U.S. Court of International Trade

Slip Op. 23–91

SKYVIEW CABINET USA, INC., Plaintiff, v. UNITED STATES, Defendant, and MASTERBRAND CABINETS, INC., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:22-cv-00080

[Sustaining Customs' Final Determination of evasion.]

Dated: June 20, 2023

Kyl J. Kirby, Attorney and Counselor at Law, of Fort Worth, TX, for Plaintiff Skyview Cabinet, Inc.

Ioana Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Tara K. Hogan*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief were *Joseph F. Clark* and *Eric Brekke*, Attorneys, Enforcement and Operations Office of the Chief Counsel, U.S. Customs and Border Protection.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor MasterBrand Cabinets, Inc. With him on the brief was *Laura El-Sabaawi.*

OPINION

Vaden, Judge:

Plaintiff Skyview Cabinet, Inc. (Skyview) comes before the Court to challenge U.S. Customs and Border Protection's (CBP or Customs) Final Determination of Evasion (Final Determination) and the agency's subsequent Administrative Review affirming that determination (the Administrative Review). *See Notice of Determination as to Evasion, EAPA Cons. Case Number 7553* (Sep. 16, 2021); Admin. Rev. Case Number H321677 (Jan. 28, 2022), J.A. at 3,071–086, ECF No. 32. In its Motion for Judgment on the Agency Record, Plaintiff argues that Commerce's finding of evasion was unlawful insofar as it failed to comply with various procedural requirements set out by the Enforce and Protect Act (EAPA), 19 U.S.C. §1517. *See generally* Pl.'s Br., ECF No. 30. Plaintiff alleges that Customs did not support its findings with substantial evidence, unlawfully applied adverse inferences, failed to confer with Commerce as the statute requires, violated Skyview's due process rights, shifted the burden of proof onto Skyview contrary to the statute, and unlawfully admitted hearsay into evidence. *Id.* at 11–36. For the reasons set forth below, Plaintiff's

Motion for Judgment on the Agency Record is **DENIED**; and Customs' determinations are **SUSTAINED**.

BACKGROUND

The Department of Commerce (Commerce) issued antidumping and countervailing duty orders on wooden cabinets and vanities (WCV) from China (Orders) on April 21, 2020. *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 22,126 (Apr. 21, 2020); *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Countervailing Duty Order*, 85 Fed. Reg. 22,134 (Apr. 21, 2020). On October 13, 2020, MasterBrand Cabinets, Inc. (MasterBrand) filed an allegation of evasion and request for an investigation under EAPA against Skyview. MasterBrand Allegation 1–14, Exs. 1–9, J.A. at 80,157–243, ECF No. 33. MasterBrand also included a request that certain information, such as photographs and the identity of some persons named in the allegation, be treated as confidential under 19 C.F.R. § 165.4(a). *Id.* at 12. Pursuant to the regulation, MasterBrand also submitted a public version of its allegation, including a summary of the redacted content. *Id.* MasterBrand alleged that Skyview had "imported Chinese cabinets subject to the Orders from Rowenda Kitchen . . . that [had] been transshipped from China through Malaysia and to the United States to evade the Orders." *Id.* at 1–2. MasterBrand further alleged that the subject imports had not been manufactured by Rowenda Kitchen, as Skyview claimed, but that Rowenda Kitchen was merely a transshipment facility. *Id.* To support its allegations, MasterBrand provided Customs with trade and shipping data illustrating significant changes in the shipping patterns of merchandise covered by the Orders since Commerce imposed those tariffs. *Id.* at 6. The data showed a decrease in Chinese wooden vanity and cabinet imports of 37% from 2018 to 2019 and 64% from January to July 2020 with a simultaneous increase of 81% from 2018 to 2019 and 164% from January to July 2020 of imports of the subject merchandise from Malaysia to the United States. *Id.* at 6–8, Exs. 6–7. It also showed that there had been a notable increase in the amount of covered merchandise being shipped from China into Malaysia during the relevant time. *Id.* at 8. To further support its allegation, MasterBrand included bill of lading data from Rowenda Kitchen's imports from 2019–2020, showing that the company had only begun importing wooden vanities and cabinets the same month that Commerce had imposed provisional measures during the dumping investigation. *Id.* at 8, Ex. 3.

Finally, MasterBrand provided data collected by a third-party market researcher who visited the alleged Rowenda Kitchen manufactur-

ing facility in Malaysia. The researcher collected statements from Rowenda Kitchen's owners and employees attesting to the limited capabilities of the facility and describing it as a transshipment operation. *Id.* at 9–10, Ex. 9. Photos of the alleged manufacturing facility included in the researcher's report showed that "there was only minor equipment in the factory, such as tables for holding doors or paint sprayers, but no equipment that indicated that there was manufacturing or significant assembly of cabinets or cabinet parts." *Id.* at 10, Attach. A. Although the photos were redacted as business confidential, the narrative descriptions of what those photos depicted were included in the public version. MasterBrand Allegation at 10, J.A. at 1,163, ECF No. 32 (public version of MasterBrand's allegation providing detailed narrative description of what the redacted photos depict and how they support the allegation of evasion). On October 22, 2020, Customs acknowledged receipt of MasterBrand's "properly filed EAPA allegation," and on November 13, 2020, it initiated an investigation of Skyview under the authority of 19 U.S.C. §1517(b)(1). Initiation Memo at 1–4, J.A. at 80,421–423, ECF No. 33.

On November 24, 2020, Customs sent Skyview a CF-28 Request for Information regarding the subject entries. CF-28 Req., J.A. at 80,451–454, ECF No. 33. Skyview responded to that request with documentation regarding the origin of the merchandise in question on December 18, 2020; January 28, 2021; and February 7 and 9, 2021. Skyview RFI Resp., J.A. at 80,514–529, 80,666–673, 80,694–768, ECF No. 33. In its responses, Skyview provided Customs with information about and photographs of the alleged Malaysian manufacturer, Rowenda Kitchen. *Id.* On February 19, 2021, Customs sent Skyview a Notice of Initiation stating that, "based on a review of available information, CBP has determined that there is reasonable suspicion of evasion" and informing the company that it would be imposing interim measures against it. Notice of Initiation at 2, J.A. at 80,789, ECF No. 33. Customs then sent Skyview a request for information related to the agency's country-of-origin analysis on March 15, 2021, to which Skyview responded on April 8, 2021. Req. for Information (RFI) at 1–4, J.A. at 80,939–953, ECF No. 33; Skyview RFI Resp. at 1–99, J.A. 80,994–81,092, ECF No. 33. In its response, Skyview stated that its "local contact visited the [Malaysian] manufacturer to verify their capacity" and that "the manufacturer also certified that their products are solely made locally and government officials can produce country of origin for their products." Skyview RFI Resp. at 3–4, J.A. at 80,996–997, ECF No. 33.

On March 15, Customs sent a request for information to the alleged manufacturer, Rowenda Kitchen, stating that the deadline for a re-

sponse was March 29, 2021. Final Determination, J.A. at 81,615, ECF No. 33. After receiving no response from Rowenda Kitchen, Customs offered to extend the deadline to April 7, 2021. *Id*. Rowenda Kitchen responded by stating that it had not received the initial communication, suggesting that it may have gone to its "junk mail" folder. It requested an additional extension. *Id.* Customs granted the request, extending the deadline to April 12, 2021. *Id.* Customs then issued a supplemental information request to Skyview on April 12, 2021. Suppl. RFI, J.A. at 2,250–256, ECF No. 32. In that request, Customs asked for additional information about Skyview's "local contact" and verification of that person's visit to the alleged Malaysian manufacturer. *Id.* at 2,255. Customs also identified numerous questions from the prior request that Skyview failed to answer and repeated its need for the missing information. *Id.* Skyview provided a timely response to the supplemental request on April 23, 2021. Skyview Suppl. RFI Resp. at 1–36, J.A. at 81,407–442, ECF No. 33. However, Skyview's response again failed to provide the missing requested information. Final Determination, J.A. at 81,618 n.36, ECF No. 33.

On June 7, 2021, Skyview voluntarily submitted additional information for the agency's review. Skyview Voluntary Submission, J.A. at 2,504–530, ECF No. 32. Skyview modified its claims and now presented evidence for the first time that the subject imports had been manufactured by or in conjunction with a different company, Roxy Heritage Furniture Manufacturer SDN ("Roxy"). *Id.* at 2,516. Along with the new documents, Skyview offered the following explanation:

> Skyview has made progress in documenting a complicated supply chain of Rowenda Kitchen . . . . Even with the extension, there are [*sic*] not sufficient time to complete the process. However, Skyview has learned additional information pertaining to its relationship with Rowenda as provided Kian Hong Ong. The cabinets in question were produced in Malaysia in conjunction with Roxy Heritage Manufacturer SDN. BHD. as demonstrated in the attached.

Id. at 2,507. Meanwhile, despite numerous requests for information and extensions of deadlines, Rowenda Kitchen failed to respond to any of Customs' inquiries or provide any documentation whatsoever. Final Determination, J.A. at 81,615, ECF No. 33.

On June 24, 2021, MasterBrand submitted comments on Skyview's voluntary submission, arguing that Customs should disregard that evidence and instead "rely on adverse inferences in making a final determination of evasion" because the alleged manufacturer, Ro-

wenda Kitchen, "did not submit a response to CBP's request for information and has refused to participate with the agency in this investigation." MasterBrand Comments at 2, J.A. at 81,515, ECF No. 33. Skyview then submitted its written case brief, responding to the allegations made by MasterBrand and to Customs' Notice of Initiation. Skyview Agency Case Br., J.A. at 2,878–904, ECF No. 32. MasterBrand submitted its case brief on July 1, 2021. MasterBrand Agency Case Br. at 1, J.A. at 81,555–581, ECF No. 33. On July 15, 2021, pursuant to 19 C.F.R. § 165.2(b), both parties submitted responses to the other party's arguments. Skyview Resp. Br., J.A. at 2,907–933, ECF No. 32; MasterBrand Resp. Br., J.A. 2,936–962, ECF No. 32.

On September 16, 2021, CBP published its Final Determination, finding that there was "substantial evidence" supporting the allegations of evasion. *See* Final Determination, J.A. at 81,612–626, ECF No. 33. The Final Determination explained that "[t]hose changes in general country trade patterns and in the specific shipment activity of Rowenda Kitchen, and the statements in the affidavit . . . that observed that company's facilities" coupled with the fact that "none of the Importers provided the requested production records . . . is applicable in CBP's final determination with regard to whether substantial evidence exists of evasion." *Id.* at 81,617. Customs explained that "Rowenda Kitchen's failure to cooperate and comply to the best of its ability to CBP's information requests leads CBP to rely on evidence otherwise on the record regarding identification of the country of origin of merchandise Rowenda Kitchen shipped to the Importers." *Id.* In its analysis of the evidence offered by Skyview, Customs found that "the existence of various discrepancies and omissions with respect to the RFI responses . . . also call into question the accuracy of information provided[.]" Final Determination, J.A. at 81,618, ECF No. 33.

Customs specified the discrepancies that the agency observed in Skyview's submissions in a related footnote. *Id.* at n.36. First, Customs recalled that Skyview's initial response claimed that the company had sent a "local contact" to visit the manufacturer in order to "verify their capacity" and review their "manpower, machines, and raw material[s]." Skyview RFI Resp. at 3–4, J.A. 80,996–997, ECF No. 33. However, when Customs requested evidence of the alleged visit in its supplemental questionnaire, Skyview "only provided documentation that appears to refer to airline itineraries, none of which even mention Rowenda Kitchen or its specific location, let alone its operations." Final Determination, J.A. at 81,618 n.36, ECF No. 33; *see* Skyview Suppl. RFI Resp. at Attach. 1, J.A. 81,409–413, ECF No. 33.

