U.S. Customs and Border Protection

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A HYDRAULIC DOCK LEVELER

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a Hydraulic Dock Leveler.

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 one ruling letter concerning tariff classification of certain Hydraulic Dock Levelers 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 January 14, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

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 one ruling letter pertaining to the tariff classification of a Hydraulic Dock Leveler. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") I81157, dated May 17, 2002 (Attachment A), 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 one 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 I81157, CBP classified a Hydraulic Dock Leveler in heading 8428, HTSUS, specifically in subheading 8428.90.00, HTSUS, which provides for "Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics): Other machinery." CBP has reviewed NY I81157 and has determined the ruling letter to be in error. It is now CBP's position that Hydraulic Dock Levelers are properly classified, in heading 8479, HTSUS, specifically in subheading 8479.89.94, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY I81157 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H321521, set forth as Attachment B 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.

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

NY I81157

May 17, 2002
CLA-2–84:RR:NC:1:103 I81157
CATEGORY: Classification
TARIFF NO.: 8428.90.0090

MS SHARON F. SWANSON
GREAT LAKES CUSTOMS BROKERAGE, INC.
85 RIVER ROCK DRIVE, SUITE 202
BUFFALO, NY 14207

RE: The tariff classification of a hydraulic dock leveler from Canada

DEAR MS. SWANSON:

In your letter dated April 22, 2002 on behalf of Richards-Wilcox Customs Systems you requested a tariff classification ruling.

With your inquiry you submitted descriptive literature on a hydraulic dock leveler used to assist in the loading and unloading of truck cargo. A dock leveler is a tilting platform which is affixed to a pit in a truck dock. Dual hydraulic cylinders incorporated in the unit allow the platform to be tilted and a steel lip to be lifted and swung out to accommodate variations in truck trailer height. The leveler also features velocity fuses to prevent the deck from moving in the event of leaking or loosened hydraulic hose lines. The machine can withstand loads up to 27,000 pounds.

In your letter you suggested classifying the hydraulic dock leveler in subheading 8429.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers: graders and levelers.. The machines of this heading are used to smooth and level the earth by means of a blade mounted in a self-propelled base. The hydraulic dock leveler is not a self-propelled earth leveler, and thus cannot be classified in subheading 8429.20.0000, HTS.

The applicable subheading for the hydraulic dock leveler will be 8428.90.0090, HTS, which provides for other lifting, handling, loading or unloading machinery: other machinery: other: other. The rate of duty will be free.

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 Alan Horowitz at 646–733–3010.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

ATTACHMENT B

HQ H321511
OT:RR:CTF:EMAIN H321511 MD
CATEGORY: Classification
TARIFF NO.: 8479.89.94

MS. SHARON F. SWANSON
GREAT LAKES CUSTOMS BROKERAGE, INC.
85 RIVER DOCK DRIVE, SUITE 202
BUFFALO, NEW YORK 14207

RE: Revocation of NY I81157; Tariff Classification of a Hydraulic Dock Leveler from Canada

DEAR MS. SWANSON:

On May 17, 2002, U.S. Customs and Border Protection ("CBP") issued New York Ruling Letter ("NY") I81157 to you on behalf of Richards-Wilcox Customs Systems. The ruling letter pertained to the tariff classification of a hydraulic dock leveler from Canada under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY I81157, CBP classified the product at issue under subheading 8428.90.00, HTSUS (2002), which provided for "Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, telefrics): Other machinery."[1] We have since reviewed NY I81157 determined it to be in error.

FACTS:

In NY I81157, the hydraulic dock leveler was described as follows:

> A dock leveler is a tilting platform which is affixed to a pit in a truck dock. Dual hydraulic cylinders incorporated in the unit allow the platform to be tilted and a steel tip to be lifted and swung out to accommodate variations in truck trailer height. The leveler also features velocity fuses to prevent the dock from moving in the event of leaking or loosened hydraulic hose lines. The machine can withstand loads up to 27,000 pounds.

ISSUE:

Whether the Hydraulic Dock Leveler at issue is classified under heading 8428, HTSUS, as other lifting, handling, loading or unloading machinery or heading 8479, HTSUS, which provides for machines and mechanical appliances having individual functions, not specified or included elsewhere in Chapter 84.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States ("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

[1] The relevant provision under the current (2021) version of the HTSUS is subheading is subheading 8248.90.02, HTSUS.

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 HTSUS provisions under review are as follows:

8428	Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, telefrics):
8428.90	Other machinery...
	* * *
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and mechanical appliances:
8479.89	Other:
8479.89.94	Other...

In addition, the Explanatory Notes (“EN”) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff 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 (Aug. 23, 1989).

The ENs to heading 8428, state, in pertinent part, the following:

> With the **exception** of the lifting and handling machinery of **headings 84.25 to 84.27**, this heading covers a wide range of machinery for the mechanical handling of materials, goods, etc. (lifting, conveying, loading, unloading, etc.)....

The ENs to heading 8479, in relevant part, state:

This heading is **restricted to** machinery having individual functions, which:

(a) Is not excluded from this Chapter by the operation of any Section or Chapter Note; and

(b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature; and

(c) Cannot be classified in any other particular heading of this Chapter since:

i. No other heading covers it by reference to its method of functioning, description or type; and

ii. No other heading covers it by reference to its use or to the industry in which it is employed

[...]

For this purpose the following are to be regarded as having “individual functions”:

(A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly and independently of any other machine or appliance.

[...]

The many and varied machines covered by this heading include *inter alia*:

[...]

(III) Miscellaneous Machinery

This group includes:

[...]

(31) Passenger boarding bridges [...] They include electromechanical or hydraulic devices that are designed for moving the bridges horizontally, vertically and radially (i.e. their telescopic sections, cabin, vertical lift columns, etc.), in order to adjust the bridges to the appropriate position to the particular aircraft's door, or to the port (entrance) of the cruise ship or ferry-boat [...] These bridges themselves do not lift, handle, load or unload anything....

As described within NY I81157, the hydraulic dock leveler at issue is "a tilting platform which is affixed to a pit in a truck dock. Dual hydraulic cylinders incorporated in the unit allow for the platform to be tilted and a steel tip to be lifted and swung out to accommodate variations in truck trailer height." These functions allow for the hydraulic dock leveler to accomplish its intended purpose – "to assist in the loading and unloading of truck cargo." In NY I81157, CBP ruled out classifying the hydraulic dock leveler under heading 8429, HTSUS, stating that the subject merchandise was not a "self-propelled earth leveler", before ultimately classifying the hydraulic dock leveler under heading 8428, HTSUS.

However, classification of the subject hydraulic dock leveler under heading 8428, HTSUS, is not consistent with the proper interpretation of the heading's scope. For instance, in HQ H108235, dated June 23, 2015, CBP found that aircraft passenger boarding bridges, which had previously been classified within heading 8428, HTSUS, were properly classified within heading 8479, HTSUS.[2] In reaching this conclusion, CBP observed that "[t]he subject [merchandise] do[es] not actively engage in lifting, moving, or handling objects. Instead, they act as walkways that allow airline personnel and passengers to cross between the airport terminal and the aircraft." As a result, CBP concluded that the subject merchandise was not "lifting and handling machinery" of heading 8428, HTSUS.

Similarly, in HQ H058784, dated December 15, 2009, CBP found that a tree running tool was properly classified within heading 8479, HTSUS. In HQ H058784, CBP ruled out classifying the subject merchandise under heading 8428, HTSUS, finding that "[t]he lifting and handling machines of heading 8428, HTSUS, either perform the actual function of lifting, moving or manipulating an object, or they constitute an integral part of a lifting or handling system." As the tree running tool merely "latches onto the [t]ree" as opposed to lifting the tree, CBP found that it was not a lifting or handling machine of heading 8428, HTSUS.

Here, like the aforementioned tree running tool and aircraft passenger boarding bridges, the hydraulic dock leveler neither handles objects via mechanical means nor operates by mechanical means to raise or lower objects. Instead, the hydraulic dock leveler merely acts to create a level bridge between the loading dock and truck trailers, which in turn enables the loading and unloading of vehicles. As the hydraulic dock leveler does not

[2] *See* NY D88830 (March 24, 1999); NY D85781 (January 20, 1999); NY B88222 (August 13, 1997).

move, manipulate, or lift an object – in this case, cargo – it is not a lifting or handling machine of heading 8428, HTSUS.

Instead, also like the aforementioned tree running tool and aircraft passenger boarding bridges, the hydraulic dock leveler is properly classified under heading 8479, HTSUS, which provides for “Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof.” Here, the hydraulic dock leveler possesses a distinct individual function: acting as a level bridge between the loading dock and truck trailers, across which cargo can move between the two. This distinct individual function is applied to “accommodate variations in truck trailer height” so as to facilitate “the loading and unloading of truck cargo.” In this respect, we find the hydraulic dock leveler’s individual function is consistent with the individual functions of the aforementioned passenger boarding bridges at issue in HQ H108235 (i.e. providing a means by which passengers can move between an airport terminal and airplanes) and the tree running tool at issue in HQ H058784 (i.e. enabling a tree to be lifted by the drill string, cable or crane). Furthermore, the hydraulic dock leveler is not more specifically provided for elsewhere in Chapter 84, or in another chapter, and is not excluded from classification in Chapter 84. Accordingly, the hydraulic dock leveler is properly classified in heading 8479, HTSUS, and specifically in subheading 8479.89.94, HTSUS.

HOLDING:

Under the authority of GRIs 1 and 6, the hydraulic dock leveler is classified under subheading 8479.89.94, HTSUS, which provides for “Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other....” The 2021 general, column one rate of duty is 2.5% *ad valorem*.

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.

EFFECT ON OTHER RULINGS:

NY I81157, dated May 17, 2002, is hereby REVOKED.

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

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

CERTIFICATE OF ORIGIN (CBP FORM 3229)

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

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than January 31, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0016 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

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

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

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

Overview of This Information Collection

Title: Certificate of Origin.

