U.S. Customs and Border Protection

AGENCY INFORMATION COLLECTION ACTIVITIES

Revision; Arrival and Departure Record and Electronic System for Travel Authorization (ESTA)

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

ACTION: 60-Day notice and request for comments

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 26, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0111 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Arrival and Departure Record and Electronic System for Travel Authorization (ESTA).

OMB Number: 1651–0111.

Form Number: N/A.

Current Actions: Revision of an existing information collection.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: CBP is implementing a new capability within CBP One™ to allow nonimmigrants who are subject to Form I–94 ("I–94") requirements, and who are departing the United States, to voluntarily provide biographic data, facial images, and geolocation to provide evidence of that departure. This collection is a part of CBP's critical efforts in fulfilling DHS's mandate to collect biometric information from departing nonimmigrants and CBP's plans to fully automate I–94 information collection. This capability will close the information gap on nonimmigrant entries and exits by making it easier for nonimmigrants subject to I–94 requirements to report their exit to CBP after their departure from the United States. It will also create a biometrically confirmed, and thereby more accurate, exit record for such nonimmigrants leaving the United States.

Certain nonimmigrants subject to I–94 requirements may voluntarily submit their facial images using the CBP One™ mobile application (the app) in order to report their exit from the United States.

Nonimmigrants may use the app to voluntarily submit their biographic information from their passports, or other traveler documents after they have exited the United States.

Nonimmigrants will then use the app to take a "selfie" picture. CBP will utilize geolocation services to confirm that the nonimmigrant is outside the United States as well as run "liveness detection" software to determine that the selfie photo is a live photo, as opposed to a previously uploaded photo. The app will then compare the live photo to facial images for that person already retained by CBP to confirm the exit biometrically.

CBP will utilize this information to help reconcile a nonimmigrant's exit with that person's last arrival. The report of exit will be recorded as a biometrically confirmed departure in the Arrival and Departure Information System (ADIS) maintained by CBP. Nonimmigrants may utilize this information as proof of departure, which is most relevant in the land border environment, but may be utilized for departures via air and sea if desired.

As it pertains to the land environment, there is no requirement for nonimmigrants leaving the United States to report their departure to CBP. However, as described further below, CBP encourages nonimmigrants to report their departure to CBP when they exit, so that CBP can record their exit from the United States.

Although CBP routinely collects biometric data from nonimmigrants entering the United States, there currently is no comprehensive system in place to collect biometrics from nonimmigrants departing the country. Collecting biometrics at both arrival and departure will thus enable CBP and DHS to know with better accuracy whether nonimmigrants are departing the country when they are required to depart. Further, collecting biometric data will help to reduce visa or travel document fraud and improve CBP's ability to identify criminals and known or suspected terrorists. CBP has been testing various options to collect biometrics at departure in the land and air environments since 2004.

At the same time, CBP is also now working to fully automate all I–94 processes. Currently CBP issues electronic I–94s to most nonimmigrants entering the United States at land border ports of entry.

Currently CBP does not routinely staff exit lanes at land border ports of entry, nor does CBP possess a single process for nonimmigrants subject to I–94 requirements to voluntarily report their departure. Nonimmigrants can currently report their departure by any one

of the following means: (1) stopping at a land border port of entry and presenting a printed copy of their electronic I–94 to a CBP officer; (2) stopping at a land border port of entry and placing a printed copy of their electronic I–94 in a drop box provided by the port where available; (3) if exiting by land on the northern U.S. border, by turning in a paper copy of their electronic I–94 to the Canadian Border Services Agency (CBSA) when entering Canada (CBSA will then return the form to CBP); or (4) mailing a copy of their electronic I–94 and other proof of departure to CBP.

The current options are burdensome and, in many cases, impractical or inconvenient due to the location and design of the ports. They also lead to haphazard record keeping and inaccurate data collection with respect to the nonimmigrants leaving the country. Most land border ports of entry provide limited access to the port for vehicles exiting the United States and have minimal parking available to the public. For this reason, most nonimmigrants do not report their departure when exiting at land border ports of entry. In those cases, CBP has no way to confirm that a nonimmigrant has exited the United States at the time of departure. CBP often discovers that a nonimmigrant has previously left the United States at a later date, when that same nonimmigrants attempts to re-enter the United States. Having proof of an exit via the CBP One™ app would provide nonimmigrants some information for CBP officers to consider in the event the officer is unsure whether a nonimmigrant complied with the I–94 requirements provided upon their previous entry.

