U.S. Court of International Trade

Slip Op. 21–151

DIAMOND TOOLS TECHNOLOGY LLC, Plaintiff, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Court No. 20–00060
PUBLIC VERSION

[The court sustains in part and remands in part Customs' Final Determination and Final Administrative Decision.]

Dated: October 29, 2021

Jay C. Campbell, White & Case LLP, of Washington, D.C., argued for Plaintiff Diamond Tools Technology LLC. With him on the brief were *Walter J. Spak*, *Dean A. Barclay*, *Ron Kendler*, and *Allison J.G. Kepkay*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With him on the brief were *Jeffery Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Tamari J. Lagvilava*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

Maureen E. Thorson, Wiley Rein LLP, of Washington D.C., argued for Defendant-Intervenor Diamond Sawblades Manufacturers' Coalition. With her on the brief were *Daniel B. Pickard*, *Stephanie M. Bell*, and *Derick G. Holt*.

OPINION AND ORDER

Reif, Judge:

The action before the court is a motion for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade ("USCIT" or "the Court") filed by plaintiff Diamond Tools Technology LLC ("DTT USA" or "plaintiff"). Pl.'s Mot. for J. on the Agency R. ("Pl. Br."), ECF No. 48. DTT USA challenges: (1) the affirmative final determination of evasion of the antidumping duty order on certain diamond sawblades and parts thereof from the People's Republic of China ("China") issued by U.S. Customs and Border Protection ("Customs"), TRLED Final Determination (Sept. 17, 2019) ("Final Determination"), CR 199, PR 220; and, (2) Customs' Office of Regulations and Rulings ("OR&R) final administrative determination affirming Customs' Final Determination. REG AND RULINGS Final Administrative Determination for Diamond Tools (Jan. 29, 2020) ("OR&R

Final Administrative Determination"), PR 232.[1] Customs issued its Final Determination and Final Administrative Determination pursuant to its authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018).[2]

DTT USA challenges Customs' Final Determination on four grounds. DTT USA argues that: (1) Customs' suspension of liquidation on entries that pre-dated December 1, 2017, is a retroactive application of Commerce's circumvention determination and not in accordance with law; (2) Customs' evasion determination related to DTT USA's entries before December 1, 2017, was arbitrary, capricious and an abuse of discretion, and otherwise not in accordance with law; (3) Customs' conduct during the EAPA proceeding deprived DTT USA of its due process rights; and, (4) Customs' imposition of interim measures is not in accordance with law because Customs failed to make a "reasonable suspicion" determination by the statutory deadline. *See* Pl. Br. at 19–36.

Defendant United States ("the Government" or "defendant") and defendant-intervenor Diamond Sawblades Manufacturers' Coalition ("DSMC") maintain that Customs conducted its investigation lawfully, and that the affirmative evasion determination is supported by substantial evidence and is not an abuse of discretion, and is not arbitrary, capricious, or otherwise not in accordance with law. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def. Br.), ECF No. 51; Def.-Intervenor's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.-Intervenor Br."), ECF No. 52. For the following reasons, the court sustains in part and remands in part Customs' Final Determination and Final Administrative Decision.

BACKGROUND

DTT USA is an importer of diamond sawblades, a circular cutting tool composed of two main components: a "core" and "segments." Pl. Br. at 5. On November 4, 2009, Commerce issued an antidumping duty order on imports of diamond sawblades and parts thereof from China. *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009) (antidumping duty order) (the "2009 Order"). On February 24, 2017, DSMC, a group of U.S. producers of diamond

[1] The U.S. Customs and Border Protection's Trade Remedy & Law Enforcement Directorate ("TRLED") conducted the EAPA investigation, and the U.S. Customs and Border Protection's Office of Regulations & Rulings ("OR&R") handled the administrative appeal of TRLED's final affirmative evasion determination.

[2] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition unless otherwise specified. EAPA was enacted as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016).

sawblades, filed an EAPA allegation that DTT USA was evading the 2009 Order. DSMC Allegation and Attachments A-C (Feb. 24, 2017), CR 1–4, PR 1–4. DSMC alleged that DTT USA, in coordination with DTT Thailand,[3] was transshipping Chinese diamond sawblades through Thailand and presenting these transshipped sawblades to Customs as non-subject goods. *Id*.

On March 1, 2017, Customs acknowledged receipt of DSMC's allegation. *See* TRLED Notice of Initiation of Investigation (7184) (June 27, 2017) ("Initiation Notice") at 2, CR 24, PR 26. On March 22, 2017, Customs initiated an investigation under the EAPA in response to DSMC's allegation. *Id.* Customs' investigation covered entries from March 1, 2016, one year before receipt of the EAPA allegation, through the pendency of the EAPA investigation.[4] *Id*. On March 24, 2017, Customs issued to DTT USA a request for information ("RFI"), seeking data related to the entry of DTT USA's sawblades. *Id.* at 4. Customs issued follow-up questions on April 25 and May 4, 2017. *Id*. at 4–5. Customs further investigated DTT Thailand's operations by visiting the facilities in Thailand on June 21, 2017. *Id*. at 5. After Customs' visit to DTT Thailand's facilities, Customs concluded that the company "does not have sufficient capacity to produce to the amount needed to export to the [United States]." CBP Site Visit Report and Pictures (June 22, 2017), CR 22, PR 51. Based on the findings from its visit, Customs found that there was "reasonable suspicion" of evasion. *See* TRLED Notice of Interim Measures (7184) (June 27, 2017) ("Notice of Interim Measures") at 2–3, CR 25, PR 27; TRLED Interim Measures E-mail (June 23, 2017), CR 23.

On June 23, 2017, Customs imposed interim measures. TRLED Interim Measures E-mail (June 23, 2017), CR 23; *see* Public Oral Argument Tr. at 65:23–65:25, ECF No. 63. On June 27, 2017, seven days after the statutory deadline, Customs sent to DTT USA a (1) notice of initiation under 19 C.F.R. § 165.15(d)(1), informing DTT USA that Customs had commenced an EAPA investigation of DTT USA on March 22, 2017, and (2) a notice of the imposition of interim measures under 19 C.F.R. § 165.24(c). Initiation Notice; Notice of Interim Measures.

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[3] DTT Thailand is an affiliate of DTT USA based in Thailand that produces diamond sawblades by laser welding Chinese-origin cores and segments together. Reply Br. of Pl. Diamond Tools Tech. LLC ("Pl. Reply Br.") at 1, ECF No. 54.

[4] Customs' regulations provide that entries covered by an EAPA investigation include "entries of allegedly covered merchandise made within one year before the receipt of an allegation . . . ." 19 C.F.R. § 165.2. Customs acknowledged receipt of DSMC's EAPA allegation on March 1, 2017, and, therefore, entries covered by the investigation are those entered on or after March 1, 2016. Initiation Notice at 2.

As interim measures, Customs determined:

> Entries under this investigation that entered the United States as not subject to antidumping duties, will be rate-adjusted to reflect that they are subject to the antidumping duty order on diamond sawblades from China and cash deposits are owed. Additionally, "live entry" is required for all future imports for DTT, meaning that all entry documents and duties are required to be provided before cargo is released by [Customs] into the U.S. commerce. [Customs] will reject any entry summaries and require a refile for those that are within the entry summary reject period; suspend the liquidation for any entry that has entered on or after March 22, 2017, the date of initiation of this investigation; as well as extend the period for liquidation for all unliquidated entries that entered before that date. For any entries that have liquidated and for which [Customs'] reliquidation authority has not yet lapsed, [Customs] will reliquidate those entries accordingly. [Customs] will also be evaluating DTT's continuous bond to determine its sufficiency, among other measures, as needed.

See Notice of Interim Measures at 3 (internal citations omitted).

After Customs imposed the interim measures, Customs issued an additional RFI to DTT USA and DTT Thailand. TRLED EAPA 7184 Scope Referral and Attachments (Nov. 21, 2017) ("Covered Merchandise Referral"), CR 188–190, PR 184–187. In response to the RFI, DTT Thailand explained that the company manufactured diamond sawblades onsite at its facility in Thailand; however, some of the cores and segments used were sourced from China. *Id*. Customs determined that the 2009 Order — issued by Commerce — did not address expressly whether "covered merchandise" included diamond sawblades that resulted from the joining of subject components in Thailand. *Id.* Accordingly, Customs concluded that it was "unable to determine whether the merchandise at issue [diamond sawblade components sourced from China and joined in Thailand] is covered merchandise." *Id.* On November 21, 2017, pursuant to 19 U.S.C. § 1517(b)(4)(A), Customs referred the matter to Commerce "as to whether the diamond sawblades laser welded in Thailand by DTT Thailand from: (1) cores from Thailand and segments from China, (2) segments and cores that are both produced in China, and/or (3) cores from China and segments from Thailand are within the scope of the AD order on diamond sawblades from China." *Id*.; *see* Commerce Response to EAPA Referral (July 10, 2019) ("Commerce Response to EAPA Referral") at 4, PR 209.

On August 9, 2017, in addition to its EAPA allegation, DSMC requested separately that Commerce issue a ruling that imports made in Thailand from cores and segments from China circumvent the 2009 Order. Pl. Br. at 10. On December 1, 2017, Commerce initiated a circumvention inquiry pursuant to 19 U.S.C. § 1677j(b) ("Section 1677j(b)"). Commerce DSBs Anti-Circ Final Issues and Decision Memo (7184) (July 10, 2019) at 2, PR 208. Section 1677(b) allows Commerce to include in the scope of an order merchandise that is subject to an antidumping ("AD") or countervailing duty ("CVD") order that is completed or assembled in a third country. On March 5, 2018, Commerce published a notice of the Covered Merchandise Referral in the Federal Register. Commerce Response to EAPA Referral at 1. On July 2, 2018, Commerce "aligned" the Covered Merchandise Referral with its "concurrent anti-circumvention inquiry." *Id*. In July 2019,[5] Commerce in its final determination of circumvention found that diamond sawblades made with Chinese cores and segments were circumventing the 2009 Order. *See* Commerce Response to EAPA Referral at 2; Commerce DSBs Anti-Circ Final Issues and Decision Memo (July 10, 2019), PR 208; Commerce DSBs Anti-Circ Final FR Notice (July 16, 2019), PR 210.

On July 10, 2019, Commerce also responded to Customs' referral request. In its response, Commerce informed Customs that Commerce "reached an affirmative circumvention finding for diamond sawblades made with Chinese cores and Chinese segments such that the diamond sawblades are covered merchandise." Commerce Response to EAPA Referral at 5. Specifically, Commerce found that, based on its circumvention determination, "diamond sawblades made in Thailand by Diamond Tools using Chinese cores and Chinese segments are subject to the AD order but diamond sawblades made in Thailand by Diamond Tools using either Thai cores or Thai segments are not subject to the AD order." *Id*. at 6.

On August 5, 2019, following Commerce's response to the EAPA referral, DTT USA filed with Customs written submissions asserting that the company did not evade the 2009 Order through its entries of diamond sawblades that were imported before December 1, 2017. DTT Legal Argument (7184) (Aug. 5, 2019), CR 198, PR 212. DTT USA argued that Commerce's regulation, 19 C.F.R. § 351.225(l)(3), "limit[s] the application of an affirmative anti-circumvention determination to imports of the affected merchandise entered on or after

[5] Commerce published its affirmative final determination of circumvention in the Federal Register on July 16, 2019. *See* Commerce Scope Referral Memo (7184) (July 23, 2019), PR 211.

the date of the inquiry's initiation." *Id*. at 27–28. DTT USA noted that Commerce initiated its circumvention inquiry on December 1, 2017, and, therefore, any entries of diamond sawblades manufactured in Thailand with Chinese cores and segments made prior to December 1, 2017, were not "covered merchandise" within the scope of the 2009 Order. *Id*. at 28–32.

On September 17, 2019, Customs issued its final affirmative evasion determination. Customs stated that "[b]ased on Commerce's response to the covered merchandise referral, we find that DTT's entries of diamond sawblades joined in Thailand were subject to the AD order on diamond sawblades." Final Determination at 8. Customs further explained: "Because Commerce did not place any temporal limitation or provide liquidation instructions to [Customs] with respect to entries covered by the EAPA investigation, we find that Commerce's response to the covered merchandise referral applies to all entries covered by the EAPA investigation, including those made prior to the initiation of [sic] anti-circumvention investigation." *Id*. In light of its evasion determination, Customs determined that the agency would:

> [C]ontinue to suspend or extend liquidation, as applicable, until instructed to liquidate entries subject to the investigation. For future entries of diamond sawblades from Thailand involving DTT Thailand, [Customs] will continue to require live entry, where the importer must post the applicable cash deposits prior to the release of merchandise into U.S. commerce. Finally, [Customs] will continue to evaluate the importer's continuous bonds in accordance with [Customs'] policies, and will continue to require single transaction bonds as appropriate.

Id. at 10.

On October 30, 2019, pursuant to 19 U.S.C. § 1517(f)(1), DTT USA filed an appeal with OR&R for *de novo* review of Customs' Final Determination. DTT EAPA 7184 Appeal for Admin. Review (Oct. 30, 2019), CR 200, PR 222. On January 29, 2020, OR&R issued its decision, sustaining the Final Determination. OR&R Final Administrative Determination.

STANDARD OF REVIEW

The court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g), and 28 U.S.C. § 1581(c).

The EAPA requires that the court determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review pursuant to 19 U.S.C. § 1517(f) was conducted "in accordance with those subsections" by examining whether Customs "fully

complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(A)-(B). "The court's review of Customs' determination as to evasion may encompass interim decisions subsumed into the final determination." *Vietnam Firewood Company Limited v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1273, 1284 (2020).

LEGAL FRAMEWORK

The EAPA statute, codified as 19 U.S.C. § 1517, directs Customs to investigate allegations of evasion of antidumping and countervailing duties. Customs must initiate an investigation within 15 business days of receiving an allegation that "reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(b)(1). The statute defines "evasion" as:

> [E]ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

19 U.S.C. § 1517(a)(5)(A).

The statute defines "covered merchandise" as merchandise that is subject to an AD or CVD order. 19 U.S.C. § 1517(a)(3)(A)-(B).

The statute directs Customs to make its final determination within 300 calendar days after the initiation of the investigation. 19 U.S.C. § 1517(c)(1)(A).[6] Customs' determination must be "based on substantial evidence." *Id*. Within 30 business days of Customs' final determination, "a person determined to have entered such covered merchandise through evasion or an interested party that filed an allegation . . . with respect to such covered merchandise may file an appeal with [Customs] for de novo review of the determination." 19 U.S.C. § 1517(f)(1).

