

# U.S. Customs and Border Protection

19 CFR PART 122

CBP DEC. 22-09

## TECHNICAL AMENDMENT TO LIST OF USER FEE AIRPORTS: REMOVAL OF ONE AIRPORT

**AGENCY:** U.S. Customs and Border Protection; DHS.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** This document amends U.S. Customs and Border Protection (CBP) regulations by removing one airport from the list of user fee airports. User fee airports are airports that have been approved by the Commissioner of CBP to receive, for a fee, the customs services of CBP officers for processing aircraft, passengers, and cargo entering the United States, but do not qualify for designation as international or landing rights airports. Specifically, this technical amendment reflects the removal of the designation of user fee airport status for the Hillsboro Airport in Hillsboro, Oregon.

**DATES:** Effective May 19, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ryan Flanagan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at *Ryan.H.Flanagan@cbp.dhs.gov* or 202-550-9566.

### SUPPLEMENTARY INFORMATION:

#### Background

Title 19, part 122 of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft engaged in international commerce and the transportation of persons and cargo by aircraft in international commerce.<sup>1</sup> Generally, a civil aircraft arriving from outside the United States must land at an airport designated as an international airport. Alternatively, civil

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<sup>1</sup> For purposes of this technical rule, an “aircraft” is defined as any device used or designed for navigation or flight in air and does not include hovercraft. 19 CFR 122.1(a).

aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.<sup>2</sup>

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 Stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an alternative option for civil aircraft seeking to land at an airport that is neither an international airport nor a landing rights airport. This alternative option allows the Secretary of Treasury to designate an airport, upon request by the airport authority or other sponsoring entity, as a user fee airport.<sup>3</sup> Pursuant to 19 U.S.C. 58b and connected delegated authorities, a requesting airport may be designated as a user fee airport only if CBP determines that the volume or value of business at the airport is insufficient to justify the unreimbursed availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business cleared through this type of airport is insufficient to justify the availability of customs services at no cost, customs services provided by CBP at the airport are not funded by appropriations from the general treasury of the United States. Instead, the user fee airport pays for the customs services provided by CBP. The user fee airport must pay the fees charged, which must be in an amount equal to the expenses incurred by CBP in providing customs and related services at the user fee airport, including the salary and expenses of CBP employees to provide such services. *See* 19 U.S.C. 58b; *see also* 19 CFR 24.17(a)–(b).

CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and 19 CFR 122.15 and on a case-by-case basis. If CBP decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between CBP and the sponsor of the user fee airport. Pursuant to 19 CFR 122.15(c), the designation of an airport as a user fee airport must be withdrawn if either CBP or the airport authority gives 120 days

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<sup>2</sup> A landing rights airport is “any airport, other than an international airport or user fee airport, at which flights from a foreign area are given permission by Customs to land.” 19 CFR 122.1(f).

<sup>3</sup> Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the newly established U.S. Department of Homeland Security. The Secretary of Homeland Security delegated the authority to designate user fee facilities (UFF) to the Commissioner of CBP through Department of Homeland Security Delegation, Sec. II.A., No. 7010.3 (May 11, 2006). The Chief Operating Officer and Senior Official Performing the Duties of the Commissioner subsequently delegated the authority to the Executive Assistant Commissioner (EAC) of the Office of Field Operations, on March 23, 2020, to designate new UFFs. On December 23, 2020, the broader authority to withdraw a facility’s designation as a UFF, as well as execute, amend, or terminate Memorandum of Agreements, was also delegated to the EAC of the Office of Field Operations.

written notice of termination to the other party, or if any amounts due to CBP are not paid on a timely basis.

The list of designated user fee airports is set forth in 19 CFR 122.15(b). Periodically, CBP updates the list to include newly designated airports that were not previously on the list, to reflect any changes in the names of the designated user fee airports, and to remove airports that are no longer designated as user fee airports.

### **Recent Change Requiring Update to the List of User Fee Airports**

This document updates the list of user fee airports in 19 CFR 122.15(b) by removing the Hillsboro Airport in Hillsboro, Oregon. On November 30, 2020, the General Aviation Operations Supervisor of the Hillsboro Airport requested termination of the user fee status for the Hillsboro Airport, and the General Aviation Operations Supervisor and CBP mutually agreed to terminate the user fee status of Hillsboro Airport effective on July 20, 2021.

### **Inapplicability of Public Notice and Delayed Effective Date Requirements**

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency is exempted from the prior public notice and comment procedures if it finds, for good cause, that such procedures are impracticable, unnecessary, or contrary to the public interest. This final rule makes a conforming change by updating the list of user fee airports by removing one airport in light of CBP's withdrawal of its designation as a user fee airport under 19 U.S.C. 58b. Because this conforming rule has no substantive impact, is technical in nature, and does not impose additional burdens on or take away any existing rights or privileges from the public, CBP finds for good cause that the prior public notice and comment procedures are impracticable, unnecessary, and contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

### **Regulatory Flexibility Act and Executive Order 12866**

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

### **Paperwork Reduction Act**

There is no new collection of information required in this document; therefore, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

### Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b). CBP Commissioner Chris Magnus, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

### List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

### Amendments to Regulations

Part 122, of title 19 of the Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

#### PART 122—AIR COMMERCE REGULATIONS

■ 1. The general authority citation for part 122 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

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#### § 122.15 [Amended]

■ 2. In § 122.15, amend the table in paragraph (b) by removing the entry for “Hillsboro, Oregon”.

Dated: May 13, 2022.

ROBERT F. ALTNEU,  
*Director,*

*Regulations & Disclosure Law Division,  
Regulations & Rulings, Office of Trade,  
U.S. Customs and Border Protection.*

[Published in the Federal Register, May 19, 2022 (85 FR 30415)]

### IMPORTERS OF MERCHANDISE SUBJECT TO ACTUAL USE PROVISIONS

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

**ACTION:** 60-Day notice and request for comments; extension without change of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for

review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than July 15, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0032 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP\_PRA@cbp.dhs.gov*.

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

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

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

## Overview of This Information Collection

**Title:** Importers of Merchandise Subject to Actual Use Provisions.

**OMB Number:** 1651-0032.

**Form Number:** N/A.

**Current Actions:** Extension without change.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** In accordance with 19 CFR 10.137, importers of goods subject to the actual use provisions of the Harmonized Tariff Schedule of the United States (HTSUS) are required to maintain detailed records to establish that these goods were actually used as contemplated by the law, and to support the importer's claim for a free or reduced rate of duty. The importer shall maintain records of use or disposition for a period of three years from the date of liquidation of the entry, and the records shall be available at all times for examination and inspection by CBP.

The collection of information is supplemental to importer information about goods subject to the actual use provisions of the Harmonized Tariff Schedule of the United States (HTSUS) and pursuant to section 10.137 of title 19 of the Code of Federal Regulations (CFR) (19 CFR 10.137).

Importers of goods subject to 19 CFR Actual Use Provisions are required to show the imported item/ merchandise:

1. Is not on an exclusion list;
2. Complies with provisions of the law; and
3. Meets the required actual use provisions laid out in law.

This information is collected from members of the trade community who are familiar with CBP regulations.

*Type of Information Collection:* Importers Subject to Actual Use Provision Recordkeeping.

**Estimated Number of Respondents:** 12,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 12,000.

**Estimated Time per Response:** 65 minutes.

**Estimated Total Annual Burden Hours:** 13,000 hours.

Dated: May 11, 2022.

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

# U.S. Court of International Trade

Slip Op. 22–41

GHIGI 1870 S.P.A. AND PASTA ZARA S.P.A., Plaintiffs, and AGRITALIA S.R.L. AND TESA S.R.L., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and RIVIANA FOODS, INC. AND TREEHOUSE FOODS, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Judge  
Consol. Court No. 20–00023

**PUBLIC VERSION**

[Remand Results are sustained.]

Dated: May 4, 2022

*David L. Simon*, Law Offices of David L. Simon, PLLC, of Washington, D.C., and *John J. Kenkel*, *Alexandra H. Salzman*, and *Judith L. Holdsworth*, deKieffer & Horgan, PLLC, of Washington, D.C. for Plaintiffs Ghigi 1870 S.p.A. and Pasta Zara S.p.A., and Consolidated Plaintiffs Agritalia S.r.L. and Tesa S.r.L.

*Sosun Bae*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

## **OPINION**

### **Eaton, Judge:**

Before the court are the U.S. Department of Commerce’s (“Commerce” or the “Department”) results of redetermination pursuant to the court’s remand in *Ghigi 1870 S.p.A. v. United States*, 45 CIT \_\_\_, 547 F. Supp. 3d 1332 (2021) (“*Ghigi I*”). See Final Results of Redetermination Pursuant to Court Remand (Feb. 25, 2022), PRR 4, CRR 11<sup>1</sup> (“Remand Results”).

Plaintiffs Ghigi 1870 S.p.A. (“Ghigi”) and Pasta Zara S.p.A. (which together comprised the collapsed entity, “Ghigi/Zara”), and Consolidated Plaintiffs Agritalia S.r.L. and Tesa S.r.L. (collectively, “Plaintiffs”) have informed the court that they do not intend to file comments on the Remand Results.<sup>2</sup> See Letter from deKieffer & Horgan, PLLC, to the Ct. (Apr. 8, 2022), ECF No. 66.

<sup>1</sup> “PRR” and “CRR” mean, respectively, the public remand record and the confidential remand record.

<sup>2</sup> Defendant-Intervenors Riviana Foods, Inc. and Treehouse Foods, Inc. withdrew from this action, effective October 7, 2021. See Order (Oct. 7, 2021), ECF No. 58.

The United States (“Defendant”) asks the court to find that Commerce has complied with the court’s instructions in *Ghigi I*, and to sustain the uncontested Remand Results. See Def.’s Resp. Pls.’ Submission Regarding Remand Results (Apr. 12, 2022), ECF No. 67.

For the following reasons, the Remand Results are sustained.

## DISCUSSION

Plaintiffs commenced this consolidated case to contest certain aspects of the final results of the twenty-second administrative review of the antidumping duty order on pasta from Italy. In *Ghigi I*, familiarity with which is presumed, the court considered Plaintiffs’ challenge to the Department’s use of facts available and application of adverse inferences to certain U.S. payment dates that Ghigi provided, which Commerce found were unverifiable. The court upheld the use of facts available, but not the application of adverse inferences, explaining that “[w]here Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts when replacing a party’s information only if it makes the requisite additional finding that a party has ‘failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department].’” *Ghigi I*, 45 CIT at \_\_\_, 547 F. Supp. 3d at 1344 (first quoting 19 U.S.C. § 1677e(b)(1)); and then citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Thus, the court stated:

Although the use of facts available was clearly warranted here, the application of adverse inferences “in selecting from among the facts otherwise available” was not. See 19 U.S.C. § 1677e(b)(1)(A). The problem with the Final Results is that Commerce based its finding that the application of an adverse inference was warranted on the same facts that it found justified its use of facts available: “Pursuant to [19 U.S.C. § 1677e(a)(2)(D)], we find that a determination based on the facts otherwise available is warranted because the information on payment data was not verifiable. Accordingly, we find that the application of partial adverse inferences under [19 U.S.C. § 1677e(b)(1)(A)] is warranted, as it applies to Ghigi’s U.S. payment date field.” Final IDM at 13 (emphasis added). This finding, however, only recites that information was missing because it was unverifiable. It says nothing about Ghigi’s behavior.

As courts have explained in numerous decisions, the determination to use facts available is a separate determination from the application of adverse inferences. Each determination must be made separately, and each must be explained separately. See,

*e.g.*, *Nippon Steel*, 337 F.3d at 1381. Commerce’s single, conclusory assertion is inadequate to satisfy the statute because it does not explain the reasons for the application of an adverse inference and indeed seems to be based on Commerce’s inability to verify the information on payment data. *See* Final IDM at 13. In the Final Results, the Department failed to satisfy the statutory requirement that it make a determination as to whether a party failed to cooperate to the best of its ability.

*Id.* at \_\_\_, 547 F. Supp. 3d at 1345 (alterations in original). Therefore, the court remanded the final results on the sole issue of adverse inferences:

Accordingly, the Final Results are remanded for Commerce to determine whether Ghigi failed to cooperate to the best of its ability and, if the Department continues to find that it did, explain its adverse inference determination with reference to record evidence. If Commerce is unable to explain its determination on remand, it may not use an adverse inference when selecting from among the facts otherwise available.

*Id.* at \_\_\_, 547 F. Supp. 3d at 1345.

In the Remand Results, Commerce continued to find adverse inferences were warranted. *See* Remand Results at 1 (“[A]fter reviewing the record pursuant to the *Remand Order*, Commerce has found that it is still appropriate to apply an adverse inference for Ghigi’s U.S. payment dates.”). The court finds that the Department’s adverse inferences finding in the Remand Results is supported by substantial evidence and otherwise in accordance with law.

To find a respondent has failed to cooperate to the best of its ability, the Department must perform two tasks:

First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. . . . Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

*Nippon Steel*, 337 F.3d at 1382–83 (citation omitted). “It is worth noting that the subjective component of the ‘best of its ability’ stan-

dard judges what constitutes the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent.” *Nat’l Nail Corp. v. United States*, 43 CIT \_\_, \_\_, 390 F. Supp. 3d 1356, 1373 (2019). Thus, “[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.” *Nippon Steel*, 337 F.3d at 1383.

Commerce has shown that here the objective and subjective prongs of the test in *Nippon Steel* are satisfied. First, by way of explanation, Commerce stated that as an “experienced respondent” Ghigi/Zara objectively should have known what information was expected to be maintained:

Ghigi/Zara is an experienced respondent that had participated in two consecutive reviews prior to the 2017/2018 administrative review as a mandatory respondent. Given this past experience in the two consecutive reviews prior to the instant review, Ghigi/Zara was particularly familiar with what requested information was required to be kept regarding payment dates and maintained under the applicable statutes, rules, and regulations, and how that information needed to be reported to Commerce. Despite this knowledge, however, Ghigi/Zara failed to report to Commerce the requested information.

Remand Results at 4 (footnote omitted). Plaintiffs do not contest this finding.

As for the subjective prong of the test, Commerce stated that

the failure of Ghigi/Zara to respond fully is the result of the respondent’s lack of cooperation in failing to put forth its maximum efforts to investigate and obtain the requested information from its records. At verification, Commerce found that the payment dates were incorrect for all five U.S. sale traces performed (three of which Ghigi/Zara were informed would be examined prior to verification and two of which were identified at verification).

Remand Results at 4–5.<sup>3</sup> Commerce found that the errors in Ghigi/Zara’s reporting of Ghigi’s U.S. payment dates were the result of inattention and carelessness—they were not merely clerical errors:

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<sup>3</sup> For instance, Commerce recited record evidence showing that for the sales traces that Commerce examined—three of which Ghigi had been informed would be examined in the pre-verification agenda—the actual payment date differed from the payment date reported in [Ghigi’s second U.S. sales database, i.e., US02] by 24, 194, 290, -301, and 43 days, respectively. Because of these misreported payment dates,

Ghigi/Zara claimed that the errors were the result of a “transcription error.” However, the errors in this field do not reflect a “transcription error” that resulted from systematic inaccuracies, such as an error that caused every payment date in the payment date field to be five days later than the actual payment date or in *any* otherwise systemic or explicable pattern. Rather, the errors in the payment date field as discovered by the verifiers were significant and followed no discernable pattern. Ghigi/Zara’s reporting of Ghigi’s U.S. payment dates was simply wrong and unreliable.

Ghigi/Zara’s submission of unreliable and inaccurate payment dates for Ghigi’s U.S. sale observations that were examined, even though such information is clearly available in Ghigi’s internal books and records, constitutes a clear example of the “inattentiveness, carelessness or inadequate record keeping” that *Nippon Steel* found is not condoned by the Act.

Remand Results at 7 (footnotes omitted). Again, Plaintiffs do not contest this finding.

