U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PARTS 113, 133, 148, 151, AND 177

CBP DEC. 24–03

RIN 1515–AE26

ENFORCEMENT OF COPYRIGHTS AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

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

ACTION: Final rule.

SUMMARY: This document adopts as final, with some changes, proposed amendments to the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise that violate or are suspected of violating the copyright laws, including the Digital Millennium Copyright Act (DMCA), in accordance with title III of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The amendments set forth in this document clarify the definition of "piratical articles," simplify the detention process involving goods suspected of violating the copyright laws, and prescribe new regulations enforcing the DMCA.

DATES: This final rule is effective on August 23, 2024.

FOR FURTHER INFORMATION CONTACT: Alaina van Horn, Chief, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325–0083, *Alaina.VanHorn@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Digital Millennium Copyright Act and the Trade Facilitation and Trade Enforcement Act of 2015

Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125; 130 Stat. 122; Section 628A of the Tariff Act of 1930 (19 U.S.C. 1628a), as amended) (TFTEA), made several significant changes to the U.S. Customs and Border Protection (CBP) procedures related to the importation of merchandise that violates or is suspected of violating intellectual property rights (IPR). Among the changes made by TFTEA are certain provisions regarding enforcement of the Digital Millennium Copyright Act (Pub. L. 105–304, 112 Stat. 2860, as amended by Pub. L. 106–113, 113 Stat. 1536, (codified at 17 U.S.C. 1201)) (DMCA). The DMCA prohibits the importation of devices used to circumvent the technological measures employed by certain copyright owners to protect their works ("copyright protection measures").

Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph (G) (19 U.S.C. 1595a(c)(2)(G)), which provides that CBP may seize merchandise containing a circumvention device violating the DMCA. Section 303(b) of TFTEA states that, when merchandise containing a circumvention device is seized pursuant to 19 U.S.C. 1595a(c)(2)(G), CBP must disclose to persons injured by that circumvention device information regarding the seized merchandise that is equivalent to the information disclosed to copyright owners when merchandise is seized for violation of the copyright laws.

Section 302 of TFTEA amended the Tariff Act of 1930 by inserting a new section 628A (19 U.S.C. 1628a) authorizing CBP to make certain pre-seizure information disclosures to owners of properly recorded trademarks or copyrights that may comprise information otherwise protected by the Trade Secrets Act (18 U.S.C. 1905). CBP is authorized to disclose information when CBP determines that these disclosures would assist CBP in determining whether the imported merchandise suspected of violating the IPR laws actually violates 17 U.S.C. 602 (copyright), 17 U.S.C. 1201 (circumvention devices), or 19 U.S.C. 1526 (trademark), as long as the disclosures would not compromise an ongoing law enforcement investigation or national security. Specifically, section 302(a) of TFTEA (19 U.S.C. 1628a(a)) permits CBP to disclose to the right holder information that appears on the imported merchandise and its packaging and labels, including unredacted images of the merchandise and its packaging and labels.

CBP also may, subject to any applicable bonding requirements, release unredacted samples of the merchandise to the right holder.

B. Notice of Proposed Rulemaking

On October 16, 2019, the Enforcement of Copyrights and the Digital Millennium Copyright Act notice of proposed rulemaking (NPRM) was published in the **Federal Register** (84 FR 55251). The NPRM proposed changes to 19 CFR part 133 necessary to implement the applicable provisions of title III of TFTEA, clarify the definition of “piratical articles,” provide for procedural safeguards to limit the release of information concerning non-violative shipments, simplify the detention process related to merchandise suspected of violating the copyright laws, and clarify the existing CBP procedures for post-seizure disclosures.

C. Changes From the Proposed Rule for Applying to CBP for DMCA Protections

Section 133.47 provides for post-seizure disclosures to persons injured by a circumvention device, as defined in § 133.47(a)(4), who have successfully applied for and been approved by CBP for DMCA protections as provided in § 133.47(b)(2)(iii). Section 133.47(b)(2)(iii) announces the establishment of a list of persons approved by CBP to receive such post-seizure disclosures. In response to the public comments received, as discussed in more detail below, this final rule expands the ways that an eligible person, as defined in § 133.47(a)(3), may apply to CBP for these DMCA protections. Eligible persons may apply for such DMCA protections when this final rule becomes effective by attaching a letter requesting such disclosures to an application to record or renew a copyright. Owners of existing recorded copyrights may apply for these DMCA protections by submitting a letter requesting such disclosures to the Intellectual Property Enforcement Branch of Regulations and Rulings at *HQIPRBranch@cbp.dhs.gov*. Pursuant to section 303(b)(2) of TFTEA, CBP will publish a notice, signed by the Executive Director, Regulations and Rulings, in the **Federal Register** when the list is established. CBP will also publish the necessary revisions to the list in a notice signed by the Executive Director, Regulations and Rulings, in the **Federal Register** on, at minimum, an annual basis, every September.

II. Discussion of Comments

CBP received six public submissions in response to the NPRM. One submission was unresponsive and contained no specifics about the NPRM, copyrights, or IPR. The remaining five submissions supported the proposed rule’s intent but sought clarifications, raised concerns, and/or made recommendations for improvements. The five submissions each contained multiple comments. The comments have been grouped together below based on the general topic.

A. Bond Requirements for Right Holders To Obtain Samples From CBP

Prior to CBP's releasing a sample of imported merchandise pursuant to § 133.21, § 133.25, § 133.42, or § 133.47, for suspected infringement of a recorded mark or recorded copyright or suspected circumvention of a copyright protection measure, proposed 19 CFR 113.70 required the owner of the recorded mark or the recorded copyright to furnish a single transaction bond to CBP. The bond was required in the amount specified by CBP and was required to contain the bond conditions set forth in proposed § 113.70, including an agreement to only use the sample for the limited purpose of assisting CBP in enforcing IPR and an agreement to indemnify the importer or owner for any improper use of the sample.

1. Type of Bond

Comment: Two commenters requested that CBP also permit the right holder to furnish a continuous bond. The commenters stated that continuous bonds are more efficient in terms of simplified tracking and administration, more economical, ease the burden of underwriting, reduce the administrative burden on CBP, and further CBP's overall strategy to facilitate trade. One of the commenters further noted that CBP has in the past allowed continuous bonds when samples of merchandise were sought for examination or testing.

Response: CBP agrees with the commenters and recognizes that some owners of a recorded mark or recorded copyright may prefer a continuous bond for reasons of efficiency, economy, or underwriting. Thus, CBP is amending the language in proposed § 113.70 to permit the owner of the recorded mark or the recorded copyright to furnish to CBP either a single transaction bond or a continuous bond, in the amount specified by CBP and containing the conditions listed, when obtaining a sample of the merchandise.

2. Bond Conditions

Comment: One commenter requested that CBP amend § 113.70 to remove references to post-seizure disclosures or procedures. The commenter noted that the use of the term "suspected" in the heading and text of proposed 19 CFR 113.70, which specifically states that the bond conditions apply when a right holder obtains a sample of imported merchandise "suspected of infringing recorded marks or recorded copyrights, or circumventing copyright protection measures," demonstrates that the bond conditions in § 113.70 are only intended to apply in a pre-seizure context. Since proposed § 113.70 contains general citations to §§ 133.21, 133.42, and 133.47, the commenter noted that the bond requirement and conditions apply in a both pre-seizure and post-seizure context because §§ 133.21(f), 133.42(f), and 133.47(f) address post-seizure disclosures and procedures. The commenter further asserted that TFTEA does not provide statutory authority for imposing the § 113.70 bond conditions, including an agreement to use the sample for the limited purpose of assisting CBP, in a post-seizure context because TFTEA only addresses CBP's authority to provide samples to right holders when doing so would assist CBP in determining whether the merchandise is being imported in violation of the IPR laws. The commenter pointed out that imported merchandise is only seized after this determination has been made and that this post-seizure context is not addressed in title III of TFTEA.

Response: The proposed amendments to 19 CFR 113.70 were intended to consolidate the IPR sample bond language and conditions, currently contained throughout 19 CFR part 133, in one centralized location. As set forth in existing 19 CFR 133.21(f) and 133.42(e), CBP already requires an IPR sample bond in the post-seizure context, conditioned on indemnifying the importer or owner of the imported merchandise against any loss or damage resulting from the furnishing of the sample by CBP to the right holder. CBP endeavored to incorporate these existing post-seizure bond requirements and conditions in proposed § 113.70. However, CBP agrees with the commenter that, as drafted, the bond conditions proposed in § 113.70 conflate pre-seizure and post-seizure contexts. To avoid confusion and to clarify the bond conditions in a post-seizure context, CBP is amending proposed § 113.70 to revise its heading and to add a new paragraph (b) setting forth the bond requirements and conditions for when CBP provides the owner of a recorded mark or recorded copyright a sample of imported merchandise seized for infringing the recorded mark or copyright, or circumventing a copyright protection measure, including samples provided pursuant to § 133.21(f), § 133.42(f), or § 133.47(f). For additional clarity, CBP is also specifying in any cross-references made to § 113.70 throughout part 133 whether § 113.70(a), containing the bond conditions for merchandise suspected of IPR violations, or § 113.70(b), containing the bond conditions for merchandise seized for IPR violations, is applicable.

Comment: Two commenters expressed concern that proposed § 113.70 does not describe the types of actions that would violate the bond conditions, including what activities are permissible in service of "providing assistance to CBP in enforcing intellectual property rights," and what actions may be deemed an "improper use" of the sample.

Response: CBP does not believe it is necessary to amend or expand on the bond conditions language in § 113.70(a). The specificity of the bond conditions in § 113.70(a) is consistent with the specificity of the conditions for other types of CBP bonds set forth throughout title 19 of the CFR. Furthermore, section 302(a) of TFTEA states, in part, that CBP may provide the right holder with a sample of the merchandise suspected of violating the IPR laws if CBP determines that the "examination or testing" of the merchandise by the right holder would assist CBP in determining if the merchandise is being imported in violation of the IPR laws. In the pre-seizure context, any activity performed by the owner of the recorded mark or recorded copyright that falls outside the scope of determining the authenticity of the sample would constitute an improper use of the sample and would violate the § 113.70(a) bond conditions.

Comment: One commenter stated that the bond conditions in proposed § 113.70, which limit the sample's use, could be construed as prohibiting a right holder from providing relevant information gleaned from its examination to law enforcement agencies other than CBP, or from pursuing civil enforcement of the right holder's legitimate rights authorized elsewhere under Federal or State law. The commenter sought clarification on this issue. This commenter also objected to CBP's not including in proposed §§ 133.21(f), 133.42(f), and 133.47(f), language specifying that another use that the sample may be utilized for is "in pursuit of a related private civil remedy for infringement," particularly given that this specific language is included in existing §§ 133.21(f) and 133.42(e).

Response: The bond conditions that limit the sample's use, as set forth in proposed § 113.70, only apply in a pre-seizure context. Pursuant to CBP's statutory authority in section 302 of TFTEA, for merchandise suspected of being imported in violation of the IPR laws, the sample may only be used by the right holder for the limited purpose of providing assistance to CBP in enforcing IPR. Thus, as explained above, in the pre-seizure context, any activity performed or disclosure made by the right holder that falls outside the scope of determining the authenticity of the sample would constitute an improper use of the sample and violate the § 113.70(a) bond conditions. This restriction is necessary since, at the time that CBP is furnishing the sample to the right holder, the imported merchandise is only suspected of IPR infringement or circumvention and therefore, it would be inappropriate for the right holder to provide information gleaned from its examination of the sample to law enforcement agencies other than CBP, or from pursuing civil enforcement under Federal or State law.

However, a right holder may use a sample obtained after the merchandise is seized for violations of the IPR laws for purposes other than assisting CBP. To provide clarification on this issue, CBP is adding a new paragraph (b) to § 113.70 to provide less restrictive bond conditions in the post-seizure context, including those related to other uses such as a civil remedy for infringement. CBP is also amending the post-seizure disclosure provisions in §§ 133.21(f), 133.42(f), and 133.47(f), as requested by the commenter, to explicitly state that samples released by CBP post-seizure may be used in pursuit of a related private civil remedy for infringement.

3. Amount of the Bond

Comment: Two commenters asserted that there is a lack of clarity regarding the amount of the bond because the proposed language in § 113.70 and part 133 states that the bond will be in the "amount specified by CBP." One of the commenters stated that this broad language appears to allow bond valuations based on highly speculative claims of loss or damage, which the commenter believes would discourage right holders from requesting samples. This commenter recommended that the bond be formulated only on provable harm that may arise from the importer's loss of the physical sample and that, for any indirect injury because of misuse of the sample, the importer should seek recourse in the courts, not with CBP. The other commenter sought clarity on the amount of the bond and whether the bond amounts would remain at the current levels, which the commenter stated are set at the value of the sample (typically $100), to secure the importer from any damage to the sample while in possession of the right holder, or if the bond amounts would dramatically increase due to the bond's now securing against any loss or damage resulting from improper use of the sample. This commenter also requested information on the range of criteria appropriate for setting bond amounts.

Response: CBP disagrees that there is a lack of clarity regarding the amount of the bond. CBP will specify the amount of the bond based on the same standard CBP bond requirements and parameters that CBP uses to determine the amount of its other bonds, as set forth in § 113.13. Section 113.13 governs the amount of any CBP bond, unless expressly exempt by law or other regulation, including setting the minimum amount of the bond, providing guidelines for determining the amount of the bond, requiring periodic review of the bond sufficiency, and providing CBP authority to require additional security if CBP determines the bond is not sufficient. In accordance with § 113.13(a), while the minimum amount of an IPR sample bond is $100, as noted by the commenter, the bond amount assessment is based on the domestic value of the sample, or $100, whichever is greater. This determination has been the long-standing policy of CBP when setting bond amounts in the post-seizure context. Regarding the criteria for setting pre-seizure bond amounts, CBP takes the particular circumstances of each situation into account when making its determination using the guidelines set forth in § 113.13(b). Numerous factors, including but not limited to, the nature of the merchandise at issue, the value of the merchandise, including the size of the shipment, and CBP's prior dealings with the principal will inform CBP's decision in setting the bond amount. It is essential to CBP's operations that CBP be able to retain flexibility in establishing the appropriate bond amount.

4. Bond Return Requirements

Comment: One commenter requested that CBP revise proposed § 113.70 to clarify that the bond will be returned when the imported merchandise at issue is determined to violate the right holder's IPR. This commenter stated that while the existing § 113.70 makes clear that the right holder's bond will be returned where the goods at issue are ultimately determined to violate the right holder's IPR, the proposed § 113.70 does not contain similar language. The commenter stated that, as drafted, the proposed regulations could lead to the forfeiture of the bond even when CBP determines that the goods were counterfeit or piratical.

Response: CBP disagrees with this commenter's suggestion. The commenter's bond description and stated concerns are addressing a bond required to pursue a disputed determination of copyright infringement that is in the existing regulations in §§ 113.70, 133.43, and 133.44, not the IPR sample bond that is contained in proposed § 113.70. The existing regulations require the right holder to furnish a bond under § 133.43(d)(1) to pursue a copyright infringement determination. Existing § 113.70 is currently a bond to indemnify the United States if CBP detains any articles alleged by the principal to be a piratical copy of material covered by the principal's copyright pending a final determination and to hold the United States harmless from any material depreciation, loss, or damage to the articles if it is determined that the goods are not piratical. Section 133.44(a) states that this bond will be returned to the right holder if the articles at issue are ultimately determined to violate the right holder's IPR. However, as explained in the NPRM, CBP believes that these procedures, including the bond, are an outdated and inefficient mechanism to address situations where CBP has a suspicion that certain goods may be piratical, therefore, CBP is removing §§ 133.43 and 133.44 in their entirety from title 19 of the CFR. Additionally, as noted in the NPRM, because CBP is removing §§ 133.43 and 133.44, CBP is revising the related provision in § 113.70, which currently sets forth the bond conditions for detention of copyrighted material. CBP is revising § 113.70, as proposed in the NPRM and finalized in this rule, to set forth, in one centralized location, the bond conditions for a right holder to obtain samples of imported merchandise suspected of infringing the right holder's IPR.

If the conditions of the IPR sample bond, as provided for in revised § 113.70(a)(1), are violated, CBP may make a demand on the bond, even if CBP ultimately determines that the imported merchandise violates the right holder's IPR. To clarify the IPR sample bond conditions, particularly with regard to the timing of the sample return requirements and to ensure that a bond is not incorrectly forfeited, CBP is amending the language proposed in § 113.70. As discussed above, proposed § 113.70 is being revised to address the pre-seizure context in paragraph (a) and the post-seizure context in paragraph (b). In the pre-seizure context, CBP is revising the language proposed to state that the sample must be returned upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the post-seizure context, CBP is adding language to state that the sample must be returned upon demand by CBP or at the conclusion of any examination, testing, or other use, whichever occurs sooner.

If the sample, in either a pre-seizure or post-seizure context, is not returned to CBP by the right holder, the IPR sample bond is forfeited regardless of whether the merchandise is determined to violate IPR.

B. Definitions

1. Piratical Articles

Comment: One commenter stated that the proposed language added to the definition of "piratical article" in § 133.42(a), which states that the copy or phonorecord must be "of a recorded copyright work, importation of which is prohibited by the Copyright Act of 1976," is too narrowly tailored. The commenter asserted that CBP enforces copyrights at the border so long as the work is registered with the U.S. Copyright Office and that the proposed definition seems to exclude works not recorded with CBP.

Response: CBP disagrees that "piratical articles" is too narrowly defined. Section 302 of TFTEA (19 U.S.C. 1628a(c)) explicitly limits its authority to apply only to merchandise suspected of infringing a trademark or copyright that is recorded with CBP. Accordingly, works not recorded with CBP are excluded from the procedures set forth in § 133.42.

2. Copyright Protection Measure

Comment: Two commenters requested that CBP revise the definition of "copyright protection measure" in proposed § 133.47(a)(1) to include copy controls. Copy controls, as set forth in 17 U.S.C. 1201(b)(1), prohibit the importation of technologies, products, or services that circumvent a technological protection measure that effectively protects the exclusive rights of a copyright owner. The commenters asserted that the proposed definition, as drafted, only applies to the seizure and forfeiture of imported merchandise that circumvents access controls, as set forth in 17 U.S.C. 1201(a)(2), prohibiting the importation of technologies, products, or services that circumvent a technological protection measure that effectively controls access to a copyrighted work. They stated that to ensure that CBP fully implements TFTEA and to ensure effective border enforcement against all unlawfully imported circumvention devices, the definition of "copyright protection measure" in § 133.47(a)(1) must also include copy controls. The commenters noted that Congress enacted section 303 of TFTEA to explicitly authorize CBP to seize and forfeit merchandise that is prohibited under both 17 U.S.C. 1201(a)(2) and 1201(b)(1). Both commenters provided language that they requested CBP use to amend the definition of "copyright protection measure."

Response: CBP agrees that the definition of "copyright protection measure" in § 133.47(a)(1) should include copy controls. Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding a new subparagraph (G), which states that the merchandise may be seized and forfeited if CBP determines it is a technology, product, service, device, component, or part whose importation is prohibited under 17 U.S.C. 1201(a)(2) or (b)(1). Since copy controls are set forth in 17 U.S.C. 1201(b)(1), CBP is amending the definition of "copyright protection measure" to include copy controls. While the language the two commenters suggested differs in form, it is substantially similar, therefore, CBP is adopting the more concise language suggested and is adding "or effectively protects a right of a copyright owner in," to the definition of "copyright protection measure" in § 133.47(a)(1).

C. Pre-Seizure Disclosures to Right Holders

1. Limited Importation Information Disclosures

From the time merchandise is presented for examination, CBP may disclose to the right holder certain limited importation information, as listed in proposed §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4), to obtain assistance in determining whether the merchandise is being imported in violation of the IPR laws.

Comment: One commenter noted that the proposed amendments to §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) shifted CBP's disclosure of limited importation information to the right holder from a mandatory disclosure ("CBP will release the information") to a permissive disclosure ("CBP may release the information"). The commenter requested that CBP revert to a mandatory disclosure using the language "CBP will release the information," as required in the existing CBP regulations at 19 CFR 133.21(b)(4).

Response: CBP disagrees with the commenter's suggestion. CBP believes that the limited information disclosures provided for in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) should remain, as proposed, permissive. Based on CBP's experience and right holders' feedback, the disclosure of limited importation information at this stage of the determination process does not provide a significant benefit. The limited importation information that CBP may disclose only includes the date of importation, the port of entry, description and quantity of the imported merchandise, and the country of origin. While this data may have been beneficial in the past when supply chains were less complex, the current reality of multi-faceted and global supply chains limits the value of this limited importation information. In today's trade environment, supply chains often involve multiple countries of origin, possible transshipment, as well as used, refurbished, or gray market merchandise. The comprehensive importation information disclosure provided to the right holder post-seizure in §§ 133.21(e), 133.42(e), and 133.47(e) is of significantly greater value and benefit. As such, CBP has determined that it is a better use of CBP resources, and of greater value to right holders, to provide more information later in the process, when appropriate, as opposed to less information sooner in the process, when it may not be as useful to the right holder and when the information disclosure requires significant expenditure of CBP resources.

Comment: A commenter stated that, as drafted, proposed § 133.21(b)(4) is silent regarding CBP's ability to disclose the limited importation information in a scenario where the information was not disclosed prior to the issuance of the notice of detention and the information is available at the time the notice of detention is issued. In the existing CBP regulations, § 133.21(b)(4) describes this scenario and states that where CBP does not disclose this information to the right holder prior to issuance of the notice of detention, CBP will do so concurrently with the issuance of the notice of detention. However, the commenter pointed out that proposed § 133.21(b)(4) only describes a scenario where the information is unavailable at the time the notice of detention is issued.

Response: CBP agrees that proposed § 133.21(b)(4), as well as proposed §§ 133.42(b)(4), and 133.47(b)(4), do not contain all the scenarios under which CBP may choose to disclose the limited importation information to the right holder. Please note that while §§ 133.21(b)(2)(i)(A), 133.42(b)(2)(i)(A), and 133.47(b)(2)(i)(A) address the scenario where CBP may have previously disclosed the information prior to the issuance of the notice of detention or where CBP may disclose the information no later than the date of issuance of the notice of detention, these regulatory sections' intended purpose is to provide notice to the importer of the possible disclosure of its information and not to provide CBP authority to disclose this information to the right holders. Accordingly, CBP is amending the language proposed in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) to address all the circumstances where CBP may permissively disclose the limited importation information, including that CBP may release such information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention.

CBP also notes that there is an inadvertent inconsistency between the third sentence in proposed § 133.21(b)(4) and the third sentence in proposed §§ 133.42(b)(4) and 133.47(b)(4). Specifically, CBP inadvertently did not propose to amend the third sentence of § 133.21(b)(4) in the NPRM, thereby leaving the regulatory language unchanged, which provides for a mandatory disclosure. To correct this error, CBP is amending the third sentence of § 133.21(b)(4) to state that CBP may permissively disclose the listed information. This amendment will correct the inadvertent error, align the third sentence of this paragraph with the permissive information disclosure proposed in the NPRM for the remainder of proposed § 133.21(b)(4), and ensure that the same permissive information disclosure is used for disclosures to owners of a recorded mark (§ 133.21), owners of a recorded copyright (§ 133.42), and owners of a recorded copyright, who employ a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA (eligible persons in § 133.47).

Comment: A commenter also pointed out that there is a conflict between proposed § 133.21(b)(4), which contains a permissive information disclosure, and existing § 133.21(b)(2)(i)(A), which CBP did not propose to amend in the NPRM and contains a mandatory information disclosure.

Response: CBP agrees with the commenter. The commenter has correctly pointed out an inconsistency between proposed § 133.21(b)(4) and existing § 133.21(b)(2)(i)(A). Without a regulatory amendment, § 133.21(b)(2)(i)(A) would require CBP to provide notice to the importer that CBP has, or will, perform a mandatory information disclosure to the right holder of the same limited importation information that CBP has the authority to choose to disclose or to not disclose as needed, per proposed § 133.21(b)(4). This inconsistency was inadvertent and also created an inconsistency between existing § 133.21(b)(2)(i)(A) and the proposed §§ 133.42(b)(2)(i)(A) and 133.47(b)(2)(i)(A), which were intended to be parallel provisions to ensure the same treatment. Accordingly, CBP is amending § 133.21(b)(2)(i)(A) to reflect the language used in §§ 133.42(b)(2)(i)(A) and 133.47(b)(2)(i)(A) and changing § 133.21(b)(2)(i)(A) from an unintended mandatory disclosure to an intended permissive disclosure. This amendment makes the CBP regulations consistent across contexts and provides clarity on the issue raised by the commenter.

Comment: A commenter requested that CBP amend § 133.42(b)(4) to add additional disclosures to the limited importation information that CBP may disclose to the owner of the recorded copyright to obtain assistance in determining whether an imported article is a piratical article. The commenter suggested that CBP also provide the owner of the recorded copyright with the origin of the shipment, including the sender and the owner of the merchandise, and the destination of the shipment, in order to assist the owner in identifying entities engaged in counterfeiting and trace the origin of the infringing goods.

Response: CBP disagrees with the commenter's suggestion. CBP may disclose limited importation information when CBP believes that the right holder may assist CBP in determining whether the article is a piratical article. When CBP seeks authentication assistance from the right holder under § 133.42(b)(4), CBP is seeking information about the article itself, namely, whether the physical characteristics of the article indicate authenticity or inauthenticity. Given the complexity of supply chains and the legitimate trade of gray market and used goods, CBP notes that information concerning the sender and the recipient of the shipment should not form the basis of an authenticity determination by the right holder. Also, as explained above, in today's current global supply chain environment, this importation information is of limited value to the right holder. Additionally, the information that the commenter requested is disclosed to the owner of the recorded copyright post-seizure pursuant to § 133.42(e).

2. Unredacted Disclosures

Comment: One commenter stated that the language "if CBP concludes that the disclosure would assist CBP in its determination" in proposed §§ 133.21(b)(2)(ii) and (b)(3), 133.42(b)(2)(ii) and (b)(3), and 133.47(b)(2)(ii) and (b)(3) is ambiguous and recommended that CBP amend the regulatory language to create a presumption that the disclosure would assist CBP in its IPR enforcement mission. The commenter stated that after CBP provides notice of detention to the importer of CBP's suspicion that the goods are counterfeit or piratical, there are only two possible scenarios: the importer either fails to respond entirely or the importer provides additional information to CBP that might be considered when CBP makes its determination. The commenter asserted that, under both possible scenarios, the right holder's examination of the merchandise would greatly assist CBP in its determination and that a presumption that the information disclosure would assist CBP in its determination is warranted.

Response: CBP disagrees. CBP does not have the statutory authority for such a presumption, which would require CBP to abdicate its role in making a determination as to the information disclosure's utility, in direct conflict with title III of TFTEA. Section 302(a) of TFTEA explicitly restricts CBP's ability to provide unredacted information disclosures and samples to situations in which CBP determines that the examination or testing of the merchandise by the right holder would assist CBP in determining whether the imported merchandise is in violation of the IPR laws. The language in §§ 133.21(b)(2)(ii) and (b)(3), 133.42(b)(2)(ii) and (b)(3), and 133.47(b)(2)(ii) and (b)(3) mirrors this statutory language.