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[6] Customs may extend the deadline to make a final determination by 60 days if it determines that "the investigation is extraordinarily complicated because of (I) the number and complexity of the transactions to be investigated; (II) the novelty of the issues presented; or (III) the number of entities to be investigated" and "additional time is necessary to make a determination . . . ." 19 U.S.C. § 1517(c)(1)(B).

DISCUSSION

I. Whether Customs' Failure to Meet the Statutory Deadline Nullifies the Interim Measures

A. Positions of Parties

Plaintiff challenges Customs' imposition of interim measures, arguing that Customs failed to comply with mandatory statutory procedures under 19 U.S.C. § 1517(e), requiring that Customs determine whether to impose interim measures within 90 calendar days of initiating an EAPA investigation. Pl. Br. at 35–36. Plaintiff argues that 19 U.S.C. § 1517(g)(2)(A) requires that the Court review whether Customs "fully complied with all procedures under subsections (c) . . . and (f) . . . ." *Id*. at 35 (citing 19 U.S.C. § 1517(g)(2)(A)). Plaintiff asserts that Customs failed to comply fully with all procedural requirements for the imposition of interim measures under 19 U.S.C. § 1517(e). *Id*. at 35. Plaintiff asserts that "[b]ecause [Customs] failed to make a 'reasonable suspicion' decision within the statutory deadline, [Customs'] imposition of interim measures was not made in accordance with law and must be overturned." *Id.* at 36.

The Government does not contest that Customs failed to make a reasonable suspicion determination within 90 days. Def. Br. at 5. The Government notes, however, that Customs explained that it failed to meet the statutory deadline because there were discrepancies in the record. *Id*. at 5–6. The Government argues that Customs' failure to comply with the deadline is immaterial because DTT USA was not substantially prejudiced by the delay. *Id.* at 21. The Government further asserts that the 90-day deadline is "merely directory" because Congress did not establish consequences for a failure to make an internal determination of reasonable suspicion within 90 days. *Id.* Defendant-Intervenor DSMC makes an additional argument that the EAPA cannot limit Customs' pre-existing authority to impose interim measures when it suspects that imports have been, or are being, entered without payment of appropriate duties. Def.-Intervenor Br. at 20.

B. Legal Framework

19 U.S.C. § 1517(e) states: "Not later than 90 calendar days after initiating an investigation . . . [Customs] shall decide based on the investigation if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United

States through evasion . . . .” 19 U.S.C. § 1517(e). If there is such reasonable suspicion of evasion, Customs shall impose interim measures consisting of:

> (1) suspend[ing] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation; (2) . . . extend[ing] the period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation; and (3) . . . tak[ing] such additional measures as [Customs] determines necessary to protect the revenue of the United States . . . .

Id.

In the event of an affirmative final determination of evasion, the statute directs Customs to continue the measures put in place as a part of the imposition of interim measures. 19 U.S.C. § 1517(d).

C. Analysis

1. Whether the Statutory Deadline is Mandatory

The Government and DSMC argue that the 90-day deadline is merely precatory because Congress did not provide any consequences stemming from a failure to reach an internal reasonable suspicion determination after 90 days. Def. Br. at 22; Def.-Intervenor Br. at 19–20. DSMC further argues that the EAPA's legislative history demonstrates that “the statute's purpose is to augment [Customs'] authority to enforce antidumping and countervailing duty orders and provide U.S. industries with effective trade remedies.” Def.-Intervenor Br. at 20. In response, DTT USA asserts that the 90-day deadline is mandatory and argues that the consequence prescribed by the statute is that Customs cannot impose interim measures past the deadline. Reply Br. of Pl. Diamond Tools Tech. LLC (“Pl. Reply Br.”) at 21, ECF No. 54. DTT USA cites the standard of review in the EAPA and the legislative history as support for its argument that Customs' compliance with the 90-day deadline for the imposition of interim measures is mandatory. *Id.* at 21–22. For the following reasons, the court concludes that the deadline is precatory, not mandatory.

a. “Shall” Alone Does Not Limit Agency Power

The statute states that “not later than 90 calendar days . . . the Commissioner *shall* decide . . . if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion . . . .” 19 U.S.C. § 1517(e) (emphasis supplied).

The Supreme Court has directed that a statute "needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160 (2003); *see also Brock v. Pierce County*, 476 U.S. 253, 262 (1986). In *Brock*, a statutory deadline provided that the Secretary of Labor "'*shall*' issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such misuse." *Brock*, 476 U.S. at 255 (emphasis supplied). The Supreme Court held that "the mere use of the word 'shall' . . . standing alone, is not enough to remove the Secretary's power to act after 120 days." *Id*. at 262; *see Barnhart*, 537 U.S at 158 (upholding its previous interpretation in *Brock*, the Supreme Court explained that "[not] since *Brock*, has this Court ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later."). Accordingly, the word "shall" is not sufficient by itself to eliminate Customs' power to act after 90 days.

Moreover, the Supreme Court has held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993). The Federal Circuit has applied consistently Supreme Court precedent, finding that in the absence of a consequence, "timing provisions are at best precatory rather than mandatory." *Liesegang v. Secretary of Veteran Affairs*, 312 F.3d 1368, 1377 (Fed. Cir. 2002). This Court has also recognized that where a statute does not specify a consequence for noncompliance with a statutory deadline, the agency is "under no clear duty to issue the final results within the statutory timeframe." *Husqvarna Constr. Prods. N. Am. v. United States*, 36 CIT 1618, 1625 (2012); *see also Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, 1355–1356 (affirming Commerce's issuance of its preliminary determination after the statutory deadline because 19 U.S.C. § 1673b "prescribes no consequence for failure to comply with the deadlines it imposes and must therefore be read as merely directory . . . .").

The Federal Circuit has clarified the type of statutory language that constitutes a consequence. In *Hitachi*, the Federal Circuit examined 19 U.S.C. § 1515(a) and determined that Congress did not impose expressly any consequences for Customs' failure to act within the two-year statutory deadline. *Hitachi Home Elecs. (Am.), Inc. v. United States*, 661 F.3d 1343 (Fed. Cir. 2011). The relevant statutory

language states: "[T]he appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, *shall* review the protest and *shall allow or deny* such protest in whole or in part." *Id*. at 1348 (quoting 19 U.S.C. § 1515(a)) (emphasis supplied). The Federal Circuit noted the use of the word "shall" in the statute; however, in light of Supreme Court decisions, the Federal Circuit determined that the word "shall" alone "is not enough to impose a specific penalty for noncompliance." *Id*. (referencing, in an earlier section, provisions that the government "shall" act in *Brock*, 476 U.S. at 266; *Barnhart*, 537 U.S. at 158; *Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998); *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990)).

The Federal Circuit in *Hitachi* also compared 19 U.S.C. § 1515(a) with 19 U.S.C. § 1515(b), which the Federal Circuit determined imposed an explicit consequence. *Hitachi*, 661 F.3d at 1349. 19 U.S.C. § 1515(b) states that "a protest which *has not been allowed or denied* in whole or in part within thirty days following the date of mailing . . . of a request for accelerated disposition shall be *deemed denied* on the thirtieth day following mailing of such request." *Id.* (quoting 19 U.S.C. § 1515(b)) (emphasis supplied). The Federal Circuit explained that the mention of a specific time limit of thirty days along with the specific consequence of deemed denial in section 1515(b), compared to section 1515(a), which did not include such language, was indicative of congressional intent to not impose a consequence in the subsection under examination. *Id.*

There is no explicit language in 19 U.S.C. § 1517(e) that specifies a consequence for Customs' non-compliance with the 90-day statutory deadline. The statute provides that Customs "shall" make a reasonable suspicion determination on the 90th day; however, as established by the Supreme Court, Federal Circuit and the USCIT, "shall" by itself is not sufficient to impose a consequence of noncompliance with a statutory timeline.

b. Standard of Review

DTT USA acknowledges that the USCIT has, at times, interpreted "shall" as precatory; however, DTT USA distinguishes 19 U.S.C. § 1517 from prior cases because the EAPA statute "expressly require[s] . . . judicial review of 'full[ ] compl[iance] with all procedures.'" Pl. Reply Br. at 21, n.4 (citing 19 U.S.C. 1517(g)(2)(A)) (alterations in original). DTT USA asserts that 19 U.S.C. § 1517(g)(2)(A) requires that the court examine whether "[Customs] fully complied with all procedures under subsections (c) and (f)." *Id*. at 21. DTT USA argues that "[n]o other section in Title 19 of the U.S. Code prescribing a

'substantial evidence,' 'arbitrary,' 'capricious,' 'abuse of discretion,' or 'not in accordance with law' standard of review calls also for judicial review of 'full[ ] compli[iance] with all procedures.'" *Id*. (alterations in original). DTT USA maintains that this language in the EAPA suggests that the 90-day deadline is mandatory. *Id*.

The court finds DTT USA's argument unpersuasive because the standard of review in 19 U.S.C. § 1517(g)(2)(A) ("Section 1517(g)(2)(A)") is not relevant to the 90-day deadline for the imposition of interim measures. Section 1517(g)(2)(A) provides that: "In determining whether a determination under subsection(c) or review under subsection (f) is conducted in accordance with those subsections, the [USCIT] shall examine . . . whether the Commissioner fully complied with all procedures under subsections (c) and (f)." 19 U.S.C. § 1517(g)(2)(A). The 90-day deadline, however, is set forth in subsection (e) addressing interim measures, not in subsections (c) or (f). 19 U.S.C. § 1517(e).

DTT USA does not cite to any case in which this Court has read expansively the standard of review in Section (g)(2)(A) to apply to the procedural requirements in subsection (e) or any language in the legislative history that would point to such intent. Pl. Reply. Br. at 21. To the contrary, the plain language of the statute — in particular, the explicit mention of subsections (c) and (f) — indicates that Congress' intent was to exclude other subsections. *See* 19 U.S.C. § 1517(g)(2)(A); *see also* Public Oral Argument Tr. at 71:9–71:22. Accordingly, the court finds that the standard of review applies only to subsections (c) and (f) and is irrelevant to the interpretation of the 90-day deadline for the imposition of interim measures in subsection (e).

c. The legislative history supports the precatory nature of the deadline in section § 1517(e)

DTT USA argues that the legislative history of the statute demonstrates that 19 U.S.C. § 1517(e) was designed to ensure that "the relevant agency 'conducts these investigations subject to strict deadlines.'" Pl. Reply Br. at 22 (citing to H.R. Rep. No. 114–114, pt. 1, at 86 (2015)). In fact, the text from which DTT USA draws this short quotation, reads in full: "This provision ensures that the Department of Commerce conducts these investigations subject to strict deadlines *so that delay in collecting antidumping and countervailing duties on evading imports is limited*."[7] H.R. Rep. No. 114–114, pt. 1, at 86 (emphasis supplied).

[7] In an earlier version of the legislation, it was proposed that the U.S. Department of Commerce was better suited to conduct administrative investigations of evasion. H.R. Rep.

DTT USA also argues that Congress wanted to "avoid prejudicing importers with drawn-out investigations." Pl. Reply Br. at 22. DTT USA points to language in the legislative history on the "importance of striking this critical balance between trade facilitation, trade enforcement, and security." *Id*. (citing to H.R. Rep. No. 114–114, pt. 1, at 51). In response, at oral argument DSMC argued that the "intent [of the statute] is clearly that investigations occur quickly to protect the domestic industry from unfair trade," and asserted that "the domestic industry shouldn't be unprotected because [Customs] missed an internal deadline by a day." Public Oral Argument Tr. 76:20–76:23.

The legislative history includes the language on the "importance of striking this critical balance between trade facilitation, trade enforcement, and security" in the background for the overall bill; however, the relevant paragraph states in full that "[Customs] cannot lose sight of its function as an international trade agency with the responsibility to facilitate trade *to help U.S. companies compete globally*." H.R. Rep. No. 114–114, pt. 1, at 51 (emphasis supplied). Trade facilitation can, in this context, be understood to mean on behalf of U.S. companies, and there is no specific indication that Congress aimed to avoid prejudicing importers with drawn-out investigations. *See* Pl. Reply Br. at 22.

In examining congressional intent, the Supreme Court in *Brock* observed from the legislative history that the deadline was "clearly intended to spur the Secretary to action, not to limit the scope of his authority." *Brock*, 476 U.S. at 265. The legislative history for the EAPA provision indicates that Congress included the deadlines, as in *Brock*, to spur the agency into action to identify evasion rather than to cut off its power to act past the deadline.

The Supreme Court in *Brock* also noted that issuing a final determination within a 120-day deadline was "subject to factors beyond [the Secretary's] control" and "[t]here is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline." *Id*. at 261. Similarly, in this case, Customs indicated that the reason for its failure to meet the 90-day deadline was due to "significant discrepancies pertaining to production, employees, equipment, and production capacity between DTT's CF 28 response and DSMC's allegation." Initiation Notice at 5. Customs noted that, "as a result of the limited amount of time between the receipt of the discrepant information and the deadline for determination as to interim measures, [Customs] did

No. 114–114, pt. 1, at 86. It was ultimately decided that Customs would make a determination within 90 calendar days of initiation of an evasion investigation as to whether there was reasonable suspicion that entries of covered merchandise were entered through evasion. H.R. Rep. No. 114–376, at 189 (2015); *see also* S. Rep. No. 114–45, at 35 (2015).

not have sufficient time to schedule the site visit prior to [the] June 20, 2017, deadline. For this reason, [Customs] did not determine to begin interim measures on June 20th, 2017, and conducted its site visit for [sic] June 21, 2017, of DTT Thailand's facility." *Id*. As in *Brock*, it is unlikely that Congress intended to preclude Customs from imposing interim measures as a result of Customs' failure to meet the deadline given these circumstances.

2. Substantial Prejudice

The Government and DSMC argue that Customs' failure to comply with the deadline is immaterial also because DTT USA was not substantially prejudiced by the delay. The Government asserts that parties seeking to overturn an administrative determination on procedural grounds must show actual substantial prejudice by reason of the alleged procedural error. Def. Br. at 21 (citing *Am. Farm Lines v. Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970); *PAM, S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006)). The Government points to the Federal Circuit, which has explained that a "notice defect [may be] cured by a subsequent notice given in time for the person to act on the matter." *Id*. (alteration in original) (citing *Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017)). The Government argues that DTT USA possesses a right to notice of interim measures only after 90 calendar days plus five business days. *Id*. at 21–22. The Government notes that DTT USA received actual notice within the regulatory deadline, and as such DTT USA was not affected in any way by Customs having missed an internal deadline by four days. *Id*.[8]

DTT USA does not contest that it must show substantial prejudice. Pl. Reply. Br. at 22–23. Rather, DTT USA argues that notice is "beside the point," and asserts that it was substantially prejudiced by Customs' imposition of interim measures past the statutory deadline which subjected DTT USA to suspension of liquidation and a cash deposit rate of 82.05%, among other measures. *Id*. at 23.