For Commerce, the unreliable reporting of Ghigi’s payment dates precluded Commerce from calculating an accurate weighted-average dumping margin for the mandatory respondent Ghigi/Zara. *See* Remand Results at 7 (“As the CREDITU adjustment is calculated based on the difference between the shipment date (SHIPDATU) and the payment date, these unreliable and inaccurate payment dates lead to incorrect values of CREDITU, an adjustment used in the calculation of the net U.S. price, and thus, to an inaccurate calculation of Ghigi/Zara’s dumping margins during the [period of review].”). Therefore, for the Department, “Ghigi/Zara . . . failed to cooperate to the best of its ability and hindered Commerce from timely completing its administrative review.” Remand Results at 7.

Ultimately, the Department applied “the longest period between payment date and shipment date that is on the record for Ghigi’s U.S. sales,” as adverse facts available for “the credit payment period for all of Ghigi’s U.S. sales, except for U.S. sale observations” with respect to which Commerce verified the actual payment date recorded in Ghigi’s accounting system and for the five sale traces examined at verification. *See* Remand Results at 8.

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the credit payment periods—the difference between shipment and payment date that is used in the calculation of the adjustment for imputed credit expenses (CREDITU)—for these five sales were, in days, 35 (correct value: 11), 257 (correct value: 63), 299 (correct value: 9), -260 (correct value: 41), and 80 (correct value: 37), respectively. Thus, Ghigi’s misreporting of payment dates is not a harmless error, but has a significant impact on the calculated CREDITU adjustment, as the time period for that adjustment is off by many multiples of the correct number of days.

Remand Results at 5–6 (footnotes omitted).

Because the Department has complied with the court's order in *Ghigi I*, and has explained and supported with substantial evidence its finding that the objective and subjective prongs of the adverse inferences test articulated in *Nippon Steel* are satisfied, the court sustains Commerce's application of adverse inferences as supported by substantial evidence and otherwise in accordance with law.

### CONCLUSION

Based on the foregoing, the court sustains the Remand Results. Judgment shall be entered accordingly.

Dated: May 4, 2022

New York, New York

*/s/ Richard K. Eaton*

JUDGE

Slip Op. 22-42

HYUNDAI ELECTRIC & ENERGY SYSTEMS Co., LTD., Plaintiff, v. UNITED STATES, Defendant, and HITACHI ENERGY USA INC. and PROLEC-GE WAUKESHA, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge

Court No. 20-00108

**PUBLIC VERSION**

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination of the final results in the sixth administrative review of the antidumping duty order on large power transformers from the Republic of Korea]

Dated: May 10, 2022

*Ron Kendler*, White & Case LLP, of Washington, D.C., argued for Plaintiff Hyundai Electric & Energy Systems Co., Ltd. With him on the brief were *David E. Bond* and *William J. Moran*.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Ian McInerney*, Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, D.C., argued for Defendant-Intervenors Hitachi Energy USA Inc. and Prolec-GE Waukesha, Inc. With her on the brief were *R. Alan Luberd* and *David C. Smith*.

### OPINION AND ORDER

#### **Barnett, Chief Judge:**

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") remand results in the sixth

administrative review of the antidumping duty order on large power transformers (“LPT(s)”) from the Republic of Korea (“Korea”) for the period of review August 1, 2017, to July 31, 2018 (“the POR”). See Confid. Final Results of Redetermination Pursuant to Court Remand (“Remand Results”), ECF No. 55–1; see also *Large Power Transformers from the Republic of Korea*, 85 Fed. Reg. 21,827 (Dep’t Commerce Apr. 20, 2020) (final results of antidumping duty administrative review; 2017–2018) (“*Final Results*”), ECF No. 24–4, and accompanying Issues and Decision Mem., A-580–867 (Apr. 14, 2020) (“I&D Mem.”), ECF No. 24–5.<sup>1</sup>

Plaintiff Hyundai Electric & Energy Systems, Co., Ltd. (“HEES”) commenced this case challenging several aspects of the *Final Results*. See Confid. Compl., ECF No. 13; Summons, ECF No. 1. HEES moved to supplement the administrative record with two additional documents relating to Commerce’s finding that a particular LPT was produced in Korea rather than the United States, which the court granted. See *Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT \_\_, 477 F. Supp. 3d 1324 (2020). Defendant United States (“the Government” or “Defendant”) then requested a remand of the *Final Results* to address these two additional documents, which the court also granted. See *Hyundai Elec. & Energy Sys. Co. v. United States*, Slip Op. 20–160, 2020 WL 6559158 (CIT Nov. 9, 2020).

On June 30, 2021, Commerce filed its Remand Results. In the Remand Results, Commerce determined to use “total facts available with an adverse inference” to calculate HEES’s dumping margin because HEES (1) “failed to cooperate by not acting to the best of its ability to comply with a request for sales documentation”; (2) “impeded the proceeding by providing shifting and opaque explanations for its classification of certain parts and components as out-of-scope”; and (3) “failed to demonstrate that it reported all required sales in its U.S. sales database and therefore that its reporting of all U.S. sales of subject merchandise during the POR was complete.” Remand Results at 31.

HEES has moved for judgment on the agency record, challenging Commerce’s application of facts available, adverse facts available, and total adverse facts available in both the *Final Results* and Remand Results. Confid. Rule 56.2 Mot. for J. on the Agency Rec. on Behalf of Pl. [HEES], ECF No. 68; Confid. Am. Mem. of P. & A. in

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<sup>1</sup> The administrative record for this case is divided into a Public Administrative Record (“PR”), ECF No. 24–1, and a Confidential Administrative Record (“CR”), ECF No. 24–2. The administrative record associated with the remand results is contained in a Public Remand Record, ECF No. 58–3, and Confidential Remand Record, ECF No. 58–2. The parties submitted joint appendices containing record documents cited in their briefs. See Public J.A., ECF No. 82; Am. Confid. J.A. (“CJA”), ECF No. 92.

Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Pl.'s Rule 56.2 Mot."), ECF No. 88; Confid. Am. Reply in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R., ECF No. 90. ("Pl.'s Reply"). Specifically, HEES avers that Commerce's determinations that HEES (1) failed to submit service-related revenue documentation, (2) incorrectly reported certain contested part(s)<sup>2</sup> as non-scope merchandise, and (3) failed to report the sale of an LPT to a U.S. customer were not supported by substantial evidence and that, with respect to these issues, substantial evidence did not support the agency's application of adverse and total adverse facts available. *See* Pl.'s Rule 56.2 Mot. at 1–4.

Defendant-Intervenors Hitachi Energy USA Inc. and Prolec-GE Waukesha, Inc.<sup>3</sup> (together, "Defendant-Intervenors") and the Government urge the court to sustain both the *Final Results* and Remand Results. *See generally* Confid. Def.-Ints.' Resp. in Opp'n to Pl.'s Mot[ ] for J. on the Agency R., ECF No. 75 ("Def.-Ints.' Resp."); Confid. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 72 ("Def.'s Resp.").

On March 9, 2022, the court heard confidential oral argument. Docket Entry, ECF No. 97.

For the reasons discussed below, the *Final Results*, as amended by the Remand Results, are again remanded to Commerce to clarify or reconsider its use of facts available with respect to HEES's reporting of the contested part(s) and to clarify or reconsider its use of total adverse facts available.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),<sup>4</sup> and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). While Commerce's conclusions must be supported by substantial evidence, *id.*, "the possibility of drawing two different conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence," *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

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<sup>2</sup> The "contested part(s)" refers to certain [ ] , reference to which is treated as business proprietary information.

<sup>3</sup> Hitachi Energy USA Inc. and Prolec-GE Waukesha, Inc. previously went by the names ABB Enterprise Software Inc. and SPX Transformer Solutions, Inc., respectively. *See* Order (Feb. 22, 2022), ECF No. 96 (granting motion to amend the caption).

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

## DISCUSSION

### I. Legal Framework

#### A. Basic Antidumping Principles

Commerce imposes an antidumping duty on foreign merchandise that “is being, or is likely to be, sold in the United States at less than its fair value” and results in material injury or threat of injury to a U.S. domestic industry. 19 U.S.C. § 1673. The antidumping duty imposed is “an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” *Id.* Accordingly, antidumping analysis requires Commerce to compare the export price (“EP”) or constructed export price (“CEP”) of the subject merchandise with the normal value of the foreign like product. *Id.* § 1677b(a) (Commerce must make “a fair comparison . . . between the export price or constructed export price” and “normal value” of the subject merchandise); *see also* 19 C.F.R. § 351.401(a).

The EP is “the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise . . . to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.” 19 U.S.C. § 1677a(a). The CEP is “the price at which the subject merchandise is first sold . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.” *Id.* § 1677a(b). In other words, generally speaking, direct sales made to unaffiliated U.S. purchasers prior to importation must be reported as EP sales, whereas, if the first sale is made to an affiliated purchaser, the affiliated party sale is disregarded, and the subsequent resale by the affiliated reseller to an unaffiliated U.S. customer must be reported as a CEP sale. *See id.* § 1677a(a)–(b).

#### B. Facts Otherwise Available

When “necessary information is not available on the record,” or an interested party “withholds information” requested by Commerce, “fails to provide” requested information by the submission deadlines, “significantly impedes a proceeding,” or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall . . . use the facts otherwise available.” *Id.* § 1677e(a).

Commerce’s authority to use facts otherwise available is subject to 19 U.S.C. § 1677m(d), which requires Commerce, upon determining that a response does not comply with its request for information, to

“promptly inform the person submitting the response of the nature of the deficiency” and provide “an opportunity to remedy or explain the [deficient response].” Broadly drawn initial or supplemental questionnaires may not sufficiently place a respondent on notice of the nature of the deficiency and may thus deprive the respondent of the opportunity to remedy that deficiency. *See, e.g., Ta Chen Stainless Steel Pipe v. United States*, 23 CIT 804, 820 (1999).

If a party provides further information in response to such deficiency, subject to 19 U.S.C. § 1677m(e), Commerce may disregard all or part of the original and subsequent responses if the agency finds the response not satisfactory or the response is not timely submitted. 19 U.S.C. § 1677m(d). Section 1677m(e) provides that Commerce may not “decline to consider information that is . . . necessary to the determination but does not meet all the applicable requirements” when the information is timely submitted; “the information can be verified”; “the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination”; the proponent of the information “has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce]”; and “the information can be used without undue difficulties.” *Id.* § 1677m(e).

### **C. Adverse Facts Available**

If Commerce determines that a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *Id.* § 1677e(b). “Compliance with the ‘best of its ability’ standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012). 76 (Fed. Cir. 2012).

Commerce uses total adverse facts available to determine dumping margins when “none of the reported data is reliable or usable.” *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted); *see also Nat’l Nail Corp. v. United States*, 43 CIT \_\_, \_\_, 390 F. Supp. 3d 1356, 1374 (2019) (explaining that “Commerce uses ‘total adverse facts available’” when it applies “adverse facts available not only to the facts pertaining to specific sales or information . . . not present on the record, but to the facts

respecting all of respondents' production and sales information that the [agency] concludes is needed for an investigation or review") (citation omitted).

## II. Service-Related Revenue

### A. Overview

In an antidumping duty review, Commerce compares the EP or CEP of subject merchandise (i.e., the price at which subject merchandise is sold in the United States) to the "normal value," which is the price of like products in the exporting country or a third country. 19 U.S.C. §§ 1677(35), 1677a(a), 1677b(a). In determining the price of subject merchandise, Commerce declines to treat service-related revenues (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation) as an addition to the EP or CEP. *See ABB Inc. v. United States*, 44 CIT \_\_, \_\_, 437 F. Supp. 3d 1289, 1295 (2020); Request for Information—Antidumping Duty Administrative Review: [HEES]—Korea—[LPTs] (Dec. 17, 2018) ("Initial Questionnaire") at C-1, PR 24, CJA Tab 3 (listing categories of service-related revenues). Accordingly, "[w]hen Commerce finds that a service is separately negotiable, its practice has been to cap the service-related revenue by the associated expenses when determining the U.S. price." *Id.* (quoting *Hyundai Heavy Indus. Co. v. United States*, 42 CIT \_\_, \_\_, 332 F. Supp. 3d 1331, 1340 (2018)).

In this sixth administrative review of LPTs from Korea, Commerce determined that HEES withheld necessary service-related revenue information and failed to cooperate to the best of its ability and, therefore, the agency used adverse facts available to determine HEES's dumping margin. *See* I&D Mem. at 14; Remand Results at 31.

During the review, Commerce twice asked HEES to report service-related revenue and associated expenses. *See* Initial Questionnaire at C-1; First Sales Suppl. Questionnaire (May 29, 2019) ("FSSQ") at 6, CR 351, PR 169, CJA Tab 12. The Initial Questionnaire specifically requested HEES to

[d]escribe your agreement(s) for sales in the United States and the foreign market (e.g., long-term purchase contract, short-term purchase contract, purchase order, order confirmation). Provide a copy of each type of agreement and *all sales-related documentation* generated in the sales process (including the purchase order, internal and external order confirmation, invoice, and shipping and export documentation) for a sample sale in the foreign market and U.S. market during the POR.

Initial Questionnaire at A-9–A-10 (emphasis added).

In response to the Initial Questionnaire, HEES explained that ownership changes had occurred such that there were differences between the identity of its affiliates in this period of review and previous reviews. HEES's Initial Methodology Cmts. (Dec. 31, 2018) ("HEES Methodology Cmts.") at 21, CR, 7, PR 28, CJA Tab 4. Specifically, HEES explained that, according to the statutory definition of the term, Hyundai USA was no longer its affiliate.<sup>5</sup> *Id.* Despite acknowledging this change in status, HEES informed Commerce that it would continue to follow the approach used in prior reviews and treat Hyundai USA as an affiliate of HEES because there were other bases upon which the agency might find affiliation. *Id.*

Commerce did not determine whether HEES and Hyundai USA were affiliated prior to HEES's submission of its Section A Questionnaire Response. *See* Pl.'s Rule 56.2 Mot. at 7. In its Section A Questionnaire Response, HEES again stated that it no longer owned more than five percent of Hyundai Corporation, but that there were other bases upon which Commerce might find that HEES was affiliated with Hyundai USA. *See* AQR at A-17, A21–A-23. HEES again stated that it would report its U.S. sales through Hyundai USA as CEP sales. *See id.* at A-23. HEES further stated that if Commerce believed its U.S. sales should be reported on an EP basis, it was "ready to provide such information in a supplemental response." *Id.*

Commerce then issued the First Sales Supplemental Questionnaire, in which it requested that HEES explain whether Hyundai USA was affiliated and why Commerce should treat HEES's U.S. sales on a CEP basis. FSSQ at 4–5. HEES again explained that Hyundai USA was not affiliated according to the statutory definition of "affiliate." HEES's Resps. to the Dep't's [FSSQ] (June 19, 2019) ("Resps. to FSSQ") at 1SS-17–1SS-18, CR 419–59, PR 192–95, CJA Tab 15. In response to Commerce's questions as to why HEES's U.S. sales should be reported on a CEP basis, HEES answered that if Commerce found that Hyundai USA was not an affiliate, U.S. sales should be treated as EP sales. *Id.* at 1SS-17.

