U.S. Court of International Trade

Slip Op. 22–154

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and KINGTOM ALUMINIO S.R.L., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 22–00236

[Plaintiff's motion for a preliminary injunction is granted.]

Dated: December 22, 2022

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, D.C., for Plaintiff Aluminum Extrusions Fair Trade Committee. With him on the brief were *Elizabeth S. Lee* and *Claire M. Webster*.

Brady W. Mills, Morris, Manning & Martin LLP, of Washington, D.C., for Defendant-Intervenor Kingtom Aluminio S.R.L. With him on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*.

MEMORANDUM OPINION AND ORDER

Eaton, Judge:

Plaintiff Aluminum Extrusions Fair Trade Committee ("Plaintiff"), a coalition of domestic aluminum extrusion producers, commenced this action pursuant to the Enforce and Protect Act ("EAPA").[1] *See* Compl. ¶¶ 1, 3, ECF No. 5. Plaintiff challenges U.S. Customs and Border Protection's ("Customs") determination that substantial record evidence does not support a finding that Defendant-Intervenor Kingtom Aluminio S.R.L. ("Kingtom")[2] imported Chinese-origin aluminum extrusions into the United States through evasion. *See* Notice of Final Determination as to Evasion, EAPA Case No. 7550 (June 29, 2022), PR 81, ECF No. 21 ("Final Evasion Determination").

Before the court is Plaintiff's partial consent Motion for Preliminary Injunction ("Motion"). *See* Mot. for Prelim. Injunction, ECF No. 8. By its Motion, Plaintiff seeks an order enjoining Customs from causing

[1] The 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), which added section 517 to the Tariff Act of 1930. The EAPA is codified at 19 U.S.C. § 1517. All references to the U.S. Code are to the 2018 edition unless otherwise specified.

[2] Kingtom is a manufacturer and exporter of aluminum extrusions in the Dominican Republic. The company began "acting as the importer of record for its shipments to the United States" in late 2019. *See* Notice of Initial Determination as to Evasion, EAPA Case No. 7550 (Feb. 4, 2022) at 5, PR 69, ECF No. 21 ("Initial Evasion Determination").

or permitting liquidation[3] of certain of Kingtom's unliquidated entries during the pendency of this litigation, including any appeals. A temporary restraining order is currently in place. *See* Order (Aug. 18, 2022), ECF No. 15.

Defendant the United States, on behalf of Customs, has consented to the terms of the injunction as proposed by Plaintiff, without conceding any likelihood of Plaintiff's success on the merits. *See* Motion at 6–7.

Defendant-Intervenor Kingtom opposes the Motion. *See* Opp'n Mot. for Prelim. Injunction, ECF No. 16 ("Kingtom's Response").

The court has jurisdiction under 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c).[4] For the following reasons, the court grants Plaintiff's Motion.

BACKGROUND

I. EAPA Legal Framework

Under the EAPA, Customs determines whether an importer has entered covered merchandise into the customs territory of the United States through evasion. *See* 19 U.S.C. § 1517(c). "Covered merchandise" is merchandise that is subject to an antidumping or countervailing duty order. *Id.* § 1517(a)(3). As defined by the statute, "evasion" means

> entering 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.

Id. § 1517(a)(5)(A). Customs' regulations describe the requirements for filing allegations of evasion and requests for investigation, the investigation procedures, and administrative review of determinations as to evasion of antidumping or countervailing duty orders. *See* 19 C.F.R. § 165.0 (2020).

Customs' Office of Trade handles EAPA cases. In particular, the Trade Remedy Law Enforcement Directorate, within the Office of Trade, investigates allegations of evasion and makes an initial deter-

[3] Liquidation is defined as "the final computation or ascertainment of duties." 19 C.F.R. § 159.1 (2020).

[4] "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section . . . 517 of the Tariff Act of 1930 [codified at 19 U.S.C. § 1517]." 28 U.S.C. § 1581(c).

mination as to whether evasion has occurred. *See id.* § 165.1 (defining "TRLED"); *see also* 19 U.S.C. § 1517(e)(1)-(3) (providing for interim measures). Then, upon timely request, the Regulations and Rulings office (also a part of Customs' Office of Trade) conducts an administrative review of the initial evasion determination. *See*19 C.F.R. § 165.1 (defining "Regulations and Rulings"); *see also id.* §§ 165.41 (requests for review of initial determination), 165.45 (Regulations and Rulings applies de novo standard of review). The initial determination by the Trade Remedy Law Enforcement Directorate and the final determination by Regulations and Rulings are subject to review by this Court. *Id.* § 165.46(a)-(b); *see also* 19 U.S.C. § 1517(g).

Under the statute, a party that alleged evasion or a party found to have entered covered merchandise through evasion may seek judicial review of the determination by the Trade Remedy Law Enforcement Directorate under § 1517(c) and the administrative review by Regulations and Rulings under § 1517(f) "to determine whether the determination [under subsection (c)] and review [under subsection (f)] [are] conducted in accordance with" these subsections. 19 U.S.C. § 1517(g)(1). This Court "shall examine . . . 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." *Id.* § 1517(g)(2).

It is worth noting that evasion determinations in EAPA cases are distinct from dumping or subsidization determinations in trade remedy cases. In trade remedy cases, the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission (the "Commission") make findings that result in a determination as to whether antidumping or countervailing duties are imposed on U.S. imports, and the rate of any such duties. *See* 19 U.S.C. §§ 1671 (countervailing duties), 1673 (antidumping duties). In addition, in trade remedy cases such a determination can have a future effect because an affirmative determination sets the tariff not only for the period of investigation or review, but for future entries, subject to later reviews.

EAPA cases, which fall under Customs' jurisdiction, are a means of enforcing antidumping and countervailing duty orders. That is, in evasion cases Customs determines whether an importer has entered merchandise that is subject to an antidumping and/or countervailing duty order through evasion, thereby avoiding payment of duties owed under the order(s). *See id.* § 1517(b)-(c). But these cases result in increased duties only for the entries made by evasion during the period of investigation.

The EAPA provides that Customs and Commerce will cooperate in some circumstances. For example, if Customs receives an allegation of evasion but is unable to determine whether the merchandise at issue is "covered merchandise," the statute requires Customs to refer the question to Commerce. *See* 19 U.S.C. § 1517(b)(4); *see also* 19 C.F.R. § 165.16(a)-(c). Commerce then determines whether the merchandise is covered by an order and transmits its determination to Customs, which places Commerce's determination on the record of the EAPA investigation. *See* 19 C.F.R. § 165.16(e). Additionally, the EAPA statute provides that if Customs ultimately makes an affirmative evasion determination, it must notify Commerce and ask Commerce to identify the applicable antidumping or countervailing duty assessment rates for entries subject to Customs' determination (or if such an assessment rate is not available, the cash deposit rate to be applied to the entry until an assessment rate becomes available). *See* 19 U.S.C. § 1517(d)(1)(C); *see also id.* § 1517(d)(2)(A) (providing that upon receiving a notification of an affirmative evasion determination from Customs, Commerce "shall promptly provide to [Customs] the applicable cash deposit rates and antidumping or countervailing duty assessment rates and any necessary liquidation instructions."). Notwithstanding this cooperation between Commerce and Customs, it is Customs that is solely responsible for investigating allegations and determining whether evasion has occurred.

II. Procedural Background

Here, on January 8, 2021, Customs received an allegation filed by Plaintiff domestic producers that Kingtom imported Chinese-origin aluminum extrusions into the United States by fraudulently transshipping them through the Dominican Republic to evade applicable antidumping and countervailing duties.[5]

On May 2, 2021, in response to Plaintiff's allegation, the Trade Remedy Law Enforcement Directorate initiated EAPA Investigation Number 7550. The investigation covered entries, imported by Kingtom, that were "entered for consumption, or withdrawn from warehouse for consumption, from January 8, 2020, [one year before receipt of the allegation,] through the pendency [*i.e.*, conclusion] of this in-

[5] Antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China have been in place since 2011. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011).

vestigation, *i.e.*, February 5, 2022."[6] Notice of Initial Determination as to Evasion, EAPA Case No. 7550 (Feb. 4, 2022) at 3, PR 69, ECF No. 21 ("Initial Evasion Determination").

Upon completion of its investigation, the Trade Remedy Law Enforcement Directorate determined that Kingtom had entered covered merchandise through evasion during the investigation period. *See* Initial Evasion Determination at 21; *see also* 19 U.S.C. § 1517(c)(1).

As is its statutory right under the EAPA, Kingtom requested an administrative review of the determination by the office of Regulations and Rulings. *See* Final Evasion Determination at 1; *see also* 19 U.S.C. § 1517(f). On June 29, 2022, after de novo review, Regulations and Rulings reversed the Trade Remedy Law Enforcement Directorate's evasion determination, finding that substantial record evidence did not support a finding of evasion as to Kingtom. *See* Final Evasion Determination at 11.

