U.S. Customs and Border Protection

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

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

ACTION: Committee management; notice of open Federal advisory committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, March 6, 2024, in Charleston, SC. The meeting will be open for the public to attend in person or via webinar. The in-person capacity is limited to 75 persons for public attendees.

DATES: The COAC will meet on Wednesday, March 6, 2024, from 1 p.m. to 5 p.m. eastern standard time (EST). Please note that the meeting may close early if the committee has completed its business. Registration to attend in-person and comments must be submitted no later than March 1, 2024.

ADDRESSES: The meeting will be held at the Doubletree Hilton, 7401 Northwood Boulevard, Charleston, SC 29406 in the Lower/Upper Altitude Ballroom. For virtual participants, the webinar link and conference number will be posted by 5 p.m. EST on March 5, 2024, at *https://www.cbp.gov/trade/stakeholder-engagement/coac.* For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible.

Comments may be submitted by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2024–0001. To submit a comment, click the "Comment" button located on the top-left hand side of the docket page.

• *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2024–0001 in the subject line of the message.

Comments must be submitted in writing no later than March 1, 2024, and must be identified by Docket No. USCBP–2024–0001. All

submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov*. Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, title 5 U.S.C. ch. 10. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of the Department of Homeland Security, the Secretary of the Department of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-Registration: Meeting participants may attend either in person or via webinar. All participants who plan to participate in person must register using the method indicated below:

For members of the public who plan to participate in person, please register online at *https://cbptradeevents.certain.com/profile/15733* by 5 p.m. EST on March 1, 2024. For members of the public who are pre-registered to attend the meeting in person and later need to cancel, please do so by 5 p.m. EST on March 1, 2024, utilizing the following link: *https://cbptradeevents.certain.com/profile/15733*.

For members of the public who plan to participate via webinar, the webinar link and conference number will be posted by 5 p.m. EST on March 5, 2024, at *https://www.cbp.gov/trade/stakeholder-engagement/coac*. Registration is not required to participate virtually.

The COAC is committed to ensuring that all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202) 344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

There will be a public comment period after each subcommittee update during the meeting on March 1, 2024. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups. The Antidumping/Countervailing Duty (AD/CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. For this quarter, CBP continued to work on revisions to the Statement of Work (SOW) for the Forced Labor Working Group. During the next quarter, the Forced Labor Working Group will begin meeting and having discussions under the revised SOW. The SOW may include objectives to enhance focus on technology best practices, stakeholder training and guidance, transparency, and monitoring progress of the implementation of prior recommendations made by COAC. The Intellectual Property Rights (IPR) Process Modernization Working Group will report on the continuation of the development of enhancements in communications between CBP, rights holders, and the trade community regarding enforcement actions. The Bond Working Group was placed on hiatus effective December 13, 2023, and does not anticipate providing an update.

2. The Next Generation Facilitation Subcommittee will provide updates on all its existing working groups, to include a new working group, and the transfer of an existing working group to this subcommittee. The Automated Commercial Environment (ACE) 2.0 Working Group had the chance to review the remaining business case scenarios for the Concept of Operations Document. The Customs Interagency Industry Working Group (CII) continues to work on identifying data redundancies to improve efficiencies for the government and the trade. A new working group, the Modernized Entry Processes Working Group (MEPWG), launched following the start of the 17th Term. The Broker Modernization Working Group (BMWG) has been

transferred from the Rapid Response Subcommittee to this subcommittee. Finally, the Passenger Air Operations (PAO) Working Group continues to discuss with the Trusted Worker Program (eBadge) CBP Security Seal automated processing, automation of forms, and global entry/trusted traveler programs, and will provide an update on those discussions.

3. The Rapid Response Subcommittee had one active working group this quarter, the United States-Mexico-Canada Agreement (USMCA) Chapter 7 Working Group. The working group met twice during this quarter. The group will discuss their determination that the goals of the Statement of Work have been met and that the group will go on hiatus starting February 1, 2024. The Broker Modernization Working Group (BMWG) is still an active working group but has been transferred from the Rapid Response Subcommittee to the Next Generation Facilitation Subcommittee.

4. The Secure Trade Lanes Subcommittee will provide updates on all seven of its active working groups: the Export Modernization Working Group, the In-Bond Working Group, the Trade Partnership and Engagement Working Group, the Pipeline Working Group, the Cross-Border Recognition Working Group, the De Minimis Working Group, and the Centers Working Group. The Export Modernization Working Group has continued its work on the Electronic Export Manifest Pilot Program and is specifically focused on the effects of progressive filing by the shipper to continuously update export information on successive dates rather than on a specific date. The In-Bond Working Group has continued its focus on the implementation of prior recommendations made by COAC. The Trade Partnership and Engagement Working Group has continued its work on the elements of the Customs Trade Partnership Against Terrorism (CTPAT) security program and the validation process. The Pipeline Working Group has continued discussing the most appropriate "next step" commodities and potential users of Distributed Ledger Technology to engage once the pilot for tracking pipeline-borne goods deploys. The Cross-Border Recognition Working Group began to meet again to develop tasks specific to its Statement of Work. The De Minimis Working Group has continued its work on strengthening the supply chain and mitigating risks in the low-value package environment. The Centers Working Group, new to this subcommittee, has begun work towards the goals of its Statement of Work.

Meeting materials will be available on February 26, 2024, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

FELICIA M. PULLAM,
Executive Director,
Office of Trade Relations.

U.S. Court of International Trade

Slip Op. 24–18

TRIJICON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00040

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: February 16, 2024

Alexander D. Chinoy, *Shara L. Aranoff*, and *Cynthia Galvez*, Covington & Burling LLP, of Washington, DC, for Plaintiff Trijicon, Inc.

Luke Mathers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel on the brief was *Michael A. Anderson*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Barnett, Chief Judge:

Before the court are cross-motions for summary judgment. *See* Confid. Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), ECF 28; Def.'s Cross-Mot. for Summ. J. and Resp. in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Cross-Mem."), ECF No. 31; Confid. Pl.'s Mem. of Law in Resp. to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Resp."), ECF No. 36; Def.'s Reply in Supp. of its Cross-Mot. for Summ. J. ("Def.'s Reply"), ECF No. 38. Plaintiff Trijicon, Inc. ("Trijicon" or "Plaintiff") contests the denial of protest number 2304–21–102337 challenging U.S. Customs and Border Protection's ("Customs") liquidation of the subject imports, referred to variously as Tritium Sight Inserts, Tritium Lamps, or Trigalights,[1] under subheading 9405.50.40 of the Harmonized Tariff Schedule of the United States ("HTSUS")[2] as "[l]amps or other lighting fittings," dutiable at six percent *ad valorem*. Compl., ECF No. 9. Trijicon contends that Customs should have classified the subject imports as an "[a]pparatus

[1] The parties and the foreign manufacturer use different terminology to refer to the imported goods in question. The court refers to the items as "subject imports."

[2] All citations to the HTSUS are to the 2019 version, as determined by the date of importation of the subject imports. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1314 n.2 (Fed. Cir. 2011).

based on the use of alpha, beta or gamma radiations," under subheading 9022.29.80 and dutiable at zero percent ad valorem. Pl.'s Mem. at 1–2.

BACKGROUND

I. Material Facts Not In Dispute

A party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." U.S. Court of International Trade ("USCIT") Rule 56(a). Parties submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Pl.'s Confid. Statement of Undisputed Material Facts ("Pl.'s SOF"), ECF No. 28–1; Def.'s Resps. to Pl.'s Statement of Undisputed Material Facts ("Def.'s Resp. to Pl.'s SOF"), ECF No. 31–1; Def.'s Statement of Add'l Undisputed Material Facts ("Def.'s Add'l SOF"), ECF No. 31–2; Pl.'s Confid. Resps. to Def.'s Statement of Add'l Undisputed Material Facts ("Pl.'s Resp. to Def.'s Add'l SOF"), ECF No. 36–1.

The subject imports consist of eleven models of goods in two shapes: cylindrical (which Trijicon uses in iron sights) and rectangular (which Trijicon uses in riflescopes).[3] Pl.'s SOF ¶¶ 2, 5, 35, 36; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 2, 5, 35, 36 (admitting in relevant part). Each model contains, at least, a "gaseous tritium light source," which consists of a "hermetically sealed glass capsule . . . coated internally with zinc sulfide (also called phosphor) and filled with tritium gas." Pl.'s SOF ¶¶ 12–13; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 12–13 (admitting in relevant part). Tritium is a radioactive isotope of hydrogen that emits a beta radiation particle as it decays. Pl.'s SOF ¶¶ 15–16; *see* Def's Resp. to Pl.'s SOF ¶¶ 15–16. "Beta radiation is not emitted outside of the subject merchandise." Pl.'s SOF ¶ 24; *see* Def.'s Resp. to Pl.'s SOF ¶ 24. The "beta particle excites the interior zinc sulfide coating" in the glass capsule and "causes the coating to emit a self-luminous glow." Pl.'s SOF ¶¶ 20–21; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 20–21. The subject imports "are warranted to glow" for five years or twelve years, depending on the model. Pl.'s SOF ¶¶ 54–55; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 54–55 (admitting in relevant part). The subject imports are not lead-lined, Def.'s Add'l SOF ¶ 4; *see* Pl.'s Resp. to Def.'s Add'l SOF ¶ 4, and do not have an aperture "through which beta radiation can pass," Def.'s Add'l SOF ¶ 2; *see* Pl.'s Resp. to Def.'s Add'l SOF ¶ 2.

[3] The distinctions between the models are immaterial. The parties (and the court) agree that, once the court determines the correct heading, all 11 models, regardless of shape, are covered by the same subheading. *See* Pl.'s Mem. at 4 n.4 (citing Customs' representative's deposition).

The subject imports are branded by its manufacturer as Trigalights. Def.'s Add'l SOF ¶ 5; *see* Pl.'s Resp. to Def.'s Add'l SOF ¶ 5 (admitting fact to the best of Trijicon's knowledge). The subject imports, when inserted into Trijicon's products, "illuminate[] aiming points in firearm sights that Trijicon manufactures." Pl.'s SOF ¶ 26; *see* Def.'s Resp. to Pl.'s SOF ¶ 26 (admitting in relevant part). Without the subject imports installed, Trijicon's firearm sights would continue to work in daylight, but "the user would lose the additional advantage . . . of being able to aim effectively in low-light situations." Pl.'s SOF ¶ 53; *see* Def.'s Resp. to Pl.'s SOF ¶ 53 (admitting in relevant part). The foreign producer of the subject imports markets Trigalights for watches, compasses, and gunsights, however, it is unclear (and not material) whether the specific models imported could be used in other items. *See* Def.'s Add'l SOF ¶ 7; Pl.'s Resp. to Def.'s Add'l SOF ¶ 7.

Trijicon refers to the subject imports as lamps in communications with the manufacturer, in its engineering diagrams and instructions for factory workers, in product information for the general public, and in regulatory filings. Def.'s Add'l SOF ¶¶ 8–12; *see* Pl.'s Resp. to Def.'s Add'l SOF ¶¶ 8–12 (admitting in relevant part).

II. Procedural Background

The subject imports were entered between January 2019 and March 2019. Pl.'s SOF ¶ 4; *see* Def.'s Resp. to Pl.'s SOF ¶ 4. In response to a request for internal advice, on August 17, 2020, Customs issued a ruling, HQ H307905, concluding that the subject imports are properly classified under HTSUS 9405.50.40 ("[l]amps and other light fittings . . . not elsewhere specified"). *See* Pl.'s SOF ¶ 7; Def.'s Resp. to Pl.'s SOF ¶ 7. On October 27, 2020, at the port of Laredo, Texas, Trijicon filed Reconciliation Entry No. 637–0639215–4 covering six entries made between January 2019 and March 2019. Pl.'s SOF ¶¶ 3–4; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 3–4. On April 30, 2021, Customs liquidated Reconciliation Entry No. 637–0639215–4 under tariff classification HTSUS 9405.50.40, and on October 17, 2021, Trijicon timely protested that classification. Pl.'s SOF ¶¶ 8–9; *see* Def.'s Resp. to Pl.'s SOF ¶¶ 8–9; *see also* Pl.'s SOF ¶ 11 (stating Customs conceded that the protest was timely); Def's Resp. to Pl.'s SOF ¶ 11 (admitting the same). On October 27, 2021, Customs denied the protest, relying on its internal advice ruling. Pl.'s SOF ¶ 10; *see* Def.'s Resp. to Pl.'s SOF ¶ 10. Trijicon contests the denial of its protest, contending that its imports are properly classified under HTSUS 9022.29.80 ("[a]pparatus based on the use of . . . beta . . . radiation . . . ."). Compl. ¶¶ 47, 55. Trijicon and the Government each moved for summary judgment.

JURISDICTION AND STANDARD OF REVIEW

The court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(a).

The court decides classification cases *de novo*. 28 U.S.C. §§ 2640(a), 2643(b). While Customs' classification is afforded deference relative to its "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). It is "the court's duty . . . to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

LEGAL FRAMEWORK

The court may enter summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Classifying an imported good involves two steps: (1) determining the meaning of the relevant tariff provisions and (2) determining whether the product at issue falls within a particular tariff provision. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018). The first step is a question of law; the second is a question of fact. *Id.* When there is no factual dispute as to the nature of the product, the two-step analysis is "entirely . . . a question of law." *Id.* (citation omitted).

The General Rules of Interpretation ("GRIs") provide the analytical framework for the court's classification of goods under the HTSUS. *Id.* The court applies the GRIs in numerical order. *Id.* First and foremost, "for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes." GRI 1, HTSUS. "Absent contrary legislative intent, [courts] construe HTSUS terms according to their common and commercial meanings, which [courts] presume are the same." *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016). The court may rely on its own understanding of the relevant terms and may consult dictionaries, encyclopedias, or other reliable authorities. *Kalle USA, Inc. v. United States*, 923 F.3d 991, 995 (Fed. Cir. 2019). In addition to the headings and section or chapter notes, courts also may consult the World Customs Organization's Explanatory Notes, which, though not legally binding, "are 'persuasive' and are

'generally indicative' of the proper interpretation." *Otter Prods.*, 834 F.3d at 1375. GRI 3 is used by the court when it determines that the imported goods are prima facie classifiable under two or more headings or subheadings of HTSUS. *Home Depot U.S.A., Inc. v. United States,* 491 F.3d 1334, 1336 (Fed. Cir. 2007). Pursuant to GRI 3, "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." GRI 3(a), HTSUS.

DISCUSSION

I. The Tariff Provisions at Issue

The parties propose two different classifications for the subject imports.[4] Trijicon contends that the subject imports are properly classified under HTSUS 9022.29.80, at a zero percent duty rate. Pl.'s Mem. at 2. Chapter 90 of the HTSUS covers "Optical, photographic, cinematographic, checking, precision, medical or surgical instruments or apparatus; parts and accessories thereof." Chapter 90 excludes "[s]earchlights or spotlights of heading 94.05." Ch. 90, Note 1(ij). The relevant portion of Chapter 90 reads:

> **9022**: Apparatus based on the use of X-Rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like; parts and accessories there of:
>
> Apparatus based on the use of alpha, beta or gamma radiations whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus:
>
> **9022.29**: For other uses:
>
> **9022.29.80**: Other

The Government contends that the subject imports are properly classified under HTSUS 9405.50.40, subject to a duty rate of six percent. Def.'s Cross-Mem. at 13. Chapter 94 covers "Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like; prefabricated buildings." The relevant portion of Chapter 94 reads:

---

[4] The court independently considered other tariff classifications, including those mentioned in the Customs case file. *See* Pl.'s Confid. Ex. 1, ECF No. 28–2. The court concludes that no other classification would be appropriate. *See Jarvis Clark Co.*, 733 F.2d 878 (explaining court's duty to reach the "correct result").