The First Sales Supplemental Questionnaire again asked HEES to "separately report all service-related revenues (i.e., not grouped together or bundled) if those revenues are reflected on any sale docu-

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<sup>5</sup> In the original investigation and each subsequent review prior to the POR, Commerce considered Hyundai Corporation USA ("Hyundai USA") and HEES to be affiliated because HEES's predecessor, Hyundai Heavy Industries Co., Ltd. ("HHI"), owned more than five percent of Hyundai Corporation, which in turn owned one hundred percent of Hyundai USA. *See* Pl.'s Rule 56.2 Mot. at 6. During the POR, HEES's ownership changed such that it no longer owned more than five percent of Hyundai Corporation, and thus, no longer owned more than five percent of Hyundai USA. *See id.* at 7; HEES's Sec. A Questionnaire Resp. (Feb. 19, 2019) ("AQR") at A-22–A-23, CR 136–37, PR 89–98, CJA Tab 5.

mentation.” FSSQ at 6. Commerce asked HEES to submit “complete copies of each type of [ ] and each change order” related to certain sales made by Hyundai USA. *Id.* at 7. HEES requested clarification of these questions. Clarification of Certain Questions in the Dep’t’s [FSSQ] (June 12, 2019) at 1–5, CR 407, PR 185, CJA Tab 14. Commerce responded that if HEES bundled related expenses and service-related revenue, it should provide an explanation as to why it did so and reiterated that HEES “should report service-related revenues if they [were] reflected on *any* documented external sales correspondence with customers . . . in accordance with Commerce’s practice.” Letter from Brian C. Davis to Neil R. Ellis (June 20, 2019) (“Commerce Ltr.”) at 1–2, CR 471, PR 208, CJA Tab 16. Commerce also explained that, regarding its request for sales documentation for the selected sales, HEES should submit copies of the requested documents. *Id.* at 2.

HEES responded by reporting “service-related revenue as reflected on any sales documentation with the customer.” HEES’s Resps. to the Remainder of the Department’s [FSSQ] (July 1, 2019) (“Resps. to Remainder of FSSQ”) at 1SS-3–1SS-4, Exhibit C-1 (Revised), Exhibit C-2 (Revised 2), CR 504–16, PR 221–23, CJA Tab 17; Resps. to FSSQ at 1SS-33–1SS-34. HEES’s response maintained that HEES was not affiliated with Hyundai USA but, nevertheless, did not provide service-related revenue documentation between HEES and Hyundai USA. Despite HEES’s claim of non-affiliation, HEES stated that documentation between the companies was “intercompany, internal communications.” *See* I&D Mem. at 13.

Commerce conducted a CEP verification of the sales responses of HEES and Hyundai USA. *See* U.S. Verification of the Sales Resp. of [HEES] (Oct. 9, 2019) (“CEP Verification Report”) at 1, CR 667, PR 295, CJA Tab 28. At verification, Commerce discovered that there were “several types of documents related to the sales process that had not been placed on the record.” *Id.* at 10. After being asked why these documents had not been placed on the record, HEES officials explained that they were “considered . . . internal documentation.” *Id.* In particular, Commerce noted a document that allocated sales and service revenues and expenses between HEES and Hyundai USA, and then subsequently between Hyundai USA and Hyundai Power Transformers USA (“HPT”); HEES affirmed that every U.S. sale had similar documentation allocating sales and service revenues and expenses. *Id.* at 11.

Based on HEES’s failure to report all requested service-related revenue documentation as outlined above, Commerce found that

HEES withheld necessary information, impeded the review, and failed to cooperate to the best of its ability; accordingly, Commerce used adverse facts available for the *Final Results*. See I&D Mem. at 8, 10–14.

## **B. Parties' Contentions**

HEES contends that Commerce's use of adverse facts available with respect to its reporting of service-related revenue was unsupported by substantial evidence and contrary to law because it fully responded to Commerce's requests and Commerce failed to notify HEES of deficiencies in its responses. See Pl.'s Rule 56.2 Mot. at 23–27; Pl.'s Reply at 1–3.

The Government and Defendant-Intervenors contend that Commerce's use of adverse facts available was supported by substantial evidence because HEES failed to submit documentation regarding the allocation of service-related revenue between HEES and Hyundai USA. See Def.'s Resp. at 19–21; Def.-Ints.' Resp. at 8 (incorporating by reference Defendant's arguments). They also contend that Commerce was not required to notify HEES of deficiencies in its responses because Commerce did not determine how to treat HEES's sales until the preliminary results,<sup>6</sup> and that HEES's argument "does not justify its incomplete responses to Commerce's requests for information." Def.'s Resp. at 19.

## **C. Analysis**

### **i. Substantial Evidence Supports Commerce's Finding that HEES Withheld Necessary Information and Otherwise Impeded the Administrative Review**

Commerce may use facts available if, *inter alia*, "necessary information is not available on the record," or an interested party withholds information requested by Commerce or significantly impedes a proceeding. 19 U.S.C. § 1677e(a). The court finds that substantial evidence supports Commerce's decision that necessary information was not on the record, that HEES withheld requested information, and that HEES's failure to provide the requested information significantly impeded the proceeding.

It is undisputed that necessary information was not on the record. As noted above, Commerce ultimately determined that HEES and

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<sup>6</sup> For Commerce's preliminary results, see *Large Power Transformers From the Republic of Korea*, 84 Fed. Reg. 55,559 (Dep't Commerce Oct. 17, 2019) (preliminary results of anti-dumping administrative review; 2017–2018), and accompanying Decision Mem., A-580–867 (Oct. 9, 2019).

Hyundai USA were not affiliated; thus, HEES was required to provide documentation of service-related revenue allocation between the two unaffiliated companies to allow Commerce to calculate an accurate dumping margin. *See* I&D Mem. at 13–14. However, because HEES decided to report its U.S. sales in the same manner as it had in prior administrative reviews, despite acknowledging the change in ownership and affiliation status, HEES did not submit the necessary service-related revenue documentation between HEES and Hyundai USA. *See* I&D Mem. at 14.

Commerce twice asked HEES to report service-related revenue and associated expenses. *See* Initial Questionnaire at B-1; FSSQ at 6. Commerce clearly directed HEES to report “all service-related revenues,” FSSQ at 6, and later clarified that HEES should document all such revenue allocated between HEES and its external customers, *see* Commerce Ltr. at 1–2. HEES does not dispute that it did not provide documentation of service-related revenue between itself and Hyundai USA, which HEES maintained, and Commerce agreed, was not an affiliated customer. *See* I&D Mem. at 13–14; Resps. to FSSQ at 1SS-17–1SS-18. Thus, the statutory requirements for using facts available were met not only because necessary information was not available on the record, but also because HEES withheld from Commerce the requested documentation of “all service-related revenue” between HEES and its customers. *See* 19 U.S.C. § 1677e(a).

HEES’s contention that Commerce was barred from using facts available because it fully responded to Commerce’s requests is without merit. Specifically, HEES argues that because Commerce knew that HEES was proceeding under the assumption that Hyundai USA would be treated as an affiliate, and because Commerce did not indicate anything to the contrary, HEES was not required to submit documentation showing service-related revenue allocation between itself and Hyundai USA. Pl.’s Rule 56.2 Mot. at 23–25; Pl.’s Reply at 2–3. HEES asserts that it “reasonably understood [Commerce’s request to report service-related revenue based on external sales correspondence with customers] to refer to documentation exchanged with unaffiliated customers, not communications with Hyundai USA,” based on prior Commerce practice and the court’s precedent in *ABB Inc. v. United States*, 42 CIT \_\_, 355 F. Supp. 3d 1206, 1219 (2018). Pl.’s Rule 56.2 Mot. at 24; *see also* Pl.’s Reply at 2.

HEES’s reliance on the court’s finding in *ABB* is misplaced. In *ABB*, the court found that contracts between HEES (then-called HHI) and Hyundai USA containing service-related revenue figures were “inter-

nal . . . communications.” *See ABB*, 355 F. Supp. 3d at 1219. *ABB*, however, is inapposite because the factual predicate for the court’s holding in that case—affiliation—no longer exists between HEES and Hyundai USA. *See id.* Indeed, HEES does not challenge Commerce’s determination that HEES and Hyundai USA were not affiliated during the POR. As the U.S. Court of Appeals for the Federal Circuit has recognized, “[t]he mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.” *Nippon Steel*, 337 F.3d at 1381. Thus, for the reasons stated above, the court finds that substantial evidence supports Commerce’s use of facts available with respect to HEES’s reporting of service-related revenue and expenses.

## **ii. Commerce Provided HEES with an Appropriate Deficiency Notice**

In order to rely on facts available, upon finding that a response does not comply with its requests for information, Commerce must promptly inform the respondent that its response is deficient and provide the respondent with an opportunity to remedy or explain the deficiency. 19 U.S.C. §§ 1677e(a), 1677m(d).

HEES argues that Commerce failed to provide a deficiency notice requesting the reporting of service-related revenue on an EP basis. Pl.’s Rule 56.2 Mot. at 25. HEES contends, in effect, that Commerce had notice that HEES did not report sales to Hyundai USA and should have provided a deficiency notice requesting HEES to do so. *See id.* at 25–27. The court finds, however, that Commerce provided HEES an opportunity to address the deficiency.

The fundamental problem for HEES is that it sought to maintain inconsistent factual and reporting positions and to place the burden on Commerce to resolve those inconsistencies. HEES asserted that, as a factual matter, its corporate structure had changed for the POR such that it was no longer affiliated with Hyundai USA. *See HEES Methodology Cmts.* at 21. Notwithstanding that factual change, HEES reported its U.S. sales on a CEP basis as if they were affiliated, as it had in prior administrative reviews. *See id.* HEES failed to reconcile these two positions before Commerce.

In its First Sales Supplemental Questionnaire, Commerce again asked HEES to provide relevant sales documentation and specified that HEES should report service-related revenue as “reflected on *any* documented external sales correspondence.” Commerce Ltr. at 1–2 (clarifying Commerce’s requests for information in the First Sales Supplemental Questionnaire). While it is clear to the court that HEES chose to interpret that clarification as relating to documenta-

tion between Hyundai USA and its U.S. customers, HEES's interpretation flies in the face of its contemporaneous position that HEES was no longer affiliated with Hyundai USA (such that HEES's correspondence with Hyundai USA would constitute external correspondence).

Commerce was not required to issue a second deficiency notice after preliminarily finding Hyundai USA not to be affiliated, nor was HEES entitled to withhold certain information in order to force the timing of Commerce's determination of the relevance of such information. *See Hyundai Heavy Indus. Co. v. United States*, 44 CIT \_\_, \_\_, 485 F. Supp. 3d 1380, 1398–99 (2020) (“[S]ection 1677m(d) is not meant to allow an interested part[y] ‘to submit information that cannot be evaluated adequately within the applicable deadlines.’”) (citation omitted).

As a respondent, HEES had the burden to build the record of the proceeding. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). HEES was not entitled to maintain that it was no longer affiliated with Hyundai USA yet seek to assign blame to Commerce when HEES did not report its sales consistent with HEES's position. HEES was asked to and failed to provide service-related revenue documentation between it and its unaffiliated customers, including Hyundai USA. Instead, HEES withheld this information, resulting in an incomplete record.

### **iii. Substantial Evidence Supports Commerce's Use of Adverse Facts Available**

The court also examines whether Commerce's analysis of HEES's failure to provide the requested service-related revenue documentation supports the agency's determination to draw an adverse inference pursuant to 19 U.S.C. § 1677e(b). HEES argues that Commerce should not have expected more forthcoming responses because HEES repeatedly requested guidance and offered to provide EP sales data if Commerce requested it. HEES maintains that its responses were “reasonable, cooperative and sufficiently ‘forthcoming’ under the circumstances.” *See* Pl.'s Rule 56.2 Mot. at 40. The court finds that substantial evidence supports Commerce's determination that HEES failed to act to the best of its ability in complying with Commerce's repeated requests that all service-related revenue be reported.

To avoid the risk of an adverse inference, a party must act to the best of its ability to comply with a request for information by Commerce. 19 U.S.C. § 1677e(b). Substantial evidence supports Commerce's determination that HEES did not act to the best of its ability to provide documentation of all service-related revenue. HEES knew that as a result of changes in its ownership structure, it was no longer affiliated by ownership with Hyundai USA, yet it chose to report its

U.S. sales on a CEP basis. HEES Methodology Cmts. at 21. Commerce reasonably concluded that HEES failed to act to the best of its ability by so doing. I&D Mem. at 14. The fact that Commerce had found the two companies affiliated in previous reviews does not excuse HEES's failure to provide all requested documentation. *See Hyundai Heavy Indus.*, 332 F. Supp. 3d at 1342 ("HHI may not [...] rely on Commerce's factual conclusions from prior reviews in the instant review because each review is separate and based on the record developed before the agency in the review."). In short, it was HEES's burden to build the record, and Commerce reasonably found that HEES failed to do so. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) ("The burden of production [belongs] to the party in possession of the necessary information.") (citation omitted) (alteration in original). Here, HEES willfully failed to report all service-related revenue as requested by Commerce, "depriv[ing] Commerce of the ability to analyze [HEES's] sales process, capping methodology, and affiliations." *See* I&D Mem. at 14.

HEES also argues that in applying adverse facts available, Commerce simply restated its basis for using facts available—HEES's failure to provide information, Pl.'s Rule 56.2 Mot. at 39–40—and thus an adverse inference is not supported, *id.* at 40. To the contrary, Commerce explained that the use of an adverse inference was warranted because HEES failed to cooperate to the best of its ability in responding to Commerce's requests when, despite multiple requests for service-related revenue and no indication from Commerce that HEES and Hyundai USA were affiliated, HEES did not provide the requested service-related revenue documentation and did not disclose, prior to verification, that such documentation existed. *See* I&D Mem. at 10–14. Thus, Commerce did not simply restate its basis for using facts available to support its use of adverse facts available.

As such, the court sustains Commerce's use of facts available with an adverse inference with respect to HEES's reporting of sales-related revenue.

### **III. Reporting of Contested Parts**

#### **A. Overview**

Commerce also determined that HEES impeded the review by failing to report certain contested parts consistently and accurately, thus preventing Commerce from accurately calculating normal value. *See* I&D Mem. at 16–19.

In order to determine normal value, Commerce required HEES to provide "a detailed list" and explanation of all merchandise, both

in-scope and out-of-scope, included in each home-market sale. Initial Questionnaire at B1–B2. In response to Commerce’s questionnaires, HEES designated certain contested parts as not within the scope of the order. *See* Resps. to Remainder of the [FSSQ], Ex. B-2 (Revised 2); Sec. B Questionnaire Resp. (Mar. 11, 2019) (“BQR”) at B-7, Ex. B-2, CR 215–31, PR 117–19, CJA Tab 6.

Petitioners<sup>7</sup> commented that certain parts designated by HEES as non-scope merchandise should have been reported as in-scope for determining normal value. *See* Pet’r’s’ Cmts. on the Suppl. Secs. B and C Questionnaire Resp. of [HEES] (July 19, 2019) (“Pet’r’s’ Cmts.”) at 10–12, CR 544, PR 239, CJA Tab 18. Petitioners pointed to the sale of a particular part,<sup>8</sup> noting that although the part was characterized as a component of in-scope merchandise, HEES classified it as out-of-scope and excluded the associated revenue and [[ ]] from the home market sales file. *Id.* at 10.

HEES explained that it classified this part as out-of-scope because it was not a transformer part and because it was not attached to or physically part of the LPT, but was instead located remotely, typically 50 to 100 meters from the transformer. HEES’s Rebuttal to Pet’r’s Cmts. on HEES’s First Sales Suppl. Resp. (Aug. 2, 2019) (“Rebuttal to Pet’r’s’ Cmts.”) at 9–11, CR 575, PR 244, CJA Tab 19. HEES argued that “the scope of the order include[d] only LPTs, active transformer parts, and *any other transformer parts* attached to, imported with or invoiced with the active parts of LPTs.” *Id.* at 10–11.

At verification, Commerce identified a possible inconsistency in HEES’s reporting of the contested part(s).<sup>9</sup> Verification of the Sales Resp. of [HEES] (Oct. 9, 2019) (“Sales Verification Report”) at 16, CR 666, PR 294, CJA Tab 27. HEES addressed the issue at verification, explaining that parts that governed (i.e., controlled) only in-scope merchandise were reported as in-scope, while parts that governed both in-scope and out-of-scope merchandise were reported as out-of-scope. *See id.* Thus, HEES explained, because the “[ ]” governed only in-scope merchandise (unlike other contested parts which also governed out-of-scope merchandise), HEES considered it to be in-scope merchandise. *See id.* Commerce concluded that this explanation was “inconsistent with” HEES’s prior

<sup>7</sup> The petitioners that commented on HEES’s reporting are Defendant-Intervenors. *See* Pet’r’s’ Cmts at 1.

