U.S. Customs and Border Protection

19 CFR PART 101

CBP DEC. NO. 23–05

RIN 1651–AB44

MANAGEMENT OF CUSTOMS PORTS OF ENTRY AND CUSTOMS STATIONS

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Homeland Security clarifies that the Secretary of Homeland Security has the authority to establish, rearrange or consolidate, and discontinue Customs ports of entry and Customs stations and revises the Customs and Border Protection regulations to reflect this clarification.

DATES: This rule is effective on November 16, 2023.

FOR FURTHER INFORMATION CONTACT: Siobhan Chambers, Branch Chief, Modeling and Optimization, Office of Field Operations, Planning, Program Analysis and Evaluation, Operational and Enterprise Analytics, U.S. Customs and Border Protection, at *siobhan.m.chambers@cbp.dhs.gov* or (202) 325–3935.

SUPPLEMENTARY INFORMATION:

I. Background

U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security, operates two types of ports of entry, commonly referred to as immigration ports of entry and Customs ports of entry. Immigration ports of entry are those ports of entry used for the processing of travelers arriving by any means of travel into the United States. *See* title 8 Code of Federal Regulations (CFR) section 235.1 (8 CFR 235.1). Customs ports of entry, which include customs service ports, are those entry locations authorized to receive entries of merchandise for the collection of duties and for the enforcement of the various provisions of the customs and navigation

laws. *See* 19 CFR 101.1. In addition, CBP operates Customs stations, which are locations outside the boundaries of Customs ports of entry, but which, like Customs ports of entry, are authorized to receive entries of merchandise and enforce the various provisions of the customs and navigation laws.[1] *See* 19 CFR 101.1.

In most cases, Customs ports of entry and Customs stations exist within the same physical location as immigration ports and utilize the same CBP personnel for processing travelers and merchandise. Despite the use of the same location and personnel, there are separate regulations governing the authority to establish, rearrange, consolidate, and close the immigration and Customs ports and stations. Authority regarding management of immigration ports is addressed in title 8 of the CFR, while Customs port and Customs station authority is addressed in title 19 of the CFR. *See* 8 CFR 100.4 and 234.4; 19 CFR 101.3 and 101.4.

With regard to customs ports of entry, 19 U.S.C. 2, authorizes the President "to discontinue [customs][2] ports of entry by abolishing the same or establishing others in their stead." President Truman delegated this authority to the Secretary of the Treasury in 1951.[3] The Secretary of the Treasury then delegated this authority to the Deputy Assistant Secretary (Regulatory, Tariff, and Trade Enforcement) through the regulation in Section 101.3 of Title 19 of the CFR (19 CFR 101.3). That regulation authorizes the Assistant Secretary to "establish, rearrange or consolidate, and to discontinue customs ports of entry as the needs of the Customs Service may require." The Homeland Security Act of 2002 (the Act) transferred this authority to the Secretary of DHS.[4] See Public Law 107–22296, Section 403, 6 U.S.C. 203. Despite this transfer of authority to the Secretary of DHS, the regulation at 19 CFR 101.3 still refers to the Treasury officers.

The authority to establish, rearrange or consolidate, and to discontinue Customs stations is held by the Secretary of DHS pursuant to the Act. *See* Sec. 403, Public Law 107–296, 6 U.S.C. 203. This authority is not specifically referenced in the title 19 CFR regulations.

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[1] 19 CFR 101.3 lists both the Customs ports of entry and the Customs service ports. 19 CFR 101.4 lists the Customs stations, all of which are supervised by a Customs port of entry. The supervising port of entry for each Customs station is also listed in 19 CFR 101.4.

[2] The word "customs" added here for clarity. Although the word "customs" does not appear in this section, Title 19 of the U.S. Code specifically deals with customs duties and therefore this section relates to customs ports as defined herein.

[3] Executive Order 10289 (16 FR 9499).

[4] In 2006, the Secretary of Homeland Security issued a Delegation Order in which he delegated certain authorities to the Commissioner of CBP but specifically reserved to himself the authority to "discontinue [Customs] ports of entry by abolishing the same and establishing others in their stead." *See* DHS Delegation Order 7010.3.

Prior to the passage of the Act, the authority to manage immigration ports of entry was held by the Commissioner of the Immigration and Nationality Service (INS). The Act transferred immigration related authorities, including those related to immigration ports of entry, from the Commissioner of the INS to the Secretary of DHS. *See* title IV, Public Law 107–296, 6 U.S.C. Chapter 1. The applicable regulations, 8 CFR 100.4 and 234.4, specify that the Commissioner of CBP (the Commissioner) has the authority to manage immigration ports of entry.[5]

In this rule, DHS is clarifying that the authority to establish, rearrange or consolidate, and to discontinue Customs ports of entry and Customs stations rests with the Secretary of Homeland Security and not the Secretary of the Treasury. This rule revises the applicable regulations in title 19 of the CFR so that they are consistent with the Act.

Specifically, DHS is amending 19 CFR 101.3 to reflect that the Secretary of DHS has the authority to establish, rearrange or consolidate, and discontinue Customs ports of entry and Customs service ports. DHS is also amending this section to include a reference to "Customs service ports," which are a type of "Customs port of entry" as noted above. The specific reference to "Customs service ports" clarifies that the Secretary has the authority to establish, rearrange or consolidate, and to discontinue all Customs ports of entry, including service ports.

DHS is also amending 19 CFR 101.4 to reflect that the Secretary has the authority to establish, rearrange or consolidate, and discontinue Customs stations as operational needs may require.

II. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** and provide interested persons the opportunity to submit comments. 5 U.S.C. 553(b), (c). The APA also generally requires that substantive rules have a 30-day delayed effective date from the date of publication. *See* 5 U.S.C. 553(d). However, certain exceptions are provided.

The APA provides an exception from notice and comment procedures as well as the requirement for a 30-day delayed effective date

[5] 8 CFR 1.2 provides that after March 1, 2003, references to "Commissioner" mean the Director of U.S. Citizenship and Immigration Services, the Commissioner of U.S. Customs and Border Protection, and the Director of U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears. In the context of immigration port authority in 8 CFR 100.4 and 234.4, "Commissioner" means the Commissioner of CBP.

when the rule is a matter relating to agency management. *See* 5 U.S.C. 553(a)(2). In this rule DHS is merely updating regulations to reflect that the Secretary of DHS has the authority to establish, rearrange or consolidate, and discontinue Customs ports of entry and Customs service ports. Therefore, this is merely a matter of agency management.

Additionally, the APA provides an exception to notice and comment requirements when the rule is one of "agency organization, procedure, or practice." *See* 5 U.S.C. 553(b)(A). This exception also applies because this rule merely amends the regulations to accurately reflect the Secretary of DHS's authority regarding ports and has no effect on the public.

Based on the above considerations, this rule is exempt from the notice and comment and delayed effective date provisions of the APA pursuant to 5 U.S.C. 553(a)(2) and 5 U.S.C. 553(b)(A).

B. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation.

These regulatory changes are being made to reflect the transfer of authority to establish, rearrange and close Customs ports of entry and Customs stations from the Secretary of the Treasury to the Secretary of DHS pursuant to the Act. These changes have no effect on the public as there will be no changes to services at the ports and no economic costs or benefits. Therefore, this rule has no economic impact.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (lo-

cality with fewer than 50,000 people). Since a notice of proposed rulemaking was not necessary, a regulatory flexibility analysis is not required.

List of Subjects in 19 CFR Part 101

Harbors, Organization and functions (Government agencies), Seals and insignia, and Vessels.

For reasons set forth in the preamble, part 101 of title 19 of the Code of Federal Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

■ 1. The authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 101, et. seq.; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a. Section 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b; Section 101.5 also issued under 19 U.S.C. 1629; Section 101.9 also issued under 19
U.S.C. 1411–1414.

■ 2. Amend § 101.3 by revising paragraph (a) to read as follows:

§ 101.3 Customs service ports and ports of entry.

(a) *Designation of Customs field organization.* The Secretary of Homeland Security is authorized to establish, rearrange or consolidate, and to discontinue Customs ports of entry and Customs service ports as operational needs may require.

* * * * *

■ 3. Amend § 101.4 by revising paragraph (c) to read as follows:

§ 101.4 Entry and clearance of vessels at Customs stations.

* * * * *

(c) *Customs stations designated.*

(1) The Secretary of Homeland Security is authorized to establish, rearrange, or consolidate, and to discontinue Customs stations as operational needs may require.

(2) The Customs stations and the ports of entry having supervision thereof are listed below:

Customs station	Supervisory port of entry
Alaska	
Barrow	Fairbanks.
Dutch Harbor	Anchorage.
Eagle	Alcan.

Customs station	Supervisory port of entry
Fort Yukon	Fairbanks.
Haines	Dalton Cache.
Hyder	Ketchikan.
Kaktovik (Barter Island)	Fairbanks.
Kenai (Nikiski)	Anchorage.
Northway	Alcan.
Pelican	Juneau.
Petersburg	Wrangell.
California	
Campo	Tecate.
Otay Mesa	San Diego.
San Ysidro	San Diego.
Colorado	
Colorado Springs	Denver.
Delaware	
Lewes	Philadelphia, PA.
Florida	
Fort Pierce	West Palm Beach.
Green Cove Springs	Jacksonville.
Port St. Joe	Panama City.
Indiana	
Fort Wayne	Indianapolis.
Maine	
Bucksport	Belfast.
Coburn Gore	Jackman.
Daaquam	Jackman.
Easton	Fort Fairfield.
Estcourt	Fort Kent.
Forest City	Houlton.
Hamlin	Van Buren.
Maryland	
Salisbury	Baltimore.
Massachusetts	
Provincetown	Plymouth.
Michigan	
Alpena	Saginaw-Bay City-Flint.
Detour	Sault Ste. Marie.
Escanaba	Sault Ste. Marie.
Grand Haven	Muskegon.
Houghton	Sault Ste. Marie.
Marquette	Sault Ste. Marie.
Rogers City	Saginaw-Bay City-Flint.

Customs station	Supervisory port of entry
Minnesota	
Crane Lake	Duluth, MN-Superior, WI.
Ely	Duluth, MN-Superior, WI.
Lancaster	Noyes.
Oak Island	Warroad.
Mississippi	
Biloxi	Mobile, AL.
Montana	
Wild Horse	Great Falls.
Willow Creek	Great Falls.
New Jersey	
Atlantic City	Philadelphia-Chester, PA and Wilmington, DE.
Port Norris	Philadelphia-Chester, PA and Wilmington, DE.
Tuckerton	Philadelphia-Chester, PA and Wilmington, DE.
New York	
Cannons Corners	Champlain-Rouses Point.
Churubusco	Trout River.
New Hampshire	
Pittsburg	Beecher Falls, VT.
Monticello	Houlton, ME.
Orient	Houlton, ME.
Ste. Aurelie	Jackman, ME.
St. Pamphile	Jackman, ME.
New Mexico	
Antelope Wells (Mail: Hachita, NM).	Columbus, NM.
North Dakota	
Grand Forks	Pembina.
Minot	Pembina.
Ohio	
Akron	Cleveland.
Fairport Harbor	Ashtabula/Conneaut.
Lorain	Sandusky.
Marblehead-Lakeside	Sandusky.
Put-in-Bay	Sandusky.
Oklahoma	
Muskogee	Tulsa.
Texas	
Amistad Dam	Del Rio.
Boquillas	Presidio.

Customs station	Supervisory port of entry
Falcon Dam	Roma.
Fort Hancock	Fabens.
Los Ebanos	Rio Grande City.
Marathon	El Paso.
Vermont	
Beebe Plaine	Derby Line.
Canaan	Beecher Falls.
East Richford	Richford.
Newport	Derby Line.
North Troy	Derby Line
West Berkshire	Richford.

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ALEJANDRO N. MAYORKAS,
Secretary.

[Published in the Federal Register, November 16, 2023 (88 FR 78637)]

ANNOUNCEMENT OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM TEST CONCERNING THE ELECTRONIC ISSUANCE OF DEMANDS ON SURETY

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will conduct a National Customs Automation Program test regarding the electronic issuance of demands on surety for certain kinds of claims, the "Electronic Issuance of Demands on Surety" (EIDS) test. Test participation is limited to sureties that receive the "Notice of Penalty or Liquidated Damages Incurred and Demand for Payment" (CBP Form 5955A) for claims for liquidated damages or penalties. The EIDS test will not include any other purpose or type of claim for which the CBP Form 5955A is used, such as a demand for duties, taxes, fees, or charges other than liquidated damages or penalties.

DATES: The EIDS test will commence on December 13, 2023, and will continue indefinitely subject to any extension, modification, or termination as announced in the **Federal Register**. CBP will begin to accept requests from sureties to participate in the test on December 13, 2023, and CBP will continue to accept such requests until the EIDS test concludes. Public comments on the test are invited and may be submitted to the address set forth below at any time during the test period.

ADDRESSES: Comments and questions concerning this notice, or any aspect of the test, may be submitted at any time before or during the test period via email to Trade Remedy Law Enforcement Directorate, U.S. Customs and Border Protection, at *EIDS@cbp.dhs.gov,* with the subject line reading "Comments/Questions on EIDS Test."

FOR FURTHER INFORMATION CONTACT: For policy-related questions, contact Sandra Barbosa, Supervisory International Trade Analyst, Civil Penalties Branch, Civil Enforcement Division, Trade Remedy Law Enforcement Directorate, Office of Trade, U.S. Customs and Border Protection, at (202) 853–6026 or via email at *EIDS@cbp.dhs.gov,* with a subject line reading "Electronic Issuance of Demands on Surety Test." For technical questions related to SEACATS, please contact Daniel P. Travi, SEACATS Program Manager, Border Enforcement Management Systems, Office of Information Technology, U.S. Customs and Border Protection, at (571) 375–5707. For all other questions related to SEACATS,

please contact Stephen Haigler, Chief, SEACATS/Training Branch, Office of Field Operations, U.S. Customs and Border Protection, at (202) 316–3898 or via email at *EIDS@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. The National Customs Automation Program

The National Customs Automation Program (NCAP) was established by Subtitle B of Title VI—Customs Modernization in the North American Free Trade Agreement Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411–1414). As a result of the implementation of NCAP, the thrust of customs modernization was focused on informed trade compliance and the development of the Automated Commercial Environment (ACE), an automated and electronic system for commercial trade processing, intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while facilitating compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions, including modernization of the administrative enforcement process (which includes the assessment of penalties, liquidated damages, and seizures). CBP's modernization efforts are accomplished through phased releases of ACE component functionality, which update the system and add new functionality.

Sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414), as amended, define and list the existing and planned components of the NCAP (section 411), promulgate program goals (section 412), provide for the implementation and evaluation of the program (section 413), and provide for Remote Location Filing (section 414). Section 411(a)(2)(E) provides for an electronic penalty process as a planned component of the NCAP. Section 411(d)(2)(A) provides for the periodic review of data elements collected in order to update the standard set of data elements, as necessary. CBP has begun development of an electronic liquidated damages and penalty process, and this notice announces the first test of a feature of the new process. The electronic liquidated damages and penalty process is intended to enhance, but not necessarily replace, the current paper process.

B. Authorization for the Test

The Customs Modernization Act provides the Commissioner of CBP with the authority to conduct test programs or procedures designed to evaluate planned components of the NCAP. The test described in this notice is authorized pursuant to the Customs Modernization Act and section 101.9(b) of title 19 of the Code of Federal Regulations (19 CFR 101.9(b)), which provides for the testing of NCAP programs or procedures. As provided in 19 CFR 101.9(b), for purposes of conducting an NCAP test, the Commissioner of CBP may impose requirements different from those specified in the CBP regulations.

C. Current Penalty/Liquidated Damages Claim Issuance Procedures

Consistent with 19 CFR 162.31(a), CBP must provide written notice of any fine or penalty incurred to each party that the facts of record indicate has an interest in the claim. Pursuant to 19 CFR 172.1(a), when there is a failure to meet the conditions of any bond posted with CBP or when a violation occurs which results in assessment of a penalty that is secured by a CBP bond, CBP must notify the principal, in writing, of any liability for that penalty or liquidated damages incurred and make a demand for payment. CBP also must notify the surety on the bond of any such liability, in writing, concurrent with notice to the principal. Claims for liquidated damages and penalties, including penalties secured by bonds, are issued by the Fines, Penalties and Forfeitures (FPF) Office in the port having jurisdiction over the claim on the CBP Form 5955A.

If the principal on the bond fails to file a petition for relief, or fails to comply in the time prescribed with a decision to mitigate a penalty or to cancel a claim for liquidated damages issued with respect to a petition for relief, the FPF Office having jurisdiction over the claim will mail a demand for payment to the surety. The surety will have 60 days from the date of the demand to file a petition for relief. *See* 19 CFR 172.4.

CBP created and maintains an electronic system entitled SEACATS[1] which is internal to the federal government, and functions as a case management system, capturing the relevant information for processing and adjudication of the legal outcomes of all fines, penalties, and claims for liquidated damages, among other things. The system allows CBP officers, import specialists, entry specialists, and other designated employees to input pertinent penalty and liquidated damages claim violation data (violator name, address, legal citations,

[1] The Seized Asset and Case Tracking System (SEACATS) is the system CBP uses to track seized and forfeited property, from case initiation to final resolution. CBP has retired the full name usage, and now the acronym "SEACATS" is a standalone term for the system.

facts pertinent to the violation, etc.) for the purpose of producing a completed CBP Form 5955A for mailing. The System of Records Notice (SORN) for SEACATS was published in the **Federal Register** on December 19, 2008 (73 FR 77764). The SORN established SEACATS as the system of records for persons found violating laws and regulations enforced by the Department of Homeland Security (DHS)/CBP.

II. Description of the Electronic Issuance of Demands on Surety Test

As part of its ongoing efforts to modernize the liquidated damages and penalty process, CBP engaged in regular outreach with internal and external stakeholders, including, but not limited to, FPF Officers, sureties, and trade associations. Through this outreach, CBP determined that the issuance of the CBP Form 5955A is time consuming and may not result in timely action on liquidated damages or penalties claims by sureties. As a result of these discussions, CBP developed the Electronic Issuance of Demands on Surety (EIDS) test, which will enable CBP to test the transmission of the CBP Form 5955A to the surety electronically by email, at the time the document is mailed to the principal on the bond, for claims for liquidated damages or penalties. Participating sureties will continue to receive a paper copy of the CBP Form 5955A by mail. The EIDS test will not include any other purpose or type of claim for which the CBP Form 5955A is used, such as a demand for duties, taxes, fees, or charges other than liquidated damages or penalties.

