U.S. Customs and Border Protection

19 CFR PART 177

MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF VARIOUS SPOT LOCATOR BEACONS

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

ACTION: Notice of modification of two ruling letters, and revocation of treatment relating to the tariff classification of various SPOT locator beacons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning tariff classification of various SPOT locator beacons under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 12, 2024.

FOR FURTHER INFORMATION CONTACT: Nataline Viray-Fung, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024, proposing to modify two ruling letters pertaining to the classification of various SPOT locator beacons. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letters ("HQ") H300872 and HQ H300873, CBP classified various SPOT locator beacons in heading 8426, HTSUS, specifically in subheading 8526.91.00, HTSUS, which provides for "Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus." In both rulings, CBP classified these goods pursuant to HTSUS General Rules of Interpretation (GRIs) 1, 3(b) and 6. CBP has reviewed HQ H300872 and HQ H300873 and has determined the ruling letters to be in error. It is now CBP's position that the subject SPOT locator beacons are classified pursuant to GRIs 1 (Note 3 to Section XVI) and 6 of the HTSUS. CBP is not changing the subheadings in which the subject locator beacons are classified. CBP is only to modifying the legal analysis applied in HQ H300872 and HQ H300873.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying H300872 and HQ H300873 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H333773, which is set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H333773

May 24, 2024
OT:RR:CTF:EMAIN H333773 NVF
CATEGORY: Classification
TARIFF NO.: 8517.62.00, 8526.91.00

Michael K. Tomenga
Neville Peterson LLP
One Exchange Plaza
55 Broadway, Suite 2602
New York, New York 10006

RE: Modification of HQ H300872, dated September 30, 2019, and HQ H300873, dated September 30, 2019; Tariff classification of certain Global Position System (GPS) positioning devices from China.

Dear Mr. Tomenga:

This letter pertains to Headquarters Ruling Letter (HQ) H300872, dated September 30, 2019 and HQ H300873, dated September 30, 2019. Both rulings were issued to you in your capacity as representative of Globalstar, Inc. ("Globalstar"), and pertain to the classification of the STX3-S, SPOT TRACE® ("SPOT TRACE"), STINGR, and SmartOne™ C ("SmartOne") global asset data and tracking devices, and the SPOT GEN3® ("GEN3") and SPOT X® ("SPOT X") personal locator beacons under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have since reconsidered HQ H300872 and HQ H300873, and while the goods at issue were correctly classified, we are modifying the analysis in the rulings as detailed below.[1]

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed modification of HQ H300872 and HQ H300873 was published on April 10, 2024, in the Customs Bulletin, Volume 58, No. 14. CBP received no comments in response to the notice.

FACTS:

In HQ H300872 and HQ H300873, the products at issue were described as follows:

> The STINGR is similar to the STX3-S but has additional features. In addition to a small, low power satellite transmitter, the STINGR also contains an integrated global positioning system ("GPS") receiver. It is sold to OEMs for integration into items such as liquid petroleum gas tanks, water tanks, pipelines, meters, cars, trucks, boats, and containers and is used to track the location of the item that it is attached to. The STINGR is designed to receive binary data supplied by separate sensors,

[1] We also note that this ruling does not impact the classification or analysis concerning the "STX3-S", which was at issue in HQ H300873. The STX3-S, classified pursuant to General Rule of Interpretation (GRI) 1, is described in HQ H300873 as a low power satellite transmitter that does not have a power source or receiver; its sole function is to transmit binary data supplied by a separate device. The type of data transmitted varies according to the end user. The STX3-S transmits data to Globalstar's satellite network which forwards the information to the end user.

i.e. when a cargo door opens, which it combines with GPS data from its GPS receiver. The combined data are transmitted to Globalstar's satellite network which forwards the information to the end user.

The SPOT TRACE is a theft alert and tracking device that contains a GPS receiver, a transmitter, a motion sensor, a battery compartment, and an internal antenna. It is a ready-to-use product which is sold directly to end users. The SPOT TRACE can be mounted on an automobile, boat, or other item that the user wishes to track. It can be programmed to alert the user when the item it is attached to moves. The SPOT TRACE can also be programmed for automatic tracking, wherein it determines and transmits its location at regular intervals of 2.5, 5, 10, 30, or 60 minutes and sends its location to the end user.

The SmartOne is a theft alert and tracking device that contains a motion sensor, GPS receiver, satellite transmitter, internal antenna, and inputs which allows it to accept signals from separate sensors. The SmartOne is a ready-to-use product which is sold directly to end users. It can be mounted on an automobile, boat, or other item. In addition to receiving GPS signals at regular intervals, the SmartOne can be programmed to send an alarm and GPS location information if the item it is attached to moves out of a pre-determined range or outside motion sensor/vibration parameters.

The GEN3 is a small, square device that has a GPS receiver and transmitter and a few buttons. It is used by people when they travel to remote, rugged locations without cellular phone service. The primary feature of the GEN3 is automatic, motion-activated tracking which can be monitored by contacts. The GEN3 has various other location-related functions: it can send a pre-written check in message with GPS location to contacts; if the SOS button is pushed, it will send an emergency distress signal and GPS information to local response teams; and the user can push the help button to send a non-emergency assistance signal to contacts along with GPS information if the user needs assistance.

The SPOT X is rectangular handheld device that has the same functions as the GEN 3, with the addition of a screen and QWERTY keyboard and additional features. Like the GEN 3, the SPOT X is intended for use by people travelling in rugged, remote locations. The SPOT X tracks the user's GPS location and sends the GPS location data to contacts or local authorities accompanied by different preset messages, depending on the option selected by the user. In addition to motion-activated automatic tracking and SOS and non-emergency alert buttons, the SPOT X can send and receive SMS messages, update social media pages, and contains an electronic compass and altimeter.

ISSUE:

Whether the SPOT TRACE, STINGR, SmartOne, GEN3 and SPOT X, are classified as other apparatus for the transmission or reception of voice, images or other data in heading 8517, HTSUS, or as other radio navigational aid apparatus in heading 8526, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the GRIs. GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes.

The HTSUS headings under consideration are as follows:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof.

8526 Radar apparatus, radio navigational aid apparatus and radio remote control apparatus.

Note 3 to Section XVI of the HTSUS states:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

In HQ H300872 and HQ H300873, we considered the subject merchandise to be composite goods and classified them pursuant to GRI 3(b) according to the component that imparts the goods with their essential character. However, GRI 1 states that (before classifying per GRI 3) classification shall be determined according to the terms of... any relative section or chapter notes. Therefore, the subject merchandise should be classified per GRI and Note 3 to Section XVI rather than GRI 3.

CBP has consistently classified GPS receivers in subheading 8526.91, HTSUS, which provides for radio navigational aid apparatus. *See, e.g.,* HQ H014564 (Dec. 6, 2017) (Holux GPS Receiver Set), N26635 (July 16, 2015) (LugTrack GPS tracking device for luggage), N267981 (Sep. 21, 2015) (Crane Bluetooth GPS watch), and HQ 955510 (Sep. 15, 1994) (GPS cards for PC).

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

By contrast, the SPOT TRACE, STINGR, and SmartOne are theft alert and tracking devices that have a GPS receiver and are capable of transmitting their GPS location data to Globalstar's network and the end user. Similarly, the GEN3 and SPOT X determine their GPS location using the internal GPS receiver and then transmit GPS location data to contacts who are tracking the user's location. GPS location data can be accompanied by a preset message, and in the case of the SPOT X, satellite network text messages can be sent to and received from contacts using the screen and keyboard. These five devices perform two or more alternating and complementary functions and

therefore, in accordance with Note 3 to Section XVI, HTSUS, they are classified as if consisting only of that component which performs the devices' principal function.

The SPOT TRACE, STINGR, and SmartOne are tracking devices intended to assist a user with monitoring and tracking property such as cargo containers, automobiles, boats, etc. In order for the devices to perform their intended function, they must be able to discern their location via a GPS receiver in order to transmit the GPS location data to Globalstar's satellite network, which forwards the information to end users. Without the ability to determine their location via GPS receiver, the devices do not have any location data to transmit. We therefore conclude that the GPS receiver performs the principal function of the SPOT TRACE, STINGR, and SmartOne. This is consistent with our decision in New York Ruling Letter (NY) N266335 (Jul. 16, 2015), which classified a similar GPS tracking device for luggage under heading 8526, HTSUS.

Similarly, the GEN3 is a satellite device which allows users to send their GPS location and preset messages to contacts. It can send location automatically, or if the check-in button is selected, it will send location data accompanied by a preset message, such as, "I am fine," to contacts. It also has an emergency response button which, when pushed, sends an alert to local authorities and the user's GPS location. The principal function of the device is to track the user's GPS location when in remote locations that do not have cellular data service. In order to perform its intended function, the GEN3 must be able to discern its location via a GPS receiver and transmit the GPS location data to contacts. Without the ability to determine its location via GPS receiver, the GEN3 does not have any GPS coordinates to transmit. This renders the motion-activated tracking, emergency signal, and non-emergency signal function useless as contacts and local authorities will be unable to track or locate the user or provide assistance or rescue if requested.

The above analysis also applies to the SPOT X, which similarly functions as a GPS location tracking device. The SPOT X must be able to discern its location via GPS receiver in order to transmit that location via transmitter. Without the GPS receiver, the motion-activated tracking, emergency signal, and non-emergency signal cannot function as intended. While the SPOT X is capable of receiving and sending text messages from contacts or local authorities, the presence of a custom messaging feature does not outweigh the principal GPS tracking function of the SPOT X. Indeed, the service plans offered by Globalstar support this position. All service plans currently offered for the SPOT X include unlimited SOS requests, check in messages, predefined messages, and unlimited tracking, all of which are forms of GPS location tracking. By contrast, custom messages are limited in the majority of the plans offered and the user is charged for every message sent or received beyond the preset limit.[2]

In light of the foregoing, we find that the principal function of the SPOT TRACE, STINGR, SmartOne, GEN3 and SPOT X is that of a GPS receiver. Thus, the devices are classified under heading 8526, HTSUS, which provides for "radar apparatus, radio navigational aid apparatus and radio remote control apparatus."

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[2] Compare the Basic, Advanced, Flex Basic, and Flex Advanced service plans with the more expensive Unlimited and Flex Unlimited plans. *https://www.globalstar.com/en-us/products/spot/SPOTX* last visited March 12, 2024.

HOLDING:

By application of GRIs 1 (Note 3 to Section XVI) and 6, the SPOT TRACE, STINGR, SmartOne, GEN3 and SPOT X are classified in heading 8526.91.00, HTSUS which provides for " Radar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus." The column one, general rate of duty for merchandise of subheading 8526.91.00, HTSUS is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under 8526.91.00, HTSUS, unless specifically excluded, are subject to an additional 25 percent *ad valorem* rate of duty. At the time of importation, you must report the Chapter 99 subheading, *i.e.,* 9903.88.01, in addition to subheading 8526.91.00, HTSUS, listed above.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at *www.hts.usitc.gov*.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

EFFECT ON OTHER RULINGS:

HQ H300872, dated September 30, 2019, and HQ H300873, dated September 30, 2019, are hereby MODIFIED.

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

Sincerely,
for

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Crewmembers Landing Permit (CBP Form I–95)

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 July 23, 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 1651–0114 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: Crewman's Landing Permit (CBP Form I–95).

OMB Number: 1651–0114.

Form Number: I–95.

Current Actions: This submission will extend the expiration date with an increase to the burden hours previously reported, no change to the information collected or method of collection.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: CBP Form I–95, *Crewman's Landing Permit,* is prepared and presented to CBP by the master or agent of vessels and aircraft arriving in the United States for nonimmigrant crewmembers applying for landing privileges. This form is provided for by 8 CFR 251.1(c) which states that, with certain exceptions, the master, captain, or agent must present this form to CBP for each nonimmigrant crewmember on board. In addition, pursuant to 8 CFR 252.1(e), CBP Form I–95 serves as the physical evidence that a nonimmigrant crewmember has been granted a conditional permit to land temporarily, and it is also a prescribed registration form under 8 CFR 264.1 for crewmembers arriving by vessel or air. CBP Form I–95 is authorized by section 252 of the Immigration and Nationality Act of 1952, Public Law 82–414, 66 Stat. 163, as amended (8 U.S.C. 1282) and is accessible at: *https://www.cbp.gov/sites/default/files/assets/documents/2018-Nov/CBP%20Form%20I-95.pdf.*

Type of Information Collection: Form I–95.

Estimated Number of Respondents: 1,072,428.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,072,428.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 71,853.

Dated: May 21, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Create/Update Importer Identity Form (CBP Form 5106)

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 July 23, 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 1651–0064 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: Create/Update Importer Identity Form.

OMB Number: 1651–0064.

Form Number: 5106.

Current Actions: This submission will extend the collection authority with an increase in the estimated numbers of respondents and annual burden.

Type of Review: Extension (w/ change).

Affected Public: Businesses.

Abstract: The collection of the information on the "Create/Update Importer Identity Form", commonly referred to as "CBP Form 5106," is the basis for establishing bond coverage, release and entry of merchandise, liquidation and the issuance of bills and refunds. Members of the trade community use the Create/Update Importer Identification Form to register an entity as an Importer of Record (IOR) in the Automated Commercial Environment (ACE). Registering as IOR with CBP is required if an entity intends to transact Customs business and be involved as an importer, consignee/ultimate consignee, any individual or organization involved as a party, such as 4811 party, or sold to party on an informal or formal entry. The number used to identify an IOR is either an Internal Revenue Service (IRS) Employer Identification Number (EIN), a Social Security Number (SSN), or a CBP-Assigned Number. By collecting, certain information from the importer enables CBP to verify the identity of the importers, meeting IOR regulatory requirements for collecting information. 19 CFR 24.5.

Importers (each person, business firm, government agency, or other organization that intends to file an import entry) shall file CBP Form 5106 with the first formal entry or request for services that will result

in the issuance of a bill or a refund check upon adjustment of a cash collection. This form is also filed for the ultimate consignee for whom an entry is being made.

CBP Form 5106 is authorized by 19 U.S.C 1484 and 31 U.S.C. 7701 and provided for by 19 CFR 24.5. The current version of the form is accessible at: CBP Forms | U.S. Customs and Border Protection.

Type of Information Collection: Importer ID Import Record (Form 5106).

Estimated Number of Respondents: 432,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 432,000.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 324,000.

Dated: May 21, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Crew's Effects Declaration (Form 1304)

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 July 23, 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 1651–0020 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: Crew's Effects Declaration.

OMB Number: 1651–0020.

Form Number: Form 1304.

Current Actions: This submission will extend the expiration date with a change to the information collection. The burden hour estimates were adjusted to reflect accurate usage.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: CBP Form 1304, *Crew's Effects Declaration,* was developed through an agreement by the United Nations' Intergovernmental Maritime Consultative Organization (IMCO) in conjunction with the United States and various other countries. The form is used as part of the entrance and clearance of vessels pursuant to the provisions of 19 CFR 4.7 and 4.7a, 19 U.S.C. 1431, and 19 U.S.C. 1434. CBP Form 1304 is completed by the master of the arriving carrier to record and list the crew's effects that are onboard the vessel. This form is accessible at *https://www.cbp.gov/newsroom/publications/forms?title=1304.*

The CBP Form 1304 is part of the Vessel Entrance and Clerance System (VECS) Public Test currently on-going, the paper Form 1304 is not required if submissions are made in VECS, on a voluntary basis.

Once public testing is done, PRA approval and formalized rulemaking will make VECS permanent.

Type of Information Collection: Form 1304.

Estimated Number of Respondents: 1,678.

Estimated Number of Annual Responses per Respondent: 52.

Estimated Number of Total Annual Responses: 85,824.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 85,824.

Dated: May 21, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Certificate of Registration (CBP Form 4455 & Form 4457)

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 July 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 1651–0010 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: Certificate of Registration.

OMB Number: 1651–0010.

Form Number: 4455 & 4457.

Current Actions: This submission will extend the expiration date of this information collection, with no change to the burden or information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 4455, *Certificate of Registration,* is used primarily for the registration, examination, and supervised lading of commercial shipments of articles exported for repair, alteration, or processing, which will subsequently be returned to the United States either duty free or at a reduced duty rate. CBP Form 4455 is accessible at: *http://www.cbp.gov/newsroom/publications/forms?title=4455&=Apply*.

Travelers who do not have proof of prior possession in the United States of foreign made articles and who do not want to be assessed duty on these items can register them prior to departing on travel. To register these articles, the traveler completes CBP Form 4457, *Certificate of Registration for Personal Effects Taken Abroad,* and presents it at the port at the time of export. This form must be signed in the presence of a CBP official after verification of the description of the articles is completed. CBP Form 4457 is accessible at: *http://www.cbp.gov/newsroom/publications/forms?title=4457&=Apply*.

CBP Forms 4455 and 4457 are used to provide a convenient means of showing proof of prior possession of a foreign made item taken on a trip abroad and later returned to the United States. This registration is restricted to articles with serial numbers or unique markings. These forms are provided for by 19 CFR 148.1.

Type of Information Collection: CBP Form 4455.

Estimated Number of Respondents: 60,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 60,000.
Estimated Time per Response: 10 minutes (0.166 hours).
Estimated Total Annual Burden Hours: 9,960.

Type of Information Collection: CBP Form 4457.

Estimated Number of Respondents: 140,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 140,000.
Estimated Time per Response: 3 minutes (0.05 hours).
Estimated Total Annual Burden Hours: 7,000.

Dated: May 24, 2024.

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

U.S. Court of International Trade

Slip Op. 24–61

ARCHROMA U.S., INC., Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and TEH FONG MIN INTERNATIONAL CO. LTD., Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 22–00354

[The court grants Plaintiff's motion for judgment on the agency record, holds that 19 C.F.R. § 351.218(d)(1) violates 19 U.S.C. § 1675(c), and orders Defendants to undertake full sunset reviews with Plaintiff's participation.]

Dated: May 28, 2024

Christopher D. Cazenave, Jones Walker LLP, New Orleans, LA, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Franklin E. White, Jr.*, Assistant Director; and *Geoffrey M. Long*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, on the brief for Defendant U.S. Department of Commerce. Of counsel on the brief was *Ayat Mujais*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Dominic L. Bianchi, General Counsel; *Andrea C. Casson*, Assistant General Counsel for Litigation; and *Henry N.L. Smith*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, Washington, DC, on the brief for Defendant U.S. International Trade Commission.

Peter Koenig, Squire Patton Boggs (US) LLP, Washington, DC, on the brief for Defendant-Intervenor.

OPINION

***Baker*, Judge:**

Although federal agencies may last forever, *see* Ronald Reagan, *A Time for Choosing* (Oct. 27, 1964) ("[A] government bureau is the nearest thing to eternal life we'll ever see on this earth."),[1] antidumping and countervailing duty orders mercifully don't. Such decrees generally sunset after five years unless a domestic interested party timely responds to the Commerce Department's warning of the pending lapse by submitting certain information prescribed by statute. Receiving such material requires the agency to determine whether to continue the tariff.

[1] Available at https://www.reaganlibrary.gov/reagans/ronald-reagan/time-choosing-speech-october-27–1964.

In this case, Commerce announced that two antidumping orders were soon due for sunset reviews. A domestic producer missed—by six days—a 15-day regulatory deadline to file a "notice of intent to participate" in any reviews but *met* the regulation's later cutoff to file "substantive responses" with the statutorily required content. The Department nevertheless refused to consider those submissions and instead peremptorily revoked the decrees because of the company's tardy notice of intent. The producer then sued.