Second, Customs highlighted that, in its initial March 15, 2021 request, it had asked Skyview for various accounting documents and records from 2019 and 2020; Skyview ignored that request. Final Determination, J.A. at 81,618 n.36, ECF No. 33. When Customs repeated its records request on April 12, 2021, Skyview offered documentation that was "unresponsive to CBP's request[,]" including an unsigned tax return that was unverifiable. Final Determination, J.A. at 81,618–619 n.36, ECF No. 33; *see* Skyview Suppl. RFI Resp. at Attach. 4, J.A. at 81,431–434, ECF No. 33. Finally, Customs noted that, in its initial response, Skyview also failed to provide a requested purchase order and, after subsequent requests, sent what "appears to be a spreadsheet" including only "two columns of data for which Skyview provided no explanation." Final Determination, J.A. at 81,619 n.36, ECF No. 33; *see* Skyview Suppl. RFI Resp. at Attach. 6, J.A. 81,435–436, ECF No. 33. Although the agency observed that "it might be appropriate to apply adverse inferences to Skyview given the potentially fraudulent 'certifications' submitted by its counsel," it stated that "CBP is not making an adverse inference against Skyview in this case." Final Determination, J.A. at 81,624, ECF No. 33. Instead, CBP chose to apply adverse inferences solely against the unresponsive alleged manufacturer, Rowenda Kitchen. *Id.*

Skyview made a timely request for administrative review of the Final Determination. *See* 19 U.S.C. § 1517(f)(1); 19 C.F.R. §165.41(a); Skyview Req. for Admin. Rev. at 1, J.A. at 2,994, ECF No. 32. In its request, Skyview argued that the Final Determination should be reversed because (1) Skyview had provided adequate evidence to support its claim that the imported merchandise had been manufactured in Malaysia but that "CBP disregarded evidence that Skyview submitted throughout the EAPA investigation"; (2) the application of adverse inferences against Skyview was unlawful; and (3) any outstanding questions regarding the country-of-origin analysis should have been referred to Commerce. Skyview Req. for Admin. Rev. at 3–4, J.A at 3,002–003, ECF No. 32. MasterBrand submitted its response on November 16, 2021, arguing that the Final Determination was in compliance with the statute and should therefore be affirmed. MasterBrand Resp. to Req. for Admin. Rev. at 125, J.A. at 81,628–659, ECF No. 33. On January 28, 2022, Customs' Office of Rules and Regulations affirmed the Final Determination based on its determination that "the evidence of evasion here is cumulative and substantial" and "Skyview failed to provide adequate and reliable evidence that the WCV it imported into the United States were manufactured in Malaysia." Admin. Rev. at 8, J.A. at 3,078, ECF No. 32.

Skyview timely filed the present action on March 10, 2022, challenging Customs' affirmative Final Determination of evasion and the administrative review affirming that determination. *See* Compl. ¶¶ 26–75, ECF No. 2. In its brief before this Court, Skyview alleged that Customs failed to support its Final Determination with substantial evidence, unlawfully applied an adverse inference against it, failed to confer with Commerce in its country-of-origin analysis, unlawfully shifted the burden of proof onto Skyview, violated Skyview's due process rights, and permitted prohibited hearsay evidence onto the record. Pl.'s Br. at 11–37, ECF No. 30. The Government submitted its response brief on October 2, 2022; and Defendant-Intervenor MasterBrand submitted a response brief in support of Customs' final determination on October 5, 2022. Def. Resp. Br., ECF No. 25; Def. Int. Resp. Br., ECF No. 27.

The Court held oral argument on March 30, 2023. ECF No. 39. In particular, the Court asked what factors Customs must consider in deciding whether and how to verify record evidence and what factors the agency considered in this case when making that determination. Oral Arg. Tr. at 19:6–25–20:1–4, ECF No. 40. Counsel for Skyview conceded that his client does not dispute the accuracy of the aggregate data MasterBrand proffered and on which Customs relied in its analysis. *Id.* 42:2325–43:1–10. Skyview also agreed that the merchandise in question would be in scope if manufactured in China, leaving the only contested issue whether the goods were of Chinese or Malaysian origin. *Id.* at 43:11–19. Counsel finally confirmed that Skyview's "local contact" who had been sent to visit the Malaysian manufacturing facility provided no work product supporting the claim that the facility manufactured the merchandise in question. *Id.* at 52:3–25–53:1–13.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c). Under the Enforce and Protect Act, the reviewing court must examine Customs' final determination, *see* 19 U.S.C. § 1517(c), and administrative review, *see id*. § 1517(f). *Id.* § 1517(g) (providing for court review of both determinations). In its review of Customs' determinations, the Court examines "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(1)-(2). Agency action constitutes an abuse of discretion "where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents

an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). Where the agency "offers insufficient reasons for treating similar situations differently," such actions are arbitrary. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

In reviewing agency action, it is "the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351–52 (Fed. Cir. 2006) (citations omitted). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted).

DISCUSSION

I. Summary

Plaintiff contends that numerous errors in Customs' investigation were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," requiring this Court to remand the agency's determination. Pl.'s Br. at 1–2, ECF No. 30. Plaintiff alleges the following errors: (1) Customs failed to support its finding that the subject imports were "covered merchandise" at the time of entry; (2) Customs unlawfully applied adverse inferences against Skyview; (3) Customs failed to confer with Commerce in making its country-of-origin assessment, contrary to its statutory obligation to do so; (4) Customs unlawfully shifted the burden of proof onto Skyview; (5) Customs violated Skyview's due process rights by not giving Skyview access to certain confidential information; and (6) Customs unlawfully considered hearsay. *Id.* The Court considers each of these arguments in turn.

Based on an assessment of both Customs' Final Determination of Evasion and its Administrative Review, the Court finds that Plaintiff's complaints are without merit. Contrary to Skyview's contentions, Customs thoroughly reviewed and discussed the evidence submitted by the parties; and substantial evidence supports its conclusions. *See* Final Determination, J.A. at 81,616–617, ECF No. 33; Admin. Rev. at 8–15, J.A. at 3,078–085, ECF No. 32. Despite numerous agency requests for information, Skyview failed to provide support for its claim that the imported merchandise was manufactured in Malaysia. Final Determination, J.A. at 81,618 n.36, ECF No. 33. The gap left by this failure, combined with the adverse inference

drawn against the alleged manufacturer Rowenda Kitchen for its refusal to provide any of the requested information, led Customs to conclude that the record as a whole supported the allegation of evasion. *Id*. Although Customs redacted the adverse photos and videos of Rowenda Kitchen's Malaysia facility as business confidential information, Skyview was on notice that it needed to provide evidence that actual manufacturing occurred in Malaysia; and Skyview had numerous opportunities to present contrary evidence refuting the allegation. *Id.* Furthermore, in its briefs before the agency and this Court, Skyview does not challenge the accuracy of the aggregate statistical evidence suggesting a pattern of transshipment following the imposition of duties on Chinese cabinets. *See* Pl.'s Br., ECF No. 30 (containing no challenge to the accuracy of evidence against it); *see also* Admin. Rev. at 10, J.A. at 3,080, ECF No. 32 (observing that Skyview placed no challenge to the accuracy of the evidence of evasion onto the record). Skyview's repeated failure to demonstrate that any actual manufacturing occurred in Malaysia combined with the evidence submitted by MasterBrand led to Customs' evasion finding. *See* Final Determination, J.A. 81,612–626, ECF No. 33; Admin. Rev. at 9, J.A. at 3,079, ECF No. 32 ("CBP found, based upon direct and circumstantial evidence in the administrative record, that neither Rowenda nor any company in Malaysia had the capacity to produce the WCV.").

II. Legal Framework Under EAPA

EAPA calls upon Customs to investigate allegations of evasion. The statute defines evasion as:

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

19 U.S.C. § 1517(a)(5)(A). "Covered merchandise" is any imported merchandise that is subject to an antidumping or countervailing duty order. *Id.* § 1517(a)(3)(A)-(B). Transshipment — where goods are manufactured in one country and imported through an intermediary country to evade duties imposed on goods originating from the manufacturing country — is one example of evasion under EAPA. *See CEK Grp. LLC v. United States*, No. 22–00082, 2023 CIT LEXIS 69, at *10 (CIT May 2, 2023) (discussing a transshipment operation as evidence of evasion under EAPA).

Allegations of evasion may be filed with Customs by any interested party (as defined by the statute) and are to be "accompanied by information reasonably available to the party that filed the allegation." 19 U.S.C. § 1517(b)(2)(B). Once an allegation of evasion has been submitted, Customs must conduct an investigation within fifteen days if it finds that the allegation and accompanying information "reasonably suggest[] that covered merchandise" has been brought into the United States through evasion. *Id.* § 1517(b)(1). If Customs receives an allegation of evasion and it is unable to determine whether the questioned merchandise is within the scope of the relevant order, the agency will refer the question to the Commerce Department for a final determination of that issue. *Id.* at § 1517 (b)(4)(A); 19 C.F.R. § 165.16.

Customs issues a final determination as to whether evasion has occurred "based on substantial evidence" within three hundred days of the investigation's initiation. 19 U.S.C. § 1517(c). Within thirty business days of Customs' determination, a party found to have entered covered merchandise through evasion, or any interested party that filed an allegation, may file an appeal for a *de novo* administrative review. 19 U.S.C. § 1517(f).

III. Substantial Evidence Determination

Skyview claims that substantial evidence does not support Customs' finding that the subject imports constitute "covered merchandise." Pl.'s Reply Br. at 1–6, ECF No. 31. It alleges that "CBP clearly did not consider 'relevant facts and observations'" but rather "simply believed that it 'was confronted with evidence of basic transshipments[.]'" *Id.* at 1–2 (quoting Admin. Rev. at 8, J.A. at 3,078, ECF No. 32). Furthermore, Skyview asserts that any discrepancies in the record that did exist were reasonably explainable and thus not fatal to its position. *Id.* at 3–6. The Government argues that the Final Determination should be affirmed because "[t]he information Skyview provided failed to overcome the substantial evidence demonstrating evasion, and thus CBP reasonably concluded that the covered merchandise entered the United States through evasion[.]" Def.'s Resp. Br. at 17, ECF No. 25.

Skyview misinterprets the substantial evidence standard and what it requires. Namely, Skyview ignores that the "possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence." *Jacobi Carbons AB v. United States*, 222 F. Supp. 3d 1159, 1168 (CIT 2017) (citations omitted). Here, Customs acted within its discretion to determine which of the parties' claims was more compelling based on

an assessment of whose evidence was more credible and reliable. Customs' finding that Skyview's evidence was replete with contradictions, omissions, and inconsistencies is a valid basis on which to determine that its submissions were not credible and that the record as a whole supported the allegations against it. Final Determination, J.A. at 81,618 n.36, ECF No. 33 (identifying each piece of evidence that was missing or inconsistent in each of Skyview's submissions). A determination where the agency "favor[s] one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1356 (Fed. Cir. 2018) (quoting *In re Cree, Inc.*, 818 F.3d 694, 701 (Fed. Cir. 2016)).