OMB Number: 1651–0016.

Form Number: CBP Form 3229.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3229, Certificate of Origin, is used by shippers and importers to declare that goods being imported into the United States are grown or the product of an insular possession of the United States and/or produced or manufactured in a U.S. insular possession from material grown in or product of such possession. This form includes a list of the foreign materials in the goods, including their description and value. CBP Form 3229 is used as documentation for goods entitled to enter the U.S. free of duty. This form is authorized by General Note 3(a)(iv) of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) and is provided for by 19 CFR part 7.3. CBP Form 3229 is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=3229&=Apply.*

Type of Information Collection: Certificate of Origin (CBP Form 3229).

Estimated Number of Respondents: 113.

Estimated Number of Annual Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 2,260.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 753.

Dated: November 23, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
U.S. Customs and Border Protection.

[Published in the Federal Register, November 30, 2021 (85 FR 67962)]

PETITION FOR REMISSION OR MITIGATION OF FORFEITURES AND PENALTIES INCURRED

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

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than January 31, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0100 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

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

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

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

Overview of This Information Collection

Title: Petition for Remission or Mitigation of Forfeitures and Penalties Incurred.

OMB Number: 1651–0100.

Form Number: CBP Form 4609.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Individuals and Businesses.

Abstract: CBP Form 4609, *Petition for Remission of Forfeitures and Penalties Incurred,* is completed, and filed with the CBP FP&F Officer designated in the notice of claim by individuals who have been found to be in violation of one or more provisions of the Tariff Act of 1930, or other laws administered by CBP. Persons who violate the Tariff Act of 1930, or other laws administered by CBP, are entitled to file a petition seeking remission or mitigation of a fine, penalty, or forfeiture incurred under these laws. This petition is submitted on CBP Form 4609. The information provided on this form is used by CBP personnel as a basis for granting relief from forfeiture or penalty. CBP Form 4609 is authorized by 19 U.S.C. 1618 and provided for by 19 CFR 171.1. It is accessible at *https://www.cbp.gov/newsroom/publications/forms?title=4609*.

This collection of information applies to members of the public who may not be familiar with import procedures and CBP regulations. It may also be used by the importing and trade community who are familiar with import procedures and with the CBP regulations.

Type of Information Collection: CBP Form 4609.

Estimated Number of Respondents: 1,610.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,610.

Estimated Time per Response: 14 minutes.

Estimated Total Annual Burden Hours: 376.

Dated: November 23, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
U.S. Customs and Border Protection.

[Published in the Federal Register, November 30, 2021 (85 FR 67963)]

U.S. Court of International Trade

Slip Op. 21–159

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

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

[Final Results are remanded to Commerce.]

Dated: November 30, 2021

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

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Kirrin A. Hough*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Elizabeth C. Johnson and *David C. Smith, Jr.*, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors Riviana Foods, Inc. and Treehouse Foods, Inc. With them on the brief was *Paul C. Rosenthal*.

OPINION AND ORDER

Eaton, Judge:

Before the court is the motion for judgment on the agency record of Plaintiffs Ghigi 1870 S.p.A. ("Ghigi") and Pasta Zara S.p.A. ("Zara") (collectively, "Ghigi/Zara" or the "company"),[1] and Consolidated Plaintiffs Agritalia S.r.L. and Tesa S.r.L. *See* Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 33 ("Pls.' Br."); Pls.' Reply, ECF No. 46. By their motion, Ghigi/Zara, Agritalia, and Tesa (collectively, "Plaintiffs") challenge the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") twenty-second administrative review of the antidumping duty order on certain pasta from Italy ("Order"),[2]

[1] Ghigi and Zara are affiliated companies that were collapsed into a single entity, Ghigi/Zara, during the underlying review.

[2] *See Certain Pasta From Italy*, 61 Fed. Reg. 38,547 (Dep't Commerce July 24, 1996) (notice of antidumping duty order).

covering the period from July 1, 2017, through June 30, 2018. *See Certain Pasta From Italy*, 85 Fed. Reg. 2,714 (Dep't Commerce Jan. 16, 2020) ("Final Results") and accompanying Issues and Decision Mem. (Jan. 10, 2020) ("Final IDM"), PR 181; *see also Certain Pasta From Italy*, 84 Fed. Reg. 48,114 (Dep't Commerce Sept. 12, 2019) ("Preliminary Results") and accompanying Decision Mem. (Sept. 6, 2019) ("PDM"), PR 156. In particular, Plaintiffs challenge (1) Commerce's use of adverse facts available and (2) its rejection of arguments, that were raised for the first time after verification, disputing Commerce's model-match method with respect to protein content and shape.

Defendant the United States and Defendant-Intervenors Riviana Foods, Inc. and Treehouse Foods, Inc.[3] maintain that Commerce's use of adverse facts available and its rejection of Ghigi/Zara's post-verification arguments were lawful, and ask the court to sustain the Final Results. *See* Def.'s Resp. Opp'n Mot. J. Agency R., ECF No. 42; Def.-Ints.' Resp., ECF No. 43.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018). For the reasons that follow, the court remands Commerce's adverse inferences determination.

BACKGROUND

On September 10, 2018, Commerce published its notice of initiation of the twenty-second administrative review of the Order. *See Initiation of Antidumping & Countervailing Duty Admin. Revs.*, 83 Fed. Reg. 45,596 (Dep't Commerce Sept. 10, 2018). Commerce selected two mandatory respondents for individual examination: Ghigi/Zara and Industria Alimentare Colavita S.p.A.[4]

I. Ghigi's Reporting of U.S. Payment Date Information

On October 12, 2018, Commerce issued an initial questionnaire to Ghigi/Zara. *See* Dep't Commerce Initial Quest. (Oct. 12, 2018) ("Initial Quest."), PR 22. By its questionnaire, Commerce asked for information about the company's U.S. and home market sales. Among the U.S. sales information requested were the dates on which "payment was received from the customer" for the sales of Ghigi's U.S. affiliate (data field: PAYDATEU). *See* Initial Quest. at C-12. In response, Ghigi reported dates and amounts of payments in its U.S. database (the "Original Database"). *See* Ghigi/Zara Secs. B-D Quest. Resp. (Dec. 10, 2018), CR 38–58, PR 55.

[3] Defendant-Intervenors have withdrawn from this action, effective October 7, 2021. *See* Order (Oct. 7, 2021), ECF No. 58.

[4] Industria Alimentare Colavita S.p.A. is not a party in this action.

Commerce thereafter issued a supplemental questionnaire and asked Ghigi to "[i]nclude the field PAYDATEU with the weighted-average payment in the U.S. sales database." *See* Dep't Commerce Secs. A-C Suppl. Quest. (Feb. 8, 2019) at 17, PR 67. Commerce also instructed Ghigi to "[p]rovide a calculation worksheet for [credit expenses associated with a particular U.S. sale] that identifies each component of the calculation." Dep't Commerce Secs. A-C Suppl. Quest. at 17. In other words, Commerce supplemented its original request by asking Ghigi to add weighted-average payment date information to its U.S. sales database, along with a calculation worksheet for certain credit expenses. In response, Ghigi submitted a revised U.S. sales database (the "Revised Database"). Ghigi/Zara Secs. A-C Suppl. Quest. Resp. (Mar. 14, 2019), CR 76–179, PR 84.

After the questionnaire period had concluded, Commerce conducted verification of Ghigi's U.S. constructed export price sales, pursuant to a request by the petitioners, the Defendant-Intervenors.[5] *See* Req. for Verification (Dec. 19, 2018), PR 61. At verification, Ghigi for the first time informed Commerce that "the payment dates in the most recent U.S. sales database [*i.e.*, the Revised Database] [were] incorrect due to a programming error in the U.S. payment date (PAYDATEU) data field." PDM at 16 (citing Ghigi/Zara Post-Verification Cmts. (July 18, 2019) at 7–9, CR 337–338, PR 140). Commerce found that as a result of the programming error "Ghigi reported the U.S. payment date incorrectly for most of its U.S. sales." PDM at 16.

In its post-verification comments and case brief, Ghigi/Zara argued that Commerce should have used the payment dates reported in the Original Database, instead of the Revised Database, because they were closer to the correct payment dates. *See* Ghigi/Zara Post-Verification Cmts. at 7–9; *see also* Ghigi/Zara Case Br. (Oct. 23, 2019) at 32–37, PR 167 (same). Ghigi proposed this plan after verification, and apparently was asking Commerce to either verify its Original Database, or use unverified payment dates. In its decision memoranda, Commerce declined, stating:

> Commerce's practice is to rely on the most recently submitted databases as the basis for verification because such data is responsive to Commerce's most recent supplemental questions. Thus, we . . . find that it is not appropriate to use the payment date information from a prior U.S. sales database.

PDM at 16 (footnote omitted); *see also* Final IDM at 12–13.

[5] In an administrative review, Commerce verifies the factual information on which it will rely in its final determination, if a timely request for verification is made, and no verification was conducted in the last two administrative reviews. *See* 19 U.S.C. § 1677m(i)(3); *see also* 19 C.F.R. § 351.307(b)(1)(v) (2019).

Unable to verify the dates in the Revised Database, Commerce found that the use of facts otherwise available, pursuant to 19 U.S.C. § 1677e(a)(2)(D), was warranted. Additionally, Commerce applied adverse inferences, pursuant to 19 U.S.C. § 1677e(b)(1)(A), when selecting from among the facts available. *See* PDM at 16–17; *see also* Final IDM at 13. As adverse facts available, Commerce "applied the longest period between shipment date and payment date for any sale on the record of the review for purposes of imputed credit expenses for Ghigi's U.S. sales." PDM at 17; *see also* Final IDM at 13.

