in this case, the interested parties could not have adequately responded to the historical Malaysian import value data placed on the record by Commerce in their agency briefs unless Commerce reopened the record and allowed parties to place rebuttal information on the record to aid in their response.

²⁰ In relying on the Malaysian historical import value for silver paste, Commerce also fails to address the possibility that when compared to other countries, the Malaysian import value for silver paste is regularly aberrant. On remand, if Commerce wishes to continue to rely on the Malaysian import value to value silver paste, it should explain why the historical and present Malaysian import value data are not regularly aberrant when compared to other countries on the record.

United States, 21 C.I.T. 1371, 1375–76 (1997). Plaintiffs placed several benchmark metrics on the record which they argue demonstrate that the Malaysian import value for silver paste is inconsistent with import values from other market economies. See Trina’s Section D Questionnaire Appendix XII Resp. at Ex. D-6, PD 157–158 CD 112–132 bar codes 3855927–01,-02, 3855903–01–17, 3856027–01–04 (July 1, 2019) (“Trina’s DQR”) (providing information on Trina’s market economy purchases of silver paste during the period of review);²¹ NREL Report at 37; Risen’s SV Rebuttal at Ex. SVR-2 (the Turkish import value for the period of review is \$214.76 USD/KG and the Bulgarian import value for the period of review is \$390.27 USD/KG) (collectively, “Benchmark Data”). Commerce explains why it declines to value silver paste using each of the benchmark data sets on the record but it does not explain why, when considered collectively, these benchmark data sets do not indicate the Malaysian import value for silver paste is unreliable.²² See Final Decision Memo. at 22–23.

Furthermore, Commerce’s rationale for rejecting the NREL Report benchmark data for silver paste is not supported by substantial evidence. The NREL Report demonstrates that the screen-printing of silver and aluminum paste (“metallization”) cost for monocrystalline PERC cell fabrication in urban China accounts for 24% of the total cost for cell conversion, or $\$0.015 \pm \$0.002/\text{watt}$. *Id.* Metallization costs range from $\$0.013$ and $\$0.049$ across all solar cells studied by the NREL Report. *Id.* at 37. The silver paste costs using Malaysian data are multiples higher than the combined metallization costs reflected in the NREL report.²³ Commerce explains it declined to rely on the NREL Report to assess the reasonableness of the Malaysian import value for silver paste because the NREL Report “groups the silver paste costs with many other costs.” Final Decision Memo. at 23. However, the NREL Report combines the cost of silver paste with one other cost: the cost of aluminum paste.²⁴ NREL Report at 26. Com-

²¹ Trina purchased [] KG of silver paste at a price of [] USD/KG. Trina’s DQR at Ex. D-6.

²² Excluding the Malaysian and Russian import values for silver paste, the remaining import values of silver paste on the record range from \$54.56 (Brazil) to \$792.84 (Thailand). Benchmark Data; Final Decision Memo. at 22 n.91.

²³ Using the Malaysian import value for silver paste, Commerce calculated Risen’s and Trina’s silver paste costs at [] and [] per watt respectively. Risen’s Br. at 13; Trina’s Br. at 22; see also Amended Final Analysis Memorandum-Trina, PD 502 CD 494–496 bar code (Dec. 2, 2020). The silver paste cost accounts for [] of Risen’s manufacturing costs and [] of Trina’s material costs. Risen’s Br. at 13; Trina’s Br. at 24.

²⁴ The NREL Report and record evidence show that silver paste accounts for a majority of the combined cost of silver and aluminum pastes. See NREL Report at 26 (77% of the metallization costs for monocrystalline PERC cell fabrication in urban China is due to silver paste and 23% is due to aluminum paste); see also Risen’s Admin Br. at 14–15; Risen’s Br. at 13–14.

binning the cost of silver and aluminum paste leads to a cost greater than the cost of silver paste alone, resulting in an overestimation of the cost of silver paste in the NREL Report. *See* Oral Argument at 32:30–35:45; *see also* Risen’s Br. at 11–15; NREL Report at 5–6 (explaining variable costs are calculated based on standard accounting practices). The court cannot discern why Commerce believed that it was reasonable to disregard the NREL Report’s metallization cost as a benchmark if the benchmark overestimates the value of silver paste, and the values used by Commerce are multiples higher than the NREL Report’s value.