The court holds that the regulation contradicts the statute. Commerce may not cancel an antidumping or countervailing duty order or bar domestic interested parties from taking part in a five-year review without first letting them submit the content dictated by Congress. The Department must accept the producer's timely substantive responses and undertake (together with the International Trade Commission) full sunset reviews with the company's participation.

I

Subject to certain limited exceptions not relevant here, the Tariff Act of 1930, as amended, directs that Commerce and the Commission each undertake a "five-year review" of antidumping and countervailing duty orders, *see* 19 U.S.C. § 1675(c), commonly known as a "sunset review," *see* 19 C.F.R. § 351.218(a). In most cases, the statute requires an initial sunset review five years "after the date of publication" of an antidumping or countervailing duty order. 19 U.S.C. § 1675(c)(1)(A).[2] If both agencies determine that the order should remain in force, the statute mandates that subsequent sunset reviews take place every five years "after the date of publication of . . . a determination under this section to continue an order." *Id.* § 1675(c)(1)(C).[3]

As to both initial and subsequent sunset reviews, the statute directs the Department to publish "a notice of initiation" "[n]ot later than 30 days before the fifth anniversary of the date described in [§

[2] As to certain countervailing duty orders, the trigger date for an initial sunset review is different. *See* 19 U.S.C. § 1675(c)(1)(A)–(B).

[3] Commerce construes a "determination under this section to continue an order" as meaning the Commission's determination to keep the antidumping duty order in effect. *See* 19 C.F.R. § 351.218(c)(2) ("In the case of an order . . . that is continued following a sunset review . . ., no later than 30 days before the fifth anniversary of the date of the last determination by the Commission to continue the order . . ., the Secretary will publish a notice of initiation of a sunset review . . . .").

1675(c)(1)].” *Id.* § 1675(c)(2).[4] This notice must instruct domestic “interested parties”[5] to submit

> (A) a statement expressing their willingness to participate in the review by providing information requested by [Commerce] and the Commission,
>
> (B) a statement regarding the likely effects of revocation of the order or termination of the suspended investigation, and
>
> (C) such other information or industry data as [Commerce] or the Commission may specify.

19 U.S.C. § 1675(c)(2).

A timely submission to the Department providing the content mandated by § 1675(c)(2) is critical because if “no [domestic] interested party responds to the notice of initiation under this subsection,” Commerce “shall . . . revok[e] the order” in what amounts to an administrative default judgment. *Id.* § 1675(c)(3)(A).[6] Essentially, the statute requires such parties to speak up in support of continuing a duty order or forever hold their peace.[7]

Although § 1675(c)(2) dictates the information that domestic interested parties must provide to prevent a duty order’s demise, the statute does not speak to *when* such a submission is due. Stepping into the breach, the Department imposes two separate deadlines through regulation.

The first, and earlier, deadline requires that a domestic interested party wishing to participate in a sunset review file a “notice of intent to participate” no later than 15 days after Commerce publishes the notice of initiation. 19 C.F.R. § 351.218(d)(1)(i).[8] An entity that fails to

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[4] The Commission explains that in practice it publishes its own companion “notice of institution” the same day the Department issues a notice of initiation “because the statute contemplates simultaneous five-year reviews by both agencies.” ECF 39, at 8 n.1.

[5] *See* 19 U.S.C. § 1675(c)(3)(A) (defining “interested party” for “purposes of this paragraph” as various domestic entities described in 19 U.S.C. § 1677(9)(C)–(G)).

[6] The court expresses no view on whether § 1675(c)(3)(A)permits Commerce to revoke a duty order when an interested party fails to respond to the *Commission’s* notice of institution of a sunset review. *See above* note 4.

[7] If a domestic interested party does respond to a notice of initiation under § 1675(c), the Department must consider whether, if the order were revoked, “dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur.” 19 U.S.C. § 1675(d)(2)(A). The Commission must do the same as to material injury. *See id.* § 1675(d)(2)(B). If the party submits “inadequate” responses to Commerce or the Commission, *id.* § 1675(c)(3)(B), either agency “may issue, without further investigation, a final determination based on the facts available [under 19 U.S.C. § 1677e],” *id.*

[8] Other than a bare-bones statement of the party’s “intent to participate in [the] sunset review,” 19 C.F.R. § 351.218(d)(1)(ii), the only other required contents in a notice of intent are basic factual details such as the entity’s contact information, *see id.* § 351.218(d)(1)(ii)(A)–(E).

do so "will be considered not willing to participate in the review and the [Department] will not accept or consider any unsolicited submissions from that party during the course of the review." *Id.* § 351.218(d)(1)(iii)(A). "If no domestic interested party files a notice," *id.* § 351.218(d)(1)(iii)(B), Commerce will "[c]onclude that no [such] party has responded to the notice of initiation under [the statute]," *id.* § 351.218(d)(1)(iii)(B)(1), and "revok[e] the order," *id.* § 351.218(d)(1)(iii)(B)(3).

The second, and later, deadline requires any interested party—not just domestic entities—to submit a "complete *substantive* response" not later than 30 days after publication of a notice of initiation. *Id.* § 351.218(d)(3)(i) (emphasis added). As relevant here, the regulation tracks 19 U.S.C. § 1675(c)(2)(A)–(B) word-for-word in prescribing what that submission must include:

> (E) *A statement expressing the interested party's willingness to participate in the review by providing information requested by the Department*, which must include a summary of that party's historical participation in any segment of the proceeding before the Department related to the subject merchandise; [and]
>
> (F) *A statement regarding the likely effects of revocation of the order or termination of the suspended investigation* under review, which must include any factual information, argument, and reason to support such statement . . . .

19 C.F.R. § 351.218(d)(3)(ii) (emphasis added).[9]

II

This case involves two 2012 antidumping orders on paper-whitening chemicals from Taiwan and China. *See* 77 Fed. Reg. 27,419; 77 Fed. Reg. 27,423. Sunset reviews for both decrees in 2017 led to a "notice of continuation" keeping them in effect. *See* 82 Fed. Reg. 55,990.

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[9] The Commission has a similar framework for responding to its "notice of institution" of a sunset review. *See id.* § 207.60(d) (defining that term). Within 21 days of such publication, an interested party must file an "entry of appearance" with the agency. *See id.* § 201.11(b)(4). Like Commerce's "notice of intent," the Commission's entry of appearance only requires bare-bones information: "the nature of the person's reason for participating" in the review and an expression of "intent to file briefs with the [agency]." *Id.* § 201.11(a). Unlike the Department, however, the Commission's regulation does not indicate that a failure to make this procedural filing is fatal.

Reinforcing this apparent difference, the latter's regulation states that all "[r]esponses to the notice of institution shall be submitted to the Commission" within 30 days of publication. *Id.* § 207.61(a). Thus, an "entry of appearance" is *not* a response to such a notice. A response must contain the material specified by 19 U.S.C. § 1675(c)(2)(A)–(B) as well as other data requested by the Commission. *See* 19 C.F.R. § 207.61(b).

On October 3, 2022—ironically, three days *late* under its own regulation,[10] *cf. Luke* 4:23 ("Physician, heal thyself")—Commerce published a notice of initiation for new five-year reviews of both orders. *See* 87 Fed. Reg. 59,779. The Department instructed domestic interested parties to file "notice[s] of intent to participate" within 15 days (by October 18) and all interested parties to submit "complete substantive responses" with statutorily required information within 30 days (by November 2). *See id.* at 59,780. It also warned that if the agency did "not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline," it would "automatically revoke the [relevant] order without further review." *Id.* (citing 19 C.F.R. § 351.218(d)(1)(iii)).[11]

Although both agencies established the same date for submitting statutorily required *substantive* information—November 2, 2022—their notices set different deadlines for the earlier procedural filings. The Department's cutoff date for a notice of intent (October 18) was six days earlier than the Commission's (October 24) for an entry of appearance.

That difference is what gives rise to this litigation, because Archroma U.S., Inc.—a domestic producer of the chemical that is the subject of the antidumping duty orders here[12]—appears to have transposed those deadlines. The company (timely) filed its entries of appearance with the Commission on October 12, Appx001304–001305, which was also before *the Department's* deadline for notices of intent. But on October 24—the last day for making

[10] The Commission published its determination to continue the orders on November 1, 2017, *see* 82 Fed. Reg. 50,678, 50,678–79, which meant the Department was required to publish a notice of initiation "*no later than* 30 days before" November 1, 2022, the "fifth anniversary date," 19 C.F.R. § 351.218(c)(2) (emphasis added); *see also above* note 3. Thirty days before that date was October 2, 2022—a Sunday.

"[W]here a . . . deadline falls on a weekend, federal holiday, or any other day when the Department is closed," Commerce's practice is to treat the "the next business day" as the applicable deadline "consistent with federal practice. *See* Fed. R. Civ. P. 6(a); Fed R. App. P. 26(a)." 70 Fed. Reg. 24,533, 24,533. Under the cited federal rule provisions, "[t]he 'next day' is determined by continuing to count forward when the period is measured after an event *and backward when measured before an event*." Fed. R. Civ P. 6(a)(5) (emphasis added); Fed. R. App. P. 26(a)(5) (same). The deadline established by § 351.218(c)(2) is determined by counting *backward*, so the cutoff moved back from Sunday, October 2, to Friday, September 30. Here, the Department instead erroneously counted *forward* and published the notice of initiation on October 3. Because the court resolves this case on other grounds, it need not consider the effect, if any, of Commerce's untimely issuance of its notice.

[11] The Commission, meanwhile, published a notice of institution on the same day as Commerce and directed all interested parties wishing to participate to file entries of appearance within 21 days (by October 24) and substantive responses containing statutorily required material within 30 days (by November 2). *See* 87 Fed. Reg. 59,827, 59,827–28; *see also above* notes 4, 9.

[12] The company states it is the successor of Clariant Corporation, "the original petitioner in the underlying . . . proceeding that led to the" orders. ECF 35, at 2–3.

its procedural filings *with the Commission*—the company made its pro forma submissions with Commerce, Appx001137–001139, six days late. As the rueful saying goes, mistakes were made.

The Department rejected Archroma's notices of intent as untimely and removed them from the record. Appx001011–001012. No other domestic interested party filed such a notice, so on October 27—before the 30-day deadline to file substantive responses—Commerce notified the Commission that it would revoke the orders. Appx001006–001007; Appx001140–001141.

Archroma nevertheless timely filed substantive responses and requested the Department accept the company's untimely notices of intent. Appx001014–001016; *see also* Appx001036 (referring to the responses' barcodes).[13] Commerce denied that request, finding no showing of an "extraordinary circumstance," and rejected the responses. Appx001035–001036. Archroma asked for reconsideration, Appx001038–001056, which the Department also denied, Appx001082–001084.[14]

Commerce then revoked the orders because "no domestic interested party responded to the sunset review notice of initiation by the applicable deadline." 87 Fed. Reg. 80,162, 80,162; Appx001089. Two weeks later, the Commission ended its review, citing Commerce's action. 88 Fed. Reg. 2,374; Appx001295.

III

Invoking jurisdiction conferred by 28 U.S.C. § 1581(c), *see* ECF 29 (amended complaint), at 2, Archroma brought this suit under 19 U.S.C. § 1516a(a)(1)(D)[15] against the Department and the Commission challenging revocation of the antidumping orders.[16] *See generally* ECF 29. Teh Fong Min International Co. Ltd., a Taiwanese producer and exporter, intervened to support the agencies. ECF 18. Archroma then moved for judgment on the agency record (ECF 35); Commerce (ECF 40), the Commission (ECF 39), and Teh Fong Min (ECF 41, joining the agencies' briefs) opposed. After receiving supple-

[13] Archroma also timely submitted substantive responses to the Commission's notice of institution. Appx001263–001293.

[14] In so doing, Commerce erroneously stated that it timely issued the notice of initiation on October 3. *Compare* Appx001083 *and* Appx001083 n.10 *with above* note 10.

[15] This provision gives interested parties who were "party to the proceeding in connection with which the matter arises" a right of action in this court to contest any factual findings or legal conclusions on which "a final determination by [Commerce] or the Commission under [19 U.S.C. §] 1675(c)(3)" is based.

[16] The company concurrently sought a preliminary injunction keeping the orders effective pending this litigation, ECF 7, to which Commerce consented, *see* ECF 8.

mental briefing from the Department (ECF 51), Archroma (ECF 52), and the Commission (ECF 53),[17] the court decides the motion on the papers.

The parties assert that this case is subject to substantial-evidence review under 19 U.S.C. § 1516a(b)(1)(B)(i). *See* ECF 35, at 7 (Archroma); ECF 40, at 8 (Commerce); ECF 39, at 5 (the Commission). The court disagrees because this is a § 1516a(a)(1)(D) case. The statute directs that "[t]he court shall hold unlawful any determination, finding, or conclusion found—. . . *in an action brought under paragraph (1)(D) of subsection (a)*, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(ii) (emphasis added); *see also Neenah Foundry Co. v. United States*, 142 F. Supp. 2d 1008, 1013 (CIT 2001) (thoroughly explaining why arbitrary-and-capricious, rather than substantial-evidence, review applies to agency determinations under 19 U.S.C. § 1675(c)(3)).

IV

Archroma argues that 19 C.F.R. § 351.218(d)(1)(iii)'s 15-day deadline for filing a notice of intent to participate exceeds "Commerce's statutory authority" because it "effectively barred [the company's] opportunity to submit the substantive information required by 19 U.S.C. § 1675(c)(2)." ECF 52, at 3, 5. It asserts that its timely submission of that material "contained all [the] information necessary" under the statute for the Department to undertake full sunset reviews. ECF 35, at 4.

Commerce answers that § 351.218(d)(1)(iii)'s deadline "represents a lawful interpretation of § 1675(c)." ECF 51, at 9. It contends that because the statute fails to define what "constitute[s] 'no response,' " *id.* at 10, "it is reasonable for [the Department] to determine that if a party does not submit a notice of intent to participate . . . then the party has not responded, triggering the revocation under 19 U.S.C. § 1675(c)(3)[(A)]," *id.*[18]

Commerce errs by reading "no . . . respon[se]" in § 1675(c)(3)(A) in isolation: "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia and Gar-

[17] The court thanks the parties for their helpful supplemental briefing.

[18] The agency adds that the deadline "promotes administrative efficiency and eliminates needless reviews" by alerting it "whether it will need to conduct a full sunset review, which requires substantial time and resources from the agency." *Id.* at 11.

ner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Thus, "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Id*. at 168 (quoting *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting)).

Applying the whole-text canon of construction resolves this case. Commerce may revoke an antidumping or countervailing duty order only if "no [domestic] interested party responds to the notice of initiation *under this subsection*." 19 U.S.C. § 1675(c)(3)(A) (emphasis added). That subsection's preceding paragraph mandates that such a notice

> request that [domestic] interested parties submit—
>
> (A) a statement expressing their willingness to participate in the review by providing information requested by [Commerce] and the Commission,
>
> (B) a statement regarding the likely effects of revocation of the order or termination of the suspended investigation, *and*
>
> (C) such other information or industry data as [Commerce] or the Commission may specify.

Id. § 1675(c)(2) (emphasis added). Reading (c)(2) and (c)(3) together—that is, in context—it's obvious that "no . . . respon[se] to the notice of initiation under this subsection" in § 1675(c)(3)(A) means no answer to a solicitation for the substantive content that *§ 1675(c)(2)(A)–(C)* instructs the agency to seek.

It's undisputed that Archroma timely responded to Commerce's request for substantive material prescribed by § 1675(c)(2)(A)–(C). The statute therefore obligated the Department to undertake reviews and allow the company to participate in the ensuing proceedings.[19] Although Archroma failed to timely submit a notice of intent to so participate, the statute confers no authority on the agency to revoke a duty order or bar participation based on that omission. Commerce does not contest that the threadbare document it instructed domestic interested parties to file within 15 days did not require any—much

[19] If a domestic interested party timely submits substantive information required by the statute, it necessarily follows that such an entity has a concomitant entitlement to participate in the review. Otherwise, the right to provide the content specified by Congress would be "remarkably hollow." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 (2009).

less *all*—of the content specified in § 1675(c)(2)(A)–(C).[20] By revoking the orders and barring the company's participation, Commerce jumped the statutory gun.

The court holds that 19 C.F.R. § 351.218(d)(1) violates 19 U.S.C. § 1675(c)(2)–(3). If Commerce is to revoke a duty order and/or bar a domestic interested party's participation in any sunset review, it must first afford that party the opportunity to submit all the content prescribed by 19 U.S.C. § 1675(c)(2)(A)–(C). The regulation extinguishes that statutory right if, as here, such an entity fails to timely file a notice of intent. The court therefore grants Archroma's motion for judgment on the agency record and enjoins the Department to accept the company's substantive responses,[21] undertake (together with the Commission) full sunset reviews, and allow the company's participation. A separate declaratory judgment and injunction will issue. *See* USCIT R. 58(a).

Dated: May 28, 2024
New York, NY

/s/ M. Miller Baker
M. MILLER BAKER, JUDGE

[20] One might argue—though the Department wisely makes no such contention here—that the "notice of intent to participate" required by 19 C.F.R. § 351.218(d)(1) falls within "such *other information* or industry data as [Commerce] . . .may specify." 19 U.S.C. § 1675(c)(2)(C) (emphasis added). That reading, even if accepted, would still be unavailing because of the conjunction "and" in § 1675(c)(2). Before Commerce may revoke a duty order in a five-year review, it must first afford domestic interested parties an opportunity to submit content specified in subparagraphs (A), (B), *and* (C) in § 1675(c)(2)—that is, *all* such content. *See* Scalia and Garner, *above*, at 116 (explaining that where a "conjunctive list" prescribes that "You must do A, B, and C," "all three things are required"). So even if § 351.218(d)(1) is read to request content encompassed by § 1675(c)(2)(C), it still does not seek material prescribed by § 1675(c)(2)(A) and (B) and therefore violates the statute.

[21] After accepting Archroma's substantive responses, the Department must determine whether they are satisfactory or "inadequate." *See* 19 U.S.C. § 1675(c)(3)(B); *see also above* note 7. The court expresses no view on that question, which the agency did not consider in the first instance.

Slip Op. 24–62

CAMBRIA COMPANY LLC, Plaintiff, and ANTIQUE MARBONITE PRIVATE LIMITED; PRISM JOHNSON LIMITED; SHIVAM ENTERPRISES; ARIZONA TILE, LLC; M S INTERNATIONAL, INC.; and PNS CLEARANCE LLC, Consolidated-Plaintiffs, v. UNITED STATES, Defendant, and APB TRADING, LLC; ARIZONA TILE LLC; COSMOS GRANITE (SOUTH EAST) LLC; COSMOS GRANITE (SOUTH WEST) LLC; COSMOS GRANITE (WEST) LLC; CURAVA CORPORATION; DIVYASHAKTI GRANITES LIMITED; DIVYASHAKTI LIMITED; FEDERATION OF INDIAN QUARTZ SURFACE INDUSTRY; M S INTERNATIONAL, INC.; MARUDHAR ROCKS INTERNATIONAL PVT LTD.; OVERSEAS MANUFACTURING AND SUPPLY INC.; QUARTZKRAFT LLP; AND STRATUS SURFACES LLC, Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 23–00007

[Remanding the U.S. Department of Commerce's final results in the 2019–2021 administrative review of the antidumping duty order on certain quartz surface products from India.]