The EIDS test is voluntary, and sureties who wish to participate must comply with all the conditions set forth below. Test participants must provide an email address to which CBP will send CBP Form 5955A notices. The email address provided will be maintained and stored in SEACATS. Participating sureties must inform CBP immediately of any changes to the email address used to receive the notices.

Participating sureties will receive a daily email from CBP. The email will contain a zip file listing up to 50 electronic notices of claims for liquidated damages or penalties secured by the receiving surety's bonds. Each zip file will be password protected, with the password being sent as a separate email, in tandem with the daily email containing the zip file. A surety could receive multiple emails in a day if the number of demands against its bonds for that day exceeds 50. Each email will indicate the total number of demands issued to the surety that day, which, if more than 50 demands are issued to a surety on a single day, could exceed the number of demands attached to an individual email. The relevant FPF Office will be copied on each

email that includes notices that fall within its jurisdiction. Participating sureties will also receive paper copies of the Form 5955A. For participating sureties, the date the email with zip file and password is sent will be the date of demand for purposes of establishing the petition response period of 60 days as required by 19 CFR 172.4.

Participation in the test will provide test participants with the opportunity to test and give feedback to CBP on the EIDS test design and scope. Participation may also enable test participants to determine whether receiving the CBP Form 5955A electronically allows them to better track and reference demands on their bonds, to communicate more effectively with their clients and CBP, and to better understand when their bonds become obligated. Consequently, participation may allow sureties to better manage and validate their bond issuance and bond obligation processes.

III. Eligibility Requirements, Application Process, and Acceptance Into the Test

CBP is opening this test to sureties that receive the CBP Form 5955A. Participating sureties must have the ability to receive zip files at the email address provided and to open zip files and PDF documents. Every surety must have a 3-digit surety code to be eligible to participate in the test.[2]

Sureties interested in participating in the EIDS test should submit an email to the Civil Enforcement Division at *EIDS@cbp.dhs.gov* stating their interest and ability to meet the eligibility criteria described in this notice. The email will serve as an electronic signature of intent to participate and must also include the email address to which the electronic notices will be sent, a point of contact name, and telephone number.

CBP may, in its discretion, decline to permit an interested surety from participating in the EIDS test, to include, for example, if CBP determines that a surety has neglected or refused to pay a valid demand made on the surety company's bond or otherwise has failed to honor an obligation on that bond or if CBP determines that any other unacceptable compliance risk exists. If CBP declines an interested surety's request to participate in the EIDS test, CBP will provide notice and an opportunity to respond, which will follow the procedures detailed below for proposed suspensions from test participation.

CBP will notify applicants by email if they are selected to participate in the test. Applicants will also be notified once CBP has verified

[2] Inquiries regarding the 3-digit surety code should be directed to the CBP Office of Finance, Revenue Division at *BondQuestions@cbp.dhs.gov.*

their ability to receive email notifications that they are permitted to participate fully in the test. Test participants will receive technical, operational, and policy guidance through all stages of test participation.

IV. Misconduct Under the Test

Misconduct under the test may include failure to abide by the rules and procedures established under this test, failure to exercise reasonable care in the execution of participant obligations, or the failure to comply with any applicable laws or regulations that have not been waived. If a test participant fails to abide by the rules, procedures, or terms and conditions of the EIDS test as provided in this notice, and all other applicable **Federal Register** notices, or fails to comply with any applicable laws and regulations, then the participant may be suspended from participating in this test. Additionally, and in accordance with the procedures below, CBP may suspend a test participant based on a determination that an unacceptable compliance risk exists.

If the Director, Civil Enforcement Division (CED), Trade Remedy Law Enforcement Directorate, Office of Trade, finds that there is a basis to suspend a participant from participating in the test, then CBP will provide a written notice, via email, proposing the suspension with a description of the facts or conduct supporting the proposal. The test participant will have the opportunity to reply to the Director's email within ten (10) business days of the date of the written notice. When responding to a proposed suspension from the test, the participant should address the facts or conduct charges contained in the notice and state how compliance has been or will be achieved.

If no timely response is received, the proposed suspension becomes the final decision of CBP as of the date that the response period expires. If a timely response is received, the Director, CED, will issue a final decision in writing, by email, on the proposed suspension within thirty (30) business days after receiving the response from the test participant, unless such time is extended for good cause. Suspension of a test participant's privileges will take place either when the proposal becomes final, if the participant fails to timely respond to the proposed suspension, or upon the final adverse decision issued by the Director after the participant has responded. The decision to suspend a surety from participation in the test may be appealed to the Executive Assistant Commissioner, Office of Trade, within fifteen (15) days of the date of CBP's final adverse decision, by submitting an email entitled, "Appeal—EIDS Suspension", to the Executive Assistant

Commissioner, CBP, at *EIDS@cbp.dhs.gov,* and attaching a copy of the decision being appealed. The surety filing the appeal must set forth its reasons for appealing the Director, CED's final decision. The Executive Assistant Commissioner's decision is not subject to further review.

V. Test Evaluation Criteria

All interested parties are invited to comment on any aspect of this test at any time. To ensure adequate feedback, participants are required to take part in evaluation of the test. CBP needs comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, to determine whether to modify, alter, expand, limit, continue, end, or implement this program. Comments should be submitted via email to *EIDS@cbp.dhs.gov,* with the subject line reading "Comments/Questions on EIDS Test."

The EIDS test is intended to evaluate the feasibility of sending via email the CBP Form 5955A to sureties. CBP will evaluate whether the test: (1) improves CBP's ability to quickly, safely and securely transmit the CBP Form 5955A to the surety; (2) enables sureties to better track claims posted against their bonds; (3) enables sureties to timely respond to claims; (4) obtains buy-in from stakeholders (including FPF Officers, sureties, and trade associations); and, (5) facilitates legal compliance with the laws, regulations, policies, and instructions enforced by CBP. At the conclusion of the test, an evaluation will be conducted to assess the efficacy of the information received throughout the course of the test. The final results of the evaluation will be published in the **Federal Register** and the *Customs Bulletin* as required by section 101.9(b)(2) of the CBP regulations (19 CFR 101.9(b)(2)).

Should the EIDS test be successful and ultimately be codified under the CBP regulations, CBP anticipates that this data would greatly enhance CBP's penalty and liquidated damages notification process, reduce risk, and improve compliance operations. CBP would also anticipate greater visibility into bond claims, which will support better decision-making during and after the case resolution process.

VI. Confidentiality

Data submitted and entered into SEACATS may include confidential commercial or financial information which may be protected under the Trade Secrets Act (18 U.S.C. 1905), the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a). The electronic notice of demand on surety will only contain that information that is currently provided on the paper CBP Form 5955A. However, as stated in previous test notices, participation in this test or

any of the previous NCAP tests is not confidential and, therefore, upon receipt of a written Freedom of Information Act request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

JOHN P. LEONARD,
Acting Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, November 13, 2023 (88 FR 77598)]

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A DECORATIVE WOOD BOX

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a decorative wooden box.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a decorative wood box under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 28, 2024.

FOR FURTHER INFORMATION CONTACT: Nicholas A. Horne, Chemical, Petroleum, Metals, and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of a decorative wood box. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N274180, dated April 21, 2016, CBP classified a decorative wood box in heading 4420, HTSUS, specifically in subheading 4420.90.4500, HTSUS, which provides for "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94: Other: Jewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics." CBP has reviewed NY N274180 and has determined the ruling letter to be in error. It is now CBP's position that decorative wooden boxes are properly classified, in heading 4420, HTSUS, specifically in subheading 4420.90.80, HTSUS, which provides for "...caskets and cases for jewelry or cutlery and similar articles, of wood. . .: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N274180 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H315828, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H315828
November 15, 2023
OT:RR:CTF:CPMMA H315828 NAH
CATEGORY: Classification
TARIFF NO: 4420.90.80

MR. DAVID PRATA
TRADE COMPLIANCE ANALYST
OHL INTERNATIONAL AT CVS HEALTH
MAIL CODE 5055
1 CVS DRIVE
WOONSOCKET, RI 02895

RE: Revocation of NY N274180; Classification of a decorative wood box from China

DEAR MR. PRATA:

This letter is in reference to New York Ruling Letter (NY) N274180, dated and issued to you on April 21, 2016, concerning the tariff classification of a decorative wood box from China. In NY N274180, U.S. Customs and Broder Protection (CBP) classified the subject merchandise in subheading 4420.90.4500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), as "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94: Other: Jewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics." We have reviewed NY N274180 and determined that the ruling is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N274180.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Vol. 57, No. 33, on September 13, 2023. No comment was received in response to this notice.

FACTS:

The subject merchandise was described in NY N274180 as follows:

> SKU number 511220 is the {7" wood box}. The item is a small decorative wooden box with slats in the shape of an open produce crate. The box measures approximately 4 inches by 6 inches by 7 inches. The box is available in two styles. The first style features a front and back panel painted with pumpkins and the second style features a front and back panel painted with apples. The two styles of decorative boxes are not used for general packing and transport of goods, but rather can be used for storage of household personal effects, and food items such as apples and other fruits, spices, etc.

ISSUE:

Whether a decorative wood box from China is classified under subheading 4420.90.45, HTSUS, as "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases and similar boxes, cases and chests, all the foregoing of wood: Other: Not lined with textile fabrics," or under subheading 4420.90.80, HTSUS, as "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Other."

LAW AND ANALYSIS:

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

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable.

The 2023 HTSUS provisions under consideration are as follows:

4420	Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94:
4420.90	Other:
	Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases and similar boxes, cases and chests, all the foregoing of wood:
	Other:
4420.90.45	Not lined with textile fabrics...
4420.90.80	Other...

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

EN 44.20 states, in pertinent part, as follows:

> The articles of this heading may be made of ordinary wood or of particle board or similar board, fibreboard, laminated wood or densified wood (see Note 3 to this Chapter).
>
> It also covers a wide variety of articles of wood (including those of wood marquetry or inlaid wood), generally of careful manufacture and good finish, such as: small articles of cabinetwork (for example, caskets and jewel cases); small furnishing goods; decorative articles. Such articles are

classified in this heading, even if fitted with mirrors, provided they remain essentially articles of the kind described in the heading. Similarly, the heading includes articles wholly or partly lined with natural or composition leather, paperboard, plastics, textile fabrics, etc., provided they are articles essentially of wood.

The heading includes:

(1) Boxes of lacquered wood (of the Chinese or Japanese type); cases and boxes of wood, for knives, cutlery, scientific apparatus, etc.; snuff-boxes and other small boxes to be carried in the pocket, in the handbag or on the person; stationery cases, etc.; needlework boxes; tobacco jars and sweetmeat boxes. However, the heading excludes ordinary kitchen spice boxes, etc. (heading 44.19).

(2) Articles of wooden furniture, other than those of Chapter 94 (see the General Explanatory Note to that Chapter. This heading therefore covers such goods as coat or hat racks, clothes brush hangers, letter trays for office use, ashtrays, pen-trays and ink stands.

* * * * *

Subheading 4420.90, HTSUS, provides for "Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; statuettes and other ornaments, of wood: wooden articles of furniture not falling within chapter 94: Other." There is no dispute at the six-digit level that the decorative wood boxes are classified therein. As such, the classification is governed by GRIs 1 and 6. Instead, the issue at hand is whether the decorative wood boxes are classified in subheading 4420.90.45, HTSUS, as "[j]ewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood," or in subheading 4420.90.80, HTSUS, as "[o]ther" than "[j]ewelry boxes, silverware chests, cigar and cigarette cases and similar boxes, cases and chests, all the foregoing of wood."

Nothing about the decorative wood box in NY N274180 makes it specifically a jewelry box, silverware chest, cigar or cigarette box, microscope case, tool or utensil case, or similar box of subheading 4420.90.45, HTSUS, or other similar boxes enumerated in the ENs. The subject decorative wood box is not specially shaped or fitted to hold jewelry; it does not, for example, have separate internal compartments or drawers to organize and protect individual articles of jewelry. Moreover, in Headquarters Ruling Letter (HQ) H304788, dated August 23, 2020, CBP noted that based on prior CBP practice, merchandise classifiable in subheading 4420.90.45, HTSUS, generally contains a lid to protect the contents of the box,[1] whereas merchandise classifiable in subheading 4420.90.80, HTSUS, generally does not have a

[1] *See, e.g.*, NY D87547, dated February 9, 1999 (classifying various wood boxes with decorated exteriors and hinged lids in subheading 4420.90.45, HTSUS); NY L80813, dated December 23, 2004 (classifying a lidded wood box suitable for small personal items in subheading 4420.90.45, HTSUS); NY R01546, dated March 3, 2005 (classifying a decorative plywood box with a hinged lid and metal clasp in subheading 4420.90.45, HTSUS); NY R01495, dated March 3, 2005 (classifying three boxes with decorated exteriors, hinged lids, and metal clasp closures in subheading 4420.90.45, HTSUS); and NY N032230, dated July 18, 2008 (classifying a mini table trunk with a lid and an iron clasp closure in subheading 4420.90.45, HTSUS).

lid.[2] The subject decorative wood boxes are generic, unlidded boxes used for storage of household personal effects, food items, spices, etc. Accordingly, they are properly classified as other than "jewelry boxes, silverware chests, . . ." in subheading 4420.90.80, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the decorative wood box from China is classified in heading 4420, HTSUS, and specifically in subheading 4420.90.80, HTSUS, which provides for "...caskets and cases for jewelry or cutlery and similar articles, of wood. . . : Other: Other." The 2023 column one, general rate of duty is 3.2 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N274180, dated April 21, 2016, is hereby revoked.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

[2] *See, e.g.,* NY N206996, dated March 30, 2012 (classifying open-top trays in subheading 4420.90.80, HTSUS); NY N224320, dated July 31, 2012 (classifying various open-topped bins and containers in subheading 4420.90.80, HTSUS); NY N276688, dated July 15, 2016 (classifying organizer trays in subheading 4420.90.80, HTSUS); NY N206996, dated March 30, 2012 (classifying an open-top tray with three compartments in subheading 4420.90.80, HTSUS); HQ H287056, dated February 25, 2020 (classifying various MDF, unlidded valet trays in subheading 4420.90.80, HTSUS); and HQ H304788, dated August 23, 2020 (classifying unlidded valet trays and unlidded, deep open boxes in subheading 4420.90.80, HTSUS).

U.S. Court of Appeals for the Federal Circuit

SOLAR ENERGY INDUSTRIES ASSOCIATION, NEXTERA ENERGY, INC., INVENERGY RENEWABLES LLC, EDF RENEWABLES, INC., Plaintiffs-Appellees v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, ACTING COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION, Defendants-Appellants

Appeal No. 2022–1392

Appeal from the United States Court of International Trade in No. 1:20-cv-03941-GSK, Judge Gary S. Katzmann.

Decided: November 13, 2023

MATTHEW R. NICELY, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, argued for plaintiffs-appellees Solar Energy Industries Association, NextEra Energy, Inc. Also represented by JULIA K. EPPARD, DEVIN S. SIKES, JAMES EDWARD TYSSE, DANIEL MARTIN WITKOWSKI.

AMANDA SHAFER BERMAN, Crowell & Moring, LLP, Washington, DC, argued for plaintiff-appellee Invenergy Renewables LLC. Also represented by JOHN BOWERS BREW, LARRY EISENSTAT, ROBERT L. LAFRANKIE; FRANCES PIERSON HADFIELD, New York, NY.

CHRISTINE STREATFEILD, Baker & McKenzie LLP, Washington, DC, for plaintiff-appellee EDF Renewables, Inc.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for all defendants-appellants. Defendants-appellants United States, United States Customs and Border Protection, Troy Miller also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY. Defendant-appellant United States also represented by MICHAEL THOMAS GAGAIN, Office of the General Counsel, Office of the United States Trade Representative, Washington, DC.

JONATHAN STOEL, Hogan Lovells US LLP, Washington, DC, for amici curiae Chamber of Commerce of the United States of America, American Clean Power Association. Also represented by MICHAEL JACOBSON, MOLLY NEWELL; KATHERINE BOOTH WELLINGTON, Boston, MA. Amicus curiae Chamber of Commerce of the United States of America also represented by TARA S. MORRISSEY, United States Chamber Litigation Center, Washington, DC.

Before LOURIE, TARANTO, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

In 2018, the President adopted certain safeguard measures to protect the domestic solar panel industry. In particular, the President issued Proclamation 9693, which imposed duties on imports of solar panels into the United States. *See Proclamation 9693: To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes*, 83 Fed. Reg.

3541 (Jan. 23, 2018). The duties of Proclamation 9693 began at 30% and were scheduled to decrease each year to 25%, 20%, and then, in their final, fourth year, 15%. *See id.* at 3548. Importers of a certain type of solar panel – called bifacial solar modules, which "consist of cells that convert sunlight into electricity on both the front and back of the cells," J.A. 4 – petitioned the United States Trade Representative ("USTR") for an exclusion, asking that bifacial solar panels not be subjected to the duties. The USTR granted the exclusion, but then quickly reversed course, with the consequence that the duties of Proclamation 9693 remained scheduled to be imposed on bifacial panels. Following litigation in the Court of International Trade ("trade court"), and additional actions by the USTR, bifacial solar panels were again excluded from the duties.

In October 2020, the President issued Proclamation 10101, "modifying" Proclamation 9693 to withdraw the exclusion of bifacial solar panels from the scheduled duties, and also to increase the fourth-year duty rate from 15% to 18%. *See Proclamation 10101: To Further Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, 85 Fed. Reg. 65639 (Oct. 16, 2020). In response to Proclamation 10101, importers of bifacial solar panels brought suit against the United States in the trade court on the grounds that the proclamation exceeded the power of the President. Their principal contention was that the statute authorizing the President to "modify" Proclamation 9693 only allowed him to make previously adopted safeguard measures more trade-liberalizing, but eliminating the exclusion of bifacial panels and raising the fourth-year duty were trade-restrictive. The suing parties further argued that even if the President had the authority to "modify" safeguards in a trade-restrictive direction, he failed to follow appropriate procedures in doing so.