In additonal, CBP intends to update the ESTA application website to require applicants to provide a photograph of their face, or “selfie”, in addition to the photo of the passport biographical page. These photos would be used to better ensure that the applicant is the rightful possessor of the document being used to obtain an ESTA authorization.

Currently, applicants are allowed to have a third party apply for ESTA on their behalf. While this update would not remove that option, third parties, such as travel agents or family members, would be required to provide a photograph of the ESTA applicant.

The ESTA Mobile application currently requires applicants to take a live photograph of their face, which is compared to the passport photo collected during the ESTA Mobile application process. This change will better align the application processes and requirements of ESTA website and ESTA Mobile applicants.

Type of Information Collection: Paper I–94.

Estimated Number of Respondents: 1,782,564.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 1,782,564.
Estimated Time per Response: 8 minutes.
Estimated Total Annual Burden Hours: 237,675.

Type of Information Collection: I–94 website.

Estimated Number of Respondents: 91,411.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 91,411.
Estimated Time per Response: 4 minutes.
Estimated Total Annual Burden Hours: 6,094.

Type of Information Collection: ESTA Mobile Application.

Estimated Number of Respondents: 500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 500,000.
Estimated Time per Response: 22 minutes.
Estimated Total Annual Burden Hours: 183,333.

Type of Information Collection: ESTA website.

Estimated Number of Respondents: 15,000,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 15,000,000.
Estimated Time per Response: 19 minutes.
Estimated Total Annual Burden Hours: 4,750,000.

Type of Information Collection: CBP One Mobile Application.

Estimated Number of Respondents: 600,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 600,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 20,000.

Dated: February 20, 2024.

Seth D. Renkema,
Branch Chief, Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES

Revision; Regulations Relating to Copyrights and Trademarks

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

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 29, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0123 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Regulations Relating to Copyrights and Trademarks.

OMB Number: 1651–0123.

Form Number: N/A.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: Title 19 of the United States Code section 1526(e) prohibits the importation of articles that bear a mark that is a counterfeit of a trademark that has been registered with the United States Patent and Trademark Office (USPTO) and subsequently recorded with U.S. Customs and Border Protection (CBP) through the e-Recordation Program. *https://iprr.cbp.gov/s/*. Pursuant to 15 U.S.C. 1124, the importation of articles that bear a mark that infringes a trademark or trade name that has been recorded with CBP is restricted pursuant to 19 U.S.C. 1595a(c)(2)(C). Likewise, under 17 U.S.C. 602 and 17 U.S.C. 603, the importation of articles that constitute a piratical copy of a registered copyrighted work that has subsequently been recorded with CBP is also prohibited. Both 15 U.S.C. 1124 and 17 U.S.C. 602 authorize the Secretary of the Treasury to prescribe by regulation the recordation of trademarks, trade names and copyrights with CBP. Additional rulemaking authority in this regard is conferred by CBP's general rulemaking authority as found in 19 U.S.C. 1624.

CBP officers enforce recorded trademarks, trade names and copyrights at all U.S. Ports of Entry. The information that respondents must submit in order to seek the assistance of CBP to protect against infringing imports is specified for trademarks under 19 CFR 133.2 and 133.3, and the information to be submitted for copyrights is specified under 19 CFR 133.32 and 133.33. Trademark, trade name,

and copyright owners seeking border enforcement of their intellectual property rights provide information to CBP beyond that which they submitted to either the U.S. Patent and Trademark Office or the U.S. Copyright Office to obtain their registration. This revision adds the new e-Recordation online application, located at *https://iprr.cbp.gov/.*

