

U.S. Customs and Border Protection

CBP Dec. 21-12

COBRA FEES TO BE ADJUSTED FOR INFLATION IN FISCAL YEAR 2022

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) is adjusting certain customs user fees and corresponding limitations established by the Consolidated Omnibus Budget Reconciliation Act (COBRA) for Fiscal Year 2022 in accordance with the Fixing America's Surface Transportation Act (FAST Act) as implemented by the CBP regulations.

DATES: The adjusted amounts of customs COBRA user fees and their corresponding limitations set forth in this notice for Fiscal Year 2022 are required as of October 1, 2021.

FOR FURTHER INFORMATION CONTACT: Tina Ghiladi, Senior Advisor, International Travel & Trade, Office of Finance, 202-344-3722, UserFeeNotices@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Adjustments of COBRA User Fees and Corresponding Limitations for Inflation

On December 4, 2015, the Fixing America's Surface Transportation Act (FAST Act, Pub. L. 114-94) was signed into law. Section 32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury (Secretary) to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation.

Sections 24.22 and 24.23 of title 19 of the Code of Federal Regulations (19 CFR 24.22 and 24.23) describe the procedures that implement the requirements of the FAST Act. Specifically, paragraph (k) in

§ 24.22 (19 CFR 24.22(k)) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary. The fees and limitations subject to adjustment, which are set forth in appendix A and appendix B of part 24, include the commercial vessel arrival fees, commercial truck arrival fees, railroad car arrival fees, private vessel arrival fees, private aircraft arrival fees, commercial aircraft and vessel passenger arrival fees, dutiable mail fees, customs broker permit user fees, barges and other bulk carriers arrival fees, and merchandise processing fees, as well as the corresponding limitations.

B. Determination of Whether an Adjustment Is Necessary for Fiscal Year 2022

In accordance with 19 CFR 24.22, CBP must determine annually whether the fees and limitations must be adjusted to reflect inflation. For Fiscal Year 2022, CBP is making this determination by comparing the average of the Consumer Price Index—All Urban Consumers, U.S. All items, 1982–1984 (CPI–U) for the current year (June 2020–May 2021) with the average of the CPI–U for the comparison year (June 2019–May 2020) to determine the change in inflation, if any. If there is an increase in the CPI–U of greater than one (1) percent, CBP must adjust the customs COBRA user fees and corresponding limitations using the methodology set forth in 19 CFR 24.22(k). Following the steps provided in paragraph (k)(2) of § 24.22, CBP has determined that the increase in the CPI–U between the most recent June to May twelve-month period (June 2020–May 2021) and the comparison year (June 2019–May 2020) is 1.94¹ percent. As the increase in the CPI–U is greater than one (1) percent, the customs COBRA user fees and corresponding limitations must be adjusted for Fiscal Year 2022.

C. Determination of the Adjusted Fees and Limitations

Using the methodology set forth in § 24.22(k)(2) of the CBP regulations (19 CFR 24.22(k)), CBP has determined that the factor by which the base fees and limitations will be adjusted is 11.009 percent (base fees and limitations can be found in appendices A and B to part 24 of title 19). In reaching this determination, CBP calculated the values for each variable found in paragraph (k) of 19 CFR 24.22 as follows:

¹ The figures provided in this notice may be rounded for publication purposes only. The calculations for the adjusted fees and limitations were made using unrounded figures, unless otherwise noted.

- The arithmetic average of the CPI-U for June 2020–May 2021, referred to as (A) in the CBP regulations, is 261.992;
- The arithmetic average of the CPI-U for Fiscal Year 2014, referred to as (B), is 236.009;
- The arithmetic average of the CPI-U for the comparison year (June 2019–May 2020), referred to as (C), is 257.092;
- The difference between the arithmetic averages of the CPI-U of the comparison year (June 2019–May 2020) and the current year (June 2020–May 2021), referred to as (D), is 4.900;
- This difference rounded to the nearest whole number, referred to as (E), is 5;
- The percentage change in the arithmetic averages of the CPI-U of the comparison year (June 2019–May 2020) and the current year (June 2020–May 2021), referred to as (F), is 1.94 percent;
- The difference in the arithmetic average of the CPI-U between the current year (June 2020–May 2021) and the base year (Fiscal Year 2014), referred to as (G), is 25.984; and
- Lastly, the percentage change in the CPI-U from the base year (Fiscal Year 2014) to the current year (June 2020– May 2021), referred to as (H), is 11.009 percent.

D. Announcement of New Fees and Limitations

The adjusted amounts of customs COBRA user fees and their corresponding limitations for Fiscal Year 2022 as adjusted by 11.009 percent set forth below are required as of October 1, 2021. Table 1 provides the fees and limitations found in 19 CFR 24.22 as adjusted for Fiscal Year 2022, and Table 2 provides the fees and limitations found in 19 CFR 24.23 as adjusted for Fiscal Year 2022.

TABLE 1—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.22 AS ADJUSTED FOR FISCAL YEAR 2022

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(a)(1).....	(b)(1)(i).....	Fee: Commercial Vessel Arrival Fee	\$485.11
(b)(5)(A).....	(b)(1)(ii)	Limitation: Calendar Year Maximum for Commercial Vessel Arrival Fees	6,610.63
(a)(8).....	(b)(2)(i).....	Fee: Barges and Other Bulk Carriers Arrival Fee	122.11

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(b)(6)	(b)(2)(ii)	Limitation: Calendar Year Maximum for Barges and Other Bulk Carriers Arrival Fees.	1,665.15
(a)(2)	(c)(1)	Fee: Commercial Truck Arrival Fee ^{2 3}	6.10
(b)(2)	(c)(2) and (3)	Limitation: Commercial Truck Calendar Year Prepayment Fee ⁴	111.01
(a)(3)	(d)(1)	Fee: Railroad Car Arrival Fee ...	9.16
(b)(3)	(d)(2) and (3)	Limitation: Railroad Car Cal- endar Year Prepayment Fee ...	111.01
(a)(4)	(e)(1) and (2)	Fee and Limitation: Private Vessel or Private Aircraft First Arrival/Calendar Year Prepayment Fee.	30.53
(a)(6)	(f)	Fee: Dutiable Mail Fee	6.11
(a)(5)(A)	(g)(1)(i)	Fee: Commercial Vessel or Commercial Aircraft Passen- ger Arrival Fee	6.11
(a)(5)(B)	(g)(1)(ii)	Fee: Commercial Vessel Pas- senger Arrival Fee (from one of the territories and posses- sions of the United States).	2.14
(a)(7)	(h)	Fee: Customs Broker Permit User Fee	153.19

² The Commercial Truck Arrival Fee is the CBP fee only; it does not include the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) Agricultural and Quarantine Inspection (AQI) Services Fee (currently \$7.55) that is collected by CBP on behalf of USDA to make a total Single Crossing Fee of \$13.65. *See* 7 CFR 354.3(c) and 19 CFR 24.22(c)(1). Once eighteen Single Crossing Fees have been paid and used for a vehicle identification number (VIN)/vehicle in a Decal and Transponder Online Procurement System (DTOPS) account within a calendar year, the payment required for the nineteenth (and subsequent) single-crossing is only the AQI fee (currently \$7.55) and no longer includes CBP's \$6.10 Commercial Truck Arrival fee (for the remainder of that calendar year).

³ The Commercial Truck Arrival fee is adjusted down from \$6.11 to the nearest lower nickel. *See* 82 FR 50523 (November 1, 2017).

⁴ The Commercial Truck Calendar Year Prepayment Fee is the CBP fee only; it does not include the AQI Commercial Truck with Transponder Fee (currently \$301.67) that is collected by CBP on behalf of APHIS to make the total Commercial Vehicle Transponder Annual User Fee of \$412.68.

TABLE 2—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.23 AS ADJUSTED FOR FISCAL YEAR 2022

19 U.S.C. 58c	19 CFR 24.23	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(b)(9)(A)(ii)	(b)(1)(i)(A).....	Fee: Express Consignment Carrier/Centralized Hub Facility Fee, Per Individual Waybill/Bill of Lading Fee.	\$1.11
(b)(9)(B)(i).....	(b)(4)(ii) ⁵	Limitation: Minimum Express Consignment Carrier/Centralized Hub Facility Fee. ⁶	0.39
(b)(9)(B)(i).....	(b)(4)(ii) ⁷	Limitation: Maximum Express Consignment Carrier/Centralized Hub Facility Fee.	1.11
(a)(9)(B)(i); (b)(8)(A)(i).....	(b)(1)(i)(B) ⁸ ...	Limitation: Minimum Merchandise Processing Fee ⁹	27.75
(a)(9)(B)(i); (b)(8)(A)(i).....	(b)(1)(i)(B) ¹⁰ .	Limitation: Maximum Merchandise Processing Fee ^{11 12} .	538.40
(b)(8)(A)(ii)	(b)(1)(ii)	Fee: Surcharge for Manual Entry or Release	3.33
(a)(10)(C)(i).....	(b)(2)(i).....	Fee: Informal Entry or Release; Automated and Not Prepared by CBP Personnel.	2.22
(a)(10)(C)(ii) ...	(b)(2)(ii)	Fee: Informal Entry or Release; Manual and Not Prepared by CBP Personnel	6.66

⁵ Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii). CBP intends to publish a future document in the **Federal Register** to make several technical corrections to part 24 of title 19 of the CFR, including corrections to Appendix B of part 24. The technical corrections will also address the inadvertent errors specified in footnotes 7, 8, and 10 below.

⁶ Although the minimum limitation is published, the fee charged is the fee required by 19 U.S.C. 58c(b)(9)(A)(ii).

⁷ Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii).

⁸ Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

⁹ Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. See 82 FR 50523 (November 1, 2017).

¹⁰ Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

¹¹ Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. See 82 FR 50523 (November 1, 2017).

¹² For monthly pipeline entries, see <https://www.cbp.gov/trade/entry-summary/pipeline-monthly-entry-processing/pipeline-line-qa>.