II. Ghigi/Zara's Reporting of Protein Content and Shape

A. Protein Content

In the initial questionnaire, as it had done in the past, Commerce instructed Ghigi/Zara to report "the percentage of protein in the pasta sold, *as stated on the label* of the respective product"[6] in the United States and Italy.[7] *See, e.g.*, Initial Quest. at C-7 (emphasis added). Commerce further instructed Ghigi/Zara to code as a "1" pasta with a protein content of 12.50 percent or more, and a "2" pasta with a protein content of between 10 and 12.49 percent. *See* Dep't Commerce Req. for Revised U.S. Sales Database (June 26, 2019), PR 133. The initial questionnaire invited Ghigi/Zara to contact the Commerce official identified on the questionnaire's cover page if it had any questions: "If you have questions, we urge you to consult with the *official in charge* named on the cover page." *See* Initial Quest. (General Instructions).

In its initial Section C response on U.S. sales, Ghigi/Zara coded the protein content of its finished pasta products sold in the United States as a "2," meaning a protein content of less than 12.50 percent, in line with the protein content of a "standard" pasta product. Ghigi/

[6] Since at least the fifteenth review of the Order, Commerce has relied on the protein percentage as stated on the packaging label of finished pasta products to identify protein content. *See* Pls.' Br. attach. 2 at 28 (Issues and Decision Memorandum for Final Results of 2010–2011 Review) ("[T]he package label is a reliable source for the Department to use in identifying the physical characteristics, including protein content."); *see also Certain Pasta From Italy*, 78 Fed. Reg. 9,364 (Dep't Commerce Feb. 8, 2013) (final results of fifteenth administrative review).

[7] The protein content in pasta comes from semolina flour—the main input of pasta—which is made from durum wheat. Protein content has been included in Commerce's pasta model-match method since the twelfth review of the Order. *See Certain Pasta from Italy*, 75 Fed. Reg. 6,352, 6,353 (Dep't Commerce Feb. 9, 2010) (final results of twelfth administrative review). In that review, Commerce determined that the dividing line between "premium" and "standard" pasta was a protein content of 12.50 percent. That is, pasta with a protein content of 12.50 percent or more was considered premium, and pasta with a protein content of between 10 percent and 12.49 percent was considered standard. *See* Final IDM at 7–8 (discussing the 2007–2008 review where Commerce found that "12.5 percent minimum content is an industry standard developed in the Italian market place of pasta manufacturers and semolina sellers").

Zara did not, however, rely on the protein content stated on its products' U.S. packaging label. Rather, the company converted the protein percentage on the label to reflect the amount of protein measured under Italian protocols,[8] and coded the protein content based on that conversion. *See, e.g.*, Ghigi Sales Verification Report (Aug. 1, 2019), PR 146.

Ghigi/Zara did not inform Commerce of the conversion it made in its questionnaire responses. Notwithstanding this omission, the company certified that it had complied with Commerce's instructions. *See, e.g.*, Pls.' Br. 13 ("Ghigi/Zara did not flag this as a particular issue, responding 'Ghigi/Zara report the protein content in accordance with the instruction.'").

At verification, Commerce compared Ghigi/Zara's protein content coding to the percentages stated on the packaging label of finished pasta products. Commerce thus learned that the company had failed to code according to the label. Subsequently, Commerce instructed Ghigi/Zara to recode the protein content in accordance with the label. *See* Req. for Revised U.S. Sales Database.

Ultimately, in accordance with Commerce's instruction, Ghigi/Zara reported the protein content of its pasta sold in the United States as a "1," based on the protein content indicated on the U.S. packaging labels (*i.e.*, without converting the protein content under the Italian protocol), but it did so under protest. *See* Ghigi/Zara Resp. to Req. for Revised U.S. Sales Database at 1 (July 2, 2019), PR 135 (stating that Ghigi/Zara was "mindful" that the question called for protein content "as stated on the label" but nonetheless "emphatically [stood] by their original reporting," stating "rote reliance on the ingredient panel of the label gives a misleading result because Italy and the United States have different formulas for measuring the protein content of food").

After verification had closed and the Preliminary Results were issued, Ghigi/Zara argued in its case brief that Commerce's questionnaire instructions contained a "latent ambiguity" because protein measurement protocols differ between the United States and Italy.

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[8] According to Plaintiffs, "the measurement [of protein content] begins from the observed nitrogen (N) content of the dry pasta":

> For the U.S. market, FDA regulations require that the N content be multiplied by 6.25, while the Italian regulation specifies that the protein content equals the N content times 5.7. Thus, a protein content of 12.5% on a U.S. nutrition panel is equivalent to a protein content of 11.4% on an Italian nutrition panel: 12.5%/6.25 * 5.7 = 11.4%. Conversely, protein content of 12.5% on an Italian nutrition panel is equivalent to protein content of 13.7% on a U.S. nutrition panel: 12.5%/5.7 * 6.25 = 13.7%.

Pls.' Br. 15–16 (cleaned up).

See Ghigi/Zara Case Br. at 8. In other words, while under *U.S. protocols* the pasta the company sold in the United States was premium (protein content of 12.5 percent or more), when the protein percentage was converted to an *Italian* measurement, the U.S. product was standard (protein content of less than 12.5 percent). *See* Ghigi/Zara Case Br. at 1–2. Ghigi/Zara insisted that, absent a conversion of protein content from the U.S. protocol to the Italian protocol, it was impossible to ensure that products with the same protein coding were physically identical, *i.e.*, to permit a comparison of premium U.S. pasta with premium Italian pasta and standard U.S. pasta with standard Italian pasta. Ghigi/Zara also objected to the use of 12.5 percent as the dividing line between premium and standard pasta. *See* Ghigi/Zara Case Br. at 11, 14.

In the Final Results, Commerce declined to accept Ghigi/Zara's arguments and found that the instructions contained no ambiguity—latent or otherwise. Commerce noted that the meaning of the Department's direction was plain and required no interpretation: Ghigi/Zara was to report "the percentage of protein content in the pasta sold, *as stated on the label of the respective product*." Final IDM at 7 (emphasis added).

In rejecting Ghigi/Zara's other arguments, Commerce relied on its decisions in prior administrative reviews of the Order. First, to address the company's arguments against the use of the 12.5 percent dividing line between premium and standard pasta, Commerce relied on its decision memorandum from the 2007–2008 review, where the Department first introduced protein content in its model-match method:

> Our decision to use a minimum protein content of 12.5 percent for premium finished pasta is based on four factors. The first one is that, as stated above, we believe some brands of pasta are produced, marketed, and sold as premium products, distinct from standard products. These premium pasta brands have distinct physical characteristics that are commercially significant. The second factor is that there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages. The third factor is that there is a clear relationship between the physical characteristics of the semolina used to produce the finished pasta and the finished pasta itself. The [fourth] factor is that 12.5 percent minimum content is an industry standard developed in the Italian market place of pasta manufacturers and semolina sellers. Given these factors, we believe our approach is reasonable and will contribute to the accuracy of the dumping analysis.

Final IDM at 7–8 (footnote omitted); *see also* Pls.' Br. attach. 1 cmt. 1 (Issues and Decision Memorandum for Final Results of 2007–2008 Review).

Next, with respect to relying on the protein content as stated on the label, Commerce cited its decision memorandum in the 2010–2011 review:

> [T]he protein content of the finished pasta listed on the package is central to our analysis. . . . [A]ll of the physical characteristics that are basis for our model match criteria are printed on the labels of the finished pasta packages. Buyers and sellers examine this information, as listed on the packaging, in determining which products to purchase and/or sell and the appropriate price. In addition, because pasta is sold through retail chain to individual customers, there are often many different intermediaries involved in the distribution and sale of finished pasta; each of which need to know the relevant information.
>
> Furthermore, our reliance upon the information listed on the packaging of the finished product (*i.e.*, the same information that is available to a consumer in the United States) conforms to our statutory obligation to base our price-to-price comparison on a transparent and consistent basis. Thus, relying on the information reported on the packages of finished pasta is appropriate.

Final IDM at 8 (footnote omitted); *see also* Pls.' Br. attach. 2 cmt. 4 (Issues and Decision Memorandum for Final Results of 2010–2011 Review). Thus, in the Final Results, Commerce restated its view that its use of the packaging label for protein content was an "objective method" to make statutorily required price comparisons on a "transparent and consistent" basis:

> Commerce based its price-to-price comparisons (*i.e.*, defining the normal value for U.S. sale prices on the sale price(s) of the identical, or alternatively the most similar, product sold in the comparison market) on a transparent and consistent basis by properly selecting the protein content as listed on the packaging label for finished pasta. As we noted in the *Pasta 2007–2008 Review*, the market reality is that "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages." Thus, Commerce's reliance on the packaging label is an objective method to achieve a product comparison on a "consistent and transparent" basis because all of the physical characteristics are listed on the product label. Indeed, Ghigi/Zara market and price their sales to U.S. custom-

> ers based on the specification of the product denoted on the label. Thus, we find unconvincing Ghigi/Zara's argument that we should base the PROTEINU coding upon the internal information in its [bill of materials] or on a different measurement protocol for protein content.

Final IDM at 8 (footnotes omitted).

Accordingly, for the Final Results, Commerce continued to rely on Ghigi/Zara's revised questionnaire responses, in which the company coded protein content in accordance with the Department's instructions, instead of its initial responses in which it coded protein content based on percentages converted from the U.S. protocol to the Italian protocol.

B. Product Shape

Product shape is one of the model match criteria that the Department uses in its comparison of U.S. merchandise and home market products.[9] Thus, in the initial questionnaire, Commerce instructed Ghigi/Zara to classify its pasta according to eight categories that are stated in a "shape classification table." These eight categories broadly distinguish "specialty" long and short cuts from "regular" cuts.[10] *See* Initial Quest., app. III. (emphasis added) ("You are required to classify the pasta types reported in field 3.9 into one of the shape categories specified in field 3.1 *in accordance with the questionnaire examples and the attached 'Classification of Pasta Shapes.'*"). It further instructed that "[i]f [the respondent] sold pasta in shapes that do not appear on the attached list, please contact the official in charge." *See* Initial Quest., app. III.