Customs' adherence to the 90-day deadline is not mandatory; however, "the court still must determine the consequence, if any, of Customs' procedural error" by examining whether plaintiff suffered substantial prejudice. *U.S. v. Great American Ins. Co. of NY*, 35 CIT

[8] Customs imposed the interim measures on June 23, 2017, three business days after the statutory deadline. TRLED Interim Measures E-mail (June 23, 2017), CR 23; *see* Public Oral Argument Tr. at 65:23–65:24. Customs provided DTT USA with notice of the interim measures on June 27, 2017, five business days after the statutory deadline. Notice of Interim Measures.

1130, 1144, 791 F. Supp. 2d 1337, 1354 (2011); *see U.S. v. American Home Assurance. Co.,* Slip Op. 11–57, 2011 WL 1882635, *5-*6 (CIT May 17, 2011); *Guandong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 85, 90, 414 F. Supp. 2d 1300, 1306 (2006) ("If, as is often the case, no law or regulation specifies the consequence of noncompliance with a regulation, the court must determine what remedy, if any, should be imposed."). "Procedural errors by Customs are harmless unless the errors are 'prejudicial to the party seeking to have the action declared invalid.'" *Am. Nat'l. Fire Ins. Co. v. U.S.,* 30 CIT 931, 942, 441 F. Supp. 2d 1275, 1287 (quoting *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063).

It is well established that DTT USA as the complaining party must demonstrate that it suffered substantial prejudice. The Federal Circuit has held that the "simple failure of an agency to follow a procedural requirement does not void subsequent agency action," and that plaintiff "must establish that it was substantially prejudiced by Customs' noncompliance." *Dixon,* 468 F.3d at 1355. This Court has also upheld the principle that "errors as to procedural rules void subsequent agency action only if they cause the challenging party 'substantial prejudice.'" *Hartford Fire Ins. Co. v. United States*, 41 CIT __, __, 254 F. Supp. 3d 1333, 1351 (2017) (citation omitted); *see also JBF RAK LLC v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1343, 1350 (2014) (holding that the burden is on the complaining party to demonstrate that it was substantially prejudiced by an agency's "supposed violation of its regulatory deadlines").

DTT USA has failed to demonstrate that it suffered substantial prejudice from Customs' failure to meet the 90-day statutory deadline. DTT USA argues that the "untimely imposition of interim measures," including the suspension of liquidation and the cash deposit rate of 82.05%, "came at a huge cost to DTT USA." Public Oral Argument Tr. at 67:20–68:7; *see* Pl. Reply Br. at 22–23. DTT USA's argument focuses on the injury, if any, caused by the imposition of interim measures themselves, not the injury, if any, caused by Customs' delay in making a "reasonable suspicion" determination of evasion.

The Federal Circuit dismissed a similar argument in *Intercargo* in which the plaintiff challenged Customs' notice of extension of liquidation. In that case, Customs' notice lacked the requisite statutory reason for obtaining additional time for the liquidations and plaintiff argued that "the prejudice flowing from this circumstance is the ultimate prejudice." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996). The Federal Circuit determined that plaintiff did not demonstrate that it had suffered substantial prejudice and ex-

plained that "[p]rejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Id*. The Federal Circuit determined that plaintiff had not been "deprived of its opportunity to challenge the extensions in court on the ground that they were not obtained for a statutorily valid reason," and, as such, that there was "no apparent prejudice to Intercargo of the type that would be required to justify terminating the government's right to assess import duties that may properly be due." *Id.* Similarly, here, DTT USA has not shown substantial prejudice because DTT USA fails to point to an injury from Customs' *delay* in making a reasonable suspicion determination and fails to demonstrate that any such injury is to an interest that the statutory deadline was designed to protect.

Moreover, while Customs missed the statutory deadline to make a "reasonable suspicion" determination, the agency met the deadline to provide DTT USA with notice of the imposition of the interim measures. Customs' regulation provides that if Customs makes a reasonable determination, Customs "will issue notification of this decision to the parties to the investigation *within five business days after taking interim measures*." 19 C.F.R. § 165.24(c) (emphasis supplied). Customs provided DTT USA with notice of the interim measures on June 27, 2017, five business days after the 90-day statutory deadline. DTT USA asserts that notice is "beside the point"; nevertheless, DTT USA fails to demonstrate how Customs' delay in meeting an internal agency deadline by three days and subsequently providing DTT USA with timely notice substantially prejudiced the company. Customs' failure to meet the statutory deadline had no effect on DTT USA's notice of the interim measures, nor did it impact DTT USA's right to challenge the interim measures.[9] *See Intercargo*, 83 F.3d at 396. Accordingly, the court determines that DTT USA has failed to make a showing of substantial prejudice.

[9] At oral argument, the Government also noted that Customs imposed the interim measures after the statutory deadline because Customs was not able to visit DTT Thailand's facility until one day after the deadline because "DTT responded to [Customs'] last request for information over two weeks late on June 1st." Public Oral Argument Tr. at 65:14–65:22. DTT USA did not dispute the Government's statement at oral argument. *See id*. at 65–66. The Supreme Court has held that it "is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it" and "[t]he action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *American Farm Lines v. Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970) (citation omitted).

3. Customs' Pre-Existing Authority for Interim Measures

In addition to the arguments raised by the Government, DSMC puts forward a third argument, asserting that the EAPA cannot reasonably be read to limit Customs' pre-existing authority to impose measures when it suspects that goods have entered or are entering the United States without payment of appropriate duties. Def.-Intervenor Br. at 20. DTT USA responds that the EAPA alone authorizes Customs to suspend liquidation based on "reasonable suspicion of evasion," and that Customs did not have independent authority outside of the EAPA statute. Pl. Reply Br. at 23–24.

The court does not need to address this argument because, as discussed above, the statutory deadline is directory, not mandatory, and DTT USA has failed to demonstrate that the delay caused substantial prejudice. Accordingly, Customs has the authority to issue the interim measures under the EAPA past the 90-day deadline.

II. Whether Customs Violated DTT USA's Due Process Rights

A. Positions of Parties

Plaintiff argues that Customs' conduct during the investigation deprived DTT USA of its due process rights to be heard and to defend itself. Plaintiff asserts that (1) Customs imposed interim measures without notice and without giving DTT USA the opportunity to comment beforehand and (2) Customs denied DTT USA the opportunity to review or comment on proprietary evidence during the EAPA proceeding. Pl. Br. at 33–34.

With regard to the interim measures, plaintiff asserts that Customs imposed the interim measures without notice to DTT USA. Plaintiff notes that Customs did not inform DTT USA of its EAPA investigation until after the imposition of interim measures — 97 days after Customs initiated the investigation. *Id*. at 34. As such, DTT USA argues that any opportunities DTT USA was given to comment occurred either *after* the imposition of the interim measures or *without notice* of the EAPA allegation. Pl. Reply Br. at 17. DTT USA argues that due process considerations establish that importers have a due process right to notice and an opportunity to be heard *before* the imposition of duties on "prior imports." *Id*. (citing *Nereida Trading Co. v. United States*, 34 CIT 241, 247, 683 F. Supp. 2d 1348, 1354–1355 (2010)).

The Government argues that "[a] company does not have a constitutionally-protected interest in any rate of duty, an importation, or even engaging in international trade." Def. Br. at 19. Accord-

ingly, the Government and DSMC maintain that DTT USA has not established any protected property right, and, therefore, DTT USA cannot have a due process right to a "particular form of procedures." *Id*. (citing *Cook v. United States*, 536 F.2d 365, 369 (Ct. Cl. 1976)). The Government argues that 19 U.S.C. § 1517(e) directs Customs to impose interim measures upon finding "reasonable suspicion" of evasion and argues that "the statute does not provide importers with any pre-initiation right to comment on" Customs' measures. *Id*. 18–19. DSMC notes that Customs' notice of interim measures was in accordance with Customs' regulations. Def.-Intervenor Br. at 17. DSMC further argues that DTT USA's due process argument is not credible because DTT USA had both notice and opportunity to comment before the imposition of interim measures. *Id.* at 17–18. DSMC asserts that by responding to Customs' RFI, submitting documentation and subjecting itself to an onsite visit from Customs at its Thailand operations, DTT USA had "constructive notice" of the EAPA investigation and opportunity to comment before the official notice of the investigation and imposition of the interim measures. Confidential Oral Argument Tr. at 9:17–10:10, ECF No. 64; *see* Def.-Intervenor Br. at 17–18.

With regard to the proprietary information, plaintiff asserts that it was denied access to proprietary information used in Customs' investigation, including the proprietary versions of Customs' 2018 EAPA Verification Report, Notice of Initiation, Notice of Interim Measures, and EAPA final determination. Pl. Br. at 34–35; Pl. Reply Br. at 19. Plaintiff argues that Customs' EAPA regulations, 19 C.F.R. § 165.0–165.47, "do not provide any mechanism through which parties' counsel can review and comment on proprietary evidence during an EAPA proceeding." Pl. Br. at 34. As such, by denying access to such information, Customs deprived DTT USA of the opportunity to review, evaluate and comment on the proprietary evidence and defend itself. *Id*. at 34–35. DTT USA argues that its right to judicial review does not cure the fact that it was denied access to proprietary information that could have enabled DTT USA to present a stronger defense at the administrative level. Pl. Reply Br. at 20.

The Government argues that the disclosure of confidential information could "prejudice any parallel proceedings" and "endanger the sources of this information." Def. Br. at 20. The Government notes that in the AD context the Court has allowed Commerce to withhold from interested parties a "Chinese Informant's business documents", determining that Commerce may restrict access to information if there is a "clear and compelling need to withhold" the information. *Id*.

(citing *Max Fortune Indus. Ltd. v. United States*, 36 CIT 964, 973, 853 F. Supp. 2d 1258, 1266) (2012)). DSMC adds that DTT USA did not explain how it was prejudiced by the lack of access to the withheld information and further notes that DTT USA did not raise the issue of withheld confidential documents during the EAPA investigation. Def.-Intervenor Br. at 16.

The Government further argues that any due process issues at the administrative level can be cured by DTT USA's right to judicial review because counsel are able to access the entire record under the protective order. Def. Br. at 20.

B. Analysis

The Fifth Amendment prohibits the deprivation of life, liberty or property without due process of law. U.S. CONST. amend. V. In any due process inquiry, the Court must first determine whether a protected interest exists. *Nereida Trading Co.,* 34 CIT at 248, 683 F. Supp. 2d at 1354–55 (citing *Int'l Trading Co. v. United States*, 24 CIT 596, 609, 110 F. Supp. 2d 977, 989 (2000)). If such a protected interest does exist, the Court must then determine what procedures are necessary to protect that interest. *Id*.

There is a "longstanding recognition that importers lack a protected interest in the *future* importation of goods at a particular tariff rate." *Id*. at 1355 (citing *Norwegian Nitrogen Prods. v. United States,* 288 U.S. 294, 297, 318–319 (1933)) (emphasis supplied). However, this Court has distinguished between an importer's interest in the *future* importation of goods at a particular tariff rate and an importer's interest in the rate on goods *already* imported. In *Nereida Trading,* the court assumed that plaintiff importer had "a protected interest in the proper assessment of tariffs on goods already imported." *Id*. In *Royal Brush Manufacturing v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1294, 1305 (2020), the court accepted the assumption that an importer has a protected interest in a proper assessment and considering what process is due in a case involving an investigation under the EAPA.

1. Interim Measures

Plaintiff challenges Customs' imposition of interim measures on the basis that Customs deprived DTT USA of its due process rights; however, plaintiff has failed to demonstrate that a protected interest exists. Plaintiff asserts that *Nereida Trading* and *Transcom, Inc. v. U.S.*, 24 CIT 1253, 121 F. Supp. 2d 690 (2000), establish that "the government must provide procedural due process — including both notice and an opportunity to be heard — before, not after, the gov-

ernment makes a determination and imposes duty measures, even interim ones." Pl. Reply Br. at 17. The facts of neither case are apposite to the present case.

In *Nereida*, the court examined whether Customs' presumption of reimbursement and subsequent liquidation of entries and application of a double-duty margin deprived the importer of due process. *Nereida Trading Co.*, 34 CIT at 247–249, 683 F. Supp. 2d at 1354–1356. In *Transcom*, the court examined a due process claim alleging that Commerce failed to provide a U.S. importer and its exporters notice prior to issuing a final determination requiring that the importer pay additional duties. *Transcom*, 121 F. Supp. 2d at 707–709.

Neither case addressed due process claims in the context of interim measures. Interim measures are temporary. Under the EAPA statute, Customs can extend interim measures only upon a final determination of evasion. *See* 19 U.S.C. § 1517(d). If Customs finds in its final determination that no evasion exists, any measures taken in the interim, such as a suspension of liquidation or collection of cash deposits, will be lifted and any additional duties or cash deposits paid will be reimbursed to the importer with interest. *See* 19 C.F.R. § 165.27(c); 19 C.F.R. § 24.36.

DTT USA argues that the Government and DSMC "mischaracterize DTT USA's protected interest as a negative EAPA final determination"; however, DTT USA itself fails to state with any particularity that a legitimate property interest exists in the specific context of interim measures. Pl. Reply Br. at 18. The court does not exclude the possibility that a protected interest may exist; rather, DTT USA has failed to establish what any such interest may be in this specific context and the court declines to do counsel's work. *See Home Prods. Int'l, Inc. v. United States*, 36 CIT 665, 673, 837 F. Supp. 2d 1294, 1301 (2012) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

2. Proprietary Information

Plaintiff argues that during the EAPA investigation DTT USA's counsel was denied access to proprietary information compiled by Customs, "including the proprietary version of DSMC's *EAPA Allegation* and the proprietary version of [Customs'] 2018 EAPA Verification Report." Pl. Br. at 34. Plaintiff further argues that Customs' regulations, 19 C.F.R. §§ 165.0–165.47, "do not provide any mechanism

through which parties' counsel can review and comment on proprietary evidence during an EAPA proceeding," and, therefore, Customs "deprived DTT USA of the opportunity to review, evaluate, and comment on proprietary evidence and, consequently, a fair opportunity to defend itself." *Id.* at 34–35.