3. Conditions of Unredacted Disclosures

Pursuant to existing § 133.21(c)(1), proposed § 133.42(c)(1), and proposed § 133.47(c)(1), when CBP discloses information prior to seizure, CBP will notify the right holder that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark for purposes of existing § 133.21(c)(1), in determining whether the merchandise is a piratical article for purposes of proposed § 133.42(c)(1), or in determining whether the merchandise violates the DMCA for purposes of proposed § 133.47(c)(1).

Comment: One commenter requested that CBP remove the references to the Trade Secrets Act in existing § 133.21(c)(1), proposed § 133.42(c)(1), and proposed § 133.47(c)(1), which set forth the conditions of disclosure for unredacted information and samples. The commenter provided two reasons for the requested removal of references to the Trade Secrets Act. Firstly, the commenter noted that the Trade Secrets Act only prohibits the unauthorized disclosure of information and the inclusion of the reference to the Trade Secrets Act is unnecessary because TFTEA specifically authorizes the disclosure of this information. Secondly, the commenter stated that the inclusion of the Trade Secrets Act reference could be construed as implying a threat of legal liability if the right holder uses the information disclosed for any purpose other than assisting CBP in the stated purpose, and the commenter asserted that the Trade Secrets Act does not restrict the subsequent use of the disclosed information by a third party.

Response: CBP disagrees and does not believe that the references to the Trade Secrets Act should be removed from §§ 133.21(c)(1), 133.42(c)(1), and 133.47(c)(1). Title III of TFTEA only authorizes disclosures in a pre-seizure context for a specific purpose, which is assisting CBP in making the relevant determination of whether the imported merchandise violates the IPR laws. Using the disclosed information in the pre-seizure context beyond the scope of what is authorized by TFTEA is impermissible and the references to the Trade Secrets Act in these sections provide notice to the right holder of the limited permissible use.

D. Notice of Detention and Importer Response Process

Pursuant to existing and proposed §§ 133.21(b), 133.42(b), and 133.47(b), CBP must notify the importer via a notice of detention that the importer's merchandise was detained and that the importer has seven business days from the notification to establish that the merchandise does not violate the IPR laws. Prior to and during those seven business days, CBP may only provide the limited importation information set forth in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) or the redacted photographs, images, or samples described in §§ 133.21(b)(5), 133.42(b)(5), and 133.47(b)(5) to the right holder. In accordance with §§ 133.21(b)(2)(ii), 133.42(b)(2)(ii), and 133.47(b)(2)(ii), CBP may disclose to the right holder information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, if the importer fails to respond within those seven business days or provides insufficient information to demonstrate that the merchandise does not violate the IPR laws.

Comment: One commenter recommended that CBP reassess the current bifurcated disclosure process in 19 CFR part 133. The commenter requested that CBP remove the seven-business-day response period process throughout 19 CFR part 133 because the commenter believes that this process has been overturned by the passage of title III of TFTEA and other actions taken by the government and that this process serves to impede efficient enforcement while failing to advance any legitimate interests of importers.

Response: CBP disagrees with the commenter. CBP has not observed any impediment to its enforcement efforts. The process of providing the importer with a notice of detention and a seven-business-day response period safeguards the importer's information from unnecessary disclosures. The Trade Secrets Act protects those required to furnish commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government, including importers whose merchandise is suspected of violating the IPR laws. These importers must be afforded due process to dispute this suspicion and provide information within the seven-business-day response period to prove that their detained merchandise is not violative before CBP discloses unredacted information and samples to the right holder. The Trade Secrets Act permits those covered by the Act to disclose protected information when the disclosure is otherwise "authorized by law" which includes both statutes expressly authorizing disclosure and properly promulgated regulations authorizing disclosure based on a valid statutory interpretation. *See Chrysler* v. *Brown,* 441 U.S. 281, 294–316 (1979). Section 302 of TFTEA expressly authorizes disclosure of unredacted images and samples of the merchandise in a pre-seizure context only when such a disclosure would assist CBP in making a determination of the authenticity of the merchandise. To make such a determination, CBP requires the seven-business-day response period to appropriately assess the information available to CBP and decide whether an unredacted disclosure to the right holder would assist CBP in its authenticity determination.

E. Post-Seizure Disclosures to Persons Injured by Violations of the DMCA

Comment: Two commenters noted that proposed § 133.47(b)(2)(iii) states that eligible persons may apply to receive post-seizure disclosures from CBP when injured by violations of the DMCA by attaching a letter requesting such disclosures to an application to record a copyright. The commenters expressed concern that, as drafted, the proposed regulatory language appears to apply only prospectively. They stated that this raises concerns about the status of copyright registrations previously recorded with CBP and questioned whether CBP intended for copyrights to be recorded again in order for the right holder to qualify as an eligible person (and therefore, an injured person) for purposes of post-seizure disclosures. One commenter requested that CBP add language to § 133.47(b)(2)(iii) allowing owners of previously recorded copyrights to similarly apply for protection by submitting a letter requesting such disclosures and also requested that CBP permit a letter to be submitted during a request for renewal of an existing recordation.

Response: CBP agrees that § 133.47(b)(2)(iii) should not be restricted to those right holders recording new copyrights and that owners of current copyright recordations should not be required to re-record their works in order to receive such post-seizure disclosures and be placed on the injured persons list. CBP is amending the language proposed in § 133.47(b)(2)(iii) to allow owners of currently recorded copyrights to apply for protection by submitting a letter to CBP requesting post-seizure disclosures at any time, as long as there is a current relevant recordation with CBP. The application process is described further in section I.C. of the Background discussion above. CBP is also amending § 133.47(b)(2)(iii) by allowing owners of recorded copyrights to apply for DMCA protections by attaching the letter to a request to renew the copyright recordation. CBP reiterates that to qualify as an eligible person, as defined in § 133.47(a)(3), who may apply to CBP to receive DMCA protections, as set forth in § 133.47(b)(2)(iii), that person must have a recorded copyright with CBP upon which the person can claim a harm that the injured status might redress.

III. Technical Corrections

In addition to the modifications explained above, CBP is amending §§ 133.21(c)(2), 133.42(c)(2), and 133.47(c)(2) to remove the corresponding cross-references to paragraph (b)(2)(ii). Paragraph (b)(2)(ii) provides the importer notice that its information may be disclosed to the right holder if the importer fails to respond to the notice of detention in paragraph (b)(2)(i) within the seven-business-day response period or if the importer provides an insufficient response to the notice. Thus, it is inaccurate to cite to paragraph (b)(2)(ii) in paragraph (c)(2) as authority for CBP's releasing the unredacted sample. CBP is releasing the unredacted sample pursuant to the regulatory authority in paragraph (b)(3) only. Accordingly, CBP is removing the citation to paragraph (b)(2)(ii) in paragraph (c)(2) and is only citing to the appropriate cross-reference of paragraph (b)(3).

Additionally, CBP is adding the language "if practicable" after "entry after obliteration of the recorded copyright" in § 133.42(g) to clarify that a recorded copyright may only be obliterated in some circumstances. It may not be possible for the importer to obliterate or remove a recorded copyright from the seized merchandise in all circumstances, for example, when the article itself consists of a piratical copy. In § 133.47(g), CBP is removing "entry after obliteration of the recorded copyright" as an option entirely since obliterating the recorded copyright is not an appropriate disposition for articles that violate the DMCA because the article itself consists of the article that violates the DMCA.

In this document, CBP is also correcting the authority section for part 113, adding additional cross-references for clarification purposes, and correcting several cross-references in § 133.47 that inadvertently cited to the definition for "copyright protection measure" (§ 133.47(a)(1)) instead of the definition of "articles that violate the DMCA" (§ 133.47(a)(2)) when referencing articles that are suspected of violating the DMCA.

IV. Conclusion

After careful consideration of the public comments received, for the reasons stated above, as well as the reasons outlined in the NPRM, CBP is adopting as final the NPRM published in the **Federal Register** on October 16, 2019 (84 FR 55251), with the changes described above.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 12866 ("Regulatory Planning and Review") and 13563 ("Improving Regulation and Regulatory Review") direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

One of CBP's roles is to safeguard the U.S. economy from the importation of goods that violate intellectual property rights. Under existing regulations, if CBP suspects that a shipment may be violative, it can share redacted information and samples of the suspect imported merchandise with a right holder.[1] To implement title III of TFTEA's IPR provisions, this final rule will, among other things, allow CBP to disclose unredacted information and share unredacted images and samples of suspect imports with right holders, if examination by right holders would assist CBP's determination and provided that these disclosures would not compromise an ongoing law enforcement investigation or national security.

Disclosing this unredacted information and sharing these unredacted samples and images with right holders may provide access to information about the importer protected by the Trade Secrets Act (18 U.S.C. 1905). This final rule establishes a procedure under which, following notice to the importer, the importer has seven business days to establish to CBP that the suspect imports are not violative of the IPR laws, and are instead admissible. If the importer is unable to demonstrate the admissibility of its imports within this timeframe, CBP will share information with the right holder by disclosing the information or releasing unredacted samples of the imports in question.

As CBP is establishing a new process for copyrights, it does not have data on the number of times CBP suspects shipments are violative of the copyright laws or piratical articles. However, on September 24, 2012, CBP published an interim final rule in the **Federal Register** (77 FR 24375) that established similar procedures for trademarks. For analytical purposes, CBP can assume that this final rule has similar effects after adjusting for the differing volumes. CBP subject matter experts estimate that CBP sends out an average of 824 detention letters every fiscal year for suspected trademark infringements. Based on the proportion of live trademark recordations[2] available to support the agency's IPR seizures every fiscal year, relative to the copyright recordations, CBP estimates an average of approxi-

[1] Note that this rule does not alter CBP's ability to provide redacted samples of an import to a right holder without prior notification to the importer.

[2] Source: CBP's IPRiS database. Sampling methodology averaged five equally spaced dates in every fiscal year to estimate the IPRiS live recordations available for IPR seizures (95% CI, p = 0.05) annually. CBP took several sample counts per year as opposed to a single annual count to ensure a representative measure as IPRiS recordations enter and expire throughout the year.

mately 21,423 seizures based on trademark, 8,881 based on copyright, and 116 DMCA seizures. If the number of detention letters is proportional to the number of seizures, CBP estimates that this final rule will result in 345 more detention letters for possible copyright-infringing importations. Similarly, by using the number of seizures related to DMCA as a proportion of total trademark seizures, CBP estimates that this final rule will result in four detention letters for possible DMCA-infringing importations.

CBP estimates that the procedure to demonstrate that the imports are not piratical will take two hours per affected importer at a cost of $34.81 per hour.[3] [4] This is based on the existing information collection for the Notice of Detention (OMB Control Number 1651– 0073), which is being updated for this rulemaking. CBP estimates that importers will bear an opportunity cost as a result of the higher number of detention notices caused by this rule. CBP estimates that this opportunity cost will total $24,019 (345 * 2 * $34.81) for copyright detentions and $278 (4 * 2 * $34.81) for DMCA detentions for a total monetized cost of $24,297. CBP received no comments from the public regarding the estimated time cost to importers of two hours to respond.

This final rule will also formalize the existing practices used to enforce the DMCA. In 1998, Congress enacted the DMCA. The DMCA prohibits the importation of devices used to circumvent the copyright protection measures copyright owners use to protect their works. Although current regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has enforced the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. CBP subject matter experts estimate that there are approxi-

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[3] Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2021 National Occupational Employment and Wage Estimates United States.” Updated March 31, 2022. Available at *https://www.bls.gov/oes/current/oes_nat.htm*. Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. “ECEC Civilian Workers—2004 to Present.” March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm*. Accessed May 25, 2022. CBP assumes an annual growth rate of 4.15% based on the prior year’s change in the implicit price deflator, published by the Bureau of Economic Analysis.

[4] Source of median wage rate: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2021 National Occupational Employment and Wage Estimates United States.” Updated March 31, 2022. Available at *https://www.bls.gov/oes/current/oes_nat.htm*. Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. “ECEC Civilian Workers—2004 to Present.” March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm*. Accessed May 25, 2022. Because median hourly wage information was not available for this respondent, CBP adjusted the annual median wage for this respondent to an hourly estimate using the standard 2,080 hours worked per year. CBP assumes an annual growth rate of 4.15% based on the prior year’s change in the implicit price deflator, published by the Bureau of Economic Analysis.

mately 116 DMCA seizures. It is possible that this final rule will result in a small increase in DMCA seizures. TFTEA requires CBP to formalize the foregoing processes with respect to the DMCA. The formalization of these existing practices in regulations does not change current practice, so this provision will not have additional impacts if this rule is finalized.

In addition to the release of unredacted samples, this final rule will amend the detention procedures applicable to imported articles that are suspected of being a piratical copy or phonorecord of a copyrighted work. The current detention procedures in the regulations allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement, prior to CBP's issuance of an admissibility determination. To expedite this process, this final rule will amend the regulations to require the agency to render an admissibility decision within 30 days from the date the articles are presented to CBP for examination. As the current detention procedures are seldom used, according to CBP subject matter experts, CBP does not believe this final rule will impose a significant effect on the public. During the public comment period, no comments were received regarding this statement.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Section 604 of the RFA requires an agency to perform a regulatory flexibility analysis for a rule unless the agency certifies under section 605(b) that the regulatory action would not have a significant economic impact on a substantial number of small entities.

As described in the Executive Orders 12866 and 13563 analysis above, CBP estimates that this final rule will result in the issuance of 345 additional notices of detention. CBP's current examination policies, use of shared enforcement systems, and targeting criteria that take into account previous examinations when determining risk make it unlikely that an importer who receives a notice of detention with this rule will be required to repeatedly prove the admissibility of its imports.[5] As such, CBP assumes for the purposes of this analysis that the number of affected importers from this final rule will be equal to the number of additional detention notices resulting from this final rule—345—with each importer receiving only one detention notice. To the extent that an importer must prove the admissibility of its imports more than once as a result of this rule, the number of importers affected by this final rule would be lower and the cost of this final rule per affected importer would be higher. During the public comment period, no comments were received regarding this assumption.

These importers are not centered in any particular industry; any importer of goods covered by a recorded copyright may be affected by this rule if CBP has a reason to believe the importer's merchandise may constitute a piratical copy and CBP cannot determine if an import is a piratical copy or prohibited circumvention device without the use of the provisions of this rule. CBP has conducted a study of importers to determine how many are small entities and has concluded that the vast majority (about 91 percent) of importers are small entities.[6] Therefore, CBP believes this final rule may affect a substantial number of small entities.

Although the final rule may affect a substantial number of small entities, CBP believes the economic impact would not be significant. As described in the Executive Orders 12866 and 13563 section of this document, CBP estimates that it takes an importer two hours to provide proof of the admissibility of an import to CBP. CBP estimates the average wage of an importer is $34.81 per hour. Thus, CBP estimates it will cost a small entity $69.62 to prove the admissibility of its import with this final rule. CBP does not believe $69.62 constitutes a significant economic impact.

CBP recognizes that repeated inquiries into the admissibility of an importer's imports could eventually rise to the level of a significant economic impact. However, it is unlikely that importers will be repeatedly required to prove the admissibility of their imports, as previously mentioned. Additionally, CBP does not anticipate law-abiding importers to be subject to the provisions in this rule on a repeated basis. Once CBP has determined the admissibility of an importation, it will record that information in the system so it can be viewed by

[5] CBP reserves the right to detain any imported merchandise, even if an importer has previously shown that its merchandise is admissible. This will depend on the particulars of the importation. Previous importations are taken into account in the risk profile, so having proven the authenticity of an importation in the past makes it less likely that an importer will receive a Notice of Detention for subsequent importations.

[6] See "CBP Analysis of Small Importers," April 2022. Available in the docket of this rulemaking.

CBP import specialists on future importations and successful previous importations are a favorable factor in the importation's risk profile. Further, CBP notes that providing this information to CBP is optional on the part of the importer, although not providing admissibility information to CBP may result in the goods being seized. Therefore, CBP believes there will not be a significant economic impact on small entities.

Accordingly, although this final rule may have an effect on a substantial number of small entities, as discussed above, CBP believes that an estimated cost of $69.62 to an importer does not constitute a significant economic impact. Thus, CBP certifies this regulation would not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the collections of information for this document are included in an existing collection for Notices of Detention (OMB control number 1651–0073). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The burden hours related to the Notice of Detention for OMB control number 1651–0073 are as follows:

Number of Respondents: 1,695.

Number of Responses: 1.

Time per Response: 2 hours.

Total Annual Burden Hours: 3,390.

Because CBP estimates that the availability of the procedures in this final rule will increase the number of Notices of Detention issued for IPR violations, there is an increase in burden hours under this collection with this final rule.

Signing Authority

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning copyright enforcement.

Troy A. Miller, Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign the document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division of CBP, for purposes of publication in the **Federal Register**.

List of Subjects

19 CFR Part 113

Bonds, Common carriers, Customs duties and inspection, Exports, Freight, Imports, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 133

Copyright, Reporting and recordkeeping requirements, Trade names, Trademarks.

19 CFR Part 148

Airmen, Copyright, Customs duties and inspection, Foreign officials, Government contracts, International organizations, Reporting and recordkeeping requirements, Seamen, Taxes, Trademarks.

19 CFR Part 151

Cigars and cigarettes, Cotton, Fruit juices, Laboratories, Metals, Oil imports, Reporting and recordkeeping requirements, Sugar, Wool.

19 CFR Part 177

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons stated above, U.S. Customs and Border Protection and the Department of the Treasury amends 19 CFR parts 113, 133, 148, 151, and 177 as set forth below:

PART 113—CBP BONDS

■ 1. The general and specific authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.
Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.
* * * * *

■ 2. Revise § 113.42 to read as follows:

§ 113.42 Time period for production of documents.

Except when another period is fixed by law or regulations, any document for the production of which a bond or stipulation is given must be delivered within 120 days from the date of notice from CBP requesting such document. If the period ends on a Saturday, Sunday, or holiday, delivery on the next business day will be accepted as timely.

■ 3. Revise § 113.70 to read as follows:

§ 113.70 Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of, or seized for, infringing recorded marks or recorded copyrights, or circumventing copyright protection measures.

(a) Prior to obtaining samples of imported merchandise pursuant to § 133.21(b)(3) or (5), § 133.25(c), § 133.42(b)(3) or (5), or § 133.47(b)(3) or (5) of this chapter, for suspected infringement of a recorded mark or recorded copyright, or suspected circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or the recorded copyright must furnish to CBP either a single transaction bond or a continuous bond in the amount specified by CBP containing the conditions listed in this paragraph (a).

(1) *Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of infringing such recorded marks or recorded copyrights, or circumventing copyright protection measures*—(i) *Agreement to use sample for limited purpose of assisting CBP.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise suspected of infringing the recorded mark or copyright, or suspected of circumventing a copyright protection measure, including samples provided pursuant to § 133.21(b)(3) or (5), § 133.25(c), § 133.42(b)(3) or (5), or § 133.47(b)(3) or (5) of this chapter, the obligors (principal and surety) agree that such samples may only be used for the limited purpose of providing assistance to CBP in enforcing intellectual property rights.

(ii) *Agreement to indemnify*—(A) *Improper use of sample.* If the sample identified in paragraph (a)(1)(i) of this section is used by the owner of the recorded mark or the recorded copyright for any purpose other than to provide assistance to CBP in enforcing intellectual property rights, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any loss or damage resulting from the improper use.

(B) *Physical loss, damage, or destruction of disclosed sample.* The owner of a recorded mark or a recorded copyright must return any sample identified in paragraph (a)(1)(i) of this section upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. If the sample identified in paragraph (a)(1)(i) of this section is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

(2) [Reserved]

(b) Prior to obtaining samples of imported merchandise pursuant to § 133.21(f), § 133.42(f), or § 133.47(f) of this chapter, seized for infringement of a recorded mark or recorded copyright, or circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or recorded copyright must furnish to CBP either a single transaction bond or continuous bond in the amount specified by CBP containing the conditions listed in this paragraph (b).

(1) *Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise seized for infringing such recorded marks or recorded copyrights, or circumventing copyright protection measures.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise seized for infringing the recorded mark or recorded copyright, or circumventing a copyright protection measure, including samples provided pursuant to § 133.21(f), § 133.42(f), or § 133.47(f) of this chapter, the owner of the recorded mark or recorded copyright must return the sample upon demand by CBP or at the conclusion of any examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. If the sample is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

(2) [Reserved]

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

■ 4. The general authority citation for part 133 is revised to read as follows, the specific authority for §§ 133.21 through 133.25 is removed, and a specific authority citation for § 133.47 is added to read as follows:

Authority: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 104, 106, 601, 602, 603; 18 U.S.C. 1905; 19 U.S.C. 66, 1202, 1499, 1526, 1595a, 1623, 1624, 1628a; 31 U.S.C. 9701.

Section 133.47 also issued under 17 U.S.C. 1201.

* * * * *

■ 5. Amend § 133.0 by revising the last sentence to read as follows:

§ 133.0 Scope.

* * * It also sets forth the procedures for the disposition, including release to the importer in appropriate circumstances, of articles bearing prohibited marks or names, piratical articles, and prohibited circumvention devices, as well as the disclosure of information concerning such articles when such disclosure would not compromise an ongoing law enforcement investigation or national security.

■ 6. Amend § 133.21 by:

■ a. Revising paragraphs (b)(2)(i)(A), (b)(2)(ii), and (b)(3);

■ b. In paragraph (b)(4) introductory text, revising the second and third sentence;

■ c. In paragraph (b)(5), removing the word "mark" and adding in its place the word "markings" in the second sentence, and revising the third sentence;

■ d. In paragraph (c)(2), revising the first sentence; and

■ e. Revising paragraph (f).

■ f. Removing the words "owner of the mark" wherever they appear and adding in their place the words "owner of the recorded mark";

The revisions read as follows:

§ 133.21 Articles suspected of bearing counterfeit marks.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) CBP may have previously disclosed to the owner of the recorded mark, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded mark, if available, no later than the date of issuance of the notice of detention; and

* * * * *

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information is insufficient for

CBP to determine that the merchandise does not bear a counterfeit mark, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded mark if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.,* an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded mark as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded mark. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) * * * CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded mark consists of:

* * * * *

(5) * * * CBP may release a sample under this paragraph (b)(5) when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter.

***

(c) * * *

(2) * * * CBP may release a sample under paragraph (b)(3) of this section when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. * * *

* * * * *

(f) *Disclosure to owner of the recorded mark, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of merchandise bearing a counterfeit mark under this section, and upon receipt of a proper request from the owner of the recorded mark, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded mark. CBP may release a sample under this paragraph (f) when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded mark, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.21(f) was (damaged/destroyed/lost) during examination, testing, or other use."

* * * * *

■ 7. Amend § 133.25 by:

■ a. In paragraph (b), removing the words "owner of the trademark" wherever it appears, and adding in their place the words "owner of the recorded mark"; and

■ b. Revise and republish paragraph (c).

■ c. Removing the word "Customs" wherever it appears, and in its place adding the term "CBP".

The revision reads as follows:

§ 133.25 Procedure on detention of articles subject to restriction.

* * * * *

(c) *Disclosure to the owner of the recorded mark or trade name.* At any time following presentation of the merchandise for CBP's examination, but prior to seizure, CBP may release a sample of the suspect merchandise to the owner of the recorded mark or trade name for examination or testing to assist in determining whether the article imported bears an infringing trademark or trade name. CBP may release a sample under this paragraph (c) when the owner of the recorded mark or trade name furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner must return the sample to CBP upon demand or at the conclusion of the examination or testing, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded mark or tradename, the owner must, in lieu of returning the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.25(c) was (damaged/destroyed/lost) during examination or testing for trademark infringement."

* * * * *

■ 8. Revise § 133.42 to read as follows:

§ 133.42 Piratical articles; Unlawful copies or phonorecords of recorded copyrighted works.

(a) *Definition.* A "piratical article," for purposes of this part, is an unlawfully made (without the authorization of the copyright owner) copy or phonorecord of a recorded copyrighted work, importation of which is prohibited by the Copyright Act of 1976, as amended.

(b) *Detention, notice, and disclosure of information*—(1) *Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that is suspected of constituting a piratical article in violation of a copyright recorded with CBP. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to owner of the recorded copyrighted work*—(i) *Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise is a piratical article:

(A) CBP may have previously disclosed to the owner of the recorded copyright, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded copyright, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise is not piratical.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise is not piratical, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded copyright, if CBP concludes that the disclosure would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels), and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.,* an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded copyright as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded copyright. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to owner of recorded copyright of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the owner of the recorded copyright limited importation information to obtain assistance in determining whether

an imported article is a piratical article. CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded copyright consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to owner of recorded copyright of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article is a piratical article and at any time after presentation of the merchandise for examination, provide to the owner of the recorded copyright photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph (b)(5) when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the

event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.42(b)(5) was (damaged/ destroyed/lost) during examination, testing, or other use."

(c) *Conditions of disclosure to owner of recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in piratical merchandise determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to the owner of the recorded copyright prior to seizure, CBP will notify the owner of the recorded copyright that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the owner of the recorded copyright for the purpose of assisting CBP in determining whether the merchandise is a piratical article.

(2) *Bond.* CBP may release a sample under paragraph (b)(3) of this section when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.42(c) was (damaged/destroyed/lost) during examination, testing, or other use."

(d) *Disclosure to importer of unredacted photographs, images, and samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of being a piratical article at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.42(d) was (damaged/ destroyed/lost) during examination, testing, or other use."

(e) *Seizure and disclosure to owner of the recorded copyright of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States is a piratical article, CBP will seize such merchandise and, in the absence of the written consent of the owner of the recorded copyright (*see* paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the recorded copyright the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

(1) The date of importation;

(2) The port of entry;

(3) The description of the merchandise from the notice of seizure;

(4) The quantity as set forth in the notice of seizure;

(5) The country of origin of the merchandise;

(6) The name and address of the manufacturer;

(7) The name and address of the exporter; and

(8) The name and address of the importer.

(f) *Disclosure to owner of recorded copyright, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of a piratical article under this section, and upon receipt of a proper request from the owner of the recorded copyright, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded copyright. CBP may release a sample under this paragraph (f) when the owner of the recorded copyright furnishes to CBP a bond in the amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.42(f) was (damaged/ destroyed/lost) during examination, testing, or other use."

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within 30 days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the recorded copyright, if practicable, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer's right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§ § 133.43 and 133.44 [Removed and Reserved]

■ 9. Remove and reserve §§ 133.43 and 133.44.

■ 10. Redesignate subpart F as subpart G and add new subpart F, consisting of §§ 133.47 and 133.48, to read as follows:

Subpart F—Enforcement of the Prohibition on Importation of Merchandise Capable of Circumventing Technological Measures for Protection of Copyright

§ 133.47 Articles suspected of violating the Digital Millennium Copyright Act

(a) *Definitions*—(1) *Copyright protection measure.* A technological measure that effectively controls access to, or effectively protects a right of a copyright owner in, a copyrighted work for which the copyright has been recorded with CBP.

