

U.S. Customs and Border Protection



PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN POLYPROPYLENE FIBRILLATED YARN

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

ACTION: Notice of proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of certain polypropylene fibrillated yarn.

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 modify one ruling letter concerning tariff classification of certain polypropylene fibrillated yarn 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 17, 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: Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

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 modify one ruling letter pertaining to the tariff classification of certain polypropylene fibrillated yarn. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N277404, dated August 12, 2016 (Attachment A), 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 N277404, CBP classified the polypropylene fibrillated yarn at issue in heading 5404, HTSUS, specifically in subheading 5404.90.0000, HTSUSA, which provides for “Synthetic monofilament

of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other.” CBP has reviewed NY N277404 and has determined the ruling letter to be in error. It is now CBP’s position that the polypropylene fibrillated yarn at issue is properly classified, in heading 5607, HTSUS, specifically in subheading 5607.49.2500, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of polyethylene or polypropylene: Other: Other, not braided or plaited: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N277404 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H319270, set forth as Attachment B 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.

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N277404

August 12, 2016

CLA-2-54:OT:RR:NC:N3:351

CATEGORY: Classification

TARIFF NO.: 5402.34.6000; 5404.90.0000

MR. STEPHEN L. FODOR
CUSTOMS SERVICES & SOLUTIONS, INC.
5833 STEWART PKWY # 102 P.O. BOX 5644
DOUGLASVILLE, GA 30135

RE: The tariff classification of yarn and fibrilated twine from China and Turkey

DEAR MR. FODOR:

In your letter dated June 20, 2016, you requested a tariff classification ruling on behalf of your client, Cosmic International, Inc.

You submitted two samples of a yarn and twine without their supports. You did state that the samples are for industrial, as opposed to retail, use; by this we assume the yarn and twine will be imported on large machine-ready spools, not retail packaging. According to the terms of Note 4 to Section XI, Harmonized Tariff Schedule of the United States (HTSUS), the yarns do not meet the definition of "put up for retail sale."

The first sample that was submitted, 9,999 Denier is described as virgin polypropylene fibrilated twine. The yarn is imported from Turkey.

The applicable subheading for the 100% virgin polypropylene fibrillated twine will be 5404.90.0000, HTSUS, which provides for Strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5mm: Other. The rate of duty is free.

The second sample that was submitted, DTY500/144/2 HIM you describe as a two-ply texturized polypropylene yarn. The yarn is imported from Turkey.

The applicable subheading for the polypropylene, two-ply texturized yarn will be 5402.34.6000, HTSUS, which provides for synthetic filament yarn (other than sewing thread), not put up for retail sale, textured yarn, of polypropylene, multiple (folded) or cabled yarn. The rate of duty will be 8% ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most

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

Samples will be retained.

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 Adleasia Lonesome at adleasia.a.lonesome@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director

National Commodity Specialist Division

HQ H319270
OT:RR:CTF:FTM H319270 TSM
CATEGORY: Classification
TARIFF NO.: 5607.49.2500

MR. STEPHEN L. FODOR
CUSTOMS SERVICES & SOLUTIONS, INC.
5833 STEWART PKWY # 102 P.O. BOX 5644
DOUGLASVILLE, GA 30135

Re: Proposed modification of New York Ruling Letter (NY) N277404; The
Tariff Classification of Polypropylene Fibrillated Yarn from Turkey

DEAR MR. FODOR:

This is in reference to NY N277404, dated August 12, 2016, issued to you on behalf of your client, Cosmic International, Inc., concerning the tariff classification of a certain polypropylene fibrillated yarn.¹ In that ruling, U.S. Customs and Border Protection (“CBP”) classified the polypropylene fibrillated yarn at issue under heading 5404, HTSUS, and specifically under subheading 5404.90.0000, HTSUSA, which provides for “Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other.”² Upon additional review, we have found this classification to be incorrect. For the reasons set forth below we hereby modify NY N277404 with regard to the tariff classification of the polypropylene fibrillated yarn at issue.

FACTS:

In NY N277404, the polypropylene fibrillated yarn at issue was described as follows:

The first sample that was submitted, 9,999 Denier is described as virgin polypropylene fibrillated twine. The yarn is imported from Turkey.

ISSUE:

What is the tariff classification of the polypropylene fibrillated yarn at issue?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRIs”). 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

¹ We note that the polypropylene yarn at issue was subject to protest number 1703–20–102603. In that protest, Cosmic International, Inc. provided a sample of the yarn, stating that the sample represents the same merchandise as the merchandise at issue in NY N277404, because the same product is under consideration in both protest number 1703–20–102603 and NY N277404. The referenced sample was tested in the CBP laboratory, and we have relied on CBP laboratory report number SV20210537 in making a determination in this instance.

² We note that NY N277404 also classified another product, described as DTY500/144/2 HIM two-ply texturized polypropylene yarn. This product is not included in this modification.

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.

The 2021 HTSUSA provisions under consideration are as follows:

5404	Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: * * *
5404.90.0000	Other * * *
5607	Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: * * * Of polyethylene or polypropylene: * * *
5607.49	Other: * * * Other, not braided or plaited: * * *
5607.49.2500	Other * * *

Note 3 to Section XI provides as follows:

(A) For the purposes of this section, and subject to the exceptions in paragraph (B) below, yarns (single, multiple (folded) or cabled) of the following descriptions are to be treated as “twine, cordage, ropes and cables”:

- (a) Of silk or waste silk, measuring more than 20,000 decitex;
- (b) Of man-made fibers (including yarn of two or more monofilaments of chapter 54), measuring more than 10,000 decitex;
- (c) Of true hemp or flax:
 - (i) Polished or glazed, measuring 1,429 decitex or more; or
 - (ii) Not polished or glazed, measuring more than 20,000 decitex;
- (d) Of coir, consisting of three or more plies;
- (e) Of other vegetable fibers, measuring more than 20,000 decitex; or
- (f) Reinforced with metal thread.

(B) Exceptions:

- (a) Yarn of wool or other animal hair and paper yarn, other than yarn reinforced with metal thread;
- (b) Man-made filament tow of chapter 55 and multifilament yarn without twist or with a twist of less than 5 turns per meter of chapter 54;
- (c) Silkworm gut of heading 5006 and monofilaments of chapter 54;
- (d) Metalized yarn of heading 5605; yarn reinforced with metal thread is subject to paragraph (A)(f) above; and

(e) Chenille yarn, gimped yarn and loop wale-yarn of heading 5606.

* * *

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN to Section XI provides the following:

(3)(A) For the purposes of this Section, and subject to the exceptions in paragraph (B) below, yarns (single, multiple (folded) or cabled) of the following descriptions are to be treated as “twine, cordage, ropes and cables”:

- (a) Of silk or waste silk, measuring more than 20,000 decitex;
- (b) Of man-made fibres (including yarn of two or more monofilaments of Chapter 54), measuring more than 10,000 decitex;
- (c) Of true hemp or flax:
 - (i) Polished or glazed, measuring 1,429 decitex or more; or
 - (ii) Not polished or glazed, measuring more than 20,000 decitex;
- (d) Of coir, consisting of three or more plies;
- (e) Of other vegetable fibres, measuring more than 20,000 decitex;
- (f) Reinforced with metal thread.

(B) Exceptions:

- (a) Yarn of wool or other animal hair and paper yarn, other than yarn reinforced with metal thread;
- (b) Man-made filament tow of Chapter 55 and multifilament yarn without twist or with a twist of less than 5 turns per metre of Chapter 54;
- (c) Silk worm gut of heading 50.06, and monofilaments of Chapter 54;
- (d) Metallised yarn of heading 56.05; yarn reinforced with metal thread is subject to paragraph (A) (f) above; and
- (e) Chenille yarn, gimped yarn and loop wale-yarn of heading 56.06.

* * *

GENERAL

In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.), semi-manufactured products (such as yarns and woven fabrics) and the made up articles made from those products...

* * *

(I) CHAPTERS 50 TO 55

(B) **Yarns**

(1) **General.**

Textile yarns may be single, multiple (folded) or cabled. For the purposes of the Nomenclature:

- (i) **Single yarns** means yarns composed **either of:**

- (a) Staple fibres, usually held together by twist (**spun yarns**); **or of**
- (b) One filament (**monofilament**) of headings 54.02 to 54.05, or two or more filaments (**multifilament**) of heading 54.02 or 54.03, held together, with or without twist (**continuous yarns**).
- (ii) **Multiple (folded) yarns** means yarns formed from two or more single yarns, including those obtained from monofilaments of heading 54.04 or 54.05 (twofold, threefold, fourfold, etc. yarns) twisted together in one folding operation. However, yarns composed solely of monofilaments of heading 54.02 or 54.03, held together by twist, are not to be regarded as multiple (folded) yarns.
The **ply** ("fold") of a multiple (folded) yarn means each of the single yarns with which it is formed.
- (iii) **Cabled yarns** means yarns formed from two or more yarns, at least one of which is multiple (folded), twisted together in one or more folding operations.
The **ply** ("fold") of a cabled yarn means each of the single or multiple (folded) yarns with which it is formed.

* * *

(2) **Distinction between single, multiple (folded) or cabled yarns of Chapters 50 to 55, twine, cordage, rope or cables of heading 56.07 and braids of heading 58.08.**

(See Note 3 to Section XI)

Chapters 50 to 55 do not cover all yarns. Yarns are classified according to their characteristics (measurement, whether or not polished or glazed, number of plies) in those headings of Chapters 50 to 55 relating to yarns, as twine, cordage, rope or cables under heading 56.07, or as braids under heading 58.08. Table I below shows the correct classification in each individual case:

TABLE I
Classification of yarns, twine, cordage, rope and cables of textile material.

Type (*)	Characteristics determining classification	Classification
	* * *	
- Of man made fibres (including those yarns of two or more monofilaments of Chapter 54 (**))	(1) Measuring 10,000 decitex or less (2) Measuring more than 10,000 decitex	Chapter 54 or 55 Heading 56.07

Footnotes.

(*) References to the various textiles materials apply also to such mixtures as are classified therewith under the provisions of Note 2 to Section XI (see Part (I) (A) of this General Explanatory Note).

(**) Silk worm gut of heading 50.06, multifilament yarn without twist or with a twist of less than 5 turns per metre, and monofilament, of Chapter 54, and man-made filament tow of Chapter 55 do not in any circumstances fall in heading 56.07.