The trade court agreed with the importers that the statutory authority to "modify" a safeguard is limited to trade-liberalizing changes. While the trade court rejected the importers' procedural challenges, it nonetheless set aside Proclamation 10101 for exceeding the President's authority. The government now appeals from the trade court's judgment in favor of the importers.

We conclude that the President's interpretation of the applicable statute, which allows him to "modify" an existing safeguard, is not a clear misconstruction. That is, the President's view that a "modification" may include a change in a trade-restricting direction, and is not limited to trade-liberalizing changes, is not unreasonable. We further determine that, in adopting Proclamation 10101, the President did

not commit any significant procedural violation of the Trade Act. Accordingly, we reverse the judgment of the trade court.

I

A

Section 201 of the Trade Act of 1974, codified at 19 U.S.C. § 2251, provides the President of the United States with the power to impose "safeguards" (also referred to as "safeguard measures") that protect domestic industries from serious injury caused by imports. Statutory Section 2251 broadly directs the President to "take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." 19 U.S.C. § 2251(a).

Imposition of a new safeguard is governed by 19 U.S.C.§§ 2252 and 2253, which set out a process that typically includes: (i) a petition from the domestic industry filed with the International Trade Commission ("Commission"), setting out the purposes for which the safeguard is sought, "which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition"; (ii) an investigation and determination by the Commission as to "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article"; (iii) the submission of a report by the Commission to the President, which may include a recommendation of presidential action to "address the serious injury, or threat thereof, to the domestic industry," such as the imposition of or increase in duty on the imported article or a modification or imposition of a quantitative restriction on the importation of the article into the United States; and (iv) a decision by the President "to take all appropriate and feasible action" that will provide "greater economic and social benefits than costs" and will assist domestic industry. Generally, safeguards adopted pursuant to these procedures may not be in effect for longer than four years without an additional petition from the domestic industry. *See id.* §§ 2253(e)(1)(A)-(B), 2254(c). Certain types of safeguards, including imposition of duties lasting more than one year, must be "phased down at regular intervals during the period in which the action is in effect." *Id.* § 2253(e)(5).

Once a particular safeguard is in place, Section 2254 governs efforts to change the existing measure. Section 2254(a)(1) requires, among other things, that the Commission "monitor developments with re-

spect to the domestic industry, including the progress and specific efforts made by workers and firms in the domestic industry to make a positive adjustment to import competition." *Id.* § 2254(a)(1). If a safeguard is imposed for longer than three years, the Commission must, no later than the midpoint of the period for which it is adopted, "submit a report ["Commission Report"] on the results of the monitoring . . . to the President and to the Congress" *Id.* § 2254(a)(2). After receiving the Commission Report, the President is empowered to take certain actions with respect to the safeguard, with different statutory provisions applying depending on whether the domestic industry has or has not made a positive adjustment to import competition.

Specifically, 19 U.S.C. § 2254(b), entitled "Reduction, modification, and termination of action," provides that "[a]ction taken under section 2253 of this title," i.e., a safeguard, "may be reduced, modified, or terminated by the President," after receiving the Commission Report,

> if the President . . .
>
> (A) . . . determines, on the basis that either –
>
> (i) the domestic industry has *not* made adequate efforts to make a positive adjustment to import competition, or
>
> (ii) the effectiveness of the action taken under section 2253 of this title has been impaired by changed economic circumstances,
>
> that changed circumstances warrant such *reduction, or termination*; or
>
> (B) determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such *reduction, modification, or termination* on such basis, that the domestic industry *has made* a positive adjustment to import competition.

Id. § 2254(b)(1) (emphasis added). While subparagraph (b)(1)(B) permits the President to "reduc[e], *modif[y]*, or terminat[e]" a safeguard when the domestic industry has made a positive adjustment to import competition, subparagraph A more narrowly describes the President's power as extending only to a "reduction, or termination" (and not also a "modification") of an existing safeguard where domestic industry has *not* made such an adjustment.

B

On January 23, 2018, President Trump issued Proclamation 9693, which imposed duties on imports of certain quantities of Crystalline Silicon Photovoltaic (CSPV) solar panels for a period of four years,

beginning at 30% *ad valorem* in the safeguard's first year and phasing down to 25%,20%, and 15% in the ensuing years. *Proclamation 9693*, 83 Fed. Reg. at 3548–49. Proclamation 9693 further delegated to the USTR authority to grant "exclusion of a particular product from the safeguard measure." *Id.* at 3543. Acting under this authority, in June 2019 the USTR granted an exclusion for solar panels consisting of bifacial solar cells. *See Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27684, 27685 (June 13, 2019). This exclusion had the effect of *not imposing* the new tariffs on bifacial solar panels.

However, just months later, in October 2019, the USTR withdrew the exclusion, re-imposing the duties on these same bifacial products. *See Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54244 (Oct. 9, 2019). Litigation followed. Cases (which are not directly at issue here) brought by consumers, purchasers, and importers of bifacial solar panels resulted in the October 2019 withdrawal of the exclusion never becoming effective. *See Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255 (Ct. Int'l Trade 2019). That meant that bifacial solar panels remained exempted from imposition of the new duties. Thereafter, in April 2020, the USTR again withdrew the exclusion, seeking thereby to impose the duties on bifacial products. *See Determination on the Exclusion of Bifacial Solar Panels from the Safeguard Measure on Solar Product*, 85 Fed. Reg. 21497 (Apr. 17, 2020). After more litigation, the trade court enjoined the April 2020 withdrawal. *See Invenergy Renewables LLC v. United States*, 552 F. Supp. 3d 1382 (Ct. Int'l Trade 2021); *Invenergy Renewables LLC v. United States*, 476 F. Supp. 3d 1323 (Ct. Int'l Trade 2020).

In the meantime, the Commission completed its statutorily required midpoint review of the safeguards imposed by Proclamation 9693 and, in February 2020, provided the Commission Report to the President and Congress. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Monitoring Developments in the Domestic Industry*, Inv. No. TA-201075, USITC Pub. 5021, at 2 (Feb. 2020). In March 2020, pursuant to 19 U.S.C. § 2254(a)(4) and in response to the USTR's request, the Commission additionally published a report containing its advice "regarding the probable economic effect on the domestic crystalline silicon photovoltaic (CSPV) cell and module manufacturing industry of modifying the safeguard measure on CSPV products." *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Advice on the Probable Economic Effect of Certain Modifications to the Safeguard Measure*, Inv. No. TA-

201–075, USITC Pub. 5032, at ES-1 (Mar. 2020). That report contained the Commission's determination that the "exclusion for imports of bifacial modules . . . is likely to have significant effects on prices and trade in both modules and cells," having the effect of limiting the positive impact of the safeguard adopted in Proclamation 9693. *Id.* at ES-4. In the wake of these two reports, the President, through the USTR, received a petition, consisting of three letters,[1] from representatives of a majority of the bifacial solar panel domestic industry requesting, among other things, that the President (1) withdraw the bifacial exclusion and (2) slow down the rate of reduction of the safeguard duty for the remainder of the scheduled term.

On October 16, 2020, the President issued Proclamation 10101. *See Proclamation 10101*, 85 Fed. Reg. at 65640. As pertinent here, Proclamation 10101 modified safeguards that had been implemented in Proclamation 9693, including by withdrawing the exclusion of bifacial solar panels, thereby again re-imposing the duties on these panels. Proclamation 10101 further provided that the fourth-year duty rate on CSPV modules, including bifacial solar panels, would be increased from 15% to 18%. *See* 85 Fed. Reg. at 65540–42. In particular, Proclamation 10101 provided that:

> [T]he domestic industry has begun to make positive adjustment to import competition, shown by the increases in domestic module production capacity, production, and market share. . . .
>
> [T]he exclusion of bifacial panels from application of the safeguard tariff has impaired and is likely to continue to impair the effectiveness of the action I proclaimed in Proclamation 9693 in light of the increased imports of competing products such exclusion entails, and that it is necessary to revoke that exclusion and to apply the safeguard tariff to bifacial panels; . . .
>
> [T]he exclusion of bifacial panels from application of the safeguard tariffs has impaired the effectiveness of the 4-year action I proclaimed in Proclamation 9693, and that to achieve the full remedial effect envisaged for that action, it is necessary to adjust the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent.

[1] The trade court held these "letters submitted to the Trade Representative are, taken collectively, sufficient to constitute a petition to the President." J.A. 13. Appellees do not challenge this finding on appeal.

Proclamation 10101, 85 Fed. Reg. at 65640. The appeal now before us requires us to determine whether the President had authority to make these modifications to Proclamation 9693 by adoption of Proclamation 10101.[2]

C

On December 29, 2020, Plaintiffs-Appellees – Solar Energy Industries Associates ("SEIA") as well as Nextera Energy Inc., Invenergy Renewables LLC, and EDF Renewables, Inc. –filed suit at the trade court challenging Proclamation 10101's modifications to the safeguards imposed by Proclamation 9693. *See Solar Energy Indus. Ass'n v. United States*, 553 F. Supp. 3d 1322 (Ct. Int'l Trade 2021) ("SEIA Decision"). Defendants-Appellants – the United States, the United States Customs and Border Protection ("CBP"), and Christopher Magnus in his capacity as Commissioner of CBP (collectively, the "government") – moved to dismiss, and Appellees cross-moved for summary judgment. The trade court granted summary judgment to Appellees and set aside the modifications contained in Proclamation 10101.

In reaching its decision, the trade court concluded that "while Proclamation 10101 complied with the procedural requirements of the safeguard statute, it nevertheless clearly misconstrued the reach of Section [2254](b)(1)(B) of the Trade Act, and thus constituted an action outside the President's delegated authority."[3] J.A. 34. More specifically, the trade court reasoned that Section 2254(b)(1)(B) "permits only trade-liberalizing modifications to existing safeguard measures," yet "Proclamation 10101's withdrawal of the exclusion of bifacial solar panels and increase of the safeguard duties on CSPV modules" were trade-restrictive. J.A. 6. Therefore, the trade court held that the modifications of Proclamation 10101 were based on a

[2] In February 2022, President Biden, acting pursuant to his authority under Section 2253, extended the safeguard measure and excluded bifacial panels from the extended measure. *See Proclamation 10339, To Continue Facilitating Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)*, 87 Fed. Reg. 7357 (Feb. 9, 2022). Thus, as the parties agree, this appeal only affects bifacial panels that were imported into the U.S. after October 25, 2020 and before February 7, 2022.

[3] The trade court found the President acted outside his delegated authority solely because it found the President's interpretation of Section 2254(b)(1)(B) was a clear misconstruction. *See* J.A. 33. There was no separate analysis of the "acting outside of authority" issue. Nor do the parties identify any other basis, besides the construction of Section 2254(b)(1)(B) and its associated procedural requirements, on which Proclamation 10101 could be deemed an action taken outside of the President's delegated authority. Thus, our conclusion that the President did not clearly misconstrue his statutory authority leads to the conclusion that the President also did not act outside of his delegated authority.

clear misconstruction of the statute. *See* J.A. 6, 28. The trade court was persuaded that, as Appellees argued, Section 2254(b)(1)(B) "was intended to provide an escape hatch" from previously imposed safeguards "where domestic industry has adequately adapted to import competition." J.A. 32. It was not, in the court's view, Congress's intent to allow for a safeguard to be "modified" so as to make it more restrictive of free trade when domestic industry had already adjusted to such competition. *See id*. Hence, the trade court set aside Proclamation 10101 and enjoined the government from enforcing it. *See* J.A. 6.

The government timely appealed. Before us, the government challenges the trade court's holding that the President clearly misconstrued Section 2254(b)(1)(B) when he interpreted it as permitting trade-restrictive modifications to safeguard measures. The government also disputes the trade court's conclusion that Proclamation 10101's modifications were actually trade-restrictive. Appellees ask us to affirm the trade court's determination that the President's interpretation of "modify" in Section 2254(b)(1)(B) as permitting trade-restrictive changes is a clear misconstruction of the statute.[4] Appellees also propose alternative grounds for affirmance, namely that the President failed to comply with the procedural requirements of the safeguard statute.

We conclude that the President did not clearly misconstrue Section 2254(b)(1)(B) when he interpreted it as permitting trade-restrictive modifications. We further conclude that, in issuing Proclamation 10101, the President did not commit any significant procedural violation of the Trade Act. Accordingly, we reverse and remand for the trade court to enter judgment for the government.

II

The trade court had jurisdiction pursuant to 28 U.S.C.§ 1581(i). We have jurisdiction under 28 U.S.C. § 1295(a)(5).

"We review the Court of International Trade's grant of summary judgment de novo, including by deciding de novo the proper interpretation of governing statutes and regulations." *Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1282 (Fed. Cir. 2008). In the absence of any genuine dispute of facts, we apply de novo review to the question of whether statutory prerequisites for presidential action under the

[4] Appellees SEIA and Nextera Energy, Inc. filed a joint brief (ECF No. 35) which we refer to as the "SEIA Brief" or "SEIA Br." Appellees Invenergy Renewables LLC and EDF Renewables, Inc. filed a separate brief (ECF No. 34) which we refer to as the "EDF Brief" or "EDF Br."

safeguard statute were satisfied. *See Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1359–61 (Fed. Cir. 2003). "Although we apply a de novo standard of review, we give great weight to the informed opinion of the Court of International Trade." *Aspects Furniture Int'l, Inc. v. United States*, 42 F.4th 1366, 1369 (Fed. Cir. 2022).Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." U.S. CIT R. 56(a).

Notwithstanding the de novo standard we generally apply to review of grants of summary judgment, "[i]n international trade controversies of th[e] highly discretionary kind" we confront today, which "involv[e] the President and foreign affairs," this court has a "very limited role . . . ." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). We may only set aside presidential action taken pursuant to statutory Sections 2251–53 of the Trade Act if it involves "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Id.*; *see also USP Holdings, Inc. v. United States*, 36 F.4th 1359, 1366 n.3 (Fed. Cir. 2022)."[T]he President's findings of fact and the motivations for his action are not subject to review." *Maple Leaf*, 762 F.2d at 89 (citation omitted); *see also Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018).

III

The trade court granted summary judgment to Appellees based on its determination that the President clearly misconstrued Section 2254(b)(1)(B) by interpreting it as permitting trade-restricting modifications. On appeal, the government challenges this conclusion on two grounds. First, the government contends that "[n]othing in the safeguard statute limits the President's authority under section [2254(b)(1)(B)] only to making modifications that liberalize trade." Opening Br. at 26. Second, the government argues that even if Section 2254(b)(1)(B) does not extend to trade-restricting modifications, the modifications that Proclamation 10101 makes to Proclamation 9693 do not "increase" restrictions and, hence, are permitted by the statute. We agree with the government's first contention and find it unnecessary to address the second.

A

It is important to stress at the outset that our review of Proclamation 10101 is limited to whether the President *clearly misconstrued* Section 2254(b)(1)(B). Because presidential action to impose a safeguard measure, as well as the decision to modify such a measure, involves presidential action in the context of foreign affairs, our re-

view is "very limited." *Maple Leaf*, 762 F.2d at 89. We are not called upon to decide whether the government's interpretation of the statute is correct or how we would have construed the statute as an original matter. Nor do we evaluate the relative merits of the parties' competing interpretations. Rather, our sole inquiry is whether the President's interpretation, that he is permitted to make trade-restricting modifications and not just trade-liberalizing ones, is a clear misconstruction of the statute. Applying this standard of review, we hold the President did not clearly misconstrue Section 2254(b)(1)(B).

Our review "begins with the language of the statute" itself. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted); *see also PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357 (Fed. Cir. 2018). Section 2254(b)(1)(B) provides that safeguards previously adopted under Section 2253 "may be reduced, modified, or terminated" by the President. The statute does not expressly indicate whether "modify" includes trade-restrictive changes or is limited to trade-liberalizing alterations. We view this statutory silence as favoring the government's broader view, as the statute simply does not contain the narrowing limitation the trade court read into it. *See generally Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . .").[5]

Ordinarily, Congress uses words consistent with their well-understood meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Here, both sides find support for their interpretations of "modify" in dictionary definitions. Appellees direct us to a definition of "modify" as "to make 'less extreme.'" SEIA Br. at 17 (quoting J.A. 30). The government, by contrast, points us to a dictionary definition of "modify" as "making of a limited change in something." Opening Br. at 24 (citing J.A. 30). Other courts, including the Supreme Court, have applied the government's non-directionally restricted definition of "modify" in other contexts. *See MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994) (collecting definitions and noting that "modify" typically connotes moderate change without

[5] By contrast, an earlier, unenacted version of the legislation that ultimately became Section 2254(b)(1)(B)would have expressly restricted the President's authority, upon receiving the Commission Report, as being to "reduce, modify *(but not increase)* or terminate any action." H.R. Conf. Rep. 100–576, at 687, *reprinted in* 1988 USCCAN 1547, 1720 (emphasis added). The parenthetical prohibiting trade-restrictive modifications was deleted during the legislative process. Generally, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23–24 (1983).

indicating which direction such change must take). Appellees concede that the government's definition is a correct one but then attempt to persuade us that their preferred definition is better supported by the broader structure and purpose of the safeguard statute. *See* SEIA Br. at 17–18 ("'[M]odify' can *also* mean 'to change moderately or in minor fashion.'"). With our review restricted to whether the President's interpretation of "modify" is a clear misconstruction, we view the government's dictionary support, other courts' precedents, and Appellees' concession as strong indicators that Appellees have failed to show the President's interpretation of "modification" is a clear misconstruction.

Appellees emphasize that the meaning of "modify" in Section 2254(b)(1)(B) can only be properly understood in the context of "[t]he broader structure and stated purpose of the statute." SEIA Br. at 18–19, 26. While we agree that structure and purpose should be taken into account, here these considerations only solidify our conclusion that Section 2254(b)(1)(B) was not clearly misconstrued to permit trade-restricting modifications to existing safeguards.

First, Section 2251 provides that the safeguard statute has a broad remedial purpose, directing the President to "*take all appropriate and feasible action within his power*" to meet the statute's objectives and provide relief to domestic industry. 19 U.S.C. § 2251 (emphasis added). This expansive directive supports the view that the President is empowered to make modifications as necessary to provide continued relief to domestic industry, regardless of whether that modification is in the direction of trade-restriction or trade-liberalization. Certainly, there is no suggestion in Section 2251 that if the President determines as lightly more restrictive safeguard is necessary, he is, nevertheless, permitted only to adopt a trade-liberalizing modification.