Relevant here, the table categorized fusilli and cavatappi as "specialty" short cuts. In its questionnaire response, however, Ghigi/Zara reported its fusilli and cavatappi pasta as simply "short cuts," coded as a "5". *See* Ghigi/Zara Sec. A Quest. Resp. (Nov. 16, 2018), PR 36–46.

As with protein content, Ghigi/Zara did not inform Commerce that it had departed from the classification table when coding for shape. Commerce only discovered Ghigi/Zara had done so at verification. *See* Final IDM at 10.

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[9] The pasta model-match method has included "product shape" since the original investigation. *See Certain Pasta From Italy*, 61 Fed. Reg. 1,344, 1,346 (Dep't Commerce Jan. 19, 1996) (preliminary determination).

[10] Each of the eight categories in the shape classification table has its own code for reporting purposes: long cut pasta (*e.g.*, linguine or spaghetti) was coded as 1; specialty long cuts (*e.g.*, capellini or fioccini) were coded as 2; nested/folded/coiled was coded as 3; and lasagna was coded as 4. Short cuts (*e.g.*, fagiolini, medium shells) were coded as 5; specialty short cuts (*e.g.*, mezzanelli, pasta mista) were coded as 6; soupettes (*e.g.*, ditali, corallini) were coded as 7; and combinations of shapes were coded as 8. *See* Initial Quest., app. III.

After verification had closed and the Preliminary Results were issued, Ghigi/Zara argued in its case brief that its "original reporting was correct." Ghigi/Zara Case Br. at 28. The company maintained that it was "correct to classify fusilli and cavatappi as normal [regular] short cuts rather than specialty short cuts, based on [its] production throughput rate (at multiple plants), [its] merchandising, and [its] pricing." Ghigi/Zara Case Br. at 32.

In the Final Results, Commerce rejected Ghigi/Zara's original coding and applied the shape codes set forth in the classification table:

> [W]e found at verification that Ghigi misreported fusilli and cavatappi as short cuts. Commerce's longstanding practice is to require respondents to report pasta shape codes based on the pasta shape classification table if the shapes are already listed on that table. This practice has been approved by the Court [in *La Molisana S.p.A. v. United States*, No. 16–00047, 2018 WL 3089242 (CIT June 21, 2018) (not reported in Federal Supplement), *aff'd* 784 Fed. Appx. 780 (Fed. Cir. 2019) (mem.)]. Fusilli and cavatappi are both listed as specialty short cuts in the shape classification table.

Final IDM at 10 (footnotes omitted). Additionally, Commerce rejected Ghigi/Zara's argument that its quicker line speeds justified classification of fusilli and cavatappi as short cuts. Commerce noted that it "has previously rejected . . . attempts to reclassify pasta shapes based on company-specific throughput rates":

> In *Pasta 2013–2014 Review*, Commerce determined to reject La Molisana's similar attempt to replace the well-established shape classification in the model match methodology with a system based on company-specific line speeds. Specifically, Commerce required La Molisana to report its pasta sales in accordance with the existing shape classification table because this methodology is reasonable and pursuant to the requirement of [19 U.S.C. § 1677(16)(A)] that classifications be based on a product's "physical characteristics." In that review, Commerce further explained that La Molisana's contentions were meritless because: (1) line speed is not the defining factor in determining pasta shape under Commerce's methodology; and (2) Commerce has no practice of permitting respondents to re-classify existing pasta shapes based upon company-specific line speeds. In *La Molisana*, the CIT sustained Commerce's application of its model-matching methodology, which required La Molisana to report product shapes in conformity with the existing identities and categories of shapes on Commerce's pasta shape list. The CIT also rejected La Molisana's argument that company-specific

> line speeds are a sufficient reason to depart from the list for shapes that are already on the list. The [Federal Circuit] affirmed the CIT's holding in *La Molisana*.
>
> Accordingly, consistent with the *Preliminary Results*, we continue to re-classify fusilli and cavatappi as specialty short cuts, consistent with the instructions in the Initial Questionnaire and Commerce's longstanding practice.

Final IDM at 10–11 (footnotes omitted). The Department had thus considered arguments similar to those now made by Ghigi/Zara in the eighteenth administrative review—four years prior to this review—and found them wanting. In the Final Results, Commerce rejected Ghigi/Zara's coding of its fusilli and cavatappi pasta as short cuts, and instead treated those shapes as specialty short cuts, coded as a "6," as provided in the table.

Based on the application of adverse facts to Ghigi/Zara with respect to Ghigi's payment dates, Commerce calculated a weighted-average dumping margin of 91.76 percent for Ghigi/Zara, and an all-others rate of 44.56 percent that was applied to Agritalia and Tesa. *See* Final Results, 85 Fed. Reg. at 2,714.

Plaintiffs timely commenced this action to challenge Commerce's adverse facts available determination, and its rejection of Ghigi/Zara's post-verification arguments against the Department's method of coding for protein content and shape.

STANDARD OF REVIEW

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

LEGAL FRAMEWORK

Where Commerce determines that a gap in the factual record exists because necessary information is missing, the statute directs the use of "facts otherwise available," to supply the needed facts. *See* 19 U.S.C. § 1677e(a). Under the statute, a gap may be found to exist where an interested party provides the requested information, "but the information cannot be verified" in accordance with § 1677m(i).[11] *See* 19 U.S.C. § 1677e(a)(2)(D).

[11] Under § 1677m(i), Commerce "shall verify all information relied upon in making . . . a final determination in a review under section 1675(a)" if "(A) verification is timely requested by an interested party," and "(B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 1675(a) . . . of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown." 19 U.S.C. § 1677m(i).

Where Commerce has determined that the use of facts available is warranted, it may apply an adverse inference when selecting from among the facts available if it makes the requisite additional finding that an "interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]." *Id.* § 1677e(b)(1). "To the best of its ability" means "one's maximum effort." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

DISCUSSION

I. Commerce's Use of Adverse Facts Available with Respect to Ghigi's U.S. Payment Dates Is Neither Supported by Substantial Evidence nor in Accordance with Law

In the Final Results, Commerce found that the use of adverse facts available was required because it could not verify Ghigi's final submitted payment dates for U.S. sales—that is, the dates reported in the Revised Database did not match the dates on the invoices for each of the sales traces that Commerce performed at verification:

> We disagree with Ghigi's argument that Commerce's application of partial [adverse facts available] is unwarranted because Ghigi's [Original Database] has accurate payment dates and thus, Commerce should use its information to calculate antidumping duty margins.
>
> At the time of commencement of verification, Ghigi's [Revised Database] was the most recent version of the U.S. sales database. Accordingly, the verifiers performed their verification procedures on the [Revised Database], and they did not conduct verification procedures on [the Original Database], which was the initial US sales submission.
>
> As indicated in the *Preliminary Results*, Commerce's practice is to rely on the most recently submitted databases as the basis for verification because such data is responsive to Commerce's most recent supplemental questions. Thus, we find it is not appropriate to use the payment date information from [the Original Database], which was the prior U.S. sales database. As for the [Revised Database], its payment dates do not match payment dates listed in the sales documentation for the U.S. transactions examined at verification. Pursuant to [19 U.S.C. § 1677e(a)(2)(D), *i.e.*, providing for the use of facts available where information cannot be verified], we find that a determination based on the facts otherwise available is warranted because the

> information on payment data was not verifiable. Accordingly, we find that the application of partial adverse inferences under [19 U.S.C. § 1677e(b)(1)(A), *i.e.*, providing for the use of adverse inferences where a respondent fails to cooperate to the best of its ability] is warranted, as it applies to Ghigi's U.S. payment date field.

Final IDM at 13 (footnotes omitted).

As an initial matter, Plaintiffs maintain that Commerce had no reason to use facts otherwise available, let alone with an adverse inference, because instead of the Revised Database, it could have used Ghigi's Original Database:

> At the outset of verification, [Ghigi's U.S. affiliate] informed Commerce of the programming error that garbled the [Revised Database] payment dates and proposed use of the [Original Database] dates, but Commerce chose to verify the [Revised Database] dates instead. It is simply counterfactual for Commerce to assert that "information on payment data was not verifiable" when [Ghigi's affiliate] presented a perfectly usable set of payment dates in [Original Database].
>
> Furthermore, the 17 sales for which Commerce reviewed payment dates constituted a reasonable sample against which to test the accuracy of the [Original Database] payment dates, and this test proved the accuracy of the [Original Database] dates, as explained in the July 19 post-verification comments . . . .
>
> Thus, the record does not justify application of [adverse facts available] under 19 U.S.C. § 1677e, because there is no gap in the record that must be filled with facts available and there is no justification for finding that Ghigi failed to cooperate to the best of its ability.

Pls.' Br. 48 (citing Ghigi/Zara's Post-Verification Cmts.).

Here, the court must determine if Commerce properly used facts available, a finding that turns on (1) whether Commerce's practice of relying on the most recently submitted database as the basis for verification is reasonable; and (2) whether Ghigi's proposal that Commerce consider the Original Database came too late.

As to the first consideration, Commerce's stated justification for its practice is sufficiently clear: its "practice is to rely on the most recently submitted databases as the basis for verification *because such data is responsive to Commerce's most recent supplemental questions*." Final IDM at 13 (emphasis added). Based on the record, it was not unreasonable for Commerce to decline to consider the Original Database after finding the dates in the Revised Database unverifiable. Commerce issued a supplemental questionnaire asking Ghigi to add payment date information to the Original Database. It is uncontested that in the process of compiling the Revised Database, in response to that request, Ghigi made a programming error which garbled the dates, and in turn prevented the verifiers from matching them to the original invoices.[12] Commerce cannot be said to err when it uses a respondent's own responses to the Department's last-in-time requests. Nor could it be said to err by not sua sponte reverting to the Original Database. Ghigi/Zara did not propose using the Original Database until after verification.