Finally, Commerce fails to address Risen’s argument that its reliance on Malaysia HTS 7115.90.10.00 covering other articles or catalysts of gold or silver is improper because it is not specific to silver paste. In its agency brief, Risen argued that Malaysia HTS 7115.90.10.00 is not a reasonable classification for silver paste because it is too broad. Risen’s Admin. Br. at 3. Commerce does not address this argument in the Final Decision Memo. On remand, if Commerce wishes to continue to rely on the Malaysian import value for silver paste, Commerce should explain why its decision to do so is reasonable in light of Risen’s specificity argument.

B. Backsheet and Ethyl Vinyl Acetate

Risen argues that Commerce’s choice of Malaysia HTS classifications to value its backsheet and EVA inputs are not supported by substantial evidence because Commerce based its choice in both instances on an “unsubstantiated difference between the flexibility of a ‘film’ or a ‘sheet.’” Risen’s Br. at 32–35. Risen also argues that these determinations are arbitrary because they deviate from Commerce’s prior treatment of identical inputs without an adequate explanation. *Id.* Defendant argues that Commerce’s determinations are supported by substantial evidence and not arbitrary because Commerce based its determinations on the inputs, Risen’s descriptions, and the available HTS subheadings. Def.’s Br. at 27–28. For the following reasons, Commerce’s valuations for backsheet and EVA are remanded for reconsideration or additional explanation consistent with this opinion.

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp.*, 340 U.S. at 477 (quoting *Consol. Edison Co.*, 305 U.S. at 229). “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Id.* at 488. In providing its explanation, Commerce must articulate a “rational connection between the facts found and the choice made.” *Burlington*,

371 U.S. at 168. An agency's decision is arbitrary when, *inter alia*, it deviates from an established practice followed in similar circumstances and does not provide a reasonable explanation for the deviation. *See Consol. Bearings Co.*, 348 F.3d at 1007; *see also SKF USA Inc.*, 263 F.3d at 1382.

Commerce's use of Malaysia HTS 3920.62.1000 to value Risen's backsheet is arbitrary and not supported by substantial evidence. Commerce values Risen's backsheet using Malaysia HTS 3920.62.1000 covering Poly(Ethylene Terephthalate): Plates And Sheets. Final Decision Memo. at 46. In support of its determination, Commerce explains that the purpose of backsheet is "to protect solar cells in a solar module." *Id.* Since film is a "lighter, less rigid product than plates and sheets" treating Risen's backsheet as a film is improper because film is not protective. *Id.* Risen placed evidence on the record demonstrating that its backsheet input is thin and flexible.²⁵ Risen's Section D Resp. at Ex. D-36, PD 160 CD 134 bar codes 385698201, 3856915-14 (July 3, 2019) ("Risen's Section D Resp."). Commerce does not address the evidence placed on the record by Risen or explain why its determination is reasonable in light of the evidence showing that Risen's backsheet satisfies Commerce's definition of film. To the extent that Commerce wishes to continue valuing Risen's backsheet using Malaysia HTS 3920.62.1000, Commerce should address the record evidence detracting from its determination.

Commerce's determination is also arbitrary. Risen proffered evidence that Commerce has historically valued backsheet under HTS classifications comparable to Malaysia HTS 3920.62.9000 covering Poly(Ethylene Terephthalate): Other Than Plates And Sheets and that Risen's backsheet is the same as the backsheet used by respondents in past reviews. Risen Final Surrogate Value Submission-Part I at Ex. SV2-7, PD 365 bar code 3926048-03 (Jan. 1, 2020) ("Risen's Final SVs Part I"). Commerce addresses Risen's argument in passing, stating "Risen's reference to a prior SV selection does not outweigh the record evidence showing that the input is a sheet," Final Decision Memo. at 46, yet Commerce does not explain how the record as a whole supports its determination that backsheet is a sheet. Absent an explanation for Commerce's deviation from its historical treatment of backsheet, Commerce's determination is arbitrary. If Commerce wishes to continue valuing backsheet using Malaysia HTS 3920.62.1000 on remand, it should explain its departure from its historical treatment.