As Customs observed in its Administrative Review, "Skyview does not dispute the accuracy" of the evidence submitted by MasterBrand and "makes no arguments to refute the statements of transshipment declared by the third-party investigator." Admin. Rev. at 10, J.A. at 3,080, ECF No. 32. At oral argument, Plaintiff's counsel confirmed that Skyview did not dispute the accuracy or truthfulness of the aggregate statistical data — critical pieces of evidence that Customs found compelling in its investigation. Oral Argument Tr. at 41:14–25–43:1–10, ECF No. 40 (responding "The aggregate data, it is what it is . . . ." to the Court's summary of the data before the agency). Instead, Plaintiff simply alleges, without specific examples, that the agency's determination was unsupported. *See* Pl.'s Reply Br. at 2–3, ECF No. 31.

Skyview's claims that Customs failed to investigate the discrepancies that it found and that the discrepancies that did exist were minor are equally without merit. *See* Pl.'s Br. at 15, ECF No. 30. Customs specifically identified the discrepancies and omissions that it deemed fatal to the Plaintiff's case and explained what gaps Skyview's evidence left in substantiating its arguments. *See* Final Determination, J.A. at 81,624, ECF No. 33; Admin. Rev. at 8, J.A. at 3,078, ECF No. 32. In the Final Determination, Customs stated that Skyview's responses "do not contain production information demonstrating that the WCV that . . . Skyview imported from Rowenda Kitchen was produced in Malaysia" and that "the existence of various discrepancies and omissions with respect to the RFI responses . . . also call into question the accuracy of information provided[.]" Final Determination, J.A. at 81,618, ECF No. 33. Customs then included a footnote that detailed three of the "discrepancies and omissions" that appeared in Skyview's initial submission and that Skyview failed to rectify despite subsequent requests by the agency. *Id.* at n.36 (citing Skyview's failure to provide additional information about its "local

contact" who had allegedly visited the Malaysian manufacturer, its failure to provide requested accounting records from 2019 and 2020, and its failure to provide a specific purchasing order requested by Customs).

In the Administrative Review, Customs also discussed the issues it found in Skyview's RFI responses. Customs stated that it "find[s] that the June 7th Submission is inadequate to substantiate Skyview's claim of Malaysian-origin WCV" because "the documents fail to rise to the level of production documents needed to substantiate Skyview's claim that the actual production of its WCV occurred in Malaysia." Admin. Rev. at 11, 12–13, J.A. at 3, 081 3,082–083, ECF No. 32. In short, the agency concluded that "[t]here is nothing to indicate that the WCV at issue were produced with the materials and parts included in the various provided invoices, and the documentation does not confirm the country of origin of the WCV as being Malaysian." *Id.* at 13. As to the evidence supporting evasion, the agency was equally thorough in its analysis. In the Final Determination as well as the Administrative Review, Customs identified with specificity the evidence that it found compelling, including the aggregate data, the company-specific shipping data, and the photographs and testimony provided by the investigator. Final Determination, J.A. at 81,616–617, ECF No. 33; Admin. Rev. at 9–10, J.A. at 3,079–080, ECF No. 32. Skyview does not challenge the accuracy or truthfulness of the aggregate data, as Plaintiff's counsel confirmed before the Court at oral argument. *See* Oral Arg. Tr. at 43:1–10, ECF No. 40.

Skyview's claim that Customs failed to investigate the errors and omissions in Skyview's evidence misconstrues the agency's role, which is to perform an investigation by collecting evidence from the parties and assessing the validity of the evidence it receives. *See* 19 U.S.C. § 1517(b). Although the statute empowers the agency to verify that information, it does not mandate verification in all cases. *Id.* § 1517(c)(2)(B) ("[T]he Commissioner *may* collect such additional information as is necessary to make the determination through such methods as the Commissioner considers appropriate, including by . . . conducting verifications, including on-site verifications, of any relevant information.") (emphasis added). Customs carried out its statutory duty to investigate the allegation of evasion by soliciting information from the parties, issuing supplemental questionnaires to clarify apparent errors and omissions in the evidence, and assessing the record as a whole to make an informed determination as to the credibility of the parties' claims. *See generally* Final Determination, J.A. at 81,612–626, ECF No. 33. After numerous attempts to gather the necessary information from Skyview and the alleged manufactur-

ers led to inadequate and contradictory responses, Customs determined that verification would not be necessary or appropriate in this investigation. An agency decision such as whether to perform verification is arbitrary and capricious where the agency "relie[s] on factors which Congress had not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463, U.S. 29, 43 (1983)). Here, Customs made a specific finding that "there was no need to consider verification" of the evidence because the agency had determined that Skyview's submission was "unreliable and therefore, not probative." Final Determination, J.A. at 81,625, ECF No. 33. Where a party's submitted evidence is substantially incomplete or discredits itself, failing to "verify" that evidence is not an abuse of the agency's discretion.

Skyview further argues that the evidence it presented should outweigh the evidence against it. However, under the substantial evidence standard, "[i]t is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube*, 975 F.2d 807, 815 (Fed. Cir. 1992); *see also Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43 (discussing the arbitrary and capricious standard and what it requires of the agency); *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015) ("While Appellants invite this court to reweigh this evidence, this court may not do so."). Customs has satisfied its mandate, and substantial evidence supports its evasion determination.

IV. Application of Adverse Inferences

EAPA permits Customs to "use an inference that is adverse to the interests of" a party or person who has "failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information[.]" 19 U.S.C. § 1517(c)(3). Skyview contends that Customs' application of adverse inferences against it was arbitrary and capricious because Rowenda Kitchen's failure to respond to Customs' information requests does not permit the agency to apply adverse inferences against Skyview. Pl.'s Reply Br. at 6–7, ECF No. 31. Skyview asserts that it cooperated with the investigation to the best of its ability and had no power to induce Rowenda Kitchen to

cooperate. *Id.* at 7. The Government retorts that Customs did not apply adverse inferences against Skyview but instead applied those inferences solely against Rowenda Kitchen. Def'.s Resp. Br. at 17–19, ECF No. 25; Final Determination, J.A. at 81,618, 81,624, ECF No. 33. Customs granted Rowenda "three extensions to the deadline for response and warned that [it] may apply adverse inferences if the company does not respond." Def.'s Resp. Br. at 18–19, ECF No. 25. Nonetheless, Rowenda Kitchen "flatly refused to cooperate[.]" *Id.* Any collateral consequences the decision to draw an adverse inference against Rowenda Kitchen had on Skyview were permissible under the statute. *Id.* at 19–20 (citing *Mueller Commercial de Mexico S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1233–36 (Fed. Cir. 2014)).

First, Customs drew no adverse inferences against Skyview. It only drew an adverse inference against Rowenda Kitchen for its failure to respond to multiple requests for information. Final Determination, J.A. at 81,618, ECF No. 33 ("The claimed manufacturer, Rowenda Kitchen, did not provide an RFI response, despite being given multiple opportunities to do so . . . . There is no basis for concluding that Rowenda Kitchen was unable to provide a response to its RFI, and application of adverse inference to that party is appropriate."); *see also* Final Determination, J.A. 81,624, ECF No. 33 ("CBP is not making an adverse inference against Skyview in this case."). Any contrary claim by Skyview is mistaken. *Cf.* Pl.'s Br. at 20, ECF No. 30 ("CBP Unlawfully Applied Adverse Inferences Against Skyview").

Second, as to the application of adverse inferences against Rowenda, the statute offers clear instruction. Customs may draw adverse inferences against a party that "has failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information[.]" 19 U.S.C. § 1517(c)(3)(A). Eligible parties against whom an adverse inference may be drawn include "a person that is a foreign producer or exporter . . . of covered merchandise" such as Rowenda Kitchen. *Id.* § 1517(c)(2)(A)(iii). In its Final Determination, Customs explained that it was drawing an adverse inference in selecting from facts otherwise available for its country-of-origin analysis to fill the gaps that Rowenda Kitchen's repeated refusal to cooperate created:

> The claimed manufacturer, Rowenda Kitchen, did not provide an RFI response, despite being given multiple opportunities to do so. The RFI issued to Rowenda Kitchen requested significant information relating to its production and sale activities, including transactions related to the Importers. There is no basis for

> concluding that Rowenda Kitchen was unable to provide a response to its RFI, and application of adverse inference to that party is appropriate.

Final Determination, J.A. at 81,618, ECF No. 33. Although Skyview argues that it suffered collateral consequences because of Customs' drawing an adverse inference against Rowenda Kitchen, Skyview's citation to cases in the antidumping context governing when a cooperating party may nonetheless have an adverse inference drawn against *it* for *another party's* failure to cooperate misses the mark. *Compare* Pl.'s Br. at 22, ECF No. 30 (citing caselaw to support Plaintiff's argument that adverse inferences cannot be applied against a cooperating party except in the specific instance where there is substantial evidence that the cooperating party has leverage to induce cooperation from the non-cooperating party), *with Mueller*, 753 F.3d at 1236 ("[W]e do not bar Commerce from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party. Where an adverse inference is used to calculate the rate of a non-cooperating party that rate may sometimes be used in calculating the rate of a cooperating party and thus have collateral consequences for the cooperating party.") The discussion of what must be shown in order to apply adverse inferences against a cooperating party because of its non-cooperating compatriots is irrelevant where the agency applied an adverse inference against the non-cooperating party. *See* Final Determination, J.A. at 81,618, ECF No. 33; Admin. Rev. at 7, J.A. at 3,077, ECF No. 32. Indeed, the statute permits Customs to draw an adverse inference against a non-cooperating party "without regard to whether another person involved in the same transaction or transactions under examination has provided the information sought." 19 U.S.C. § 1517(c)(3)(B). Skyview does not point to specific information on the record that *it* provided that might lessen any collateral consequences to *Skyview* of Customs' decision to draw an adverse inference against Rowenda. Consequently, Skyview has pointed to no reason to disturb Customs' decision to draw an adverse inference against Rowenda Kitchen based on Rowenda Kitchen's failure to cooperate with the investigation.

V. Failure to Confer with Commerce

EAPA requires Customs to investigate whether covered merchandise has entered into the United States through evasion, which the agency does by assessing the evidence it receives from interested parties regarding the merchandise's country of origin. 19 U.S.C. § 1517(c)(1)(A); 19 C.F.R. § 165.27(a). Skyview claims that, because

there are allegedly conflicting facts regarding the country of origin of the subject merchandise entered into the record, the statute required Customs to refer the matter to Commerce for consultation. Pl.'s Br. at 25, ECF No. 30; Pl.'s Reply Br. at 7–8, ECF No. 31. Customs' failure to confer with Commerce, according to Skyview, makes its determination "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Pl.'s Br. at 25, ECF No. 30. In response, the Government observes that Skyview misinterprets the statute, which is meant to apply only where the question that Customs is unable to answer pertains to the scope of the orders. Def.'s Resp. Br. at 20, ECF No. 25. In other words, the Government posits that the statute instructs Customs to confer with Commerce only in the specific situation where it is "unable to determine whether the imported merchandise is the type of merchandise covered by the scope of the order at issue." *Id.* To adopt Skyview's much broader interpretation would, according to the Government, "essentially strip CBP of its authority to investigate evasion of AD/CVD duties because any such finding would be immediately transferred to Commerce." *Id.* The Government also argues that the statute authorizes Customs to determine whether imported merchandise is "covered merchandise" — an essential component of the investigatory duties assigned to Customs — and only when that determination *cannot* be made is Customs instructed to confer with Commerce. *Id*. at 21. Finally, the Government contends that there is no question here as to whether the merchandise at issue was "covered merchandise" so that the provision of the statute discussing how Customs must resolve a contested question is irrelevant. *Id.*

The language of the statute is clear: Customs "shall . . . refer the matter to [Commerce] to determine whether the merchandise is covered merchandise" when Customs "is unable to determine whether the merchandise at issue is covered merchandise." 19 U.S.C. § 1517(b)(4)(A)(i). Thus, only when there is a dispute about whether the merchandise is the *type* of merchandise that would be subject to an antidumping or countervailing duty order must Customs refer the dispute to Commerce for determination. *Id*.