* * *

EN to heading 5607 provides in relevant part as follows:

This heading covers twine, cordage, ropes and cables, produced by twisting or by plaiting or braiding.

(1) Twine, cordage, ropes and cables, not plaited or braided.

Parts (I) (B) (1) and (2) (particularly the Table) of the General Explanatory Note to Section XI set out the circumstances in which single, multiple (folded) or cabled yarns are regarded as twine, cordage, ropes or cables of this heading.

* * *

In NY N277404, the polypropylene fibrillated yarn at issue was classified under subheading 5404.90.0000, HTSUSA, which provides for “Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other.” However, consistent with the foregoing discussion, we find this classification to be incorrect.

According to the record, the yarn at issue measures 9,999 denier. In the June 20, 2016 letter requesting a ruling concerning the tariff classification of this yarn, the requestor stated that 9,999 denier is described as 1,111 decitex. Upon review, we find this to be incorrect. Both denier and decitex are units of measure of fibers, yarns, and thread. Denier is defined as the mass in grams per 9,000 meters of yarn.³ Decitex is defined as the mass in grams per 10,000 meters of yarn.⁴ Therefore, we find that 9,999 denier converts to 11,110 decitex.⁵ However, upon CBP laboratory testing and according to the CBP laboratory report no. SV20210537, the precise measurement of the sample of the yarn at issue was found to be 11,641 decitex. Based on the foregoing information, we conclude that it is undisputed that the yarn under consideration measures more than 10,000 decitex.

Yarns measuring more than 10,000 decitex are described in Note 3(A)(b) to Section XI and EN 3(A)(b) to Section XI, which provide that yarns of man-made fibers measuring more than 10,000 decitex are to be treated as “twine, cordage, ropes & cables.” Twine, cordage, ropes and cables are classified under heading 5607, HTSUS, which specifically provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics.” EN to heading 5607 further provides that “Parts (I) (B) (1) and (2) (particularly the Table) of the General EN to Section XI set out the circumstances in which single, multiple (folded) or cabled yarns are regarded as twine, cordage, ropes or cables of this heading.” Table I featured in Part (I)(2) of the General EN to Section XI, provides in relevant part that yarns of man-made fibers measuring 10,000 decitex or less, are classified under Chapters 54 or 55, HTSUS. However, yarns measuring more than 10,000 decitex are classified under heading 5607, HTSUS.

Upon review, we conclude that the yarn at issue measures 11,641 decitex and is composed of polypropylene, which is a man-made, artificial material.⁶ Accordingly, consistent with Table I found in Part (I)(2) of the General EN to

³ https://www.apparelsearch.com/definitions/miscellaneous/denier_measurement_definition.htm

⁴ <https://www.apparelsearch.com/education/measurements/textiles/fibers/tex.html>

⁵ <https://hextobinary.com/unit/textile/from/deniertex/to/decitex>

⁶ <https://www.collinsdictionary.com/us/dictionary/english/polypropylene>

Section XI, it cannot be classified in any heading of Chapter 54, HTSUS. Rather, it is classified in heading 5607, HTSUS, and specifically in subheading 5607.49.2500, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of polyethylene or polypropylene: Other: Other, not braided or plaited: Other.”⁷ See NY N207437, dated March 21, 2012 (classifying certain polypropylene yarn measuring 33,333 decitex under heading 5607, HTSUS); See also NY N265266, dated February 29, 2016 (classifying a certain polypropylene rope measuring 65,778 decitex under heading 5607, HTSUS).

HOLDING:

By application of GRIs 1 and 6, we find that the polypropylene fibrillated yarn at issue is classified under heading 5607, HTSUS, and specifically under subheading 5607.49.2500, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of polyethylene or polypropylene: Other: Other, not braided or plaited: Other.” The 2021 column one, general rate of duty is 9.8¢/kg + 5.3% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N277404, dated August 12, 2016, is hereby MODIFIED.

Sincerely,

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

⁷ We note that although footnote ** to Table I, Part (I)(2) of the General EN to Section XI, excludes certain multifilament yarn without twist or with a twist of less than 5 turns per metre, and monofilament, of Chapter 54 from classification under heading 5607, HTSUS, the yarn at issue is not a multifilament or monofilament yarn. Rather, according to CBP laboratory report no. SV20210537, it is a twine composed of wholly fibrillated polypropylene. Fibrillated yarn is split into visible interconnecting fibrils (fiber-like tears or splits running lengthwise). See NY 083629, dated March 26, 1990, and HQ 089586, dated September 12, 1991 (finding that the term “fibrillation” requires a strip to be split into visible interconnecting fibrils).

19 CFR PART 177

REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN DEVICES KNOWN AS NETWORK ADAPTERS

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

ACTION: Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of certain devices known as network adapters.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of certain devices known as network adapters 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. 23, on June 16, 2021. One comment was 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 17, 2021.

FOR FURTHER INFORMATION CONTACT: Tom P. Beris, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

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. 23, on June 16, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of certain devices known as network adapters. 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") 301141, dated November 5, 2018, CBP classified certain devices known as network adapters in heading 8517, HTSUS, specifically in subheading 8517.62.0020, HTSUS, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus." CBP has reviewed NY 301141 and has determined the ruling letter to be in error. It is now CBP's position that subject devices, known as network adapters, are properly classified, in subheading 8517.62.0090, HTSUS, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion & transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY 301141 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H316155, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H316155

July 28, 2021

CLA-2 OT:RR:CTF:EMAIN H316155 TPB

CATEGORY: Classification

TARIFF NO.: 8517.62.0090

CARL W. MERTZ

TP-LINK USA CORP

*145 SOUTH STATE COLLEGE BLVD., SUITE 400**BREA, CA 92821*

RE: Revocation of NY N301141; Classification of network adapters

DEAR MR. MERTZ:

This is in response to a request, submitted by counsel on your behalf on January 19, 2021, for reconsideration of New York Ruling Letter (NY) N301141, dated November 5, 2018. The items concerned are referred to as network adapters (Archer T4U AC1300 wireless network adapter; Archer T9E AC1900 wireless network adapter; TL-WN821N N300 USB network adapter; and TL-WN881ND N300 PCI-E wireless network adapter).

In NY N301141, U.S. Customs and Border Protection (CBP) classified the network adapters in subheading 8517.62.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus.”

We have reviewed that ruling and determined that it is incorrect. For the reasons set forth below, NY N301141 is revoked. Notice of the proposed action was published in the Customs Bulletin, Vol. 55, No. 23, on June 16, 2021. One comment in support of the proposed revocation was received in response to that notice.

FACTS:

The products at issue are described in N301141as follows:

The first item concerned is the “Archer T4U AC1300” wireless network adapter. This is a USB 3.0 network adapter with a folding external dual band PIFA antenna. This antenna arm has 2 high gain transmitters built-in allowing up to a 400 Mbp transmission rate on the 2.4GHz spectrum and up to a 867 Mbp transmission rate on the 5GHz spectrum. This device is compatible with the 802.11 a/b/g/n/ac wireless standards. Transmit power is <20dBm. The adapter is compatible with the following modulations DBPSK, DQPSK, CCK, OFDM, 16-QAM, 64-QAM, 256-QAM.

The second item concerned is the “Archer T9E AC1900” wireless network adapter. This is a PCI-E network adapter with 3 detachable external omni-directional antennas allowing up to a 600 Mbp transmission rate on the 2.4GHz spectrum and up to a 1300 Mbp transmission rate on the 5GHz spectrum. This device is compatible with the 802.11 a/b/g/n/ac wireless standards. Transmit power is <20dBm. It is CE, FCC, RoHS

certified. The adapter is compatible with the following modulations DBPSK, DQPSK, CCK, OFDM, 16-QAM, 64-QAM, 256-QAM.

The third item is the “TL-WN821N N300” USB network adapter. This USB adapter is a 3.0 single band network adapter with an on-board internal antenna. This device has 2 transmitters built in allowing up to a 300 Mbp transmission rate on the 2.4GHz spectrum. This device is compatible with the 802.11 /b/g/n/ wireless standards. Transmit power is <20dBm. It is CE, FCC, RoHS certified. The adapter is compatible with the following modulations DBPSK, DQPSK, CCK, OFDM, 16-QAM, 64-QAM, 256-QAM.

The fourth item is the “TL-WN881ND N300 PCI-E” wireless network adapter. This PCI-E device has 2 single band external detachable antennas allowing up to a 300 Mbp transmission rate on the 2.4GHz spectrum. This device is compatible with the 802.11 /b/g/n/ wireless standards. Transmit power is <20dBm. It is CE, FCC, RoHS certified. The adapter is compatible with the following modulations DBPSK, DQPSK, CCK, OFDM, 16-QAM, 64-QAM, 256-QAM.

In your request for reconsideration, dated January 19, 2021, you provided additional information on the four products at issue:

The Archer T4U AC1300 is a wireless USB adapter that connects a computer to a Wi-Fi network for lag-free video streaming, online gaming, internet surfing, and internet calls. It is inserted into the computer through the USB port and designed to speed up one’s Wi-Fi connection by concentrating a Wi-Fi signal towards a router through support beamforming technology. Although data is transmitted and received through this USB adapter, the adapter does not provide intelligent path selection nor traffic directing function while doing so. Additionally, it does not physically connect individual network devices in a computer network.

The Archer T9E AC1900 is a three-antenna device designed to deliver a faster wireless connection to a computer. While data is transmitted and received through this adapter, the Archer T9E AC1900 does not provide intelligent path selection or traffic directing function while doing so. Additionally, it does not physically connect individual network devices in a computer network, it only physically connects to the computer.

The TL-WN821N N300 is a wireless USB adapter that connects one’s computer to a Wi-Fi network and strengthens the penetration of one’s signal for a faster connection. It does not provide intelligent path selection or traffic directing function. Additionally, it does not physically connect individual network devices in a computer network, it only physically connects to the computer.

The TL-WN881ND is a wireless PCI express adapter that connects a desktop computer to a Wi-Fi network for faster video streaming, online gaming, internet surfing, and internet calls. While the data is transmitted or received through this adapter, TL-WN881ND does not provide intelligent path selection or traffic directing function while doing so. Additionally, it does not physically connect individual network devices in a computer network. It simply speeds up transmission of data to the router for an enhanced experience.

ISSUE:

Whether the network adapters at issue should be classified as switching and routing apparatus under the HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRIs”). 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.