(2) *Articles that violate the DMCA.* Articles that violate the importation prohibitions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. 1201, consist of products, devices, components, or parts thereof primarily designed or produced for the purpose of circumventing a copyright protection measure, or which have only a limited commercially significant purpose or use other than such circumvention, or which are knowingly marketed by the manufacturer, importer, consignee, or other trafficker in such articles, or another acting in concert with the manufacturer importer, consignee, or trafficker for use in such circumvention.

(3) *Eligible person.* The owner of a recorded copyright, who employs a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA.

(4) *Injured person.* The owner of a recorded copyright, who employs a copyright protection measure that has been circumvented or attempted to be circumvented by articles seized for violation of the

importation prohibitions of the DMCA, and who has successfully applied to CBP for DMCA protections pursuant to paragraph (b)(2)(iii) of this section.

(b) *Detention, notice, and disclosure of information*—(1) *Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that it suspects is in violation of the DMCA, as described in paragraph (a)(2) of this section. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for the purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to eligible persons*—(i) *Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise violates the DMCA:

(A) CBP may have previously disclosed to the eligible person, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the eligible person, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the eligible person information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise does not violate the DMCA.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise does not violate the DMCA, CBP will proceed with the disclosure of information, as described in paragraph (b)(3) of this section, to the eligible person if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(iii) *Request for DMCA protections and establishment of a list of persons approved for post-seizure disclosures.* Eligible persons may apply to receive post-seizure disclosures from CBP by attaching a letter requesting such disclosures to an application to record or renew a copyright. Owners of existing copyright recordations may similarly apply for protection by submitting a letter requesting such disclosures to CBP. CBP will add those persons CBP approves for such disclosures to a list that CBP will maintain. CBP will provide the post-seizure disclosures described in this section to injured persons, as defined in this part, appearing on the list. CBP will publish a notice, signed by the Executive Director, Regulations and Rulings, of the establishment of the list in the **Federal Register**. After the list has been established, CBP will publish a notice of revisions to the list, signed by the Executive Director, Regulations and Rulings, in the **Federal Register**.

(3) *Disclosure to eligible persons of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.,* an unredacted condition) if CBP concludes that the disclosure of information to the eligible person as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the eligible person. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to eligible person of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the eligible person limited importation information in order to obtain assistance in determining whether an imported article violates the DMCA. CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the eligible person consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to eligible person of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article violates the DMCA and at any time after presentation of the merchandise for examination, provide to the eligible person photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph (b)(5) when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.47(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use."

(c) *Conditions of disclosure to eligible person of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in DMCA determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to an eligible person prior to seizure, CBP will notify the eligible person that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the eligible person for the purpose of assisting CBP in determining whether the merchandise violates the DMCA.

(2) *Bond.* CBP may release a sample under paragraph (b)(3) of this section when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.47(c) was (damaged/destroyed/lost) during examination, testing, or other use."

(d) *Disclosure to importer of unredacted photographs, images or samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of violating the DMCA at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.47(d) was (damaged/destroyed/lost) during examination, testing, or other use."

(e) *Seizure and disclosure to injured person of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States violates the DMCA as described in paragraph (a)(2) of this section, CBP will seize such merchandise and, in the absence of written consent of the injured person (*see* paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the injured person the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

(1) The date of importation;

(2) The port of entry;

(3) The description of the merchandise from the notice of seizure;

(4) The quantity as set forth in the notice of seizure;

(5) The country of origin of the merchandise;

(6) The name and address of the manufacturer;

(7) The name and address of the exporter; and

(8) The name and address of the importer.

(f) *Disclosure to injured person, following seizure, of unredacted photographs, images and samples.* At any time following a seizure of DMCA-violative merchandise under this section, and upon receipt of a proper request from the injured person, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging or labels, in its condition as presented for examination, to the injured person. CBP may release a sample under this paragraph (f) when the injured party furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The injured person must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the injured person, the injured person must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.47(f) was (damaged/destroyed/lost) during examination, testing, or other use."

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within 30 days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer's right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§ 133.48 Demand for redelivery of released articles

If it is determined that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, an authorized CBP official will promptly make demand for redelivery of the articles in accordance with § 141.113 of this chapter. If the articles are not redelivered to CBP custody under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter, a claim for liquidated damages will be made in accordance with § 141.113 of this chapter.

§ 133.51 [Amended]

■ 11. Amend § 133.51, in paragraph (a), by:

■ a. Adding the words ” including the DMCA,” after the words “trademark or copyright laws,”; and

■ b. Removing the citations “§ 133.24 or § 133.46” and adding in their place the citations “§ 133.24, § 133.46, or § 133.48”

§ 133.52 [Amended]

■ 12. Amend § 133.52, in paragraph (b), by adding the phrase “except as provided in §§ 133.42(g) and 133.47(g)” after the word “destroyed”.

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

■ 13. The general authority citation for part 148 continues and new specific authority is added for § 148.55 to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States).

* * * * *

Section 148.55 also issued under 17 U.S.C. 602 and 19 U.S.C. 1526;

* * * * *

■ 14. Amend § 148.55 by revising the section heading and paragraphs (a) and (c) to read as follows:

§ 148.55 Exemption for articles embodying American trademark or copyright.

(a) *Application of exemption.* An exemption is provided for articles bearing a counterfeit mark (as defined in § 133.21(a) of this chapter) or piratical articles (as defined in § 133.42(a) of this chapter) accompanying any person arriving in the United States which would be prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602. The exemption may be applied either to those piratical articles or to those articles bearing a counterfeit mark that are of foreign manufacture and bear a recorded mark owned by a citizen of, or a corporation or association created or organized within, the United States, when imported for the arriving person’s personal use in the quantities provided in paragraph (c) of this section.

* * * * *

(c) *Quantities.* Generally, every 30 days, persons arriving in the United States may apply the exemption to the following: one piratical article of each type, or one article of each type bearing a counterfeit mark, and/or one piratical article of each type that is also an article bearing a counterfeit mark. The Commissioner shall determine if more than one article may be entered and, with the approval of the Secretary of the Treasury, publish in the **Federal Register** a list of types of articles and the quantities of each entitled to the exemption. If the owner of a recorded mark or recorded copyright allows importation of more than one article normally prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602, the total of those articles authorized by the owner may be entered without penalty.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

■ 15. The general authority citation for part 151 continues to read as follows:

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

* * * * *

§ 151.16 [Amended]

■ 16. Amend § 151.16 by:

■ a. Revising paragraphs (a) through (c);

■ b. In paragraph (d), removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” wherever it appears and adding in its place the word “will”;

■ c. In paragraph (e), removing the word “Customs” and adding in its place the term “CBP”;

■ d. In paragraph (f), removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will”;

■ e. In paragraph (g), removing the word “shall” and adding in its place the word “will”;

■ f. In paragraph (h), removing the word “Customs” and adding in its place the term “CBP”;

■ g. In paragraph (i), removing the word “Customs” and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will”; and

■ h. In paragraph (j), removing the word “Customs” and adding in its place the term “CBP”.

The revisions read as follows:

§ 151.16 Detention of merchandise.

(a) *Exemptions from applicability.* The provisions of this section are not applicable to detentions effected by CBP on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested.

(b) *Decision to detain or release.* Within five business days from the date on which merchandise is presented for CBP examination, CBP will decide whether to release or detain merchandise. Merchandise that is not released within the five business day period will be considered to be detained merchandise under 19 U.S.C. 1499(c)(1). For purposes of this section, merchandise will be considered to be presented for CBP examination when it is in a condition to be viewed and examined by a CBP officer. Mere presentation to the examining officer of a cargo van, container, or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for CBP examination for purposes of this section. Except when merchandise is examined at the public stores, the importer must pay all costs relating to the preparation and transportation of merchandise for CBP examination.

(c) *Notice of detention.* If a decision to detain merchandise is made, or the merchandise is not released within the five business day period described in paragraph (b) of this section, CBP will issue a notice to the importer or other party having an interest in such merchandise within five business days from such decision or failure to release. Issuance of a notice of detention is not to be construed as a final determination as to admissibility of the merchandise. The notice will be prepared by the CBP officer detaining the merchandise and will advise the importer or other interested party of the:

(1) Initiation of the detention, including the date the merchandise was presented for examination;

(2) Specific reason for the detention;

(3) Anticipated length of the detention;

(4) Nature of the tests or inquiries to be conducted; and

(5) Nature of any information which, if supplied to CBP, may accelerate the disposition of the detention.

* * * * *

PART 177—ADMINISTRATIVE RULINGS

■ 17. The authority citation for part 177 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

§ 177.0 [Amended]

■ 18. In § 177.0 remove the words “part 133 (relating to disputed claims of piratical copying of copyrighted matter),”.

EMILY K. RICK,
Acting Director, Regulations & Disclosure Law Division Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

Approved:

AVIVA R. ARON-DINE,
Acting Assistant Secretary of the Treasury for Tax Policy.

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AN AUTOMOTIVE CLUTCH TUBE

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

ACTION: Notice of revocation of one ruling letter, and revocation of treatment relating to the tariff classification of an Automotive Clutch Tube.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of an Automotive Clutch Tube under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 9, 2024.

FOR FURTHER INFORMATION CONTACT: Julio Ruiz-Gomez, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0736.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024, proposing to revoke one ruling letter pertaining to the classification of an Automotive Clutch Tube. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY 816028, CBP classified an Automotive Clutch Tube in subheading 8708.93, HTSUS, more specifically 8708.93.75, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Clutches and parts thereof: Other." CBP has reviewed NY 816028 and has determined the ruling letter to be in error. It is now CBP's position that an Automotive Clutch Tube is properly classified in subheading 8708.99, HTSUS, more specifically 8708.99.81, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY816028 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H294714 set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H294714

May 24, 2024
OT:RR:CTF:TCM H294714 JRG
CATEGORY: Classification
TARIFF NO.: 8708.99.81

MS. ANN SALO
PROJECT MANAGER
F.W. MYERS & COMPANY
85 N. MAIN STREET, SUITE 300
MT. CLEMENS, MICHIGAN 48043–5616

RE: Revocation of NY 816028 (October 26, 1995); Tariff classification of an Automotive Clutch Tube

DEAR MS. SALO:

This is regarding New York Ruling Letter (NY) 816028, dated October 26, 1995, in which CBP classified a certain "Automotive Clutch Tube" under subheading 8708.93.75 of the Harmonized Tariff Schedule of the United States (HTSUS). Upon reconsideration, we find the classification of the subject merchandise in NY 816028 to be in error. For the reasons set forth below, we hereby revoke NY 816028.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on April 10, 2024, in Volume 58, Number 14, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

The facts, as noted in NY 816028, are as follows:

> The item in question is a gray, zinc and fluorocarbon resin-coated steel tube which is approximately 15" in "bent-to-shape" length; fitted on both ends of the tube are gold-colored metal nuts which are 22/40″L. You state that the clutch tube is part of the transmission system and its purpose is to carry hydraulic fluid from the slave cylinder to the clutch pressure plate. You further state that the clutch tube will solely be used in "motor vehicles of the kind classified under [HTS] heading 8703".

As also noted in NY 816028, you stated in your original ruling request that the Automotive Clutch Tube would be used exclusively in motor vehicles of the kind classified under heading 8703, HTSUS.

ISSUE:

Is the Automotive Clutch Tube, as described above, properly classified under subheading 8708.93, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Clutches and parts thereof," or under subheading 8708.99, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other"?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARI). GRI 1 provides that the classification of goods shall be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely using GRI 1, and the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order. GRI 6 provides:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The HTSUS headings and subheadings at issue are the following:

8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
	Other parts and accessories:
8708.93	Clutches and parts thereof:
8708.93.75	Other...
	* * *
8708.99	Other:
8708.99.81	Other...

There is no dispute that the Automotive Clutch Tube is a part covered by heading 8708, HTSUS. Therefore, the threshold question, applying GRI 6, is whether the Automotive Clutch Tube is a part of an automobile clutch. The courts have considered the nature of "parts" under the HTSUS and two distinct, though not inconsistent, tests have resulted. *See Bauerhin Techs. Ltd. P'ship. v. United States* (*Bauerhin*), 110 F.3d 774 (Fed. Cir. 1997). The first, articulated in *United States v. Willoughby Camera Stores, Inc.* (*Willoughby*), 21 C.C.P.A. 322, 324 (1933), requires a determination of whether the imported item is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 778 (quoting *Willoughby*, 21 C.C.P.A. at 324). The second, set forth in *United States v. Pompeo* (*Pompeo*), 43 C.C.P.A. 9, 14 (1955), states that an "imported item dedicated solely for use with another article is a 'part' of that article within the meaning of the HTSUS." *Id.* at 779 (citing *Pompeo*, 43 C.C.P.A. 9 at 13). Under either line of cases, an imported item is not a part if it is "a separate and distinct commercial entity." *Bauherin*, 110 F. 3d at 779.

We also note that the term "clutches" in subheading 8708.93, HTSUS, is not defined in the HTSUS or the Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System. When a tariff term is not defined by the HTSUS or the legislative history, its correct meaning is its common, or commercial, meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001) ("To ascertain the common meaning of a term, a court may consult 'dictionaries, scientific authorities, and other reliable information sources' and 'lexicographic and other materials.'" (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271, 69 C.C.P.A. 128 (C.C.P.A. 1982))); *see also Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

Merriam-Webster defines a clutch as "a coupling used to connect and disconnect a driving and a driven part (such as an engine and a transmission) of a mechanism." *Clutch*, Merriam-Webster, https://www.merriam-webster.com/dictionary/clutch (last visited Sept. 21, 2023). An automotive clutch connects the engine to the transmission to ensure they spin at the same speed and disconnects them to allow for gear changes without requiring the constantly spinning engine to be turned off. *See* Karim Nice et al., *How Clutches Work*, howstuffworks.com (February 1, 2024), https://auto.howstuffworks.com/clutch.htm (last visited March 14, 2024). While there are various types of clutches, an automotive clutch generally uses a pressure plate to push together a flywheel, connected to the engine, and a clutch plate, connected to the transmission, causing the friction between the two to make the engine and transmission spin together. When disengaged, the clutch pulls the pressure plate away from the clutch plate, disconnecting the engine from the transmission and allowing for a gear change.

Based on this understanding of an automotive clutch's function, an Automotive Clutch Tube is not a part of an automobile clutch or clutch assembly. The function of the Automotive Clutch Tube is to convey hydraulic fluid from the slave cylinder to the clutch pressure plate. The slave cylinder is attached to the master cylinder of the hydraulic system that engages the clutch's pressure plate to disengage the clutch. *See, e.g.*, Spencer Lowe, *Why a Clutch Slave Cylinder is Important and How to Spot a Bad One*, FanBuzz Racing (Aug. 9, 2021), https://altdriver.com/gearhead/why-a-clutch-slave-cylinder-is-important-and-how-to-spot-a-bad-one/ (last visited March 14, 2024). Although the Automotive Clutch Tube serves as a conduit for hydraulic fluid that ultimately plays a role in the operation of a clutch, the tube itself is not integral to the function of connecting and disconnecting a vehicle's motor and transmission. Furthermore, a review of technical sources indicated an Automotive Clutch Tube is generally not considered a part of the clutch mechanism. *See* Martin W. Stockel et al., *Auto Fundamentals* (11th ed. 2014); *Anatomy of Your Car's Clutch*, Haynes Publishing, https://haynes.com/en-gb/tips-tutorials/anatomy-your-cars-clutch (last visited March 14, 2024).

Based on these findings, we conclude that the Automotive Clutch Tube is not a part of an automobile clutch. As such, the Automotive Clutch Tube is a part of an automobile and is properly classified under subheading 8708.99, HTSUS, specifically under subheading 8708.99.81, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the Automotive Clutch Tube is properly classified under heading 8708, HTSUS, and specifically under subheading 8708.99.81, HTSUS, which provides "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories: Other: Other." The general column one rate of duty, for merchandise classified under this subheading is 2.5%.

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

Pursuant to U.S. Note 20(f) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8708.99.81, HTSUS, unless specifically excluded, are subject to an additional 25% ad valorem rate of duty. At the time of importation, an importer must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8708.99.81, HTSUS, noted above, for products of China.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions and https://www.cbp.gov/ trade/remedies/301-certain-products-china respectively.

EFFECT ON OTHER RULINGS:

NY 816028, dated October 26, 1995, is hereby REVOKED.

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

Sincerely,

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

THE GOVERNMENT OF QUEBEC, MARMEN INC., MARMEN ENERGIE INC., MARMEN ENERGY CO., THE GOVERNMENT OF CANADA, Plaintiffs-Appellants v. UNITED STATES, WIND TOWER TRADE COALITION, Defendants-Appellees THE GOVERNMENT OF ONTARIO, Defendant

Appeal No. 2022–1807

Appeal from the United States Court of International Trade in Nos. 1:20-cv-00168-GSK, 1:20-cv-00170-GSK, 1:20-cv-00172-GSK, Judge Gary S. Katzmann.

Decided: June 21, 2024

NANCY NOONAN, ArentFox Schiff LLP, Washington, DC, argued for plaintiff-appellant Government of Quebec. Also represented by MATTHEW CLARK, JESSICA R. DIPIETRO.

JAY CHARLES CAMPBELL, White & Case LLP, Washington, DC, argued for plaintiffs-appellants Marmen Inc., Marmen Energie Inc., Marmen Energy Co., Government of Canada. Marmen Inc., Marmen Energie Inc., and Marmen Energy Co. also represented by RON KENDLER, ALLISON KEPKAY.

JOANNE OSENDARP, Blank Rome LLP, for plaintiff-appellant Government of Canada. Also represented by CONOR GILLIGAN, ALAN KASHDAN, TYLER J. KIMBERLY.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON, ROBERT R. KIEPURA, PATRICIA M. MCCARTHY; ALEXANDER FRIED, United States Department of Commerce, Washington, DC.

MAUREEN E. THORSON, Wiley Rein, LLP, Washington, DC, argued for defendant-appellee Wind Tower Trade Coalition. Also represented by THEODORE PAUL BRACKEMYRE, TESSA V. CAPELOTO, ROBERT E. DEFRANCESCO, III, LAURA EL-SABAAWI, DERICK HOLT, ELIZABETH S. LEE, ALAN H. PRICE, JOHN ALLEN RIGGINS.

Before LOURIE, PROST, and REYNA, *Circuit Judges*.

REYNA, *Circuit Judge*.

Marmen Inc., Marmen Énergie Inc., Marmen Energy Co., the Government of Québec, and the Government of Canada appeal from a decision of the U.S. Court of International Trade, which sustained the final affirmative determination of the U.S. Department of Commerce in a countervailing duty investigation concerning imports of certain utility scale wind towers from Canada. We affirm the judgment of the U.S. Court of International Trade.

BACKGROUND

The Tariff Act of 1930, as amended, authorizes the U.S. Department of Commerce ("Commerce") to impose countervailing duties on imports that benefited from illegal subsidies provided by a foreign government. *See* 19 U.S.C. § 1671(a). Such duties form trade relief to U.S. domestic industries injured by the subsidized imports. *E.g.*, *Al Ghurair Iron & Steel LLC v. United States*, 65 F.4th 1351, 1355 (Fed. Cir. 2023). If Commerce determines that a countervailable subsidy exists and the U.S. International Trade Commission ("ITC") determines that a domestic industry is materially injured or is threatened with material injury by virtue of the subsidized imports, Commerce may impose countervailing duties on the subject imports equal to the amount of the net countervailable subsidy. *See* 19 U.S.C. § 1671(a).

The trade statute provides that a countervailable subsidy exists if: (1) a foreign government provides a "financial contribution;" (2) a "benefit" is thereby conferred upon a recipient in connection with the manufacture or export of the subject merchandise; and (3) the subsidy is "specific" to a foreign enterprise or industry, or a group of such enterprises or industries. *See id.* §§ 1677(5), (5A). To calculate a subsidy rate, Commerce divides "the amount of the benefit allocated to the period of investigation" by the "sales value" of the subject merchandise during the same period, the latter referred to as the sales denominator. 19 C.F.R. § 351.525(a). The larger the sales denominator, the lower the subsidy rate.

This case involves (1) Commerce's final determination that the Government of Canada and the Government of Québec provided countervailable subsidies to producers and exporters of utility scale wind towers[1] imported from Canada to the United States, and (2) Commerce's calculation of the subsidy rate of 1.18% ad valorem.[2] Generally, a subsidy rate of less than 1% is considered *de minimis*, which Commerce will disregard, and no countervailing duties are assessed. 19 U.S.C. § 1671b(b)(4). Appellants argue that Commerce erred in its assessment of three of the investigated programs and its computation of the sales denominator used to calculate the subsidy rate. According to Appellants, the subsidy rate should have been *de minimis*.

[1] Generally, wind towers are steel towers with wind turbines that are used to convert the kinetic energy from wind to electrical power. *See Gov't of Québec v. United States*, 567 F. Supp. 3d 1273, 1277 (Ct. Int'l Trade 2022).

[2] The 1.18% rate represents the aggregate subsidy rate calculated based on eight of the investigated programs that Commerce found countervailable. As noted *infra*, this rate was subsequently reduced to 1.13% to account for ministerial errors not at issue here.

I. The Investigation and Commerce's Determination

In July 2019, Appellee Wind Tower Trade Coalition("WTTC") petitioned Commerce to initiate a countervailing duty investigation of certain imports of utility scale wind towers from Canada. *See Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations*, 84 Fed. Reg. 38216, 38216 (Aug. 6, 2019). WTTC contended that imports of the subject merchandise, the merchandise under investigation, received countervailable subsidies from the Government of Québec and the Government of Canada through various government programs. *See id.*

Commerce initiated a countervailing duty investigation, the period of investigation covering January 1, 2018–December 31, 2018. *Id.* at 38217. Commerce selected, as mandatory respondents,[3] Marmen Inc. and Marmen Énergie Inc. (collectively, "Marmen"), the two largest and cross-owned Canadian exporters of the subject merchandise during the period of investigation. During the investigation, Commerce issued initial countervailing duty questionnaires and supplemental questionnaires, to which Marmen, the Government of Québec, and the Government of Canada submitted responses. *See* J.A. 8387.

In December 2019, Commerce reached a preliminary affirmative determination that countervailable subsidies were being provided to Canadian producers of wind towers through eight of the investigated programs. *Utility Scale Wind Towers from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 Fed. Reg. 68126, 68126 (Dec. 13, 2019) ("*Preliminary Affirmative Determination*"); J.A. 8386–8408 (decision memorandum for the *Preliminary Affirmative Determination*). For the eight countervailable programs, Commerce calculated a total countervailable subsidy rate of 1.09% ad valorem. *Preliminary Affirmative Determination*, 84 Fed. Reg. at 68127. In calculating the subsidy rate, Commerce used the 2018 "Applicable Sales Value" Marmen reported as the sales denominator. *See* J.A. 8428; J.A. 2907.

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[3] In countervailing duty investigations, if a large number of exporters or producers are involved, Commerce may select, and limit the investigation to, a small number of mandatory respondents. 19 U.S.C. § 1677f-1(e)(2). Mandatory respondents are compelled to participate in the investigation. Other exporters or producers of the subject merchandise may volunteer to participate in the investigation, and Commerce may accept voluntary respondents at its discretion. *Id.* § 1677m(a); 19 C.F.R. § 351.204(d). Mandatory respondents' failure to properly cooperate in the investigation may adversely affect the countervailing duty rates assessed for them. *See* 19 U.S.C. § 1677e(b).The calculated subsidy rates for the mandatory respondents may determine the countervailing duty rates applicable to other exporters and producers that are not individually investigated during the investigation. 19 U.S.C. §§ 1671d(c)(5), 1677f-1(e)(2).

After Commerce issued the *Preliminary Affirmative Determination*, Marmen submitted a "ministerial error" comment,[4] alleging that Commerce erred in not adjusting the sales denominator to include a year-end "exchange rate adjustment" that Marmen's auditor made. J.A. 8434–35; J.A. 8436 (citing line item "Year-end auditor adjustment to General Ledger (revenue) for exchange rate gain(loss)"). According to Marmen, this adjustment was to translate all foreign-currency sales recorded in its general ledger to Canadian dollars ("CAD"). J.A. 8434–35. Using the "correct[ed] sales denominator" that includes this adjustment, according to Marmen, would change the preliminarily calculated subsidy rate from above *de minimis* (1.09%) to below *de minimis* (0.95%). J.A. 8436. Commerce declined to amend its *Preliminary Affirmative Determination* based on Marmen's allegation because the record information did not support that the alleged error was "ministerial" as defined in the regulations. J.A. 8453; *see* 19 C.F.R. § 351.224(f).

In February 2020, Commerce conducted a verification of the information Marmen submitted during the investigation. *See Verification of Questionnaire Responses of Marmen Inc., Marmen Énergie Inc., and Gestion Marmen*, J.A. 8654–8708 ("*Verification Report*"). Verification refers to the process by which Commerce "verif[ies] the accuracy and completeness" of factual information submitted by interested parties, before Commerce makes a final countervailing duty determination. 19 C.F.R § 351.307(d). If the submitted information "cannot be verified," Commerce may make determinations based on "the facts otherwise available" on the record. 19 U.S.C. § 1677e(a)(2)(D); 19 C.F.R. § 351.308(a).

At verification, relevant to the auditor's adjustment, Commerce discussed with Marmen the U.S. dollars ("USD") sales Marmen identified as needing to be converted to CAD and reviewed the underlying sales records. J.A. 8679–80. This process revealed several discrepancies in the requested adjustment. Specifically, Commerce found that the adjustment included sales classified as USD sales but recorded in European currency, the EURO, in Marmen's general ledger. *Id.* Upon reviewing the underlying records, Commerce discovered that two of the EURO-coded sales in the general ledger were shown in the origi-

[4] Generally, after Commerce discloses its calculations in its preliminary determinations, a party to the proceeding may submit comments concerning "ministerial errors" contained in Commerce's calculations. 19 C.F.R. § 351.224(c). Commerce will analyze such comments and make corrections where appropriate. *Id.* § 351.224(e). According to the regulations, a "*ministerial error* means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like." *Id.* § 351.224(f).

nal sales documentation as transacted in CAD. *Id.* These sales were thus inappropriately included in the USD-CAD conversion as part of the auditor's adjustment.

In June 2020, Commerce reached a final affirmative countervailing duty determination. *Utility Scale Wind Towers from Canada: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 85 Fed. Reg. 40245, 40245 (July 6, 2020) ("*Final Affirmative Determination*"). In the *Final Affirmative Determination*, Commerce maintained its determination that eight of the investigated programs were countervailable. *Issues and Decision Memorandum for the Final Determination of the Countervailing Duty Investigation of Utility Scale Wind Towers from Canada*, J.A. 74–130.