As to the second consideration, as noted, Plaintiffs did not make their arguments in favor of using the Original Database until after verification. Importantly, Ghigi failed to inform Commerce of the errors until verification had already commenced. By that point, though, it was too late, for "[v]erification represents a point of no return." *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343 (Fed. Cir. 2021). "The purpose of verification is to test information provided by a party for accuracy and completeness." *Id.* at 1343–44 (citation omitted) (cleaned up). If Commerce had accepted Ghigi's proposal, it would be agreeing either to forego verification entirely with respect to that database, or to conduct another verification. On these facts, it was not unreasonable for Commerce to decline to use the unverified Original Database.

Thus, the court finds that Commerce's inability to verify the Revised Database created a gap in the record that justified the use of facts available, pursuant to 19 U.S.C. § 1677e(a)(2)(D) (stating that Commerce shall use facts available where an interested party "provides [information requested by Commerce] but the information cannot be verified").

Next, the court turns to whether Commerce's use of an adverse inference when selecting from among the facts available was reasonable.

Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts when replacing a party's information only if it makes the requisite additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]." *Id.* § 1677e(b)(1); *see also Nippon Steel*, 337 F.3d at 1381 (citation omitted) (cleaned up) ("[S]ubsection (b) permits Commerce

[12] While it is Commerce's practice to permit correction of *minor* errors, here Commerce determined the errors were not minor because they affected the majority of the payment dates for the company's U.S. sales. *See* Final IDM at 12.

to use an inference that is adverse to the interests of a respondent in selecting from among the facts otherwise available, only if Commerce makes the separate determination that the respondent has failed to cooperate by not acting to the best of its ability to comply. The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability,* not its failure to provide requested information."). Importantly, here the use of facts available requires a finding of missing information because the information on the record was unverifiable. The application of an adverse inference requires a finding with respect to a respondent's behavior.

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

As courts have explained in numerous decisions, the determination to use facts available is a separate determination from the application of adverse inferences. Each determination must be made separately, and each must be explained separately. *See, e.g.*, *Nippon Steel*, 337 F.3d at 1381. Commerce's single, conclusory assertion is inadequate to satisfy the statute because it does not explain the reasons for the application of an adverse inference and indeed seems to be based on Commerce's inability to verify the information on payment data. *See* Final IDM at 13. In the Final Results, the Department failed to satisfy the statutory requirement that it make a determination as to whether a party failed to cooperate to the best of its ability.

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

II. Commerce Properly Rejected Ghigi/Zara's Post-Verification Arguments Disputing the Instructions for Reporting Protein Content and Pasta Shape

The court next turns to whether Commerce erred when it rejected Ghigi/Zara's post-verification arguments against the Department's method of coding for protein content and pasta shape. The court finds no error here.

The "basic purpose" of the antidumping statute is to "determin[e] current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The burden of creating the administrative record lies with the interested parties; through questionnaires, Commerce asks for the information that it deems necessary to make its margin determinations. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019).

Gathering information during the questionnaire phase of a proceeding is often an iterative process, with Commerce issuing supplemental questionnaires and inviting respondents to contact the official assigned to their case if they have any questions, *e.g.*, with respect to reporting instructions. *See* 19 C.F.R. § 351.301(c)(1); *see also* Initial Quest. (General Instructions) ("If you have questions, we urge you to consult with the *official in charge* named on the cover page."). From the outset, respondents are directed to comply fully with Commerce's questions:

> Your response to the questionnaire should include all of the information requested. It is essential and in your interest that the Department receive complete information early in the proceeding to ensure a thorough and accurate analysis and to provide all parties the fullest opportunity to review and comment on your submission and the Department's analysis.

Initial Quest. (General Instructions).

The time for fact-finding is limited by Commerce's regulations. *See* 19 C.F.R. § 351.301 (setting forth the time limits for submitting factual information). Thus, there comes a time when Commerce ceases to gather information through questionnaires, and, under certain circumstances, undertakes to verify the information on the record. The antidumping statute provides that Commerce "shall verify all information relied upon in making . . . a final determination in a review under section 1675(a)" if "(A) verification is timely requested by an interested party," and "(B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 1675(a) . . . of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.” 19 U.S.C. § 1677m(i); *see also* 19 C.F.R. § 351.307 (setting out, *inter alia*, procedures for verification of information).

It has been said, as noted *supra*, that “[v]erification represents a point of no return.” *Goodluck*, 11 F.4th at 1343. That is, “verification is not intended to be an opportunity for submission of new factual information.” Ghigi Sales Verification Agenda (May 16, 2019) at 2, PR 111 (noting that “[n]ew information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record”). Verification is thus the culmination of an orderly process of information-gathering. “The purpose of verification is to test information provided by a party for accuracy and completeness.” *Goodluck*, 11 F.4th at 1343–44 (citation omitted). Although, there have certainly been cases where Commerce has accepted new information at verification, no sound reason has been provided to do so in this review.

Here, after the questionnaire period and verification were complete, Ghigi/Zara argued for the first time that Commerce’s instructions on coding for protein content were ambiguous. *See* Ghigi/Zara Case Br. at 1. It further argued that notwithstanding the classification table’s shape categories, it was “correct to classify fusilli and cavatappi as normal short cuts rather than specialty short cuts, based on [its] production throughput rate (at multiple plants), [its] merchandising, and [its] pricing.” Ghigi/Zara Case Br. at 32.

While not necessarily required to do so because they were made so late in the proceeding, Commerce addressed Ghigi/Zara’s claims. In doing so, Commerce did not credit these arguments in the Final Results. As to protein content, it found that its instructions to report protein content “as stated on the label” of the finished pasta product were plain and unambiguous and comported with its past practice:

> [T]he market reality is that “there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages.” Thus, Commerce’s reliance on the packaging label is an objective method to achieve a product comparison on a “consistent and transparent” basis because all of the physical characteristics are listed on the product label.

Final IDM at 8 (footnote omitted); *see also* Pls.’ Br. attach. 2 at 28 (Issues and Decision Memorandum for Final Results of 2010–2011 Review) (“[T]he package label is a reliable source for the Department to use in identifying the physical characteristics, including protein content.”).

As to the shape classification table, Commerce cited case law where this Court has rejected similar arguments to those advanced by Plaintiffs and a prior determination rejecting arguments similar to those advanced by Ghigi/Zara. *See infra* at 11–12 (quoting Final IDM at 10–11).

There is no serious dispute that the label is a useful source of protein content information to differentiate between premium and standard pasta. *See* Pls.' Br. 29 ("[Plaintiffs] do[] not disagree with Commerce's differentiation between standard and premium pasta based on protein content as expressed on the label. [Their] only disagreement is with Commerce's failure to account for the difference in protein-testing protocol as between [the United States and Italy].").

With respect to the shape classification table, this Court has sustained Commerce's rejection of proposed modifications to the table that were based on company-specific data, rather than evidence of industry-wide commercial practices.[13] *See, e.g.*, *La Molisana*, 2018 WL 3089242, at *4 (rejecting plaintiff's argument for reclassification of its pasta based on company-specific line speeds and upholding Commerce's method as reasonable); *Prodotti Alimentari Meridionali, S.r.l. v. United States*, 27 CIT 547, 549–550 (2003) (not reported in Federal Supplement) (rejecting the plaintiff's argument that the distinction between two types of short cuts was meaningless based on similar production speeds and machinery).

Plaintiffs' real argument is that the model-match method requires modification with respect to protein content and shape to ensure a comparison of like products when Commerce makes its dumping

[13] The Federal Circuit has upheld the view that products may be considered identical, "despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant." *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001) (interpreting 19 U.S.C. § 1677(16)(A)). Determining whether a physical difference between products is commercially significant, *i.e.*, one "that merits distinguishing between identical and similar products," is a fact-intensive inquiry. *See Manchester Tank & Equip. Co. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1309, 1316, 1317 (2020) ("Considering the record as a whole, Commerce has supported with substantial evidence its decision to accept as commercially significant the distinction between zinc and non-zinc coatings because zinc coating requires unique production processes, is specifically requested by customers, and leads to price variations."). This inquiry may involve a consideration of whether and to what extent the industry at large treats the difference as significant. *See Pesquera Mares*, 266 F.3d at 1384, 1385 (cleaned up) (affirming Commerce's finding that "the differences between super-premium and premium salmon do not warrant separate classification in an antidumping analysis," where Commerce relied on record evidence of the "commercial practice of the world's largest salmon farming countries whose salmon industries also exported to" the third country market, Japan). Relying on industry-wide data, instead of a smaller, company-specific dataset, avoids the risk of manipulation of sales information by the respondent. *See id.* at 1385 ("Indeed, if Commerce were to limit itself to consideration of the small volume of 'premium' sales of the particular exporter, it would risk market manipulation for antidumping purposes.").

determination. For Plaintiffs, the method for reporting protein content should be changed to account for differences in the ways that the United States and Italy measure protein content. Likewise, they argue that the shape classification table, at least with respect to specialty short cuts, is outdated and ought to be revised to account for advances in technology.

The problem for Ghigi/Zara is that (1) it decided to modify the model-match method with respect to protein content and shape on its own without alerting Commerce to its activities,[14] and (2) it did not raise the argument in favor of its preferred methods for calculating protein content and for classifying shapes during the questionnaire phase, when Commerce could have considered its claims, sought evidence of industry-wide changes, and, importantly, made findings on the proposed modifications to the methods based on substantial record evidence. Rather than contact Commerce with a question about the meaning of the purportedly ambiguous reporting instructions when it received the initial questionnaire, or propose alternate methods of reporting protein content or shape, Ghigi/Zara responded to the questionnaires in its own special way, "correcting" what it found to be flaws or ambiguities in the instructions, without alerting Commerce. *See* Pls.' Br. 5 (arguing, with respect to protein content, that "Ghigi's original reporting of PROTEINU was reasonable and correct, and the final results should restore Ghigi's original designation") & 44 (arguing, with respect to pasta shape, "[i]f Commerce's coding causes products that are factually dissimilar to be matched, then the resulting margins are inaccurate. Correcting such an inaccuracy is not manipulation; it is correction"). Then, despite having used alternative reporting methods for protein content and shape, Ghigi/Zara certified that it had complied with Commerce's instructions.