9405: Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:

9405.50: Non-electrical lamps and lighting fittings:

9405.50.40: Other

The Explanatory Notes to both chapters and headings provide further guidance for understanding the chapters and headings. For Chapter 90, "as a rule," apparatus are "characterised by their high finish and high precision," though "[t]here are certain exceptions to the general rule." Def.'s Ex. 8 (2017 Explanatory Notes to Chapter 90) at XVIII-90–3, ECF No. 31–10.[5] Apparatus "are used mainly for scientific purposes . . ., for specialised technical or industrial purposes . . . or for medical purposes." *Id.* Apparatus "may be of any material." *Id.*

Specifically for Heading 9022, the "radioactive substance is placed in a container, normally of steel coated with lead (bomb), which has an aperture designed to let the radiations pass in one direction only." *Id.* at XVIII-9022–2. As examples, apparatus based on the use of alpha, beta, or gamma radiations include therapy apparatus and apparatus for radiological examinations. *Id.*

Turning to Heading 9405, lamps and light fittings may consist of "any material" and "use any source of light." *Id.* (2017 Explanatory Notes to Chapter 94) at XX-9405–1. The heading includes "[s]pecialised lamps," like "inspection lamps," and "[l]amps and light fittings for . . . vehicles . . ., for aircraft or for ships or boats," like "headlamps for trains." *Id.*

Based on the plain language of HTSUS 9405, the two tariff classifications are mutually exclusive. HTSUS 9405 covers "[l]amps and light fittings . . . not elsewhere specified or included . . .," so that if the subject imports are described by HTSUS 9022, they cannot be classified under HTSUS 9405. Because of this mutual exclusivity, the subject imports are not prima facie classifiable under two headings and, therefore, GRI 3 does not apply.

II. HTSUS 9022 Classification

a. Parties' Contentions

Trijicon argues for classification under heading 9022, Pl.'s Mem. at 12, and, to that end, the parties disagree over whether the subject

[5] Defendant provided copies of the Explanatory Notes to both chapters and subheadings from 2017; the 2019 version contains no relevant material changes.

imports are "apparatus," *see* Def.'s Cross-Mem. at 22. Trijicon first focuses on "apparatus" as a "set of materials which are intended for some purpose or use," Pl.'s Mem. at 15, asserting that each subject import is a set of materials consisting of, at least, a glass capillary, a phosphor coating, and tritium gas, *id.* at 16. In response, the Government argues that the U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit") defined "apparatus" as a "complex device or machine for a specific use," thereby "effectively" holding that a lamp is not an apparatus. Def.'s Cross-Mem. at 13 (relying on *Gerson*, 898 F.3d at 1236). The Government further argues that the subject imports are not apparatus described by HTSUS 9022 because they do not have an aperture to let through beta radiation (as described in the Explanatory Note); they are not high precision (also as described in the Explanatory Note); and they cannot perform simple tasks like turning on and off or dimming. *Id.* at 18–20. Even accepting Trijicon's initial reliance on a "set of materials," the Government argues that the subject imports do not qualify because "materials" means "tools" or "equipment," not simply "anything that has matter." *Id.* at 13–14.

Trijicon responds that the Federal Circuit also defined "apparatus" as "equipment designed specifically to carry out a particular purpose," and, Trijicon contends, the subject imports meet this definition because they consist of three core components (glass capillary, phosphor coating, and tritium) that "facilitate the aiming" of Trijicon's products. Pl.'s Resp. at 16–20. Moreover, Trijicon contends that the subject imports also fit the proffered definition of "any complex device or machine for a specific use" because the aforementioned parts cannot be easily separated—each relies on the other. *Id*. at 17, 21–22. Finally, Trijicon asserts that each model of subject imports has an aperture allowing light radiation to pass in one direction and that the "complex production process" to manufacture the subject imports qualifies them as apparatus. *Id.* at 21, 24–25.

The Government replies that the subject imports are not complex because the parts are simply coordinated: they "statically interact" to create "the natural phenomenon of radioluminescence," Def.'s Reply at 12, and the aperture described in the Explanatory Note refers to one for the beta radiation—not light radiation—which the subject imports do not have, *id.* at 12–13.

b. Analysis

In *Gerson*, the Federal Circuit explained that, in setting out definitions for apparatus, the term "is not free of ambiguity." 898 F.3d at 1236 (citation omitted). Here, while the parties present various defi-

nitions of "apparatus," they ultimately coalesce around two: "a set of materials or equipment for a particular use" or "a complex machine or device." Pl.'s Ex. 17, ECF No. 28–18 (reproducing *Apparatus*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2019)); *see also* Def.'s Ex. 7, ECF No. 31–9 (reproducing *Apparatus*, WEBSTER' S NEW WORLD DICTIONARY (3d ed. 1988) ("the instruments, materials, tools, etc. needed for a specific use, experiment, or the like" or "any complex device or machine for a specific use")); *Apparatus*, COLLINS ENGLISH DICTIONARY (1st ed. 2016) ("a collection of equipment used for a particular purpose"). Similarly, the Federal Circuit described apparatus as "equipment designed specifically to carry out a particular function," relying in part on the definition of apparatus as "any complex device or machine for a specific use." *Gerson*, 898 F.3d at 1236 (quoting *Apparatus*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2009)). Here, any difference between those two definitions (a set of materials or equipment or a complex device) is inconsequential because the subject imports do not meet either definition. The court takes each of those definitions in turn.

To begin, it is clear to the court that the subject imports serve a particular or specific use or function. Namely, the subject imports provide illumination, in this case for the aiming points in firearm sights that Trijicon manufactures. Pl.'s SOF ¶ 26; Def.'s Resp. to Pl.'s SOF ¶ 26 (admitting in relevant part). While their insertion into various firearm sights occurs after importation, the purpose of the subject imports, as imported, is illumination, whether for firearm sights or for other products. Relatedly, the subject imports also meet the common definition of a device—that is, a thing made for a particular purpose. *Device*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2018). Moreover, Defendant effectively concedes that the subject imports are devices because a lamp, by Defendant's definition, is "any of various devices for producing light or heat, as an electric light bulb or a gas jet." Def.'s Ex. 7 (reproducing *Lamp*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (3d ed. 1988)).

The court, however, concludes that the subject imports are not a set of materials for purposes of HTSUS 9022. "[W]ords grouped in a list should be given related meaning," *Third Nat. Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977), and the court considers the provided examples when evaluating the definitions of apparatus referencing materials or equipment in this context. In particular, the court notes that Plaintiff's proffered definition is "a set of materials *or equipment*." Pl.'s Ex. 17 (emphasis added). While this is stated in the disjunctive, in the context of an apparatus of HTSUS 9022, it appears incongruous to read "materials" to include anything of matter, rather than referring

to equipment or tools or instruments. *See* Def.'s Ex. 7 (providing the definition of apparatus as "*the instruments*, materials*, tools, etc.* needed . . . .) (emphases added). Equipment means a "set of articles or physical resources serving to equip" something and is also, circularly for these purposes, known as an "apparatus." *Equipment*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2018). Nevertheless, each individual component of the subject imports must also serve a particular function. While the subject imports each contain, at least, three components consisting of a glass capillary, phosphor coating, and tritium gas, *see* Pl.'s SOF ¶¶ 12–13; Def.'s Resp. to Pl.'s SOF ¶¶ 12–13 (admitting in relevant part), none of those constituent parts constitutes equipment because no part, alone, serves a particular function. As discussed below, it is only in combination with the other constituent parts that they serve the intended function of providing illumination. Thus, the existence of the constituent parts is insufficient insofar as "apparatus" means "a collection of equipment." *Apparatus*, COLLINS ENGLISH DICTIONARY (1st ed. 2016). Moreover, the alternative definition of "a complex device" further supports that "apparatus" requires more than the inclusion of individual constituent parts.

The alternative definition of a "complex device" fares no better for Plaintiff. "Complex" is commonly defined as "[c]onsisting of parts or elements not simply coordinated, but some of them involved in various degrees of subordination"; "complicated, involved, intricate"; or "not easily analysed or disentangled." Pl.'s Ex. 21, ECF No. 36–4 (definition from the online version of *The Oxford English Dictionary*). The court can readily discern the separate elements of the subject imports: the glass capillary, the phosphor coating, and the tritium gas. However, as just discussed, these elements must work together to create illumination—if any element were removed, the illumination could not be effectively created *and* directed. Each element remains distinct and able to be disentangled from the others, and no element is subordinate to the others. Instead, all three elements must be coordinated, and this coordinated functioning is not sufficient to establish complexity. Despite the scientific nature of this manner of producing illumination, and the inclusion of beta radiation, it is a natural phenomenon created by the coordination of different component parts. Trijicon's assertion of a "complex production process" to manufacture the subject imports, Pl.'s Resp. at 21, is inapposite: the question is whether the device is complex, not whether the process of creating the device is complex. Here, the subject imports are not complex devices for purposes of being considered apparatus under HTSUS 9022.

The court is not suggesting that illuminative items can never be complex. *Cf.* Def.'s Cross-Mem. at 15. In *Gerson*, the Federal Circuit, rather than discussing complexity, explained that the LED candles at issue did not serve a particular function, because they were *both* decorative *and* illuminative. 898 F.3d at 1236. In fact, the Chapter 90 Explanatory Notes support the understanding that illuminative articles may be complex by explicitly excluding "[s]earchlights and spotlights of heading 94.05." Def.'s Ex. 8 at XVIII-90–1. There would be no need to exclude any part of HTSUS 9405 from HTSUS 9022 if lamps could not be considered a complex device or apparatus. Here, however, the court has considered the interaction of the individual parts of the subject imports and determined that the subject imports are not complex.[6]

The relevant Explanatory Notes further support the conclusion that the subject imports are not apparatus notwithstanding their inclusion of beta radiation. The Explanatory Notes contextualize *how* the beta radiation is *used*—it passes through an aperture. Def.'s Ex. 8 at XVIII-9022–2. It is undisputed that the subject imports do not contain an aperture "through which beta radiation can pass." Def.'s Add'l SOF ¶ 2; *see also* Pl.'s Resp. to Def.'s Add'l SOF ¶ 2.[7] Plaintiff attempts to avoid the absence of an aperture for beta radiation by averring that the subject imports have an "aperture that allows for light radiation to pass in one direction." Pl.'s Resp. at 25; *see also* Pl.'s Ex. 23 at 13–14, ECF No. 36–6. But the Explanatory Note addresses alpha, beta, and gamma radiation—not light radiation. *See* Def.'s Ex. 8 at XVIII-9022–2 (identifying beta radiation and describing "an aperture designed to let the radiations pass in one direction only"). Thus, the subject imports also do not ultimately *use* the beta radiation in the manner referenced in the Explanatory Notes. That is to say, the beta radiation is present and contained within the glass capsule, where it interacts with the phosphor coating to create *light* radiation, which is directed by an outside sheathing (whether of metal or paint). *See* Pl.'s SOF ¶¶ 21, 42, 63; Def.'s Resp. to Pl.'s SOF ¶¶ 21, 42, 63.

Trijicon's attempts to analogize the subject imports to other Customs classification rulings are unpersuasive. Relying on a 1991 Headquarters Ruling regarding the classification of a research irradiator,

[6] Defendant also argues that classifying the subject imports under HTSUS 9022 would unreasonably limit HTSUS 9405 to non-radiation powered lamps. Def.'s Cross-Mem. at 15. Trijicon replies by citing numerous Customs rulings classifying non-electrical lamps under HTSUS 9405. Pl.'s Resp. at 27–28. Because the court, relying on the definition of apparatus and the undisputed facts describing the subject imports, concludes the subject imports are not complex, this argument is inapposite.

[7] The subject imports also do not contain a steel coating with lead; however, the parties agree this is not a requirement. *See* Pl.'s Mem. at 24; Def.'s Cross-Mem. at 22.

Trijicon argues that Customs has previously found that "the incorporation of radiation along with other materials resulted in an 'apparatus' classified in 9022." Pl.'s Mem. at 15 (citing HQ 088465 (Feb. 22, 1991)). That Customs ruling, however, is inapposite. First, the ruling did not define the contours of an "apparatus"; rather, Customs focused on why the irradiator was not classified as a package for radioactive materials. *See* HQ 088465. Second, that product was "a high dose rate research irradiator" used for "medical product sterilization, biological and genetic effects, food preservation, growth stimulation, [and] chemistry pollution," *id.*; that description suggests a different level of complexity and a product that is incomparable in its manner of composition from the subject imports here. The single common feature of beta radiation between the two goods is insufficient to make the research irradiator a helpful comparator.[8]

For the reasons listed above, the court concludes that the subject imports are not properly classified under HTSUS 9022.

III. HTSUS 9405 Classification

a. Parties' Contentions

Defendant argues that the subject imports are classifiable within HTSUS 9405, lamps or light fittings. Defendant explains that the subject imports fit the common definition of a lamp because they provide illumination, that light sources in gunsights are referred to as lamps, and that Trijicon refers to the subject imports as lamps in various materials. Def.'s Cross-Mem. at 10.

Trijicon responds that the subject imports cannot be classified as "lamps" because that classification does not contemplate illumination devices using radiation for specific purposes. Pl.'s Resp. at 2–15. Trijicon contends that the incorporation of radiation and the specific purpose of these products distinguish them from examples of lamps in caselaw and the Explanatory Notes (which do not mention tritium). *Id*. Trijicon further argues that prior Customs rulings establish that illumination is insufficient to warrant classification as a lamp because the subject imports do not light a room. *Id.* at 2–9. Trijicon avers that HTSUS 9405 "contemplates merchandise that the general

[8] Trijicon further relies on this Customs ruling to dispute that "Heading 9022 applies only to an imported article consisting of several different devices working together as a machination, rather than a discrete, individual article designed for a particular purpose." Pl.'s Resp. at 19. However, the Customs ruling in question did not provide a detailed description of the irradiator. *See* HQ 088465. Trijicon further cites to a Customs ruling classifying an Optical Heating Crystallization Device under HTSUS 9022, Pl.'s Resp. at 19, but that product consisted of a "laser, a red pointing laser diode, a combined scanner and mirror, additional mirrors, and a controller," thus indicating it, in fact, contained "several different devices." NYRL 184115 (Oct. 5, 2011).

public would traditionally understand to be 'lamps' or 'light fixtures,'" like "table lamps, Christmas lights, and candlesticks." Pl.'s Mem at 34.

b. Analysis

The parties (and the court) agree that HTSUS 9405 is an *eo nomine* provision, that is, one that describes an article by a specific name and, absent terms of limitation, includes all forms of the article. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citations omitted). When considering classification under an *eo nomine* provision, the court may, in some circumstances, consider an article's "physical characteristics, . . . how it was designed and for what objectives, and how it is marketed." *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1358 (Fed. Cir. 2014).