²⁵ Risen's backsheet is [] mm thick and sold in rolls. Risen's Section D Resp. at Ex. D-36, PD 160 CD 134 bar codes 3856982-01, 3856915-14 (July 3, 2019).

Commerce fails to support its valuation of Risen's EVA with substantial evidence. Commerce values Risen's EVA input using Malaysia HTS 3920.10.1900 covering Polymers of Ethylene: Plates And Sheets: Other Than Rigid. In support of this determination Commerce explains that it considers Risen's EVA a sheet rather than a film because it is over .5mm thick and sheets and plates are thicker and more rigid than film. *Id.* Commerce's explanation fails to address record evidence submitted by Risen demonstrating that the product is flexible and described as a film. Risen Final Surrogate Value Submission–Part II at Ex. SV2–12 PD 374, CD 412 barcodes 3926074–01, 3926060–01 (Jan. 2, 2020) (“Risen's Final SVs Part II”). On remand, if Commerce wishes to continue valuing Risen's EVA using Malaysia HTS 3920.10.1900, it should address the evidence detracting from its determination and explain its departure from its historical treatment of EVA.²⁶ See Risen Final SVs Part I at Ex. SV 2–7.

III. Surrogate Financial Ratios

Although Commerce's reasoning could be clearer, its surrogate financial ratio calculations are supported by substantial evidence, consistent with its practice, and do not double count labor and energy costs. Plaintiffs argue that the proportion of Hanwha's cost of sales currently allocated to materials, labor, and energy (“MLE”) only includes costs for raw materials. Risen's Br. at 28–30. Therefore, Commerce's allocation of the remaining cost of sales amount to overhead rather than to MLE costs fails to allocate any line item costs for labor and energy to the MLE costs, inflating overhead expenses and distorting the overhead ratio. *Id.* at 30–32. Plaintiffs argue that Commerce's allocation to overhead is contrary to Commerce's practice and the financial statement notes accompanying Hanwha's financial statement. *Id.* Further they argue, as a result of Commerce's allocations, Commerce double counts energy and labor costs by including labor and energy costs in both the numerator of the overhead ratio and as separate factors of production. *Id.* at 30–32. Defendant argues that Commerce's surrogate ratio calculations are consistent with the notes of the financial statement and that Commerce's MLE costs include both labor and energy costs. Def.'s Br. at 39–43. Defendant further contends that Commerce enjoys broad discretion to select its methodology to calculate surrogate financial ratios and Plaintiffs have failed to demonstrate that Commerce has a consistent practice of excluding energy and labor costs from the factors of production

²⁶ Defendant provides several reasons supporting Commerce's deviation from its historical treatment of backsheets and EVA in its brief. Def.'s Br. at 30–32. Those reasons are absent from Commerce's Final Decision Memo., see Final Decision Memo. at 46, and the court will not rely on them.

under these circumstances. Def.'s Br. at 43. For the following reasons, Commerce's surrogate ratio calculations are sustained.

In antidumping investigations and reviews involving NME countries Commerce determines "the normal value of subject merchandise on the basis of the value of the factors of production utilized in producing merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B). "[T]he factors of production utilized in producing merchandise include, but are not limited to— (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." *Id.* § 1677b(c)(3). For the purpose of determining the normal value of subject merchandise, "the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country" when calculating the manufacturing overhead, general expenses, and profit amounts. 19 C.F.R. § 351.408(c)(4).

Here, Commerce uses solar cell and module producer Hanwha's financial statement to value general expenses, profit, and representative capital costs using surrogate financial ratios. *See* Final Decision Memo. at 47–49. Commerce uses manufacturing, labor, and energy ("MLE") costs as part of the denominator in its calculation of the overhead ratio, the sales, general, and administrative costs ("SG&A") ratio, and the profit ratio.²⁷ *Id.* Commerce explains that it is relying on the total inventories cost identified in Note 17 of the financial statement to calculate MLE. *Id.* Note 17 identifies the total inventories cost as "RM 1.648 million (2017: RM2,142 million)."²⁸ *See* Risen Final Surrogate Value Submission—Part I at Ex. SV28 at 51, PD 365 bar code 3926048–03 (Jan. 1, 2020) ("Hanwha Financial Statement"); Final Decision Memo. at 47–48. Commerce points to the language in Note 2.12 explaining that it relied in part on the valuation of finished inventory and work-in-progress inventory as evidence that labor and energy costs are included in the valuation of these