Here, there is no dispute about whether the wooden vanities and cabinets at issue are of the type that would be subject to the antidumping and countervailing duty orders. At issue in the investigation is only the country of origin for the merchandise in question. If the cabinets and vanities originate from China, the Orders apply; if they originate from Malaysia, the Orders do not. The statute delegates the determination of the country of origin to Customs. *See* 19 U.S.C. § 1517(c)(1)(A); 19 C.F.R. §165.27(a) (both providing that Customs

"shall make a determination . . . with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion"). As Customs explained in its Administrative Review:

> Here, there is no dispute that if Chinese-manufactured WCV were shipped directly from China to the United States, the WCV would fall under the AD/CVD orders. There is also no dispute that Skyview's entries were entered as classified under subheading number, 9403.40.9060, HTSUS, and, again, if of Chinese origin, are within the scope of the AD/CVD Orders. The only fact in contention is whether the WCV at issue are in fact of Chinese origin.

Admin. Rev. at 7–8, J.A. at 3,077–78, ECF No. 32.

Plaintiff's counsel conceded this point at oral argument, agreeing that the wooden cabinets and vanities imported by Skyview would be within the scope of the Orders if found to have originated from China. Oral Arg. Tr. at 43:11–19, ECF No. 40 (responding "We do not dispute that" to the question of whether, if the goods had been purchased from China, "they would be subject to the anti-dumping order and within scope"). Because there is no dispute about whether the wooden cabinets and vanities Skyview imported are of the type covered by the Orders, there was no dispute over the Orders' scope that should have been referred to Commerce. *See* 19 U.S.C. § 1517(b)(4)(A) (requiring a dispute over whether the merchandise is covered by an order). The statutory provisions regarding referral are thus irrelevant, and Skyview's arguments that Customs abused its discretion by not seeking Commerce's guidance are meritless.

VI. Burden Shifting

EAPA provides that Customs "may collect such additional information as is necessary to make the determination" by "conducting verifications, including on-site verifications, of any relevant information." 19 U.S.C. § 1517(c)(2); *see also* 19 C.F.R. § 165.25(a) ("Prior to making a determination . . . CBP may in its discretion verify information . . . as is necessary to make its determination."). Skyview argues that Customs' determination must be reversed because, under the statute, the agency "was required to verify the facts presented by both Skyview and Masterbrand" but that "[t]he record is absent of CBP doing anything beyond the beginning phase of the EAPA action." Pl.'s Reply Br. at 9, ECF No. 31. Skyview argues that, by failing to verify the submitted information, Customs unlawfully shifted the burden onto Skyview, requiring it to disprove the allegations made against it. Pl.'s

Br. at 30, ECF No. 30. The Government responds that Skyview has misconstrued the statute. Def.'s Br. at 21–22, ECF No. 25. It is the respondent that bears the burden of establishing its right to any reduced duty and that requiring "the Government to affirmatively prove the origin of material before assigning duties would both frustrate the statutory directive and incentivize respondents to withhold information." *Id.* at 22. Further, the Government argues that "verification" does not require Customs to "[conduct] an independent search based upon a party's unsupported assertions" but rather "is a process to confirm information it has already received." *Id.* at 23. Ultimately, the Government argues that Customs was within its authority to determine that the information it received from Skyview was not credible and to decline to conduct any further investigation or verification on the company's behalf. *Id.*

After receiving a plausible allegation of evasion of customs duties, Customs "shall initiate an investigation" and make a determination based on "substantial evidence." *See* 19 U.S.C. §§ 1517(b)(1), (c)(1)(A). The substantial evidence standard requires the agency to consider the record as a whole, including "whatever in the record fairly detracts from its weight[,]" and render a decision based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–488 (1951); *Nippon Steel*, 458 F.3d at 1351; *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). Where the record would support more than one conclusion by substantial evidence, the agency's choice between the options governs. *See Universal Camera Corp.*, 340 U.S. at 488 (holding that a court cannot "displace the [agency's] choice between two fairly conflicting views").

Customs' regulations implementing the statute define the administrative record, permit Customs to obtain additional information by issuing requests for information, and allow parties to voluntarily submit information for the agency's consideration. 19 C.F.R. §§ 165.21, 165.23. It is from this record — built largely by the parties themselves — that Customs makes its determination regarding whether evasion has occurred. Here, Customs did not shift the burden onto Skyview by requiring Skyview to "disprove" the allegations. Rather, after reviewing all the evidence offered by the parties and making numerous attempts to build a more complete record by soliciting additional, missing information from Skyview, Customs found that substantial evidence supported the evasion allegations. *See* Final Determination, J.A. at 81,617, ECF No. 33 (stating that the general shipping patterns of covered merchandise between China,

Malaysia, and the United States; the specific shipping data from Rowenda Kitchen; and the affidavits are "applicable in CBP's final determination with regard to whether substantial evidence exists of evasion by the Importers.").

Regarding Plaintiff's claim that Customs was required but failed to perform a verification of the evidence it provided, the Court agrees with the Government's interpretation of Customs' duty. As discussed above, under 19 C.F.R. § 165.25(a), "CBP *may in its discretion* verify information in the United States or foreign countries collected under § 165.23 as is necessary to make its determination" (emphasis added); but where the agency has determined that the evidence is not credible or is otherwise lacking, it is not required to conduct verification. In this case, the agency stated in the Final Determination that there was "no need to consider verification of the information" because it had already determined that the submissions were "unreliable and therefore, not probative." Final Determination, J.A. at 81,625, ECF No. 33. Specifically, the agency explained that "the onus is on Skyview, as the importer, to investigate and know the full production chain of its imports and to provide CBP with accurate information." Admin. Rev. at 13, J.A. at 3,083, ECF No. 32. Having failed to provide such information, the agency reasonably determined that there was nothing to verify. *Id.* Customs' decision not to verify did not have the effect of shifting any evidentiary burdens. The substantial evidence standard continued to govern. *See id.* at 9 (explaining that the final affirmative determination was supported by the absence of a "dispute as to whether the WCV are in scope merchandise, if of Chinese origin" and that "CBP found, based upon direct and circumstantial evidence in the administrative record, that neither Rowenda nor any company in Malaysia had the capacity to produce the WCV.").

VII. Due Process

Skyview raises a constitutional challenge under the Due Process Clause to the procedures Customs employed in this investigation. Plaintiff takes issue with Customs' reliance on photographs and videos[1] of the alleged manufacturer's facility while redacting them from its view as "business confidential." Pl.'s Br. at 33–34, ECF No. 30. Without having access to those photos and videos before filing suit at the Court of International Trade, Skyview claims that "CBP deprived

[1] Although the Court will analyze Skyview's claims regarding the photos and videos, Skyview has likely forfeited its claim regarding the videos. It did not raise any constitutional claim regarding the video evidence before the agency and made but a bare mention of the videos in the due process section of its brief to the Court. *Compare* Oral Arg. Tr. at 73:10–13 (pointing to the bottom two sentences on page 33 of Skyview's opening brief), *with* Pl.'s Br. at 33 ("It is worth noting that videos in the Administrative Record also differ from the investigator's depiction of the manufacturing location.").

Skyview of the opportunity to review, evaluate, and comment on business confidential data and, consequently, a fair opportunity to defend itself." *Id.* at 34. In its brief, the Government argues that Customs met its requirement to provide the plaintiff with "notice and a meaningful opportunity to be heard" but "that right does not entitle an importer to all information upon which CBP makes its determination." Def.'s Resp. Br. at 24, ECF No. 25. The Government points to 19 C.F.R. § 165.4 and the accompanying notes, which outline how such materials are to be treated throughout the course of an EAPA investigation. *Id.* at 25. That provision, according to the Government, describes a balance of interests whereby the confidentiality of the submitting party is protected while the party against whom the documents are being used is given access to a public version of the materials, including summaries of the "confidential" information. *Id.* The Government contends that Customs properly executed this balance because "Skyview was on notice as to what information CBP would require for its investigation, and the type of evidence it was reviewing, and thus had plenty of opportunity to submit its own evidence." *Id.* at 26.

Due process guarantees parties a "right to notice and a meaningful opportunity to be heard." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (quoting *LaChance v. Erikson*, 522 U.S. 262, 266 (1998)). As the Supreme Court has instructed, "the due process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937) and *United States v. Abilene & S.R. Co.*, 265 U.S. 274 (1924)). Thus, one way to substantiate a claim that an agency has violated a party's due process rights is to demonstrate that agency action has inhibited a party's ability to present its case or to respond to evidence being used against it. In the narrow confines of Plaintiff's specific claims in this case, it has failed to make such a showing.

Customs provided summaries of the confidential evidence. Although Customs redacted the photos and videos as confidential business information, the narrative form of the allegations describes their content with enough specificity that Plaintiff was put on notice and able to offer counterevidence. MasterBrand Allegation at 1011, J.A. at 1,163–164, ECF No. 32; Notice of Initiation at 2–4, J.A. at 1,423–424, ECF No. 32. Plaintiff does not dispute that it was aware that the question of whether any manufacturing occurred in Malaysia was the key question before Customs. Oral Arg. Tr. at 65:7–18 (asking Sky-

view's counsel whether lack of information on the contents of the photos and video prevented Skyview's agent from making photos and videos of its own and hearing no dispute); *see also* Final Determination, J.A. at 81,625 n.67, ECF No. 33 (discussing Skyview's failure to provide any evidence of manufacturing in Malaysia). In the unique context of photos and videos, nothing Customs did prevented Skyview from submitting photos and videos of any facility in Malaysia that Plaintiff claimed manufactured the merchandise in question. Skyview was free to begin outside the alleged manufacturing facility and create a video walkthrough demonstrating actual manufacturing of wooden cabinets and vanities. Such evidence would have refuted MasterBrand's claims of transshipment. Indeed, Skyview claims to have sent a person to Malaysia for this purpose. Oral Arg. Tr. at 51:9–16, ECF No. 40. Yet, despite taking advantage of the ability to procure such evidence, the unidentified agent who allegedly traveled to Malaysia on Skyview's behalf provided no photos, videos, or other evidence to demonstrate what he observed at the facility. *Id.* at 52:3–25–53:1–13. The only photos that Skyview did submit of the Malaysian facility were piecemeal and apparently originated from the otherwise unresponsive party, Rowenda Kitchen. *Id.* at 51:21–25. Having had adequate notice of what type of evidence was necessary to refute the claims MasterBrand made, Skyview sought to procure such evidence and came up short. Due process requires notice and an opportunity to be heard by providing evidence at a meaningful point in the proceedings. *See PSC VSMPO-Avisma Corp.*, 688 F.3d at 761–62 (finding that, where a party was aware of the evidence that might be used against it and had "the opportunity to put forth evidence" to support an alternative conclusion, there is no due process violation). Plaintiff received that opportunity, and its as-applied due process challenge regarding photographic and video evidence must therefore fail.