19 U.S.C. 58c	19 CFR 24.23	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(a)(10)(C)(iii) ..	(b)(2)(iii)	Fee: Informal Entry or Release; Automated or Manual; Pre- pared by CBP Personnel.	9.99
(b)(9)(A)(ii)	(b)(4)	Fee: Express Consignment Carrier/Centralized Hub Fa- cility Fee, Per Individual Waybill/Bill of Lading Fee.	1.11

Tables 1 and 2, setting forth the adjusted fees and limitations for Fiscal Year 2022, will also be maintained for the public's convenience on the CBP website at *www.cbp.gov*.

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this notice document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, July 29, 2021 (85 FR 40864)]

**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF FROZEN SOYBEANS
OR EDAMAME**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of frozen soybeans or edamame.

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) intends to revoke one ruling letter concerning tariff classification of

frozen soybeans or edamame 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. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before September 10, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0101.

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), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of frozen soybeans or edamame. Although in this notice, CBP is specifically referring to New York Ruling Letter

(“NY”) N296408, dated May 16, 2018 (Attachment 1), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. 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 advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this 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 the final decision on this notice.

In NY N296408, CBP classified frozen soybeans or edamame in heading 0710, HTSUS, specifically in subheading 0710.22.3700, HTSUSA, which provides for “Vegetables (uncooked or cooked by steaming or boiling in water), frozen: Leguminous vegetables, shelled or unshelled: Beans (*Vigna* spp., *Phaseolus* spp.): Not reduced in size: Other.” CBP has reviewed NY N296408 and has determined the ruling letter to be in error. It is now CBP’s position that frozen soybeans or edamame are properly classified, in heading 2008, HTSUS, specifically in subheading 2008.99.6100, HTSUSA, which provides for “Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N296408 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H317126, set forth as Attachment 2 to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H317126
OT:RR:CTF:FTM H317126 MD
CATEGORY: Classification
TARIFF NO.: 2008.99.6100

MR. ANTHONY SCHOLLEN

NATURE'S CLASSICS

26190 124 AVENUE

MAPLE RIDGE, BRITISH COLUMBIA, V2W 1C4, CANADA

RE: Revocation of NY N296408; Tariff Classification of Frozen Soybeans or Edamame

DEAR MR. SCHOLLEN:

On May 16, 2018, U.S. Customs and Border Protection ("CBP") issued New York Ruling ("NY") N296408 to you. The ruling letter pertained to the tariff classification of "Edamame" under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N296408, CBP classified the product at-issue under subheading 0710.22.3700, HTSUSA, which provides for "Vegetables (uncooked or cooked by steaming or boiling in water), frozen: Leguminous vegetables, shelled or unshelled: Beans (*Vigna spp.*, *Phaseolus spp.*): Not reduced in size: Other." The general duty rate was 4.9 cents per kilogram.

We have since reviewed NY N296408 at the request of our National Commodity Specialist Division ("NCSA") and determined it to be in error. For the reasons set forth below, we hereby revoke NY N296408. It is now CBP's position that the product at-issue is classified under subheading 2008.99.6100, HTSUSA, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans." The general rate of duty is 3.8 percent *ad valorem*.

FACTS:

In NY N296408, the frozen edamame was described as follows:

You describe "Edamame" as 100% young soybeans in the pods to be consumed as microwavable snacks. You state that the beans are picked, washed, boiled [sic] for three to four minutes, and flash frozen within hours of being picked. The beans will be packaged in a box containing eight bags each 2.4 kg (5.25 lbs.), net weight. You state in your inquiry that the product is imported into Canada as described and no manufacturing takes place in Canada prior to its importation into the United States. As you state, the country of origin of the "Edamame" is China, therefore, there is no trade program or agreement that applies to this merchandise coming from China.

While previously classified under 0710.22.3700, HTSUSA, CBP now believes that the proper classification for the frozen edamame is under subheading 2008.99.6100, HTSUSA.

ISSUE:

Whether the frozen edamame at-issue is classified under subheading 0710.22.3700, HTSUSA, or subheading 2008.99.6100, HTSUSA.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is determined in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5.

The 2021 HTSUS provisions under review are as follows:

0710	Vegetables (uncooked or cooked by steaming or boiling in water), frozen:
	Leguminous vegetables, shelled or unshelled:
0710.22	Beans (<i>Vigna spp.</i> , <i>Phaseolus spp.</i>):
	Not reduced in size:
0710.22.3700	Other
	* * *
2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Other, including mixtures other than those of subheading 2008.19:
2008.99	Other:
2008.99.6100	Soybeans
	* * *

In addition, the Explanatory Notes (“EN”) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff 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 (Aug. 23, 1989).

The ENs to Heading 0708, providing for “Leguminous vegetables, shelled or unshelled, fresh or chilled,” state, in relevant part:

0708 – Leguminous vegetables, shelled or unshelled, fresh or chilled.

0708.10 – Peas (*Pisum sativum*)

0708.20 – Beans (*Vigna spp.*, *Phaseolus spp.*)

0708.90 – Other leguminous vegetables

This heading **excludes:**

(a) Soya beans (**heading** 12.01)

* * *

The ENs for Heading 0710 state, in relevant part:

07.10 – Vegetables (uncooked or cooked by steaming or boiling in water), frozen

- Leguminous vegetables, shelled or unshelled:

0710.21 - - Peas (*Pisum sativum*)

0710.22 - - Beans (*Vigna spp.*, *Phaseolus spp.*)

0710.29 - - Other

* * *

The ENs for Heading 1201 provides for:

12.01 – Soya beans, whether or not broken

[...]

The soya beans of this heading may be heat-treated for the purpose of de-bittering.

* * *

The ENs for Heading 2008 state, in pertinent part:

This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than any of the processes specified in other Chapters or in the preceding headings of this Chapter.

* * *

As noted, the frozen edamame at-issue are understood to consist of “100% young soybeans in the pods” meant to be consumed at microwaveable snacks. Despite the fact that soybeans are provided for *eo nomine* within the HTSUS, the product at-issue was classified elsewhere within NY N296408. We consider this original classification, within subheading 0710.22.3700, HTSUSA, to be incorrect. The ENs to Heading 0710 provide a list of vegetables which are properly classified therein when frozen. In these ENs is a list of “leguminous vegetables,” either shelled or unshelled. Leguminous vegetables, when not frozen, are properly provided for within heading 0708, HTSUS. The ENs for heading 0708 are explicit, providing a list of vegetables and exclusions for classification therein. Pursuant to the ENs, those leguminous vegetables within heading 0710, HTSUS, are the frozen varieties of those which would normally be classified within heading 0708, HTSUS. While the list of inclusions within the heading 0708 ENs is important, there is a notable exclusion. The ENs to heading 0708 explicitly exclude “[s]oya beans,” which are instead provided for *eo nomine* within heading 1201, HTSUS. As a result of this, we find the initial classification set forth within NY N296408 to be improper, as the product consisting of “100% young soybeans” would be excluded from such classification.

Instead, the frozen edamame soybeans are properly classified under subheading 2008.99.6100, HTSUSA, which provides for “Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans.” The frozen edamame is not classified under heading 1201, HTSUS, because they are prepared beyond what is allowed

within that specific heading. The ENs for heading 1201 note that soybeans classified therein may be “heat-treated” for the express purpose of de-bittering. Here, the soybeans have been frozen. As a result of this further preparation, we find that the frozen soybeans are properly classified within Chapter 20, which provides for “preparations of vegetables, fruit, nuts or other parts of plants.” Specifically, we classify the frozen edamame within heading 2008, HTSUS, and the *eo nomine* subheading 2008.99.6100, HTSUSA.

A line of CBP rulings involving the classification of frozen soybeans supports this classification. In NY 866417, dated September 19, 1991, the product at-issue was described as “[w]hole soybeans, in the pod, that have been blanched in water, frozen, and packed in plastic pouches containing 16 ounces, net weight.” The frozen soybeans were classified under subheading 2008.99.6100, HTSUSA. In NY D87519, dated March 5, 1999, the product at-issue was described as “[s]oybeans that have been removed from their pods, blanched in water or by ‘moderate heat,’ flash frozen, and put up in bulk containers. These frozen soybeans were also classified under subheading 2008.99.6100, HTSUSA. In NY N251647, dated April 7, 2014, the product at-issue was described as “[r]aw soybeans [which] are shelled and blanched in hot water [at] 95 degrees centigrade for ten seconds before entering the IQF [(“Individual Quick Freezing”)] freezing tunnel.” Again, the frozen soybeans were classified under subheading 2008.99.6100, HTSUSA.

As noted within NY N296408, the frozen edamame at-issue here are “picked, washed, boiled [sic] for three to four minutes, and flash frozen within hours of being picked.” This production process mirrors those enumerated in the rulings above, which consists of some form of blanching of the soybeans before being frozen and subsequently packed. The only processing difference between the rulings discussed and the frozen edamame here is that within NY D87519 and NY N251647, the soybeans are shelled before being blanched; however, we consider this minor processing difference to be immaterial. The notes to Chapter 12, HTSUS, provide that “[t]he seeds and fruits covered by this heading may be whole, broken, crushed, husked, or shelled,” enumerating that the shelling of soybeans does not explicitly remove it from classification therein. In contrast, neither the Chapter 12, HTSUS, notes nor the heading 1201 ENs provide for freezing soybeans as a contemplated preparation. As such, the freezing of the edamame goes beyond the scope of classification within heading 1201, HTSUS, and the products at issue are classified under subheading 2008.99.6100, HTSUSA.

HOLDING:

Under the authority of GRIs 1 and 6, the frozen edamame is classified under subheading 2008.99.6100, HTSUSA, which provides for “Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures other than those of subheading 2008.19: Other: Soybeans.” The general rate of duty is 3.8 percent *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N296408, dated May 16, 2018, is hereby REVOKED.

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

Sincerely,
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

N296408

May 16, 2018

CLA-2-07:OT:RR:NC:N2:228

CATEGORY: Classification

TARIFF NO.: 0710.22.3700

MR. ANTHONY SCHOLLEN
NATURES CLASSICS
26190 124 AVE
MAPLE RIDGE V2W1C4
CANADA

RE: The tariff classification of frozen vegetables from Canada

DEAR MR. SCHOLLEN:

In your letter dated April 16, 2018, you requested the tariff classification, and applicable trade program or agreement pertaining to the frozen vegetables, called “Edamame,” from Canada.