E-Recordation applicants may provide as much additional information as they would like that would aid CBP in authenticating their genuine merchandise and distinguishing it from non-genuine merchandise, such as a Product Identification or Authentication Guides, lists of licensees and authorized manufacturers, and Applicants can supplement their application with additional information at any time by emailing the e-Recordation team at *IPRRQuestions@cbp.dhs.gov.* All information provided to CBP is housed in a secure database that can be viewed by CBP and Homeland Security Investigations personnel with a need to know. Limited information regarding the recorded trademark, trade name or copyright is published online to inform the public of which registrations are receiving border enforcement. *https://iprs.cbp.gov/s/.*

On December 15, 2017, CBP published a final rule in the **Federal Register** (82 FR 59511) regarding Donations of Technology and Related Support Services to Enforce Intellectual Property Rights. The final rule added 19 CFR 133.61 in a Subpart H to the CBP regulations which authorizes CBP to accept donations of hardware, software, equipment, and similar technologies, as well as related support services and training, from private sector entities, for the purpose of assisting CBP in enforcing intellectual property rights (IPR). A donation offer must be submitted to CBP either via email, to *dap@cbp.dhs.gov,* or mailed to the attention of the Executive Assistant Commissioner, Office of Field Operations, or his/her designee.

The donation offer must describe the proposed donation in sufficient detail to enable CBP to determine its compatibility with existing CBP technologies, networks, and facilities (*e.g.,* operating system or similar requirements, power supply requirements, item size and weight, *etc.*). The donation offer must also include information pertaining to the donation's scope, purpose, expected benefits, intended use, costs, and attached conditions, as applicable, that is sufficient to enable CBP to evaluate the donation and make a determination as to whether to accept it. CBP will notify the donor, in writing, if additional information is requested or if CBP has determined that it will not accept the donation. If CBP accepts a donation, CBP will enter into a signed, written agreement with an authorized representative of the donor. The agreement must contain all applicable terms and conditions of the donation.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: IPR Recordation Application.

Estimated Number of Respondents: 2,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,000.

Estimated Time per Response: 1 hours.

Estimated Total Annual Burden Hours: 2,000.

Type of Information Collection: IPR Donations of Authentication Technology.

Estimated Number of Respondents: 10.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10.

Estimated Time per Response: 20 hours.

Estimated Total Annual Burden Hours: 200.

Type of Information Collection: Training Requests.

Estimated Number of Respondents: 20.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 40.

Dated: February 22, 2024.

Seth D. Renkema,
Branch Chief, Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from LifeScan IP Holdings, LLC seeking "Lever-Rule" protection for certain blood glucose monitoring test trips that bear the federally registered and recorded "ONE TOUCH ULTRA" trademark and are intended for sale outside of the United States.

FOR FURTHER INFORMATION CONTACT: Morgan McPherson, Intellectual Property Enforcement Branch, Regulations & Rulings, Morgan.N.McPherson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from LifeScan IP Holdings, LLC, seeking "Lever-Rule" protection. Protection is sought against importations of foreign made blood glucose monitoring test strips intended for sale outside the United States that bear the recorded "ONE TOUCH ULTRA" mark, U.S. Trademark Registration No. 2,538,658 / CBP Recordation No. TMK 03–00074. Specifically, LifeScan IP Holdings, LLC, seeks "Lever-Rule" protection against importation into the U.S. of foreign made Ultra Strips products intended for sale in Canada. See below for a list of the specific products that have been granted "Lever-rule" protection.

Model No.	Item	Product	Intended Market	Country of Origin on Packaging	Description
1146012	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 10 CA (LE)
2290103	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 2x50 CA (LE)
2290204	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 1x50 CA (LE)

In the event that CBP determines that the test strips under consideration are physically and materially different from the test strips authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2(f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different test strips.

Dated: February 28, 2024

Alaina van Horn
Chief, Intellectual Property
Enforcement Branch
Regulations and Rulings, Office of Trade

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Procter & Gamble Co., ("Procter & Gamble") seeking "Lever-Rule" protection against importations of certain CREST®-branded toothpaste/dentifrice products that bear the federally registered and recorded "CREST" trademark.