<sup>8</sup> This part was referred to as the “[ ]” and consisted of [[ ]], including a “[ ]” Pet’r’s’ Cmts. at 10.

<sup>9</sup> Specifically, Commerce noted that HEES classified as in-scope a part described as an “[ ]” despite this part having similar features to contested parts that HEES reported as out-of-scope merchandise—it was neither attached to, nor physically part of the LPT, was located 50 to 100 meters from the LPT, and was attached by cables. Sales Verification Report at 16.

reporting that HEES did “not consider or report [the contested parts] as [in-scope] because the components are located several meters away and only attached by cables.” *Id.*

For the *Final Results*, Commerce concluded that the contested part(s) should have been classified as in-scope merchandise. *See* I&D Mem. at 16. Commerce noted that because it learned about this inaccuracy only during verification, it was not able to gather adequate information about the contested part(s) and, thus, HEES impeded the review by preventing Commerce from accurately calculating normal value. *See id.* at 16, 19.

### **B. Parties’ Contentions**

HEES challenges Commerce’s decision to rely on AFA on the grounds that HEES incorrectly reported certain contested parts as outside the scope of the order, claiming the decision is unsupported by substantial evidence and contrary to law. *See* Pl.’s Rule 56.2 Mot. at 27–31. HEES argues that it reported the contested parts consistent with the scope of the order and consistently throughout this review, that there was no gap in the record, and that Commerce failed to notify HEES of any reporting deficiencies. *See id.*

The Government contends that Commerce reasonably concluded that it was unable to verify HEES’s reporting of the contested part(s) or provide a deficiency notice because the inaccuracy was not apparent until verification. *See* Def.’s Resp. at 21–23. Defendant-Intervenors contends that HEES did not consistently report the contested part(s). Def.-Ints.’ Resp. at 8–12.

### **C. Analysis**

Commerce based its use of facts available on its finding that HEES inaccurately classified the contested part(s), stating that HEES impeded the review with its “shifting explanations” for treating the parts as in- or out-of-scope. *See* I&D Mem. at 16. For the following reasons, the court finds that substantial evidence does not support Commerce’s reliance on facts available with respect to this issue.

As a baseline matter, Commerce failed to establish that HEES incorrectly reported the contested part(s). While Commerce cursorily notes that “it will treat parts and components as subject or non-subject merchandise based on the language in the scope of the order,” it did not directly address HEES’s interpretation of the scope of the order and application of the interpretation to HEES’s reporting of sales. *Id.* The Government argues that HEES “should have known that [the contested part(s)] needed to be included in the gross unit price” based on the “plain language” of the scope of the order. *See* Def.’s Resp. at 22–23. The court is unable to follow the agency’s logic,

not only because the relevant scope language has not been interpreted by Commerce, but because Commerce does not clearly identify the particular part(s) that it believes HEES should have included in the gross unit price and explain why it finds the contested part(s) are within the scope of the order. *See* I&D Mem. at 16.

Likewise, substantial evidence does not support Commerce's finding that HEES inconsistently classified the contested part(s). HEES's classification of the part(s) remained unchanged in its questionnaire responses, *compare* BQR, Ex. B-2, *with* Resps. to Remainder of the FSSQ, Ex. B-2 (Revised 2), and its reporting of what may be distinct types of the contested part(s) also appears to have been consistent, *see* Rebuttal to Pet'r's' Cmts. at 9–11.

Defendant-Intervenors argue that, even if HEES's classification of the contested parts remained consistent, its explanations as to why they were classified as in- or out-of-scope were inconsistent. *See* Def.-Int.'s Resp. at 9 (citing I&D Mem. at 18). Although HEES did expand upon its reporting methodology at verification, it is not clear to the court, from the record, that the additional explanation conflicted with HEES's earlier statements. In its Rebuttal to Petitioners' Comments, HEES responded to the petitioners' claim that a particular contested part should have been reported as in-scope. *See* Rebuttal to Pet'r's' Cmts. at 10–12. HEES explained that this part was not in-scope because it was not a transformer part and was located remotely. *Id.* at 10–11.

HEES's description at verification—that contested part(s) were being treated as in- or out-of-scope depending on what parts they governed—does not clearly conflict with the explanation provided in the Rebuttal to Petitioners' Comments. In the Rebuttal to Petitioners' Comments, HEES identified that certain of the contested part(s) were not transformer parts, Rebuttal to Pet'r's' Cmts. at 10–12, and HEES's explanation at verification further clarified how HEES determined whether a part was a transformer part, *see* Sales Verification Report at 16. In concluding that HEES's explanation was "inaccurate and . . . misleading," I&D Mem. at 18, Commerce ignored HEES's statements that different types of the contested part(s) were necessarily classified differently.

As the court understands the issue, in simpler terms, the distinction HEES draws is similar to the difference between a switch on a lamp and a switch on a circuit breaker. Both parts are referred to as switches and flipping either switch off would turn off the lamp; nevertheless, the switch on the circuit breaker would not reasonably be considered part of the lamp, as it controls not only the flow of electricity to the lamp, but also controls the flow of electricity throughout

the circuit. Similar to how referring to both parts as “switches,” despite their distinct functions, might lead to confusion, neither Commerce’s explanation nor the record is sufficiently clear to indicate whether the dispute is caused by the use of a generic label being applied to two distinct parts, or whether the part is one and the same and the dispute is over whether the part is in-scope depending upon its placement in the LPT/electrical system.

For these reasons, the court finds that substantial evidence does not support Commerce’s finding that HEES misclassified the contested part(s) and its reliance on adverse facts available. On remand, Commerce must reconsider or further explain whether HEES failed to properly report the contested part(s) and, if so, what the appropriate consequences of that reporting are.

#### **IV. Completeness Failure at Verification**

##### **A. Overview**

In the Initial Questionnaire, Commerce asked HEES to report each U.S. sale of subject merchandise during the POR. *See* Initial Questionnaire at A-1. HEES reported [[ ]] U.S. sales. *See* HEES’s Revised Home Market and U.S. Sales Databases (Sept. 10, 2019), Ex. C-1 (Revised 2), CR 628, PR 273, CJA Tab 24. Commerce reconciled this database to HEES’s audited books and records during verification. *See* Remand Results at 26.

At verification, Commerce selected and examined an LPT sale that was not included in HEES’s U.S. sales database to test the completeness of that database (i.e., a completeness test). *See* U.S. Verification of the Sales Resp. of [HEES] (Oct. 9, 2019) (“CEP Sales Verification Report”) at 9–10, CR 667, PR 295, CJA Tab 28. This sale had been shipped and installed during the POR, but was recorded in Hyundai USA’s accounting system outside the POR. *Id.* at 9.

HEES provided documentation indicating that this sale was made by Hyundai USA on behalf of HPT and was for an Alabama-produced LPT. *Id.* at 9–10. The invoice for the sale indicated that the customer was invoiced for customs duties, leading Commerce to question whether the LPT was from Korea. *Id.*; *see also* Hyundai CEP Sales Verification Exs. (Sept. 6, 2019) (“USSVE”), Ex. VE-8 at 5, CR 625–27, CJA Tab 23.

HEES explained that the LPT was originally planned to be produced in Korea, but that production was transferred to the United States after the initial purchase order, CEP Sales Verification Report at 10, and the inclusion of customs duties on the invoice was a clerical error, I&D Mem. at 7. Noting that the purchase order required Hyun-

dai USA to notify the customer of certain information<sup>10</sup> and obtain customer approval prior to beginning production, USSVE, Ex. VE-8 at 11, Commerce requested documentation that the customer was provided the notice of production transfer, CEP Sales Verification Report at 10. HEES could not document such notification. *See id.*

Commerce requested documentation of the shipment of the [[ ]]. *See id.* HEES was unable to provide a bill of lading that included the [[ ]], but instead provided a “Confirmation of Shipping” showing that the [[ ]] had been shipped from HPT to the ultimate customer. *See id.*; USSVE, Ex. VE-8 at 33. Based on these facts, Commerce determined that the application of adverse facts available was warranted. *See I&D Mem.* at 6–8.

Pursuant to the court’s Remand Order, Commerce considered two additional documents, a test report and a nameplate document.<sup>11</sup> *See Remand Results* at 10–19. Commerce concluded that the test report was inconclusive as to the manufacturer because the full test report included “a diagram of the nameplate for [the] LPT in question with the name ‘[[ ]]’ at the top and ‘[[ ]]’ at the bottom.” *Id.* at 24 (internal footnote citation omitted). Furthermore, the test report contained a form with nameplate information identifying “[ ]” as the manufacturer.” *Id.* HEES was unable to identify record evidence demonstrating that “[ ]” refers to HPT. *Id.* at 24–25. Commerce also concluded that while the test report indicated that the LPT was tested at the Alabama plant, it did not establish that the [[ ]] was produced in the United States because it contained no information indicating the manufacturing location of the [[ ]]. *Id.* at 12. Commerce also found inconclusive the test report’s inclusion of a serial number that differed from serial numbers given to LPTs produced in Korea as evidence that the LPT was manufactured in Alabama. *Id.* at 25.

Commerce concluded that HEES failed to demonstrate that it had reported a complete U.S. sales database and, thus, application of adverse facts available was warranted. *See id.* at 19, 28. Commerce cited the following as evidence that the LPT was not produced in Alabama: HEES’s inability to document that the production of the LPT was transferred from Korea to the United States; HEES’s inability to provide a bill of lading that showed that all parts of the LPT were transferred from the production site in the United States to the

<sup>10</sup> Specifically, the purchase order required Hyundai USA to provide the customer with the “[ ]].”

<sup>11</sup> The test report shows, *inter alia*, that a particular item was tested and met certain specification requirements, while the nameplate document contains information about the LPT, such as the manufacturer’s name, serial numbers, and technical specifications. *See Confid. Pl.’s Mot. to Suppl. the R., Att. 1 and 2, ECF No. 28–2.*

final project site; Hyundai USA’s accounting records and invoice indicating that the U.S. customer was billed for and paid customs duties; and a commission payment made by Hyundai USA to its Korean parent company associated with the sale of the LPT, listing HEES as the seller of the LPT. *See id.* at 18–19. Commerce explained that, “[t]aken as a whole, the lack of basic supporting documentation and the payment of customs duties by the customer” supported the agency’s conclusion that HEES “failed to report [the sale of the LPT] as a U.S. sale” and “establishe[d] [HEES’S] failure at verification.” *Id.* at 19. Commerce concluded that “[a]ny inference that may be drawn from the testing in Alabama or a nameplate serial number [was] completely overshadowed by these failures.” *Id.*

### **B. Parties’ Contentions**

HEES contends that Commerce’s application of adverse facts available with respect to the LPT allegedly produced in Korea is unsupported by substantial evidence. Pl.’s Rule 56.2 Mot. at 31–39, 41; Pl.’s Reply at 8–17. HEES argues that the weight of the evidence shows that “a reasonable person could only conclude that the LPT was produced in Alabama.” Pl.’s Reply at 17.

The Government and Defendant-Intervenors contend that Commerce’s conclusion that the [[ ] ] of the LPT was produced in Korea, and not Alabama, as well as the use of adverse facts available, is supported by substantial evidence and is otherwise in accordance with law. Def.’s Resp. at 14–18; Def.-Ints.’ Resp. at 2–8.

### **C. Analysis**

For the reasons discussed below, the court sustains Commerce’s reliance on adverse facts available with respect to HEES’s failure of the completeness test. In particular, the court considers Commerce’s determination in light of the undisputed fact that the LPT was originally planned to be manufactured in Korea. *See* Oral Arg. at 1:31:15–25 (on file with the court); Pl.’s Rule 56.2 Mot. at 16. Thus, in reviewing Commerce’s determination, the question is whether the only reasonable conclusion supported by the record, in its entirety, is that the LPT was produced in Alabama. *See Consolo*, 383 U.S. at 620.

Commerce’s determination that the LPT was not produced in Alabama is not, as HEES contends, “supported by a ‘mere scintilla’ of evidence.” Pl.’s Rule 56.2 Mot. at 39. The record shows that the LPT in question was originally contracted to be produced in Korea. CEP Sales Verification Report at 10. At verification, HEES provided an invoice showing that the customer was billed for customs duties associated with the LPT. *See* USSVE, Ex. VE-8 at 5. While HEES argues that the inclusion of customs duties on this invoice was a

clerical error, *see* Pl.'s Rule 56.2 Mot. at 37, and that this document does not prove that the customs duties were actually paid, *see* Pl.'s Reply at 12, verification also confirmed that the invoice was paid in full, *see* USSVE, Ex. VE-8 at 5. The fact that an invoice to the unaffiliated customer, inclusive of a line item for customs duties, was paid in full calls into question the assertion that this customer was aware that production of this LPT had been shifted to the United States and agreed to the shift.

While HEES is not wrong that the evidence relied on by Commerce does not definitively prove that the LPT was manufactured in Korea, likewise, the evidence pointed to by HEES does not definitively prove that the LPT was manufactured in Alabama. HEES did not provide record evidence that the ultimate customer approved or acknowledged the change in the place of manufacture from Korea to Alabama.<sup>12</sup> *See* CEP Sales Verification Report, Ex. VE-8 at 11; CEP Sales Verification Report at 10. HEES was also unable to provide a bill of lading for the [ ] of the LPT, which might have documented that all parts of the LPT were shipped from Alabama to the customer. *See* CEP Sales Verification Report at 10.

The court does not find Commerce's weighing of the record evidence to be unreasonable. HEES cites *Diamond Sawblades Manufacturers' Coalition v. United States*, 42 CIT \_\_, 301 F. Supp. 3d 1326 (2018), to argue that Commerce failed to give adequate weight to material evidence contradicting its conclusion—in particular, the agency's reconciliation of HEES's reported sales and costs. Pl.'s Reply at 9–10. Reliance on *Diamond Sawblades* is misplaced. In *Diamond Sawblades*, the court found that substantial evidence did not support Commerce's determination because Commerce relied on a single piece of evidence to support its determination, despite substantial record evidence supporting a contrary conclusion. 301 F. Supp. 3d at 1349. Although the court agrees that Commerce's reconciliation of HEES's U.S. sales database and the inclusion of the serial number in the test report and nameplate support HEES's position, Commerce weighed this evidence against more than a single piece of evidence. Absent definitive evidence of the place of production, all record evidence was circumstantial, and the court must sustain Commerce's findings when substantial evidence supports those findings. *See Consolo*, 383 U.S. at 620.

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<sup>12</sup> HEES argues that the purchase order does not require this notice to be provided in writing. Pl.'s Rule 56.2 Mot. at 36; Pl.'s Reply at 14–16. While it is true that written notice was not required, HEES provided no record evidence that notice was provided.

The court now turns to whether Commerce's use of an adverse inference was supported by substantial evidence. HEES argues that its "alleged failure to respond to a request for information" was not a failure to act to the best of its ability. See Pl.'s Rule 56.2 Mot. at 41; see also Pl.'s Reply at 20. The Government argues that Commerce's use of adverse facts available was warranted because HEES was unable to support its claim that the LPT in question was manufactured in the United States. Def.'s Resp. at 14–18. Defendant-Intervenors further argue that HEES's inadequate record keeping supports Commerce's use of an adverse inference. See Def.-Ints.' Resp. at 2–8.

The court finds that substantial evidence supports Commerce's decision to apply an adverse inference. As discussed above, Commerce "may use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available" when the respondent "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1)(A). Commerce may apply an adverse inference in circumstances under which it is reasonable for the agency "to expect that more forthcoming responses should have been made." *Nippon Steel*, 337 F.3d at 1382.