An ingredients breakdown, manufacturing flowchart, description of the manufacturing process, product label, and sample were provided with your inquiry. The sample was examined and discarded. You describe “Edamame” as 100% young soybeans in the pods to be consumed as microwaveable snacks. You state that the beans are picked, washed, boiled for three to four minutes, and flash frozen within hours of being picked. The beans will be packaged in a box containing eight bags each 2.4 kg (5.25 lbs.), net weight. You state in your inquiry that the product is imported into Canada as described and no manufacturing takes place in Canada prior to its importation into the United States. As you state, the country of origin of the “Edamame” is China, therefore, there is no trade program or agreement that applies to this merchandise coming from Canada.

The applicable subheading for the frozen Edamame beans will be 0710.22.3700, Harmonized Tariff Schedule of the United States (HTSUS), which provides for vegetables (uncooked or cooked by steaming or boiling in water), frozen . . . leguminous vegetables, shelled or unshelled . . . beans (*Vigna* spp., *Phaseolus* spp.) . . . not reduced in size . . . other. The general rate of duty is 4.9 cents/kg.

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 World Wide Web at <https://hts.usitc.gov/current>.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Bruce N. Hadley, Jr. at bruce.hadleyjr@cbp.dhs.gov.

Sincerely,

(for)

STEVEN A. MACK

Director

National Commodity Specialist Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WI-FI INFRARED MOTION SENSORS

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of Wi-Fi infrared motion sensors.

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 one ruling letter concerning the tariff classification of Wi-Fi infrared motion sensors under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 24, on June 23, 2021. 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 October 10, 2021.

FOR FURTHER INFORMATION CONTACT: Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, via email at suzanne.kingsbury@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. 55, No. 24, on June 23, 2021, proposing to modify one ruling letter pertaining to the tariff classification of Wi-Fi infrared motion sensors. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N255515, dated August 21, 2014, CBP classified Wi-Fi infrared motion sensors in heading 8543, HTSUS, specifically in subheading 8543.70.40, HTSUS (now designated subheading 8543.70.45 under the 2021 HTSUS), which provides for "[E]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; Flight data recorders; Defrosters and demisters with electric resistors for aircraft." CBP has reviewed NY N255515 and has determined the ruling letter to be in error. It is now CBP's position that Wi-Fi infrared motion sensors are properly classified, in heading 8531, HTSUS, specifically in subheading 8531.80.90, HTSUS, which provides for "[E]lectric sound or visual signaling apparatus...: Other apparatus: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N255515 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H276956, 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*.

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H276956

July 26, 2021

CLA-2 OT:RR:CTF:EMAIN H276956 SKK

CATEGORY: Classification

TARIFF NO.: 8531.80.90

Ms. AMY HESS

WORLD EXCHANGE INC.

11205 S. LA CIENEGA BLVD.

LOS ANGELES, CA 90045

RE: Modification of NY N255515; Classification of D-Link WiFi motion sensors.

DEAR Ms. HESS:

This is in response to your correspondence of February 24, 2016, in which you request reconsideration of New York Ruling Letter (NY) N255515, issued to your client, D-Link Systems, Inc., on August 21, 2014. In NY N255515, U.S. Customs and Border Protection (CBP) classified WiFi-enabled D-Link smart plugs and motion sensors. This reconsideration is limited to the WiFi-enabled D-Link motion sensors (model number DCH-S150) at issue in NY N255515, which CBP classified under heading 8543, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 8543.70.40, HTSUS (2014) as “[E]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; Flight data recorders; Defrosters and demisters with electric resistors for aircraft.”* No sample was submitted with your reconsideration request.

We have reviewed NY N255515 and have determined that the ruling is incorrect as regards the classification of the subject WiFi-enabled D-Link motion sensor. For the reasons set forth below, we are modifying that portion of NY N255515 pertaining to motion sensors.

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, a notice proposing to modify NY N255515 was published on June 23, 2021, in Volume 55, Number 24 of the Customs Bulletin. No comments were received in response to the proposed action.

FACTS:

The motion sensor at issue in NY N255515 is described as the D-Link WiFi PIR Motion Sensor (model number DCH-S150). The subject sensor is designed as a two-prong plug-in module. It features a Wireless Protected Setup (WPS) button (to connect to the home network) and operates with D-Link Smart Plug model numbers DSP-W110 and DSP-W215. The sensor uses Passive Infrared Sensor (PIR) technology to detect motion within a range of 26 feet by sensing a change in infrared heat. When motion is detected, the unit sends a signal to the user’s phone or device. The sensor does not have an internal alarm. It contains a built-in LED light that indicates when the unit is connected to a network and rapidly flashes to signal when motion is detected. The subject sensor has two printed circuit boards (PCB): a motion detector board with the motion sensor and LED light and a QCA9531 chip for transmitting and receiving wireless signals when motion is detected. When

* This provision is now designated subheading 8543.70.45 under the 2021 HTSUS.

the motion detector board detects motion, it activates the LED light on the motion detector board and transmits a digital message to the QCA9531 chip, which relays the message as a wireless data packet to the user's mobile device. The article is encased in a plastic housing measuring approximately 2 inches in length by 2 inches in width by 1-½ inches in depth. It is rated for up to 120 Volts (V) and 0.1 Amps (A).

ISSUE:

Whether the instant Wi-Fi enabled motion sensor is properly classified as an electric sound or visual signaling apparatus of heading 8531, HTSUS.

LAW AND ANALYSIS:

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

The HTSUS provisions under consideration are as follows:

8531 Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof.

* * *

8543 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 85.31 states:

With the **exception** of signalling apparatus used on cycles or motor vehicles (**heading 85.12**) and that for traffic control on roads, railways, etc. (**heading 85.30**), this heading covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms).

Static signs, even if lit electrically (e.g., lamps, lanterns, illuminated panels, etc.) are not regarded as signalling apparatus. They are therefore not covered by this heading but are classified in their own appropriate headings (**headings 83.10, 94.05**, etc.).

As heading 8543, HTSUS, excludes electrical apparatus that are specified or included elsewhere in chapter 85, the threshold determination is whether the subject sensors are covered by heading 8531, HTSUS.

The subject sensors are electrical apparatus that feature an integrated LED light that flashes rapidly to visually signal when motion is detected. As such, the subject sensors are *prima facie* classified in heading 8531, HTSUS, as electric visual signaling apparatus. Subheading 8531.10, HTSUS, provides

for “burglar or fire alarms and similar apparatus.” The subject sensors are not classified in this provision as they do not perform the function of an alarm apparatus. The subject sensors identify motion via a change in temperature and do not possess an internal alarm. When motion is detected, the LED on the sensor’s motion detection board blinks and a digital message communicating the change in status is transmitted to the sensor’s second PCB (QCA9531 chip), which relays the message as a wireless transmission to the user’s mobile device. The subject sensor’s ability to wirelessly transmit signals to another device may enable it to activate a burglar or fire alarm or similar apparatus, but this capability does not constitute the function of an alarm apparatus of subheading 8531.10, HTSUS, on its own. The subject motion sensors are therefore properly classified in subheading 8531.80.90, HTSUS, which provides for “[E]lectric sound or visual signaling apparatus...: Other apparatus: Other.” See NY N264715, dated June 5, 2015 and NY N271651, dated January 12, 2016 (classifying door/window and motion sensors that trigger LED illumination under heading 8531, HTSUS).

On the basis of the foregoing, NY N255515 is modified as regards the classification of the D-Link Wi-Fi PIR Motion Sensor (model number DCH-S150).

HOLDING:

By application of GRIs 1 and 6, the subject D-Link Wi-Fi PIR Motion Sensor (model number DCH-S150) at issue in NY N255515 is classified under heading 8531, HTSUS, specifically under subheading 8531.80.90, HTSUS, which provides for “[E]lectric sound or visual signaling apparatus...: Other apparatus: Other.” The applicable rate of duty is free. 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.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N255515, dated August 21, 2014, is 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,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

DATES AND DRAFT AGENDA OF THE SIXTY-EIGHTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 68th session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

DATE: July 22, 2021

FOR FURTHER INFORMATION CONTACT: Joan A. Jackson, joan.a.jackson@cbp.dhs.gov, Paralegal Specialist, Office of Trade, Regulations and Ruling, U.S. Customs and Border Protection (202–325–0010), or Daniel Shepherdson, daniel.shepherdson@usitc.gov, Senior Attorney Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2598).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”). The Harmonized Commodity Description and Coding System (“Harmonized System”), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee (“HSC”). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC’s responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in

Brussels, Belgium. The next session of the HSC will be the 68th, commencing and it will be held from Monday September 6, to Tuesday September 28, 2021.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission (“ITC”), jointly represent the U.S. The Customs and Border Protection representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either U.S. Customs and Border Protection or the ITC. Comments on agenda items may be directed to the above-listed individuals.

GREGORY CONNOR

Chief,

*Electronics, Machinery, Automotive, and
International Nomenclature Branch*

Attachment



WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITTEE

-
68th Session

NC2805Ea

Brussels, 8 July 2021.