There is no dispute that the subject merchandise is properly classified under heading 8517, HTSUS. Accordingly, the question is controlled by GRI 6, which provides as follows:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The HTSUSA subheadings under consideration are:

8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:
	Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):
8517.62.00	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:
8517.62.0020	Switching and routing apparatus
8517.62.0090	Other

As clarified in your reconsideration request, the wireless network adapters are designed to increase the Wi-Fi network speed as it relates to the user’s computer. They do not provide intelligent path selection to decide where the data goes next, nor do they have the requisite Ethernet ports to physically connect individual network devices in a computer network. Wireless network adapters merely enhance transmission of data while making no decisions themselves.

To be classified as a switching or routing apparatus, the device must perform switching or routing itself and not merely rely on an external switching or routing device. A routing device performs the traffic directing function. It is used to forward IP packets in a wide area network (WAN) to a destined client in a local area network (LAN) based on reading the network address information in the data packet, which determines the destination. Then

using information in its routing table, or routing policy, it actively directs the packet to the next network on its journey. A routing table file is stored in random access memory (RAM) that contains network information.

A network switch is a multiple-Ethernet-port device that physically connects individual network devices in a computer network, so they can communicate with one another. It is the key component in a business network, connecting multiple network devices such as: PCs, printers, servers and peripherals, and it associates each device's address with one of the physical ports on the switch.

Unlike a router or a switch, these network adapters have no intelligence and make no decisions as to where the data goes next. They do not contain a software or firmware routing table and cannot read the network address information in the data packet to determine the specific destination of the data packet. They do not physically connect individual network devices in a computer network, they only physically connect to the computer

Based on the supplemental information provided and the understanding that the network adapters do not act as a switch or a router within the realm of networking terminology, CBP is now of the view that these devices are properly classified under subheading 8517.62.0090, HTSUSA, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other."

The comment received in response to the Notice of Proposed Revocation from an interested party agreed with CBPs analysis on the re-classification of the network adapters and found it to be consistent with other CBP rulings.

HOLDING:

For the reasons set forth above, the network adapters (Archer T4U AC1300 wireless network adapter; Archer T9E AC1900 wireless network adapter; TL-WN821N N300 USB network adapter; and TL-WN881ND N300 PCI-E wireless network adapter) are classified in subheading 8517.62.0090, HTSUSA, which provides for "Machines for the reception, conversion & transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

New York ruling letter N301141, dated November 5, 2018, is hereby REVOKED.

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

Sincerely,

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

DECLARATION OF FREE ENTRY FOR RETURNED AMERICAN PRODUCTS (CBP FORM 3311)

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

ACTION: 60-day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted no later than October 4, 2021 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0011 in the subject line and the agency name. Please use the following method to submit comments:

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

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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

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

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

Overview of This Information Collection

Title: Declaration for Free Entry of Returned American Products (CBP Form 3311).

OMB Number: 1651-0011.

Form Number: CBP Form 3311.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3311, *Declaration for Free Entry of Returned American Products*, which is authorized by, among others, 19 CFR 10.1, 10.66, 10.67, 12.41, 123.4, and 143.23, is used to collect information from the importer or authorized agent in order to claim duty-free treatment for articles entered under certain provisions of Subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS, <https://hts.usitc.gov/current>). The form serves as a declaration that the articles are: (1) The growth, production, and manufacture of the United States; (2) are returned to the United States without having been advanced in value or improved in condition while abroad; (3) the goods were not previously entered under a temporary importation under bond provision; and (4) drawback was never claimed and/or paid.

This collection of information applies to members of the importing public and trade community who seek to claim duty-free treatment based on compliance with the aforementioned requirements. These members of the public and trade community are familiar with import procedures and with CBP regulations. Obligation to respond to this information collection is required to obtain benefits.

Type of Information Collection: CBP Form 3311, Declaration for Free Entry of Returned American Products.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 35.

Estimated Number of Total Annual Responses: 420,000.

Estimated Time per Response: 0.10 hours.

Estimated Total Annual Burden Hours: 42,000.

Dated: July 30, 2021.

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

[Published in the Federal Register, August 4, 2021 (85 FR 41985)]

19 CFR PARTS 102 AND 177

RIN 1515-AE63

NON-PREFERENTIAL ORIGIN DETERMINATIONS FOR MERCHANDISE IMPORTED FROM CANADA OR MEXICO FOR IMPLEMENTATION OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (USMCA)

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

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: This document provides additional time for interested parties to submit comments on the proposed rule published in the **Federal Register** on July 6, 2021, to amend the U.S. Customs and Border Protection (CBP) regulations regarding non-preferential origin determinations for merchandise imported from Canada or Mexico. Based on a request from the public to provide additional time to prepare comments on the proposed rule, CBP is extending the comment period to September 7, 2021.

DATES: The comment period for the proposed rule published July 6, 2021 (86 FR 35422), is extended. Comments must be received on or before September 7, 2021.

ADDRESSES: You may submit comments, identified by docket number USCBP-2021-0025 by *one* of the following methods:

- Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of the public comments.

FOR FURTHER INFORMATION CONTACT: *Operational Aspects:* Queena Fan, Director, USMCA Center, Office of Trade, U.S. Customs and Border Protection, (202) 738–8946 or usmca@cbp.dhs.gov.

Legal Aspects: Craig T. Clark, Director, Commercial and Trade Facilitation Division, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325–0276 or craig.t.clark@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information or authority that support such recommended change.

II. Background

On July 6, 2021, U.S. Customs and Border Protection (CBP) published a document in the **Federal Register** (86 FR 35422), that proposes to amend the CBP regulations regarding non-preferential origin determinations for merchandise imported from Canada or Mexico. The document solicited public comments on the proposed rule and requested that commenters submit their comments on or before August 5, 2021.

Extension of Comment Period

In response to the proposed rule published in the **Federal Register**, CBP has received correspondence from the public requesting an extension of the comment period for 30 days. CBP has decided to grant the extension. Accordingly, the comment period for the proposed rule is extended to September 7, 2021.

Dated: August 2, 2021.

Alice A. Kipel,
Executive Director,
Regulations and Rulings, Office of Trade,
U.S. Customs and Border Protection.

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS
(NO. 05 2021)**

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in May 2021. A total of 145 recordation applications were approved, consisting of 16 copyrights and 129 trademarks. The last notice was published in the Customs Bulletin Vol. 55 No. 25

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at iprrquestions@cbp.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325–0295.