The court's assessment of whether HEES "put forth its maximum efforts to investigate and obtain the requested information from its records," *Nippon Steel*, 337 F.3d at 1382–83, necessarily must consider whether HEES could or should have been able to provide Commerce with the requested information. Here, HEES should have been able to document the place of production of the LPT. See *Nippon Steel*, 337 F.3d at 1382–84; *Diamond Sawblades Manufacturers' Coal. v. United States*, 43 CIT \_\_, \_\_, 415 F. Supp. 3d 1365, 1372–73 (2019) (noting that an experienced respondent "should have been aware of the necessity to maintain country of origin records"). HEES, as a participating respondent in previous proceedings, was certainly aware of the antidumping order, the importance of reporting sales from Korea to the United States, and in a case such as this, the importance of documenting any alleged change of production from Korea to the United States. It is HEES's burden to create an adequate record for Commerce to make its determination. See *QVD Food*, 658 F.3d at 1324. It was "reasonable for Commerce to expect that more forthcoming responses should have been made," *Nippon Steel*, 337 F.3d at 1383, and it is reasonably discernible to the court that Commerce found that HEES, an experienced respondent, failed to provide documents that would surely be kept in the ordinary course of business. See *Hung Vuong Corp. v. United States*, 44 CIT \_\_, \_\_, 483 F. Supp. 2d 1321, 1351 (holding that substantial evidence "permitted

Commerce to apply an adverse inference” based on experienced respondent’s failure to retain documents maintained in the normal course of business).

For the foregoing reasons, the court sustains Commerce’s use of adverse facts available with respect to HEES’s completeness failure at verification.

## V. Total Adverse Facts Available

Because the court finds that substantial evidence does not support Commerce’s use of facts available with respect to HEES’s reporting of the contested part(s), the court does not reach the question of whether substantial evidence supports Commerce’s use of total adverse facts available. Although Commerce stated that HEES’s failure to provide the requested service-related revenue documentation warranted the application of total adverse facts available, I&D Mem. at 14, Commerce also stated that it relied on a combination of the failures to provide service-related revenue documentation, the failed completeness test, and inconsistently reported contested parts for home market sales as a basis for applying total adverse facts available, I&D Mem. at 21; Remand Results at 30–31 (“Commerce’s decision to apply total AFA . . . was based on three findings, not solely on [HEES’s failed completeness test].”). On remand, Commerce must therefore reconsider or further explain its use of total adverse facts available consistent with this decision.

## CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce’s *Final Results*, as amended by the Remand Results, are remanded in part and sustained in part; it is further

**ORDERED** that, on remand, Commerce shall reconsider or further explain its determination to use facts available with respect to HEES’s reporting of the contested part(s) in accordance with this opinion; it is further

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

**ORDERED** that Commerce’s *Final Results*, as amended by the Remand Results, are sustained in all other aspects; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before August 8, 2022; it is further

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

**ORDERED** that any comments or responsive comments must not exceed 4,000 words.

Dated: May 10, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

Slip Op. 22–46

HYUNDAI STEEL CO., Plaintiff, and UNITED STATES STEEL CORP., Consolidated Plaintiff, and NUCOR CORP., Consolidated Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor, and HYUNDAI STEEL CO., Consolidated Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Consol. Court No. 19–00099

[Remand Results are sustained.]

Dated: May 13, 2022

*J. David Park*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff and Consolidated Defendant-Intervenor Hyundai Steel Co. With him on the brief were *Henry D. Almond*, *Daniel R. Wilson*, and *Henry B. Morris*.

*Kelly A. Krystyniak*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant the United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Brendan S. Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Thomas M. Beline* and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor United States Steel Corp. With them on the brief were *Jack A. Levy* and *Chase J. Dunn*.

**OPINION**

**Eaton, Judge:**

Before the court is the remand redetermination of the U.S. Department of Commerce (“Commerce” or the “Department”) pursuant to the court’s order in *Hyundai Steel Company v. United States*, 45 CIT \_\_, 518 F. Supp. 3d 1309 (2021) (“*Hyundai I*”). See Final Results of Redetermination Pursuant to Court Remand (Sept. 24, 2021), PRR 20, CRR 14<sup>1</sup> (“Remand Results”).

Plaintiff and Consolidated Defendant-Intervenor Hyundai Steel Company (“Hyundai” or “Hyundai Steel”) and Consolidated Plaintiff

<sup>1</sup> “PRR” and “CRR” mean, respectively, the public remand record and the confidential remand record. “PR” refers to the public record of the final results.

and Defendant-Intervenor United States Steel Corporation (“U.S. Steel”) have each filed comments on the Remand Results, and the United States (“Defendant”) has filed responsive comments on behalf of Commerce. *See* Hyundai’s Cmts., ECF No. 64; Hyundai’s Reply, ECF No. 66; U.S. Steel’s Cmts., ECF No. 65; Def.’s Resp. Cmts., ECF No. 68.

In their respective comments, Hyundai Steel and Defendant ask the court to sustain the Remand Results as supported by substantial evidence and otherwise in accordance with law. For its part, U.S. Steel seeks another remand with respect to Commerce’s finding that it no longer needed to rely on facts otherwise available, or adverse inferences, under 19 U.S.C. § 1677e(a) and (b).

Because Commerce has complied with the court’s orders in *Hyundai I*, and its findings on remand are supported by substantial evidence on the record, and otherwise in accordance with law, the court sustains the Remand Results. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (2018).

## DISCUSSION

In *Hyundai I*, familiarity with which is presumed, the court reviewed the final results of Commerce’s first administrative review of the antidumping duty order on cold-rolled steel flat products from the Republic of Korea. *See Certain Cold Rolled Steel Flat Prods. From the Republic of Korea*, 84 Fed. Reg. 24,083 (Dep’t Commerce May 24, 2019) and accompanying Issues and Decision Mem. (May 17, 2019), PR 202.

The court found that Commerce’s use of facts available, under 19 U.S.C. § 1677e(a)<sup>2</sup> based on Hyundai’s claimed “withholding” of requested information, could not be sustained because Commerce had failed to comply with its obligation, under 19 U.S.C. § 1677m(d),<sup>3</sup> to

<sup>2</sup> “If . . . an interested party or any other person . . . withholds information that has been requested by [Commerce],” Commerce “shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination under this subtitle.” 19 U.S.C. § 1677e(a) (emphasis added).

<sup>3</sup> Subsection 1677m(d) provides:

If [Commerce] . . . determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) [Commerce] . . . finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then [Commerce] . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).

notify Hyundai of the nature of the alleged deficiencies in the company's questionnaire responses and provide it with an opportunity to remediate. Thus, the court directed Commerce, on remand, to "(1) identify with specificity the control numbers and individual U.S. sales with respect to which it found a deficiency in Hyundai's reported specification data (PRODCOD2U/H and SPECGRADEU/H), (2) clearly describe the nature of each deficiency, and (3) provide Hyundai an opportunity to remediate it." *Hyundai I*, 45 CIT at \_\_, 518 F. Supp. 3d at 1333. The court further directed Commerce to "reconsider whether the use of facts otherwise available is warranted with respect to any of Hyundai's sales, and adequately explain and support its remand redetermination with substantial evidence." *Id.* at \_\_, 518 F. Supp. 3d at 1333. If, on remand, Commerce continued to find that the use of facts available was warranted, and if it made the "additional, distinct finding that the application of an adverse inference is warranted because Hyundai failed to cooperate 'to the best of its ability,' under 19 U.S.C. § 1677e(b), then [Commerce was directed to] support this finding with substantial evidence."<sup>4</sup> *Id.* at \_\_, 518 F. Supp. 3d at 1333.

The court finds that Commerce has complied with the remand instructions in *Hyundai I*. In the Remand Results, Commerce addressed the shortcomings identified by the court with respect to the notice and remediation requirements of 19 U.S.C. § 1677m(d), which must be satisfied before Commerce can rely on facts otherwise available. The Department stated that it

- 1) Notified Hyundai Steel of the specific . . . observations for which PRODCOD2U and SPECGRADEU differed in its Remand Supplemental Questionnaire to Hyundai Steel;
- 2) Recognized that Commerce never directed Hyundai Steel to report PRODCOD2U in a manner other than based on how the merchandise was sold; and
- 3) Recognized that Commerce never directed the company to report SPECGRADEU in a manner other than according to how the merchandise was produced.

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<sup>4</sup> In addition to remanding Commerce's facts available finding, the court found unlawful Commerce's assignment of the all-others rate to Company A, Hyundai's affiliated freight company, and directed Commerce to "rescind its assignment of the all-others rate to Company A." *Hyundai I*, 45 CIT at \_\_, 518 F. Supp. 3d at 1333. The Department had found that Company A was neither a producer nor an exporter of subject merchandise during the period of review. Thus, Company A did not meet the requirements of 19 U.S.C. §§ 1673b(d) and 1673d(c)(1) for the determination of an antidumping duty rate. *See id.* at \_\_, 518 F. Supp. 3d at 1331–33. In the Remand Results, Commerce rescinded the rate for Company A, and no party disputes this rescission. The court sustains the rescission of a rate for Company A.

In response, Hyundai Steel has provided in its Remand Supplemental Response an explanation as to why it reported differing PRODCOD2U and SPECGRADEU characteristics for the . . . observations identified by Commerce. We find that explanation to be reasonable and consistent with record evidence. . . .

On remand, Commerce determines that Hyundai Steel's explanation provides a sufficient basis as to why there was a discrepancy between the relevant observations between the PRODCOD2U and SPECGRADEU fields.

Remand Results at 12 (footnotes omitted). The Department afforded Hyundai an opportunity to explain its reporting via a supplemental questionnaire, and Hyundai provided a full and documented explanation. Thus, on remand, because Commerce found sufficient the information that Hyundai provided in its Remand Supplemental Questionnaire Response, the Department "no longer [relied] on facts available in determining a rate for Hyundai Steel." Remand Results at 14. Additionally, because Commerce did not rely on facts available with regard to Hyundai, it did "not consider[] whether Hyundai Steel cooperated to the best of its ability and whether an adverse inference is appropriate, pursuant to [19 U.S.C. § 1677e(b)]." Remand Results at 14. Thus, Commerce "relied on the CONNUM coding provided by Hyundai Steel for the . . . observations which were subject to the application of facts available with an adverse inference in the *Final Results*." Remand Results at 14.

Turning to U.S. Steel's comments, the court notes that the company does not argue that Commerce's remand findings are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Indeed, the standard of review appears nowhere in U.S. Steel's brief. Rather, U.S. Steel's main argument appears to be that Hyundai has changed its story over the course of this proceeding, and thus Commerce should conclude that Hyundai has not cooperated to the best of its ability. *See* U.S. Steel's Cmts. at 9–10 (asking "that this Court remand to Commerce with instructions to review its redetermination, taking into consideration that it has the authority to continue applying adverse factual inferences if, in light of Hyundai's shifting narratives in these proceedings, it finds that the respondent has failed to cooperate to the best of its ability."). U.S. Steel seems to argue that Commerce is authorized to use adverse inferences because of what U.S. Steel characterizes as Hyundai's general pattern of uncooperative behavior—that is, even though Hyundai ultimately provided the information that Commerce asked for, Commerce should nevertheless apply adverse inferences to Hyundai's information.

The court is not persuaded by U.S. Steel’s argument that remand is required here. First, Commerce—the administrative agency charged with enforcing the antidumping law—concluded that Hyundai had provided all of the information the Department had requested, and that there were no gaps in the factual record to fill with “facts otherwise available.” Remand Results at 14; *see also* 19 U.S.C. § 1677e(a). Moreover, Commerce disagreed with U.S. Steel’s position that Hyundai continually shifted its story. *See* Def.’s Resp. Cmts. at 13 (“Commerce . . . relied on Hyundai’s explanation that SPECGRADEU and PRODCOD2U differed in some instances because they are derived from different data sources. Specifically, SPECGRADEU reflects the physical characteristics of the merchandise, whereas PRODCOD2U reflects the merchandise as sold. Commerce also determined that Hyundai consistently has argued that both fields were reported based on different sources of information.”). That is to say, Commerce found as a matter of fact that Hyundai cooperated with its requests for information on remand, and had met the legal standard for cooperation. *See* Remand Results at 18–19 (finding that Hyundai “fully responded to each of the questions put forth in Commerce’s remand supplemental questionnaire.”). U.S. Steel has made no argument that convinces the court that Commerce erred on remand. Thus, it would be contrary to the law and the record evidence to conclude that Hyundai “failed to cooperate by not acting to the best of its ability to comply with a request for information” from Commerce. *See* 19 U.S.C. § 1677e(b)(1). Accordingly, the court finds no grounds for remand.

### CONCLUSION

For the foregoing reasons, the Remand Results are sustained. Judgment will be entered accordingly.

Dated: May 13, 2022

New York, New York

*/s/ Richard K. Eaton*

JUDGE

Slip Op. 22–47

VOESTALPINE USA CORP. and BILSTEIN COLD ROLLED STEEL LP,  
Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge  
Consol. Court No. 20–03829

VOESTALPINE USA LLC and BILSTEIN COLD ROLLED STEEL LP,  
Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge  
Court No. 21–00290

[In Consolidated Court No. 20–03829, granting Plaintiffs’ motion for reconsideration of the court’s prior opinion dismissing the action as moot; granting Defendant’s motion to dismiss the action for failure to state a claim upon which relief may be granted; and denying Plaintiffs’ motion for leave to amend the complaint as futile. In Court No. 2100290, denying Defendant’s motion to dismiss for lack of subject matter jurisdiction; granting Plaintiffs’ consent motion for leave to amend the complaint; and granting Defendant’s motion to dismiss the action for failure to state a claim upon which relief may be granted.]

Dated: May 17, 2022

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*Aimee Lee*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant. With her on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the briefs were *Kenneth S. Kessler*, Senior Counsel, Office of the Chief Counsel, Bureau of Industry and Security, U.S. Department of Commerce, of Washington, D.C., and *Yelena Slepak*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, D.C.

**OPINION AND ORDER**

**Barnett, Chief Judge:**

Plaintiffs<sup>1</sup> in these companion cases filed complaints seeking reliquidation of several entries of steel merchandise exclusive of duties imposed pursuant to section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2018).<sup>2</sup> Compl., ECF No. 1 (20–3829); Compl., ECF No. 2 (21–290).<sup>3</sup> Plaintiffs based their requests for relief on the U.S.

<sup>1</sup> Bilstein Cold Rolled Steel LP (“Bilstein”) is a plaintiff in each case. Bilstein is joined by VoestAlpine USA Corp. (“VoestAlpine”) in Court No. 20–3829 and by voestalpine USA LLC in Court No. 21–290. For ease of reference, the court refers to these parties collectively as “Plaintiffs.”

<sup>2</sup> Citations to the U.S. Code are to the 2018 version, unless otherwise stated.

<sup>3</sup> Throughout the opinion the court cites to ECF Nos. in both Court Nos. 20–3829 and 21–290. When the Court No. is unclear from the text accompanying the citation, the court identifies the case in a parenthetical.

Department of Commerce (“Commerce”) Bureau of Industry and Security’s (“BIS”) approval of exclusion requests, each containing the same invalid 10-digit subheading of the Harmonized Tariff Schedule of the United States (“HTSUS”). By the time Plaintiffs discovered the respective errors and obtained revised exclusions from BIS that were effective as of the date of the original requests, U.S. Customs and Border Protection (“Customs” or “CBP”) had liquidated the entries at issue in each case and the liquidations had become final. Plaintiffs now seek court-ordered reliquidation to obtain a refund of section 232 duties paid in connection with the entries in each case.

Pending in Court No. 20–3829 is Plaintiffs’ motion for reconsideration of the court’s opinion and judgment dismissing the action as moot and for leave to amend the complaint. Pls.’ Mot. for Relief from J., Recons. and Leave to Amend Consol. Compls. (“Pls.’ Mot. Recons. 20–3829”), ECF No. 28; Reply Br. of Pls. in Supp. of Mot. for Recons., Relief from J. and to Amend the Compl. (“Pls.’ Reply Recons. 20–3829”), ECF No. 30; *see generally VoestAlpine USA Corp. v. United States* (“*VoestAlpine I*”), 45 CIT \_\_\_, 532 F. Supp. 3d 1379 (2021) (finding statutory subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) but dismissing Plaintiffs’ claim as moot).