Dated: May 28, 2024

Luke A. Meisner, Schagrin Associates, of Washington DC, argued for Plaintiff Cambria Company LLC. Also on the brief was *Roger B. Schagrin*.

Jonathan T. Stoel and *Jared Wessel*, Hogan Lovells US LLP, of Washington, DC, argued for Consolidated Plaintiffs Arizona Title, LLC, M S International, Inc., and PNS Clearance LLC. Also on the brief were *Nicholas R. Sparks* and *Cayla D. Ebert*.

Sezi Erdin, Trade Pacific PLLC, of Washington, DC, argued for Consolidated Plaintiffs Antique Marbonite Private Limited, Prism Johnson Limited, and Shivam Enterprises. Also on the brief were *Robert G. Gosselink* and *Aqmar Rahman*.

Collin T. Mathias, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. Also on the brief were *Joshua E. Kurland*, Senior Trial Counsel, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief were *Vania Wang*, Senior Attorney, and *Joseph Grossman*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

R. Will Planert, *Julie C. Mendoza*, *Donald B. Cameron*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffey*, and *Ryan R. Migeed*, Morris Manning & Martin LLP, of Washington, DC, for Defendant-Intervenor Federation of Indian Quartz Surface Industry.

David John Craven, Craven Trade Law LLC, of Chicago, IL, for Defendant-Intervenor APB Trading, LLC, *et al.*

OPINION AND ORDER

Barnett, Chief Judge:

This consolidated action is before the court following the filing of motions for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2 challenging the final results of the U.S. Department of Commerce's ("Commerce" or "the agency") first admin-

istrative review of the antidumping duty order covering quartz surface products from India for the period of review ("POR") December 13, 2019, through May 31, 2021. *See Certain Quartz Surface Prods. From India*, 88 Fed. Reg. 1,188 (Dep't Commerce Jan. 9, 2023) (final results of antidumping duty admin. rev.; 2019–2021) ("*Final Results*"), ECF No. 41–4, and accompanying Issues and Decision Mem., A-533–889 (Dec. 30, 2022) ("I&D Mem."), ECF No. 41–5.[1]

Parties present three sets of challenges to the *Final Results*, listed in the order in which they are addressed. First, Consolidated Plaintiffs Antique Marbonite Private Limited, Prism Johnson Limited, and Shivam Enterprises (collectively, "Antique Group"), foreign producers and exporters of subject merchandise and mandatory respondents in the administrative proceeding, challenge Commerce's rejection of its second supplemental questionnaire response and denial of subsequent requests for permission to refile that response. *See* Mem. in Supp of the Mot. of [Antique Grp.] for J. on the Agency R. ("Antique Grp.'s Mem."), ECF No. 52; Reply Br. of [Antique Grp.], ECF No. 83. Second, Consolidated Plaintiffs Arizona Tile, LLC, M S International, Inc., and PNS Clearance LLC (collectively, "Arizona Tile"), U.S. importers of subject merchandise, challenge Commerce's rejection of Antique Group's second supplemental questionnaire response, the agency's application of total adverse facts available ("AFA") to Antique Group and the resulting antidumping duty rate, and Commerce's decision not to apply an export subsidy offset to the rate assigned to Indian exporters not selected for individual review. *See* Confid. Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. of Consol. Pls. [Arizona Tile] ("Arizona Tile's Mem."), ECF No. 53; Confid. Reply of Consol. Pls. [Arizona Tile], ECF No. 86. Third, Plaintiff Cambria Company LLC ("Cambria"), a domestic producer of subject merchandise, challenges Commerce's decision to assign the all-others rate from the original investigation to the non-selected respondents in the administrative review. *See* Confid. Pl.'s Mem. in Supp. of its Mot. for J. on the Agency R. ("Cambria's Mem."), ECF No. 55; Confid. Pl.'s Reply Br. in Supp. of its Mot. for J. on the Agency R., ECF No. 84.

[1] The amended administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 47–3, and a Confidential Administrative Record ("CR"), ECF No. 47–2. Parties submitted joint appendices containing record documents cited in their briefs. *See* Confid. J.A. ("CJA"), ECF No. 88; Public J.A., ECF No. 89. The court references the confidential version of the relevant record documents, unless otherwise specified.

Defendant United States ("the Government") defends the *Final Results*. *See* Confid. Def.'s Resp. to Pls.' Mots. for J. upon the Agency R. ("Def.'s Resp."), ECF No. 67. Cambria, appearing as a defendant-intervenor in the member actions, filed a response to both Antique Group and Arizona Tile's motions. *See* Cambria Co.'s Resp. to Consol. Pls.' Mot. for J. on the Agency R. ("Cambria's Resp."), ECF No. 73. In their respective positions as defendant-intervenors in the lead case, Arizona Tile and the Federation of Indian Quartz Surface Industry ("Federation"), an association of Indian producers and exporters of subject merchandise, each filed a response to Cambria's motion. *See* Confid. Def.-Ints.' [Arizona Tile's] Resp. to Pl.'s Mot. for J. upon the Agency R. ("Arizona Tile's Resp."), ECF No. 74; Def.-Int.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Federation's Resp."), ECF No. 72.[2]

BACKGROUND

In June 2020, Commerce issued an order imposing antidumping duties on certain quartz surface products from India. *See Certain Quartz Surface Prods. From India and Turkey*, 85 Fed. Reg. 37,422 (Dep't Commerce June 22, 2020) (antidumping duty orders) ("*Order*"). In August 2021, Commerce initiated the first administrative review of that order. *Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 86 Fed. Reg. 41,821, 41,823 (Dep't Commerce Aug. 3, 2021), PR 22, CJA Tab 3. Commerce initially selected Antique Group[3] and Pokarna Engineered Stone Limited ("Pokarna") as mandatory respondents. *See* Resp't Selection (Sept. 28, 2021) ("Resp't Selection Mem.") at 1, PR 53, CR 13, CJA Tab 8. Antique Group timely responded to Commerce's initial and first supplemental questionnaires. *See* Submission of Section-A Initial Questionnaire Resp. (Nov. 3, 2021), PR 79–87, CR 21–35, CJA Tab 13; Submission of Section-B Initial Questionnaire Resp. (Dec. 9, 2021), PR 95, CR 36–41, CJA Tab 14; Submission of Section-C Initial Questionnaire Resp. (Dec. 9, 2021), PR 96, CR 42–54, CJA Tab 15[4]; Submission of Section-D Initial Questionnaire Resp. (Dec. 9, 2021), PR 97, CR 55–62, CJA Tab 17; Submission of Resp. to First Suppl. Questionnaire (Section A and B) (Apr. 15, 2022), PR 189–92, CR 206–15, CJA Tab 23. On April 20,

[2] ABP Trading, LLC, *et al.*, appeared as a defendant-intervenor in the lead action but did not file substantive briefs.

[3] As stated above, Antique Group consists of three parties, but Commerce found those three parties constituted a single entity. I&D Mem. at 1 n.2.

[4] This document was later refiled, within the provided timelines, for business proprietary treatment. *See* Filing of Corrected Version of Submission of Section-C Initial Questionnaire Resp. (Dec. 23, 2021), CR 180–92, CJA Tab 16.

2022, Commerce issued Antique Group a second supplemental questionnaire. Second Suppl. Questionnaire (Apr. 20, 2022), PR 197, CR 216, CJA Tab 24.

On April 30, 2022, Antique Group requested an extension of time to file its second supplemental questionnaire response; Commerce granted that extension in part, setting a deadline of May 11, 2022, at 5 p.m. *See* Extension Req. to Submit Resp. to Second Suppl. Questionnaire (Section A, C and D) (Apr. 30, 2022), PR 198, CJA Tab 25; First Extension of Time for Antique Grp.'s Second Suppl. Questionnaire Resp. (May 2, 2022), PR 199, CJA Tab 26. On May 7, 2022, Antique Group requested a second extension of time, which Commerce granted in part, setting a deadline of May 16, 2022, this time at 10 a.m. *See* 2nd Extension Req. to Submit Resp. to Second Suppl. Questionnaire (Section A, C and D) (May 7, 2022), PR 200, CJA Tab 27; Second Extension of Time for Antique Grp.'s Second Suppl. Questionnaire Resp. (May 9, 2022), PR 201, CJA Tab 28. On the due date, May 16, 2022, Antique Group submitted its second supplemental questionnaire response between 2:55 p.m. and 3:45 p.m. *See* Antique Grp.'s Resp. to Commerce's Second Suppl. Questionnaire (May 16, 2022) (Rejected Filing), PR 202, CR 217, CJA Tab 29; Rejection of Second Suppl. Questionnaire Resp. (May 18, 2022) ("Rejection of Second Suppl. Resp.") at 1, PR 203, CJA Tab 30. Two days later, on May 18, 2022, Commerce rejected Antique Group's submission as untimely pursuant to 19 C.F.R. § 351.302(d). *See* Rejection of Second Suppl. Resp. at 1–2.

Antique Group filed three letters with Commerce requesting the opportunity to refile its second supplemental questionnaire response, citing both its participation in the proceeding and the unusual nature of a 10 a.m. deadline. *See* Req. for Opportunity to Refile Resp. to Second Suppl. Questionnaire (Section A, C and D) (May 19, 2022) ("Req. to Refile Secs. ACD"), PR 205, CJA Tab 32; Req. for Acceptance of 2nd Suppl. Questionnaire Resp. (Sec-ACD) Post Deadline (May 24, 2022), PR 208, CR 218, CJA Tab 35; Req. for Recons. and Req. for Extension to File Out of Time (June 10, 2022), PR 225, CJA Tab 43. Commerce rejected Antique Group's requests, noting that Antique Group did not demonstrate the extraordinary circumstances necessary to grant an untimely extension request. *See* Rejection of Second Suppl. Questionnaire Resp. (May 20, 2022) ("First Denial of Req. to Resubmit"), PR 207, CJA Tab 34; Denial of Second Req. to Resubmit Second Suppl. Questionnaire Resp. (June 3, 2022) ("Second Denial of Req. to Resubmit"), PR 216, CJA Tab 40.

Approximately forty-five days after Antique Group filed its second supplemental questionnaire response (and Commerce's subsequent rejection of that response), Commerce published its preliminary results. *Certain Quartz Surface Prods. From India*, 87 Fed. Reg. 40,786 (Dep't Commerce July 8, 2022) (prelim. results of antidumping duty admin. rev. and partial rescission of antidumping duty admin. rev.; 2019–2021) ("*Prelim. Results*"), PR 248, CJA Tab 48; *see also* Prelim. Decision Mem., A-533–889 (June 30, 2022) ("Prelim. Mem.), PR 243, CJA Tab 46. Therein, Commerce calculated a weighted-average dumping margin of zero percent for Pokarna and preliminarily assigned Antique Group a dumping margin of 323.12 percent based on total AFA.[5] *Prelim. Results*, 87 Fed. Reg. at 40,787. The AFA rate assigned to Antique Group was the dumping margin alleged in the petition underlying the original investigation. Prelim. Mem. at 10–11. Commerce also preliminarily established a rate of 161.56 percent for the fifty-one companies not selected for individual examination by averaging the margins of Pokarna and Antique Group. *Prelim. Results*, 87 Fed. Reg. at 40,786; Calculation of the Rate for Resp'ts Not Selected for Individual Examination (June 30, 2022) ("Prelim. Non-Selected Calc. Mem.) at 2, PR 244, CR 229, CJA Tab 47.

Commerce published the *Final Results* on January 9, 2023, 88 Fed. Reg. at 1,188, and made no change to the total AFA rate assigned to Antique Group, I&D Mem. at 40. In a change from the *Preliminary Results*, Commerce assigned a rate of 3.19 percent to the non-selected companies based on the non-selected respondent rate from the investigation. *Id.* at 55. Commerce explained that, upon review of "the history of rates for this *Order*," the agency concluded that the non-selected respondent rate assigned in the *Preliminary Results* was "not reasonably reflective of the non-selected companies' potential dumping margins during the POR." *Id.* at 54.

This appeal followed. The court consolidated various challenges to the *Final Results* into this lead case. *See* Order (Mar. 17, 2023), ECF No. 40. The court heard oral argument on March 19, 2024.[6] *See* Docket Entry, ECF No. 98.

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[5] "The phrase 'total adverse [facts available]' or 'total AFA' encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available." *Deacero S.A.P.I. de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1305 n.2 (2018).

[6] Subsequent citations to the oral argument include the time stamp from the recording, which is available at https://www.cit.uscourts.gov/sites/cit/files/20240319–23–00007-MAB.mp3.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[7] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is defined as "more than a mere scintilla," as well as evidence that "a reasonable mind might accept as adequate to support a conclusion." *See Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

DISCUSSION

I. Commerce's Rejection of Antique Group's Second Supplemental Questionnaire

A. Legal Framework

Commerce's regulations establish a default standard for the time of day by which a submission must be received on the due date, noting, "[i]n general," that "[a]n electronically filed document must be received successfully in its entirety . . . by 5 p.m. Eastern Time on the due date." 19 C.F.R. § 351.303(b)(1).[8] Commerce's regulations permit the agency to extend any deadline upon a showing of good cause. *Id.* § 351.302(b).

Parties may file untimely extension requests, which Commerce may grant provided the moving "party demonstrates that an extraordinary circumstance exists." *Id.* § 351.302(c). An extraordinary circumstance is defined as "an unexpected event" that "[c]ould not have been prevented if reasonable measures had been taken, and . . . [p]recludes a party or its representative from timely filing an extension request through all reasonable means." *Id.* § 351.302(c)(2)(i)–(ii). These standards notwithstanding, a deadline-setting regulation that "is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an

[7] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless otherwise specified.

[8] A review of the history of section 351.303(b) shows that Commerce first promulgated the default standard of 5 p.m. in July 2011. *See Antidumping and Countervailing Duty Proceedings*, 76 Fed. Reg. 39,263, 39,275 (Dep't Commerce July 6, 2011) (electronic filing procedures; admin. protective order procedures). Commerce established this standard to create an equivalence between when its records room closed for receiving paper submissions and when electronic filings would be due. *Id.* at 39,264–65. As indicated by the regulation currently in effect, Commerce has not changed the default standard. *See* 19 C.F.R. § 351.303(b) (2023).

abuse of discretion." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995).

B. Discussion

Antique Group and Arizona Tile argue that Commerce abused its discretion and acted in an arbitrary and capricious manner in rejecting Antique Group's second supplemental questionnaire response. *See* Antique Grp.'s Mem. at 13–27; Arizona Tile's Mem. at 16–34. The Government and Cambria respond that Commerce properly exercised its discretion in setting a 10 a.m. deadline, and Antique Group did not demonstrate the extraordinary circumstances necessary for Commerce to accept its submission out of time. *See* Def.'s Resp. at 13–30; Cambria's Resp. at 11–20.

Commerce is "free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (citation omitted). To that end, "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007) (citation omitted). As relevant here, this means that Commerce has discretion to depart from its regulation establishing a default deadline of 5 p.m. to instead set a 10 a.m. deadline.

Commerce, however, must have a reasonable basis for such a departure, particularly when, as here, Commerce's decision to advance the deadline to 10 a.m. resulted in the rejection of Antique Group's submission that, if not for the departure from the 5 p.m. deadline, would have been timely. Therefore, the court considers Commerce's departure in assessing whether its rejection of the submission was reasonable. Upon review of the record, Commerce's decision to reject Antique Group's submission was unreasonable and unsupported by substantial evidence, constituting an abuse of discretion.

Regardless of whether the departure from the 5 p.m. deadline is an extraordinary circumstance of Commerce's own making,[9] Commerce "must" waive its extraordinary circumstance standard when "failure to do so would amount to an abuse of discretion." *NTN Bearing*, 74 F.3d at 1207. "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an

[9] Commerce admits the lack of uniformity present here, by noting that departures from the 5 p.m. deadline are "not utilized regularly," I&D Mem. at 17, and that "10 a.m. is not the routine deadline time," Second Denial of Req. to Resubmit at 3.

unreasonable judgment in weighing relevant factors." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted). In this case, Commerce abused its discretion.

As discussed above, Antique Group submitted its response five hours after the changed deadline, approximately two hours *before* the standard deadline, and forty-five days before the *Preliminary Results*. No party questions that this untimely submission was inadvertent. *See, e.g.,* Def.'s Resp. at 13 (noting Commerce's finding that an oversight is not an extraordinary circumstance). In declining to accept this late submission, Commerce explained generally that "untimely extension requests hinder the efficient and timely conduct of [the agency's] proceedings," First Denial of Req. to Resubmit at 2, but failed to engage with the specific facts of *this* case, which involved an atypical deadline and a five-hour delay, but otherwise resulted in the submission being received within business hours on the date upon which it was due.[10] Commerce failed to weigh the relevant facts, resulting in a decision that is unreasonable and unsupported by the evidence. *See Consol. Bearings Co.*, 412 F.3d at 1269.

The Government's arguments to the contrary are unpersuasive. At oral argument, the Government averred only that Commerce is free to set its own deadlines pursuant to section 351.302, Commerce's regulation regarding the extension of time limits. Oral Arg. 6:30–8:00. The Government argues that section 351.302 operates independently of section 351.303(b) and provides no limitations on Commerce's ability to set deadlines in granting extension requests. *Id.* 8:00–10:05. These arguments are misplaced.

Section 351.302(b) and section 351.303(b) can, and should, be read together. Section 351.302(b) states that "the Secretary may, for good cause, extend any time limit established by this part," but it does not affect the time of day that submission must be received. Section 351.303(b) provides 5 p.m. as the default time of day even when the agency has extended the due date for a submission. In fact, at oral argument, the Government conceded that when Commerce extends a deadline and fails to provide a specific time of day in its extension, the default time that a party must provide its submission is 5 p.m., as provided by section 351.303(b). Oral Arg. 10:05–10:50. Thus, the Government has failed to justify its position that section 351.302(b) supersedes the default time deadline in section 351.303(b) such that

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[10] The Government and Cambria reference *Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT __, 433 F. Supp. 3d 1297 (2020), as an example of this court affirming Commerce's rejection of a response made less than two hours after the deadline. *See* Def.'s Resp. at 27; Cambria's Resp. at 16. *Bebitz Flanges Works* is easily distinguishable because the respondent there demonstrated a pattern of noncooperation, evidenced by the filing of four extension requests and multiple warnings from Commerce. *See id*. at 1302.

Commerce's departure from the 5 p.m. deadline here was supported by substantial evidence solely by reason of the extension.

The Government also avers that "Commerce has set a 10 a.m. deadline more than ten times . . . in the first five months of 2022 across various Enforcement and Compliance offices." Def.'s Resp. at 15. However, a mere factual statement by the Government of the number of times Commerce departed from its regulation is insufficient explanation to support Commerce's departure in this case.[11] While Commerce has discretion to depart from its default deadline, the agency failed to explain why it was necessary to depart in this case such that its corresponding rejection of Antique Group's submission was reasonable.[12]

In reaching this conclusion, the court declines to consider the parties' contentions regarding *Oman Fasteners, LLC v. United States*, Slip Op. 23–17, 2023 WL 2233642 (CIT Feb. 15, 2023), and Commerce's alleged practice of permitting untimely submissions discussed therein. That case is currently on appeal and is not dispositive as to whether Commerce reasonably rejected Antique Group's submission in this case.[13]

In sum, Commerce abused its discretion by rejecting Antique Group's second supplemental questionnaire response. On remand, Commerce must accept and consider the information contained within that submission.