It is clear from the definition of lamp and the description of the subject imports that the subject imports are readily classified as lamps. A lamp is "any of various devices for producing light." Def.'s Ex. 7 (quoting *Lamp*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (3d ed. 1988)). It is undisputed that the subject imports produce illumination. Pl.'s SOF ¶ 26; *see* Def.'s Resp. to Pl.'s SOF ¶ 26 (admitting in relevant part). The Explanatory Note confirms that lamps "can be constituted of any material . . . and use any source of light." Def.'s Ex. 8 at XX-9405–1. Thus, a lamp can readily include one that involves beta radiation. It makes no difference that the Explanatory Notes do not specify tritium-powered lamps because the list is exemplary, not exhaustive. Moreover, Trijicon regularly refers to the subject imports as tritium lamps in various documents within the organization and with government agencies. *See* Def.'s Confid. Exs. 2–5, ECF Nos. 32–4, 32–5, 32–6, 32–7. At least one science journal also refers to the item used to illuminate the aiming point of a gun as a "lamp." *See* Def.'s Ex. 7 (reproducing *Gunsights*, MCGRAW-HILL ENCYCLOPEDIA OF SCI. AND TECH. at 305 (9th ed. 2002) (". . . the reticle may be illuminated by a small lamp to permit night use."). Meanwhile, Trijicon's averment that the "general public" would not consider the subject imports to be lamps is unsupported. The documented usage of the term "lamp" to describe the subject imports suggests that they meet the "common and commercial meaning[]" of lamps. *See Carl Zeiss,* 195 F.3d at 1379.

Trijicon's further counterpoints are unavailing. First, Trijicon points out that, when "pressed" to place the subject imports into one of the Explanatory Note's categories, the Government's witness chose "candelabra, candlesticks, candle brackets, e.g., for pianos." Pl.'s Resp. at 7. Regardless of the witness's suggestion, the Explanatory

Note's list is not exhaustive, and Customs need not place the items in any category. Moreover, the Government now suggests the subject imports could be considered to be specialized lamps. *See* Def.'s Cross-Mem. at 10.

Trijicon next quibbles over the purpose of the subject imports, contending that they are not meant to "illuminate a space" or "light a room" and therefore are not lamps. Pl.'s Resp. at 7. But HTSUS 9405 is not limited to items meant to light a room—it includes searchlights and spotlights, exterior lamps, and headlamps for trains, none of which would necessarily light a room or even a space, as those lamps might be used for guidance or warning. *See* Def.'s Ex. 8 at XX-9405–1. Moreover, the subject imports do illuminate a space—as used by Trijicon, they illuminate the "aiming points in firearm sights." Pl.'s SOF ¶ 26; *see* Def.'s Resp. to Pl.'s SOF ¶ 26 (admitting in relevant part).

Trijicon's reliance on caselaw wherein courts found that certain products (namely LED candles and candles in decorative glass vessels) were properly classified under HTSUS 9405 is equally unconvincing to distinguish the subject imports. Pl.'s Resp. at 3–4 (discussing *Gerson*, 898 F.3d 1232, and *Pomeroy Collection, Ltd. v. United States*, 32 CIT 526, 559 F. Supp. 1374 (2008)). Trijicon argues that because LED candles and candles in decorative glass vessels *are* lamps, the subject imports, which are not decorative and serve a single particular purpose, therefore *are not* lamps. Pl.'s Resp. at 3–4. The fact that the subject imports are different from the products in those cases does not mean that they cannot also be lamps. The term lamp encompasses all sorts of devices that illuminate and there is no requirement that a lamp be decorative simply because two prior court opinions involved decorative lamps. Trijicon also notes that the goods in *Pomeroy* fit into an identified category of the Explanatory Notes (candles), *id.*, but that list is illustrative, not exhaustive.[9]

Finally, Trijicon argues that "a name that *sometimes* refers to the articles in colloquial usage does not determine how the article is classified." Pl.'s Resp. at 13. Trijicon advises that courts should not "ignore the purpose for which [the subject imports] were designed and made and the use to which they were actually put." Pl.'s Resp. at 13 (citation omitted). Nevertheless, marketing is a factor courts may

[9] Trijicon also tries to analogize the subject imports to glows sticks and "light sticks," which Customs has previously classified as something other than lamps. *See* Pl.'s Resp. at 8–9. Those items, and their appropriate classifications, are sufficiently distinct from the subject imports that the analogies are unhelpful to the court. In particular, glow sticks were ultimately classified in a subheading that still required a lighting effect (unlike the alternative subheading here), and "light sticks" (according to Trijicon) "are used in a variety of applications" (unlike the subject imports here which are used solely for illumination).

consider, *GRK Can.*, 761 F.3d at 1358, and that is all the court does here—consider the marketing and industry usage of the term "lamp" when describing the subject imports. The court does not ignore the purpose of the subject imports; that purpose (illumination) is consistent with the court's analysis and conclusion. Trijicon would, instead, have the court focus on the inclusion of beta radiation to find that the subject imports cannot be lamps, *see* Pl.'s Resp. at 7, 9–10; however, the mere inclusion of beta radiation does not detract from the court's finding that the physical characteristics, design, objectives, and marketing of the subject imports for illumination support classification of the subject imports as lamps within HTSUS 9405.

Having determined that the subject imports are properly classified within HTSUS 9405, and in the absence of any dispute as to the proper subheading, the court further finds that these imports are properly classified within the HTSUS subheading 9045.50.40, Non-electrical lamps and lighting fittings, Other.

CONCLUSION

For the foregoing reasons, the court finds that Customs properly classified the subject imports under HTSUS 9405.50.40. The court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: February 16, 2024
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 24–19

PT. ZINUS GLOBAL INDONESIA, Plaintiff, and BROOKLYN BEDDING, LLC, CORSICANA MATTRESS COMPANY, ELITE COMFORT SOLUTIONS, FXI, INC., INNOCOR, INC., KOLCRAFT ENTERPRISES INC., LEGGETT & PLATT, INCORPORATED, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC, CORSICANA MATTRESS COMPANY, ELITE COMFORT SOLUTIONS, FXI, INC., INNOCOR, INC., KOLCRAFT ENTERPRISES INC., LEGGETT & PLATT, INCORPORATED, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 21–00277

[Sustaining in part and remanding in part Commerce's Final Results of Redetermination Pursuant to Court Order in the U.S. Department of Commerce's antidumping duty investigation of mattresses from Indonesia.]

Dated: February 20, 2024

J. David Park, *Henry D. Almond*, *Daniel R. Wilson*, *Leslie C. Bailey*, *Kang Woo Lee*, and *Gina Marie Colarusso*, of Arnold & Porter Kaye Scholer, LLP, Washington, D.C., for Plaintiff PT. Zinus Global Indonesia. With them on the brief were *Phyllis L. Derrick* and *Eric Johnson*.

Yohai Baisburd, *Jeffrey B. Denning*, *Chase J. Dunn*, and *Nicole Brunda*, of Cassidy Levy Kent (USA) LLP, Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Inc., International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO.

L. Misha Preheim, Assistant Director, and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination in the antidumping duty investigation of mattresses from Indonesia, filed pursuant to the Court's Remand Order in *PT. Zinus Global Indonesia v. United States* ("*PT. Zinus*"), 47 CIT __, 628 F. Supp. 3d 1252 (2023). *See Final Results of*

Redetermination Pursuant to Court Remand ("*Remand Redetermination*"), ECF Nos. 59–1, 60–1; *see also Mattresses from Indonesia* ("*Final Determination*"), 86 Fed. Reg. 15,899 (Dep't of Commerce Mar. 25, 2021) (final affirmative determination of sales at less than fair value), accompanying Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Market Value Investigation of Mattresses from Indonesia ("IDM"), ECF No. 15–4.

In *PT. Zinus*, the Court remanded for Commerce to reconsider its inclusion of mattresses in transit from Indonesia at the end of the period of investigation in the calculation of constructed export price, adjustments made to the selling expenses of Plaintiff PT. Zinus Global Indonesia's ("Plaintiff" or "Zinus Indonesia") parent company, Zinus, Inc. ("Zinus Korea"), and the application of the Transactions Disregarded Rule. *PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d at 1287–88. Commerce addressed each of these issues on remand. *See Remand Redetermination*. Plaintiff filed Plaintiff's Comments in Partial Opposition to Commerce's Remand Determination and Plaintiff's Comments in Partial Support of Commerce's Remand Determination. Pl.'s Cmts. Part. Opp'n Commerce's Remand Determination ("Pl.'s Cmts. Part. Opp'n"), ECF Nos. 64, 65; Pl.'s Cmts. Part. Supp. Commerce's Remand Determination ("Pl.'s Cmts. Part. Supp."), ECF No. 73. Defendant-Intervenors filed Defendant-Intervenors' Comments in Partial Opposition to the Final Results of Redetermination and Defendant-Intervenors' Comments in Partial Support of the Final Results of Redetermination. Def.-Intervs.' Cmts. Part. Opp'n Final Results Redetermination ("Def.-Intervs.' Cmts. Part. Opp'n"), ECF Nos. 62, 63; Def.-Intervs.' Cmts. Part. Supp. Final Results Redetermination ("Def.-Intervs.' Cmts. Part. Supp."), ECF Nos. 71, 72. Defendant filed Defendant's Response to Comments of Remand Redetermination. Def.'s Resp. Cmts. Remand Redetermination ("Def.'s Resp."), ECF No. 74, 75. For the following reasons, the Court sustains in part and remands in part the *Remand Redetermination*.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's inclusion of mattresses in transit as facts otherwise available in the calculation of constructed export price was in accordance with law and supported by substantial evidence;

2. Whether Commerce's exclusion of Zinus Korea's selling expenses from the calculation of normal value was supported by substantial record evidence; and

3. Whether Commerce's use of Indonesian Global Trade Atlas ("GTA") import data to value input purchase transactions involving an affiliated supplier in a non-market economy was supported by substantial evidence and in accordance with law.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Remand Redetermination*. *See PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d at 1258–59.

On March 30, 2020, an antidumping duty petition concerning imports of mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam was filed with Commerce by Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises, Inc., Leggett & Platt, Inc., the International Brotherhood of Teamsters, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. Antidumping Countervailing Duty Pet. ("Petition") (Mar. 31, 2020), PR 1–4, CR 1–10.[1] In response to the Petition, Commerce initiated on April 24, 2020 an antidumping investigation on mattresses imported from Indonesia. *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam*, 85 Fed. Reg. 23,002 (Dep't of Commerce Apr. 24, 2020) (initiation of less-than-fair-value investigations). The period of investigation was January 1, 2019 through December 31, 2019, the four most recent financial quarters prior to the filing of the March 2020 Petition. *Id.* at 23,003; Commerce's Decision Mem. Prelim. Affirmative Determination and Postponement Final Determination Less-Than-Fair-Value Investigation Mattresses from Indonesia ("PDM") at 5, PR 226; *see also* 19 C.F.R. § 351.204(b)(1). Zinus Indonesia was selected as the sole mandatory respondent in the investigation. *See* Less-Than-Fair-Value Investigation Mattresses Indonesia Resp. Selection Mem., PR 66, CR 32.

Because Plaintiff was unable to identify the country of origin of imported mattresses after merchandise entered Plaintiff's United States warehouse, Commerce applied a quarterly ratios sales methodology to determine the quantity of Zinus Indonesia's U.S. sales for purposes of calculating constructed export price. *See* IDM at 8–9;

[1] Citations to the administrative record reflect the public record ("PR") and confidential record ("CR") document numbers filed in this case, ECF Nos. 39, 40, 76, 77.

PDM at 9–10; *see also* Commerce's Prelim. Determination Margin Calculation Zinus Indonesia at 1–3 (Oct. 27, 2020), PR 229, CR 258. The quarterly ratio was applied to the full universe of Zinus, Inc.'s ("Zinus U.S.") mattresses, including those mattresses that were in transit and had not yet entered the United States at the conclusion of the period of investigation. IDM at 8–9. Commerce calculated Zinus Indonesia's antidumping duty margin rate at 2.22 percent. *Final Determination*, 86 Fed. Reg. at 15,900.

The Court remanded for Commerce to explain and support its inclusion of mattresses in transit from Indonesia in its quarterly ratio calculations, Commerce's adjustments to the selling expenses of Zinus Korea, and Commerce's application of the Transactions Disregarded Rule. *PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d. at 1287–88. On remand, Commerce continued to include in transit mattresses in its calculation of constructed export price and to exclude affiliated party transfer payments from its margin calculations. *Remand Redetermination*. Commerce also continued to use the market import data for inputs into Indonesia. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction 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 the final determination in an antidumping duty investigation. The Court shall hold unlawful any determination 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 Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Legal Framework

Commerce imposes antidumping duties on foreign goods if "(1) it determines that the merchandise 'is being, or is likely to be, sold in the United States at less than its fair value,' and (2) the International Trade Commission determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States." *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. 19 U.S.C. § 1673.

Normal value is ordinarily determined using the sales price of the subject merchandise in the seller's home market. 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce determines that normal value cannot be reliably calculated using home market or third-country sales, Commerce may use the subject merchandise's constructed value as an alternative to normal value. *Id.* § 1677b(a)(4). The method for calculating constructed value is defined by statute. *Id.* § 1677b(e). When calculating constructed value, Commerce must utilize the respondent's actual selling, general, and administrative expenses, and profits in the respondent's home market or a third-country market. *Id.* § 1677b(e)(2)(A). If Commerce cannot rely on those data, it may look to:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(2)(B).

Commerce must also calculate export price or constructed export price. Export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,

subject to certain adjustments. *Id.* § 1677a(a). Constructed export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,

subject to certain adjustments. *Id.* § 1677a(b). The price used to calculate constructed export price is reduced by commissions, selling expenses, further manufacturing expenses, and the profit allocated to these expenses. *Id.* § 1677a(d).

II. Facts Available Analysis

Plaintiff alleges that Commerce failed to comply with the statutory requirements under 19 U.S.C. § 1677e and 19 U.S.C. § 1677m(d) before applying adverse facts available against Zinus Indonesia. Plaintiff argues that Commerce failed to request missing data regarding Zinus U.S.' inventory, and Commerce violated its statutory obligations when it filled in factual gaps regarding in transit subject merchandise and improperly applied adverse facts available. Pl.'s Cmts. Part. Opp'n at 17–20. The Government contends that it did not apply an adverse inference to Zinus Indonesia under 19 U.S.C. § 1677e(b). Def.'s Resp. at 8–9. The Government does not assert that it used neutral facts otherwise available under 19 U.S.C. § 1677e(a), but merely argues that it did not apply adverse facts available. *See id.*

The Court notes at the outset that Commerce did not make any determinations in its *Remand Redetermination* under 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d) about the use of facts otherwise available, or under 19 U.S.C. § 1677e(b) about the use of an adverse inference.