The Court has recently addressed a company's due process rights in relation to a company's access to proprietary information during an EAPA investigation. In *Royal Brush*, the court examined whether Customs denied plaintiff, Royal Brush, due process during the EAPA proceeding by failing to disclose confidential information on which Customs relied in its determination. The court noted that Royal Brush "alerted Customs to its concerns regarding the extent of the redactions to various documents and Royal Brush's corresponding inability to fully defend its position." *Royal Brush,* 44 CIT at __, 483 F. Supp. 3d at 1306. Specifically, the court explained that, during the EAPA proceeding, Royal Brush expressed its due process concerns in detail at least three times.[10] *Id*. Customs did not respond to Royal Brush's request for disclosure of certain information nor did Customs address Royal Brush's due process concerns in its final determination, or in its review of the final determination. Accordingly, the court concluded that Customs "'failed to consider an important aspect of the problem,' resulting in a determination that is arbitrary and capricious." *Id*. (quoting *SKF USA Inc. v. United States*, 630 F. 3d 1365, 1374 (Fed. Cir. 2011)).

The court in *Royal Brush* further explained that "Customs' procedures must afford adequate opportunity for importers to respond to the evidence used against them." *Id*. The court noted that Customs' regulation, 19 C.F.R. § 165.4, addresses the procedures for confidential documents. *Id.* These procedures include instructions for interested parties to request that submissions receive confidential treatment and the requirement that submitters of such confidential information submit a public version of the document, "contain[ing] a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." 19 C.F.R. § 165.4(a)(2). The court noted that the lack of public summa-

[10] The court explained that during the EAPA proceeding, Royal Brush "argu[ed] that due process required [Customs] to provide copies of the photographs of the Philippine Shipper's facility attached to the Attaché Report to Royal Brush or to the Philippine Shipper before verification, and there was no reason to withhold the photographs from the Philippine Shipper since the photographs pertained to that company's business information." *Royal Brush*, 44 CIT at __, 483 F. Supp. 3d at 1306 (citation omitted). Royal Brush further argued, on two separate occasions, that it "had been denied procedural due process based on [Customs'] treatment of confidential information in the Allegation, Attaché Report, and Verification Report." *Id.* (citation omitted).

ries accompanying Customs' Attaché Report and Verification Report was "particularly concerning" because Customs relied on the reports in its determination. *Royal Brush*, 44 CIT at __, 483 F. Supp. 3d at 1307. As such, the court concluded that Customs failed to afford Royal Brush "the opportunity to be heard at a meaningful time and in a meaningful manner," and remanded the final determination back to Customs. *Id*. (citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)).

In contrast, in respect of this EAPA investigation DTT USA does not challenge that Customs complied with its regulations to provide public summaries of proprietary information. Moreover, during the proceeding, DTT USA did not raise specific concerns — including due process concerns — with respect to the summaries, ask for disclosure of proprietary information or ask for more detailed public summaries.[11] To the contrary, DTT USA appears to have expressed satisfaction with its access to, for example, Customs' verification report. In particular, in DTT USA's brief submitted to Customs on August 5, 2019, DTT USA explained that "[t]he purpose of [Customs'] April 2018 site visit to DTT Thailand and the conclusion of [Customs'] resulting verification report are unambiguous." DTT Legal Argument (Aug. 5, 2019) at 10, CR 198; PR 212. In the corresponding footnote, DTT USA stated:

> Redactions from the public version of [Customs'] verification report on the April 2018 site visit have prevented DTT Thailand from knowing certain details in [Customs'] description and interpretation of DTT Thailand's proprietary data. Our argument's summary quotes the report's public portions only and assumes that, to the maximum extent possible, [Customs'] summaries have provided "sufficient detail to permit a reasonable understanding of the substance of the information."

Id. at n.5 (citing 19 C.F.R. § 165.4(a)(2)).

DTT USA's language does not suggest that Customs denied DTT USA "a meaningful opportunity to participate in the administrative proceeding." *Royal Brush*, 44 CIT at __, 483 F. Supp. 3d at 1307. Specifically, DTT USA did not take issue with Customs' public summary, or ask Customs to disclose proprietary information. In fact, DTT USA itself described the public version of the verification report as "unambiguous" and was able to describe subsequently the purpose

[11] At oral argument, DTT USA explained that counsel e-mailed and called Customs on December 27, 2018, to request access to the proprietary versions of Customs' verification report; however, these e-mails are not on the record and DTT USA conceded that the only notation about lack of access to confidential information on the record is contained in the footnote of its brief submitted on August 5, 2019. Confidential Oral Tr. 17:17–17:25.

of Customs' verification visit. DTT Legal Argument (Aug. 5, 2019) at 10–11, CR 198, PR 212.

Additionally, DTT USA seems to argue that due process requires that DTT USA have access to proprietary information during EAPA proceedings. The court in *Royal Brush* dismissed this argument. Notwithstanding its remand to Customs to address the lack of public summaries, the court explained: "To be clear, the court does not hold that Royal Brush is entitled to receive business confidential information. Congress has not mandated that Royal Brush be afforded such access and Royal Brush has not shown that due process requires it." *Royal Brush*, 44 CIT at __, 483 F. Supp. 3d at 1308.

Similarly, DTT USA has not demonstrated that due process requires that it receive access to proprietary information during the EAPA investigation. Moreover, DTT USA has failed to demonstrate how access to the proprietary information would have aided the company during the administrative proceeding.

Customs complied with its regulation concerning public summarization of confidential information. As such, the court finds that Customs did not violate DTT USA's due process rights.

III. Customs' treatment of entries that pre-dated December 1, 2017

DTT USA challenges Customs' inclusion in the Final Determination of entries made before December 1, 2017. DTT USA argues that Commerce's finding — in response to Customs' scope referral request — that DTT USA's Thai imports are "covered merchandise" under the 2009 Order is applicable only to entries made on or after December 1, 2017. As such, DTT USA challenges on two grounds Customs' treatment of pre-December 2017 entries of diamond sawblades. First, DTT USA asserts that entries made before December 1, 2017, were not "covered merchandise," and, therefore, DTT USA contends that Customs' determination that DTT USA entered "covered merchandise" through evasion before December 1, 2017, was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *Id.* at 25–33. Second, DTT USA argues that by continuing to extend the suspension of liquidation on entries made before December 1, 2017,[12]

[12] In its final determination of evasion, Customs stated: "[Customs] will continue to suspend or extend liquidation, as applicable, until instructed to liquidate entries subject to the investigation. For future entries of diamond sawblades from Thailand involving DTT Thailand, [Customs] will continue to require live entry, where the importer must post the applicable cash deposits prior to the release of merchandise into U.S. commerce. Finally, [Customs] will continue to evaluate the importer's continuous bonds in accordance with [Customs'] policies, and will continue to require single transaction bonds as appropriate. None of the above actions preclude [sic] [Customs] or other agencies from pursuing additional enforcement actions or penalties." Final Determination at 10.

Customs "retroactively applied" Commerce's final circumvention determination, and, therefore, Customs' Final Determination was unlawful and an abuse of discretion. Pl. Br. at 19–24.

A. Positions of Parties

DTT USA argues that Customs' Final Determination applies Commerce's affirmative circumvention determination retroactively, and, as such, is an abuse of discretion and otherwise not in accordance with law. Pl. Br. at 19–29.

Plaintiff challenges Customs' Final Determination on the grounds that entries made before December 1, 2017, do not meet the evasion requirements of EAPA. Specifically, (1) the entries were not "covered merchandise," (2) DTT USA did not import the entries by means of "material and false" statements or "material omissions," and (3) DTT USA did not avoid "applicable" payment of cash deposits. Pl. Br. at 25–33.

DTT USA argues that, as a result of Commerce's circumvention inquiry, Commerce "expanded" the 2009 Order covering diamond sawblades from China to include certain sawblades manufactured by DTT Thailand in Thailand. *Id*. at 21. DTT USA argues that in response to Customs' EAPA referral, Commerce informed Customs that, in accordance with 19 C.F.R. § 351.225(l)(3), Commerce's affirmative final determination applied only to merchandise that entered on or after December 1, 2017 — the initiation date of Commerce's circumvention inquiry.[13] *Id*. at 26. Plaintiff asserts that the "legal effect of Commerce's affirmative final circumvention determination was that DTT USA's entries were *not* 'subject to' the [2009] Order — and thus were not 'covered merchandise' — until December 1, 2017." *Id*. at 27 (emphasis in original). As such, DTT USA disputes Customs' finding in the EAPA Final Determination that Commerce's response to the covered merchandise referral applied to all entries covered by the EAPA investigation, including entries made prior to the initiation of Commerce's circumvention inquiry. *Id*. at 22 (citing Final Determination at 8).

DTT USA further argues that because its imports that entered before December 1, 2017, were not "covered merchandise," DTT USA declared correctly that those imports were of Thai origin. *Id*. at 29. DTT USA argues that before Commerce reached its affirmative final

[13] Commerce's regulation states that when Commerce makes a final scope determination it will "instruct the Customs Service to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption *on or after the date of initiation of the scope inquiry.*" 19 C.F.R. § 351.225(l)(3) (emphasis supplied).

circumvention determination, DTT USA "reasonably relied" on Commerce's prior country-of-origin determination, and, therefore, DTT USA did not import its diamond sawblades by means of material and false statements or omissions. *Id*. at 31–32. Plaintiff also argues that Customs' determination that DTT USA avoided payment of applicable cash deposits is based on Customs' "unlawful interpretation" of "covered merchandise" and finding that DTT USA entered merchandise by means of material and false statements and omissions. *Id*. at 33. DTT USA argues that Customs' conclusion is an abuse of discretion and not in accordance with law. *Id*.

Finally, DTT USA argues that the Federal Circuit's decision in *Sunpreme v. United States*, 946 F.3d 1300 (Fed. Cir. 2020) is not relevant to this case. Pl. Reply Br. at 7. DTT USA asserts that the Federal Circuit in *Sunpreme* held that under 19 U.S.C. § 1500(c) Customs has the authority to suspend liquidation of goods "when it determines that the goods fall within the scope of an ambiguous [AD] or [CVD] order." *Id.* at 23 (citing *Sunpreme*, 946 F.3d at 1321). DTT USA maintains, however, that Customs lacks the statutory authority to expand the scope of the 2009 Order to include diamond sawblades manufactured and exported by DTT Thailand before December 1, 2017. DTT USA asserts that "[o]nly Commerce has the authority to *expand* the scope of an [AD] or [CVD] order to cover merchandise completed or assembled in a third country (*i.e.*, a country other than the subject country to which the AD/CVD order applies)." Pl. Br. at 1 (citing 19 U.S.C. § 1677j(b)) (emphasis in original); *see* Pl. Reply. Br. at 6. DTT USA asserts that in Commerce's response to Customs' referral request, Commerce "acknowledged that Thailand *was* the country of origin — and, consequently, that DTT USA's imports were *outside* the scope of the [2009] Order . . . ." Pl. Reply Br. at 7 (emphasis in original). Therefore, DTT USA argues that Commerce, in the context of a circumvention inquiry made pursuant to 19 U.S.C. § 1677j, expanded the scope of the 2009 Order to include only those sawblades manufactured in Thailand using Chinese cores and segments imported after December 1, 2017. *Id.* at 7–8.

The Government and DSMC acknowledge that the EAPA statute addresses circumstances in which Customs cannot by itself determine whether goods subject to an EAPA allegation are covered by an AD or CVD order, and, in such cases, is directed to refer this question to Commerce in a scope referral request. Def. Br. at 16; Def.-Intervenor Br. at 12 (citing 19 U.S.C. § 1517(b)(4)). The Government maintains, however, that Commerce, within the context of an EAPA referral request, is limited to a "binary 'covered' or 'not covered'

response to any [Customs] referral." Def. Br. at 16. The Government argues that the EAPA does not provide Commerce with an additional requirement "to respond with 'covered' or 'not covered' *and* a separate determination as to the date that the referral merchandise became 'covered'." *Id.* (emphasis in original). The Government and DSMC note that Commerce did, in fact, confirm to Customs that certain Thai-origin goods are "covered merchandise" under the 2009 Order and did not set a temporal limitation on its covered merchandise response.[14] *Id.* As such, DSMC maintains that Customs did not act "unlawfully in taking Commerce at its word." Def.-Intervenor at 12.

The Government does not address directly DTT USA's challenge to Customs' finding that DTT USA entered covered merchandise *by means of material and false statement or material omission* and avoided payment of applicable cash deposits. DSMC does address DTT USA's challenge and argues that Commerce's response to the referral stated that DTT USA's sawblades constituted "covered merchandise," and, as such, DSMC asserts that DTT USA's remaining arguments about material statements and omissions and applicable duties are without merit. Def.-Intervenor Br. at 15.

The Government asserts that DTT USA's argument — that Customs' suspension of liquidation is restricted to entries after December 1, 2017 — is based on Commerce's circumvention regulation, 19 C.F.R. § 351.225(l). Def. Br. at 17. The Government and DSMC argue that Commerce's regulation cannot be read to "supersede" Customs' independent authority to suspend liquidation under the EAPA. *Id.*; *see* Def.-Intervenor Br. at 13. The Government notes that the EAPA grants Customs authority to impose interim measures. Def. Br. at 15–16 (citing 19 U.S.C. § 1517(e)). The Government further explains that after a final affirmative determination of evasion, the statute directs Customs to suspend liquidation on unliquidated entries of such merchandise "on or after the date of the initiation of the investigation," or to pre-initiation entries. Def. Br. at 16 (citing 19 U.S.C. § 1517(d)(1)(A)(i) and (B)(i)). Similarly, DSMC asserts that the EAPA establishes that Customs' initiation of an EAPA investigation "defines the universe of entries to which interim measures and any final affirmative EAPA determination will be applied . . . [n]othing in the statute subordinates the universe of relevant entries to Commerce's determination in separate proceedings, inclusive of anticircumvention proceedings." Def.-Intervenor Br. at 12 (citing 19 U.S.C. §

[14] The Government notes that in response to Customs' referral, Commerce explained that "[t]he Covered Merchandise Referral does not identify any temporal limitation, but merely describes the merchandise subject to the referral." Def. Br. at 16 (citing Commerce Response to EAPA Referral at 5).

1517(d)-(e)).[15] Accordingly, the Government and DSMC assert that it is the EAPA, not Commerce's regulation, that governs the "temporal reach" of Customs' imposition of measures in an EAPA investigation. *Id*. at 13; Def. Br. 16.