The Plaintiff domestic producers timely commenced this action to contest Regulations and Rulings' final negative evasion determination, and shortly thereafter filed its Motion seeking injunctive relief. *See* Compl. ¶ 1; *see also* Motion at 1–2. A temporary restraining order was issued to enjoin liquidation while the court considered the Motion. *See* Order (Aug. 18, 2022).

DISCUSSION

Injunctive relief is an "extraordinary remedy." *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). To prevail on its Motion, Plaintiff must show (1) that it would be immediately and irreparably injured absent the injunction; (2) that there is a likelihood of success on the merits; (3) that the balance of equities tips in Plaintiff's favor; and (4) that the public interest would be better served by the relief requested. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

As this Court has observed, "before issuing a preliminary injunction inquiry must first be made as to the nature of the administrative

[6] The court notes that the language of the proposed injunction, as agreed to by Customs, would cover "entries that were entered, or withdrawn from warehouse for consumption, on or after January 8, 2020, up to and including the date of the final and conclusive court decision in this litigation, including all appeals and remand proceedings." Motion at 1–2. As shall be seen, in keeping with its statutory analysis, the court has adjusted this language to conform to the scope of the entries covered by the investigation and subject to Customs' determination, *i.e.*, those "entered for consumption, or withdrawn from warehouse for consumption, from January 8, 2020, through the pendency [*i.e.*, conclusion] of this investigation, *i.e.*, February 5, 2022." Initial Evasion Determination at 3.

determination under judicial consideration."[7] *Am. Spring Wire Corp. v. United States*, 7 CIT 2, 6, 578 F. Supp. 1405, 1408 (1984). Here, the nature of the EAPA determination is one that either does or does not impose increased duties on entries entered through evasion during a discrete period of time, *i.e.*, from January 8, 2020, until February 5, 2022. By their nature, then, EAPA determinations are distinct from trade remedy cases. The EAPA is administered by Customs, whereas the trade remedy laws are administered by Commerce and the Commission. The EAPA authorizes the investigation and determination of evasion, whereas the trade remedy laws authorize the investigation and determination of dumping or subsidization. EAPA determinations are reviewed by this Court under the arbitrary and capricious standard of review, whereas trade remedy determinations are generally reviewed according to the substantial evidence standard. Most importantly, the effect of an EAPA determination is limited by time, whereas a trade remedy determination is not time limited.[8]

Another important further distinction is that the EAPA does not contain explicit statutory authority for the granting of an injunction against liquidation. By way of contrast, the governing statute for trade remedy cases does provide for a statutory injunction against liquidation. *Compare* 19 U.S.C. § 1516a(c)(2) (providing that this Court "may enjoin the liquidation of some or all entries of merchandise covered by a determination of [the Secretary of the Treasury], [Commerce] or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances"), *with* 19 U.S.C. § 1517(g) (providing for judicial review of EAPA determinations by this Court, with no mention of the opportunity to seek an injunction).

Absent specific statutory provision in the EAPA authorizing the court to grant an injunction against liquidation, Plaintiff's Motion will be decided pursuant to the court's equity powers. *See* 28 U.S.C. § 1585 (endowing the Court with "all the powers in law and equity" possessed by district courts); *id.* § 2643(c)(1) ("[T]he Court of International Trade may . . . order any other form of relief that is appro-

[7] There is some question as to whether cases making a distinction between investigations and reviews in trade remedy cases remain good law. This is because in both investigations and reviews a domestic plaintiff would lose a major part of their case should liquidation occur while it was pending. *See Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1358, 1368 (2015). ("[I]rreparable harm can be shown irrespective of whether the results of an investigation are negative or affirmative, find sales at [less than fair value], or whether the injunction is sought by foreign producers or exporters, or by domestic producers. In each of these cases, without injunctive relief, the parties face the prospect of losing the only remedy they have with respect to merchandise liquidated prior to a court ruling.").

[8] Of course, a later administrative review in a trade remedy case has the effect of time limiting the rate determined by an order or a review of that order.

priate in a civil action, including, but not limited to . . . injunctions "). "[T]he grant or denial of a preliminary injunction remains a matter for the trial court's discretion, which is exercised in conformity with historic federal equity practice." 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2022) (footnote omitted).

When considering the four-factor preliminary injunction test, "the most compelling reason in favor of entering a[n injunction] order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Id.* § 2947. With respect to irreparable and immediate injury, the court must consider whether liquidation of the unliquidated subject entries prior to the court's ruling on the merits of Plaintiff's claims would "impair the court's ability to grant an effective remedy." *Id.* § 2948.1 ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.").

As to a likelihood of success on the merits, "[s]ince *Winter*, [the Federal Circuit has] held that the party seeking the injunction must be able to 'demonstrate that it has at least a fair chance of success on the merits for a preliminary injunction to be appropriate.'" *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (affirming denial of preliminary injunction in Section 301 case) (quoting *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 96 (Fed. Cir. 2014)); *see also Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1381 (Fed. Cir. 2009). Nonetheless, courts have recognized a "sliding scale" approach when considering injunction applications. Under the sliding scale approach, "the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." *Qingdao*, 581 F.3d at 1378–79 (quoting *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988)).

As to the two other factors, the court must consider the balance of hardships by comparing the hardship on the Plaintiff domestic producers, should the injunction be denied, and the severity of the impact on Kingtom, the only party that opposes the Motion, should the injunction be granted. *See* WRIGHT, ET AL. § 2948.2.

And finally, the court must take into account the public interest. *See Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021) ("The public interest is in having governmental agencies abide by the federal laws that govern their existence and operations.") (citation and quotation marks omitted); *see also Lands Council v. Cottrell*, 731 F. Supp. 2d 1074, 1092 (D. Idaho 2010) (noting the

"failure to provide for an injunction would undermine the public's interest in ensuring that executive agencies follow the laws that govern their conduct.").

A. Immediate and Irreparable Injury

Plaintiff domestic producers argue that "without the requested relief, [they] will be immediately and irreparably injured" because "if [the subject] entries are not suspended and [are] liquidated without paying the [antidumping and countervailing] duties . . . , Plaintiff will not be able [to] litigate this appeal, thereby undermining the relief owed to the domestic industry." Motion at 2, 4. Plaintiff points out that Customs' final negative evasion determination only covers the subject entries, which were made during a specific time frame. *See* Motion at 2–3. Absent an injunction, those entries might liquidate without antidumping and countervailing duties (which Plaintiff claims are owed), and, thus, Plaintiff would be deprived of the judicial remedy provided for in the EAPA. For Plaintiff, "[l]iquidating the subject entries prior to the resolution of this proceeding could render Plaintiff's claims moot if it eliminates Plaintiff's only available remedy in an action contesting the results of a final determination." Motion at 3 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983)).

In response, Kingtom asserts that Customs' evasion determination is like a decision in an antidumping investigation, in that Plaintiff will not be deprived of meaningful judicial review of its claims. Apparently discounting the possibility of the entries being liquidated, Kingtom asserts that "[i]f this Court were to reverse [Customs'] final determination, the [interim] measures in place prior to [Regulations and Rulings'] reversal would be reinstated and Kingtom's entries would once again be subject to duties applicable to entries of aluminum extrusions from China." Kingtom's Response at 5. Moreover, without citation, Kingtom asserts that Plaintiff "would retain a continuing remedy for future entries." Kingtom's Response at 6. In other words, for Kingtom, an affirmative evasion determination has prospective effect in that it would apply not only to the subject entries, but to future entries, too.

The court finds that Plaintiff has sufficiently shown that it will be immediately and irreparably injured if the subject entries liquidate before a final court decision is made in this case. First, Kingtom is right that, should the negative evasion determination be reversed by the court, the subject entries would again be "subject to duties applicable to entries of aluminum extrusions from China." Kingtom's Response at 5. What Kingtom does not address is the question of what

happens if the subject entries are liquidated during the pendency of this action, thus eliminating the only relief Plaintiff domestic producers seek—liquidation with dumping and countervailing duties. This is why an injunction is needed—to preserve Plaintiff's sole remedy. *See* WRIGHT, ET AL. § 2947 ("[T]he most compelling reason in favor of entering a[n injunction] order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act."). Second, Kingtom does not support with statutory or case law the proposition that, should it prevail, Plaintiff would gain prospective relief. In other words, there does not appear to be any law that supports the conclusion that an affirmative evasion determination has future effect. Rather, the language of the EAPA and applicable regulations support the conclusion that an affirmative evasion determination affects solely the entries that are investigated by Customs and are subject to the resulting determination.

A review of the statute makes this all clear. Should Plaintiff prevail on the merits of its claims, and, on remand, Customs makes an affirmative evasion determination, the provisions of subsection (d) of the EAPA would apply. Under subsection (d)(1), Customs "shall" take certain actions if it makes an affirmative evasion determination. These actions include "suspend[ing] the liquidation of *unliquidated entries* of . . . covered merchandise *that are subject to the determination*," and that entered the United States within a specific time frame, *i.e.*, "on or after the date of the initiation of the investigation . . . with respect to such covered merchandise and on or before the date of the determination." 19 U.S.C. § 1517(d)(1)(A)(i) (emphasis added).

