U.S. Customs and Border Protection

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WOVEN UPHOLSTERY FABRIC

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

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

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of woven upholstery fabric 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. 57, No. 37, on October 11, 2023. 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EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 14, 2024.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation 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. 57, No. 37, on October 11, 2023, proposing to modify one ruling letter pertaining to the classification of woven upholstery fabric. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N319028, CBP classified various woven upholstery fabrics in heading 5903, HTSUS, specifically in subheading 5903.90.25, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." CBP has reviewed NY N319028 and has determined the ruling letter to be in error. It is now CBP's position that a certain woven upholstery fabric, Style J1819 (Fringe), is classified in heading 5515, HTSUS, and specifically within subheading 5515.12.00, HTSUS, which provides for "Other woven fabrics of synthetic staple fibers: Of polyester stable fibers: Mixed mainly or solely with man-made filaments."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N319028 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H331151 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*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H331151

July 30, 2024
OT:RR:CTF:FTM H331151 TJS/TSM
CATEGORY: Classification
TARIFF NOs.: 5903.90.25; 5515.12.00

MS. ANGIE COURTEAU
LZB MANUFACTURING, INC.
ONE LA-Z-BOY DRIVE
MONROE, MI 48162

RE: Modification of NY N319028; Tariff Classification of Woven Upholstery Fabrics from China

DEAR MS. COURTEAU:

This is in response to your request, dated December 1, 2021, for reconsideration of New York Ruling Letter ("NY") N319028, issued to you on April 30, 2021. In that ruling, U.S. Customs and Border Protection ("CBP") classified five woven upholstery fabrics from China under the Harmonized Tariff Schedule of the United States ("HTSUS"). According to your request for reconsideration, you dispute CBP's classification of three of the woven upholstery fabrics (Style N1829 (Moriarty), Style D1818 (Glossary), and Style J1819 (Fringe)) under subheading 5903.90.25, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." Upon review, we have found this classification for Style J1819 (Fringe) to be incorrect. For the reasons set forth below, we hereby modify NY N319028.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Vol. 57, No. 37, on October 11, 2023, proposing to modify NY N319028, and to revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

NY N319028 described the subject merchandise as follows:

> Style N1829 (Moriarty) is a woven fabric composed wholly of polyester textured filament yarns of different colors and weighs 525 g/m^2. The fabric has an acrylic coating applied to the reverse side of the fabric that is visible to the naked eye.
>
> Style D1818 (Glossary) is a woven fabric of yarns of different colors composed of 54 percent polyester filament yarns and 46 percent polypropylene filament yarns. The fabric weighs 358 g/m^2. The fabric has an acrylic coating applied to the reverse side of the fabric that is visible to the naked eye.
>
> Style J1819 (Fringe) is a woven fabric composed wholly of polyester yarns of different colors, of which 72 percent is staple fibers and 28 percent is filament yarns. The fabric weighs 482 g/m^2. The fabric has an acrylic coating applied to the reverse side of the fabric that is visible to the naked eye.

ISSUE:

What is the tariff classification of the woven upholstery fabrics under the HTSUS?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5.

The 2024 HTSUS headings under review are as follows:

5407 Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404:
5515 Other woven fabrics of synthetic staple fibers:
5903 Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:

* * *

In addition to the terms of the headings, classification of goods under the HTSUS is governed by any applicable section or chapter notes. Note 2 to Chapter 59, HTSUS, provides, in pertinent part, the following:

2) Heading 5903 applies to:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color; ...

* * *

The subject fabrics have been coated with an acrylic coating. At issue is whether they are coated fabrics of Chapter 59, HTSUS, and whether, pursuant to Note 2(a)(1) to Chapter 59, HTSUS, they are products of heading 5903, HTSUS. Heading 5903, HTSUS, provides for the classification of "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." According to Note 2(a)(1) to Chapter 59, for a fabric to be considered coated within the meaning of heading 5903, HTSUS, the coating must be visible to the naked eye (whatever the nature of the plastic material), but no account is to be taken of changes in color. Therefore, to determine whether these fabrics are classifiable in heading 5903, HTSUS, we must determine whether they are visibly coated with plastic.

Although there is no definition within the HTSUS of whether or not a coating is "visible to the naked eye," CBP has set forth a number of factors to consider when determining what constitutes a coating that can be seen with

the naked eye within the meaning of Note 2(a)(1) to Chapter 59, HTSUS. In Headquarters Ruling Letter ("HQ") HQ 955031, dated March 30, 1994, CBP stated:

> The sole criter[ion] upon which Customs is to determine whether fabric is coated for purposes of classification under heading 5903, HTSUSA, is based on visibility: fabric is classifiable in Chapter 59 if the plastic coating is visible to the naked eye. This standard does not allow for the examiner to take the "effects" of plastic into account. Plastic coating will often result in a change of color, increase in the fabric's stiffness[,] or lend a sheen to fabric: these are factors which while indicative of the presence of plastic, may not be taken into account in determining whether the plastic itself is visible to the naked eye. The prohibition against taking a change of color into account is explicitly set forth in Chapter Note 2(a)(1). Stiffness is not a reliable indicator of coating because it may dissipate or entirely disappear over time, and it is detected more by touch than by visual inspection. Sheen may be imparted to a fabric by the application of coating, but this too is an unreliable indicator of the presence of coating inasmuch as it may be imparted to fabric by means of heat calendaring and other methods of treating fabric which do not involve the application of coating.

Recently in HQ H314149, dated March 8, 2022, CBP elaborated on the factors CBP takes into consideration when determining whether a coating is visible to the naked eye under Note 2 to Chapter 59, HTSUS. These factors include whether the coating has visibly altered the surface of the fabric; whether the plastic is visible in the interstices of the fabric; whether the thread or weave is blurred or obscured; whether the surface of the fabric is leveled or smoothed; and whether the coating itself creates a distinct visible pattern. *See* HQ H314149 (citing HQ 961172 (Aug. 6, 1998); HQ 967884 (Oct. 26, 2005); and HQ W968381 (Nov. 20, 2007)). Additionally, CBP has previously compared uncoated samples to coated samples to determine whether the plastic application alters the surface of the fabric. *See* HQ 957850 (July 5, 1995); HQ 961172 (Aug. 6, 1998); HQ W968191 (Jan. 25, 2008); and HQ H330139 (June 13, 2023). For the purposes of Note 2(a)(1) to Chapter 59, HTSUS, and in deciding if the coating on subject fabrics is visible to the naked eye, we consider each of the above-referenced factors, which are not exclusive and none of which are determinative. *See* HQ W968300 (Feb. 8, 2007).

In your request for reconsideration, you assert that the acrylic coating applied to the reverse side of each woven upholstery fabric is not "visible to the naked eye," and thus classification within heading 5903, HTSUS, is precluded. Specifically, you contend that Style N1829 (Moriarty) and Style D1818 (Glossary) should be classified under heading 5407, HTSUS, as woven fabrics of synthetic filament yarn, and Style J1819 (Fringe) should be classified under heading 5515, HTSUS, as other woven fabrics of synthetic staple fibers. In support of this assertion, you reiterate several of the CBP rulings cited above and their enumerated criteria. You contend that these rulings support the following four points: (1) The acrylic coating does not change the surface character of the fabric; (2) "The fabrics in question do not impart a visible sheen, and the underlying weave is still visible;" (3) "For each of the fabrics in question, when held up to a light source, the light can be seen through the interstices of the weave;" and (4) The fabrics are neither "leveled [n]or smoothed, and the coating itself does not create a distinct visible pattern."

Style N1829 (Moriarty) and Style D1818 (Glossary)

Applying each of the aforementioned criteria and upon our extensive examination of the submitted samples, we find that the samples of Style N1829 (Moriarty) and Style D1818 (Glossary) have a visible layer of plastic coating. Although the coating allows some light to shine through the interstices of the weave, the plastic material is visible at the interstices of the yarns of the fabric. Furthermore, the coating does impart a noticeable clouded matte effect to the fabric. Since the coating clearly blurs the weave, which is especially evident when comparing the uncoated and coated samples, we find that the plastic coating visibly affects the surface character of the fabric. In view of the foregoing, we affirm NY N319028 with respect to the classification of Style N1829 (Moriarty) and Style D1818 (Glossary) under subheading 5903.90.25, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other."

Style J1819 (Fringe)

Upon reviewing the sample of Style J1819 (Fringe), we find that the acrylic coating is not visible to the naked eye since it neither changes the surface character of the fabric nor creates a visible pattern. Moreover, the underlying weave still visible and the fabric is neither leveled nor smoothed because of the plastics application. Lastly, it is difficult to discern the coating when comparing the uncoated sample to the coated sample. As such, we find that Style J1819 (Fringe) is excluded from classification within heading 5903, HTSUS and is properly classified based upon its construction. Style J1819 (Fringe) is properly classified under heading 5515, HTSUS, as a woven fabric made of 72 percent polyester staple fibers. Since the woven fabric is composed wholly of polyester yarns, including staple fibers and filaments, Style J1819 (Fringe) is classified under subheading 5515.12.00, HTSUS, which provides for "Other woven fabrics of synthetic staple fibers: Of polyester staple fibers: Mixed mainly or solely with man-made filaments." In view of the foregoing, we modify NY N319028 with respect to the classification of Style J1819 (Fringe).

HOLDING:

By application of GRIs 1 and 6, Style N1829 (Moriarty) and Style D1818 (Glossary) are classified under heading 5903, and specifically in subheading 5903.90.25, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." The 2024 column one, general rate of duty is 7.5% *ad valorem*.

By application of GRIs 1 and 6, Style J1819 (Fringe) is classified under heading 5515, HTSUS, and specifically in subheading 5515.12.00, HTSUS, which provides for "Other woven fabrics of synthetic staple fibers: Of polyester stable fibers: Mixed mainly or solely with man-made filaments." The 2024 column one, general rate of duty is 12% *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheadings 5903.90.25 and 5515.12.00, HTSUS,

unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.02, HTSUS, in addition to subheadings 5903.90.25 and 5515.12.00, HTSUS, listed above.

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 on the U.S. International Trade Commission's website at https://hts.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N319028, dated April 30, 2021, is hereby MODIFIED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF FOUR RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN HEARING AMPLIFICATION DEVICES

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

ACTION: Notice of proposed revocation of four ruling letters, and proposed revocation of treatment relating to the tariff classification of certain hearing amplification devices.

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) intends to revoke four ruling letters concerning tariff classification of certain hearing amplification devices 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. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before September 14, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

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), this notice advises interested parties that CBP is proposing to revoke four ruling letters pertaining to the tariff classification of certain hearing amplification devices. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N283085, NY N166443, NY N025447, and NY D80822, dated February 28, 2017, May 31, 2011, April 18, 2008, and August 11, 1998, respectively, (Attachments A, B, C, and D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N283085, NY N166443, NY N025447, and NY D80822, CBP classified certain hearing amplification devices in heading 9021, HTSUS, specifically in subheading 9021.40.00, HTSUS, which provides for "Orthopedic appliances, including crutches, surgical belts and

trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Hearing Aids, excluding parts and accessories thereof." CBP has reviewed NY N283085, NY N166443, NY N025447, and NY D80822 and has determined the ruling letters to be in error. It is now CBP's position that these hearing amplification devices are properly classified, in heading 8518, HTSUS, specifically in subheading 8518.30.20, HTSUS, which provides for "Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other." We note that CBP previously proposed to reclassify the subject merchandise under subheading 8518.40.20, HTSUS, which provides for, in pertinent part, "Audio-frequency electric amplifiers," in Volume 55, Number 24, of the *Customs Bulletin*, published on June 23, 2021. Upon review, CBP determined classification in subheading 8518.40.20, HTSUS, would be incorrect, and is publishing a new proposal.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N283085, NY N166443, NY N025447, and NY D80822 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter H313006, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

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

Attachments

ATTACHMENT A

N283085
February 28, 2017
CLA-2–90:OT:RR:NC:2:235
CATEGORY: Classification
TARIFF NO.: 9021.40.0000

MR. DAVID PRATA
GEODIS USA FREIGHT FORWARDING
1 CVS DRIVE
WOONSOCKET, RI 02895

RE: The tariff classification of a "Hearing Amplifier Kit" from China

DEAR MR. PRATA:

In your letter dated January 19, 2017, on behalf of your client, CVS Health, you requested a classification ruling on a "Hearing Amplifier Kit," which you also refer to as "Item number 207741." The provided sample has been reviewed and will be returned as requested. In your letter, you have described the product at issue as a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. This product is intended to be worn as an in-ear sound amplification device.

The Explanatory Notes to the Harmonized Tariff System, although not legally binding, provide guidance in the interpretation of the Harmonized Commodity Description and Coding System at the international level. Explanatory Note X to GRI 3 (b) provides that the term "goods put up in sets for retail sale" means goods that; (a) consist of at least two different articles which are, prima facie, classifiable in different headings; (b) consist of articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. Goods classifiable under GRI 3 (b) are classified as if they consisted of the material or component which gives them their essential character, which may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the article. GRI 3 (c) provides that when goods cannot be classified by reference to GRI 3 (a) or 3 (b), they are to be classified in the heading that occurs last in numerical order among those which equally merit consideration.

The product at issue will be classified as a set for tariff classification purposes in accordance with GRI 3(b), with the essential character imparted by the sound amplifier.

The applicable subheading for the "Hearing Amplifier Kit" will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Hearing Aids, excluding parts and accessories thereof. The general rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Nuccio Fera at nuccio.fera@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT B

N166443

May 31, 2011
CLA-2–90:OT:RR:NC:N4:405
CATEGORY: Classification
TARIFF NO.: 9021.40.0000

JOHN BESSICH
FOLLICK & BESSICH
33 WALT WHITMAN ROAD, SUITE 310
HUNTINGTON STATION, NY 11746

RE: The tariff classification of the RCA Symphonix Personal Sound Amplifier from China

DEAR MR. BESSICH:

In your letter dated May 10, 2011, on behalf of Audiovox Electronics Co., you requested a tariff classification ruling. A sample was provided.

In your submission you state:

"The RCA Personal Sound Amplifier, further identified as the RPSA10, is made in China and imported by Audiovox. The RPSA10 includes a high-quality, non-resonant plastic earpiece, gray plastic charging case with transparent blue plastic top, a plug-in AC power adapter with cable, plastic left and right ear tubes, and plastic medium and large ear domes. The RPSA10 is packaged for retail sale in a clear plastic container with a printed paper user guide, use and care pamphlet, accessories pamphlet, and warranty registration card. The main component of the RPSA10, the earpiece, incorporates a 15-hour rechargeable NiMH battery. The user recharges the earpiece battery by placing it in the charging case, inserting the AC adapter cable into the case, and plugging the adapter plug wire into a standard electrical outlet. The charging case and top also serve together as a storage compartment for the earpiece.

"The earpiece includes an on/off switch, volume button to switch between three sound settings, a microphone to pick up sounds in the user's immediate surroundings, a tube to carry the audio from the earpiece directly into the ear, a tube connector which attaches the tube to the earpiece, and the dome, which fits securely in the ear, similar to an earbud. Because the earpiece fits over the ear, with the thin sound tube inserted into either ear with the dome, the user may continue to use a cellphone or Smartphone. Moreover, the earpiece is thin and lightweight and has been designed not to interfere with eyeglasses that may be worn by the user.

"Using high-definition digital sound processing, the RPSA10 enables the user to hear better in certain situations. It provides speech frequency amplification and active layered noise reduction."

You also state:

"The RPSA10 does not require a prescription or a hearing test for purchase and is not sold or intended for use as a hearing aid for FDA (Food & Drug Administration) purposes."

Harmonized System Explanatory Note (IV) to Heading 9021, entitled HEARING AIDS, states:

"These are generally electrical appliances with a circuit containing one or more microphones (with or without amplifier), a receiver and a battery. The receiver may be worn internally or behind the ear, or it may be designed to be

held in the hand against the ear. This group is restricted to appliances for overcoming deafness; it therefore excludes articles such as headphones, amplifiers and the like used in conference rooms or by telephonists to improve the audibility of speech."

Although these imports are not optimized for the individual after extensive (and expensive) hearing tests by an audiologist, which is the most effective method of improving an individual's hearing, they should significantly improve the user's hearing especially when the hearing loss is not severe. The HS EN specifically includes a device held against the ear, which is also not the most effective method.

The Proper Use and Care pamphlet in the package indicates that the tube that goes inside the ear canal that is designed for the right ear can be replaced by one for the left ear and that "with proper care, you RCA Symphonix earpiece should provide years of use." This is not indicative of an item to improve hearing for those with normal hearing in both ears, but dealing with conferences, traffic noise, etc.

Whether or not it is regulated by the FDA as a Hearing Aid for their purposes, that is not controlling regarding its classification. As stated in Headquarters Ruling Letter 946267, dated February 2, 2001: "However, 'It is well established that statutes, regulations and administrative interpretations relating to "other than tariff purposes" are not determinative of Customs classification disputes' Amersham Corp. v. United States, 5 CIT 49, 56 (1983). Articles are classified by the FDA to protect public safety, not as guidance to Customs classification. HQ 085064 dated August 24, 1990. See also, HQ 962181 dated January 13, 1999."

We agree that the applicable subheading for the RCA Symphonix Personal Sound Amplifier will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Hearing Aids, excluding parts and accessories thereof. The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist J. Sheridan at (646) 733–3012.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT C

N025447

April 18, 2008
CLA-2–90:RR:NC:N1:105
CATEGORY: Classification
TARIFF NO.: 9021.40.0000

MS. ROXANNE PEIFFER
NORMAN G. JENSEN INC.
3050 METRO DRIVE, STE 300
MINNEAPOLIS. MN 55425

RE: The tariff classification of PockeTalkers from China

DEAR MS. PEIFFER:

In your letter dated March 24, 2008, on behalf of Williams Sound Corporation, you requested a tariff classification ruling. Three samples were provided.

You describe the samples as follows:

A) Pocketalker Ultra Duo pack: PKT D1 EH - this is a kit that is packaged for retail sale upon import in the same condition the enclosed sample is. It contains the Pocketalker amplifier, 2 AAA batteries, microphone, TV Listening extension cord, Lanyard, instruction manual, Mini ear bud, and a folding headphone.

B) Pocketalker: PKT D1 Nur and PKT C1 Nur - these are not packaged for retail sale upon import. After import, Williams Sound will package them with various accessories; typically they will include an earphone or headphone, a microphone, batteries, and a cable.

The packaging for the Pocketalker Ultra kit states, in large print, "Improve Your Hearing, Improve Your Life."

From the booklet in the retail box, the personal amplifier would typically be clipped on the person (using the built-in clip) or left on a restaurant table, etc, to receive sound waves and to convert them to amplified electrical signals which are sent by wire to headphones. Its output can also power a telecoil to send that sound information to an in-the-ear hearing aid with a built in telephone coil via magnetic induction.

While it differs from item you cite in NY Ruling letter D80822–105, 8–11–98, since it is not an in-the-ear device, it appears from your sample and your advertising literature that this device will also be used principally as a low cost way to compensate for hearing loss in people with moderate deafness and not to enhance the hearing of others to hear faint sounds.

The PKT D1 NUR is the Pocketalker person amplifier, i.e., the main element in the kit, which receives sounds from a small microphone which plugs into its top surface and emits corresponding amplified electrical outputs.

The PKT C1 NUR is labeled as the Pocketalker Pro. You did not provide any description of it. However, www.marilynelectronics.com/Pocketalker-Pro-w-EAR013-Earphone-p/ws-pktpro1-e13.htm describes a kit that uses it as its main element as:

Pocketalker Pro w/EAR013 Earphone by Williams Sound.

The Pocketalker Pro is an easy to use, portable amplifier that can improve your ability to communicate in difficult listening situations. It helps you listen and function more effectively.

Quality Components - the Pocketalker Pro includes a sensitive microphone that can be placed close to the sound source to minimize background noise, a compact amplifier with volume control, and a choice of three earphone/ headphone options to deliver full range, high quality sound. Two AA batteries provide up to 100 hours of use, while rechargeable batteries and an AC adapter/charger are also available. A microphone extension cord for TV listening, a belt clip case, and handy carry cases are standard components as well. The optional Telelink attaches to the handset of most telephones and amplifies calls to a clear and comfortable listening level. Foe hearing aid wearers, neck loop and silhouette telecoil couplers are available for use with telecoil equipped hearing aids.

The Pocketalker Pro can be used for one on one conversations, indoor and outdoor activities, listening in a car, TV or radio listening, and restaurants or small groups.

The PockeTalker Pro is thus quite similar to the PockeTalker Ultra.

We agree that the applicable subheading for the three items will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Hearing aids, excluding parts and accessories thereof. The rate of duty will be Free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist J. Sheridan at 646–733–3012.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT D

NY D80822
August 11, 1998
CLA-2–90:RR:NC:1:105 D80822
CATEGORY: Classification
TARIFF NO.: 9021.40.0000

MR. JAMES SHAW
PANASONIC LOGISTICS COMPANY OF AMERICA
2 PANASONIC WAY
SECAUCUS, NJ 07094

RE: The tariff classification of an Assistive Listening Device from Japan

DEAR MR. SHAW:

In your letter dated August 3, 1998, you requested a tariff classification ruling.

Model# WH-770 is an assistive listening device which consists of a small microphone and amplifier with a volume control that rests in the ear. The unit is designed to enhance listening and hearing in conversation or in group activities. You stated in your letter that "the unit is not uniquely fitted to the ear as most hearing aids are. It does not require a special prescription from an audiologist or hearing aid specialist. It is sold at retail in pharmacies or via direct advertising."

From the fact that it is worn in the ear canal and from your advertising literature, it appears that these devices will be used principally as a low cost way to compensate for hearing loss in people with moderate deafness and not to enhance the hearing of others to hear faint sounds.

The applicable subheading for the assistive listening device will be 9021.40.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for hearing aids, excluding parts and accessories thereof. The rate of duty will be 0.8 percent ad valorem.

The assistive listening device is eligible for free entry under the provision for articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons, other than the blind, in subheading 9817.00.96, HTS. All applicable entry requirements must be met including the filing of form ITA-362P.

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

A copy of this ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding this ruling, contact National Import Specialist James Sheridan at (212) 466–5669.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

ATTACHMENT E

HQ H313006
OT:RR:CTF:EMAIN HQ H313006 JRG
CATEGORY: Classification
TARIFF NO.: 8518.30.20

MR. DAVID PRATA
GEODIS USA FREIGHT FORWARDING
1 CVS DRIVE
WOONSOCKET, RI 02895

Re: Revocation of New York Ruling Letter (NY) N283085, NY N166443, NY N025447, and NY D80822

DEAR MR. PRATA:

This is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York Ruling Letter (NY) N283085, dated February 28, 2017, regarding the classification of a "Hearing Amplifier Kit." Additionally, we have also reconsidered NY N166443[1], N025447[2], and D80822[3], all of which deal with the classification of certain hearing amplification devices.

FACTS:

In NY N283085, your product is briefly described as follows:

...a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. This product is intended to be worn as an in-ear sound amplification device.

In N166443, the Personal Sound Amplifier, is described as an earpiece with an on/off switch, volume button to switch between three sound settings, a microphone to pick up sounds in the user's immediate surroundings, a tube to carry the audio from the earpiece directly into the ear, a tube connector which attaches the tube to the earpiece, and the dome, which fits securely in the ear, similar to an earbud. It is noted that the Personal Sound Amplifier does not require a prescription or a hearing test for purchase and is not sold or intended for use as a hearing aid for FDA (Food & Drug Administration) purposes. The PockeTalkers classified in N025447 include a variety of models. In essence, they are described as personal sound amplifiers that consist of an amplifier, batteries, microphone, ear bud, and folding headphones. Finally, the Assistive Listening Device in NY D80822 is described as a device that consists of a small microphone and amplifier with a volume control that rests in the ear. The unit is designed to enhance listening and hearing in conversation or in group activities. It does not require a special prescription from an audiologist or hearing aid specialist. It is sold at retail in pharmacies or via direct advertising.

The above referenced rulings describe the subject merchandise as "amplifying" sound to the extent that all of the subject articles are indeed designed to increase the volume of sounds for the user. However, we understand that

[1] N166443, dated May 31, 2011, classified a Personal Sound Amplifier under subheading 9021.40.00, HTSUS.

[2] N025447, dated April 18, 2008, classified products referred to as "PockeTalkers" under subheading 9021.40.00, HTSUS.

[3] D80822, dated August 11, 1998, classified an Assistive Listening Device under subheading 9021.40.00, HTSUS.

in their condition as imported, the subject products are in the form of a headphone or earphone that feature, in addition to an "amplifier", feature at least a microphone.

ISSUE:

Whether the hearing amplification devices are classified as other headphones and earphones of heading 8518, HTSUS, or hearing aids of heading 9021, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

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

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are:

8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:
8518.30	Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers:
8518.30.20	Other
	* * *
9021	Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof:
9021.40	Hearing aids, excluding parts and accessories thereof

Note 1(m) to Section XVI states that the Section does not cover articles of Chapter 90. As such, we must first determine whether the hearing amplifiers at issue are goods of Chapter 90. Additionally, the EN to Chapter 85 states that the heading excludes hearing aids of heading 9021, HTSUS.

Heading 9021, HTSUS, provides for, *inter alia*, hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. The term "hearing aids" is not defined in the legal texts of the HTSUS. A tariff term that is not defined in the HTSUS is construed in accordance with its common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982). Further, the EN to heading 9021, HTSUS, provides guidance. Part IV of the EN, titled "Hearing Aids" gives a brief technical description of the products, i.e., that they are generally electrical appliances with a circuit containing one or more microphones (with or without amplifier), a receiver and a battery. The receiver may be worn internally or behind the ear, or it may be designed to be held in the hand against the ear. Additionally, the EN states that hearing aids of heading 9021, HTSUS, are *restricted* to appliances for *overcoming deafness* (emphasis added). It goes on to explain that certain devices, such as headphones, amplifiers and the like used in conference rooms or by telephonists to improve the audibility of speech are excluded from heading 9021, HTSUS. This is not an exhaustive list of excluded devices.

The Online Webster Dictionary defines a "defect" as an imperfection or abnormality that impairs quality, function, or utility.[4] It defines a "disability" as a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions.[5] Finally, it defines "deaf" as "lacking or deficient in the sense of hearing."[6] "'Deaf' people mostly have profound hearing loss, which implies very little or no hearing."[7] "'Deaf' usually refers to a hearing loss so severe that there is very little or no functional hearing."[8] The Cambridge Dictionary defines "deafness" as "the quality of being unable to hear, either completely or partly."[9]

The degree of hearing loss can range from mild to profound:[10]

(1) Mild Hearing Loss
A person with a mild hearing loss may hear some speech sounds but soft sounds are hard to hear.

(2) Moderate Hearing Loss
A person with a moderate hearing loss may hear almost no speech when another person is talking at a normal level.