Finally, the Government and DSMC argue that the Federal Circuit in *Sunpreme* established that Customs has authority beyond the EAPA to suspend liquidation when Customs concludes that an importer is entering covered merchandise. Def. Br. at 17; Def.-Intervenor Br. at 13–14. The Government and DSMC note that *Sunpreme* was pre-EAPA; however, they argue that the Federal Circuit addressed specifically a scenario in which Customs determines that imports are subject to suspension of liquidation prior to the initiation of a scope inquiry by Commerce, including in the context of a circumvention inquiry. Def. Br. at 17–18; Def.-Intervenor Br. at 13–14. The Government and DSMC further argue that the Federal Circuit in *Sunpreme* determined that if Customs' suspension of liquidation predates Commerce's initiation of a scope inquiry, then Customs' determination must be upheld unless Commerce orders Customs to lift the measures. Def. Br. at 18; Def.-Intervenor Br. at 14 (citing *Sunpreme*, 946 F.3d at 1317–1319). DSMC argues that DTT USA failed to identify any instruction by Commerce to lift the pre-existing suspension of liquidation imposed by Customs. Def.-Intervenor Br. at 14–15.

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[15] It appears that 19 U.S.C. § 1517(d)(1)(B)(ii) ("subsection (d)(1)(B)(ii)") contains a drafting error. Subsection (d)(1) provides (in relevant part) that:

> If the Commissioner makes a determination under subsection (c) that covered merchandise was entered into the customs territory of the United States through evasion, the Commissioner shall—
>
> . . .
>
> (B) pursuant to the Commissioner's authority under section 1504(b) of this title—
>
> (i) extend the period for liquidating unliquidated entries of such covered merchandise that are subject to the determination and that entered before the date of the initiation of the investigation; or
>
> (ii) if the Commissioner has already extended the period for liquidating such entries pursuant to *subsection (e)(1),* continue to extend the period for liquidating such entries;

19 U.S.C. § 1517(d)(1)(B) (emphasis supplied).

19 U.S.C. § 1517(e) addresses Customs' authority to impose interim measures:

> [I]f the Commissioner decides there is such a reasonable suspicion, the Commissioner shall—
>
> (1) suspend the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation;
>
> (2) pursuant to the Commissioner's authority under section 1504(b) of this title, *extend the period for liquidating each unliquidated entry of such covered merchandise* that entered before the date of the initiation of the investigation;

19 U.S.C. § 1517(e)(1)-(2) (emphasis supplied).

Contrary to the language in subsection (d)(1)(B)(ii), subsection (e)(1) does not give Customs the authority to extend as interim measures the period for liquidating entries made prior to the initiation of the investigation. The authority to extend as interim measures the period for liquidation is provided for under subsection (e)(2).

B. Analysis

The parties raise two issues with respect to Customs' Final Determination: (1) Customs' finding of evasion; and, (2) Customs' suspension of liquidation for entries made before December 1, 2017. Central to both issues is the question of whether the entries of DTT USA were "covered merchandise" before December 1, 2017. As such, the court notes that Customs' evasion finding and suspension of liquidation are inherently linked, and, at times, overlap. Based on the following reasons, the court concludes that entries made before December 1, 2017, are "covered merchandise"; however, Customs has failed to demonstrate, how, if at all, DTT USA entered the covered merchandise by means of material and false statement or material omission. Accordingly, the court declines to address whether Customs' final determination to "*continue* to suspend or *extend* liquidation" on pre-December 2017 entries was lawful. Final Determination at 10 (emphasis supplied).

1. Whether Customs' evasion determination was reasonable and in accordance with law

A determination of evasion requires three elements: (1) entering covered merchandise into the United States; (2) by means of any document or data or information, written or oral statement, or act that is material and false, or any omission that is material; and (3) that results in any applicable cash deposit or other security being reduced or not applied to the merchandise. *See* 19 U.S.C. § 1517(a)(5)(A).

i. Covered Merchandise

Customs' evasion determination that DTT USA's entries made prior to December 1, 2017, are "covered merchandise" is based on its finding that Commerce's response to the "covered merchandise" referral applies to all of DTT USA's entries covered by the EAPA investigation, including entries made prior to the initiation of Commerce's circumvention investigation. Final Determination at 8.

The EAPA statute provides that if Customs receives an EAPA allegation and "is unable to determine whether the merchandise at issue is covered merchandise, [Customs] shall . . . refer the matter to the administering authority to determine whether the merchandise is covered merchandise pursuant to the authority of the administering authority under subtitle IV." 19 U.S.C. § 1517(b)(4)(A)(i).[16] The statute further provides that "[a]fter receiving a referral . . . with respect

[16] The administering authority refers to the U.S. Department of Commerce. 19 U.S.C. § 1517(a)(1); *see* 19 U.S.C. § 1677(1).

to merchandise, the administering authority shall determine whether the merchandise is covered merchandise and promptly transmit that determination to [Customs]." 19 U.S.C. § 1517(b)(4)(B).

Customs during its EAPA investigation found that it was unable to determine whether diamond sawblades assembled by DTT Thailand in Thailand were "covered merchandise," and referred that question to Commerce pursuant to 19 U.S.C. § 1517(b)(4)(A)(i). Covered Merchandise Referral. After receiving Customs' request, Commerce "aligned [the] covered merchandise referral segment with the concurrent anti-circumvention inquiry." Commerce Response to EAPA Referral at 1. In its response to Customs, Commerce found that, based on the results of its circumvention inquiry, "diamond sawblades made in Thailand by Diamond Tools using Chinese cores and Chinese segments are subject to the AD Order . . . ." *Id*. at 6.

Customs subsequently issued its Final Determination finding that, based on Commerce's response to the covered merchandise referral, DTT USA's entries of diamond sawblades joined in Thailand were subject to the 2009 Order. Final Determination at 8. Customs also determined that, due to Commerce's lack of liquidation instructions and temporal limitation on its "covered merchandise" response, Commerce's "covered merchandise" determination applied to all entries covered by the EAPA investigation, including entries made prior to December 1, 2017.[17] *Id*.

In its Final Administrative Determination on DTT USA's administrative appeal of the Final Determination, Customs[18] upheld the Final Determination, stating:

> Commerce made an affirmative determination with regard to the covered merchandise referral and transmitted [sic] same to [Customs] pursuant to Commerce's obligations under the EAPA statute. There is no temporal limitation on this determination and to find such a limitation would create a result contrary to that intended by the Federal Circuit's *en banc* holding in *Sunpreme*. Therefore, we find that all entries that have been suspended or extended as a result of this EAPA investigation, *regardless of the date of entry*, are covered merchandise.

OR&R Final Administrative Determination at 9 (emphasis supplied).

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[17] Customs stated: "Because Commerce did not place any temporal limitation or provide liquidation instructions to [Customs] with respect to entries covered by the EAPA investigation, we find that Commerce's response to the covered merchandise referral applies to all entries covered by the EAPA investigation, including those made prior to the initiation of [sic] anti-circumvention investigation." Final Determination at 8.

[18] *See supra* note 1.

In sum, Customs interpreted the referral provision in the statute as limiting Commerce's response to scope referrals to either an affirmative determination, *i.e.,* the merchandise is covered, or a negative determination, *i.e.,* the merchandise is not covered. Accordingly, in Customs' view, the covered merchandise determination is not bound by Commerce's circumvention timeline, and DTT USA's entries made prior to December 1, 2017, are covered merchandise.

The statute provides that when Customs is unable to determine whether merchandise subject to an EAPA investigation is "covered merchandise," Customs must "refer the matter to [Commerce] to determine whether the merchandise is covered merchandise." Commerce must then "determine whether the merchandise is covered merchandise and promptly transmit that determination to [Customs]." 19 U.S.C. § 1517(b)(4)(A)-(B). The statute is not clear as to whether Customs, having referred a "covered merchandise" matter to Commerce, is consequently bound by the timeline created by Commerce's initiation of a circumvention inquiry in a separate proceeding, the results of which are used as a basis of Commerce's affirmative "covered merchandise" response to Customs. Conversely, the statute does not *preclude* Customs from utilizing its authority under the EAPA, which is independent of Commerce's authority under the AD/CVD provisions of U.S. law.

Moreover, since the EAPA's enactment in 2015, only a handful of EAPA determinations has reached the Court and the present case is the first to involve a review of the statute's referral provision. As such, the interaction between Customs' EAPA investigations and Commerce's scope inquiries, specifically a circumvention inquiry, is a novel one for which the statute provides no clear guidance. The court, therefore, finds it appropriate to examine whether Customs' interpretation of the referral provision, 19 U.S.C. § 1517(b)(4)(A)-(B), is entitled to deference.

When reviewing an agency's interpretation of a statute, the court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984). If the court concludes that the statute does address the precise question, the court "'must give effect' to Congress's unambiguous intent." *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (citing *Chevron*, 467 U.S. at 842–843). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

As already noted, when Customs is unable to determine whether merchandise subject to an EAPA investigation is "covered merchandise" under the relevant AD or CVD order, the statute directs Customs to refer the matter to Commerce. *See* 19 U.S.C. § 1517(b)(4)(A). The statute then directs Commerce to determine whether the subject merchandise is "covered merchandise" and promptly inform Customs of its determination. *See* 19 U.S.C. § 1517(b)(4)(B). The text of the EAPA, however, is silent as to whether Commerce in using its findings from a separate circumvention inquiry to make its "covered merchandise" determination under the EAPA consequently imposes a temporal limitation on its "covered merchandise" response to Customs.

Turning to the legislative history, the Conference Committee on the Trade Facilitation and Trade Enforcement Act of 2015 ("Conference Report"),[19] contained the final versions of the proposed bill and added the referral provision. Specifically, the Conference Report states:

> If the Commissioner is unable to determine whether the merchandise at issue is covered merchandise, the Commissioner shall refer the matter to the Department of Commerce to determine whether the merchandise is covered merchandise. The Department of Commerce is to make this determination pursuant to its applicable statutory and regulatory authority, and the determination shall be subject to judicial review under 19 U.S.C. 1516a(a)(2). *The Conferees intend that such determinations include whether the merchandise at issue is subject merchandise under 19 U.S.C. 1677j.* The time required for the Department of Commerce to determine whether the merchandise at issue is covered merchandise shall not be counted in calculating any deadlines under the procedures created by this section.

Conf. Rep. No. 114–376, at 190 (2015) (emphasis supplied).

The Conference Report demonstrates that Congress intended for Customs to be able to access Commerce's circumvention inquiries through the referral provision. The Conference Report does not describe, however, how these two proceedings should interface, and, more specifically, whether circumvention inquiries used as a basis for Commerce's "covered merchandise" determination in an EAPA proceeding would consequently bind Customs to Commerce's timelines from a separate circumvention proceeding. The legislative history is, therefore, ambiguous.

[19] A Conference Committee was convened to resolve the remaining conflicts between amendments from the U.S. House of Representatives and the U.S. Senate. Conf. Rep. No. 114–376, at 182–93 (2015).

With regard to *Chevron* step two, the court determines that Customs has put forth a reasonable interpretation of the referral provision, 19 U.S.C. § 1517(b)(4)(A)-(B). In its Final Determination, Customs acknowledged that Commerce chose to use its "concurrent anti-circumvention inquiry" to make its "covered merchandise" determination due to the circumvention inquiry's "potentially overlapping issues."[20] Final Determination at 7 (footnote omitted). Customs explained that Commerce's circumvention inquiry was a "distinct" administrative proceeding that had no bearing on Customs' independent statutory authority with respect to entries subject to an EAPA investigation. *Id*. Accordingly, Customs interpreted the covered merchandise referral as "only instruct[ing] Commerce to transmit its determination of whether the merchandise described in the Covered Merchandise Referral is 'covered merchandise.'" *Id*. (quoting Commerce Response to EAPA Referral at 5). Based on its interpretation of the statute, Customs determined DTT USA's entries made prior to December 1, 2017, were "covered merchandise."

The EAPA statute empowers Customs to investigate allegations of evasion and determine whether entries under an investigation are "covered merchandise." Customs' statutory authority notwithstanding, when Customs is unable to determine whether certain imports are "covered merchandise," Customs is directed to refer the matter to Commerce. 19 U.S.C. § 1517(b)(4)(A)-(B). Nevertheless, Commerce's role in an EAPA investigation is limited to the extent that the statute provides for Commerce simply to determine whether merchandise is covered by an applicable AD or CVD order and "promptly transmit" its determination to Customs, which can then take any appropriate action. *Id.* As such, Commerce's decision to base its covered merchandise determination in response to Customs' EAPA referral request on Commerce's results from a separate parallel circumvention proceeding neither expands Commerce's authority under the EAPA statute, nor does Commerce's action diminish Customs' authority under the EAPA to apply Commerce's affirmative covered merchandise determination to all entries covered by the EAPA investigation.

To read the scope referral request as suggested by DTT USA would not only potentially disincentivize Customs from making scope referral requests where appropriate — *e.g.,* where there is third country assembly — but would also contravene Congress' expressed intent for the statute. The purpose of the EAPA was to empower the U.S. Government and its agencies with the tools to identify proactively

[20] Customs noted that "five of the six issues in the anti-circumvention investigation were unrelated to the EAPA investigation; the only issue that overlapped with the EAPA investigation was the one issue that pertained to the scope of the order." Final Determination at 7.

and thwart evasion at earlier stages to improve enforcement of U.S. trade laws, including by ensuring full collection of AD and CVD duties and, thereby, preventing a loss in revenue.[21] To require that Customs be bound by Commerce's later circumvention timeline would restrict Customs' authority to find that DTT USA's pre-December 2017 entries were "covered merchandise," thereby limiting Customs' enforcement authority under the EAPA with regard to those entries. Such an outcome would be contrary to the congressional intent underlying the EAPA statute and Customs' ability to exercise its statutory authority. Accordingly, the court upholds as a permissible construction of the statute Customs' interpretation of the referral provision to find that DTT USA's entries prior to December 1, 2017, are "covered merchandise."

ii. Material and False Statement or Material Omission

Turning next to the second statutory requirement, the court determines that Customs' determination does not satisfy this requirement that DTT USA entered covered merchandise by means of a material and false statement or a material omission. *See* 19 U.S.C. § 1517(a)(5)(A).

Customs in its Final Determination stated that Commerce in its Covered Merchandise Referral Response confirmed that Chinese-origin cores and segments joined in Thailand are within the scope of the 2009 Order, and as such "DTT evaded the [2009 Order] by not entering diamond sawblade imports from Thailand as type 03 entries and posting the appropriate cash deposits." Final Determination at 8.