In other words, should Customs ultimately make an affirmative evasion determination here, it would be required to suspend liquidation with respect to unliquidated entries subject to that determination. In the context of this case, "unliquidated entries of . . . covered merchandise that are subject to the determination" means any of the subject entries remaining unliquidated that entered from January 8, 2020, through February 5, 2022. If the subject entries are already liquidated by the time judicial review is complete, there will be no merchandise for Customs to liquidate and apply the higher duties to.

Other actions required by subsection (d) also could not be completed. For example, Customs "shall" (1) notify Commerce of the affirmative determination, (2) ask Commerce for the applicable duty rate for these unliquidated entries, and (3) "require the posting of cash deposits and assess duties" on those entries. 19 U.S.C. § 1517(d)(1)(C)-(D). Notifying Commerce as to the affirmative determination and requesting applicable duty rates would serve little pur-

pose, however, if the entries subject to that determination were already liquidated, nor could Customs require the posting of cash deposits on those entries.[9]

Because, here, liquidation prior to a decision by the court would effectively eliminate Plaintiff's right to judicial review of the contested determination by eliminating the only meaningful relief sought by Plaintiff, the immediate and irreparable injury factor favors granting an injunction.

B. Likelihood of Success on the Merits

As noted, under the "sliding scale" approach, "the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." *Qingdao*, 581 F.3d at 1378–79 (citation omitted). Nonetheless, for relief to be granted, Plaintiff must show "at least a fair chance of success on the merits for a preliminary injunction to be appropriate." *Silfab Solar*, 892 F.3d at 1345 (citation omitted).

Plaintiff claims that Customs "exceeded [its] authority in interpreting the scope of the antidumping and countervailing duty orders at issue and concluding that Kingtom did not evade the Orders." Motion at 5. Briefing on the merits of Plaintiff's claims in this case has not begun, so the precise contours of Plaintiff's argument are not known to the court. Based on the allegations in the complaint, however, there have been several EAPA investigations involving the same merchandise and parties in which Customs has asked for voluntary remand and/or reversed itself, which suggests that Customs is still developing its understanding of the scope of its authority under the law. *See, e.g.*, *Glob. Aluminum Distrib. LLC v. United States*, 46 CIT , 585 F. Supp. 3d 1352 (2022) (sustaining uncontested final determination in EAPA Investigation No. 7348 after voluntary remand); *see also* Order, *H&E Home, Inc. v. United States*, Consol. Court No. 21–00337, (U.S. Ct. Int'l Trade Sept. 7, 2022), ECF No. 70 (granting motion for voluntary remand in EAPA Investigation No. 7423, the results of which are pending). Indeed, briefing in this case will be scheduled only after the results of voluntary remand in *H&E Home, Inc. v. United States*, Consol. Court No. 21–00337 have been filed with the Court. *See* Order (Oct. 25, 2022), ECF No. 28. Given this uncertainty, it cannot be said

[9] While it may be possible for the court to order reliquidation of any liquidated entries subject to an affirmative evasion determination using its equitable powers, this procedure would be cumbersome and is not yet settled law. *See In re Section 301 Cases*, 45 CIT __, __, 524 F. Supp. 3d 1355, 1374 n.4 (2021) (Barnett, J., dissenting); *compare Home Prods. Int'l, Inc. v. United States*, 43 CIT __, 405 F. Supp. 3d 1368 (2019), *appeal dismissed*, 846 F. App'x 890 (Fed. Cir. 2021), *with Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT __, __, 427 F. Supp. 3d 1375, 1382 (2020) *and Best Mattresses Int'l Co. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1338, 1344 (2022).

at this time that Plaintiff does not have a "fair chance" of success on the merits. Thus, Plaintiff has made a sufficient showing on this factor, which, considered together with the irreparable injury factor discussed above, weighs in favor of granting the injunction.

C. Balance of Hardships

Next, the court considers the balance of hardships on the parties. As discussed, Plaintiff faces the potential loss of its ability to obtain a judicial remedy if the preliminary injunction does not issue. For its part, Kingtom claims that if the injunction issues, *i.e.*, if liquidation is enjoined, the company will suffer hardship because, notwithstanding its negative Final Evasion Determination, Customs has continued to issue liquidated damages notices, demanding payment of unpaid antidumping and countervailing duties on the subject entries.[10] Kingtom's Resp. at 7 ("[Customs'] premature and repeated issuances of liquidated damages notices and its refusal to cease their issuance until the Court permits the entries to be liquidated has caused, and continues to cause, a great deal of hardship for Kingtom."). Further, Kingtom worries that Customs might bring a collection action against it.[11] *Id.* ("Following the denial of Kingtom's numerous petitions against [the liquidated damages] notices, [Customs] may proceed with collection efforts in federal court, which could result in the seizure of Kingtom's shipments at port and prevent the importation of Kingtom merchandise into the United States.").

It does seem peculiar that Commerce should seek liquidated damages with respect to entries which Customs itself has found were not entered through evasion. These demands for liquidated damages,

[10] To be clear, Customs is not requiring cash deposits on Kingtom's entries made following the period of investigation. *See* Kingtom's Resp. at 11.

[11] As described in its brief, Kingtom has filed petitions to contest Customs' claims for liquidated damages, which Customs has denied. For example, in a letter dated August 5, 2022, Customs denied Kingtom's petition on the grounds that the EAPA investigation was "currently ongoing," apparently unaware that its own Regulations and Rulings office had issued the negative Final Evasion Determination more than one month earlier on June 29, 2022. *See* Kingtom's Resp., attach. III at 2 ("As this EAPA investigation is *currently ongoing*, and final determination as to whether Kingtom entered covered merchandise into the United States through evasion has not been issued, no protest or petition will be considered until after completion of the proceeding or the applicable AD/CVD . . . is paid." (emphasis added)). The court trusts that this is an instance of the left hand not knowing what the right hand is doing. Though the court is not persuaded by the argument that these denials tip the balance of hardships in Kingtom's favor for purposes of the Motion, that is not to say the company is necessarily without recourse. Customs' denials of Kingtom's petitions are agency actions that might be subject to challenge in this Court. *See* U.S.C. § 1581(i)(1)(B), (D) (granting "the Court of International Trade . . . exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.").

however, are not a part of the subject matter of this case. On the other hand, as noted, relief for Plaintiff can only be obtained from the court in this lawsuit, and without an injunction, Plaintiff stands to lose the benefit of any relief achieved through this lawsuit. Therefore, the balance of hardships weighs in favor of granting the injunction.

D. Public Interest

Ensuring that government agencies comply with the law and interpret the statutes they administer uniformly and fairly serves the public interest. *See Lands Council*, 731 F. Supp. 2d at 1092; *see also Wages & White Lion Invs.*, 16 F.4th at 1143. Because here liquidation could render judicial review ineffectual, the court finds that this factor weighs in favor of granting the injunction.

CONCLUSION AND ORDER

Based on the foregoing, and all other papers and proceedings herein, it is hereby

ORDERED that Plaintiff's Motion for a preliminary injunction is **GRANTED**; it is further

ORDERED that Defendant the United States, together with the delegates, officers, agents, and employees of the United States Customs and Border Protection ("U.S. CBP"), shall be, and are hereby, **ENJOINED**, pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, from causing or permitting liquidation of unliquidated entries of aluminum extrusions from the Dominican Republic that:

- were subject to Enforce and Protect Act Investigation Number 7550, Letter from Brian M. Hoxie, Director, Enforcement Operations Division, Trade Remedy & Law Enforcement Directorate, CBP Office of Trade, re: *Notice of Final Determination as to Evasion* (Feb. 4, 2022), and the subsequent *de novo* administrative review, Letter from Wiley R. Beevers, Chief, Cargo Security, Carriers & Restricted Merchandise Branch, Regulations & Rulings, Office of Trade, U.S. CBP, re: *Enforce and Protect Act ("EAPA") Case Number 7550; Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 FR 30650 (May 26, 2011) and Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order, 76 FR 30653 (May 26, 2011); Kingtom Aluminio SRL; 19 U.S.C. § 1517* (June 29, 2022);
- were entered, or withdrawn from warehouse for consumption, on or after January 8, 2020, through February 5, 2022;
- were imported by Kingtom Aluminio S.R.L.;

- remain unliquidated as of 5:00 p.m. on the day the Court enters this order on the docket in this case; it is further

ORDERED that this injunction shall dissolve upon entry of a final court decision in this litigation, including all appeals and remand proceedings, and that the entries covered by this injunction shall be liquidated in accordance with that final decision; and it is further

ORDERED that the temporary restraining order issued on August 18, 2022, ECF No. 15, is lifted.

Dated: December 22, 2022
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 22–156

COLUMBIA ALUMINUM PRODUCTS, LLC, et al., Plaintiffs, v. UNITED STATES, Defendant, and ENDURA PRODUCTS, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consolidated Court No. 19–00185

[Denying defendant's motion for a remand and ordering resumption of briefing]

Dated: December 23, 2022

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, DC, for plaintiff. With him on the brief was *Peter J. Koenig*.