FOR FURTHER INFORMATION CONTACT: Morgan N. McPherson, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–0294.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Procter & Gamble seeking "Lever-Rule" protection. Protection is sought against importations of the following CREST®-branded toothpaste/dentifrice products manufactured abroad and intended for sale in countries outside the United States, that bear the "CREST" trademark (U.S. Trademark Registration No. 0608106 / CBP Recordation No. TMK 22–00257):

(1) CREST® Pro-Health toothpaste/dentifrice products made in Mexico and intended for sale in Mexico; Procter & Gamble seeks protection for the 125ml and 75ml product sizes.

(2) CREST® Complete toothpaste/dentifrice products made in Mexico and intended for sale in Mexico; Procter & Gamble seeks protection for the 75ml, 100ml, and 120ml product sizes, as well as the 180ml size, which is a 2-pack comprised of 2 90ml sized products.

(3) CREST® Complete toothpaste/dentifrice products made in Germany and intended for sale in Egypt, Lebanon, Jordan, and Iraq; Procter & Gamble seeks protection for the 100ml product size.

In the event that CBP determines that the toothpaste/dentifrice products under consideration are physically and materially different from the toothpaste/dentifrice products authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different toothpaste/dentifrice products.

Dated: February 28, 2024

ALAINA VAN HORN
Chief, Intellectual Property
Enforcement Branch
Regulations and Rulings, Office of Trade

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Procter & Gamble seeking "Lever-Rule" protection for certain anti-dandruff shampoo and conditioner products bearing the federally registered and recorded "HEAD & SHOULDERS" trademark.

FOR FURTHER INFORMATION CONTACT: Morgan McPherson, Intellectual Property Rights Branch, Regulations & Rulings, Morgan.N.McPherson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Procter & Gamble Company seeking "Lever-Rule" protection. Protection is sought against importations of foreign made anti-dandruff shampoo and conditioner products intended for sale outside the United States that bear the recorded "HEAD & SHOULDERS" mark, U.S. Trademark Registration No. 0,729,556 / CBP Recordation No. TMK 12–00804. Specifically, The Procter & Gamble Company seeks "Lever-Rule" protection against importation into the U.S. of HEAD & SHOULDERS® Classic Clean 2 in 1 Shampoo & Conditioner products made in Germany and intended for sale in Albania, Bosnia & Herzegovina, Bulgaria, Greece, Kosovo, Moldova, Montenegro, Romania, and Serbia; and Classic Clean Shampoo made in Germany and intended for sale in Denmark, Finland, Norway, and Sweden. In the event that CBP determines that the anti-dandruff shampoo and conditioner products under consideration are physically and materially different from the anti-dandruff shampoo and conditioner products authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2(f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different anti-dandruff shampoo and conditioner products.

Dated: February 28, 2024

Alaina van Horn
Chief, Intellectual Property
Enforcement Branch
Regulations and Rulings, Office of Trade

U.S. Court of International Trade

Slip Op. 24–23

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and NTSF SEAFOODS JOINT STOCK COMPANY, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 20–00105

[The court partially sustains Commerce's redetermination and remands for further proceedings.]

Dated: February 26, 2024

Nazak Nikakhtar, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley Rein LLP of Washington, DC, on the comments for Plaintiffs.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the comments for Defendant. Of counsel on the comments was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC of Washington, DC, on the comments for Defendant-Intervenor.

OPINION

***Baker*, Judge:**

This case returns after the court directed the Department of Commerce to reconsider (1) whether Indonesia is economically comparable to Vietnam; (2) the finding that Indian data are superior to Indonesia's; (3) certain evidence submitted by Plaintiffs Catfish Farmers of America and its individual members, and in light of that evidence, whether Defendant-Intervenor NTSF Seafoods Joint Stock Company accurately reported production information; (4) NTSF's by-product offset; and (5) evidence relating to moisture content. ECF 68, at 1–2.[1]

On remand, Commerce largely stood its ground. Appx017420–017421. Catfish Farmers challenge those results. ECF 86, at 8. The government responded, *see* ECF 84, and NTSF joined in

[1] The court presumes the reader's familiarity with its previous opinion, *NTSF Seafoods Joint Stock Co. v. United States*, Ct. Nos. 20–00104 and 20–00105, Slip Op. 22–38, 2022 WL 1375140 (CIT Apr. 25, 2022).

those comments, *see* ECF 83. The court requested supplemental briefing, ECF 96, which the parties submitted, ECF 99 (plaintiffs), ECF 100 (government). The court again remands.