---

[4] *https://www.merriam-webster.com/dictionary/defect* (last visited July 25, 2024).

[5] *https://www.merriam-webster.com/dictionary/disability* (last visited July 25, 2024).

[6] *https://www.merriam-webster.com/dictionary/deafness* (last visited July 25, 2024).

[7] *https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss* (last visited July 25, 2024). *Also* see a table showing a common way to classify hearing loss at *https://www.asha.org/public/hearing/Degree-of-Hearing-Loss/* (last visited July 25, 2024).

[8] *https://www.washington.edu/doit/how-are-terms-deaf-deafened-hard-hearing-and-hearing-impaired-typically-used* (last visited July 25, 2024).

[9] *https://dictionary.cambridge.org/us/dictionary/english/deafness* (last visited July 25, 2024).

[10] *https://www.cdc.gov/ncbddd/hearingloss/types.html* (last visited July 25, 2024).

(3) Severe Hearing Loss
A person with severe hearing loss will hear no speech when a person is talking at a normal level and only some loud sounds.
(4) Profound Hearing Loss
A person with a profound hearing loss will not hear any speech and only very loud sounds.

An online article explains what a hearing aid is and how hearing aids help with hearing loss.[11] It states:

> Hearing aids are small electronic devices that can be highly customized to address different types of hearing loss. All digital hearing aids contain at least one microphone to pick up sound, a computer chip that amplifies and processes sound, a speaker that sends the signal to your ear and a battery for power. More sophisticated models provide additional features, such as direct connection to a smartphone or neural networks.
>
> * * *
>
> A hearing aid amplifies the sounds going into the ear. They are most often prescribed for people who have a type of hearing loss known as "sensorineural," meaning that some of the tiny hair cells of the inner ear are damaged. The surviving healthy hair cells pick up the sound delivered by the hearing aid and send them as neural signals to the brain via the auditory nerve.
>
> For people with mild-to-moderate hearing loss, standard hearing aids work best. "Power" models are often used for people who have severe-to-profound hearing loss as the batteries require more power.

Based on online research, a hearing aid is a doctor-prescribed device based on the patient's hearing test result and usually custom-programmed by a hearing care professional to suit the patient's specific hearing loss and listening needs.

Hearing aids are a kind of assistive listening devices,[12] but not all assistive listening devices are hearing aids. "Hearing aids are the best all-around solution for people with hearing loss, but other assistive listening devices (ALDs) can help you navigate specific communication demands."[13] "Some of these devices [ALDs] are made to work specifically with certain hearing aids while others are stand-alone and can be helpful—even if you don't yet wear hearing aids ... Assistive listening devices include amplified telephones, hearing aid compatible phones and smartphones, television compatible devices, FM systems for public settings, and alerting devices.[14] " Accordingly, heading 9021, HTSUS, as it relates to the provision for "hearing aids", does not cover all assistive listening devices.

---

[11] *https://www.healthyhearing.com/help/hearing-aids* (last visited July 25, 2024).

[12] *https://www.healthyhearing.com/report/47717-Digital-hearing-aid-history* (last visited July 25, 2024). *https://www.hearingaidmuseum.com/gallery/General_Info/GenInfoMisc/info/generalinfo-assistivedevices.htm* (last visited July 25, 2024).

[13] *https://www.healthyhearing.com/help/assistive-listening-devices/fm-systems* (last visited July 25, 2024).

[14] *https://www.healthyhearing.com/help/assistive-listening-devices* (last visited July 25, 2024). *See also https://www.hearingaidmuseum.com/gallery/Miscellaneous/Assistive%20Devices/index-asstdev.htm* (last visited July 25, 2024).

Based on the Hearing Aid Museum website, the personal sound amplifier products (PSAPs) are also considered assistive listening devices.[15] However, personal sound amplifier products and hearing aids are two different product categories. We understand the three principal differences between PSAPs and hearing aids as follows:[16]

> Difference #1: Class of product
> PSAPs are basic sound amplifiers for those who do not have hearing loss. The FDA does not regulate them and says they are designed to "increase environmental sounds for non-hearing impaired consumers." On the other hand, hearing aids are FDA-regulated medical devices that are intended to compensate for hearing loss and be customized to your needs.
>
> Difference #2: Amplification style
> Most PSAPs amplify all sounds within a given radius, even those you don't want to hear. This can actually damage (instead of help) your hearing. Modern hearing aids, on the other hand, use broadband technology and filters to selectively amplify the sounds you need to hear, while reducing background noise and feedback. This can make a huge difference – for example, in a noisy restaurant where amplifying all sounds equally (a companion's speech plus background noise) would make it virtually impossible to hear a conversation.
>
> Difference #3: Fit and features
> Most PSAPs only consist of a microphone, amplifier and receiver (miniloudspeaker). In addition, they are only available in standard settings and are typically one size fits all. Hearing aids, however, are custom-programmed by a hearing care professional to suit your specific hearing loss and listening needs. Hearing aids are available with advanced features such as directional microphones, tinnitus control and streaming capabilities. They can also be custom-molded for a secure and ultra-comfortable fit.

This is supported by additional internet research that differentiates hearing aids from other sound amplification devices.[17] In sum, our research has indicated that unlike sound amplification devices, such as PSAPs, hearing aids are sophisticated, highly customized devices tailored to a user's specific hearing deficits. While PSAPs amplify all sounds, hearing aids are programmed to amplify only the sounds a user cannot hear well. Because PSAPs amplify all sounds, they can potentially cause more harm than good to the users and are not recommended as a replacement for hearing aids.

While these personal sound amplifiers may help people hear things that are at low volume or at a distance, the Food and Drug Administration (FDA)

---

[15] *https://www.hearingaidmuseum.com/gallery/Miscellaneous/Assistive%20Devices/Sonic%20Technology/index-sonictechnology.htm* (last visited July 25, 2024).

[16] *https://www.miracle-ear.com/hearing-aid-technology/psap-hearing-aids-differences* (last visited July 25, 2024).

[17] *See*, *e.g.*, *https://www.connecthearing.com/blog/hearing-loss/what-the-new-otc-hearing-aid-law-means-for-you/* ; *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/regulatory-requirements-hearing-aid-devices-and-personal-sound-amplification-products-draft-guidance* ; and *https://www.signia-hearing.com/blog/the-difference-between-hearing-amplifiers-hearing-aids/*; *https://www.fda.gov/consumers/consumer-updates/hearing-aids-and-personal-sound-amplification-products-what-know* (all last visited July 25, 2024).

wants to ensure that consumers don't mistake them—or use them as substitutes—for approved hearing aids.

Hearing aids and PSAPS can both improve one's ability to hear sound; they are both wearable, and some of their technology and function is similar. However, the products are different in that only hearing aids are intended to make up for impaired hearing. PSAPs are not intended to make up for impaired hearing. Instead, they are intended for non-hearing-impaired consumers to amplify sounds in the environment for any number of reasons.

Frequency-specific hearing loss is not something that can be mitigated through the amplification of all sound and using an amplifier where a hearing aid should be used can be dangerous. Personal sound amplifying products are designed to boost environmental hearing for people without hearing loss. Some people might use PSAPs as over-the-counter hearing aids to cut costs and avoid spending money on a certified hearing aid, but audiologists and doctors warn against the practice. Hearing aids perform a complex purpose that depends on the wearer, whereas amplifiers boost all sound.

Hearing aids are usually professionally fitted and fine-tuned to the wearer and help mitigate hearing loss by boosting certain frequencies. Amplifiers simply make things louder, regardless of the frequency or volume. While hearing aids are tailored to hard of hearing people, PSAPs are meant to be used by people with a full range of hearing.

We note that the Food and Drug Administration regulates hearing aids in the United States.[18] Under the FDA Reauthorization Act of 2017, Section 709, Congress outlined certain requirements and set forth a process to establish a separate category of over-the-counter (OTC) hearing aids and the requirements that apply to them. While the FDA may impose certain requirements on hearing aids as medical or OTC devices, these requirements are not controlling regarding classification under the HTSUS. "It is well established that statutes, regulations and administrative interpretations relating to 'other than tariff purposes' are not determinative of Customs classification disputes." *Amersham Corp. v. United States*, 5 CIT 49, 56 (1983). "Articles are classified by the FDA to protect public safety, not as guidance to Customs classification." HQ 085064 (August 24, 1990). *See also* HQ 962181 (January 13, 1999).

In this case, based on guidance from the EN to heading 9021, HTSUS, the commonly understood definitions of "defect", "disability", "deafness" and "hearing aids", and our own research on the topic, we conclude that the instant devices are not hearing aids of heading 9021, HTSUS. As such, they are not excluded from classification under Section XVI by operation of Note 1(m) to Section XVI.

Heading 8518, HTSUS, provides for headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers. These goods are discussed in Part C of the EN to heading 8518, HTSUS:

> Headphones and earphones are electroacoustic receivers used to produce low-intensity sound signals. Like loudspeakers, described above, they transform an electrical effect into an acoustic effect; the means used are the same in both cases, the only difference being in the powers involved.
>
> * * *

[18] *See* 21 CFR 801.420–21.

> The heading also covers sets consisting of a microphone and one or more loudspeakers which may be fitted together. A headphone or earphone may be included with the set for private listening. These sets are designed to be plugged into or connected to a central control system which includes an amplifier. These units may be used by participants at meetings or conferences.

The product at issue in NY N283085 is a retail-ready kit, comprised of a sound amplifier, three plastic earplugs in different sizes, a spare battery, and a plastic storage case. In this case, the earphones provide the essential character of the kit because, although the merchandise amplifies sound, they transmit the amplified sound to the user via the earphones. As such, the correct classification for the hearing amplifier kit is heading 8518, HTSUS, and more specifically, subheading 8518.30.20, HTSUS, by application of GRIs 1, 3(b), and 6. Classification of the subject merchandise under heading 8518, is also consistent with prior CBP rulings where sound amplifying headphones were classified under subheading 8518.30.20, HTSUS. *See* NY N305242 (August 2, 2019); NY N115718 (August 19, 2010). The products at issue in NY N166443, NY N025447, and NY D80822 are not components of retail sets and are therefore classified under the same provision by application of GRIs 1 and 6.

HOLDING:

By application of GRIs 1, 3 (b) and 6, the hearing amplification kit described in NY N283085 is classified under heading 8518, HTSUS, subheading 8518.30.20, HTSUS, which provides for "Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other." The devices described in NY N166443, NY N025447, and NY D80822 are classified under the same provision by application of GRIs 1 and 6. The column one, general rate of duty for merchandise of this subheading is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at *https://hts.usitc.gov/current*.

EFFECT ON OTHER RULINGS:

NY N283085, N166443, N025447, and D80822, dated February 28, 2017, May 31, 2011, April 18, 2008, and August 11, 1998, respectively, are hereby REVOKED.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: John Bessich
Follick & Bessich
33 Walt Whitman Road, Suite 310
Huntington Station, NY 11746

Ms. Roxanne Peiffer
Norman G. Jensen Inc.
3050 Metro Drive, Ste 300
Minneapolis. MN 55425

Mr. James Shaw
Panasonic Logistics Company of America
2 Panasonic Way
Secaucus, NJ 07094

U.S. Court of International Trade

Slip Op. 24–78

SEKO CUSTOMS BROKERAGE, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 24–00097
PUBLIC VERSION

[Denying Seko Customs Brokerage, Inc.'s application for temporary restraining order and motion for preliminary injunction.]

Dated: July 15, 2024

Eric R. Rock, *Serhiy Kiyasov*, and *Austin J. Eighan*, Rock Trade Law LLC, of Chicago, IL, for plaintiff Seko Customs Brokerage, Inc.

Edward F. Kenny, Senior Trial Counsel, and *Nico Gurian*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and Justin R. Miller, Attorney-In-Charge. Of counsel on the brief were *Alexandra Khrebtukova*, Office of Chief Counsel, International Trade Litigation, *Jennifer L. Petelle*, Office of Chief Counsel, and *Zachary S. Simmons*, U.S. Customs and Border Protection.

OPINION AND ORDER

Kelly, Judge:

Before the Court is Plaintiff Seko Customs Brokerage, Inc.'s ("Seko") application for temporary restraining order ("TRO") and motion for preliminary injunction (collectively "the motion" or "Seko's motion"). *See generally* [Pl. Mot.] June 4, 2024, ECF No. 21. Seko's motion requests that this Court: (1) restrain U.S. Customs and Border Protection ("CBP") from requiring that Seko remedy its alleged violations of Customs-Trade Partnership Against Terrorism ("CTPAT") and the Automated Commercial Environment Entry Type 86 Test ("T86") (collectively "the programs") without providing facts of the underlying violations that led to Seko's suspension from the programs; (2) enjoin CBP from requiring Seko to take remedial action concerning the alleged violations of the programs without access to the facts of the underlying violations; (3) require CBP to provide Seko with a meaningful and reasonable timeline to address the specific facts of the underlying program violations; and (4) restrain CBP from making information concerning the violations of and suspension from the programs "available to anyone other than" Seko and CBP. Pl. Mot. at 1. Since filing the motion, Seko has modified its request for injunctive relief, now seeking a mandatory injunction that CBP uncondi-

tionally reinstate Seko's privileges unless and until CBP proves its case. Reply Supp'n [Pl. Mot.] at 17–18, July 10, 2024, ECF No. 40 ("Pl. Reply"). Defendant opposes Seko's request. *See* Def's Mot. Dismiss & Opp'n [Pl. Mot.] at 31–38, July 1, 2024, ECF No. 35 ("Def. Resp."). For the following reasons, Seko's motion is denied.

BACKGROUND

Seko is a privately held corporation based in Illinois that provides customs brokerage services, including full customs clearance, entry services, and express e-commerce shipping solutions to e-commerce clients. Compl. at ¶ 22–23, June 4, 2024, ECF No. 19. Seko participates in the CTPAT and T86 programs, offered by CBP to facilitate the tax and duty-free de minimis entries of merchandise under $800, pursuant to Section 321(a)(2)(C) of the Tariff Act of 1930, as amended 19 U.S.C. § 1321.[1] *See id.* at ¶¶ 28, 32; Def.'s Resp. [The Court's] Questions at 1–3, June 4, 2024, ECF No. 20.

Congress established CTPAT, through passage of the Security and Accountability for Every Port Act of 2006, Pub. L. Mo. 109–347, 120 Stat. 1884 (codified at 6 U.S.C. § 961 et seq.), as a voluntary public-private partnership intended to strengthen national security and facilitate the movement of secure cargo throughout the international supply chain. *See* 6 U.S.C. § 961(a). Applications for CTPAT participation is available to "[i]mporters, customs brokers, forwarders, air, sea, land carriers, contract logistics providers, and other entities in the international supply chain and intermodal transportation system." 6 U.S.C. § 962. The statute prescribes the minimum requirements for participation in the program, including that participants implement and maintain security measures meeting the criteria established by CBP. 6 U.S.C. § 963(2)–(3). Moreover, Section 967 delineates the consequences for lack of compliance with CBP's requirements and establishes the right to appeal such consequences. *See* 6 U.S.C. § 967.

The T86 program is a pilot program,[2] established by CBP in 2019 seeking to measure the effectiveness of the Automated Commercial Environment ("ACE") to streamline entry of de minimis entries. *See Test Concerning Entry of Sect. 321 Low-Value Shipments Through Automated Commercial Environment (ACE)*, 84 Fed. Reg. 40,079,

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

[2] CBP is permitted to conduct test programs and procedures to "evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels or merchandise." 19 C.F.R. § 101.9(a). CBP may "impose requirements different from those specified in the CBP regulations," provided that the differences do not affect "the collection of revenue, public health, safety, or law enforcement." *Id.*

40,080–82 (Dept' Homeland Sec. Aug. 13, 2019) ("*T86 Announcement*"). The test is open to all "owners, purchasers, consignees, and designated customs brokers of Section 321 low-valued shipments," as well as "all modes of cargo transportation." *Id.* at 40,081. As a condition of participation in the T86 program, participants agree to exercise "reasonable care" in executing their obligations under the test, including adherence to certain reporting requirements outlined by CBP for entries.[3] *Id.* at 40,081–82.

Under both programs, failure to adhere to CBP's requirements may result in the assessment of penalties, sanctions, and damages that CBP deems appropriate, including the possibility of suspension or termination. *See T86 Announcement*, 84 Fed. Reg. at 40,082 (notifying the public of the T86 test and possible repercussions for misconduct); *Test Concerning Entry of Section 321 Low-Value Shipments Through the Automated Commercial Environment (ACE) (Also Known as Entry Type 86); Republication With Modifications*, 89 Fed. Reg. 2,630, 2,634 (Dept' Homeland Sec. Jan. 16, 2024) ("*T86 Modification*") (clarifying that CBP may suspend a T86 participant if it is determined that the participant poses an "unacceptable compliance risk"); 6 U.S.C. § 961(a) (establishing CTPAT program); 6 U.S.C. § 963 (outlining minimum requirements for CTPAT participation); 6 U.S.C. § 967 (explicating consequences for lack of compliance with the CTPAT program as well as prescribing the right to appeal suspension from the program).

On May 17, 2024, CBP suspended Seko from participation in the CTPAT program for 90 days, which was followed by a 90-day suspension from the T86 program on May 20, 2024. *See* Exh. A: Letter CBP to Seko Re CTPAT Suspension at 1–2, May 17, 2024, ECF No. 19 ("CTPAT Suspension"); Exh. G: Letter CBP to Seko Re T86 Suspension at 1–2, May 20, 2024, ECF No. 19 ("T86 Suspension"). CBP explained that the suspensions stemmed from inconsistent data in T86 entry filings and corresponding manifests submitted by Seko, posing a risk to "revenue and admissibility." CTPAT Suspension at 1; T86 Suspension at 1. Thus, CBP determined that Seko failed to meet the minimum-security requirements for participation in both programs. CTPAT Suspension at 1; T86 Suspension at 1.

---

[3] CBP requires T86 participants to submit the following data elements on entry of de minimis imports:

> (1) The bill of lading or the air waybill number; (2) Entry number; (3) Planned port of entry; (4) Shipper name, address, and country; (5) Consignee name and address; (6) Country of origin; (7) Quantity; (8) Fair retail value in the country of shipment; (9) 10-digit HTSUS number; (10) IOR number of the owner, purchaser, or broker when designated by a consignee conditional).

T86 Announcement, 84 Fed. Reg. 40,082.

After receipt of Seko's request that CBP reconsider the suspensions, *see* Exh. B: Letter Seko to CBP Re [CTPAT Suspension & T86 Suspension] at 1–5, May 23, 2024, ECF No. 19, CBP granted Seko a 90-day conditional reinstatement into both programs, effective May 31, 2024. *See* Exh. I: Letter CBP to Seko [Re CTPAT & T86 Reinstatement] at 1–2, May 31, 2024, ECF No. 19 ("CTPAT & T86 Reinstatement").[4]

On June 1, 2024, Seko filed its complaint, asserting jurisdiction under 28 U.S.C. § 1581(i),[5] and requested injunctive relief against Defendant. *See generally* Pub. Compl., June 1, 2024, ECF No. 2; Pub. Mot. Prelim. Injunct. & [TRO], June 1, 2024, ECF No. 8. On June 3, 2024, the Court held a virtual conference requesting certain information from the parties. *See* Teams Conf., June 3, 2024, ECF No. 12. On June 4, 2024, the parties applied for a judicial protective order, which was granted by the Court. *See* Order, June 4, 2024, ECF No. 18. That same day, after entry of the judicial protective order, Seko filed its confidential complaint and confidential motion for a preliminary injunction & TRO. *See generally* Compl.; Pl. Mot.

On June 7, 2024, the Court held a telephone status conference with the parties. *See* Telephone Conf., June 7, 2024, ECF No. 27. That same day, Seko moved the Court to expedite briefing on the instant motion, but the Court found that the circumstances did not justify an accelerated briefing schedule. *See generally* Pl. Mot. Exped., June 7, 2024, ECF No. 29; Order, June 12, 2024, ECF No. 32. On June 11, 2024, Defendant provided additional detailed information to Seko concerning its initial suspension from the programs. Def. Resp. Pl. Mot. Exped. at Exh. A, June 11, 2024, ECF No. 30 ("Add. Info."). On July 1, 2024, Defendant filed its response in opposition to Seko's motion, consolidated with its motion to dismiss Seko's action. *See generally* Def. Resp. After being given leave to file a reply to Defendant's response by the Court, Seko filed its reply brief on July 10, 2024. *See generally* Pl. Reply. On July 12, 2024, the Court held an evidentiary hearing on Seko's request.[6] Oral. Arg., July 12, 2024, ECF No. 43.

---

[4] To obtain unconditional reinstatement, CBP instructed Seko to develop, update, and implement an action plan in 30 days demonstrating that, inter alia, Seko (i) has taken "sufficient remedial actions" to ensure that accuracy of its T86 submissions; and (ii) show compliance with program requirements as well as CBP regulations. CTPAT & T86 Reinstatement at 1.

[5] Defendant has challenged the jurisdictional grounds on which Seko's suit rests, and the Court will address that challenge when ruling on Defendant's motion to dismiss. *See* Def. Resp. at 17–30. The Court only addresses Seko's motion at this time, as Defendant's motion to dismiss is not yet fully briefed.

[6] Despite the opportunity to call witnesses at the July 12, 2024, hearing, neither party opted to do so. *Compare* Order at 1, July 8, 2024, ECF No. 39, *with* Oral Arg.

The parties have also engaged in extensive dialogue throughout the litigation. *See, e.g.,* Letter Seko to CBP Re [Req. Unconditional Reinstatement into Type 86 & CTPAT Programs] at 2–3, June 28, 2024, ECF No. 37 ("Seko June 28 Letter") (detailing timeline of communications between the parties from May 17, 2024, to June 25, 2024). After receiving the additional violation details from CBP on June 11, Seko indicated its desire to stay proceedings in this Court on June 13 and 21; the offer was rejected by CBP on June 25. *Id.* On July 3, 2024, CBP notified Seko that it was extending the deadline for submission of Seko's remedial action plan to July 31, 2024. *See* CBP Letter to Seko Re [Seko June 28 Letter] at 2, July 3, 2024, ECF No. 42 ("CBP Ext.").

JURISDICTION AND STANDARD OF REVIEW

The Court is authorized to issue injunctive relief in the form of a preliminary injunction or temporary restraining order pursuant to United States Court of International Trade Rule 65. *See Harmoni Int'l Spice, Inc. v. United States*, 211 F. Supp. 3d 1298, 1306 (Ct. Int'l Trade 2017). Injunctive relief is "an extraordinary remedy never awarded as of right." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A movant is entitled to injunctive relief if the following conditions are satisfied: "(1) likelihood of success on the merits, (2) irreparable harm absent immediate relief, (3) the balance of interests weighing in favor of relief, and (4) that the injunction serves the public interest." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter*, 555 U.S. at 20).

DISCUSSION

Seko requests that the Court grant its motion for injunctive relief because (1) it is likely to suffer imminent, irreparable harm in the absence of preliminary relief; (2) it is likely to succeed on the merits; (3) the balance of equities tips in Seko's favor; and (4) injunctive relief is in the public interest. Pl. Mot. at 7; *id.* at 8–17; Pl. Reply at 2–19. Defendant responds that Seko is not entitled to injunctive relief because all factors weigh against granting Seko's request. Def. Resp. at 31–38. For the following reasons, Seko's motion is denied.

Although courts weigh all the articulated factors in determining whether to grant injunctive relief, the requirement that the movant demonstrate some form of irreparable harm is indispensable. *See Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction" (emphasis omitted)); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 393 F. Supp. 3d 1271, 1276 (Ct. Int'l Trade

2019) ("*COALITION*") ("Critically, irreparable harm may not be speculative or determined by surmise" (internal citations omitted)); *Bill Barrett Corp. v. U.S. Dep't of Interior*, 601 F. Supp. 2d 331, 334–35 (D.D.C. 2009) (citing *Winter*, 555 U.S. at 22) ("While these factors interrelate on a sliding scale, the movant must, at a minimum, demonstrate that irreparable injury is likely in the absence of an injunction" (internal citations, quotations, and emphasis omitted)). Thus, failure to show irreparable harm alone is sufficient to deny injunctive relief. *See, e.g.*, *Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1348 (Fed. Cir. 2019) (affirming the lower court's denial of injunctive relief to movant on sole grounds that it could not show irreparable harm); *Matsushita Elec. Indus. Co. v. United States*, 823 F.2d 505, 509–10 (Fed. Cir. 1987) (reversing grant of injunctive relief upon failure to show irreparable harm without consideration of other factors).

Irreparable harm is a near certain and serious harm that cannot be undone. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). As the Court of Appeals explained:

> Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.

Id. (internal citations and emphasis omitted). The moving party assumes the "extremely heavy burden" of putting forth more than merely speculative evidence to demonstrate the level of harm requiring injunctive relief. *Grupo Simec S.A.B. de C.V. v. United States*, No. 22-CV-00202, 2023 WL 2202813, at *5 (Ct. Int'l Trade Feb. 24, 2023). Typically, loss of income alone is not sufficient to constitute irreparable harm, particularly when there is the possibility of compensatory or corrective relief in the future. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). However, other harms such as price erosion, damage to customer relationships or reputation, and loss of business opportunities can be considered irreparable harm. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). To show irreparable harm under these standards, the movant must demonstrate a "slowing or discontinuation of its business while awaiting [the agency's] determination [that] would be immediate, irreparable, and out of its own control." *See Harmoni*, 211 F. Supp. 3d at 1308 (emphasizing that the plaintiff failed to demonstrate that "it lack[ed] sufficient access to capital" to continue doing business until the agency issued its final

determination when denying request for injunctive relief); *see also Winter*, 555 U.S. at 22 (clarifying that the proper standard for irreparable harm is "likely" harm, not a "possibility" of harm)

Even though economic loss alone is insufficient for a finding of irreparable harm warranting injunctive relief, *see Sampson*, 415 U.S. at 90, when monetary damages are unavailable, such as in cases where the defendant benefits from sovereign immunity, "courts have recognized that economic loss may constitute 'irreparable harm.'"[7] *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 65–66 (D.D.C. 2004). Nonetheless, "the mere fact that economic losses may be irrecoverable does not, in and of itself, compel a finding of irreparable harm." *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 53 (D.D.C. 2011); *see also Luokong Tech. Corp. v. Dep't of Def.*, 538 F. Supp. 3d 174, 192 (D.D.C. 2021) ("[That courts have recognized that unrecoverable economic loss can constitute irreparable harm from an immune defendant] is not to say that the existence of any unrecoverable financial injury from an entity that enjoys sovereign immunity means irreparable harm can be established"); *Ninestar Corp. v. United States*, 687 F. Supp. 3d 1308, 1338 (Ct. Int'l Trade 2024) (citing *Luokong Tech. Corp.*, 538 F. Supp. 3d at 192). To treat unrecoverable damages as per se irreparable "would essentially eviscerate the irreparable harm requirement for any cases brought against the government." *Xiaomi Corp. v. Dept. of Def.*, No. CV 21–280 (RC), 2021 WL 950144, at *10 (D.D.C. Mar. 12, 2021) (reasoning that "[a]ny movant that could show any damages against an agency with sovereign immunity—even as little as $ 1—would satisfy the standard" (internal citations omitted)).