Alexander J. Vanderweide, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the briefs was *Justin R. Miller*, Attorney-in-Charge. Also on the briefs were *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, and *Stephen C. Tosini*, Senior Trial Counsel. Of counsel on the briefs was *Tamari J. Lagvilava*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor Endura Products, Inc. With him on the brief was *Elizabeth S. Lee*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Columbia Aluminum Products, LLC ("Columbia") brought this action to contest two related decisions that U.S. Customs and Border Protection ("Customs" or "CBP") issued under the Enforce and Protect Act, 19 U.S.C. § 1517[1] ("EAPA"), concluding that certain door thresholds imported by Columbia from Vietnam evaded antidumping and countervailing duty orders (the "Orders") on aluminum extrusions from the People's Republic of China. The decision resulted from investigative proceedings Customs initiated following a submission by Endura Products, Inc. ("Endura"), a domestic producer of extruded aluminum door thresholds that is a consolidated plaintiff and defendant-intervenor in this action, alleging that Columbia's imported thresholds evaded the Orders.

Denying a motion by defendant for a remand to Customs that would be unduly limited in scope, the court orders the resumption of briefing in response to motions of Columbia and Endura under USCIT Rule 56.2 for judgment on the agency record.

[1] Citations to the United States Code are to the 2018 edition.

I. BACKGROUND

The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued antidumping and countervailing duty orders on certain aluminum extrusions from the People's Republic of China ("China") in 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

On February 9, 2018, Customs initiated an investigation under the EAPA in response to Endura's allegation that certain door thresholds Columbia imported from Vietnam were evading the Orders. *EAPA Case Number 7232: Initiation of Investigation*, PR Doc. 12.[2] Endura alleged that these door thresholds, which were produced in Vietnam, contained aluminum extrusion components that were produced in China. *Id.* at 1.

On December 19, 2018, Commerce issued a "Scope Ruling" in response to a request by Columbia. *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds*, A-570–967, Barcode No. 3784481–01 (Int'l Trade Admin.) ("*Scope Ruling*"). The door thresholds that were the subject of the Scope Ruling, which were made in China, were not themselves aluminum extrusions but contained an aluminum extrusion as a single component that was permanently assembled with other components made of non-aluminum-extrusion components, such as plastic or wood. *See id.* at 13–14. The Scope Ruling held that the aluminum extrusion component within each of the door thresholds was within the scope of the Orders and that the non-aluminum-extrusion components were not. *Id.* at 33–35. Columbia contested the Scope Ruling in this Court in litigation that Columbia commenced on January 18, 2019. *See Columbia Aluminum Products v. United States*, 46 CIT __, Slip Op. 22–144 (Dec. 16, 2022) (*"Columbia IV*"). This litigation recently concluded with this Court's entry of a judgment sustaining a redetermination that Commerce submitted on September 9, 2022, in response to court order. *Id.* at 3–4. The Department's redetermination concluded, under protest, that these door thresholds are not within the scope of the Orders. *Id.* at 2.

[2] Documents in the Administrative Record (Oct. 23, 2019), ECF Nos. 24 (public), 25 (conf.) are cited herein as "PR Doc. __." All citations to record documents are to the public versions of those documents.

In response to Endura's allegation, Customs issued a decision under 19 U.S.C. § 1517(c) (the "Evasion Determination") on March 20, 2019, concluding that entries of Columbia's door thresholds from Vietnam were evading the Orders. *Notice of Final Determination as to Evasion*, PR Doc. 61. The merchandise at issue in the Evasion Determination, like the door thresholds that were the subject of the Scope Ruling, were assemblies containing an aluminum extrusion component among other components. *Id.* at 3. Columbia sought administrative review of the Evasion Determination according to 19 U.S.C. § 1517(f), and after conducting that review, CBP's Regulations and Rulings Directorate ("R&R") issued a decision on August 26, 2019 (the "Administrative Review Determination") that narrowed the scope of the Evasion Determination. *Enforce and Protect Act ("EAPA") Case Number 7232*, PR Doc. 67. The Administrative Review Determination ruled that the door thresholds from Vietnam did not constitute "covered merchandise" for purposes of the EAPA, i.e., could not have been ruled under the EAPA to evade the Orders, unless they were imported on or after December 19, 2018, which was the date of the Department's Scope Ruling. *Id.* at 1–2. As described by defendant, the Administrative Review Determination "relied on *Sunpreme Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019) for the proposition that CBP cannot resolve a scope issue in the first instance, and as such, only Commerce's scope determination is dispositive of whether merchandise is covered by the Orders." Def.'s Mot. for Voluntary Remand and to Suspend the Current Briefing Schedule 3 (Jan. 22, 2020), ECF No. 57 ("Def.'s Remand Mot.").

Plaintiff commenced the current action on October 1, 2019 to contest the "August 26, 2019 Administrative Review, including March 20, 2019 Final Determinat[ion]." Summons, ECF No. 1; *see also* Compl. (Oct. 1, 2019), ECF No. 2. Endura brought its own action "to contest portions of the final administrative determination" of August 26, 2019. Compl. ¶ 1 (Oct. 7, 2019), Ct. No. 19–00190, ECF No. 5. This Court consolidated the two actions, Order (Dec. 18, 2019), ECF No. 18, and granted Columbia's motion for leave to intervene as a defendant-intervenor in Ct. No. 19–00190, Order (Dec. 31, 2019), ECF No. 19.

Before the court are Columbia's and Endura's motions under USCIT Rule 56.2 for judgment on the agency record. Pl. Columbia Aluminum Products, LLC's Rule 56.2 Mot. for J. on the Agency R. (Jan. 8, 2020), ECF Nos. 53 (conf.), 56 (public) ("Columbia's Mot."); Consol. Pl. Endura Products, Inc.'s Mot. for J. on the Agency R. (Jan. 8, 2020), ECF No. 54; Consol. Pl. Endura Products, Inc.'s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. (Jan. 8, 2020), ECF No. 55

("Endura's Mot."). Columbia has responded to Endura's Rule 56.2 motion, Pl. Columbia Aluminum Products, LLC's Resp. to Endura Products, Inc.'s Rule 56.2 Mot. for J. on the Agency R. (Feb. 10, 2020), ECF No. 59, but to date Endura has not responded to Columbia's Rule 56.2 motion.

Instead of responding to the Rule 56.2 motions of the two plaintiffs, defendant United States moved for what it terms a "voluntary remand" and to stay the briefing schedule. Def.'s Remand Mot. Columbia has opposed this motion. Pl. Columbia Aluminum Products, LLC's Resp. in Opp'n to the Gov't's Mot. for Voluntary Remand and to Suspend the Current Briefing Schedule (Feb. 12, 2020), ECF No. 60 ("Columbia's Opp'n").

Separately, defendant moved, with the consent of Endura but not Columbia, for an extension of time for the parties to file responses to the two Rule 56.2 motions until 14 days after the court rules on the motion for a remand and to stay the current briefing schedule. Def.'s Partial Consent Mot. for Extension of Time to File Resp. Brs. 1 (Feb. 4, 2020), ECF No. 58.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to 19 U.S.C. § 1517(g)(1) and 28 U.S.C. § 1581(c). The court decides whether a determination of evasion issued by Customs under subsection (c) of 19 U.S.C. § 1517, or an administrative *de novo* review of such a determination of evasion issued by Customs under subsection (f) of 19 U.S.C. § 1517, by examining "whether the Commissioner 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).

B. Columbia's Motion for Judgment on the Agency Record

In its motion for judgment on the agency record, Columbia describes the imported merchandise at issue in this litigation as "assembled door thresholds, which are multi-component products fully and permanently assembled before importation." Columbia's Mot. 2. Each contained an aluminum extrusion component among other components, including a "continuous PVC [polyvinyl chloride] sill composite and screws (the risers) that allow the end-user to adjust the threshold." *Id*. at 2–3 ("These non-aluminum components are fundamental to the functionality of the finished product and provide a competitive advantage in terms of weatherproofing and energy conservation."). Columbia used this same description to identify the

Chinese-origin door thresholds that were the subject of its request to Commerce for the Scope Ruling. *Id*. at 3–4.

Columbia argues that Customs had no basis to initiate its EAPA investigation against Columbia on February 9, 2018, because the door thresholds Columbia imported from Vietnam qualify for the "finished merchandise exclusion" set forth in the scope language and, therefore, were not subject to the Orders. Columbia's Mot. 5–9. That exclusion applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Columbia argues, in the alternative, that CBP's decisions were arbitrary and capricious because Customs lacked any evidence to support its finding that the aluminum door thresholds imported from December 19, 2018 through March 20, 2019 were assembled in Vietnam using aluminum extrusions produced in China. Columbia's Mot. 9–14. According to Columbia, "[a]ll of the evidence upon which CBP relies is from the week of September 23, 2018 and before." *Id*. at 10.

In summary, Columbia asserts that "[t]here is no evidence that Columbia entered covered merchandise by means of evasion between December 19, 2018 and March 20, 2019 (or during any other time)." *Id*. at 14.