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 00-00606	05/21/2021	08/23/2030	BREITLING B & DESIGN	BREITLING S.A.	No
TMK 01-00504	05/24/2021	06/16/2031	SEIKO	SEIKO HOLDINGS KABUSHIKI KAI-SHA	No
TMK 01-00549	05/13/2021	09/02/2031	ROCA	Brown & Haley	No
TMK 02-00339	05/21/2021	06/05/2031	METS	Sterling Mets, L.P.	No
TMK 02-00340	05/06/2021	02/28/2031	A & DESIGN	AZPB Limited Partnership	No
TMK 02-00414	05/06/2021	05/05/2031	PIRATES	PITTSBURGH ASSOCIATES	No
TMK 02-00733	05/21/2021	07/09/2031	CONFIGURATION: GOLDFISH SOLID CRACKER (3-D)	PEPPERIDGE FARM, INCORPORATED	No
TMK 05-00762	05/04/2021	04/16/2031	CAT & DESIGN	Caterpillar Inc.	No
TMK 06-00097	05/07/2021	11/15/2030	TEVA	Deckers Outdoor Corporation	No
TMK 07-00279	05/21/2021	09/13/2023	HEELYS	BBC INTERNATIONAL LLC	No
TMK 10-00244	05/11/2021	06/07/2030	TIDE & DESIGN	Procter & Gamble Company	Lever
TMK 10-00338	05/12/2021	05/13/2031	ATHLETA	ATHLETA, INC.	No
TMK 11-00332	05/06/2021	04/16/2031	Woven Check Design of Light and Dark Brown (Damier)	LOUIS VUITTON MALLETIER	No
TMK 11-00575	05/18/2021	06/29/2031	Birkin Bag Configuration Mark	Hermes InternationalFRANCE	No
TMK 11-00730	05/07/2021	05/01/2031	AUTO GAGE	Auto Meter Products, Inc.	No
TMK 11-00782	05/06/2021	05/15/2031	PERPETUA	MARK ANTHONY GROUP INC.	No
TMK 11-01046	05/26/2021	06/06/2031	JOB & DESIGN	Republic Technologies (NA), LLC	No
TMK 11-01242	05/12/2021	05/22/2031	METROID	Nintendo of America Inc.	No
TMK 11-01335	05/27/2021	11/23/2031	JAVA POWERED & DESIGN	ORACLE AMERICA, INC.	No
TMK 11-01346	05/06/2021	06/08/2031	TAPOUT (STYLIZED)	TAPOUT, LLC	No
TMK 12-00172	05/19/2021	05/06/2031	DC & DESIGN	DC Shoes, Inc.	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 12-00228	05/03/2021	04/26/2029	Roxy Heart logo	BOARDRIDERS IP HOLDINGS, LLC	No
TMK 12-00244	05/03/2021	09/22/2029	ROXY	BOARDRIDERS IP HOLDINGS, LLC	No
TMK 12-00792	05/12/2021	10/15/2028	U (STYLIZED)	The University of Utah	No
TMK 13-00128	05/07/2021	04/11/2031	GALAXY S	Samsung Electronics Co., Ltd.	No
TMK 13-00161	05/21/2021	05/22/2031	EXFORGE HCT	Novartis AG (SWITZERLAND)	No
TMK 14-00038	05/26/2021	06/15/2031	VASELINE (STYLIZED)	CONOPCO, INC.	No
TMK 14-00865	05/07/2021	01/31/2031	ACDELCO & DESIGN	GENERAL MOTORS LLC	No
TMK 14-00869	05/19/2021	05/06/2031	ACDELCO (Stylized)	GENERAL MOTORS LLC	No
TMK 14-01164	05/07/2021	05/22/2031	YAKULT	Kabushiki Kaisha Yakult Honsha TA Yakult Honsha Co.	No
TMK 15-00041	05/26/2021	08/24/2031	SMITH & WESSON	SMITH & WESSON INC.	No
TMK 15-00438	05/11/2021	04/24/2031	ELCAN	RAYTHEON CANADA LIMITED	No
TMK 18-00144	05/21/2021	06/13/2022	MJB & DESIGN	MJB Wood Group, LLC	No
TMK 18-00598	05/06/2021	02/09/2031	ENFAGROW	Mead Johnson & Company, LLC	No
TMK 19-00044	05/11/2021	04/16/2031	RICE N EASY	Riceland Foods, Inc.	No
TMK 19-00241	05/18/2021	08/15/2031	ZYMOX	PET KING BRANDS, INC.	No
TMK 19-00336	05/12/2021	08/10/2031	TEXAS (STYLIZED)	RANGERS BASEBALL LLC	No
TMK 19-00447	05/26/2021	06/08/2031	ALTESSE	Altesse Zigarettenhullenerzeugung und Papierverarbeitung Gesellschaft M.B.H.	No
TMK 20-00794	05/11/2021	03/14/2031	Crossed Tuning Forks Design	Yamaha Motor Co., Ltd.	No
TMK 21-00430	05/03/2021	03/22/2030	ROXY	BOARDRIDERS IP HOLDINGS, LLC	No
TMK 21-00431	05/03/2021	04/23/2027	AMERIGEL	AMEREX HEALTH CARE CORP.	No
TMK 21-00432	05/03/2021	06/30/2030	PEEKA	Mobi Games Inc.	No
TMK 21-00433	05/03/2021	02/10/2026	MOBI	Mobi Games Inc.	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00434	05/03/2021	08/19/2030	MÖBI	Mobi Games Inc.	No
TMK 21-00435	05/03/2021	01/09/2028	CLOSYS	Rowpar Pharmaceuticals, Inc.	No
TMK 21-00436	05/03/2021	04/28/2030	ZIPPEE	Mobi Games Inc.	No
TMK 21-00437	05/03/2021	03/20/2027	MÖBI & DESIGN	Mobi Games Inc.	No
TMK 21-00438	05/03/2021	01/14/2030	GE & DESIGN	GENERAL ELECTRIC COMPANY	No
TMK 21-00439	05/03/2021	10/09/2029	LADDER	LADDER, LLC	No
TMK 21-00440	05/03/2021	05/27/2027	GE & DESIGN	General Electric Company	No
TMK 21-00441	05/03/2021	12/23/2023	GE MONOGRAM	General Electric Company	No
TMK 21-00442	05/03/2021	12/03/2029	EUCALYPTUS STEAM	EARTH & DAUGHTER	No
TMK 21-00443	05/03/2021	07/06/2031	OHOM (STYLIZED)	Kao, Peter	No
TMK 21-00444	05/04/2021	01/14/2025	Skull Design	Skullcandy, Inc.	No
TMK 21-00445	05/04/2021	03/24/2030	TESTAMATTA	Bibi Graetz di Dan Graetz	No
TMK 21-00446	05/06/2021	09/27/2027	BROOM	Emeco Industries, Inc.	No
TMK 21-00447	05/06/2021	06/17/2030	ALFI	Emeco Industries, Inc.	No
TMK 21-00448	05/06/2021	06/17/2030	1"	Emeco Industries, Inc.	No
TMK 21-00449	05/06/2021	06/09/2031	EEVEE	Nintendo of America Inc.	No
TMK 21-00450	05/06/2021	05/16/2031	PRATT AND HART	Stompers Gloves, LLC	No
TMK 21-00451	05/06/2021	07/27/2031	COBRA	Microtech Knives, Inc.	No
TMK 21-00452	05/06/2021	07/27/2031	DURAPINCH	Continuous Engineering Solutions, Inc.	No
TMK 21-00453	05/06/2021	05/09/2031	Overlapping Ovals And Circle	TONG YANG INDUSTRY CO., LTD.	No
TMK 21-00454	05/06/2021	06/30/2025	ZEN DEN	Judith L. Coulter INDIVIDUAL	No
TMK 21-00455	05/07/2021	06/21/2027	REGENERON	Regeneron Pharmaceuticals, Inc.	No
TMK 21-00456	05/07/2021	04/29/2029	REGENERON	Regeneron Pharmaceuticals, Inc.	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00457	05/07/2021	01/01/2026	Double Coin & Design	DOUBLE COIN TYRE GROUP LTD.	No
TMK 21-00458	05/07/2021	02/13/2028	Double Coin (STYLIZED)	DOUBLE COIN TYRE GROUP LTD.	No
TMK 21-00459	05/07/2021	11/23/2026	REGENERON	Regeneron Pharmaceuticals, Inc.	No
TMK 21-00460	05/07/2021	12/17/2023	REGENERON	Regeneron Pharmaceuticals, Inc.	No
TMK 21-00461	05/07/2021	08/05/2030	Steer Head Design	Bruno Investments LLC	No
TMK 21-00462	05/07/2021	01/16/2023	REGENERON	Regeneron Pharmaceuticals, Inc.	No
TMK 21-00463	05/12/2021	07/20/2031	STORIES OF THE PROPHETS	NOAHA	No
TMK 21-00464	05/12/2021	01/22/2030	UU (STYLIZED)	The University of Utah	No
TMK 21-00465	05/12/2021	02/07/2026	REGENERON	REGENERON PHARMACEUTICALS, INC.	No
TMK 21-00466	05/12/2021	12/24/2029	MIGHTY CARVER & DESIGN	LANKIM LLC	No
TMK 21-00467	05/13/2021	12/25/2028	VIGADRONE	UPSHER-SMITH LABORATORIES, LLC	No
TMK 21-00468	05/13/2021	02/27/2028	Dao Xiang Cun Design	NORTHERN FOOD I/E INC.	No
TMK 21-00469	05/18/2021	10/16/2029	BEIJING 2022	UNITED STATES OLYMPIC & PARALYMPIC COMMITTEE	No
TMK 21-00470	05/18/2021	05/27/2029	STRAPLOK	DUNLOP MANUFACTURING, INC.	No
TMK 21-00471	05/18/2021	03/23/2025	MODERNA	MODERNATX, INC.	No
TMK 21-00472	05/18/2021	03/18/2023	RODMAC	Rodmac International Company	No
TMK 21-00473	05/18/2021	12/25/2022	LOS ANGELES COUNTY SHERIFF & Badge Design	County of Los Angeles Sheriff's Department	No
TMK 21-00474	05/18/2021	12/01/2030	Partial Ellipses Design	TONG YANG INDUSTRY CO. TAIWAN	No
TMK 21-00475	05/18/2021	02/28/2027	Angel logo	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00476	05/18/2021	11/29/2026	STRONGHOLD	BPFP HOLDINGS LLC	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00477	05/19/2021	01/29/2024	GAMES OF THE XXIIRD OLYMPIAD LOS ANGELES 1984 & Design	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00478	05/20/2021	08/04/2031	EVOLVING METALS	EVOLVING METALS, LLC	No
TMK 21-00479	05/20/2021	01/27/2026	OLYMPIC	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00480	05/21/2021	05/18/2030	VUESET	Brenda Green	No
TMK 21-00481	05/21/2021	05/18/2024	Vueset & Design	Green, Brenda	No
TMK 21-00482	05/21/2021	12/29/2030	TEA WITH TAE	Taebur LLC	No
TMK 21-00483	05/21/2021	08/22/2028	MONCLER	MONCLER S.P.A.	No
TMK 21-00484	05/21/2021	09/13/2027	M MONCLER & DESIGN	MONCLER S.P.A.	No
TMK 21-00485	05/21/2021	10/12/2026	MISCELLANEOUS DESIGN (Bell Shape)	MONCLER S.P.A.	No
TMK 21-00486	05/21/2021	01/28/2024	OLYMPIC	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00487	05/21/2021	01/26/2024	BRANCA FERNET BRANCA CASA FON- DATA NEL 1845 LIQUEUR FRATELLI BRANCA-DISTILLERIE S.P.A. MILANO- ITALIA 40% ALC/VOLA BITTERS LI- QUEUR MADE IN ITALY 750 ML & DE- SIGN	FRATELLI BRANCA DISTILLERIE S.R.L.	No
TMK 21-00488	05/21/2021	04/16/2030	BRANCA FLLI. BRANCA MILANO & DESIGN	FRATELLI BRANCA DISTILLERIE S.R.L.	No
TMK 21-00489	05/21/2021	07/13/2031	GOLDEN ROYAL & DESIGN	Golden Royal LLC	No
TMK 21-00490	05/21/2021	03/29/2031	GLOCK Silhouette	GLOCK, Inc.	No
TMK 21-00491	05/21/2021	08/18/2031	G19	Glock, Inc.	No
TMK 21-00492	05/21/2021	10/16/2023	TEAM USA	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 21-00493	05/21/2021	10/23/2023	TEAM USA	UNITED STATES OLYMPIC AND PARALYMPIC	No
TMK 21-00494	05/24/2021	05/20/2030	FERNET BRANCA	FRATELLI BRANCA-DISTILLERIE S.R.L.	No
TMK 21-00495	05/25/2021	04/02/2027	FERNET-BRANCA & DESIGN	FRATELLI BRANCA DISTILLERIE S.R.L.	No
TMK 21-00496	05/25/2021	12/22/2030	DESIGN. DIAGONAL BARS IN CIRCLE.	TONG YANG INDUSTRY CO., LTD.	No
TMK 21-00497	05/25/2021	07/28/2025	FITKICKS	D.M. Merchandising, Inc.	No
TMK 21-00498	05/26/2021	04/23/2030	CLEAN & CLEAR	JOHNSON & JOHNSON CORPORATION	No
TMK 21-00499	05/26/2021	08/18/2031	I BOURBON & Configuration of a bottle	Triple I, LLC	No
TMK 21-00500	05/26/2021	08/18/2031	IT'S YOURS	Triple I, LLC	No
TMK 21-00501	05/26/2021	07/27/2031	DOUBLE	BioBarrier, Inc.	No
TMK 21-00502	05/26/2021	03/19/2028	USA & DESIGN	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00503	05/26/2021	02/20/2029	Candleberry Company & DESIGN	Candleberry Company	No
TMK 21-00504	05/26/2021	08/04/2031	QUARANTINE RACISM	Campbell, Derrick, L	No
TMK 21-00505	05/26/2021	07/02/2022	THE CANDLEBERRY COMPANY	Candleberry Company, The	No
TMK 21-00506	05/26/2021	03/08/2026	TEAM USA	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00507	05/26/2021	08/11/2031	DE Fastlink (STYLIZED)	DE Fastlink, LLC	No
TMK 21-00508	05/26/2021	12/30/2024	IGNITUS	Ignitus Corporation	No
TMK 21-00509	05/26/2021	12/26/2027	FINE FRAGRANCE FOR THE HOME	Candleberry Company	No
TMK 21-00510	05/26/2021	09/14/2021	HOT MAPLE TODDY	Candleberry Company	No
TMK 21-00511	05/26/2021	03/17/2030	BESTWAY OILFIELD	Bestway Oilfield, Inc.	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00512	05/26/2021	05/27/2031	BETTY BOOP	FLEISCHER STUDIOS, INC.	No
TMK 21-00513	05/26/2021	08/16/2030	BETTY BOOP Design	FLEISCHER STUDIOS, INC.	No
TMK 21-00514	05/27/2021	06/24/2030	BOMBAS	Bombas LLC	No
TMK 21-00515	05/27/2021	12/18/2023	OLYMPIC	UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE	No
TMK 21-00516	05/27/2021	06/04/2024	Bee Design	Bombas LLC	No
TMK 21-00517	05/27/2021	06/04/2024	BOMBAS	Bombas LLC	No
TMK 21-00518	05/28/2021	01/27/2028	AVEENO	JOHNSON & JOHNSON CORPORATION	No
TMK 21-00519	05/28/2021	07/15/2027	AVEENO	JOHNSON & JOHNSON CORPORATION	No
COP 01-00064	05/07/2021	06/08/2041	Pokemon	Nintendo of America, Inc.	No
COP 21-00035	05/03/2021	01/23/2022	Coastal Project (SHV01A/B and 9 other unpublished works)	MENG-LAN CHA	No
COP 21-00036	05/03/2021	04/30/2041	Cozy Street in Milan	NICOLE, INC. DBA NICOLE LEE.	No
COP 21-00037	05/03/2021	04/30/2041	Eye Contact	NICOLE, INC. DBA NICOLE LEE.	No
COP 21-00038	05/11/2021	05/11/2041	Aggretsuko / Aggressive Retsuko Character Guide 2019.	Sanrio Company Ltd.	No
COP 21-00039	05/20/2021	05/19/2041	GAME & WATCH: SUPER MARIO BROS.	Nintendo of America Inc.	No
COP 21-00040	05/20/2021	05/19/2041	French Quarter Tile Design	Artistic Tile, Inc.	No
COP 21-00041	05/20/2021	05/19/2041	Webbing & Bee on Flower by Alba.	CHUNMA USA, INC.	No
COP 21-00042	05/26/2021	05/26/2041	A DESIGN 9.	United States Olympic and Paralympic Committee	No
COP 21-00043	05/26/2021	05/26/2041	A DESIGN 10	United States Olympic and Paralympic Committee	No
COP 21-00044	05/26/2021	05/26/2041	A DESIGN 8	United States Olympic and Paralympic Committee	No