Section 1677e(a) requires the use of facts otherwise available when necessary information is not available on the record, or a respondent withholds information that has been requested by Commerce, fails to provide the requested information by the deadlines in the form and manner requested, significantly impedes a proceeding, or provides the requested information but the information cannot be verified. 19 U.S.C. § 1677e(a). Commerce explained in the *Remand Redetermination* that Zinus U.S.' data in Exhibit SA-5 showed that the purchased quantity of mattresses in inventory was less than the quantity Zinus U.S. reported that it sold out of inventory during the period of inves-

tigation. *Remand Redetermination* at 6. Thus, it appears that substantial evidence supports Commerce's determination that certain data was missing because Zinus U.S. sold more mattresses than it purchased and the data did not account for those missing mattress quantities.

19 U.S.C. § 1677e(a) specifies that if necessary information is not available on the record, Commerce shall use facts otherwise available subject to 19 U.S.C. § 1677m(d). It is not apparent from the *Remand Redetermination* that Commerce requested information from Zinus Indonesia or Zinus U.S. about the missing sales data subject to the requirements of 19 U.S.C. § 1677m(d). The *Remand Redetermination* does not mention Commerce's requests to Zinus Indonesia or Zinus U.S. for the missing information, nor does it mention responses or a failure to respond to such requests by the Zinus entities. The Court agrees with Plaintiff's argument that:

> [i]f Commerce had any doubt, or considered this information missing from the record, it had an obligation to ask Zinus for this information. It failed to do so. Even if it were the case that Zinus had failed to provide necessary information or otherwise satisfied 19 U.S.C. § 1677e(a), Commerce failed to observe the notice requirements of 19 U.S.C. § 1677m(d).

Pl.'s Cmts. Part. Opp'n at 18. The Government does not address the facts available issue under 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d) in its brief, only arguing that Commerce did not apply adverse facts available. *See* Def.'s Resp. at 9.

It is clear that Commerce failed to comply with the requirements under 19 U.S.C. § 1677m(d) to inform Zinus Indonesia of the nature of a deficiency and provide Zinus Indonesia with an opportunity to remedy or explain the deficiency. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003) ("[T]he statute requires a factual assessment of the extent to which a respondent keeps and maintains reasonable records and the degree to which the respondent cooperates in investigating those records and in providing Commerce with the requested information"). Because Commerce failed to make the necessary determinations to comply with its statutory obligations under 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d), the Court holds that Commerce's determination to use in transit mattress information as facts otherwise available is neither in accordance with law nor supported by substantial evidence. The Court remands this issue for further consideration and explanation. The Court suggests that on remand, Commerce should consider reopening the record to address the missing sales data, inventory, and in transit

mattress issues as Commerce fulfills its obligations under 19 U.S.C. § 1677m(d), especially because Commerce is requesting a remand to reopen the record on a different issue, as discussed below.

III. Zinus Korea's Actual Selling Expenses

In the *Final Determination*, Commerce included Zinus Korea's actual incurred selling expenses as a component of its margin calculation. IDM at 32–33. The Court remanded to Commerce for further explanation the question of Zinus Korea's involvement in the sale of subject mattresses and the treatment of selling expenses under the Korean-version International Financial Reporting Standards ("K-IFRS"). *PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d at 1280–83. On remand, Commerce determined that Zinus Korea's involvement in the sale of subject mattresses was minimal and continued to treat costs considered "commissions and fees" under K-IFRS as payments between related parties and not as selling expenses. *Remand Redetermination* at 9–16.

In the *Remand Redetermination*, Commerce cited record evidence to support its determination that Plaintiff reported that Zinus Korea's involvement in the sale of subject mattresses to the United States during the period of investigation "was limited to document and invoice management, i.e., receiving invoices from Zinus Indonesia and forwarding them to affiliated and unaffiliated U.S. customers, as even Zinus Korea's invoices were generated by Zinus Indonesia as part of Zinus Indonesia's operations and sales process." *Id.* at 9–10; *see* Zinus Indonesia's Sec. A Questionnaire Resp. (June 18, 2020) at A-15, PR 97–102, CR 36–39; Zinus Indonesia's Sec. A Supp. Questionnaire Resp. (Aug. 20, 2020) at 9–10, PR 165, CR 154. Commerce cited to the selling functions chart provided as an exhibit to Zinus Indonesia's Section A Questionnaire Response. *Remand Redetermination* at 10; *see* Zinus Indonesia's Sec. A Questionnaire Resp. at Ex. A-7a. Commerce determined that the chart indicated that for constructed export price sales from inventory and back-to-back constructed export price sales, Zinus Korea's involvement was limited to minimal order input and processing. *Remand Redetermination* at 10; *see* Zinus Indonesia's Sec. A Questionnaire Resp. at Ex. A7a. Commerce determined that for export price sales, Zinus Korea was involved in sales promotion, order input, and warranty services. *Remand Redetermination* at 10. Commerce also cited examples in the record supporting its determination that Zinus Indonesia performed the majority of selling activities, including arranging shipments and providing technical and sales support. *Id.* at 11; *see* Zinus Indonesia's Sec. A Supp. Questionnaire Resp. at 10; Zinus Indonesia's Sec. C. Questionnaire

Resp. (Jul. 13, 2020) at Ex. C-16, PR 119–20; CR 96–97, 104–05, 117–20 (example of freight arrangements arranged by Zinus Indonesia); Zinus Indonesia's Sec. A. Supp. Questionnaire Resp. at SA-6b (email regarding online training); Zinus Indonesia's Sec. A Questionnaire Resp. at Ex. A-7b (sample documents relating to categories of sale reflected in Zinus Indonesia's selling functions chart).

Defendant-Intervenors disagree with Commerce's determination, arguing that record documents demonstrate that Zinus Korea took a more active role in all sales of subject mattresses. Def.-Intervs.' Cmts. Part. Opp'n at 2–3 (citing Zinus Indonesia's Sec. A Questionnaire Resp. at A-8). Defendant-Intervenors point to Zinus Indonesia's Section A Questionnaire Response as contrary record evidence showing that for both constructed export price sales and export price sales, Zinus Indonesia sold subject mattresses to Zinus Korea, which resold the subject mattresses to affiliated or unaffiliated customers in the United States. *Id.* at 3; *see* Zinus Indonesia's Sec. A Questionnaire Resp. at A-18–A-19. Defendant-Intervenors also argue that record evidence shows that Plaintiff referred to export price sales as sales by Zinus Korea. Def.-Intervs.' Cmts. Part. Opp'n at 4; *see* Zinus Indonesia's Sec. A Questionnaire Resp. at A-3; Zinus Indonesia's Sec. A Supp. Questionnaire Resp. at 11. Defendant-Intervenors contend that it would be commercially unreasonable for Zinus Korea to be responsible for a significant number of sales while not incurring expenses for sales staff or administrative overhead. Def.-Intervs.' Cmts. Part. Opp'n at 4.

The Government acknowledges existing deficiencies and contradictions in the record with regard to Zinus Korea's selling functions and requests a remand of this issue to reopen the record for additional information. Def.'s Resp. at 15–17. The Court concludes that remand is appropriate on this issue because Commerce's determinations with respect to the exclusion of Zinus Korea's selling expenses are not supported by substantial evidence.

IV. Transactions Disregarded Rule

Commerce determined that during the period of investigation, Zinus Indonesia obtained ten types of material inputs from affiliated suppliers in the People's Republic of China. IDM at 16–18; *Remand Redetermination* at 16. Because the suppliers were in a non-market economy, Commerce determined that it was unable to use the affiliated suppliers' prices and costs in calculating normal value. IDM at 17; *Remand Redetermination* at 16–17. In the *Preliminary Determination*, *Mattresses From Indonesia*, 85 Fed. Reg. 69,597 (Dep't of Commerce Nov. 3, 2020) (preliminary affirmative determination of

sales at less than fair value, postponement of final determination, and extension of provisional measures), Commerce calculated and applied an average of the market prices of GTA import data for Brazil, Indonesia, Malaysia, Mexico, Romania, Russia, and Turkey. IDM at 17–18; Commerce's Cost Production Constructed Value Calculation Adjustments Prelim. Determination (Oct. 27, 2020) at 1–2, PR 231, CR 262. In the *Final Determination*, Commerce changed its approach and adopted only GTA data from Indonesia to calculate normal value. IDM at 18. Commerce interpreted the phrase "market under consideration" in 19 U.S.C. § 1677b(f)(2) to only refer to the market under review in the investigation. *Id.* The Court found this interpretation to be overly narrow and remanded for Commerce to provide further explanation or to reconsider whether Commerce's selection of Indonesia constituted a reasonable method to confirm that the affiliated prices reflect arm's length transactions under 19 U.S.C. § 1677b(f)(2). *PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d at 1287.

On remand, Commerce continued to use the Indonesian GTA data "because actual market import prices into Indonesia are more likely to be available to our Indonesian respondent than market import prices into other countries." *Remand Redetermination* at 16–23.

Under the Transactions Disregarded Rule, Commerce may disregard the transfer price of inputs provided to a respondent by an affiliated supplier and instead use the input's market price in calculating normal value. 19 U.S.C. § 1677b(f)(2). Commerce applies the Transactions Disregarded Rule through a multi-step process. *Best Mattresses Int'l Co. v. United States* ("*Best Mattresses*"), 47 CIT __, __, 622 F. Supp. 3d 1347, 1383–84 (2023). First, Commerce looks at whether the respondent purchased the input from an affiliated supplier. *Id.* at 1383. If that information is not available, Commerce looks to sales of the input by the affiliated supplier to an unaffiliated buyer. *Id.* When no other information is available, Commerce looks to a reasonable source of market value available on the record. *Id.* As the Court previously noted, when resorting to a "reasonable source for market value," if "a market price is not available, Commerce has developed a consistent and predictable approach whereby it may use an affiliate's total cost of providing the [good or service] as information available for a market price." *PT. Zinus*, 47 CIT at __, 628 F. Supp. 3d at 1285 (quoting *Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1383–84). The phrase "market under consideration" is purposefully broad to allow Commerce to choose a market that allows for a reasonable source for market value to confirm that the affiliated prices reflect arm's length transactions. *Id.*

Defendant-Intervenors argue that Commerce has not sufficiently explained or supported its change in practice to use only GTA data from Indonesia. Def.-Intervs.' Cmts. Part. Opp'n at 9–12. Defendant-Intervenors contend that Commerce has an established practice of calculating market price in a manner that best represents the respondent's own experience in the market under consideration. *Id.* at 9–10 (citing *Unicatch Indus. Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1229, 1249 (2021)).

In a situation in which transactions are performed between two affiliates and not at arm's length, Commerce must attempt to determine an amount that would have occurred if the parties had not been affiliated. 19 U.S.C. § 1677b(f)(2). As Commerce explained in the *Remand Redetermination*, adoption of the Indonesian GTA data allowed for the calculation of a market rate that Zinus Indonesia would have experienced but for its affiliation to its suppliers. *Remand Redetermination* at 19–20. Because a reasonable market price was available on the record, it was not necessary for Commerce to consider other available options, such as the average of other country GTA data. The Court concludes that Commerce's reliance on the Indonesian GTA data was reasonable, in accordance with law, and supported by substantial evidence. The Court sustains Commerce's application of the Transactions Disregarded Rule.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Court sustains Commerce's application of the Transactions Disregarded Rule; and it is further

ORDERED that the *Remand Redetermination* is remanded to Commerce to reconsider consistent with this opinion the inclusion of mattresses in transit; and it is further

ORDERED that the *Remand Redetermination* is remanded to Commerce to reconsider consistent with this opinion Zinus Korea's selling expenses; and it is further

ORDERED that this case shall proceed according to the following schedule:

(1) Commerce shall file its remand determination on or before April 19, 2024;

(2) Commerce shall file the administrative record on or before May 3, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before June 17, 2024;

(4) Comments in support of the remand determination shall be filed on or before July 17, 2024; and

(5) The joint appendix shall be filed on or before July 26, 2024.

Dated: February 20, 2024
New York, New York

/s/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 24–20

ZHEJIANG AMERISUN TECHNOLOGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BRIGGS & STRATTON, LLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 23–00011

[Remanding the U.S. Department of Commerce's final scope ruling that R210-S engines are included in the antidumping and countervailing duty orders on certain vertical shaft engines between 99cc and up to 225cc and parts thereof from the People's Republic of China.]

Dated: February 20, 2024

Brittney R. Powell and *Lizbeth R. Levinson*, Fox Rothschild LLP, of Washington, D.C., for Plaintiff Zhejiang Amerisun Technology Co., Ltd.

Claudia Burke, Deputy Director, and *Kyle S. Beckrich*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *JonZachary Forbes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Schneiderman and *Stephen Orava*, King & Spalding LLP, of Washington, D.C., for Defendant-Intervenor Briggs & Stratton, LLC.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Zhejiang Amerisun Technology Co., Ltd. ("Plaintiff" or "Zhejiang Amerisun") is a foreign exporter of lawn mowers from the People's Republic of China ("China"). Plaintiff challenges the U.S. Department of Commerce's ("Commerce") final scope ruling that the R210-S engine manufactured by Chongqing Rato Technology Co., Ltd. ("Chongqing Rato") is included in the antidumping and countervailing duty orders on certain vertical shaft engines between 99cc and up to 225cc and parts thereof from China. Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from the People's Republic of China: Scope Ruling on Modified Vertical Shaft Engines (Dec. 22, 2022) ("Final Scope Ruling"), PR 25[1]; *see Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof From the People's Republic of China*, 86 Fed. Reg. 23,675 (May 4, 2021) (antidumping and countervailing duty orders) ("*Orders*").

The crux of this case is whether Chongqing Rato's R210-S horizontal engines fall within the scope of the *Orders* that cover vertical engines. Plaintiff argues that the R210-S engines contain a newly designed horizontal shaft engine that should be deemed outside the

[1] Citations to the administrative record reflect the public record ("PR") document numbers filed in this case. ECF No. 32.

scope of the *Orders*. The Government contends that Commerce's scope ruling, which determined that the horizontal shaft engine was equivalent to a "modified vertical" shaft engine and thus fell within the scope of the *Orders*, should be sustained. At oral argument, discussions with the Parties revealed that the horizontal shaft engine design is new to the market, and thus a horizontal engine was not contemplated when the *Orders* were drafted to cover vertical engines. *See* Oral Arg. at 34:30–35:59, Dec. 11, 2023, ECF No. 35.

Before the Court is Plaintiff's Motion for Judgment on the Agency Record ("Plaintiff's Motion"). Pl.'s Mot. J. Agency R. ("Pl.'s Mot."), ECF No. 24; Pl.'s Mem. Points Authorities Supp. Pl.'s 56.2 Mot. J. Agency R. ("Pl.'s Br."), ECF No. 24–2. Defendant United States ("the Government" or "Defendant") and Defendant-Intervenor Briggs & Stratton, LLC ("Defendant-Intervenor," "Briggs & Stratton," or "Petitioner") oppose Plaintiff's Motion. Resp. Br. Def.-Interv. Opp'n Pl.'s Mot. J. Agency R. ("Def.-Interv.'s Resp."), ECF No. 25; Def.'s Resp. Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp."), ECF No. 26. Plaintiff filed its reply. Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply"), ECF No. 30.

For the reasons discussed below, the Court remands Commerce's Final Scope Ruling as unsupported by substantial evidence and not in accordance with law.

BACKGROUND

On May 4, 2021, Commerce issued antidumping and countervailing duty orders for certain vertical shaft engines between 99cc and up to 225cc, and parts thereof from China. *See Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof From the People's Republic of China*, 86 Fed. Reg. at 23,675.