It is noteworthy that prior to the 2009 Order, Commerce issued a final less than fair value determination for diamond sawblades from China in its original antidumping investigation.[22] *Diamond*

[21] In 2015, the Committee on Ways and Means in the U.S. House of Representatives released a report on the Trade Facilitation and Trade Enforcement Act of 2015. H.R. Rep. No. 114–114, pt. 1 (2015). This report demonstrates that Congress intended for the EAPA to provide a specific timeline for evasion investigations. *Id.* Sander M. Levin, Ranking Member of the Committee, included the following statement in the Additional Views section:

> There appears to be growing consensus that ENFORCE is the appropriate way to address allegations of evasion. Prior efforts to require Customs to enforce these allegations by using existing statutory provisions (e.g., Section 516 of the Tariff Act of 1930) have failed by not requiring Customs to act on a petition within a fixed period of time. The longer Customs takes, the more entries are liquidated — that is, they become final, and any additional duties owing are foregone.

Id. at 381. *See also* S. Rep. No. 114–45 at 12 (2015).

[22] In December 2005, Commerce initiated an antidumping duty investigation of diamond sawblades and parts thereof from China. *See Advanced Technology & Materials Co., Ltd. v. United States*, 35 CIT 1099, 1101 (2011). Commerce issued its final determination on May 22, 2006, finding that subject merchandise was being sold in the United States for less than

Sawblades and Parts Thereof from the People's Republic of China, 71 Fed. Reg. 29,303 (May 22, 2006) ("2006 Final LTFV Determination") and accompanying Issues and Decisions Memorandum ("2006 IDM"). In the 2006 IDM, Commerce found that "country of origin should be determined by the location of where the segments are joined to the core." 2006 IDM at Comment 4. Commerce explained in detail that:

> [T]he Department has determined that it is the attachment of cores to segments that gives finished diamond sawblades their essential quality, not the manufacture of diamond segments. Even though there is a significant capital investment also associated with manufacturing diamond segments, given the fact that the attachment process imparts the essential quality of the diamond sawblade, coupled with the substantial capital investment and technical expertise that is required for the attachment process, we continue to find that the country of origin is determined by the location where segments and cores are attached to create finished diamond sawblades.

Id.[23]

Commerce's 2006 IDM notwithstanding, Customs in its Final Determination maintained that DTT USA entered covered merchandise by means of a material and false statement or a material omission. Final Determination at 8–9. Customs based its finding on two factors. First, Customs noted that DTT Thailand, in importing diamond sawblades into the United States, did not distinguish between Chinese-origin cores and segments joined in Thailand and Thai-origin cores and segments joined in Thailand. *Id*. at 9. Customs found that:

> These imports lacked clear documentation or labelling that distinguished their country of origin, and the evidence on the record shows that the covered and uncovered merchandise were comingled. This comingling of covered and uncovered merchandise created the opportunity for DTT to evade duties through the lack of differentiation. Therefore, we determine that all mer-

fair value. *See id*. In July 2006, the U.S. International Trade Commission ("the Commission") issued a final determination finding that the domestic industry was not materially injured or threatened with material injury. *See id*. at 1102. The diamond sawblades investigation was subsequently terminated and no antidumping order was issued. *See id.* In response, DSMC challenged the Commission's negative determination before this Court. *See Diamond Sawblades Manufacturers Coalition v. United States,* 32 CIT 134 (2008). The court remanded the Commission's final determination for reconsideration, and, upon remand, the Commission issued an affirmative determination. *See Advanced Technology,* 35 CIT at 1102. Following an unsuccessful challenge in the Federal Circuit to the Commission's remand determination, Commerce issued the antidumping duty order on November 4, 2009. *See id*.

[23] Commerce's country of origin determination was affirmed by this Court. *See Advanced Tech. & Materials. Co., Ltd. v. United States,* 35 CIT 1380, 1386 (2011).

> chandise that does not identify the country-of-origin of its cores and segments is covered merchandise and that DTT Thailand evaded the AD order by importing Chinese-origin diamond sawblades and claiming that merchandise was Thai-origin on entry documents.

Id.

Second, Customs found that: "it is the responsibility of the importer and manufacturer to ensure that imports into the customs territory of the United States comply with the law and to seek clarity concerning the compliance of any merchandise potentially subject to an AD/CVD order." *Id*. Customs noted that DTT USA "had ample opportunity to request a scope ruling [on diamond sawblades made of Chinese-origin cores and segments] from Commerce or to seek clarity from [Customs] during the years before this EAPA investigation." *Id*. The court will address each point in turn.

To start, as discussed previously, a determination of evasion requires a finding that covered merchandise has entered the United States by "means of any document or electronically transmitted data or information, written or oral statement, or act that is material and *false*, or any *omission* that is material." 19 U.S.C. § 1517(a)(5)(A) (emphasis supplied). "False" is defined as: ""Untrue . . . Deceitful . . . Not genuine; inauthentic . . . What is false can be so by intent, by accident, or by mistake . . . Wrong; erroneous . . . ." *False,* BLACK'S LAW DICTIONARY (11th ed. 2019). An "omission" is defined as: "A failure to do something; esp., a neglect of *duty*. . . [t]he act of leaving something out . . . [t]he state of having been left out or of not having been done . . . [s]omething that is left out, left undone, or otherwise *neglected*." *Omission*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis supplied).

The court is not convinced that DTT USA's failure to distinguish the country of origin of the cores and segments joined in Thailand constitutes a material and false statement or a material omission. Customs found that DTT USA's failure to label its diamond sawblades as "Chinese-origin diamond sawblades" constitutes a false statement or act or a material omission. Final Determination at 8–9. Customs' conclusion appears to hinge either on (1) the presumption that entering covered merchandise without so declaring it is *per se* false or an omission, or (2) the legal conclusion that DTT USA was under an obligation to notify Customs of the Chinese origin of some of its cores and segments. Such a presumption or such a legal conclusion would ignore that Commerce's 2006 IDM stated explicitly that the country of origin of diamond sawblades is to be determined by the country of

assembly of the cores and segments. *See* 2006 IDM at Comment 4. Given Commerce's clearly stated conclusion, DTT USA did not make a material and false statement by importing the diamond sawblades as Thai-origin because such a statement was not "erroneous", "untrue" or "deceitful." DTT USA's imports were made of Chinese cores and segments assembled in *Thailand*. As such, by importing the diamond sawblades as Thai-origin, DTT USA complied fully with Commerce's clear directive that the country of origin be determined by the country in which the cores and segments are joined.

Moreover, Commerce's 2006 IDM could not have been any *more* clear, stating: "neither the cores nor the segments alone constitute the essential component of the product under investigation". 2006 IDM at Comment 4. Commerce *expressly* found that "*the essential quality of the product is not imparted until the cores and segments are attached to create a finished diamond sawblade*." *Id*. (emphasis supplied). In light of Commerce's 2006 IDM, the court is unable to conclude that DTT USA had a "duty" to disclose that its diamond sawblades assembled in Thailand consisted of Chinese-origin cores and segments, nor that any disclosure or action by DTT USA was "neglected." Accordingly, the court determines that Customs has failed to establish that DTT USA's actions constitute a material omission.

Similarly, Customs found that DTT USA's decision not to seek a clarification from Customs or Commerce as to whether the diamond sawblades made of Chinese-origin cores and segments were covered by the 2009 Order "indicates that . . . DTT Thailand set up their Thai operations to join Chinese-origin cores and segments that were labelled as Thai-origin, in order to avoid payment of AD/CVD duties on Chinese-origin diamond sawblades." Final Determination at 9. Customs has not explained how DTT USA's failure to seek such a clarification constitutes a material and false statement or act, or a material omission. Neither the 2006 IDM nor the 2009 Order prohibited DTT USA from manufacturing Chinese-origin cores and segments in Thailand and labelling the finished diamond sawblades as Thai-origin. To the contrary, the way in which DTT USA labeled its imports was expressly contemplated and sanctioned by Commerce's 2006 IDM.

In fact, Commerce in its 2006 IDM addressed directly the issue of third-country assembly. The petitioner in the administrative proceeding had urged Commerce not to base its country-of-origin determination on the assembly/attachment process. Commerce acknowledged that the petitioner had argued that "the Department's proposed country of origin methodology poses significant circumvention con-

cerns."[24] 2006 IDM at Comment 4. Commerce, however, expressly rejected the petitioner's concerns and proffered approach and, instead, adopted an assembly-based country-of-origin standard, adding: "[i]n any event, the Department retains that statutory authority to address circumvention concerns as appropriate." *Id*.

It is beyond the scope of this proceeding for the court to assess the reasons that Commerce chose to adopt an assembly-based rule-of-origin standard notwithstanding arguments presented to it that presaged the very circumvention issues that in fact arose. What is not beyond the scope of this proceeding — indeed, lies at its heart — is whether, considering Commerce's determination, DTT USA had an obligation to seek a clarification from Commerce or Customs prior to importing the merchandise that is the subject of this proceeding.

As mentioned, Commerce in its 2006 IDM stated that country of origin be determined "by the location where segments and cores are attached to create finished diamond sawblades." 2006 IDM at Comment 4. In making this statement, Commerce created a clear standard with respect to which affected companies, including DTT USA, were to operate.

Customs in its Final Determination and Final Administrative Decision failed to reference any authority that would create an obligation on DTT USA to seek a scope determination from Commerce or to seek a clarification from Customs as to the scope of the 2009 Order. Final Determination at 8–9; OR&R Final Administrative Determination at 9–10. Accordingly, DTT USA acted in accordance with Commerce's 2006 IDM and Customs has failed to demonstrate how, if at all, DTT USA's actions constitute a material and false statement or act, or a material omission.

Customs in the Final Determination stated that "[b]ecause EAPA does not have a knowledge requirement for evasion as defined under 19 CFR 165.1, there is no requirement that the importer know of the material or false statement and, thus, [Customs] does not need to determine any level of culpability only that evasion occurred with

[24] In outlining the petitioner's concerns, Commerce stated:

> Petitioner argues that the Department's proposed country of origin methodology poses significant circumvention concerns. Petitioner argues that if the Department's country of origin analysis remains unchanged in the final determination, Korean and Chinese manufacturers may move joining operations to third countries in an attempt to avoid antidumping duties, particularly since many of these entities are sophisticated multinational corporations that already have substantial experience manufacturing across borders.
>
> Petitioner maintains that the Department's preliminary determination to treat the location where segments and cores are joined as the country of origin of the finished diamond sawblade is contrary to Department precedent and wholly unsupported by an understanding of the essential character of a diamond sawblade and the manufacturing processes involved in its production.

2006 IDM at Comment 4.

entry." Final Determination at 8. Similarly, citing 19 C.F.R. § 165.1 and 19 U.S.C. § 1517(a)(5), Customs in the Final Administrative Determination found that "a finding of evasion does not require an intentional or purposeful attempt by an importer to avoid duties." OR&R Final Administrative Determination at 9. 19 C.F.R. § 165.1 defines evasion as "the entry of covered merchandise in the customs territory of the United States for consumption by means of any document or electronic transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the covered merchandise." 19 C.F.R. § 165.1.

Customs' statements are insufficient as a matter of law in at least three respects. First, Customs' comment that it "does not need to determine any level of culpability only that evasion occurred with entry" is unclear at best and potentially tautological. Second, even if Customs' statement were readily comprehensible, neither the text of the EAPA statute nor 19 C.F.R. 165.1 supports Customs' statement that it does not need to establish "any level of culpability." *See* 19 U.S.C. § 1517(a)(5)(A); 19 C.F.R. § 165.1. Third, the plain language of Customs' decision does not address the issue of material *omission*, or material and false statement or act, which is covered both by the statute and Customs' regulations.

In addition, it is notable that the potential consequences of an evasion finding by Customs extend far beyond application of the pertinent antidumping duties and include "such additional enforcement measures as the Commissioner determines appropriate," including referring the record to U.S. Immigration and Customs Enforcement for civil or criminal investigation or initiating proceedings under 19 U.S.C. § 1592 (penalties for fraud, gross negligence and negligence) and 19 U.S.C. § 1595a (aiding unlawful importation). 19 U.S.C. § 1517 (d)(1)(E). The fact that there may be additional consequences to an importer from a finding of evasion punctuates the need for Customs to provide a well-buttressed and well-reasoned explanation of its conclusion.

iii. Avoiding Applicable Payment of Cash Deposits

As Customs failed to establish that DTT USA entered merchandise by means of a material and false statement or an omission that is material, the court will not turn to the third requirement — paying applicable cash deposits.

Accordingly, the court remands the determination of evasion to Customs for reconsideration to make a finding consistent with this opinion as to whether DTT USA made any material and false statement or act, or material omission.

2. Whether Customs lawfully suspended and extended liquidation of entries that predated December 1, 2017

Plaintiff argues that because Commerce's "covered merchandise" response is based on the results of its circumvention inquiry, any imposition of measures by Customs on DTT USA's entries made before December 1, 2017 — the date of the initiation of the circumvention inquiry — is a "retroactive application of Commerce's affirmative circumvention determination." Pl. Br. at 19–24.

As the court is remanding, in part, Customs' Final Determination as to evasion, the court declines to address whether the effect of Customs' determination, *i.e.*, Customs' authority to suspend or continue to extend the suspension of liquidation upon an affirmative determination of evasion, is lawful.

CONCLUSION AND ORDER

In the 2020 miniseries, *The Queen's Gambit*, teenage chess prodigy Beth Harmon (portrayed by Anya Taylor-Joy) attends her first professional chess tournament, the Kentucky State Championship. Unknown and underestimated by the local chess community, Beth surprises everyone at the event by making it to the final match against reigning state champion, Harry Beltik (portrayed by Harry Melling). During the tense showdown, Beth, flustered in part by Harry's arrogance and seemingly superior chess skills, momentarily steps away from the match to collect herself. Beth eventually returns to the match with clarity and a strategy to win. As the game progresses further, it becomes clear that, despite Harry's best efforts, Beth's win is inevitable. Knowing how the rest of the match will play out, Beth asks Harry: "Do you see it now? Or should we finish this on the board?"[25]

* * *

In view of the foregoing: (1) the court concludes that Customs did not violate DTT USA's due process rights and sustains Customs' imposition of interim measures; (2) the court concludes that Customs' finding that DTT USA's entries that pre-dated December 1, 2017, are

[25] *The Queen's Gambit*: *Exchanges*, NETFLIX (October 23, 2020); https://www.netflix.com/title/80234304

"covered merchandise" is in accordance with law; and (3) the court remands in part to Customs the Final Determination and Final Administrative Decision.

Based on the foregoing reasons, it is hereby

ORDERED that Customs' Final Determination of evasion and Final Administrative Decision are remanded in part to Customs for reconsideration to make a finding consistent with this opinion as to whether DTT USA made any material and false statement or act, or material omission; it is further

ORDERED that Customs shall file its remand redetermination within 90 days following the date of this Opinion and Order; it is further

ORDERED that, within 14 days of the date of filing of Customs' remand redetermination, Customs must file an index and copies of any new administrative record documents; it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Customs files its remand results with the court.