CBP IPR RECORDATION — MAY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 21-00045	05/26/2021	05/26/2041	A DESIGN 6	United States Olympic and Paralympic Committee	No
COP 21-00046	05/26/2021	05/26/2041	A DESIGN 5	United States Olympic and Paralympic Committee	No
COP 21-00047	05/26/2021	05/26/2041	A DESIGN 7	United States Olympic and Paralympic Committee	No
COP 21-00048	05/26/2021	05/25/2041	AirPods Pro Connect pairing mode on iPhone video.	Apple Inc.	No
COP 21-00049	05/26/2021	05/26/2041	Art of Graffiti by Alba	CHUNMA USA, INC.	No

U.S. Court of International Trade

Slip Op. 21–94

PRIME SOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Judge
Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Court No. 20–00032

[Granting defendants’ motion for stay pending appeal.]

Dated: August 2, 2021

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Bryan P. Cenko*.

Brian M. Boynton, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With him on the brief were *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION AND ORDER

Stanceu, Judge:

Defendants move for a partial stay pending their appeal of the judgment this Court entered in *PrimeSource Bldg. Prods., Inc. v. United States*, Judgment (Apr. 5, 2021), ECF No. 111 (“Judgment”). The Judgment granted certain relief to plaintiff PrimeSource Building Products, Inc. (“PrimeSource”), an importer of steel nails, in a challenge to a Presidential action taken under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (“Section 232”) imposing additional duties of 25% *ad valorem* on certain imported products made of steel, including steel nails.¹ See Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) (“Proclamation 9980”). Plaintiff opposes the motion for a stay.

The court grants the motion for a stay, orders suspension of liquidation of the entries affected by this litigation, and requires PrimeSource and the government to consult to obtain agreement on bond-

¹ Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

ing of entries made on and after April 5, 2021, for protection of the revenue potentially owing due to Proclamation 9980.

I. BACKGROUND

The background of this action is set forth in our prior opinions and supplemented herein. See *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT ___, 497 F. Supp. 3d 1333 (2021) (“*PrimeSource I*”), *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT ___, 505 F. Supp. 3d 1352 (2021) (“*PrimeSource II*”).

On February 13, 2020, upon the consent of both parties, this Court entered a preliminary injunction that prohibited defendants from collecting 25% cash deposits on PrimeSource’s entries of merchandise within the scope of Proclamation 9980 and prohibited the liquidation of the affected entries. Order (Feb. 13, 2020), ECF Nos. 39 (conf.), 40 (public) (“Prelim. Inj. Order”). The preliminary injunction required, further, that PrimeSource terminate its existing continuous bond and replace it with a continuous bond having a higher limit of liability to reflect the additional duties PrimeSource otherwise would have been required to deposit. Prelim. Inj. Order 2.

On February 12, 2021, again with the consent of parties, the court amended the preliminary injunction to require PrimeSource, instead of conferring with defendants prior to the expiry of its continuous bond, “to monitor its subject imports and foregone duty deposits” and terminate and replace its continuous bond once the amount of foregone duty deposits reached the amount of the bond, minus the baseline bond amount as calculated pursuant to the general continuous bonding formula of U.S. Customs and Border Protection (“Customs” or “CBP”). [Amended] Order 1–2 (Feb. 12, 2021), ECF No. 105 (“Am. Prelim. Inj. Order”). The amended preliminary injunction also authorized Customs “to deny release to PrimeSource’s entries until PrimeSource terminates its current continuous bond and obtains a new continuous bond . . . or enters the merchandise using single transaction bonds in the amount of 100 percent of the value of the merchandise, plus 100 percent of the estimated duties, taxes, and fees, plus the foregone duty deposit on each entry.” *Id.* at 2.

This amended preliminary injunction dissolved upon the entry of judgment entered in *PrimeSource II* on April 5, 2021. See Judgment 1–2. In the Judgment, this Court ordered, *inter alia*, that defendants liquidate the duties affected by this litigation without the assessment of the 25% additional duties provided for in Proclamation 9980. *Id.*

Defendants filed a notice of appeal of the judgment entered in *PrimeSource II* on June 4, 2021, ECF No. 112, and filed the instant motion for a stay pending appeal the same day. Defs.’ Mot. for Partial

Stay of J. to Maintain the *Status Quo* Pending Appeal (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public) (“Defs.’ Mot. for Stay”). Defendants requested that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate PrimeSource’s entries without the assessment of the 25% additional duties; (2) reinstate the order to suspend liquidation; and (3) reinstate the requirement that PrimeSource monitor its imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.’ Mot. for Stay 1–2.

Plaintiff filed its response in opposition to defendants’ stay motion on June 25, 2021. Pl. PrimeSource Resp. to Defs.’ Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal, ECF No. 116 (“Pl.’s Resp.”).

II. DISCUSSION

In exercising its traditional powers to further the administration of justice, a federal court may stay enforcement of a judgment pending the outcome of an appeal. *Nken v. Holder*, 556 U.S. 418, 421 (2009). “While an appeal is pending from . . . [a] final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” USCIT R. 62(d). When that judgment was rendered by a three-judge panel, “the order must be made . . . by the assent of all its judges, as evidenced by their signatures.” *Id.*

The party seeking a stay pending appeal has the burden of showing that the stay is justified by the circumstances. *Nken*, 556 U.S. at 433–34 (citations omitted). We consider four factors in deciding whether the movant has met that burden: (1) whether defendants have made a strong showing that they will succeed on the merits; (2) whether they will be irreparably harmed absent the stay; (3) whether issuance of the stay will substantially injure the plaintiff; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). “There is substantial overlap between these and the factors governing preliminary injunctions.” *Nken*, 556 U.S. at 434 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The “likelihood of success” and “irreparable harm” factors, working together, are the most critical, and where the United States is a party, the balance of equities and the public interest factors “merge.” *Id.* at 434–35.

We conclude that all four factors support our granting defendants’ motion to stay.

A. Success on the Merits

A recent decision by the Court of Appeals for the Federal Circuit (“Court of Appeals”) in *Transpacific Steel LLC v. United States*, No. 2020–2157, 2021 WL 2932512 (Fed. Cir. 2021) (“*Transpacific II*”) causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal, so as to satisfy the first factor in our analysis. In *Transpacific II*, the Court of Appeals vacated a judgment of this Court in *Transpacific Steel LLC v. United States*, 44 CIT __, 466 F. Supp. 3d 1246 (2020) (“*Transpacific I*”), rejecting a claim similar in some respects to a claim this Court found meritorious in *PrimeSource I* and *PrimeSource II*.

The *Transpacific* litigation involves a Presidential proclamation that increased to 50% the then-existing 25% Section 232 duties on imports of steel products from Turkey. See Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Exec. Office of the President Aug. 15, 2018) (“Proclamation 9772”). In *Transpacific I*, this Court held the proclamation invalid as untimely and as a violation of equal protection. Regarding the former, *Transpacific I* held that Proclamation 9772 was issued after the close of the combined 105-day time period Congress established in 1988 amendments to Section 232 (the time period codified as Section 232(c)(1), 19 U.S.C. § 1862(c)(1)), that commenced upon President Trump’s receipt, on January 11, 2018, of a report by the Secretary of Commerce issued under the authority of 19 U.S.C. § 1862(b)(3)(A) (the “2018 Steel Report”). The President’s receipt of that report by the Commerce Secretary had been the procedural predicate for the issuance of Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) (“Proclamation 9705”).