Second, the Trade Act has its own general definition of "modification." It provides: "[t]he term 'modification', as applied to any duty or other import restriction, includes the elimination of any duty or other import restriction." *Id.* § 2481(6). Plainly, this is an open-ended definition and does not *exclude* anything, including further restrictions. Nor does it even suggest that assessment of whether a change qualifies as a "modification" is based to any extent on the direction of the change (i.e., trade-liberalizing or -restricting).

Other provisions of the Trade Act are similarly supportive of the government's interpretation. Section 2254(b)(3), for example, provides that the President may "modify" a safeguard to bring it into conformity with a decision of the World Trade Organization ("WTO"),

which could require a trade-liberalizing or trade-restricting modification, depending on the relative relationship between an existing U.S. safeguard and a WTO determination. *See id.* § 2254(b)(3). Similarly, Sections 2252(e)(2)(C) and 2253(a)(3)(C) authorize the Commission to recommend, and the President to impose, "modification . . . of any quantitative restriction on importation," modifications which Appellees do not dispute may include changes in a more trade-restrictive direction.

Because the Trade Act clearly uses "modify" and "modification" in ways that permit trade-restricting changes, Appellees next insist that "Congress clearly did not give the word 'modification' the same connotation throughout the Trade Act." SEIA Br. at 32. We are not persuaded. "[A]term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Appellees insist that Section 2254(b)(3)'s inclusion of the phrase "notwithstanding paragraph (1)" signifies that Section 2254(b)(1)'s modification power is different from that power as delineated in Section 2254(b)(3). But we agree with the government that "[n]ot withstanding paragraph (1)" means that modifications under Section 2254(b)(3) may be accomplished without having to fulfill the procedural requirements of Section 2254(b)(1) (e.g., receipt of the Commission Report or a domestic industry petition). *See* Reply Br. at 10.

Appellees, echoing the trade court, further contend that permitting the President to make trade-restrictive modifications pursuant to Section 2254(b)(3) creates a loophole through which the President can bypass the procedural requirements Section 2253 establishes for adopting a safeguard measure in the first place. *See* SEIA Br. at 25; J.A. 32. We disagree. Even under the government's reading of Section 2254(b)(1)(B), the President's modification power is far from unbounded. For instance, Section 2253(e)(5) requires duties to be "phased down at regular intervals," ensuring that any duty rate modification cannot exceed the highest rate imposed by the original safeguard measure. Thus, here, because the maximum tariff rate imposed by Proclamation 9693 was 30% – a measure adopted only after the President followed all of the procedures setout in Section 2253 – the President could not, through his modification power under Section 2254, impose a tariff greater than 30%. Additionally, the President may not modify a safeguard pursuant to Section 2254 any time he wishes; instead, he must wait until after receiving the Commission Report as well as a petition from the majority of domestic

industry (which may not ever be forthcoming).[6] Furthermore, because the power to "modify" a safeguard is included only in subparagraph (b)(1)(B), and not also in(b)(1)(A), the President may only make a modification after determining that domestic industry is making a positive adjustment to import competition. *See infra* at pp. 21, 23–26. While Congress is free to create a "loophole" if it wishes, here we think it has, instead, cabined the President's modification authority – just not with the further constraint of limiting modifications to only trade-liberalizing changes.

As yet another argument, Appellees contend that "[t]he total lack of historical usage" of Section 2254(b)(1)(B) "to restrict trade is further evidence weighing in favor of the trade court's interpretation." SEIA Br. at 26. Even assuming historical practice, or the lack of it, could transform another wise-reasonable reading of a statute into a clear misconstruction, the government has directed us to one instance in which it appears President Clinton acted pursuant to Section 2254(b)(1) to take trade-restrictive action. *See* Opening Br. at 39–40 & n.8 (citing *Proclamation 7314: To Modify the Quantitative Limitations Applicable to Imports of Wheat Gluten*, 65 Fed. Reg. 34899 (May 26, 2000)); Reply Br. at 17–18. Hence, there does appear to be historical support for President Trump's construction of presidential authority under Section 2254(b)(1)(B).

Finally, Appellees point to the distinction between subsection (b)(1)(A), which applies where "domestic industry has *not* made adequate efforts to" adjust to import competition, and subsection (b)(1)(B), which applies where "domestic industry *has made* a positive adjustment to import competition." SEIA Br. at 20–21 (emphasis added). In the former circumstance, where domestic industry has not responded positively, Section 2254(b)(1)(A) provides the President authority only to "reduce" or "terminate" the safeguard while in the latter scenario, where domestic industry "has made a positive adjustment, Section 2254(b)(1)(B) more broadly provides the President authority to "reduce, *modify*, or terminate" a safeguard. Appellees insist it would be backwards for Congress to permit the President to "modify" trade restrictions to become more restrictive where domestic industry has positively adjusted to competition while depriving the President of such trade-restricting power where domestic industry has not. *See, e.g.*, SEIA Br. at 18 ("It would make no sense for Congress to authorize further trade *restrictions* after the domestic industry already 'has made' a positive adjustment . . . ."). We side with

[6] As we explain below, however, the President's power is not limited to making the modifications that are advocated by the Commission Report and requested by the petition. Still, the receipt of the Commission Report and of a domestic industry petition are the prerequisites to a Presidential modification of a safeguard.

the government on this point, agreeing with it that "[t]his distinction logically suggests that Congress intended to give the President greater flexibility to take action when progress is being made, to protect and ensure the continuation of that progress." Opening Br. at 34. In sum, we find this argument of Appellees no more persuasive than their many other contentions.

For all of these reasons, we conclude it was not a clear misconstruction for the President to interpret his authority under Section 2254(b)(1)(B) as permitting him to adopt trade-restrictive modifications, as well as trade-liberalizing modifications.

B

The government additionally argues that "even if 'modification' in Section 2254(b)(1)(B) were construed as prohibiting the President from implementing an 'increase' to the safeguard measure, Proclamation 10101 should still be sustained as lawful because the modifications at issue are neutral in relation to the original safeguard measure." Opening Br. at 20. In the government's view, all that Proclamation 10101 accomplished was "to restore application of the safeguard measure to bifacial panels and to slow the rate at which the measured phased down in its fourth year," neither of which were trade-restricting "increases" in measures imposed on imports. *Id.* at 2. Because we find it was not a clear misconstruction to interpret Section 2254(b)(1)(B) as permitting trade-restrictive modifications to safeguard measures, we need not, and do not, reach this issue.

IV

Our siding with the government on whether the President's statutory interpretation was a clear misconstruction is not enough to resolve this appeal. Appellees offer, as alternative grounds for affirmance, the arguments they presented to the trade court for a finding that, in adopting Proclamation 10101, the President failed to comply with the procedural requirements of the safeguard statute. In particular, Appellees renew their contentions that: (1) the petition leading to Proclamation 10101 was inadequate to meet the "on such basis" requirement of Section 2254(b)(1)(B); (2) the President's finding that the domestic industry "has begun to make" a positive adjustment to import competition does not meet the statutory requirement that domestic industry "has made" such adjustment; and (3) the President failed to meet his obligation to weigh the economic and social costs and benefits of his alterations to the safeguard tariffs imposed by Proclamation 9693 before issuing Proclamation 10101. SEIA Br. at 4, 20 n.1 (adopting arguments from EDF Brief); EDF Br. at 15–16. The trade court rejected each of these positions and we do so as well.

A

Appellees argue that the President lacked authority under Section 2254(b)(1)(B) to modify the safeguards imposed by Proclamation 10101 because the petition submitted by domestic industry did not base the modification request on domestic industry having made a positive adjustment to import competition. The portion of Section 2254(b)(1)(B) on which this argument is based provides:

> Action taken under section 2253 [i.e., a safeguard]. . . may be reduced, modified, or terminated by the President (but not before the President receives the [Commission] report . . .) . . . if the President . . . determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination *on such basis*, that the domestic industry has made a positive adjustment to import competition.

19 U.S.C. § 2254(b) (emphasis added). Appellees contend that the phrase "on such basis" refers to the petition, such that the petition itself must be based on domestic industry's view that it has made a positive adjustment to import competition. The trade court, agreeing with the government, held instead that "on such basis" refers to the President's determination, which may be based on the Commission Report's finding that domestic industry has made a positive adjustment, regardless of whether the petition also contends the same. In other words, the parties agree that "such" in "on such basis" refers back to something indicated or implied earlier in the provision, but the government contends that the thing being referred to is the Commission mid-point Report while Appellees insist the thing is, by contrast, the domestic industry petition.

We find both views to be reasonable. Section 2254(b) expressly refers to both the Commission Report and the domestic industry petition before it sets out the requirement that the President make a determination, that domestic industry has made a positive adjustment, "on such basis." That "basis" could be the Commission Report or could just as easily be the industry petition. *See* J.A. at 20 (trade court explaining that "a determination made on the basis of the [Commission] report would reflect the views of an independent body based on information and argument provided by all market participants, and would therefore align with . . . Section [2254](b)(1)(B)'s overall aim of permitting the adjustment of safeguard measures when the industry as a whole begins to adapt to competition") (internal quotation marks omitted). It follows, then, that the government's interpretation is *not* a clear misconstruction and, hence, we must

affirm the trade court's conclusion on this point. *See Maple Leaf*, 762 F.2d at 89. We agree with the trade court that the President did not violate the "on such basis" procedural requirement for adopting a modification.

The trade court also concluded that even if Appellees' interpretation on this point were a clear misconstruction, "the failure of petitioners to comply with [the petition] requirement would not render Proclamation 10101 unlawful." J.A. 21. Given our other conclusions, it is unnecessary for us to review this determination of the trade court.

B

Appellees next argue that the President failed to comply with Section 2254(b)(1)(B)'s requirement to determine that "the domestic industry *has made* a positive adjustment to import competition" (emphasis added). As Appellees correctly observe, in Proclamation 10101 the President found that "the domestic industry *has begun to make* positive adjustment to import competition." *Proclamation 10101*, 85 Fed. Reg. at 65640 (emphasis added). According to Appellees, this is insufficient, as the President merely made a finding that positive adjustment had started but did not make the purportedly required finding that such positive adjustment be completed. Appellees insist that "'[h]as made' and 'has begun to make' do not mean the same thing." SEIA Br. 58.

Once again, we are not required to decide if Appellees' interpretation is reasonable or even the better view. Instead, we are asked only to determine if the government's view, that the statutory language "has made a positive adjustment" is broad enough to include circumstances in which domestic industry "has begun to make a positive adjustment," is a clear misconstruction. Like the trade court, we hold that "the distinction between 'has made' and 'has begun to make' is too narrow to rise to the level of a clear misconstruction." J.A. 22.

It is reasonable to interpret "has made a positive adjustment" as relating to a process, which might be ongoing, rather than being limited to periods following a completed, successful adjustment. As the government notes, the statutory phrase is written in the present perfect tense, which can be used to refer to an action completed entirely in the past and also to action still in process. *See* Reply Br. at 36 (citing Kenneth G. Wilson, *The Columbia Guide to Standard American English* 342 (1993)). This plain meaning understanding of "has made" is supported by other parts of the Trade Act, which recognize that "positive adjustment" to import competition will occur over time and not on a single date. *See, e.g.,* 19 U.S.C. § 2254(c)(1) ("[T]here is evidence that the industry *is making* a *positive adjust-*

ment to import competition.") (emphasis added); *id.* § 2254(d)(1) ("[T]he Commission shall evaluate the effectiveness of the actions in facilitating positive adjustment by the domestic industry to import competition."). Indeed, two of the conditions that the statute expressly identifies as constituting components of "a positive adjustment" – when "the domestic industry *experiences* an orderly transfer of resources" and "workers in the industry *experience* an orderly transition," *id.* § 2251 (emphasis added) – use the present tense, again reflecting that positive adjustment by domestic industry can involve an ongoing process.

Thus, we agree with the trade court that the President did not violate the procedural requirement that he determine that domestic industry "has made" a positive adjustment to competition from imports.

C

Finally, we consider whether the President is required to re-weigh costs and benefits when modifying a safeguard pursuant to Section 2254(b)(1). The trade court concluded that the President must do so and also that, in connection with Proclamation 10101, he did so. J.A. 27–28. We conclude, by contrast, that the President is not required to reweigh costs and benefits when modifying a safeguard measure. Thus, we need not decide whether the President complied with this non-requirement in issuing Proclamation 10101.

Two statutory provisions mention the President's obligation to weigh costs and benefits. The first is Section 2251(a), which provides:

> If the United States International Trade Commission (hereinafter referred to in this part as the "Commission") determines under [S]ection 2252(b) of this title that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which *the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.*

19 U.S.C. § 2251(a) (emphasis added). Section 2253(a) restates the President's authority to take safeguard action under Section 2251(a), reciting the requirement that the President must consider both long-

and short-term benefits and costs. *See* 19 U.S.C. § 2253(a)(2)(E) ("In determining what action to take . . ., the President shall take into account . . . the short-and long-term economic and social costs of the actions authorized . . . relative to their short-and long-term economic and social benefits.").

These provisions expressly apply to the initial adoption of a safeguard measure and make no reference to modification of such measures. The President's power to reduce, modify, or terminate an existing safeguard is governed by Section 2254(b)(1), which makes no mention whatsoever of cost-benefit determinations. Nor does any portion of the safeguard statute tie the requirement of a cost-benefit analysis, set out in Sections 2251(a) and 2253(a)(1)(A), to the President's power to reduce, modify, or terminate a safeguard, as provided for in Section 2254.

The trade court seems to have been persuaded to adopt the contrary view due, at least in part, to its concern that the government's interpretation "risks permitting absurd results" (e.g., a 1% initial tariff followed by a 50% modified tariff, with no cost-benefit analysis of the 50% rate) and might allow the modification "exception" of Section 2254 to "swallow . . . the rule" of Section 2251. J.A. 27. We do not share this fear. On any reading, a "modification" must be a relatively minor adjustment; expansion of a 1% duty to a 50% duty is obviously not a minor change. And any modification to a duty rate must comply with the phase-down requirement, preventing the modified tariff from being any higher than the tariff that was imposed in the preceding year. *See* Reply Br. at 42 (Government conceding "[t]he President's modification authority remains subject to the section 2253(e)(5) phase-down requirement"). More importantly, the trade court failed to explain how its conclusion is consistent with the actual language of the statute, or how the government's interpretation is a clear misconstruction.

We conclude that the President's view that he was not required to re-weigh the costs and benefits when modifying the safeguard pursuant to Section 2254(b)(1) is not a clear misconstruction. Thus, Appellees have failed to show that the President committed any procedural violation in issuing Proclamation 10101.

V

Because the President's interpretation of 19 U.S.C. § 2254(b)(1)(B) as permitting trade-restricting modifications is not a clear misconstruction, and because the President did not violate the procedural requirements of the statute, we reverse the trade court's judgment. Proclamation 10101 is not invalid.

REVERSED AND REMANDED

COSTS

No costs.

Slip Op. 23–158

SAHA THAI STEEL PIPE PUBLIC COMPANY LTD., Plaintiff, and THAI PREMIUM PIPE CO. LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS, INC. and WHEATLAND TUBE CO., Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21-cv-00627

[Plaintiffs' Motion for Judgment on the Agency Record is granted in part and denied in part.]

Dated: November 13, 2023

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiff. With him on the brief were *James P. Durling*, *James C. Beaty*, and *Ana Amador*.

Robert G. Gosselink, Trade Pacific PLLC, of Washington, DC, for Plaintiff-Intervenor. With him on the brief was *Aqmar Rahman*.

Elizabeth Anne Speck, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *Franklin E. White*, Assistant Director, Commercial Litigation Branch, and *JonZachary Forbes*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Tubular Products Inc. With him on the brief were *Alan H. Price* and *Theodore P. Brackemyre*.

Elizabeth J. Drake, Schagrin Associates, of Washington, DC, for Defendant-Intervenor Wheatland Tube Company. With her on the brief were *Roger B. Schagrin*, *Christopher T. Cloutier* and *Saad Y. Chalchal*.

OPINION

Vaden, Judge:

Saha Thai Steel Pipe Public Company Ltd. (Saha Thai or Plaintiff) filed this case under Section 516A of the Tariff Act of 1930, as amended. Saha Thai challenges the Final Determination issued by the U.S. Department of Commerce (Commerce) after the agency conducted an administrative review of its 1986 antidumping duty order on circular welded carbon steel pipes and tubes imported from Thailand. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020* (Final Determination), 86 Fed. Reg. 69,620 (Dec. 8, 2021). It challenges (1) Commerce's

decision to apply adverse inferences drawn from facts otherwise available to find that Saha Thai was affiliated with seven customers and (2) Commerce's inclusion of out-of-scope merchandise in its calculation of the final antidumping margin. *See* Compl. ¶¶ 18–31, ECF No. 39; 19 U.S.C. § 1677e(b)(1)(A). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion and **REMANDS** the Final Determination to Commerce to act consistently with the Court's opinion.

BACKGROUND

Saha Thai is a foreign producer and exporter of welded carbon steel pipes and tubes. Compl. ¶ 3, ECF No. 39. The relevant antidumping order defines covered pipes and steel tubes:

> [C]ertain circular welded carbon steel pipes and tubes (referred to in this notice as 'pipes and tubes'), also known as 'standard pipe' or 'structural tubing,' which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241,610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the *Tariff Schedules of the United States Annotated* (TSUSA).

Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand, 51 Fed. Reg. 8341 (Mar. 11, 1986).[1]

I. The Disputed Final Determination

Commerce issued the original antidumping order on circular welded carbon steel pipes and tubes from Thailand (Order) in 1986. *See Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8,341 (Mar. 11, 1986). The subject of that Order and the products at issue in this case are standard pipes imported from Thailand to the United States. The International Trade Commission (ITC) explained the differences between standard pipe and line pipe in its original investigation:

> Standard pipe is manufactured to American Society of Testing and Materials (ASTM) specifications and line pipe is manufactured to American Petroleum Institute (API) specifications. Line pipe is made of higher grade steel and may have a higher carbon and manganese content than is permissible for standard pipe. Line pipe also requires additional testing. Wall thicknesses for

[1] This definition, which appears in the text of the original 1986 Order, is cited to for the "Scope" in Commerce's Notice of the Final Results of the Administrative Review. *See* Final Determination, 86 Fed. Reg. at 69,620.