II. Commerce's Application of AFA to Antique Group

The court's conclusion that Commerce abused its discretion in rejecting Antique Group's submission necessarily impugns the agency's basis for finding that Antique Group failed to act to the best of its ability and thus its decision to rely on the application of total adverse

[11] The Government's reference to multiple 10 a.m. deadlines set across Commerce's trade enforcement offices also is not persuasive. Based on the number of orders it administers, Commerce likely sets hundreds or even thousands of deadlines each year, the vast majority of which adhere to the 5 p.m. deadline prescribed in section 351.303(b). Thus, the limited use of a 10 a.m. deadline is insufficient to justify such a deadline here.

[12] In fact, the Government offered no reason for Commerce to have adopted a 10 a.m. deadline in this instance. Commerce might well be within its discretion to enforce strictly a 10 a.m. deadline if, for example, it established that agency officials needed the requested information for verification and were expecting to depart later that day to commence the verification.

[13] The Government and Cambria also rely upon *Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015), to support the notion that agencies should be free to fashion their own rules of procedure. *See* Def.'s Resp. at 23; Cambria's Resp. at 12. Therein, a respondent received warnings from Commerce in response to extension requests filed six minutes before the submission deadline. *See Dongtai Peak*, 777 F.3d at 1346–47. Rather than heed Commerce's warnings, later in that proceeding the respondent failed to submit a supplemental questionnaire response within Commerce's stated deadline, and instead filed an untimely extension request two days after the deadline. *Id.* at 1347. The facts of this case distinguish it from *Dongtai Peak*.

facts available. Even if the court had sustained Commerce's rejection of the submission, the court would—and does—nevertheless find that Commerce's determination that Antique Group failed to act to the best of its ability lacks substantial evidence.

A. Legal Background

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce, "fails to provide" requested information by the submission deadline, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Once Commerce determines that the use of facts otherwise available is warranted, if Commerce also "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

B. Discussion

Antique Group argues that Commerce construed "best of its ability" to mean perfection, as evidenced by the application of total AFA in response to what Antique Group characterizes as an inadvertent calendaring error. Antique Grp.'s Mem. at 28–30. In response, the Government argues that the application of AFA is justified because Antique Group did not act to the best of its ability in timely responding to Commerce's second supplemental questionnaire, which the agency needed to calculate an accurate dumping margin. Def.'s Resp. at 32–34.

Commerce's determination that Antique Group failed to act to the best of its ability is unsupported by substantial evidence. First, Antique Group had complied with all prior deadlines throughout the course of Commerce's review. Second, as noted above, no party argues that Antique Group's failure to meet the 10 a.m. deadline was anything more than a calendaring error and, but for Commerce's arbitrary setting of the 10 a.m. deadline, Antique Group's response would have been timely. Third, Antique Group explained to Commerce that it had established remedial measures to prevent future late filings including: instructing its paralegal team to adopt new practices re-

lating to calendaring and internal communication, and retaining U.S.-based counsel to monitor deadlines and assist with future submissions. *See* Req. to Refile Secs. ACD at 3. This evidence, without more, does not support a finding that Antique Group failed to act to the best of its ability. A single late response is not determinative that a respondent has not acted to the "best of its ability" to cooperate because "mistakes sometimes occur." *Nippon Steel Corp.*, 337 F.3d at 1382.

In light of the court's finding that Commerce unreasonably rejected Antique Group's second supplemental questionnaire response, and because Commerce otherwise failed to support its decision to apply total AFA, that decision must be remanded for reconsideration by Commerce, consistent with the agency's statute, regulations, and practices.

III. Commerce's Corroboration of the AFA Rate Applied to Antique Group

In the interest of judicial economy, the court addresses the merits of Commerce's corroboration of the AFA rate applied to Antique Group in case, upon analysis of Antique Group's second supplemental questionnaire response, Commerce continues to find the use of total AFA warranted on some other basis.

A. Legal Framework

Commerce is statutorily obligated to corroborate the AFA rate pursuant to 19 U.S.C. § 1677e(c). When using an adverse inference to select from among the facts otherwise available, Commerce may rely "on information derived from—(A) the petition, (B) a final determination in the investigation . . . , (C) any previous [administrative] review . . . , or (D) any other information placed on the record." 19 U.S.C. §1677e(b)(2). "When Commerce 'relies on secondary information rather than on information obtained in the course of an investigation or review,' it 'shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.'" *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1299 (Fed. Cir. 2021) (alteration in original) (quoting 19 U.S.C. § 1677e(c).

Corroboration does not require Commerce to estimate what Antique Group's dumping margin would have been if Commerce had considered Antique Group to have cooperated or demonstrate that the dumping margin used by the agency reflects the alleged commercial reality of Antique Group. *See* 19 U.S.C. § 1677e(d)(3). Instead, "corroborating information means determining that [the information]

'has probative value.'" *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1380 (Fed. Cir. 2016) (quoting the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 870 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("SAA")).[14] Commerce evaluates the probative value of information by "demonstrating the rate is both reliable and relevant." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015).

B. Discussion

In selecting an AFA rate for Antique Group, Commerce selected the highest dumping margin alleged in the petition, 323.12 percent. I&D Mem. at 41–42. Commerce explained that it corroborated the petition rate using certain transaction-specific margins from Pokarna's margin calculation. *Id.* at 42. Arizona Tile argues that Commerce failed to corroborate properly the AFA rate because it compared that rate to the dumping margins for certain of Pokarna's transactions, when, according to Arizona Tile, those transactions were of a distinct nature[15] that was not representative of Antique Group's sales. Arizona Tile's Mem. at 36–38. The Government and Cambria argue that Commerce corroborated the AFA rate by comparing the dumping margin of 323.12 percent alleged in the petition to individual dumping margins preliminarily calculated for Pokarna and found the rate to be within range of those individual dumping margins. Def.'s Resp. at 35–36; Cambria's Resp. at 22–24.

The record establishes that Commerce's decision to corroborate the petition margin using transaction-specific margins, when those transactions all shared a distinct feature, is not supported by substantial evidence. Transaction-specific margins may have probative value when the rate selected as AFA falls within a range of those transaction-specific margins. *See Deacero*, 996 F.3d at 1300 (sustaining Commerce's determination that the highest rate alleged in the petition was relevant when it was in the range of transaction-specific margins calculated in the immediately preceding administrative review); *Papierfabrik*, 843 F.3d at 1381 (sustaining Commerce's determination that the selected rate "fell within the range of transaction-specific margins calculated in [the second administrative review]"

[14] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements." 19 U.S.C. § 3512(d).

[15] At oral argument, the Government agreed with Arizona Tile's description of the distinct nature of the sales relied upon by Commerce (without conceding that the distinct nature rendered them inappropriate for purposes of corroboration). Oral Arg. 1:41:15–1:41:45. The distinct nature is business proprietary information, so the court does not further address the nature of the sales.

(alteration in original) (citation omitted)). Here, however, the Pokarna transactions Commerce used to corroborate Antique Group's AFA rate were not demonstrably relevant. Commerce used Pokarna sales with the certain sales characteristic that distinguished them from Pokarna's normal sales transactions. While Commerce is under no obligation to ensure that the corroborating sales, or the rate being corroborated, reflect Antique Group's commercial reality, the distinct characteristic of these sales indicates that they are not relevant for purposes of corroboration.

Because the court finds that Commerce failed to properly corroborate the petition rate, the court need not reach Arizona Tile's arguments that the selected petition rate was unduly punitive. If, upon remand, Commerce finds that the use of total AFA remains appropriate for Antique Group, it must select and, if necessary, corroborate any such rate consistent with this opinion and the statute.

IV. Commerce's Departure from the Expected Method in Calculating the Non-Selected Company Rate

A. Legal Background

In determining the rate for companies not selected for individual examination in an administrative review, Commerce looks to 19 U.S.C. § 1673d(c)(5) for guidance. *See, e.g.*, *Albemarle Corp. v. United States*, 821 F.3d 1345, 1351–52 (Fed. Cir. 2016). Section 1673d(c)(5)(A) provides that the non-selected company rate is the "weighted average of the estimated weighted average dumping margins" determined for individually examined companies, "excluding any zero and *de minimis* margins, and any margins determined entirely" on the basis of the facts available. 19 U.S.C. § 1673d(c)(5)(A).

When the dumping margins assigned to all individually examined companies are zero, *de minimis*, or based on facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated." *Id.* § 1673d(c)(5)(B). The SAA provides that the "expected method" to determine the non-selected company rate in these situations "will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available." SAA at 873*, as reprinted in* 1994 U.S.C.C.A.N. at 4201. The SAA further provides that "if this [expected] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." *Id.* The expected method is the default method, and the burden of proof lies with the party seeking to depart from the

expected method. *See Albemarle*, 821 F.3d at 1353. Put another way, when Commerce seeks to depart from the expected method, as it did here, “Commerce must find based on substantial evidence that there is a reasonable basis for concluding that the separate respondents’ dumping is different.” *Id*.

In *Albemarle*, where respondents were both found to have *de minimis* margins, instead of weight-averaging those results (as “expected”), Commerce decided to “carry forward” the results of the prior administrative review to determine the rate for non-selected respondents. *Id.* In reviewing that determination, the Federal Circuit outlined “at least two circumstances” in which Commerce may depart from the expected method to carry forward a rate from a prior period. *Id.* at 1357. As relevant here, departure may be reasonable if Commerce establishes that the market and margins relevant to the subject merchandise has not changed. *Id.* “There is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period.” *Id*. at 1356.

B. Factual Background

For the *Preliminary Results*, Commerce applied the expected method by averaging the margins of Pokarna and Antique Group, and the agency assigned a preliminary rate of 161.56 percent to the non-selected companies.[16] *Prelim. Results*, 87 Fed. Reg. at 40,787; *see also* Prelim. Non-Selected Calc. Mem.at 2. For the *Final Results*, Commerce departed from the expected method by carrying forward the 3.19 percent non-selected companies’ rate from the original investigation for the non-selected companies in this review. I&D Mem. at 54–55. Commerce stated that, “based on the history of rates for this *Order*, . . . the [rate from the *Preliminary Results*] is not reasonably reflective of the non-selected companies’ potential dumping margins during the POR.” *Id.* at 54.

C. Discussion

Cambria argues that Commerce’s review of the history of rates under the *Order* did not justify its departure from the expected

[16] Although Commerce stated that it weight-averaged the two dumping margins, *Prelim. Results*, 87 Fed. Reg. at 40,787, Commerce elsewhere explained that it used a simple average, rather than a weighted average, Prelim. Non-Selected Calc. Mem. at 1. Commerce could not weight-average the two dumping margins because to do so would reveal, at least between the two respondents, their proprietary import quantities. *Id.* Therefore, Commerce followed its practice of using the simple average, which it considered a “proxy” for the weighted average. *Id.* at 1, 3.

method.[17] *See* Cambria's Mem. at 13–20. The Government, Federation, and Arizona Tile each respond that Commerce's review of the history of the rates supports its determination that 161.56 percent was not reasonably reflective of the non-selected companies' potential dumping margins during the POR. Def.'s Resp. at 40–41; Federation's Resp. at 14–17; Arizona Tile's Resp. at 18–20.

Here, Commerce failed to support its departure from the expected method and use of a prior margin. Commerce asserted that while its "preference continues to be that [it] will use contemporaneous information where possible, in this instance, the expected method is not reasonably reflective of the potential dumping margins of the non-selected companies." I&D Mem. at 55. However, in merely referring to "the history of rates,"[18] Commerce "simply assume[d] that the underlying facts or calculated dumping margins remain[ed] the same from period to period," *Albemarle*, 821 F.3d at 1356, such that the expected method was not reasonably reflective of the dumping margin. But that assumption does not amount to substantial evidence. *See OSI Pharm., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) ("'Mere speculation' is not substantial evidence." (citation omitted)).

Commerce fails to identify substantial evidence to establish that any one segment is more representative than a single other segment. This litigation involves the *first* administrative review of this order, so the "history" Commerce relies upon is merely one segment—the original investigation conducted in 2020. Commerce failed to explain why the investigation is more probative than the first administrative review. Commerce even acknowledged the lack of history when it rejected a request by Cambria to review the historical rates to justify the use of sampling exporters of varying sizes in this review. Commerce replied, "[a]t this time, there is *limited evidence* to provide Commerce with a reasonable basis to believe or suspect that the . . . dumping margins for the largest exporters differ from those of

[17] Cambria also argues that Commerce ignored evidence that the average unit values of the respondents supported the preliminary non-selected respondents' rate and that Commerce erred by not considering alternative methods to calculate that rate. *See* Cambria's Mem. at 24–25, 34–36. The Government counters that Cambria's additional arguments either fail on the merits or were not exhausted. *See* Def.'s Resp. at 43–44, 46–48. Because the court agrees with Cambria that Commerce has not supported with substantial evidence its departure from the expected method, the court does not reach these additional arguments. On remand, parties will have the opportunity to fully raise these issues to the extent they remain relevant, and Commerce will have the opportunity to respond as appropriate.

[18] Counsel for Arizona Tile averred at oral argument that Commerce also looked at data from the second administrative review in an attempt to strengthen the position that Commerce reviewed contemporaneous data. Oral Arg. 1:57:00–1:57:50. This subsequent data is not referenced anywhere in Commerce's explanation. The court may not accept counsel's *post hoc* rationalizations for agency action; an agency's decision must be upheld, if at all, on the basis articulated by the agency itself. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

smaller exporters." Resp't Selection Mem. at 6 (emphasis added). In other words, Commerce recognized that the history of dumping margins was insufficient to show that the margins calculated for the largest exporters were not representative of the non-selected companies.

Commerce's departure from the expected method in calculating the non-selected company rate is not supported by substantial evidence.[19] On remand, Commerce must reconsider or further explain any decision to depart from the expected method.

V. Commerce's Determination Not to Apply an Export Subsidy Offset to the Non-Selected Company Rate

Arizona Tile also challenges Commerce's decision not to apply an export subsidy offset to adjust the non-selected company rate, arguing that Commerce's decision constitutes a ministerial error. Arizona Tile's Mem. at 40–44. In response, the Government avers that Commerce's decision was not ministerial but rather methodological in nature and that Arizona Tile failed to exhaust its administrative remedies with respect to the adjustment. Def.'s Resp. at 49–51.

In light of the need for Commerce to analyze Antique Group's second supplemental questionnaire response and, if appropriate, further corroborate any AFA rate and reconsider or better explain any decision to depart from the expected method, the court declines to reach the issue of the export subsidy offset. Parties may address this issue before the agency, as appropriate, in the course of the remand proceeding.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results* are remanded to the agency for further action consistent with this opinion; and it is further

ORDERED that, the Parties must consult and, no later than June 27, 2024, provide the court with a joint status report proposing a reasonable date by which the remand proceeding will be completed; and it is further

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[19] Commerce's departure here is striking considering its disinclination to depart from the expected method in other proceedings involving one or more AFA rates for the mandatory respondents. *See PrimeSource Building Prods., Inc. v. United States*, 46 CIT __, __, 581 F. Supp. 3d 1331, 1341–43 (2022), *appeal docketed*, No. 2022–2128 (Fed. Cir. Aug. 17, 2022); *Pro-Team Coil Nail Enter., Inc. v. United States*, 46 CIT __, __, 587 F. Supp. 3d 1364, 1372–74 (2022), *appeal docketed*, No. 2022–2241 (Fed. Cir. Sept. 22, 2022); *see also Bosun Tools Co. v. United States*, No. 2021–1929, 2022 WL 94172 at *4–6 (Fed. Cir. Jan. 10, 2022) (sustaining Commerce's averaging of zero and AFA rates to determine the rate for the non-selected respondents).

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 5,000

Dated: May 28, 2024
New York, New York

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

Slip Op. 24–63

UNITED STATES OF AMERICA, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-03628 (SAV)

[Denying Plaintiff's Motion for Partial Reconsideration.]

Dated: May 28, 2024

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, and *Peter Mancuso*, Trial Attorney, for Plaintiff United States. With them on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director, Commercial Litigation Branch; *Aimee Lee*, Assistant Director, Commercial Litigation Branch; *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, of New York, NY; and *Suzanna Hartzell-Ballard*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, IN.

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Gilbert Lee Sandler, Sandler, Travis & Rosenberg, P.A., of Miami, FL, for Amicus Curiae the Customs Surety Coalition and its individual members the International Trade Surety Association; the National Association of Surety Bond Producers, Inc.; the Surety & Fidelity Association of America; and the Customs Surety Association. With him on the brief were *Robert B. Silverman* and *Peter W. Klestadt*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY.

Michael J. Coursey, *Paul C. Rosenthal*, *John M. Herrmann II*, *Jennifer E. McCadney*, and *Cameron R. Argetsinger*, Kelley Drye & Warren, LLP, of Washington, DC; and *Louis S. Mastriani*, Adduci, Mastriani & Schaumberg, LLP, of Washington, DC, on the brief for Amici Curiae Adee Honey Farms; American Honey Producers Association; Bayou Land Seafood, LLC; Catahoula Crawfish, Inc.; Christopher Ranch, LLC; L.K. Bowman Company; Sioux Honey Association; and The Garlic Company.

OPINION

Vaden, Judge:

The Government has a problem. It would like to appeal the result in this case. However, its counsel made several concessions in open court that would greatly complicate any appeal the Government may file. Thus, the Government has filed a Motion for Reconsideration that seeks to (1) reimagine the proceedings and its own actions before this Court and (2) raise for the first time arguments the Government now wishes it had made. Because neither is an appropriate use of a motion under USCIT Rule 59, the Government's Motion will be **DENIED**.

BACKGROUND

The Court presumes familiarity with the facts of this case as set forth in *United States v. Aegis Security Insurance Co.* (Aegis I), No. 1:20-cv-03628 (SAV), 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33 (March 18, 2024) and recounts only those facts relevant to the present Motion. *See generally* Pl.'s Mot. for Partial Recons. (Pl.'s Mot.), ECF No. 139. The United States sued Aegis to recover under a customs bond Aegis issued. *Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *2–3. That bond secured garlic entries by a Chinese company in January and February 2004. *Id.* at *6–7. Those entries were deemed liquidated in November 2006. *Id.* at *8. The Government did not make a demand to Aegis for the outstanding duties until January 2015, more than eight years after the deemed liquidation. *Id.* at *9. The Court held that the Government breached an implied contractual duty in the bond to make demand within a reasonable time and granted summary judgment to Aegis. *Id.* at *28–29.

"This case has a long and winding procedural history." *Id.* at *10. That history includes multiple rounds of briefing and three oral arguments. *Id.* From the very beginning, the primary question in this case was what limits exist on the Government's time to make demand on a customs bond. At the first oral argument, the Court asked the parties questions to determine what limits might exist on the Government's ability to delay making demand in addition to the statute of limitations. *See* First Oral Arg. Tr. at 96:17–18, ECF No. 49 (The Court: "Is there any limit at all ... to how late the Government can send a bill?"). The briefing in this case also addressed that issue. For example, in its supplemental brief Aegis argued that U.S. Customs and Border Protection (Customs) "was required to issue its bill within a reasonable time following liquidation." Def.'s Suppl. Br. at 27, ECF No. 104. Aegis pressed the argument again in its reply. *See* Def.'s Suppl. Reply Br. at 9–12, ECF No. 107. The Government responded to this argument by contending it did not unreasonably delay making demand. *See* Pl.'s Sur-Reply at 6–7, ECF No. 113.