Based on the eight countervailable programs, Commerce calculated an aggregate countervailable subsidy rate of 1.18% ad valorem for Marmen and assigned the same rate for all other producers. *Final Affirmative Determination*, 85 Fed. Reg. at 40246. In calculating the subsidy rate, Commerce again did not include Marmen's auditor's adjustment in the sales denominator. J.A. 116. Because "Commerce found multiple improperly identified and improperly converted [sales] values in the calculation of the auditor's adjustment at verification," Commerce determined the adjustment to be "unverified and unreliable." *Id.* Commerce explained that it lacked the ability to check each sale, and instead, the checks it performed at verification were to "test the broader reliability of reported information." *Id.* Commerce thus relied on Marmen's reported sales information excluding the unverified auditor's adjustment. *Id.*; *see* 19 U.S.C. § 1677e(a)(2)(D).

Along with five other programs, Commerce determined that the following three programs provided countervailable subsidies, each contributing to the ultimately assessed aggregate subsidy rate of 1.18%. *See* J.A. 78–80. We provide an overview of each of the three programs below. As noted above, to be countervailable, a subsidy must satisfy three criteria: (1) a program provides a financial contribution; (2) a benefit is thereby conferred on a recipient; and (3) the subsidy is specific to a foreign enterprise or industry, or a group thereof. By finding the three programs at issue countervailable, Commerce found they each satisfy all three criteria. For each program, Appellants challenge Commerce's assessment of one or two criteria. Consequently, in the overview below, we focus on the criteria that the parties dispute in this appeal.

i. Additional Depreciation for Certain Class 1 Assets

The Canadian tax regulations provide property depreciation deductions from taxable income, called the Capital Cost Allowance ("CCA"). J.A. 8037–38; J.A. 2513. Under the CCA program, assets are divided into different classes, each assigned a respective deduction rate. For Class 1 assets, a generally applicable CCA rate is 4%, but taxpayers can claim a higher rate for certain subsets of Class 1 assets acquired after March 2007. As relevant here, taxpayers can claim an additional 6% (for a total of 10%) if at least 90% of an eligible building's floor space is used for manufacturing. J.A. 2514. Similarly, an additional 2% (for a total of 6%) may be claimed for other non-residential buildings. *Id.* The additional allowances are intended to reflect the shorter useful life of buildings used for manufacturing or other non-residential purposes. *Id.; see* J.A. 2522–82 ("*Economic Depreciation and Retirement of Canadian Assets: A Comprehensive Empirical Study*") ("*StatCan Study*").

To be eligible for the additional allowances, "a building will be required to be placed into a separate class." J.A. 2514. "If the taxpayer forgoes the separate class," the standard 4% rate applies. *Id.*; J.A. 8037. Marmen, for certain buildings, elected to claim the 10% depreciation deduction, which reduced its taxable income during the period of investigation.

Commerce determined that the additional allowance provided a countervailable subsidy and calculated a subsidy rate of 0.07% ad valorem. J.A. 79. As relevant here, Commerce determined that the additional allowance provided a financial contribution and that it conferred a benefit equal to the resulting tax savings. J.A. 97–98. Commerce reasoned that absent the additional allowance, Marmen would have paid more taxes under the 4% standard rate. J.A. 98. The appropriate benefit, Commerce concluded, was the "tax savings of the difference between the deduction calculated using the basic rate" and the deduction "using the total depreciation rate" that Marmen claimed. J.A. 98–99.

ii. GASPÉTC Tax Credit

The GASPÉTC program provides a tax credit to promote employment in certain regions in Gaspésie and certain maritime regions of Québec. J.A. 2182. This program allows employers to claim a 15% tax credit for total wages paid to eligible employees. *Id.* An employer can claim the credit when filing tax returns for the previous year. At the same time, the previous year's credit is considered taxable income, which the employer must then pay taxes on in the following year. In

2018, Marmen claimed the GASPÉTC tax credit on its year-2017 tax return and paid taxes for the GASPÉTC credit it received for year-2016. J.A. 2871.

Commerce determined that the GASPÉTC credit provided a countervailable subsidy and calculated a subsidy rate of 0.78% ad valorem. J.A. 80. As relevant here, in quantifying the benefit conferred under this program, Commerce used the amount of credit Marmen received for 2017. J.A. 126–27. Commerce declined to reduce that amount by the taxes Marmen paid for the credit it received for 2016. *Id.* In doing so, Commerce cited the regulatory directive under 19 C.F.R. § 351.503(e): "[i]n calculating the amount of a benefit, [Commerce] will not consider the tax consequences of the benefit." J.A. 126. Commerce also explained that its calculation here was consistent with its past "treatment of other tax credits which ha[d] similar consequences." *Id.*

iii. On-the-Job Training Tax Credit

The on-the-job training program encourages businesses to hire trainees, such as students or apprentices. J.A. 1970. The program allows businesses to claim a tax credit for 24% of wages paid to trainees, and a higher percentage if the trainee is a person with a disability or is an immigrant. *Id.* To be eligible for this credit, an employer must satisfy several criteria, including, among others, engaging in a qualified business and having received the required certification. J.A. 1976–77.

Commerce determined that the on-the-job training credit provided a countervailable subsidy and calculated a subsidy rate of 0.01% ad valorem. J.A. 79–80. As relevant here, Commerce found that this program provided a subsidy that is de facto (as a matter of fact) specific. J.A. 129. Commerce determined that, during the period of investigation, the actual number of recipients that benefited from this program was "limited in number on an enterprise basis." *Id.* In reaching this determination, Commerce compared "the actual number of companies that received the tax credit in 2018 to the total number of tax filers, inclusive of corporations and individuals in business, within Québec for 2018." *Id.*

After Commerce issued the *Final Affirmative Determination*, the ITC reached a final affirmative determination that a domestic industry was materially injured by the subsidized wind towers imported from Canada. *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, Inv. Nos. 701-TA-627–629, 731-TA-1458–1461 USITC Pub. 5101 (Aug. 2020) (Final). Based on these two affirmative determinations, Commerce issued a countervailing duty order imposing countervailing duties on the imports of wind towers from Canada. *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Orders*, 85 Fed. Reg. 52543, 52543 (Aug. 26, 2020). The 1.18% subsidy rate assessed in the *Final Affirmative Determination* was subsequently reduced to 1.13%, to account for ministerial errors not at issue here. *See id.* at 52544.

II. Appeal to the U.S. Court of International Trade

In September 2020, the Government of Québec filed suit in the U.S. Court of International Trade, challenging various aspects of Commerce's *Final Affirmative Determination*. *Gov't of Québec v. United States*, 567 F. Supp. 3d 1273, 1280 (Ct. Int'l Trade 2022) ("*CIT Decision*"). The Government of Canada joined as plaintiff-intervenor and WTTC joined as defendant-intervenor. *Id.* Marmen and WTTC subsequently filed separate appeals. *Id.* The appeals were consolidated. *Id.* The Government of Québec, the Government of Canada, Marmen, and WTTC each moved for judgment on the agency record. *Id.*

The Court of International Trade sustained Commerce's *Final Affirmative Determination*, finding that the *Final Affirmative Determination* was in accordance with law and supported by substantial evidence. Relevant here are the court's affirmances of (1) Commerce's computation of the sales denominator used to calculate the subsidy rate, and (2) Commerce's assessment concerning the additional depreciation allowance, GASPÉTC tax credit, and the on-the-job training credit.

Regarding the sales denominator, the Court of International Trade concluded that Commerce properly excluded Marmen's requested auditor adjustment as unreliable after identifying multiple errors at verification. *Id.* at 1285. In reaching this conclusion, the court rejected Marmen's contention requiring Commerce to identify compelling evidence before rejecting the auditor's report, finding such a contention lacked support in law. *Id.* The errors identified through verification, the court reasoned, undermined the broader reliability of the requested adjustment and supported Commerce's determination to exclude the adjustment as unreliable. *Id.* at 1286.

As to the assessment of the three subsidy programs at issue here, the Court of International Trade affirmed Commerce's determination in all challenged aspects. We provide below an overview of the Court of International Trade's decision, focusing on the challenged aspects at issue here.

i. Additional Depreciation for Certain Class 1 Assets

As to the additional depreciation for certain Class 1 manufacturing buildings, the Court of International Trade affirmed Commerce's determination that the additional 6% allowance provided a financial contribution conferring a benefit. *Id.* at 1293. The court rejected the Canadian parties' argument that the additional allowance reflected the actual shorter useful life of manufacturing buildings so it constituted neither a "financial contribution" or "benefit." *Id.* at 1294–95. The court concluded that Commerce's determination was in accordance with the statutory definition of "financial contribution"[5] and the pertinent regulations on "Direct Taxes" benefits.[6] *Id.* The Court of International Trade also rejected the argument that Commerce erred by declining to directly engage with the *StatCan Study*, an empirical analysis on building depreciation the Canadian parties relied on. *Id.* at 1295–96. According to the court, "where a taxpayer can opt-in to more favorable treatment, it is reasonable for Commerce to confine its analysis to the comparisons provided for by law, even if the more favorable treatment better reflects economic reality." *Id.* at 1296.

ii. GASPÉTC Tax Credit

Regarding the GASPÉTC tax credit, the Court of International Trade affirmed Commerce's determination to exclude increased tax liabilities in calculating the benefit Marmen received under the program. *Id.* at 1292–93. The court found unpersuasive the Government of Québec and Marmen's assertion that 19 C.F.R. § 351.509(a)(1) directed Commerce to consider and exclude the previous year's tax liabilities from the benefit calculation. *Id.*; *see also* 19 C.F.R. § 351.509(a)(1) ("[A] benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program."). The regulations, the court reasoned, did not require treating "tax liabilities from a previous year's use of the program [as] a component" of the "result of the program." *CIT Decision*, 567 F. Supp. 3d at 1293. The court added that Commerce's determination was consistent with its uniform past practice of disregarding tax consequences when assessing benefits provided through direct taxes. *Id.*

[5] Under 19 U.S.C. § 1677(5)(D), "financial contribution" includes "(i) the direct transfer of funds, such as grants, loans, and equity infusions," and as relevant here,"(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income."

[6] Regarding benefits provided through direct taxes, 19 C.F.R. § 351.509(a)(1) ("Exemption or remission of taxes") provides that "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program."

iii. On-the-Job Training Tax Credit

The Court of International Trade also sustained Commerce's determination that the on-the-job training tax credit provided a de facto subsidy. *Id.* at 1291. The Government of Québec and the Government of Canada argued that Commerce's specificity determination violated the statutory requirements and that its comparison was "methodologically unsound." *See id.* at 1290. The court disagreed. First, the court explained Commerce's approach assessed both whether "the actual recipients of the subsidy" were "limited in number," 19 U.S.C. § 1677(5A)(D)(iii)(I), and whether the subsidy is "truly . . . broadly available and widely used throughout [the] economy." *Id.* at 1291. The court concluded that Commerce's approach was in accordance with the statute and the aims of the specificity test as set out in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA").[7] *Id.* (citing SAA, H.R. Doc. No. 103–316, at 929 (1994), reprinted in 1994 U.S.C.C.A.N. 4040). Second, the court determined that Commerce did not err in using all corporate tax filers as the comparator group in assessing specificity. *Id.* The court explained that it was "reasonable to think that [such] a comparison" would be "instructive" in assessing whether the subsidy was widely used. *Id.*

Accordingly, the Court of International Trade sustained in full Commerce's *Final Affirmative Determination*. Marmen Inc., Marmen Énergie Inc., Marmen Energy Co., the Government of Québec, and the Government of Canada appeal to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review de novo the Court of International Trade's decisions involving Commerce's countervailing duty determinations, reapplying the same substantial evidence review standard applied by the Court of International Trade. *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 992 F.3d 1348, 1352 (Fed. Cir. 2021). We uphold Commerce's determination unless it is unsupported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means such relevant evidence that a reasonable mind may accept as adequate to support a

[7] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreement Act] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

conclusion. *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). In conducting our review, we "will not ignore the informed opinion of the Court of International Trade," which often serves as a starting point of our analysis. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

Appellants raise two categories of challenges to Commerce's *Final Affirmative Determination*. First, as to the subsidy rate calculation, Appellants challenge Commerce's exclusion of Marmen's auditor's adjustment from the sales denominator. Second, Appellants challenge Commerce's assessment concerning the three programs at issue, specifically: (1) Commerce's finding that the additional depreciation deduction for certain Class 1 assets constituted a financial contribution conferring a benefit; (2) Commerce's determination to exclude increased tax liabilities when calculating the benefit conferred under the GASPÉTC program; and (3) Commerce's finding that the on-the-job training tax credit provided a de facto specific subsidy. Because Commerce's determinations are supported by substantial evidence and in accordance with law, we affirm.

I. The Sales Denominator

We first address Commerce's determination not to adopt Marmen's auditor's adjustment in computing the sales denominator. Appellants argue that Commerce "unreasonabl[y]" determined that the auditor's adjustment was "unverified and unreliable." Appellants Br. 25. Appellants further argue that Commerce's determination contravenes its past practice and its obligation to accurately calculate subsidy rates. *Id.* We disagree.

Based on errors identified through verification, Commerce reasonably determined that Marmen's auditor's adjustment was unreliable. Marmen claimed that the adjustment was to convert USD sales recorded in its general ledger to CAD, and the auditor used a single annual average USD-CAD exchange rate. J.A. 8676–77. Commerce's verification revealed that the auditor's adjustment erroneously included sales denominated in a non-USD foreign currency (the EURO) in the general ledger, and two of these sales were transacted in CAD and thus erroneously coded. J.A. 8679–80. Based on these "improperly identified and improperly converted" sales, it was reasonable for Commerce to determine that "the auditor's adjustment was not accurate or reliable." J.A. 116.

Appellants take issue with Commerce's statement that Commerce "discovered" the five EURO-coded sales through "spot-checking." Appellants Br. 32. Appellants contend that Marmen *self-identified* these sales to Commerce because, in the USD-sales listings Marmen prepared, these EURO-coded sales were listed as such and were thus flagged for Commerce.[8] *E.g.*, *id.* at 33. These errors, Appellants claim, account for less than 0.2% of the total requested adjustment and Commerce's spot-checking beyond these errors did not reveal additional "EURO-coded sales." *Id.* at 34, 36. According to Appellants, because Commerce found no additional errors and concluded the verification early, it was "unreasonable for Commerce to infer that additional errors were likely." *Id.* at 34–35.

Regardless of whether Commerce completely *independently* discovered those problematic sales or used Marmen's submitted listings as a clue, these errors undeniably exist and undermine the reliability of the adjustment. When Commerce inquired about the errors relating to the EURO-coded sales, Marmen attributed them to its accounting firm's "sales classification" or its "internal coding mistake." J.A. 8680. The fact that Commerce's verification did not reveal *additional EURO-coded sales* does not compel a conclusion that the auditor's adjustment contains *no other errors*. Marmen's explanation for the identified errors does not support that *all* errors are fully accounted for by the identified EURO-coded sales, whether attributed to "sales classification," "coding mistake[s]," or other causes. This evidence supports Commerce's reasonable inference that the auditor's adjustment may contain other errors. *See CIT Decision*, 567 F. Supp. 3d at 1286 n.11. As Commerce explained, it lacked the ability to verify each sale and exhaustively examine all underlying sales documentation. J.A. 116. Here, the verification demonstrated that the requested adjustment contained errors, which undermined "[its] broader reliability." *Id.* We agree with the Court of International Trade that "[w]hile the impact of the discovered errors, taken alone, on the proposed foreign currency adjustment may be small, Commerce could reasonably infer that there may remain other errors." *CIT Decision*, 567 F. Supp. 3d at 1286.

We also find unpersuasive Appellants' assertion that Commerce's action here contradicts its past practice or its legal obligations. *See* Appellants Br. 37. Appellants contend that, by conducting verification of "an independent auditor's" analysis, Commerce took an erroneous

[8] Countering Appellants' argument, the United States contends that Marmen never alerted Commerce to the "second type of error—sales included as USD in the adjustment and recorded in Marmen's ledger as Euro that were *actually* in CAD." United States Br. 24. According to Appellees, it was Commerce that identified this "second type of error" when "it spot-checked documentation for the Euro-coded sales." *Id.*; WTTC Br. 25; *see Verification Report*, J.A. 8579–80.

"extraordinary" action departing from its past practice and the law. *Id.* at 39–40.

Verifying the parties' submission and rejecting inaccurate and unverifiable information is consistent with, and required by, Commerce's statutory obligation to calculate subsidy rates "as accurately as possible." *See id.* at 41; *see also* 19 U.S.C. § 1677m(i). Marmen requested the auditor's adjustment in a ministerial error allegation *after* Commerce reached the *Preliminary Affirmative Determination* based on the sales value Marmen itself reported. J.A. 114. To support its allegation, Marmen pointed to a line item "Year End auditor adjustment in [General Ledger] 40000 for Gain(loss) exchange rate," which had little accompanying explanation. *See id.*; J.A. 8436; J.A. 8092; J.A. 8118. Given the timing and nature of Marmen's request and the lack of corroborating explanation in the record, it was reasonable for Commerce to decide to investigate the accuracy of the requested adjustment.

Lastly, we reject Appellants' argument that Commerce should have, but failed to, "cite compelling evidence" to disregard the auditor's adjustment. Appellants Br. 40. To support its proposition, Appellants cite *SeAH*, a decision by the Court of International Trade in an unrelated proceeding, and certain statements in a previous administrative proceeding referenced in *SeAH*. *Id.* at 39 (citing *SeAH Steel VINA Corp. v. United States*, 269 F. Supp. 3d 1335, 1352 (Ct. Int'l Trade 2017)); *see also id.* (citing statements from memo accompanying *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan*, 71 Fed. Reg. 67098 (Nov. 20, 2006)). Appellants' arguments lack merit.

SeAH involves Commerce's evaluation and selection of one set of surrogate financial statements over the other, where Commerce "had reason to trust the reliability" of the one it selected and explained its "basis for rejecting" the other. *SeAH*, 269 F. Supp. 3d at 1351–52. One of the reasons supporting Commerce's selection was that the selected set contained an auditor's opinion and registration information, while the other did not. *Id.* In that context, the Court of International Trade observed that Commerce *can* "accept the independent auditor's report as reliable unless 'compelling evidence' exists that the auditor is not in 'good standing.'" *Id.* at 1352. This observation does not stand for Appellants' proposed rule requiring Commerce to provide "compelling evidence to set aside information provided by an auditor." *See CIT Decision*, 567 F. Supp. 3d at 1285. Further, as the Court of International Trade noted, the facts here are readily distinguishable from those in *SeAH*. *See id.* In *SeAH*, no evidence "contradicted the independent auditor's conclusions" accompanying the selected surrogate statements; here, in contrast, Marmen's own auditor's adjustment was “shown to be at least partially in error.” *Id.* Appellants’ reliance on the out-of-context statements from the *Butt-Weld Pipe Fittings* proceeding fails for similar reasons. *See id.* (explaining the differences between the determination involved in *Butt-Weld Pipe Fittings* and Commerce’s evaluation here).

Accordingly, we agree with the Court of International Trade that Commerce’s exclusion of Marmen’s requested auditor adjustment was supported by substantial evidence and in accordance with law.

II. Program Assessment

i. Additional Depreciation for Certain Class 1 Assets

Appellants challenge Commerce’s determination that the additional 6% depreciation Marmen claimed for certain Class 1 assets provided a countervailable subsidy. Appellants contend that the additional depreciation does not provide a “benefit” nor result in a “financial contribution” in the form of foregone revenue. Appellants Br. 42, 49. According to Appellants, the additional depreciation merely reflects the actual shorter useful life of manufacturing buildings and the normal rate at which they depreciate. *E.g.*, *id.* at 42–43, 53–54. We are unpersuaded.

To find a countervailable subsidy, there must be a governmental “financial contribution” that conferred a “benefit.” *See* 19 U.S.C. § 1677(5). As relevant here, financial contribution includes “foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income.” 19 U.S.C. § 1677(5)(D)(ii). And in cases involving direct taxes, “a benefit exists to the extent that the tax paid by a firm *as a result of the program is less than the tax the firm would have paid* in the absence of the program.” 19 C.F.R. § 351.509(a) (emphasis added).

In accordance with the governing statute and regulations, Commerce reached a determination that is supported by substantial evidence in the record, including the Canadian tax regulations themselves. Before the Canadian tax regulations implemented additional allowances for certain subsets of Class 1 assets, a single standard or default 4% rate applied for all Class 1 assets. J.A. 2514. Around 2007, the Canadian tax regulations added additional allowances for two subsets of Class 1 assets, including as relevant here, “an additional allowance of 6% (total 10%)” for certain eligible buildings acquired after March 2007 and used for manufacturing. *Id.* To be eligible for this additional allowance, “a building will be required to be placed into a separate class,” and “elections have to be filed.” *Id.*; J.A. 9539; *see also* J.A. 9548 (“If you do not file an election to put it in a separate class, the 4% rate will apply.”). Marmen filed its election to claim this additional allowance (of 6%) and thereby further reduced its taxable income during the 2018 period of investigation.

Absent the additional allowance, the generally applicable 4% standard rate would have applied. Marmen would have paid more taxes and the Canadian governments would have collected more revenue. The additional 6% allowance claimed and received by Marmen thus represents revenue that the Canadian governments could have collected but forewent, which constitutes a "financial contribution." 19 U.S.C. § 1677(5)(D)(ii); *see* J.A. 99. And because of this additional 6% allowance, "a benefit exists" as "the tax paid by [Marmen] as a result of the program is less than the tax [Marmen] would have paid in the absence of the program." 19 C.F.R. § 351.509(a)(1); *see* J.A. 97–99.

We find unpersuasive Appellants' contention that Commerce committed a "fundamental error" by failing to consider that "the depreciation rate is based on the average useful life of a particular asset." Appellants Br. 47, 49. Commerce based its determination on how the Canadian tax regulations explicitly structured the additional depreciation allowance, applying the explicit definitions of "benefit" and "financial contribution" provided in the governing statute and regulations. *See* J.A. 97–99. The governing statutory and regulatory provisions do not require Commerce to base its determination on whether a program at issue accurately aligns with the economic reality of building depreciation. 19 U.S.C. § 1677(5)(D)(ii); 19 C.F.R. § 351.509(a)(1); *see CIT Decision*, 567 F. Supp. 3d at 1295. We thus agree with the Court of International Trade that Commerce's determinations are in accordance with law and supported by the tax regulations themselves. *See CIT Decision*, 567 F. Supp. 3d at 1294–96.

Relatedly, we reject Appellants' contention that Commerce ignored or failed to adequately address the *StatCan Study*. *See* Appellants Br. 47, 49. Appellants relied on the *StatCan Study* to support their characterization that the additional depreciation allowance reflected the economic reality. *See* J.A. 93–94. As discussed above, Commerce based its assessment on a comparison of the different depreciation deduction rates provided in the Canadian tax regulations. *See CIT Decision*, 567 F. Supp. 3d at 1296. In doing so, Commerce rejected Appellants' contrary contention that would require Commerce to compare the deduction rate(s) to what would be justified by the economic reality. *See* J.A. 98. By rejecting that over arching contention, Commerce adequately engaged with the *StatCan Study* evidence Appellants cited to support their underlying characterization of the depreciation allowance.

ii. GASPÉTC Tax Credit

Appellants next challenge Commerce's benefit assessment under the GASPÉTC tax credit program. In calculating the benefit Marmen received under this program in 2018, Commerce used the tax credit Marmen claimed for 2017 without offsetting it by the income tax Marmen paid for the credit it received in 2016. Appellants contend that the regulations require Commerce to consider the "total tax effect of the program" that, in Appellants' view, requires a reduction by the tax Marmen paid for the prior year's credit. Appellants Br. 57. We are not persuaded.

Under 19 C.F.R. § 351.509(a)(1), in cases involving "[e]xemption or remission of taxes," "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program." In excluding the tax Marmen paid as a result of the prior year's credit from its benefit assessment, Commerce followed the directive under 19 C.F.R. § 351.503(e). Section 351.503 is the "Benefit" section under "Subpart E—Identification and Measurement of Countervailable Subsidies," and it contains various subsections on benefit assessment. Subsection (e) instructs that "[i]n calculating the amount of a benefit, [Commerce] *will not consider the tax consequences of the benefit*." 19 C.F.R. § 351.503(e) (emphasis added).

Appellants argue that 19 C.F.R. § 351.503(e) is inapplicable because, in their view, it provides a general rule whose application would contravene the "specific rule" provided in 19 C.F.R. § 351.509(a)(1). *See* Appellants Br. 60–61. We discern no contravention. Section 351.509(a)(1) directs Commerce to calculate the benefit received under a program in the year at issue, here the 2018 period of investigation. The regulatory language does not address taxes resulting from prior year(s)' credit, let alone instruct that such resulting taxes be subtracted from the benefit received in the year at issue. This section thus does not contradict the instruction contained in 19 C.F.R. § 351.503(e).

Additionally, further supporting Commerce's determination are the statutory limitations on the circumstances where offsets are applied. *See* 19 U.S.C. § 1677(6). Specifically, section 1677(6) explicitly lists a narrow range of scenarios where Commerce may apply offsets in calculating countervailable subsidies. *Id.* These include, among other scenarios, cases involving fees paid to receive a subsidy and "loss in the value" of the subsidy due to delayed receipt. *Id.* The enumerated scenarios do not include, as relevant here, tax consequences from prior year's benefit. *Id.*; *see Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163, 1174 (Fed. Cir. 1998) (discussing permissible offsets under § 1677(6)).

Accordingly, we agree with the Court of International Trade that Commerce acted in accordance with law when it excluded taxes incurred from the previous year's credit in computing the benefit Marmen received under the GASPÉTC program.

iii. On-the-Job-Training Tax Credit

Lastly, Appellants challenge Commerce's determination that the Québec on-the-job training tax credit was de facto specific under 19 U.S.C. § 1677(5A)(D)(iii). Appellants Br. 62. As noted *supra*, to be countervailable, a subsidy must be "specific" to a foreign enterprise or industry, or a group of foreign enterprises or industries. 19 U.S.C. § 1677(5)(A). Specificity can be de jure (as a matter of law), or de facto. *Id.* § 1677(5A)(D). As relevant here, a subsidy is de facto specific if Commerce finds "one or more of the following factors":

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

Id. § 1677(5A)(D)(iii). In assessing de facto specificity, Commerce examines the factors enumerated in 19 U.S.C. § 1677(5A)(D)(iii) sequentially. 19 C.F.R. § 351.502. "If a single factor warrants a finding of specificity, [Commerce] will not undertake further analysis." *Id.* § 351.502(a).Here, Commerce found the on-the-job training tax credit to be de facto specific based on factor (I), namely the actual number of recipients was "limited in number" on an enterprise basis. J.A. 129.

Appellants raise two primary challenges to Commerce's specificity determination. Appellants first contend that Commerce erred in not conducting a de jure specificity analysis, which Appellants argue should inform the defacto analysis. Appellants Br. 64. Appellants also argue that Commerce's comparison approach in its "limited in number" analysis was methodologically unsound and contravened the SAA's directive regarding the purpose of the specificity determination. *Id.* at 71–78. We disagree.