**DRAFT AGENDA OF THE 68TH SESSION OF THE
HARMONIZED SYSTEM COMMITTEE**

From : Monday 6 September 2021

- I. ADOPTION OF THE AGENDA**
1. Draft Agenda NC2805Ea
 2. Draft Timetable NC2806Ea
- II. REPORT BY THE SECRETARIAT**
1. Position regarding Contracting Parties to the HS Convention, HS Recommendations and related matters; progress report on the implementation of HS 2017 NC2807Ea
 2. Report on the last meetings of the Policy Commission (84th Session) and the Council (138th session) NC2808
 3. Approval of decisions taken by the Harmonized System Committee at its 67th Session NG0267Ea
NC2804Ea
 4. Capacity building activities of the Nomenclature and Classification Sub-Directorate NC2809
 5. Co-operation with other international organizations NC2810
 6. New information provided on the WCO Web site NC2811
 7. Progress report on the use of working languages for HS-related matters NC2812Ea
 8. Questionnaire on national practices regarding advance rulings NC2813
 9. Report on use of Secretariat Classification Advice NC2814
 10. Other
- III. GENERAL QUESTIONS**
1. Consultation on the possible strategic review of the HS NC2815

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| 2. | Possible amendment of the Rules of Procedure of the Harmonized System Committee to clarify the voting procedures (proposal by the Secretariat) | NC2816Ea
NC2816EAB1a |
| 3. | Amendment to the Compendium of Classification Opinions consequential to the Article 16 Council Recommendation of 28 June 2019 | NC2817 |

IV. REPORT OF THE PRESESSIONAL WORKING PARTY

Possible amendments to the Compendium of Classification Opinions and the Explanatory Notes consequential to the decisions taken by the Committee at its 64th Session	NC2714Ea NC2714EAB1a HSC/65 NC2818
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Possible amendments to the Compendium of Classification Opinions and the Explanatory Notes consequential to the decisions taken by the Committee at its 67th Session	NC2819
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| 1. | Amendment to the Compendium of Classification Opinions to reflect the decision to classify four products : product 1, “ [REDACTED] corn cobs originating from sweet corn” in heading 07.10 (subheading 0710.40); product 2, “ [REDACTED] corn cobs originating from cereal maize”, in heading 07.10 (subheading 0710.80); product 3, “ [REDACTED] corn cobs originating from sweet corn prepared or preserved otherwise than by vinegar or acetic acid”, in heading 20.05 (subheading 2005.80) and product 4, “ [REDACTED] corn cobs originating from cereal maize prepared or preserved otherwise than by vinegar or acetic acid”, in heading 20.05 (subheading 2005.99). | PRESENTATION_
Annex_A |
| 2. | Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “ [REDACTED] ” in heading 18.06 (subheading 1806.32) | PRESENTATION_
Annex_B |
| 3. | Amendment to the Compendium of Classification Opinions to reflect the decision to classify certain food preparations (Products 2, 3 and 4) : Product 2 “Herbal Aloe Concentrate” in heading 21.06 (subheading 2106.90); Product 3 “Herbal Tea Concentrate” in heading 21.01 (subheading 2101.20) and Product 4 “ [REDACTED] Cookies & Cream” in heading 18.06 (subheading 1806.90). | PRESENTATION_
Annex_C |
| 4. | Amendment to the Compendium of Classification Opinions to reflect the decision to classify three vitamin products (“ [REDACTED]”, “ [REDACTED]” and “ [REDACTED]”) in heading 21.06 (subheading 2106.90) | PRESENTATION_
Annex_D |

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| <p>5. Amendment to the Compendium of Classification Opinions to reflect the decision to classify three dietary sip feeds (Products 1 to 3): Product 1 “[REDACTED]”; Product 2 “[REDACTED]” and Product 3 “[REDACTED]”, in heading 22.02 (subheading 2202.99)</p> | <p>PRESENTATION_Annex_E</p> |
| <p>6. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “Partially defatted coconut powder” in heading 23.06 (subheading 2306.50)</p> | <p>PRESENTATION_Annexe_F</p> |
| <p>7. Amendment to the Compendium of Classification Opinions to reflect the decision to classify two kinds of tobacco stems (“Cut rolled expanded stem tobacco (CRES)” and “Expanded tobacco stems (ETS)”) in heading 24.03 (subheading 2403.99)</p> | <p>PRESENTATION_Annex_G</p> |
| <p>8. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a lavender essential oil, put up for retail sale in heading 33.01 (subheading 3301.29)</p> | <p>PRESENTATION_Annex_H</p> |
| <p>9. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “[REDACTED]” in heading 34.04 (subheading 3404.90)</p> | <p>PRESENTATION_Annex_IJ</p> |
| <p>10. Amendment to the Compendium of Classification Opinions to reflect the decision to classify in HS 2022, a 1.75mm ABS Refill Filament manufactured for an additive manufacturing machine (3D printer) in heading 39.16 (subheading 3916.90)</p> | <p>PRESENTATION_Annex_K</p> |
| <p>11. Amendment to the Compendium of Classification Opinions to reflect the decision to classify of certain on-street garbage containers in heading 39.26 (subheading 3926.90)</p> | <p>PRESENTATION_Annex_L</p> |
| <p>12. Amendment to the Compendium of Classification Opinions to reflect the decision to classify of new pneumatic tyres (Products A and B), of rubber, intended for vehicles used for the transportation of goods in construction, mining or industry in heading 40.11 (subheading 4011.20)</p> | <p>PRESENTATION_Annex_M</p> |
| <p>13. Amendment to the Compendium of Classification Opinions to reflect the decision to classify two hot-rolled steel plates in heading 72.08 (subheading 7208.52 for Product A and subheading 7208.51 for Product B)</p> | <p>PRESENTATION_Annex_N</p> |
| <p>14. Amendment to the Compendium of Classification Opinions to reflect the decision to classify of a steam boiling generator “[REDACTED]” model [REDACTED] (cabinet size can provide steam for 740 cubic feet (20.9 m³) steam room) in heading 84.02 (subheading 8402.19)</p> | <p>PRESENTATION_Annex_O</p> |

15. Amendment to the Compendium of Classification Opinions to reflect the decision to classify an apparatus called “steriliser formaldehyde [REDACTED]” in heading 84.19 (subheading 8419.20) PRESENTATION_ nnex_P
16. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a “[REDACTED]” tap serving instant boiling and chilled filtered water in heading 84.21 (subheading 8421.21) PRESENTATION_ Annex_Q
17. Amendment to the Compendium of Classification Opinions to reflect the decision to classify of a “Self-Propelled Articulated Boom Lift” in heading 84.27 (subheading 8427.10) PRESENTATION_ Annex_R
18. Amendment to the Compendium of Classification Opinions to reflect the decision to classify of a floor polisher called “[REDACTED], 1 HP, [REDACTED]” in heading 84.79 (subheading 8479.89) PRESENTATION_ Annex_S
19. Amendment to the Compendium of Classification Opinions to reflect the decision to classify Solid Oxide Fuel Cells (SOFC) called “[REDACTED]” in heading 85.01 (subheading 8501.62) PRESENTATION_ Annex_T
20. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a diesel power generating set with dual power rating in heading 85.02 (subheading 8502.13) PRESENTATION_ Annex_U
21. Amendment to the Compendium of Classification Opinions to reflect the decision to classify an electronic speed controller called “[REDACTED]” PRESENTATION_ Annex_V
22. Amendment to the Compendium of Classification Opinions to reflect the decision to classify an apparatus called “[REDACTED] RFID/Barcode Reader” in heading 85.17 (subheading 8517.12) PRESENTATION_ Annex_W
23. Amendment to the Compendium of Classification Opinions to reflect the decision to classify mild hybrid vehicles in heading 87.03 (subheading 8703.22) PRESENTATION_ Annex_X
24. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a motorized flying inflatable boat, model “[REDACTED]” in heading 88.02 (subheading 8802.20) PRESENTATION_ Annex_Y
25. Amendment to the Compendium of Classification Opinions to reflect the decision to classify “dissolved gas analysis (DGA) monitors” in heading 90.27 (subheading 9027.20) PRESENTATION_ Annex_Z
26. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a “single phase electricity smart meter box” in heading 90.28 (subheading 9028.90) PRESENTATION_ Annex_AA

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| 27. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called “Tracing Light Box in heading 94.05 (subheading 9405.40) | PRESENTATION_Annex_AB |
| 28. Possible amendment of the Explanatory Note to heading 95.05 regarding the new second exclusion paragraph of Part (A) | PRESENTATION_Annex_AC |

V. REQUESTS FOR RE-EXAMINATION (RESERVATIONS)

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| 1. Re-examination of the classification of two products called “RF Generators and RF Matching Networks” (Request by Korea) | NC2718Ea
NC2745Eb
NC2747Ea
HSC/65 |
| 2. Re-examination of the amendments to the Explanatory Notes (HS 2022) to heading 15.09 in respect of “other virgin olive oils” (Request by Morocco) | NC2820 |
| 3. Re-examination of the classification of a device called “GPS running watch with wristbased heart rate monitor” (Requests by Switzerland and Russia Federation) | NC2821 |
| 4. Re-examination of the classification of certain food preparations – Product 1 called “Protein Powder” (Request by the Russia Federation) | NC2822 |
| 5. Re-examination of the classification of a “cutter/ripper” (Request by the Russian Federation) | NC2823 |
| 6. Re-examination of the classification of dried fish subsequently treated with water (rehydrated dried fish) (Request by Japan) | NC2824 |
| 7. Re-examination of the classification of electronic speed controllers – product called “ ” (Request by China) | NC2825 |
| 8. Re-examination of the classification of a TFT-LCD module (Request by the United States). | NC2826 |

VI. FURTHER STUDIES

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| 1. Possible amendment of the Explanatory Note to heading 27.11 to clarify the classification of liquefied petroleum gas (LPG) (Proposal by the Secretariat) | NC2827 |
| 2. Possible amendment of the Explanatory Note to heading 27.10 (Proposal by Japan) | NC2828 |
| 3. Classification of certain food preparations in liquid form (Request by Tunisia) | NC2829 |
| 4. Classification of a product called “Soy bean flakes” (Request by Madagascar) | NC2830 |
| 5. Possible amendment of the Explanatory Notes to headings 73.18, 81.08 and 90.21 (Proposal by the EU) | NC2831 |
| 6. Classification of certain “plastic clothes hangers” (Request by Ukraine) | NC2775Ea
HSC/67 |