Dated: October 29, 2021
New York, New York

/s/ Timothy M. Reif,
TIMOTHY M. REIF, JUDGE

Slip Op. 21–153

TRINITY MANUFACTURING, INC., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 20–03831

[Denying plaintiffs' motion for judgment on the agency record in an action contesting the revocation of an antidumping duty order.]

Dated: November 8, 2021

Adam H. Gordon, The Bristol Group PLLC, of Washington, D.C., for plaintiffs Trinity Manufacturing, Inc., Ashta Chemicals, Inc., and Niklor Chemical Company, Inc. With him on the submissions were *Jennifer M. Smith, Ping Gong,* and *Lauren Fraid*.

Geoffrey M. Long, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the submission were *Brian M. Boynton,* Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the submission was *Ian McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Stanceu, Judge:

Plaintiffs Trinity Manufacturing, Inc., Ashta Chemicals, Inc., and Niklor Chemical Company, Inc. contest a decision by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to revoke an antidumping duty order on chloropicrin from the People's Republic of China (the "Order"). Commerce revoked the Order after concluding that it had not received a timely substantive response from plaintiffs in response to its notice initiating, with respect to the Order, a five-year review. Before the court is plaintiffs' motion for judgment on the agency record under USCIT Rule 56.2, opposed by defendant United States, in which plaintiffs claim that Commerce acted unlawfully in denying their request for an extension of the time period to file their substantive response. The court denies plaintiffs' motion.

I. BACKGROUND

A. The Contested Decision and the Antidumping Duty Order

The contested decision (the "Final Results") is *Chloropicrin From the People's Republic of China: Final Results of Sunset Review and Revocation of Order*, 85 Fed. Reg. 71,314 (Int'l Trade Admin. Nov. 9, 2020) ("*Final Results*"). Commerce issued the Order in 1984. *Antidumping Duty Order; Chloropicrin From the People's Republic of China*, 49 Fed. Reg. 10,691 (Int'l Trade Admin. Mar. 22, 1984). Chloropicrin, also known as trichloronitromethane, is a chemical with a major use as a pre-plant soil fumigant. *Id*.

B. The Parties

Plaintiffs are domestic producers of chloropicrin, Compl. ¶ 6 (Nov. 12, 2020), ECF No. 2, who entered appearances in the administrative proceeding culminating in the contested decision to revoke the Order. *Id*. ¶ 7. Defendant is the United States.

C. Proceedings Before Commerce

On August 4, 2020, Commerce, pursuant to section 751(c) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1675(c),[1] published a "Notice of Initiation" to announce the opportunity for interested parties to participate in the fifth of the five-year reviews of

[1] All citations to the United States Code herein are to the 2018 edition and all citations to the Code of Federal Regulations herein are to the 2020 edition, unless otherwise indicated.

the Order. *Initiation of Five-Year (Sunset) Reviews*, 85 Fed. Reg. 47,185 ("*Notice of Initiation*").

On August 18, 2020, plaintiffs submitted a timely entry of appearance, notice of intent to participate in the five-year review, and application for access to proprietary information under an administrative protective order. *See Entry of Appearance from Kalik Lewin to Sec'y of Commerce* (P.R. Doc. 2); *Notice of Intent to Participate in Five-Year ("Sunset") Review of Chloropicrin from China; Application Under Administrative Protective Order* (P.R. Doc. 3); *Application for Access to Documents under the Administrative Protection Order on behalf of Martin Lewin* (P.R. Doc. 4).[2] Plaintiffs were the only interested parties to appear in the five-year review. *See Final Results*, 85 Fed. Reg. at 71,315.

In accordance with the Department's regulations, the Notice of Initiation set a due date of 30 days from the date of publication, i.e., September 3, 2020, for the submission by domestic interested parties, such as plaintiffs, of a substantive response to certain inquiries by Commerce, as stated in the notice. *Notice of Initiation*, 85 Fed. Reg. at 47,185. It is uncontested that as of the September 3, 2020 due date, plaintiffs neither had submitted the required substantive response nor had requested an extension of the time period for filing.

On September 10, 2020, Commerce notified the U.S. International Trade Commission (the "ITC" or the "Commission") that, not having received a substantive response from domestic interested parties, it would issue a final determination revoking the Order pursuant to 19 U.S.C. § 1675(c)(3)(A) and 19 C.F.R. § 351.218(e)(1)(i)(C)(2). *Sunset Review Initiated on August 4, 2020* (P.R. Doc. 6). Plaintiffs state that they received a copy of the Department's notification to the ITC on September 14, 2020. Pls.' Br. in Supp. of Mot. for J. on the Agency R. 6 (Mar. 22, 2021), ECF Nos. 22–1 (conf.), 23–1 (public) ("Pls.' Br.").

On September 18, 2020, plaintiffs filed a request that Commerce grant a retroactive extension of the filing deadline for their substantive response. *Request for Leave for late Filing: Substantive Response in Five-Year ("Sunset") Review of Chloropicrin from China* (P.R. Doc. 7) (attaching plaintiffs' substantive response to the Notice of Initiation). On September 25, 2020, plaintiffs' new counsel entered an appearance in the five-year review proceeding and submitted comments supporting the September 18, 2020 extension request. Pls.' Br.

[2] All information disclosed in this Opinion was obtained from the public record. Public documents in the administrative record are cited as "P.R. Doc. __." Confidential record documents are cited as "C.R. Doc. __."

8; *see Chloropicrin from China: Support of Request for Leave for Late Filing of Substantive Response in Five-Year ("Sunset") Review* (P.R. Doc. 10).

Commerce denied plaintiffs' request for a time extension on September 28, 2020, stating that "[t]he events described in the request do not meet the regulatory standard." *Five-Year ("Sunset") Review of Chloropicrin from China: Rejection of Request for Leave for Late Filing and Rejection of Domestic Interested Parties' Substantive Response* 2 (Sept. 28, 2020) (P.R. Doc. 11). On September 29, 2020, plaintiffs filed a request for reconsideration of the denial, arguing the Department's September 28, 2020 denial letter did not acknowledge plaintiffs' newly retained counsel's appearance nor its September 25, 2020 submission. *Chloropicrin from China: Response to Rejection of Request for Leave for Late Filing and Rejection of Domestic Interested Parties' Substantive Response* 1–2 (Sept. 29, 2020) (P.R. Doc. 14).

Plaintiffs' counsel met with Commerce officials on October 1 and 5, 2020, to discuss the extension request and the request for reconsideration and on October 7, 2020, "submitted confidential supplemental information detailing the sensitive medical conditions affecting Plaintiffs' representative at the time the filing deadline was missed." Pls.' Br. 9. Commerce issued its last denial of the extension request on November 2, 2020. *Five-Year ("Sunset") Review of Chloropicrin from China: Response to Second Request to Extend the Deadline for Filing a Substantive Response* (Nov. 2, 2020) (P.R. Doc. 26).

On November 9, 2020, Commerce published the Final Results, which referenced the denial of plaintiffs' request for a time extension and revoked the Order. *Final Results*, 85 Fed. Reg. at 71,315 ("[T]he domestic interested parties failed to submit a substantive response to the notice of initiation by the applicable time limit of September 3, 2020, as required by 19 CFR 351.218(d)(3).") & n.11.

D. Proceedings Before the Court

Plaintiffs brought this action to contest the Final Results in November 2020. Summons (Nov. 12, 2020), ECF Nos. 1 & 14 (*see* Order (Nov. 17, 2020), ECF No. 13); Compl. (Nov. 12, 2020), ECF No. 2.

On December 23, 2020, the court granted plaintiffs' consent motion for an order enjoining liquidation of entries of chloropicrin from China. Consent Mot. to Preliminarily Enjoin Termination of Suspension of Liquidation for Entries of Chloropicrin from China, ECF No. 17; Order, ECF No. 18.

Plaintiffs filed the instant motion for judgment on the agency record under USCIT Rule 56.2 and accompanying brief on March 22, 2021. Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 22 (conf.), 23

(public); Pls.' Br. Defendant responded on May 21, 2021. Def.'s Resp. to Pls.' Br. for J. on the Administrative R., ECF No. 24 ("Def.'s Resp."). On June 17, 2021, plaintiffs replied. Pls.' Reply Br., ECF Nos. 25 (conf.), 26 (public) ("Pls.' Reply"). On July 2, 2021, plaintiffs submitted an unopposed motion for oral argument on their Rule 56.2 motion. Unopposed Mot. for Oral Arg., ECF No. 29.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a. Among the decisions that may be contested according to section 516A is a final determination by Commerce revoking an antidumping order when no interested party responds to a notice of initiation of a five-year review. *See* 19 U.S.C. § 1516a(a)(1)(D); 19 U.S.C. § 1675(c)(3)(A). In reviewing such a determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(ii).

B. Procedures for Five-Year ("Sunset") Reviews

Commerce and the ITC are required by section 751(c) of the Tariff Act to conduct, at five-year intervals, a five-year review (sometimes referred to as a "sunset" review) of an antidumping duty order "to determine . . . whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury." 19 U.S.C. § 1675(c). The Tariff Act requires Commerce to revoke an antidumping duty order upon completing a five-year review "unless—(A) the administering authority [i.e., Commerce] makes a determination that dumping . . . would be likely to continue or recur, and (B) the Commission makes a determination that material injury would be likely to continue or recur as described in section 1675a(a) of this title." *Id*. § 1675(d)(2).

The Tariff Act requires Commerce to publish a "notice of initiation" of a five-year review and to "request that interested parties submit—(A) a statement expressing their willingness to participate in the review by providing information requested by the administering authority [i.e., Commerce] and the Commission, (B) a statement regarding the likely effects of revocation of the order . . . and (C) such other information or industry data as the administering authority or the Commission may specify." *Id*. § 1675(c)(2).

As is particularly significant to this dispute, the Tariff Act further provides, in pertinent part, that "[i]f no interested party responds to the notice of initiation under this subsection [19 U.S.C. § 1675(c)], the administering authority shall issue a final determination . . . revoking the order." *Id*. § 1675(c)(3)(A).

C. Commerce Did Not Abuse its Discretion in Denying the Request for a Retroactive Extension of the Filing Deadline and in Revoking the Order

Plaintiffs attack the Final Results with two lines of argument. They maintain, first, that "Commerce abused its discretion when it denied Plaintiffs' extension request and rejected the substantive response." Pls.' Br. 11. Second, they argue that "Commerce's denial of Plaintiffs' extension request and refusal to accept the simultaneously-submitted substantive response is arbitrary and capricious" and "at odds with prior decisions accepting untimely submissions in other proceedings under less severe or, at least, analogous circumstances." *Id*. at 18.

The Department's regulations address extensions of filing requirements in 19 C.F.R. § 351.302. "Unless expressly precluded by statute, the Secretary [of Commerce] may, for good cause, extend any time limit established by this part." 19 C.F.R. § 351.302(b). The time limit at issue in this case is set forth in Part 351, Code of Federal Regulations, in 19 C.F.R. § 351.218(d)(3)(i), under which "[a] complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department not later than 30 days after the date of the publication in the FEDERAL REGISTER of the notice of initiation." Consistent with this requirement, the Notice of Initiation stated that "[i]f we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation." *Notice of Initiation*, 85 Fed. Reg. at 47,186.

The Department's regulation on time extensions specifically addresses the topic of "untimely" extension requests, i.e., those received after the applicable time period has expired: "An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists." 19 C.F.R. § 351.302(c). "An extraordinary circumstance is an unexpected event that: (i) Could not have been prevented if reasonable measures had been taken, and (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means." *Id*. § 351.302(c)(2). In the preamble accompanying the promulgation of this

regulation in 2013, Commerce provided additional guidance on what would constitute an "extraordinary circumstance," which may include "a natural disaster, riot, war, *force majeure*, or medical emergency." *See Extension of Time Limits,* 78 Fed. Reg. 57,790, 57,793 (Sept. 20, 2013). Plaintiffs do not challenge the validity of the regulation.

1. The Department's Initial Denial of Plaintiffs' September 18, 2020 Extension Request

In the September 18, 2020 extension request, plaintiffs' counsel stated that he, upon receiving the Department's September 10, 2020 notice to the ITC "for the first time realized that [he] might not have filed the Substantive Response." *Request for Leave for late Filing: Substantive Response in Five-Year ("Sunset") Review of Chloropicrin from China* 2 (P.R. Doc. 7). While stating that the document had been completed as of 4:24 p.m. on the September 3 due date, the attorney also stated that "I do not know why the document might not have been filed" and that "I recall having difficulty with ACCESS [on-line filing system] prior to and/or on the date for filing the Substantive Response and have had intermittent internet problems on my end during the course of the pandemic." *Id*. The attorney added that "I can attest I thought I had filed the Substantive Response with the Department on September 3." *Id*.

The Department's initial letter denying plaintiffs' extension request, after summarizing the "extraordinary circumstance" requirement of 19 C.F.R. § 351.302(c), states that "[a]lthough you explained in your request for leave to file the untimely substantive response that you prepared the substantive response and thought you had timely filed it, you acknowledged that was apparently not the case and you noted that you 'do not know why the document {the substantive response} might not have been filed.'" *Five-Year ("Sunset") Review of Chloropicrin from China: Rejection of Request for Leave for Late Filing and Rejection of Domestic Interested Parties' Substantive Response* 2 (Sept. 28, 2020) (P.R. Doc. 11). The Department's letter concludes that "[t]he events described in the request do not meet the regulatory standard for extraordinary circumstances." *Id*.

The Department's initial denial of plaintiffs' September 18, 2020 extension request was not an abuse of discretion. The extension request did not come close to meeting the standard set forth in 19 C.F.R. § 351.302(c)(2): not only did the extension request fail to demonstrate that an extraordinary circumstance had resulted in plaintiffs' failure to accomplish the required filing, but also, the extension request failed even to claim that an "extraordinary circumstance" occurred. As Commerce reasoned, an extraordinary circumstance (which § 351.302(c)(2) defines as an "unexpected event") is not dem-

onstrated when the person attempting to make the filing did not know, and could not say, why the attempt at filing did not succeed. Moreover, the extension request did not demonstrate that the filing could not have been accomplished through "reasonable measures" and "reasonable means," 19 C.F.R. § 351.302(c)(2), including ordinary measures to confirm that the document actually had been filed.