The Court of Appeals reversed and remanded the case to this Court. On the issue of the time limits added by the 1988 amendments to Section 232, the Court of Appeals reasoned that “[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary.” *Transpacific II*, 2021 WL 2932512 at *19. The Court of Appeals stated that “[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning ‘by then or not at all’ as to each discrete imposition that might be needed, as judged over time.” *Id.*

PrimeSource I and *II* arose from somewhat different facts than did the *Transpacific* litigation. Rather than upwardly adjust the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products. These products, identified in Proclamation 9980 as “Derivatives of Steel Articles,” Proclamation 9980, 85 Fed. Reg. at 5,281, were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705. In this litigation, defendants have relied upon the President’s receipt of the 2018 Steel Report as the procedural basis upon which the President issued Proclamation 9980, arguing that the President retained “modification” authority over the previous Section 232 action. *See PrimeSource II*, 45 CIT at ___, 505 F. Supp. 3d at 1355 (noting that defendants’ “position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary’s 2018 Steel Report and the timely issuance of Proclamation 9705.”). Proclamation 9980 was signed by the President on January 24, 2020 (and published in the Federal Register on January 29, 2020), long after the President’s receipt, on January 11, 2018, of the 2018 Steel Report. This Court held that, due to the combined 105-day time limitation set forth in 19 U.S.C. § 1862(c)(1), the President’s authority to adjust tariffs on the “derivative” articles of steel had expired by the time Proclamation 9980 was issued, if that time period were presumed to commence upon the receipt of the 2018 Steel Report. *PrimeSource I*, 45 CIT at ___, 497 F. Supp. 3d at 1356. We concluded, later, that defendants had waived any defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report. *PrimeSource II*, 45 CIT at ___, 505 F. Supp. 3d at 1355.

Our decision in *PrimeSource II* is also distinguishable from *Transpacific II* in the length of time that transpired between the receipt of a Section 232(b)(3)(A) report from the Secretary of Commerce and the President’s taking implementing action. In issuing Proclamation 9980, the President acted more than two years after receiving the 2018 Steel Report. In the *Transpacific* litigation, the analogous time period was approximately seven months. In *Transpacific II*, the Court of Appeals rejected the appellee’s argument that Congress sought, through the time limits, to ensure that the President will have timely information on which to act. *See Transpacific II*, 2021 WL 2932512 at *21 (“Concerns about staleness of findings are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue.”).

Even though *Transpacific II* and this case arose from somewhat different facts, we nevertheless conclude that the opinion of the Court of Appeals potentially affects the outcome of this litigation. In reaching this conclusion, we do not opine on whether *Transpacific II* necessarily controls that outcome, i.e., whether the President's adjusting of tariffs on derivatives of steel products falls within what the Court of Appeals termed, in a different factual setting, "a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary," *id.* at *19. But for purposes of ruling on the instant stay motion, it is sufficient that the discussion in *Transpacific II* of the "continuing" nature of Presidential Section 232 authority is expressed in broad terms. Accordingly, we conclude that defendants have made a showing that they will succeed on the merits on appeal that is sufficient to satisfy the first factor in our analysis.

B. Irreparable Harm in the Absence of the Requested Stay

In their motion for a stay, defendants request that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate PrimeSource's entries without the assessment of the 25% additional duties; (2) reinstate the order to suspend liquidation; and (3) reinstate the requirement that PrimeSource monitor its imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. The court concludes that all three of these requested measures are necessary to prevent a form of irreparable harm to the United States. As we discuss below, that harm is the loss of the authority, provided for by statute and routinely exercised by Customs in every import transaction, to require and maintain such bonding as it determines is reasonably necessary to protect the revenue of the United States. Without the requested stay, the judgment entered in *PrimeSource II* would interfere with the exercise of that authority.

In Section 623(a) of the Tariff Act of 1930, Congress explicitly recognized the importance of security, such as bonding, to protect the revenue. In pertinent part, the relevant provision reads as follows:

In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue. . . .

19 U.S.C. § 1623(a). This authority is effectuated in the Customs Regulations and applies generally to all import transactions. *See* 19

C.F.R. § 113. Due to the decision of the Court of Appeals in *Transpacific II*, the government has established a likelihood that ultimately it will assess Section 232 duties of 25% *ad valorem* on all entries at issue in this litigation. In any ordinary import transaction, i.e., one not affected by litigation such as this, Customs would exercise its statutory and regulatory authority to ensure that the basic importer's bond (be it a continuous or single transaction bond) has a sufficient limit of liability to secure the liability for all potential duties, such as the Section 232 duties that potentially will be owed by PrimeSource.

Importers' bonds are the ordinary means by which the government ensures that the joint and several liability of the importer of record, and of its surety (up to the limit of liability on the bond) will attach for the payment of all duties and other charges eventually determined to be owed. Notably, in the situation posed by this litigation, PrimeSource, due to the consent preliminary injunction that dissolved upon the entry of judgment in this litigation, has made no cash deposits of estimated duties to cover potential duty liability from Proclamation 9980. The enhanced bonding required by the consent preliminary injunction was a substitute for these estimated duty deposits.

If an importer's bond has a limit of liability that is too low to cover the ordinary duties plus the 25% duties, there is an inherent risk to the revenue, codified by statute and effectuated by regulation, because one of the two parties that contractually could have been bound to pay the duties—the surety—has liability limited by the face amount of the bond. In short, Congress contemplated in 19 U.S.C. § 1623 that the government should have resort to two parties for assessed duty liability, the importer of record and the surety.

We do not base our decision to grant the requested stay on a factual determination that PrimeSource will be unable to satisfy its potential duty obligation. Rather, we base it on the loss of the ability of the United States to exercise, as it would in the ordinary course of administering import transactions, the statutory authority of 19 U.S.C. § 1623(a) to secure this potential duty liability. That loss, absent the requested stay, itself will constitute an irreparable harm to the United States.² But for the judgment entered in *PrimeSource II*, the

² Because we find irreparable harm for the reasons noted, we need not, and do not, consider whether finality of liquidation itself constitutes potential irreparable harm to the United States. Defendants claim they may be unable to collect duties on entries for which liquidation has become final under 19 U.S.C. § 1514(a), *see* Defs.' Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal 12 (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public). Their argument is brought into question by precedent recognizing the authority of this Court, in a case brought according to 28 U.S.C. § 1581(i), to enforce its own judgments by ordering the reliquidation of the entries. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1311–12 (Fed. Cir. 2004). The opinion in *Shinyei* reasoned that finality of liquidation under 19 U.S.C. § 1514 does not “preclude judicial

government would maintain, and continue into the future, the requirement of bonding adequate to secure the revenue potentially owing on the entries affected by this case. In summary, were we to deny the government's motion to stay the effect of that judgment as to these entries, we would be interfering with the exercise of the government's statutory authority under 19 U.S.C. § 1623(a). Based on the intent Congress expressed in enacting that provision, we conclude that any such interference is best avoided.

In addition to enhanced bonding, the government's stay motion seeks a stay of our order to liquidate without Section 232 liability the entries subject to this litigation and a suspension of the liquidation of those entries pending the appeal. We agree that these steps are warranted. The court notes the possibility that finality of liquidation, should it attach to all entries associated with a particular continuous bond, could result in the cancellation of such a bond and the resultant extinguishing of the liability of the surety. Such a prospect would pose irreparable harm to the United States for the reasons the court has discussed. Because avoiding irreparable harm requires that the government have the authority not only to require, but to maintain, sufficient bonding for potential duty liability on all entries at issue in this case, we conclude that avoiding such harm requires that the affected entries remain in an unliquidated state during the pendency of the appeal.

C. Balance of the Hardships

The government also prevails on the third factor. Defendants seek narrow relief that would not substantially prejudice PrimeSource. They do not seek cash deposits; rather, under their proposed stay order PrimeSource will incur instead the costs of maintaining enhanced bonding for the potential Section 232 duty liability, i.e., the cost of the bond premiums. Although this will require that PrimeSource "pay a new premium with its surety every time it must put in place a new bond to cover its estimated Section 232 deposits," Pl.'s Resp. 20, these are conditions PrimeSource found acceptable in agreeing to the initial preliminary injunction order and the amended preliminary injunction orders, implicitly acknowledging they were necessary and appropriate under 19 U.S.C. § 1623(a). *See* Pl.'s Resp. 21; Prelim. Inj. Order 2–3; Am. Prelim. Inj. Order 1–2. The government's request for a stay essentially maintains the balance struck by the parties in their agreement for a consent injunction that maintained enhanced bonding while the outcome of this case was not yet determined by this Court. In comparison, denying the government the enforcement of court orders after liquidation," as "the Court of International Trade has been granted broad remedial powers." *Id.* at 1312.

authority to require such bonding on current and future entries poses a hardship on the United States that, under the statutory scheme designed to ensure adequate protection of the revenue, is unwarranted now that such duty liability is likely to be incurred.

D. The Public Interest

Unquestionably, the public interest favors allowing the government to exercise its lawful authority to protect the revenue, and potential revenue, of the United States, which in this case involves a significant amount of potential duty liability. *See* Defs.’ Mot. for Stay 12–13. PrimeSource has a continuous bond that secures the 25% additional duty liability for all entries between February 1, 2020 until April 5, 2021, the date judgment was entered in favor of PrimeSource. The court will order the parties to consult with a view to reaching an agreement under which the entries occurring on and after April 5, 2021, and going forward throughout the appeal (with a superseding bond, if necessary), will be covered by bonding reasonably necessary to secure the potential Section 232 duties.

Prior to the decision of the Court of Appeals in *Transpacific II*, PrimeSource argued that “[a]ny concerns over protecting the revenue of the United States are rendered moot if the government never had a claim to that revenue in the first instance.” Pl.’s Resp. 26. But the government now has a potential claim to the revenue, to which the court must give due consideration.