²⁷ Commerce calculates the overhead ratio as overhead costs/(MLE + change in inventory). It calculates the SG&A ratio as total SG&A/(total MLE-traded goods + manufacturing overhead). Final Decision Memo. at 49. The profit ratio is profit/(MLE + manufacturing overhead – change in finished goods + SG&A). *Id.*

²⁸ In the preliminary results, Commerce constructed Hanwha's MLE cost by reducing the entire amount of the cost of sales line of Hanwha's Financial Statement by the deductions listed in Note 9 of Hanwha's financial statements to arrive at a raw materials cost. Final Decision Memo. at 47. Commerce then added labor and energy costs. *Id.* Commerce explains that its preliminary MLE cost failed to take Note 2.12 and Note 17 from Hanwha's financial statement into account. *Id.*

inventories. *Id.* at 47; Ministerial Error Memo. at 5. Commerce’s reliance is reasonable because Hanwha’s financial statement indicates that it is prepared in accordance with International Financial Reporting Standards (“IFRS”).²⁹ See Hanwha Financial Statement at 16 (“The financial statements . . . have been prepared in accordance with Malaysian Financial Reporting Standards (“MFRS”), [IFRS] and the Companies Act 2016 in Malaysia”). IFRS Standard IAS 2³⁰ requires that IFRS-compliant financial statements expense all variable costs in the cost of inventory. International Financial Reporting Standards Foundation, *IAS 2 Inventories, About*, <https://www.ifrs.org/issued-standards/list-of-standards/ias-2-inventories/> (last accessed Mar. 30, 2022).³¹ Thus, the court can reasonably discern from Commerce’s citation to both Notes 2.12 and 17 that Commerce believes that because Hanwha’s financial statement is compliant with IFRS, it must include labor and energy costs in inventories cost.³² IAS 2; see Final Decision Memo. at 47–48; compare IAS 2 with Hanwha Financial Statement at 29 (significant linguistic overlap). After determining that the inventories cost included MLE costs, Commerce reduced the inventories cost by the change in finished goods inventories, isolating the MLE costs and included them as part of the denominator of the surrogate financial ratios.³³ Final Decision Memo. at 48. Having accounted for MLE, depreciation, and the change in finished goods balance, Commerce reasonably allocated the remaining amount of the cost of sales balance to overhead.

²⁹ IFRS “is a not-for-profit international organization responsible for developing a single set of high-quality accounting and sustainability disclosure standards” (“IFRS Standards” or “IFRS Standard”) to promote transparency, accountability and efficiency in global financial markets. International Financial Reporting Standards Foundation, *About Us*, <https://www.ifrs.org/about-us/> (last accessed Mar. 30, 2022).

³⁰ “IAS 2 provides guidance for determining the cost of inventories and the subsequent recognition of the cost as an expense. . . . The cost of inventories includes all costs of purchase, costs of conversion (direct labour and production overhead) and other costs incurred in bringing the inventories to their present location and condition.” International Financial Reporting Standards Foundation, *IAS 2 Inventories, About*, <https://www.ifrs.org/issued-standards/list-of-standards/ias-2-inventories/> (last accessed Mar. 30, 2022).

³¹ Commerce selected Hanwha’s financial statement in part because it had been audited. Prelim. Decision Memo. at 27–28. The audit confirmed that Hanwha’s financial statement complied with IFRS Standards. Hanwha Financial Statement at 6.

³² Note 2.12 further explains Hanwha’s calculation of costs associated with “bringing the inventories to their current location or condition,” includes labor and energy costs. Hanwha Financial Statement at 29.

³³ To isolate the MLE costs for inventories produced and sold in 2018, Commerce reduced the inventories costs included in the cost of sales by the decrease in finished goods balance. See Final Decision Memo. at 48. The decrease in finished goods balance is the difference between the finished goods beginning balance (valued at both cost and net realizable value) and the finished goods ending balance (valued at both cost and net realizable value). See *id.* No party disputes the downward adjustment for finished goods.