Pending in Court No. 21–290 is the Government’s motion to dismiss the action pursuant to U.S. Court of International Trade (“USCIT” or “CIT”) Rules 12(b)(1) and 12(b)(6). Def.’s Mot. to Dismiss (“Def.’s Mot. Dismiss 21–290”), ECF No. 17; Def.’s Reply in Supp. of its Mot. to Dismiss, ECF No. 19. Also pending is Plaintiffs’ consent motion for leave to file a second amended complaint to remove one of the two entries in the action. Pls.’ Consent Mot. for Leave to Amend Compl. (“Pls.’ Consent Mot. Amend 21–290”), ECF No. 22.

The facts and legal issues underlying each case are similar in relevant respects and, thus, the court resolves the pending motions in a single opinion. For the reasons discussed herein, the court grants Plaintiffs’ motion for reconsideration, vacates its opinion in *VoestAlpine I* dismissing Court No. 20–3829 as moot, and denies the Government’s motion to dismiss Court No. 21–290 for lack of subject matter jurisdiction. The court grants Plaintiffs’ consent motion for leave to file a second amended complaint in Court No. 21–290, but nevertheless grants the Government’s motions to dismiss both Court Nos. 20–3829 and 21–290 for failure to state a claim upon which relief may be granted. The court denies Plaintiffs’ contested motion for leave to file a second amended complaint in Court No. 20–3829 because the amendment would be futile.

## BACKGROUND

### I. Section 232 Duties and the Exclusion Process

“Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods to ‘[s]afeguard[ ] national security.’” *N. Am. Interpipe, Inc. v. United States*, 45 CIT \_\_, \_\_, 519 F. Supp. 3d 1313, 1319 (May 25, 2021) (alterations in original) (quoting 19 U.S.C. § 1862). Pursuant to that authority, on March 8, 2018, the President announced a 25 percent tariff on imports of certain steel products, effective March 23, 2018. *See* Proclamation 9705 of Mar. 8, 2018, cl. 1–2, 83 Fed. Reg. 11,625 (Mar. 15, 2018). Proclamation 9705 identified certain six-digit tariff provisions that would be subject to section 232 duties. *Id.*, cl. 1.<sup>4</sup> In order to implement the increased duty rates, Proclamation 9705 modified subchapter III of chapter 99 of the HTSUS to add a new subheading, 9903.80.01, which provides for an additional 25 percent tariff on “all entries of iron or steel products from all countries, except products of Canada and of Mexico, classifiable in the headings or subheadings enumerated in this note.” *Id.*, Annex (U.S. Note 16(a)).

Proclamation 9705 further authorized Commerce “to provide relief from the additional duties . . . for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” and “to provide such relief based upon specific national security considerations.” *Id.*, cl. 3. Commerce must convey all exclusion determinations “to [CBP] for implementation . . . at the earliest possible opportunity.” *Id.*, Annex (U.S. Note 16(c)). Importers are required to “report information concerning any applicable exclusion granted by Commerce in such form as CBP may require.” *Id.*, Annex (U.S. Note 16(d)).

The President twice amended the exclusion information provided in clause three of Proclamation 9705. In Proclamation 9711, the President amended clause 3 to state that, “[f]or merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the request for exclusion was posted for public comment.” Proclamation 9711 of Mar. 22, 2018, cl. 7, 83 Fed. Reg. 13,361 (Mar. 28, 2018). In Proclamation 9777, the President amended clause three such that retroactive relief

<sup>4</sup> The subheadings included “7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90, including any subsequent revisions to these . . . classifications.” Proclamation 9705, cl. 1; *see also id.*, Annex (U.S. Note 16(b)) (enumerating the affected tariff provisions). The covered articles are subject to section 232 duties in addition to other applicable duties. *Id.*, cl. 2.

pursuant to a granted exclusion would extend to entries for “which liquidation is not final.” Proclamation 9777 of Aug. 29, 2018, cl. 5, 83 Fed. Reg. 45,025 (Sept. 4, 2018).

In 2018, BIS amended 15 C.F.R. pt. 705 to include rules for the administration of the exclusion process. *See generally Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objs. to Submitted Exclusion Reqs. for Steel and Aluminum*, 83 Fed. Reg. 12,106 (Dep’t Commerce Mar. 19, 2018) (interim final rule); *Submissions of Exclusion Reqs. and Objs. to Submitted Reqs. for Steel and Aluminum*, 83 Fed. Reg. 46,026 (Dep’t Commerce Sept. 11, 2018) (interim final rule); *see also* 15 C.F.R. pt. 705, Supp. 1 (eff. Sept. 11, 2018). The regulations that were in effect when the entries at issue were made state that exclusion requests must be filed by an individual or organization “using steel in business activities . . . in the United States” and include “the submitter’s name, date of submission, and the 10-digit [HTSUS] statistical reporting number.” 15 C.F.R. pt. 705, Supp. 1(c)(1). Commerce’s approval of an exclusion is limited to the product specified in the request and the “individual or organization that submitted the specific exclusion request, unless Commerce approves a broader application of the [exclusion].” *Id.* pt. 705, Supp. 1(c)(2). Companies may “submit[] a request for exclusion of a product even though an exclusion request submitted for that product by another requester or that requester was denied or is no longer valid.” *Id.* Commerce must deny “[e]xclusion requests that do not satisfy the [specified reporting] requirements.” *Id.* pt. 705, Supp. 1(h)(1)(i). With respect to refunds, the regulations state that “Commerce does not provide refunds on tariffs” and “[a]ny questions on the refund of duties should be directed to CBP.” *Id.* pt. 705, Supp. 1(h)(2)(iii)(B).

Both Customs and Commerce issued guidance to importers seeking exclusions. Customs issued several Cargo Systems Messaging Service (“CSMS”) messages on the proper submission of approved exclusions. On May 21, 2018, Customs issued guidance stating that “[e]xclusions granted by [Commerce] are retroactive on imports to the date the request for exclusion was posted for public comment at Regulations.gov.” U.S. Customs and Border Prot., CSMS # 18–000352 - Submitting Imports of Products Excluded from Duties on Imports of Steel or Aluminum, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/1f1986e> (May 21, 2018, 8:41 AM) (“CSMS # 18–000352”). Thus, “[t]o request an administrative refund for previous imports of excluded products granted by [Commerce], importers

may file a [post summary correction (“PSC”)].” *Id.* If, however, “the entry has already liquidated, importers may protest the liquidation.” *Id.* Subsequent CSMS messages reiterated that exclusions may be applied retroactively to unliquidated entries and to entries that have liquidated when the liquidation is nonfinal and the protest period has not expired. *See* U.S. Customs and Border Prot., CSMS # 42566154 – Section 232 and Section 301 – Extensions Reqs., PSCs, and Protest, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/289820a> (May 1, 2020, 5:05 PM); U.S. Customs and Border Prot., CSMS # 39633923 - UPDATE: Submitting Imports of Products Excluded from Duties on Imports of Steel or Aluminum, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/25cc403> (Sept. 3, 2019, 11:08 AM); U.S. Customs and Border Prot., CSMS # 18–000378 - UPDATE: Submitting Imports of Products Excluded from Duties on Imports of Steel or Alumin [sic], <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/1f6cce3> (June 5, 2018, 3:37 PM).

In June 2019, Commerce published guidance on the section 232 exclusion process. BUREAU OF INDUS. AND SEC., U.S. DEP’T COMMERCE, 232 EXCLUSION PROCESS FREQUENTLY ASKED QUESTIONS (FAQS) (June 19, 2019), <https://www.bis.doc.gov/index.php/documents/section-232-investigations/2409-section-232-faq/file>. Therein, Commerce explained that a company in receipt of an approved exclusion should provide CBP with information concerning the importer of record listed in the exclusion and the “product exclusion number.” *Id.* at 12. Commerce indicated that “an exclusion is granted for one year from the date of signature, or until all excluded product volume is imported (whichever comes first).” *Id.* Companies “cannot make substantive changes to their exclusion request after submission” but may make “non-substantive changes,” such as changes to the importer of record. *Id.* at 18. Commerce further stated that it could revoke a granted exclusion “if there was a technical issue that resulted in an inadvertent approval.” *Id.* at 13. Commerce also provided guidance on the resubmission of denied exclusion requests, including requests that were denied for HTSUS errors. *Id.* at 25. Resubmissions may apply retroactively “to [the] original submission date for refund purposes.” *Id.*

## II. Factual and Procedural History

Plaintiffs commenced Court No. 20–3829 on November 10, 2020. Summons, ECF No. 2; Compl. Plaintiffs filed an amended complaint on November 12, 2020, that corrected paragraph numbering. [Am.]

Compl. (“Am. Compl. 20–3829”), ECF No. 8.<sup>5</sup> BIS’s approval of the revised exclusion and grant of retroactive application occurred after Plaintiffs commenced the action and amended their complaint. Def.’s Mot. Dismiss 20–3829, Exs. E–F.

Plaintiffs commenced Court No. 21–290 on June 18, 2021. Summons, ECF No. 1; Compl. By then, BIS had already taken the corrective steps outlined above (i.e., approving the revised exclusion request with retroactive effect). Compl. ¶ 15. Plaintiffs filed an amended complaint on September 17, 2021, that corrected paragraph numbering. [Am.] Compl., ECF No. 15. On February 28, 2022, after briefing on the Government’s motion to dismiss had concluded, Plaintiffs requested leave to file a second amended complaint to remove one of the entries because it “has been determined after review not to be covered by the approved exclusions at issue in this case” and “was mistakenly included in this action.” Pls.’ Consent Mot. Amend 21–290 at 1; *id.*, Ex. 2 (proposed amended complaint (“2nd Am. Compl. 21–290”)), ECF No. 22–2. The Government consented to the motion provided the court did not require a response to the second amended complaint and considered briefing on the motion to dismiss in connection with the second amended complaint. *See* Pls.’ Consent Mot. Amend 21–290 at 2; *id.*, Ex. 1 (proposed order), ECF No. 22–1.

The operative complaints<sup>6</sup> emphasize BIS’s allegedly unlawful act in approving—instead of denying—the flawed exclusion requests and seek to hold BIS responsible for the delay that Plaintiffs allege prevented them from applying the revised exclusions to the identified entries. In Court No. 20–3829, in which the complaint is particularly bereft of details, Plaintiffs allege that BIS approved an exclusion with a non-existent HTSUS provision. Am. Compl. 20–3829 ¶ 11. Plaintiffs also acknowledge that the importer of record and port of entry listed in Bilstein’s original exclusion request were incorrect but allege that these inconsistencies were immaterial. *Id.* ¶¶ 16, 18–19. Plaintiffs claim that the Government “wrongfully failed to refund” the section 232 duties, *id.* ¶ 20, and that “BIS has refused to assist in securing refund of the duties,” *id.* ¶ 21. Plaintiffs seek a judgment holding that the revised exclusion applies to its entries and that the Government must reliquidate the entries and refund the section 232 duties. *Id.* at 4–5 (prayer for relief).

In Court No. 21–290, Plaintiffs likewise allege that BIS approved an exclusion request with a non-existent HTSUS provision. 2nd Am.

<sup>5</sup> The court consolidated Court No. 20–3829 and Court No. 20–3840 with Court No. 20–3829 operating as the lead case. Order (Jan. 28, 2016), ECF No. 14.

<sup>6</sup> As discussed *infra*, the court grants Plaintiffs’ consent motion for leave to file a second amended complaint in Court No. 21–290. Thus, the court cites to the allegations therein and to the allegations contained in the first amended complaint filed in Court No. 20–3829.

Compl. 21–290 ¶¶ 12–13. Plaintiffs further allege that “[s]hortly after” BIS approved the original exclusion request, “Bilstein noted that the HTSUS classification number was incorrect” and that the error traced to Bilstein’s request. *Id.* ¶ 16. Plaintiffs complain that “BIS was required to review all exclusion requests before posting” but “failed to do so.” *Id.* Plaintiffs allege that, in May 2019,<sup>7</sup> they contacted BIS seeking guidance about correcting an HTSUS error in an exclusion and fault the clarity of the guidance they allegedly received. *Id.* ¶ 17. Plaintiffs followed up with BIS in August 2020 and submitted a revised exclusion request to BIS on November 23, 2020. *Id.* ¶¶ 19–20. BIS approved the revised exclusion request on December 31, 2020. *Id.* ¶ 20. On February 2, 2021, BIS approved Bilstein’s request to render the exclusion effective as of December 9, 2018, the date of Bilstein’s original submission. *Id.*; *see also* Def.’s Mot. Dismiss 21–290, Ex. F (BIS decision on retroactivity).<sup>8</sup> Plaintiffs’ entry liquidated before BIS approved the revised exclusion. 2nd Am. Compl. 21–290 ¶ 21. Plaintiffs claim that both the original and revised exclusions apply to the entry “with the exception of the HTSUS classification number in the first [e]xclusion.” *Id.* ¶ 25. Plaintiffs also claim that BIS failed to “publish any regulation” on correcting HTSUS provisions, *id.* ¶ 26, failed to “notify Plaintiffs of any mechanism to obtain refunds” before liquidation, and “had the authority to correct the erroneous HTSUS classification number at any time,” *id.* ¶ 27. Plaintiffs claim that the Government “is wrongfully in possession of the [s]ection 232 duties” VoestAlpine paid on the entry. *Id.* ¶ 28. Plaintiffs seek a judgment holding that both exclusions apply to the entry and that the Government must reliquidate the entry and refund the section 232 duties. *Id.* at 10 (prayer for relief).

Plaintiffs’ complaints fail to cite legal authority for the respective claims alleged therein but may reasonably be read to make out a claim against Commerce pursuant to the Administrative Procedure Act (“APA”) for unlawful “final agency action for which there is no

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<sup>7</sup> The Government disputes this allegation and asserts that Plaintiffs did not contact BIS until May 2020. Def.’s Mot. Dismiss 21–290 at 20; *see also* Resp. to the Court’s Req. at 1, App. 1, ECF Nos. 25, 25–1 (21–290) (cover letter and copy of email showing that Bilstein contacted BIS on May 19, 2020, to request information on correcting exclusions containing incorrect tariff provisions). The court need not and, therefore, does not resolve this factual dispute to resolve the pending motions.

<sup>8</sup> BIS’s decision memorandum is dated January 30, 2021. Def.’s Mot. Dismiss 21–290, Ex. F. The difference between the memorandum and Plaintiffs’ allegation may reflect the time between BIS’s approval and posting of the decision and is immaterial for purposes of resolving the pending motions. *See id.* at 11.

other adequate remedy in a court.” 5 U.S.C. § 704.<sup>9</sup> The procedural history of these cases reflects that understanding.

The Government first moved to dismiss Court No. 20–3829, arguing, *inter alia*, that: 1) any challenge to BIS’s grant of the original exclusion with an invalid HTSUS provision was moot because BIS issued a revised exclusion effective as of the date of the original submission, and 2) Plaintiffs failed to state a cognizable claim against the Government because the complaint does not identify unlawful final agency action by Commerce or CBP and Plaintiffs’ own inaction resulted in the final assessment of section 232 duties. Def.’s Mot. to Dismiss (“Def.’s Mot. Dismiss 20–3829”) at 22–28, ECF No. 19. In their opposing brief, Plaintiffs argued that although “the true nature of this action *is* a challenge to the approval by BIS of a fatally flawed and therefore useless steel product exclusion,” Pls.’ Resp. to Def.’s Mot. to Dismiss Compls. (“Pls.’ Opp’n Dismiss 20–3829”) at 24–25, ECF No. 21 (emphasis added), the case was not moot because the court retains the “authority to order reliquidation of entries notwithstanding final liquidation,” *id.* at 28.<sup>10</sup> The court agreed with the Government that the sole claim alleged was moot because Plaintiffs had received all the relief available to them and dismissed the action accordingly. *VoestAlpine I*, 532 F. Supp. 3d at 1392–95.