2. The Department's Denial of Plaintiffs' September 29, 2020 Request for Reconsideration

Plaintiffs requested reconsideration of the Department's denial of the September 18, 2020 extension request in a submission dated September 29, 2020. *See Chloropicrin from China: Response to Rejection of Request for Leave for Late Filing and Rejection of Domestic Interested Parties' Substantive Response* (P.R. Doc. 14). This submission adds no new information. It argues, instead, that Commerce should reconsider its denial of the request because it "was based on an incomplete review of the record evidence," having failed to acknowledge or "to address, in any manner, the extensive substantive analysis and comments filed by the undersigned on September 25, 2020." *Id. at* 2–3.

Plaintiffs' September 25, 2020 submission, filed by plaintiffs' new counsel to supplement the original extension request, did not cure the defect in the original, September 18, request for extension. This supplemental submission stated as follows:

> Here, the regulatory "extraordinary circumstance" definition has been met. Counsel could not have anticipated that the Substantive Response inadvertently would not be filed, or somehow prevented the failure to file, because at all times, he fully believed that, in fact, he had timely filed the Substantive Response on ACCESS on the September 3, 2020 due date. As such, there was simply to [*sic*] basis for counsel to have any awareness or belief that any extension request was needed, much less that such a request should be filed using "all reasonable means." Because the Substantive Response was understood to have been filed, there was simply no basis to even contemplate an extension request of any type.

Chloropicrin from China: Support of Request for Leave for Late Filing of Substantive Response in Five-Year ("Sunset") Review 4 (Sept. 25, 2020) (P.R. Doc. 10) (footnote omitted). The submission does not explain what "extraordinary circumstance" caused the attorney who attempted to accomplish the filing to conclude, erroneously yet somehow reasonably, that the filing had been successfully accomplished.

Plaintiffs' September 29, 2020 submission requested a meeting "on this matter at the level of Deputy Assistant Secretary, as soon as possible." *Chloropicrin from China: Response to Rejection of Request for Leave for Late Filing and Rejection of Domestic Interested Parties' Substantive Response* 3 (P.R. Doc. 14). Commerce conducted a meeting by videoconference with plaintiffs' counsel on October 1, 2020, with the Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations and eight other Commerce officials in attendance. *Five-Year ("Sunset") Review of Chloropicrin from China: Meeting with the Petitioners' Counsel* (Oct. 15, 2020) (P.R. Doc. 20). Commerce, on October 5, 2020, also conducted a conference call with plaintiffs, in which the Assistant Secretary for Enforcement and Compliance participated. *Five-Year ("Sunset") Review of Chloropicrin from China: Conference Call with the Petitioners' Counsel* (Oct. 15, 2020) (P.R. Doc. 21).

Plaintiffs made an additional submission to Commerce on October 7, 2020. *Chloropicrin from China: Supplemental Information in Support of Request for Leave for Late Filing of Domestic Interested Parties' Substantive Response* (P.R. Doc. 17). This submission stated that plaintiffs' counsel who was to make the filing on September 3, 2020 "has no documentation showing that the substantive response was filed" and that "[b]y all appearances, he inadvertently failed to file it." *Id*. at 5. It adds that he "recalls experiencing internet issues and/or issues accessing ACCESS as he sought to file the Department substantive response on September 3, while simultaneously preparing and filing the non-confidential version of the ITC substantive response that also was due on September 3." *Id*. The submission states that the inadvertent failure to file "was the result of a combination of technical as well as medical issues that" this attorney "has not previously disclosed in this matter because their sensitive personal nature made his [*sic*] reluctant to share or discuss them." *Id*. The medical issues, disclosure of which the court considers unnecessary to this Opinion, are discussed in the confidential version of plaintiffs' October 7, 2020 submission and in a confidential, signed declaration by the attorney. *See Chloropicrin from China: Supplemental Information in Support of Request for Leave for Late Filing of Domestic Interested Parties' Substantive Response* (C.R. Doc. 1 & Attachment 1).

Commerce gave its last answer in a letter to plaintiffs dated November 2, 2020. *Five-Year ("Sunset") Review of Chloropicrin from China: Response to Second Request to Extend the Deadline for Filing a Substantive Response* (P.R. Doc. 26). Stating that "[t]he party requesting the extension bears the responsibility to demonstrate that

extraordinary circumstances exist," the letter concludes that the combination of the technical difficulties identified by plaintiffs and the medical issues did not meet that standard. *Id.* at 2. As to the technical difficulties, the Department's letter cited the preamble to the promulgation of the regulation, *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,793 (Sept. 20, 2013), in stating that "[e]xamples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party's representative to access the Internet on the day a submission was due." *Id*.

The Department's letter gave three reasons why the medical issues did not establish an extraordinary circumstance. First, Commerce concluded that the information it had been provided "is not a medical emergency." *Id*. Second, Commerce reasoned that "[f]urthermore, this medical issue did not preclude [the attorney] from timely filing an extension request for the substantive response through all reasonable means." *Id*. Third, Commerce pointed out that the medical emergency did not preclude the attorney from filing, on September 3, "the public version of a confidential substantive response at the International Trade Commission" and that plaintiffs had stated that the attorney completed the unfiled substantive response on that same day. *Id*. Commerce reasoned that if the attorney was able to perform these other activities "despite his medical issue, then the medical issue also did not preclude him from also timely filing an extension request on or before September 3." *Id*.

The court does not agree with plaintiffs' contention that the Department's November 2, 2020 decision was an abuse of discretion. Plaintiffs' confidential submissions do not describe medical issues that accurately could be characterized as an unexpected medical "emergency" that occurred on September 3, 2020, and these submissions do not present them as such. *See Chloropicrin from China: Supplemental Information in Support of Request for Leave for Late Filing of Domestic Interested Parties' Substantive Response* (Oct. 7, 2020) (C.R. Doc. 1 & Attachment 1). Also missing is an explanation as to how these medical issues caused, or could have caused, the attorney to believe, incorrectly, that he had successfully accomplished the filing on the due date. *See id*. On this record, Commerce reasonably could conclude that plaintiffs had not met their burden of showing that an extraordinary circumstance, i.e., an "unexpected event," prevented a timely filing or that the filing could not have been accomplished through "reasonable measures" and "reasonable means." 19 C.F.R. § 351.302(c)(2).

Plaintiffs base their argument that Commerce abused its discretion on the following contentions: (1) the deadline was missed "innocently

and inadvertently," (2) granting the extension and accepting the substantive response would be entirely inconsequential to Commerce, and (3) the interests of accuracy and fairness, and the extreme and disproportionate consequences of denying the extension, outweigh any burden on Commerce. Pls.' Br. 12–18. In advocating that the court apply these factors, they rely principally on *Artisan Mfg. Corp. v. United States*, 38 C.I.T. __, 978 F. Supp. 2d 1334 (2014) and *Grobest & I-Mei Indus. (Viet.) Co.*, 36 C.I.T. 98, 815 F. Supp. 2d 1342 (2012).

Plaintiffs' argument alleging an abuse of discretion is unconvincing. *Artisan* and *Grobest* involved the prior version of the Department's regulation, 19 C.F.R. § 351.302 (2012), which did not impose the current "extraordinary circumstance" requirement—the validity of which, as the court has noted, plaintiffs do not contest. The current regulation defines how Commerce will exercise its discretion when it receives an untimely extension request. Rather than abuse that discretion, Commerce reasonably applied the criteria the amended regulation sets forth. The factors plaintiffs would have the court apply to resolve the current dispute do not mention the Department's interest in the orderly administration of the antidumping duty law and, specifically, its interest in deterring late filings for which extension requests are not made prior to the expiration of the filing period. These interests are served by a rule confining the granting of such requests to extraordinary circumstances.

D. The Contested Determination May Not Be Set Aside under the "Arbitrary and Capricious" Standard

"[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (citation omitted). Relying on other administrative proceedings, plaintiffs argue that the Department's decision "is at odds with prior decisions accepting untimely submissions in other proceedings under less severe or, at least analogous circumstances." Pls.' Br. 18. The court rejects this argument.

Plaintiffs are correct that agencies must give a reasonable explanation when treating similar situations differently. But here, plaintiffs have not demonstrated that Commerce granted an untimely extension request under facts analogous to those of this case. Plaintiffs rely primarily on an untimely extension request Commerce granted in a 2014 proceeding. *See* Pls.' Br. 18–20; Pls.' Reply Br. 14–15 (citing *Aluminum Extrusions from the People's Republic of China: Further Explanation in Support of Sapa Profiles' Request for an Extension of Time to Respond to the Quantity and Value Questionnaire* (Sept. 17, 2014) (Dep't of Commerce ACCESS Barcode 3228665–01)

(involving extension request granted where counsel had suffered from a medical condition over the past several months)). Plaintiffs argue that having granted the extension request in that proceeding, it was required to, but did not, provide a reasonable explanation for why Commerce denied the one at issue. Pls.' Br. 19. The court disagrees. The medical information Commerce relied upon to grant the extension in *Aluminum Extrusions from the People's Republic of China* has been redacted from the public version of that decision. The court (and, presumably, plaintiffs) are unable to discern that the circumstances of that proceeding are analogous to this one.

What is clear from the publicly-available portions of the submissions in *Aluminum Extrusions From the People's Republic of China* is that counsel disclosed in its initial submission, four days after the regulatory deadline, that the reason for the extension request was a medical condition and thereafter provided more details in connection with that condition at the Department's request. *See Aluminum Extrusions from the People's Republic of China: Sapa Profiles' Request for an Extension of Time to Respond to the Quantity and Value Questionnaire* (Sept. 8, 2014) (Dep't of Commerce ACCESS Barcode 3227011–01); *Aluminum Extrusions from the People's Republic of China: Further Explanation in Support of Sapa Profiles' Request for an Extension of Time to Respond to the Quantity and Value Questionnaire* (Sept. 17, 2014) (Dep't of Commerce ACCESS Barcode 3228665–01). Here, plaintiffs raised the previously-unmentioned medical issues on October 7, 2020, more than a month following the filing deadline and more than two weeks after the original extension request. And aside from the question of timing, plaintiffs have failed to demonstrate that, or how, the medical issues they identify caused their counsel to conclude that he had completed the filing or prevented him from exercising ordinary due diligence to confirm that the filing actually had been accomplished.

Finally, plaintiffs rely on numerous other extension requests that were granted by Commerce, contending that these "appear to be based on far less severe circumstances than those present here." *See* Pls.' Reply Br. 15–21. The circumstances underlying these requests differ materially from the facts before the court in this matter. The majority of the cited extension requests were submitted to Commerce within a day or two of the applicable due date.[3] The remaining

[3] *Notice of Intent to Participate in Second Five-Year Review of the Antidumping and Countervailing Duty Orders on Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China – Request for Extension of Deadline and Acceptance of Submission* (Apr. 17, 2019) (Dep't of Commerce ACCESS Barcode 3821488–01) (filing extension

extension requests related to factual circumstances not analogous to those present in this case.[4]

Because plaintiffs have failed to provide an example of a similar situation that Commerce treated differently than it treated this case, the court concludes that Commerce did not act in an arbitrary or capricious manner in denying plaintiffs' untimely request for extension and revoking the Order.

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request a day after the deadline); *Citric Acid and Certain Citrate Salts from Thailand: Section A-C Second Supplemental Questionnaire Response Extension Request* (Nov. 17, 2017) (Dep't of Commerce ACCESS Barcode 3642674–01) (filing extension request the day of the deadline when counsel mistook the 10:00 a.m. deadline for a 5:00 p.m. deadline); *Carbon and Certain Alloy Steel Wire Rod from Mexico: Extension Request for New Factual Information in Response to Deacero's Supplemental Section D and E Questionnaire Responses* (Aug. 25, 2017) (Dep't of Commerce ACCESS Barcode 3611722–01) (submitting extension request one day after deadline); *Carbon and Certain Alloy Steel Wire Rod from the United Kingdom: British Steel Request for Extension* (July 7, 2017) (Dep't of Commerce ACCESS Barcode 3590026–01) (submitting extension request when counsel mistook the 10:00 a.m. deadline for a 5:00 p.m. deadline and submitted filing a few hours late); *Certain Softwood Lumber Products from Canada: Government of British Columbia Request for Extension* (Mar. 16, 2017) (Dep't of Commerce ACCESS Barcode 3552802–01) (filing extension request the day of the deadline); *Uncovered Innerspring Units from the People's Republic of China AR6: Response to Department Letter dated June 15, 2016* (June 16, 2016) (Dep't of Commerce ACCESS Barcode 34790039–01) (requesting an extension the day of the deadline when counsel did not receive notice of Commerce's deadline); *Certain Cold-Rolled Steel Flat Products from Korea: Extension Request for Supplemental Section D Questionnaire Response* (Jan. 5, 2016) (Dep't of Commerce ACCESS Barcode 3429991–01) (filing extension request when counsel mistook noon deadline for 5:00 p.m. deadline).

[4] *Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from India: Response to Section III Identifying Affiliated Companies* (Aug. 18, 2017) (Dep't of Commerce ACCESS Barcode 3609072–01) (accidentally filing on ITC site instead of Commerce's online filing system and in parallel emailing submission to Commerce in a timely manner); *Fresh Garlic from the People's Republic of China: Second Draft Remand Redetermination Pursuant to Slip Op. 16–68, CIT Consol. Ct. No. 14–00180 (Fresh Garlic Producers Association, et al. v. United States) Request to Accept Comments on Draft Remand Results* (Oct. 27, 2016) (Dep't of Commerce ACCESS Barcode 3517360–01) (filing extension request three days after deadline when counsel mistook the noon deadline for 5:00 p.m. and submitted filing a few hours late); *New Pneumatic Off-the-Road Tires from the People's Republic of China: Request for Administrative Review* (Dec. 19, 2016) (Dep't of Commerce ACCESS Barcode 3530805–01) (submitting five days after deadline when counsel inadvertently missed deadline due to departure of counsel's long-term docketing clerk); *Certain Polyethylene Terephthalate Resin from the People's Republic of China — Request to Accept Section A Response* (June 23, 2015) (Dep't of Commerce ACCESS Barcode 3286027–01) (inadvertently calendaring the incorrect deadline four days late when multiple other deadlines and extension requests were being handled by counsel in the same matter); *Narrow Woven Ribbons with Woven Selvedge from Taiwan: Request Reconsideration of Sec. D Extension Request* (Feb. 18, 2015) (Dep't of Commerce ACCESS Barcode 3260204–01) (submitting a timely extension request but accidentally omitting one additional section in questionnaire response).

III. CONCLUSION

For the reasons discussed in the foregoing, the agency decision contested in this action cannot be set aside as an abuse of discretion or as arbitrary and capricious. The court, therefore, will deny plaintiffs' motion for judgment on the agency record and enter judgment in favor of defendant. Plaintiffs' motion for oral argument will be denied.

Dated: November 8, 2021
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

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