While this matter was pending, another judge of this Court decided a similar case, *United States v. American Home Assurance Co.*, 47 CIT __, 653 F. Supp. 3d 1277 (2023). The Court in *American Home Assurance* granted summary judgment to a surety in circumstances akin to this case. *Id.* at 1280. One ground for that decision was that the Government "must act, and act reasonably, in pursuing its claims under a bond[.]" *Id.* at 1294. American Home Assurance prevailed because the Government's "suit was untimely based on its failure to act in a reasonable time." *Id.* at 1295. The Government in this case

filed a notice alerting the Court to the *American Home Assurance* decision and addressed the decision in its supplemental briefing. Notice of Suppl. Authority, ECF No. 106; *see also* Pl.'s Sur-Reply at 6–7, ECF No. 113.

Nearly a month before the third oral argument, the Court distributed to the parties a list of questions that the parties "should be prepared to address." Order Scheduling Oral Arg. at 1, ECF No. 118.[1] The third question on the list was: "Does federal common law apply 31 Williston on Contracts § 79:14 (4th ed. 2023)?" *Id.* That provision of Williston on Contracts states, "Where the plaintiff's right of action depends on a preliminary act to be performed by the plaintiff, the plaintiff cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the act." *Id.* at 1 n.1 (quoting Williston, *supra*, § 79:14). The next question asked whether "the principle elucidated in Williston [is] an implied contractual term, similar to the implied duty of good faith and fair dealing, or an equitable defense[.]" *Id.* at 1.

At the third oral argument, both parties addressed the implied reasonable time requirement. The Government conceded that it applies. *See* Third Oral Arg. Tr. at 57:16–20, ECF No. 128 (The Court: "So just to clarify, the Government does not dispute that the implied reasonableness contractual term applies to it. Its dispute is what the time period we're looking at [is] to determine whether it is reasonable." Ms. Farrell: "Right."); *Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *24.[2] Aegis agreed with the Government. *See, e.g.*, Third Oral Arg. Tr. at 69:10–12, ECF No. 128 ("Everybody agrees you have this implied provision in the contract that says that the Government has to act within [a] reasonable time."); *id.* at 70:12–14 ("If there is a reasonable requirement — everybody agrees to that. We've given the Court two bases for finding that this demand was unreasonable.").

The parties disagreed over whether the eight-year delay between liquidation and demand was reasonable. Aegis argued the delay was unreasonable. *See, e.g.*, *id.* at 34:17–18 ("[T]here is nothing reasonable about the delay that took place."). Conversely, the Government argued that the delay was reasonable because the Court should look only at the portion of the delay attributable to Customs, not the portion attributable to the U.S. Department of Commerce (Commerce). *See id.* at 47:16–18 (The Court: "[Y]our argument is seeking to bifurcate ... the counting of time." Ms. Farrell: "Yes."). The Govern-

[1] The Order is appended to this opinion as Appendix 1.

[2] Page fifty-seven of the third oral argument transcript is appended to this opinion as Appendix 2.

ment blamed much of the delay on Commerce's not notifying Customs of the deemed liquidation and claimed Customs acted promptly once it learned about the deemed liquidation from Commerce. *See, e.g.*, Pl.'s Sur-Reply at 7, ECF No. 113 ("[U]ntil [Customs] received the July 14, 2014 message from [Commerce], [Customs] was unaware of the deemed liquidation of the entries. However, shortly after receiving the message, [Customs] issued bills ...."). The Court rejected this argument. *See Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *26.

The Court issued its opinion in *Aegis I* granting summary judgment to Aegis. *Id.* at *29. The Court held the Government's delay in making demand was "unreasonable and ... a breach of contract." *Id.* The Government now asks the Court to reconsider *Aegis I* for two reasons. First, it claims the implied reasonable time requirement is not "consistent with the statutory and regulatory scheme." Pl.'s Mot. at 4, ECF No. 139 (capitalization altered). Second, it claims that, even if it breached an implied term of the bond contract, the breach was not material and "does not warrant discharging Aegis's obligation[s]" under the contract. *Id.* at 6 (capitalization altered). Both arguments rest on the underlying premise that the Government "could not have anticipated raising" these arguments during the underlying proceedings. *Id.* at 4, 6.

STANDARD OF REVIEW

Plaintiff moves the Court to reconsider, alter, or amend its prior decision under USCIT Rule 59(a)(1)(B), which is a mechanism for requests for reconsideration in the Court of International Trade.[3] *Acquisition 362, LLC v. United States*, 45 CIT __, 539 F. Supp. 3d 1251, 1255 (2021) (citing *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 745, 748 (2010)), *aff'd*, 59 F.4th 1247 (Fed. Cir. 2023), *cert. denied*, 144 S. Ct. 81 (2023). Under USCIT Rule 59(a)(1)(B), "The court may, on motion, grant a new trial or rehearing on all or some of the issues ... after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." USCIT Rule 59(a)(1)(B). The Court has discretion to grant or deny

[3] Despite the plain text of Rule 59 referring to "actions which have been tried and gone to judgment," longstanding decisions of this Court identify Rule 59 as allegedly broad enough to include "'rehearing of any matter decided by the court without a jury.'" *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584 (1985) (quoting *Timken Co. v. United States*, 6 CIT 76, 77 (1983)), *rev'd on other grounds*, 840 F.2d 1547 (Fed. Cir. 1988). Regardless of whether USCIT Rule 59 or USCIT Rule 60 is the more textually appropriate basis for Plaintiff's Motion, this Court has the power to reconsider its prior opinion. *Compare* USCIT Rule 59(a)(1)(B) (invoked by Plaintiff here and providing for rehearing "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court"), *with* USCIT Rule 60(b) (providing that the Court "may relieve a party or its legal representative from a *final judgment*, order, or proceeding" for any of the listed reasons (emphasis added)).

reconsideration. *UPS*, 34 CIT at 748 (citing *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990)).

Reconsideration or rehearing of a case is proper when "a significant flaw in the conduct of the original proceeding" exists. *Union Camp Corp. v. United States*, 21 CIT 371, 372 (1997) (quoting *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). Examples include:

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

Id. at 372 (quoting *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336–37 (1984)). "The purpose of a Rule 59 motion is not to allow the losing party to reargue its case." *Acquisition 362*, 45 CIT __, 539 F. Supp. 3d at 1256 (citing *Int'l Custom Prods., Inc. v. United States*, 38 CIT 990, 991 (2014), *aff'd*, 791 F.3d 1329 (Fed. Cir. 2015)). The Court should only disturb its prior decision if it is "manifestly erroneous." *Id.* (citing *Papierfabrik August Koehler SE v. United States*, 39 CIT 42, 43 (2015)).

DISCUSSION

The Government raises two arguments: (1) The implied reasonable time requirement is inconsistent with the statutory and regulatory scheme governing customs bonds, and (2) the Government can recover even if it breached the implied reasonable time requirement because any breach was not material. Pl.'s Mot. at 4, 6, ECF No. 139. The Government claims it "could not have anticipated" raising these arguments in the underlying proceedings. *Id.* Those claims are baseless. The Motion is denied.

I. Procedure

USCIT Rule 59 does not allow the losing party to relitigate its case by raising arguments it previously waived or forfeited. *See Banister v. Davis*, 590 U.S. 504, 508 (2020) ("[C]ourts will not address new arguments ... that the moving party could have raised before the decision issued.").[4] That is exactly what the Government seeks to do here with its claim that it lacked sufficient notice to adequately

[4] *Banister* involved the analogous Federal Rule of Civil Procedure 59. 590 U.S. at 507. "[I]t is without question that [the Court of International Trade] may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules." *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 185–86 (1991).

develop arguments regarding the implied reasonable time requirement. The Government had ample opportunity to make the arguments it now raises. Instead, it waived any argument that the implied reasonable time requirement does not apply and forfeited any argument it could recover notwithstanding its breach. That the Government regrets its strategic litigation decisions is not proper grounds for reconsideration.

A. Notice

The Government's Motion rests on the notion it lacked sufficient notice to raise its two arguments during the underlying proceedings. In its Motion, the Government claims it "could not have anticipated raising or discussing" the points it makes now. Pl.'s Mot. at 4, 6, ECF No. 139. Not so. In fact, the Government knew from the very beginning that this was a contract law case that might be decided on contract law principles. *See* First Oral Arg. Tr. at 99:16–19, ECF No. 49 (Mr. Mancuso: "[W]e believe that contract law governs this, and ... we brought this cause of action under [28 U.S.C. § 1582(2)] for breach of contract."). At least three sources put the Government on notice that the arguments in its Motion were relevant: (1) the supplemental briefing, (2) the opinion in *American Home Assurance* and the Court's subsequent Order instructing the Government to respond to that opinion, and (3) the Court's Order scheduling the third oral argument.

First, the supplemental briefing in this case raised the issue of an implied reasonable time requirement sufficiently to put the Government on notice. The Court asked the parties for "any ... argument or case citations regarding the duty of the Government to make demand within a reasonable time." Minute Order, ECF No. 96 (dated nearly one year from the opinion's issuance). This alone was sufficient to put the Government on notice. Aegis addressed the issue multiple times in its supplemental briefing. *See, e.g.*, Def.'s Suppl. Br. at 27, ECF No. 104 ("In the event the Court concludes that Customs' bill is a necessary precursor to suit, Customs was required to issue its bill within a reasonable time following liquidation."); Def.'s Suppl. Reply Br. at 9, ECF No. 107 ("In the event demand is a precursor to suit, the United States was obligated to issue its bill within a reasonable time after the suspension of liquidation[.]") (capitalization altered). The Government, too, was aware of the instructions in the Court's Minute Order; it recited those instructions in its supplemental briefing. Pl.'s Suppl. Resp. Br. at 1, ECF No. 105 (quoting verbatim the Court's Order).

Second, the opinion in *American Home Assurance* put the Government on further notice. *American Home Assurance* involved a similar

factual scenario to the one here. *See* 47 CIT __, 653 F. Supp. 3d at 1280–82. The Government sued a surety to recover unpaid antidumping duties for entries made under a customs bond. *Id.* at 1279–80. The entries were deemed liquidated by operation of law, and the Government took no action to collect the unpaid duties for more than a decade. *Id.* at 1281–82. After finding in favor of the surety on the statute of limitations,[5] the Court further explained that, even were it to side with the Government on the statute of limitations question, it "would still find [the Government's] claims time-barred." *Id.* at 1293. The Court held that the Government "must act, and act reasonably, in pursuing its claims under a bond ...." *Id.* at 1294. Accordingly, the Court found the Government's "suit was untimely based on its failure to act in a reasonable time." *Id.* at 1295.

The Government was well aware of *American Home Assurance*. Indeed, the Government alerted the Court to the decision by filing a Notice of Supplemental Authority. ECF No. 106. The Court entered an Order allowing the Government to submit a sur-reply brief addressing *American Home Assurance*. Minute Order, ECF No. 111. The Government did just that. *See generally* Pl.'s Sur-Reply Br., ECF No. 113. The Government's brief addressed *American Home Assurance*'s holding that Customs' suit was barred because it failed to make demand within a reasonable time. *See id.* at 6–7; *American Home Assurance*, 47 CIT __, 653 F. Supp. 3d at 1295. The Government noted Aegis' argument that "[Customs] was unreasonable and seeking to gain an advantage when it made its demand long after the entries" liquidated. Pl.'s Sur-Reply Br. at 6, ECF No. 113. However, the Government did not suggest that it was allowed to unreasonably delay making demand. *See id.* at 6–7. The Government instead argued Customs did not unreasonably delay making demand because Customs acted promptly on hearing from Commerce about the entries' deemed liquidation. *Id.* The Government's Sur-Reply confirmed its strategic litigation decision not to contest the existence of an implied reasonable time requirement.

Finally, the Court's Order scheduling the third oral argument put the Government squarely on notice that the Court would consider whether an implied reasonable time requirement in the bond contract limited the Government's time to make demand. *See* Order Scheduling Oral Argument, ECF No. 118. The Order contained several questions the parties were told to be "prepared to address" at oral argument. *Id.* at 1. Questions three and four both implicate the implied

[5] This portion of *American Home Assurance* differs from the Court's decision in *Aegis I*. *See Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *20 n.5.

reasonable time requirement. *See id.* Question three asked: "Does federal common law apply 31 Williston on Contracts § 79:14 (4th ed. 2023)? Can the parties cite any applicable case law?" *Id.* An accompanying footnote gave the following quote from Williston: "Where the plaintiff's right of action depends on a preliminary act to be performed by the plaintiff, the plaintiff cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the act." *Id.* at 1 n.1 (quoting Williston, *supra*, § 79:14). Question four then asked whether the principle from Williston is "*an implied contractual term* ... or an equitable defense[.]" *Id.* at 1 (emphasis added). These two questions informed the parties nearly a month before the third oral argument that the Court would consider whether an implied contractual term limited the Government's time to make demand. *See id.* (dated October 20, 2023); Third Oral Arg. Tr. at 1, ECF No. 128 (held November 15, 2023). This is more notice than parties usually receive; the Court is under no obligation to provide the parties the questions it intends to ask. *Compare* Order Scheduling Oral Arg., ECF No. 36 (containing no questions), *and* Order Scheduling Oral Arg., ECF No. 92 (containing no questions), *with* Order Scheduling Oral Arg., ECF No. 118 (containing questions). *See also* USCIT Rule 7(c) (containing no requirement that the Court provide the parties with questions before oral argument).

B. Waiver and Forfeiture

Despite having sufficient notice to raise the two arguments in its Motion, the Government failed to do so. It waived any argument that the implied reasonable time requirement does not exist or does not apply here. It also forfeited any argument for a materiality requirement by failing to raise it.

The Government conceded away its argument that the implied reasonable time requirement is incompatible with the statutory and regulatory scheme.[6] Accordingly, it cannot raise it now. *See Banister*, 590 U.S. at 508; *Acquisition 362*, 45 CIT __, 539 F. Supp. 3d at 1256. The Government conceded at oral argument that the implied reasonable time requirement exists and applies in this case. The Court noted during the third oral argument that it did not "hear [the Government] arguing that the reasonable time ... requirement [does not] apply." Third Oral Arg. Tr. at 56:12–13, ECF No. 128. Counsel for

[6] The Court notes that the Government took a different position on the relationship between contract law and the statutory scheme at the first oral argument. *See* First Oral Arg. Tr. at 100:1–5, ECF No. 49 (Mr. Mancuso: "I think we have to hold the contract and the terms of the contract over ... the Customs law ... I'm not saying that it's irrelevant, but the contract law is what's important, and that's how we have to look at this case.").

the Government did not object to this characterization. *See id.* at 56:12–24. The Court then directly asked whether the Government contested the application of the implied reasonable time requirement, and the Government's counsel confirmed it did not. *See id.* at 57:16–20 (The Court: "So just to clarify, the Government does not dispute that the implied reasonableness contractual term applies to it. Its dispute is what the time period we're looking at [is] to determine whether it is reasonable." Ms. Farrell: "Right."); *Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *24. Counsel for Aegis also repeatedly stated that "everybody agree[d]" the bond contract included an implied reasonable time requirement. Again, the Government's counsel did not object to this characterization. *See, e.g.*, Third Oral Arg. Tr. at 69:10–12, ECF No. 128 ("Everybody agrees you have this implied provision in the contract that says that the Government has to act within [a] reasonable time."); *id.* at 70:12–14 ("If there is a reasonable requirement — everybody agrees to that. We've given the Court two bases for finding that this demand was unreasonable."). The Government therefore waived any argument that the implied reasonable time requirement does not apply. The Government made this waiver knowingly. Multiple notices had alerted the Government that this case might turn on its compliance with an implied reasonable time requirement. The concession was not an off-the-cuff response to a "gotcha" question. Rather, it was a strategic litigation decision made on-the-record after the Government received actual notice of the questions it "should be prepared" to answer. Order Scheduling Oral Argument at 1, ECF No. 118. The Government is bound by its concession at oral argument. *Dorce v. City of New York*, 2 F.4th 82, 102 (2d Cir. 2021) ("[Parties] are ... bound by concessions made by their counsel at oral argument."); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 676–78 (2010) (holding party to its prior concession).

Rather than argue no such standard applied, the Government instead argued that it did not unreasonably delay making demand. *See* Third Oral Arg. Tr. at 44:21–45:18, ECF No. 128; Pl.'s Sur-Reply Br. at 6–7, ECF No. 113. This argument centered around the notion that Customs acted diligently on learning from Commerce that the relevant entries were deemed liquidated years earlier, blaming the delay on Commerce rather than Customs. *See* Third Oral Arg. Tr. at 47:16–18, ECF No. 128 (The Court: "[Y]our argument is seeking to bifurcate ... the counting of time." Ms. Farrell: "Yes."); Pl.'s Sur-Reply at 7, ECF No. 113 ("[U]ntil [Customs] received the July 14, 2014 message from [Commerce], [Customs] was unaware of the deemed liquidation of the entries. However, shortly after receiving the mes-

sage, [Customs] issued bills ....”). As the Court explained in *Aegis I*, this argument fails because the Court must consider the delay attributable to the Government as a whole and cannot bifurcate the delay between Customs and Commerce. *See Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *26 (“The question is not whether Commerce or Customs ... unreasonably delayed making demand; the question is whether the Government collectively did.”).

In addition to waiving its first argument, the Government forfeited its second argument. The Government had sufficient notice to argue for the existence of a materiality requirement in the underlying proceeding. It did not do so. *See* Pl.’s Mot. at 6, ECF No. 139 (admitting the Government failed to raise the issue). The Government could have argued for a materiality requirement in its extensive briefing or during the lengthy exchange between the Government’s counsel and the Court at oral argument regarding the implied reasonable time requirement. *See generally* Third Oral Arg. Tr. at 44:19–58:6, ECF No. 128. Instead, the Government made the strategic decision to focus on arguing that the delay was reasonable. It also failed to raise any alternative bases on which the Government might recover notwithstanding its breach, such as “*quantum meruit* or other similar” arguments. *Aegis I*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 33, at *17–18 n.4 (noting the Government’s failure to make such claims). By failing to raise the issue, the Government forfeited any argument for a materiality requirement.

In sum, the record shows the Government was aware the Court might decide this case by finding a breach of an implied contractual term requiring demand to be made within a reasonable time. The Government made a strategic decision not to contest the existence of the implied contractual term or to argue for a materiality requirement. The Government instead chose to argue it made demand within a reasonable time. That this strategy was unsuccessful is not grounds for the Court to grant the Government’s request for a mulligan. The Government’s Motion raises only arguments that it could have made earlier. Such arguments are not permitted in a motion under USCIT Rule 59. *See Banister*, 590 U.S. at 508; *Acquisition 362*, 45 CIT __, 539 F. Supp. 3d at 1256.

CONCLUSION

USCIT Rule 59 is not an avenue to undo strategic litigation decisions the losing party comes to regret. Like any other litigant, the Government must live with the concessions it made. The Motion for Reconsideration is accordingly **DENIED**.

Dated: May 28, 2024
New York, New York

/s/ *Stephen Alexander Vaden*
Stephen Alexander Vaden, Judge

Appendix 1

UNITED STATES, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 20–03628

ORDER

In accordance with USCIT Rule 7(c), it is hereby:

ORDERED that oral argument shall take place, in person, on Wednesday, November 15, 2023, at 2:30 p.m. in Courtroom 2 of the United States Court of International Trade in New York. At oral argument, the parties should be prepared to address the following questions:

(1) Do all parties agree that federal common law — rather than the law of any particular state — governs the bond at issue in this case?