Plaintiffs argue that Commerce double counts labor and energy costs by including labor and energy costs in the overhead ratio's numerator and separately valuing labor and energy as factors of production when calculating normal value. Risen's Br. at 30–32. Plaintiffs contend that when energy or labor costs are not specifically broken out in the financial statement and assigned to the MLE denominator, Commerce does not separately value labor and energy in the factors of production because they are accounted for in the numerator of the overhead financial ratio.³⁴ *Id.* Yet Plaintiffs' argument assumes that Commerce did not isolate the labor and energy costs and account for them in the MLE denominator when calculating the surrogate financial ratios. However, Commerce explains that it isolates the labor and energy costs using the notes in Hanwha's Financial Statement and includes those costs in the surrogate ratios' denominator. Final Decision Memo. at 48; Ministerial Error Memo. at 5. Since Commerce isolates and removes the MLE costs from Hanwha's cost of sales before calculating the surrogate financial ratios, labor and energy costs are not included in total overhead and thus are not included in the numerator of the overhead ratio.³⁵ Therefore, the inclusion of labor and energy costs in the factors of production does not double count the labor and energy costs and is consistent with the determinations cited by Plaintiffs.

³⁴ *Hand Trucks and Certain Parts Thereof From [China]*, 80 Fed. Reg. 33,246 (Dep't Commerce June 11, 2015) (Final Results of [ADD] Admin. Review and Rescission of Review in Part; 2012–2013) and accompanying Issues and Decision Memo. at 8, A570–891, June 4, 2015, bar code 3282119–01 (“it is the Department's recent practice to set energy factors of production inputs to zero if there is not a separate line item for energy factors on the financial statements”); *Solar Cells from China*, 83 Fed. Reg. 35,616 (Dep't Commerce July 27, 2018) (final results of [ADD] admin. review and final deter. of no shipments; 2015–2016) and accompanying Issues and Decision Memo. at 47, A-570–979, July 11, 2018, bar code 3729972–01 (“if Commerce valued a respondent's FOPs, including energy, and calculated financial ratios using energy costs (because they could not be removed from the surrogate company's expenses), it would be double counting energy expenses.”); *1,1,1,2-Tetrafluoroethane From [China]*, 79 Fed. Reg. 30,817 (Dep't Commerce May 29, 2014) ([ADD] investigation, prelim. deter. of sales at less than fair value, affirmative prelim. deter. of critical circumstances, in part, and postponement of final deter.) and accompanying Issues and Decision Memo. at 22, A-570–998, May 21, 2014, bar code 3203506–01 (“Here, we will not disregard energy or labor in the normal value calculation because, except for depreciation, all of Thai-Japan's cost of sales is treated as material, labor and energy in the surrogate financial ratio calculation, therefore, we are not double counting these expenses when we include energy and labor in our normal value calculation”).

³⁵ Commerce calculates total overhead by subtracting total MLE costs from the cost of sales line from Hanwha's Financial Statement. Final Decision Memo. at 48. Commerce calculates the overhead ratio by dividing total overhead by the sum of MLE and the change in inventory. *Id.* at 49. Overhead is a representative capital cost; thus, if Commerce could not isolate the MLE costs, those costs would be accounted for in both the factors of production for amounts of energy and other utilities consumed and representative capital cost. See 19 U.S.C. § 1677b(c)(3); 19 C.F.R. § 351.408(c).

IV. Application of Partial Adverse Facts Available

Commerce's use of facts available with an adverse inference is unsupported by substantial evidence. Commerce fails to demonstrate that Risen and Trina did not cooperate to the best of their ability. Commerce also fails to demonstrate that Risen and Trina have leverage to induce the cooperation of their non-cooperative unaffiliated suppliers; the non-cooperative unaffiliated suppliers are evading their own duties by exporting subject merchandise through Risen and Trina; or using the highest factor of production consumption rates on the record results in an accurate dumping margin. Commerce's application of facts available with an adverse inference is remanded for reconsideration or additional explanation consistent with this opinion.

When Commerce is missing information necessary to make an ADD determination, it uses facts otherwise available to fill the gap in the record created by the missing information. *See* 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–81 (Fed. Cir. 2003). If a gap exists because a party failed to cooperate to the best of its ability, Commerce may use an adverse inference when selecting facts available to fill the gap. 19 U.S.C. § 1677e(b). A party cooperates to the best of its ability when it does “the maximum it is able to do.” *Nippon*, 337 F.3d at 1380–81 (Fed. Cir. 2003). However, under 19 U.S.C. § 1677e(a) Commerce may use adverse inferences against a cooperative respondent, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014). When using facts available with an adverse inference under *Mueller*, the predominant interest when determining the antidumping rate must be accuracy. *Id.* at 1235.