C. Endura's Motion for Judgment on the Agency Record

Endura argues that the Administrative Review Determination erroneously reversed the Evasion Determination "with respect to entries of door thresholds before December 19, 2018." Endura's Mot. 23. Endura characterizes the Administrative Review Determination as "based on an erroneous interpretation of law and contradicted by R&R's own observations in its decision." *Id*.[3]

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[3] Endura also claimed in its Rule 56.2 Motion that U.S. Customs and Border Protection erred in determining that no evasion could have occurred before the issuance of *Aluminum Extrusions From the People's Republic of China*, 82 Fed. Reg. 34,630 (Int'l Trade Admin. July 26, 2017), which was an affirmative final determination of circumvention of *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) and *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011). Consol. Pl. Endura Products, Inc.'s Mot. for J. on the Agency R. (Jan. 8, 2020), ECF No. 54; Consol. Pl. Endura Products. Inc.'s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. 14–15 (Jan. 8, 2020), ECF No. 55 ("Specifically, R&R's conclusion that Columbia's door thresholds were not brought within the scope of the Orders until after . . . Commerce's determination in the anti-circumvention inquiry covering certain imports of aluminum extrusions from Vietnam is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.").

D. Defendant's Motion for a "Voluntary Remand"

Defendant grounds its motion for a "voluntary remand" on the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Sunpreme Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020) ("*Sunpreme II*"), which upon rehearing *en banc* vacated that court's decision in *Sunpreme Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019) ("*Sunpreme I*"). Defendant points out that the Administrative Review Determination relied on *Sunpreme I* "for the proposition that CBP cannot resolve a scope issue in the first instance, and as such, only Commerce's scope determination is dispositive of whether merchandise is covered by the Orders." Def.'s Remand Mot. 3.

Defendant argues that "[i]n reversing the panel's constriction of CBP's authority to determine whether a particular product is subject to antidumping or countervailing duties, the Federal Circuit explained that, 'Customs is both empowered and obligated to determine in the first instance whether goods are subject to existing antidumping or countervailing duty orders.'" *Id*. (quoting *Sunpreme II*, 946 F.3d at 1317). Defendant states in its motion that "because the vacated *Sunpreme [I]* decision is at the heart of R&R's administrative review analysis, remand is necessary for R&R to reevaluate its analysis in light of the Federal Circuit's new precedent." *Id*. at 4. Defendant informs the court, further, that certain documents were not forwarded to R&R for review in the proceeding resulting in the Administrative Review Determination; defendant proposes that, during the requested remand proceeding, it would provide the parties with opportunities to address the new record evidence and, later, would move to supplement the record before the court. *Id*. at 5–7. Defendant also proposes that the parties consult with the goal of reaching agreement on a proposed new briefing schedule. *Id*. at 7.

In opposing the government's motion for a remand, Columbia argues, *inter alia*, that the remand is not being sought because CBP "has doubts about the correctness of its decision" or believes it "is incorrect on the merits." Columbia's Opp'n 2 (quoting *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)). Columbia argues, further, that a remand is unwarranted because the "intervening event" consisting of the decision in *Sunpreme II* "does not 'affect the validity of the agency action.'" *Id.* at 2 (quoting *SKF USA, Inc.*, 254 F.3d at 1028).

E. This Court's Judgment Sustaining the Remand Redetermination in the Litigation Contesting the Department's Scope Ruling

In *Columbia Aluminum Products, LLC v. United States*, 44 CIT __, 470 F. Supp. 3d 1353 (2020) ("*Columbia I*"), this Court held that the Scope Ruling was contrary to law in misinterpreting the scope language of the Orders and in refusing to consider the issue of whether Columbia's Chinese-origin door thresholds qualified for the finished merchandise exclusion. The Department's decision upon remand considered the applicability of this exclusion, concluding that it did not apply to Columbia's products and once again ruled that the door thresholds were within the scope of the Orders. The Department's redetermination was rejected by this Court in *Columbia Aluminum Products, LLC v. United States*, 45 CIT __, 536 F. Supp. 3d 1346 (2021) ("*Columbia II*"), resulting in another order of remand to Commerce. In its second remand redetermination, Commerce, under protest, determined that the finished merchandise exclusion applied to Columbia's imported goods. This Court, in *Columbia Aluminum Products, LLC v. United States*, 46 CIT __, 587 F. Supp. 3d 1375 (2022) ("*Columbia III*"), declined to sustain that decision, ruling that it "seeks court approval for a decision that, unlike the agency determination contested in this litigation, is not a scope ruling or determination but is merely preliminary to such a determination." 46 CIT at __, 587 F. Supp. 3d at 1382. The court objected specifically to the Department's statement in the second remand redetermination that Commerce would issue a revised scope ruling if the court sustained the second remand redetermination. *Id.* "Because it is not the actual scope ruling or determination Commerce plans to issue, it would not be self-effectuating should the court sustain it, and the agency decision that would follow if it were sustained would escape direct judicial review." *Id*. The court allowed a limited time—30 days—for Commerce to issue a new determination that would go into effect if sustained upon judicial review. Commerce issued another determination (the "Third Remand Redetermination") on September 9, 2022, again ruling that Columbia's door thresholds qualified for the finished merchandise exclusion and, therefore, were not within the scope of the Orders. Final Results of Redetermination Pursuant to Ct. Remand 19, Ct. No. 19–00013, ECF No. 85–1 ("*Third Remand Redetermination*"). On December 16, 2022, this Court held that the Third Remand Redetermination must be sustained. *Columbia IV* at 15–17.

Upon issuing its opinion in *Columbia IV*, this Court entered judgment to conclude the litigation in which Columbia contested the Scope Ruling. Judgment (Dec. 16, 2022), Ct. No. 19–00013 (ECF No.

93). The Judgment sustained the decision in the Department's Third Remand Redetermination that the door thresholds Columbia imported from China satisfied the requirements of the finished merchandise exclusion and, therefore, are excluded from the scope of the Orders. *Id.* at 1–2. The Judgment ordered "that, as Commerce expressly has provided in the Third Remand Redetermination, Commerce shall publish a *Federal Register* notice 'stating that, consistent with the Court's holdings,' the door thresholds at issue in this action are excluded from the scope of the Orders." *Id*. at 2 (quoting *Third Remand Redetermination* at 3). The Judgment ordered, further, that "as Commerce expressly has provided in the Third Remand Redetermination, Commerce shall issue, at the time of the publication of the *Federal Register* notice described above, '[r]elevant instructions to U.S. Customs and Border Protection (CBP) giving effect to that determination'" and that these instructions "shall provide for the liquidation of the entries affected by this litigation in accordance with the Third Remand Redetermination." *Id*. (quoting *Third Remand Redetermination* at 3).

F. Procedures under USCIT Rule 56.2

The court denies defendant's motion for a remand directed only to CBP's reconsideration of the contested decisions based on the appellate decision in *Sunpreme II*. Such a remand will not advance the progress of this litigation, for two reasons.

First, this Court's decision in *Columbia IV* sustained a decision of Commerce excluding from the Orders door thresholds that are not themselves aluminum extrusions but instead are assemblies of various components, only one of which is an aluminum extrusion, that are fully and permanently assembled at the time of importation and that do not require cutting or fabrication prior to use. *Columbia IV* at 15–18. The submissions filed in this action to date do not indicate to the court that the door thresholds Columbia imported from Vietnam differ from that description as to physical characteristics.

Second, the procedural posture of this case under USCIT Rule 56.2 calls for defendant now to have the opportunity to respond to the two motions for judgment on the agency record that are pending before the court and for Endura to respond to Columbia's Rule 56.2 motion. In their submissions, defendant and Endura will have the opportunity to address whether the entry of judgment in *Columbia IV* sustaining and effectuating the Third Remand Redetermination requires anything other than a ruling in favor of Columbia's Rule 56.2 motion and a denial of the motion of Endura. Defendant's second motion, Def.'s Partial Consent Mot. for Extension of Time to File Resp. Brs.

(Feb. 4, 2020), ECF No. 58, informs the court that defendant is prepared to file these responses within 14 days of the court's ruling on its motion for a remand.