First, contrary to Appellants' contention, the statute does not make a de jure analysis a prerequisite inquiry for a de facto analysis. Rather, the statutory language is clear that specificity can be *either* de jure *or* de facto. 19 U.S.C. § 1677(5A)(D)(ii)–(iii). The de jure specificity inquiry is separate from the de facto inquiry and the two are based on different factors. *Id.* Commerce thus did not err in finding specificity based on its de facto analysis without a separate de jure analysis.

Second, Commerce did not err in using the total corporate tax filers as a comparator in assessing whether the credit recipients are limited in number. The governing statute and the implementing regulations do not prescribe any mandatory method that Commerce must employ in assessing de facto specificity or analyzing the listed factors. *See* 19 U.S.C. § 1677(5A)(D)(iii); 19 C.F.R. § 351.502. Rather, it is a fact-intensive and case-specific inquiry, where the factors involved and the weight accorded to them vary from case to case. *Royal Thai Gov't v. United States*, 436 F.3d 1330, 1335–36 (Fed. Cir. 2006); *see* SAA, H.R. Doc. No. 103–316, at 929. In conducting this inquiry, Commerce exercises the necessary latitude afforded it in choosing the appropriate approach.

We agree with the Court of International Trade that Commerce did not exceed that latitude here. In assessing specificity, Commerce considered that the on-the-job training program is to encourage businesses to take on trainees. J.A. 8400. Both corporations and individuals engaging in business activities can avail themselves of this program and claim the tax credit. *Id.* The Government of Québec reported that during the 2018 period of investigation, 4,930 of 387,949 corporate entities, roughly 1.27%,[9] received the on-the-job training credit. J.A. 1982; J.A. 2173. Commerce thus concluded that the credit recipients were "limited in number" on an "enterprise" basis. J.A. 129. As the Court of International Trade pointed out, Commerce has taken similar comparison approaches to assess specificity of tax credit programs in past investigations. *CIT Decision*, 567 F. Supp. 3d at 1291–92; *see also* United States Br. 76–77. While the facts in other cases may call for different approaches or considerations, the nature of the program and the small percentage of

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[9] This percentage is based on a comparison of the number of credit recipients to the number of *corporate* tax filers, J.A. 1982, excluding *individual* tax filers engaging in business. The United States contends that this percentage would be even smaller if such individual tax filers were included. United States Br. 60–61, 61 n.7.

recipients here support Commerce's "limited in number" assessment.[10] *See CIT Decision*, 567 F. Supp. 3d at 1292.

Contrary to Appellants' assertion, Commerce's approach does not conflict with the SAA's directive regarding the purpose of the specificity determination. *See, e.g.*, Appellants Br. 72, 74. As stated in the SAA, the specificity determination serves to "winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy." SAA, H.R. Doc. No. 103–316, at 929. It ensures that countervailing duties are not improperly levied against subsidies that are generally available and widely used across the economy, such as certain public infrastructure-related programs. *Id.* at 929–30. Commerce's comparison of the on-the-job training credit recipients to corporate tax filers aligns with this intended purpose of the specificity determination. As the Court of International Trade noted, Commerce's comparison is "instructive in determining whether the subsidy is widely spread throughout the economy." *CIT Decision*, 567 F. Supp. 3d at 1291. Given the nature of the program, the limited number of recipients (about 1.27% of corporate entities) demonstrates that the on-the-job credit is not one of widespread availability and use throughout the economy.

Accordingly, we agree with the Court of International Trade that Commerce's de facto specificity determination of the on-the-job training credit is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

We have considered Appellants' remaining arguments and find them unpersuasive. For the reasons set forth above, we conclude that Commerce's *Final Affirmative Determination* is supported by substantial evidence and in accordance with law. Accordingly, the Court of International Trade's decision sustaining Commerce's *Final Affirmative Determination* is affirmed.

AFFIRMED

COSTS

Costs against Appellants.

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[10] For similar reasons, we find unpersuasive Appellants' reliance on *Mosaic Co. v. United States*, 659 F. Supp. 3d 1285 (Ct. Int'l Trade 2023), which Appellants submitted as a supplemental authority. In *Mosaic*, the Court of International Trade rejected Commerce's de facto specificity analysis concerning a different and unrelated penalty relief program. *Mosaic*, 659 F. Supp. 3d at 1314. As the Court of International Trade itself explained in *Mosaic*, the program at issue there was "distinguishable" from the on-the-job training program we are evaluating in this case. *Id.* at 1315 n.10.

U.S. Court of International Trade

Slip Op. 24–71

UNITED STATES STEEL CORPORATION, Plaintiff, and SSAB ENTERPRISES LLC, and STEEL DYNAMICS, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and BLUESCOPE STEEL LTD. and BLUESCOPE STEEL AMERICAS, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 21–00528
PUBLIC VERSION

[U.S. Department of Commerce's final results are sustained.]

Dated: June 13, 2024

Sarah E. Shulman, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Plaintiff United States Steel Corporation. With her on the brief were *Thomas M. Beline* and *Yohai Baisburd*.

Roger B. Schagrin, *Jeffrey D. Gerrish*, and *Kelsey M. Rule*, Schagrin Associates, of Washington, D.C., for Plaintiff-Intervenors Steel Dynamics, Inc. and SSAB Enterprises LLC.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Staff Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Defendant-Intervenors BlueScope Steel Ltd. and BlueScope Steel Americas, Inc. With him on the brief were *Christopher A. Dunn* and *James C. Beaty*.

OPINION

Eaton, Judge:

On May 16, 2023, proceedings in this case were stayed "pending resolution of the appeal in *U.S. Steel Corp. v. United States*, No. 22–2078." Order (May 16, 2023), ECF No. 67. That case involved the second administrative review of the antidumping duty order covering hot-rolled steel from Australia ("Order"). *See Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 81 Fed. Reg. 67,962 (Dep't of Commerce Oct. 3, 2016) (Order). On April 4, 2024, the Federal Circuit, as discussed below, published its opinion in *U.S. Steel Corp. v. United States*,[1] affirming this Court's holding that the U.S. Department of Commerce's ("Commerce" or the "Department") non-reimbursement finding was supported by substantial evidence and otherwise in accordance with law. *See* 97 F.4th 1364, 1371 (Fed. Cir. 2024); *see also U.S. Steel Corp. v. United States*, 46 CIT __, 578 F. Supp. 3d 1323 (2022). Thereafter, the court lifted its stay of this case. *See* Order (May 1, 2024), ECF No. 71.

This case involves the final results of Commerce's third administrative review of the Order. *See Certain Hot-Rolled Steel Flat Products From Australia*, 86 Fed. Reg. 47,054 (Dep't of Commerce Aug. 23, 2021) ("Final Results") and accompanying Issues and Decision Mem. (Aug. 17, 2021), PR 116 ("Final IDM"); *see also* Order, 81 Fed. Reg. at 67,962. Domestic steel producers Plaintiff United States Steel Corporation ("U.S. Steel") and Plaintiff-Intervenors Steel Dynamics, Inc. and SSAB Enterprises LLC (collectively, "Plaintiffs") challenge certain aspects of the Final Results.

Before the court is Plaintiffs' motion for judgment on the agency record. *See* Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 37 ("Pls.' Br."); Pls.' Reply, ECF No. 47. By their motion, Plaintiffs challenge as unsupported by substantial evidence and otherwise not in accordance with law, the dumping margin that Commerce determined for the sole mandatory respondent in the review—a collapsed entity of affiliated steel companies in Australia owned by Defendant-Intervenor BlueScope Steel Ltd. Specifically, Plaintiffs fault Commerce for not making two adjustments to U.S. price. First, Plaintiffs argue that the respondent exporter reimbursed its affiliated U.S. importer for the payment of antidumping duties, and, therefore, that Commerce was required to make a deduction from U.S. price for those duties. Second, Plaintiffs argue that Commerce must make a standalone deduction from U.S. price for profit resulting from the further manufacture of the steel in the United States.

The United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenors BlueScope Steel Ltd. and BlueScope Steel Americas, Inc. ask the court to sustain Commerce's non-reimbursement finding and its finding that the profit deduction had been made, and thus to deny Plaintiffs' motion. *See* Def.'s Resp. Br., ECF No. 45 ("Def.'s Br."); Def.-Ints.' Resp. Br., ECF No. 43 ("Def.-Ints.' Br.").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018). For the following reasons, the court finds that Commerce's non-reimbursement finding and its decision not to

[1] On May 28, 2024, the Federal Circuit issued its Mandate. *See* Mandate (May 28, 2024), Ct. No. 22–2078, ECF No. 78.

make a standalone profit deduction for further manufacturing are supported by substantial evidence, and are otherwise in accordance with law. Plaintiffs' motion is therefore denied, and the Final Results are sustained.

BACKGROUND

On January 17, 2020, Commerce initiated its third administrative review of the antidumping duty order on hot-rolled steel flat products from Australia. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 3,014 (Dep't of Commerce Jan. 17, 2020). The period of review ("POR") was October 1, 2018, to September 30, 2019. *See* Final IDM at 1.

Commerce reviewed one mandatory respondent[2]—a collapsed entity consisting of affiliated companies owned by Defendant-Intervenor BlueScope Steel Ltd. ("BlueScope").[3] *See* Final IDM at 1. BlueScope is the parent company of the Australian producer and exporter of the subject steel, BlueScope Steel (AIS) Pty Ltd. ("Exporter"), the U.S. importer of that steel Defendant-Intervenor BlueScope Steel Americas, Inc. ("Importer"), and the Importer's U.S. customer, Steelscape LLC ("Steelscape").[4] *See* BlueScope Steel Ltd.'s Resp. Sec. A Quest. (Mar. 3, 2020) at 8, 12, PR 33, CR 3 ("BlueScope's Resp. Sec. A Quest."). BlueScope and the Exporter, together with three other Australian entities, comprise Australian Steel Products ("ASP"), which is "an internal company designation for a segment" of the BlueScope business "responsible for both the manufacture and sale of the subject goods." BlueScope's Resp. Suppl. Sec. A Quest. (July 10, 2020) at

[2] As an exception to the general rule that "[Commerce] shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise," the statute permits Commerce to "determine the weighted average dumping margins for a *reasonable number* of exporters or producers." 19 U.S.C. § 1677f-1(c) (emphasis added); *see also Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1235–36 (2021) (labeling this exception the "Mandatory Respondent Exception"). Although the statute provides for a reasonable number, "Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be 'representative' of unexamined respondents for the purpose of calculating the all-others rate in a review, a devolution that this Court has regarded with some skepticism." *Jilin Forest Indus.*, 45 CIT at __, 519 F. Supp. 3d at 1236 (footnote omitted) (first citing *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); and then citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009)). As the Federal Circuit has stated, "a 'reasonable number' is generally more than one." *YC Rubber Co. (N. Am.) LLC v. United States*, No. 21–1489, 2022 WL 3711377, at *4 (Fed. Cir. Aug. 29, 2022).

[3] The collapsed entity consisted of three companies: BlueScope, the parent company; BlueScope Steel (AIS) Pty Ltd. ("Exporter"); and BlueScope Steel Distribution ("Distributor"). *See* Final IDM at 1; BlueScope Steel Ltd.'s Resp. Sec. A Quest. (Mar. 3, 2020) at 8–9, PR 33, CR 3. Neither the Exporter nor the Distributor is a party to this action.

[4] Steelscape is BlueScope's half-owned subsidiary, in that BlueScope and another entity (Nippon Steel Sumitomo & Metal Corporation) each own a fifty percent interest in a holding company which itself wholly owns Steelscape. *See* BlueScope's Resp. Sec. A Quest. at 8.

12–13, PR 59, CR 146; *see* BlueScope's Resp. Second Suppl. Sec. A Quest. (Dec. 17, 2020) at 5, PR 73, CR 159. In other words, it is not ASP itself that manufactures and sells the goods (as it is not its own legal entity), but rather the companies included in this designation.

Relevant to Commerce's determination of U.S. price are two back-to-back transactions between BlueScope's affiliated companies: (1) BlueScope, through its Exporter, sold the subject steel to the Importer, and (2) the Importer then resold the steel to Steelscape. *See* BlueScope's Resp. Sec. A Quest. at 2. After purchasing the subject steel from the Importer, "Steelscape further processed [in the United States] the subject merchandise into non-subject coated steel before its first sale to an unrelated customer." *Id.* This non-subject, further manufactured product was the only product Steelscape sold to unaffiliated U.S. customers. *See id.* at 2, 6–7, 22.

The back-to-back transactions among the three affiliates were governed by the terms of a supply agreement. *See* BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-5 ("Supply Agreement"), PR 60, CR 152; *see also* Final IDM at 7.[5] This Supply Agreement set the transfer price between the Importer and Steelscape through a pricing formula[6] and included a confidential shipping term.[7] The effect of the pricing formula, read together with the shipping term, was that the "reference prices [in the pricing formula] [were] delivered, duty-paid prices, that is, they assume that the [Importer] [paid] freight, insurance, and any duties that might accrue on the importation of the steel." Def.-Ints.' Br. at 5; *see also* BlueScope's Rebuttal Br. (Apr. 6, 2021) at 4, PR 109, CR 265. In other words, in accordance with the pricing formula, the Importer paid the antidumping duties (and freight) on the hot-rolled steel, and the price that Steelscape paid the Importer for the subject steel included "the estimated duties and freight." Def.-Ints.' Br. at 6.

While the Supply Agreement detailed the pricing between the Importer and Steelscape, it did not state how the invoice price between

[5] The Supply Agreement is the same agreement that applied in the case involving the prior administrative review. *See U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1325–26. There have been no changes to the Supply Agreement since the prior administrative review. *See* BlueScope's Resp. Sec. A Quest. at 20.

[6] The pricing formula in the Supply Agreement is: "[[

]]." Supply Agreement at 10.

[7] The shipping term is "DDP [Delivered Duty Paid] Incoterms 2010", which is "the Delivered Duty Paid section of the Incoterms 2010 produced by the International Chamber of Commerce". Supply Agreement at 4, 10. This term means that "[t]he seller [Importer] bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." *U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1325 n.2 (quoting the 2010 Incoterms).

the Exporter and the Importer was determined. In its questionnaire responses, however, BlueScope (the owner of all the affiliated companies) submitted a transfer pricing worksheet to Commerce, which showed how BlueScope calculated the invoice price from the Exporter to the Importer for the subject steel. *See* BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-6. First, BlueScope calculated the price of the hot-rolled steel to Steelscape using the pricing formula in the Supply Agreement—this gave the base price of the steel, which BlueScope adjusted for product characteristics. *See* Mem. from Allison Hollander to File, re: Final Results Analysis Mem. for BlueScope Steel (AIS) Pty Ltd, BlueScope Steel Limited, and BlueScope Steel Distribution (Aug. 17, 2021) ("Final Analysis Mem.") at 3, PR 117, CR 266. From this price charged to Steelscape, BlueScope deducted commissions, ocean freight, and inland freight to reach a "mill duty paid" price. *See id.* Then, BlueScope deducted estimated duties (including antidumping duties) to reach the entered value.[8] BlueScope then added ocean freight to the entered value to reach the Importer's transfer price. Thus, the amount that the affiliated Importer paid the affiliated Exporter was a duty-free price. The Importer then paid the estimated antidumping duty cash deposits on the entered value, as demonstrated in its antidumping duty deposit account. *See id.*; BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-15.

Of importance to this case, BlueScope calculated the transfer price from the Exporter to the Importer by first referencing the duty-inclusive price eventually charged to Steelscape. BlueScope then deducted estimated antidumping duties. *See* Final IDM at 9 ("[Exporter] calculates [Importer's] transfer price by, among other things, deducting an amount for estimated antidumping duties[9] from the price calculated for its ultimate affiliated purchaser, Steelscape."). In doing so, BlueScope accounted for the fact that the Importer made two payments: first, it paid to U.S. Customs and Border Protection ("Customs") the estimated antidumping duties on the entered value of the subject merchandise, and second, it paid to the Exporter the transfer price for the subject steel itself. Steelscape then paid the

[8] Estimated duties are the duties calculated at the time of entry and include any antidumping duties. *See* 19 U.S.C. § 1505(a); *see also* 19 C.F.R. § 141.103 (2019).

[9] Commerce also describes the deduction of estimated duties in its Final Analysis Memorandum, stating that "BlueScope deducts estimated duties (29.71 percent) from $[[ ]] to arrive at the $[[ ]] entered value, upon which [the Importer] paid its cash deposit antidumping duties." Final Analysis Mem. at 3. The estimated duties deducted here are nearly identical to the antidumping duty margin in place at the time of the purchase order between the Importer and Steelscape (December 20, 2018). *See* Order, 81 Fed. Reg. at 67,965; BlueScope's Resp. Sec. A Quest. at Ex. A-8, PR 34, CR 4.

Importer an amount that included the estimated duties (which had been paid by the Importer) and the price of the steel.

On February 23, 2021, Commerce issued its preliminary results. *See Certain Hot-Rolled Steel Flat Products From Australia*, 86 Fed. Reg. 10,923 (Dep't Commerce Feb. 23, 2021) ("Preliminary Results"), and accompanying Preliminary Decision Mem. (Feb. 16, 2021) ("PDM"), PR 94. In the Preliminary Results, Commerce found that BlueScope made sales of subject merchandise at less than fair value. *See* Preliminary Results, 86 Fed. Reg. at 10,924. As part of its dumping calculation, Commerce made certain adjustments to U.S. price, including an adjustment for the cost of further manufacturing the subject merchandise in the United States and for the profit allocable to further manufacture in the United States.[10] *See* PDM at 10. Commerce, however, declined to adjust U.S. price for reimbursement of antidumping duties, having found that "the record does not demonstrate that BlueScope reimbursed its U.S. affiliate [Importer]." *Id.*

On August 23, 2021, Commerce published its Final Results. *See* Final Results, 86 Fed. Reg. at 47,054. In the Final Results, Commerce continued to find that BlueScope, through its Exporter, did not reimburse the Importer for antidumping duties. *See* Final IDM at 7. Therefore, Commerce did not make a deduction from U.S. price for reimbursement of antidumping duties. Commerce did, however, deduct from U.S. price the profit allocated to U.S. selling expenses and the profit allocated to the further manufacture. *See id.* at 11–12; *see also* 19 U.S.C. § 1677a(d); Computer Programs from USDOC to File, Pertaining to BlueScope Margin Program Log (Feb. 18, 2021), PR 97, CR 258. As a result, Commerce determined a dumping margin of 9.94% for BlueScope. *See* Final Results, 86 Fed. Reg. at 47,054.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

To determine whether subject merchandise is being sold in the United States at less than fair value, Commerce compares the U.S.

[10] Commerce made these deductions in accordance with the statute, which provides three different deductions ("Additional adjustments") specific to constructed export price: (1) a deduction for selling expenses, (2) a deduction for the cost of further manufacturing, and (3) a deduction for the profit allocated to the selling expenses and the cost of further manufacturing. *See* 19 U.S.C. § 1677a(d).

price (export[11] or constructed export price ("CEP")[12]) with the price at which the foreign like product is sold in the exporting country (normal value). *See* 19 U.S.C. §§ 1677a, 1677b. If Commerce determines that subject merchandise is being sold at less than fair value, Commerce must impose an antidumping duty equal to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. This amount is known as the dumping margin. *See id.* § 1677(35)(A).

When determining U.S. price, Commerce must make certain adjustments, if applicable. *See id.* § 1677a(c)-(d); 19 C.F.R. § 351.402(a) (2019). These adjustments include a deduction for the reimbursement of antidumping duties, as stated in Commerce's regulation. *See* 19 C.F.R. § 351.402(f). The reimbursement regulation states: "[i]n calculating the export price (or the constructed export price) [the U.S. price], [Commerce] will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer: (A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer." *Id.* § 351.402(f)(1)(i).

The purpose of the reimbursement regulation is "to preserve the statute's remedial purpose by discouraging foreign exporters from assuming the cost of duties." *Hoogovens Staal BV v. United States*, 22 CIT 139, 141, 4 F. Supp. 2d 1213, 1217 (1998); *see also id.* at 141, 4 F. Supp. 2d at 1216 ("The antidumping statute provides a remedy to domestic producers injured by dumping." (first citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990); and then citing *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 9 CIT 213, 216–17, 608 F. Supp. 653, 656 (1985))). When "the exporter assumes the cost of antidumping duties, an importer could continue to import at the lower, dumped price," placing U.S. producers at a competitive disadvantage without a viable remedy for this injury. *Id.* at 141, 4 F. Supp. 2d at 1217.

When the transactions at issue are among affiliated companies, as they are here, evidence that intracorporate transfers occurred, with-

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[11] The "export price" is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)]." 19 U.S.C. § 1677a(a).

[12] The "constructed export price" is "the price at which the merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation 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, as adjusted under [19 U.S.C. § 1677a(c) and (d)]." 19 U.S.C. § 1677a(b). Here, BlueScope reported that all sales to the United States were made on a constructed export price basis. *See* PDM at 9.

out more, is not enough to find reimbursement. There must be "evidence showing a link between intracorporate transfers and the reimbursement of antidumping duties." *See Torrington Co. v. United States*, 19 CIT 403, 410, 881 F. Supp. 622, 632 (1995); *see, e.g.*, *U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1333 ("Commerce's finding that the Exporter's deduction of estimated antidumping duties from its invoice to the Importer, without evidence that the price charged to the Importer was further lowered to reimburse the duties, fails to demonstrate reimbursement . . . .").

Another adjustment to the U.S. starting price, stated in 19 U.S.C. § 1677a(d)(3), is a deduction for "the profit allocated to" certain expenses, i.e., selling expenses and the cost of further manufacturing the product. *See id.* § 1677a(d). The amount for profit is determined by reference to a separate subsection, § 1677a(f), titled "[s]pecial rule for determining profit." *Id.* § 1677a(f) ("For purposes of subsection (d)(3), profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.").

When a product is further manufactured after it has entered the United States, Commerce is directed to make certain adjustments to the U.S. starting price to take this further manufacturing into account. *See id.* § 1677a(d)(2)-(3). The purpose of these adjustments (including the profit allocated to further manufacturing) is to make sure the CEP (U.S. price) reflects the price of the product as entered. *See Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (indicating that Commerce makes adjustments when calculating CEP (U.S. price) in order "to achieve 'a fair, "apples-to-apples" comparison' between U.S. price and foreign market value" (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995))).

DISCUSSION

I. Commerce's Finding of No Reimbursement Is Supported by Substantial Evidence and in Accordance with Law

Commerce determined that the Exporter did not reimburse the Importer for antidumping duties during the POR. *See* Final IDM at 9–10. In particular, Commerce found that the transfer price from the Exporter to the Importer did not demonstrate reimbursement:

> [The Exporter]'s pricing methodology, in which [the Exporter] calculates [the Importer's] transfer price by, among other things, deducting an amount for estimated antidumping duties from the price calculated for its ultimate affiliated purchaser, Steelscape, is not evidence of reimbursement on the part of [the Exporter] as defined by Commerce's regulation against reimbursement.

> Therefore, consistent with *Torrington*,[13] for these final results, we continue to find that there is no basis to conclude that reimbursement of [antidumping] duties occurred in this segment of the proceeding.

Id. at 8. When making this finding, Commerce looked at the subsequent transaction between the Importer and Steelscape, the affiliated U.S. purchaser and further manufacturer: "The record is clear that [the Importer] paid [antidumping duty] deposits, and passed the price of those duties on to Steelscape. Thus, Steelscape's U.S. customers bore the impact of the antidumping duties." *Id.* at 9. In other words, the Importer paid duties on the steel and Steelscape paid an amount for the steel that included those duties, and Steelscape's customers paid a duty-inclusive price for the steel. Thus, the burden of the duties was felt in the U.S. market—the Exporter did not assume the burden of the duties.

Plaintiffs claim, however, as was argued in the *U.S. Steel* case resulting from the prior administrative review, that reimbursement occurred when the Exporter lowered the amount invoiced to the Importer to take account of antidumping duties.[14] *See* Pls.' Br. at 10; *see also U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1326. Plaintiffs argue that "BlueScope indirectly reimbursed its importer by lowering the [hot-rolled steel, i.e., subject merchandise] price by an amount for antidumping duties," and, thus they further argue, "BlueScope ensured the burden of the antidumping duty was carried by the Australian producer instead of the importer." Pls.' Br. at 11, 26.

The court finds Plaintiffs' argument unconvincing and thus sustains Commerce's finding of no reimbursement. Importantly, the facts here are nearly identical to those in *U.S. Steel*, the case resulting from the prior administrative review:

> Shorn of references to transfer pricing, tri-partite agreements, and Commerce's regulations, the facts show: a single entity took the final price paid by its last-in-line affiliate, deducted from

[13] The Court in *Torrington* sustained Commerce's decision not to make a deduction for reimbursement, citing Commerce's statement that "[e]vidence of below-cost transfer pricing between related parties is not in itself evidence of reimbursement of antidumping duties." *Torrington Co.*, 19 CIT at 409, 881 F. Supp. at 631. The Court held: "In light of Torrington's failure to produce any evidence showing a link between intracorporate transfers and the reimbursement of antidumping duties, this Court finds Commerce properly decided not to make a deduction to [U.S. price] for antidumping duty reimbursement or to conduct an investigation concerning transfer prices." *Id.* at 410, 881 F. Supp. at 632.

[14] Plaintiff U.S. Steel was the plaintiff in *U.S. Steel*, a case sustaining Commerce's final results in the prior administrative review. *See U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1323; *U.S. Steel*, 97 F.4th at 1364. Plaintiff-Intervenors here, SSAB Enterprises LLC and Steel Dynamics, Inc., were not parties in that lawsuit.

> that price an amount equal to the duties paid at the time of entry, and used the result as the basis for the price charged to the Importer. Thus, the entered price, as is universally the case, did not contain duties which were paid at entry by the Importer. The Importer (as an affiliate) paid the duties and added them to the price charged to the last-in-line affiliate purchaser. Plaintiffs have presented no evidence that the Exporter adjusted the price charged to the Importer in two ways: first, to make the price free of the duties that the Importer would pay at entry, and second, in an amount sufficient to reimburse the duties paid by the Importer at entry. Thus, Plaintiffs have failed to demonstrate that the actual payments and prices charged were anything other than those in a garden variety transaction among an exporter, an importer, and an unaffiliated purchaser. That the price paid was arrived at by means of a formula found in the Supply Agreement simply does not matter so long as the price paid for the merchandise by the Importer was not discounted to account for the duties.

U.S. Steel, 46 CIT at __, 578 F. Supp. 3d at 1331; *id.* at 1325 (holding that "Commerce's non-reimbursement finding is supported by substantial evidence and otherwise in accordance with law"); *see also U.S. Steel*, 97 F.4th at 1370–71. In other words, in *U.S. Steel*, the price the importer charged to Steelscape (the affiliated U.S. purchaser and further manufacturer) was a duty-inclusive price. Thus, in *U.S. Steel*, the importer—the same entity as the Importer here—separately paid the duties on the entered value of the steel. Thereafter, the price the importer charged Steelscape included the value of the duties. That is, the *U.S. Steel* Court held that the price to the importer was determined by subtracting the duties from the duty-inclusive price that Steelscape paid. This way, the importer did not pay duties twice. Regardless of BlueScope's pricing formula, the price the affiliated importer paid for the subject steel was not lowered by an amount to reimburse it for antidumping duties.