I

Catfish Farmers brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) to contest Commerce's final determination in the 15th administrative review of the applicable antidumping order. Subject-matter jurisdiction is conferred by 28 U.S.C. § 1581(c).

In actions brought under 19 U.S.C. § 1516a(a)(2), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

II

Broadly speaking, the issues presented fall into two buckets: the selection of a primary surrogate country and how NTSF reported factors of production. The court addresses them in turn.

A

1

In determining costs of production in antidumping cases involving goods imported from a nonmarket-economy country, Commerce must use, "to the extent possible," one or more market-economy countries (surrogates) that are "at a level of economic development *comparable to* that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4) (emphasis added). The court accordingly instructed the agency to "explain whether Indonesia is economically comparable to Vietnam using the same World Bank gross national income data used to

identify India and the five other countries on the Department's list of six countries at levels of comparable economic development." ECF 68, at 1 (remand order).

Notwithstanding the court's instruction, Commerce found Indonesia presumptively ineligible because it was not at the "same" level of economic development as Vietnam:

> [D]espite the petitioners' arguments that Indonesia represents a country at a comparable level of economic development as Vietnam, it was not at the *same* level of economic development and, thus, did not present a scenario where Commerce must afford that country the same consideration as others on the list of countries at the same level of economic development.

Appx017428 (emphasis in original; internal quotation marks and brackets omitted).

The statute, however, does not require a surrogate to be at the "same" level of economic development as the nonmarket-economy country where imports are produced. Instead, it only dictates that a surrogate have a "comparable" level of development, 19 U.S.C. § 1677b(c)(4), a somewhat broader standard, as it includes the merely similar as well as the identical.

Indeed, the remand results themselves show that Commerce views "the same" as narrower and more selective than "comparable":

> Surrogate [candidates] that are not at the same level of economic development as the [nonmarket-economy] country, but still at a level of economic development *comparable* to the [nonmarket-economy] country, are selected only to the extent that data considerations outweigh level-of-economic development differences or significant producer considerations.

Appx017423 (emphasis added).

Commerce thus presumptively disqualifies countries that are only "comparable" in favor of its own stricter criterion. But the statute requires the use of "one or more market economy countries that are . . . at a level of economic development *comparable* to that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4)(A) (emphasis added). A more demanding rule that excludes "comparable" countries is therefore not in accordance with law. The court remands again for the Department to apply the statutory standard—under protest, if necessary.

2

a

The court concluded that Commerce impermissibly used circular reasoning to find that "the Indian data were superior in part because 'the Indonesian information is not from the primary surrogate country which we have selected in this case, India.'" Slip Op. 22–38, at 41, 2022 WL 1375140, at *14. On remand, the Department objects that "[t]his passage was not intended to suggest any inherent superiority of the Indian data; rather, it reflects the standard application of Commerce's sequential surrogate country selection process." Appx017430.

The problem—as explained above—is that the Department went off the rails in its sequential selection process when it excluded Indonesia from consideration as a surrogate because that country was only at a comparable (rather than the same) level of economic development. On remand, insofar as Commerce includes Indonesia on its candidate list because it is at a comparable level, the Department must evaluate the Indian data on its relative merits vis-à-vis Indonesian data. *See* Import Administration Policy Bulletin 04.1, *Non-Market Economy Surrogate Country Selection Process* (Mar. 1, 2004), at 4 ("[I]f more than one country has survived the selection process to this point, the country with the best factors data is selected as the primary surrogate country."), ECF 73–2.

b

i

The court directed Commerce to explain its use of the *Fishing Chimes* study because it was unclear whether that study represented a "broad market average." Slip Op. 22–38, at 41–45, 2022 WL 1375140, at **14–15. The court observed that *Fishing Chimes* appeared to say that most of Andhra Pradesh's[2] fish producers were not located in the districts on which the study focused. *See id*. at 43–44, 2022 WL 1375140, at *15 ("[H]ow can a study that relies on data from only those two districts represent a broad market average, absent data (which no party has cited) showing that those districts produced far more fish than anywhere else?").