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| 7. Classification of a “heat-resistant glass lid” (Request by Ukraine) | NC2777Eb
HSC/67 |
| 8. Classification of a “System for the production of animal feed in pellet form” (Request by Colombia) | NC2778Ea
HSC/67 |
| 9. Classification of certain “ Edible collagen casings for sausages ” (Request by Peru) | NC2779Ea
HSC/67 |
| 10. Classification of a product called “ [REDACTED] ” (Request by Tunisia) | NC2780Ea
HSC/67 |
| 11. Classification of a product called “ [REDACTED] ” (Request by Tunisia) | NC2781Ea
HSC/67 |
| 12. Classification of two products called “Coffee Makers” (Request by Guatemala) | NC2782Ea
HSC/67 |
| 13. Classification of a product called “Quilt bag” (Request by Republic of North Macedonia) | NC2783Ea
HSC/67 |
| 14. Classification of products called “Shampoo& gel 2 in 1” and possible amendment to Note 1 (b) to Chapter 33 (Request by Uzbekistan) | NC2784Ea
HSC/67 |
| 15. Classification of a product called “digital smart pen (smart pen) (Request by the Russian Federation) | NC2785Ea
HSC/67 |
| 16. Classification of certain products of Chapter 24 and possible amendment to the Explanatory Note (HS 2022) to clarify the scope of heading 24.04 (Proposal by the United States) | NC2832 |

VII. NEW QUESTIONS

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| 1. Classification of rooibos tea | NC2833 |
| 2. Classification requests from United Nations | NC2834 |
| 3. Possible Amendment to the Nomenclature to clarify the classification of “pickets, poles and stakes of headings 44.03 and 44.04” and the use of the phrase “whether or not sawn lengthwise” in the text of the two headings. (Proposal by the Secretariat) | NC2835 |
| 4. Classification of certain varieties of fruits spreads (Request by the Secretariat) | NC2836 |
| 5. Classification of products called “ [REDACTED] ” (Request by the Secretariat) | NC2837 |
| 6. Classification of certain projectors (Requests by Ukraine and Japan) | NC2838 |
| 7. Possible amendment of the Explanatory Notes to heading 15.21 concerning beeswax (Proposal by the EU) | NC2839 |
| 8. Classification of derivatives of isothiazolones (Request by the EU) | NC2840 |
| 9. Possible amendment of the Explanatory Notes to heading 85.18 concerning micro-phones (Proposal by the EU) | NC2841 |
| 10. Classification of [REDACTED] Commercial Utility vehicle (Request by Guyana) | NC2842 |

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| 11. Possible amendment to the Nomenclature to clarify the classification of cellular bamboo panels. (Proposal by the Secretariat) | NC2843 |
| 12. Possible amendment to the Explanatory Note to clarify the classification of sterilisers using an aqueous solution of formaldehyde as a volatile sterilizing agent (Proposal by Secretariat) | NC2844Ea
NC2844EAB1a |

VIII. ADDITIONAL LIST

IX. OTHER BUSINESS

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| 1. List of questions which might be examined at a future session | NC2845 |
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X. DATES OF NEXT SESSIONS

U.S. Court of International Trade

Slip Op. 21–91

SOLARWORLD AMERICAS, INC. et al., Plaintiff and Consolidated Plaintiffs, and CANADIAN SOLAR INC. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CHANGZHOU TRINA SOLAR ENERGY Co., LTD. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 16–00134

[Remanding the U.S. Department of Commerce’s third remand redetermination in the second administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People’s Republic of China.]

Dated: July 28, 2021

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington DC, for consolidated plaintiffs, Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Trina Solar (U.S.) Inc.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Tupan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd.

Craig A. Lewis, *Jonathan T. Stoel*, and *Lindsay K. Brown*, Hogan Lovells US LLP, of Washington, D.C., for plaintiff-intervenors, Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luyang), Inc.; Canadian Solar (USA), Inc.; Canadian Solar Inc.; BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd.

Tara K. Hogan, Assistant Director, 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*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Brendan S. Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) third remand determination pursuant to the court’s remand order, *see* Order, Sept. 2, 2020, ECF No. 176 (“Remand Order”), issued following the Court of Appeals for the Federal Circuit’s (“Court of Appeals”) decision in *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351 (Fed. Cir. 2020) (“*SolarWorld IV*”). *See* Final Results of Redetermination Pursuant to Court Order, Jan. 14, 2021, ECF No. 187–1 (“*Third Remand Results*”). In *SolarWorld IV*, the Court of Appeals, *inter alia*, vacated this court’s judgment entered pursuant to *SolarWorld Americas, Inc. v. United States*, 42 CIT ___, 355 F. Supp. 3d

1306 (2018) (“*SolarWorld III*”), and remanded Commerce’s decision to use Thai import data published by the Global Trade Atlas (“Thai import data”) to construct a surrogate value for Trina’s¹ nitrogen input in Commerce’s second administrative review of the antidumping duty (“ADD”) order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People’s Republic of China (“China”) covering the period December 1, 2013 through November 30, 2014. *See SolarWorld IV*, 962 F.3d at 1358–59; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From [China]*, 81 Fed. Reg. 39,905 (Dep’t Commerce June 20, 2016) (final results of [ADD] administrative review and final determination of no shipments; 2013–14) (“*Final Results*”) and accompanying Issues and Decision Memo., A-570–979, (June 13, 2016), ECF No. 21–5 (“*Final Decision Memo*”).²

In *SolarWorld Americas, Inc. v. United States*, 41 CIT __, 273 F. Supp. 3d 1254 (2017) (“*SolarWorld I*”), the court sustained Commerce’s use of the average unit value (“AUV”) of nitrogen imports into Thailand as a surrogate value for Trina’s nitrogen input, while remanding on other grounds. *SolarWorld I*, 273 F. Supp. at 1271–73. This court ultimately fully sustained Commerce’s Results of Second Remand Redetermination Pursuant to Court Order, July 31, 2018, ECF No. 144–1 (“*Second Remand Results*”). *SolarWorld III*, 355 F. Supp. 3d at 1310. However, that decision was vacated and remanded pursuant to *SolarWorld IV*. *SolarWorld IV*, 962 F.3d at 1358–59.

In the *Third Remand Results*, Commerce continues to value Trina’s nitrogen input using Thai import data. *Third Remand Results* at 2. Trina and Plaintiff-Intervenors Canadian Solar³ and BYD⁴ object to the *Third Remand Results* on the grounds that the Thai surrogate value is aberrational, Commerce does not adequately justify its use of Thai import data to value Plaintiff’s nitrogen inputs because Commerce’s explanation is speculative, and Commerce does not adequately explain the discrepancies between Thai import data and U.S. export data. *See* Consol. Plt. Trina’s Comment on the Final Results of Third Redetermination Pursuant to Remand, Feb. 24,

¹ Consolidated Plaintiffs Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd. are referred to, collectively, as “Trina.”

² The Final Decision Memo is also referred to as the “final determination.”

³ Plaintiff-Intervenors Canadian Solar Inc.; Canadian Solar (USA) Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; and Canadian Solar International Limited are referred to, collectively, as “Canadian Solar.”

⁴ Plaintiff-Intervenors BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd. are referred to collectively as “BYD,” and collectively, Trina, Canadian Solar, and BYD are referred to as “Plaintiff.”

2021, ECF No. 190 (“Trina Br.”); Comments of [Canadian Solar] and BYD in Opp’n to the Results of Redetermination Pursuant to C. Remand, Feb. 24, 2021, ECF No. 192 (“CS-BYD Br.”). Defendant United States argues that Commerce complies with the court’s remand order by sufficiently explaining why the Thai import data is reliable and not aberrational. *See Defendant’s Response to Comments on the Remand Determination*, March 26, 2021, ECF No. 193 (“Def.’s Br.”). For the following reasons, the court remands Commerce’s decision to continue using Thai import data to value Trina’s nitrogen input.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its and the Court of Appeals’ previous opinions ordering remand to Commerce, and now recounts only those facts relevant to the court’s review of the *Third Remand Results*. *See SolarWorld IV*, 962 F.3d at 1355–56; *SolarWorld I*, 273 F. Supp. 3d at 1259–60; *see also SolarWorld Americas, Inc. v. United States*, 42 CIT ___, 320 F. Supp. 3d 1341, 1344–48 (2018) (“*SolarWorld II*”); *SolarWorld III*, 355 F. Supp. 3d at 1309–14.

Trina challenged the *Final Results* on the grounds that, *inter alia*, Commerce’s decision to use Thai import data to value Trina’s nitrogen input was unsupported by substantial evidence because the data was aberrational and unreliable. *See SolarWorld I*, 273 F. Supp. 3d at 1271–73. The court disagreed and sustained Commerce’s use of the Thai import data as a surrogate value for Trina’s nitrogen input but remanded the *Final Results* on other grounds. *Id.* at 1278–79.

After an additional remand on unrelated grounds, *see SolarWorld II*, 320 F. Supp. 3d at 1358, Commerce issued its *Second Remand Results*, which the court then sustained and entered judgment accordingly. *See SolarWorld III*, 355 F. Supp. 3d at 1310; Judgement Order, Dec. 13, 2018, ECF No. 161. Trina and Plaintiff SolarWorld Americas, Inc. (“SolarWorld”) both appealed the court’s judgment entered pursuant to *SolarWorld III*. *See Notice of Appeal*, Feb. 11, 2019, ECF No. 163; *Notice of Appeal*, Feb. 11, 2019, ECF No. 164.

On June 24, 2020, the Court of Appeals held, *inter alia*, that Commerce failed to adequately justify its use of Thai import data to value Trina’s nitrogen input in Commerce’s *Final Results* and vacated in part this court’s judgment sustaining Commerce’s final determination. *See SolarWorld IV*, 962 F.3d at 1356–59. The Court of Appeals instructed Commerce to “either adequately explain why the Thai [Global Trade Atlas] data is not aberrational” or “adopt an alternative surrogate value for [Trina’s] nitrogen input.” *Id.* at 1358–59. Pursu-

ant to the Court of Appeals' decision in *SolarWorld IV* and the Court of Appeals' mandate pursuant to that order (*see* CAFC Mandate in Appeal, Aug. 17, 2020, ECF No. 175), the court remanded the case back to Commerce. *See* Remand Order.