On August 8, 2022, Briggs & Stratton filed a scope ruling request to determine whether Chongqing Rato's R210-S "modified vertical," single-cylinder, air-cooled, non-road, internal combustion engines used to power lawn mowers, with a horizontal crankshaft connected to a right-angle gearbox, are covered by the scope of the *Orders*. Letter from King & Spalding LLP to Commerce, re: Certain Vertical Shaft Engines Between 99cc and 225cc, and Parts Thereof from China[:] Request for Scope Ruling Regarding Certain Modified Vertical Shaft Engines (Aug. 8, 2022) ("Petitioner's Scope Ruling Request"), PR 1–10.

On August 26, 2022, Commerce initiated the scope inquiry. Mem. re: Initiation Memo [for] Modified Vertical Shaft Engines (Aug. 26, 2022), PR 16. The Parties filed their respective comments. Letter from Commerce & Finance Law Offices to Commerce, re: Certain

Vertical Shaft Engines Between 99cc and 225cc, and Parts Thereof from China: Comments on Scope Ruling Application Regarding Certain Modified Vertical Shaft Engines (Sept. 26, 2022) ("Plaintiff's Administrative Comments"), PR 12; Letter from King & Spalding LLP to Commerce, re: Certain Vertical Shaft Engines Between 99cc and 225cc, and Parts Thereof from China[:] Petitioner's Response Comments (Oct. 11, 2022) ("Petitioner's Rebuttal Comments"), PR 21. Commerce issued the Final Scope Ruling on December 22, 2022, determining that Chongqing Rato's R210-S engines are modified vertical shaft engines included in the scope of the *Orders*. *See* Final Scope Ruling. Plaintiff filed this timely action. *See* Summons, ECF No. 1; Compl., ECF No. 9.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination 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).

DISCUSSION

I. Commerce's Scope Determination

The descriptions of merchandise covered by the scope of an antidumping or countervailing duty order must be written in general terms, and questions may arise as to whether a particular product is included within the scope of an order. *See* 19 C.F.R. § 351.225(a). When such questions arise, Commerce's regulations direct it to issue scope rulings that clarify whether the products are in scope or out of scope. *Id*. Commerce is guided by case law and agency regulations in their scope rulings. *See Meridian Prods., LLC v. United States* ("*Meridian Prods*."), 851 F.3d 1375, 1381 (Fed. Cir. 2017); 19 C.F.R. § 351.225.

A. Scope of the *Orders*

Commerce's inquiry must begin with the relevant scope language. *See, e.g., OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020). If the scope language is unambiguous, "the plain meaning of the language governs." *Id*. If the language is ambiguous, however, Commerce interprets the scope with the aid of the sources set forth in 19 C.F.R. § 351.225(k)(1). *Meridian Prods*., 851 F.3d at 1382. If the (k)(1) sources do not dispositively answer the question, Commerce may consider the (k)(2) factors under 19 C.F.R. § 351.225(k)(2). *Id*.

Commerce may consider the following interpretive sources under 19 C.F.R. § 351.225(k)(1) to determine whether merchandise is covered by the scope of an order:

> (A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;
>
> (B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue;
>
> (C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and
>
> (D) Determinations of the Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

19 C.F.R. § 351.255(k)(1). Secondary interpretive sources include any other determinations of the Secretary or the Commission not identified above, rulings or determinations by U.S. Customs and Border Protection ("Customs"), industry usage, dictionaries, and any other relevant record evidence. *Id*. If there is a conflict between these secondary interpretive sources and the primary interpretive sources of this section, the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue. *Id*.

The scope language of the *Orders* in this case states in relevant part:

> The merchandise covered by these orders consists of spark-ignited, non-road, vertical shaft engines, whether finished or unfinished, whether assembled or unassembled, whether mounted or unmounted, primarily for walk-behind lawn mowers. Engines meeting this physical description may also be for other non-hand-held outdoor power equipment, including but not limited to, pressure washers. The subject engines are spark ignition, single-cylinder, air cooled, internal combustion engines with vertical power take off shafts with a minimum displacement of 99 cubic centimeters (cc) and a maximum displacement of up to, but not including, 225cc. Typically, engines with displacements of this size generate gross power of between 1.95 kilowatts (kw) to 4.75 kw.

Engines covered by this scope normally must comply with and be certified under Environmental Protection Agency (EPA) air pollution controls title 40, chapter I, subchapter U, part 1054 of the Code of Federal Regulations standards for small non-road spark-ignition engines and equipment. Engines that otherwise meet the physical description of the scope but are not certified under 40 CFR part 1054 and are not certified under other parts of subchapter U of the EPA air pollution controls are not excluded from the scope of these proceedings. Engines that may be certified under both 40 CFR part 1054 as well as other parts of subchapter U remain subject to the scope of these proceedings.

Certain small vertical shaft engines, whether or not mounted on non-hand-held outdoor power equipment, including but not limited to walk-behind lawn mowers and pressure washers, are included in the scope. However, if a subject engine is imported mounted on such equipment, only the engine is covered by the scope. Subject merchandise includes certain small vertical shaft engines produced in the subject country whether mounted on outdoor power equipment in the subject country or in a third country. Subject engines are covered whether or not they are accompanied by other parts.

For purposes of these orders, an unfinished engine covers at a minimum a sub-assembly comprised of, but not limited to, the following components: Crankcase, crankshaft, camshaft, piston(s), and connecting rod(s). Importation of these components together, whether assembled or unassembled, and whether or not accompanied by additional components such as a sump, carburetor spacer, cylinder head(s), valve train, or valve cover(s), constitutes an unfinished engine for purposes of these orders. The inclusion of other products such as spark plugs fitted into the cylinder head or electrical devices (e.g., ignition coils) for synchronizing with the engine to supply tension current does not remove the product from the scope. The inclusion of any other components not identified as comprising the unfinished engine subassembly in a third country does not remove the engine from the scope.

Specifically excluded from the scope of these orders are "Commercial" or "Heavy Commercial" engines under 40 CFR 1054.107 and 40 CFR 1054.135 that have (1) a displacement of 160cc or greater, (2) a cast iron cylinder liner, (3) an automatic compression release, and (4) and a muffler with at least three chambers and volume greater than 400cc.

See Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof From the People's Republic of China, 86 Fed. Reg. at 23,676–77.

B. Description of Merchandise

Plaintiff is a foreign exporter of lawn mowers from China that employs the R210-S engine in its PowerSmart brand lawn mowers. *See* Petitioner's Scope Ruling Request at 4. From the outset of the scope ruling request, the domestic producer Briggs & Stratton described Chongqing Rato's R210-S engine as a "modified vertical shaft engine" rather than a horizontal shaft engine. *Id.* at 3–4. Commerce echoed this language when it provided the following description in the scope ruling:

> The merchandise subject to this scope inquiry is a modified vertical shaft engine, such as the modified R210-S engine manufactured by Chongqing Rato. A modified vertical shaft engine is a single-cylinder, air-cooled, spark-ignited, non-road, internal combustion engine used to power lawn mowers, with a horizontal crankshaft connected to a right-angle gearbox. The gearbox of the engine redirects power from the crankshaft to a vertical power take off shaft that powers the blades of the lawn mower.

Final Scope Ruling at 3.

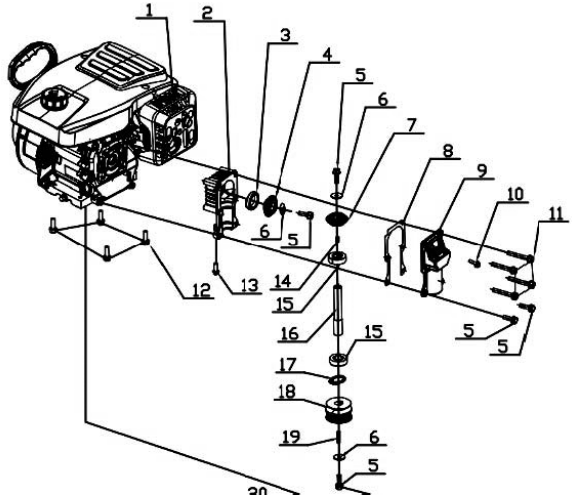
C. Commerce's Determination

To determine if the R210-S engines were covered by the scope of the *Orders*, Commerce examined the plain language of the scope and the (k)(1) sources consisting of the Petitioner's Scope Ruling Request, the underlying ITC Report, and the Petition. *See* Petitioner's Scope Ruling Request at Att. 15, *Small Vertical Shaft Engines from China*, USITC Pub. 5185, Inv. Nos. 701-TA-643, 731-TA-1493 (Aug. 25, 2008) ("ITC Report"); Petitioner's Scope Ruling Request at Att. 7, Petitions for the Imposition of Antidumping and Countervailing Duties, Certain Vertical Engines Between 99cc and Up to 225cc, and Parts Thereof, from the People's Republic of China, Volume I: General Information and Injury (Mar. 18, 2020) ("Petition").

Commerce first determined that the R210-S engines were "spark-ignited, single-cylinder, air-cooled, internal combustion engines between 99cc and 225cc that generate 1.95 kw to 4.75 kw of gross power." Final Scope Ruling at 7 (citing Petitioner's Scope Ruling Request at Att. 3 (certification from the California Air Resources Board ("CARB")) and Att. 5 (data from the Environmental Protection Agency ("EPA") regarding small non-road spark-ignition engines)).

Commerce then determined that the engine's horizontal crankshaft was attached to a right-angle gearbox, which redirected power from a horizontal orientation to a vertical orientation through a downward vertical shaft to the blades of the lawn mower, resulting in a vertical "power take off shaft." *Id*. at 7–8. Commerce determined that the horizontal crankshaft, right-angle gearbox, and vertical downward shaft comprised a single engine unit. *Id*.

The PowerSmart manual includes a schematic of the R210-S engine, which is divided into individual parts with descriptions and is depicted below. The manual indicates that the part identified as item 1 in the schematic is the engine and the parts identified as items 2 to 19 make up the gearbox. Petitioner's Scope Ruling Request at 8 (figure 2); *see also id*. at Att. 6 at 21–22.



During oral argument, the Government clarified that Commerce determined that items 1 through 19 make up the modified vertical shaft engine, with item 1 (the engine) plus items 2 to 19 (the gearbox) comprising one single engine unit. Oral Arg. at 49:55–50:15. Plaintiff contended, on the other hand, that item 1 was the only engine unit and constituted a horizontal shaft engine, and items 2 to 19 (the gearbox) were not part of the engine. *Id*. at 11:57–14:58.

This interpretation is critical to Commerce's scope ruling: rather than viewing the R210-S as a horizontal engine, Commerce considered the horizontal engine plus the vertical gearbox together as one "single engine unit" in order to determine that there was a vertical component of the product that fell within the scope of the vertical engine *Orders*.

After relying on the plain scope language in the *Orders*, the Government argued that Commerce examined the (k)(1) sources of the Petition, underlying ITC Report, and articles from Wikipedia and Pennsylvania State University to support its determination that the modified vertical shaft engine had a vertical orientation through its vertical "power take off shaft" and followed the primary use outlined in the scope language. Final Scope Ruling at 8–9.

The Parties use different terminology for the components to describe how the R210-S engine operates with the blades of the lawn mower. For the purposes of this opinion, the Court refers to the two shafts at issue as the horizontal crankshaft and the vertical drive shaft. The vertical drive shaft is referred to as the "vertical power take off shaft" and "vertical downward shaft" by Commerce, as the "vertical transmission shaft" by Plaintiff, and as the "vertical drive shaft" by Defendant-Intervenor; the horizontal crankshaft is referred to as the "horizontal power take off shaft" by Plaintiff. See Final Scope Ruling; Pl.'s Br.; Def.'s Resp.; Def.-Interv.'s Resp.; Pl.'s Reply.

1. Whether the R210-S Engine Includes the Gearbox and Vertical Drive Shaft

Plaintiff first challenges Commerce's determination that the right-angle gearbox and the vertical drive shaft are part of the R210-S engine and are therefore included within the scope of the *Orders*. Plaintiff contends that the gearbox and vertical drive shaft are not part of the engine. *See* Pl.'s Br. at 8–9; Pl.'s Reply at 4–7.

Commerce relied on the Petitioner's Scope Ruling Request in determining that "[m]odified vertical shaft engines contain a horizontal crankshaft . . . attached to a right-angle gearbox, which redirects power from a horizontal orientation to a vertical orientation through a downward shaft to the blades of the lawn mower." Final Scope Ruling at 7 (citing Petitioner's Scope Ruling Request at 3–4, 7–13, 23–24). The Petitioner's Scope Ruling Request contained a description of the physical characteristics of the R210-S engine:

> The R210-S has a horizontal crankshaft, but the engine has been modified to include a right-angle gearbox that redirects power from a horizontal to a vertical orientation. Put simply, the horizontal crankshaft turns a gear, and that gear then turns a vertical take off shaft. As modified with the gearbox, the shaft comes out the bottom (rather than from the side) of the engine.

Petitioner's Scope Ruling Request at 4. Additional technical descriptions were included in Attachments 1–3 and 5–6. *See id*. at Att. 1 (picture of lawn mower marketed on Walmart website), Att. 2 (picture of lawn mower marketed on PowerSmart website), Att. 3 (certification

from CARB), Att. 5 (data from EPA regarding small non-road spark-ignition engines), and Att. 6 (PowerSmart manual).

Commerce cited evidence provided by Petitioner to show that the right-angle gearbox and vertical drive shaft are considered parts of the R210-S engine, rather than parts of the lawn mower. Final Scope Ruling at 8 (citing to Petitioner's Scope Ruling Request at 8–13). As shown above, the PowerSmart manual includes a schematic of the R210-S engine. The manual indicates that the part identified as item 1 is the engine and the parts identified as items 2 to 19 make up the gearbox. Petitioner's Scope Ruling Request at 8 (figure 2); *see also id.* at Att. 6 at 21–22.

Commerce also cited to Figures 3, 4, and 6 to 8 in the Petitioner's Scope Ruling Request. Figures 3 and 4 show photographs of the box packaging of the lawn mower and the lawn mower itself when sold. *Id*. at 9. Commerce cited to Figures 6 to 8 as evidence that the right-angle gearbox works in tandem with the engine, in support of its determination that the gearbox can reasonably be determined to be attached to, and part of, the engine. The Court observes that Figure 6 is a photograph of the gearbox without its cover. *Id*. at 11. Figure 7 is a photograph of the engine without the gearbox attached to it and Figure 8 is a photograph of the bottom of the lawn mower, showing that the vertical drive shaft is off-center with the removal of the gearbox, along with demonstrating that there is a pulley system added to direct power from the vertical drive shaft to a centralized blade hub and through an additional belt to the wheels. *Id*. at 12–13.

The Court observes that the schematic in the PowerSmart manual (as shown above) demonstrates that item 1 is a horizontal shaft engine, and items 2 to 19 make up the gearbox. This supports Plaintiff's position, and is contrary to Commerce's scope ruling that the engine incorporates the gearbox. This example of record evidence from the Petitioner's Scope Ruling Request therefore does not support Commerce's scope determination.