VIII. Hearsay

Finally, Skyview argues that evidence provided by a third-party investigator, paid by MasterBrand, constituted unlawful hearsay and thus should not have been considered by Customs in making its determination. Pl.'s Br. at 34–37, ECF No. 30; Pl.'s Reply Br. at 11–12, ECF No. 31. Citing the Administrative Procedure Act and Federal Circuit precedent, the Government argues that hearsay evidence is admissible where it is relevant and credible. Def.'s Resp. Br. at 28, ECF No. 25. In this case, the Government argues that "the affidavits are not irrelevant, immaterial, or unduly repetitious, and Skyview has presented no evidence calling into question the truthfulness,

reasonableness, and credibility of the affiants." *Id.* at 29. Therefore, the Government urges the Court to affirm Customs' inclusion of the third party's affidavits. *Id.*

For better or worse, the Federal Rules of Evidence do not govern administrative adjudications. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement "a party offers in evidence to prove the truth of the matter asserted in the statement"). It is long established that agencies may consider hearsay and that it "may be treated as substantial evidence, even without corroboration if, to a reasonable mind, the circumstances are such as to lend it credence." *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1538 (Fed. Cir. 1984); *see also Richardson v. Perales*, 402 U.S. 389, 407–08 (1971) (clarifying that hearsay evidence is not prohibited in administrative proceedings if it is reliable and probative). Plaintiff's reason for attacking the credibility of the hearsay statements is that they are "biased towards, prejudice[d] against, and [are] adverse to Skyview based on MasterBrand's employment of the services" — in other words, that the investigator was on MasterBrand's payroll. Pl.'s Br. at 36, ECF No. 30. Customs noted that the allegations made in the investigator's report were corroborated by "foreign market research . . . conducted by disinterested entities, including U.S. government agencies, not parties to the case[.]" Admin Rev. at 14, J.A. at 3,084, ECF No. 32. Therefore, Customs found "no reason to conclude that this information is biased or irrelevant[.]" *Id.* Because admission of hearsay evidence is permitted in administrative proceedings and Customs adequately explained why it considered the challenged evidence credible, substantial evidence supports its determination.

CONCLUSION

Skyview has raised several procedural claims against Customs' evasion determination in addition to questioning its evidentiary basis. All of Skyview's objections fail. The Court therefore **SUSTAINS** Customs' Final Determination of evasion in EAPA case number 7553 and **SUSTAINS** the January 28, 2022 decision in Administrative Review number H321677.

Dated: June 20, 2023
New York, New York

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

Slip Op. 23–92

SEA SHEPHERD NEW ZEALAND and SEA SHEPHERD CONSERVATION SOCIETY, Plaintiffs, v. UNITED STATES, GINA M. RAIMONDO, in her official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, a United States government agency, JANET COIT, in her official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, a United States government agency, JANET YELLEN, in her official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, a United States government agency, ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a United States government agency,[1] Defendants, and NEW ZEALAND GOVERNMENT, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 20–00112

[The court denies Defendants' Partial Motion to Dismiss.]

Dated: June 21, 2023

Lia Comerford, and *Kevin Cassidy*, Earthrise Law Center at Lewis & Clark Law, of Portland, OR and Norwell, MA, for Plaintiffs Sea Shepherd New Zealand and Sea Shepherd Conservation Society.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants United States, Gina M. Raimondo, United States Department of Commerce, National Marine Fisheries Service, Janet Yellen, United States Department of the Treasury, Alejandro Mayorkas, and United States Department of Homeland Security. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Jason S. Forman*, Office of the General Counsel, National Oceanic and Atmospheric Administration, of Silver Spring, MD.

Warren E. Connelly, *Robert G. Gosselink* and *Kenneth N. Hammer*, Trade Pacific PLLC, of Washington, D.C., for Defendant-Intervenor New Zealand Government.

OPINION

Katzmann, Judge:

Earlier this month, the world observed World Ocean Day, an international day, recognized by the United Nations, dedicated to

[1] Per CIT Rule 25(d), named officials have been substituted to reflect the current office-holders.

"unit[ing] and rall[ying] . . . to protect and restore our blue planet."[2] Relatedly, the court today returns to the precarious state of the Māui dolphin — the world's smallest dolphin, found only in the waters around New Zealand — of which an estimated forty-eight to sixty-four individuals remain.[3] Since May 2020, Plaintiffs Sea Shepherd New Zealand Ltd. and Sea Shepherd Conservation Society[4] have pursued a line of litigation before this court based on the fundamental claim that as a result of incidental capture — also referred to as "bycatch" — in gillnet and trawl fisheries within their range, the Māui dolphin population is declining such that a ban on imports of fish and fish products from New Zealand is required by the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq*. That statute — the MMPA — aims to protect marine mammals by setting forth standards applicable to both domestic commercial fisheries and to foreign fisheries, like those in New Zealand, that wish to export their products to the United States.[5]

In November 2022, after dismissing the first count of Plaintiffs' Complaint, this court — upon evaluation of the factors that govern a request for injunctive relief — granted Plaintiffs a preliminary injunction to preserve the status quo of their remaining second and third counts pending final adjudication. That preliminary injunction ordered the immediate ban on imports into the United States of fish and fish products deriving from nine species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries, unless

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[2] *About*, World Ocean Day, www[.]worldoceanday[.]org/about/ (last visited June 15, 2023). "World Ocean Day" was officially recognized by the United Nations in 2008 and is celebrated annually on June 8. *Mission and History*, World Ocean Day, www[.]worldoceanday[.]org/about/mission-and-history/ (last visited June 15, 2023). [Please note, in order to disable links to outside websites, the court has removed the "http" designations and bracketed the periods within all hyperlinks. For archived copies of the webpages cited in this opinion, please consult the docket.]

[3] *See Facts About Hector's & Māui Dolphin*, Dep't of Conservation, www[.]doc[.]govt[.]nz/nature/native-animals/marine-mammals/dolphins/maui-dolphin/facts/ (last visited June 15, 2023).

[4] Sea Shepherd New Zealand Ltd. is a registered New Zealand charity whose purpose is to protect and preserve New Zealand's ocean environment, *see* First Suppl. Compl. ¶ 16, Nov. 24, 2020, ECF No. 46, and Sea Shepherd Conservation Society is a 501(c)(3) international nonprofit corporation incorporated in Oregon dedicated to safeguarding the biodiversity of the planet's ocean ecosystems, *see id.* ¶ 17.

[5] In proceeding under the MMPA and seeking an import ban, Plaintiffs here are building upon a legal theory first presented to this court in litigation involving Mexico's vaquita, the world's smallest porpoise on the verge of extinction. *See Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1338 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1381 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 774 F. App'x. 646 (Fed. Cir. 2019); *Nat. Res. Def. Council, Inc. v. Ross*, 44 CIT __, 456 F. Supp. 3d 1292 (2020).

affirmatively identified as having been caught with a gear type other than gillnets or trawls. The preliminary injunction remains in effect at present.

The court is now asked to consider the third count of Plaintiffs' Complaint, which alleges that the U.S. Department of Commerce ("Commerce") acted arbitrarily, capriciously, and otherwise not in accordance with law in issuing to New Zealand's West Coast North Island inshore trawl and set net fisheries findings of comparability with U.S. standards. On January 1, 2023, these "comparability findings" issued by Commerce expired on their own terms. Accordingly, Defendants — several United States agencies and officials (collectively "the United States" or "the Government") — here ask the court to dismiss as moot Plaintiffs' third claim. The Government of New Zealand — as Defendant-Intervenor — supports the United States' instant motion; while Plaintiffs oppose it on the grounds that the expiry of New Zealand's comparability findings has not mooted their attendant claim.

Because the court concludes that aspects of Plaintiffs' request for declaratory relief under their third claim remain live, the court denies Defendants' Partial Motion to Dismiss.

BACKGROUND

The court presumes familiarity with its decisions in *Sea Shepherd N.Z. v. United States*, 44 CIT __, 469 F. Supp. 3d 1330 (2020) ("*Sea Shepherd I*"), *Shepherd N.Z. v. United States*, 46 CIT __, 606 F. Supp. 3d 1286 (2022) ("*Sea Shepherd II*"), and *Shepherd N.Z. v. United States*, 47 CIT __, 611 F. Supp. 3d 1406 (2023) ("*Sea Shepherd III*"), but for ease of reference, sets out the legal and procedural background necessary to contextualize the instant motion.

I. Legal Background

A. The Marine Mammal Protection Act

Congress enacted the MMPA, 16 U.S.C. § 1361 *et seq.*, to protect marine mammal species that "are, or may be, in danger of extinction or depletion as a result of man's activities" from "diminish[ing] below their optimum sustainable population." *Id.* § 1361(1)–(2). To achieve this directive, the MMPA mandates a ban on "the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals *in excess of United States standards*." *Id.* § 1371(a)(2) (emphasis added) ("Import Provision").

The MMPA does not otherwise define the phrase "United States standards," *id.*, but the National Oceanic and Atmospheric Administration ("NOAA") — a bureau within Commerce — has defined the concept, in part, through the promulgation of agency regulations. *See* 50 C.F.R. Part 216 ("Imports Regulation"); *see also Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 81 Fed. Reg. 54390 (Dep't Com. Aug. 15, 2016).

B. NOAA's Imports Regulation

Central to the instant motion, NOAA's Imports Regulation requires foreign harvesting nations to secure "comparability findings" for their fisheries importing fish and fish products into the United States and establishes that any fish or fish product harvested in a fishery for which a "valid comparability finding" is not in effect is in excess of "U.S. standards," and thereby prohibited from import. *See* 50 C.F.R. § 216.24(h)(1)(i).[6,7] Receipt of a comparability finding signifies that NOAA has assessed a nation's fisheries to satisfy certain mandatory regulatory conditions. *See id.* § 216.24(h)(6)(iii), (h)(7) (enumerating the requirements for a comparability finding).

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[6] 50 C.F.R. § 216.24(h)(1)(i) provides in relevant part:

> [T]he importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards or caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States are prohibited. For purposes of paragraph (h) of this section, *a fish or fish product* caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals *in excess of U.S. standards is any fish or fish product* harvested in an exempt or export fishery *for which a valid comparability finding is not in effect*.

(Emphasis added).

[7] The Regulation further instructs that "[t]he prohibitions of paragraph (h)(1) . . . shall not apply during the exemption period," *id.* § 216.24(h)(2)(ii), which is the one-time, now seven-year period that commenced on January 1, 2017, *id.* § 216.3; *see also Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 87 Fed. Reg. 63955, 63955 (Dep't Com. Oct. 21, 2022) ("*Deadline Modification*"). But "nothing prevents a nation from . . . seeking a comparability finding during th[is] . . . exemption period." *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act-Notification of Rejection of Petition and Issuance of Comparability Findings*, 85 Fed. Reg. 71297, 71297 (Dep't Com. Nov. 9, 2020), P.R. 1 ("*Comp. Finding Determ.*").

As established, *infra*, the Government of New Zealand requested such early comparability findings for its West Coast North Island inshore trawl and set net fisheries, which — by NOAA's own assessment — rendered such fisheries presently subject to "the *full effect* of the [Imports Regulation]." *See* Mem. from A. Cole to C. Oliver, re: Decision Memorandum for the Denial of Petition for Rulemaking and Issuance of a Comparability Finding for the Government of New Zealand's Fisheries at 2, 8 (Dep't Com. Oct. 27, 2020), P.R. 3104 (emphasis added). Accordingly, those fisheries currently require "valid comparability finding[s]" to comport with "U.S. standards" under NOAA's Imports Regulation. 50 C.F.R. § 216.24(h)(1)(i).

In the ordinary course, "a comparability finding shall remain valid for 4 years from [its] publication or for such other period as [NOAA] may specify." *Id.* § 216.24(h)(8)(iv). "To seek renewal of a comparability finding," "the harvesting nation must submit to [NOAA] the application and the [requisite] documentary evidence" "every 4 years or" "by November 30 of the year prior to the expiration date of its current comparability finding." *Id.* § 216.24(h)(8)(v).