On remand, Commerce continues to use Thai import data to value Trina's nitrogen input. *Third Remand Results* at 2. Defendant argues that Commerce complied with the Court of Appeals' instructions and provides a sufficient explanation of its choice of Thai data and asks the court to sustain the *Third Remand Results*. *See* Def.'s Br. at 2. Trina, Canadian Solar, and BYD, on the other hand, assert that Commerce's choice of Thai data is unreasonable in this case because the surrogate value is aberrational and Commerce's explanations for the difference between the AUV of imports into Thailand and the AUV of over 99% of the imports Commerce reviewed are speculative and unsupported by record evidence. *See* Trina's Br. at 2–3; CS-BYD Br. at 1–2.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tarriff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274 (2008)).

DISCUSSION

Defendant argues that Commerce's *Third Remand Results* comply with the court's order in *SolarWorld IV* and sufficiently explain Commerce's choice of using Thailand's AUV data as the surrogate value for Trina's nitrogen input. *See* Def.'s Br. at 8–24. Plaintiff asks the court to reject Commerce's use of Thai data to calculate the surrogate value for Trina's nitrogen input as unreasonable and unsupported by substantial evidence because Plaintiff alleges that the Thai data is aberrational and Commerce has offered only speculation in response to the court's instruction to provide further explanation. *See* Trina Br. at 3–19; CS-BYD Br. at 8–19.

When subject merchandise is exported from a nonmarket economy country, Commerce calculates normal value based on factors of production (“FOPs”). 19 U.S.C. § 1677b(c)(1). Commerce uses “the best available information” to value the FOPs, *id.*, and has discretion to determine what constitutes the best available information. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce generally selects surrogate values that are publicly available, product specific, reflect a broad market average, and are contemporaneous with the POR. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), available at <https://enforcement.trade.gov/policy/bull04-1.html> (last visited July 22, 2021) (“Policy Bulletin 04.1”). Commerce’s practice is to avoid using aberrational values as surrogate values. *See generally Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep’t Commerce May 19, 1997). Commerce further defines “aberrational” to mean an extreme outlier, distorted or misrepresentative, or somehow incorrect. *Tri Union Frozen Prods. v. United States*, 41 CIT __, __, 227 F. Supp. 3d 1387, 1394–95 (2017).

In *SolarWorld IV*, the Court of Appeals addressed Commerce’s use of a “bookend methodology” where Commerce accepted data as reliable and not aberrational because it fell within the range of average import prices of the potential surrogate countries. 962 F.3d at 1357. The Court of Appeals rejected Commerce’s bookend methodology in those cases where specific evidence detracts from its use. *Id.* at 1357–58. Specifically, the Court of Appeals noted that over 99% of the imports into potential surrogate countries were for \$0.13 or less/kg, while Thailand’s imports, which made up less than 1% of the imports reviewed, averaged over \$11.00/kg. *Id.* at 1357–58. The Court of Appeals further found that Commerce had not sufficiently explained the discrepancy between the Thai data and the ITC data. *Id.* at 1358–59. Thus, on remand Commerce was required to provide an additional explanation for its choice of Thai AUV data for the surrogate value for Plaintiff’s nitrogen input beyond its prior explanations rejected by the Court of Appeals.

Commerce’s additional explanations in the *Third Remand Results* for its continued reliance on Thailand for the surrogate value of Trina’s nitrogen input are unsupported by substantial evidence and unreasonable in light of the Court of Appeals’ decision in *SolarWorld IV*. First, Commerce states that not only is the Thai AUV within the range of potential surrogate countries, but also that the Thai AUV is within the ranges of import prices in Bulgaria and Romania. *See*

Third Remand Results at 6. However, this reasoning suffers from the same defect as the Court of Appeals found in Commerce’s use of the “bookend” methodology. Although Commerce looks at the range of individual prices for imports into certain potential surrogate countries rather than only the range of average prices paid, it once again fails to account for the discrepancy in the volume of imports at the low end of the spectrum versus the high end. Just as Bulgaria and Romania account for over 99% of the imports into potential surrogate countries and Thailand, Ecuador, and Ukraine account for less than 1%, so too do the low-priced imports into Bulgaria and Romania account for over 99% of the imports into those individual countries while the high-priced imports account for less than 1%. See Petitioner’s Letter, “Submission of Publicly Available Factual Information to Rebut, Clarify or Correct,” Oct. 29, 2015, Ex. 5B, Ex. 3, PDs 497–99, bar codes 3411020–01–03 (“Petitioner’s SV Rebuttal Letter”). The Court of Appeals expressly found Commerce’s failure to address this discrepancy to be unreasonable, yet on remand Commerce uses the same bookend methodology to justify its determination. Commerce’s explanation that the Thai AUV is within the ranges of the individual countries’ imports is insufficient in light of *SolarWorld IV*. The court cannot sustain Commerce’s determination as reasonable on this record. The Court of Appeals made clear that it is not reasonable to select a price that is consistent with a fraction of a percent of imports and thousands of percent higher than 99% of imports solely because at least one importer in similarly situated countries, under unknown circumstances, paid a higher price. *SolarWorld IV*, 962 F.3d 1357–58; see also *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (stating that the court’s duty is to “evaluate . . . whether a reasonable mind could conclude that Commerce chose the best available information.”).⁵

Next, Commerce attempts to differentiate the import data from Romania and Bulgaria from that of Thailand and argues that the Thai import data is actually more reliable. *Third Remand Results* at 7–8, 21–22. In support of this theory, Commerce notes that approximately 99% of the imports into Bulgaria and Romania come from

⁵ Defendant argues that requiring Commerce to implement a new practice to consider relative quantities of imports when determining whether an AUV is aberrational would impose an unbearable administrative burden on Commerce and lead to endless litigation and “cherry picking” of data. See Def.’s Br. at 14; *Third Remand Results* at 13. However, the Court of Appeals found that it is unreasonable to employ a bookend methodology and ignore a vast discrepancy in import quantity without explaining why that discrepancy coupled with an enormous difference in AUV does not render a primary surrogate country’s data aberrational. *SolarWorld IV*, 962 F.3d at 1357–58. Therefore, Commerce was required to provide an additional explanation in this case. That Commerce found the imports into Thailand constitute a “commercial quantity” does not sufficiently explain why the AUV is not aberrational. See *Third Remand Results* at 27.

neighboring countries, and concludes that there must be unique conditions that permit neighboring countries to import nitrogen at unusually low prices. *Id.* at 21. Specifically, Commerce states, “Hence, the overall AUV of imports of nitrogen into these countries may be more reflective of prices between certain suppliers (the suppliers in one or two exporting countries) and certain customers (the customers of those suppliers) and may not reflect the prices experienced by other customers in those markets.” *Id.* at 7–8. Commerce further states that those lower prices are “[u]ndoubtedly due to lower transportation costs.” *Id.* at 21.

Commerce does not cite any record evidence that would permit it to make an inference that importers in Bulgaria and Romania receive special deals from suppliers in neighboring countries that are somehow unrepresentative of the nitrogen import market as a whole. See *id.* at 7–8, 21–22. Although Commerce cites to the record in support of its explanation, the document to which Commerce cites provides the volume and pricing of imports into the potential surrogate countries sorted by country of export, and does not contain any information about suppliers, consumers, or the contractual arrangements between them. See *id.* at 7; Petitioner’s SV Rebuttal Letter, Ex. 5B, PDs 497–99. Commerce’s conclusion that the lower prices of imports into Bulgaria and Romania from neighboring countries are due to special prices between buyers and sellers in those countries that are not reflective of the overall market is speculative, as is Commerce’s explanation that the lower prices are “undoubtedly due to lower transportation costs.”

Although it may be reasonable to infer transportation over shorter distances may cost less, there is no record evidence to support any conclusion that lower transportation costs account for the entirety of the lower cost or even that lower transportation costs account for a significant difference in the price of nitrogen. In fact, the nitrogen imported into Thailand from the neighboring country of Malaysia does not support Commerce’s explanation. Petitioner’s SV Rebuttal Letter, Ex. 5B, PDs 497–99. Imports of nitrogen into Thailand from Malaysia were twice as expensive as those from Italy, for example. *Id.* The prices of imports into Thailand vary substantially and the differences cannot be explained by transportation costs based on distance. *Id.* Thus, Commerce’s explanation that the vast majority of imports into Bulgaria and Romania are not reliable approximations of the market for nitrogen because those imports enjoy special pricing and lower transportation costs from neighboring countries is not supported by substantial evidence.

Commerce also suggests that the discrepancy between the price of the nitrogen imported into Thailand and the price of the nitrogen imported into Bulgaria and Romania can be explained by the fact that the nitrogen imported into Thailand was of unique “purity” necessary to construct solar cells. *Third Remand Results* at 23, 29. Commerce reasons that because there is evidence of Thai businesses engaged in the manufacture of solar cells (and no such evidence for Bulgaria or Romania), the price of nitrogen imports into Thailand is a more reliable indicator of the market price applicable to Canadian Solar. *Id.* at 23. However, Commerce itself admits that “There is no record evidence that Thailand imported an anomalous type, form, or purity of nitrogen during the POR.” *Id.* at 20. Commerce does not cite any record evidence in support of the explanation that Thai data is more accurate because the nitrogen imported into Thailand is of the proper “purity” for solar cell production. *See Id.* 23, 29. Commerce’s explanation that Thai data is not aberrational because nitrogen imported into Thailand is of the type and purity for use in the manufacture of solar cells is speculative and not supported by substantial evidence.

Lastly, Commerce’s explanation for the discrepancy between Thai import data and ITC export data is speculative and unsupported by substantial evidence. *See id.* at 13–15, 27–29. The Court of Appeals found that Commerce’s decision to rely on Thai import data instead of U.S. export data compiled by the ITC required further explanation because the two datasets “cannot both be correct.” *SolarWorld IV*, 962 F.3d at 1358. On remand, Commerce asserts that the discrepancy could be due to a number of factors, including that transportation and insurance costs might be included in one set but not the other, time lags for when exports are shipped and imports enter the receiving country, delays at customs warehouses, and differences in reporting data from free trade zones. *Third Remand Results* at 28. However, although these discrepancies may explain minor differences, it is unreasonable to conclude that they reconcile the “admitted inconsistencies” noted by the Court of Appeals. *SolarWorld IV*, 962 F.3d at 1358. Moreover, none of Commerce’s explanations is supported by record evidence, and Commerce does not cite to the record in support of its explanations. *Third Remand Results* at 28.