III. CONCLUSION AND ORDER

All four factors necessitate granting the governments’ motion to stay. Upon the court’s consideration of the parties’ motions, including defendants’ motion to stay and plaintiff’s response, and all other filings herein, and upon due deliberation, it is hereby

ORDERED that Defs.’ Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public) be, and hereby is, granted; it is further

ORDERED that the order of this Court to liquidate the entries subject to this litigation, as stated in the Judgment entered on April 5, 2021 be, and hereby is, stayed pending the appeal of that judgment before the United States Court of Appeals for the Federal Circuit; it is further

ORDERED that defendants be, and hereby are, enjoined, through the pendency of the appeal, from liquidating the entries affected by this litigation; it is further

ORDERED that plaintiff and defendants shall confer to seek to reach agreement on PrimeSource’s monitoring and continuous bonding for entries of merchandise within the scope of Proclamation 9980 that have occurred, and will occur, on and after April 5, 2021, to

secure potential liability for duties and fees, including potential liability for duties under Proclamation 9980; should the parties be unable to reach such an agreement, the parties shall file a joint status report with the court by no later than by August 16, 2021; and it is further

ORDERED that this Order shall remain in effect until issuance of a mandate of the Court of Appeals for the Federal Circuit in the pending appeal of the judgment entered by this Court.

Dated: August 2, 2021

New York, New York

/s/ Timothy C. Stanceu, Judge

/s/ Jennifer Choe-Groves, Judge

/s/ M. Miller Baker, Judge

Slip Op. 21–95

SIMPSON STRONG-TIE COMPANY, Plaintiff, v. UNITED STATES, Defendant,
and MID CONTINENT STEEL & WIRE INC., Defendant-Intervenor.

Before: Gary S. Katzmman, Judge
Court No. 17–00287

[The court sustains Commerce’s Final Results of Redetermination.]

Dated: August 3, 2021

George R. Tuttle, III, George A. Tuttle, A Professional Corporation, of Larkspur, CA, for plaintiff.

Sosun Bae, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Jared Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, D.C.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, D.C., for defendant-intervenor.

OPINION

Katzmann, Judge:

Plaintiff Simpson Strong-Tie Co. (“Simpson”) brought this action to contest a final scope ruling by the United States Department of Commerce (“Commerce”). Compl., Jan. 26, 2018, ECF No. 8. Simpson initially alleged that Commerce erred by including certain of Simpson’s split-drive anchors¹ in the scope of its antidumping (“AD”) order on certain steel nails from China. *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 Fed. Reg. 44,961 (Dep’t Commerce Aug. 1, 2008) (“AD Order”); Mem. to J. Maeder from S. Pulongbarit and A. Cook re: Antidumping and Countervailing Duty Orders on Certain Steel Nails from the People’s Republic of China: Final Scope Ruling on Simpson Strong-Tie Co.’s Anchors, Dec. 1, 2017, P.R. 31 (“Scope Ruling”). Following a determination by the Federal Circuit in *OMG, Inc. v. United States*, 972 F.3d 1358 (Fed. Cir. 2020) (“*OMG II*”), this court remanded the scope determination at Commerce’s request for further consideration. As explained below, the court concludes that Commerce’s *Final Results of Redetermination Pursuant to Court Remand*, Feb. 16, 2021, ECF No. 51–1 (“*Remand Results*”) are supported by substantial evidence and in accordance with law.

¹ A split-drive anchor is “a one-piece expansion anchor designed for anchoring fixtures to concrete, brick, block, and masonry.” Compl. at 3. Simpson’s split-drive anchors are constructed of a split shank which has been heat treated so that it expands when driven into a pre-drilled hole and wedges the anchor securely in place. *Id.* at 3–4.

BACKGROUND

This action was initiated on December 28, 2017, by Simpson, and a complaint was timely filed. Summons, ECF No. 1; Compl. As noted above, Simpson alleged in its Complaint that Commerce erroneously included Simpson's split-drive anchors in its final scope ruling for the AD Order. Compl. at 7. In support of this contention, Simpson highlighted (in both its Complaint and Amended Complaint) a number of points of difference between nails and split-drive anchors, among them: (1) the split-drive anchor has a non-uniform diameter shank split into two half sections extending beyond the circumference of the main body of the shank, and (2) split-drive anchors are not known commercially or sold as nails. Compl. at 4–5; Am. Compl. 4–5, Feb. 13, 2018, ECF No. 22. Simpson also noted in both its Complaint and Amended Complaint that the split-drive anchors must be driven into pre-drilled holes. Compl. at 4, Am. Compl. at 4. In light of the differences between nails and split-drive anchors, Simpson requested that the court hold that Commerce's inclusion of split-drive anchors in the scope of its AD order on Certain Steel Nails from the People's Republic of China was unsupported by substantial evidence and not in accordance with law. Compl. at 7; Am. Compl. at 7.

On February 1, 2018, Mid Continent Steel & Wire, Inc. ("Mid Continent") joined the litigation as Defendant-Intervenor. Order Granting Consent Mot. to Intervene, ECF No. 18. On February 13, 2018, Simpson's Amended Complaint was filed, and on July 10, 2018, Simpson additionally filed a Rule 56.2 motion for judgment on the agency record. Am. Compl.; Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 28. The United States ("Government") and Mid Continent each submitted a response to Simpson's motion on December 4, 2018. Def.-Inter.'s Resp. in Opp. to Mot., ECF No. 33; Def.'s Resp. in Opp. to Mot., ECF No. 34. Simpson filed its reply on January 14, 2019, Pl.'s Reply, ECF No. 36, and moved for oral argument on the Rule 56.2 motion, Mot. for Oral Arg., Jan. 28, 2019, ECF No. 37. Simpson's motion for oral argument was granted on April 16, 2019. Order Granting Mot. for Oral Arg., ECF No. 40. On June 12, 2019, the court issued an Order staying the proceedings pending notice of appeal in related cases *OMG, Inc. v. United States*, 43 CIT __, 321 F. Supp. 3d 1262 (2019) ("*OMG I*") and *Midwest Fastener Corp. v. United States*, 43 CIT __, 389 F. Supp. 3d 1384 (2019), and canceling the scheduled oral argument. Order, ECF No. 43. The following month, on July 22, 2019, the Government submitted a consent motion alerting the court of the appeal of *OMG I* and requesting stay of the proceedings be continued until the resolution of that

appeal by the Federal Circuit. *Status Report and Consent Mot. to Stay*, ECF No. 44. The court granted the motion to continue stay and ordered that the parties submit a joint status report to the court following the issuance of the mandate in *OMG II*. Order Granting Mot. to Continue Stay, Jul. 22, 2019, ECF No. 45 (“Stay Order”).

On August 28, 2020, the Federal Circuit issued its opinion in *OMG II*. The court affirmed the Court of International Trade’s determination in *OMG I* that OMG, Inc.’s imported masonry anchors were not within the scope of the AD and countervailing duty (“CVD”) orders at issue. *OMG II*, 972 F.3d at 1360. Of relevance here, the court affirmed the CIT’s determination that OMG, Inc.’s two-piece zinc masonry anchors were not subject to the AD Order because “the dictionary definitions ‘define a nail as a fastener inserted by impact into the materials to be fastened,’ and ‘[t]he merchandise at issue is not inserted by impact into the materials to be fastened,’” but rather required a pre-drilled hole. *Id.* at 1366 (quoting *OMG I*, 321 F. Supp. 3d at 1269). Pursuant to the Stay Order, the parties submitted a joint status report on November 10, 2020, requesting either (on the part of the Government and Mid Continent) that the court remand to Commerce, or (on the part of Simpson) that the court require supplemental briefing from the parties on the impact of *OMG II* and issue a decision on Simpson’s pending Rule 56.2 motion. Joint Status Report, ECF No. 48. The court on November 18, 2020, issued an order remanding the case to Commerce for further proceedings and requiring that redetermination be filed within ninety days of the order. Order, ECF No. 50 (“Remand Order”).

On remand, Commerce determined that, in light of the Federal Circuit’s decision in *OMG II*, Simpson’s split-drive anchors were not within the scope of the AD Order. *Remand Results* at 1. Commerce noted that, like OMG, Inc.’s zinc masonry anchors, Simpson’s split-drive anchors “are masonry anchors which require pre-drilled holes for installation in addition to the use of a hammer.” *Remand Results* at 3. Accordingly, Commerce found that the split-drive anchors are not “nails” under the definition set out in *OMG II*. *Id.* at 2–3. Following issuance of the *Remand Results*, on March 18, 2021, Simpson and Mid Continent each submitted comments requesting that the court affirm Commerce’s determination. Def.-Inter.’s Comments on Final Results of Redetermination, ECF No. 53; Pl.’s Comments on Final Results of Redetermination, ECF No. 54. The Government filed its response to the parties’ comments on April 19, 2021, and further requested that the *Remand Results* be sustained. Def.’s Resp. to Comments on Remand Results, ECF No. 55.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

The court concludes that Commerce’s *Remand Results* are supported by substantial evidence and in accordance with law. As the court determined in *OMG I*, the plain meaning of the term “nail” entails impact insertion. 321 F. Supp. 3d at 1269. On appeal, the Federal Circuit upheld this determination, reiterating that “no reasonable person could conclude that OMG’s anchors are nails because unlike nails, OMG’s anchors are not designed for impact insertion” and instead “require a predrilled hole.” *OMG II*, 972 F.3d at 1364. As in *OMG I* and *II*, the product at issue here is a masonry anchor which requires a predrilled hole for insertion. Am. Compl. at 3–4; *Remand Results* at 3. It is therefore clear, as Commerce acknowledged in its *Remand Results*, that “[b]ecause of the similarities between OMG’s zinc masonry anchors and Simpson’s split-drive anchors, and in light of the intervening decision” of the Federal Circuit in *OMG II*, “Simpson’s anchors are not covered by the scope of the [AD Order].” *Remand Results* at 3. As Commerce’s determination on remand is supported by substantial evidence and in accordance with law, and as it further complies with the court’s Remand Order requesting redetermination by February 16, 2020, the court sustains Commerce’s *Remand Results*.

CONCLUSION

For the foregoing reasons, Commerce’s *Remand Results* are sustained.

SO ORDERED.

Dated: August 3, 2021

New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–96

SIMPSON STRONG-TIE COMPANY, Plaintiff, v. UNITED STATES, Defendant,
and MID CONTINENT STEEL & WIRE INC., Defendant-Intervenor.

Before: Gary S. Katzmman, Judge
Court No. 18–00062

[The court sustains Commerce’s Final Results of Redetermination.]

Dated: August 3, 2021

George R. Tuttle, III, George A. Tuttle, A Professional Corporation, of Larkspur, CA, for plaintiff.

Sosun Bae, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Jared Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, D.C.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, D.C., for defendant-intervenor.