Here, Seko's allegations are either moot or speculative. First, the evolving nature of Seko's claims for injunctive relief, much of which are now moot, undermines its view that it will suffer irreparable harm absent injunctive relief. Seko's motion sought an order:

> (1) Restraining [CBP] from requiring [Seko] to take remedial action(s) as to the alleged violation(s) concerning [the T86 and CTPAT programs] without providing any specific facts concerning such alleged violation(s);
>
> (2) Enjoining [CBP] from requiring [Seko] to take remedial action(s) as to the alleged violations concerning the T86 and CTPAT programs without providing any specific facts concerning such alleged violation(s);

[7] The United States and its agencies are protected by sovereign immunity; thus, a plaintiff may only seek monetary damages from agencies if there has been an affirmative waiver of immunity by Congress. *See Lane v. Pena*, 518 U.S. 187, 192 (1996).

> (3) Requiring [CBP] to provide to [Seko] meaningful and reasonable timeline to address such specific facts of alleged violation(s) when provided; and
>
> (4) Restraining [CBP] from making such alleged violation(s) or anything identifying such alleged violation(s) available to anyone other than [Seko] or [CBP].

Pl. Mot. at 1. Since filing its motion, Seko has been provided with a detailed explanation of the specific facts of the violation. *See* Add. Info. at 1–10 (explaining the illicit nature of seized items, the inadequate and erroneous HTSUS descriptions, defects with the Power of Attorney signatures, and instances of exceeding the daily entry limit per ultimate consignee). Further, since filing the motion, Seko has been conditionally reinstated into the CTPAT and T86 programs, *see* CTPAT & T86 Reinstatement at 1, and CBP has provided Seko with a timeline for unconditional reinstatement as well as an extension for submission of the remedial action plan. *See* Def's Resp. Pl. Mot. Expedite at 1, June 11, 2024, ECF No. 30 (explaining the additional detailed information concerning the identified violations and remedial actions CBP expects Seko to address); *id.* at 11–17 (same); CBP Ext. at 2. Moreover, Defendant has filed its submissions under seal, with the relevant sensitive information redacted as requested by Seko, since entry of the judicial protective order on June 4, 2024. Thus, all of the alleged harms it proffered in its motion have been addressed.

Nonetheless, Seko maintains that it is "suffering significant financial harm and ongoing loss of business due to CBP's enforcement actions under the T86 program" because the suspensions have inhibited its ability to retain future business and marred Seko's reputation in the e-commerce community.[8] Pl. Reply at 3–4. Thus, Seko currently seeks a mandatory injunction that the government unconditionally reinstate Seko's privileges unless and until the government proves it case. Pl. Reply at 17–18 (arguing that CBP's refusal to unconditionally reinstate Seko presumes Seko committed trade violations, which "necessitates that Seko accept liability for all of the associated underlying violations asserted by CBP which are unproven or erroneous"). Ignoring the changes in the relief sought by Seko, its motion must fail because (1) the evidence it offers in support of its alleged

[8] Prior to being conditionally reinstated, Seko claimed its suspension (a) jeopardized the investments Seko made to comply with and maintain the T86 program's requirements; (b) caused losses of goodwill and confidence in its customers through publication of the suspensions; (c) resulted in significant monetary losses "by and through its inability to compete in the marketplace"; (d) required Seko to overhaul its Section 321 low-value entry filing process; and (e) otherwise impacted its business operations. Pl. Mot. at 8–11.

injuries is lacking, and (2) the purported injuries it claims, i.e., interference with business and harm to reputation, fail in this case to overcome the high burden the law imposes for injunctive relief. *See Zenith Radio Corp.*, 710 F.2d at 809.

First, the evidence supplied by Seko alludes to speculative harm at best. Seko predicts it has permanently lost customers, who allegedly severed business with Seko after suspension from both programs, due to the cloud cast by CBP's suspension and conditional reinstatement under which Seko operates. *See generally* Decl. James Gagne Supp'n [Pl. Mot.], May 31, 2024, ECF No. 21 (" May Gagne Decl."); Decl. Lila Landis Supp'n [Pl. Mot.], May 31, 2024, ECF No. 21 ("May Landis Decl."); *See generally* Decl. James Gagne Further Supp'n [Pl. Mot.], July 10, 2024, ECF No. 40 ("July Gagne Decl."); Decl. Lila Landis Further Supp'n [Pl. Mot.], July 10, 2024, ECF No. 40 ("July Landis Decl."). Specifically, Seko claims it has lost e-commerce clients since suspension from the programs, [[ ]] of which has returned.[9] July Gagne Decl. at ¶¶ 9–10. From this statement, Seko asks the Court to infer that it will continue to lose customers absent injunctive relief. However, it is not clear when Seko lost its customers. If Seko lost its customers as a result of the suspensions, it does not follow that it would lose more customers based on its conditional reinstatement as opposed to its unconditional reinstatement. Nor does it follow that the requested injunctive relief would lead to the return of those customers. Seko offered no witnesses to testify as to precisely when or why business ties with Seko were severed, or under what circumstances they would be restored. Instead, Seko infers that its continued conditional reinstatement will result in the harm that it predicts and asks the Court to do the same.

Similarly, the evidence supplied by Seko that suspension from the programs has irreparably damaged its reputation within the customs brokerage industry, resulting in a loss of business, is inadequate. July Gagne Decl. at ¶ 11 (claiming the suspensions have labeled Seko as an "unacceptable compliance risk," as deemed by CBP). It is unclear whether the conditional reinstatement had any impact on its reputation. Again, Seko asserts a harm in a declaration, but when given the opportunity to be heard, offered no live testimony to further substantiate the claim. Seko further states that it has lost at least [[ ]] for potential business with a client, as well as [[ ]] for an e-commerce client" being placed on "hold" as a result of the T86 suspension. *Id.* at ¶ 12. But again, Seko offered no witnesses or evidentiary support to substantiate any of the alleged

[9] Seko specifies that it has lost "at least [[ ]]" since suspension. July Gagne Decl. at ¶ 9.

harms in the declarations. *See generally* Oral Arg.[10]

Second, even ignoring the weak evidentiary showing, the purported injuries Seko claims, i.e., interference with business and harm to reputation, do not warrant an injunction in this case. Potential economic loss alone is insufficient to warrant the extraordinary remedy of injunctive relief. *See, e.g., Sampson*, 415 U.S. at 90; *Nat'l Min. Ass'n*, 768 F. Supp. 2d at 52–53. Any regulation can impose costs upon businesses, and to invoke that cost as a form of irreparable harm would create a "per se irreparable harm rule" which "would lie in tension with the [regulation] itself." *Ninestar*, 687 F. Supp. 3d at 1341 (finding that loss of "business opportunities and corporate reputation[] are obvious consequences that would be true of any entity" that did not comply with regulatory standards, and an insufficient showing for irreparable harm).[11] Indeed, Seko's economic loss stemming from regulatory action is a cost that many businesses face, and it is a consequence for which Seko had notice. *See T86 Announcement*, 84 Fed. Reg. at 40,082 (prescribing T86 program requirements and pen-

[10] Seko's invocation of *American Customs Brokers Co. v. United States Customs Services* fails to persuade. *See* Pl. Reply at 5, 14 (citing 10 CIT 385, 637 F. Supp. 218 (1986)); Oral Arg. at 21:50, 55:45. In *American Customs Brokers Co.*, the court found that the plaintiff would suffer irreparable harm absent injunctive relief after the U.S. Customs Service ("Customs") indefinitely discontinued the plaintiff's immediate delivery privilege due to erroneous information in the plaintiff's entry papers. *See* 10 CIT at 387, 637 F. Supp. at 221.

Unlike the plaintiff in that case, however, Seko has been conditionally reinstated into both the CTPAT and T86 programs, thus allowing it to resume its business operations involving T86 entries. *See* CTPAT & T86 Reinstatement at 1. Moreover, the Court in *American Customs Brokers Co.* made a factual finding, lacking here, after assessing affidavits and detailed testimony that the harm the plaintiff suffered rose to the level required for injunctive relief. *See* 10 CIT at 387, 637 F. Supp. at 221.

[11] This Court has rejected a per se irreparable harm rule, noting that it nullifies the irreparable harm requirement for preliminary injunctions. *Ninestar*, 687 F. Supp. 3d at 1341. In *Ninestar*, the plaintiff-corporation was added to the Uyghur Forced Labor Prevention Act ("UFLPA") Entity List, which prohibits "the importation into the United States of any goods produced by [an entity on the list.]". *Id.* at 1314–15 (citing *Notice Regarding the Uyghur Forced Labor Prevention Act Entity List*, 88 Fed. Reg. 38,080, 38,082 (Dep't Homeland Sec. June 12, 2023)). The plaintiff sought a preliminary injunction to vacate the listing decision, alleging that its inclusion on the list caused loss of reputation, goodwill, and loss of business opportunities. *Id*. at 1315, 1340. The Court denied injunctive relief, noting that a finding of irreparable harm under the circumstances would "nullify" the element within injunctive relief analysis, and the harms alleged would "be the same for all other similarly situated plaintiffs." *Id.* at 1341.

Here, although the facts are mirrored such that Seko alleges harm involving suspension from (and conditional reinstatement to) an advantageous list (rather than inclusion on a detrimental list, as in *Ninestar*), there exists the same danger of implementing a per se rule for irreparable harm. Suspension from a privileged list, like the CTPAT or T86 programs, will "necessarily have an adverse effect" on a brokerage firm. *Corus Grp. PLC v. Bush*, 26 CIT 937, 944, 217 F. Supp. 2d 1347, 1356 (2002) (holding that a finding of irreparable harm caused by an increase in duty rate would create an impermissible per se irreparable harm rule, which is "contrary to the extraordinary nature of the remedy"), *aff'd in part sub nom. Corus Grp. PLC. v. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed. Cir. 2003). Nonetheless, here, and similar to *Ninestar*, suspension from the programs alone cannot satisfy the irreparable harm requirement.

alties); *T86 Modification*, 89 Fed. Reg. at 2,634 (clarifying T86 penalties); 6 U.S.C. § 963 (prescribing CTPAT minimum requirements); 6 U.S.C. § 967 (prescribing consequences for non-compliance with CTPAT requirements). Participation in the programs is predicated on remaining in good standing by following the rules and standards that CBP established, all of which must be achieved before allowed entry into the programs. *See T86 Announcement*, 84 Fed. Reg. at 40,082; 6 U.S.C. § 963.

Seko's alleged harm to its reputation also fails to support its motion. To the extent that Seko has been labeled an "unacceptable compliance risk" by CBP, *see* July Gagne Decl. at ¶ 11, that harm has already occurred, and Seko fails to substantiate a claim that it currently faces an imminent harm from the conditional reinstatement under which it now operates. Indeed, Seko's request that CBP agree to stay the proceedings in this Court multiple times after filing the motion suggests that it is not suffering from irreparable harm by virtue of its current conditional reinstatement. *See* Seko June 28 Letter at 2–3 (indicating that Seko expressed interest in a stay of the proceedings in letters to CBP dated June 13, 2024, and June 21, 2024). Accordingly, Seko's motion is denied.

CONCLUSION

Therefore, Seko fails to make a sufficient showing to warrant granting its application for temporary restraining order and its motion for a preliminary injunction. In light of the foregoing, it is

ORDERED that Seko's application for temporary restraining order and motion for preliminary injunction, *see* ECF No. 21, are denied. ECF No. 21, are denied.

Dated: July 15, 2024
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 24–83

DALIAN MEISEN WOODWORKING CO., LTD., Plaintiff, and CABINETS TO GO, LLC, and THE ANCIENTREE CABINET CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 20–00110
PUBLIC VERSION

[U.S. Department of Commerce's remand results are remanded.]

Dated: July 22, 2024

Stephen W. Brophy and *Jeffrey S. Neeley*, Husch Blackwell, LLP, of Washington, D.C., for Plaintiff Dalian Meisen Woodworking Co., Ltd.

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. With her on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill, PLC, of Washington, D.C., for Plaintiff-Intervenor Cabinets to Go, LLC.

Ioana C. Meyer, 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 *Elio Gonzalez*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Luke A. Meisner, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor American Kitchen Cabinet Alliance. With him on the brief was *Christopher T. Cloutier.*

OPINION AND ORDER

Eaton, Judge:

Before the court are the U.S. Department of Commerce's ("Commerce" or the "Department") second remand results pursuant to the court's order in *Dalian Meisen Woodworking Co. v. United States*, No. 20–00110, 2023 WL 3222683 (Ct. Int'l Trade Apr. 20, 2023) (not reported in Federal Supplement) ("*Dalian II*"), in the countervailing duty investigation[1] of wooden cabinets and vanities from the People's Republic of China ("China").[2] *See* Final Results of Redetermination Pursuant to Court Remand, PRR2 52, CRR2 85, ECF No. 130–1 ("Second Remand Results"); *see also Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962 (Dep't of Commerce Feb. 28, 2020) ("Final Determination") and accompanying Issues and Decision Mem. (Feb. 21, 2020), PR 846, ECF No. 33–6 ("Final IDM").

Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. ("Ancientree") opposes the court sustaining the Second Remand Results,[3]

---

[1] The investigation covered the period of July 1, 2018, through December 31, 2018. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962, 11,963 (Dep't of Commerce Feb. 28, 2020).

[2] Citations are to public and confidential documents on the original investigation record ("PR" and "CR"), the first remand record ("PRR1" and "CRR1"), and second remand record ("PRR2" and "CRR2").

[3] Plaintiff-Intervenor Cabinets to Go, LLC "agrees with and incorporates by reference Ancientree's Comments" into its comments. *See* Cabinets to Go's Cmts. Opp'n Remand Results at 1, ECF No. 136. No comments have been filed by Plaintiff Dalian Meisen Woodworking Co., Ltd. ("Meisen"); the issues related to Meisen's claims were decided in *Dalian II*. *See* 2023 WL 3222683, at *8 (sustaining "Commerce's use of adverse facts available to find that Meisen used and benefitted from the Export Buyer's Credit Program").

while the United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenor (and petitioner) American Kitchen Cabinet Alliance (the "Alliance") ask the court to sustain them. *See* Ancientree Remand Cmts. ("Ancientree's Cmts."), ECF No. 134; *see also* Def.'s Resp., ECF No. 140; Def.-Int.'s Cmts., ECF No. 139.

For the following reasons, the court remands this matter a third time with instructions that, for each of Ancientree's U.S. customers whose non-use of the Export Buyer's Credit Program (the "Program") was verified, Commerce must determine a customer-specific rate that excludes a subsidy amount for the Program and recalculate Ancientree's final countervailing duty rate and the all-others rate.

BACKGROUND

The court presumes familiarity with its two prior opinions in this case and limits its recitation of the facts to those relevant to the issues before it here, i.e., those pertaining to Ancientree's claims. *See Dalian Meisen Woodworking Co. v. United States*, No. 20–00110, 2022 WL 1598896 (Ct. Int'l Trade May 12, 2022) (not reported in Federal Supplement) ("*Dalian I*"); *Dalian II*, 2023 WL 3222683.

I. Final Determination in the Countervailing Duty Investigation

During its investigation, Commerce sent questionnaires to China seeking information about the Export Buyer's Credit Program.[4] *See* Initial Questionnaire Issued to Government of China (May 31, 2019) at 33–34, 36, PR 443. The Program, which is administered by China's Export-Import Bank, is designed to promote the sale of Chinese exports by providing loans at preferential rates to foreign purchasers (including, at least potentially, those in the United States), directly or through third-party banks. The information Commerce asked for

[4] By its petition, Defendant-Intervenor the Alliance asked Commerce to investigate approximately thirty-eight alleged subsidy programs, including the Export Buyer's Credit Program. The petition acknowledged the dearth of "reasonably available" information about the Program and China's unwillingness to cooperate with Commerce's requests for information regarding the Program in past proceedings. *See* Pet'n Vol. III, Part 1 at 115 (Mar. 6, 2019), PR 4 ("All importers of wooden cabinets and vanities from China are eligible for such benefit as long as the exported Chinese product meets a certain threshold of Chinese-made content. Additional information regarding subject producers' customers' receipt of Export Buyers' Credits is not reasonable [sic] available to Petitioners. Indeed, as a result of [China's] repeated failures to cooperate in prior investigations, even the Department has been unable to fully understand the operation of the program. Notwithstanding, as it has done in many prior cases, . . . the Department should initiate an investigation of this program."). The petition recited the elements of the countervailing duty statute, stating that buyer's credits constitute a "financial contribution" by an "authority" (the Chinese government) that gives rise to a "benefit" to the recipient, and that the subsidy is "specific." *Id.* at 116; *see* 19 U.S.C. § 1677(5)(B) (subsidy), (D) (financial contribution), (E) (benefit conferred), (5A) (specificity).

included operational information about the Program, e.g., disbursement of funds through third-party banks and revisions that China made to the Program in 2013. *See id.*

China provided some, but not all, of the operational information that Commerce requested. For example, while it provided the "Administrative Measures of Export Buyers' Credit of the Export-Import Bank of China . . . and Detailed Implementation Rules Governing Export Buyers' Credit of the Export-Import Bank of China," China failed to provide "a list of all partner/correspondent banks involved in disbursement of funds under the [Program]." Government of China's Initial Questionnaire Resp. (July 15, 2019) at 71–72, PR 505. Instead, China responded that Commerce's question asking for the bank information was "not applicable" because the Program was not used by respondents or their U.S. customers. *See id.*; *see also* Final IDM at 26.

With respect to the 2013 Program revisions,[5] China responded that the information was internal to the Export Import Bank, not public, and not available for release, and further that it could not compel the Export Import Bank to give the information to Commerce. *See* Final IDM at 26–27. China further responded that it "had confirmed that 'none of the U.S. customers of the mandatory respondents has been provided with loans under this program,'" and, thus, answers to Commerce's questions were "not required." *Id.* at 26 (quoting Government of China's Initial Questionnaire Resp. at 70).

During the underlying investigation, Commerce conducted verification of questionnaire responses in China at the offices of Ancientree (and Plaintiff Meisen) from October 29, 2019, through November 15, 2019, as required by 19 U.S.C. § 1677m(i). *See id.* at 2; 19 U.S.C. § 1677m(i)(1) ("The administering authority shall verify all information relied upon in making . . . a final determination *in an investigation*." (emphasis added)). Though it verified the "non-use" of some of the subsidy programs[6] under investigation, Commerce did not attempt to verify the respondents' claims that they did not receive a benefit under the Program. *See, e.g.*, Ancientree Verification Rep. (Jan. 7, 2020) at 9, PR 808. Instead, Commerce stated that it was "unable to verify in a meaningful manner what little information there is on the record indicating non-use . . . with the exporters, U.S. customers, or at the China [Export Import] Bank itself, given the refusal of [China]

[5] The revisions with respect to which Commerce asked for information pertained to an amendment that was apparently made to the Administrative Measures in 2013, which eliminated the $2 million minimum contract value requirement to apply for a loan under the Program. *See* Final IDM 24–25.

[6] The subsidy programs under investigation included, for example, the provision of certain materials, like standing timber, cut timber, and veneers, for less than adequate remuneration. *See* Final IDM at 5–8.

to provide the 2013 revision and a complete list of correspondent/partner/intermediate banks." Final IDM at 34.

Based on this claimed inability to verify non-use, Commerce found that factual gaps in the record existed with respect to the operation of the Program, requiring the use of "facts otherwise available."[7] *See* 19 U.S.C. § 1677e(a); Final IDM at cmt. 3.

Perhaps anticipating, or being actually aware, that China would fail to provide the requested information, Ancientree had placed on the record sworn declarations by its U.S. customers stating that they did not use the Program to make purchases from Ancientree during the period of investigation.[8] *See* Ancientree's Initial Section III Resp. (July 11, 2019) at 27–28 & Ex. II-12, PR 495–496, CR 189–190. By providing customer declarations of non-use, Ancientree sought to demonstrate that the Program had not conferred a "benefit" on the company—a statutory precondition to the imposition of countervailing duties.[9] Thus, Ancientree maintained that the operational information that China failed to provide was irrelevant. No doubt Ancientree was familiar with case law indicating that a respondent could not be subject to the imposition of adverse facts available based on a gap

---

[7] Commerce must use "facts otherwise available" if, during the investigation or review of a countervailing duty order, the Department determines that (1) "necessary information is not available on the record" or (2) "an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines . . . or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified." 19 U.S.C. § 1677e(a)(1)-(2). Where requested information is not made available on the record, regardless of the reason for the respondent's failure to provide it, the statute requires Commerce to use facts otherwise available to replace the missing information in order to complete the record. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.").

[8] Each declaration stated that the U.S. customer had "purchased subject wooden cabinets and vanities and components thereof from [Ancientree] during the period between January 1, 2018 and December 31, 2018"; had "not financed any purchases from [Ancientree] through the use of the Import-Export Bank of China's export buyer's credit program," and that the customer "has never used the Import Export Bank of China's financing (*i.e.*, 'Buyer's Credit program') in any way." *See* Ancientree's Initial Section III Resp. (July 11, 2019) at Ex. II-12, PR 495–496, CR 189–190.

[9] Under the countervailing duty law, Commerce must determine where there is a subsidy, i.e., a financial contribution by an "authority" (such as a government) that gives rise to a benefit to the recipient, and that the subsidy is specific. *See* 19 U.S.C. § 1677(5)(B) (subsidy), (D) (financial contribution), (E) (benefit conferred), (5A) (specificity). "A benefit shall normally be treated as conferred where there is a benefit to the recipient, including . . . in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." *Id.* § 1677(5)(E)(ii). Here, the benefit to Ancientree would result from its customers' cost of buying the subject wooden cabinets and vanities being reduced by the customers receiving preferential rates on loan proceeds used to buy the merchandise.

created by the failure of a third party to answer questionnaires, where the requested information was available elsewhere on the record. *See, e.g.*, *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015); *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1209, 865 F. Supp. 2d 1254, 1260 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014).

Commerce found that the customer declarations did not fill the gaps in the record left by China's failure to provide the requested operational information because, among other reasons, the declarations could not be verified without a "complete understanding" of how Program loans were distributed. *See* Final IDM at 30 ("Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce's complete understanding of how this program is administrated is necessary to verify claims of non-use."). That is, Commerce found that the non-use information on the record could not fill the gaps left by China's failure to provide the information that the Department requested about the Program. Thus, Commerce found that, notwithstanding the non-use evidence, the declarations could not be verified (or Commerce would not endeavor to do so),[10] and the use of facts available was required to fill those gaps.

In addition, Commerce found that China failed to cooperate to the best of its ability with its requests for information about the Program, and so applied adverse inferences when selecting from among the facts otherwise available.[11] *See* Final IDM at 36 (finding "that an adverse inference is warranted in the application of facts available . . . because [China] did not act to the best of its ability in providing the necessary information to Commerce"); *see also* 19 U.S.C. § 1677e(b)(1).

---

[10] In the Final IDM, Commerce identified the gap more specifically:

> In short, because the [Chinese government] failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credits from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the [Program]. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China Ex-Im Bank, which is a government-controlled bank. Without cooperation from the China Ex-Im Bank and/or the [Chinese government], we cannot know the banks that could have disbursed export buyer's credits to the company respondents' customers. Therefore, there are gaps in the record because the [Chinese government] refused to provide the requisite disbursement information.

Final IDM at 34.

[11] Where Commerce determines that the use of facts available is required, it may apply adverse inferences to those facts only if it makes the requisite additional finding that that party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1); *see Nippon Steel*, 337 F.3d at 1381.

Based on adverse facts available, Commerce then concluded that the Program was countervailable, that Ancientree's U.S. customers used the Program to finance their purchases of the subject wooden cabinets and vanities, and that thus Ancientree had benefitted from the Program. *See* Final IDM at cmt. 3; Final Determination, 85 Fed. Reg. at 11,963 (listing subsidy rates). As an adverse facts available rate for the Program, Commerce selected 10.54% *ad valorem*, the highest rate determined for, what Commerce found to be, a similar program in the *Coated Paper* proceeding. *See* Final IDM 37–38 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 70,201, 70,202 (Dep't of Commerce Nov. 17, 2010) (amended final determination)); *see also* 19 U.S.C. § 1677e(d).

In *Dalian I*, the court remanded Commerce's adverse facts available finding that Ancientree (and Plaintiff Meisen) benefitted from the Program. *See Dalian I*, 2022 WL 1598896, at *8–9. The court found that remand was required because Commerce's use of facts available was not supported by substantial evidence, since the only actual record evidence was the uncontroverted sworn U.S. customer declarations of non-use:

> Here, as in other cases, [12] to justify the substitution of relevant evidence placed on the record by cooperating respondents with facts available, Commerce has constructed an argument that is difficult to credit—*i.e.*, that operational information was withheld by China and therefore there are gaps regarding the use of the program. The problem with this argument is that the withheld information is (at best) only indirectly related to alleged actual use of the program by Meisen's and Ancientree's U.S. customers. Moreover, Commerce's argument that the operational information is necessary to verify the accuracy of the non-use information because without it, verification is unreasonably burdensome using its typical procedure, rings hollow when Commerce fails to even try.

Id. at *8. The court thus directed that

[12] The court noted that the Program had been vigorously litigated in this Court, but that the merits of these cases had not found their way to the Federal Circuit. *See Dalian I*, 2022 WL 1598896, at *9 ("As noted in prior cases, Commerce has never appealed this Court's rejection of the Department's facts otherwise available determination in the context of the Export Buyer's Credit Program." (citing *Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339, 1353 n.13 (2020)). This remains so, since Commerce's appeal in *Risen Energy Co. v. United States*, No. 2024–1524 (Fed. Cir. Feb. 27, 2024), was dismissed, pursuant to the agreement by the parties, on July 9, 2024. *See Risen Energy Co. v. United States*, No. 20–03912, ECF No. 145.

> on remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers; or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly.

Id. at *11. A remand proceeding commenced thereafter.