Commerce fails to demonstrate that Trina and Risen did not put forth the maximum effort to provide full and complete responses to inquiries from Commerce. Risen placed evidence on the record demonstrating that it contacted each of its non-cooperative unaffiliated suppliers on at least two occasions asking them to provide the factor of production data and threatening to cease doing business with the suppliers if they failed to cooperate. Risen's Section D Resp. at Ex. D-21. Risen also sent the factor of production questionnaires issued by Commerce to the non-cooperative unaffiliated suppliers. *Id.* Further attempting to induce the cooperation of the non-cooperative unaffiliated suppliers, Risen offered to provide the non-cooperative unaffiliated suppliers access to Risen's legal and accounting teams. *Id.* Trina placed evidence on the record that it began making formal written requests to its non-cooperative unaffiliated suppliers request-

ing their cooperation in supplying the factor of production data in May 2019. Trina's Section D Questionnaire Resp. at Ex. D-2, CD 112-132 bar code 3855903-01 (July 1, 2019) ("Trina's Section D. Resp."). Trina subsequently made several additional requests for the non-affiliated suppliers' cooperation via letter and telephone. *Id.*

Commerce fails to demonstrate that Trina and Risen did not cooperate to the best of their ability by continuing to do business with the non-cooperative unaffiliated suppliers. Commerce argues that Trina's supplier relationships are longstanding and although it does not know the length of the relationships between Risen and its suppliers, it is unlikely that all the relationships are new. Final Decision Memo. at 12. Commerce further argues that there is no record evidence showing that Trina or Risen have followed through with threats to end relationships with unaffiliated suppliers who were uncooperative in prior reviews.³⁶ *Id.* Commerce's argument assumes, without evidence, that the non-cooperative unaffiliated suppliers in the present review are the same suppliers who were uncooperative in prior reviews. *Id.* Commerce must support its determinations with substantial evidence on the record. Commerce could have, but did not, issue questionnaires asking respondents to provide Commerce with a list of non-cooperative unaffiliated suppliers from past reviews and compared it to a list of current non-cooperative unaffiliated suppliers to determine if there is any overlap. *See id.* at 15 n.57.

Commerce also fails to show that Trina or Risen have sufficient leverage to induce the cooperation of their non-cooperative unaffiliated suppliers and has not shown that there is a threat of duty evasion by the non-cooperative unaffiliated suppliers absent the use of facts available with an adverse inference. Commerce asserts that Trina and Risen had leverage over their non-cooperative unaffiliated suppliers because they were large exporters to the U.S. and could threaten to cease doing business with the non-cooperative unaffiliated suppliers in order to induce their cooperation. *Id.* at 14-15. Indeed, record evidence shows that Trina and Risen did make such threats and those threats did not induce the cooperation of the suppliers. Risen's Section D Resp. at Ex. D-21 p. 14 ("if your company refuse [sic] to cooperate by providing the requested data, Risen would be forced to refuse to purchase any products from your company");

³⁶ Commerce states that "neither Trina or Risen have cited to one instance where they stopped doing business because parties refused to provide them with [factors of production]." Final Decision Memo. at 16. Yet, none of Commerce's questionnaires to Trina and Risen asked either respondent to provide such evidence. The best of its ability standard requires a respondent to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon*, 337 F.3d at 1382. Commerce may not determine that a respondent failed to cooperate to the best of its ability because it did not provide information that Commerce did not request.

Trina's Section D Resp. at Ex. D-2 ("your cooperation is significantly important both for our response to the antidumping duty administrative review as well as our long-term business relationship").