> standard and line pipes, although similar in the smaller diameters, differ in the larger diameters. Moreover, standard pipe (whether imported or domestic) is generally used for low-pressure conveyance of water, steam, air, or natural gas in plumbing, air-conditioning, automatic sprinkler and similar systems. Line pipe is generally used for the transportation of gas, oil, or water in utility pipeline distribution systems.

Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, Inv. Nos. 701-TA-242 and 731-TA-252 and 253 (Preliminary), USITC Pub. 1680 (Apr. 1985).

Commerce initiated the 2019–2020 administrative review of the Order in May 2020. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 Fed. Reg. 26,931 (May 6, 2020). It selected Saha Thai and Blue Pipe Steel Center[2] (Blue Pipe) as mandatory respondents. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2019–2020* (Preliminary Results), 86 Fed. Reg. 30,405, 30,406 (June 8, 2021).

Seeking to collect information on potential affiliates, Commerce issued Section A of its Initial Antidumping Questionnaire to Saha Thai on October 13, 2020. Section A Questionnaire at A-1, J.A. at 3,307, ECF No. 56. Commerce requested that Saha Thai:

> Identify all suppliers, (sub)contractors, lenders, exporters, distributors, resellers, and other persons involved in the development, production, sale and/or distribution of the merchandise under review which Commerce may also consider affiliated with your company, in accordance with section 771(33) of the Act and sections 351.102(b) and 351.401(f) of the regulations.

Id. at A-6, J.A. at 3,312. In Section B of its Questionnaire, Commerce further requested that:

> If you had sales to an affiliated party that consumed all or some of the merchandise (i.e., used it in the production of merchandise that does not fall within the description provided in Appendix III), then report all of your sales to that affiliate, whether the merchandise was consumed or resold by the affiliate.

Section B Questionnaire Response at 5, J.A. at 8,197, ECF No. 56.

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[2] Blue Pipe is not a party to this action.

Saha Thai submitted its Section A Response to Commerce on November 10, 2020. Section A Resp., J.A. at 82,816 ECF No. 57. In its narrative response, Saha Thai explained that it divided its answer into the following three categories: "(1) sales to unaffiliated customers, (2) sales to potentially affiliated entities for consumption, and (3) sales to affiliated resellers." *Id.* at 3, J.A. at 82,819. The company then attached a table listing several companies as affiliated and indicating whether those companies resold the subject merchandise or bought it for consumption. *Id.* at Ex. A1, J.A. at 82,854. It also reported that 16.68% of Saha Thai was owned by the Ratanasirivilai family, 24.32% of the company was owned by the Karuchit family, and that each family had two members serving as corporate directors. *Id.* at Ex. A3, A-5, J.A. at 82,857, 83,667–8.

Needing more information from Saha Thai about certain reported affiliates, Commerce issued its First Supplemental Questionnaire, requesting Saha Thai "provide a detailed history, from January 1, 2015, through the present, of your business relationships with Blue Pipe [and other companies]." First Suppl. Questionnaire at 1 (Feb. 3, 2021), J.A. at 90,946, ECF No. 58. Saha Thai complied with this request and submitted its response on February 24, 2021. First Suppl. Questionnaire Resp., J.A. at 92,359, ECF No. 58. The agency then issued a Second Supplemental Questionnaire requesting revisions to Saha Thai's previously submitted customer list, including a request to "add a column to identify whether the customer is an affiliate." Second Suppl. Questionnaire at 1 (Mar. 11, 2021), J.A. at 96,071, ECF No. 58. Commerce issued a Third Supplemental Questionnaire on April 13, 2021. Third Suppl. Questionnaire, J.A. at 96,233, ECF No. 58. There, the agency requested Plaintiff:

> Please submit a list of all stockholders and their equity positions, managers, directors, officers, and department heads for both Saha Thai . . . and Saha Thai's affiliates. Please state whether any stockholder, manager, director, officer, or department head is also a stockholder, manager, director, officer, or department head at any other company involved in the development, production, sale and/or distribution of the merchandise under review.
>
> Please provide a complete family tree for . . . Saha Thai . . . . Please identify any member of these families that has any role in any company involved in the development, production, sale and/or distribution of the merchandise under review. For each such family member, please specify their role in the company, the English and Thai name of the company, and state whether that company is an affiliated party.

Id. at 1, J.A. at 96,235 (paragraph break added for readability).

Saha Thai submitted its response to the Third Supplemental Questionnaire in two parts. Third Suppl. Questionnaire Resp. Part 1 (Third Resp. Part 1) (May 4, 2021), J.A. at 96,420, ECF No. 58; Third Suppl. Questionnaire Resp. Part 2 (Third Resp. Part 2) (May 6, 2023), J.A. at 96,459, ECF No. 58. In its response, the company affirmed that "none of the individuals in the family grouping that owns Saha Thai is involved in the production, development, sale or distribution of merchandise under review other than the reported affiliations in Saha Thai's Section A response to the Department." Third Resp. Part 2 at 2, J.A. at 96,467, ECF No. 58. Saha Thai also affirmed that "none of its or its affiliates' employees, stockholders, managers, directors, officers, or department heads currently is employed with any other company that develops, produces, sells and/or distributes the merchandise under review other than those affiliations already described in Saha Thai's Section A response." *Id.* at 2–3, J.A. at 96,467–68.

Defendant-Intervenor Wheatland Tube then filed several hundred pages of public documents as rebuttal information, pertaining to Thai companies potentially affiliated with Saha Thai. Wheatland Tube Rebuttal of Saha Thai (Rebuttal of Saha Thai) (June 1, 2021), J.A. at 97,105, ECF No. 58. That same day, Wheatland Tube also filed rebuttal information against fellow respondent Blue Pipe's supplemental questionnaire responses regarding its affiliations. Wheatland Tube Rebuttal of Blue Pipe (Rebuttal of Blue Pipe) (June 1, 2021), J.A. at 97,685, ECF No. 58. In its submission against Saha Thai, Wheatland Tube quoted Saha Thai's supplemental questionnaire response — in which the company stated that "none of its or its affiliates' employees, stockholders, managers, directors, officers, or department heads currently is employed with any other company that develops, produces, sells and/or distributes merchandise under review" — and explained that the information Wheatland Tube now proffered was intended to "rebut, clarify, or correct [those] statements[.]" Rebuttal of Saha Thai at 1, J.A. at 97,109, ECF No. 58. Wheatland Tube explained that its submission would "[shed] light on the owners and directors which impact[] Saha Thai's claims of affiliation[.]" *Id.* Wheatland Tube provided a series of fifteen exhibits outlining the corporate structure, board membership, and other publicly available information for specific companies that had not been identified as affiliates by Saha Thai in its questionnaire response. *Id.* at 1–2, J.A. at 97,109–10. In its case brief, Wheatland Tube explained that its June 1, 2021 submission revealed that "Saha Thai's three largest home market customers now appear to be affiliated with Saha Thai, and these three companies represent some 50 percent of home

market sales yet account for 95 percent of the sales matched to export sales in Commerce's standard margin program." Petitioner Case Brief at 2, J.A. at 99,011, ECF No. 58. Wheatland Tube also explained that Exhibit 4 from its Rebuttal to Blue Pipe and Exhibits 8, 10, and 14 from its Rebuttal to Saha Thai illustrate that four companies listed as Saha Thai's home market customers — C.S. Steel Product Co. Ltd., Nawapon Kanka Sakon Co. Ltd., Tac-M Group Co. Ltd., and Metallic Section Steel Co. Ltd. — "are affiliated through total or near total stock ownership and board membership of the Ratanasirivilai Family" and that another two companies — Paisan Steel Co. Ltd. and JHP International Co. Ltd. — "appear to be affiliated through stock ownership and board members of the Kruchit (Krujit) Family." *Id.* at 11–12, J.A. at 99,020–21; *see also* Rebuttal of Blue Pipe at Exs. 4–5, J.A. at 97,997–98,011, 98,013–42, ECF No. 58; Rebuttal of Saha Thai at Exs. 2, 8, 10, 14, J.A. at 97,116–134, 97,301–347, 97,404–477, 97,592–669, ECF No. 58. This revelation was significant because Saha Thai had reported in its questionnaire responses that those same two families owned significant portions Saha Thai, and each family had members serving on Saha Thai's board. Sect. A Resp. at Ex. A-3, A-5, J.A. at 82,857, 83,667–68, ECF No. 57.

Because Wheatland Tube submitted this rebuttal information only seven days before Commerce published its preliminary determination, the agency did not analyze Wheatland Tube's submission in its preliminary results. *See* Preliminary Results, 86 Fed. Reg. 30,405 (June 8, 2021). In that determination, Commerce assigned Saha Thai a dumping margin of 7.23% based in part on the application of a particular market situation adjustment to Saha Thai's costs. *Id.* at 30,406; Preliminary Decision Memorandum (PDM) at 8–11, J.A. at 13,684–67, ECF No. 56. Shortly after publication of the preliminary determination, Saha Thai submitted its own rebuttal information on June 21, 2021. Saha Thai's Rebuttal of Wheatland Tube (Saha Thai Rebuttal), J.A. at 98,778, ECF No. 58. Saha Thai argued that Wheatland Tube's "submission is wholly irrelevant for the purposes of this administrative review because none of the entities identified by Petitioners produce, sell or distribute merchandise under review." *Id.* at 7, J.A. at 98,785.

Commerce addressed the new information submitted by Wheatland Tube and Saha Thai in its Final Determination and accompanying Issues and Decision Memorandum and Final Calculation Analysis. *See* Final Determination, 86 Fed. Reg. 69,620; IDM at 4–10, J.A. at 14,291–97, ECF No. 56; Final Calculation Analysis at 1–7, J.A. at 99,504–510, ECF No. 56. Commerce decided to draw adverse inferences from facts otherwise available because Saha Thai had "home-

market customers [that] may, in fact, be affiliated with Saha Thai and . . . Saha Thai did not report them as affiliated customers, nor did it report certain family members that had a role with respect to those customers." IDM at 8–9, J.A. at 14,295–96, ECF No. 56. The agency found that there was a gap in the record justifying the use of facts otherwise available because, even with the documentation provided by Wheatland Tube, it lacked "complete details on the ties between Saha Thai and these customers to make affiliation determinations." *Id.* at 9, J.A. at 14,296. Commerce "determine[d] that, by withholding this information [concerning potential affiliates], Saha Thai . . . has not acted to the best of its ability[.]" *Id.* It found that Saha Thai had failed to identify the home-market customers flagged by Wheatland Tube as affiliates. *Id.* Commerce also drew an adverse inference to find that all the customers in question were involved in sales or production of subject merchandise because "the record does not establish that any of the home-market customers in question unquestionably did or did not re-sell some or all their purchases from Saha Thai." *Id.* at 10, J.A. at 14,297. Thus, Commerce drew the adverse inference that "the customers in question are all affiliated with Saha Thai." *Id.* at 9, J.A. at 14,296. It continued to apply a particular market situation adjustment to Saha Thai's costs of production. *Id.* at 23–28, J.A. at 14,310–15. Together, these determinations led Commerce to assign Saha Thai an updated antidumping margin of 36.97%. Final Determination, 86 Fed. Reg. at 69,621.

The Final Calculation Analysis provided further details about the agency's reasoning. Final Calculation Analysis at 1–7, J.A. at 99,504–510, ECF No. 58. Commerce, drawing on Wheatland Tube's submission of publicly available information, explained:

> The record shows that following [*sic*] Saha Thai home market customers are affiliated through majority stock ownership and board membership of the Ratanasirivilai family: C.S. Steel Product Co. Ltd., Nawapon Kanka Sakon Co., Ltd., Tac-M Group Co., Ltd., and Metallic Section Steel Company Limited. The record further indicates that members of the Khruchit . . . family are shreholders of JHP International Co., Ltd. With respect to Paisan Steel Co., Ltd., one of the directors is "Somchai Karuchit" who is also one of the directors of Saha Thai. Thus, the record suggests that Saha Thai is affiliated with the home market customers identified above.[3]

[3] At oral argument, the parties agreed that this information, which was marked confidential in the Final Calculation Analysis, is not confidential because it is publicly available information. Oral Arg. Tr. at 22:5–15, ECF No. 80.

Id. at 2, J.A. at 99,505.

In addition to the six companies for which Wheatland Tube provided extensive ownership documentation to support its allegation of affiliation, the agency also found an affiliation between Saha Thai and a seventh customer, BNK Steel Co. Ltd. (BNK), based on a single shared human resources manager. *Id.* Commerce acknowledged Saha Thai's response that this single shared employee did not "[amount] to a traditional leadership position" and that "Wheatland Tube . . . has not proven that it entails a legal or operational position allowing for the exercise of control." *Id.* However, Commerce concluded that Saha Thai should have identified BNK when it was asked "to 'state whether Saha Thai's or any of Saha Thai's affiliates' employees, stockholders, managers, directors, officers, or department heads has an equity or a debt position in any other company involved in the development, production, sale, and/or distribution of the merchandise under review.'" *Id.* This omission left Commerce to rely only on Wheatland Tube's submission which, Commerce observed, "was limited to public records in its research[.]" *Id.* On that basis, Commerce concluded that "we cannot assume that there are no other ties between Saha Thai and BNK which Saha Thai failed to disclose[, and as] a result we cannot determine that Saha Thai is necessarily not affiliated with BNK." *Id.*

II. The Present Dispute

Saha Thai filed a Complaint challenging Commerce's Final Determination on December 20, 2021. ECF No. 6. On April 8, 2022, Saha Thai amended its complaint to incorporate Commerce's remand redetermination pursuant to this Court's opinion in *Saha Thai I*, which "confirmed that dual-certified pipe is not within the scope of the order under review in the administrative proceeding at issue here." Pl.'s First Am. Compl. ¶¶ 26–31, ECF No. 39; *see also Saha Thai Steel Pipe Pub. Co. Ltd. v. United States*, 547 F. Supp. 3d 1278 (CIT 2021) (*Saha Thai I*). Of Plaintiff's claims, the following remain at issue: (1) whether Commerce's application of adverse inferences to find that Saha Thai is affiliated with certain customers is unsupported by substantial evidence; (2) whether the agency's decision to permit Wheatland Tube to file new factual information rebutting Saha Thai's questionnaire responses was an abuse of discretion; and (3) whether the antidumping margin calculation includes products outside the scope of the antidumping order.[4] Pl.'s Br. at 22–54, ECF No. 40.

[4] Plaintiff-Intervenor Thai Premium Pipe Company fully adopted Saha Thai's positions. *See* Pl.-Int. Reply Br. at 1, ECF No. 55.

In its response brief, the Government argued that its decision to draw adverse inferences from facts otherwise available was lawful because (1) Saha Thai impeded the investigation; (2) the agency gave adequate notice to Saha Thai through its issuance of supplemental questionnaires; and (3) it properly accepted Wheatland Tube's submission of new factual information. Def.'s Resp. at 10–31, ECF No. 47. Wheatland Tube filed a response brief largely echoing Commerce's arguments. Def.-Int Wheatland Tube's Resp. at 4–22, ECF No. 50. Defendant-Intervenor Nucor Tubular also submitted a brief fully adopting the positions of Wheatland Tube. Def.-Int. Nucor Tubular's Resp. at 1, ECF No. 49. Saha Thai replied that (1) it had fully cooperated with all of Commerce's requests for information; (2) there was no gap in the record regarding affiliated companies and therefore no justification for Commerce's reliance on facts otherwise available; (3) Commerce never notified it of any deficiencies in its responses as the governing statute requires; and (4) the antidumping rate must be revised because it contains out-of-scope merchandise. Pl.'s Reply at 11–32, ECF No. 53.

The parties were able to solve one count of the Complaint before argument. Saha Thai cited the Federal Circuit's decision in *Hyundai Steel Co. v. United States*, 19 F.4th 1346 (Fed. Cir. 2021) — which confirmed that Commerce lacked the authority to make particular market situation adjustments under 19 U.S.C. § 1677b(b) — and argued that Commerce's adjustment here similarly was illegal. Pl.'s Br. at 10–12, ECF No. 40. Commerce replied to this argument by requesting a remand to remove the particular market situation adjustment. Def.'s Resp. at 41, ECF No. 47. Wheatland Tube also agreed to a voluntary remand. Def.-Int Wheatland Tube's Resp. at 21–22, ECF No. 50.

The Court granted Commerce's request for a voluntary remand so that it could remove the particular market situation adjustment. ECF No. 60. In *Hyundai Steel*, the Federal Circuit affirmed the consistent position of the Court of International Trade and held that applying a particular market situation adjustment to the calculation of the cost of production under 19 U.S.C. § 1677b(b) for sales below cost is illegal. *Hyundai Steel*, 19 F.4th at 1352. Commerce filed its Remand Redetermination on November 29, 2022, removing the particular market situation adjustment. ECF No. 61. No party contests its removal. *See, e.g.*, Pl.'s Remand Comments at 3, ECF No. 63 ("Saha Thai agrees that the change in weighted-average dumping margin correctly reflects removal of the PMS cost adjustment.").

Plaintiff's scope claim — by contrast — became messier. Commerce asserted that administrative exhaustion bars Saha Thai's argument. Def.'s Resp. at 41–43, ECF No. 47. Saha Thai responded that administrative exhaustion did not bar its argument because it was only *after* the filing of its initial case brief here that "Commerce issued its remand redetermination in the scope proceeding in which Commerce changed its scope determination, concluding that dual-certified line pipe was *not* covered by this AD order." Pl.'s Reply at 28, ECF No. 53. Saha Thai noted that it was not until August 25, 2022, that "this Court rendered its final judgment affirming Commerce's remand redetermination" regarding the scope of the Order. *Id.*; *see also Saha Thai Steel Pipe Pub. Co. Ltd. v. United States*, 592 F. Supp. 3d 1299 (CIT 2022) (*Saha Thai II*). Plaintiff asserts that "Commerce is under an affirmative obligation to correct the Final Results" of the disputed review to reflect the scope determination. Pl.'s Reply at 28, ECF No. 53. Saha Thai alleges that two exceptions to administrative exhaustion — futility and pure question of law — should apply to excuse its failure to raise the issue before the agency. *Id.* at 29.