III. CONCLUSION

For the reasons stated in the foregoing, the court must deny defendant's motion for a remand and will resume the schedule for briefing in this litigation. Although defendant requested 14 days for the filing of responses to the Rule 56.2 motions, the court, pursuant to the standard procedure of USCIT Rule 56.2(d), is allowing 60 days for defendant and Endura to respond to Columbia's motion. The resumption of briefing will enable the court to consider the parties' views on the correct determination of this action, and the procedures necessary to effectuate it, particularly in light of this Court's opinion and entry of judgment in *Columbia IV*. Therefore, upon consideration of defendant's motions, upon consideration of all papers and proceedings had herein, and with due deliberation, it is hereby

ORDERED that Defendant's Motion for Voluntary Remand and to Suspend the Current Briefing Schedule (Jan. 22, 2020), ECF No. 57, be, and hereby is, denied as to the request for a voluntary remand; it is further

ORDERED that Defendant's Partial Consent Motion for Extension of Time to File Response Briefs (Feb. 4, 2020), ECF No. 58, be, and hereby is, granted; it is further

ORDERED that defendant and Endura shall file responses to Columbia's Rule 56.2 motion for judgment on the agency record within 60 days of the date of this Opinion and Order; it is further

ORDERED that defendant shall file its response to Endura's Rule 56.2 motion for judgment on the agency record within 60 days of the date of this Opinion and Order; it is further

ORDERED that should defendant so choose, it may file a single brief responding to both Rule 56.2 motions; it is further

ORDERED that, pursuant to USCIT Rule 56.2(d), any reply to a response to a Rule 56.2 motion must be filed within 28 days after the filing of such response; and it is further

ORDERED that, pursuant to USCIT Rule 56.2(e), any motion for oral argument must be filed no later than 21 days after the filing of the last reply brief.

Dated: December 23, 2022
New York, New York

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

Slip Op. 22–157

YAMA RIBBONS AND BOWS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 20–00059

[Ordering remand of an agency determination in a countervailing duty proceeding on narrow woven ribbons with woven selvedge from the People's Republic of China.]

Dated: December 23, 2022

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, D.C., for plaintiff Yama Ribbons and Bows Co., Ltd. With her on the briefs were *Brittney R. Powell* and *Ronald M. Wisla*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., for defendant the United States of America. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief is *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Daniel B. Pickard, Buchanan Ingersoll and Rooney PC, of Washington D.C., for defendant-intervenor Berwick Offray LLC.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Yama Ribbons and Bows Co., Ltd. ("Yama") contests an administrative determination that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude a periodic administrative review of a countervailing duty ("CVD") order on certain ribbons from the People's Republic of China ("China" or the "PRC"). Concluding that the agency determination is contrary to law in one respect, the court remands it to Commerce for appropriate corrective action.

I. BACKGROUND

A. The Contested Determination

The contested determination (the "Final Results") was published as *Narrow Woven Ribbons with Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 10,653 (Int'l Trade Admin. Feb. 25, 2020) ("*Final Results*").

B. Proceedings Before Commerce

On September 1, 2010, Commerce issued a countervailing duty order (the "Order") on narrow woven ribbons with woven selvedge

from China (the "subject merchandise"). *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642 (Int'l Trade Admin.) ("*Order*").[1]

On September 11, 2018, Commerce invited requests for a review of the Order for the period of January 1, 2017, through December 31, 2017 (the "period of review" or "POR"). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 83 Fed. Reg. 45,888 (Int'l Trade Admin.). Upon the request of Berwick Offray LLC ("Berwick Offray"), a U.S. ribbon producer that was the petitioner in the countervailing duty investigation culminating in the Order and the defendant-intervenor in this litigation, Commerce published a notice of initiation of the administrative review, which was the seventh periodic review of the Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 57,411 (Int'l Trade Admin. Nov. 15, 2018). Commerce identified Yama as the sole exporter or producer of the subject merchandise in the seventh review. *Id.* at 57,418.

On August 23, 2019, Commerce published the preliminary results of the review ("Preliminary Results"), assigning Yama a total net CVD subsidy rate of 31.57%. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 Fed. Reg. 44,281, 44,282 (Int'l Trade Admin.) ("*Preliminary Results*"). Commerce also published an explanatory document for the preliminary results. *Decision Memorandum for Preliminary Results of 2017 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. Aug. 5, 2019), P.R. Doc. 110 ("*Prelim. Decision Mem.*").[2]

Commerce published the Final Results on February 25, 2020. *Final Results*, 85 Fed. Reg at 10,654. Commerce incorporated by reference an explanatory memorandum, the final decision memorandum. *Issues and Decision Memorandum for the Final Results of 2017 Coun-*

[1] The subject merchandise is defined generally in the countervailing duty order as woven ribbons twelve centimeters or less in width, and of any length, that are composed in whole or in part of man-made fibers and that have woven selvedge. Some exclusions apply. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642, 53,642–43 (Int'l Trade Admin. Sept. 1, 2010). The term "selvedge" refers to "the edge on either side of a woven or flat-knitted fabric so finished as to prevent raveling." *Selvage or selvedge*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002).

[2] Documents in the Joint Appendix (Mar. 26, 2021), ECF Nos. 38 (conf.), 39 (public) are cited herein as "P.R. Doc. __." All citations to record documents are to the public versions of those documents.

tervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China (Int'l Trade Admin. Feb. 19, 2020), P.R. Doc. 171 ("*Final I&D Mem.*"). Commerce determined that Yama benefited from twenty-three subsidy programs and assigned Yama a total net countervailable subsidies rate of 31.87%, *Final Results*, 85 Fed. Reg at 10,654, marginally higher than the rate of 31.57% Commerce calculated in the Preliminary Results, *Preliminary Results*, 84 Fed. Reg. at 44,282.

Here, Yama contests the Department's inclusion of the following three subsidies in the 31.87% total subsidy rate: a rate of 10.54% for the Export Buyer's Credit Program ("EBC Program" or "EBCP"), which is an export-promoting loan program administered by the Export Import Bank of China; a rate of 17.76% for the provision of synthetic yarn for less than adequate remuneration ("LTAR"); and a rate of 0.17% for the provision of caustic soda for LTAR.

C. Proceedings in the Court of International Trade

Yama brought the instant action in March 2020. Summons (Mar. 9, 2020), ECF No. 1; Compl. (Mar. 25, 2020), ECF No. 7. Before the court is Yama's motion for judgment on the agency record under USCIT Rule 56.2 and accompanying brief. Mot. for J. on the Agency R. (Oct. 28, 2020), ECF No. 29; Mem. of P. & A. in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R. (Oct. 28, 2020), ECF No. 29–2 ("Pl.'s Br.").

The United States and defendant-intervenor Berwick Offray oppose Yama's motion, urging the court to sustain the Final Results. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. upon the Agency R. (Jan. 26, 2021), ECF No. 34 ("Def.'s Br."); Resp. Br. of Def.-Int. Berwick Offray LLC in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. (Jan. 26, 2021), ECF No. 33.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court authority to review actions commenced under section 516A of the Tariff Act of 1930, *as amended* (the "Tariff Act"), 19 U.S.C. § 1516a, including actions contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *Id*. § 1516a(a)(2)(B)(iii).[3]

[3] All citations to the United States Code herein are to the 2018 edition. Citations to the Code of Federal Regulations are to the 2019 edition.

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Countervailing Duties under the Tariff Act

When certain conditions are met, the Tariff Act provides for a "countervailing duty" to be imposed on imported merchandise to redress the effect of a subsidy provided by the government of the exporting country. Section 701(a) of the Tariff Act, 19 U.S.C. § 1671(a), directs generally that Commerce is to impose a countervailing duty if: (1) Commerce determines that an "authority," defined as either the government of a country or any public entity within the territory of the country, *id*. § 1677(5)(B), "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the U.S. International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury by reason of the subsidized imports.

A "countervailable subsidy" exists, generally, where an authority provides a financial contribution to a person and a benefit is thereby conferred, and the subsidy meets the requirement of "specificity," as determined according to various rules set forth in the statute. *Id.* §§ 1677(5), (5A). When subsidies consist of the provision of goods or services rather than the provision of monies directly, a benefit is conferred if those goods or services are provided for less than adequate renumeration. *Id.* § 1677(5)(E)(iv).

C. Use of Facts Otherwise Available and Adverse Inferences when the Exporting Country Government Fails to Cooperate in a CVD Proceeding

In the Final Results, Commerce invoked its authority to use "the facts otherwise available" under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), and "adverse inferences" under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), with respect to the EBCP and the provision of synthetic yarn and caustic soda. When using both the "facts otherwise available" and the "adverse inference" provisions, Commerce describes its action by using the term "adverse facts available" ("AFA").

Commerce may resort to the use of facts otherwise available when, for example, "an interested party or any other person" withholds requested information or "significantly impedes a proceeding." *See* 19 U.S.C. § 1677e(a)(2). If Commerce finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply" with a request for information, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id*. § 1677e(b)(1)(A).

Upon conducting a countervailing duty investigation or review, Commerce, in some circumstances, may use an inference adverse to the interests of a party in a countervailing duty proceeding in the event of non-cooperation by the government of the exporting country in responding to the Department's requests for information, even if the result is a collateral adverse effect upon a fully cooperative party. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014); *see also Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018) (quoting *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 768–69, 917 F. Supp. 2d 1331, 1342 (2013)) ("Commerce may apply AFA even if the collateral effect is to 'adversely impact a cooperating party.'"). But in such an event, Commerce should "seek to avoid such impact if relevant information exists elsewhere on the record." *Changzhou Trina Solar Energy Co.*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted).