II. Procedural Background

Contending Māui dolphins are being "caught with commercial fishing technology . . . result[ing] in . . . incidental kill[s] or . . . serious injury . . . in excess of United States standards," 16 U.S.C. § 1371(a)(2), on February 6, 2019, Plaintiffs submitted a formal petition to the Government asking it to utilize its rulemaking authority[8] to ban the import of fish and fish products originating from New Zealand fisheries in the Māui dolphin's range that employ either gillnets or trawls. *See* Sea Shepherd Legal et al., *Petition to Ban Imports of Fish and Fish Products from New Zealand* 3, 12 (2019), P.R. 1 ("February 2019 petition").[9] NOAA rejected Plaintiffs' February 2019 petition on July 10, 2019, *see Notification of the Rejection of the Petition to Ban Imports of All Fish and Fish Products from New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 84 Fed. Reg. 32853, 32854 (Dep't Com. July 10, 2019), P.R. 5426,[10] and Plaintiffs filed suit against the United States in this court on May 21, 2020, *see* Original Compl., May 21, 2020, ECF No. 5.

Meanwhile, on June 24, 2020, the Government of New Zealand announced new fishing measures to enhance protections of Māui dolphins. *See* Letter from Hon. Stuart Nash, Minister of Fisheries, re: Hector's and Māui Dolphin Threat Management Plan at 3 (July 24, 2020), P.R. 580. On the belief that these revised measures are comparable to "United States standards" under the MMPA, the New Zealand Government requested that NOAA perform comparability assessments for its "West Coast North Island inshore trawl fishery" and "West Coast North Island inshore set net fishery" pursuant to the Imports Regulation. *Id.*

In light of the New Zealand Government's request for comparability assessments, as well as in light of certain assessed differences be-

[8] Pursuant to subsection 553(e) of the Administrative Procedure Act ("APA"), which provides: "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

[9] The court notes that as a general matter, any public record ("P.R.") page numbers reflect those listed in the Supplemental Administrative Record Index, Nov. 23, 2020, ECF No. 44–2. But here, see Administrative Record Index, Nov. 23, 2020, ECF No. 44–1.

[10] Here too, see Administrative Record Index, Nov. 23, 2020, ECF No. 44–1.

tween Plaintiffs' February 2019 petition before the agency and the May 2020 complaint before this court, on August 13, 2020, this court granted the United States a remand so that the agency could address these intervening developments in the first instance. *See Sea Shepherd I*, 469 F. Supp. 3d at 1337–38; *see also* Ct. Order Granting Defs.' Mot. for Voluntary Remand, Aug. 13, 2020, ECF No. 39. As part of this remand, Plaintiffs submitted a supplemental petition asking Commerce to "ban the import of all fish and fish products originating from fisheries [operating] in . . . the entire coastline of [New Zealand's] North Island out to the 100m depth contour, that employ either set nets or trawls." *See* Sea Shepherd Legal et al., *Supplemental Petition to Ban Imports of Fish and Fish Products from New Zealand* 5 (2020), P.R. 5.

On November 9, 2020, Commerce again declined to impose Plaintiffs' requested import ban and instead issued comparability findings to New Zealand's West Coast North Island inshore trawl and set net fisheries. *See Comp. Finding Determ.* NOAA stated that the issued comparability findings were to remain in effect through January 1, 2023, subject to revocation by the agency before that date if warranted. *Id.* at 71298.

With their petition denied for a second time, Plaintiffs filed a Supplemental Complaint with this court on November 24, 2020. *See* First Suppl. Compl. This Supplemental Complaint lodged three claims, that:

(1) NOAA unlawfully withheld or unreasonably delayed agency action in violation of section 706(1) of the APA, *see* 5 U.S.C. § 706(1), by failing to ban the import of commercial fish and products from fish caught using gillnet and trawls in excess of U.S. standards in the Māui dolpin's range;

(2) NOAA's denial of Plaintiffs' petition for emergency rulemaking was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA, *see* 5 U.S.C. § 706(2)(A); and

(3) NOAA's grant of comparability findings to the two New Zealand fisheries was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA, *see* 5 U.S.C. § 706(2)(A).

See id. ¶¶ 104–112. Concerning their third claim, Plaintiffs seek two forms of relief: that this court (1) "[h]old unlawful and set aside Defendants' comparability findings"; and (2) "[d]eclare that Defendants' issuance of comparability findings to New Zealand was

arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under APA, 5 U.S.C. § 706(2)(A)." *Id.* at 38.

Plaintiffs asked this court to preliminarily enjoin New Zealand's implicated imports, pending final resolution of the merits. *See* Pls.' Renewed Mot. for Prelim. Inj. at 1, Dec. 11, 2020, ECF No. 49 ("Pls.' Ren. PI Mot."). The United States and the Government of New Zealand opposed Plaintiffs' Motion for a Preliminary Injunction, *see* U.S. Gov't Resp. in Opp. to Pls.' Renewed Mot. for Prelim. Inj., Jan. 15, 2021, ECF No. 57 ("Defs.' Resp. in Opp. to PI"); N.Z. Gov't Resp. in Opp. to Pls.' Renewed Mot. for Prelim. Inj., Jan. 15, 2021, ECF No. 55 ("Def.-Inter.'s Resp. Br."), and moved to dismiss for lack of subject matter jurisdiction Plaintiffs' first claim of agency action unlawfully withheld, *see* U.S. Gov't Mot. to Dismiss Count I of Suppl. Compl., Jan. 27, 2021, ECF No. 58 ("Defs.' Mot. to Dismiss Count I"); N.Z. Gov't Mot. to Dismiss Count I of Suppl. Compl., Jan. 15, 2021, ECF No. 56 ("Def-Inter.'s Mot. to Dismiss Count I").

After oral argument on the parties' respective motions and while the court was deliberating, the Government of New Zealand submitted on November 30, 2021, an application to NOAA — pursuant to 50 C.F.R. § 216.24(h)(8)(v) — to secure comparability findings for its fisheries for the period following January 1, 2023. *See* Joint Status Report in Resp. to Ct.'s Order, Jan. 7, 2022, ECF No. 90 ("Joint Status Report"). Although NOAA originally anticipated issuing new comparability findings — to cover the period following January 1, 2023 — to New Zealand's fisheries by November 30, 2022, *see* Joint Status Report, Oct. 27, 2022, ECF No. 102, on November 4, 2022, the United States informed the court that NOAA would no longer be able to meet this deadline, *see* U.S. Gov't Resp. to Ct.'s Oct. 28, 2022, Suppl. Qs. at 1–2, Nov. 4, 2022, ECF No. 105.

Correspondingly, NOAA extended the deadline from December 31, 2022, to December 31, 2023, for foreign harvesting nations to secure comparability findings for their fisheries, *see Deadline Modification*, 87 Fed. Reg. at 63955, and moved before this court for a second voluntary remand so that the agency could conform the expiration of New Zealand's comparability findings with conclusion of the exemption period for all other foreign fisheries on December 31, 2023, *see* U.S. Gov't Partial Consent Mot. to Remand at 1, Nov. 8, 2022, ECF No. 106 ("Defs.' Second Remand Mot."). Plaintiffs opposed this motion. *See* Pls.' Opp. Br. to Defs.' Mot. for Voluntary Remand, Nov. 23, 2022, ECF No. 107.

Because the court determined that it would benefit from oral argument on the Government's Second Remand Motion, and because the United States submitted that said motion need "not delay a final

decision on the [parties' other] pending motions," Defs.' Second Remand Mot. at 6, the court resolved to: (1) grant Defendants' Motion to Dismiss Plaintiffs' First Claim; and (2) grant Plaintiffs a preliminary injunction on their remaining second and third claims, without reaching Defendants' Second Remand Motion. *See Sea Shepherd II*, 606 F. Supp. 3d at 1332; Further Order on Pls.' Mot. for Prelim. Inj., Nov. 28, 2022, ECF No. 109. After determining that each of the factors that govern a court's grant of injunctive relief[11] weighed in favor of Plaintiffs, on November 28, 2022, the court issued a preliminary injunction that ordered the immediate ban on imports into the United States of fish and fish products deriving from nine species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. *Id.*[12]

Concluding that "[t]he preliminary injunction ha[d] overtaken events and supersede[d] the soon to expire comparability findings," the United States withdrew its Second Remand Motion on December 2, 2022. *See* Defs.' Notice of Withdrawal of Partial Consent Mot. to Remand Case at 1–2, Dec. 2, 2022, ECF No. 112. In so withdrawing, the United States submitted that "the expiration of [New Zealand's] comparability findings on January 1, 2023, [would] have no impact on the import ban . . . in place pursuant to the preliminary injunction." *Id.*

On January 1, 2023, the comparability findings issued to New Zealand's West Coast North Island inshore trawl and set net fisheries expired on their terms.

The Government of New Zealand filed its Answer to Plaintiffs' Supplemental Complaint on January 6, 2023. *See* N.Z. Gov't Answer to First Suppl. Compl., Jan. 6, 2023, ECF No. 128. In light of the expiration of New Zealand's comparability findings, and before filing

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[11] Namely:

> (1) whether the moving party is likely to prevail on the merits of the claims; (2) whether the moving party is likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equities; and (4) whether a preliminary injunction is in the public interest.

Sea Shepherd II, 606 F. Supp. 3d at 1310 (quoting *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018)).

[12] On January 9, 2023, this court denied a motion from the Government of New Zealand seeking to delay the effective date of the preliminary injunction. *See* Mot. of N.Z. Gov't for Temp. Stay of Effective Date of Ct.'s Prelim. Inj., Dec. 6, 2022, ECF No. 115 ("Def.-Inter.'s Mot. to Modify PI"); *see also Sea Shepherd III*, 611 F. Supp. 3d at 1410. As such, the preliminary injunction — as articulated in *Sea Shepherd II* and the Court's Further Order — is presently in effect.

an answer,[13] the United States filed on February 2, 2023, the instant motion to dismiss as moot the third claim of Plaintiffs' Supplemental Complaint, which asks this court to set aside and declare unlawful the now-expired comparability findings. *See* U.S. Gov't's Partial Mot. to Dismiss Count III of Pls.' Suppl. Am. Compl. at 1, Feb. 2, 2023, ECF No. 132 ("Defs.' Mot."). While the Government of New Zealand supports the instant motion, *see* Resp. of Gov't of N.Z. to Defs.' Mot. to Dismiss Count III at 2, Mar. 3, 2023, ECF No. 133, Plaintiffs oppose it on the grounds that the expiry of New Zealand's comparability findings has not mooted their attendant claim, *see* Pls.' Resp. in Opp. to Defs.' Partial Mot. to Dismiss Count III at 3, Mar. 9, 2023, ECF No. 134 ("Pls.' Resp."). With the United States' Reply in hand, *see* Defs.' Reply in Supp. of Partial Mot. to Dismiss Count III of Pls.' Suppl. Am. Compl., Mar. 29, 2023, ECF No. 135 ("Defs.' Reply"), the court proceeds to resolve the instant motion on the papers.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(C).[14]

"Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions' . . . ." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). A court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). This "case-or-controversy requirement subsists through all stages of federal judicial proceedings," such that an issue becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (first quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); then quoting *Knox v. Serv. Emp.*, 567 U.S. 298, 307 (2012)).

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[13] *See* USCIT R. 12(a)(2). *See generally* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346 (3d ed. 2022) (collecting cases illuminating the majority view that filing a partial motion to dismiss stays the time for filing an answer as to other portions of the pleading).

[14] That provision endows the court with exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety," *id.* § 1581(i)(1)(C), such as that provided for under the MMPA's Import Provision, 16 U.S.C. § 1371(a)(2).