II. Commerce's First Remand Results

On remand, Commerce reopened the record and sought to verify non-use of the Program by issuing a supplemental questionnaire. The supplemental questionnaire asked respondents to report "all loans/financing to each of your U.S. importers/customers that were received and/or outstanding during the period of investigation . . . regardless of whether you consider the financing to have been provided under the Export Buyer's Credit program," including non-traditional loans. *See, e.g.*, Export Buyer's Credit Suppl. Questionnaire, attach. (May 19, 2022) at 1, PRR1 1. Commerce asked that the parties "[s]ubmit the information requested in the ***Loan Template*** as an attachment to your response." *Id.* The loan template asked for: the names of lenders, the date of the loan agreement, the date of the loan receipt, the purpose of the loan, the initial loan amount, the currency of the loan, the life of the loan, the type of interest (i.e., fixed or variable rate), the interest rate specified in the agreement, the date of principal payments, amount of principal payments, dates of interest payment, amounts of interest paid, principal balance to which each interest payment applied, and the total number of days each payment covered, for each loan with interest payments during the period of investigation. *Id.*

In response to the supplemental questionnaire, Commerce received complete information for some, but not all, of Ancientree's U.S. customers. That is, Ancientree reported loan information for fifteen of its twenty-seven unaffiliated U.S. customers, which, according to the company, represented approximately 90% of its U.S. sales both by volume and by value during the period of investigation. *See* Ancientree Export Buyer's Credit Suppl. Questionnaire Resp. (June 13, 2022) at 1, PRR 14, CRR1 6–15, ECF No. 97. Of the twelve U.S. companies whose loan information Ancientree failed to report, one had gone out of business. *Id.* With respect to the remaining eleven companies, representing approximately 10% of its U.S. sales both by volume and value, Ancientree stated that despite its efforts, it could not reach, or could not convince, those companies to provide the loan

information that Commerce requested. *Id.* at 1–2.

In the remand results pursuant to *Dalian I*, Commerce found that without *complete* responses for *all* U.S. customers it would be futile to attempt to verify *any* of the non-use information placed on the remand record. *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 86–1 ("First Remand Results") at 21 ("The fact that the respondents in this remand did not provide complete responses for all their U.S. customers guaranteed that the record would remain incomplete as to usage information, thus, rendering futile any efforts to verify non-usage."). Because, for Commerce, none of the claims of non-use could be verified, gaps in the record persisted.

In *Dalian II*, the court sustained Commerce's First Remand Results, in part,[13] and remanded its use of facts available with respect to Ancientree. The court held that substantial evidence did not support Commerce's finding that the use of facts available was required based on Commerce's claim that without complete loan information from all of Ancientree's U.S. customers, the Department could not verify any of the loan information that Ancientree had placed on the remand record. *Dalian II*, 2023 WL 3222683 at *6–7. Accordingly, the court ordered

> that, on remand, Commerce attempt to verify Ancientree's submissions to the extent the Department finds appropriate, and if that is successful, either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer's Credit Program was not used at all, and recalculate Ancientree's rate and the all-others rate accordingly.

Id. at *8. A second remand proceeding thus commenced.

III. Commerce's Second Remand Results

During the second remand proceeding, Commerce made efforts to verify the non-use information that Ancientree placed on the record in response to the supplemental questionnaire. As noted, Ancientree reported loan information for fifteen of its twenty-seven unaffiliated U.S. customers. For ten of the fifteen customers, Commerce was able to conduct in-person verification at the customers' offices. *See* Public Verification Reports of Customers A (PRR2 34), B (PRR2 43), C (PRR2 42), D (PRR2 35), E (PRR2 47), I (PRR2 39), J (PRR2 17), K (PRR2 18), L (PRR2 46), and O (PRR2 45).

Of the ten U.S. customers with respect to which Commerce conducted in-person verification, Commerce "found no explicit usage of

[13] The court sustained Commerce's finding, based on adverse facts available, that Plaintiff Meisen used and benefitted from the Program. *Dalian II*, 2023 WL 3222683, at *8.

the [P]rogram for . . . eight customers during the [period of investigation]." Second Remand Results at 8–9. Nonetheless, Commerce found that verification, as a whole, was unsuccessful because it was "unable to verify non-use of the [Program] for more than 70 percent of Ancientree's customers." *Id.* at 20. Commerce stated, by way of explanation, its reasons for finding that the verification was unsuccessful:

> At the outset, we note that – of Ancientree's 27 U.S. customers – 12 provided no response to Commerce's [Export Buyer's Credit Program] questionnaire when we reopened the record on remand. Further, while two additional customers (herein referred to as "Customer N" and "Customer M") nominally provided information, these submissions were plainly unresponsive and did not provide any of the requested data relating to the customers' [period of investigation or "POI"] financing. Specifically, Customer N's response summarily stated that: "{t}he pre-acquisition, legacy financial records of Customer N are disorganized" and "{i}t would take company personnel significant time and effort to try to locate and decipher 2018 {POI} financial records . . . if they even exist." With respect to Customer M, Ancientree stated that "we are omitting Customer M's narrative and related exhibit{s} because they are not finalized." Thus, Customers M and N did not provide complete or verifiable non-use information, and – before the verification process even began – less than half of Ancientree's customers provided a response to Commerce's [Export Buyer's Credit Program] questionnaire.
>
> Three of the remaining 13 customers would not agree to verification. Customers F and G stated that they would not participate in Commerce's verification process prior to any verification arrangements being made. Customer H initially consented to verification but, two days prior to the scheduled start date, stated that it would no longer be participating.
>
> Of the 10 remaining customers, we were unable to verify non-use for two companies (Customer B and Customer E). With respect to Customer B, Commerce officials arrived at the customer's location on September 18, 2023, and began examining the items set forth in the verification agenda that was circulated to Ancientree and the customer in advance. During the on-site verification process, a company official asked the Commerce team to step out of the conference room. At that time, a company official entered the verification room and took several key docu-

ments that Commerce officials had collected as exhibits. The company representative stated that Customer B would no longer be providing the information. The verification process was halted at this time.

Customer E did permit Commerce officials to conduct the verification process. However, during the verification procedure, Customer E failed to provide crucial documentation that was requested prior to verification. Specifically, Customer E did not provide the underlying loan agreement(s) and/or application(s) relating to the line of credit that was outstanding during the POI; this represents the type of documentation that would permit Commerce officials to analyze the basis for the loan(s) and any restrictions or requirements relating to the lending. Such information was requested in Commerce's [Export Buyer's Credit Program] Supplemental Questionnaire. Customer E provided "Change in Terms" agreements for the credit facility, which operated to extend the duration of the loan, but it did not provide the underlying loan documentation itself. [14]. . . These documents were necessary for Commerce's analysis. Accordingly, in the verification agenda issued prior to the on-site verification process, we identified the loan agreement and application as key documentary support for Customer E's reporting. Nonetheless, these documents were not provided at verification, restricting Commerce's ability to examine the company's usage of the [Program].

After accounting for the difficulties identified above, we were unable to verify non-use of the [Program] for more than 70 percent of Ancientree's customers. Further, *while we found no explicit usage of the program for the remaining eight customers during the POI, these eight customers accounted for far less than Ancientree's claim of "approximately 90 {percent}" of POI sales*. Given that a clear majority of the customers that provided cer-

[14] Regarding the significance of the underlying loan documentation, Commerce stated, by way of explanation:

> This is significant, because the "Change in Terms" agreements incorporate by reference the underlying 2012 loan documentation. For instance, they reference the terms set forth in an underlying Promissory Note and Business Loan Agreement, *i.e.*, noting that "This Note is subject to and is governed by the terms of a Business Loan Agreement (the Loan Agreement) between Borrower and Lender." Similarly, Customer E's numerous draw requests under the line of credit reference the underlying documents, noting that such requests are made "{u}nder and pursuant to the terms of that certain Business Loan Agreement and Promissory Note dated February 13, 2012."

Second Remand Results at 8–9.

> tifications of non-use in this proceeding declined, or otherwise were unable, to support such certifications with verifiable information, *we do not find that this level of completeness is sufficient to overcome [China's] non-cooperation, and to permit a finding of non-use here.*

Id. at 6–9 (emphasis added). It is worth noting that Commerce relied on its inability to verify non-usage of a majority of the number of Ancientree's customers rather than its ability to verify non-use with respect to a majority of Ancientree's sales by volume and by value. This may be because, "[a]lthough Commerce verified Ancientree's *overall* sales figures as part of the underlying investigation, it did not – and had no reason to – verify such figures on a *customer-specific* basis." *Id.* at 9 n.43 (emphasis added). Notwithstanding that the record does not contain verified sales data on a customer-specific basis for Ancientree, during oral argument, Defendant acknowledged that the eight U.S. customers whose non-use of the Program was verified represented 79% of Ancientree's sales by value. *See* Oral Argument (Apr. 17, 2024) (audio) at 7:20–35. But apparently, for Commerce, successful verification of 79% of sales by value did not amount to a "successful" verification as that word appeared in *Dalian II*'s remand order:

> With respect to calculating a *pro rata* adjustment for Ancientree regarding the [Program], upon remand, the Court ordered that Commerce could elect to attempt verification of Ancientree's submissions and "if that is successful" should accept the *pro rata* adjustment proposed by Ancientree or conclude that the [Program] was not used at all. As detailed above, over 70 percent of Ancientree's customers – which accounted for a significant percentage of Ancientree's U.S. sales during the POI, by volume – declined or otherwise failed to be fully verified. Thus, Commerce concludes that verification of Ancientree's submissions *was not successful within the meaning of the Court's instructions* and it is, therefore, not necessary or appropriate to apply a *pro rata* adjustment as sought by Ancientree or to conclude that Ancientree did not use the [Program].

Second Remand Results at 9–10 (emphasis added). In other words, Commerce interpreted the word "successful" in the court's remand order to mean verification of some number more than eight of Ancientree's U.S. customers, or some greater percentage of Ancientree's customers than the roughly 30% that Commerce was able to verify.

Having found that the non-use verification was unsuccessful, Commerce then found that it was not "necessary or appropriate" to apply a *pro rata* adjustment or find non-use of the Program, as directed in the court's remand order. *Id.* at 10; *see Dalian II*, 2023 WL 3222683, at *8.

In addition, Commerce concluded that because verification was "unsuccessful," the use of facts available was required because "there is a gap in the record that Ancientree has been unable to fill with verifiable information." Second Remand Results at 21. The gap in the record was identified as that which "result[ed] from the Government of China . . . withholding necessary information that was requested of it."[15] *Id.* at 2.

Commerce further found that applying an adverse inference when selecting from among the facts available was appropriate because of China's "failure to provide necessary information on the [Program]" in response to Commerce's questionnaires. *Id.* at 21. Commerce found that, "despite [its] attempt to gather information following the *First Remand Order* [issued in *Dalian I*], and our subsequent attempt to verify necessary information following the *Second Remand Order* [issued in *Dalian II*], the record does not contain non-use information that overcomes the [Chinese government's] reporting failure." *Id.*

In making this finding, the Department stated, by way of explanation, that it rejected Ancientree's argument that "Commerce should apply a *pro rata* program rate for the [Program] or apply [adverse facts available] only to non-responsive customer imports (by setting up customer-specific rates), because each customer's use of the [Program] stands alone." *Id.*

In other words, Ancientree had argued that, because verification was successful with respect to some of its U.S. customers, there were two potential methods by which Commerce could adjust its rate: (1) "a *pro rata* adjustment based on the [period of investigation] sales of the

[15] In the Final IDM, Commerce identified the gap more specifically:

> In short, because the [Chinese government] failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credits from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the [Program]. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China Ex-Im Bank, which is a government-controlled bank. Without cooperation from the China Ex-Im Bank and/or the [Chinese government], we cannot know the banks that could have disbursed export buyer's credits to the company respondents' customers. Therefore, there are gaps in the record because the [Chinese government] refused to provide the requisite disbursement information.

Final IDM at 34.

customer"; or (2) "[i]f Commerce declines to *pro rate* the [adverse facts available] rate, Commerce could set up customer-specific rates for the case, with no [Program] subsidy rate included in the rate assigned to the customers that were successfully verified for non-use." *Id.* at 13–14.

For the Department, neither method was feasible because (1) "Commerce was unable to verify the sales figures that form the basis of the pro rating sought by Ancientree,"[16] and (2) not all of "the customer-specific quantity and value figures that Ancientree provided in support of its proposed *pro rata* adjustment" matched the customer's own reporting. *Id.* at 9 n. 43, 21 n. 69.

Commerce thus continued to include a 10.54% subsidy rate for the Program, as adverse facts available, in the calculation of Ancientree's final countervailing duty rate of 13.33%. *See* Final Determination, 85 Fed. Reg. at 11,963.

DISCUSSION

The court will sustain the Second Remand Results if Commerce has complied with the court's remand order in *Dalian II*, and its findings on remand are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). For the following reasons, the court finds that a third remand is necessary.

Ancientree argues that the court cannot sustain the Second Remand Results and should remand with instructions that Commerce "either find Ancientree did not benefit from the [Program] . . . or apply a pro rata adjustment or company-specific [Program] rate," relying primarily on the *Risen* line of cases.[17] Ancientree's Cmts. at 4, 18; *see also Risen Energy Co. v. United States*, 46 CIT __, 570 F. Supp. 3d 1369 (2022) ("*Risen I*"); *Risen Energy Co. v. United States*, No. 20–03912, 2023 WL 2890019 (Ct. Int'l Tr. Apr. 11, 2023) (not reported

[16] By way of explanation, Commerce stated:

> We note that the customer-specific quantity and value figures that Ancientree provided in support of its proposed *pro rata* adjustment remain largely unverified. Although Commerce verified Ancientree's overall sales figures as part of the underlying investigation, it did not – and had no reason to – verify such figures on a customer-specific basis. During our verification of Ancientree's customers, we examined the quantity/value of acquisitions from Ancientree. In some cases, the customer's reporting approximated the Ancientree figures; in others, the figures were not close to those reported by Ancientree.

Second Remand Results at 9 n.43.

[17] The *Risen* cases involve the sixth administrative review of the countervailing duty order on crystalline silicon photovoltaic cells. The Court entered judgment on December 19, 2023. *See Risen Energy Co. v. United States*, No. 20–03912, 2023 WL 8788862 (Ct. Int'l Trade Dec. 19, 2023). On February 27, 2024, the United States filed an appeal at the Federal Circuit. Subsequently, the parties agreed to dismiss the appeal, and mandate was issued on July 9, 2024. *See Risen Energy Co. v. United States*, No. 20–03912, ECF Nos. 144, 145.

in Federal Supplement) ("*Risen II*"); *Risen Energy Co. v. United States*, 47 CIT __, 665 F. Supp. 3d 1335 (2023) ("*Risen III*"). For Ancientree, the Department cannot substantiate its use of adverse facts available to find that Ancientree used or benefitted from the Program. Ancientree argues that, as in *Risen*, "there is no information on this record to support any finding [of use] of the [Program] nor has there been any evidence in any review or investigation of any Order that this program has ever been used."[18] Ancientree's Cmts. at 5. Specifically, Ancientree asserts that, here, the Department "reviewed an extensive amount of information at each of these companies, and found no evidence of use of the [Program] at each." *Id.* at 6.

In *Risen*, the Court ultimately held, after three remands, "[i]n the face of substantial evidence of non-use from Risen and its customers, and no evidence of use supported by actual evidence or any reasonable [adverse facts available] inference, Commerce must not include a subsidy amount for [the Export Buyer's Credit Program]" in the final countervailing duty rate for Risen. *See Risen III*, 47 CIT at __, 665 F. Supp. 3d at 1344 & n.9 (noting that, in that case, "Commerce confirm[ed] in briefs that it [was] not willing to consider a pro-rata approach"). In this case Ancientree insists that the court likewise "*order* the Department to either find non-use of the Export Buyer's Credit Program *in toto* or to assign a *pro-rata* [Program] rate [or company-specific Program rate] based on the record as developed to date." Ancientree's Cmts. at 18.

While the *Risen* line of cases is indeed persuasive with respect to Commerce's failure to find any American purchasers that used the Program, it is the case that those proceedings involved reviews rather than investigations. Unlike in reviews,[19] in investigations Commerce

[18] The court notes this Court's observation in *Risen Energy Co. v. United States*, Consol. Court No. 22–00231 that "no use of this Program for exports to the United States has ever been uncovered." *Risen Energy Co. v. United States*, 47 CIT __, __, 658 F. Supp. 3d 1364, 1371 n.2 (2023) (granting Commerce's request for voluntary remand to reconsider its application of adverse facts available for an exporter's use of the Program in the eighth administrative review of the countervailing duty order on crystalline silicon photovoltaic cells).

[19] In reviews, verification is required only if it "is timely requested by an interested party," and "no verification was made . . . during the 2 immediately preceding reviews and determinations under section 1675(a) of this title of the same order, finding, or notice," except "if good cause for verification is shown." 19 U.S.C. § 1677m(i)(3); 19 C.F.R. § 351.307(b)(1)(v). This was not always the case. Prior to 1984 amendments to the statute, the Department "was required to verify information submitted by a foreign manufacturer during a section 751 administrative review." *Monsanto Co. v. United States*, 12 CIT 949, 951, 698 F. Supp. 285, 288 (1988) (citing *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 575 F. Supp. 1277 (1983), *aff'd* 745 F.2d 632 (Fed. Cir. 1984)). The change in the law no longer requiring verifications in administrative reviews seems to have been a way to alleviate the administrative burden on Commerce, except in certain circumstances, as provided in the statute and regulations. *See id.* ("Section 618 of the Trade and Tariff Act of

is directed by statute to verify "all information relied upon in making . . . a final determination." 19 U.S.C. § 1677m(i)(1) ("The administering authority *shall* verify all information relied upon in making . . . a final determination in an investigation." (emphasis added)); 19 C.F.R. § 351.307(b)(1)(i). The *Risen* Court was persuaded that, because there was no affirmative evidence (either on the record of that case, or for that matter anywhere) that the Program had been used by American buyers, Commerce should be prohibited from finding otherwise. But again, *Risen* involved an administrative review where no verification was required.

For its part, Commerce argues that the court should sustain the Second Remand Results. For the Department, the Second Remand Results comply with the court's remand order because it attempted to verify Ancientree's submissions. *See* Def.'s Resp. at 8. "Ultimately, however, Commerce was unable to verify significant portions of the non-use information provided by Ancientree on behalf of its U.S. customers." *Id.* Since Commerce could conduct a complete in-person verification at only eight customer locations—i.e., approximately 30% of Ancientree's 27 U.S. customers—it considered its "attempt to verify" unsuccessful. For Defendant, "Commerce cannot rely on only a portion of a respondent's customers to verify non-usage of the Export Buyer's Credit Program because doing so would give respondents an incentive to evade scrutiny by providing responses only for those customers that do not use the Program." *Id.*

Thus, having found that its "attempt to verify" was unsuccessful, Commerce concluded that it was not compelled by the court's remand order to "either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer's Credit Program was not used at all." *Id.* at 6; *Dalian II*, 2023 WL 3222683, at *8. Moreover, Commerce did not calculate customer-specific rates for the companies whose non-use of the Program had been verified—an alternative method proposed by Ancientree. Rather, Commerce continued to apply adverse facts available to find that Ancientree's U.S. customers used the Program to purchase the subject merchandise, which conferred a benefit on Ancientree.

The court will order a third remand of this matter. While the facts here are much like those found in *Risen*, and while it remains the case that there appears to be no evidence that the Program has been used in the United States, the fact that this proceeding is an investigation matters. As noted, in an investigation, Commerce must verify all

1984, codified at 19 U.S.C. § 1677e (Supp. IV 1986), relieves ITA of the *burden of conducting verification* if verification occurred during either of the preceding two administrative reviews, unless good cause for verification is shown." (emphasis added)).

information relied upon in making a final determination. *See* 19 U.S.C. § 1677m(i)(1). Here, Commerce claims that it need not rely on the verified non-use of the Program for eight of Ancientree's U.S. customers, which represented approximately 79% of sales by value during the period at issue, because it was "unable to verify significant portions of the non-use information." Def.'s Resp. at 8. But this "all or nothing" approach is not called for by the statute. Nothing in the statutory directive that Commerce "shall verify all information relied upon in making . . . a final determination in an investigation" suggests that unless *all* information is verified, *none* of the information that is actually verified can be relied upon to make a final determination. But here instead of relying on the non-use information on the record that the Department was able to verify, Commerce relied on adverse facts available as applied to all of Ancientree's U.S. sales.

The statute requires Commerce to fill gaps in the administrative record with "facts otherwise available." 19 U.S.C. § 1677e(a). It further permits the application of an adverse inference "in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1). Here, Commerce has found a gap in the record where there is not one in fact. With respect to a majority of sales by value, there is no non-use gap. Rather there is verified information of non-use upon which Commerce must rely. With respect to the verified information, in a related context, this Court has said "Commerce opened the door by requesting additional information already requested on subsidies and cannot shut that door simply because it does not like the relevant information submitted." *GPX Int'l Tire Corp.*, 37 CIT at 60, 893 F. Supp. 2d at 1333.

Because Commerce verified non-use of the Program by certain of Ancientree's U.S. customers but could not (or did not) with respect to others, the court will treat the use of countervailing duties differently for the sales to customers whose non-use of the Program was verified, from those sales where non-use was not verified. As a result of its verification efforts, Commerce now knows for sure that certain of Ancientree's U.S. customers did not use the Program. Based on this verification determination, with respect to the sales to those companies whose non-use of the Program has been verified, Commerce must eliminate the subsidy represented in the rate applied to those sales. Commerce now knows that their declarations of no-nuse were valid. There is no gap in the record. And Commerce can base its determination of non-use on verified information in accordance with the statute.

This kind of distinction, i.e., separation of sales with respect to which verification was successful from those where it was not suc-

cessful, is not entirely foreign to Commerce. Where Commerce has been able to verify non-use of the Program by a Chinese respondent's U.S. customers in past cases it has removed the Program subsidy rate from the respondent's total rate. *See, e.g.*, *Risen II*, 2023 WL 2890019, at *3 ("Commerce verified that [the U.S. importer of JA Solar, a Chinese exporter] received no loans or financing connected with the [Chinese government]," and thus "removed the previously applied [Export Buyer's Credit Program] subsidy rate from [the exporter's] total rate."); *Both-Well (Taizhou) Steel Fittings, Co. v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1343, 1345 (2022) (sustaining Commerce's revision of the subsidy rate calculations for respondent where "Commerce determined there is no evidence that the [respondent's] customers applied for or used, directly or indirectly, the [Program] during the period of review; therefore, the use of facts available with an adverse inference was not warranted"). Thus, as to sales to customers whose non-use of the Program was verified, no gap in the record was created by China's refusal to provide requested information because other information was available on the record (indeed legally required verified information) confirming non-use. Since no gap was created, with respect to these sales, the use of facts available (let alone an adverse inference) was not directed by statute. Indeed, the requirement of the use of verified information for an investigation determination directs the opposite result. *See* 19 U.S.C. § 1677m(i)(1).

As to Ancientree's remaining U.S. sales, information regarding non-use was placed on the record, but this information has not been verified. Again, in an investigation, Commerce must verify the information on which it relies in making its final determination. *Id.* With respect to these sales, then, a gap has been created because, although there is information of non-use on the record (the declarations), the information could not be verified, and Commerce may not rely on it when making its determination.[20] A gap in the record exists with respect to these sales. Therefore, the use of facts available is directed by statute. *See, e.g.*, *id.* § 1677e(a)(2)(D) (directing that Commerce shall use "facts otherwise available" where, inter alia, a respondent "provides . . . information but the information cannot be verified").

Moreover, the use of adverse facts available is authorized based on China's failure to cooperate. There is a good deal of law indicating that courts should be careful when applying adverse facts available to respondents based on the failure of unrelated actors who are not

[20] A difference between this case and the *Risen* cases is that, as noted, the *Risen* cases involved the final results of an administrative review, not the final determination in an investigation. *See, e.g.*, *supra* note 17. Thus, unlike in this case, in *Risen*, verification of the information relied upon by Commerce in reaching the final results of its review was not mandatory. *See* 19 U.S.C. § 1677m(i)(3).

respondents themselves. *See, e.g.*, *Mueller Comercial de Mex. v. United States*, 753 F.3d 1227, 1235 (Fed. Cir. 2014) ("[I]f the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party." (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011)); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012) (where non-cooperating parties were unrelated to the respondent, "[d]eterrence is not relevant here, where the 'AFA rate' only impacts cooperating respondents. We find no support in our caselaw or the statute's plain text for the proposition that deterrence, rather than fairness or accuracy, is the 'overriding purpose' of the antidumping statute when calculating a rate for a cooperating party.").

Nonetheless, the Federal Circuit has upheld the imposition of adverse inferences against a cooperating Chinese respondent where the Chinese government has failed to cooperate with Commerce's requests for information in a countervailing duty proceeding, under the theory that "a remedy that collaterally reaches [the exporter] has the potential to encourage the government of China to cooperate so as not to hurt its overall industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). The court thus finds (1) that a gap in the record exists with respect to Ancientree's U.S. customers whose claims of non-use of the Program to finance their purchases of subject merchandise were not verified; and (2) that the application of adverse facts available is authorized with respect to the facts of non-use based on China's failure to fully answer Commerce's questionnaires with respect to the Program.

CONCLUSION AND ORDER

Based on the foregoing, it is hereby

ORDERED that, on remand, for each customer whose non-use of the Program was verified Commerce must determine a customer-specific rate that excludes a subsidy amount for the Program, and recalculate Ancientree's total rate, and the all-others rate. The Department may determine its own method for complying with this order; it is further

ORDERED that Commerce's findings are sustained with respect to the remaining U.S. customers whose non-use was not verified; and it is further

ORDERED that Commerce's remand redetermination is due ninety (90) days from the date of this Opinion and Order; any comments to the remand redetermination shall be due thirty (30) days following the filing of the remand redetermination; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: July 22, 2024
New York, New York

/s/ *Richard K. Eaton*
JUDGE

Slip Op. 24–85

UNIVERSAL TUBE AND PLASTIC INDUSTRIES, LTD., THL TUBE AND PIPE INDUSTRIES, LLC, and KHK SCAFFOLDING & FORMWORK, LLC, Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 23–00113

[Remanding the U.S. Department of Commerce's final results in the 2020–2021 antidumping duty review of circular welded carbon-quality steel pipe from the United Arab Emirates.]

Dated: July 26, 2024

Robert G. Gosselink, *Jonathan M. Freed*, and *MacKensie R. Sugama*, Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries, LLC, and KHK Scaffolding & Formwork, LLC. With them on the brief was *Kenneth N. Hammer*.

Franklin E. White, Jr., Assistant Director, and *Kelly M. Geddes*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Brishaila Brown*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce. *Vania Y. Wang* also appeared.

Roger B. Schagrin and *Luke A. Meisner*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company. *Christopher T. Cloutier*, *Elizabeth Jackson Drake*, *Jeffrey D. Gerrish*, *Justin M. Neuman*, *Michelle R. Avrutin*, *Nicholas J. Birch*, *Nicholas Phillips*, *Saad Younus Chalchal*, *William A. Fennell*, and *Alessandra A. Palazzolo*, also appeared.