Plaintiffs seek reconsideration of that decision. Pls.’ Mot. Recons. 20–3829. The Government opposes the motion. Def.’s Resp. to Pls.’ Mot. for Relief from J., Recons. and Leave to Amend the Consol. Compls. (“Def.’s Opp’n Recons. 20–3829”), ECF No. 29.

Following the court’s opinion in *VoestAlpine I*, the Government moved to dismiss Court No. 21–290. *See* Def.’s Mot. Dismiss 21–290. The Government argues, *inter alia*, that: 1) any challenge to Commerce’s original exclusion decision underlying that case is likewise moot, *id.* at 14–16, and 2) Plaintiffs failed to state a cognizable claim for relief because their failure to take any action to prevent finality of liquidation bars the refund of section 232 duties by operation of 19 U.S.C. § 1514(a),<sup>11</sup> *id.* at 17–19. The Government also argues that

<sup>9</sup> In cases brought pursuant to the court’s jurisdiction pursuant to 28 U.S.C. § 1581(i), the court applies the standard of review set forth in the APA. 28 U.S.C. § 2640(e) (cross-referencing 5 U.S.C. § 706). Section 706 directs the court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

<sup>10</sup> Plaintiffs relied, in part, on the court’s remedial statute, which provides that the CIT may “order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.” 28 U.S.C. § 2643(c)(1).

<sup>11</sup> Section 1514(a) provides for the finality of certain “decisions of the Customs Service, including the legality of all orders and findings entering into the same . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest . . . is commenced in the [CIT].” 19 U.S.C. § 1514(a).

Plaintiffs' failure to pursue the administrative options available to them to keep their entries open precludes court-ordered reliquidation and, on that basis, Plaintiffs failed to state a claim entitling them to any relief. *Id.* at 19–21. Plaintiffs oppose the motion, arguing that the action is not moot largely for the same reasons provided in briefing filed in Court No. 20–3829. *See* Pls.' Opp'n Dismiss 21–290 at 4–5. Plaintiffs further contend that Commerce could have corrected the HTSUS error, the circumstances did not require a protest, and BIS's approval of the revised exclusion constitutes an "intervening legal development" meriting reliquidation. *Id.* at 11–12 (citing *ThyssenKrupp Steel N. Am. v. United States*, 886 F.3d 1215, 1222 (Fed. Cir. 2018)).<sup>12</sup>

On March 8, 2022, the court heard oral argument on the pending motions. Docket Entry, ECF No. 34 (20–3829); Docket Entry, ECF No. 24 (21–290).

## JURISDICTION

The court has statutory subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(D) (2018 & Supp. II 2020). Section 1581(i) grants the court jurisdiction to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this subsection and subsections (a)–(h) of this section." *Id.* § 1581(i)(1)(D).

## DISCUSSION

Article III of the U.S. Constitution limits the court to resolving "legal questions only in the context of actual 'Cases' or 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting U.S. CONST. art. III, § 2). The "case-or-controversy limitation on federal judicial authority underpins both . . . standing and . . . mootness jurisprudence." *Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (internal citation omitted). Thus, the court first addresses Plaintiffs' motion for reconsideration in Court No. 20–3829 and the Government's motion to dismiss for lack of subject matter jurisdiction in Court No. 21–290 because both motions turn on whether these cases satisfy the Article III case-or-controversy requirement that the court be able to provide effective relief. After concluding that the complaints survive dismissal pursuant to USCIT

<sup>12</sup> The Government also argued that the actions should be dismissed as time barred. Def.'s Mot. Dismiss 21–290 at 17; Def.'s Reply in Supp. of its Mot. to Dismiss at 14–15, ECF No. 23 (20–3829). Plaintiffs' failure to state a cognizable claim obviates any need to address this alternative argument for dismissal.

Rule 12(b)(1), the court considers the Government's arguments pursuant to USCIT Rule 12(b)(6), and finds those arguments dispositive.

### I. Availability of Relief

Plaintiffs seek reconsideration of the court's dismissal of Court No. 20–3829 as moot pursuant to USCIT Rules 59(a)(1)(B) and 60(b)(1). Pls.' Reply Recons. 20–3829 at 1–2; *see also* Pls.' Mot. Recons. 20–3829 at 4, 8 (citing USCIT Rules 59 and 60(b) generally).<sup>13</sup> Pursuant to USCIT Rule 59(a)(1)(B), “[t]he court may, on motion, grant a new trial or rehearing on all or some of the issues — and to any party — . . . after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.” USCIT 60(b)(1) provides for relief from a final judgment based on “mistake, inadvertence, surprise, or excusable neglect.”<sup>14</sup>

Reconsideration is appropriate to correct “a significant flaw in the conduct of the original proceeding” but is not intended “to allow the losing party to reargue its case.” *Acquisition 362, LLC v. United States*, 45 CIT \_\_, 539 F. Supp. 3d 1251, 1255–56 (2021) (citations omitted), *appeal docketed*, No. 22–1161 (Fed. Cir. Nov. 12, 2021). “The decision whether to grant reconsideration lies largely within the discretion of the [lower] court.” *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). In this case, the court has reconsidered its position that Plaintiffs' claim in Court No. 20–3829 is moot.

The standard for demonstrating mootness is “demanding,” *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019), and requires a showing that “an event [has occurred] while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party,” *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)); *see also, e.g., Mills v. Green*, 159 U.S. 651, 653 (1895) (stating that when the facts—either on the record or “proved by extrinsic evidence”—show that an intervening event “renders it impossible for [the] court . . . to grant . . . any effectual relief whatever, the court . . . will dismiss the appeal”).

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<sup>13</sup> Plaintiffs also cite USCIT Rule 59(e) as grounds for altering or amending the judgment, *see* Pls.' Reply Recons. 20–3829 at 2, 4; however, USCIT Rule 59(e) speaks only to the timing of such a motion, not the basis for any such motion.

<sup>14</sup> Rule 59 motions are due within 30 days of the court's entry of judgment. USCIT Rule 59(b). Rule 60(b)(1) motions must be filed “no more than a year after the entry of the judgment.” USCIT Rule 60(c)(1). Plaintiffs filed their motion within 22 days of the court's entry of judgment. *See* Docket, ECF Nos. 27–28.

The court has observed that “[w]hat constitutes ‘appropriate relief’ pursuant to 28 U.S.C. § 2643(c)(1) ‘is a case-specific determination.’” *In re Section 301 Cases*, 45 CIT \_\_, \_\_, 524 F. Supp. 3d 1355, 1377 n.14 (2021) (Barnett, C.J., dissenting) (“*In re Section 301 PI Slip Op.*”). A finding that reliquidation constitutes an appropriate form of relief in a given case defeats an assertion of mootness. See *Shinyei Corp. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004).<sup>15</sup> This case presents a different question, however: whether the court must decide the appropriateness of reliquidation in the context of the Article III case-or-controversy requirement, as it did in *VoestAlpine I*, or whether the court should find the requirement satisfied to the extent that reliquidation is within the court’s statutory authority to order pursuant to 28 U.S.C. § 2643(c)(1) in an appropriate case. Upon further consideration, the court reaches the latter conclusion.

The court finds instructive *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401 (Fed. Cir. 1989). In the CIT opinion underlying that appeal, the court relied on *United States v. Torch Manufacturing Co.*, 509 F.2d 1187 (CCPA 1975),<sup>16</sup> to find that the CIT lacked jurisdiction to entertain a motion for reconsideration filed outside the 30-day timeframe provided for such motions in 28 U.S.C. § 2646 (1982). See *Rhone Poulenc*, 880 F.2d at 403. In *Torch*, the CCPA had concluded that the 30-day statutory deadline for filing motions for a retrial or rehearing in the Customs Court (predecessor to the CIT) was jurisdictional and, because the Customs Court “lack[ed] equitable powers, and there was at the time no court rule 60(b),” the Customs Court lacked jurisdiction to entertain an untimely motion. *Rhone Poulenc*, 880 F.2d at 405 (citing *Torch*, 509 F.2d at 1189, 1192) (footnote omitted). In *Rhone Poulenc*, the appellate court held that the enactment of 28 U.S.C. § 1585, which confers on the CIT “all the powers in law and equity of, or as conferred by statute upon, a district court of the United States,” overruled *Torch* and, thus, the CIT could entertain a Rule 60(b) motion filed 33 days after the judgment dismissing the action. *Id.* at 405–06.

While the legal issues addressed in *Rhone Poulenc* are distinct, in reaching its decision the Federal Circuit made several relevant ob-

<sup>15</sup> *Shinyei* held that the CIT retained jurisdiction pursuant to 28 U.S.C. § 1581(i) to address Shinyei Corporation of America’s (“Shinyei”) APA claim challenging Commerce’s liquidation instructions issued after litigation regarding an administrative review of the antidumping duty order notwithstanding Customs’ liquidation of Shinyei’s entries. 355 F.3d at 1305–12. The appellate court found that the action was not moot because reliquidation was not otherwise barred by statute and was “easily construed” as an appropriate form of relief. *Id.* at 1312.

<sup>16</sup> The U.S. Court of Customs and Patent Appeals (“CCPA”) was the predecessor to the Federal Circuit.

servations. The court noted the “fundamental distinction between a court’s subject matter jurisdiction and its equitable powers,” such that “[t]he former must exist before the latter may be exercised.” *Id.* at 402. In other words, while subject matter jurisdiction “concerns the authority of a court to hear and decide [a case],” the court’s equitable powers “concern[] the remedial relief a court having that authority may grant.” *Id.* More pointedly, the court explained that “[e]quitable remedial powers,” including the authority conferred by 28 U.S.C. § 2643(c)(1), “aid a court in the exercise of its subject matter jurisdiction” but “are not themselves jurisdictional predicates.” *Id.* at 407; *see also id.* at 408 n.19 (“The court’s exercise of its informed discretion in the employment of all its equity powers in future cases cannot but aid its conduct of the judicial process.”).

*Rhone Poulenc* suggests that the court should not convert its decision on the appropriateness of reliquidation in a given case into a “jurisdictional predicate[]” and should instead consider the possibility of reliquidation sufficient for purposes of the Article III case-or-controversy requirement. *Cf. id.* at 407–08. The Federal Circuit further indicated that the court should consider the appropriateness of reliquidation in connection with Plaintiffs’ claim for such relief and not as a jurisdictional matter in *Confederacion De Asociaciones Agricolas Del Estado De Sinaloa, A.C. v. United States*, 2022 WL 1112233 (Fed. Cir. Apr. 14, 2022).

In *Confederacion*, the Federal Circuit addressed the CIT’s dismissal of a claim alleging that Commerce unlawfully terminated a suspension agreement<sup>17</sup> as moot based on the court’s finding that it lacked the authority to grant the plaintiffs’ requested relief—reinstatement of the suspension agreement. 2022 WL 1112233, at \*4. The Federal Circuit found dismissal on that basis “improper” apparently based on the possibility that the plaintiffs could “prevail on their claims relating to the termination of the [suspension] agreement *and* their contentions concerning the appropriate relief,” notwithstanding the CIT’s contrary finding. *Id.* (emphasis added).<sup>18</sup>

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<sup>17</sup> Section 1673(c) of Title 19 governs agreements to suspend an antidumping duty investigation.

<sup>18</sup> The Federal Circuit did not analyze the CIT’s authority to reinstate the suspension agreement beyond citing *CSC Sugar LLC v. United States*, 43 CIT \_\_, \_\_, 413 F. Supp. 3d 1318 (2019), a case in which the CIT, exercising jurisdiction pursuant to 28 U.S.C. § 1581(c), vacated an amendment to a suspension agreement based on noncompliance with procedural requirements. *See Confederacion*, 2022 WL 1112233, at \*4 (citing *CSC Sugar*, 413 F. Supp. 3d at 1326). The CIT had distinguished *CSC Sugar* and a related case when it concluded that it lacked the authority to reinstate the suspension agreement. *See Confederacion De Asociaciones Agricolas Del Estado De Sinaloa, A.C. v. United States*, 44 CIT \_\_, \_\_, 459 F. Supp. 3d 1354, 1365 n.12 (2020).

There, as here, the CIT exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). *See id.* at \*3. While neither the CIT nor the Federal Circuit discussed 28 U.S.C. § 2643, the CIT’s authority to order reinstatement of the suspension agreement would appear to derive from the court’s authority pursuant to subsection (c)(1) of that provision. *Confederacion* thus suggests that the possibility of relief pursuant to 28 U.S.C. § 2643(c)(1) defeats an assertion of mootness. *See id.* at \*4 (finding that the Government had not met “its ‘heavy’ burden to establish mootness”). The Federal Circuit subsequently found that certain counts should be dismissed for failure to state a claim upon which relief may be granted and remanded the dismissal of other counts for the CIT to consider in the first instance. *See id.* at \*7–9.

In light of *Rhone Poulenc* and *Confederacion*, the court concludes that the appropriateness of reliquidation as a form of relief would be better addressed in conjunction with an analysis of the claims presented by Plaintiffs in these cases and not through the lens of mootness. The court thus vacates its prior holding in Court No. 203829 that Plaintiffs’ claim was moot.<sup>19</sup>

With respect to Court No. 21–290, BIS granted retroactive application of the revised exclusion before Plaintiffs commenced the action. *See* 2nd Am. Compl. 21–290 ¶ 20. While mootness may arise upon the occurrence of an event mid-litigation, standing is typically assessed at the outset. *See Friends of Earth, Inc.*, 528 U.S. at 189 (addressing standing before mootness). Because all relevant events preceded commencement of the action, the court considers the Parties’ respective arguments regarding dismissal through the lens of standing. Oral Arg. 4:50–6:40, available at <https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings> (time stamp from the recording) (statement by counsel for the Government that standing is the appropriate analysis in this case). For the same reasons that the court finds that Plaintiffs’ claim in Court No. 20–3829 is not moot, however, the court finds that Plaintiffs have standing to pursue their claim in Court No. 21–290.

## **II. Leave to File a Second Amended Complaint in Court No. 21–290**

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<sup>19</sup> Because the court finds that dismissal is nevertheless appropriate pursuant to USCIT Rule 12(b)(6), the court does not vacate the judgment entered in Court No. 20–3829. *See J.*, ECF No. 27. The court notes that this is without prejudice to Plaintiffs and their time to appeal. *See* Fed. R. App. P. 4(a)(4).

Before turning to whether dismissal of the complaints is required pursuant to USCIT Rule 12(b)(6), the court must identify the operative complaint to which it should address the Parties' arguments in Court No. 21–290.<sup>20</sup>

The Government's consent notwithstanding, ordinarily, "an amended complaint supersedes the original complaint," *Pac. Bell Tele. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009), and a prior motion targeting the sufficiency of the original pleading is rendered moot, *see, e.g., Aspects Furniture Int'l, Inc. v. United States*, 44 CIT \_\_, \_\_, 469 F. Supp. 3d 1359, 1362, 1366–67 (2020) (granting leave to amend a complaint to add factual allegations and alter the nature of the claim mooted pending cross-motions for judgment on the pleadings). The rule is not absolute, however. When, as here, the proposed amended complaint is "substantially identical to the original complaint," the court may consider the motion to dismiss against the allegations in the proposed pleading. *Crawford v. Tilley*, 15 F.4th 752, 759 (6th Cir. 2021) (citation omitted); *see also, e.g., Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 303–04 (2d. Cir. 2020) (per curiam); *Kalos v. United States*, 368 F. App'x. 127, 131–32 (Fed. Cir. 2010) (lower court did not abuse its discretion in applying the defendant's motion to dismiss to an amended complaint when "the amended complaint contained the same claims and substantially the same factual allegations as the original [complaint]").