All this is true here too. First, BlueScope (the parent company) determined the price that would be charged to Steelscape (the affiliated U.S. purchaser and further manufacturer), which was a duty-inclusive price. *See* Final Analysis Mem. at 3; Final IDM at 9. Then, BlueScope deducted commissions, ocean freight, inland freight, *and estimated duties (including antidumping duties)* to reach the value of the entered steel. *See* Final Analysis Mem. at 3. On importation, the Importer paid the estimated antidumping duties on this amount. *See id.* Next, BlueScope added ocean freight to the value of the entered steel to reach the transfer price to the Importer. *See id*. As a result, the price the Importer paid for the subject merchandise was the entered value—"the price of the merchandise at the port of export" in Australia—plus ocean freight. BlueScope's Rebuttal Br. at 4; *see* Final Analysis Mem. at 3. This price to the Importer did not include estimated duties, and the Importer separately paid those duties at entry.

Consequently, there is no evidence that reimbursement occurred. The transfer price from the Exporter to the Importer was not lowered to reimburse the Importer for antidumping duties. So, there is no link between the intracorporate transfers and the reimbursement of antidumping duties. *Torrington*, 19 CIT at 410, 881 F. Supp. at 632. As in *U.S. Steel*:

> Plaintiffs have failed to demonstrate that the actual payments and prices charged were anything other than those in a garden variety transaction among an exporter, an importer, and an unaffiliated purchaser. That the price paid was arrived at by means of a formula found in the Supply Agreement simply does not matter so long as the price paid for the merchandise by the Importer was not discounted to account for the duties.

U.S. Steel, 46 CIT at __, 578 F. Supp. 3d at 1331.

Additionally, the purpose of the antidumping law is satisfied: the Importer paid antidumping duties and passed the burden to the affiliated U.S. further manufacturer, Steelscape—the Exporter did not bear the burden of the duties.

A. Alleged Factual Distinctions of This Case

Although the nature of the transactions is the same here as in *U.S. Steel*, Plaintiffs claim that two factual distinctions exist in this administrative review that require a finding of reimbursement. First, Plaintiffs claim that the terms of a purchase order between the Importer and Steelscape demonstrate that the Exporter, as part of an Australian steel segment, was responsible for the antidumping duties. *See* Pls.' Br. at 28; *see also* BlueScope's Resp. Sec. A Quest. at Ex. A-8, PR 34, CR 4. Also, to show that the Exporter, in fact, paid the duties, and thus reimbursed the Importer, Plaintiffs rely on a transfer pricing worksheet. Pls.' Br. at 8; *see also* BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-6.

Second, Plaintiffs point to an additional factual distinction, a statement Commerce made in its Final IDM, addressing the lowered transfer price from the Exporter to the Importer. According to Plaintiffs, "Commerce mistakenly suggested that the 'lowered transfer price from [the Exporter] to [the Importer] by the amount of dumping duties offers no relief to [the Importer], because the lowered transfer price will be reflected in [the Exporter's] dumping margin.'" Pls.' Br. at 20.

1. The Purchase Order Does Not Evidence Reimbursement of Duties

Plaintiffs claim that the terms of the purchase order between Steelscape (the affiliated U.S. purchaser and further manufacturer) and the Importer confirm that the Exporter was responsible for the payment of antidumping duties.[15] *See* Pls.' Br. at 28 ("BlueScope confirmed ASP [Australian Steel Products]—its Australian steel producing segment—took all risk of the antidumping duty."). The confidential language of the purchase order, to which Plaintiffs point, states, "ASP[16] continues to take risk on all AD duties up to the existing c. 30%[17]."[18] BlueScope's Resp. Sec. A Quest. at Ex. A-8.

The purchase order is an agreement between two affiliates—Steelscape (the affiliated U.S. purchaser and further manufacturer) and the Importer—and appears to allocate which affiliated entity takes the risk with respect to both antidumping duties and those

[15] It should be noted that Plaintiffs attribute to BlueScope an assertion that the company did not, in fact, make. Plaintiffs claim that BlueScope admitted that "antidumping duties are for [sic] the responsibility of ASP [Australian Steel Products], not the responsibility of Steelscape." Pls.' Br. at 28 (citing BlueScope's Rebuttal of U.S. Steel's Pre-Prelim. Cmts. (Feb. 1, 2021) at 5, PR 87, CR 243 ("BlueScope's Pre-Prelim. Cmts.")). BlueScope never admitted this. Instead, BlueScope cited a statement in Plaintiff U.S. Steel's pre-preliminary comments to rebut it: "[U.S. Steel] notes specifically that Steelscape's purchase order for the steel explicitly states that antidumping duties are for [sic] the responsibility of ASP, not the responsibility of Steelscape." BlueScope's Pre-Prelim. Cmts. at 4–5. BlueScope offered its rebuttal by stating that "Steelscape's purchase order[,] in fact[,] says nothing about who actually pays the antidumping duties. Rather, it makes clear that the 'responsibility' for dumping duties belongs to someone else, not Steelscape." *Id.* at 5 n.1.

[16] As previously noted, Australian Steel Products, or ASP, is not its own legal entity, but rather is "an internal company designation for a segment" of the BlueScope business "responsible for both the manufacture and sale of the subject goods." BlueScope's Resp. Suppl. Sec. A Quest. at 12–13. In other words, it is not ASP that itself manufactures and sells the goods, but rather the companies included in this designation that do so. ASP consists of five of BlueScope's Australian entities, including BlueScope, the Exporter, and the Distributor. *See* BlueScope's Resp. Second Suppl. Sec. A Quest. at 5; BlueScope's Resp. Sec. A Quest. at Ex. A-2.

[17] In its Final Analysis Memorandum, Commerce states that "BlueScope deducts estimated duties (29.71 percent) from $[[ ]] to arrive at the $[[ ]] entered value, upon which [the Importer] paid its cash deposit antidumping duties." Final Analysis Mem. at 3. In other words, the estimated duties here are nearly identical to the antidumping duty margin in place at the time of the purchase order, varying by just over a tenth of a percentage point. *See* Order, 81 Fed. Reg. at 67,965.

[18] In its entirety, the purchase order description states, "[]Risk of additional AD duties on POR3 is shared equally between parties; []ASP continues to take risk on all AD duties up to the existing c. 30%; and []this only relates to POR3 and has no bearing on other PORs or future pricing from ASP to SS [Steelscape]". BlueScope's Resp. Sec. A Quest. at Ex. A-8.

duties in excess of duties represented by the cash deposit rate.[19] This language, however, is of no use to Plaintiffs. As with the back-to-back transactions discussed, *supra*, the affiliated entity contractually obligated to take the risk with respect to the duties simply does not matter. What matters is what actually occurred, not which entity contractually assumes what responsibility. Here, the affiliated importer made two payments: (1) one for the steel, and (2) one for the duties, so that ultimately the unaffiliated purchaser paid a price that was duty-inclusive. The regulation against reimbursement is aimed at the unaffiliated U.S. purchaser—if it pays the duty-inclusive price, and is itself not reimbursed, there is no evidence of unlawful reimbursement because the burden of the duties is in the United States. *See* 19 C.F.R. § 351.402(f)(1)(i); *see also Hoogovens Staal BV*, 22 CIT at 141, 4 F. Supp. 2d at 1216–1217.

An examination of the purchase order, and a review of the actual transactions themselves, reveals that the Exporter did not agree to pay antidumping duties or, in fact, that it paid them. Rather, the key phrase—“take risk”—merely indicates that, if the steel is not sold to an unaffiliated purchaser, the affiliated entities responsible for the duties are those entities (such as the Exporter) included in the Australian steel segment, Australian Steel Products (ASP), which manufactured and sold the steel. Thus, the provision to which Plaintiffs point refers to which affiliated entity assumed the risk in the event that Steelscape did not sell the steel. It means that, if Steelscape did not sell the further manufactured product (non-subject coated steel), the entities that comprise ASP would pay the antidumping duties. BlueScope’s Resp. Second Suppl. Sec. A Quest. at 5. That is, the risk assumed by ASP was that it would become responsible for the duties only if Steelscape did not sell the non-subject coated steel. The risk of

[19] In this context, “additional” duties means duties in excess of estimated duties. *See United States v. Am. Home Assurance Co.*, 47 CIT __, __, 653 F. Supp. 3d 1277, 1280, 1292 n.22 (2023) (indicating that “additional duties” are “amounts in excess of the cash deposit” of estimated duties). The estimated duties upon which the Importer paid cash deposits are apparently the “c. 30%” referenced in the purchase order because this was the antidumping margin at the time the purchase order was created in 2018, before Commerce had done its first administrative review on the antidumping Order. *See* Order, 81 Fed. Reg. at 67,965 (stating that BlueScope’s weighted average dumping margin is 29.58%). Because the purchase order says “ASP continues to take risk on all AD duties up to the existing c. 30%,” that means that it would not take risk on anything more than 30%. Yet to take risk on duties in excess of estimated duties, ASP would have to take risk on an amount *more than* 30%, such as 31%. Thus, under this term of the purchase order, it does not appear that ASP takes risk on excess duties.

having to pay the duties would then solely be an internal matter.[20] Steelscape, however, did sell the coated steel, and so the risk provisions of the purchase order were never put into effect because the precondition for ASP being on the hook for the duties, never took place. Thus, this part of the various agreements was never invoked.

What matters here, for purposes of the reimbursement regulation, is the sale that did take place to the unaffiliated U.S. purchaser. That is, the unaffiliated U.S. purchaser obtained the further manufactured steel at the duty-inclusive price. Thus, the burden of the duties was felt by an unaffiliated purchaser in the U.S. market—not by the Exporter in Australia. Accordingly, the term in the Steelscape purchase order does not show that ASP, which includes the Exporter, actually reimbursed the Importer for antidumping duties. And the reimbursement regulation, 19 C.F.R. § 351.402(f), was not violated.

Plaintiffs next argue that BlueScope's transfer pricing formula confirms the reimbursement allegedly promised in the purchase order. *See* Pls.' Br. at 8, 26–27 ("BlueScope's transfer pricing worksheet . . . confirms that BlueScope indirectly reimbursed its importer by lowering the [hot-rolled steel] price by an amount for antidumping duties."). The transfer pricing formula is nothing new to these proceedings, as it has been considered by both this Court and the Federal Circuit. *See U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1331; *U.S. Steel*, 97 F.4th at 1370–71 ("Even after weighing this evidence, the agency found that the transfer pricing methodology did not constitute reimbursement. . . . The record indicates that the evidence before the agency was adequate to support the agency's finding of nonreimbursement.").

The transfer pricing formula found in this case is the same one considered by the courts in *U.S. Steel*. *See U.S. Steel*, 46 CIT at __, 578 F. Supp. 3d at 1325 n.3; *U.S. Steel*, 97 F.4th at 1367–68, 1370–71. All this formula shows is a transfer between affiliated companies whereby the estimated duties included in the price to the affiliated further manufacturer, are deducted in setting the price to the affiliated importer. BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-6. As noted, in accordance with the transfer pricing formula, the affiliated Importer separately paid antidumping duties and passed them on by including them in the price charged to Steelscape, which then passed them on to the unaffiliated purchaser. Nothing in the formula or the

[20] If Steelscape did not sell the steel—not the facts here—then the product would not reach the customers in the U.S. market. In this scenario, there would, of course, be no impact on the U.S. market. Indeed, for antidumping purposes there would be no way to determine CEP (U.S. price) absent a sale to an unaffiliated purchaser. Thus, the transfer of the responsibility for the duties to ASP would merely be an internal transfer, and therefore would not affect the U.S. market.

facts demonstrates that the price to the Importer was lowered in an amount sufficient to reimburse it for antidumping duties, only that the price charged to the Importer was duty free. *See* BlueScope Rebuttal Br. at 4 ("[The Importer] has paid an amount exactly equivalent to the price set forth in the pricing formula: the FOB [free on board] Australia price, plus the estimated duties that it pays separately."); *see also* BlueScope's Resp. Suppl. Sec. A Quest. at Ex. SA-6. Plaintiffs' attempt to show reimbursement through the combination of the purchase order and BlueScope's transfer pricing formula fails because neither provides evidence that unlawful reimbursement was anticipated by the formula or the agreement, or that such reimbursement was actually made.

2. Commerce's Statement on Transfer Pricing Does Not Evidence Reimbursement of Duties

Plaintiffs next argue that Commerce was mistaken in its Final IDM when it stated that "[a]s a practical matter, the fact that [the Exporter] lowered its transfer price[21] to [the Importer] by the amount of estimated antidumping duties offers no relief to [the Importer] because the lowered transfer price will be accurately reflected in [the Exporter's] dumping margin." Final IDM at 9. For Plaintiffs, Commerce is incorrect because, "[b]y statute, Commerce disregards the transfer price in its dumping calculation." Pls.' Br. at 20. Plaintiffs go on to claim that "[t]he lowered transfer price will not be reflected in BlueScope's margin without a reimbursement adjustment." *Id.* at 23.

Plaintiffs may well be right that what they call the "lowered transfer price" would "not be reflected in BlueScope's [dumping] margin" because the transfer price plays no role in the dumping margin's calculation. *See generally* 19 U.S.C. §§ 1677a, 1677b. Nonetheless, this focus on Commerce's statement does not help Plaintiffs' case.

As previously discussed, under the transfer pricing formula, the transfer price that the Importer pays to the Exporter is calculated by subtracting an amount equal to the estimated duties from the price paid by Steelscape, the affiliated U.S. purchaser and further manufacturer. The Importer both pays the Exporter for the steel and pays the antidumping duties (duties determined by the dumping margin) to Customs. The price paid by Steelscape (the affiliated U.S. purchaser and further manufacturer) and by the unaffiliated purchasers, thus represents (1) an amount for the steel and (2) an amount for the

[21] Although Commerce and Plaintiffs use the phrase "lowered transfer price," its use does not accurately describe what has happened here. The Importer's transfer price was never "lowered"—it was merely determined by making deductions from the duty-inclusive price that Steelscape paid. In other words, the deductions were made to *reach* the Importer's transfer price, but the Importer's transfer price was never itself lowered.

antidumping duties. Thus, the burden of the duties was assumed by U.S. purchasers just as the statute intends. Whatever Commerce meant by its statement is thus immaterial to the decision of this case because no reimbursement took place.

Therefore, Plaintiffs' two alleged factual distinctions do not support a finding of reimbursement. As in *U.S. Steel*, here Plaintiffs have not shown a link between the affiliates' transfer pricing and the reimbursement of antidumping duties. Thus, Commerce's determination that there was no reimbursement is sustained.

II. Commerce's Calculation and Deduction of Profit from U.S. Price Is Supported by Substantial Evidence and in Accordance with Law

When calculating constructed export price, i.e., CEP (U.S. price), the statute directs Commerce to make certain adjustments to "the first sale price to an unaffiliated purchaser ('starting price')." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1304 (Fed. Cir. 2001). The purpose of these adjustments is "to achieve 'a fair, "apples-to-apples" comparison' between U.S. price and foreign market value [normal value]." *Fla. Citrus Mut.*, 550 F.3d at 1110 (quoting *Torrington Co.*, 68 F.3d at 1352). Among these adjustments is a deduction for *profit allocated to* (1) selling expenses incurred in the United States and (2) *the further manufacturing that takes place in the United States*. *See* 19 U.S.C. § 1677a(d)(3). In addition, an adjustment is made for the cost of any further manufacturing itself. *See id.* §1677a(d)(2).

In its Final Results, Commerce made one deduction from the starting price in the United States for profit, and this deduction included an amount for profit allocated to selling expenses incurred in the United States and an amount for profit allocated to the cost of further manufacturing in the United States. *See* Final IDM at 11–12.

Plaintiffs insist that Commerce acted contrary to law by only making one profit deduction, for "CEP profit": "Commerce erred as a matter of law by concluding that 'the appropriate amount of profit attributable to further manufacturing activities has already been deducted from CEP [U.S. price] {by [including profit allocable to further manufacture in the total] CEP profit [amount]}' thus declining to reduce the U.S. starting price by an apportioned further manufacturing profit amount." Pls.' Br. at 35. For Plaintiffs, the statute requires two profit deductions for activities taking place in the United States when CEP (U.S. price) is being calculated: one for "further manufacturing profit" and one for CEP profit. *See id.* at 33; Pls.' Reply at 14. As to the deduction for "further manufacturing profit" (i.e., profit allocated to further manufacture), the Plaintiffs argue that "by both failing to [1] calculate a further manufacturing profit amount apportioned to the value added in the United States after import and [2] reducing CEP [U.S. price] by that amount, Commerce calculated a dumping margin based on an inflated U.S. price inconsistent with the dumping statute." Pls.' Br. at 2.

The essence of Plaintiffs' argument appears to be that, in fact, Commerce did not deduct an amount for the profit allocated to the further manufacturing that took place in the United States and that "the profit associated with further manufacturing activities should not be included in the net U.S. price of hot-rolled steel (*i.e.*, the subject merchandise)." Pls.' Reply at 13; *see* Pls.' Br. at 37. Plaintiffs elaborated on their argument:

> [F]urther manufacturing expenses reported based on the sale of the downstream merchandise will necessarily include a proportion of profit attributable to the subject merchandise as distinct from the value added in the United States by further manufacturing. Therefore, *to adjust CEP*[22] *[U.S. price] by an amount specific to further manufacturing profit*, Commerce must apportion the reported profit as between the subject merchandise and the value added in the United States.

Pls.' Br. at 30 (emphasis added).

For Plaintiffs, accomplishing the calculation and deduction of the profit allocated to further manufacture requires two steps: (1) Commerce must apportion profit between subject merchandise and the value added from further manufacturing (i.e., the creation of the non-subject coated steel) so that Commerce can identify an amount for "further manufacturing profit," and (2) Commerce must deduct this further manufacturing profit from U.S. price. *See id.*

In the Final Results, Commerce declined to adopt Plaintiffs' two-step process. Rather, the Department stated that "the appropriate amount of profit attributable to further manufacturing activities *has already been deducted*." Final IDM at 12 (emphasis added). By this, Commerce meant that the single deduction it made included a deduction for further manufacturing profit.

The court finds that Commerce's calculation and deduction of profit from the U.S. starting price is supported by substantial evidence and in accordance with law.

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[22] To the extent Plaintiffs believe that CEP (U.S. price) is or should be adjusted by subsection (d), they are in error. The statute states that CEP (U.S. price) is the price "as adjusted," meaning, that CEP (U.S. price) is the price that is determined *after* the relevant adjustments—such as the profit deduction—are made to the price to the unaffiliated purchaser (i.e., the starting price). *See* 19 U.S.C. § 1677a(b); *see also* 19 C.F.R. § 351.402(a) ("In order to establish export price, constructed export price, and normal value, [Commerce] must make certain adjustments to the price to the unaffiliated purchaser (often called the 'starting price') . . . .").

As an initial matter, the statute provides for only certain deductions from the U.S. starting price when calculating CEP (U.S. price). It does not, however, direct that these individual deductions either be treated separately or as a sum. The statute provides that one of these deductions shall be "the profit allocated to the expenses described in paragraphs (1) and (2)." 19 U.S.C. § 1677a(d)(3).[23] The expenses described in paragraphs (1) and (2) are incurred in the United States and include, respectively, selling expenses and "the cost of any further manufacture or assembly (including additional material and labor)."[24] *Id.* § 1677a(d)(1)-(2). Thus, in addition to other adjustments, Commerce must deduct from the U.S. starting price an amount that includes both the profit allocated to selling expenses and *the profit allocated to the cost of further manufacturing in the United States*. 19 U.S.C. § 1677a(d)(3).

The statute provides a method for determining this profit amount in a separate subsection, which provides that "[f]or purposes of subsection (d)(3), [allocated] profit [for selling expenses and further manufacture] shall be an amount determined by multiplying the total

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[23] 19 U.S.C. § 1677a(d) provides: "the price used to establish constructed export price [U.S. price] shall also be reduced by—":

> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> > (A) commissions for selling the subject merchandise in the United States;
> >
> > (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
> >
> > (C) any selling expenses that the seller pays on behalf of the purchaser; and
> >
> > (D) any selling expenses not deducted under subparagraph (A), (B), or (C);
>
> (2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e); and
>
> (3) the profit allocated to the expenses described in paragraphs (1) and (2).

19 U.S.C. § 1677a(d).

[24] While the statute explicitly states that the expenses in paragraph (1) are "incurred . . . in the United States," it does not do so for the expenses in paragraph (2). The statute, however, clarifies that the expenses in both paragraphs (1) and (2) are incurred in the United States when it defines "total United States expenses" as "the total expenses described in subsection (d)(1) and (2) [i.e., selling expenses and the cost of further manufacture]." 19 U.S.C. § 1677a(f)(2)(B). The Statement of Administrative Action confirms this by indicating that the profit deducted from the U.S. starting price is the profit "allocable to the selling, distribution, and further manufacturing expenses *in the United States*." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 823 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163 (emphasis added).

Additionally, Commerce's regulation clarifies that the adjustments stated in 19 U.S.C. § 1677a(d)—which include "the cost of any further manufacture or assembly"—are incurred in the United States. *See* 19 C.F.R. § 351.402(b) (emphasis added) ("In establishing constructed export price under section 772(d) of the Act [19 U.S.C. § 1677a(d)], [Commerce] will make adjustments for expenses associated with *commercial activities in the United States* that relate to the sale to an unaffiliated purchaser, no matter where or when paid.").

actual profit[25][from the sale of the subject steel] by the applicable percentage." *Id.* § 1677a(f)(1). The "applicable percentage" is defined as "the percentage determined by dividing the total United States expenses by the total expenses."[26] *Id.* § 1677a(f)(2)(A). The "total United States expenses" (the numerator of this percentage calculation) are "the total expenses described in subsection (d)(1) and (2)," i.e., selling expenses and the cost of further manufacturing the product. *Id.* § 1677a(f)(2)(B). The "total expenses" (the denominator) are "all expenses . . . which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise."[27] *Id.* § 1677a(f)(2)(C).

This calculation for the profit deducted from U.S. price ("CEP profit") can be expressed as a formula:

$$\text{CEP prot} = \text{total actual prot x} \; \frac{\textit{total U.S. expenses, i.e., U.S. selling expenses + cost of further manufacture}}{\textit{total expenses}}$$

Thus, the statute provides for one profit deduction from U.S. starting price for profit associated with selling expenses and further manufacturing, and provides the method for determining the amount of this deduction. So, the single profit deduction resulting from application of the method includes profit attributable to the cost of further manufacturing of the steel in the United States.

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[25] "Total actual profit" is "the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph." 19 U.S.C. § 1677a(f)(2)(D). In other words, the total actual profit is the profit earned by the foreign producer, exporter, and U.S. seller affiliated with the producer and exporter from selling *subject merchandise* in the United States (here, the product sold was subject merchandise that was further manufactured into non-subject coated steel), and it is based on all revenues and expenses (including both U.S. and home market revenues and expenses). *See U.S. Steel Grp. v. United States*, 225 F.3d 1284, 1291 (Fed. Cir. 2000); *Floral Trade Council v. United States*, 23 CIT 20, 43, 41 F. Supp. 2d 319, 339–40 (1999) ("Both 'total actual profit' and 'total expenses' include data for both U.S. and home market sales."). Commerce describes how it calculates total actual profit in a policy bulletin. *See* Import Admin., U.S. Dep't of Commerce, Calculation of Profit for Constructed Export Price Transactions, Policy Bulletin 97.1 (1997), https://enforcement.trade.gov/policy/bull97–1.htm (last visited May 30, 2024) ("Policy Bulletin 97.1").

[26] The Federal Circuit has stated that the "ratio [of total U.S. expenses to total expenses] acts to identify a narrower set of U.S. profit from a base pool of total actual profit." *U.S. Steel Grp.*, 225 F.3d at 1291.

[27] "Total expenses" cover all expenses in the first of three categories which applies. *See* 19 U.S.C. § 1677a(f)(C). The first category is for "expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price." *Id.* § 1677a(f)(2)(C)(i). The parties did not raise an issue about which category applies, nor did Commerce discuss this in its Final IDM. *See* Final IDM at 11–12.

It is, therefore, apparent that Plaintiffs are wrong in their contention that Commerce did not "apportion the reported profit as between the subject merchandise and the value added in the United States." Pls.' Br. at 30. Commerce did apportion the profit resulting from further manufacture just as the statute directs. The statute provides for only one profit deduction and this deduction includes an amount for further manufacturing profit. Plaintiffs are therefore mistaken in arguing that the law directs an additional, "separate deduction" for further manufacturing profit, and that Commerce failed to apportion profit between subject and non-subject merchandise to reach the amount for further manufacturing profit. *See* Pls.' Br. at 2, 30, 33. Were Commerce to follow Plaintiffs' lead, further manufacturing profit would be deducted twice from the U.S. starting price.

Plaintiffs next argue (while not making their point quite clear) that somehow it matters that the deduction for "further manufacturing profit" is found in 19 U.S.C. § 1677a(d)(3),[28] while the CEP profit deduction is found in 19 U.S.C. § 1677a(f). Pls.' Br. at 33; *see also* Pls.' Reply at 14 ("Commerce's further manufacturing profit and CEP profit adjustment are provided for under two distinct provisions of the statute."). This is a peculiar reading of the subsections. While § 1677a(d)(3) provides for the deduction of profit associated with further manufacturing (profit is "allocated to" the cost of further manufacture), § 1677a(f) provides for how the amount of profit is determined. *See* 19 U.S.C. § 1677a(d)(2)-(3); *Micron Tech.*, 243 F.3d at 1309 ("[T]he [Statement of Administrative Action] instructs that this profit deduction applies only to profits 'allocable to selling, distribution and further manufacturing activities in the United States.'"); *see also* *NTN Bearing Corp. of Am. v. United States*, 295 F.3d 1263, 1268 (Fed. Cir. 2002).

Plaintiffs' claim that § 1677a(f) provides for an additional deduction is a misreading of the subsection. Subsection 1677a(f) does not provide for its own standalone deduction, but rather provides the method for calculating the amount of the deduction in (d)(3).

Consistent with the statute, Commerce allocated profit to U.S. selling expenses and the cost of further manufacture, combined it with certain expenses incurred with manufacturing and selling the coated steel, and deducted the combined amount from the U.S. starting price. To determine the amount of profit allocated to further manufacture, Commerce multiplied an amount including the total

[28] Plaintiffs later claim that this deduction is found in subsection (d)(2) (a deduction for "the cost of further manufacture or assembly"). *See* Pls.' Reply at 14; *see also* 19 U.S.C. § 1677a(d)(2). Costs, however, are not profit.

actual profit (including profit resulting from the further manufactured product)[29] by an amount including the cost of further manufacture in the United States.[30] *See* Final IDM at 11. Commerce, therefore, deducted from the U.S. starting price a profit amount that included profit allocated to the further manufactured product. Accordingly, the CEP (U.S. price) *does not include* profit attributable to the further manufactured product (i.e., the non-subject merchandise), or for that matter, any profit associated with U.S. sales.[31] *See id.* at 11–12.