OPINION

Choe-Groves, Judge:

This case presents a unique issue that Plaintiffs describe as an "internal inconsistency." Plaintiffs argue that the U.S. Department of Commerce correctly applied one methodology to compare costs in one segment of the case, yet failed to apply that same methodology in another segment of the case, and thus there is an internal inconsistency that is not in accordance with law. The Court agrees with Plaintiffs and remands the U.S. Department of Commerce's *Final Results*.

Plaintiffs Universal Tube and Plastic Industries, Ltd. ("UTP"), THL Tube and Pipe Industries, LLC ("TTP"), and KHK Scaffolding & Formwork, LLC ("KHK") (collectively, "Plaintiffs" or "Universal") filed this action pursuant to 19 U.S.C. § 1675 contesting the final results of the U.S. Department of Commerce ("Commerce") in *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates* ("*Final Results*"), 88 Fed. Reg. 28,483 (Dep't of Commerce May 4, 2023 (final results of antidumping duty administrative review; 2020–2021) and accompanying Issues and Decision Memorandum for the Final Results of the 2020-2021 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates (Dep't of Commerce Apr. 27, 2023) ("Final IDM"), ECF No. 22–5.

Before the Court is Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Pls.' R. 56.2 Mot. J. Agency R. ("Plaintiffs' Motion" or "Pls.' Mot."), ECF Nos. 23, 24; *see also* Mem. Supp. Pls.' Mot. J. Agency R. ("Pls.' Br."), ECF Nos. 23, 24. Defendant United States ("Defendant" or "the Government") filed Defendant's Response to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record. Def.'s Resp. Pls.' R. 56.2 Mot. J. Agency R. ("Def.'s Resp."), ECF No. 27. Defendant-Intervenor Wheatland Tube Company ("Defendant-Intervenor" or "Wheatland") filed Defendant-Intervenor's Response in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Def.-Interv.'s Resp. Opp'n Pls.' R. 56.2 Mot. J. Agency R. ("Def.-Interv.'s Resp."), ECF No. 26. Plaintiffs filed Reply Brief of Plaintiffs Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries, LLC, and KHK Scaffolding and Formwork, LLC. Pls.' Reply Br. ("Pls.' Reply"), ECF No. 33.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Universal failed to exhaust its administrative remedies with respect to its arguments regarding Commerce's use of quarters as time periods for the comparison of sales prices in the Cohen's *d* test.
2. Whether Commerce's determination to compare sales prices made in different quarters of the period of review under one provision of the antidumping statute while declining to utilize the same comparisons of sales prices under another provision of the antidumping statute is in accordance with law.

BACKGROUND

Commerce conducted an administrative review for the period from December 1, 2020 to November 30, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 6487, 6492 (Dep't of Commerce Feb. 4, 2022), PR 7.[1] Commerce selected Universal as one of the mandatory respondents in the investigation.[2] *See* Commerce's 2020-2021 Antidumping Duty Administrative Review of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Selection of Respondents for Individual Examination, PR 22.

On December 28, 2022, Commerce published its preliminary results. *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates* ("*Preliminary Results*"), 87 Fed. Reg. 79,862 (Dep't of Commerce Dec. 28, 2022) (preliminary results of antidumping duty administrative review; 2020–2021), and accompanying Decision Memorandum for the Preliminary Results of the 2020–2021 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates (Dec. 20, 2022) ("Preliminary Determination Memorandum" or "PDM"), PR 105.

Universal submitted an administrative case brief arguing that Commerce should ensure that its differential pricing analysis for Universal was not impacted inaccurately by comparing perceived patterns of price differences among quarters. Universal's Admin. Case Br. at 2–5, PR 117.

In the *Final Results*, Commerce continued to compare sales prices across different quarters of the period of review as part of the differential pricing analysis and determined that there was a pattern of export prices that differed significantly across purchasers, regions, or time periods. Final IDM at 10–11, 14–15. Commerce did not make any changes to its determination to calculate the cost of production using a method based on the weighted-average of costs within individual quarters of the period of review. *See id.* at 5–6. Commerce calculated Universal's antidumping duty margin at 2.63%. *Final Results*, 88 Fed. Reg. at 28,484.

---

[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF No. 35.

[2] Commerce collapsed UTP, TTP, and KHK into a single entity, Universal, in a prior investigation and treated Universal as one respondent. *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates*, 81 Fed. Reg. 36,881, 36,881 (Dep't Commerce June 8, 2016) (affirmative preliminary determination of sales at less than fair value and postponement of final determination). For the current period of review, Commerce continued to collapse Universal. Commerce's 2020–2021 Antidumping Duty Administrative Review of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Selection of Respondents for Individual Examination at 1 n.2, PR 22.

Plaintiffs filed this action timely pursuant to 19 U.S.C. § 1675 contesting Commerce's *Final Results*. *See* Compl., ECF No. 10.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Administrative Exhaustion

As an initial matter, Defendant argues that Universal failed to exhaust its administrative remedies with respect to the specific argument that "Commerce could have considered other periods of time to determine whether the 'pattern' and 'significant difference criteria' were satisfied" because Universal allegedly did not raise that issue in the administrative case brief and Defendant contends that none of the exceptions to the exhaustion requirement apply. Def.'s Resp. at 17–19. Universal counters that it did not fail to exhaust its administrative remedies because Universal put Commerce on notice of Universal's concerns about time periods during the administrative proceeding. Pls.' Reply at 8.

Before commencing suit in the U.S. Court of International Trade, an aggrieved party must exhaust all administrative remedies available to it. "In any civil action . . . the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The Court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies[.]" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013).

There are limited exceptions to the exhaustion requirement. *See Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145, 1147, 724 F. Supp. 2d 1327, 1351–1352 (2010) ("[T]he court has waived the exhaustion requirement where it would have been futile for the party to raise its argument at the administrative level, as well as where the record indicates that . . . the agency in fact thoroughly considered the issue in question."); *see also Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) ("[E]xhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it.").

In its administrative case brief, Universal argued that although 19 U.S.C. § 1677f-1(d)(1)(B) indicates that Commerce may make comparisons when there is a pattern of comparable merchandise that differs significantly among purchasers, regions, or time periods, the use of "may" implies that "there are circumstance[s] where Commerce need not consider certain criteria, such as periods of time, when evaluating whether a pattern of prices that differs significantly existed." Universal's Admin. Case Br. at 5; *see* 19 U.S.C. § 1677f-1(d)(1)(B). Universal argued that in the *Final Results*, Commerce "must limit the first part of its Cohen's *d* differential pricing analysis to a comparison of groups of sales data only for particular purchasers and regions, and *not* for time periods." Universal's Admin. Case Br. at 4–5 (emphasis in original).

On appeal before this Court, Universal asserts that Commerce should not have considered time periods at all or should have considered other periods of time in the Cohen's *d* test. Pls.' Br. at 23. Universal challenged Commerce's use of quarters within the period of review in the Cohen's *d* test. *Id.* Universal also noted that 19 U.S.C. § 1677f-1(d)(1)(B), in permitting Commerce to consider time periods, does not mandate how Commerce should determine the existence of patterns of prices that differ or whether Commerce should be required to consider time periods at all. *Id.*

Defendant contends that, in the administrative case brief, "Universal argued that Commerce should not include time periods in its Cohen's *d* differential pricing analysis, but did not raise the alternative argument that Commerce should use a unit of time other than quarters to assess differences in prices over time periods" or "suggest a specific alternative time period." Def.'s Resp. at 18. The Government asserts that the Court should not "entertain Universal's arguments concerning the use of a different time period in its Cohen's *d* analysis" and that the exceptions to the exhaustion doctrine do not apply. *Id.* at 18–19.

The Court holds that an exception to the exhaustion doctrine applies here because Commerce was on notice that Universal was challenging the issue of time periods when Universal argued that 19 U.S.C. § 1677f-1(d)(1)(B) neither mandates how Commerce evaluates whether a pattern of prices that significantly differ exists nor requires Commerce to consider time periods at all. Commerce was aware of Universal's challenge to the issue of time periods and had the opportunity to fully consider the issue of time periods, including whether to use time periods at all or consider using a different unit of time (either annually, quarterly, or some other unit of time), or whether to compare sales and cost data within the same quarters, or data com-

pared from quarter to quarter, in both the preliminary and final results of the administrative review. Universal's failure to articulate an alternative argument that Commerce should use a specific unit of time or failure to "suggest a specific alternative time period," as Defendant asserts, did not result in a waiver of the issue on appeal, when it was clear that Universal was challenging Commerce's use of time periods for analyzing costs and prices. *See* Def.'s Resp. at 18. The Court concludes that Universal did not waive the issue regarding Commerce's consideration of alternative time periods in the Cohen's *d* test simply because Universal did not argue that Commerce should use a unit of time other than quarters or suggest a specific alternative time period.

II. Internal Inconsistency in Commerce's Determinations

Universal does not challenge Commerce's cost of production determination to consider Universal's quarterly direct material costs. Pls.' Br. at 14. Plaintiffs explain that:

> Commerce usually compares prices to a weighted-average of costs incurred throughout the entire [period of review] (i.e., annual costs). . . . But Commerce deviates from its standard methodology when it determines that there are significant changes in costs during the [period of review]. . . . Commerce concluded that record evidence showed that Universal had experienced significant cost changes (i.e., changes that exceeded 25 percent) between the high and low quarterly [costs of manufacturing] during the [period of review]; that there was linkage between Universal's changing selling prices and [costs of manufacturing] during the [period of review] such that changes in selling prices correlated reasonably to changes in unit [costs of manufacturing]; and that it therefore was necessary for Commerce to employ an alternative costing methodology that relied on Universal's quarterly direct material costs.

Id. (citing PDM at 23–24). Notably, Plaintiffs emphasize that Commerce "limited its price comparisons for purposes of calculating dumping to sales made only within the same quarter. . . . to prevent any inter-quarter sales price comparisons." *Id.* at 15. The Court refers to Commerce's determination to consider Universal's quarterly direct material costs as the "same-quarter comparison," meaning that Commerce compared only sales made within the same quarters.

When calculating the cost of production, Commerce explained that its normal practice is to calculate an annual weighted-average cost based on the average of the annual cost of production for the period of

review. *See* PDM at 23–24. Commerce stated that it deviates from the normal practice of using the annual weighted-average cost method if using the annual weighted-average cost method during a time of significant cost changes results in possible distortions. *See id.* at 23. Based on the cost data provided by Universal, Commerce determined that deviating from the normal practice of calculating an annual weighted-average cost was warranted. *Id.* To determine whether to deviate from the annual weighted-average cost method, Commerce evaluated whether (1) the changes in the cost of manufacturing during the period of review were significant and (2) whether the record evidence showed that there was a correlation between the changes in cost of manufacturing and the sales prices during the period of review. *Id.* Changes in cost of manufacturing were deemed significant if the changes exceeded 25% between the high cost of manufacturing and the low cost of manufacturing in each quarter of a period of review. *Id.* To determine whether there was a correlation between the changes in cost of manufacturing and the sales prices during the period of review, Commerce compared the weighted-average of the sales prices within a quarter of the period of review to the corresponding cost of manufacturing within the same quarter. *Id.*

Commerce determined that the record evidence established that Universal experienced significant changes in cost between the high cost of manufacturing and the low cost of manufacturing in each quarter of the period of review, and that there was a reasonable correlation between Universal's sales prices and the changes in cost of manufacturing for the period of review. *Id.* at 23–24. Commerce determined that it was appropriate to base cost of production on a calculation of a weighted-average within individual quarters of the period of review. *Id.* at 24. Commerce did not make any changes to the determination to calculate a weighted-average cost based on an average of the cost of production within individual quarters of the period of review for the cost of production analysis in the *Final Results*. *See* Final IDM at 5–6.

In contrast to the "same-quarter comparison" with which Universal agrees, Plaintiffs challenge Commerce's determination in the *Final Results* as follows:

> But after having determined that it was not appropriate to calculate Universal's dumping margin by comparing the selling prices of U.S. and home market sales made in different [period of review] quarters, Commerce nonetheless did exactly that, i.e., Commerce compared the selling prices of U.S. sales made in different [period of review] quarters for purposes of its differential pricing analysis.

Pls.' Br. at 16. Commerce's Cohen's *d* test analysis compared sales prices made in different quarters of the period of review. *See* Final IDM at 14; PDM at 11–12 (unchanged in *Final Results*). The Court refers to this determination as the "inter-quarter comparison."

Universal argues that:

> In the first stage of the differential pricing analysis, Commerce applied the "Cohen's *d* test," and found that the extent to which prices in particular time periods differed from the prices of all other sales was large. . . . But, as discussed above, Commerce already had determined in this review (1) that Universal had significant cost changes between its high and low quarterly costs of manufacturing during the [period of review], (2) that there was a close linkage between Universal's changing selling prices and quarterly costs of manufacturing for the same periods, and (3) that the change in Universal's costs of manufacturing and selling prices between and among quarters was so significant that Commerce, in fact, modified its margin calculation program specifically to prevent comparisons of sales in different quarters. Having already concluded that it could not compare the selling prices of sales made in different [periods of review] quarters, it was inconsistent and contradictory for Commerce to compare the selling prices of Universal's U.S. sales across the four quarters of the [period of review] as part of its differential pricing analysis.

Pls.' Br. at 19.

Plaintiffs allege that Commerce's application of the "same-quarter comparison" and the "inter-quarter comparison" within the same administrative review was internally inconsistent, arbitrary, and contrary to law. Pls.' Br. at 16–20. Universal asserts that Commerce determined in the "same-quarter comparison" that comparing Universal's sales prices made in different quarters of the period of review would be distortive and cause an inaccurate dumping margin because the costs and prices changed so significantly from quarter to quarter such that Universal's sales in different quarters were "incomparable," and that it was arbitrary and inconsistent for Commerce to later rely in the "inter-quarter comparison" on a comparison of Universal's sales prices made in different quarters when conducting the differential pricing analysis in the same administrative review. *Id.* at 15; 19–20.

Defendant contends that Universal's argument is essentially that the differential pricing analysis cannot consider differences in sales prices that are caused by changes in cost of production. Def.'s Resp. at

14. Defendant and Defendant-Intervenor assert that Commerce's decision to consider changes in sales prices from quarter to quarter of the period of review for the differential pricing analysis is consistent with Commerce's practice and 19 U.S.C. § 1677b(b) because cost determinations and the differential pricing analysis are governed by different statutes. Def.'s Resp. at 16, 19–20; Def.-Interv.'s Resp. at 12–14.

Universal counters that Defendant's characterization of Universal's argument is "an incorrect and oversimplified description of Universal's claim that adopted an internally inconsistent and arbitrary approach for calculating Universal's dumping margin in this review." Pls.' Reply at 3. Universal explains that it, "challenges only the arbitrary and inconsistent decision by Commerce" to compare sales prices made in different quarters of the period of review under one provision of the statute while refusing to compare sales prices made in different quarters of the period of review under another provision. Pls.' Br. at 22; Pls.' Reply at 3. Universal contends that:

> At its core, Universal's argument is that it is irrational, unreasonable, and inconsistent for Commerce to reject sales comparisons across [period of review] quarters to determine dumping while at the same time rely[ing] on sales comparisons across [period of review] quarters to determine the methodology to be used to calculate dumping. This internal inconsistency argument is not one that the [c]ourts have previously addressed. It is also not an issue that Commerce addressed in its *Final Results*.

Pls.' Reply at 3.

In support of its argument that Commerce improperly compared sales prices made in different quarters of the period of review (the "inter-quarter comparison") under one provision of the statute while refusing to make such comparisons (the "same-quarter comparison") under another provision of the statute, Universal relies on *NSK Ltd. v. United States*, 390 F.3d 1352 (Fed. Cir. 2004). *Id.* at 7. In *NSK Ltd.*, the United States Court of Appeals for the Federal Circuit ("CAFC") stated that, "Commerce's classification of repacking expenses as selling expenses is internally inconsistent with its classification of U.S. warehousing expenses and U.S. warehouse-to-customer-shipping expenses as movement expenses." *NSK Ltd.*, 390 F. 3d at 1357. The *NSK Ltd.* court explained that:

> To be consistent, it would appear that Commerce should classify them as the same type of expenses, whether that be as movement expenses or as sales expenses. If Commerce wants to treat

> these expenses inconsistently, then . . . Commerce [must] reasonably explain[] the inconsistency and . . . not act arbitrarily.

Id. at 1358 (citing *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1381–82 (Fed. Cir. 2001), *aff'd,* 332 F.3d 1370 (Fed. Cir. 2003) (vacating Commerce's decision to inconsistently define a term in two provisions of the antidumping statute because Commerce acted arbitrarily by not providing a reasonable explanation for the inconsistency)). The CAFC in *NSK Ltd.* held that Commerce's determination was arbitrary and impermissible because Commerce did not sufficiently explain the internal inconsistencies. *Id.*

19 U.S.C. § 1677f requires Commerce to explain the basis for its determinations. 19 U.S.C. § 1677f(i)(3); *see NMB Sing. Ltd v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions . . . [and] the path of Commerce's decision must be reasonably discernable to a reviewing court." (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). As further required by *NSK Ltd.*, Commerce must either make consistent determinations in different provisions of the antidumping statute or provide a reasonable explanation for any inconsistencies, which Commerce failed to do in the Final IDM. *See NSK Ltd.*, 390 F. 3d at 1357–58.

Similar to *NSK Ltd.*, Commerce here must either make consistent determinations, or reasonably explain any inconsistency in why Commerce should be permitted to calculate Universal's cost of production using the "same-quarter comparison," while then comparing the sales prices of U.S. sales made in different quarters using the "inter-quarter comparison" for purposes of Commerce's differential pricing analysis. Commerce's explanation that Universal's costs and prices changed so significantly from quarter to quarter that Commerce had to deviate from calculating the cost of production using an annual weighted-average cost because of possible distortions suggests that applying the "same-quarter comparison" is inconsistent with Commerce's later "inter-quarter comparison" analyzing sales prices made in different quarters for the differential pricing analysis. The Court observes that if Commerce's comparison of costs and prices would lead to distortive results because of significant fluctuations from quarter to quarter, thus justifying the "same-quarter comparison" examining sales prices only within specific quarters, it does not follow that costs and prices from sales in different quarters should be compared across quarters (the "inter-quarter comparison") in a different segment of the administrative review.

Because Commerce did not explain why it was reasonable to apply the "inter-quarter comparison" and the "same-quarter comparison" in the same administrative review, the Court holds that Commerce's internally inconsistent determinations are not in accordance with law. The Court remands for Commerce to reconsider or provide further explanation in accordance with this Opinion.

CONCLUSION

Accordingly, it is hereby

ORDERED that this case shall proceed according to the following schedule:

(1) Commerce shall file the remand determination on or before September 23, 2024;

(2) Commerce shall file the administrative record on or before September 30, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before October 18, 2024;

(4) Comments in support of the remand determination shall be filed on or before November 18, 2024; and

(5) The joint appendix shall be filed on or before November 22, 2024.

Dated: July 26, 2024
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 24–86

MEIHUA GROUP INTERNATIONAL TRADING (HONG KONG) LIMITED and XINJIANG MEIHUA AMINO ACID CO., LTD., Plaintiffs, and DEOSEN BIOCHEMICAL (ORDOS) LTD., DEOSEN BIOCHEMICAL LTD., and JIANLONG BIOTECHNOLOGY COMPANY, LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00069

[Sustaining the U.S. Department of Commerce's second remand redetermination of the 2019–2020 administrative review of the antidumping duty order on xanthan gum from the People's Republic of China].

Dated: July 29, 2024

Mark B. Lehnardt, Law Offices of David L. Simon, PLLC, of Washington, D.C., for Plaintiffs Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd.

Chunlian (Lian) Yang, Alston & Bird, LLP, of Washington, D.C., for Consolidated Plaintiffs Deosen Biochemical (Ordos), Ltd. and Deosen Biochemical Ltd.

Robert G. Gosselink, *Aqmar Rahman*, *Jonathan M. Freed*, *Kenneth N. Hammer*, and *MacKensie R. Sugama*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiff Jianlong Biotechnology Company, Ltd.

Sosun Bae, Senior Trial Attorney, and *Kelly Ann Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. Of Counsel was *Spencer C. Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the 2019–2020 administrative review of the antidumping duty order on xanthan gum from the People's Republic of China ("China") conducted by the U.S. Department of Commerce ("Commerce"), covering the period from July 1, 2019 through June 30, 2020. *See Xanthan Gum from the People's Republic of China* ("*Final Results*"), 87 Fed. Reg. 7104 (Dep't of Commerce Feb. 8, 2022) (final results of antidumping duty administrative review and final determination of no shipments; 2019–2021); *see also* Issues and Decision Memorandum for the Final Results of the 2019–2020 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China ("Final IDM"), ECF No. 23–3.

Before the Court is Commerce's Redetermination Pursuant to Court Remand Order in *Meihua Group International Trading (Hong Kong) Limited et al. v. United States* ("*Second Remand Redetermination*"), ECF Nos. 73, 74. *See Meihua Grp. Int'l Trading (Hong Kong), Ltd. v. United States* ("*Meihua II*"), 48 CIT __, 686 F. Supp. 3d 1359 (2024). Also before the Court is Plaintiffs' Unopposed Motion to Forego Comment Period ("Plaintiffs' Motion" or "Pls.' Mot."), ECF No. 78, filed by Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd. ("Plaintiffs" or "Meihua").

For the reasons discussed below, the Court sustains Commerce's *Second Remand Redetermination* and grants Plaintiffs' Motion.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case as set forth in *Meihua Group International Trading (Hong Kong) Limited v. United States* ("*Meihua I*"), 47 CIT __, __, 633 F. Supp. 3d 1203, 1207–08 (2023) and *Meihua Group International*

Trading (Hong Kong), Limited v. United States ("*Meihua II*"), 48 CIT __, __, 686 F. Supp. 3d 1359, 1364–65 (2024).

In the *Final Results*, Commerce determined that Meihua knowingly provided inaccurate data and withheld relevant information, and Commerce applied an adverse inference when it selected from the facts otherwise available on the record to determine Meihua's dumping margin. Final IDM at 11–16. Commerce applied a dumping margin rate of 154.07% to Meihua. *Final Results*, 87 Fed. Reg. at 7105. Commerce assigned Consolidated Plaintiffs Deosen Biochemical (Ordos) Ltd. and Deosen Biochemical Ltd. (collectively, "Deosen") and Jianlong Biotechnology Co., Ltd. ("Jianlong") a dumping margin rate of 77.04% for separate companies not individually investigated, based on the average of the 154.07% dumping margin rate assigned to Meihua and the 0% dumping margin rate assigned to Neimenggu Fufeng Biotechnologies Co., Ltd., Xinjiang Fufeng Biotechnologies Co., Ltd., and Shandong Fufeng Fermentation Co., Ltd. *Id.* Commerce also treated Deosen as a single collapsed entity and determined that Deosen had shipments to the United States during the period of review. Final IDM at 8. Commerce rejected Deosen Biochemical Ltd.'s offer to provide additional documents showing that Deosen Biochemical Ltd. did not have shipments during the period of review and Commerce did not rescind the review of Deosen Biochemical Ltd. *Id.* at 7–8

In *Meihua I*, the Court remanded for Commerce to reconsider the application of total adverse facts available and the highest dumping margin rate to Meihua because the Court concluded that Commerce failed to satisfy its statutory obligation under 19 U.S.C. § 1677m(d). *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1212. The Court directed Commerce to reconsider the applicable separate rate for Jianlong and Deosen in light of any changes Commerce made to Meihua's dumping margin rate. *Id.* at __, 633 F. Supp. 3d at 1213. The Court also remanded for Commerce to perform a collapsing analysis pursuant to 19 C.F.R. § 351.401(f) to determine whether the Deosen entities should have remained collapsed, whether Deosen Biochemical Ltd. was an exporter with shipments of subject merchandise during the period of review, and whether Commerce should have rescinded Deosen Biochemical Ltd.'s review. *Id.* at __, 633 F. Supp. 3d at 1215.

In the Final Results of Redetermination Pursuant to Court Remand ("*First Remand Redetermination*"), ECF Nos. 52–1, 53–1, Commerce did not provide Meihua with an opportunity to remedy any deficiencies and continued to apply total adverse facts available to Meihua. *First Remand Redetermination* at 7–13, 18–21. Commerce made no changes to Meihua's dumping margin rates and the Consolidated

Plaintiffs' separate rate. *Id.* at 16, 18–21, 27–29. Commerce did not conduct a collapsing analysis of the Deosen entities based on Commerce's prior determination that the collapsed entities comprised a single entity. *Id.* at 14–16, 23–25.

In *Meihua II*, the Court remanded for Commerce to reconsider the application of total adverse facts available and the highest dumping margin rate to Meihua pursuant to Commerce's statutory obligation under 19 U.S.C. § 1677m(d) and for Commerce to reconsider the separate rate based on any changes made to Meihua's dumping margin rate. *Meihua II*, 48 CIT at __, 686 F. Supp. 3d at 1370. The Court also remanded for Commerce to conduct a new collapsing analysis of Deosen based on information specific to the relevant period of review. *Id.* at __, 686 F. Supp. 3d at 1374.

Commerce filed its *Second Remand Redetermination*, determining that: (1) a rate of 0% was appropriate for Meihua for the period of review; (2) a separate rate of 0% for Jianlong and Deosen was also appropriate for the period of review; (3) Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. did not comprise a single entity during the period of review; and (4) the 2019–2020 administrative review for Deosen Biochemical Ltd. should be rescinded. *Second Remand Redetermination* at 2.

Plaintiffs filed a motion to forego the comment period and requested that the Court affirm Commerce's *Second Remand Redetermination*. Pls.' Mot. at 1–2. No party opposed Plaintiffs' Motion or filed comments opposing the *Second Remand Redetermination*. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

Plaintiffs and Consolidated Plaintiffs waive their right to file comments regarding Commerce's *Second Remand Redetermination* and ask the Court to sustain the *Second Remand Redetermination*. Pls.' Mot. at 2.

Commerce calculated a 0% weighted average dumping margin based on information reported by Meihua in its June 16, 2021 response to Commerce's third supplemental questionnaire and the final usable U.S. sales database that Meihua submitted in its June 4, 2021 response to Commerce's second supplemental questionnaire. *Second Remand Redetermination* at 8 (citing Meihua's Resp. Second Supp. Sec. C/D Questionnaire at Ex. SC2–6, PR 230;[1] Meihua's Resp. Third Supp. Sec. C/D Questionnaire, PR 244). Consistent with Commerce's practice of using a reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, Commerce determined that it was reasonable to assign a dumping margin of 0% to Jianlong and Deosen. *Id.* at 9.