Although the party alleging jurisdiction typically bears the burden of proving it, *see, e.g.*, *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936), "[t]he party arguing that a case has become moot 'bears the burden of coming forward with the subsequent events that have produced that alleged result,'" *Mitchco Int'l., Inc. v. United States*, 26 F.4th 1373 (Fed. Cir. 2022) (quoting *Hyosung TNS Inc. v. Int'l Trade Comm'n*, 926 F.3d 1353, 1357 (Fed. Cir. 2019)). Mootness "problems often require a highly individualistic, and usually intuitive, appraisal of the facts of each case." Wright & Miller, *supra* note 13, § 3533. "[E]ven the availability of a partial remedy is sufficient to prevent [a] case from being moot." *Chafin*, 568 U.S. at 177 (second alteration in original) (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam)).

DISCUSSION

As has been noted, count three of Plaintiffs' Supplemental Complaint asks this court: (1) to "[h]old unlawful and set aside" the comparability findings that NOAA issued to New Zealand's West Coast North Island inshore trawl and set net fisheries; and (2) to "[d]eclare that [NOAA's] issuance of [said] comparability findings to New Zealand was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under APA, 5 U.S.C. § 706(2)(A)." First Suppl. Compl. at 38. With the comparability findings expired on their own terms as of January 1, 2023, the United States now maintains that "no case or controversy remains for the Court to decide with respect to count III" of Plaintiffs' Complaint, such that the court must dismiss it as moot. Defs.' Mot. at 1. By contrast, Plaintiffs maintain that because the challenged agency decision underlying count three — namely, NOAA's grant of comparability findings to New Zealand — is "capable of repetition, yet evading review," their third claim is not moot. Pls.' Resp. at 3. Upon an "individualistic[] and . . . intuitive[] appraisal of the facts," Wright & Miller, *supra* note 13, § 3533, the court denies Defendants' motion to dismiss as moot count three of Plaintiffs' Supplemental Complaint.

Because "even the availability of a partial remedy is sufficient to prevent [an issue] from being moot," *Chafin*, 568 U.S. at 177 (quoting *Calderon*, 518 U.S. at 150), and because Plaintiffs seek both injunctive and declaratory relief under count three of their Supplemental Complaint, the court examines each form of requested relief in turn.

I. Plaintiffs' Request for Injunctive Relief Is Moot.

As an initial matter, the court concludes that Plaintiffs' request for injunctive relief is moot. This is so, because the challenged comparability findings issued to New Zealand's West Coast North Island inshore trawl and set net fisheries expired by their own terms on January 1, 2023, and — as the Government explains — "no fish or fish product can [now] ever enter the United States based" upon them. Defs.' Reply at 1. Thus, whether or not this court "hold[s] [the comparability findings] unlawful and set[s] [them] aside," they have — and will continue to have — no effect. First Suppl. Compl. at 38. Where "even a favorable decision," *Murphy v. Hunt*, 455 U.S. 478, 481–82 (1982), "could have no practical effect" for Plaintiffs, *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1329 (Fed. Cir. 2008), their request for injunctive relief is moot. *See Mitchco*, 26 F.4th at 1378 (holding "[t]here is no question that the injunctive relief [plaintiff] seeks is moot insofar as [plaintiff] seeks an order enjoining . . . performance of [a] contract [that] the [defendant] Army has already terminated").

II. Plaintiffs' Request for Declaratory Relief Is Not Moot.

However, the determination that Plaintiffs' request for injunctive relief is moot does not end the inquiry. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974) (explaining that although the termination of an economic strike "dissolved" plaintiff employers' "case for an injunction," they might "still retain sufficient interests and injury as to justify the award of declaratory relief"). Plaintiffs ask this court to "[d]eclare that [NOAA's] issuance of comparability findings to New Zealand was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under APA, 5 U.S.C. § 706(2)(A)," First Suppl. Compl. at 38, and maintain that "because NOAA's challenged decision is capable of repetition, yet evading review," their third claim "is not moot," Pls.' Resp. at 3.

This "capable of repetition, yet evading review" exception to mootness invoked by Plaintiffs "applies 'only in exceptional situations'"; namely, where (1) "'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again'" and (2) "'the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration.'" *Ebanks v. Shulkin*, 877 F.3d 1037, 1038–39 (Fed. Cir. 2017) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (alterations in original)). The court concludes that certain aspects of Plaintiffs' request for declaratory relief satisfy both requirements, such that the third count of their Supplemental Complaint is not moot.

A. Capable of Repetition

When assessing the "capable of repetition" prong, the "question is 'whether the controversy [is] *capable of repetition* and not . . . whether the claimant [has] demonstrated that a recurrence of the dispute was more probable than not.'" *NIKA Techs., Inc. v. United States*, 987 F.3d 1025, 1028 (Fed. Cir. 2021) (alterations and emphasis in original) (quoting *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988)). To show that their objections to the comparability findings are "capable of repetition," Plaintiffs submit several examples of other courts affirmatively assessing this prong in the context of expired permits. *See, e.g.*, *Montgomery Env't Coal. v. Costle*, 646 F.2d 568, 578–79 (D.C. Cir. 1980) ("[A] controversy concerning an initial permit may simply continue in the context of succeeding permits.").[15] A close reading of these cases reinforces that the "capable of repetition" prong defies absolute, a priori application, but rather "requires careful consideration of the relevant facts" of "an individual case." *Montgomery Env't Coal.*, 646 F.2d at 579.

For example, in *Montgomery Environmental Coalition* — the case this court deems most analogous to the instant one of those submitted by the parties — the D.C. Circuit considered plaintiff environmentalists' challenge to the issuance of discharge permits to certain sewage treatment plants by the Environmental Protection Agency ("EPA"). *Id.* at 572–73. In particular, plaintiffs contested the EPA's award of a permit to the "Blue Plains" plant on seven grounds:

(1) refusal to consider diversion of excess capacity to alternative treatment methods,

(2) refusal to consider a sewer hook-up moratorium,

(3) denial of the binding character of certain planning documents,

(4) failure to deem combined sewer overflow points as part of the "treatment works,"

(5) improper placement of the burden of persuasion,

(6) insufficient support in the record for deletion of the denitrification provisions, and

(7) insufficient support for annual rather than more frequent averaging in testing water quality.

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[15] The parties have not submitted, and the court has not found, an example of the Federal Circuit applying the mootness doctrine in the context of an expired permit. Accordingly, the court "look[s] to the law of . . . sister circuits for guidance." *In re EMC CORP*, 677 F.3d 1351, 1354 (Fed. Cir. 2012).

Id. at 580 n.6. Where the Blue Plains permit had expired during the course of litigation, the D.C. Circuit undertook to "separate the claims that [were] moot from those that remain[ed] live." *Id.* at 573. Parsing each individually, the court concluded that "the first four objections concern[ed] errors that [we]re liable to be repeated, but that the last three d[id] not and [we]re moot." *Id.* at 580 n.6.

Regarding "the first four objections," the D.C. Circuit held that because plaintiffs challenged a "categorical legal stance" of the agency, "[t]he fact that the original permit ha[d] expired [wa]s irrelevant." *Id.* at 580–81. More specifically, the court explained:

> The EPA has . . . adopted the flat position that as a matter of law it has no right to impose a sewer hook-up moratorium as a condition of granting a . . . permit, or to require diversion to alternative treatment, and it denies that it is legally bound to impose a denitrification requirement at Blue Plains. This categorical legal stance amounts to a "continuing and brooding presence, cast[ing] what may well be a substantial adverse effect on the interests of the petitioning parties."

Id. (last alteration in original) (quoting *Super Tire Eng'g Co.*, 416 U.S. at 122). Determining that it was "highly reasonable . . . that petitioners w[ould] be subjected to the same action again," the D.C. Circuit held that plaintiffs' first four objections were not moot.

By contrast, regarding "the last three" objections, the D.C. Circuit "conclude[d] that these issues" — which hinged on allegations that the EPA awarded the Blue Plains permit based on insufficient evidence, consideration of impermissible factors, and arbitrary deviations from past practice — "d[id] not present a reasonable expectation of repetition, and so [we]re moot." *Id.* at 583. In so deciding, the D.C. Circuit explained, in part,[16] that:

> All that remains is the question of sufficiency of the evidence, whether the [EPA's] weighing of the factual evidence pertaining to a now-expired permit was defensible. The new permit[']s . . . adjudicatory hearing will develop an entirely new factual record. There have been further studies, and there will be new testimony. No purpose would be served in our reviewing the stale record of the earlier [permit].

[16] The court notes that the following excerpt is specific to the D.C. Circuit's consideration of plaintiffs' sixth objection; however, this court assesses that the reasoning is broadly representative of the D.C. Circuit's treatment of "the last three" objections.

Id. at 584. Accordingly, "the last three" objections were "stated in a form that [wa]s not capable of repetition, and [were] therefore moot." *Id.* at 580 n.6, 584.

Informed by the persuasive model of *Montgomery Environmental Coalition*, the court concludes that at least one of Sea Shepherd's objections allege "errors that are liable to be repeated," even if the majority do not. *Id.* at 580 n.6. In Plaintiffs' own words:

> Plaintiffs challenge the comparability findings as arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the MMPA, 16 U.S.C. § 1371(a)(2), within the meaning of APA section 706(2)(A) for the following reasons:
>
> [1] New Zealand's fisheries continue to kill and injure Māui dolphins in excess of U.S. standards;
>
> [2] NOAA failed to exercise independent judgment in issuing the comparability determination;
>
> [3] in response to [New Zealand's] submission of insufficient evidence in support of its application for a comparability finding, NOAA failed to draw reasonable conclusions about the fisheries at issue; and
>
> [4] NOAA failed to undertake the mandatory considerations outlined in its regulations at 50 C.F.R. § 216.24(h)(7).

Pls.' Resp. to Ct.'s Apr. 11, 2022, Suppl. Qs. at 19, May 2, 2022, ECF No. 97 ("Pls.' Suppl. Qs. Resp.") (numbering and formatting added); *see also* First Suppl. Compl. ¶ 111 (substantively similar).

To start, the court determines that Sea Shepherd's first, second, and third objections are "stated in a form that is not capable of repetition, and [are] therefore moot." *Montgomery Env't Coal.*, 646 F.2d at 584.

This is so, because Sea Shepherd's first and third objections — that New Zealand is indeed killing/injuring Māui dolphins in excess of U.S. standards and has failed to substantiate its representations to the contrary — appear merely to "question [the] sufficiency of the evidence." *Id.* at 584. Just as the D.C. Circuit in *Montgomery Environmental Coalition* deemed it important that the EPA would award "new permits" on the basis of an "adjudicatory hearing [that] w[ould] develop an entirely new factual record," *id.*, so too here, NOAA will award new comparability findings on the basis of notice and comment rulemaking addressing "successive application[s] . . . based on different facts than the preceding applications," Defs.' Reply at 2. As the Government notes, such subsequent applications might "reflect[]

changes to marine mammal populations, commercial fishing technology, regulations of the United States, and the exporting country's regulations" as well as new scientific studies. *Id*. Because the court agrees with the D.C. Circuit's view that "[n]o purpose would be served in . . . reviewing the stale record of [an] earlier" comparability finding, Sea Shepherd's first and third objections are "stated in a form that is not capable of repetition, and [are] therefore moot." *Montgomery Env't Coal.*, 646 F.2d at 584.