Nor has Commerce shown a possibility of duty evasion by the non-cooperative unaffiliated suppliers. Commerce speculates that the suppliers' consumption rates may be higher than Risen's and Trina's rates; therefore, by withholding information, the non-cooperative unaffiliated suppliers will not receive a separate rate and can sell their merchandise through Risen and Trina. Final Decision Memo. at 13–14. The record does not support Commerce's speculation. None of the non-cooperative unaffiliated suppliers are mandatory respondents or named Chinese exporters of subject merchandise; therefore, there is no rate for the non-cooperative unaffiliated suppliers to evade. *Mueller*, 753 F.3d at 1235 ("here is the possibility that Ternium could evade its own AFA rate of 48.33 percent by exporting its goods through Mueller if Mueller were assigned a favorable dumping rate.") *Compare Initiation Notice* 84 Fed. Reg. at 9,299 (listing named Chinese exporters to be reviewed) *with* Risen's Section A Questionnaire Resp. at Exs. A-14 & A-15, PD 130 CD 54 bar code 384633201 (June 10, 2019) (listing unaffiliated solar cell and solar module suppliers); Trina's DQR at Ex. DA-36 (listing Trina's non-cooperative unaffiliated suppliers). Finally, Commerce fails to explain why the use of the highest factor of production consumption rates result in a more accurate dumping margin. *Mueller*, 753 F.3d at 1232–33.

On remand, if Commerce wishes to use facts available with an adverse inference, Commerce should address the evidence detracting from its determination that Trina and Risen have leverage over their non-cooperative suppliers and support their speculation of duty evasion with substantial evidence from the record. Commerce should also explain how the adverse facts it selected lead to an accurate dumping margin.

V. Commerce's Separate Rate Calculation

Commerce's determination in the *Final Results* to apply the weighted-average antidumping margins calculated for Risen and Trina to the separate rate respondents is not supported by substantial evidence. The separate rate is "the weighted average of the estimated weighed average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(a); *see also Final Results* at 62,278 n.6. Thus, because the separate rate is determined by, and derivative of, the rate calculated for Risen and Trina, and the court

has found that those rates are not supported by substantial evidence, Commerce's separate rate calculation is also not supported by substantial evidence and is remanded for reconsideration consistent with this opinion.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations with respect to its selection of Malaysia as the primary surrogate country and its surrogate financial ratio calculations. Commerce's surrogate values for silver paste, EVA, and backsheet, its application of facts available with an adverse inference, and its separate rate calculation are remanded. In accordance with the foregoing, it is

ORDERED that Commerce's *Final Results* are remanded for further explanation or reconsideration consistent with this opinion; and it is further

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

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the Joint Appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

Dated: April 4, 2022

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

Index

Customs Bulletin and Decisions
Vol. 56, No. 16, April 27, 2022

U.S. Customs and Border Protection *CBP Decisions*

	CBP No.	Page
Implementation of the Electronic System for Travel Authorization (ESTA) at U.S. Land Borders	22-07	1

General Notices

	Page
Procedures for Debarring Vessels From Entering U.S. Ports	36
Modification of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Belts	50
Revocation of One Ruling Letter, Modification of One Ruling Letter, and Revocation of Treatment Relating to the Tariff Classification of Mechanically Adjustable Bed Base	57
Proposed Modification of 15 Ruling Letters and the Revocation of Treatment Relating to the Applicability of Subheading 9817.00.96, HTSUS to Certain Footwear Products for Men and Women	65

U.S. Court of Appeals for the Federal Circuit

	Appeal No.	Page
Red Sun Farms, Plaintiff-Appellant v. United States, Florida Tomato Exchange, Defendants-Appellees	2020-2230	106
Red Sun Farms, Plaintiff-Appellant v. United States, Florida Tomato Exchange, Defendants-Appellees	2020-2230	115
Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agrícola De Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, Sistema Producto Tomate, Plaintiffs-Appellants v. United States, Florida Tomato Exchange, Defendants-Appellees	2020-2300	120
Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., Kaliroy Fresh LLC, Plaintiffs-Appellants v. United States, Florida Tomato Exchange, Defendants-Appellees	2020-2267	134

U.S. Court of International Trade
Slip Opinions

	Slip Op. No.	Page
Risen Energy Co., Ltd., Plaintiff, and Trina Solar Energy Co., Ltd. et al., Consolidated Plaintiffs, and Shanghai BYD Co., Ltd. et al., Plaintiff-Intervenors, v. United States, Defendant, and Sunpower Manufacturing Oregon, LLC, Defendant- Intervenor and Consolidated Defendant-Intervenor.	22–33	151