On second remand, Commerce issued requests in March and April 2024 for Deosen to identify record information and provide new factual information regarding the collapsed status of Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. for the 2019–2020 period of review. *Id.* at 10–11. Commerce conducted a collapsing analysis based on Deosen Biochemical Ltd.'s certification that Deosen Biochemical Ltd. made no shipments during the period of review and information showing that Deosen Biochemical Ltd. was not capable of producing xanthan gum or a similar product during the period of review. *Id.* at 11–12. Commerce determined that, pursuant to 19 C.F.R. § 351.401(f)(1), Deosen Biochemical Ltd. should not be collapsed with Deosen Biochemical (Ordos) Ltd. for the 2019–2020 period of review. *Id.* at 12. Consequently, Commerce determined that Deosen Biochemical Ltd.'s 2019–2020 administrative review should be rescinded. *Id.* at 13.

Commerce's recalculation of Meihua's dumping margin rate and recalculation of the separate rate for Jianlong and Deosen is consistent with the Court's prior opinions and orders in *Meihua I* and *Meihua II*. *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1213; *Meihua II*, 48 CIT at __, 686 F. Supp. 3d at 1370. Commerce's determinations that Deosen did not comprise a single entity for the 2019–2020 period of review and that Deosen Biochemical Ltd.'s 2019–2020 administrative review should be rescinded are also consistent with the Court's prior opinion and orders in *Meihua I* and *Meihua II*. *Meihua I*, at __, 633 F. Supp. 3d at 1215; *Meihua II*, at __, 686 F. Supp. 3d at 1374.

CONCLUSION

The Court sustains the *Second Remand Redetermination*. Accordingly, it is hereby

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") numbers filed in this case, ECF Nos. 45, 62.

ORDERED that Plaintiffs' Unopposed Motion to Forego Comment Period, ECF No. 78, is granted; and it is further

ORDERED that the remaining deadlines and opportunities for comments in opposition and in support of the Second Remand Redetermination, as specified in the Court's Amended Scheduling Order, ECF No. 72, are hereby stricken.

Judgment will be entered accordingly.

Dated: July 29, 2024
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 24–87

NAGASE & CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and DEER PARK GLYCINE, LLC, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21-cv-00574 (SAV)

[Sustaining Commerce's Remand Determination.]

Dated: July 30, 2024

Neil R. Ellis, Law Office of Neil Ellis PLLC, of Washington, DC, for Plaintiff Nagase & Co., Ltd. With him on the brief was *Jay C. Campbell*, White & Case LLP, of Washington, DC.

Kelly M. Geddes, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, and *Christopher Kimura*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Michelle Li, Thompson Hine LLP, of Washington, DC, for Defendant-Intervenor Deer Park Glycine, LLC.

OPINION

Vaden, Judge:

Before the Court is the U.S. Department of Commerce's (Commerce) remand determination in the first administrative review of the antidumping order on glycine from Japan, filed pursuant to the Court's opinion in *Nagase & Co. v. United States* (*Nagase I*). *See* 47 CIT __, 628 F. Supp. 3d 1326 (2023). In *Nagase I*, the Court ordered Commerce to further explain its determination that a compensation for payment expense was properly treated as a general and administrative expense. The Court also held that, in the absence of a finding of legal error, it could not command Commerce to change its Final

Results on remand to address an alleged error in Nagase's assessment rate — an error that Nagase failed to timely raise. On remand, Commerce declined to revisit the assessment rate. Although no party contests Commerce's remand determination on the compensation for payment expense, Nagase continues to challenge Commerce's decision not to modify the assessment rate. For the following reasons, Commerce's remand determination is **SUSTAINED**.

BACKGROUND

The Court presumes familiarity with this case's facts as described in its previous opinion. *See Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1330–36. This opinion will recount those facts relevant to review of the Remand Results. On April 11, 2023, the Court issued its decision granting in-part and denying in-part Nagase's Motion for Judgment on the Agency Record. *Id.* at 1330. Two issues from the prior opinion remain relevant in this remand determination.

First, the Court held that Commerce incorrectly categorized a compensation for payment expense as a general and administrative expense and remanded the issue for further analysis and consideration. *Id.* at 1344. By statute, Commerce must determine whether a foreign producer is selling merchandise below the "cost of production." *Id.* at 1337 (citing 19 U.S.C. §§ 1677b(b)(1), (3)). Commerce is directed to include "an amount for selling, general, and administrative expenses" when calculating the cost of production. *Id.* (citing 19 U.S.C. § 1677b(b)(3)(B)). Commerce usually "exclude[s] expenses related to the production of non-subject merchandise from its calculation of general and administrative expenses if the expenses are allocated properly in the producer's ... books and records." *Id.* at 1332. Nagase explained that a non-glycine customer paid it to produce a drug; but when Nagase's facility failed an inspection, Nagase agreed to compensate the customer for the costs incurred and to dispose of any product already produced. *Id.* at 1333. Commerce determined that this compensation payment should be categorized as a general and administrative expense. *Id.* at 1341. The Court held that Commerce's findings on the issue were "conclusory and were contradicted by record evidence" and remanded the issue for reconsideration. Final Results of Redetermination Pursuant to Ct. Remand Order (Remand Results) at 1–2, ECF No. 57 (citing *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1342, 1344).

Second, the Court sustained Commerce's rejection of Nagase's untimely request to change the assessment rate determination. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1347. The request stemmed from Nagase's claim that it submitted inaccurate entered value figures for

its constructed export price sales.[1] *Id.* at 1335 (quoting Pl.'s Reply at 15, ECF No. 42) ("Nagase determined that 'the per-unit amounts of regular U.S. duties paid on Nagase's imports corresponding with [constructed export price] sales were inadvertently duplicated and reported as the entered values for those sales.'"). Although the calculation never changed from the publication of the Preliminary Results, Nagase did not seek a correction until nineteen days after Commerce published the Final Results — well after the five-day window for ministerial error allegations had closed. *Id.*

The Court determined that Commerce did not abuse its discretion in denying Nagase's untimely request to correct the claimed error. *See id.* at 1347. It also rejected Nagase's proffered work-around methodologies, which Nagase claimed Commerce could use to derive a more accurate entered value figure — despite that figure's absence from the record. *Id.* at 1346 ("The record does not contain the target at which Commerce should be aiming, and this Court is limited to facts on the record when it reviews Commerce's determinations."). Although the Court lacked a "free-floating power to command Commerce to alter its Final Results on remand without a finding of legal error," Nagase could continue to request that Commerce correct the assessment rate as "Commerce retains the discretionary power to do so until after judicial review is completed." *Id.* at 1347 (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1376 (Fed. Cir. 2010); *In re Clean Water Act Rulemaking*, 60 F.4th 583, 594 (9th Cir. 2023)).

On remand, Nagase filed a letter requesting that Commerce revise the assessment rate to exclude the allegedly inaccurate entered value data. *See generally* Nagase Letter to Commerce (June 8, 2023), J.A. at 3,093, ECF No. 66. Nagase proposed three possible pathways to do so. Commerce could: (1) permit Nagase to report accurate entered value sales; (2) "reverse engineer" accurate values by dividing the reported

[1] The dumping margin and assessment rate are "the two most important numbers calculated in any antidumping review." *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1331. The dumping margin is "'the total amount by which the price charged for the subject merchandise in the home market (the "normal value") exceeds the price charged in the United States[.]'" *Id.* (quoting *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001)). It "applies prospectively to future [subject merchandise] entries[,] ... which [are] cover[ed] with cash deposits ... until the completion of the next administrative review." *Id.*

When Nagase brings subject merchandise into the United States, it lists the declared value for the merchandise at entry — the "entered value" — at a value typically lower than for what the merchandise is later sold. *Id.* at 1331–32. As a result, "applying the dumping margin rate to the declared 'entered value' would result in the under-collection of duties." *Id.* at 1332. To address this problem, Commerce calculates an assessment rate by dividing the dumping margin by the entered value and "applies the resulting rate 'uniformly on all entries each importer made during the [period of review].'" *Id.* (quoting *Koyo Seiko*, 258 F.3d at 1343). Entered value is thus an important factor in the assessment rate's calculation and the determination of what antidumping duties are due.

constructed export price entered values by the U.S. duty; or (3) recalculate the constructed export price assessment rate as a per-unit (weight-based) rate rather than an *ad valorem* rate.[2] *Id.* at 2–3. As with the initial proceedings, at no point during the remand did Nagase proffer or place on the record what it alleges is the actual entered value amount. Oral Arg. Tr. at 8:16–19, ECF No. 73. The Court and Commerce remain ignorant of that amount to this day.

The Defendant-Intervenor opposed Nagase's request but otherwise did not file a brief.[3] *See* Deer Park Letter to Commerce (June 13, 2023), J.A. at 3,098, ECF No. 66. In the original court proceedings, Deer Park opposed Nagase's alternative means to derive the correct entered value figure. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346; Def.-Int.'s Resp. to Pl.'s Mot. for J. on Agency R. (Def.-Int.'s Br.) at 29–30, ECF No. 39; *Nagase I* Oral Arg. Tr. at 76:7–13, ECF No. 54.

Commerce published its Draft Results on July 14, 2023. Draft Results of Redetermination Pursuant to Ct. Remand Order (July 14, 2023) at 12, J.A. at 3,116, ECF No. 66. It filed the Remand Results with the Court on August 9, 2023. *See generally* Remand Results, ECF No. 57. Nagase's dumping margin declined from 27.71 percent in the original review to 15.93 percent following remand. *Compare id.* at 23, *with Glycine from Japan: Final Results of the Antidumping Administrative Review; 2018–2020; Correction*, 86 Fed. Reg. 57,127 (Dep't of Com. Oct. 14, 2021). The agency explained its decision to remove the compensation for payment expense from the general and administrative expense ratio, the resulting recalculated ratio, and its

---

[2] "Commerce 'normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes.' Thus, the normal method as prescribed by the regulation results in an *ad valorem* assessment rate." *Albemarle Corp. v. United States*, 37 CIT 1202, 1218 (2013) (quoting 19 C.F.R. § 351.212(b)(1)), *aff'd in part, rev'd in part*, 821 F.3d 1345, 1359 (Fed. Cir. 2016). Under some circumstances, Commerce may calculate the assessment rate on a per-unit basis, which would state the margin as dollars per kilogram. *Id* ; *see also* Pl.'s Comments in Partial Opp'n to Remand Redetermination (Pl.'s Br.) at 8, ECF No. 59 (quoting *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China*, 84 Fed. Reg. 67,925 (Dep't of Com. Dec. 12, 2019), accompanying Issues and Decisions Memorandum at Comment 5) ("Commerce has also stated that its 'normal practice [is] to use a per-unit assessment rate when the entered value is unknown and to use an *ad valorem* assessment rate when the entered value is known.'"). Under Nagase's approach, "This calculation would use the [potential uncollected dumping duties] in the numerator and the total weight in kilograms of [Nagase's constructed export price] sales during the [period of review] as the denominator, to derive a per-kg figure" — thereby avoiding use of the entered value information. Nagase Letter to Commerce at 3, J.A. at 3,095, ECF No. 66.

[3] During the remand, Defendant-Intervenor GEO Specialty Chemicals, Inc. transferred all "rights, title, and interest in and to its glycine business" to Deer Park Glycine, LLC (Deer Park or Defendant-Intervenor). Def.-Int.'s Mot. to Amend Caption at 1, ECF No. 68. The Court amended the caption to reflect this change. ECF No. 70.

denial of Nagase's request to revise the assessment rate. *See generally* Remand Results, ECF No. 57. Commerce stated that, on remand, it collected more information from Nagase via supplemental questionnaires regarding the compensation for payment issue. *Id.* at 6–8. Commerce also clarified that it does not use manufacturing costs related to a particular product in its general and administrative expense calculation. *Id.* at 9. It determined, "Record evidence indicates that the compensation for payment expense relates to a production process or manufacturing cost that does not involve glycine and that [Nagase] continues to produce other subcontracted non-glycine products." *Id.* Commerce therefore removed the compensation for payment expense and recalculated Nagase's general and administrative expense ratio. *Id.* at 9–10.

In its brief to this Court, Nagase states that Commerce made two more calculations to effectuate its changes to the general and administrative expense ratio. *See* Pl.'s Comments in Partial Opp'n to Remand Redetermination at 2, ECF No. 59 (Pl.'s Br.) (citing Margin Calculation Output (July 14, 2023) at 97, J.A. at 103,445, ECF No. 64). First, Commerce recalculated the amount of antidumping duties owed. *Id.* Second, Commerce recalculated Nagase's assessment rate based on the constructed export price sales for which it was the importer of record. *Id.* Commerce recalculated Nagase's assessment rate by dividing the now-corrected amount of antidumping duties owed by the total entered value of the constructed export price sales for which Nagase was the importer of record — the latter still reflecting the data Nagase originally submitted. *Id.*

Commerce addressed its decision not to further revisit the assessment rate. Remand Results at 10–23, ECF No. 57. It noted that Commerce's assessment rate calculation relied on data Nagase submitted and that Nagase did not seek to update the data in a timely manner. *Id.* at 10. Commerce also noted that Deer Park did not agree that Nagase's alternative methodology would correct the alleged error — especially since the "correct" entered value figure is unknown. *Id.* Citing the Federal Circuit's *Alloy Piping* decision, Commerce described the question as "whether it would be appropriate to disturb the administrative finality of an issue ... arising from Commerce's reliance [on Nagase's] reported data." *See id.* at 10–11; *see also Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292–93 (Fed. Cir. 2003). Commerce found that Nagase failed to cite "any ... remand determinations in which Commerce made a correction for an issue that the Court did not remand." Remand Results at 11, ECF No. 57.

With respect to Nagase's proposal to use a per-unit methodology, Commerce explained that its normal practice is to use the *ad valorem* methodology when a respondent provides entered value data. *Id.* at 15; *see also* 19 C.F.R. § 351.212(b)(1) ("The Secretary normally will calculate the assessment rate by dividing the dumping margin ... by the entered value of such merchandise for normal customs duty purposes."). Commerce also found that it was unclear that Nagase's alternative methodology would work because "the 'record does not contain a target at which Commerce should be aiming'" and "'the other interested parties do not accede to Nagase's understanding of the correct entered value total or to Commerce's use of nonstandard means to derive it.'" Remand Results at 18, ECF No. 57 (quoting *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346); *see also Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346 n.7 (quoting Pl.'s Mot. for J. on Agency R. and Supp. Opening Br. (Pl.'s Mot. Br.) at 37, ECF No. 34) ("Nagase, applying its alternative methodology, describes the resulting rate as 'a far more realistic figure' but noticeably does not call it the correct figure."). Although Commerce found that it had some discretion to depart from its normal methodology, it believed that Nagase should have submitted any updated data during the administrative review. Remand Results at 15–17, ECF No. 57.

Nagase supports Commerce's excluding the compensation for payment expense from the general and administrative expense ratio. *Id.* at 12; Pl.'s Br. at 1, ECF No. 59. However, Nagase continues to press the Court to order Commerce not to use the data Nagase submitted in its recalculation. Remand Results at 12–13, ECF No. 57; Pl.'s Br. at 1, ECF No. 59. To distinguish *Nagase I*'s timeliness, exhaustion, and finality considerations, Nagase advances three arguments for why the "circumstances surrounding Commerce's recalculation of [Nagase's] assessment rate ... differed fundamentally from the circumstances during the underlying annual review." Pl.'s Br. at 1, ECF No. 59. Nagase first argues that Commerce knowingly used the incorrect entered value data when implementing the Court's remand. *Id.* at 3–6. Because the Court reviews the Remand Results for substantial evidence, the recalculation created a new opportunity to review the assessment rate issue and Nagase's otherwise untimely claim. *Id.* Nagase believes that the Court should remand the case "to recalculate an assessment rate ... that is not based on information known to be incorrect." *Id.* at 1. It next proposes that Commerce could use information on the record to calculate the assessment rate using a per-unit (weight-based) methodology instead of an *ad valorem* methodology — thereby overcoming the finality concerns by avoiding the

"inaccurate" data without reopening the record. *Id.* at 6. Nagase's final argument is that Commerce's response to Nagase's request to revise the assessment rate during the remand is subject to judicial review so that prior finality or timeliness concerns are no longer relevant. Oral Arg. Tr. at 12:9–14, ECF No. 73 (The Court: "[B]ecause [Commerce] chose to expound on further reasons why they thought it was not appropriate for them to exercise their discretion and review this issue[,] ... that makes their methodology and the rationales ... a fresh issue for review by me?" Mr. Ellis: "Yes, correct, Your Honor.").

Commerce responds that it complied with the Court's remand order to reexamine the compensation for payment expense and that its redetermination is supported by substantial evidence. Def.'s Resp. in Supp. of Remand Results (Def.'s Br.) at 4–5, ECF No. 63. It also argues that it correctly declined Nagase's entreaties to revise the assessment rate. *Id.* at 5–9. Unlike Nagase, Commerce views the remand as necessarily tied to the original determination. Therefore, Nagase's failure to raise timely concerns about the assessment rate during the original proceedings pretermits the Court's ability to issue any order regarding the calculation now. *Id.* at 6 ("[Commerce] concluded that the interest in finality outweighed the interest in ensuring accuracy where the party responsible for the error had failed to take advantage of multiple opportunities to raise the issue before the results became final."). Citing Federal Circuit precedent, Commerce argues that the Court's remand on an unrelated issue is not a "vehicle for circumventing exhaustion requirements." *Id.* at 6–7 (citing *Alloy Piping*, 334 F. 3d at 1292–93; *QVD Food Co. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011); *Dorbest*, 604 F.3d at 1363). The agency found that it would be inappropriate to use Nagase's alternative methodologies because the correct entered value "target" is not on the record, Commerce and Deer Park oppose using "nonstandard means" to derive it, and Commerce's preference is to use a respondent's entered value data when it is provided. *Id.* at 9 (quoting *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346).

The Court held oral argument on February 16, 2024. ECF No. 71. No party objected to Commerce's new determination on the compensation for payment issue. Oral Arg. Tr. at 6:10–18, 40:19–24, ECF No. 73. The parties disagreed about the assessment rate. Nagase emphasized that the remand created a new determination for the Court to review and the circumstances favored ordering Commerce to reconsider it. *Id.* at 12:5–14, 12:25–13:7. Commerce and Deer Park emphasized the need for finality, that the Court sustained and did not remand the assessment rate issue, and that the parties never conceded that Nagase's entered value data was incorrect because there

was no merits determination on the issue. *Id.* at 6:25–7:3, 22:6–13, 35:14–19, 39:23–40:6.

JURISDICTION AND STANDARD OF REVIEW

As in *Nagase I*, the Court has jurisdiction over Nagase's challenge under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping reviews. The Court must sustain Commerce's "determination[s], finding[s], or conclusion[s]" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, 45 CIT __, No. 20–00008, 2021 Ct. Intl. Trade LEXIS 34, at *15 (Mar. 21, 2021). Additionally, "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT 189, 190 (2014) (quoting *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1274 (2008)).

DISCUSSION

I. Summary

The Court remanded the issue of whether Nagase's compensation for payment expense should have been included in Commerce's calculation of the general and administrative expense ratio. Commerce determined on remand that the compensation for payment expense should be removed from Nagase's ratio and performed the recalculations needed to effectuate that change. Because the remand determination is supported by substantial evidence and no party objects, the Court sustains the Remand Results.

The Court did not order Commerce to reconsider the assessment rate; but it noted, "Commerce retains discretionary power to do so until after judicial review" concludes. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1347 (citing *Dorbest*, 604 F.3d at 1376). Despite Nagase's request on remand, Commerce declined to alter the entered value used in determining the assessment rate. Commerce calculated the assessment rate using the information Nagase put on the record; there is no allegation of any mathematical error. Because Nagase failed to raise any objection during the administrative review to Commerce's calculations, it may not do so now. That this Court remanded the review to Commerce to address an unrelated argument

does not save Nagase from its procedural default. A remand is not a new wellspring for issues already forfeited. Commerce's Remand Results will be **SUSTAINED**.

II. Compensation for Payment

The first issue is whether Commerce complied with the Court's order to reconsider the compensation for payment expense. On remand, Commerce solicited more information on the expense from Nagase via supplemental questionnaires. Remand Results at 7, ECF No. 57. After reviewing the new evidence, Commerce reversed its original position. It wrote, "While Commerce initially considered the compensation for payment similar to litigation or settlement claims, upon reexamination, we find that the amount represents the reimbursement of certain of the consignee's expenses incurred for the production of non-subject merchandise." *Id.* at 8. Because Nagase continues to produce custom non-glycine products, the cost of the compensation for payment expense can be offset by that continuing line of business. Therefore, the compensation for payment expense should not be included in the general and administrative expenses for Commerce's calculations in this review. *See* Oral Arg. Tr. at 5:25–6:15, ECF No. 73 (summarizing Commerce's actions on remand); Remand Results at 9, ECF No. 57 ("Record evidence indicates that the compensation for payment expense relates to a production process or manufacturing cost that does not involve glycine and that [Nagase] continues to produce other subcontracted non-glycine products.").

Nagase supports Commerce's remand determination on this issue, and Deer Park does not object. Oral Arg. Tr. at 6:10–18, ECF No. 73 (The Court: "[D]o I understand that there is no objection by any party to the Commerce Department's new determination on the compensation for payment issue?" Ms. Geddes: "You have that information correct, Your Honor." Mr. Ellis: "And you're correct, Your Honor, that there is no objection or remaining issue regarding that topic."); *id.* at 40:19–24 (The Court: "I did not hear that you had any objection ... on behalf of your client, Deer Park Glycine ... to Commerce's redetermination with regard to the compensation for payment expense; is that correct ...?" Ms. Li: "No objection; that's correct."). Commerce complied with the Court's remand order to reexamine its determination regarding the compensation for payment expense, and no party objects to the agency's new determination. The Court finds that Commerce's Remand Results are supported by substantial evidence and are therefore **SUSTAINED**.

III. Recalculation of the Assessment Rate

The Court next turns to the issue not remanded: Nagase's objection to the assessment rate. Nagase argues that the Court should remand this case for Commerce to use one of Nagase's proffered solutions to change the assessment rate — either reopening the record for Commerce to accept "corrected" entered value data or "reverse engineer-[ing]" the numbers from information already on the record. *See* Nagase Letter to Commerce at 3, J.A. at 3,095, ECF No. 66; *see also* Pl.'s Br. at 6, ECF No. 59. Nagase maintains that "[t]he circumstances surrounding ... the remand differed fundamentally from ... the underlying ... review." Pl.'s Br. at 1, ECF No. 59.

The core of Nagase's argument is that, regardless of its procedural default, the remand created a new determination for judicial review when Commerce (1) recalculated the general and administrative expense ratio, knowing that one of the recalculation inputs involved the questioned data and (2) explained in the Remand Results its decision not to exercise its discretion to alter the data. *See id.* at 2, ECF No. 59 ("Commerce [when recalculating Nagase's assessment rate] knew that this entered value was incorrect and, therefore, likewise knew that the resulting assessment rate for [Nagase] ... was incorrect."). Nagase essentially argues that the remand revived Nagase's defaulted objection.

From Commerce's perspective, the Court remanded on a separate issue; and it would be inappropriate to reconsider the assessment rate after the Court found no legal error on the initial review. Remand Results at 15–16, ECF No. 57; Def.'s Br. at 5, ECF No. 63 (citing *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1344–47). Commerce opposes Nagase's solutions — reopening the record or using a per-unit assessment rate — because doing so undermines the principle of finality and deviates from Commerce's standard methodology. Def.'s Br. at 8–9, ECF No. 63; *see also* Oral Arg. Tr. at 35:21–25, ECF No. 73 ("The question was should we ... reopen a closed issue that was not remanded based on an allegation that isn't in the record and that would require us to collect new information or to deviate from our standard methodology.").

The Court remains unconvinced that the remand eliminated the consequences of Nagase's procedural default. This Court may not use non-record information in its review, and Nagase has consistently refused to provide either Commerce or this Court with what it believes the "correct" entered value amount is. *See* Oral Arg. Tr. at 8:16–19, ECF No. 73. Because Nagase provided the only entered value amount on the record, the record it built does not demonstrate error. Nagase's arguments are also at odds with Federal Circuit

precedent. *See, e.g.*, *Dorbest*, 604 F.3d at 1377. The Court will **SUSTAIN** Commerce's remand determination against Nagase's remaining objections.

A.

It is important to note the Court's limited role in reviewing Commerce's determinations. The Court is not at liberty to conduct independent factfinding to sustain or overturn Commerce's final decisions in antidumping reviews. *Cf. Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) ("[T]o the extent the [CIT] engaged in refinding the facts (*e.g.*, by determining witness credibility), or interposing its own determinations ... [it] exceeded its authority."). Instead, federal statute limits the Court to review of the record created by the parties before the agency. *See* 19 U.S.C. § 1516a(b)(2)(A) (defining scope of record for review in proceedings before the CIT); *QVD Food*, 658 F.3d at 1324–25 (quoting S. Rep. No. 96–249, at 247–48 (1979)) ("[J]udicial review of antidumping proceedings is based on 'information before the relevant decision-maker at the time the decision was rendered[.]'"). The parties bear the burden to create that record. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Should that record turn out to be inadequate, the parties also bear the costs of their failure to put necessary information on the record. *Navneet Educ. Ltd. v. United States*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 194, at *35 (Dec. 29, 2023) (declining to adjudicate a claim where the plaintiff "unfortunately did not place any such evidence on the record ....").

Commerce requested that Nagase provide the entered value for all the glycine it exported to the United States during the period of review. Nagase Initial Questionnaire, J.A. at 1,312, ECF No. 45. Nagase provided a dollar figure for that amount. Pl.'s Mot. Br. at 5, 14, ECF No. 34 (identifying the entered value provided); Remand Results at 21, ECF No. 57 ("[Nagase] reported entered value and, thus, the entered value is on the record."). Commerce used the figure Nagase provided to calculate the resulting assessment rate and the additional duties Nagase owed. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1335. There is no dispute that Commerce's mathematical calculations — both in its original determination and on remand — are correct. Remand Results at 17, ECF No. 57 ("[Nagase has] alleged no such error in Commerce's programming or in Commerce's calculation methodology used to calculate its assessment rate."). Nagase objects that it provided an inaccurate amount for the entered value and that it will pay a substantial amount in excess duties that it should not owe. Nagase Letter to Commerce at 2, J.A. at 3,094, ECF No. 66. Its problem is that there is no other figure on the record reflecting an

alternative amount for the entered value of the glycine it exported to the United States. Indeed, Nagase has conspicuously declined to provide either Commerce or the Court with what it claims is the "correct" entered value amount. *See* Oral Arg. Tr. at 8:16–19, ECF No. 73 (The Court: "[T]here is no proffered actual value for what the 'correct' entered value is anywhere; that number has never been disclosed." Mr. Ellis: "That's correct."). Because (1) the Court is limited to reviewing the record that was before the agency, (2) Commerce used the entered value Nagase provided, and (3) there is no mathematical error in Commerce's calculations using that amount, there is no error on the record. Nagase cannot object that Commerce chose to use the value it provided. *Cf. ABB Inc. v. United States*, 42 CIT __, 355 F. Supp. 3d 1206, 1222 (2018) ("When a respondent provides seemingly complete, albeit completely inaccurate, information, [the law] does not require Commerce to issue a supplemental questionnaire seeking assurances that the initial response was complete and accurate. In other words, Commerce is not obligated to issue a supplemental questionnaire to the effect of, 'Are you sure?'"). Any information a party places on the record may be used by Commerce in its determination. *Navneet*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 194, at *27 (declining plaintiff's entreaties to order Commerce to ignore evidence it placed on the record); *Cheng Shin Rubber Ind. Co. v. United States*, 47 CIT ___, 2023 Ct. Intl. Trade LEXIS 19, at *29 (Feb. 13, 2023) (same). Commerce cannot be held responsible for Nagase's failure to create a perfect record. *Qingdao Sea-Line*, 766 F.3d at 1386 ("The burden of creating an adequate record lies with the interested parties, not with Commerce.").