Sea Shepherd's second objection — that NOAA failed to exercise independent judgment in issuing the comparability determinations — presents a more nuanced question, but is ultimately also moot. At base, this objection appears to allege that NOAA's "issuance of the comparability finding[s] was . . . biased." Pls.' Ren. PI Mot. at 35. Federal Circuit caselaw is instructive in this regard. For example, in *Galen Medical Associates, Inc. v. United States*, a disappointed bidder challenged the Veterans Affairs ("VA")'s award of a contract to another supplier, alleging bias and wrongful award of contract. 369 F.3d 1324, 1327 (Fed. Cir. 2004). Where the VA had already elected to redo the selection process but continued to award the contract to the originally selected supplier, the Federal Circuit had to decide whether "complaints based on *pre-corrective action events* [we]re moot." *Id.* at 1333 (emphasis added). The court held that where such complaints were "charged as a specific violation of a code or statute," they were moot; but where such complaints were "relevant in order to establish a possible pattern of bias," they were not. *Id.*

As in *Galen Medical*, Plaintiffs here allege "a possible pattern of bias." *Id.*; *see also* Defs.' Reply at 4 (acknowledging that "Sea Shepherd . . . accuse[s] NOAA of being a rubber stamp for whatever New Zealand submits to the agency"). However, a critical difference is that unlike in *Galen Medical* — where the VA had already awarded for a second time the contested contract to the original selectee — here, NOAA has not yet awarded any subsequent comparability findings to New Zealand. Whether, upon evaluation of New Zealand's latest application, NOAA will continue to issue comparability findings, and whether Sea Shepherd will continue to hold the view that "NOAA failed to exercise independent judgment in issuing" any such replacement findings, "depends upon a chain of hypothesized actions."

Ebanks, 877 F.3d at 1039 (deeming plaintiff's arguments "too attenuated and speculative to trigger the exception to mootness").[17]

In short, where New Zealand's one-off comparability findings expired without replacement on January 1, 2023, Sea Shepherd's second objection — that NOAA failed to exercise independent judgment in issuing the comparability determinations —asks this court to "pronounc[e] that [Commerce's] past actions which have no demonstrable continuing effect were . . . wrong." *Spencer v. Kenma*, 523 U.S. 1, 18 (1998). Because courts "are not in the business of" doing as such, *id.*, Sea Shepherd's second objection is moot.[18]

Finally, Sea Shepherd's fourth objection — that NOAA failed to undertake mandatory considerations — presents a mix of live and moot questions.

Beginning with the moot elements, Plaintiffs overarchingly state that "in their third claim, [they] are challenging NOAA's application of the Imports Rule *to the factual circumstances specific to this case* by asking the Court to determine whether NOAA's comparability findings failed to comply with the express requirements of the Rule." Pls.' Resp. to Ct.'s Qs. at 11, June 29, 2021, ECF No. 73 (emphasis added). Where the United States does not contest that the Imports Regulation enumerates mandatory conditions that NOAA must consider in awarding comparability findings to foreign fisheries, *see* 50 C.F.R. §

[17] Plaintiffs invoke excerpts of New Zealand's pending application for comparability findings that cite to New Zealand's 2020 application as evidence that "it is reasonable to expect that NOAA will . . . [merely] repeat the same or similar flawed reasoning from its decision on New Zealand's 2020 Comparability Findings." Pls.' Resp. at 4 (citing Def.-Inter.'s Mot. to Modify PI Ex. C at 1). The court is unpersuaded by this argument.

As an initial matter, the excerpts Plaintiffs cite comprise five pages of New Zealand's pending application, a document that past experience suggests could be over 100 pages in full. *Compare* Def.-Inter.'s Mot. to Modify PI Ex. C at 1–4, i (five-page excerpt of New Zealand's pending comparability finding application), *with* Supplemental Administrative Record at 94–233, Nov. 23, 2020, ECF No. 44–9 (New Zealand's 140-page 2020 application). Where New Zealand's full, pending application is not on the record, the court cannot speculate as to the degree of overlap with New Zealand's prior application.

But even assuming arguendo a high degree of overlap in New Zealand's submissions, the court remains unpersuaded that Sea Shepherd's second objection is stated in a form that is capable of repetition. As noted, NOAA will conduct a fresh round of notice and comment rulemaking on whether to award new comparability findings to New Zealand, and the court cannot predict what impact any such attendant submissions might have on NOAA's determinations. Moreover, the agency's future decision making will likely be informed by this court's prior review of NOAA's deliberative processes to date. *See, e.g.*, *Sea Shepherd II*, 606 F.Supp. 3d at 1310–23. Accordingly, because Sea Shepherd's argument "that NOAA will . . . [simply] repeat the same or similar flawed reasoning from its decision on New Zealand's 2020 Comparability Findings," Pls.' Resp. at 4, depends on "many contingencies," Plaintiffs "ha[ve] not shown a sufficiently reasonable expectation that [they] will again be subjected to the same action," *Ebanks*, 877 F.3d at 1039.

[18] Of course, such a conclusion does not preclude — in the event that NOAA does subsequently issue additional comparability findings to New Zealand — Plaintiffs' invocation of the now-expired comparability findings to reallege "a possible pattern of bias." The court expresses no view on such contingent matters, except to note that in the absence of legally effective, replacement comparability findings, any such arguments are premature.

216.24(h)(6)(iii), (h)(7); *see also* U.S. Gov't Resp. to Ct.'s Qs. at 6, June 29, 2021, ECF No. 71 (maintaining "NOAA evaluated [New Zealand's] Comparability Finding application in accordance with . . . 50 C.F.R. §§ 216.24(h)(6) and (7) as [it] does for all Comparability Finding applications"), Plaintiffs' fourth objection largely amounts to a challenge to NOAA's *particular* application of the regulatory criteria to the *particular* administrative record underlying the now-expired comparability findings. Here too, because NOAA will award future comparability findings on the basis of new notice and comment rulemaking addressing new applications, *supra*, any such objections to the agency's "weighing of the factual evidence pertaining to a now-expired permit" are "stated in a form that is not capable of repetition, and [are] therefore moot," *Montgomery Env't Coal.*, 646 F.2d at 584.

All that said, aspects of Plaintiffs' challenge under the fourth objection are of a different quality, and thus remain live. Specifically, parties disagree as to the meaning of certain criteria under 50 C.F.R. § 216.24(h)(6)(iii) and (h)(7). For example, Plaintiffs argue that Defendants' interpretive position that the Imports Regulation does not require consideration of historical rates of marine mammal population decline in awarding comparability findings[19] contravenes the Imports Regulation's express terms. Plaintiffs maintain:

> The Imports Rule states that the deciding official "shall" consider the "extent to which the harvesting nation has successfully implemented measures . . . to reduce incidental mortality and serious injury of each marine mammal stock below the bycatch limit." 50 C.F.R. § 216.24(h)(7)(ii). The Rule also states that, where relevant, the decisionmaker should consider the population trend and "the history and nature of interactions with marine mammals in th[e] export fishery." *Id.* § 216.24(h)(7)(iv). These factors necessarily require Federal Defendants to consider the historical rate of decline.

See Pls.' Combined Reply Br. in Supp. of Renewed Mot. for Prelim. Inj. and Resp. Br. in Opp. to Fed. Defs.' and Def.-Inter.'s Mots. to Dismiss at 31, Feb. 17, 2021, ECF No. 64. Unlike Plaintiffs' other objections, this interpretation-based argument challenges a "categorical legal stance" of Defendants. *Montgomery Env't Coal.*, 646 F.2d at 584. Where New Zealand has already applied to NOAA for replacement comparability findings, *see* Joint Status Report at 1–2, the court determines that it is reasonably likely the agency will continue to

[19] *See, e.g.*, Defs.' Resp. in Opp. to PI at 38 (maintaining "[t]he historical rate of decline of the Māui dolphin population has no role in the calculation of [Potential Biological Removal] and is of little or no consequence when making comparability findings").

adhere to its contested legal interpretation in reviewing these successive applications. Thus, in this regard, Plaintiffs have lodged under their fourth objection a challenge that is "capable of repetition."

Having concluded that count three of Plaintiffs' Supplemental Complaint alleges *at least some* "errors that are liable to be repeated," *id.* at 580 n.6, the court next considers whether the comparability findings are "too short to be fully litigated prior to [their] expiration,'" *Ebanks*, 877 F.3d at 1038–39 (quoting *Kingdomware Techs., Inc.*, 579 U.S. at 170).

B. Evading Review

By "evading review," "the Supreme Court has meant evading Supreme Court review," *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 369–70 (D.C. Cir. 1992) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976)), and has previously held that, at least in some scenarios, "a period of two years is too short to complete judicial review," *Kingdomware Techs., Inc.*, 579 U.S. at 170.

New Zealand's now-expired comparability findings were in place for just over two years. *See Comp. Finding Determ.* at 71297 ("These comparability findings are valid for the period of November 6, 2020, through January 1, 2023, unless revoked."). While NOAA's Imports Regulation suggests that comparability findings issued in the ordinary course "shall remain valid for 4 years," 50 C.F.R. § 216.24(h)(8)(iv), the court assesses that even four years is "in its duration too short" for "full[] litigat[ion] prior to [their] expiration.'" *Ebanks*, 877 F.3d at 1038–39 (quoting *Kingdomware Techs., Inc.*, 579 U.S. at 170).

The court so concludes in light of the particular procedural history of the case at bar. Plaintiffs filed their Original Complaint in this action on May 21, 2020. *See* Original Compl. Accounting for the various substantive motions already filed and adjudicated,[20] three years have since passed and this court of first instance has not yet had occasion to pass on the merits. Where parties have previously identified twenty specific challenges to NOAA's issuance of compara-

[20] *See, e.g.*, Pls.' Mot. for a Prelim. Inj. on First Cl. for Relief, July 1, 2020, ECF No. 11; U.S. Gov't Partial Consent Mot. to Remand Case, July 17, 2020, ECF No. 17; Ct. Order Granting Defs.' Mot. for Voluntary Remand, Aug. 13, 2020, ECF No. 39; Pls.' Ren. PI Mot.; Defs.' Mot. to Dismiss Count I; Def-Inter.'s Mot. to Dismiss Count I; Pls.' Mot. for Leave to Suppl. Evid. R. on Ren. Mot. for Prelim. Inj., Sept. 13, 2021, ECF No. 81; Defs.' Second Remand Mot.; Def.-Inter.'s Mot. to Modify PI; Def.-Inter.'s Mot. to Suppl. R. in Supp. of Mot. to Modify Prelim. Inj., Dec. 13, 2022, ECF No. 121; Defs.' Mot. to Dismiss Count III.

bility findings, *see, e.g.*, Def.-Inter.'s Resp. Br. at 16–47 (rebuttal by New Zealand of twenty specific challenges to the now-expired comparability findings), an "individualistic[] and . . . intuitive[] appraisal of the facts of [this] case," Wright & Miller, *supra* note 13, § 3533, suggests that four years is too short a period for this case to reach the Federal Circuit, let alone the Supreme Court, and for judicial review to conclude.

CONCLUSION

In sum, although the expiry of New Zealand's comparability findings has mooted Plaintiffs' request for injunctive relief under the third count of their Supplemental Complaint, certain aspects of Plaintiffs' request for declaratory relief are "capable of repetition, yet evading review," and thus remain live. Because "even the availability of a 'partial remedy' is 'sufficient to prevent [an issue] from being moot,'" *Chafin*, 568 U.S. at 177 (quoting *Calderon*, 518 U.S. at 150), for the foregoing reasons, the court denies Defendants' Partial Motion to Dismiss.

It is hereby:

ORDERED that the United States' Partial Motion to Dismiss, ECF No. 132, is denied; and it is further

ORDERED that the Parties shall confer and submit to the court by no later than July 7, 2023 a proposed scheduling order for briefing on the merits in this action.

SO ORDERED.

Dated: June 21, 2023
New York, New York

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

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