In the seventh review, Yama was not found to have withheld any information or to have failed to cooperate in responding to the Department's information requests. Commerce based its use of the facts otherwise available and adverse inferences entirely on its findings of non-responsiveness and non-cooperation on the part of the government of China (the "GOC"). Instead of acting to the best of its ability to respond to the Department's information requests in the seventh review, the GOC put forth only a minimal effort. Its only response to the Department's inquiries during the review consisted of a one-page cover letter submitted by Yama's counsel "on behalf of the China Chamber of International Commerce ('CCOIC')," accompanied by what the cover letter described as "a copy of the response of the Government of China and its legal brief from the AR ["Administrative Review"] 01/01/2016–12/31/2016 segment of the proceeding (GOC's AR 2016 Response)." *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: GOC Response* 1 (Feb. 19, 2019), P.R. Docs. 21, 23 ("*GOC's Questionnaire Resp.*"). The cover letter stated, "CCOIC submits that, because of the overlapping programs

between the two segments of the proceeding, the Department should accept the GOC's AR2016 response as GOC's response to the Department's Nov. 26, 2018 questionnaire issued to the GOC." *Id*. The letter then stated that "CCOIC also wishes to inform the Department that it will not submit any further responses for the GOC in this proceeding." *Id*. The Department's initial questionnaire to the GOC included requests for information pertaining specifically to the POR for the seventh review, i.e., to calendar year 2017. *See 2017 Administrative Review of the Countervailing Duty Order on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Countervailing Duty Questionnaire* (Nov. 26, 2018), P.R. Doc. 4 ("*GOC's Initial Questionnaire*"). The Chinese government made no attempt to respond to these time-specific requests.

D. The Export Buyer's Credit Program

The Export Buyer's Credit Program is an export-promoting loan program administered by the Export Import Bank of China (the "EX-IM Bank"). *See Final I&D Mem*. at 11–13. In reaching its decision to impose countervailing duties based on the EBCP, Commerce invoked its "facts otherwise available" and "adverse inference" authorities, under 19 U.S.C. § 1677e(a) and (b), respectively, to rule that the Export Buyer's Credit Program "provides a financial contribution, is specific, and provides a benefit to Yama within the meaning of sections 771(5)(D) [19 U.S.C. § 1677(5)(D), 'Financial contribution'], 771(5A) [19 U.S.C. § 1677(5A), 'Specificity'], and 771(5)(E) [19 U.S.C. § 1677(5)(E), 'Benefit conferred'] of the [Tariff] Act." *Id.* at 26.

Yama argues that Commerce should not have imposed countervailing duties upon Yama's exports for the EBCP, arguing that Yama received no benefit from that program and that Commerce impermissibly concluded to the contrary in relying upon 19 U.S.C. § 1677e(a) and (b). Yama claims that record evidence, disregarded by Commerce, demonstrates that neither Yama nor its customers used this program and, therefore, that the imposition of a subsidy rate for the EBCP was unlawful. Pl.'s Br. 12–16. In the alternative, Yama claims that the 10.54% subsidy rate Commerce imposed on Yama and attributed to the program was "extremely adverse, punitive and not related to exports or this industry, or connected to the EBC." *Id.* at 24–25.

1. The Use of Adverse Inferences for the EBC Program

In support of its principal claim, Yama argues, first, that "the GOC fully answered Commerce's questions regarding usage of the EBC Program" and argues, second, that Yama "also submitted complete responses pertaining to the EBC Program." Pl.'s Br. 11. The court agrees with Yama's second argument, but not the first.

In its initial questionnaire, Commerce asked Yama, with respect to the Export Buyer's Credit Program, to "discuss in detail the role your company plays in assisting your customers in obtaining buyer credits." *Narrow Woven Ribbons With Woven Selvedge from People's Republic of China, Antidumping Duty: Response to Section III Questionnaire* 17 (Feb. 5, 2019), P.R. Doc. 12. Yama responded that it "did not provide any assistance to its customers in obtaining buyer credits." *Id*. Commerce also requested as follows: "If you claim that none of your customers used buyer credits during the POR, please explain in detail the steps you took to determine that no customer used the Buyer Credit Facility." *Id*. at 17–18. Yama responded that it "contacted all of its US customers, as listed in Exhibit 12, and confirmed that no customer obtained buyers' credit from China Ex-Im Bank in the POR" and that "[m]oreover, some of Yama Ribbons' US customers signed back certifications that they did not use buyer credit from EXIM Bank during the POR." *Id*. at 18. Yama included these certifications and requests for certifications to its response. *See id.* at Ex. 13.

The Department's initial questionnaire to the Chinese government sought certain information on EBCP usage that was specific to the POR, i.e., calendar year 2017. *GOC's Initial Questionnaire* at 1, II-12–II-13. For example, Commerce asked the GOC to "answer the below listed questions regarding Export Buyer's Credits provided to ***all* U.S.** customers of the mandatory company respondents . . . during the POR." *Id*. at II-12. Seven information requests followed. Of particular significance was the seventh request in the initial questionnaire pertaining to the EBCP, which was as follows: "If you claim that no customer of the respondent companies used buyer credits, please explain in detail the steps the government took to determine that no customer used Export Buyer's Credits. In your answer, please identify the documents, databases, accounts etc. that were examined to determine there was no use." *Id*. at II-13. The GOC's questionnaire response from the prior review included a detailed response to this question. *GOC's Questionnaire Resp.*, Ex. B at 66. That response began with the statement that "[t]he GOC contacted the mandatory Respondent Company YAMA to ask for its customer lists. YAMA provided its customer lists to the GOC, and the GOC confirmed no company on that list obtained any Export Buyers Credits from the EX-IM Bank during the POR." *Id*. This statement would have provided responsive, and probative, information had it pertained to measures the Chinese government undertook during calendar year 2017. But neither the GOC nor Yama submitted record evidence demonstrating that it did.

Commerce must be afforded discretion to determine the scope of its inquiry in conducting reviews of countervailing duty orders, so long

as it does so reasonably. Here, it was reasonable for Commerce to request information from the Chinese government to supplement and corroborate the information Yama provided to show that neither Yama nor its U.S. customers used the EBCP. But because the Chinese government made no effort to provide the requested information as it related specifically to the period of review, Commerce was within its authority in using an adverse inference that Yama benefitted from the EBCP during that period.

Yama argues that Commerce conducted an on-site verification and reported having found no evidence that Yama used subsidies other than the ones Yama reported to have used. Pl.'s Br. 16–17. According to Yama, "Commerce did not discover any evidence during verification that contradicted Yama Ribbons' claims of non-use, and in the absence of any other controverting evidence, Commerce's finding that Yama Ribbons used and benefitted from the EBC Program was not supported by substantial evidence and was otherwise unlawful." *Id*. at 17. The gist of Yama's argument is that the information Yama submitted, when combined with the report of the verification and the GOC's responses from the prior review, constituted substantial evidence that Yama did not benefit from the EBCP during calendar year 2017. But that argument overlooks the Department's valid finding that the POR-specific information it requested from the GOC was missing from the record due to the failure of the Chinese government to make even a minimal effort to assist Commerce in confirming that Yama received no benefit from the EBCP during that year. While "relevant information" existed "elsewhere on the record," *Changzhou Trina Solar Energy Co.*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted), obtained from Yama and its suppliers, that would lend support to a finding that Yama did not benefit from the EBCP, Commerce was not required to consider that information determinative in the particular situation this case presents. It was reasonable in that situation for Commerce to consider the POR-specific information it sought from the GOC—none of which it obtained—to be essential to its inquiry.

Yama also argues that "[a]s explained by the GOC in its response to Section II of the questionnaire, under the EBC Program the loan applicant must provide credit materials and supporting documents to the exporter." Pl.'s Br. 17. This argument fails to persuade the court because the questionnaire response on which Yama relies did not provide requested information pertaining to the EBCP as administered by the EX-IM Bank during the POR for the seventh review and was not prepared for that purpose. Yama's argument presumes that Commerce was required to infer that the information in the GOC's

responses for the previous review remained valid for the current review. The information on the record of the seventh review was insufficient to compel Commerce to draw such an inference. The vague statement in the cover letter that Commerce should accept the questionnaire response in the sixth review as the questionnaire response for the seventh review "because of the overlapping programs between the two segments of the proceeding" does not demonstrate that all information in that response remained valid for the 2017 calendar year. *GOC's Questionnaire Resp.* at 1.

2. The Department's Choice of a Subsidy Rate for the EBCP as an Adverse Inference

The court concludes that a remand to Commerce is required in this case in response to Yama's alternate claim that the 10.54% subsidy rate Commerce imposed on Yama was "extremely adverse, punitive and not related to exports or this industry, or connected to the EBC Program." Pl.'s Br. 24. Yama argues, *inter alia*, that the countervailing duty rate Commerce chose as an adverse inference was not permissible because it pertained to a program in China that the Chinese woven ribbons industry could not use. *Id*. This argument merits consideration because of the way Commerce described its methodology for choosing a countervailing duty rate as an adverse inference:

> Consistent with section 776(d) of the Act [19 U.S.C. §1677e(d)] and our established practice, we select the highest calculated rate for the same or similar program as AFA. When selecting rates in an administrative review, we first determine if there is an identical program from any segment of the proceeding and use the highest calculated rate for the identical program (excluding *de minimis* rates). If no such identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) within the same proceeding and apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates. When there is no comparable program, we apply the highest calculated rate from any non-company specific program in any CVD case involving the same country, *but we do not use a rate from a program if the industry in the proceeding cannot use that program*.