The Court ordered Commerce to respond to Saha Thai's argument that it met one of the exceptions to administrative exhaustion. ECF No. 67; *see also* Pl.'s Reply at 29, ECF No. 53. In its sur-reply brief, Commerce argued that, because Saha Thai never challenged the appropriateness of the inclusion of dual-stenciled pipe before the agency, the futility exception to administrative exhaustion does not apply. Def.'s Sur-Reply at 4, ECF No. 68. Commerce also noted that the appeal of this Court's determination that dual-stenciled pipe is not within the Order's scope remains pending before the Federal Circuit and requested that "[t]o the extent that the Court determines Saha Thai's arguments raise a pure question of law . . . this Court should wait until after the issuance of the final mandate by the Federal Circuit before ruling on this issue." *Id.* at 5–6; *see also Saha Thai Steel Pipe Public Co. Ltd. v. United States*, No. 22–2181 (Fed. Cir.) (argued Nov. 7, 2023). The Government did not, however, articulate any substantive response to Plaintiff's argument that the pure question of law exception should apply. In Wheatland Tube's sur-reply, it contended that the pure question of law exception to administrative exhaustion does not apply because scope rulings are highly factual inquiries. Def.-Int.'s Sur-Reply at 4, ECF No. 70.

With the supplemental briefing complete, the Court held oral argument on July 13, 2023. ECF No. 78. There, the parties clarified their positions on whether administrative exhaustion prohibits Plaintiff's arguments regarding the scope of Commerce's review or whether an exception to that doctrine applies. Plaintiff reaffirmed its position

that, despite its failure to preserve the issue before the agency, the matter falls under the pure question of law exception and should therefore not be barred. Oral Arg. Tr. at 12:18–20, ECF No. 80. Counsel argued that 19 U.S.C. § 1675, which provides the statutory framework for Commerce's calculation of antidumping margins, empowers the agency to calculate those margins only on "covered merchandise." Thus, where the agency includes non-covered merchandise in its calculation, it has exceeded its statutory authority and must be reversed as a matter of law. *Id.* at 13:5–17. Meanwhile, the Government conceded it had failed to address this argument in its sur-reply. When asked to state its position, the Government explained that it could "see it from both sides" but ultimately agreed with Plaintiff and "thought it could be a question of law." *Id.* at 18:5–18. Because the Government wishes any remand redetermination to reflect the forthcoming decision of the Federal Circuit on the scope issue, it requested that the Court structure any remand to allow it to align the agency's position with that of the Federal Circuit. *Id.* at 72:11–17.

The parties also discussed the omission of seven companies as potential affiliates in Plaintiff's questionnaire responses and whether those omissions constituted noncooperation by Saha Thai. Regarding the six companies for which Wheatland Tube provided extensive documentation, counsel for Saha Thai conceded that their omission was error. *Id.* at 29:4–5 ("Straight up, that was likely a mistake."). Plaintiff's counsel also stated that it would not make a difference for Saha Thai whether Commerce's finding of affiliation regarding those six companies was affirmed. Nonetheless, Plaintiff declined to withdraw its challenge on that issue. *Id.* at 25:13–14 ("The punch line is as follows. Your decision on the six companies has no bearing on the result."); 27:3–25; 74:1–2 ("honestly whatever they do with six, don't really care"). With this scrambled set of party positions as the background, the Court applies the law.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiffs' challenge to the administrative review under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping orders. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). If they are unsupported by substantial evidence or not in accordance with the law, the Court must "hold unlawful any determination, finding, or

conclusion found." *Id.* "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New American Keg v. United States*, No. 20–00008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Summary

The present case raises three issues: (1) whether administrative exhaustion bars the argument that dual-stenciled pipe was improperly included in the calculation of Saha Thai's antidumping margin; (2) whether Commerce complied with the statutory prerequisites for drawing adverse inferences from facts otherwise available with respect to six of Saha Thai's customers; and (3) whether substantial evidence supports the agency's finding that BNK is affiliated with Saha Thai. *See* Pl.'s Reply at 11–33, ECF No. 53. The first issue is easily disposed of because the Government took the position that it would need to reconsider the question of whether to include dual stenciled pipe in light of intervening judicial decisions. Oral Arg. Tr. at 18:12–23, ECF No. 80; *see Saha Thai I*, 547 F. Supp. 3d at 1281 (holding that dual-stenciled pipe was not within the scope of the Order). The Court therefore interprets Commerce's request as one for a voluntary remand regarding the question of exhaustion and **GRANTS** that request.

The second issue is similarly straightforward. Saha Thai never named the six companies as potential affiliates even though it had notice that Commerce was requesting information about companies that *may* have been affiliated. *See* Section A Resp. at 3. J.A. at 82,819, ECF No. 57. At oral argument, counsel for Saha Thai conceded that the omission of the six companies was in error. Oral Arg. Tr. at 29:4–5, ECF No. 80 (In response to the Court's observation that Commerce was never told about the six companies, Plaintiff's counsel stated,

"Straight up, that was likely a mistake."). This omission left a gap in the record that rendered Commerce unable to complete its affiliation analysis, warranting the use of facts otherwise available with an adverse inference. *See* 19 U.S.C. § 1677e(a)(1)–(2). Substantial evidence therefore supports Commerce's findings regarding the six potentially affiliated companies such that the Court will **SUSTAIN** Commerce's related determinations.

The same cannot be said for Commerce's decision to apply adverse inferences to find that the seventh omitted company — BNK — was also affiliated with Saha Thai. Commerce drew that adverse inference based on a single human resources manager that was shared between BNK and Saha Thai. *See* Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58. Instead of explaining how a single shared employee whose position is not obviously involved in overseeing the manufacture of subject merchandise could be evidence of affiliation, Commerce merely speculated that there *could* be *other* links between the two companies. *Id.* Bare speculation is not substantial evidence. The Court must **REMAND** Commerce's determination of affiliation for further analysis and explanation in conformance with this opinion.

II. Remand Because of Intervening Legal Decision

Plaintiff first asks the Court to remand Commerce's decision with instructions to remove dual-stenciled pipe from the scope of the administrative review. In *Saha Thai I*, this Court held that the scope governing this administrative review did not bring dual-stenciled pipe within its ambit. 547 F. Supp. 3d at 1281. Saha Thai notes that, at the time of the administrative proceedings in this case, "the law was that the dual-certified pipe was within the scope of the order." Pl.'s Reply at 28, ECF No. 53. Because of the Court's subsequent ruling in *Saha Thai I*, Plaintiff argues that the pure question of law exception to administrative exhaustion applies to excuse its failure to raise the issue of the scope's proper coverage during the administrative review. Pl.'s Reply at 29–31, ECF No. 53. Commerce failed to offer a substantive response to this argument in its brief and, instead, merely noted that the question is still on appeal at the Federal Circuit. Def.'s Sur-Reply at 5, ECF No. 68 (noting that the "relevant scope issue is still on appeal in the Federal Circuit in *Saha Thai Steel Pipe Public Co. Ltd. v. United States*, No. 22–2181 (Fed. Cir.)"). Conversely, Wheatland Tube was unequivocal that the pure question of law exception does not apply because the construction of the scope of the Order is not a purely legal question. Def.-Int.'s Sur-Reply at 4, ECF No. 70; *see also* Oral Arg. Tr. at 19:3–8, ECF No. 80 ("It's our position that . . . Commerce would have to engage in a fact-specific

inquiry and in fact, make new calculations, and that would go beyond what the pure question of law doctrine would allow.").

The Court sought to clarify the Government's position at oral argument. After much throat-clearing, Commerce stated that the agency would need to reconsider the scope's coverage if this Court's ruling is affirmed on appeal. Oral Arg. Tr. at 17:12–14, ECF No. 80 ("[I]f the Court says it's in scope, then Commerce will have to reach a decision telling us you'll have to correct it . . . ."). Government counsel then confirmed that Commerce believes the pure question of law exception applies. *Id.* at 18:21–23 (responding "yes, Your Honor" when asked by the Court whether the Government "agree[d] that it is a question of law").

Under Federal Circuit precedent, an agency may request a remand "because of intervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). "A remand is generally required if the intervening event may affect the validity of the agency action." *Id.* The Court is "free, within reasonable limits, to set the parameters of the remand." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed. Cir. 1992).

The present circumstances justify a remand. Plaintiff has pointed to this Court's intervening legal decision; and Commerce has taken the position that, if the Federal Circuit affirms that decision, Commerce should align its scope determination here with the Court's decision. Oral Arg. Tr. at 72:12–17, ECF No. 80. Given the Government's concessions at oral argument, this Court **GRANTS** a voluntary remand to the agency so that it may reconsider whether Saha Thai's dual-stenciled pipe sales were properly included in the administrative review. The Remand Redetermination will not be due until after the mandate issues in the pending Federal Circuit appeal to promote administrative and judicial economy.

III. Six of the Seven Potential Affiliates

Commerce found that Saha Thai failed to disclose seven companies as potential affiliates despite multiple questionnaires seeking that information. *See* Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58; Def.'s Resp. at 13–19, ECF No. 47. Wheatland Tube found publicly available data that shed light on the seven potential affiliates and filed that information with Commerce. Rebuttal of Saha Thai, J.A. at 97,105, ECF No. 58. Commerce used that publicly available information to draw adverse inferences against Saha Thai and find that all seven companies were affiliated with Plaintiff. Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58. Saha Thai counters

that Commerce never asked for information about *potential* affiliates so that no necessary information was missing from the record. Pl.'s Reply at 12, ECF No. 53. However, at oral argument, Saha Thai's counsel admitted that it was an error not to include six of the seven companies in its response to Commerce's Initial Questionnaire. Oral Arg. Tr. at 29:4–7, ECF No. 80 ("Straight up, that was likely a mistake . . . . They should have been [reported] in category 2.").

Commerce must determine whether a given customer is affiliated with a respondent because "an overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible[.]" *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). To calculate the antidumping margin, the agency must compare the U.S. price and the normal value of the subject merchandise. 19 U.S.C. § 1675(a)(2)(A). Normal value is the sale price of the foreign like product sold "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). In other words, Commerce must determine if the company under investigation sells the same product in its home country for more than its selling price in the United States. Sales to affiliated companies raise the question of whether the transactions reflect true market price. Commerce may only consider a company's sales to affiliates if Commerce is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c). When examining sales to affiliated parties, Commerce applies an arm's length test to determine whether the transactions were truly made in the ordinary course of trade. *See Timken Co. v. United States*, 26 CIT 1072, 1079–80 (2002) (describing the arm's length test). When transactions with affiliated customers are found to be not at arm's length, Commerce excludes them from the calculation of normal value; and those transactions play no role in the calculation of the final antidumping margin. *Id.* It is therefore vital that parties identify to Commerce all potentially affiliated companies so that Commerce will only use arm's length transactions when calculating normal value.

The test for whether a company is considered "affiliated" is defined by statute. 19 U.S.C. § 1677(33) defines "affiliated persons" as:

> "Members of a family . . . any officer or director of an organization and such organization[,] partners[,] employer and employee[,] any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization[,] two or more persons directly or indirectly controlling, or

> controlled by, or under common control with, any person[, and] any person who controls any other person and such other person."

The same statute also explains that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." *Id.* The accompanying regulation expounds on this definition, explaining that "in determining whether control over another person exists . . . [the agency] will not find that control exists . . . unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." 19 C.F.R. § 351.102(b)(3). When carrying out its mandate to calculate the subject company's dumping margin, it is this definition that Commerce must apply to determine whether customers are affiliated. Commerce collects information from respondents to calculate antidumping margins through voluntary responses to questionnaires, which reflect the statutory definition of affiliation.

When Commerce is missing data necessary to calculate the normal value of merchandise subject to an antidumping investigation — whether it be related to affiliation or any other information necessary for the agency's analysis — the statutes provide a two-part process to fill the gap. *See* 19 U.S.C. § 1677e(a). The statute enables Commerce to use "facts otherwise available" in place of the missing information if:

> (1) Necessary information is not available on the record, or
>
> (2) An interested party or any other person —
>
> (A) Withholds information that has been requested by [Commerce],
>
> (B) Fails to provide such information by the deadlines for submission of the information or in the form and manner requested, . . .
>
> (C) Significantly impedes a proceeding under this subtitle, or
>
> (D) Provides such information but the information cannot be verified[.]

Separately, 19 U.S.C. § 1677e(b) permits those facts otherwise available to be chosen with an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." Although § 1677e(a) and § 1677e(b) are often collapsed into "adverse facts avail-

able" or "AFA," the two statutory processes require distinct analyses rather than the single analysis implied by the term "AFA." Commerce first must determine that it is missing necessary information; and, if it wishes to fill the resulting gap with facts that reflect an adverse inference against an interested party, Commerce must secondarily determine that the party has failed to cooperate by not acting to the best of its ability. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011).

Before using facts available, however, Commerce must give the respondent an opportunity to rectify the deficiency. *See* 19 U.S.C. § 1677m(d). The agency shall "promptly inform the person submitting the response of the nature of the deficiency" and "provide that person with an opportunity to remedy or explain the deficiency." *Id.* If those further responses are also unsatisfactory or untimely, Commerce may disregard the information respondents have provided and "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. §§ 1677m(d), 1677e(a); *see also Diamond Sawblades Mfrs.' Coal. v. United States*, 986 F.3d 1351, 1362–64 (Fed. Cir. 2021) (analyzing the statutory framework).

Commerce's Section A Questionnaire requested that Saha Thai "[i]dentify all suppliers, (sub)contractors, lenders, exporters, distributors, resellers, and other persons involved in the development, production, sale and/or distribution of the merchandise under review which *Commerce may also consider affiliated* with your company[.]" Section A Questionnaire at A-6, J.A. at 3,312, ECF No. 56 (emphasis added). Saha Thai did not identify any of the six companies now at issue in its answer to that question. *See* Section A Resp. at Ex. A-1, J.A. at 82,854 ECF No. 57. Nor did Saha Thai identify those companies in response to Commerce's Third Supplemental Questionnaire, which asked "whether any stockholder, manager, director, officer, or department head is also a stockholder, manager, director, officer, or department head at any other company involved in the development, production, sale and/or distribution of the merchandise under review." Third Suppl. Questionnaire at 1, J.A. at 96,235, ECF No. 58. Instead, Saha Thai asserted that, "Other than the affiliations reported in Saha Thai's Section A response, no other stockholders, managers, directors, officers, or department heads at Saha Thai are related to any other company that produces, develops, distributes or sells [the subject merchandise]." *Id.*; Third Resp. Part 2 at 1, J.A. at 96,466, ECF No. 58. Wheatland Tube's submission of public data demonstrated Saha Thai's response was less than forthcoming. IDM at 9, J.A. at 14,296, ECF No. 56. Namely, the public records showed that four of Saha Thai's home market customers — C.S. Steel Product

Co. Ltd., Nawapon Kanka Sakon Co. Ltd., Tac-M Group Co. Ltd., and Metallic Section Steel Company Ltd. — "are affiliated through majority stock ownership and board membership of the Ratanasirivilai family"; that "members of the Khruchit . . . family are shareholders" of another of Saha Thai's home market customers, JHP International Co., Ltd.; and that, for a sixth home market customer, Paisan Steel Co. Ltd, "one of the directors . . . is also one of the directors at Saha Thai." Final Analysis Memo at 2, J.A. at 99,505, ECF No. 58. All of this offers strong support of affiliation in light of Saha Thai's own admission "that members of the Ratanasirivilai family own 16.68% of Saha Thai and members of the Karuchit family own 24.32% of Saha Thai" and that "of Saha Thai's six directors, two are members of the Ratanasirivilai family and two are members of the Karuchit family." *Id.*; *see also* 19 U.S.C. § 1677(33) (listing persons who "shall be considered 'affiliated'" including "members of a family" and "any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization"). However, the publicly available information was insufficient for Commerce to do a full affiliation analysis because the agency still lacked the "complete details on the ties between Saha Thai and these customers to make affiliation determinations." IDM at 9, J.A. at 14,296, ECF No. 56. In other words, although the publicly available documents provided by Wheatland Tube regarding the shared ownership and executive ties between Saha Thai and other companies served as strong evidence of affiliation, it could not entirely fill the gap left by Saha Thai's omissions. The failure to provide this information therefore inhibited Commerce in fulfilling its statutory mandate to analyze the affiliation status of each of the six companies. *See* 19 U.S.C. § 1677(33) ("The following persons *shall* be considered to be 'affiliated' . . . .") (emphasis added).

Saha Thai first raises a procedural defense against use of Wheatland Tube's submission. *See* Pl.'s Mot. at 23–28, ECF No. 40. Plaintiff argues that Wheatland Tube violated the requirement that submitters of rebuttal information provide a written summary of that information. *Id.* at 24 (citing 19 C.F.R. § 351.301(b)(2)). However, that regulation does not require the submission of a complete narrative summarizing all the submitted documents. Instead, it requires the submitter to "provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct." 19 C.F.R. § 351.301(b)(2). Wheatland Tube stated on the first page of its submission that it was providing information to rebut specific statements and exhibits in Saha Thai's

Third Supplemental Questionnaire Response. In fact, Wheatland Tube went as far as to quote the responses from Saha Thai's questionnaire response that it sought to rebut. *See* Rebuttal of Saha Thai at 1, J.A. at 97,109, ECF No. 58 ("On pages 2–3 of its supplemental questionnaire response dated May 6, 2021, respondent Saha Thai . . . informed Commerce that "none of its or its affiliates' employees, stockholders, managers, directors, officers, or department heads currently is employed with any other company that develops, produces, sells and/or distributes merchandise under review" except as described in the company's Section A response."). Wheatland Tube's submission then proceeded to do just that by providing a series of documents outlining the ownership and executive ties between Saha Thai and companies it failed to identify as potential affiliates in its responses. *Id.* at 1–2, J.A. at 97,109–10. Wheatland Tube's summary put Saha Thai on sufficient notice of which of its claims was challenged. Wheatland Tube therefore complied with the regulation.[5]

Saha Thai next objects that Commerce did not give it notice of its deficient affiliation responses or an opportunity to remedy those deficiencies as required by statute. Pl.'s Reply at 21–24, ECF No. 53. The burden to provide timely notice before the agency publishes its final determination lies with Commerce. *See* 19 U.S.C. § 1677m(d). Commerce may refuse to provide notice when it can demonstrate bad faith on the respondent's part but not when it merely alleges that some information it wanted was not provided. *See Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 605 F. Supp. 3d. 1348, 1366 (CIT 2022) (citing *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016)). The statute does not "compel[] Commerce to treat intentionally incomplete data as a 'deficiency' and then to give a party that has intentionally submitted incomplete data an opportunity to 'remedy' as well as to 'explain.'" *Papierfabrik*, 843 F.3d at 1384; *see also ABB Inc. v. United States*, 355 F. Supp. 3d 1206, 1222 (CIT 2018) ("When a respondent provides seemingly complete, albeit completely inaccurate, information, § 1677m(d) does not require Commerce to issue a supplemental questionnaire seeking assurances that the initial response was complete and accurate.").