To compound matters, Nagase never objected to Commerce's calculations — using the figure Nagase provided — during the entire pendency of the original administrative review. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1344. Nagase waited until weeks after the publication of the Final Results before alleging it had provided inaccurate information. *Id.* at 1335. But even if Nagase had timely proffered an objection during the ministerial error period following publication of the Final Results, its objection still would have been untimely. *QVD Food*, 658 F.3d at 1328 (holding that a party may not raise in a ministerial error allegation an objection that could have been made following the publication of the preliminary results). Commerce never wavered in its use of the data Nagase provided. The assessment rate Commerce calculated in its original determination was the same one it had published in its Preliminary Results. *Compare* Prelim. Margin Calculation Output, J.A. at 102,781, ECF No. 44, *with* Final Margin Calculation Output, J.A. at 103,299, ECF No. 44. Commerce's regu-

lations have long provided that, following the Preliminary Results' publication, parties must submit a case brief to the agency containing "all arguments that continue in the submitter's view to be relevant to the Secretary's final determination[.]" 19 C.F.R. § 351.309(c)(2); *see also* Oral Arg. Tr. at 16:10–15, ECF No. 73 (The Court: "[T]his allegation is untimely in the extreme. It's actually not that you missed it by two weeks, you missed it by a matter of months." Mr. Ellis: "That's correct." The Court: "It wasn't close." Mr. Ellis: "That's correct."). Nagase submitted such a brief, but it did not object to Commerce's calculation of the assessment rate. *See* Nagase Admin. Case Br., J.A. at 102,799, ECF No. 44; Nagase Admin. Rebuttal Br., J.A. at 102,839, ECF No. 44. It was at that point Nagase relinquished its right to object to the data Commerce used. *QVD Food*, 658 F.3d at 1328. Nagase's failure to file a ministerial error allegation following publication of the Final Results was just the cherry on top of Nagase's forfeiture sundae.

Precedent is straightforward. "Neither this Court nor the Court of Appeals for the Federal Circuit has ever found an abuse of discretion where Commerce has declined to correct a ministerial error that was detectable during the original proceedings but was not raised until after publication of the final results and the closure of the five-day window for ministerial error comments." *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1345 (citing *Dorbest*, 604 F.3d at 1377). Commerce's remand determination does not change this rule. Having previously forfeited its objection and with no new evidence regarding the entered value amount on the record, there is nothing to raise now. "The remand after th[e] first appeal was on one very narrow ground, and that ground is all that remains to be litigated in this subsequent appeal." *Vivint v. Alarm.com Inc.*, 856 F. App'x 300, 304 (Fed. Cir. 2021); *see also NEXTEEL Co. v. United States*, 44 CIT __, 461 F. Supp. 3d 1336, 1343–46 (2020) (declining to consider arguments that could have been raised during proceedings in front of Commerce but were not).

Although Commerce may have the power to offer Nagase an opportunity to revise its data as a matter of grace following publication of the Final Results, it is not legally obligated to do so. *Compare Dorbest*, 604 F.3d at 1376–77 (holding that, although Commerce has the discretion to correct an alleged error until judicial review concludes, a court may not force it to do so once the ministerial error allegation period closes), *with ATC Tires Priv. Ltd. v. United States*, 42 CIT __, 324 F. Supp. 3d 1355, 1363 (2018) (affirming Commerce's discretionary decision to *sua sponte* correct a ministerial error without a formal error allegation). Even where an alleged error "is apparent (or should

have been apparent) from the face of the calculation or from the final determination itself," Nagase is still "required to exhaust its administrative remedies." *Alloy Piping*, 334 F.3d at 1292–93. The Court's role is circumscribed by Federal Circuit precedent and limited to the record that Nagase built with its submissions. It is undisputed Nagase failed to raise an objection during the time allotted by regulation. That ends the matter.

B.

Nagase's final effort to gain a remand is its argument that there are alternative methodologies that could divine a more accurate assessment rate. Pl.'s Br. at 6, ECF No. 59. This argument misses the mark for similar reasons. First, there is only one entered value on the record of this case. Pl.'s Mot. Br. at 5, 14, ECF No. 34; Remand Results at 21, ECF No. 57 ("[Nagase] reported entered value and, thus, the entered value is on the record."). It is also undisputed that Commerce used its normal methodology in calculating the assessment rate. *See* Pl.'s Br. at 8, ECF No. 59; *see also* Remand Results at 22, ECF No. 57. Because the parties agree that Commerce correctly performed its calculations using the data the parties provided to it, there is no "wrong" information present on the record for which a workaround is necessary. *Cf. Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 352 (2002), *aff'd sub nom. Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284 (Fed. Cir. 2003) ("Procedures exist allowing respondents to correct submitted data. Kanzen's failure to follow those procedures in this case is fatal to its position.").

Second, there is no objective way to tell how much more "accurate" Nagase's proposed methodologies are because Nagase has not disclosed what the "correct" entered value is. *See* Oral Arg. Tr. at 8:16–19, ECF No. 73. Without knowing what the target is at which Commerce is aiming, it is impossible to determine how much "closer" we are. All Commerce has is Nagase's assertion that the amount should be much less than Commerce's determination. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346 ("The record does not contain the target at which Commerce should be aiming, and this Court is limited to facts on the record when it reviews Commerce's determinations."); *id.* at 1346 n.7 (quoting Pl.'s Mot. Br. at 37, ECF No. 34) ("Nagase, applying its alternative methodology, describes the resulting rate as 'a far more realistic figure' but noticeably does not call it the correct figure.").

Third, Nagase has similarly forfeited its arguments regarding any workaround methodologies by failing to raise them before the agency. *Navneet*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 194, at *42 (citing

Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990)) ("As the Federal Circuit has explained, when a party fails to raise a particular argument before the agency, that argument is forfeited."). Because Nagase failed to allege any error in the assessment rate during the administrative review, Commerce had no occasion to opine in its final decision about whether Nagase's proposals are possible. Remand Results at 17, ECF No. 57 ("[A]ny alleged reporting error should have been discovered and raised by Nagase during the administrative review."); *see also* Oral Arg. Tr. at 27:24–28:2, ECF No. 73 (Ms. Geddes: "Commerce reasonably found [using Nagase's alternative methodology] was inappropriate ... when the information on the record was not clear as to why [using Commerce's] standard methodology, relying on the entered values, would be incorrect.").

Deer Park Glycine alleges Nagase's proposal would generate inaccurate results, and it has consistently objected to Nagase's alternative methodologies since Nagase first raised them in this Court. *Nagase I*, 47 CIT __, 628 F. Supp. 3d at 1346; Def.-Int.'s Br. at 29–30, ECF No. 39; *Nagase I* Oral Arg. Tr. at 76:7–13, ECF No. 54. Nagase's procedural default prevents the Court from having the benefit of Commerce's judgment in reviewing the proposed alternative calculations. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (noting that "agencies, not the courts, ought to have primary responsibility for [their] programs" such that allowing the agency to first provide its views "promotes judicial efficiency" by "produc[ing] a useful record for subsequent judicial consideration"); *Assan Aluminyum Sanayi ve Ticaret A.S. v. United States* , 48 CIT __, 2024 Ct. Intl. Trade LEXIS 55, at *27 (May 8, 2024) ("Allowing agencies to address issues first promotes accuracy and judicial economy."). There is no agency record on this issue for the Court to review. *Ellwood City Forge Co. v. United States*, 46 CIT __, 582 F. Supp. 3d 1259, 1276 (2022) (citing *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013)) ("Exhaustion applies when it serves a 'practical purpose' — that of giving notice to the agency so that it may be the initial decision maker and create a record for subsequent judicial review."); *see also Qingdao Sea-Line*, 766 F.3d at 1386 ("The burden of creating an adequate record lies with the interested parties, not with Commerce."). The Court declines Nagase's invitation to usurp the agency's role and rule on Nagase's proposal in the first instance.

CONCLUSION

Commerce's Remand Determination complies with the Court's prior order and is supported by substantial evidence. No party objects to

Commerce's removal of the compensation for payment expense from the general and administrative expense ratio. Although Nagase seeks to relitigate whether Commerce properly calculated the assessment rate, this Court is limited in its review to the record Nagase built and remains powerless to order Commerce to consider Nagase's procedurally defaulted claims. Commerce accurately performed the necessary mathematical calculations using the information supplied by the parties. That Nagase now regrets the information it placed on the record is not grounds to excuse it from complying with the rules of administrative exhaustion and Federal Circuit precedent. Commerce's Remand Determination is therefore **SUSTAINED**.

Dated: July 30, 2024
New York, New York

/*s*/ *Stephen Alexander Vaden*
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–88

BLUESCOPE STEEL, LTD., BLUESCOPE STEEL AMERICAS INC., AND NORTH STAR BLUESCOPE STEEL LLC, Plaintiffs, v. UNITED STATES, Defendant, and CLEVELAND-CLIFFS INC., NUCOR CORP., STEEL DYNAMICS, INC., SSAB ENTERPRISES, LLC, AND UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 22–00353
PUBLIC VERSION

[The court denies Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: August 1, 2024

Daniel L. Porter, Curtis, Mallet-Prevost, Colt, & Mosle LLP, of Washington, D.C., argued for Plaintiffs BlueScope Steel, Ltd., BlueScope Steel Americas Inc., and North Star BlueScope Steel LLC. With him on the briefs were *James P. Durling*, *James C. Beaty* and *Katherine R. Afzal*.

Michael K. Haldenstein, Attorney-Advisor, Office of the General Counsel, International Trade Commission, of Washington, D.C., argued for Defendant United States. With him on the briefs were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Maureen Thorson, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Nucor Corporation. With her on the briefs were *Alan H. Price, Christopher B. Weld* and *Theodore P. Brackemyre*.

Roger B. Schagrin and *Jeffrey D. Gerrish*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Steel Dynamics, Inc. and SSAB Enterprises, LLC.

Stephen P. Vaughn, *Neal Reynolds*, and *Barbara Medrado*, King & Spalding LLP, of Washington, D.C., for Defendant-Intervenor Cleveland-Cliffs Inc.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION

Katzmann, Judge:

From 2021 to 2022, the U.S. International Trade Commission ("Commission") conducted a five-year review of an antidumping duty order on imports of hot-rolled steel flat products ("hot-rolled steel"). In its review, the Commission cumulatively assessed ("cumulated") imports of hot-rolled steel from Australia alongside imports of hot-rolled steel from other countries. On the basis of this cumulative assessment, the Commission determined that revocation of "the antidumping duty order[] on hot-rolled steel from Australia . . . would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Hot-Rolled Steel from Australia, Brazil, Japan, Korea, Netherlands, Russia, Turkey, and the United Kingdom*, 87 Fed. Reg. 74167, 74167 (ITC Dec. 2, 2022), P.R. 357 ("*Five-Year Determination*"). The result of this material-injury determination is that Australian imports of hot-rolled steel remain subject to an antidumping duty order imposed by the U.S. Department of Commerce ("Commerce"). *See* 19 U.S.C. § 1675(d)(2)(B).

Plaintiffs BlueScope Steel, Ltd. ("BlueScope Ltd."), BlueScope Steel Americas Inc., North Star BlueScope Steel LLC ("North Star") (collectively, "BlueScope"), comprise an Australian exporter-producer of steel and its U.S. affiliates. In a motion for judgment on the agency record, they challenge the Commission's determination to cumulate hot-rolled steel imports from Australia with imports from other countries. *See* Pls.' Mot. for J. on the Agency R. at 1–2, July 14, 2023, ECF No. 44 ("Pls.' Br.").

As the court discusses below, the Commission made a series of independently necessary findings in reaching its cumulation determination as to Australia. BlueScope challenges only the Commission's finding that subject imports from Australia would likely compete under similar conditions of competition to those faced by imports from other subject countries. *See* Pls.' Br. at 1–2. Specifically, BlueScope contends (1) that the Commission's decision to cumulate Australian imports of hot-rolled steel with other subject imports constitutes an unlawful departure from the Commission's established practice of considering U.S. investments by foreign producers, and (2) that this decision is unsupported by substantial evidence. *See* Compl. ¶¶ 9–20, Jan. 13, 2023, ECF No. 8; Pls.' Br. at 2. BlueScope requests that the court remand the Commission's final determination as "unlawful." Pls.' Br at 3. Defendant the United States opposes BlueScope's motion, as do U.S.-based Defendant-Intervenors Cleveland-

Cliffs Inc., Steel Dynamics, Inc., SSAB Enterprises, LLC., Nucor Corporation, and United States Steel Corporation. Defendant-Intervenors are U.S. producers of steel products.

The court concludes that the Commission's cumulation determination with respect to Australia is in accordance with law and supported by substantial evidence. The court accordingly enters Judgment on the Agency Record for Defendant and Defendant-Intervenors.

BACKGROUND

I. Legal and Regulatory Framework

The Tariff Act of 1930, as amended, provides for the imposition of antidumping duties on imported merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C § 1673(1); *see also id.* § 1673e. Commerce may impose these duties only where the Commission separately determines that "an industry in the United States (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of [the subject] merchandise for importation." *Id.* §§ 1671(a)(2), 1673(2).

Every five years after the publication of an antidumping or countervailing duty order, the Commission must conduct a "sunset" review of that order. *Id.* § 1675(c)(1); *see also Nucor Corp. v. United States*, 32 CIT 1380, 1385, 594 F. Supp. 2d 1320, 1333 (2008), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010). In this review, the Commission determines whether "revocation of [the] order . . . would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). The Commission must consider the "likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated." *Id.* If the Commission determines that revocation would likely lead to continued or recurrent material injury, Commerce cannot revoke the order. *Id.* § 1675(d)(2)(B). But if the Commission concludes that revocation would not have this effect, Commerce must revoke the subject order if Commerce does not separately determine "that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur . . . ." *Id.* § 1675(d)(2)(A).

In conducting its likely-material-injury analysis, the Commission "may cumulatively assess the volume and effect of imports" from multiple source countries if those imports satisfy certain threshold criteria. *Id.* § 1675a(a)(7). The imports must (1) be "likely to compete with each other and with domestic like products in the United States market" and (2) not be "likely to have no discernible adverse impact

on the domestic industry." *Id.* If these criteria are satisfied, the Commission "may cumulatively assess the volume and effect of imports of the subject merchandise from all countries" subject to review. *Id.* If they are not satisfied, or if the Commission exercises its statutory discretion not to cumulate, the Commission proceeds to conduct a likely-material-injury analysis for the decumulated imports on an independent, country-specific basis. *See id.* § 1675a(a)(2).

Section 1675a does not delineate factors for the Commission's consideration in determining whether to cumulate imports from a given country. *See Nucor*, 601 F.3d at 1295; *Neenah Foundry Co. v. United States*, 25 CIT 702, 709, 155 F. Supp. 2d 766, 772 (2001). The Commission accordingly enjoys "wide latitude" in identifying factors relevant to cumulation in sunset reviews. *Allegheny Ludlum Corp. v. United States*, 30 CIT 1995, 2002, 475 F. Supp. 2d 1370, 1380 (2006). At the same time, however, the Commission's discretion must "be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Mins. Co. v. United States*, 766 F.2d 1029, 1032 (Fed. Cir. 1985).

In practice, the Commission bifurcates its analysis of whether certain countries' imports would be "likely to compete with each other and with domestic like products," 19 U.S.C. § 1675a(a)(7), into two sub-analyses: a "Likelihood of a Reasonable Overlap of Competition" analysis and a "Likely Conditions of Competition" analysis. *See Nucor*, 601 F.3d at 1295–96 (holding that the likely-conditions-of-competition analysis is a reasonable exercise of the Commission's discretion in carrying out the cumulation provision).

In determining whether imports are likely to compete under similar "conditions of competition" in the U.S. market, the Commission assesses considerations that include the import prices, impact, and sales prices that would be likely upon revocation.[1] *See Nucor*, 601 F.3d at 1294 (concluding that the Commission reasonably determined in a sunset review that conditions of competition differed on account of subject countries' differences in price and volume trends, variation in focus on home and regional markets, and levels of affiliation with major U.S. producers); *see also Neenah Foundry*, 155 F. Supp. 2d at 790 (concluding that Commission did not abuse its discretion in

[1] 19 U.S.C. § 1675a(a)(7) does not specify that the likely competition condition pertains to events that would occur upon revocation of the relevant antidumping or countervailing duty order. It differs in this respect to the material injury provision, which refers explicitly to the "impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated." *Id.* § 1675a(a)(1). Nevertheless, no party challenges the notion that § 1675a(a)(7) impliedly refers to post-revocation events.

declining to cumulate from a country whose subject imports were dumped at a significantly lower margin than those of other of subject countries).

II. History of Relevant Administrative Proceedings

In 2016, the Commission determined that an industry in the United States was materially injured by reason of imports of hot-rolled steel from eight subject countries: Australia, Brazil, Japan, the Netherlands, South Korea, Turkey, and the United Kingdom. *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, 81 Fed. Reg. 66996 (ITC Sept. 29, 2016); Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom, Inv. Nos. 701TA-545–547 and 731-TA-1291–1297 (Final), USITC Pub. No. 4638 (Sept. 2016), P.R. 81. Commerce subsequently issued antidumping duty orders on imports from all investigated countries, and countervailing duty orders on imports from Brazil and South Korea. *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: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 Fed. Reg. 67962, (Dep't Com. Oct. 3, 2016) ("*Antidumping Duty Order*"); *Certain Hot-Rolled Steel Flat Products From Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 Fed. Reg. 67960 (Dep't Com. Oct. 3, 2016) ("*Countervailing Duty Order*").

Pursuant to 19 U.S.C. § 1675(c)(1), the Commission instituted five-year reviews of the antidumping and countervailing duty orders on September 1, 2021. *See Notice of Institution of Five Year Reviews*, 86 Fed. Reg. 49057 (ITC Sept. 1, 2021), P.R. 5. As a respondent foreign producer, BlueScope filed both pre- and post-hearing briefs and attended the Commission's hearing. *See* Pre-Hr'g Br., Sept. 8, 2022, P.R. 273, C.R. 269 ("BlueScope's Pre-Hr'g Br."); Hr'g Tr., Sept. 26, 2022, P.R. 315; Post-Hr'g Br., Sept. 26, 2022, P.R. 321, 288 ("BlueScope's PostHr'g Br.").

The Commission issued its final five-year review determination on November 25, 2022. *See Five-Year Determination*. The Commission

determined[2] that revocation of "the antidumping duty orders on hot-rolled steel from Australia, Japan, the Netherlands, Russia, South Korea, Turkey, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Id.* at 74167. The Commission explained its reasoning in a separate publication with both public and confidential versions. *See Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom*, Inv. Nos. 701-TA-545–546, 731-TA-1291–1297 (Review), and 731-TA-808 (Fourth Review), USITC Pub. 5380 (Nov. 2022), P.R. 352, 355 ("Views"), C.R. 336 ("Confidential Views").[3]

The Commission explained, among other things, that it cumulatively assessed imports from every subject country except Brazil. *See* Views at 66–67; Confidential Views at 96. The Commission reached this cumulation determination upon finding that (1) imports from all countries (including Brazil) "would not be likely to have no discernible adverse impact on the domestic industry" upon revocation of the countervailing and antidumping duty orders, that (2) "there would likely be a reasonable overlap of competition between the subject imports from each of these countries and the domestic like product and among the subject imports from these countries," and that (3) "imports from each subject country except Brazil are likely to compete in the U.S. market under similar conditions of competition." Views at 67; Confidential Views at 96. This third finding is the sole focus of BlueScope's arguments in this case. *See* Pls.' Br. at 3–4.

In its conditions-of-competition analysis, the Commission found that Australia is similar to other cumulated countries in that BlueScope (the sole Australian producer) has an incentive to compete, as well as a demonstrated interest in competing, for sales in the U.S. market. *See* Views at 63; Confidential Views at 91. The Commission also found that BlueScope would be able to compete in the U.S. market in large volumes given its production capacity. *See* Views at 63–64; Confidential Views at 91, 93. In making this finding, the Commission rejected BlueScope's arguments that BlueScope's sales

[2] "The Commission makes its determinations by tallying the votes of the six individual commissioners, each of whom is obligated to determine whether particular imports cause or threaten to cause the requisite harm." *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1360 (Fed. Cir. 1996). In the *Five-Year Determination*, Commissioners Schmidtlein and Stayin dissented as to the Commission's determinations regarding Brazil. *Id.* at 74167 n.2. The commissioners were otherwise unanimous, including as to all elements of the *Five-Year Determination* at issue in this case. *Id.*

[3] The Views and Confidential Views are paginated differently (the Confidential Views are longer). For clarity, the court refers to both versions throughout this opinion.

to its U.S. affiliate Steelscape would not constitute sales in the U.S. merchant market, and thus would not compete with U.S. producers. *See* Views at 65; Confidential Views at 93 & n.394, 94. The Commission noted BlueScope's production capacity and found that BlueScope's sales to the U.S. would not likely be limited to sales to its U.S. affiliate Steelscape.[4] *See* Views at 65; Confidential Views at 93–94 & n.394. The Commission also found that domestic producers were able to compete for sales in the western United States, where Steelscape is located, and that, as a result, BlueScope could compete with U.S. producers for sales to Steelscape and other U.S. purchasers.[5] *See* Views at 65 & n.395; Confidential Views at 93–94 & n.395.

To further support its finding of similarity among the conditions of competition faced by subject countries' producers, the Commission noted "that BlueScope is not the only subject producer to have substantial investments in hot-rolled steel production in the United States." Views at 65 n.396; Confidential Views at 94 n.396. This, the Commission explained, was because Japanese subject producer Nippon Steel had invested in a steel production facility based in Calvert, Alabama in 2021. Views at 65 n.396; Confidential Views at 94 n.396.

The Commission next considered BlueScope's ownership and investments in its U.S. affiliate North Star, determining that the relationship would not disincentivize BlueScope from competing in the U.S. market upon revocation of the *Antidumping Duty Order*. *See* Views at 65–66; Confidential Views at 94–95. The Commission noted BlueScope's sales to unaffiliated U.S. producers during the original period of investigation, made even after BlueScope acquired a full ownership interest in North Star. *See* Views at 65; Confidential Views at 94–95. The Commission further noted that North Star's "relatively small share of U.S. production" indicated BlueScope could sell to unaffiliated purchasers without harming their relationship with North Star. *See* Views at 66; Confidential Views at 95. According to the Commission, BlueScope itself maintained that North Star would not compete for sales in the western United States because of freight logistics, with the result that BlueScope could compete in that region without imperiling North Star's economic position. *See* Views at 66; Confidential Views at 95. Accordingly, the Commission concluded that

[4] The Commission referenced details raised in its analysis of whether imports from Australia would have a discernible adverse impact on a U.S. domestic industry upon revocation. *See* Views at 65; Confidential Views at 93. In that analysis, which BlueScope does not challenge, the Commission considered BlueScope's contractual obligations to supply Steelscape and how those obligations would affect BlueScope's capacity limitations and ability to export. *See* Views at 29–30; Confidential Views at 38–41.

[5] The Commission concluded that BlueScope retained an incentive to export to the western United States, where it currently supplies Steelscape, and that it would compete with other U.S. producers. *See* Views at 65 & n.395; Confidential Views at 93–94 & n.395.

despite BlueScope's substantial investments in North Star, and despite the veto power assertedly held by North Star's head of operations, BlueScope would have post-revocation incentives similar to those of other subject importers—and that BlueScope and other subject producers would resultingly be likely to compete under similar conditions of competition. *See* Views at 66 & n.400, 67; Confidential Views at 95 & n.400.

III. Procedural History

BlueScope filed a complaint with the court on January 1, 2023. *See* Compl. On July 14, 2023, BlueScope filed the instant Motion for Summary Judgment on the Agency Record under USCIT Rule 56.2. *See* Pls.' Br. The Government filed a response on October 19, 2023. *See* Gov't Br. Defendant-Intervenors filed a response on the same date. *See* Def.-Inters.' Br. in Opp'n to Pls.' Mot. for J. on the Agency R., Oct. 19, 2023, ECF No. 48 ("Def.-Inters.' Br."). BlueScope filed a reply on November 21, 2023. *See* Pls.' Reply Br. in Supp. of Mot. for J. on the Agency R., Nov. 21, 2023, ECF No. 52 ("Pls.' Reply").

The court then issued a letter with questions to the parties in advance of oral argument, to which the parties responded. *See* Letter re: Qs. for Oral Arg., Mar. 20, 2024, ECF No. 60; Pls.' Resp. to Oral Arg. Qs., March 28, 2024, ECF No. 63 ("Pls.' OAQ Resp."); Def. Resp. to Oral Arg. Qs., Mar. 28, 2024, ECF No. 64; Def.-Inters.' Resp. to Oral Arg. Qs., Mar. 28, 2024, ECF No. 61. The court held oral argument on April 1, 2024, after which the parties filed post-argument submissions. *See* Pls.' Post- Arg. Subm., Apr. 8, 2024, ECF No. 68; Def.'s Post-Arg. Subm., Apr. 8, 2024, ECF No. 69; Def.-Inters.' Post-Arg. Subm., Apr. 8, 2024, ECF No. 66.

Following oral argument, the court ordered (1) the Government's filing of a complete version of a confidential document that the Commission cited as part of its cumulation analysis and (2) brief statements by the Government and BlueScope regarding this filing. *See* Order, June 14, 2024, Order, ECF No. 74. The Government and BlueScope timely responded. *See* BlueScope's Foreign Producer Questionnaire (July 19, 2022), C.R. 100, ECF No. 75; Def.'s Statement in Resp. to Order, June 18, 2024, ECF No. 76; Pls.' Statement in Resp. to Order, June 21, 2024, ECF No. 78. The court then ordered the Government to file two additional confidential documents that the Commission cited in its Views. The Government timely responded, but indicated that the Commission's citations were erroneous—and that the Commission's intended references were to a document that

already appears in the joint appendix. *See* Def.'s Resp. to Order, June 25, 2024, ECF No. 82 ("Gov't. Suppl. Resp."); BlueScope's Post-Hr'g Br. at Ex. 3 ("Steelscape Declaration").