(2) If the answer to question one is yes, do the parties agree that federal common law looks to the Restatement (Third) of Suretyship and Guaranty for guidance in determining the legal principles to apply?

(3) Does federal common law apply 31 Williston on Contracts § 79:14 (4th ed. 2023)?[1] Can the parties cite any applicable case law?

(4) Is the principle elucidated in Williston an implied contractual term, similar to the implied duty of good faith and fair dealing, or an equitable defense?

(5) What is the effect on Defendant's assertion of imparity of suretyship from the fact that Plaintiff made demand on Defendant nearly eleven months before Defendant's reinsurer became insolvent?

(6) Does Defendant have any cases that support that a change in legal position — without a change in the underlying law — by a party counts as impairment?

(7) If the Court determines that the plain language of 19 U.S.C. § 1505(b) requires the submission of a bill, is resolution of the applicability of any demand requirement necessary?

[1] "Where the plaintiff's right of action depends on a preliminary act to be performed by the plaintiff, the plaintiff cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the act."

(8) Does any legal authority exist for finding that a Federal Register notice or some other notice that occurs on liquidation satisfies a requirement for a “bill”?

SO ORDERED.

Dated: October 20, 2023
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Appendix 2

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1 get a 30-day grace period. And if you do so, you don't owe
2 any interest, and you've paid your bill in full, and the
3 Government is very happy.
4 MS. FARRELL: Exactly right, Your Honor. But
5 because they have that statutorily mandated requirement of a
6 bill and a right for 30 days to pay, we don't turn to the
7 surety until we know we haven't been paid, that there's been
8 an obligation not fulfilled.
9 We then turn to the contract, which incorporates by
10 reference Regulation 113.62, and therefore the other
11 regulations that are associated with that. But that all
12 pulls it in together. That's when we make our demand on the
13 surety. Our regulations say that these are the steps that
14 Customs takes. They send a bill out to the importer, then
15 they go to the surety.
16 THE COURT: So just to clarify, the Government does
17 not dispute that the implied reasonableness contractual term
18 applies to it. Its dispute is what the time period we're
19 looking at to determine whether it is reasonable.
20 MS. FARRELL: Right. And that contract -- our
21 action is an action against a surety based in contract. Our
22 action, if Linyi hadn't disappeared, would have been an
23 action in personal obligation under 1582.3.
24 MS. FARRELL: Which they can't dodge.
25 MS. FARRELL: Which they can't dodge.

Slip Op. 24–64

APIÁRIO DIAMANTE COMERCIAL EXPORTADORA LTDA. AND APIÁRIO DIAMANTE PRODUÇÃO E COMERCIAL DE MEL LTDA., Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 22–00185

[Remanding an affirmative agency determination concluding an antidumping duty investigation of raw honey]

Dated: May 30, 2024

Pierce J. Lee and *Daniel J. Cannistra*, Crowell & Moring LLP, of Washington, D.C., for plaintiffs Apiário Diamante Comercial Exportadora Ltda. and Apiário Diamante Produção e Comercial de Mel Ltda.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Benjamin Juvelier*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

R. Alan Luberda, Elizabeth C. Johnson, and *Maliha Khan*, Kelley Drye & Warren LLP, of Washington D.C., for defendant-intervenors American Honey Producers Association and the Sioux Honey Association.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs contest an affirmative "less-than-fair-value" determination ("Final Determination") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an antidumping duty investigation on imported raw honey from several countries. *Raw Honey From Brazil: Final Determination of Sales at Less Than Fair Value,* 87 Fed. Reg. 22,182 (Int'l Trade Admin. April 14, 2022) P.R. 358 ("*Final Determination*").[1]

In the Final Determination, Commerce assigned plaintiffs an estimated dumping margin of 83.72% *ad valorem*. Concluding that Commerce based this rate on findings unsupported by substantial evidence on the record of the investigation, the court remands the decision to Commerce for reconsideration.

[1] Citations to documents from the Joint Appendix (Apr. 18, 2023), ECF Nos. 30 (conf.), 31 (public) (supplemented by ECF Nos. 33 (conf.), 34 (public) filed on Nov. 16, 2023) are referenced herein as "P.R. __" for public versions. All information disclosed in this Opinion and Order is public information.

I. BACKGROUND

A. The Parties

Plaintiffs Apiário Diamante Comercial Exportadora Ltda. ("Apiário Export") and Apiário Diamante Produção E Comercial De Mel Ltda. ("Apiário Produção") (collectively, "Apiário," operating jointly under the trade name "Supermel") were treated as a single entity in the investigation. *Memorandum Re Less-Than-Fair-Value Investigation of Raw Honey from Brazil: Preliminary Affiliation and Single Entity Memorandum for Apiário Diamante Comercial Exportadora Ltda and Apiário Diamante Produção e Comercial de Mel Ltda* (Int'l Trade Admin. Nov. 17, 2021), P.R. 285. Apiário Export primarily exported honey to foreign markets and Apiário Produção sold exclusively into the domestic Brazilian market. Defendant is the United States. Defendant-intervenors, domestic producers of raw honey and the petitioners in the investigation, are the American Honey Producers Association and the Sioux Honey Association ("Petitioners").

B. Administrative Proceedings

The Final Determination resulted from an antidumping duty petition ("the Petition") filed in April of 2021. *Petition for the Imposition of Antidumping Duties Against Imports of Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam* (Apr. 20, 2021), P.R. 1–17.

On May 18, 2021, Commerce initiated the antidumping duty investigation, which applied to imports of raw honey (the "subject merchandise") from several countries over a time period (the "period of investigation" or "POI") of April 1, 2020 through March 31, 2021. *Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 86 Fed. Reg. 26,897 (Int'l Trade Admin. May 18, 2021), P.R. 53. Commerce selected Supermel and another Brazilian company, Melbras lmportadora E Exportadora Agroindustrial Ltda. ("Melbras") (not a party to this case), as the two "mandatory respondents" from Brazil, i.e., the respondents Commerce would investigate individually and assign individual estimated dumping margins. *Department Memorandum to James Maeder re: Less-Than-Fair-Value Investigation of Raw Honey From Brazil: Respondent Selection* (Int'l Trade Admin. June 7, 2021), P.R. 64.

In its preliminary less-than-fair-value determination, which incorporated by reference a preliminary issues and decision memorandum

("Preliminary I&D Memorandum"), Commerce used Supermel's reported data to calculate a preliminary estimated dumping margin of 29.61%. *Raw Honey From Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 86 Fed. Reg. 66,533, 66,534 (Int'l Trade Admin. Nov. 23, 2021), P.R. 292; *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* at 21, 17 (Int'l Trade Admin. Nov. 17, 2021), P.R. 288 ("*Prelim. I&D Mem.*").

Shortly after issuing its preliminary determination, Commerce determined that it had made ministerial errors within the meaning of 19 CFR 351.224(f) in its preliminary margin calculation and issued an amended preliminary determination that reduced Supermel's estimated dumping margin to 10.52%. *Raw Honey From Brazil: Amended Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 86 Fed. Reg. 71,614 (Int'l Trade Admin. Dec. 17, 2021).

On April 14, 2022, Commerce issued the Final Determination, which incorporated by reference a "Final Issues and Decision Memorandum" ("Final I&D Memorandum"). *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* (Int'l Trade Admin. Apr. 7, 2022), P.R. 354 ("*Final I&D Mem.*"). Concluding that Supermel withheld information and impeded the investigation by failing to respond to various questionnaires with information necessary to allow it to verify "cost-of-production" ("COP") data that Commerce used to calculate the 10.52% amended preliminary estimated dumping margin, Commerce assigned Supermel an estimated dumping margin of 83.72% in the Final Determination. *Final I&D Mem.* at 12; *Final Determination* at 22,183. Commerce assigned Melbras an estimated dumping margin of 7.89%. *Final Determination* at 22,183.

Following an affirmative injury determination by the U.S. International Trade Commission, Commerce issued an antidumping order on raw honey from Argentina, Brazil, India, and the Socialist Republic of Vietnam. *Raw Honey From Argentina, Brazil, India, and the Socialist*

Republic of Vietnam: Antidumping Duty Orders, 87 Fed. Reg. 35,501 (Int'l Trade Admin. June 10, 2022) P.R. 362.[2]

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court exclusive jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1516a, and 28 U.S.C. § 1581(c).[3] Among the decisions that may be contested according to Section 516A are final affirmative determinations of sales at less than fair value. *Id*. §§ 1516a(a)(2)(B)(i), 1673d.

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

B. Antidumping Duties under the Tariff Act

The Tariff Act provides for an "antidumping duty" to be assessed on imported merchandise if Commerce determines that the merchandise is being sold at less than fair value and the International Trade Commission determines that an industry in the United States is materially injured or is threatened with material injury by reason of that merchandise or by reason of sales (or likelihood of sales) of that merchandise for importation. 19 U.S.C. § 1673. The statute provides that the antidumping duty shall equal the "amount by which the normal value exceeds the export price (or the constructed export

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[2] The scope of the antidumping duty order is as follows:

> The product covered by these orders is raw honey. Raw honey is honey as it exists in the beehive or as obtained by extraction, settling and skimming, or coarse straining. Raw honey has not been filtered to a level that results in the removal of most or all of the pollen, e.g., a level that removes pollen to below 25 microns. The subject products include all grades, floral sources and colors of raw honey and also include organic raw honey.
>
> Excluded from the scope is any honey that is packaged for retail sale (e.g., in bottles or other retail containers of five (5) lbs. or less).

Raw Honey From Argentina, Brazil, India, and the Socialist Republic of Vietnam: Antidumping Duty Orders, 87 Fed. Reg. 35,501, 35,504 (Int'l Trade Admin. June 10, 2022) P.R. 362.

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

price) for the merchandise." *Id.* In the ordinary instance, "[t]he normal value of the subject merchandise shall be the price . . . at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." *Id.* §§ 1677b(a)(1)(A), (B)(i). *See id.* § 1677(16) (defining "foreign like product" in terms related to comparability to the subject merchandise).

If Commerce determines that sales of the foreign like product in the market of the exporting country are "insufficient to permit a proper comparison with the sales of the subject merchandise to the United States," Commerce may compare the U.S. sales of the subject merchandise to sales of the foreign like product in a third country. *Id.* § 1677b(a)(1)(B), (C). A small portion of the honey produced by Apiário Export and all of that produced by Apiário Produção was sold into the domestic Brazilian market. *Supermel's Section D Second Supplemental Questionnaire Response* at 4 (Nov. 4, 2021), P.R. 265 ("*Second Supplemental Questionnaire Response*"). Commerce considered those combined sales to be insufficient to use the Brazilian market as the "comparison" market. *Prelim I&D Mem.* at 13. Therefore, in the investigation at issue, Commerce chose Australia as the third country comparison market. *Id.*

C. "Cost of Production" in the Normal Value Calculation

"In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). When determining normal value, Commerce may disregard sales that are not made in the "ordinary course of trade." *Id.* § 1677b(a)(1)(B)(i). The statute defines "ordinary course of trade" to exclude sales made below the cost of production. *Id.* §§ 1677(15)(A), 1677b(b)(1)(B) (referring to sales at prices that do not permit recovery of all costs within a reasonable period of time). Cost of production includes an exporter's or producer's material costs, amounts for selling and general expenses, and the cost of containers. *Id.* § 1677b(b)(3). The statute provides that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." *Id.* § 1677b(f)(1)(A).

D. Verification

Information submitted during an antidumping duty investigation is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1). The Department's regulations describe verification as a procedure "to verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d). During verification, "the Department will request access to all files, records, and personnel which the Secretary [of Commerce] considers relevant to factual information submitted of . . . [p]roducers, exporters, or importers." *Id.*

Commerce ordinarily conducts on-site verifications of submitted information. Due to the constraints posed by the COVID-19 pandemic that was ongoing throughout the investigation at issue in this case, Commerce did not follow its ordinary procedure. After the preliminary phase of the investigation, Commerce sent Supermel an "In Lieu of Verification Questionnaire" that addressed information placed on the record by Supermel's questionnaire responses. *Letter from the Department to Supermel re: Questionnaire in Lieu of Verification* (Int'l Trade Admin. Dec. 10, 2021), P.R. 299 ("*In Lieu of Verification Questionnaire*"). In its response to this questionnaire, Supermel clarified some of its responses to previous questionnaires and provided additional supporting documentation. *Letter from Supermel to the Department re: Antidumping Duty Investigation of Raw Honey from Brazil: Supermel's In Lieu of Verification Questionnaire Response* (Dec. 20, 2021) (P.R. 325–331) ("*In Lieu of Verification Questionnaire Response*").

E. Supermel's Claim in this Litigation

The estimated rate ultimately assigned to Supermel in the Final Determination was not a weighted average estimated dumping margin calculated from Supermel's sales during the POI. The 83.72% estimated dumping rate Commerce applied to Supermel in the Final Determination, after calculating a 10.52% preliminary estimated rate in the Amended Preliminary Determination, resulted from the Department's invoking the "facts otherwise available" provision of section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), and the "adverse inference" provision of section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b).[4] The Department's principal rationale in doing so was that Supermel impeded the investigation by withholding information necessary to allow it to verify Supermel's reported data on the cost of production of the raw honey it exported to the comparison market (i.e., Australia).

[4] The term "adverse facts available" ("AFA") is sometimes used to refer to the combined use of these two provisions.

Before the court is Supermel's motion for judgment on the agency record, brought according to USCIT Rule 56.2. Supermel claims that Commerce unlawfully invoked 19 U.S.C. § 1677e(a) ("facts otherwise available") and (b) ("adverse inference") in assigning Supermel the 83.72% estimated dumping margin. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 3 (Dec. 7, 2022), ECF Nos. 22 (conf.), 23 (public) ("Pl.'s Br."). Supermel argues that the factual determinations upon which Commerce invoked these provisions are not supported by substantial evidence on the administrative record of the investigation. Specifically, Supermel argues that it "submitted verifiable honey purchase data." *Id.* at 32 (citing its responses to the Department's questionnaires). Supermel also asserts that to the extent its submissions were deficient, Commerce failed to provide "an opportunity to remedy or explain the deficiency" as required by 19 U.S.C. § 1677m(d). *Id.* at 21.[5]

F. The Derivation of the 10.52% Rate in the Preliminary Determination

Supermel reported in its questionnaire responses that it purchased raw honey from more than a thousand individual, unaffiliated beekeepers in Brazil and performed further processing on that honey to produce raw honey products for its export sales. The processing included "1–6 hours of heat treatment, homogenization (involving additional heat treatment), filtration, organic certification, and inspection." Pl.'s Br. 16, 6 (citing *Supermel's Response to the Initial Request for Information* (June 17, 2021), P.R. 79).

At the onset of the investigation, considering "the numerous non-affiliated middlemen and beekeepers involved in the cost of producing raw honey," Commerce sought input from the parties on methods of determining the cost of raw honey production. *Letter from the Department to All Interested Parties Re: Antidumping Duty Investigations of Raw Honey from India, Argentina, Brazil, and Ukraine: Request for Comments on the Raw Honey Cost of Production Reporting Methodology* at 1 (July 22, 2021), P.R. 108; *Prelim. I&D Mem.* at 16—17. After receiving comments from the parties, Commerce "selected and requested cost information from two direct beekeeper suppliers to

[5] Additionally, Supermel contests the Department's decision to treat the beekeeper suppliers, rather than Supermel, as the producers of the subject merchandise, arguing that this formed the basis for the application of facts otherwise available with an adverse inference under 19 U.S.C. § 1677e to Supermel. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 41—42 (Dec. 7, 2022), ECF Nos. 22 (conf.), 23 (public). Because the court concludes that certain of the Department's findings for applying 19 U.S.C. § 1677e lacked required support in the record evidence, the court does not reach the question of whether Commerce improperly designated the beekeepers as the "producers."

Supermel with the aim of determining whether reliance on Melbras['s] and Supermel's acquisition costs as a proxy for the actual COP of the raw honey purchased was reasonable." *Prelim. I&D Mem.* at 17.

Between June and October of 2021, Commerce issued a series of questionnaires to Supermel and two beekeepers that Supermel identified as its largest suppliers, referred to in the submissions as "Beekeeper 1 and Beekeeper 2" (collectively, "the beekeeper suppliers") for whose identity Supermel claims business proprietary treatment. Supermel and both beekeeper suppliers timely responded to those questionnaires. As did Supermel, the beekeepers reported their sales prices and their costs of production.

Commerce explained in the Final I&D Memorandum that "[i]n the Preliminary Determination, we relied on the respondents' honey acquisition costs as a proxy for the cost of producing raw honey. We relied on Supermel's reported cost information and applied its acquisition costs plus Supermel's own processing costs as a reasonable proxy for the total cost of production (COP) because the acquisition prices Supermel paid were higher than the honey producers' reported COP." *Final I&D Mem.* at 4.

In arriving at the amended preliminary margin of 10.54% for Supermel, Commerce removed from Supermel's comparison market sales database certain sales it determined to have been made below the cost of production. *Prelim. I&D Mem.* at 19 ("We found that, for certain products, more than 20 percent of Melbras['s] and Supermel's comparison sales during the POI were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time.").

G. The Department's Application of 19 U.S.C. § 1677e on Findings that Supermel Withheld Information, Impeded the Investigation, and Provided Cost-of-Production Data that Could Not Be Verified

Commerce decided that it could not use any of Supermel's reported data on the cost of production of the foreign like product as sold in the third country market of Australia, finding as a fact that it lacked the information necessary to verify the cost of production data that Supermel submitted.[6] Substituting "facts otherwise available" for Supermel's entire comparison market sales database, Commerce further concluded that Supermel withheld information, impeded the investigation, and failed to cooperate by not acting to the best of its ability

[6] Commerce is directed to use "the facts otherwise available" if a party provides requested information "but the information cannot be verified as provided in section 1677m(i) of this title." 19 U.S.C. § 1677e(a)(2)(D).

in responding to certain of its questionnaires. Commerce assigned Supermel a rate of 83.72% as an adverse inference, using a rate it determined from the Petition. *Final Determination* at 22,183.

This case presents, first, the issue of whether substantial record evidence supported the findings that the record lacked sufficient information for verification of some or all of Supermel's reported cost of production data, that Supermel withheld information, and that Supermel impeded the Department's investigation. If it did not, then Commerce was not authorized by the Tariff Act to substitute facts otherwise available for that cost information. If, on the other hand, one or more of these findings are valid, the issue is whether Commerce permissibly applied an adverse inference in selecting from among facts otherwise available.

1. Misplaced Reliance on Differences between the Information Submitted by Supermel and its Two Largest Beekeeper Suppliers

Commerce based its application of 19 U.S.C. § 1677e(a) in part on a factual finding that there were "unexplained and unreconciled differences between the information submitted by Supermel and its beekeeper suppliers." *Final I&D Mem.* at 18. As discussed below, the Department's finding of "unexplained and unreconciled differences" lends no support to the use of facts otherwise available under § 1677e(a).