Plaintiffs seem to argue that Commerce must break out the amount for further manufacturing profit and deduct it separately when calculating CEP (U.S. price). At no point do Plaintiffs contend that separately deducting profit attributable to the further manufactured product would materially alter the CEP (U.S. price) calculation. Indeed, since the profit allocable to further manufacture was, in fact, deducted from the U.S. starting price to arrive at CEP (U.S. price), it is difficult to see how Plaintiffs could demonstrate with substantial

[29] The amount being referenced here is represented by the variable TOTPROFT (i.e., total profit—this is the label Commerce has given to the "total actual profit" stated in the statute). *See* Final IDM at 11. Total actual profit equals total revenue (for both the U.S. and home markets) reduced by total expenses (including the cost of manufacture for both the U.S. and home markets). *See* Policy Bulletin 97.1.

[30] Commerce calculated the profit to be deducted from the U.S. starting price in its margin program log. *See* Final IDM at 11. The margin program demonstrates that, to determine the profit amount, Commerce used the following formula: CEPROFIT = (USCREDIT + CEPICC + CEPISELL + CEPOTHER) * CEPRATIO. *See* Computer Programs from USDOC to File, Pertaining to BlueScope Margin Program Log (Feb. 18, 2021), PR 97, CR 258. Commerce stated that "[t]he variable CEPOTHER, in the calculation of CEP Profit . . . includes the cost of further manufacturing" Final IDM at 11. Commerce also indicated that "[t]he variable CEPRATIO is equal to TOTPROFT (total profit) over TOTEXP (total expenses)." *Id.* Therefore, by multiplying the sum of variables, including CEPOTHER, by CEPRATIO, Commerce allocated profit to the cost of further manufacture in the United States. Commerce then stated, "this calculated CEP profit is then deducted from the starting price in the U.S. market." *Id.* at 11–12. In other words, in accordance with the statute, Commerce deducted from the U.S starting price profit that was attributable to the cost of further manufacture in the United States. *See* 19 U.S.C. § 1677a(d)(3).

[31] Commerce's regulation states that "[t]he Secretary will not double-count adjustments." 19 C.F.R. § 351.401(b)(2). Here, this means that Commerce will not make two deductions from U.S. price for profit attributable to the cost of further manufacture in the United States. Defendant and Defendant-Intervenors are correct in arguing that making a separate deduction for "further manufacturing profit" would double-count a profit deduction because profit allocated to the cost of further manufacture was *already* deducted from U.S. price. *See* Def.'s Br. at 17 (arguing that interpreting "further manufacturing profit" as distinct from CEP profit "would unreasonably lead to the double counting of a profit deduction, because Commerce's practice is to deduct an amount of the respondent's total actual profit apportioned to its United States sales"); Def.-Ints.' Br. at 23 ("Plaintiffs' calculation both deducts its presumed 'profit' from U.S. price on a line-item basis, and then includes that same 'profit' amount once more in the calculation of the actual CEP profit deduction.").

evidence, or indeed any evidence at all, how the CEP (U.S. price) calculation would be different had Commerce made two separate profit calculations.

CONCLUSION

Based on the foregoing, the court denies Plaintiffs' motion and sustains the Final Results. Judgment will be entered accordingly.

Dated: June 13, 2024
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 24–74

YC RUBBER CO. (NORTH AMERICA) LLC AND SUTONG TIRE RESOURCES, INC., Plaintiffs, KENDA RUBBER (CHINA) CO., LTD., Plaintiff-Intervenor, and MAYRUN TYRE (HONG KONG) LIMITED AND ITG VOMA CORPORATION, Consolidated-Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19–00069
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's Remand Results regarding the second administrative review of the antidumping duty order on certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: June 18, 2024

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for Plaintiffs YC Rubber Co. (North America) LLC and Sutong Tire Resources, Inc. Also on the brief was *Ned H. Marshak*.

Patrick B. Klein, Neville Peterson LLP, of New York, NY, argued for Consolidated Plaintiff Mayrun Tyre (Hong Kong) Limited. Also on the brief were *John M. Peterson* and *Richard F. O'Neill*.

Jonathan T. Stoel, Hogan Lovells US LLP, of Washington, DC, argued for Consolidated Plaintiff ITG Voma Corporation. Also on the brief were *Craig Lewis* and *Nicholas R. Sparks*.

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, DC, for Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Ayat Mujais*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Chief Judge:

Before the court is the redetermination upon remand from the U.S. Department of Commerce ("Commerce" or "the agency") for the second administrative review of the antidumping duty order on passenger tires from the People's Republic of China ("China"). *See* Final Results of Redetermination Pursuant to Ct. Remand, A-570–016 (Oct. 31, 2023) ("Remand Results"), ECF No. 78–1; *see also Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 84 Fed. Reg. 17,781 (Dep't Commerce Apr. 26, 2019) (final results of antidumping duty admin. rev. and final determination of no shipments; 2016–2017) ("*Final Results*"), ECF No. 24–4, and accompanying Issues and Decision Mem., A-570–016 (Apr. 19, 2019) ("I&D Mem."), ECF No. 24–5.[1] After remand from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") and this court, Commerce selected a second mandatory respondent, recalculated the separate rate, denied certain non-investigated companies' separate rate status, denied requests to withdraw from the review, and made no changes to its surrogate value selections. For the following reasons, the court sustains in part and remands in part the Remand Results.

BACKGROUND

I. Agency Proceedings Prior to the *Final Results*

In October 2017, Commerce initiated the second administrative review of the antidumping duty order on passenger tires from China for the period of review August 1, 2016, through July 31, 2017. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 48,051, 48,055 (Dep't Commerce Oct. 16, 2017). In its initiation notice for this administrative review, Commerce explained that "[f]or exporters and producers who submit a separate-rate status application or certification and subsequently are selected as manda-

[1] The administrative record for the Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 81–2, and a Confidential Remand Record ("CRR"), ECF No. at 81–3. The administrative record for the *Final Results* is contained in a Public Administrative Record ("PR"), ECF No. 24–2, and a Confidential Administrative Record ("CR"), ECF No. 24–3. The parties submitted joint appendices containing record documents cited in their comments. [Confid.] Remand J.A. ("RCJA"), ECF No. 93; [Public] Remand J.A., ECF No. 94. Upon request from the court, the parties supplemented the joint appendices. [Confid.] Suppl. J.A. ("Suppl. RCJA"), ECF No. 98; [Public] Suppl. J.A., ECF No. 99. When necessary, the court cites to confidential record documents contained in the previously filed joint appendices. [Confid.] J.A. to Opening, Resp., and Reply Brs. Regarding Pls.' and Consol. Pls.' Mot. for J. on the Agency R. Pursuant to Rule 56.2 ("CJA"), ECF No. 46.

tory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents." *Id.* at 48,053; *Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 57,705, 57,707 & n.4 (Dep't Commerce Dec. 7, 2017) (correcting misspellings from the October 16, 2017, notice) (collectively referred to as "*Initiation Notice*"). Commerce initially selected two mandatory respondents: Shandong Haohua Tire Co., Ltd. ("Haohua") and Zhaoqing Junhong Co., Ltd. ("Junhong"). Resp't Selection Mem. (Apr. 12, 2018) ("Original Resp't Selection Mem.") at 1, CR 47, PR 140, CJA Tab 24. Haohua later withdrew from participating in the review and Commerce did not select a replacement respondent. I&D Mem. at 14–15.

Commerce preliminarily relied on Junhong's rate of 73.63 percent to establish the rate for certain non-investigated companies found to be eligible for a separate rate. *See* Decision Mem. for the Prelim. Results (Sept. 4, 2018) at 11–12, PR 224, CJA Tab 32; *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 83 Fed. Reg. 45,893, 45,895 (Dep't Commerce Sept. 11, 2018) (prelim. results of antidumping duty admin. rev., prelim. determination of no shipments, and rescission, in part; 2016–2017), PR 225, RCJA Tab 8. Commerce identified Kenda Rubber (China) Co., Ltd. ("Kenda"), Mayrun Tyre (Hong Kong) Limited ("Mayrun"), Shandong Hengyu Science & Technology Co., Ltd ("Hengyu"), Shandong Linglong Tyre Co., Ltd ("Linglong"), Shandong Wanda Boto Tyre Co., Ltd ("Wanda Boto"), and Winrun Tyre Co., Ltd ("Winrun") as companies eligible for a separate rate. *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 83 Fed. Reg. at 45,895.

Commerce then issued the *Final Results*. Among other things, Commerce rejected the requests of Winrun, Linglong, Mayrun, and Hengyu to withdraw their requests for review, explaining that the withdrawal requests were untimely. I&D Mem. at 2 & n.3, 8–9. Commerce calculated a rate of 64.57 percent for Junhong, the one participating respondent, and assigned that margin to the non-investigated companies eligible for a separate rate. *See Final Results*, 84 Fed. Reg. at 17,782.

II. Initial Challenge to the *Final Results*

In this consolidated case, YC Rubber Co. (N. Am.) LLC and Sutong Tire Resources, Inc. (collectively, "YC Rubber"), Mayrun, and ITG

Voma Corp. ("ITG Voma")[2] challenged the *Final Results.* Following briefing here at the U.S. Court of International Trade ("CIT"), this court sustained Commerce's *Final Results*. *YC Rubber Co. (N. Am.) LLC v. United States (YC Rubber I)*, 44 CIT __, 487 F. Supp. 3d 1367 (2020).[3] First, the court concluded that Commerce did not err in relying on a single mandatory respondent, noting that no party requested that Commerce select another respondent until after Commerce's preliminary determinations. *Id.* at 1375–79. The court also rejected the argument that Junhong's rate was not representative and therefore should not have been used as the basis for the rate assigned to the non-investigated separate rate companies. *Id.* at 1379–82. Next, the court sustained Commerce's decision to deny the untimely withdrawal requests, concluding that Commerce's reasons for not granting an extension to withdraw were reasonable. *Id.* at 1384–85. Finally, the court concluded that substantial evidence supported Commerce's decision to exclude certain import values from the surrogate values used to calculate Junhong's antidumping duty margin because Commerce relied on prior administrative determinations that export subsidies existed in the countries at issue. *Id.* at 1386.

Plaintiffs appealed *YC Rubber I* to the Federal Circuit, which vacated this court's decision. *YC Rubber Co. (N. Am.) LLC v. United States (YC Rubber II)*, Appeal No. 21–1489, 2022 WL 3711377, at *5 (Fed. Cir. Aug. 29, 2022).[4] The Federal Circuit "conclude[d] that a 'reasonable number' [of respondents] is generally more than one." *Id.* at *4. The Federal Circuit explained that Commerce thus "erred in relying on a single entity for calculation of a dumping margin for all respondents." *Id.* As for the other arguments, the Federal Circuit declined to consider whether Commerce erred in denying the withdrawal requests or in excluding certain import data. *Id.* at *4–5. The Federal Circuit closed by "remand[ing] for further proceedings in conformity with th[e] opinion." *Id.* at *5.

This court subsequently remanded the *Final Results* "to Commerce to issue a determination consistent with [*YC Rubber II*]." Order (Feb. 2, 2023) at 1, ECF No. 72.

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[2] These parties are referred to collectively as "Plaintiffs." Kenda intervened on Plaintiffs" side but did not file comments on the Remand Results.

[3] *YC Rubber I* provides additional background information, familiarity with which is presumed.

[4] *YC Rubber II* provides additional discussion, familiarity with which is presumed. The court notes that *YC Rubber II* was not published in the Federal Reporter, but the decision is precedential. *See* FED. CIR. R. 32.1(a) (providing that decisions are precedential unless designated otherwise). The court also notes that *YC Rubber II* contains incorrect citations that may confuse the reader. On pages *1 (3 times), *2, and *3 (3 times), the references to section 1677, regardless of the subsection, refer to the equivalent subsection of section 1677f-1.

III. Remand Pursuant to *YC Rubber II*

Based on *YC Rubber II*, Commerce reconsidered the *Final Results* of the review. On remand, Commerce sought an additional mandatory respondent, identifying eligible companies and selecting a second respondent from them in the order of their volume of imports. Remand Results at 2–3.[5] Each of the first four mandatory respondents selected in the remand proceeding (Wanda Boto, Hengyu, Mayrun, and Winrun) declined to provide a complete questionnaire response or further participate. *Id.* at 3–4. Commerce then selected Kenda, which agreed to participate and for which Commerce calculated a weighted average dumping margin of 18.15 percent. *Id.* at 4–5. Because Wanda Boto, Hengyu, Mayrun, and Winrun declined to respond to the questionnaires as mandatory respondents, Commerce, citing language in its *Initiation Notice*, determined that they were ineligible for a separate rate and thus were subject to the China-wide rate of 87.99 percent. *Id.* at 5–6, 36. Commerce averaged Junhong's 64.57 percent rate and Kenda's 18.15 percent rate to calculate a rate for non-investigated separate rate companies of 41.36 percent. *Id.* at 36–37. Commerce applied the 41.36 percent rate only to Linglong. *Id.* at 37. During the remand proceeding, Mayrun, Winrun, and Hengyu also renewed their withdrawal requests, which Commerce denied on the basis that the original withdrawal requests had been untimely and the subsequent litigation did not alter the agency's analysis. *Id.* at 36.

Plaintiffs YC Rubber, Mayrun, and ITG Voma oppose Commerce's Remand Results. Cmts. of Consol. Pl., [Mayrun], in Opp'n to the Commerce Dep't's First Remand Redetermination ("Mayrun's Cmts."), ECF No. 88; Confid. Pls.' Cmts. Opposing Remand Redetermination ("YC Rubber's Cmts."), ECF No. 89; Cmts. of ITG Voma Corp. Opposing Remand Redetermination ("ITG Voma's Cmts."), ECF No. 91.[6] Defendant United States ("the Government") supports Commerce's Remand Results. Def.'s Resp. to Cmts. on Remand Results ("Def.'s Cmts."), ECF 92. Plaintiffs' arguments are addressed in turn.

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[5] Commerce, in its Remand Results, stated that Wanda Boto, Hengyu, Mayrun, Winrun, Kenda, and Linglong had been potential mandatory respondents. Remand Results at 2–3. Throughout the remand proceeding, however, Commerce omitted Linglong from each of its respondent selection memoranda. *See, e.g.*, [Wanda Boto] Resp. Selection Mem. (Feb. 8, 2023) ("Wanda Boto Resp't Selection Mem.") at 1, PRR 1, RCJA Tab 18; Draft Results of Redetermination Pursuant to Court Remand (July 25, 2023) at 3, PRR 103, RCJA Tab 29. After parties raised this issue in their comments on the draft remand results, Commerce declared that Linglong would be subject to the rate for non-investigated separate rate respondents. *See* Remand Results at 34–35.

[6] YC Rubber and ITG Voma are importers of the subject merchandise. *See* YC Rubber's Cmts. at 18 n.2; ITG Voma's Cmts. at 1.

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),[7] 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).

DISCUSSION

I. Decision to Select a Second Mandatory Respondent

a. Parties Contentions

Plaintiffs argue that, on remand, Commerce should not have selected a second mandatory respondent. YC Rubber's Cmts. at 7–11; ITG Voma's Cmts. at 3–12; *see also* Mayrun's Cmts. at 7.[8] Selecting a second mandatory respondent, Plaintiffs argue, was not reasonable because that action came several years after the initial administrative review, when potential respondents no longer have the pertinent information available. *See* Mayrun's Cmts. at 7; YC Rubber's Cmts. at 8–9; ITG Voma's Cmts. at 5–6. In Plaintiffs' view, Commerce should have pulled forward a rate from a prior segment for the non-investigated separate rate respondents. ITG Voma's Cmts. at 12; YC Rubber's Cmts. at 8; *see also* Mayrun's Cmts. at 5.

The Government contends that Commerce's decision to select a second mandatory respondent complied with *YC Rubber II* given that the Federal Circuit found Commerce erred in using a single entity to calculate the non-investigated separate rate companies' dumping margin. Def.'s Cmts. at 7. The Government further reasons that the remand order did not require Commerce to take any other action now suggested by Plaintiffs. *Id.* at 8–11.

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[7] 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.

[8] At times, Plaintiffs make arguments inconsistent with this position. For instance, Mayrun acknowledges that, "[h]ad Commerce set the separate rate respondents' rates by creating an average of the Junhong and Kenda rates, this likely would have been in conformity with the Federal Circuit's Remand Order." Mayrun's Cmts. at 8. While this is what Commerce, in fact, did, Commerce also concluded that Mayrun was no longer eligible for that separate rate. Likewise, ITG Voma and YC Rubber argue that Commerce should have based the non-investigated separate rate companies' rate solely on Kenda's rate, ITG Voma's Cmts. at 12; YC Rubber's Cmts. at 21–22, implicitly accepting that Commerce's selection of Kenda as a second mandatory respondent was lawful while ignoring the holding of *YC Rubber II* that "a 'reasonable number'" for averaging the rates used to determine the non-investigated separate rate companies' rate "is generally more than one," 2022 WL 3711377, at *4.

b. Analysis

Commerce's decision to select a second mandatory respondent is supported by substantial evidence on the record and is in accordance with law. After "conclud[ing] that Commerce erred in restricting its examination to only one exporter/producer," the Federal Circuit "remand[ed] for further proceedings in conformity with th[e] opinion." *YC Rubber II*, 2022 WL 3711377, at *5. Commerce considered the content of the Federal Circuit's decision, noting the appellate court's conclusions "that a 'reasonable number' is generally more than one" and that "Commerce erred in restricting its examination to a single mandatory respondent." Remand Results at 2 (quoting *YC Rubber II*, 2022 WL 3711377, at *4). Based on that language, Commerce concluded that "selecting additional mandatory respondents was a reasonable method for addressing the Federal Circuit's concerns." *Id.* at 25. Commerce acknowledged the parties' proposal to pull forward a rate from a prior segment and explained that the Federal Circuit did not require such an approach. *Id.* at 26.

The Federal Circuit held that Commerce's decision to examine only one respondent in this case was unreasonable, but a wider context shapes this court's understanding of that decision. Over the last 25 years, the number of respondents Commerce examines in a typical investigation or review has declined to one or two. Whether this is a result of increased demands on the agency, decreased resources available to the agency, or a combination of the two, the cause is beyond the power of the courts to address. However, this decline has resulted in litigation by parties objecting to their inability to obtain an individual examination. *Cf. Viet I-Mei Frozen Foods Co. v. United States*, 39 CIT 1054, 1058–60, 83 F. Supp. 3d 1345, 1349–50 (2015) (describing company's challenge to Commerce's decision to deny it an individual dumping margin). Similarly, both this court and the appellate court have, on multiple occasions, considered cases regarding the rate to be applied to non-individually examined companies (the "all-others" in a market economy proceeding or the "separate rate companies" in a non-market economy proceeding), particularly when the individually examined companies (i.e., the so-called "mandatory respondents") all have zero or *de minimis* rates or rates based entirely on adverse facts available. *See, e.g.*, *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348–50 (Fed. Cir. 2016); *Pro-Team Coil Nail Enter., Inc. v. United States*, 46 CIT __, __, 587 F. Supp. 3d 1364, 1372–74 (2022), *appeal docketed*, No. 2022–2241 (Fed. Cir. Sept. 22, 2022). Litigation regarding the reasonableness of such rates, whether too high or too low, is more likely when there are fewer respondents selected for examination, if only because a greater number of examined respondents increases the possibility of having calculated margins that are not zero or *de minimis* upon which to base the non-investigated companies' rate. Additional indirect issues abound (the representativeness of a small number of the largest producers/exporters; the low odds of smaller producers being examined; self-selection or abuse of requests for review and withdrawal thereof). All of these issues can be tied in one way or another to the agency's examination of fewer respondents.

While it may be uncontroversial among domestic and foreign parties, the agency, and reviewing courts that Commerce could reduce these issues by examining more respondents, the role of the courts is to review Commerce's determinations – ensuring that those decisions are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co.*, 5 F.4th 1367, 1374 (Fed. Cir. 2021) ("That highly deferential review standard recognizes Commerce's special expertise in antidumping duty investigations."). Commerce makes the policy decisions regarding its allocation of resources and the number of respondents that may be examined based on those resources, whereas the courts determine if such decisions are consistent with statutory requirements.

The central issue here was Commerce's reliance on one mandatory respondent's rate for the rate to be assigned to the non-investigated separate rate respondents. The Federal Circuit identified three statutory provisions as relevant to its holding: (1) 19 U.S.C. § 1677f-1(c)(1)[9] – a general rule requiring Commerce to determine individual dumping margins for each known exporter and producer; (2) 19 U.S.C. § 1677f-1(c)(2)[10] – an exception to the above rule allowing Commerce to examine a reasonable number of exporters or producers when it is not practicable to make individual determinations "because of the large

[9] According to that provision, "[i]n determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, the [agency] shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1).

[10] Section 1677f-1(c)(2) provides:

> If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the [agency] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to – (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

number of exporters or producers"; and (3) 19 U.S.C. § 1673d(c)(5)[11]—providing the methodology for determining the estimated all-others rate.

While 19 U.S.C. § 1677f-1(c)(1) and (2) are applicable to both investigations and reviews, 19 U.S.C. § 1673d(c)(5), on its face, applies only in investigations. To be clear, Commerce regularly draws on the methodology of 19 U.S.C. § 1673d(c)(5) in administrative reviews involving both market and non-market economies when the agency finds that it is not practicable to individually determine dumping margins for all respondents. *See Albemarle*, 821 F.3d at 1352 & n.6 (recognizing that Commerce may rely on 19 U.S.C. § 1673d in administrative reviews and in non-market economy proceedings). *YC Rubber II*, however, marks a shift by using the agency's discretionary reliance on a provision governing final determinations in investigations to support and define the existence of an unambiguous statutory obligation in administrative reviews. *See* 2022 WL 3711377, at *3–4 (reasoning that Commerce's interpretation of 19 U.S.C. § 1677f-1(c)(2)(B) to allow the agency to individually examine a single mandatory respondent "is contrary to the statute's unambiguous language" requiring Commerce to examine a "reasonable number" of companies because, pursuant to the averaging required by 19 U.S.C. § 1673d(c)(5), "a 'reasonable number' is generally more than one").

The challenge in appreciating the general rule of *YC Rubber II* is that the statutory provisions relied upon by the court have temporal limitations and applications. Section 1677f-1(c)(2), allowing Commerce to engage in selecting fewer than all respondents when it is not practicable to examine all of them, applies early in the segment of the administrative proceeding. By referring to what is practical for Commerce to do, Congress provided the agency with discretion to allocate its resources in the examination. Moreover, Congress recognized that the agency would have to make certain respondent selection decisions

[11] Section 1673d(c)(5)(A) provides, as a general rule, that

> [f]or purposes of this subsection and section 1673b(d) of this title, the estimated all-others rather shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined [on the basis of adverse facts available].

But as an exception, section 1673d(c)(5)(B) provides that

> [i]f the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 1677e of this title, the [agency] may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

with less than perfect data. *See* 19 U.S.C. § 1677f-1(c)(2)(A) (whereby Commerce selects a statistically valid sample of respondents "based on the information available to [Commerce] at the time of selection"). Section 1673d(c)(5), meanwhile, speaks to the methodology for determining the all-others rate at the end of an investigation. The temporal aspect of this provision is clear because it calls for determining a rate to apply to non-examined companies based on the results (i.e., the "estimated weighted average dumping margin") determined for the examined companies.

Because a statute must be read as a whole, *Delverde, SrL v. United States*, 202 F.3d 1360, 1364 (Fed. Cir. 2000), and the provisions in question read "with a view to their place in the overall statutory scheme," *Nucor Corp. v. United States*, 927 F.3d 1243, 1250 (Fed. Cir. 2019), provisions such as section 1673d(c)(5) that apply at the end of an investigation may aide in understanding what Congress meant when it permitted Commerce to select the number of respondents "that can be reasonably examined," 19 U.S.C. § 1677f-1(c)(2)(B). Thus, even accepting that section 1673d(c)(5) does not apply to administrative reviews on its face, it may be appropriate to take account of its requirements when the agency applies section 1677f-1(c)(2), even in administrative reviews.

Reading these provisions together, as the Federal Circuit did, leads to the conclusion that when Commerce engages in respondent selection at the beginning of a segment, the agency "generally" must select more than one respondent for examination.[12] This interpretive analysis, however, is incomplete because, in this case, Commerce selected two respondents for individual examination, and one of those two withdrew from participation. *YC Rubber II*, 2022 WL 3711377, at *2. Nevertheless, the Federal Circuit vacated and remanded the court's decision in *YC Rubber I*.

To understand the ruling in *YC Rubber II*, it is necessary to recognize the implied question that the opinion addresses: does Commerce have an ongoing obligation to maintain more than one respondent for individual examination after the initial selection?

YC Rubber II suggests that the answer to that question is—or in this case at least, was—yes. 2022 WL 3711377, at *4 (stating that "Commerce provide[d] no reason why it would be reasonable to 'average' a single rate"). Put differently, the appellate court indicated that the end-of-segment requirement for Commerce to use a math-

[12] The court interprets the Federal Circuit's inclusion of the modifier "generally" as a recognition that there may be unusual cases in which Commerce establishes, from the outset, that it cannot "reasonably examine" more than one respondent.

ematical average to determine the "all-others" rate required Commerce to both select and maintain multiple mandatory respondents.[13] *Id.* (concluding that Commerce "unlawfully restricted its examination to a single mandatory respondent" and "erred in relying on a single entity for calculation of a dumping margin for all respondents").

As the *YC Rubber II* court indicated with its use of the modifier "generally," answering that question in any particular situation will require the agency to balance considerations such as the resources available to it, the speed with which it can identify another respondent, and the agency's deadlines for completing the segment.

For purposes of this case, however, the answer is clear. Commerce reasonably determined that it could examine two respondents. When one of those two respondents indicated that it would cease participation in the review just two weeks after receiving the questionnaire, it remained practicable for Commerce to examine a second respondent and a replacement second respondent should have been selected in this review.[14] Because Commerce did not do so, its further decision to base the rate for non-investigated separate rate companies on only one respondent was not in accordance with law. On remand, Commerce's correction of this error by selecting a second respondent was in accordance with law (however, the manner in which Commerce made this selection will be considered separately, below).