Plaintiffs seek to make one change—the removal of one of two entries in the action. *See* Pls.' Consent Mot. Amend 21–290 at 1–2. The minor nature of the change, in conjunction with the benefit of having a clear record regarding the scope of the action, favors accepting the proposed second amended complaint and evaluating the Government's motion to dismiss against the allegations contained therein.

Accordingly, the court will grant Plaintiffs' consent motion to file a second amended complaint. The court now turns to whether dismissal is required pursuant to USCIT Rule 12(b)(6).

### **III. In Each Case, Plaintiffs Failed to State a Cognizable Claim Upon Which the Court May Grant the Requested Relief**

When reviewing a motion to dismiss for failure to state a claim, "any factual allegations in the complaint are assumed to be true and

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<sup>20</sup> Unlike the consent motion filed in Court No. 21–290, Plaintiffs' motion for leave to file a second amended complaint in Court No. 20–3829 is opposed by the Government. *See* Def.'s Opp'n Recons. 20–3829 at 12–13. The court therefore considers Plaintiffs' contested motion *infra* and with respect to whether the proposed amendments cure the deficiencies the court identifies with the first amended complaint.

all inferences are drawn in favor of the plaintiff.” *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000). When there is “more to the story than what appears in [the] complaint,” *White v. Keely*, 814 F.3d 883, 885 & n.2 (7th Cir. 2016), the court may also consider “matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record,” *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004) (alteration in original)). Public records include “letter decisions of government agencies.” *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1197 (3rd Cir. 1993) (citing *Phillips v. Bureau of Prisons*, 591 F.2d 966, 968 (D.C. Cir. 1979)).

A court may properly dismiss a claim pursuant to Rule 12(b)(6) only if Plaintiffs’ allegations of fact are not “enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

As previously noted, a generous reading of the operative complaints suggests that BIS’s issuance of the flawed exclusions constitutes the unlawful final agency action underlying the requests for reliquidation. There is no serious dispute that BIS erred in granting the exclusions containing the invalid HTSUS provisions. *See* Oral Arg. 1:01:55–1:04:00 (counsel for the Government acknowledging the mistake). “In a case arising under the APA, the court may—and regularly will—remand” deficient agency action for reconsideration. *In re Section 301 Cases*, Slip Op. 22–32, 2022 WL 987067, at \*25 (CIT Apr. 1, 2022) (citing *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affs.*, 260 F.3d 1365, 1379–80 (Fed. Cir. 2001)); *see also* 28 U.S.C. § 2643(c)(1) (providing for “orders of remand”); *Borlem S.A.-Empredimentos Industriais v. United States*, 913 F.2d 933, 937–38 (Fed. Cir. 1990) (recognizing the CIT’s authority to remand pursuant to section 2463(c)(1)).

A remand to BIS is unnecessary here, however, because BIS provided all the relief it could when it issued the revised exclusions and made those exclusions retroactive. Def.’s Mot. Dismiss 20–3829, Ex. F;<sup>21</sup> 2nd Am. Compl. 21–290 ¶ 20. Thus, the court returns to the question of court-ordered reliquidation. The court concludes, how-

<sup>21</sup> The court considers the Government’s exhibit—BIS’s decision memorandum rendering Bilstein’s revised exclusion effective as of the date of the original submission—to constitute a public record the court may consider when ruling on a motion to dismiss pursuant to USCIT Rule 12(b)(6) without converting the motion into one for summary judgment. The decision memorandum is publicly available on Commerce’s website for published exclusion

ever, that Plaintiffs have not stated a claim pursuant to which court-ordered reliquidation is an appropriate remedy.

Plaintiffs rely heavily on *Shinyei* to support their argument regarding the court's authority to order reliquidation. *See, e.g.*, Pls.' Opp'n Dismiss 20–3829 at 30; Pls.' Opp'n Dismiss 21–290 at 9. To be sure, the court may exercise such authority in appropriate cases. *See Shinyei*, 355 F.3d at 1312; *PrimeSource Building Prods., Inc. v. United States*, 45 CIT \_\_, \_\_, 505 F. Supp. 3d 1352, 1357–58 (2021) (ordering a refund of any section 232 duties paid on entries liquidated despite the court's preliminary injunction suspending liquidation);<sup>22</sup> *Gilda Indus., Inc. v. United States*, 33 CIT 751, 760, 625 F. Supp. 2d 1377, 1385 (2009) (ordering CBP to refund certain section 301 retaliatory duties without regard to liquidation status), *aff'd*, 622 F.3d 1358 (Fed. Cir. 2010). Here, however, Plaintiffs' claims relate to the section 232 exclusion process established by the Executive Branch.

The exclusion process established by the President provided that retroactive relief—refunds of section 232 duties on entries made on or after an exclusion request was made—is limited to unliquidated entries or entries for which liquidation is not final. Proclamation 9777, cl. 5; *see also* Proclamation 9705, cl. 3. Regulations issued by BIS notify importers that refunds of section 232 duties are within the province of CBP, not BIS. *See* 15 C.F.R. pt. 705, Supp. 1(h)(2)(iii)(B). CBP issued guidance consistent with the limitations established by the President. *See, e.g.*, CSMS # 18–000352 (directing importers to file post summary corrections or protests to request refunds on prior entries). In other words, the section 232 exclusion process is a discretionary regime implemented with certain conditions and limitations.

The instant cases are distinct from *Shinyei*, in which *Shinyei*'s claim arose out of the statute—19 U.S.C. § 1675(a)(2)(C)—that governed the relationship between Commerce's calculations pursuant to an antidumping duty administrative review and CBP's assessment of

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requests. *See* U.S. Dep't of Commerce, Published Exclusion Reqs., <https://232app.azurewebsites.net/steellalun> (starting point for accessing exclusions using the search function) (last visited May 17, 2022); *see also* BIS Decision Mem. on Exclusion Req. No. 155507, available at <https://232app.azurewebsites.net/Forms/ExclusionRequestItem/155507> (scroll down to "BIS Decision Memo" and see attached file) (last visited May 17, 2022). The decision memorandum also constitutes a "letter decision of [a] government agency[.]" *Pension Ben. Guar. Corp.*, 998 F.2d at 1197; *Phillips*, 591 F.2d at 968. Additionally, the court may take judicial notice of BIS's decision memorandum (and certain others like it) as a fact that is "not . . . subject to reasonable dispute." *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1360 (Fed. Cir. 2019) (quoting Fed. R. Evid. 201(b)). While Plaintiffs did not seek to supplement their complaint pursuant to USCIT Rule 15(d) to allege relevant subsequent events or include such events in their proposed second amended complaint, Plaintiffs have acknowledged BIS's actions in their briefing. *See, e.g.*, Pls.' Opp'n Dismiss 20–3829 at 31; Pls.' Reply Recons. 20–3829 at 8.

<sup>22</sup> The court later stayed this aspect of its judgment pending appeal before the Federal Circuit. *See PrimeSource Building Prods., Inc. v. United States*, 45 CIT \_\_, \_\_, 535 F. Supp. 3d 1327, 1336 (2021).

the duties. *See Shinyei*, 355 F.3d at 1303, 1306. Plaintiffs' claims are also distinct from claims raised in cases seeking to challenge the imposition of certain duties as void *ab initio*. *See In re Section 301 PI Slip Op.*, 524 F. Supp. 3d at 1372–83 (Barnett, C.J., in a case challenging the imposition of duties pursuant to section 301 of the Trade Act of 1974 as void *ab initio*, dissenting from the grant of a preliminary injunction upon finding that the court's authority to order re-liquidation undermined the plaintiffs' assertions of irreparable harm arising from liquidation).

At the hearing, Plaintiffs implicitly acknowledged the absence of any legal requirement for an exclusion process when counsel was unable to identify any such requirement (while suggesting, without elaboration, that the absence of a process might have had legal implications). *See Oral Arg.* 42:50–43:59. Regarding the process established to effectuate section 232 exclusions, Plaintiffs make no claim<sup>23</sup> that the limitation on retroactive refunds to entries that have not liquidated or for which liquidation is not final is arbitrary or capricious.<sup>24</sup> Plaintiffs also raise no challenge to BIS's regulations alerting importers to CBP's role in providing refunds and do not suggest that BIS has any authority to issue refunds. While in one case Plaintiffs allege, in a conclusory fashion, that BIS failed to publish a regulation concerning the correction of HTSUS errors in exclusions or inform Plaintiffs of a mechanism to obtain refunds prior to liquidation, 2nd Am. Compl. 21–290 ¶¶ 26–27, Plaintiffs do not identify any legal basis for the claim, nor is one suggested in their briefing, *see* Pls' Opp'n Dismiss 21–290 at 8 (asserting, without supporting authority, that "Commerce was obligated to make publicly available a viable remedy" for "chang[ing] the tariff number in the exclusion"). *Cf.* 15 C.F.R. pt. 705, Supp. 1(c)(2) (allowing importers to submit exclusions for a product even if a prior exclusion was denied or is otherwise invalid).

Plaintiffs' reliance on *ThyssenKrupp v. United States*, 886 F.3d 1215 (Fed. Cir. 2018) is also misplaced. *See* Pls' Opp'n Dismiss 21–290 at 11. That case concerned an intervening change in the legal requirement to pay antidumping duties on eight entries based on revocation of the antidumping duty order with an effective date prior to the entries, a change that CBP failed to apply in response to a timely-filed

<sup>23</sup> Plaintiffs argue that "the government attempts to invent a new requirement for a 'protective' protest to stop the clock in order to obtain a refund of duties." Pls' Opp'n Dismiss 21–290 at 7. Plaintiffs do not, however, allege any such claim regarding CBP's use of the protest statute to implement exclusions in their complaints or support their argument with legal authority.

<sup>24</sup> This statement is without prejudice to the question whether any challenge to the President's imposition of such conditions would be justiciable.

protest. *ThyssenKrupp*, 886 F.3d at 1218–20, 1223. Here, however, Commerce’s approval of the revised exclusions, *see* Def.’s Mot. Dismiss 20–3829, Ex. F; 2nd Am. Compl. 21–290 ¶ 20, did not automatically void the application of the duties because approved exclusions must be presented to CBP for evaluation and, when appropriate, the issuance of refunds.<sup>25</sup> *See* Proclamation 9705, Annex (U.S. Note 16(c)–(d)); 15 C.F.R. pt. 705, Supp. 1(h)(2)(iii)(B). Absent presentation of an approved exclusion to CBP, the legal requirement to pay duties on merchandise subject to section 232 duties remained.

In sum, Plaintiffs’ complaints fail to state a claim upon which the court can grant relief beyond BIS’s grant of the corrected exclusions.

Plaintiffs’ proposed second amended complaint filed in Court No. 20–3829 fails to cure the deficiencies discussed above and amendment would be futile. *See Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1353 (Fed. Cir. 2006) (stating that leave to amend may be denied “if the court finds that . . . the amendment would be futile”) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Plaintiffs seek to add factual allegations concerning the internal processes used by Bilstein and VoestAlpine to apply granted exclusions. *See* [Proposed] Am. Compl. (“Proposed 2nd Am. Compl. 20–3829”) ¶¶ 12–13, ECF No. 28–1.<sup>26</sup> Concerning the purported legal basis for the claim, Plaintiffs seek to allege that “[t]he actions of Defendant contributed substantially to the inability of Plaintiffs to obtain refunds of Section 232 duties before the liquidation of the Entry became final,” *id.* ¶ 19; “Defendant United States wrongfully granted an exclusion that led Plaintiffs to believe that refunds of duties could be claimed,” *id.* ¶ 23; “[w]hen Plaintiffs discovered the only method to obtain relief, the entry had liquidated,” *id.* ¶ 24; and “[o]btaining refunds without the assistance of the [c]ourt is not possible,” *id.* ¶ 25.<sup>27</sup>

As with the existing complaints, however, a favorable reading of the proposed second amended complaint suggests a claim based on Com-

<sup>25</sup> The court notes that presentation of the exclusion to CBP allows CBP to undertake its own evaluation of whether the exclusion properly applies to the entry in question, including whether the quantitative cap on the product subject to the exclusion has been met. *See, e.g.*, Def.’s Mot. Dismiss 21–290, Ex. F (listing a quantitative cap on the requested annual exclusion amount).

<sup>26</sup> Contrary to the court’s rules and administrative orders, Plaintiffs did not append “a list of each amendment or correction, including the page number for each amendment or correction,” or “an amended or corrected version of the document showing the additions, deletions, and any other changes in a ‘redline and strikeout’ format.” USCIT Admin. Order 02–01 ¶ 4(d)(i); *see also* USCIT Rule 15 (practice comment).

<sup>27</sup> Plaintiffs also seek to modify an existing allegation to note that the Government “has challenged the right of Plaintiffs to obtain equitable relief in this [c]ourt.” Proposed 2nd Am. Compl. 20–3829 ¶ 26. This proposed amendment is immaterial to issues under consideration.

merce's alleged improper grant of the erroneous exclusions and nothing from which the court may infer a "plausible claim" for refunds through reliquidation. *See Iqbal*, 556 U.S. at 679. Plaintiffs identify no additional allegedly unlawful final agency action(s) or legal theory to support their claim or requested relief. Thus, further amendment would be futile and will be denied. *See Kemin Foods, L.C.*, 464 F.3d at 1353.

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Plaintiffs' motion for relief from judgment, for reconsideration, and for leave to amend the consolidated complaints (ECF No. 28, Court No. 20-3829) is **GRANTED IN PART** as to reconsideration of the question of mootness and **DENIED IN PART** as to leave to file a second amended complaint and for relief from judgment; it is further

**ORDERED** that the portion of the court's opinion in *VoestAlpine USA Corp. v. United States*, 45 CIT \_\_, 532 F. Supp. 3d 1379 (2021), dismissing Court No. 20-3829 as moot is **VACATED**; it is further

**ORDERED** that Plaintiffs' consent motion for leave to file a second amended complaint (ECF No. 22, Court No. 21-290) is **GRANTED**; and it is further

**ORDERED** that the Government's motions to dismiss the actions for failure to state a claim upon which relief may be granted (ECF No. 19, Court No. 20-3829; ECF No. 17, Court No. 21-290) are **GRANTED**.

Judgment will enter in Court No. 21-290 accordingly.

Dated: May 17, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE



# Index

*Customs Bulletin and Decisions*  
*Vol. 56, No. 21, June 1, 2022*

## *U.S. Customs and Border Protection* *CBP Decisions*

	CBP No.	Page
Technical Amendment to List of User Fee Airports: Removal of One Airport . . . . .	22-09	1

## *General Notices*

	Page
Importers of Merchandise Subject to Actual Use Provisions . . . . .	4

## *U.S. Court of International Trade* *Slip Opinions*

	Slip Op. No.	Page
Ghigi 1870 S.p.A. and Pasta Zara S.p.A., Plaintiffs, and Agritalia S.r.L. and Tesa S.r.L., Consolidated Plaintiffs, v. United States, Defendant, and Riviana Foods, Inc. and Treehouse Foods, Inc., Defendant-Intervenors. . . . .	22-41	9
Hyundai Electric & Energy Systems Co., Ltd., Plaintiff, v. United States, Defendant, and Hitachi Energy USA Inc. and Prolec-GE Waukesha, Inc., Defendant-Intervenors. . . . .	22-42	14
Hyundai Steel Co., Plaintiff, and United States Steel Corp., Consolidated Plaintiff, and Nucor Corp., Consolidated Plaintiff-Intervenor, v. United States, Defendant, and United States Steel Corp., Defendant-Intervenor, and Hyundai Steel Co., Consolidated Defendant-Intervenor. . . . .	22-46	36
VostAlpine USA Corp. and Bilstein Cold Rolled Steel LP, Plaintiffs, v. United States, Defendant. . . . .	22-47	41
VostAlpine USA LLC and Bilstein Cold Rolled Steel LP, Plaintiffs, v. United States, Defendant. . . . .	22-47	41