Commerce responded by block-quoting a paragraph from *Fishing Chimes* that, first, estimates that pangasius is being farmed "in more than 300 villages in West Godavari and Krishna districts"; second,

[2] Andhra Pradesh is an Indian state.

states that the survey focused on those areas "as they are major producers"; and, third, clarified that "[o]ut of the 300 villages that the study covered, 46 of them are in these two districts." *Id.* (quoting Appx13786). The Department concluded that "the study selected 54 farmers from 46 villages, and the researchers explicitly considered the representativeness of the data in selecting their survey sample." Appx017435.

The quoted passage from *Fishing Chimes* does not support Commerce's conclusion. While the study refers to pangasius farming in "more than 300 villages" in the two districts in question, it also says that only 46 of the 300 villages studied were located *in those districts*. By negative implication, that means the other 254 studied villages were *not* so located. This is the same problem the court identified when it first remanded, and the Department's explanation fails to engage with it. The court again remands.[3]

ii

The court instructed the Department to reconsider its reliance on *Fishing Chimes* data as to fish feed. *Id.* at 46–47, 2022 WL 1375140, at **15–16. Commerce accordingly cited an article from a source called *Undercurrent* as substantiating that data. Appx017467. As Catfish Farmers do not dispute that finding, the court—putting aside its other concerns with *Fishing Chimes*—sustains the agency's reliance on that study's fish feed data.

iii

The court originally remanded Commerce's use of *Fishing Chimes* as to the "whole live fish" input because the agency's entire finding was that "the Indian data for this input are in fact a broad market average, for the reasons discussed above." Slip Op. 22–38, at 47, 2022 WL 1375140, at *16. The court understood the finding as a reference to the Department's general discussion of whether *Fishing Chimes* overall represented a broad market average. *Id.*

Insofar as the court can discern, the remand results do not address this issue. The Department did state that the prices cited in *Fishing Chimes* were based on around 28 million kg of fish in 2017–18 and 14 million kg during the period of review, which is "a significant volume of fish." Appx017465. Even so, it does not indicate anything as to a

[3] Commerce also found that the *Fishing Chimes* data as to fingerlings represent a "broad market average" based on "the reasons discussed above concerning the reliability of [that] data in general." Appx017436. The court therefore remands the fingerlings finding because it assumes that the study represents a "broad market average"—a finding the court again remands for the reasons explained above.

"broad market average" absent any discussion showing how those amounts compare to India's overall pangasius production, so the court must remand again.

c

The court remanded Commerce's valuation of labor inputs because the Department used 2006 Indian labor data despite Policy Bulletin 04.1 attaching significance to whether data are "contemporaneous" with the period of review. Slip Op. 22–38, at 48–49, 2022 WL 1375140, at *16. The court noted that the only argument the government made to support the decision was "its irrelevant contention that Commerce chose the Indian data because India was the primary surrogate country." *Id.*

The Department responded that "the fact that the data are from India *is* relevant" because that country was the primary surrogate based on the "sequential" process. Appx017438–017439 (emphasis in original). To repeat: Commerce's choice of India as the primary surrogate was contrary to law because the Department improperly excluded Indonesia from consideration.

And even if, on remand, Commerce lawfully concludes that Indonesia is not at a "comparable" level of economic development and therefore chooses India as the primary surrogate, it must address how it is reasonable to use Indian data from eleven years before the period of review when Policy Bulletin 04.1 requires the use of contemporaneous data when possible.

B

The second principal issue involves Catfish Farmers' challenge to NTSF's reporting of its factors of production. On remand, Commerce stood by its prior conclusions. *See* Appx017440–017442 (whole live fish ratio and byproducts); Appx017442–017446 (moisture content).