Plaintiffs' arguments now opposing Commerce's selection of a second respondent (that they previously sought) are unpersuasive. To begin, Plaintiffs' suggestion of other options for complying with *YC Rubber II*, such as pulling forward a rate from a prior segment, YC Rubber's Cmts. at 8; ITG Voma's Cmts. at 12–13; *see also* Mayrun's Cmts. at 5, ignores the statutory requirements. Commerce may use

[13] Here again, *YC Rubber II* must be understood within the context of its facts and the statutory provisions understood within their temporal limitations. The Federal Circuit concluded that "Commerce provides no reason why it would be reasonable to 'average' a single rate" when determining the non-investigated company rate when Commerce only examined one respondent from the time Haohua ceased participation in the early weeks of the review. 2022 WL 3711377, at *4. Nevertheless, it is much less clear that it would also be unreasonable for Commerce to "average" a single rate if the agency had examined five respondents and two were found to have *de minimis* rates, two received rates based on adverse facts available, and only one respondent received an individually calculated rate above *de minimis*. Section 1673d(c)(5)(A) would still provide that Commerce is to determine the weighted average of the results of the individual examinations, excluding the proscribed results. In this scenario, there would only be a single rate available to "average" within the provision's parameters. Such scenarios were, however, beyond the scope of *YC Rubber II.*

[14] As the "'master' of the antidumping laws," *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995), Commerce must, in the first instance, determine at what point in a segment it is no longer practicable, within the applicable statutory deadlines, to identify a replacement respondent for individual examination; however, as in this case, that decision would be reviewable by the courts. In this case, Commerce erred in waiting until the non-investigated separate rate respondents requested the agency to select another mandatory respondent to decide whether it was feasible to do so. *See* I&D Mem. at 14.

other reasonable methods (like pulling forward a rate) when *all* the individually investigated companies' rates are zero, *de minimis*, or determined based on adverse facts available. 19 U.S.C. § 1673d(c)(5)(B). That is not the case here.

The passage of time does not detract from Commerce's decision to select a second mandatory respondent. Plaintiffs cite *Changzhou Hawd Flooring Co. v. United States*, 39 CIT 64, 74–78, 44 F. Supp. 3d 1376, 1388–91 (2015), in which the CIT concluded that Commerce's decision to conduct an individual investigation of a respondent approximately three and a half years after the initial investigation, was arbitrary and capricious. *See* YC Rubber's Cmts. at 8–10; ITG Voma's Cmts. at 5–8. That case, however, is inapposite. First, it is a non-precedential CIT decision which predates *YC Rubber II*, a binding Federal Circuit opinion. Second, the *Changzhou* court reached its conclusion based on the specific facts of that case, explaining that "Commerce cannot have it both ways" by previously asserting a lack of resources to examine an additional respondent and then, much later, performing the examination. *Changzhou*, 39 CIT at 77, 44 F. Supp. 3d at 1389–90. Here, Commerce acknowledged at the time of the *Final Results* that it "had the resources to examine two mandatory respondents," I&D Mem. at 14, however, the second respondent had declined to participate. As the *Changzhou* court pointedly recognized, "the decision to reopen the record is generally within the agency's discretion," 39 CIT at 76, 44 F. Supp. 3d at 1389 (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012)), and here Commerce reasonably exercised that discretion consistent with *YC Rubber II*. Although several years have passed since Commerce conducted the administrative review, the exporters and producers subject to review are either parties to this litigation or export to parties to this litigation and should have been aware of the ongoing litigation, which centered, in no small part, around the selection of a second mandatory respondent. Thus, the passage of time does not compel Commerce to refrain from selecting a second mandatory respondent.

Commerce's decision not to select a second mandatory respondent in other proceedings does not, as Plaintiffs argue, suggest that doing so here is arbitrary and capricious. *See* YC Rubber's Cmts. at 10–11; ITG Voma's Cmts. at 10–11. Here, the Federal Circuit found that, on the facts of this case, it was not sufficient for Commerce to examine only one respondent, and, upon remand, Commerce chose a second mandatory respondent. As noted, the appellate court recognized that its holding would not be universally applicable. *Supra* note 12. Thus, while Commerce may seek to distinguish the facts of *YC Rubber II* in another case to justify the use of one respondent, the agency cannot distinguish this case from itself.

In sum, because Commerce reasonably selected a second mandatory respondent to comply with the Federal Circuit's remand, the court sustains that part of the Remand Results.

II. Methodology for Selecting a Second Mandatory Respondent

a. Parties Contentions

YC Rubber contends that Commerce's method of selecting a second mandatory respondent was flawed. YC Rubber's Cmts. at 11–13. YC Rubber argues that Commerce erred by providing each selected party with only one week to respond to the selection. *See id.* at 11–12. YC Rubber further argues that Commerce failed to explain why its selection pool was limited to entities with suspended entries, while basing the order of selection on overall volumes of exports. *Id.* at 11. Even assuming Commerce properly considered the entire volume of entries, YC Rubber further argues that Kenda had a higher overall volume than Hengyu, Winrun, and Mayrun and that Commerce failed to explain its omission of Linglong from the selection process. *Id.* at 12–13.

The Government responds that the one-week deadline only required the company to inform Commerce if the company intended to respond, not to fully respond. Def.'s Cmts at 27. The Government further explains that, "[c]onsistent with its standard practice," Commerce selected the second mandatory respondent based on "the largest volume of imports." *Id.* at 26 (citing 19 U.S.C. § 1677f-1(c)(2)). Regarding the order of selection, the Government did not address the omission of Linglong but noted that YC Rubber's belated contention that Kenda should have been selected second "does not demonstrate that Commerce erred in following its practice." *Id.*

b. Analysis

On this issue, the court takes each argument in turn. To begin, YC Rubber's contention that Commerce erred by allowing a one-week response is, at best, misguided. Commerce provided each selected respondent, in turn, one week to indicate whether it "*intends* to respond to this questionnaire." *See, e.g.*, Initial Questionnaire (Feb. 8, 2023) at Cover Letter, PRR 2, RCJA Tab 19 (emphasis added). In each case, the potential second respondent was notified that it had 28 days to respond to the questionnaire in full. *See id.* at 3. To the extent that YC Rubber argues that Commerce should have responded more fully to its argument, the company overstates the value of its own position. *See Husteel Co. v. United States*, 39 CIT 1382, 1432, 98 F. Supp. 3d 1315, 1359 (2015) ("Because this argument and accompanying evidence were not significant, Commerce did not err in failing to specifically address them.").

Similarly, Commerce's decisions to limit its selection of mandatory respondents to those with suspended entries and look at the largest overall volume of imports are supported by substantial evidence and otherwise in accordance with law. Although the Remand Results provide limited explanation, Commerce's reasoning is plain based on the law. As for limiting selection to only those companies with suspended entries, any liquidated entries are already final, so no further challenge to the antidumping duty rate applied to them would be possible. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809–11 (Fed. Cir. 1983) (explaining the consequence of liquidation on judicial review). As for Commerce's use of the total volume of entries (rather than the suspended volume of entries) for the order of selection, such a basis is consistent with 19 U.S.C. § 1677f-1(c)(2), which instructs Commerce to select the exporters or producers to examine on the basis of those "accounting for the largest volume of the subject merchandise from the exporting country." Again, to the extent that Commerce did not specifically address this argument, the agency did not err because the argument was otherwise baseless. *See Husteel*, 39 CIT at 1432, 98 F. Supp. 3d at 1359.

The court, however, struggles to discern the basis for Commerce's order of selection. Although Commerce explained that it based its selection on the volume of entries after narrowing the list to companies with suspended entries, the record does not appear to support Commerce's purported actions. To begin, the exclusion of Linglong from the list of potential second mandatory respondents is glaring. While Commerce identified Kenda, Mayrun, Hengyu, Winrun, Wanda Boto, and Linglong as possible respondents in the Remand Results, Remand Results at 2–3, throughout the selection process, Commerce never included Linglong as a possible mandatory respondent, *see, e.g.*, Wanda Boto Resp't Selection Mem. at 1 (listing only Kenda, Mayrun, Hengyu, Wanda Boto, and Winrun). Even now, the Government does not offer a basis in the record for this discrepancy. *See* Def.'s Cmts. at 26–27. At best, Commerce appears to have considered any issue regarding the omission of Linglong as resolved when it assigned a separate rate to Linglong. But because the order in which the second mandatory respondent was selected had consequences for the respondents that refused to participate, namely the denial of separate rate eligibility, this treatment of Linglong does not address adequately the parties' concerns.

In an effort to discern Commerce's reasoning, the court examined the underlying data Commerce cited for the companies' import volumes. *See* [Winrun] Resp't Selection Mem. (Mar. 3, 2023) at 1 n.4, CRR 3, PRR 34, RCJA Tab 26 (citing U.S. Customs Entries (Nov. 30, 2017), Excel attachment, CR 44–45, PR 119, CJA Tab 22 (on file with the court)). The data in that Excel attachment appears to support YC Rubber's argument that Kenda should have been selected second. *See* U.S. Customs Entries, Excel attachment; *see also* YC Rubber's Cmts. at 12–13. It appears to the court that Commerce failed to aggregate certain data entries with slightly different names. *See* U.S. Customs Entries, Excel attachment. While Commerce stated that it would "combine[ ] the export quantities of companies with minor variations in the spelling of their names," it is unclear which entries were combined, which were not, and how Commerce drew the line between minor and non-minor variations in names.[15] Original Resp't Selection Mem. at 7. At Oral Argument, the Government suggested that minor variations were limited to issues like the omission of periods in abbreviations or the omission of corporate abbreviations (like "Co.") but was unable to confirm whether the distinct data entries actually represented distinct companies (that might ultimately be entitled to different rates). Confid. Oral Arg. (May 16, 2024) at 11:50–13:45 (on file with the court); Docket Entry, ECF No. 101.

Even if the court accepts Commerce's import quantity for Kenda, questions remain as to whether Linglong had a higher volume of entries for the relevant period. *Compare* U.S. Customs Entries, Excel attachment (showing Linglong's entries), *with* [Kenda's] Resp't Selection Mem. (Mar. 10, 2023) at 1, PR 34, CRR 4, Suppl. RCJA Tab 3 (identifying the volume of Kenda's entries). Alternatively, if Kenda should have been selected second, then Linglong's omission would be harmless error but the selections of Winrun, Mayrun, and Hengyu before Kenda would be erroneous. The Government all but ignores these nuances by simply stating, without supporting data, that "[c]onsistent with its standard practice of respondent selection, Commerce initially selected the company with the largest volume of imports as a potential mandatory respondent and went down the list

[15] In the case of [[ ]], Commerce apparently distinguished between [[ ]]. *See* U.S. Customs Entries, Excel attachment. But Commerce appears to have also considered the relevance of differences between [[ ]] combining the first three and distinguishing the final one. *Id.* While Commerce may have reasons for these distinctions, they are not clear from the record.

from there as needed." Def.'s Cmts. at 26. This statement assumes the list was accurately compiled and followed; however, the record evidence does not support that assumption.[16] In this instance, it is not the practice that is the problem; it is the execution.

Because the court cannot discern Commerce's reason for omitting Linglong from the respondent selection process or any explanation, based on the data available, for the order in which Commerce sought to select the second mandatory respondent, the court remands this issue for Commerce to reconsider or further explain its respondent selection methodology for the second mandatory respondent.

III. Junhong's Data as a Basis for the Non-Investigated Separate Rate

a. Parties Contentions

YC Rubber argues that the rate applied to non-investigated separate rate companies should not be based on Junhong's data. YC Rubber's Cmts. at 19–22. YC Rubber asserts that Junhong's calculated antidumping margin is aberrational and not representative of the market. *Id.* at 19. YC Rubber points to various rates, including from subsequent administrative reviews, to support its assertion of aberration, *id.* at 20, and contends that Commerce should have either carried forward the rate from the first administrative review or used Kenda's calculated rate,[17] *id.* at 21–22.

The Government counters that the Federal Circuit did not identify any issues with Junhong's rate, so Commerce did not err in not revisiting the use of Junhong's rate in the Remand Results. Def.'s Cmts. at 25.

b. Analysis

In *YC Rubber I*, the court rejected Plaintiffs' contention that Junhong's rate was unrepresentative and therefore should not have been used to determine the rate applied to non-investigated separate rate

[16] The court acknowledges that YC Rubber did not raise this argument before the agency. *See* [YC Rubber's] Cmts. on Draft Remand (Aug. 17, 2023) at 7–9, PRR 109, RCJA Tab 30. YC Rubber also appears to concede as much. *See* YC Rubber's Cmts. at 12 n.1. While the Government characterizes this argument as "after-the-fact," it did not argue that YC Rubber failed to exhaust its administrative remedies. Def.'s Cmts. at 26. Non-jurisdictional exhaustion claims are "subject to waiver and forfeiture." *Santos-Zacarias v. Garland*, 598 U.S. 411, 423 (2023). Here, the Government has waived any failure-to-exhaust claim, so YC Rubber's argument is properly before the court now.

[17] The court notes that this second alternative requires YC Rubber to accept 1) that Kenda was properly selected as a second mandatory respondent (which YC Rubber otherwise contests) and 2) that only one respondent (now Kenda, rather than Junhong) is an appropriate basis for Commerce to establish the non-investigated separate rate, notwithstanding *YC Rubber II*.

companies because the parties failed to "identify any legal authority that requires Commerce to evaluate the representativeness of a calculated rate determined pursuant to the general rule provided in 19 U.S.C. § 1673d(c)(5)(A)." *YC Rubber I*, 487 F. Supp. at 1379–82. To support its argument, YC Rubber now relies on the same cases that the court has already distinguished. *See id.* at 1381–82 (discussing *Diamond Sawblades Mfrs.' Coal. v. United States*, 43 CIT __, 359 F. Supp. 3d 1374 (2019), and *Baoding Mantong Fine Chem. Co. v. United States*, 39 CIT 1664, 113 F. Supp. 3d 1332 (2015)). As to the addition of new data points from subsequent administrative reviews, *see* YC Rubber's Cmts. at 20; Notice of Suppl. Authorities, Attachs. 1–3, ECF No. 100, that data is unresponsive to the absence of legal authority the court highlighted in *YC Rubber I*. Thus, the court continues to find that Commerce's reliance on Junhong's rate to determine the rate applied to non-investigated separate rate companies is in accordance with law and supported by substantial evidence.

IV. Denial of Separate Rate Status

a. Parties Contentions

Commerce's decision to select a second mandatory respondent during the remand proceeding had consequences for certain respondents that Commerce previously found eligible for a separate rate. Commerce found that those companies that were selected to be the second mandatory respondent and declined to participate were no longer eligible for a separate rate. Remand Results at 6.

Plaintiffs argue that Commerce should not have reconsidered and denied the separate rate status of Wanda Boto, Mayrun, Hengyu, and Winrun based on the companies' decisions not to participate as mandatory respondents. Mayrun's Cmts. at 7–15; YC Rubber's Cmts. at 13–22; ITG Voma's Cmts. at 13–17. Plaintiffs further argue that assigning these companies the China-wide rate is arbitrary and capricious because the determination comes at a late stage of the administrative proceeding when they only had one week to respond to the agency. *See* YC Rubber's Cmts. at 17–18; Mayrun's Cmts. at 11–12. Plaintiffs also aver that altering their separate rate status was beyond the scope of the remand and is settled "law of the case." Mayrun's Cmts. at 7; *see also* YC Rubber's Cmts. at 18 (arguing that nothing in the Federal Circuit opinion "suggests that Commerce could on remand reassess separate rate eligibility for exporters granted such status in [the administrative review]”).[18]

The Government responds that Commerce’s decision to deny separate rates to companies that declined to participate as mandatory respondents is supported by the agency’s practice. Def.’s Cmts. at 15–23. The Government points out that “Commerce made clear at the outset . . . that the refusal of a company to participate as a mandatory respondent results in their loss of separate rate eligibility.” *Id.* at 18. The Government maintains that the decision to alter separate rate status was within the bounds of the remand proceeding because *YC Rubber II* focused on the selection of a second mandatory respondent, which involved reconsideration of issues such as separate rates, and nothing in the opinion barred Commerce from reconsidering separate rate status. *Id.* at 16, 19–20.

b. Analysis

To begin, Commerce has the authority to reconsider the separate rate status. Neither the passage of time since the original administrative review nor the purported one-week response time are persuasive reasons to limit Commerce’s ability to reconsider the separate rate eligibility. In light of *YC Rubber II*, Commerce acted reasonably in reopening the record and, as discussed above, the one-week response time was simply for an indication of participation, not a full questionnaire response.

Likewise, Mayrun’s contention that the companies’ eligibility for a separate rate “was settled ‘law of the case,’” Mayrun’s Cmts. at 10, is inapposite. The law of the case applies only to issues that were “actually decided, either explicitly or by necessary implication, in the earlier litigation.” *Ford Motor Co. v. United States*, 809 F.3d 1320, 1324 (Fed. Cir. 2016) (citation omitted). Here, the Federal Circuit had no occasion to consider the separate rate eligibility of any of the respondents, either explicitly or implicitly. Similarly, Mayrun’s con-

[18] Plaintiffs also contend that Commerce applied adverse facts available by rescinding the companies’ separate rate status. *See* YC Rubber’s Cmts. at 13, 16–17; ITG Voma’s Cmts. at 13; Mayrun’s Cmts. at 12–13. Nothing in the Remand Results suggests that Commerce did, in fact, apply adverse facts available. *See* Def.’s Cmts. at 25. To the extent Plaintiffs are attempting to analogize adverse facts available with the rescission of separate rate status, the inquiries are distinct. In a non-market economy country, the basic notion is that the means of production, prices, etc., are centrally controlled, *see* 19 U.S.C. § 1677(18) (definition of non-market economy country), and a party is eligible for a rate separate from that non-market economy only when it meets the *de jure* and *de facto* criteria Commerce has established. *See generally Sparklers From the People’s Republic of China*, 56 Fed. Reg. 20,588 (Dep’t Commerce May 6, 1991) (final determination of sales at less than fair value); *Silicon Carbide from the People’s Republic of China*, 59 Fed. Reg. 22,585 (Dep’t Commerce May 2, 1994) (notice of final determination of sales at less than fair value).

tention that "[a]n agency's deviation from remand instructions is 'itself legal error, subject to reversal on further judicial review,'" must also fail. Mayrun's Cmts. at 10 (quoting *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989)); *see also* YC Rubber's Cmts. at 18. The types of remands discussed in *Sullivan* "often include[d] detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed." 490 U.S. at 885. In contrast, the remand order here did not include any instructions regarding separate rate eligibility; thus, there was nothing for Commerce to deviate from. The agency was free to reconsider the separate rate status of various respondents, as necessary and appropriate, in the context of the agency's actions to comply with the holding of *YC Rubber II*. Indeed, under certain circumstances, the refusal to participate as a mandatory respondent may support Commerce's decision to rescind a party's separate rate status.

But that does not resolve the issue before the court. While Commerce may reconsider the separate rate eligibility of respondents in the course of the remand proceeding, the results of that reconsideration must be supported by substantial evidence. Here, Commerce did not adequately support its decision.

Commerce's reference back to the language of the *Initiation Notice*, by itself, is unpersuasive. Therein, Commerce stated that "exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents . . . will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents." Remand Results at 30 & n.113 (quoting *Initiation Notice*). That statement does not constitute an adequate explanation of why these respondents, at this stage of the process, are not eligible for separate rate status. Although exporters and producers may have been notified that failure to participate as a mandatory respondent would result in a denial of a separate rate, the *Initiation Notice* does not explain *why* the failure to participate as a mandatory respondent alters the separate rate analysis or *why* the questionnaire response was needed to confirm a previously approved separate rate status. This rote citation, particularly given the facts of this case, is insufficient to support Commerce's finding. Commerce must support its decisions with substantial evidence.

Similarly, Commerce's statement that it was "unable to confirm, clarify, or verify" the separate rate certifications, *id.* at 31, does not explain why the failure to participate as a mandatory respondent on remand altered Commerce's previous determination that the companies were eligible for a separate rate, *see Final Results*, 84 Fed. Reg. at 17,782–83. While the information (or lack thereof) could be relevant, "a company's failure to provide information unrelated to establishing entitlement to a separate rate does not necessarily undermine submissions demonstrating an absence of government control." *Hubbell Power Sys., Inc. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1302, 1309 (2019) (collecting cases); *cf. Green Farms Seafood Joint Stock Co. v. United States*, Slip Op. 24–46, 2024 WL 1653791, at *4–5 (CIT Apr. 17, 2024) (rejecting the argument that Commerce erred in granting separate rate status when the grant was based on the submission of a separate rate certification *and* a section A questionnaire response while remanding for Commerce to further explain its determination under the relevant criteria). Here, Commerce failed to explain *why* the lack of a complete mandatory respondent questionnaire response rendered the agency unable to confirm, clarify, or verify information that it had previously accepted as sufficient to grant separate rate eligibility. Thus, the court remands for Commerce to reconsider its rescission of separate rate status for Wanda Boto, Hengyu, Mayrun, and Winrun.[19]

V. Denial of Withdrawal Requests

a. Parties Contentions

Plaintiffs next argue that Commerce should have allowed certain respondents to withdraw their requests for administrative review during the remand proceeding. YC Rubber's Cmts at 22–25; Mayrun's Cmts at 15–17. YC Rubber argues that the respondents' initial withdrawal requests were reasonable because the final results of the first administrative review and the respondent selection process for the second administrative review did not occur until after the 90-day deadline to withdraw. YC Rubber's Cmts. at 22–23. YC Rubber further argues that the renewed withdrawal requests made during the remand proceeding are "especially compelling given the unique circumstances surrounding litigation." *Id.* at 24. Mayrun similarly argues that Commerce's decision to select a second mandatory respondent constituted an "extraordinary circumstance" that entitled it to withdraw its request for review. Mayrun's Cmts. at 15–16.

The Government contends that these withdrawal requests (both initial and renewed) are outside the scope of the remand because the Federal Circuit declined to rule on the issue. Def.'s Cmts. at 24–25.

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[19] The court notes that Commerce's reconsideration of the order of selection of the second mandatory respondent may moot some of these issues.

b. Analysis

Commerce "will rescind an administrative review . . . if a party that requested a review withdraws the request within 90 days of the publication of notice of initiation of the requested review." 19 C.F.R. § 351.213(d)(1). Commerce "may extend this time limit if [the agency] decides that it is reasonable to do so." *Id.*; *see also Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1344–45 (Fed. Cir. 2018) (confirming the reasonableness test).

With respect to the initial requests to withdraw the review requests, this court previously reviewed and affirmed Commerce's denial of the withdrawal requests and that holding was unaltered by the Federal Circuit. *See YC Rubber II*, 2022 WL 3711377, at *5 ("We also do not reach Appellants' challenge to Commerce's decision to deny Appellants' withdrawal requests."). To the extent that Plaintiffs continue to challenge Commerce's original denials, those challenges fail for the reasons previously articulated. *See YC Rubber I*, 487 F. Supp. 3d at 1384–85.

The renewed requests of respondents to withdraw their review requests during the remand proceedings, however, present a fresh question for the agency and now this court. Although the renewed requests contain similar arguments to the original withdrawal requests, they also raise new arguments. Mayrun argued before Commerce that the decision to "re-start the review[ ] and return to the stage of mandatory respondent selection" makes "[t]he instant remand unique" because the "prior timeline" has been "effectively swept away." [Mayrun's] Renewed Req. to Withdraw from Rev. (Feb. 16, 2023) at 4, PRR 8, RCJA Tab 21. Hengyu renewed its request when it notified Commerce that it could not participate as a mandatory respondent and explained that it was in bankruptcy proceedings and without any personnel. [Hengyu] Resp. to Dep't's Req. to Notify (Feb. 24, 2023) at 2, PRR 16, RCJA Tab 23. Winrun renewed its request when it indicated that it would not participate as a mandatory respondent because Commerce requested data that was six or seven years old and Winrun, "pursuant to normal business practices," only maintained data for three years. Winrun Resp. to Dep't Letter of Mar. 3, 2023 (Mar. 10, 2023) at 2, PRR 29, RCJA Tab 25. Despite these additional bases for their requests, Commerce did not distinguish between the initial requests to withdraw and the renewed requests, stating simply that it "continue[s] to find that it is inappropriate to accept the untimely review withdrawal requests." *See* Remand Results at 36. Commerce's failure to distinguish the requests and clearly address the new arguments amounts to legal error.

The court reaches no conclusion regarding how Commerce should decide those requests. While some of the respondents offered rationales for why they were no longer capable of participating in the administrative review in an effort to justify their belated withdrawal requests, the court also recognizes that the respondents did not attempt to provide "suggested alternative forms" in which they might have responded. 19 U.S.C. 1677m(c)(1); *see also Viet I-Mei Frozen Foods*, 39 CIT at 1073–74, 83 F. Supp. 3d at 1361 (concluding that Commerce permissibly declined a belated withdrawal request when that party failed to provide "suggested alternatives" for responding). Moreover, Commerce may decide that the new arguments and absence of alternatives are insufficient to establish reasonableness given that the parties were (or should have been) aware of the ongoing and unsettled nature of this administrative review. "A continuing obligation to maintain records and institutional information during subsequent judicial review of the administrative proceeding is an unremarkable condition of the antidumping statute and of litigation generally." *Abitibi-Consol. Inc. v. United States*, 30 CIT 714, 723, 437 F. Supp. 2d 1352, 1361 (2006) (discussing in the context of whether a remedy is manifestly inadequate such that it may establish residual jurisdiction). Nonetheless, the Remand Results do not suggest, and the court is unable to discern, that Commerce even considered the renewed requests with their corresponding new arguments. Therefore, the court remands for further agency consideration of the renewed withdrawal requests.

VI. Exclusion of Surrogate Value Import Data

a. Parties Contentions

ITG Voma revives its argument that Commerce erroneously excluded Thai imports from India, Indonesia, and South Korea in selecting surrogate values for Junhong based on its reasoning that there were generally available subsidies in those countries. ITG Voma's Cmts. at 17. ITG Voma contends that Commerce's "simple citation to previous determinations" is insufficient to support its decision. *Id.*

The Government argues that Commerce was not required to reconsider this issue on remand and therefore did not err in maintaining its decision to exclude that data. Def.'s Cmts. at 24.

b. Analysis

The court previously explained that "[s]ection 1677b(c)(5) expressly provides that, 'without further investigation,' Commerce may disregard such imports if it 'has determined that broadly available export subsidies existed.'" *YC Rubber I*, 487 F. Supp. 3d at 1386. Consistent therewith, this court affirmed Commerce's exclusion of the import data from India, Indonesia, and South Korea. While this challenge goes to the distinct issue of the calculation of Junhong's rate, on appeal, the Federal Circuit did not reach this issue, stating that "[s]uch a decision is premature." *YC Rubber II*, 2022 WL 3711377, at *5. In its comments on the Remand Results, ITG Voma raises no arguments that this court did not previously consider and reject. Therefore, the court continues to find that Commerce's decision to exclude certain import values is supported by substantial evidence and otherwise in accordance with law. *See YC Rubber I*, 487 F. Supp. 3d at 1386.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are sustained in part and remanded in part; it is further

ORDERED that, on remand, Commerce shall reconsider its method of selecting the second mandatory respondent; it is further

ORDERED that, on remand, Commerce shall reconsider its decision to rescind the separate rate status of Wanda Boto, Mayrun, Hengyu, and Winrun; it is further

ORDERED that, on remand Commerce shall reconsider the denial of the renewed requests to withdraw from review; it is further

ORDERED that Commerce shall filed its remand redetermination on or before September 16, 2024; 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 6,000 words.

Dated: June 18, 2024
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

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