Commerce complied with § 1677m(d) by virtue of its series of questionnaires in which the agency repeatedly asked for information about Saha Thai's potential affiliates. Saha Thai's own answers dem-

[5] Saha Thai also argues that Wheatland Tube violated Commerce's regulations by failing to provide translations of its documents. Pl.'s Mot. at 26, ECF No. 40. Saha Thai fails to point to any prejudice resulting from the lack of translated versions. Hence, this violation was harmless error. *See PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006)(requiring a showing of substantial prejudice when Commerce violated its own regulation that required it to give notice to a foreign exporter).

onstrate that it understood the questions to include not only companies that, in Saha Thai's view, clearly were affiliates but also companies for which the question of affiliation might be disputed. Commerce's Section A Questionnaire requested that Saha Thai identify all customers that "Commerce may consider" affiliated with Saha Thai. Section A Questionnaire at A6, J.A. at 3,312, ECF No. 56. Plaintiff's narrative response explained that it was reporting "sales to *potentially affiliated* entities for consumption," yet Saha Thai did not include any of the six companies in its response. Section A Resp. at 3, J.A. at 82,819, ECF No. 57 (emphasis added). Saha Thai answers that it did not have to report the six companies because Commerce never asked Saha Thai to report potential affiliates that were not involved in the sale, development, or production of the subject merchandise. Pl.'s Reply at 13–14, ECF No. 53. Once again, the plain text of Commerce's questions belies Saha Thai's claim. Commerce's Section B Questionnaire asked Saha Thai to "report all of your sales to that affiliate, *whether the merchandise was consumed or resold by the affiliate*." Section B Questionnaire Response at 5, J.A. at 8,197, ECF No. 56 (emphasis added). Thus, Commerce did not limit its query to companies that sold, developed, or produced pipe but also included those companies that may have only consumed or resold it. *See* Section A Resp. at Ex. A-1, J.A. at 82,854 ECF No. 57.

Commerce gave Saha Thai yet another opportunity to remedy the deficiencies in its initial response when it issued the Third Supplemental Questionnaire. There, Commerce asked Saha Thai to list any companies that had overlapping directors, significant stockholders, and board members with Saha Thai. Third Supp. Quest. at 1, J.A. at 96,235, ECF No. 58 ("Please submit a list of all stockholders, managers, directors, officers, and department heads" and state whether any of those individuals "is also a stockholder, manager, director, officer, or department head at any other company involved in the development, production, sale, and or distribution" of the covered merchandise.). Plaintiff again declined to disclose any information about the six companies in question and stated that "none of the individuals in the family grouping that owns Saha Thai is involved in the production, development, sale or distribution of merchandise under review other than the reported affiliations in Saha Thai's Section A response to the Department." Third Response Part 2 at 2, J.A. at 96,467, ECF No. 58. Saha Thai's counsel removed any doubt about the clarity of Commerce's requests when he admitted that it was an error not to report the six companies as potential affiliates. Oral Arg. Tr. at 29:4–5, ECF No. 80. Having given Plaintiff at least two oppor-

tunities to report the companies' information, Commerce was not required to "issue a[n] [additional] supplemental questionnaire to the effect of, 'Are you sure?'" *ABB Inc.*, 355 F. Supp. 3d at 1222. The agency's multiple requests for the information complied with the notice requirements of Section 1677m(d).

As a final attack, Saha Thai argues that the missing information was not necessary because Commerce could have marked those six companies as affiliated in the sales database and calculated the margin without further information from Saha Thai. Pl.'s Reply at 16, ECF No. 53 ("Here, for those home-market customers that did not re-sell the subject merchandise, Commerce had all of the data needed to calculate an accurate antidumping margin, regardless of whether the home-market customer was considered affiliated or unaffiliated."). This is sophistry. Even accepting the premise that Commerce had all the data it needed to calculate an accurate antidumping margin, the agency lacked the data necessary to flag the companies as affiliates until Wheatland Tube provided the rest of the story. *See* IDM at 9, J.A. at 14,296, ECF No. 56. That Commerce could have calculated the margin if the companies in question are affiliated with Saha Thai does not answer the question of whether they actually *are* affiliated — an analysis that the agency is required to perform as part of its investigation. Moreover, the record lacks evidence of whether the companies in question resold the subject merchandise precisely because Saha Thai never identified the companies to Commerce, preventing it from requesting additional information about their downstream sales in the Thai market. *See* IDM at 9–10, J.A. at 14,296–97, ECF No. 56. Saha Thai's contrary argument is meritless.

Saha Thai's failure to provide the requested information to Commerce justified the agency's drawing of an adverse inference from the facts otherwise available. When a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1). To show that a party has failed to cooperate, Commerce:

> must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations" and "a subjective showing that the respondent under investigation['s] . . . failure to fully respond is the result of. . . either: (a) failing to keep and main-

> tain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

Although "intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element." *Id.* at 1383. Saha Thai understood it had a duty to report potential affiliates. *See* Section A Resp. at 3, J.A. at 82,819, ECF No. 57 (Saha Thai explaining it is reporting "sales to *potentially affiliated* entities for consumption") (emphasis added). Despite having at least two distinct opportunities to report the six companies to Commerce, it refrained from doing so. This led Commerce to conclude that Saha Thai "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). Saha Thai's failure to identify companies in which its owners also held substantial equity interests justifies the application of an adverse inference. *See Nippon Steel*, 337 F.3d at 1382 (requiring respondents "to put forth [their] maximum efforts to investigate and obtain the requested information"). Commerce's affiliation determination regarding the six companies is therefore **SUSTAINED**.

IV. The Adverse Inference Regarding BNK

Although Commerce's application of adverse inferences to find affiliation regarding the first six companies was proper, its application of an adverse inference to find that the seventh company — BNK — was also an affiliate is problematic. Wheatland Tube's proffered information demonstrated only a single link between BNK and Saha Thai: a shared a human resources manager. Commerce argues that it "could not assume that this was the only tie between Saha Thai and BNK." Def.'s Resp. at 29, ECF No. 47. Saha Thai retorts that Wheatland Tube's submissions contained no evidence of overlapping shareholders or directors between Saha Thai and BNK and that "neither Commerce nor Defendant could point to evidence that established affiliation [with] BNK." Pl.'s Reply at 18, ECF No. 53. Because the sharing of a single human resources manager is insufficient for a reasonable mind to conclude that Saha Thai and BNK are affiliated, the Court cannot sustain Commerce's adverse inference on this point. *See Consol. Edison*, 305 U.S. at 229 (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

The Court reviews Commerce's decisions and findings for substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). In the context of affiliation determinations, the agency must explain how the facts on the record fulfill the statutory requirements of 19 U.S.C. § 1677(33), which provides the definition of an affiliate. *See Hyundai Heavy Indus. Co. v. United States*, 393 F. Supp. 3d 1293, 1319 (CIT 2019) (holding that Commerce failed to explain how an adverse inference of affiliation met the statutory definition when all the agency cited was a single shared employee with a shared email address). Commerce's explanation of its affiliation finding concerning BNK consisted of a single paragraph, reproduced in full below:

> In addition, Saha Thai reported that [an employee] is its HR Manager; documents which BNK Steel Co., Ltd. (BNK)submitted to the Thai Labor Department show that that [same employee] is BNK's Human Resource Manager and that this individual can be contacted at a Saha Thai e-mail address . . . . Although Saha Thai dismisses this as not amounting to a traditional leadership position such as Chairman or Chief Executive Officer and *Wheatland Tube Company (Wheatland) has not proven that it entails a legal or operational position allowing for the exercise of control*, as discussed in the Issues and Decision Memorandum, we asked Saha Thai to "state whether Saha Thai's or any of Saha Thai affiliates' employees, stockholders, managers, directors, officers, or department heads has an equity or a debt position in any other company involved in the development, production, sale and/or distribution of the merchandise under review." Moreover, this information only came to light as a result of Wheatland's research of public records. Because Wheatland was limited to public records in its research, we cannot assume that there are no other ties between Saha Thai and [BNK] which Saha Thai failed to disclose. As a result, we cannot determine that Saha Thai is necessarily not affiliated with BNK.

Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58 (emphasis added).

This Court's previous decision in *Hyundai Heavy Industries* is instructive in evaluating Commerce's explanation. There, the Court held that Commerce's bare citation to a shared employee with a shared email was insufficient to uphold Commerce's finding of affiliation through the application of an adverse inference. 393 F. Supp. 3d at 1319. Commerce had found that the respondent had impeded its

review by failing to disclose a shared sales agent with a customer and drew an adverse inference to find that the customer was affiliated with the respondent. *Id.* Commerce cited this lone fact to support its affiliation finding and failed to "explain how that 'fact' fulfilled the statutory definition of affiliation pursuant to section 1677(33)(D)." *Id.*

Here, too, the agency has offered no explanation of how a single shared human resources manager meets the statutory definition of affiliation. *See* Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58. Assumptions and speculations are not evidence. *OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) and *Intellectual Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d. 1320, 1331 (Fed. Cir. 2017) ("The Supreme Court 'has stressed the importance of not simply rubber-stamping agency factfinding' . . . . 'Mere speculation' is not substantial evidence.")). Even if they were, Commerce misuses its "fact." The agency is required to find whether two entities are affiliated. *See* 19 U.S.C. § 1677(33) (listing seven ways to meet the affiliation test). Rather than attempt to explain how one shared human resources employee meets the statutory test, Commerce instead declares it "cannot determine that Saha Thai is necessarily not affiliated with BNK." Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58. "Necessarily not affiliated" is not the statutory standard; it is instead Commerce's attempt to dodge the standard. Commerce's finding therefore not only fails to provide substantial evidentiary support, it also fails to apply the proper legal standard found in the statute. *Cf.* 19 U.S.C. § 1677(33). Commerce's prior findings regarding the six other companies are instructive. There, Commerce could point to shared ownership interests and shared directors as facts meeting the affiliation standard. *Compare id.* ("Members of a family," shared "officer[s] or director[s] of an organization," and anyone who has "power to vote[] 5 percent or more" of the stock of an organization are affiliated), *with* Final Analysis Memo at 2, J.A. at 99,505, ECF No. 58 ("Saha Thai reported that members of the Ratanasirivilai family own 16.68% of Saha Thai and members of the Karuchit family own 24.32% of Saha Thai . . . . The record shows that . . . Saha Thai home market customers are affiliated through majority stock ownership and board membership of the Ratanasirivilai family . . . [and] that members of the Karuchit family are shareholders of [certain home market customers.]"). No such analysis or information is present regarding BNK. *See* Final Calculation Analysis at 2, J.A. at 99,505, ECF No. 58 (quoted in full above). Because Commerce's finding is both factually unsupported and legally improper, it may not stand. The Court therefore **GRANTS** Plaintiff's Motion for Judgment on the Agency Record

on this issue and **REMANDS** to Commerce to perform a proper affiliation analysis regarding the relationship between Plaintiff and BNK.

CONCLUSION

This case must return to the agency for further consideration. Commerce's request to reconsider the scope of the administrative review following the forthcoming decision of the Federal Circuit in *Saha Thai Steel Pipe Public Co. Ltd. v. United States*, No. 22–2181 is **GRANTED**. On remand, Commerce must also reconsider its affiliation analysis regarding BNK, apply the proper statutory test for affiliation, and explain how the facts on the record support its determination. Commerce's affiliation analysis of the six other companies is **SUSTAINED** as having substantial evidentiary support and complying with all legal standards.

On consideration of all papers and proceedings held in relation to this matter, and on due deliberation, it is hereby:

ORDERED that Plaintiffs' Motion for Judgement on the Agency Record is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that Commerce, no later than 90 days from the issuance of the mandate in *Saha Thai Steel Pipe Public Co. Ltd. v. United States*, No. 22–2181 (Fed. Cir.), shall submit a Second Remand Redetermination in compliance with this Opinion and Order; and it is further

ORDERED that Defendant shall supplement the administrative record with all additional documents considered by Commerce in reaching its decision in the Remand Redetermination;

ORDERED that Plaintiff and Plaintiff-Intervenor shall have 30 days from the filing of the Remand Redetermination to submit comments to the Court;

ORDERED that Defendant shall have 30 days from the date of Plaintiffs' filing of comments to submit a response; and

ORDERED that Defendant-Intervenors shall have 15 days from the date of Defendant's filing of comments to submit their responses.

SO ORDERED.

Dated: November 13, 2023
New York, New York

Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 23–159

BGH EDELSTAHL SIEGEN GMBH, Plaintiff, v. UNITED STATES, Defendant, and ELLWOOD CITY FORGE COMPANY, et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 21–00080

[Remanding the U.S. Department of Commerce's remand redetermination in the 2018 investigation of the countervailing duty order covering forged steel fluid end blocks from the Federal Republic of Germany.]

Dated: November 14, 2023

Marc E. Montalbine, deKieffer & Horgan, PLLC, of Washington, DC, for plaintiff BGH Edelstahl Siegen GmbH. Also on the brief were *Gregory S. Menegaz*, *Alexandra H. Salzman*, and *Merisa A. Horgan*.

Kelly M. Geddes, Trial Attorney, *Sarah E. Kramer*, Trial Attorney, and *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. Also on the brief was *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel on the brief was *Ayat Mujais*, Attorney, and *Joseph Grossman*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Nicole Brunda, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant intervenors Ellwood City Forge Co., Ellwood National Steel Co., Ellwood Quality Steels Co., and A. Finkl & Sons. Also on the brief were *Thomas M. Beline*, *Jack A. Levy*, *Myles S. Getlan*, and *Chase J. Dunn*.

OPINION AND ORDER

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the Court's second remand order, *see BGH Edelstahl Siegen GmbH v. United States*, 639 F. Supp. 3d 1237 (Ct. Int'l Trade 2023) ("BGH II"), on Commerce's final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("fluid end blocks") from the Federal Republic of Germany ("FRG"). *See* Final Results of Redetermination Pursuant to Court Remand, C-428–848 (Aug. 7, 2023), ECF No. 60–1; *see generally [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders, and am. Final affirmative [CVD] determination for the People's Republic of China) and accompanying Issues and Decision Mem., C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020), ECF No. 15–2; *[Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). For the following reasons, the Court remands Commerce's redetermination.

BACKGROUND

The Court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, *see BGH Edelstahl Siegen GmbH v. United States*, 600 F. Supp. 3d 1241, 1248 (Ct. Int'l Trade 2022) ("*BGH I*"); *BGH II*, 639 F. Supp. 3d at 1237, and now recounts only those facts relevant to the court's review of the Remand Results. Commerce selected plaintiff BGH Edelstahl Siegen GmbH ("BGH") during its CVD investigation of fluid end blocks from the FRG between the period of January 1, 2018 to December 31, 2018. Resp't Selection Mem. at 1, C-428–848, PD 54, bar code 3938815–01 (Feb. 4, 2020). The investigation concluded that the Government of Germany offered countervailable subsidies through multiple programs, including the Konzessionsabgabenverordung Program ("KAV Program").[1] Issues and Decision Mem. at 6–8, C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020), ECF No. 15–2; *see also* Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–19, C-428–848, PD 271, bar code 4043279–01 (Oct. 21, 2020); Decision Mem. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 19–27, C-428–848, PD 220, bar code 3975458–01 (May 18, 2020). BGH filed its complaint and sought judgment on the agency record, challenging Commerce's final determination. Compl., Mar. 29, 2021, ECF No. 7; [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21. The Court sustained in part and remanded in part Commerce's final determination after briefing. *BGH I*, 600 F. Supp. 3d at 1248. The Court held that Commerce's finding that the KAV Program was a specific countervailable subsidy as a matter of law was unsupported by the record because Commerce did not explain how the program limits usage to certain industries or enterprises and failed to consider its economic and horizontal properties and application. *Id.* at 1269. The Court also remanded Commerce's CVD rate calculation for the Electricity Tax Act and the Energy Tax Act. *Id.* at 1258.

Commerce filed Remand Results in January 2023. After briefing was complete, the Court sustained in part and remanded in part. *BGH II*, 639 F. Supp. 3d at 1239. Specifically, the Court again found that Commerce's classification of the KAV Program as de jure specific

[1] BGH challenged Commerce's determination that the following programs are countervailable: 1. Stromsteuergesetz ("Electricity Tax Act"), 2. Energiesteuergesetz ("the Energy Tax Act"), 3. Erneuerbare-Energien-Gesetz ("EEG Program"), 4. Kraft-Wärme-Kopplungsgesetz ("KWKG Program"), 5. The European Union's ("EU")Emissions Trading System ("ETS Program"), 6. The EU ETS Compensation of Indirect CO2 Costs Program ("CO2 Compensation Program"), and 7. the KAV Program. [BGH] Rule 56.2 Mem. Supp. Mot. J. Agency R. at 7, 21, 30, 39–40, Oct. 26,2021, ECF No. 22.

was insufficient in light of the record. *Id.* at 1243. The Court remanded for further explanation or reconsideration as to the economic and horizontal nature of the subsidy. *Id.* at 1244. The Court sustained Commerce's CVD rate calculation for both the Electricity Tax Act and the Energy Tax Act. *Id.* at 1242.

Commerce filed its Second Remand Results on August 7, 2023. In the second redetermination, Commerce continues to find the KAV Program to be a specific countervailable subsidy. Second Remand Results at 2. BGH opposes Commerce's redetermination, asserting that Commerce failed to support its findings that the KAV Program constitutes a specific subsidy in light of the second remand order, the plain wording of the statute, and legislative history. [BGH] Comments Opp. [Second Remand Results] at 1–12, Sept. 6, 2023, ECF No. 63 ("BGH Comments"). Defendant and Defendant-Intervenors contend that the court should sustain Commerce's second remand redetermination because the KAV Program is specific as a matter of law due to its vertical eligibility criteria and access limitations to special contract customers. Second Remand Results at 2; Def.-Int.'s Reply on [Second Remand Results] at 2–6, July 19, 2023, ECF No. 62–4 ("Def-Int. Reply").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 516A of the Tariff Act,[2] as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (2018), and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of a CVD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (quotation marks omitted).