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(b)(1)(B)(i) supplies the standard of review: "The court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ."

"[A] party challenging the Commission's determination under the substantial evidence standard has chosen a course with a high barrier to reversal." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006) (internal quotation marks and citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022) (internal quotation marks and citation omitted). To be supported by substantial evidence, a determination must account for "whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–88 (1951)). A "determination may be supported by substantial evidence of record even if it is possible to draw two inconsistent conclusions from evidence in the record." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001) (internal quotation marks and citation omitted). "The substantial evidence inquiry takes into account the entire record, which includes evidence that supports and detracts from the conclusion reached." *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009).

DISCUSSION

BlueScope maintains that Australian imports would not likely compete under conditions of competition similar to other subject imports', and that it was accordingly improper for the Commission to cumulatively assess the imports in a single group.[6] *See* Pls.' Br. at 1–4. As noted above, BlueScope argues that (1) the Commission unlawfully departed from established practice and did not act in accordance with law when determining to cumulate imports of hot-rolled steel from

[6] No party challenges the Commission's determination that revocation of the antidumping order would not likely lead to no discernible adverse impact on a U.S. industry. Nor does any party challenge the Commission's determination that a likely and reasonable overlap of competition existed among subject imports.

Australia with other subject imports; and that (2) the Commission's determination to cumulate imports was not supported by substantial evidence. *See id.* The court concludes that (1) the Commission's determination to cumulate does not unlawfully deviate from an established practice, and that (2) the Commission's determination is supported by substantial evidence. The court accordingly affirms the Commission's determination and enters judgment on the agency record for the Government.

I. The Commission's Cumulation Determination is in Accordance With Law.

BlueScope argues that the Commission unlawfully declined to find that BlueScope's U.S. investments distinguish the conditions of competition faced by Australian imports from those faced by other subject producers' imports. This, BlueScope contends, is because Commission unexplainedly departed from its "long-standing practice of declining to cumulate those subject country producer-exporters that had made U.S. investments of scale pursued by BlueScope."[7] Pls.' Br. at 16. BlueScope attributes to the Commission a practice of "declining to cumulate countries when likely conditions of competition are distinct" and notes that "significant investment in U.S. production . . . is a distinctive condition of competition that is relevant for the Commission's cumulation analysis." Pls.' Reply at 12.

A party that alleges an unlawful departure from an established agency practice must demonstrate three things in order to obtain relief. First, it must demonstrate that an established practice exists. *See Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1373 (1999), *dismissed per stipulation*, 232 F.3d 909 (Fed. Cir. 2000). Second, it must demonstrate a departure from the practice. *See DAK Americas LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340, 1356 (2020). And third, the party must demonstrate that the departure is insufficiently explained. *See Allegheny Ludlum Corp. v. United States, 346 F.3d 1368, 1373 (Fed. Cir. 2003)* (explaining that an agency is permitted to deviate from past practice "at least where it explains the reason for its departure.").

BlueScope's established-practice argument falters at step one: the past Commission determinations that BlueScope cites do not amount to an established practice. Accordingly, as there can be no departure from a practice that does not exist (let alone an unexplained depar-

[7] BlueScope further notes that "the most important factors in determining the likely conditions of competition are significant U.S. investment by a subject producer and changes in the corporate structure underlying those investments." Pls.' Br. at 18.

ture), the court concludes that the Commission's conditions-of-competition analysis is "otherwise . . . in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).[8]

BlueScope cites three determinations in which the Commission considered a foreign producer's investment in the United States as part of its conditions-of-competition analysis. *See* Pls.' Br. at 17–21 (citing Certain Large Residential Washers from Korea and Mexico, Inv. Nos. 701-TA-488 and 731-TA-1199–1200, USITC Pub. 4882 (Review) (April 2019) ("Large Residential Washers"); Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan, Inv. Nos. 701-TA-379 and 731-TA- 788, 790–793, USITC Pub. 4248 (Second Review) (August 2011) ("Steel Plate"); Hot-Rolled Steel Products From Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404–408 and 731-TA-898–902 and 904–908 (Review) USITC Pub. 3956 at 17–18 (October 2007) ("Hot-Rolled Steel Products")).[9]

These determinations do not add up to an established practice. As a general matter, "[p]rior determinations by the Commission with regard to one industry typically provide little guidance for later determinations with regard to different industries." *Cleo Inc. v. United States*, 501 F.3d 1291, 1299 (Fed. Cir. 2007). Each case, moreover, presents "unique interactions of the economic variables the Commission considers." *Ugine-Savoie Imphy v. United States*, 26 CIT 851, 863, 248 F. Supp. 2d 1208, 1220 (2002); *see also USEC, Inc. v. United States*, 25 CIT 49, 64, 132 F. Supp. 2d 1, 14 (2001) ("[A] particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation."). And while the Commission may consider a foreign producer's U.S. activity as a relevant factor, *see* 19 U.S.C. § 1675a(a)(7), such consideration reflects the Commission's "exercise of discretion on a case-by-case and fact-specific basis," which "complicates any efforts to divine

[8] In any event, the Commission did provide an explanation that would constitute a sufficient explanation if its determination in this represented a departure from past practice. The Commission noted the lack of precedential value of prior determinations, and explained that past U.S. investment–related non-cumulation "involved instances where subject imports were replaced by domestic production, where foreign ownership of the domestic producer at issue was a new condition of competition during the review period, and/or where the domestic producer at issue held a substantial share of domestic production." Views at 95 n. 401.

[9] BlueScope also cites *Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, and Taiwan*, Inv. Nos. 731-TA-770–773 and 775, USITC Pub. 4623 at 12 (Third Review) (July 2016) ("*Steel Wire Rod*") as an example of a case where the Commission declined to cumulate imports from a certain country upon considering "a change in the corporate ownership including mergers with U.S. entities and the resulting change in economic incentives." Pls.' Br. at 20. But the Commission made that determination in the context of a no-discernable-adverse-impact inquiry, which is not the relevant inquiry here.

rules from past agency practice." *Goodluck India Ltd. v. United States*, 47 CIT __, __, 670 F. Supp. 3d 1353, 1374 (2023) (internal quotation marks and citation omitted).

Against this strong presumption that each Commission determination rests on its own facts, the specific determinations that BlueScope cites do not support an inference that the Commission uniformly treats U.S. investment—even at a large scale—as a factor whose existence compels a finding of differing conditions of competition. In each determination (Large Residential Washers, Stainless Steel Plate, Steel Wire Rod, and Hot-Rolled Steel Products), the Commission referenced U.S. investment alongside a variety of factors including corporate ownership, sales strategy, investment size, home-country production capacity, and economic incentives to export subject merchandise. The Commission considered investments made by foreign producers insofar as they impacted that unique producer's incentive and ability to compete in the U.S. market for subject merchandise—but not as a condition whose satisfaction alone warrants non-cumulative assessment.

Large Residential Washers, which BlueScope cites as a case where "the most important factors in determining the likely conditions of competition [were] significant U.S. investment by a subject producer and changes in the corporate structure underlying those investments," Pls.' Br. at 18, is an illustrative example. In that 2019 sunset review, the Commission did not cumulate subject imports from Korean producers with those from Mexican producers because it found that Korean producers were "committed to supplying the U.S. market primarily from their U.S. production facilities" and that they would "likely manage their subject imports from Korea accordingly." Large Residential Washers at 22. Korean producers had made significant investments in two large U.S. facilities and demonstrated "a highly coordinated strategy of localizing production . . . for the U.S. market." *Id.* at 20. Accordingly, the Commission found that they "are likely to maintain their plans to supply the U.S. market primarily from their new U.S. washer production facilities after revocation." *Id.* By contrast, the Commission found that washer producers in Mexico (the only other country under investigation) did not have the same level of involvement in the United States: "no Mexican producer that currently serves or has recently served the U.S. market produces washers in the United States or has any plans to do so." *Id.* at 22. The Commission therefore found that washers from Korea and Mexico were likely to compete under different conditions of competition. *Id.* at 19.

Stainless Steel Plate lends no more support to BlueScope's argument than Large Residential Washers. It is true, as BlueScope notes, that the Commission in that determination "declined to cumulate Italy with the other subject countries because the sole producer in Italy, TKAST, had become part of a broader corporate entity with production facilities in the United States." Pls.' Br. at 19 (citing Stainless Steel Plate at 16). But this finding was more nuanced than BlueScope indicates:

> Because TKAST, unlike subject producers in any of the other subject countries, will be subject to and operate under Thyssen-Krupp's local supply strategy in the U.S. market, which is calculated to ensure the success of ThyssenKrupp's $1.4 billion investment in domestic producer SL-USA, the conditions under which subject imports from Italy are likely to compete in the United States in the event of revocation (i.e., the discipline of a local supply strategy designed to foster domestic [stainless steel plate] production) are quite distinct from those under which subject imports from Belgium, Korea, South Africa, and Taiwan are likely to compete and justify declining to cumulate subject imports from Italy with other subject imports.

Stainless Steel Plate at 18. In other words, the Commission did not decline to cumulatively assess Italian imports simply because of the Italian producer's affiliation with an entity that was active in the U.S. market. The cumulation determination instead reflected a detailed assessment of the U.S. based production strategy that the Italian producer was bound to advance through its corporate affiliation. And even this factor was just one among many:

> We also find that the combination of the Italian industry's size relative to the industries in the other subject countries and its downward trends in capacity and production, differences in the orientation of its sales, with a greater domestic focus than the industries of the other subject countries, and the lack of any presence in the U.S. market since 2001, further support our conclusion that subject imports from Italy are likely to compete under conditions of competition that are distinct from those under which subject imports from the other subject countries are likely to compete.

Id. at 19.

The Commission's negative cumulation determination in Hot-Rolled Steel Products similarly involved the Commission's consideration of the nature of foreign producers' relationship with a U.S.

entity—as opposed to the mere existence of that relationship—as a factor militating against cumulation. In that determination, the Commission (over the dissents of two Commissioners) declined to cumulatively assess subject imports from countries whose producers of subject merchandise belonged to the multinational ArcelorMittal Group. The Commission explained that "a very significant [U.S.] producer . . . controls virtually all production of subject hot-rolled steel" in those countries, and that "the industries in any of the other subject countries, which individually or in the aggregate lack any similar relationship with the domestic hot-rolled steel industry." Hot-Rolled Steel Products at 17–18. On account of this difference, the Commission conducted two separate cumulative assessments: one that encompassed imports from countries with ArcelorMittal-affiliated producers, and another that encompassed the rest. *See id.*

In none of these determinations did the Commission's decisionmaking reflect or bring about an established practice of declining to cumulate subject imports where a producer has made a "large" investment in U.S. production. *See* Pls.' Br. at 14. While they do demonstrate that a foreign producer's relationship with a U.S. entity may sometimes constitute a relevantly distinct condition of competition, that is a far cry from the kind of "uniform and established procedure . . . that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen*, 23 CIT at 884–85, 74 F. Supp. 2d at 1374 (citation omitted).

By BlueScope's description, the Commission considers whether a subject country's industry meets a set of fixed criteria and either cumulates or declines to cumulate on that basis. *See* Pls.' Br. at 22. But this misconstrues the nature of the Commission's conditions-of-competition analysis. The statute calls for a comparative analysis: the Commission's task is to assess whether subject imports "would be likely to compete *with each other* and with domestic like products," 19 U.S.C. § 1675a(a)(7) (emphasis added). Whether a given conditions-of-competition factor cuts in favor of cumulation is thus entirely a function of the composition of the set of subject merchandise–producing countries.

Here, BlueScope states that the Commission's practice is not to cumulate where a foreign exporter makes "significant investments in U.S. production of the very product at issue after the AD order, thereby changing that exporter's economic incentives concerning future exports to the United States." Pls.' Br. at 1. This statement assumes that investments of this kind categorically distinguish their

investors from other producers of subject merchandise. But in a hypothetical scenario where such investments are the norm, a given producer's investment would represent a *similar* condition of competition—and thus would cut in favor of cumulative assessment.[10] In other words, the Commission's conditions-of-competition analysis naturally resists the identification of specific attributes that tend towards cumulation. *See Cleveland-Cliffs Inc. v. United States*, 48 CIT __, __, 693 F. Supp. 3d 1341, 1354 (2024) ("[I]n a conditions-of-competition analysis, similarity prevails. Absolute likely volume may cut in either direction, away from similarity.").

For these reasons, the court concludes that the Commission does not have an established practice of declining to cumulatively assess imports from countries whose producers of subject merchandise invest in U.S. production. Accordingly, BlueScope's argument that the Commission unlawfully departed from such a practice is unavailing.

II. The Five-Year Determination is Supported by Substantial Evidence

BlueScope next argues that "[t]he factual record simply does not support the Commission's conclusion that BlueScope, the sole producer-exporter in Australia, would likely face the same conditions of competition as those producer-exporters from other subject countries." Pls.' Br. at 32. As such, BlueScope contends, the Commission's determination to cumulate hot-rolled steel imports from Australia with imports from other subject countries is not supported by substantial evidence. *See* Pls.' Br. at 33–53. BlueScope argues that the Commission (1) ignored specific evidence demonstrating limitations on BlueScope's incentive to export hot-rolled steel to the United States (including production capacity limits and contractual supply obligations), (2) improperly discounted evidence pertaining to BlueScope's ownership of its U.S. affiliate North Star, which BlueScope asserts is a corporate relationship that disincentivizes future imports, and (3) improperly discounted evidence that BlueScope's head of North American operations had the power to "veto" imports from Australia. *See id.*

These arguments lack purchase: the Commission supported each of the conclusions that BlueScope challenges with "such relevant evidence as a reasonable mind might accept as adequate . . . ." *Allegheny Ludlum Corp*, 30 CIT at 1997, 475 F. Supp. 2d at 1374.

---

[10] Indeed, in this very case, the Commission noted that "BlueScope is not the only subject producer to have substantial investments in hot-rolled steel production in the United States." Views at 65 n.396; Confidential Views at 94 n.396.

A. The Commission Reasonably Determined That BlueScope's Capacity Limits and Contractual Obligations Would not Disincentivize Future Imports of Hot-Rolled Steel.

BlueScope argues that the Commission "largely ignored data on the record" demonstrating two limitations on BlueScope's likely incentive to import hot-rolled steel to the United States upon revocation of the *Antidumping Duty Order*. Pls.' Br. at 33. But this is not so.

1. BlueScope's Production Capacity

The first of these asserted limitations is BlueScope's production capacity: BlueScope argues that the Commission erred in its assessment of BlueScope's practical ability to produce hot-rolled steel in Australia for export. But instead of challenging the Commission's reasoning on this point directly, BlueScope asserts that the reasoning does not exist: "The Commission's reference to 'explained above' is actually a reference to nothing at all . . ." Pls.' Br. at 34. Later on, BlueScope restates its position that the Commission's Views contain "no discussion" of the topic of BlueScope's production capacity. *Id.* at 38.

These assertions elide the Commission's extensive discussion of the topic of BlueScope's production efforts in its analysis of the no-discernable-adverse-impact element of the cumulation determination. *See* Views at 27–30; Confidential Views at 36–41. The Commission noted that the *Antidumping Duty Order* "appears to have had a restraining effect on the volume of subject imports from Australia" and referenced an upward trend in BlueScope's production, steady production capacity, and a downward trend in BlueScope's export volume over the period of review. Views at 28; Confidential Views at 37–38. The Commission also noted that BlueScope's exports are not subject to U.S. trade restrictions imposed pursuant to section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862). Views at 28; Confidential Views at 37. The Commission ultimately found that BlueScope has the "ability and incentive . . . to increase its exports to the United States upon revocation of the Antidumping Duty Order." Views at 30; Confidential Views at 41. The Commission then incorporated this discussion into its conditions-of-competition analysis. *See* Views at 65; Confidential Views at 93. The court accordingly concludes that this incorporated line of reasoning—which BlueScope does not directly challenge—rests on substantial evidence.

2. The Nature of BlueScope's Sales to Steelscape

BlueScope also asserts that the Commission ignored a second limitation when it "inexplicably concluded" that BlueScope's post-revocation exports of hot-rolled steel to the United States would likely exceed the amount that BlueScope is obligated to provide under an agreement with its U.S. affiliate[11] Steelscape. Pls.' Br. at 37–38. According to BlueScope, this contractual obligation means that Steelscape would receive all of BlueScope's marginal post-revocation imports of hot-rolled-steel, thereby insulating those imports from competition with other subject imports in the broader U.S. market. *Id.* at 33–34. "If BlueScope were to meet its obligations under the supply agreement," BlueScope argues, "it would have to utilize ALL of its excess capacity AND take away sales from some other existing customers." *Id.* at 37–38.

The parties dispute the precise effect of the supply agreement. BlueScope argues that the agreement requires BlueScope to sell a minimum amount of hot-rolled steel to Steelscape before it can sell hot-rolled steel to non-Steelscape U.S. buyers. *Id.* at 42–43. The Government argues that the agreement instead provides for a maximum quantity. Gov't Br. at 32–33.

It is unnecessary to decide whose interpretation prevails. This is because the Commission reasonably found that BlueScope's sales to Steelscape—whether limited or encouraged by the supply agreement—constitute market-exposed sales of subject merchandise to a U.S. buyer.[12] The Commission stated that "[a]lthough BlueScope is affiliated with Steelscape and thus maintains an interest in its operations, any sales from BlueScope (Australia) to Steelscape would

[11] BlueScope owns Steelscape through a joint venture with Japanese producer Nippon Steel. *See* Steelscape Declaration at 1.

[12] The concepts of the "merchant market" and "captive production" are features of the Commission's initial (but not five-year) material-injury determination. *See* 19 U.S.C. § 1677(7)(B), (C)(iv). In that context, the Commission distinguishes merchant-market sales from actions where "domestic producers internally transfer significant production of the domestic like product for the production of a downstream article." *Id.* § 1677(7)(C)(iv); *see, e.g.*, *Full Member Subgroup of Am. Inst. of Steel Constr., LLC v. United States*, 81 F.4th 1242, 1254–55 (Fed. Cir. 2023) (analyzing the applicability of § 1677(7)(C)(iv) to a circumstance where "both [the] domestic like product and the purported downstream article both fall within the domestic like product scope").
Even though § 1677(7)(C)(iv) does not apply to cumulation at the five-year review stage, the Commission borrows from it to frame its conditions-of-competition inquiry: "We note that the statutory direction for the Commission to focus primarily on the merchant market in certain circumstances does not apply to five-year reviews. We do, however, consider the significant quantity of captive production as a condition of competition." Views at 62 n.387; Confidential Views at 90 n.387. In other words, the Commission considers the possibility that captive-production sales could face conditions of competition that differ from those faced by merchant-market sales. No party to this litigation contests the lawfulness of this conceptual borrowing.

not constitute internal consumption/transfers to related firms with respect to the U.S. market." Views at 65; Confidential Views at 93.

The record supports this statement. It includes a declaration by Steelscape's Supply Chain Manager that "[m]ost of our substrate needs are purchased through two supply agreements, one with each of our two [joint venture] owners—BlueScope and Nippon Steel." Steelscape Declaration at 1. Steelscape is not a simple offshoot of BlueScope: it is co-owned by and buys steel from Japanese producer Nippon Steel, which is another subject producer. *See* Views at 7; Confidential Views at 8. And any insulation from the market (beyond Nippon Steel) that BlueScope's joint-venture affiliation might provide is eroded further by the "market-based pricing formula" that governs sales from BlueScope to Steelscape. Steelscape Declaration at 1. While this formula, as well as the fact of the BlueScope–Steelscape affiliation itself, might in some sense differentiate BlueScope's U.S. sales from those of other cumulated subject producers, a "reasonable mind might accept" these facts "as adequate to support a conclusion" that any such difference is immaterial. *Broadcom*, 28 F.4th at 249.

The court recognizes that the Commission did not cite this declaration in its Views. The Government now states that "upon review . . . it appears the Commission mis-cited" two references in its conditions-of-competition analysis for BlueScope "instead of the correct citation in both instances, which should have been to" the declaration. *See* Gov't. Suppl. Resp. at 1.

These errors are troubling. Pertaining as they do to a matter at the heart of the Commission's analysis, they impair the Commission's fulfillment of its "general duty to explain the reasoning underlying its determinations in a sunset review." *Cleveland-Cliffs*, 693 F. Supp. 3d at 1356–57. This duty is a creature of statute, *see* 19 U.S.C. § 1677f(i)(3)(B), and it also serves to "enable the court to evaluate the agency's rationale at the time of decision." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. at 654 (1990); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

But the impairment in this case is not a fatal one. Even though the Commission did not cite the Steelscape Declaration, the Commission's reliance on it may "reasonably be discerned" from context. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *see also U.S. Steel Grp.-A Unit of USX Corp. v. United States*, 18 CIT 1190, 1215, 873 F. Supp. 673, 696 (1994), *aff'd sub nom. U.S. Steel Grp. v. United States*, 96 F.3d 1352 (Fed. Cir. 1996) ("If the agency's determination is reasonably discernable, remand for error

correction is inappropriate."). For one thing, as noted above, the Steelscape Declaration constitutes part of the record and supports the Commission's conclusion that BlueScope's sales to Steelscape are not insulated from market forces. For another, the Steelscape Declaration's relevance to the Commission's reasoning is manifest: the propositions for which the Commission deployed the erroneous citations [[ ]] *See* Confidential Views at 93 n.394, 94 n.395.

The court also notes that BlueScope was on actual notice of the Steelscape Declaration's existence and significance throughout the Commission proceeding and the present litigation. BlueScope submitted the Steelscape Declaration as an exhibit to its post-hearing brief, and indeed cites to it at two points in its opening brief. *See* Pls.' Br. at 37, 42–43. This case may involve an administrative record of haystack proportions—the joint appendix alone exceeds 1,400 pages—but if the Steelscape Declaration is a needle, BlueScope is the party that embedded it.

Recall, finally, that the substantial-evidence standard of review does not automatically compel remand where the Commission does not cite a document that supports its reasoning—whether as a result of a "mis-cit[ation]," Gov't. Suppl. Resp. at 1, or of a simple omission. The court "presume[s] that a fact-finder reviews all of the evidence presented unless it states otherwise, even if its opinion does not recite every piece of evidence." *US Magnesium LLC v. United States*, 839 F.3d 1023, 1031 (Fed. Cir. 2016) (internal quotation marks and citation omitted). "[I]deal clarity," furthermore, is unnecessary so long as "the agency's path may reasonably be discerned." *Bowman*, 419 U.S. at 286 (1974).

B. The Commission's Consideration of BlueScope's Investments in U.S. Production is Supported by Substantial Evidence.

Repackaging the established-practice argument discussed above, BlueScope argues on substantial-evidence grounds that Commission's conditions-of-competition analysis rests on a flawed consideration of developments in BlueScope's investment in its U.S. affiliate North Star between the original investigation and this sunset review. *See* Pls.' Br. at 45–53. These developments include BlueScope's assumption of full ownership of its North Star, substantial investments in North Star, and the control exerted by North Star's head of operations over BlueScope's export decisions. *See id.* BlueScope challenges the Commission's conclusion that "we are unpersuaded that BlueScope's investments in North Star would substantially limit its sales

activity in the U.S. market such that BlueScope would likely compete under different conditions of competition upon revocation." Views at 66; Confidential Views at 95.

This conclusion is supported by substantial evidence. The Commission explained that BlueScope also "maintained ownership" of North Star during the pre-*Antidumping Duty Order* period of investigation, and nevertheless managed to sell hot-rolled steel to U.S. market purchasers other than Steelscape. Views at 65; Confidential Views at 94–95. This, the Commission reasoned, likely means that the North Star investment would similarly fail to restrain BlueScope's unaffiliated sales upon revocation of the *Antidumping Duty Order*. Views at 65–66; Confidential Views at 95. Although BlueScope argues that this reasoning is flawed because BlueScope held a full ownership stake in North Star for only the final five months of the original period of investigation, BlueScope does not support this argument with a showing that this five-month stretch is unrepresentative of the period of investigation as a whole. *See* Pls.' Br. at 48–49. Nor does BlueScope demonstrate that BlueScope's sales to unaffiliated U.S. customers trailed off during this final period as a result of the North Star investment. *See id.*

BlueScope also faults the Commission for failing to credit the "massive" size of BlueScope's North Star investment between the original investigation and the sunset review. Pls.' Br. at 49. But as the Government points out, BlueScope made the bulk of this investment either before the period of review or for purposes not directly related to hot-rolled steel production. *See* Gov't Br. at 39. While BlueScope's more recent hot-rolled steel–related investments are undisputedly sizeable, the Commission acknowledged them as "significant investments" and nevertheless concluded—reasonably, on the basis of "North Star's relatively limited position in the U.S. market"—that they do not meaningfully dampen BlueScope's incentive to sell hot-rolled steel into the U.S. market. Views at 65; Confidential Views at 95.[13] This explanation sufficiently accounts for "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas*, 44 F.3d at 985.

Finally, BlueScope argues that the Commission's finding as to BlueScope's export incentives is inconsistent with the sworn declaration by the head of BlueScope North America—formerly the head of North

[13] The Commission cited BlueScope's own representation at the Commission hearing that North Star, as an Ohio-based producer, "does not compete for sales to the West Coast of the United States because North Star considers freight and logistics to be too high." Views at 66; Confidential Views at 95 (citing BlueScope's Pre-Hr'g Br. at 38–39 & Ex. 4.). This, the Commission reasoned, supports a finding that North Star's position in the U.S. market is "limited," which in turn "is consistent with an incentive [for BlueScope] to increase sales of imports from Australia." Views at 65; Confidential Views at 95.

Star—that "under the management structure implemented by our global CEO, I have a complete authority to veto any steel imports into the U.S. market desired by [BlueScope Americas] if I believe that such imports would harm our overall objectives in the market." *See* Pls.' Br. at 51 (quoting Post-Hr'g Br. at Ex. 1). This statement, however, is consistent with the Commission's narrow finding that "BlueScope is able to sell into the U.S. market without harming North Star's sales or pricing." Views at 65; Confidential Views at 95. The BlueScope North America executive framed the exercise of his veto authority as part of a conditional statement—implicitly acknowledging that "such imports" by BlueScope might not in fact "harm our overall objectives in the market." Post-Hr'g Br. at Ex. 1.

***

For these reasons, the court concludes that the Commission reasonably determined that BlueScope would maintain an incentive to export hot-rolled steel to the U.S. market upon revocation of the *Antidumping Duty Order*.

CONCLUSION

The Commission's determination to cumulate subject exports from Australia with other subject countries is in accordance with law and supported by substantial evidence. The Commission's *Five-Year Determination* is therefore sustained. Judgment on the agency record will enter accordingly for Defendant and Defendant-Intervenors.

Dated: August 1, 2024
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 58, No. 32, August 14, 2024

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2024—427-373/30088