Commerce stated in the Final Scope Ruling that because the *Orders* do not include an exhaustive list for the components necessary for an engine to be covered, the scope language does not preclude a gearbox connected to a shaft from being considered an integrated part of the R210-S engine. Final Scope Ruling at 8. Commerce explained that:

> Furthermore, we find that the scope merely enumerates the minimum components that must be included for a machine to be considered an engine, rather than providing an exhaustive list. Thus, there is nothing in the language of the scope that precludes a gearbox connected to a shaft from being considered an integrated part of an engine.

Id.

Commerce's explanation is inconsistent with well-established legal precedent regarding scope rulings. The Court of Appeals for the Federal Circuit ("CAFC") has held that "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States* ("*Duferco*"), 296 F.3d 1087, 1089 (Fed. Cir. 2002). Significantly, Commerce's position that the scope language's silence permits Commerce to interpret the subject merchandise within the scope of the *Orders* is the opposite of the principle set forth in *Duferco*. The Court observes that gearboxes are not mentioned in the scope language. The Court concludes that because (1) the scope language does not specify that a gearbox connected to a shaft is part of the engine or any language that reasonably suggests such a result, and (2) Commerce's interpretation is contrary to well-established legal precedent, Commerce's determination that the R210-S engine includes the right-angle gearbox and vertical drive shaft is neither supported by substantial evidence nor in accordance with law.

2. Power Transmission from Secondary Shaft

Plaintiff contends that Commerce's scope determination is not in accordance with law or supported by substantial evidence because the *Orders* cover only engines with a vertical "power take off shaft," but the R210-S engine has a horizontal "power take off shaft." *See* Pl.'s Br. at 4–11. Plaintiff does not challenge the ambiguity of the scope language or Commerce's determination that the R210-S engines are "spark-ignited, single-cylinder, air-cooled, internal combustion engines between 99cc and 225cc that generate 1.95 kw to 4.75 kw of gross power." *See id*. Plaintiff only contests Commerce's determination that the "power take off shaft" was "modified vertical" rather than horizontal.

The Government and Defendant-Intervenor urge the Court to sustain Commerce's scope ruling because they argue that Commerce determined reasonably that the R210-S engine fell within the scope of the *Orders* based on record evidence and proper (k)(1) sources. Def.'s Resp. at 4; Def.-Interv.'s Resp. at 6–11.

Commerce defines a "power take off shaft" as: "[T]he mechanism through which power is transmitted from the engine to an attached implement (such as a blade), and it can be a secondary drive shaft (*i.e.*, a shaft connected via a gearbox (or transmission) to the crankshaft)." Final Scope Ruling at 8. Plaintiff challenges the second part of Commerce's definition of "power take off shaft," which states that

"it can be a secondary drive shaft (*i.e.*, a shaft connected via a gearbox (or transmission) to the crankshaft)." Plaintiff contends that Commerce's scope ruling is not supported by substantial evidence because Commerce cited unreliable evidence, such as Wikipedia articles, and irrelevant evidence that was not specific to engines used for lawn mowers. Pl.'s Br. at 6–7.

Plaintiff challenges Commerce's determination that the vertical drive shaft can be considered a "power take off shaft," based on Commerce's definition of a "power take off shaft" as a "secondary drive shaft" that can be connected to the engine via a gearbox or any other secondary drive shaft. *Id*. at 7. Plaintiff disagrees with this definition. *Id*.

To support its determination, Commerce relied on two articles from Wikipedia and one academic article for its definition of "power take off shaft." Final Scope Ruling at 8 n.46; *see* Petitioner's Scope Ruling Request at Atts. 16b, 16c, 17. The Court observes that none of these articles relied on by Commerce discuss a "power take off shaft" in the context of walk-behind lawn mowers or provide specific information as to how a "power take off shaft" can be a "secondary drive shaft," such as a shaft connected via a gearbox (or transmission) to the crankshaft.

As a preliminary matter, the Court rejects the reliability of Wikipedia articles as authoritative evidence deserving of judicial notice. *See* Petitioner's Scope Ruling Request at Atts. 16a, 16b, 16c. Wikipedia describes itself as "a free encyclopedia, written collaboratively by the people who use it," and "[a]nyone can edit almost every page; just find something that can be improved and make it better."[2] Wikipedia articles do not contain the editorial controls of other published work and may be manipulated by anyone.

The U.S. Court of International Trade has discussed its concerns about Wikipedia due to its unreliability as an evidentiary source. *See BP Prod. N. Am. Inc. v. United States*, 34 CIT 676, 681, 716 F. Supp. 2d 1291, 1295 n.10 (2010) ("Based on the ability of any user to alter Wikipedia, the court is skeptical of it as a consistently reliable source of information. At this time, therefore, the court does not accept Wikipedia for purposes of judicial notice."). Courts have expressed concerns over Wikipedia's lack of editorial controls:

> A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article "may be, at any given moment, in a bad state: for example it could be in the middle of

[2] Introduction to Wikipedia, https://en.wikipedia.org/wiki/Help:Introduction_to_Wikipedia (last visited Feb. 19, 2024).

> a large edit or it could have been recently vandalized"; (ii) Wikipedia articles are "also subject to remarkable oversights and omissions"; (iii) "Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work"; (iv) "[a]nother problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written"; and (v) "many articles commence their lives as partisan drafts" and may be "caught up in a heavily unbalanced viewpoint."

Campbell ex rel. Campbell v. Secretary of Health and Human Servs., 69 Fed. Cl. 775, 781 (2006). Other courts have also expressed their concerns about the dangers of relying on Wikipedia as an authoritative source. *See, e.g., Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008); *Bing Shun Li v. Holder*, 400 F. App'x 854, 857–58 (5th Cir. 2010).

Commerce has even rejected Wikipedia as evidence in cases appealed to the U.S. Court of International Trade. *See Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1342 (2017) ("Commerce discounted the Wikipedia article because of its vagueness and lack of an authoritative citation. . . . The court further notes that . . . Wikipedia, is often an unreliable evidentiary source."); *Xiamen Int'l Trade & Indus. Co. v. United States*, 37 CIT 1724, 1729, 953 F. Supp. 2d 1307, 1314 (2013) ("Commerce dismissed XITIC's Wikipedia entry as unreliable because it contained no citations to outside sources supporting the article's definitions."). It is remarkable that Commerce has rejected Wikipedia as a reliable source of evidence for over a decade, and here Commerce cites Wikipedia as evidence before this Court. The Court views Commerce's heavy reliance on Wikipedia articles as an indication of the weakness of Commerce's scope determination.

In addition to being unreliable evidence, the Wikipedia articles cited by Commerce do not adequately explain what a "power take off shaft" is, particularly in the context of a walk-behind lawn mower. *See* Petitioner's Scope Ruling Request at Atts. 16b, 16c. Attachment 16b describes "power take-off" as one of several methods for taking power from a power source, such as a running engine, and transmitting it to an application such as an attached implement or separate machine. *Id.* at Att. 16b. This article only mentions the application of this method to other kinds of large machinery, such as tractors, trucks, and jet aircrafts, and the term "secondary" is included once in the context of "semi-permanently mounted power take-offs" on industrial

and marine engines, which "typically use a drive shaft and bolted joint to transmit power to a secondary implement or accessory." Id. There is no indication that the R210-S engine includes a "semi-permanently mounted power take-off," and the R210-S is a small engine for lawn mowers-not an industrial or marine engine. *See* Final Scope Ruling; Petitioner's Scope Ruling Request. Attachment 16c describes a "drive shaft" as a component for transmitting mechanical power, torque, and rotation, which is used to connect other components of a drivetrain that cannot be connected directly because of distance or the need to allow for relative movement between them. Petitioner's Scope Ruling Request at Att. 16c. The article discusses drive shafts in the context of automobiles, motorcycles, trucks, and bicycles. *Id*. The Wikipedia article includes a short, general description of "power take-off" drive shafts, describing them as "one method of transferring power from an engine and [power take-off] to vehicle-mounted accessory equipment, such as an air compressor" and "used when there isn't enough space between the engine power take-off and accessory," but fails to mention drive shafts applied to walk-behind lawn mowers or whether a "power take off shaft" may be a secondary drive shaft connected via a gearbox to the horizontal crankshaft as in the R210-S engine. *Id.*

Because Commerce's definition of a "power take off shaft" is based on these unreliable and irrelevant Wikipedia articles, and is what ultimately supports Commerce's determination that the R210-S engine falls within the scope of the *Orders*, the Court concludes that Commerce's scope determination on the issue of a "power take off shaft" is not supported by substantial evidence.

The only article relied on by Commerce that is not from Wikipedia is Attachment 17, an article from Pennsylvania State University that discusses power-take off safety in the context of farm tractors and implements. *Id.* at Att. 17. The article defines the "power take off shaft" as "an efficient means of transferring mechanical power between farm tractors and implements" and discusses the hazards of the shaft associated with farm machinery and safety practices to mitigate the hazards. *Id.* While this article may be a reliable authoritative source as an academic publication, it is irrelevant because it also does not specifically discuss a "power take off shaft" in the context of walk-behind lawn mowers or as a secondary shaft connected via a gearbox to a crankshaft. Thus, the Court concludes that the article from Pennsylvania State University does not provide evidentiary support for Commerce's scope ruling.

Defendant and Defendant-Intervenor argue that it was reasonable for Commerce to rely on these articles to determine that a "power

take off shaft" can be a vertical drive shaft when it is used as a means to transmit power to the blades and for common industry understanding of the relevant engine components, even though they are not specific to lawn mowers. *See* Def.'s Resp. at 8; Def.-Inverv.'s Resp. at 8. The Court disagrees. The Wikipedia articles cannot be relied on for the definition of a "power take off shaft" as being a secondary drive shaft attached via a gearbox to a crankshaft, and the academic article does not adequately support Commerce's definition. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court reviews the substantiality of the evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Deacero S.A. de C.V. v. United States*, 37 CIT 1457, 1460–61, 942 F. Supp 2d. 1321, 1325 (2013) (citation and internal quotations omitted). While all three articles generally discuss a "power take off shaft" as a power transfer system, they fail to support Commerce's determination because they do not address the specific context of lawn mowers and the Wikipedia articles are inherently unreliable as evidentiary sources.

Other record evidence also does not sufficiently support Commerce's determination because the documents do not explain why a horizontal crankshaft cannot be a "power take off shaft" for the R210-S engine. The plain scope language of the *Orders* does not exclude vertical drive shafts from being a "power take off shaft," but it also does not exclude horizontal crankshafts from being a "power take off shaft." Commerce's reliance on the Petitioner's Scope Ruling Request, the ITC Report, and the Petition do not provide adequate support as to why the transmission of power through a certain shaft would render it a "power take off shaft" if power can go through both the horizontal crankshaft and vertical drive shaft, especially if the vertical drive shaft is a secondary shaft connected to a gearbox. The Parties seem to concede that the power from the engine must at some point be transmitted in a vertical direction in order to reach the lawn mower blades, whether through the vertical drive shaft as an "intermediary" before it reaches a transmission belt (as asserted by Plaintiff) or as the "power take off shaft" that ultimately powers the blades (as argued by Defendant and Defendant-Intervenor). *See* Pl.'s Br. at 6; Def.'s Resp. at 8; Def.-Interv.'s Resp. at 8; Pl.'s Reply at 9. Defendant-Intervenor asserts that "whether both the crankshaft and the drive draft are considered [power take off] shafts, or whether only the secondary drive shaft should be considered the [power take off] shaft is irrelevant," but this interpretation fails to support Commerce's

scope ruling. Def.-Interv.'s Resp. at 9. Defendant contends in its brief before the Court that the horizontal crankshaft cannot transmit power to the blades without the vertical drive shaft because "if the horizontal crankshaft were the power take off shaft, the lawn mower blades would be upright, such as in a tiller machine, and not flat on the ground," but Commerce did not raise this point in its Final Scope Ruling. Def.'s Resp. at 8 (citing Petitioner's Scope Ruling Request at 18 (referencing Att. 9 (testimony of Petitioner's senior vice president before the U.S. International Trade Commission))); *see* Final Scope Ruling at 8.

Commerce's reliance on the Petitioner's Scope Ruling Request for general information on engines designed for use on a lawn mower is not sufficient. The Petitioner's Scope Ruling Request states:

> Every other engine designed for use on mowers has only one shaft: a vertical crankshaft which also is the [power take off shaft] powering the blades. But this is not necessarily the case As is clearly pictured in Figure 6 . . . , the modified R210-S has a vertical [drive] shaft connected to the gearbox that transmits power straight down the engine to the mower blades.

Petitioner's Scope Ruling Request at 24. Figure 6, depicted below, is a photograph of the gearbox without its cover, showing that the gears work with the horizontal crankshaft from the side of the engine and a vertical drive shaft directed to the mower deck of the blades. *Id*. at 11.

Figure 6 does not demonstrate that the power is transmitted from the vertical drive shaft directly to the mower blades. It shows how the shafts are placed, but it is not sufficient evidence to demonstrate that power can only be transmitted from the vertical drive shaft to the blades of the lawn mower.

The Court concludes that Commerce's scope determination is not supported by substantial evidence and not in accordance with law.

CONCLUSION

For the foregoing reasons, the Court remands Commerce's Final Scope Ruling as unsupported by substantial evidence and not in accordance with law. Accordingly, it is hereby

ORDERED that Commerce shall file its remand redetermination on or before April 19, 2024; and it is further

ORDERED that Commerce shall file the administrative record on remand on or before May 3, 2024; and it is further

ORDERED that the Parties shall file any comments on the remand redetermination or before June 17, 2024; and it is further

ORDERED that the Parties shall file replies to the comments on or before July 17, 2024; and it is further

ORDERED that the joint appendix shall be filed on or before July 26, 2024.

Dated: February 20, 2024
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 24–21

MEIHUA GROUP INTERNATIONAL TRADING (HONG KONG), LIMITED AND XINJIANG MEIHUA AMINO ACID CO., LTD., Plaintiffs, and DEOSEN BIOCHEMICAL (ORDOS), LTD., DEOSEN BIOCHEMICAL, LTD., AND JIANLONG BIOTECHNOLOGY COMPANY, LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00069

[Remanding the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Order in the antidumping duty administrative review of xanthan gum from the People's Republic of China].

Dated: February 22, 2024

Mark B. Lehnardt, Law Offices of David L. Simon, PLLC, of Washington, D.C., for Plaintiffs Meihua Group International Trading (Hong Kong), Limited and Xinjiang Meihua Amino Acid Co., Ltd.

Chunlian (Lian) Yang and *Lucas Queiroz Pires*, Alston & Bird, LLP, of Washington, D.C., for Consolidated Plaintiffs Deosen Biochemical (Ordos), Ltd. and Deosen Biochemical, Ltd.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiff Jianlong Biotechnology Company, Ltd.

Sosun Bae, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination in the administrative review of the antidumping duty order on xanthan gum from the People's Republic of China ("China") covering the period of review from July 1, 2019 through June 30, 2020. *See Final Results of Redetermination Pursuant to Court Remand* ("*Remand Redetermination*"), ECF Nos. 52–1, 53–1, pursuant to the Court's Opinion and Order in *Meihua Group International Trading (Hong Kong), Ltd. v. United States* ("*Meihua I*"), 47 CIT __, 633 F. Supp. 3d 1203 (2023); *see also Xanthan Gum from the People's Republic of China* ("*Final Results*"), 87 Fed. Reg. 7104 (Dep't of Commerce Feb. 8, 2022) (final results of antidumping duty administrative review and final determination of no shipments;

2019–2020); *see also* Issues and Decision Memorandum for the Final Results of the 2019–2020 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China ("IDM"), ECF No. 23–3.