Commerce fails to satisfactorily explain its continued reliance on Thailand’s AUV for use as the surrogate value for Trina’s nitrogen input. Commerce did not sufficiently explain why the detracting evidence cited by the Court of Appeals does not render Thailand’s AUV aberrational.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's redetermination of its surrogate value selection for valuing Trina's nitrogen input is remanded to the agency for reconsideration or further explanation consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand determination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

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

Dated: July 28, 2021

New York, New York

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

Slip Op. 21-92

CANADIAN SOLAR INTERNATIONAL LIMITED et al., Plaintiffs and Consolidated Plaintiffs, and SHANGHAI BYD Co., LTD. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 17-00173

[Remanding the U.S. Department of Commerce's third remand redetermination in the third administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: July 28, 2021

Craig A. Lewis, Jonathan T. Stoel, and Lindsay K. Brown, Hogan Lovells US LLP, of Washington, D.C., for plaintiffs and consolidated plaintiffs, Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Solar Power (China) Inc.; CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd.; CSI Cells Co., Ltd.; Canadian Solar (USA), Inc.; and plaintiff-intervenor and consolidated plaintiff-intervenor Shanghai BYD Co., Ltd.

Tara K. Hogan, Assistant Director, 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*, Acting Assistant Attorney General, and *Jeanne E. Davidson*,

Director. Of counsel on the brief was *Brendan S. Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) third remand redetermination filed pursuant to the court’s order in *Canadian Solar Int’l Ltd. v. United States*, 44 CIT __, 471 F. Supp. 3d 1379 (Sept. 14, 2020) (“*Canadian Solar IV*”). See Final Results of Redetermination Pursuant to Ct.’s Remand in [*Canadian Solar IV*], Jan. 13, 2021, ECF No. 180–1 (“*Third Remand Results*”). In *Canadian Solar IV*, the court remanded Commerce’s decision to use Thai import data published by the Global Trade Atlas (“Thai import data”) to construct a surrogate value for Canadian Solar’s¹ nitrogen input in Commerce’s third administrative review of the antidumping duty (“ADD”) order covering crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”), from the People’s Republic of China (“PRC”) covering the period December 1, 2014 through November 30, 2015 (“AR3”). See *Canadian Solar IV*, 44 CIT at __, 471 F. Supp. 3d at 1383–84; see also *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the [PRC]*, 82 Fed. Reg. 29,033 (Dep’t Commerce June 27, 2017) (final results of [ADD] administrative review and final determination of no shipments; 2014–15) (“*Final Results*”) and accompanying Issues and Decision Memo., A-570–979 (June 20, 2017), ECF No. 44–5 (“Final Decision Memo”).

On June 24, 2020, the Court of Appeals for the Federal Circuit (“Court of Appeals”) decided *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351 (Fed. Cir. 2020) (“*SolarWorld*”). In *SolarWorld*, the Court of Appeals held that Commerce failed to adequately justify its use of Thai import data to value Trina Solar Energy Co., Ltd.’s (“Trina”) nitrogen input in Commerce’s previous administrative review of the same ADD order and vacated in part this court’s judgment sustaining Commerce’s final determination. See *id.* at 1356–59.

In *Canadian Solar IV*, the court reconsidered its decision in *Canadian Solar Int’l Ltd. v. United States*, 44 CIT __, 448 F. Supp. 3d 1333 (June 15, 2020) (“*Canadian Solar III*”) to sustain Commerce’s Redetermination Pursuant to Ct.’s Second Remand Order in [*Canadian Solar III*], Feb. 11, 2020, ECF No. 147–1 (“*Second Remand Results*”),

¹ Plaintiffs Canadian Solar International Limited; Canadian Solar (USA), Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Cells Co., Ltd.; CSI-GCL Solar Manufacturing (Yancheng) Co., Ltd.; and CSI Solar Power (China) Inc. are referred to, collectively, as “Canadian Solar.”

vacated the court's Judgment sustaining the *Second Remand Results*, and ordered Commerce to "either adequately explain why the Thai [Global Trade Atlas] data is not aberrational or adopt an alternative surrogate value for [Canadian Solar's] nitrogen input" in accordance with the Court of Appeals' decision in *SolarWorld*. See *Canadian Solar IV*, 44 CIT at __, 471 F. Supp. 3d at 1383 (internal quotation marks omitted).

In its *Third Remand Results*, Commerce continues to value Canadian Solar's nitrogen input using Thai import data, explaining that the use of Thai import data is not aberrational. See *Third Remand Results* at 2. Canadian Solar and plaintiff-intervenor Shanghai BYD Co., Ltd. ("Shanghai BYD") (collectively with Canadian Solar, "Plaintiff") object to the *Third Remand Results*. See Comments of [Plaintiff] in Opposition to the Final Results of Redetermination Pursuant to C. Remand, February 24, 2021, ECF No. 184 ("Pl.'s Br."). Defendant United States argues that Commerce complies with the court's remand order by sufficiently explaining why the Thai import data is reliable and not aberrational. See *Defendant's Response to Comments on the Remand Determination*, March 26, 2021, ECF No. 185 ("Def.'s Br."). For the following reasons, the court remands Commerce's decision to continue using Thai import data to value Canadian Solar's nitrogen input.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, and now recounts only those facts relevant to the court's review of the *Third Remand Results*. See *Canadian Solar IV*, 44 CIT at __, 471 F. Supp. 3d at 1381–82; see also *Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, __, 378 F. Supp. 3d 1292, 1310–13 (Apr. 16, 2019) ("*Canadian Solar I*"); *Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, 415 F. Supp. 3d 1326, 1328–31 (Dec. 3, 2019) ("*Canadian Solar II*"); *Canadian Solar III*, 44 CIT at __, 448 F. Supp. 3d at 1335–39.

Canadian Solar previously challenged the *Final Results* on the grounds that, *inter alia*, Commerce's decision to use Thai import data to value Canadian Solar's nitrogen input was unsupported by substantial evidence because the data was aberrational and unreliable. See *Canadian Solar I*, 43 CIT at __, __, 378 F. Supp. 3d at 1310. The court disagreed, sustaining Commerce's use of the Thai import data, but remanded the *Final Results* on other grounds. *Id.* at __, 378 F. Supp. 3d at 1325.

In *Canadian Solar II*, the court sustained Commerce's surrogate value methodology, but remanded for a second time on other unre-

lated grounds. See *Canadian Solar II*, 43 CIT at ___, 415 F. Supp. 3d at 1334–35. Commerce issued its *Second Remand Results*, which the court then sustained and entered judgment accordingly. See *Canadian Solar III*, 44 CIT at ___, 448 F. Supp. 3d at 1339–40.

However, on June 24, 2020, the Court of Appeals decided *SolarWorld*, holding that Commerce failed to adequately justify its use of Thai import data to value Trina’s nitrogen input in Commerce’s previous administrative review of the same ADD order at issue in this action, and vacated in part this court’s judgment sustaining Commerce’s final determination. See *SolarWorld*, 962 F.3d at 1356–59. In particular the Court of Appeals stated that relying on Thai data was “illogical” in light of the fact that the average price of imports into Bulgaria and Romania, which accounted for over 99% of the imports in the period of review, was significantly lower than imports into Thailand, and that Commerce appeared to deviate from past practice of disregarding small quantity import data where the per unit value were substantially different from large quantity data. *Id.* at 1357–58. Further, it concluded Commerce “failed to explain how the Thai data can be reconciled with data from the United States International Trade Commission’s (“ITC”) Data website.” *Id.* at 1358.

In *Canadian Solar IV*, this court held that the Court of Appeals’ decision in *SolarWorld*, which instructed Commerce to “either adequately explain why the Thai [Global Trade Atlas] data is not aberrational” or “adopt an alternative surrogate value for [Trina’s] nitrogen input,” constituted an intervening change in controlling law that relates to whether Commerce’s determination to rely on Thai import data to value Canadian Solar’s nitrogen input was supported by substantial evidence. See *Canadian Solar IV*, 44 CIT ___, 471 F. Supp. 3d at 1382–83.

On remand Commerce continues to use Thai import data to value Canadian Solar’s nitrogen input. See *Third Remand Results* at 2. Defendant argues that Commerce provides a sufficient explanation of its choice of Thai data in compliance with *SolarWorld* and asks the court to sustain the *Third Remand Results*. See Def.’s Br. at 1–2. Plaintiff, on the other hand, asserts that Commerce’s choice of Thai data is unreasonable in this case because the surrogate value is aberrational and Commerce’s explanations for the difference between Thailand’s import price versus the prices of the vast majority of imports which Commerce reviewed are speculative and unsupported by record evidence. See Pl.’s Br. at 1–2.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tarriff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)² and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Defendant argues that Commerce sufficiently explains its reliance on Thai import data to value Canadian Solar’s nitrogen input and asserts that Commerce’s reliance is reasonable, in accordance with its established practice, and should be sustained. *See* Def.’s Br. at 8–24. Plaintiff asks the court to reject Commerce’s use of Thai data to calculate the surrogate value for Canadian Solar’s nitrogen input as unreasonable and unsupported by substantial evidence because Plaintiff alleges the Thai data is aberrational and Commerce has offered only speculation in response to the court’s instruction to provide further explanation. *See* Pl.’s Br. at 9–21. For the following reasons, the court remands Commerce’s *Third Remand Results* for further consideration in accordance with this opinion.

When subject merchandise is exported from a nonmarket economy country, Commerce calculates normal value based on factors of production (“FOPs”). 19 U.S.C. § 1677b(c)(1). Commerce uses “the best available information” to value the FOPs, *id.*, and has discretion to determine what constitutes the best available information. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce generally selects surrogate values that are publicly available, product specific, reflect a broad market average, and are contemporaneous with the POR. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection*

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Process, Policy Bulletin 04.1 (2004), available at <https://enforcement.trade.gov/policy/bull04-1.html> (last visited July 22, 2021) (“Policy Bulletin 04.1”). Commerce’s practice is to avoid using aberrational values as surrogate values. See generally *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep’t Commerce May 19, 1997). Commerce further defines “aberrational” to mean an extreme outlier, distorted or misrepresentative, or somehow incorrect. See *Tri Union Frozen Prods. v. United States*, 41 CIT __, __, 227 F. Supp. 3d 1387, 1394–95 (2017).