Indeed, Ghigi/Zara advanced its arguments regarding protein content and shape only after its departures from Commerce's questionnaire instructions came to light. In particular, Commerce learned for the first time at verification that Ghigi/Zara reported the protein content of its U.S. pasta sales, not according to the percentage on the packaging, but by converting the U.S. percentages to an Italian measurement. It also learned at verification that even though fusilli and

[14] The twenty-second administrative review is not the first time Ghigi/Zara decided not to disclose its alternative methods for reporting protein content and shape to Commerce. As Plaintiffs note in their brief, Ghigi/Zara seems to have failed to bring its disputes about the model-match method to Commerce's attention in the past two reviews in which it participated as a mandatory respondent. *See* Pls.' Br. 13 n.4 ("There is no reason to believe that the companies' approach to the protein coding changed over the course of these reviews."). Ghigi/Zara's alternative methods apparently went undetected until this review. Notably, verification was not conducted in either of those reviews.

cavatappi are shapes that have been identified as specialty short cuts in the classification table, Ghigi/Zara coded them as regular short cuts.

By proceeding in this way, Plaintiffs deprived themselves of the opportunity to make their case before Commerce that a change to the method is warranted, and prevented Commerce from properly considering their proposed changes, and making findings accordingly.[15] Changes to Commerce's model-match method are not undertaken lightly. This Court and the Federal Circuit "have looked for 'compelling reasons' when Commerce modifies a model-match methodology in a review after having used that methodology in previous segments of the proceeding." *Manchester Tank & Equip. Co. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1309, 1315 (2020); *see also SKF USA, Inc. v. United States*, 537 F.3d 1373, 1380 (Fed. Cir. 2008); *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1517–18, 516 F. Supp. 2d 1323, 1331–32 (2007), *aff'd* 551 F.3d 1286 (Fed. Cir. 2008); *Fagersta Stainless AB v. United States*, 32 CIT 889, 894–95, 577 F. Supp. 2d 1270, 1276–77 (2008). "'Compelling reasons' require the agency to provide 'compelling and convincing evidence that the existing model-match criteria are not reflective of the merchandise in question, that there have been changes in the relevant industry, or that there is some other compelling reason' requiring the change." *Manchester Tank*, 44 CIT at __, 483 F. Supp. 3d at 1315 (quoting *Fagersta*, 32 CIT at 894, 577 F. Supp. 2d at 1277). So too must respondents provide a compelling reason to change the model-match criteria by presenting their

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[15] For example, in *New World Pasta*, the respondent pasta producer (Ferrara) proceeded correctly by initially raising its concern that Commerce should add a product-matching criterion for die-type in defining the "foreign like product" during the questionnaire phase:

> In the antidumping review at issue here, Commerce originally chose four criteria to use in identifying the foreign like product: pasta shape, wheat type, presence of additives, and presence of enrichment. . . . *Ferrara, in answering its first questionnaire, requested that a fifth criterion be added, representing the type of die used to extrude the pasta* . . . . In response to a supplemental questionnaire requesting explanation of why a fifth criterion should be added, Ferrara provided Commerce's verification, from the review conducted a year previously, that the surface texture of bronze-die and Teflon-die pastas were noticeably different.

New World Pasta Co. v. United States, 28 CIT 290, 307, 316 F. Supp. 2d 1338, 1353 (2004) (emphasis added) (cleaned up); *see also Prodotti Alimentari Meridionali, S.r.l. v. United States*, 26 CIT 749 (2002) (not reported in the Federal Supplement) (remanding the plaintiff pasta producer's challenge to Commerce's separation of certain pasta shapes in the classification table, at Commerce's request, so that it could reconsider its analysis); *Prodotti Alimentari Meridionali*, 27 CIT at 548 (sustaining Commerce's shape classification method after remand, rejecting the plaintiff's argument that "Commerce's application of that methodology . . . [was] flawed"); *Fagersta Stainless AB v. United States*, 32 CIT 889, 889, 577 F. Supp. 2d 1270, 1273 (2008) ("During the course of the review, Plaintiff Fagersta Stainless AB . . . requested that Commerce modify its existing model-match methodology by adding an additional product criterion. Commerce rejected this request on the basis that Fagersta had not demonstrated that there were 'compelling reasons' to do so. Plaintiff challenges this determination [before the Court].").

proposed modifications first to Commerce during the administrative process, and only if they fail to convince Commerce, by bringing their arguments to this Court. Ghigi/Zara has failed to do so. The court finds no error in Commerce's adherence to its long-standing model-match method with respect to protein content and pasta shape.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the Final Results are remanded for Commerce to reconsider and explain its adverse inference determination in a manner that satisfies the requirements of 19 U.S.C. § 1677e(b) and to support its redetermination with substantial record evidence; and it is further

ORDERED that if, on remand, Commerce is unable to explain its determination, it may not use adverse inferences when selecting from among the facts otherwise available.

Dated: November 30, 2021
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 21–161

COLAKOGLU METALURJI A.S. and COLAKOGLU DIS TICARET A.S., Plaintiffs, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 20–00153

[Denying plaintiffs' motion for judgment on the agency record and sustaining Commerce's final results of its fourth administrative review of its countervailing duty order covering steel concrete reinforcing bar from the Republic of Turkey.]

Dated: December 2, 2021

Jessica R. DiPietro, Arent Fox, LLP, of Washington, D.C. argued for Plaintiffs. Also on the brief was *Matthew M. Nolan*.

Ann C. Motto, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C. argued for Defendant. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Reza Karamloo*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen E. Thorson, Wiley Rein LLP, of Washington, D.C. argued for Defendant-Intervenor. Also on the brief were *Alan H. Price* and *John R. Shane*.

OPINION

Kelly, Judge:

Before the court is plaintiffs Çolakoğlu Metalurji A.S.'s and Çolakoğlu Dis Ticaret A.S.'s (collectively, "Çolakoğlu") motion for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2. [Çolakoğlu's] Mot. for J. on Agency R., Jan. 26, 2021, ECF No. 22–1 ("Pl. Mot."); *see also* [Pl. Mot.] and Memo. of Law in Supp. of [Pl. Mot.], Jan. 26, 2021, ECF No. 22 ("Pl. Br."). Çolakoğlu asks the court to reject the U.S. Department of Commerce's ("Commerce") imposition of a countervailing duty ("CVD") on Çolakoğlu pursuant to Commerce's final results of its fourth administrative review of *Steel Concrete Reinforcing Bar From the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't of Commerce Nov. 6, 2014) ([CVD] order) ("*Rebar from Turkey*"). Pl. Br. at 2, 10; *see also Steel Concrete Reinforcing Bar from the Republic of Turkey*, 85 Fed. Reg. 42,353 (Dep't of Commerce July 14, 2020) (final results and partial rescission of [CVD] admin. review; 2017), PD138,[1] ECF No. 19–4 ("*Final Results*"), and accompanying Issues and Decision Memo., C-489–819 (July 6, 2020), PD135, ECF No. 19–3 ("Final Decision Memo").

Specifically, Çolakoğlu argues that Commerce's decision to pull forward Çolakoğlu's CVD rate from Commerce's prior administrative review was contrary to law in that, according to Çolakoğlu, Commerce was obligated to calculate Çolakoğlu's rate by averaging the de minimis rates of the two mandatory respondents. Pl. Br. at 5–8; *see also* Reply Br. of [Çolakoğlu], 2–6, June 16, 2021, ECF No. 27 ("Reply Br."). Çolakoğlu further asserts that its rate is unsupported by substantial evidence because the record lacks any information that would support the imposition of its rate. Pl. Br. at 8–10; Reply Br. at 6–9.

Defendant United States and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC") oppose the motion on the grounds that Commerce could use any reasonable method to calculate Çolakoğlu's rate, averaging the mandatory respondents' de minimis rates would not have been reasonably reflective of Çolakoğlu's actual rate, and Commerce followed its past practice in pulling Çolakoğlu's rate forward from the prior administrative review. *See* Def.'s Resp. to [Pl. Mot.], 5–12, May 12, 2021, ECF No. 25 ("Def. Br."); [RTAC's] Resp.

[1] On October 21, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. *See* ECF No. 19–1–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

Br., 7–11, May 13, 2021, ECF No. 26 ("RTAC Br."). Defendant further argues that Çolakoğlu's rate is supported by substantial evidence because Çolakoğlu previously availed itself of a subsidy program in the prior administrative review and offers no evidence that it has stopped using that program. Def. Br. at 12–13; *see also* RTAC Br. at 11–13.

For the following reasons, Commerce's *Final Results* are sustained.

BACKGROUND

Commerce published a CVD order covering steel concrete reinforcing bar ("rebar") from the Republic of Turkey ("Turkey") on November 6, 2014. *See Rebar from Turkey*. Commerce administratively reviewed *Rebar from Turkey* on an annual basis for the years 2014, 2015, and 2016 prior to initiating the fourth administrative review, which is the subject of this action. *See [Rebar] from [Turkey]*, 82 Fed. Reg. 26,907 (Dep't of Commerce June 12, 2017) (final results and partial rescission of [CVD] admin. review; 2014) ("*2014 Final Results*") and accompanying Issues and Decision Memo., C-489–819, bar code 3578880–01 ("2014 IDM"); *[Rebar] from [Turkey]*, 83 Fed. Reg. 16,051 (Dep't of Commerce April 13, 2018) (final results and partial rescission of [CVD] admin. review; 2015) ("*2015 Final Results*") and accompanying Issues and Decision Memo., C-489–819, bar code 3692588–01 ("2015 IDM"); *[Rebar] from [Turkey]*, 84 Fed. Reg. 36,051 (Dep't of Commerce July 26, 2019) (final results and partial rescission of [CVD] admin. review; 2016) ("*2016 Final Results*") and accompanying Issues and Decision Memo., C-489–819, bar code 3866067–01 ("2016 IDM"); *see also Final Results*.