The Court reviews Commerce's determination to apply total adverse facts available to Meihua Group International Trading (Hong Kong), Limited and Xinjiang Meihua Amino Acid Co., Ltd. (collectively, "Meihua"). In summary, Commerce requested that Meihua provide information about what duties it paid, and Meihua reported the duties paid to the U.S. Department of Customs and Border Protection ("Customs"). IDM at 9, 12. It became apparent later that Meihua's duties paid to Customs are subject to change due to ongoing Section 301 exclusion requests, and the duties already paid might be potentially adjusted in the future. *Id.* at 10, 12–13. Meihua provided updated information requested by Commerce, but Commerce continues to fault Meihua and apply total adverse facts available for failing to provide accurate information about its U.S. duties and sales database.

In *Meihua I*, the Court remanded for Commerce to reconsider the application of total adverse facts available and the highest dumping margin rate to Meihua because the Court concluded that Commerce failed to satisfy its statutory obligation under 19 U.S.C. § 1677m(d). *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1212. The Court directed Commerce to reconsider the applicable separate rate for Consolidated Plaintiffs Jianlong Biotechnology Co., Ltd. ("Jianlong") and Deosen Biochemical (Ordos), Ltd. and Deosen Biochemical, Ltd. (collectively, "Deosen") if Commerce made any changes to Meihua's rate. *Id.* at __, 633 F. Supp. 3d at 1213. The Court also directed Commerce to perform a collapsing analysis pursuant to 19 C.F.R. § 351.401(f) to determine whether Deosen Biochemical, Ltd. was an exporter with shipments of subject merchandise during the period of review, whether the Deosen entities should have been collapsed, and whether Commerce should have rescinded Deosen Biochemical, Ltd.'s review. *Id.* at __, 633 F. Supp. 3d at 1215.

Meihua filed Comments of Meihua Group International Trading (Hong Kong), Limited and Xinjiang Meihua Acid Co., Ltd., on Remand Redetermination. Meihua's Cmts. Remand Redetermination ("Meihua's Cmts."), ECF Nos. 57, 58. Jianlong filed Comments on Final Results of Redetermination Pursuant to Court Remand of Consolidated Plaintiff Jianlong Biotechnology Co., Ltd. Jianlong's Cmts. Final Results Redetermination Pursuant Court Remand ("Jianlong's Cmts."), ECF No. 55. Deosen filed Consolidated Plaintiff Deosen's Comments in Opposition to the Final Results of Redetermination

Pursuant to Court Remand. Deosen's Cmts. Opp'n Final Results Redetermination Pursuant Court Remand ("Deosen's Cmts."), ECF No. 56. Defendant United States ("Defendant" or "the Government") filed Defendant's Response to Plaintiffs' and Plaintiff-Intervenors' Comments Regarding the Remand Redetermination. Def.'s Resp. Pls.' Pl.-Intervs.' Cmts. Regarding Remand Redetermination ("Def.'s Resp."), ECF Nos. 59, 60. For the reasons discussed below, the Court remands Commerce's *Remand Redetermination*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination to apply total adverse facts available to Meihua is supported by substantial evidence and in accordance with law;
2. Whether Commerce's determination to apply the separate rate to Jianlong and Deosen is supported by substantial evidence; and
3. Whether Commerce's determination not to conduct a collapsing analysis of Deosen and rescind Deosen Biochemical, Ltd.'s review is supported by substantial evidence.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case as set forth in *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1207–08.

On September 3, 2020, Commerce initiated an administrative review of an antidumping duty order on xanthan gum from China. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* ("*Initiation Notice*"), 85 Fed. Reg. 54,983 (Dep't of Commerce Sept. 3, 2020). Commerce selected Meihua as one of the mandatory respondents. Commerce's Mem. Re: Selection Resps. 2019–2020 Admin. Rev. Antidumping Duty Order Xanthan Gum People's Rep. China at 1, PR 39.[1] During the investigation, Commerce treated Deosen Biochemical (Ordos), Ltd. and Deosen Biochemical, Ltd. as a single entity and continued to do so during the administrative review. *Id.* at 2 n.5

In its *Final Results*, Commerce applied total adverse facts available to Meihua after concluding that Meihua should have communicated to Commerce that the duties it paid and the entered values on its Customs entry forms were incorrect. IDM at 12. Commerce applied a

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") numbers filed in this case, ECF Nos. 45, 62.

dumping margin rate of 154.07% to Meihua. *Final Results*, 87 Fed. Reg. at 7105. With respect to Deosen, Commerce rejected Deosen Biochemical, Ltd.'s offer to provide additional documents and did not rescind the review of Deosen Biochemical, Ltd. IDM at 7–8; *See* Deosen's Case Br. ("Deosen's Admin. Case Br.") at 10, PR 293. Deosen and Jianlong (collectively, "Separate Rate Respondents") were assigned a dumping margin rate of 77.04% for separate companies not individually investigated. *Final Results*, 87 Fed. Reg. at 7105. Commerce calculated the separate rate using the simple average of Meihua's adverse facts available rate of 154.07% and the 0% rate assigned to Neimenggu Fufeng Biotechnologies Co., Ltd., Xinjiang Fufeng Biotechnologies Co., Ltd., and Shandong Fufeng Fermentation Co., Ltd. *Id.*; IDM at 5.

The Court held in *Meihua I* that Commerce failed to satisfy its statutory obligation under 19 U.S.C. § 1677m(d) when Commerce did not notify Meihua of any deficiencies in its submissions or provide Meihua with an opportunity to remedy the deficiencies. *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1212. The Court remanded for Commerce to reconsider the application of total adverse facts available and the highest dumping margin rate to Meihua, the applicable rate for the Separate Rate Respondents, and the collapsing analysis for Deosen. *Id.* at __, 633 F. Supp. 3d at 1215.

On remand, Commerce did not provide Meihua with an opportunity to remedy any deficiencies and determined that Meihua submitted inaccurate data and misrepresented information. *Remand Redetermination* at 7. As a result, Commerce continued to apply total adverse facts available and made no changes to the dumping margin rates of Meihua and the Separate Rate Respondents. *Id.* at 14, 18–21. Commerce did not conduct a collapsing analysis of the Deosen entities based on Commerce's prior determination that the collapsed entities comprised a single entity. *Id.* at 23–25.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an antidumping duty investigation. The Court shall hold unlawful any determination 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 Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Commerce's Continued Application of Total Adverse Facts Available and the Highest Dumping Margin Rate to Meihua

Section 776 of the Tariff Act provides that if necessary information is not available on the record, or an interested party withholds information that Commerce has requested, fails to submit the requested information by the deadlines imposed by Commerce, significantly impedes the administrative review, or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), then Commerce shall use facts otherwise available in reaching its determination. 19 U.S.C. § 1677e(a). Commerce's authority to use facts otherwise available under 19 U.S.C. § 1677e(a) is subject to 19 U.S.C. § 1677m(d), which states that:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d). After being given an opportunity to remedy or explain, if the interested party or person submits a response that Commerce determines to be unsatisfactory or untimely, Commerce may disregard all or part of the original and subsequent responses. *Id.*

After Commerce determines that the use of facts otherwise available is warranted, Commerce may apply adverse inferences if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. 19 U.S.C. § 1677e(b)(1); *Nippon Steel Corp. v. United States* ("*Nippon Steel*"), 337 F.3d 1373, 1383 (Fed. Cir. 2003). A determination that a party has failed to comply to the best of its ability requires an objective and subjective showing that a party has not put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. *Nippon Steel*, 337 F.3d at 1382–83. An objective determination requires Commerce to show 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. *Id.* at 1382 (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). A subjective determination requires Commerce to show that the respondent's failure to fully respond is the result of a lack of cooperation indicated by not putting forth maximum effort in producing the requested information or maintaining all required records. *Id.* at 1382–83. A mere failure to respond does not warrant adverse inferences. *Id.* at 1383. Rather, Commerce must show that the situation called for more forthcoming responses than what a party provided. *Id.* In the event that a respondent possesses relevant information but does not provide it, such behavior cannot be considered maximum effort to provide Commerce with full and complete answers. *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (quoting *Nippon Steel*, 337 F.3d at 1382).

A. Commerce's Use of Facts Otherwise Available

1. Necessary Information Not Available on the Record Pursuant to 19 U.S.C. § 1677e(a)(1)

Commerce determined that the use of facts otherwise available was appropriate because necessary information was missing regarding Meihua's U.S. sales database. *Remand Redetermination* at 6, 19–20. Commerce determined that "Meihua failed to provide a reliable U.S. sales database, claiming instead, that the information would not be finalized until after [Customs] completed its review, which, according to Meihua, would be well after the *Final Results*." *Id.* at 6 (citing Brief from Craven Trade Law LLC to Sec of Commerce Pertaining to Meihua Case Brief ("Meihua's Admin. Case Br."), at 9, PR 294); *see also id.* at 19–20. Commerce explained that it needed finalized information about Meihua's U.S. sales database to calculate Meihua's dumping margin rate. *Id.* at 19–20.

In *Meihua I*, this Court noted that Meihua contended that the information initially provided to Commerce was accurate and answered Commerce's specific question about duties paid to Customs, but the potential adjusted amounts that Meihua might eventually need to pay or that might be reimbursed were not final due to ongoing Section 301 exclusion requests. *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1210; Meihua's Cmts. at 9. Commerce noted on remand that the finalized information about Meihua's U.S. sales database would not be available until after Customs completed its review, which could be after Commerce issued its *Final Results*. *Remand Redetermination* at 6. Nonetheless, Commerce recognized that Meihua provided the requested information to Commerce fifty-six days before the signature

date of the preliminary results. *Id.* Thus, record evidence demonstrates that Meihua provided the information requested by Commerce, and Commerce's determination that necessary information was missing from the record pursuant to 19 U.S.C. § 1677e(a)(1) is not supported by substantial evidence.

2. Information Pursuant to 19 U.S.C. § 1677e(a)(2)

With respect to its statutory obligations under 19 U.S.C. § 1677e(a)(2), Commerce continued to determine on remand that Meihua withheld accurate information about its U.S. duties and sales database, failed to timely notify Commerce of the information it had submitted to Customs, and significantly impeded the administrative review by misrepresenting the values of its U.S. duties and sales database. *Remand Redetermination* at 12.

The Court first reviews Commerce's determination that Meihua withheld accurate information about its U.S. duties and sales database. In summary, Commerce requested that Meihua provide information about what duties it paid, and Meihua reported the duties paid to Customs. IDM at 9, 12. Later, it became apparent that the duties paid to Customs were subject to change due to ongoing Section 301 exclusion requests. *Id.* at 10; 12–13.

Meihua argues that "Commerce requested that Meihua report what it paid in U.S. duties, and Meihua reported exactly that." Meihua's Cmts. at 9. Meihua highlights evidence on the record with respect to the first questionnaire. *Id.* Commerce's Section C Questionnaire specifically requested that Meihua provide information about the amount of U.S. duties it paid:

> Field Number 29.0: U.S. Customs Duty . . . . Description: If terms of sale included this charge, report the *unit amount of any customs duty paid* on the merchandise under consideration. Include in the unit cost the U.S. customs processing fee and the U.S. harbor maintenance fee."

Commerce's Questionnaire; Appendix VIII, Appendix VII, Appendix X ("Initial Questionnaire") at C-19–C-20, PR 44–47 (emphasis added). In response, Meihua explained that it calculated the unit amount of Customs duties paid and attached a calculation package and other supporting documents. Meihua's Resp. Section C Commerce's Initial Questionnaire ("Meihua's Initial Section C Questionnaire Resp.") at C-31, Ex. C-5, PR 71–74.

The Government argues that Meihua's submission was not responsive to the Initial Questionnaire because Meihua misrepresented the

values of its U.S. duties and did not provide Commerce with information submitted to Customs that affected its U.S. duties and sales database. Def.'s Resp. at 9; *see also Remand Redetermination* at 7–8. 19 U.S.C. § 1677e(a) applies when a party "*withholds information* that has been *requested*." 19 U.S.C. § 1677e(a)(2)(A) (emphasis added). The Initial Questionnaire only requested that Meihua provide information about the U.S. duties it *paid*, and Meihua answered the question about what duties were paid. As discussed during oral argument, Commerce did not ask initially if the duty amount would change, or whether the amounts paid were incorrect. Oral Arg. at 21:25–21:58; 25:06–26:03; 67:28–68:30, Dec. 13, 2023, ECF No. 66. The Court observes that the question was poorly worded if Commerce intended to elicit whether the amounts paid would change or whether the amounts paid were correct, when the actual question asked how much duties were paid. It is clear to the Court, however, that Meihua answered the question that was asked by Commerce in the Initial Questionnaire about what it paid and included a calculation package. Commerce's determination that Meihua withheld information or significantly impeded the proceeding by failing to answer the Initial Questionnaire differently is unreasonable and not supported by substantial evidence.

Commerce also determined that Meihua failed to provide supplemental information on a timely basis because Meihua submitted the information addressing the deficiencies "less than two months before the preliminary results." *Remand Redetermination* at 12. Meihua submitted the supplemental information requested, albeit under protest, and included an 802-page filing with a Microsoft Excel Spreadsheet and complete information related to Meihua's submissions to Customs. Commerce's Second Supplemental Section C & D Qnaire ("Second Suppl. Section C Questionnaire") at 6, PR 211; Meihua's Resp. Second Suppl. Section C/D Questionnaire ("Meihua's Resp. Second Suppl. Section C Questionnaire") at 10–11, Ex. SC2–5, PR 230; Meihua's Cmts. at 8. The fact that Meihua submitted the requested supplemental information under protest is not relevant to the fact that Meihua eventually complied and provided the supplemental information. Commerce did not determine on remand that Meihua failed to provide the requested information in the Second Supplemental Section C Questionnaire.

Moreover, the Court concludes that Commerce's determination is unreasonable that Meihua's provision of supplemental information approximately two months before the preliminary results were issued was untimely. Commerce has discretion to fashion its time limits concerning the submission of written information and data, but such

time limits must still be reasonable. Commerce alleges that Meihua's submission of supplemental information approximately two months prior to the preliminary results date was "uncooperative" behavior, rendering Commerce "unable to analyze record evidence and develop a methodology that would allow for the accurate calculation of U.S. duties." *Remand Redetermination* at 10. The Court notes that this is not a case in which a respondent failed completely to provide the requested information, or provided the information after the preliminary results were issued. Meihua provided the requested supplemental information approximately two months prior to the preliminary results being issued, which allowed Commerce reasonable time to analyze the information rather than disregard it and apply total adverse facts available to Meihua. Notably, the *Remand Redetermination* does not cite any evidence demonstrating that Meihua missed any deadlines set by Commerce. Commerce merely states that "it was not unreasonable for Commerce to expect Meihua to have been more forthcoming with its responses; the company should have provided a full and detailed explanation of how it reported U.S. duties *well before the preliminary results*." *Id.* at 12 (emphasis added). The Court concludes that Meihua did not make an untimely filing when it provided the information asked by Commerce in the Initial Questionnaire, nor did Meihua make an untimely filing when it provided supplemental information approximately two months prior to the issuance of the preliminary results ("well before the preliminary results"), leaving time for interested parties to comment and for Commerce to arrive at a methodology with which to calculate export prices using the information available. "Well before the preliminary results" is a vague deadline, and not enough to show that a party failed to provide information by a required deadline under 19 U.S.C. § 1677e(a)(2)(B). The Court observes that approximately two months prior to the preliminary results would seem to satisfy this vague standard. Absent record evidence demonstrating that Meihua missed any specific deadlines, Commerce's determination that Meihua filed untimely information is not supported by substantial evidence.