1

The court remanded the whole live fish issue because Catfish Farmers cited three reports in the record showing that around 3.2 kg of whole fish is required to yield 1 kg of product, but the court could "find no indication that Commerce engaged with the reports [they] offered." Slip Op. 22–38, at 62–64, 2022 WL 1375140, at **21–22. The remand order instructed the Department to address those reports and Catfish Farmers' argument of possible double counting of byproducts. *Id.* at 65 n.23, 2022 WL 1375140, at *22 n.23.

The Department responded that NTSF's whole live fish figures are within the ranges seen in verification reports from yield tests Commerce performed during prior administrative reviews that are part of

the record here. Appx017441. It also observed that "*none* of the companies verified in these earlier segments, or NTSF in this segment, had a whole fish to fillet ratio as high as the ratios proposed by" Catfish Farmers. *Id.* (emphasis in original). The agency found Catfish Farmers' reports unpersuasive because it did not either take part in or observe the creation of those studies. Appx017441–017442.

That Commerce did not participate in or observe the preparation of record evidence does not excuse its failure to address that material on its own merits. The court therefore remands again for the Department to explain why the studies proffered by Catfish Farmers are unconvincing or unreliable.

The other aspect of the "whole live fish" issue that the court remanded involved possible double counting. *See* Slip Op. 22–38, at 65 n.23, 2022 WL 1375140, at *22 n.23. Catfish Farmers now ask the court to remand again because the redetermination was "not consistent with the record." ECF 99, at 9. For its part, the government requests a voluntary remand to allow Commerce "to re-evaluate whether potential double counting with NTSF's factors of production reporting is present." ECF 100, at 5. The court will do so.

2

The last issue is Catfish Farmers' contention that NTSF overstated the amount of water and understated the volume of fish in its products. As to this dispute, the Department "failed to address both the record evidence contrary to its decision and the record evidence potentially supportive of its decision." Slip Op. 22–38, at 69, 2022 WL 1375140, at *23. The court directed Commerce to address NTSF's product labels and "studies and other documentation in the administrative record." *Id.* at 66, 2022 WL 1375140, at *22.

On remand, the Department stated that NTSF's evidence included third-party inspection certificates relating to moisture content. It found that they "establish that NTSF's reported moisture did not exceed the stated maximum in the contract," Appx017443, and that the test reports showed moisture levels within one percent of those the company reported, *id.*

Commerce then addressed Catfish Farmers' evidence. The Department found that the product labels did not undermine NTSF's reporting because the customer—not the company—specifies what information is printed on the label and nothing in the record shows how the customer determines what is to appear. Appx017444. Catfish Farmers object, arguing that the logic Commerce applied to the inspection reports— that they "came from an independent third party" hired by NTSF's unaffiliated customers "and nothing on the record under-

mines the reliability of the party or the results obtained by its testing"—applies to the labels as well. ECF 86, at 46.

Commerce reasonably addressed the potential inconsistency. It found that while the inspection reports come from an independent facility that specializes in such testing, nothing in the record ties the customer labels to any testing protocols or shows that NTSF controls the labels' contents. Appx017477.[4] The Department explained that the company and its customers rely on the independent testing, not the product labels, to confirm moisture content. *Id.* Thus, Commerce's choice to rely on NTSF's moisture content reporting is supported by substantial evidence.[5]

* * *

For the foregoing reasons, the court sustains the redetermination in part and otherwise remands for further proceedings.

Dated: February 26, 2024
New York, NY

/s/ M. Miller Baker
Judge

[4] The agency gave an example of two different calculations that could both show a 30 percent solution of water. Appx017477–017478. "Accordingly, what is reflected in the label depends on how the customer defines 'contains,' and the accuracy of the information therein." Appx017478. Because the Department did not have "definitive evidence" showing how the customers calculated the percentage and what the labels meant by "contains," it could not rely on the labels. *Id.* In contrast, the inspection certificates showed that the moisture content was under the maximum threshold and included actual results of testing consistent with the company's reporting. Appx017478–017479.

[5] The Department also found that other studies and documentation on the record were not necessarily reliable because they may have been prepared using "different procedures and merchandise than those in this review." Appx017445. Catfish Farmers do not challenge that finding.

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