Commerce found that "both Supermel and the beekeepers provided conflicting information regarding the quantity and value of honey reported, which further supports our finding that Supermel's reported costs cannot be verified." *Id.* at 16—17. This finding is contradicted by the record evidence in two respects. First, the discrepancies were insignificant in the context of the cost of production data Supermel provided and, therefore, could not have precluded verification of those data. Second, these discrepancies, which pertained to the quantities and values of purchases from the two largest beekeepers who supplied Supermel raw honey, must be viewed along with the record evidence consisting of the two beekeepers' own admissions that their "labor is almost entirely dedicated to production activities and virtually no time is spent on administrative activities."[7] *Antidumping Duty Investigation of Raw Honey From Brazil: Beekeeper Question-*

[7] Both beekeepers invoked 19 U.S.C. § 1677m(c), requesting that their difficulties be "taken into account, particularly as a small company." *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 1]* at 2 (Oct. 26, 2021), P.R. 241 *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 2]* at 2 (Oct. 26, 2021), P.R. 242.

naire for [Beekeeper 1] at 14 (Sept. 9, 2021), P.R. 198 (*"Beekeeper 1 Initial Questionnaire Response")*. Accordingly, the record does not support a finding that the beekeepers' records, which understandably may have been less than perfect, called Supermel's reported costs into question. The beekeepers' questionnaire responses, considered in the context of the evidence about the nature of the beekeepers' businesses, did not support a finding or inference that Supermel underreported its own honey acquisition costs.

Commerce collected information from Supermel's two largest beekeeper suppliers, Beekeeper 1 and Beekeeper 2, with the stated aim of determining whether reliance on "Supermel's acquisition costs as a proxy for the actual COP of the raw honey purchased was reasonable." *Prelim. I&D Mem.* at 17. Beekeepers 1 and 2 provided 2.5% and 2% of Supermel's total honey, respectively. Pl.'s Br. 9 (citing *Supermel's Section D Questionnaire Response* at Ex. D-5a (Aug. 3, 2021), P.R. 133—152 ("*Supermel's Initial Questionnaire Response*")).

In his response, Beekeeper 1 (Supermel's largest supplier of honey) noted that while he operates under a trade name, "there is no incorporated company. All the operations are conducted by me and my family." *Beekeeper 1 Initial Questionnaire Response* at 2. Because Beekeeper 1's business was not incorporated, he did not file a corporate tax return. *Id.* at 9. Instead, Beekeeper 1 provided tax returns for himself, his wife, and his child. Beekeeper 2 informed Commerce that he operated with no formal accounting or inventory system and noted that "I have no incorporated company. All the operations are conducted by me and my wife." *Antidumping Duty Investigation of Raw Honey From Brazil: Beekeeper Questionnaire for [Beekeeper 2]* at 2 (Sept. 9, 2021), P.R. 201 (*"Beekeeper 2 Initial Questionnaire Response")*. Like Beekeeper 1, Beekeeper 2 was able to provide detailed information about the physical processes by which he harvests honey but was unable to answer the Department's questions that required a formal inventory or accounting system.

In his initial questionnaire response, responding to the Department's request for "a schedule for FY 2020 listing major honey customers with quantity and value by types of honey sold[,]" Beekeeper 1 provided his records of the total quantity and value of his sales to Supermel during the POI. *Beekeeper 1 Initial Questionnaire Response* at 10. The total quantity was within 1% of the total quantity reported by Supermel for purchases made from Beekeeper 1 during the POI, and the total value was 3% less than the total value reported by Supermel. Pl.'s Br. 10 (citing *Beekeeper 1 Initial Questionnaire Response* at 10). Beekeeper 2 did not provide quantity or value figures in response to the same question, instead reiterating that he does not

keep detailed business records. *Beekeeper 2 Initial Questionnaire Response* at 10.

Tax invoices provided by Beekeeper 1 in response to the supplemental questionnaire showed the same minor discrepancies as to the quantity and value of the sales to Supermel. *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 1]* at Ex. SUP-1 (Oct. 26, 2021), P.R. 241 ("*Beekeeper 1 Supplemental Questionnaire Response*"). Tax invoices provided by Beekeeper 2 showed that the total quantity reported matched Supermel's reported data within 0.02%, but they listed values that were 6% less than the total value reported by Supermel for purchases made from him during the POI. *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 2]* at SUP-1 (Oct. 26, 2021), P.R. 242. ("*Beekeeper 2 Supplemental Questionnaire Response*"). Viewed cumulatively, these discrepancies were less than 5% as to the total transactions between Supermel and the two parties and were spread over multiple transactions.

In blaming Supermel for what it described as "discrepancies" between the beekeepers' and Supermel's data pertaining to Supermel's acquisition costs, Commerce did *not* find as a fact that Supermel failed to maintain COP data in accordance with Brazilian accounting requirements. *See* 19 U.S.C. § 1677b(f)(1)(A) (directing that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."). Although Supermel operated under the Brazilian tax regime for "micro and small businesses," (and, like the beekeepers, invoked 19 U.S.C. § 1677m(c)), it was incorporated as a business and operated during the POI under tax and accounting requirements provided for under Brazilian law. *Id.*, Pl.'s Br. 13. Supermel's responses to Commerce were based, necessarily, on its production costs as shown in the business records it kept in the ordinary course of business. Commerce attached unwarranted significance to the fact that the values of the purchases from the two sampled beekeepers as shown in records or tax returns of those beekeepers did not agree exactly with the records of acquisition costs maintained by Supermel.

Supermel suggested that one source of the discrepancy may be that the "issue dates" on the tax invoices provided by the Beekeepers came before the date on which the beekeepers signed the invoices provided

by Supermel, which could indicate that negotiation occurred and shifted prices in the days immediately preceding the finalization of the transactions. Pl.'s Br. at 26 (citing *Beekeeper 1 Supplemental Questionnaire Response* at SUP-1) Commerce rejected an explanation provided by Supermel that "third-party freight charges" account for the difference by pointing out that that explanation merely raises another discrepancy between information provided by Supermel and the beekeepers as to which party pays the freight charges. *Final I&D Mem.* at 13—14. Commerce found that "this explanation still does not address the differences in Supermel's reported quantities of honey purchased from the unaffiliated beekeepers compared to the beekeeper reported quantities sold to Supermel[,]" an apparent reference to the discrepancy of reported quantity of less than 1% for Beekeeper 1 and .02% for Beekeeper 2. *Id.* at 14.

The court need not dwell on the possible reasons for the minor discrepancies between the data reported by Supermel and by its suppliers, who admit to spending "virtually no time" on administration and recordkeeping. *Beekeeper 1 Initial Questionnaire Response* at 14. Only in the most literal and technical sense was Commerce correct in finding that "the information provided by both beekeepers contradicted Supermel's reporting." *Final I&D Mem.* at 14; *see also Final I&D Mem.* at 13 ("We agree with the petitioners that Supermel's reported unprocessed honey purchases do not agree with the unaffiliated beekeeper suppliers' sales invoices."). Contrary to the Department's finding and inference, the record evidence showed that Supermel's data and the data of Beekeepers 1 and 2 were relatively consistent.

In conclusion, the evidence on the administrative record, viewed as a whole, does not support the Department's reliance on what it termed "unexplained and unreconciled differences between the information submitted by Supermel and its beekeeper suppliers," *Final I&D Mem.* at 18, for invoking 19 U.S.C. § 1677e(a)(2)(D) and setting aside Supermel's cost-of-production data and, ultimately, its entire comparison market database, as unverifiable.

2. Failure to Identify Deficient Responses to Question 25 of the Second Supplemental Questionnaire as Required by 19 U.S.C. § 1677m(d)

Supermel argues that Commerce failed to identify alleged deficiencies in questionnaire responses and failed to provide an opportunity to remedy or explain those deficiencies, as required by 19 U.S.C. §

1677m(d).[8] Pl.'s Br. 20—21. With respect to a question in the Second Supplemental Questionnaire, "Question 25," the court agrees. *Second Supplemental Questionnaire Response* at 13—14.

For its application of 19 U.S.C. § 1677e, Commerce relied in part on Supermel's response to Question 25. *Final I&D Mem.* at 13. Commerce found that despite its request for such documentation, "Supermel did not provide copies of correspondence with the beekeepers that would corroborate the quantity and value Supermel reported, copies or screenshots of any journal entries used to record the transactions in Supermel's accounting system, or proof of payment confirming the amount Supermel paid to the beekeepers" and that Supermel failed to "state why it had not submitted or could not submit the required documentation." *Id.* The question was as follows:

> Commerce selected two beekeepers ([Beekeeper 1] and [Beekeeper 2]) whom you have purchased honey from during the POI. Based on the information provided by the beekeepers there is a discrepancy between the quantity and value of unprocessed honey you have reported as procured from the beekeepers. Confirm that you have purchased [quantity] kg and R$ [value] of honey from [Beekeeper 1] and [quantity] kg and R$ [value] from [Beekeeper 2]. Provide all relevant supporting documentation including correspondence with the beekeepers that corroborate the quantity and value you have reported, copies or screenshots of any journal entries you have prepared to record the transactions and proof of payment confirming the amount you have paid.

Letter from the Department to Supermel re: Less Than Fair Value Investigation of Raw Honey From Brazil at 8—9 (Oct. 20, 2021), P.R. 236 ("*Second Supplemental Questionnaire*"). This question solicited four things from Supermel. The first was a confirmation of the quantities and values of purchases from Beekeepers 1 and 2. The latter three were subcategories of the request for "all relevant supporting

[8] 19 U.S.C. § 1677m(d) provides in relevant part that:

> If the administering authority or the Commission (as the case may be) 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. If that person submits further information in response to such a deficiency and either—(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

documentation," which included (1) "correspondence with the beekeepers that corroborate the quantity and value you have reported;" (2) "copies or screenshots of any journal entries you have prepared to record the transactions"; and (3) "proof of payment confirming the amount you have paid." *Id.*

In response to Question 25, Supermel provided a table representing the quantities and values it purchased from the beekeepers, thereby responding only to the "confirmation of the quantities and values" part of the question. Because Supermel did not provide the supporting documentation in its response to Question 25, that response was deficient.

Supermel argues that "Commerce only described the discrepancies for the first time in the Final Determination" and thereby failed to notify Supermel of the deficiency and afford an opportunity to cure as required by 19 U.S.C. § 1677m(d). Pl.'s Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 23 (April 4, 2023), ECF No. 29. Defendant argues that "Commerce's obligations under § 1677m(d) can be satisfied when it issues a supplemental questionnaire 'specifically pointing out and requesting clarification' of a respondent's deficient responses." Def.'s Resp. In Opp'n to Pls.' Mot. for J. Upon the Admin. R. 26 (Feb. 10, 2023), ECF No. 24 ("Def.'s Resp.") (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007)). Defendant points to the "*two* supplemental questionnaires on the topic of verifying its cost information with respect to purchases from the beekeepers, including specific reference to acceptable types of documentation that Commerce deemed appropriate to remedy the missing information." Def.'s Resp. 26 (citing *Final I&D Mem.* at 14—16).

The government's argument is unavailing. Defendant is correct that one or more supplemental questionnaires can fulfill the Department's obligation to provide an opportunity to remedy deficient submissions pursuant to 19 U.S.C. § 1677m(d). Def.'s Resp. 26 (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007)). But this requires that a subsequent questionnaire have given the submitter actual notice of the deficiency or reiterated the initial request. The Department's In Lieu of Verification Questionnaire, the only questionnaire Commerce issued following the Second Supplemental Questionnaire, did not notify Supermel that Commerce had determined that Supermel's response to Question 25 of the Second Supplemental Questionnaire was deficient. Commerce had the opportunity to do so in the In Lieu of Verification Questionnaire but in fact did not bring the deficiency to Supermel's attention prior to identifying it in the Final Issues and Decision Memorandum. Nor did Com-

merce issue a second request for the "correspondence with the beekeepers" or "proof of payment" it requested in Question 25.

Defendant cites a large portion of the Final I&D Memorandum in arguing that Commerce met its obligations under § 1677m(d) by issuing multiple supplemental questionnaires referring to "acceptable types of documentation." Def.'s Resp. 26 (citing *Final I&D Mem.* at 14—16). The cited portion of the Final I&D Memorandum does not support defendant's argument because none of the questions it identifies from the In Lieu of Verification Questionnaire actually reiterated the requests it made in Question 25 for correspondence with Beekeepers 1 and 2 and proof of payment.

The court notes that, as an incidental matter, Supermel later provided, in response to a request by Commerce, "screenshots of any journal entries" that corroborated, *inter alia*, the purchases of raw honey from Beekeepers 1 and 2. This question appeared in the In Lieu of Verification Questionnaire cited in the Final I&D Memorandum, question 5.a., but did not relate specifically to Beekeepers 1 and 2. *In Lieu of Verification Questionnaire* at 12, Ex. VC-4.1. Instead, it pertained to "inventory movement schedules," which were documents provided by Supermel relating to honey inventory. A portion of that question included a request for "copies of spreadsheets, handwritten journals and screen prints from your accounting system as support." Commerce further requested that Supermel "[d]emonstrate how the POI . . . inventory values reflected on the inventory movement schedules at exhibit 2SD-14 of the 2SDQR tie to Apiario Diamante Comercial Exportadora Ltda's (Apiario Export.) and Apiario Diamante Producao's (Apiario Prod.) POI trial balances." *In Lieu of Verification Questionnaire* at 6. In responding, Supermel provided Commerce a complete set of its journal entries for raw material purchases during the POI, including all of the journal entries that recorded transactions between Supermel and Beekeepers 1 and 2. *In Lieu of Verification Questionnaire Response* at 12, VC-4.1.

In conclusion, the deficiencies in Supermel's responses to Question 25, viewed according to the record evidence on the whole, did not provide an adequate basis for the Department's invoking 19 U.S.C. §1677e.

3. Question 3(a)(iii) of the First Supplemental Questionnaire

Question 3(a)(iii) of the First Supplemental Questionnaire ("Question 3.a.iii") directed Supermel to:

> Provide excerpts from your accounting system that shows [*sic*] how you have recorded the purchases of the honey from the independent beekeepers, the transfer of the unprocessed honey

> from Apiário Export. to Apiário Prod. and the transfer of the processed honey from Apiário Prod. back to Apiário Export. (e.g., journal entries corroborating the purchases and transfer of the unprocessed honey, invoices etc.).

Letter from the Department to Supermel re: Less Than Fair Value Investigation of Raw Honey From Brazil at 4 (Sept. 1, 2021), P.R. 195 ("*First Supplemental Questionnaire*"). Supermel provided this narrative response:

> Apiário Export records its purchases of honey from beekeepers as debit entries in the raw material stock account (41). Apiário Export does not sell the unprocessed honey to Apiário Producao. There has not been any transfer of unprocessed honey from Apiário Export to Apiário Prod. and the processed honey from Apiário Prod. back to Apiário Export.

Supermel's Section A- D Supplemental Questionnaire Response at 4 (Sept. 15, 2021), P.R. 205 ("*First Supplemental Questionnaire Response*"). Thus, Supermel described how it recorded the purchases from beekeepers in its accounting system and clarified for Commerce that the supposed transfers of honey between the companies did not occur. But it did not provide, in response to Question 3.a.iii, "excerpts" from its accounting system.

Commerce found as facts that "Supermel did not provide the requested journal entries or any other supporting documents, nor did Supermel explain why it did not submit the requested documentation" and "Supermel ignored Commerce's request." *Final I&D Mem.* at 15. These findings are correct when viewed solely as to the response to Question 3.a.iii, but they are unsupported by the record considered on the whole. On the previous page of the questionnaire, in subpart a.i. of the same question and in response to a request that it "[d]iscuss how the honey purchased from the independent beekeepers are recorded in your normal books and records," Supermel referred to, and provided as exhibits, excerpts from its accounting system as it listed the steps it took after it "manually record[ed] its honey purchases" from the beekeepers:

> Honey purchased for international sales is recorded as debit entries in the "stock: raw materials" account (41) in Apiario Export's books. Honey purchased for domestic sales is recorded in entries in the "stock: raw materials" account (41) in Apiario Producao's books. *The reconciliation of the raw material purchase cost is provided as Exhibit SD-12*. As shown in the reconciliation, Supermel's raw material accounts also capture pur-

> chases of pollen, propolis and beeswax.[9] Pollen and propolis are used as the raw materials for the domestic products sold by Apiario Producao. Beeswax is provided to beekeepers to support their production activities . . . In the *revised COP data provided as Exhibits SD-1a (monthly), Exhibit SD-1b (quarterly) and Exhibit 1c (POI)*, Supermel included the cost of beeswax in the reported [variable overhead costs]. *The revised processing cost calculation is provided as Exhibit SD-3*.

First Supplemental Questionnaire Response at 3 (emphasis added). Supermel did not write "see response in previous subpart," or words to that effect or otherwise indicate that it already had provided responsive documentation. Nevertheless, its answer to subpart a.i directed Commerce to the exhibits responsive to the request for documentation that Commerce included in subpart a.iii, which Supermel provided voluntarily in addition to the information specifically requested in subpart a.i. The record, therefore, is inconsistent with the Department's findings that it had not been provided the requested information and that its request that Supermel "demonstrate how the purchase database ties to Supermel's accounting system" had been "ignored." Supermel reasonably could have presumed the Department's familiarity with its response to subpart a.i. Moreover, as discussed later in this Opinion and Order, Supermel informed Commerce repeatedly during the investigation that all raw honey purchases, recorded on a complete set of documents that Supermel provided Commerce in screenshots, were entered in a specific cost account in Apiario Export's accounting system.

4. Question 18 of the First Supplemental Questionnaire

After discussing Question 3.a.iii, Commerce stated in its Final I&D Memorandum that it "also requested in the same First Supplemental Section D Questionnaire that Supermel demonstrate how the purchase database ties to Supermel's accounting system. Supermel ignored Commerce's request." *Final I&D Mem* at 15. For this finding, Commerce cited page 18 of the First Supplemental Section D Questionnaire.

[9] The raw material purchases that Apiário Export made during the POI were of honey and beeswax. Honey was processed and sold whereas the beeswax was "provided to beekeepers to support their production activities." Both categories of raw material purchases were recorded in the "stock: raw materials account (41)" of Apiário Export's accounting system. Supermel considered the beeswax purchased during the POI to be a variable overhead cost. *Supermel's Section A- D Supplemental Questionnaire Response* at 3 (Sept. 15, 2021), P.R. 205 ("*First Supplemental Questionnaire Response*").

The only question on page 18 pertinent to this issue was question 18(c) of that Questionnaire (“Question 18(c)”).[10] That question asked Supermel to provide the following:

> a. Discuss how Supermel’s accounting system normally captures production costs by product.
>
> b. Explain how the product-specific costs recorded in your accounting system compare to the weighted-average CONNUM specific costs reported for COP and CV.
>
> c. Supermel stated on page 10 that the honey purchase database is sufficiently detailed to track all production characteristics identified in this investigation. Provide sample copies of the honey purchase database which shows all the production characteristics normally captured in your ordinary course of business and demonstrate how the database ties to your accounting system.

First Supplemental Questionnaire at 8. In response to this three-part question, Supermel stated that its “accounting system does not capture production costs by product. Since there is no difference in production process for honey based on product characteristics, Supermel allocated its total processing cost over all of its production quantity during the POR [*sic*]. Supermel reported the same per-unit processing costs for all of its CONNUMs.” *First Supplemental Questionnaire Response* at 18.