Substantial evidence on the record does not support Commerce's determination that Meihua withheld information that Commerce requested, failed to submit requested information by the deadlines set by Commerce, or submitted inaccurate information that significantly impeded the review pursuant to 19 U.S.C. § 1677e(a)(2).

B. Notice and Opportunity to Remedy or Explain a Deficiency

Commerce's authority under 19 U.S.C. § 1677e(a) to use facts otherwise available is subject to a statutory obligation under 19 U.S.C. §

1677m(d) to promptly notify a respondent of the nature of a deficiency in the record and to provide the respondent with an opportunity to remedy or explain the deficiency. 19 U.S.C. § 1677e(a); 19 U.S.C. § 1677m(d). If the party submits a response that Commerce finds to be unsatisfactory or the response is not filed by the deadline set by Commerce, then Commerce may disregard all or part of the original and subsequent responses. 19 U.S.C. § 1677m(d).

The Court determined in *Meihua I* that "Commerce failed to fulfill its statutory obligation under 19 U.S.C. § 1677m(d) because Commerce did not 'promptly inform the person submitting the response of the nature of the deficiency and . . . to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency.'" *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1212. This Court noted that "Commerce neither notified Meihua of any deficiencies in its provision of information, nor provided Meihua with an opportunity to correct such deficiencies before Commerce determined that Meihua failed to cooperate to the best of its ability and drew adverse inferences against Meihua." *Id.*

On remand, Commerce declined to provide notice and an opportunity for Meihua to remedy any deficiency because Commerce determined that "the statutory directive of section 782(d) [of] the [Tariff] Act cannot apply where '[the] deficiency was not due to an error or misunderstanding, but to intentional misconduct.'" *Remand Redetermination* at 11 (quoting *Papierfabrik August Koehler SE v. United States* ("*Papierfabrik*"), 843 F.3d 1373, 1378 (Fed. Cir. 2016)). The Government argues that even though Commerce has a statutory obligation under 19 U.S.C. § 1677m(d), Commerce was relieved of this obligation because it concluded that Meihua submitted "intentionally incomplete" information. Def.'s Resp. at 10 (citing *Papierfabrik*, 843 F.3d at 1383–84); *see also Remand Redetermination* at 21 (citing *Papierfabrik*, 843 F.3d at 1379). *Papierfabrik* is inapplicable to the facts of this case because the "intentionally incomplete" language of *Papierfabrik* addressed fraudulent activity of the respondent. *Papierfabrik*, 843 F.3d at 1384; *see Shelter Forest Int'l Acquisition, Inc. v. United States*, 2022 WL 2155965 at *6 (Fed. Cir. June 15, 2022) ("The 'intentionally incomplete data' language from [*Papierfabrik*] stems from the fact that the respondent there submitted fraudulent sales data to Commerce. . . . The fraudulent nature of the respondent's previous submission formed the underlying rationale for our decision that [19 U.S.C.] § 1677m(d) did not apply. . . .") (internal citation omitted).

Here, unlike *Papierfabrik*, there are no allegations of fraud. The *Remand Redetermination* does not mention Meihua engaging in fraudulent activity in making its submissions to Commerce, and the record demonstrates no evidence of fraud. Commerce's determination that it was relieved of its statutory obligation under 19 U.S.C. § 1677m(d) to promptly notify Meihua of the nature of any deficiencies on the record and to provide Meihua with an opportunity to remedy any deficiencies is not supported by substantial evidence and not in accordance with law.

As noted previously, Meihua provided the information asked in Commerce's Initial Questionnaire about the amount of duties paid. Meihua also provided supplemental information, including an 802-page spreadsheet, in response to Commerce's subsequent inquiries. Commerce did not cite any record evidence demonstrating that Meihua's supplemental information was deficient in any way. Because Commerce failed to notify Meihua of any deficiencies in its reported supplemental information and failed to give Meihua an opportunity to remedy or explain the deficiencies before determining that the use of facts otherwise available or adverse inferences was warranted, Commerce did not fulfill its statutory obligations under 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d).

Consequently, the Court concludes that Commerce has no authority to apply facts otherwise available under 19 U.S.C. § 1677e(a) or adverse inferences under 19 U.S.C. § 1677e(b) until Commerce meets its statutory obligations under 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d). The Court does not reach the substantive analysis of whether Commerce's determination to apply total adverse facts available was supported by substantial evidence. The Court remands Commerce's application of total adverse facts available and the application of the highest rate in a prior proceeding to Meihua for further consideration in accordance with this Opinion.

II. Commerce's Continued Application of the Separate Rate to the Separate Rate Respondents

The Court previously ordered Commerce to recalculate the separate rate for the Separate Rate Respondents based on any changes applied to Meihua's rate. *Meihua I*, 47 CIT at __, 633 F. Supp. 3d at 1213. On remand, Meihua's rate remained unchanged, and the separate rate was calculated based on an average that included Meihua's current dumping rate. The Court again directs Commerce to reconsider the separate rate in light of any changes made to Meihua's dumping margin rate on second remand.

III. Commerce's Determination Not to Rescind the Review of Deosen Biochemical, Ltd. and Failure to Conduct a New Collapsing Analysis of Deosen

Under 19 U.S.C. § 1675(a)(2)(B), if Commerce receives a request from an exporter or producer of subject merchandise establishing that the exporter or producer did not export the subject merchandise during the period of investigation, and establishing that the exporter or producer is not affiliated, as defined in 19 U.S.C. § 1677(33), with any exporter or producer who exported the subject merchandise during the period of review, Commerce "shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer." 19 U.S.C. § 1675(a)(2)(B)(i). Under 19 U.S.C. § 1677(33), exporters and/or producers are considered to be "affiliated" if they are "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." *Id.* § 1677(33)(F). An exporter or producer is determined to control another if such exporter or producer is "legally or operationally in a position to exercise restraint or direction over the other person." *Id.* § 1677(33).

"[Commerce] may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." 19 C.F.R. § 351.213(d)(3). "Where sales can be linked to customs entries, it is only entries within the period of review that are examined and used to calculate the cash deposit rates." *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1371 (Fed. Cir. 2003) (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,314 (Dep't of Commerce May 19, 1997)).

If two or more producers are affiliated and share "production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" and Commerce determines "that there is a significant potential for the manipulation of price or production," Commerce will treat such producers as a single entity. 19 C.F.R. § 351.401(f)(1). In reaching the conclusion that there is a significant potential for price or production manipulation, Commerce considers:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Id. § 351.401(f)(2).

Deosen Biochemical, Ltd. argues that it met the requirement of 19 U.S.C. § 1675(a)(2)(B)(i)(I) by sending a letter notifying Commerce that Deosen Biochemical, Ltd. "had no exports, shipments, sales or entries of subject merchandise to the United States during the review period of July 1, 2019–June 30, 2020." Deosen's Letter Re: No Shipment Certification ("No Shipment Certification Letter") at 1, PR 30. During the administrative review, Deosen offered to provide additional documents so that Commerce could confirm that Deosen Biochemical, Ltd. did not make any shipments during the period of review. Deosen's Admin. Case Br. at 10. Commerce rejected Deosen Biochemical, Ltd.'s No Shipment Certification and offer to submit additional documents because Commerce relied on its prior collapsing analysis from 2017–2018 in which Commerce determined that under 19 U.S.C. § 1677(33)(F), Deosen Biochemical, Ltd. was affiliated with Deosen Biochemical (Ordos), Ltd. *Remand Redetermination* at 13. As a result, Commerce determined not to rescind Deosen Biochemical, Ltd.'s review.

The Court held in *Meihua I* that Commerce's failure to conduct a collapsing analysis for the period of review was an abuse of discretion, in light of Commerce's rejection of Deosen Biochemical, Ltd.'s No Shipment Certification and its offer to submit additional documents demonstrating no shipments of subject merchandise during the period of review. *Id.* at __, 633 F. Supp. 3d at 1215.

On remand, Commerce did not rescind Deosen Biochemical, Ltd.'s review or conduct a new collapsing analysis of Deosen. *Remand Redetermination* at 14. Instead, Commerce "adopted by reference its collapsing analysis in the 2017–2018 administrative review, in which it found that Deosen Biochemical[,] Ltd. and Deosen Biochemical (Ordos)[,] Ltd. are a single entity." Def.'s Resp. at 14 (citing *Remand Redetermination* at 14).

The United States Court of Appeals for the Federal Circuit ("CAFC") has held in the context of a collapsing analysis that, "Commerce must consider the 'totality of circumstances' between all entities when it evaluates whether, for purposes of collapsing entities, there is significant potential for manipulation of price or production to circumvent antidumping duties." *Prosperity Tieh Enterprises Co., Ltd. v. United States* ("*Prosperity Tieh*"), 965 F.3d 1320, 1326 (Fed.

Cir. 2020) (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,346 (noting that collapsing determinations "are very much fact-specific in nature, requiring a case-by-case analysis")). An analysis of the totality of circumstances requires an evaluation of all pertinent evidence. *Id.* at 1327.

Commerce's determination is not supported by substantial evidence under the totality of circumstances test set forth in *Prosperity Tieh* because Commerce did not examine whether any facts had changed during the current period of review that would alter the conclusion that a significant potential for manipulation of price or production to circumvent antidumping duties existed between the Deosen entities during the relevant period of 2019–2020.

At the very least, Deosen Biochemical, Ltd.'s letter (rejected by Commerce) stating that it did not ship subject merchandise during the period of review from 2019–2020 was an indication of pertinent evidence that some facts had changed and that Deosen Biochemical, Ltd. had taken some actions separate from Deosen Biochemical (Ordos), Ltd. (perhaps relevant to whether the entities' operations were intertwined). As stated in *Meihua I*, the Court concludes that Commerce abused its discretion by rejecting Deosen Biochemical, Ltd.'s No Shipment Certification, which is enough to warrant a new fact-specific collapsing analysis examining the totality of circumstances. To comply with *Prosperity Tieh*, Commerce must conduct a fact-specific, case-by-case analysis based on all pertinent evidence from the relevant timeframe of 2019–2020 to determine whether the Deosen entities should be collapsed during the period of review.

The Court holds that Commerce's determination on remand that the Deosen entities should be collapsed during the period of review of 2019–2020 is not supported by substantial evidence because it is based on outdated factual information from the 2017–2018 collapsing analysis, several years prior to the relevant period of review.

The Court next considers whether Commerce's determination not to collapse the Deosen entities is supported by substantial evidence and in accordance with law because Deosen failed to provide updated information to Commerce. The Government argues that Deosen is at fault for failing to provide evidence to rebut Commerce's presumption of single-entity treatment, noting that "Commerce found that Deosen had multiple opportunities to timely provide evidence indicating that it was no longer a single entity, and at every opportunity decided not to do so; nor did Deosen timely request a new collapsing analysis." Def.'s Resp. at 15. The Government asserts that, "Commerce's practice as explicitly stated in the [*Initiation Notice*], is to presume that a company which was collapsed in a previous review will remain col-

lapsed in successive reviews, absent a request and a submission of factual information indicating that circumstances have changed such that a company should no longer be treated as a single entity." *Id.*

On remand, Commerce justified its determination to not conduct a new collapsing analysis on its practice of not revisiting an initial collapsing of entities absent a party's request and submission of factual information. *Remand Redetermination* at 14–15. Commerce explained that Deosen was put on notice at the beginning of the period of review and was "reasonably aware" that it would remain collapsed during the review. *Id.* at 15 (citing *Initiation Notice*, 85 Fed. Reg. at 54,983).

Commerce's *Initiation Notice* stated that:

> In general, Commerce has found that determinations concerning whether particular companies should be "collapsed" (e.g., treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this [antidumping] proceeding (e.g., investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Initiation Notice, 85 Fed. Reg. at 54,983. The *Initiation Notice* stated multiple times that at the respondent selection phase, Commerce would not conduct any collapsing analyses. *Id.*

When a party is subject to a presumption, it has a right to attempt to rebut it. *Transcom, Inc. v. United States*, 182 F.3d 876, 883 (Fed. Cir. 1999). If that party does not have notice that its interests are at stake in an administrative review, however, the party does not have a meaningful opportunity to rebut the presumption. *Id.* Commerce may be free to choose the means by which it gives reasonable notice that an exporter's or producer's goods are subject to an administrative review, but before taking action that significantly affects such exporter or producer, Commerce must provide some form of notice

that the administrative review may affect its interests. *Id.* at 884.

Commerce cites the *Initiation Notice* as evidence that Deosen knew that it would remain collapsed throughout the review and was "reasonably aware" of the need to request a reevaluation of the prior collapsing determination. *Remand Redetermination* at 15; Def.'s Resp. at 15. The Court observes that the *Initiation Notice* did not mention any deadlines or procedures for a party to request a new collapsing analysis during the relevant period of review, but only mentioned that Commerce would not conduct any collapsing analyses during the respondent selection phase. Other than the *Initiation Notice*, the Government does not cite to any record evidence showing that Commerce communicated the deadlines for a party to request a collapsing analysis after the respondent selection period was completed, nor evidence that Deosen missed any such deadlines to request a collapsing analysis. The Government seems to suggest that putting parties on notice that they would remain collapsed during respondent selection is the same as providing notice that parties could request a new collapsing analysis during the administrative review. The Court does not agree that these are synonymous.

Because Commerce fails to cite any record evidence to support its determination that Deosen knew of the need to request a new collapsing analysis and missed the deadlines by which such requests needed to be filed, the Court remands this issue for Commerce to conduct a new collapsing analysis based on information specific to the relevant period of review or to provide further explanation consistent with this Opinion.

CONCLUSION

Accordingly, it is hereby

ORDERED that the *Remand Redetermination* is remanded to Commerce to reconsider the application of facts otherwise available and total adverse facts available to Meihua, the calculation of the separate rate, whether Deosen Biochemical, Ltd. and Deosen Biochemical (Ordos), Ltd. should be collapsed into a single entity, and whether the review of Deosen Biochemical, Ltd. can be rescinded consistent with this Opinion; and it is further

ORDERED that this case shall proceed according to the following schedule:

(1) Commerce shall file the remand determination on or before April 22, 2024;

(2) Commerce shall file the administrative record on or before May 6, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before June 18, 2024;

(4) Comments in support of the remand determination shall be filed on or before July 18, 2024; and

(5) The joint appendix shall be filed on or before July 29, 2024.

Dated: February 22, 2024
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Index

Customs Bulletin and Decisions
Vol. 58, No. 09, March 6, 2024

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2024—427-373/30065