In *SolarWorld*, the Court of Appeals addressed Commerce’s use of a “bookend methodology” where Commerce accepted data as reliable and not aberrational because it fell within the range of average import prices of the potential surrogate countries. 962 F.3d at 1357. The Court of Appeals rejected Commerce’s bookend methodology in those cases where specific evidence detracts from its use. *Id.* at 1357–58. Specifically, the Court of Appeals noted that over 99% of the imports into potential surrogate countries were for \$0.13 or less/kg, while Thailand’s imports, which made up less than 1% of the imports reviewed, averaged over \$11.00/kg. *Id.* at 1357–58. The Court of Appeals further found that Commerce had not sufficiently explained the discrepancy between the Thai data and the ITC data. *Id.* at 1358–59. Those same concerns regarding the use of the bookend methodology and a discrepancy between the Thai data and the ITC data are present here. See *Final Decision Memo.* at 53–55; Petitioner’s Submission of Information to Rebut, Clarify or Correct Information Pertaining to Surrogate Values, Exhibit 3, PD 397–98, CD 482–84, bar codes 3490795–01–02, 3490786–01–03 (July 26, 2016) (“Petitioner’s SV Rebuttal Letter”). Thus, on remand Commerce was required to provide an additional explanation for its choice of Thai AUV data for the surrogate value for Plaintiff’s nitrogen input beyond its prior explanations rejected by the Court of Appeals.

Commerce’s additional explanations in the *Third Remand Results* for its continued reliance on Thailand for the surrogate value of Canadian Solar’s nitrogen input are unsupported by substantial evidence and unreasonable in light of the Court of Appeals’ decision in *SolarWorld*. First, Commerce states that not only is the Thai AUV within the range of potential surrogate countries, but also that the Thai AUV is within the ranges of import prices in Bulgaria, Romania, and Mexico. See *Third Remand Results* at 7, 22. However, this reasoning suffers from the same defect as the Court of Appeals found in Commerce’s use of the “bookend” methodology. Although Commerce looks at the range of individual prices for imports into certain potential surrogate countries rather than only the range of average prices

paid, it once again fails to account for the discrepancy in the volume of imports at the low end of the spectrum versus the high end. Just as Bulgaria, Romania, and Mexico account for over 99% of the imports into potential surrogate countries and Thailand, Ecuador, and South Africa account for less than 1%, so too do the low-priced imports into Bulgaria, Romania, and Mexico account for over 99% of the imports into those individual countries while the high-priced imports account for less than 1%. *See* Petitioner’s SV Rebuttal Letter, Ex. 3, PDs 397–98, CDs 482–84. The Court of Appeals expressly found Commerce’s failure to address this discrepancy to be unreasonable, yet on remand Commerce uses the same bookend methodology to justify its determination. Commerce’s explanation that the Thai AUV is within the ranges of the individual countries’ imports is insufficient in light of *SolarWorld*. The court cannot sustain Commerce’s determination as reasonable on this record. The Court of Appeals made clear that it is not reasonable to select a price that is consistent with a fraction of a percent of imports and thousands of percent higher than 99% of imports solely because at least one importer in similarly situated countries, under unknown circumstances, paid a higher price. *SolarWorld*, 962 F.3d 1357–58; *see also Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (stating that the court’s duty is to “evaluate . . . whether a reasonable mind could conclude that Commerce chose the best available information.”).³

Next, Commerce attempts to differentiate the import data from Romania, Bulgaria, and Mexico from that of Thailand and argues that the Thai import data is actually more reliable. *Third Remand Results* at 7, 21–22. In support of this theory, Commerce notes that more than 99% of the imports into Bulgaria, Romania, and Mexico come from neighboring countries, and concludes that there must be unique conditions that permit neighboring countries to import nitrogen at unusually low prices. *Id.* at 21. Specifically, Commerce states, “Hence, the overall AUV of imports of nitrogen into these countries may be more reflective of prices between certain suppliers (the suppliers in one or two exporting countries) and certain customers (the customers of those suppliers) and may not reflect the prices experi-

³ Defendant argues that requiring Commerce to implement a new practice to consider relative quantities of imports when determining whether an AUV is aberrational would impose an unbearable administrative burden on Commerce and lead to endless litigation and “cherry picking” of data. *See* Def.’s Br. at 14–15; *Third Remand Results* at 25–26. However, the Court of Appeals found that it is unreasonable to employ a bookend methodology and ignore a vast discrepancy in import quantity without explaining why that discrepancy coupled with an enormous difference in AUV does not render a primary surrogate country’s data aberrational. *SolarWorld*, 962 F.3d at 1357–58. Therefore, Commerce was required to provide an additional explanation in this case. That Commerce found the imports into Thailand constitute a “commercial quantity” does not sufficiently explain why the AUV is not aberrational. *See Third Remand Results* at 27.

enced by other customers in those markets.” *Id.* at 7. Commerce further states that those lower prices are “[u]ndoubtedly due to lower transportation costs.” *Id.* at 21.

Commerce does not cite any record evidence that would permit it to make an inference that importers in Bulgaria, Romania, and Mexico receive special deals from suppliers in neighboring countries that are somehow unrepresentative of the nitrogen import market as a whole. *See id.* at 7, 21–22. Although Commerce cites to the record in support of its explanation, the document to which Commerce cites provides the volume and pricing of imports into the potential surrogate countries sorted by country of export, and does not contain any information about suppliers, consumers, or the contractual arrangements between them. *See id.* at 7; Petitioner’s SV Rebuttal Letter, Ex. 3, PDs 397–98, CDs 482–84. Commerce’s conclusion that the lower prices of imports into Bulgaria, Romania, and Mexico from neighboring countries are due to special prices between buyers and sellers in those countries that are not reflective of the overall market is speculative, as is Commerce’s explanation that the lower prices are “undoubtedly due to lower transportation costs.”

Although it may be reasonable to infer transportation over shorter distances may cost less, there is no record evidence to support any conclusion that lower transportation costs account for the entirety of the lower cost or even that lower transportation costs account for a significant difference in the price of nitrogen. In fact, the nitrogen imported into Thailand from the neighboring country of Malaysia contradicts Commerce’s explanation. Petitioner’s SV Rebuttal Letter, Ex. 3, PDs 397–98, CDs 482–84. Imports of nitrogen into Thailand from Malaysia were four times as expensive as those from Austria, for example, and were approximately the same price as imports from the United Kingdom and Spain. *Id.* Thus, Commerce’s explanation that the vast majority of imports into Bulgaria, Romania, and Mexico are not reliable approximations of the market for nitrogen because those imports enjoy special pricing and lower transportation costs from neighboring countries is not supported by substantial evidence.

Commerce also suggests that the discrepancy between the price of the nitrogen imported into Thailand and the price of the nitrogen imported into Bulgaria, Romania, and Mexico can be explained by the fact that the nitrogen imported into Thailand was of unique “purity” necessary to construct solar cells. *Third Remand Results* at 22–23. Commerce reasons that because there is evidence of Thai businesses engaged in the manufacture of solar cells (and no such evidence for Bulgaria, Romania, or Mexico), the price of nitrogen imports into Thailand is a more reliable indicator of the market price applicable to

Canadian Solar. *Id.* at 23. However, Commerce itself admits that “There is no record evidence that Thailand imported an anomalous type, form, or purity of nitrogen during the POR.” *Third Remand Results* at 20. The only evidence Commerce cites in support of the explanation that Thai data is more accurate because the nitrogen imported into Thailand is of the proper “purity” for solar cell production is a Wikipedia article discussing different uses for nitrogen. *See Third Remand Results* at 22–23; Canadian Solar’s Surrogate Value Information, Exhibit SV-10 PD362, CD421, bar codes 348871–01, 348824–16 (July 16, 2016). Setting the reliability of the Wikipedia article aside, nowhere does the article state that solar cell production requires a different type or purity of nitrogen or that there is any difference in the price of nitrogen depending on its use. Canadian Solar’s Surrogate Value Information, Exhibit SV-10 PD362, CD421, bar codes 348871–01, 348824–16 (July 16, 2016). Commerce’s explanation that Thai data is not aberrational because nitrogen imported into Thailand is of the type and purity for use in the manufacture of solar cells is speculative and not supported by substantial evidence.

Lastly, Commerce’s explanation for the discrepancy between Thai import data and ITC export data is speculative and unsupported by substantial evidence. *See Third Remand Results* at 13–15, 27–30. The Court of Appeals found that Commerce’s decision to rely on Thai import data instead of U.S. export data compiled by the ITC required further explanation because the two datasets “cannot both be correct.” *SolarWorld*, 962 F.3d at 1358. On remand, Commerce asserts that the discrepancy could be due to a number of factors, including that transportation and insurance costs might be included in one set but not the other, time lags for when exports are shipped and imports enter the receiving country, delays at customs warehouses, and differences in reporting data from free trade zones. *Third Remand Results* at 28. However, although these discrepancies may explain minor differences, it is unreasonable to conclude that they reconcile the “admitted inconsistencies” noted by the Court of Appeals. *SolarWorld*, 962 F.3d at 1358. Moreover, none of Commerce’s explanations is supported by record evidence, and Commerce does not cite to the record in support of its explanations. *Third Remand Results* at 28.

Commerce fails to satisfactorily explain its continued reliance on Thailand’s AUV for use as the surrogate value for Canadian Solar’s nitrogen input. Commerce did not sufficiently explain why the detracting evidence cited by the Court of Appeals does not render Thailand’s AUV aberrational.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's redetermination of its surrogate value selection for valuing Canadian Solar's nitrogen input is remanded to the agency for reconsideration or further explanation consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand determination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

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

Dated: July 28, 2021

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

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