DISCUSSION

In its second remand redetermination, Commerce again argues that the KAV Program is specific as a matter of law. Second Remand Results at 5. Specifically, Commerce contends that the FRG has "limited" the KAV Program to a subset of enterprises and as a result the KAV Program is specific as a matter of law. Second Remand Results at 5. BGH argues that Commerce's explanation for its finding

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

is insufficient to demonstrate specificity. BGH Comments at 1–4, 9–11. For the following reasons, the Court remands Commerce's second remand redetermination for further explanation or reconsideration.

A domestic subsidy may be countervailable either because it is specific as a matter of law (de jure specific) or specific as a matter of fact (de facto specific). 19 U.S.C. § 1677(5A)(D). Congress provided statutory guidelines[3] to identify when a subsidy is (i) specific as a matter of law (ii) not specific as a matter of law, and (iii) specific as a matter of fact. *Id.* The guidelines identify a de jure specific subsidy as one that "expressly limits access to the subsidy to an enterprise or industry."[4] *Id.* § 1677(5A)(D)(i); *see also* Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4242 ("SAA"). "Thus, a subsidy is de jure specific when the authority providing the subsidy, or its operating legislation, expressly limits access to the subsidy to a business or industry, or to a group of businesses or industries." *Risen Energy Co. v. United States*, No. 22–00231, 2023 WL 6620508, at *5 (Ct. Int'l Trade Oct. 11, 2023); *See* 19 U.S.C. § 1677(5A)(D)(i).

The second guideline makes clear that the existence of criteria—that limits access—alone is insufficient to render a subsidy specific as a matter of law if the criteria is horizontal in application and economic in nature. *See* 19 U.S.C. § 1677(5A)(D)(ii); SAA at 4243. If objective criteria are publicly and clearly set forth, and those criteria provide for automatic eligibility and are strictly followed, a subsidy awarded pursuant to those criteria is not specific as a matter of law. 19 U.S.C. § 1677(5A)(D)(ii). The SAA's explication of permissible criteria makes clear that criteria may create objective categories of industries or enterprises which may benefit from the subsidy to the exclusion of others. SAA at 4243. The SAA provides:

> Finally, the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.

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[3] 19 U.S.C. § 1677(5A)(D) provides: "In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:"

[4] An enterprise or industry may mean group of enterprises or industries. 19 U.S.C. § 1677 (5A)(D); SAA at 4242.

Id. Criteria based on size or the number of employees could exclude entire categories of enterprises and industries, but such criteria would not render the subsidy de jure specific because it is horizontal (operating throughout the economy), and is economic in nature. *Id.*

Moreover, the SAA reveals that a subsidy will not be deemed de jure specific simply because it is available to fewer than all enterprises or industries. *Id.* at 4242. Indeed, the SAA elaborates that there is no "precise mathematical formula" for Commerce to invoke that can calculate when a number of enterprises or industries is "sufficiently small" to be specific as a matter of law.[5] *Id.* The SAA's rejection of a "precise mathematical formula" acknowledges that some limitations will result in a "sufficiently small" number of beneficiaries such that the subsidy will be considered specific as a matter of law. That the SAA provides that where the subsidy is available to a "sufficiently small" number of beneficiaries, the subsidy will be de jure specific, necessarily means that when criteria limit the number of beneficiaries to a group that is not "sufficiently small" it will not be de jure specific.[6] *See id.*

Here, the KAV Program identifies a category of enterprises or industries that are eligible for the subsidy based upon energy usage. The KAV Program is only available to the group of "special contract customers," meaning customers "whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours (kWh)" and whose "electricity prices [] were lower than the Marginal Price agreed upon by the network operator and the municipality." Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to the Suppl. Questionnaire at 2–3, C-428–848, PD 270, bar code 4030747–01 (Sept. 22, 2020) ("FRG Response"); Second Remand Results at 4; *see also BGH II*, 639 F. Supp. 3d at 1244 at n. 6 (citing FRG Response at 2–3.). Although the KAV Program is limited[7] by its terms to special contract customers, Commerce fails to explain how this limitation renders the program de jure specific. In order to find the

[5] A proposal for a mathematical formula to determine de jure specificity was explicitly rejected by the United States, instead providing that such determinations must be made on a case-by-case basis. SAA at 4242–43.

[6] In its third guideline Congress delineates de facto specific subsidies, specifically providing that "[w]here there are reasons to believe that a subsidy may be specific as a matter of fact," Commerce will consider the actual number of recipients, whether there is a predominant or disproportionate user, and the manner in which the granting authority exercises discretion. 19 U.S.C. § 1677(5A)(D)(iii).

[7] Commerce clarifies that it incorrectly indicated that the KAV Program "favored" certain enterprises in its First Remand Results and in the Second Remand Results now indicates that the KAV Program limits access to the program. Second Remand Results at 5.

KAV Program specific as a matter of law, Commerce must conclude that the criteria imposed is not objective.

Commerce acknowledges that objective criteria are those that are economic in nature and horizontal in application.[8] Second Remand Results at 6. The SAA allows for some limitations, such as the size of an enterprise or number of employees, because those limitations are neutral, meaning they are economic in nature and horizontal in application, i.e., they cut across the economy. SAA at 4242. The KAV Program is available to all customers that meet a specified energy consumption level.[9] FRG Response at 2–3. Nowhere does Commerce explain why energy usage is not objective criteria in the same way the size of an enterprise or number of employees would be.[10] SAA at 4243. Commerce simply concludes that because "these eligibility criteria do not apply uniformly across all enterprises and industries (i.e., are not horizontal in application), they cannot be neutral pursuant to [19 U.S.C. § 1677(5A)(D)(ii)]." Second Remand Results at 5–6, 11 (emphasis omitted). However, that the program contains limiting criteria

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[8] Commerce fails to address whether the KAV Program is economic in nature in the second redetermination, claiming it only needs to support its determination that the KAV Program is not horizontal in application in order to support its findings. *See* Second Remand Results at 11–12 (noting "the SAA requires both conditions (i.e., 'economic in nature and horizontal in application'") and declining to assess the former in light of its conclusion regarding the later). Commerce therefore has waived any argument that the KAV Program is not economic in nature.

[9] That a limited number of enterprises or industries may ultimately benefit from the program may support a finding of de facto specificity, but it does not support a finding of express or de jure specificity. *See Asociacion de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 523 F. Supp. 3d 1393, 1404 (Ct. Int'l Trade 2021).

Defendant-Intervenors assert Commerce could not have conducted a de facto analysis because the FRG could not supply the needed information for such an analysis. Def-Int. Reply at 6–7. However, nowhere in Final Decision Memo or subsequent remand determinations does Commerce indicate that it did not conduct such an analysis because the FRG did not supply needed information. *See generally,* Issues and Decision Mem., C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020),ECF No. 15–2; *BGH I*, 600 F. Supp 3d 1241, *BGH II,* 639 F. Supp. 3d 1237. Where Commerce lacks information, Congress has empowered it to resort to facts available. 19 U.S.C. § 1677e(a). Commerce did so in this case for other programs. Issues and Decision Mem. at 13–16, C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020). Indeed, Commerce found in its post-preliminary determination that the KAV Program was specific as a matter of fact "because recipients of the subsidy are limited in number." Post Prelim. Analysis Mem. at 14, C-428–848, PD 271, bar code 4043279–01 (Oct. 21, 2020). The FRG challenged Commerce's de facto specificity finding, *see* Brief from [FRG] to [Commerce] Pertaining to [FRG] at 20, C-428–848, PD 285, barcode 4048444–01 (Nov. 3, 2020), to which Commerce responded by changing to a dejure analysis of the KAV Program instead. Issues and Decision Mem. at 39, C-428848, PD 293, bar code 4062827–01 (Dec. 7, 2020).

[10] Commerce's arguments that a group of enterprises or industries does not need to be "specifically named" and Commerce is not required to identify "shared characteristics among the enterprises or industries" are irrelevant. *See* Second Remand at 7. The issue Commerce must, but fails, to address is whether criteria is horizontal—that is, whether it is available across enterprises or industries.

does not in itself render it de jure specific. *See* 19 U.S.C. § 1677(5A)(D)(ii). The SAA rejects the notion of a mathematical formula when determining specificity as a matter of law, meaning that certain criteria may limit potential beneficiaries to some number without the subsidy being de jure specific. SAA at 4242. Indeed, in its Second Remand Results, Commerce makes the point that preeminent purpose of the specificity test is "to 'function as a rule of reason and avoid imposition of [CVDs] in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy.'" Second Remand Result at 7–8 (quoting SAA at 4242) (emphasis omitted).

Nonetheless, Commerce reasons here, as it has in prior determinations,[11] that where the "implementing legislation expressly limited access to the 'group' that the legislation itself created" the subsidy is de jure specific. *Id.* at 11 ("Indeed, where an authority, by law, limits eligibility to a group of enterprises or industries . . . it cannot do so uniformly. . . .by expressly limiting eligibility to certain groups that the authority, itself, defines, the authority has, in effect, established criteria that are vertical in nature") (emphasis omitted). Commerce's example of a permissible program which only requires firms to strive to improve energy efficiency for eligibility, implies that all industries must be capable of taking advantage of a program for the program to be horizontal in application. *See id.* at 11 ("Indeed, where an authority, by law, limits eligibility to a group of enterprises or industries (e.g., those that operate specific types of 'stationary equipment'), it cannot do so uniformly") (emphasis omitted). This implication runs counter to the example provided in the SAA indicating that a category based upon the size or number of employees would be horizontal. SAA at 4243. The implication also runs counter to the SAA's rejection of a precise mathematical formula in determining de jure specificity. *Id.* at 4242–43.

Commerce's position where "implementing legislation expressly limit[s] access to the 'group' that the legislation itself created" the

[11] Commerce references past decisions: *Certain Softwood Lumber Products from Canada, 2020*; *Certain Softwood Lumber Products from Canada, 2017–18*; *Certain Hot-Rolled Steel Flat Products from the Republic of Korea, 2020*; and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, 2019* in which it pronounces the same rule that a program is "dejure specific pursuant to section 771(5A)(D)(i) of the Act despite the fact that the authority or implementing legislation did not limit the program to specifically named enterprises or industries." Second Remand Results at 10; 87 FR 48455 (Aug. 9, 2022), and accompanying IDM at Comment 103; 85 FR 77163 (Dec. 1, 2020), and accompanying IDM at Comment 65; 88 FR 29889 (May 9, 2023), and accompanying IDM at Comment 3; 87 FR 40491 (July 7, 2022), and accompanying IDM at Comment 20. *See also* Second Remand Results at 7–10. However, these decisions also fail to explain how objective criteria creates an express limitation in light of 19 U.S.C.§ 1677(5A)(D)(ii).

subsidy is de jure specific, *see* Second Remand Results at 11, is contrary to law. The statute allows a subsidy to be limited to fewer than all enterprises or industries in an economy, so long as that criteria creating that legislation is objective. SAA at 4242 (noting that the purpose of the specificity functions to allow subsidies which "truly are broadly available and widely used throughout an economy"). The Court remands to Commerce for further consideration or explanation. Commerce can either explain and support its determination that the criteria are not neutral, (i.e., are not economic in nature and horizontal in application) or conduct a de facto analysis or reconsider its determination. Commerce cannot rely upon its determination by "expressly limiting eligibility to certain groups that the authority, itself, defines, the authority has, in effect, established criteria that are vertical in nature" as that determination is contrary to law. *See* Remand Results at 11.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's Second Remand Results are remanded for further explanation or reconsideration consistent with this opinion with respect to its determination that the KAV Program is a specific subsidy; and it is further

ORDERED that Commerce shall file its third remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall file any comments on the third remand redetermination within 30 days of the date of filing of the third remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the third remand redetermination; and it is further

ORDERED that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the third remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its third remand redetermination.

Dated: November 14, 2023
New York, New York

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

Slip Op. 23–160

AG DER DILLINGER HÜTTENWERKE, ILSENBURGER GROBBLECH GMBH, SALZGITTER MANNESMANN GROBBLECH GMBH, SALZGITTER FLACHSTAHL GMBH, SALZGITTER MANNESMANN INTERNATIONAL GMBH, and FRIEDR. LOHMANN GMBH, Consolidated Plaintiffs, and THYSSENKRUPP STEEL EUROPE AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

Marc E. Montalbine, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff AG der Dillinger Hüttenwerke.

Ron Kendler, White & Case LLP, of Washington, D.C., for Consolidated Plaintiffs Ilsenburger Grobblech GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Flachstahl GmbH, and Saltzgitter Mannesmann International GmbH.

Robert L. LaFrankie, Crowell & Moring LLP, of Washington D.C., for Plaintiff-Intervenor thyssenkrupp Steel Europe AG.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C., argued for Defendant United States. Of counsel was *Ayat Mujais*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Jeffrey Gerrish, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor SSAB Enterprises LLC.

Stephanie M. Bell, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

MEMORANDUM and ORDER

Gordon, Judge:

Recently, the court issued an opinion denying a challenge to the final determination made by the U.S. Department of Commerce ("Commerce") in the antidumping investigation of certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Federal Republic of Germany. *See AG der Dillinger Hüttenwerke v. United States*, 47 CIT ___, 648 F. Supp. 3d 1321 (2023) ("*AG Dillinger 2023*"); *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep't of Commerce Apr. 4, 2017) ("*Final Determination*"), and accompanying Issues and Decision Memorandum, A-428–844 (Mar. 29, 2017), http://enforcement.trade.gov/frn/summary/germany/2017–06628–1.pdf (last visited this date) ("*Decision Memorandum*"). The court's opinion focused on Commerce's determination under 19 U.S.C. § 1677e(b) to apply partial adverse facts available ("AFA") to certain sales for which Consolidated Plaintiffs, Ilsenburger Grobblech GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Flachstahl GmbH, and Salzgitter Mannesmann International GmbH (collectively,

"Salzgitter"), could not identify and report the manufacturer. *See also AG der Dillinger Hüttenwerke v. United States*, 43 CIT ___, 399 F. Supp. 3d 1247 (2019) (sustaining Commerce's decision to apply "facts available" under 19 U.S.C. § 1677e(a), as well as an adverse inference under 19 U.S.C. § 1677e(b), but remanding the selection of AFA as applied in this matter); *AG der Dillinger Hüttenwerke v. United States*, 45 CIT ___, 534 F. Supp. 3d 1403 (2021) (remanding Commerce's application of AFA again after Commerce erred in following court's instructions to explain its decision-making in light of *Dillinger France S.A. v. United States*, 43 CIT ___, 350 F. Supp. 3d 1349 (2018)). The court rejected Salzgitter's argument that Commerce's determination was unreasonable or unlawful, and also rejected Salzgitter's challenge to Commerce's selection and application of partial AFA to Salzgitter. *See* Salzgitter Consol. Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 43 ("Salzgitter Br."); *see also* Def.'s Mem. Opp. Pls.' Rule 56.2 Mots. for J. on the Admin. R., ECF No. 55 ("Def.'s Resp."); Reply in Supp. of Consol. Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 64 ("Salzgitter Reply"); Final Results of Redetermination Pursuant to Court Remand, ECF No. 129 ("*Second Remand Results*"); Consol. Pls.' Comments in Opp'n to Second Remand Redetermination, ECF No. 135; Def.'s Resp. to Comments on Second Remand Redetermination, ECF No. 141.

Pending before the court is a motion by Salzgitter pursuant to USCIT Rule 54(b) for the entry of partial judgment sustaining Commerce's determination as to the challenges raised by Salzgitter.[1] *See* Consol. Pls.' Mot. for Partial Final J., ECF No. 194. For the reasons set forth below, the court will grant Salzgitter's motion and enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

> [w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b). Rule 54(b) requires finality—"an ultimate disposition of an individual claim entered in the course of a multiple claims

[1] Specifically, the court is sustaining Commerce's determination as presented in its *Second Remand Results*, in which Commerce explained why it differed in its application of partial AFA to Salzgitter as compared to Dillinger and adjusted its calculation of Salzgitter's final weighted-average dumping margin to 22.90 percent.

action." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956). Additionally, in evaluating whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See Timken v. Regan*, 5 CIT 4, 6 (1983).

Here, Salzgitter solely challenged Commerce's determination under 19 U.S.C. § 1677e(b) to apply partial AFA to certain sales for which Salzgitter could not identify and report the manufacturer. *See generally* Salzgitter Br. What remains for adjudication is a challenge by AG der Dillinger Hüttenwerke ("Dillinger") and other interested parties to the Fourth Remand Results in this matter which addresses issues not relevant to Salzgitter. *See, e.g.*, Final Results of Redetermination Pursuant to Court Remand, ECF No. 184; Pl. AG der Dillinger Hüttenwerke's Comments in Partial Opp'n to Final Results of Redetermination, ECF No. 192; Def.-Intervenor Nucor Corp.'s Comments on Final Results of Redetermination, ECF No. 193. As Salzgitter has no interest in the issues remaining to be litigated before the court in this action, *AG Dillinger 2023* provides "an ultimate disposition" as to Salzgitter's challenge to the *Final Determination*. *See Sears, Roebuck & Co.*, 351 U.S. at 436; *see also AG Dillinger 2023*.

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing this issue, and Salzgitter's role in this litigation, to a conclusion. Partial judgment would also give Salzgitter the opportunity to immediately appeal if it so chooses. In consulting with the parties, the Government confirmed that there is no threat of piecemeal judicial review as the resolution of the remaining issue presented by Dillinger does not implicate the final disposition of the challenges raised by Salzgitter. *See* Conference Call, ECF No. 196 (Oct. 31, 2023). Therefore, the court has no just reason for delay, and will enter partial judgment pursuant to USCIT Rule 54(b). Accordingly, it is hereby

ORDERED that Salzgitter's motion for partial judgment pursuant to USCIT Rule 54(b) is granted.

Dated: November 15, 2023
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

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