Question 18 is redundant with other requests in the same questionnaire, for which Commerce requested and received such a description and sample documentation from Supermel’s purchase database. One such instance was on the previous page, in response to the preceding question, question 17, and others occurred in questions 3.a.i and 3.a.iii, discussed above. *First Supplemental Questionnaire Response* at 3—4, 17, 22, 25, Ex. SD-15. Contrary to the Department’s finding, *Final I&D Mem.* at 18, that such information was “withheld,” the record contains complete purchase databases covering all purchases of honey and beeswax made by Apiário Export during the POI. *See Second Supplemental Questionnaire* at 2SD-11c; *In Lieu of Verification Questionnaire Response* at Ex. VC-4.1.

[10] This document was not initially included in the Joint Appendix for this case, requiring the court to request additional record documentation from the parties. The incomplete status of the Joint Appendix delayed the court’s review of the relevant record evidence.

5. Question 10 of the Second Supplemental Questionnaire

Commerce identified Supermel's response to question 10 of the Second Supplemental Questionnaire ("Question 10") as part of its basis for applying facts otherwise available with an adverse inference. Question 10, which referred to question 3.a.iii of the First Supplemental Questionnaire, was as follows:

> As requested at question 3.a.iii of SDQ, provide excerpts from your accounting system that shows [*sic*] how you have recorded the purchases of the honey from the independent beekeepers, the transfer of the unprocessed honey from Apiário Export to Apiário Producao and the transfer of the processed honey from Apiário Producao back to Apiário Export (e.g., journal entries corroborating the purchases and transfer of the unprocessed honey, invoices etc.). In addition, provide copies of the accounting entries for Apiário Producao purchases of unprocessed honey.

Second Supplemental Questionnaire at 6—7. In response, Supermel stated as follows:

> The screenshots of the journal entries used to record honey purchases made by Apiario Export and Apiario Producao are provided as Exhibit 2SD-13a and Exhibit 2SD-13b. Because this is a tolling operation. [*sic*] the transfer of the unprocessed honey for toll processing is not recorded as a sale. Once the processing is finished, Apiario Producao issues an invoice for processing fees to Apiario Export. The sample invoices for toll processing fees are provided at Exhibit 2SD-17c.

Second Supplemental Questionnaire at 7. Throughout its analysis, Commerce characterized as deficient the documents provided by Supermel in response to requests for "journal entries." *Final I&D Mem.* 14—16. Commerce described in this way its objections to the screenshots of documents Supermel identified as "journal entries" in the submissions:

> As noted by the petitioners, the screenshots do not reflect any accounting data. Instead, the screenshots simply show a list of honey purchases by date, name of supplier, address of supplier, weight, value and per-unit price. The screenshots do not show the name or number of Supermel's "stock: raw materials" account nor do they reflect debits and credits or account balances.

Final I&D Mem. at 15. The "screenshots" to which Commerce referred contained individual information for each of more than two thousand purchases of unprocessed honey that Supermel made during the POI. Supermel explained repeatedly in the investigation that each of its raw honey and beeswax purchases reflected in those journal entries is recorded as a debit in the "stock: raw materials (41)" account in the accounting records maintained by Apiário Export, *First Supplemental Questionnaire Response* at 2—4, Ex. SD-6; *Second Supplemental Questionnaire* at 4, and provided a visual aid in the form of a flowchart on that process. *Initial Questionnaire Response* at Ex. D-3. The record evidence refutes the Department's finding that the screenshots "do not reflect any accounting data." The amounts paid for the individual raw honey purchases are the very data that were recorded in "stock: raw materials (41)," which refers to a specific cost account in Supermel's accounting system.

The Department's finding that the "screenshots do not show the name or number of Supermel's "stock: raw materials" account is true with respect to the individual screenshots, but Supermel provided these screenshots of records that were in the form in which Supermel maintained them. At the urging of the petitioners, Commerce objected that these individual records of purchase transactions did not reference the "stock: raw materials" account, but that objection is meritless in light of Supermel's informing Commerce that *all* of these purchases were recorded as "debits" in the same account, i.e., the "stock: raw materials (41)" account of Apiário Export.

In accordance with instructions from Commerce, Supermel provided a "trial balance" that contained accounting information pertaining to the POI. *First Supplemental Questionnaire Response* at Ex. 2SA-5. Supermel described the trial balance as "exactly the same as the financial statements but more detailed." *Initial Questionnaire Response* at 22. Also at the Department's request, Supermel provided "a worksheet reconciling all items on the fiscal year income statement (e.g., revenues, cost of sales, selling and administrative expenses, and non-operating expenses) in the audited financial statements to the total costs in the financial accounting system (i.e., the summary trial balance)." *Initial Questionnaire Response* at 20—21, Ex. D-11. Contrary to the Department's objections, the record shows that the trial balance presented information from Supermel's "financial accounting system" that related directly to the individual purchases from the beekeepers. *Id.*, *First Supplemental Questionnaire Response* at Ex. 2SA-5.

The court has examined the evidence consisting of the trial balance and compared it to the evidence consisting of screenshots of indi-

vidual records of the more than two thousand individual raw honey purchases Supermel made during the POI. The court notes that these records are essentially in agreement. When the total value of the beeswax transactions provided at exhibit 2SD-11c to the Second Supplemental Questionnaire and the total value of the honey transactions provided at exhibit VC-4.1 to the In Lieu of Verification Questionnaire are combined, the total figure is within 99.9999% of the total for line 41, "stock: raw materials" in Apiário Export's trial balance provided at Ex. 2SA-5 to the First Supplemental Questionnaire. Thus, the cost data on the "journal entries" provided by Supermel substantially equal the cost data on the "stock: raw materials" line on Supermel's trial balance.

Like the government, defendant-intervenor characterizes the "journal entries" as inadequate, arguing that they "contain no accounting information" and are not responsive to a request for "journal entries for honey purchases." Def.-Int.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. 14, 16 (Mar. 6, 2023), ECF Nos. 26 (conf.), 27 (public). Neither defendant-intervenor nor the government explained how writing "debit stock: raw materials account" atop the journal entries would have converted what they maintain are deficient submissions into responsive ones. Nor do they explain the purported inadequacy of Supermel's narrative description of how the transactions listed in the "journal entries" tie to its accounting records, i.e., that they are all recorded as debit entries in the "stock: raw materials" account of Apiário Export's trial balance. This narrative description is supported by the record evidence that the total of the values Supermel recorded for each transaction is nearly identical to the value reported in the debit "stock: raw materials" account of Apiario Export's accounting records. The record shows that Commerce, at the instigation of the petitioners, based its use of 19 U.S.C. § 1677e in part on business records that were submitted in the form in which they were maintained.

The Department's characterization of the journal entries provided by Supermel as inadequate appears to have developed at some point after it issued the In Lieu of Verification Questionnaire but before the promulgation of the Final Determination. During the investigation, Commerce did not identify the journal entries as inadequate for recording Supermel's purchase data or unresponsive to a request for journal entries. Commerce never defined or described "journal entries" in its requests for them. Absent such a definition, Supermel apparently presumed, quite reasonably, that its journal entry screenshots, coupled with its descriptions of how those entries were recorded into a specific cost account within its accounting records, were

responsive to the Department's request for journal entries or demonstrations of how the purchase data they reflect "tie" to their accounting records. See, *inter alia*: *First Supplemental Questionnaire* at 4, 7, 10; *Second Supplemental Questionnaire* at 5, 6, 8, 9. For this reason as well, the Department's *ex post facto* finding of "deficiencies" in Supermel's journal entries is unsupported by the record evidence.[11]

6. Question 7(b) in the Second Supplemental Questionnaire

Commerce stated in the Final I&D Memorandum that it "asked Supermel to select any honey purchase transaction from its purchase database spreadsheet submitted in Exhibit D-5a to demonstrate how Supermel prepared and recorded the raw honey purchases in the stock raw materials general ledger account." *Final I&D Mem.* at 15. Commerce further stated that "[i]n response, Supermel provided screenshots similar to the ones described above that only list Supermel's unprocessed honey purchases." *Id.* Here also, Commerce found these screenshots deficient because they "do not show the name or number of Supermel's 'stock: raw materials' account, nor do they reflect debits and credits or account balances." *Id.*

The Department's analysis of this question and response presents two unsupported findings, one relating the Department's question and the other related to Supermel's response. Question 7(b) in the Second Supplemental Questionnaire was as follows:

> Using one of the honey purchase transactions you have provided at exhibit D-5a of the [Initial Questionnaire Response], provide a sample of the journal entries you have prepared and recorded in the "stock: raw materials" account for honey procured for domestic sales.

Second Supplemental Questionnaire Response at 4. Contrary to the Department's characterization of question 7(b) in the Final I&D

[11] Commerce characterized the journal entries provided in response to requests for Supermel's sales information as responsive while rejecting the journal entries provided for cost information, stating that "Supermel provided screenshots of supporting general ledger accounts and journal entries from its accounting system in response to the sales verification questions. However, Supermel failed to provide similarly requested support related to selected raw honey purchase transactions." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* at 16 (Int'l Trade Admin. Apr. 7, 2022), P.R. 354 ("*Final I&D Mem.*") (citing *Supermel's In Lieu of Verification Questionnaire Response* at Exs. VE-3.9—VE-8.9 (Dec. 20, 2021), P.R. 325–331 ("*In Lieu of Verification Questionnaire Response*")). The sales journal entries provided by Supermel and cited favorably by Commerce match the form of the cost journal entries that Commerce rejected. *In Lieu of Verification Questionnaire Response* at Ex. VE-3.10, VE-4.11, VE-5.11. The record does support a finding that the sales information provided by Supermel was more detailed than the purchase information. Regardless, that finding does not establish that the purchase information was not tied to the accounting system.

Memorandum, the question does not ask Supermel to "demonstrate how [it] prepared and recorded the raw honey purchases in the stock raw materials general ledger account." *Final I&D Mem.* at 15. The information solicited by the question is a "sample of the journal entries you have prepared and recorded" drawn from "one of the honey purchase transactions you have provided as exhibit D-5a of the [Initial Questionnaire Response]," related to domestic sales.[12]

The second unsupported finding in the Department's discussion of Question 7(b) in the second supplemental questionnaire was that Supermel failed to respond adequately. In response to this question, Supermel provided sample journal entries from both Apiário Export and Apiário Produção. The deficiency that Commerce identifies in Supermel's response to this question is the same that it identified in Question 10, discussed above: "The screenshots do not show the name or number of Supermel's 'stock: raw materials' account, nor do they reflect debits and credits or account balances." *Final I&D Mem.* at 15. The finding that Supermel's journal entry screenshots were unresponsive to the Department's request for "journal entries" is equally unsupported in each of Supermel's responses that Commerce identified as deficient in that regard.[13]

7. The Department's Finding that It Could Not Rely on the CONNUM-Specific Costs Reported by Supermel

Commerce requested data on Supermel's U.S. sales and comparison market sales that were organized according to "CONNUM" (or "control number"), an identifier for a product, or a group of products, with

[12] As the court has pointed out, the "verification" issue Commerce raised in this case pertained only to cost-of-production information relating to sales made in the comparison market of Australia, Commerce having concluded that the domestic Brazilian market sales were insufficient for use as a comparison market. It is not clear why Commerce based its resort to 19 U.S.C. § 1677e in part on information relating to domestic sales in Brazil. Regardless, the substantive basis for Department's objection to Supermel's response to its request pertaining to records of domestic sales is not apparent to the court. Supermel told Commerce that "Apiário Export and Apiário Producao have separate accounting systems. They do not share the same books or records" and that "[h]oney purchased for international sales is recorded as debit entries in the 'stock: raw materials' account (41) in Apiario Export's books. Honey purchased for domestic sales is recorded in entries in the 'stock: raw materials' account (41) in Apiario Producao's books." *First Supplemental Questionnaire Response* at 3, 5. Supermel's questionnaire response related the raw honey purchases for honey produced for the domestic market, and the purchases for honey produced for the comparison market, to the respective, separate accounting systems of the two companies.

[13] In addition to the questions discussed here, Commerce based its application of facts otherwise available and an adverse inference on the same journal entries Supermel provided in response to question 21 of the Second Supplemental Questionnaire and question 5 of the In Lieu of Verification Questionnaire, which Commerce, without evidentiary foundation, characterized as "deficient." *Final I&D Mem.* at 15—16 (citing *Supermel's Section D Second Supplemental Questionnaire Response* at 12 (Nov. 4, 2021), P.R. 265; *In Lieu of Verification Questionnaire Response* at 10—16.

a unique and specifically-defined set of physical characteristics. Here, "Commerce identified five criteria for the physical characteristics of the subject merchandise: (1) color; (2) organic versus non-organic; (3) homogenization; (4) straining/filtering; and (5) honey source." *Prelim. I&D Mem.* at 11. Using information from its purchase database and processing details, Supermel reported "CONNUM-specific" costs for different types of honey it had sold to the U.S. and comparison markets based on those physical characteristics. *Initial Questionnaire Response* at 17, Ex. D-5a.

Commerce found that "because we find that Supermel failed to tie its purchases to its accounting system, we find that Commerce cannot rely on Supermel's purchase information as support for its CONNUM-specific costs." *Final I&D Mem.* at 17. Because the Department's finding that Supermel "failed to tie its purchases to its accounting system" is invalidated by the evidentiary record when viewed as a whole, so too is the finding that Commerce "cannot rely on Supermel's purchase information as support for its CONNUM-specific costs." *Id.*

8. The Department's Unsupported Findings for Applying 19 U.S.C. § 1677e(a)

As the court noted, rather than assign Supermel a weighted average dumping margin calculated from Supermel's sales during the POI as it did in the preliminary stage of the investigation, Commerce ultimately applied subsections (a) and (b) of 19 U.S.C. § 1677e. This statutory provision directs Commerce to invoke "facts otherwise available" when "necessary information is not available on the record" or when any of four conditions specified in subparagraph (a)(2) is met. The four conditions apply to situations where an interested party:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a)(2). Where a respondent meets any of these four conditions, the statute provides that Commerce shall, subject to § 1677m(d), "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a).

In the Final Determination, Commerce concluded that condition (A) of 19 U.S.C. § 1677e(a), regarding the withholding of information, had been satisfied because Supermel "withheld information in its ILVQ [In Lieu of Verification Questionnaire] Response (i.e., screenshots showing that its purchases tie to its accounting system);" as well as (C), concerning significantly impeding a proceeding, which Commerce claims Supermel did "by not substantiating its reported costs, an integral part of Commerce's margin analysis;" and (D), with respect to information that was provided but cannot be verified because "Supermel's purchase information as reflected in its accounting system could not be verified because Supermel failed to provide that information in its ILVQ Response." *Final I&D Mem.* at 18.

Though ostensibly based upon three separate subsections of 19 U.S.C. § 1677e(a), each of the reasons Commerce states for its application of that statutory provision rests upon the Department's rejection of Supermel's reported cost information for its raw honey acquisitions from the numerous beekeepers. Commerce based each of these determinations principally on its finding that Supermel failed to "tie" these data on raw honey acquisitions to its accounting system.

Commerce made no finding that it could not rely upon Supermel's cost data for the processing it performed on the raw honey it purchased. To combine with those data on processing costs for the calculation of cost of production, Commerce had been provided: (1) a complete database of all purchases of raw honey and beeswax Supermel made from its many unaffiliated beekeepers during the POI, (2) total values for those two categories of purchases that when added together were substantially equal to the total value recorded in Supermel's accounting system, and (3) a breakdown of costs by CONNUM and an explanation that "Supermel reported the same per-unit processing costs for all of its CONNUMs." *First Supplemental Questionnaire Response* at 18. Still, Commerce relied upon a finding that Supermel "failed to tie" its raw honey acquisition costs to its accounting system in developing its CONNUM-specific costs of production and thus (1) withheld information, (2) impeded the investigation, and (3) provided information that could not be verified. Based on its own examination of the questionnaire responses and included exhibits, the court concludes that these findings are not supported by substantial evidence on the record of the antidumping duty investigation.

As the court has explained, the principal information that Commerce found Supermel to have withheld was provided in full by the complete set of journal entries for raw honey purchases from the beekeepers and the related responses disclosing the placement of all of the recorded costs in the "stock: raw materials (41)" cost account

maintained in the accounting system of Apiário Export. *See Initial Questionnaire Response* at Ex. D-3; *First Supplemental Questionnaire Response* at 2—4, Exs. SD-6, 2SA-5, *Second Supplemental Questionnaire Response* at 4, 2SD-11c; *In Lieu of Verification Questionnaire Response* at VC-4.1. The only requested information Supermel did not provide, which was the "correspondence" with the beekeepers related to raw honey purchases from Beekeepers 1 and 2 and proof of payment to those beekeepers, was not again requested or identified as deficient, as required by 19 U.S.C. § 1677m(d). Thus, the record viewed in the entirety does not contain substantial evidence to support the finding that resort to 19 U.S.C. § 1677e was warranted by Supermel's having withheld requested information. The ancillary findings that "Supermel significantly impeded the proceeding by not substantiating its reported costs" and that "Supermel's purchase information as reflected in its accounting system could not be verified because Supermel failed to provide that information in its ILVQ Response," *Final I&D Mem.* at 18, are, for the same reason, lacking evidentiary support in the administrative record.

H. The Department's Potential Application of 19 U.S.C. § 1677e in Future Proceedings

Supermel claims that Commerce acted unlawfully when it stated in the Preliminary Issues & Decision Memorandum that "all beekeepers are now 'on notice that they will be required to submit accurate cost information that is fully supported by documentary evidence and is verifiable by Commerce officials' and '[f]ailure to provide such information [in the future administrative reviews] could result in the application of AFA.'" Pl.'s Br. 45 (quoting *Prelim. I&D Mem.* at 18). Supermel asks the Court to disallow Commerce "in the future administrative reviews to rely on this statement from the investigation to apply AFA to an otherwise cooperative processor-respondent based on an unaffiliated beekeeper supplier's failure to provide requested cost information." *Id.* (citing *Tianjin Magnesium Intern. Co., Ltd. v. United States*, 35 CIT 187 (2011)).

Supermel understandably objects to the Department's threatened future application of an adverse inference against it for the future actions of an unaffiliated party. Nevertheless, this claim is not directed to an alleged injury resulting from the determination contested in this litigation but to a potential finding in a future determination. *See Lujan v. Defs. of Wildlife*, 504 U.S. 2130, 2134 (1992). In seeking a remedy for future harm, Supermel in effect is asking the court for an advisory opinion that the court cannot provide. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) (stating that "the implicit policies

embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts").

III. CONCLUSION

The court must remand the Final Determination to Commerce for reconsideration of the determination to apply 19 U.S.C. § 1677e, which was based on multiple findings of fact for which the record does not contain substantial evidence, and for determination of a new estimated dumping margin for Supermel.

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

ORDERED that plaintiff's motion for judgment on the agency record (Dec. 7, 2022), ECF Nos. 22 (Conf.), 23 (Public) be, and hereby is, granted in part and denied in part; it is further

ORDERED that Commerce shall submit to the court a redetermination upon remand ("Remand Redetermination") that reconsiders, based on the existing record, the Department's determination on the application of 19 U.S.C. § 1677e to Supermel; that determines a new estimated dumping margin for Supermel; and that is in accordance with this Opinion and Order; it is further

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

ORDERED that plaintiffs shall have 30 days from the date of submission of the Remand Redetermination to submit to the court comments thereon; and it is further

ORDERED that defendant shall have 15 days from the submission of plaintiffs' comments on the Remand Redetermination to submit to the court a response to those comments.

Dated: May 30, 2024
New York, New York

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

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