Prelim. Decision Mem. at 10 (emphasis added) (footnotes omitted). It appears that Commerce used the last method mentioned in this excerpt from the Preliminary Decision Memorandum ("the highest calculated rate from any non-company specific program in any CVD case involving the same country"). Commerce stated that "consistent

with *Ribbons AR 2016* [the previous review of the Order, for which the period of review was calendar year 2016], we assigned an AFA rate of 10.54 percent *ad valorem*, the highest rate determined for a similar program in *Coated Paper from China*, as the rate for this program." *Id*. at 11 (footnotes omitted).

The Department's reference to "*Coated Paper from China*" was a reference to *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 70,201 (Int'l Trade Admin. Nov. 17, 2010). *Id*. at 11 n.41. The Preliminary Decision Memorandum describes the 10.54% CVD subsidy rate as the "revised rate for 'Preferential Lending to the Coated Paper Industry.'" *Id*. The Preliminary Decision Memorandum does not explain how this program was considered to be available to the woven ribbons industry in China and thereby conformed to the Department's own stated method of choosing a rate as an adverse inference.

In support of the Department's choice of a rate Commerce determined in a another proceeding from a program entitled "Preferential Lending to the Coated Paper Industry," defendant argues that "Commerce found that based on the record of *Coated Paper from China*, there is no evidence to support Yama's argument that preferential lending in China is only provided to the coated paper industry." Def.'s Br. 32. This argument misinterprets the "substantial evidence" prong of the standard of review the court must apply. The pertinent issue is not whether substantial evidence existed (in this or another proceeding) "to support Yama's argument" but whether substantial evidence existed on the record of *this* proceeding to support the Department's findings in the determination contested before the court. Commerce proceeded under an assumption that the industry of which Yama is a part could have used a program designated as benefitting the Chinese coated paper industry, but defendant has not pointed to substantial evidence on the record of the seventh review that could have supported this assumption.

On remand, Commerce must reconsider, in the entirety, its use of the 10.54% rate as an adverse inference and explain why whatever rate it decides to use is appropriate under 19 U.S.C. § 1677e(b) and is consistent with the purpose of that statute, which, rather than to impose a rate that is "punitive," is to encourage interested parties to act to the best of their ability to comply with the agency's information requests. Commerce must explain, specifically, why it considers the rate it chooses to be appropriate for that purpose in the special case

presented here, in which an unreasonably high rate could unduly prejudice Yama, as the "interested party" that was fully cooperative during the review.

E. Provision of Synthetic Yarn and Caustic Soda for Less-Than-Adequate Remuneration

A countervailable subsidy potentially may exist where an "authority," which the Tariff Act defines as a "government of a country or any public entity within the territory of the country," 19 U.S.C. § 1677(5)(B), confers a benefit upon a person by providing goods "for less than adequate remuneration," *id*. § 1677(5)(E)(iv). In order to be countervailable, any such subsidy also must satisfy the "specificity" requirement set forth in the statute. *Id*. §§ 1677(5)(A), (5A). In the seventh review, Commerce designated each of Yama's suppliers of synthetic yarn and caustic soda as "authorities," invoking its authority to use facts otherwise available, *id.* § 1677e(a), and adverse inferences, *id.* § 1677e(b). Commerce invoked its facts otherwise available authority based on its finding that the GOC "withheld necessary information that was requested of it." *Final I&D Mem.* at 10. Commerce resorted to adverse inferences upon finding that the Chinese government "failed to cooperate by not acting to the best of its ability to comply with our requests for information." *Id*. Commerce stated, further, that "[i]n drawing an adverse inference, we continue to find that prices from actual transactions involving Chinese buyers and sellers are significantly distorted by the involvement of the GOC," *id.* (footnote omitted), and that "we continue to find that the use of an external benchmark is warranted for calculating the benefit for the provision of synthetic yarn and caustic soda for LTAR," *id*. Using import prices as a determinant of "world market prices available to purchasers in China," *id*. at 12, as its benchmarks for the two inputs in determining what would have been adequate remuneration for the two inputs, Commerce, applying the method prescribed by its regulations, 19 C.F.R. § 351.511(a)(2)(ii), calculated a subsidy rate of 17.76% for the provision of synthetic yarn and a subsidy rate of 0.17% for the provision of caustic soda.

Yama brings only one claim with respect to the Department's including subsidy rates for synthetic yarn and caustic soda in the total net countervailable subsidies rate of 31.87%: "In short, this Court should reverse Commerce's decision to apply adverse facts available by finding that each of the private companies which supplied Yama with synthetic yarn and caustic soda is an 'authority.'" Pl.'s Br. 9. The court does not find merit in this claim.

In the initial questionnaire to GOC, Commerce requested, for the period of the current review (calendar year 2017), that the GOC

disclose whether a Chinese Communist Party ("CCP") committee, branch or "primary organization" was formed within the supplier companies and whether government or CCP officials were involved as owners, directors, or managers of any of Yama's suppliers of the two inputs in question during the POR. *See Final I&D Mem*. at 11; *GOC Initial Questionnaire* at II-26–II-27 ("Please identify any individual owners, members of the board of directors, or senior managers who were Government or CCP *officials* during the PO[R]"). As discussed previously in this Opinion and Order, the CCOIC did not respond to that questionnaire and informed Commerce that it would not submit any further responses for the GOC in this proceeding. Providing the responses to a questionnaire for the previous (sixth) review in no way cured this defect: those responses pertained to a period of review of calendar year 2016.[4] In light of the failure of the GOC to lend any meaningful cooperation in responding to the Department's inquiries regarding a CCP presence, Commerce lawfully drew an adverse inference that the operations of Yama's suppliers of synthetic yarn and caustic soda were "authorities" for purposes of 19 U.S.C. § 1677(5)(B). Yama's arguments to the contrary are not convincing.

Yama argues that "Commerce does not identify in the Final Results what information was missing from the administrative record," Pl.'s Br. 6, "or identify why the GOC's response was inadequate," *id*. at 7. The court disagrees. Most important among the information Commerce sought but did receive was information on the presence of government or CPP officials in leadership position of Yama's suppliers during the POR for the seventh review. Had Commerce received that information, it could have requested additional information in an effort to ascertain the possible effect during the POR of that presence in the commercial operations of any specific supplier, if it existed. Here, the Department's legitimate inquiry was thwarted by the GOC's failure to make any meaningful response. Nor can it credibly be said that Commerce failed to identify why the GOC's response was inadequate. With respect to responses to questions specific to the POR for the seventh review, the Chinese government made, essentially, no response at all.

Yama points to the GOC's statements that "there were no programs for the provision of either synthetic yarn or caustic soda" and "that all Yama's suppliers were private companies with no affiliation to the

[4] In a prior decision, this Court held that the Chinese government's response to the initial questionnaire for the sixth review failed to provide information in response to the Department's inquiries concerning CCP participation in the ownership or operations of the suppliers. *Yama Ribbons and Bows Co., Ltd. v United States*, 46 CIT __, Slip Op. 22–138 (Dec. 8, 2022).

GOC" and, from this information, argues that "the initial questionnaire therefore ended the inquiry with regard to the programs at issue." *Id*. Without having received the requested information on the possible CCP influence on the specific suppliers, for the specific time period (calendar year 2017), Commerce was within its discretion in using an adverse inference that these suppliers were "authorities" in conducting the seventh review. In determinations Yama does not contest, Commerce concluded that Yama was able to obtain the two inputs from the suppliers for less than the world market price that was available to it in China. Commerce acted lawfully in deciding that the record before it, based on actual evidence and permissible adverse inferences, allowed Yama to benefit from "programs" allowing it to obtain the inputs for LTAR. *See Yama Ribbons and Bows Co., Ltd. v United States*, 46 CIT __, Slip Op. 22–138 (Dec. 8, 2022).

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands the Final Results to Commerce for reconsideration of the Department's decision to use, as an adverse inference, a subsidy rate of 10.54% *ad valorem* for the Export Buyer's Credit Program.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's Motion for Judgment on the Agency Record (Oct. 28, 2020), ECF No. 29, be, and hereby is, granted in part and denied in part; it is further

ORDERED that Commerce shall submit a new determination upon remand ("Remand Redetermination") in compliance this Opinion and Order; it is further

ORDERED that Commerce will submit its Remand Redetermination within 60 days of the date of this Opinion and Order; it is further

ORDERED that any comments by plaintiff Yama Ribbons and Bows Co. and defendant-intervenor Berwick Offray LLC in opposition to the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; and it is further

ORDERED that defendant and other parties supporting the Remand Redetermination may file comments in support of the Remand Redetermination within 30 days after the filing of the last comment in opposition to the Remand Redetermination.

Dated: December 23, 2022
New York, New York

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

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