In two of three prior administrative reviews, Commerce selected Çolakoğlu as a mandatory respondent, but did not select it as a mandatory respondent in the fourth administrative review. *See 2014 Final Results*, 82 Fed. Reg. at 26,908 (Çolakoğlu not selected as mandatory respondent); *2015 Final Results*, 83 Fed. Reg. at 16,051–52 (Çolakoğlu selected as mandatory respondent); *2016 Final Results*, 84 Fed. Reg. at 36,051 (Çolakoğlu selected as mandatory respondent); Memo. from C. Monks to E. Yang re: [Rebar] from [Turkey]: Respondent Selection in [CVD] Admin. Review for 2017, 1–3, PD28, CD4, bar codes 3830692–01, 3830691–01 (May 7, 2019) ("Respondent Selection Memo"). In both the 2014 and 2015 administrative reviews of *Rebar from Turkey*, Çolakoğlu received de minimis rates. *See 2014 Final Results*, 82 Fed. Reg. at 26,908; *2015 Final Results*, 83 Fed. Reg. at 16,051–53. In the 2014 adminsitrative review, Commerce assigned all non-selected respondents de minimis rates because all mandatory respondents received de minimis rates.

2014 Final Results, 82 Fed. Reg. at 26,908–09. In the 2015 administrative review, Commerce determined that Çolakoğlu purchased natural gas from Born Hatlan Ile Petrol Tasima A.S. ("BOTAS"), a state-run company through which the Turkish government provides subsidies to Turkish companies by selling natural gas for less than adequate remuneration ("LTAR"). *2015 Final Results*; 2015 IDM at 5; *see also* Final Decision Memo at 13, 35. However, Commerce determined that Çolakoğlu paid market rates and thus was not subject to countervailing duties. *2015 Final Results*; 2015 IDM at 5, 15. In the 2016 administrative review, Commerce again found that Çolakoğlu purchased natural gas from BOTAS, but also determined that Çolakoğlu purchased the gas for LTAR. *2016 Final Results*; 2016 IDM at 8. Therefore, Commerce assigned Çolakoğlu a 1.82% CVD rate for the 2016 administrative review. *2016 Final Results*, 84 Fed. Reg. at 36,052.

Çolakoğlu now brings this challenge to the *Final Results* of the fourth administrative review of *Rebar from Turkey*, which covers the period of January 1, 2017 through December 31, 2017 (the "POR"). Pl. Br. at 1; *see also Final Results*, 85 Fed. Reg. at 42,353. Çolakoğlu, which was not selected as a mandatory respondent, specifically challenges Commerce's decision to assign to Çolakoğlu a 1.82% subsidy rate when both examined respondents received de minimis rates. Pl. Br. at 3–4, 8–9; *Final Results*, 85 Fed Reg. at 42,355. Commerce calculated Çolakoğlu's rate by pulling forward Çolakoğlu's rate from the 2016 administrative review. Final Decision Memo at 4. However, Çolakoğlu argues that the statutory scheme precludes Commerce from pulling forward Çolakoğlu's prior rate, and that there is no record evidence to support the 1.82% rate because Çolakoğlu was not selected as a mandatory respondent and thus the record is devoid of any company-specific information to support Çolakoğlu's rate. Pl. Br. at 8–10; Reply Br. at 6–7. For the following reasons, Commerce's decision to assign Çolakoğlu a 1.82% CVD rate is sustained.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[2] and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of a CVD order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[2] 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.

DISCUSSION

There are two issues before the court. First, Çolakoğlu contends that Commerce acted contrary to law by assigning Çolakoğlu a 1.82% CVD rate because Commerce was obligated to calculate its rate pursuant to the so-called "expected method" set forth in the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. I, at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4201 ("SAA"). *See* Pl. Br. at 7. Second, Çolakoğlu asserts that even if Commerce did not err as a matter of law, the 1.82% CVD rate is not supported by substantial evidence on the record. *Id*. at 9. Defendant and RTAC each argue that Çolakoğlu misinterprets the relevant law, that the expected method is only presumed in the context of antidumping duty ("ADD") investigations, and that the statute empowers Commerce to use any reasonable method to calculate Çolakoğlu's rate. Def. Br. at 6–12; RTAC Br. at 7–11. Defendant and RTAC further argue that Commerce reasonably chose not to use the ADD expected method in calculating Çolakoğlu's rate because the mandatory respondents' rates were not reasonably representative of Çolakoğlu's experience in light of Çolakoğlu's history of purchasing gas from BOTAS for LTAR. Def. Br. at 11; RTAC Br. at 11. Finally, Defendant and RTAC argue that Commerce's rate for Çolakoğlu is supported by substantial evidence because it is based on the *2016 Final Results*. Def. Br. at 12–13; RTAC Br. at 11–13.

I. Commerce's Methodology

In a CVD administrative review, Commerce generally calculates the rate for companies that are not individually examined by calculating the "weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and de minimis countervailable subsidy rates, and any rates entirely determined [using facts otherwise available]." 19 U.S.C. § 1671d(c)(5)(A)(i). However, when all mandatory respondents in an administrative review of a CVD order are assigned de minimis rates, Commerce "may use any reasonable method to establish [rates] for exporters and producers not individually investigated, including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated." *Id*. § 1671d(c)(5)(A)(ii). The SAA reiterates that "[w]here the countervailable subsidy rates for all exporters and producers examined are zero or de minimis . . . [19 U.S.C. § 1671d(c)(5)(A)(ii)] authorizes Commerce to use any reasonable method" to calculate rates for non-examined companies.[3] SAA at 942.

Despite the apparently broad discretion the statute grants to Commerce in calculating non-examined companies' rates when all examined respondents are assigned de minimis rates, as is the case here, Çolakoğlu points to the similar provisions of the Tariff Act of 1930 which cover antidumping investigations to argue that Congress also imposed a requirement that Commerce use an "expected method" in such situations in CVD investigations and reviews. *See* Pl. Br. at 6–7 (citing 19 U.S.C. § 1673d(c)(5)(A)[4] and SAA at 873); *see also* Reply Br. at 3–5. Although Çolakoğlu is correct that the sections of the Tariff Act of 1930 applicable to Commerce's calculations of non-selected respondents' ADD and CVD rates when all mandatory respondents receive de minimis rates are nearly identical, the corresponding explanations of those sections in the SAA are not. *Compare* 19 U.S.C. § 1671d(c)(5)(A)(ii) (CVDs) *with id.* § 1673d(c)(5)(B) (ADDs); *compare* SAA at 942 (CVDs) *with id.* at 873 (ADDs).

Both sections of the U.S. Code state that when all mandatory respondents receive de minimis rates, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually examined, including averaging the estimated weighted average [CVD/ADD] margins determined for the exporters and producers individually examined." *Id.* §§ 1671d(c)(5)(A)(ii) and 1673d(c)(5)(B). However, the SAA provides that, in the antidumping context, when all mandatory respondents receive a de minimis rate,

> [t]he expected method [for calculating an all-others rate] will be to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this [expected] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 873. Although the SAA does not contain any similar language regarding an expected method for calculating all others rates in the CVD context, Çolakoğlu nonetheless contends that because the sec-

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

[4] Çolakoğlu cites 19 U.S.C. § 1673d(c)(5)(A), but the relevant subsection is 19 U.S.C. § 1673d(c)(5)(B).

tions of the U.S. Code governing Commerce's role in calculating an all-others rate when all mandatory respondents receive de minimis rates are so similar, the court should read into the SAA's section on all-others CVD rates the same expected method included in the ADD context. Pl. Br. at 6–7; Reply Br. at 3–5.

Contrary to Çolakoğlu's argument, that the SAA contains an expected method in the ADD context and not in the CVD context demonstrates that there is no expected method in the CVD context. Congress could have easily included the same language in both sections or even combined the sections into one if it had intended to place the exact same restrictions on Commerce in both contexts. Instead, Congress chose to elucidate an expected method of calculating an all-others rate when all mandatory respondents receive de minimis rates only in the ADD context. *Compare* SAA at 873 *with id*. at 942. Where Congress chooses to include certain language in one section of a statute and not in another similar section, courts must interpret that choice as intentionally excluding the wording where it is absent. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Although the relevant sections of the U.S. Code are quite similar, the SAA is the authoritative interpretation of those sections of Code, and there is an explicit difference in the SAA's description of how Commerce may calculate all-others rates in the CVD context as opposed to the ADD context. *Compare* 19 U.S.C. § 1671d(c)(5)(A)(ii) (CVDs) *with id*. § 1673d(c)(5)(B) (ADDs); *compare* SAA at 942 (CVDs) *with id*. at 873 (ADDs). Even though the SAA is not a statute, it is reasonable to interpret the explicit difference between the ADD and CVD sections of the SAA in accordance with the traditional canon of statutory construction that the difference is intentional. *Cardoza-Fonseca*, 480 U.S. at 432.

Such an interpretation reflects the differences between ADD and CVD investigations. As Commerce explains, as opposed to an ADD investigation in which Commerce analyzes companies' "pricing behavior," in a CVD investigation, "Commerce's concern is with government subsidization and the extent to which different companies may use or benefit from subsidy programs." Final Decision Memo at 34. Thus, CVD rates depend on individual companies' use of specific subsidy programs. In the ADD context, on the other hand, Commerce must assess pricing behavior based on a comparison between U.S. prices and the respondent's home country prices. *Id.; see also* 19 U.S.C. § 1677b(a). The different inquiries Commerce must make in the ADD and CVD contexts support Commerce's interpretation of the SAA's differing explanations for how to calculate rates for non-selected respondents.

Çolakoğlu argues that the relevant provisions of the U.S. Code and the SAA are ambiguous. Pl. Br. at 5–8. However, even if that were true, unless Commerce's interpretation of the Tariff Act of 1930 and the SAA is unreasonable, the court will defer to Commerce. *See Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842–43 (1984). To the extent any ambiguity exists as a result of the differing explanations in the SAA, Commerce's interpretation of Congress' decision not to include the requirement to first consider using the ADD expected method in the CVD provision to mean that Commerce was not required to use the ADD expected method is reasonable. That Congress wrote the two sections differently is reason enough to interpret the sections as imposing different requirements on Commerce. The differences between ADD and CVD investigations further support Commerce's interpretation. Moreover, Congress provided in both the Tariff Act of 1930 and the SAA that Commerce may "use any reasonable method" in the CVD context without any reference to a specific method. *See* 19 U.S.C. § 1671d(c)(5)(A)(ii); SAA at 942. Thus, absent a specific indication to the contrary, as there is in the ADD context, it is reasonable to conclude that Commerce is not bound to use any particular methodology in the CVD context, only that the chosen methodology be reasonable.

Neither of the cases that Çolakoğlu cites change this analysis because each case Çolakoğlu cites in support of restricting Commerce to the ADD expected method in the CVD context relates to ADDs, not CVDs. *See Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016); *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006 (Fed. Cir. 2017). Çolakoğlu has not identified any case where Commerce has been required to follow the ADD expected method in the CVD context. Therefore, Commerce's interpretation that it is not obligated to use or consider using the ADD expected method in the CVD context is reasonable.

Furthermore, that Commerce used the ADD expected method in the *2014 Final Results* does not require Commerce to do so now. *See* Final Decision Memo at 31. Commerce's reliance here on the *2016 Final Results* for a rate renders it reasonably discernible that Commerce distinguished its choice in the 2014 administrative review because in the 2014 administrative review there was no previously calculated non-de minimis rate from Çolakoğlu to pull forward. *Compare 2014 Final Results*, 82 Fed. Reg. at 26,908–09, *with Rebar from Turkey*, 79 Fed. Reg. at 54,963–64. To be sure, the ADD expected method may be a reasonable way to calculate an all-others rate, as it was for the *2014 Final Results*. But the reasonableness of Commerce's methodology in the 2014 review does not render its methodology unreasonable in this review, nor does it constrain Commerce where Commerce encounters a new context supporting a different approach. *See* 19 U.S.C. § 1671d(c)(5)(A)(ii); SAA at 942.

Moreover, even if the statute obligated Commerce to consider using the ADD expected method for calculation of all-others rates in the CVD context, Commerce sufficiently explained that calculating Çolakoğlu's rate using the ADD expected method of averaging the mandatory respondents' de minimis rates would not be reasonably reflective of Çolakoğlu's actual CVD rate. Final Decision Memo at 34–35. Commerce found that neither mandatory respondent purchased natural gas for LTAR from the BOTAS program during the POR or in the prior review. *Id*. Yet there is no dispute that the BOTAS program to sell natural gas for LTAR still exists. *See id*. at 13. Çolakoğlu did not provide any evidence that it no longer purchases natural gas from BOTAS for LTAR. *Id*. at 34–35; *see QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (it is the parties' obligation to develop the record, not Commerce's). Because CVD rates depend upon the specific subsidy programs used and Çolakoğlu had a history of purchasing natural gas from BOTAS during the two prior reviews, both for market rates and for LTAR, Commerce concluded that the mandatory respondents' rates would not reasonably reflect Çolakoğlu's rate. Final Decision Memo. at 34–35. Thus, even if Commerce was obligated to consider using the ADD expected method, it adequately explained why using the ADD expected method was not reasonably reflective of Çolakoğlu's rate in this case. *See* SAA at 873.

Not being bound to use the ADD expected method and, in any case, having sufficiently explained why the ADD expected method would not lead to a rate reasonably reflective of Çolakoğlu's actual rate, Commerce was entitled to use any reasonable method to calculate Çolakoğlu's rate. 28 U.S.C. § 1671d(c)(5)(A)(ii); SAA at 942. Commerce explained that it determined that "a reasonable method" to calculate all-others rates in the CVD context where all mandatory respondents receive de minimis rates "is to assign to the non-selected respondents the average of the most recently determined rates that are not zero, de minimis, or based entirely on facts available."[5] Final Decision Memo at 4. Commerce further explained that "if a non-selected respondent has its own calculated rate that is contempora-

[5] Commerce calculated the rates for the other non-selected respondents in this review by averaging the non-de minimis rates calculated during the 2016 review. The all-others rate for those companies is 2.29%. *Id*. at 4.

neous with or more recent than such previous rates, Commerce has found it appropriate to apply that calculated rate to the non-selected respondent, even when that rate is zero or de minimis." *Id*.

Given that Commerce will generally not have any company-specific information about non-selected respondents and the broad statutory authority to use "any reasonable method" to calculate rates when the mandatory respondents received de minimis rates, the court concludes that Commerce's chosen method is reasonable. Only mandatory respondents are required to respond to Commerce's requests for information. *See* 19 U.S.C. § 1677f-1(e); 19 C.F.R. § 351.204(c). Therefore, unless non-selected respondents voluntarily supply information to Commerce, which Commerce can either accept or decline, the only information on the record would be the information that led Commerce to assign de minimis rates to the mandatory respondents. *See id*. § 1677f-1(e); 19 C.F.R. § 351.204(d). Thus, by specifically carving out an exception to the general rule that Commerce should calculate all-others rates by using a weighted average of the mandatory respondents' rates for situations such as this when all mandatory respondents receive de minimis rates, *see* 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii), Congress contemplated Commerce pulling forward previously determined rates. In light of this record, it is reasonable for Commerce to use the most recent company-specific information to calculate Çolakoğlu's rate. *See* Final Decision Memo at 4, 34–35.

II. Evidence Supporting Commerce's Rate

Çolakoğlu argues that even if Commerce's method in calculating Çolakoğlu's rate was reasonable, the record does not support a 1.82% CVD rate for this POR. Pl. Br. at 8–10. Defendant and RTAC assert that any lack of record evidence stems from Çolakoğlu's failure to seek voluntary respondent status or otherwise attempt to populate the record. Def. Br. at 13; RTAC Br. at 12. In any case, Defendant and RTAC contend that Commerce need not have relied on any evidence other than the *2016 Final Results* because there was no evidence indicating that Çolakoğlu no longer purchased natural gas from BOTAS for LTAR. Def. Br. at 13; RTAC Br. at 12. For the following reasons, Commerce's decision to assign Çolakoğlu a 1.82% CVD rate is supported by substantial evidence.

Commerce determined that Çolakoğlu utilized a subsidy program provided by the Turkish government by purchasing natural gas from BOTAS in both 2015 and 2016. *See* 2015 IDM at 5, 10; 2016 IDM at 8, 16. Commerce explained that in the absence of evidence to the contrary, Commerce will assume that a company continues to avail itself of subsidy programs that it has been found to have previously used. Final Decision Memo at 34. Here, Çolakoğlu offered no evidence that it discontinued its use of the BOTAS subsidy program, or that it continued to purchase natural gas from BOTAS but for adequate remuneration. *See id*. at 34–35. Çolakoğlu does not dispute that it failed to offer any evidence to contradict Commerce's rate. Pl. Br. at 9. Instead, Çolakoğlu claims that it was not obligated to place any information on the record and that in the absence of any company-specific information Commerce was prohibited from looking to past reviews and instead was obligated to use the expected method, which Çolakoğlu asserts is the only reasonable method in the absence of record evidence. *Id*. at 9–10; Oral Argument, 18:10, October 7, 2021, *see* ECF No. 33 ("Oral Arg."). This argument simply re-packages Çolakoğlu's argument that Commerce's method was contrary to law and is therefore rejected for the same reasons.

Moreover, the obligation to populate the record is the parties', not Commerce's. *QVD Food Co*., 658 F.3d at 1324. Çolakoğlu conceded as much at oral argument. Oral Arg. at 21:04. Nonetheless, Çolakoğlu admits that it did not even attempt to place any relevant information on the record. Oral Arg. at 16:45. The U.S. Court of Appeals for the Federal Circuit has held that the availability of voluntarily submitted information of non-selected respondents cautions against pulling forward a rate from a prior review in lieu of adopting the de minimis rate of the examined respondents. *See Albemarle*, 821 F.3d at 1358 (drawing a distinction between a non-cooperating party and a party that volunteered for investigation and tried to submit data but was rejected in both instances by Commerce); *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 793–94 (Fed. Cir. 2020) (finding that "efforts in volunteering for investigation [and providing extensive information aimed at enabling such review] offer some reason to think that for those firms, unlike for non-volunteer firms, there is no more need for continuing coverage than there is for individually investigated firms" with de minimis rates). The court need not opine on whether Commerce's determination would be reasonable had Commerce rejected voluntarily submitted evidence of a de minimis or lower rate. Although Commerce would not have been required to accept or review any such information, the fact that Çolakoğlu did not offer any leaves it unable to contest Commerce's conclusion that Çolakoğlu continues to purchase natural gas from BOTAS for LTAR. Although Commerce may not justify "the absence of evidence by invoking procedural difficulties that were at least in part a creature of its own making," *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013), the absence of evidence was entirely due to Çolakoğlu's failure to provide any data.

In light of the record in this case that Commerce determined that BOTAS continued to supply natural gas for LTAR during the POR, Çolakoğlu was found to have utilized that subsidy program in each of the prior two periods of review, and Çolakoğlu failed to make any attempt to place any contradictory information on the record, Commerce's decision to pull forward Çolakoğlu's prior rate is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, Çolakoğlu's motion for judgment upon the agency record is denied, and Commerce's *Final Results* are sustained. Judgment for defendant will enter accordingly.

Dated: December 2, 2021
New York, New York

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

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