OPINION

Katzmann, Judge:

Plaintiff Simpson Strong-Tie Co. (“Simpson”) brought this action to contest a final scope ruling by the United States Department of Commerce (“Commerce”). Compl., Apr. 24, 2018, ECF No. 8. Simpson initially alleged that Commerce erred by including Simpson’s crimp drive anchors¹ in the scope of its antidumping (“AD”) order on certain steel nails from China. *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 Fed. Reg. 44,961 (Dep’t Commerce Aug. 1, 2008) (“AD Order”); Mem. to J. Maeder from B. Ballesteros re: Antidumping Duty Order on Certain Steel Nails from the People’s Republic of China: Final Scope Ruling on Simpson Strong-Tie Co.’s “Crimp Drive” Anchors, Mar. 6, 2018, P.R. 192 (“Scope Ruling”). Following a determination by the Federal Circuit in *OMG, Inc. v. United States*, 972 F.3d 1358 (Fed. Cir. 2020) (“*OMG II*”), this court remanded the scope determination at Commerce’s request for further consideration. As explained below, the court concludes that Commerce’s *Final Results of Redetermination Pursuant to Court Remand*, Feb. 16, 2021, ECF No. 46–1 (“*Remand Results*”) are supported by substantial evidence and in accordance with law.

¹ A crimp drive anchor is “a one-piece expansion anchor that can be installed in concrete, grout-filled block, or stone.” Compl. at 3. Simpson’s crimp drive anchors are constructed of a drivable head and undulated shank which, when driven into a pre-drilled hole, “compresses and exerts force against” the sides of the hole to secure the anchor. *Id.*

BACKGROUND

This action was initiated on March 29, 2018, by Simpson, and a complaint was timely filed. Summons, ECF No. 1; Compl. As noted above, Simpson alleged in its Complaint that Commerce erroneously included Simpson's crimp drive anchors in its final scope ruling for the AD Order. Compl. at 7. The Complaint highlighted a number of points of difference between nails and crimp drive anchors, among them: (1) the crimp drive anchor must be inserted into a pre-drilled hole, (2) the crimp drive anchor includes at least one undulation in its shank, and (3) crimp drive anchors are not known commercially or sold as nails. *Id.* at 4. In light of these distinctive features, the Complaint requested that the court hold that Commerce's inclusion of crimp drive anchors in the scope of its AD order on Certain Steel Nails from the People's Republic of China was unsupported by substantial evidence and not in accordance with law. *Id.* at 7.

On May 18, 2018, Mid Continent Steel & Wire, Inc. ("Mid Continent") joined the litigation as Defendant-Intervenor. Order Granting Consent Mot. to Intervene, ECF No. 18. On September 21, 2018, Simpson filed a Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 23. The United States ("Government") and Mid Continent each submitted a response to Simpson's motion on March 14, 2019. Def.-Inter.'s Resp. in Opp. to Mot., ECF No. 28; Def.'s Resp. in Opp. to Mot., ECF No. 30. Simpson filed its reply on April 12, 2019, Pl.'s Reply, ECF No. 32, and moved for oral argument on the antidumping scope review, Mot. for Oral Arg., May 2, 2019, ECF No. 35. On June 12, 2019, the court issued an Order staying the proceedings pending notice of appeal in related cases *OMG, Inc. v. United States*, 43 CIT ___, 321 F. Supp. 3d 1262 (2019) ("*OMG I*") and *Midwest Fastener Corp. v. United States*, 43 CIT ___, 389 F. Supp. 3d 1384 (2019). Order, ECF No. 38. The following month, on July 22, 2019, the Government submitted a consent motion alerting the court of the appeal of *OMG I* and requesting stay of the proceedings be continued until the resolution of that appeal by the Federal Circuit. *Status Report and Consent Mot. to Stay*, ECF No. 39. The court granted the motion to continue stay and ordered that the parties submit a joint status report to the court following the issuance of the mandate in *OMG II*. Order Granting Mot. to Continue Stay, Jul. 22, 2019, ECF No. 40 ("Stay Order").

On August 28, 2020, the Federal Circuit issued its opinion in *OMG II*. The court affirmed the Court of International Trade's determination in *OMG I* that *OMG, Inc.*'s imported masonry anchors were not within the scope of the AD and countervailing duty ("CVD") orders at

issue. *OMG II*, 972 F.3d at 1360. Of relevance here, the court affirmed the CIT's determination that OMG, Inc's two-piece zinc masonry anchors were not subject to the AD Order because "the dictionary definitions 'define a nail as a fastener inserted by impact into the materials to be fastened,' and '[t]he merchandise at issue is not inserted by impact into the materials to be fastened,'" but rather required a pre-drilled hole. *Id.* at 1366 (quoting *OMG I*, 321 F. Supp. 3d at 1269). Pursuant to the Stay Order, the parties submitted a joint status report on November 10, 2020, requesting either (on the part of the Government and Mid Continent) that the court remand to Commerce, or (on the part of Simpson) that the court require supplemental briefing from the parties on the impact of *OMG II* and issue a decision on Simpson's pending Rule 56.2 motion. Joint Status Report, ECF No. 43. The court on November 18, 2020, issued an order remanding the case to Commerce for further proceedings, requiring that redetermination be filed within ninety days of the order, and denying Simpson's pending motion for oral argument. Order, ECF No. 45 ("Remand Order").

On remand, Commerce determined that, in light of the Federal Circuit's decision in *OMG II*, Simpson's crimp drive anchors were not within the scope of the AD Order. *Remand Results* at 1. Commerce noted that, like OMG, Inc's zinc masonry anchors, Simpson's crimp drive anchors "are masonry anchors which require pre-drilled holes for installation in addition to the use of a hammer." *Id.* at 3. Accordingly, Commerce found that the crimp drive anchors are not "nails" under the definition set out in *OMG II*. *Id.* at 2–3. Following issuance of the *Remand Results*, on March 18, 2021, Simpson and Mid Continent each submitted comments requesting that the court affirm Commerce's determination. Def.-Inter.'s Comments on Final Results of Redetermination, ECF No. 48; Pl.'s Comments on Final Results of Redetermination, ECF No. 49. The Government filed its response to the parties' comments on April 19, 2021, and further requested that the *Remand Results* be sustained. Def.'s Resp. to Comments on Remand Results, ECF No. 50.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." The court also reviews the determinations pursuant to remand "for com-

pliance with the court's remand order." See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

The court concludes that Commerce's *Remand Results* are supported by substantial evidence and in accordance with law. As the court determined in *OMG I*, the plain meaning of the term "nail" entails impact insertion. 321 F. Supp. 3d at 1269. On appeal, the Federal Circuit upheld this determination, reiterating that "no reasonable person could conclude that OMG's anchors are nails because unlike nails, OMG's anchors are not designed for impact insertion" and instead "require a predrilled hole." *OMG II*, 972 F.3d at 1364. As in *OMG I* and *II*, the product at issue here is a masonry anchor which requires a predrilled hole for insertion. Compl. at 4; *Remand Results* at 3. It is therefore clear, as Commerce acknowledged in its *Remand Results*, that "[b]ecause of the similarities between OMG's zinc masonry anchors and Simpson's crimp drive anchors, and in light of the intervening decision" of the Federal Circuit in *OMG II*, "Simpson's anchors are not covered by the scope of the [AD Order]." *Remand Results* at 3. As Commerce's determination on remand is supported by substantial evidence and in accordance with law, and as it further complies with the court's Remand Order requesting redetermination by February 16, 2020, the court sustains Commerce's *Remand Results*.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: August 3, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–97

HEZE HUAYI CHEMICAL CO., LTD. AND JUANCHENG KANGTAI CHEMICAL CO., LTD. Plaintiffs, v. UNITED STATES, Defendant, BIO-LAB, INC., CLEARON CORP. AND OCCIDENTAL CHEMICAL CORPORATION, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 20–00058

[Final Determination sustained.]

Dated: August 5, 2021

Gregory S. Menegaz, deKieffer & Horgan PLLC, of Washington, DC, argued for plaintiffs Heze Huayi Chemical Co. and Juancheng Kangtai Chemical Co. With him on the brief were *Alexandra H. Salzman* and *James K. Horgan*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the defendant United States. Of counsel on the brief was *Jesus N. Saenz*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for defendant-intervenors Bio-Lab, Inc., Clearon Corporation and Occidental Chemical Corporation. With him on the brief were *Jonathan M. Zielinski* and *Ulrika Kristin Skitarelic Swanson*.

OPINION

Reif, Judge:

This action arises from a challenge by plaintiffs, Heze Huayi Chemical Co., Ltd. (“Heze Huayi”) and Juancheng Kangtai Chemical Co., Ltd. (“Kangtai,” and, collectively, “plaintiffs”) to certain aspects of the final results of an administrative review of the antidumping duty order covering chlorinated isocyanurates (“chlorinated isos”) published by the Department of Commerce (“Commerce”) in the Federal Register on June 20, 2016.¹ See *Chlorinated Isocyanurates from the People’s Republic of China*, 85 Fed. Reg. 10,411 (Dep’t Commerce Feb. 24, 2020) (final results) (“Final Determination”), and accompanying Issues and Decision Memorandum (“IDM”). As a result, plaintiffs were assigned an assessment deposit rate of 116.83 percent for Heze Huayi and 76.63 percent for Kangtai. See Final Determination.

Plaintiffs filed a motion for judgment upon the agency record pursuant to Rule 56.2 and challenge as unsupported by substantial evidence three principal aspects of Commerce’s Final Determination: (1) to select Mexico over Malaysia as a surrogate country; (2) to determine that Mexico sources the highest quality information; and, (3) to adjust the Mexican “freight-on-board” (“FOB”) values to a “cost

¹ Chlorinated isos may be processed in various forms, commonly including, for example, swimming pool additives. Compl. 2, ECF No. 7 (“Complaint”).

of insurance and freight” (“CIF”) basis. *See* Pls.’ Rule 56.2 Mem. Supp. Mot. for J. Upon the Agency R., ECF No. 30 (“Pls. Br.”); *see also* Pls.’ Reply Br., ECF No. 33 (“Pls. Reply Br.”). Defendant United States (“Government”) and defendant-intervenors, Bio-Lab, Inc., Clearon Corp. and Occidental Chemical Corporation (collectively “defendant-intervenors”) respond that Commerce’s determination is supported by substantial evidence and is otherwise in accordance with law. *See* Def.’s Resp. to Pls. Mot. for J. Upon the Agency R., ECF No. 31 (“Def. Br.”); *see also* Response Brief of Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corporation, ECF No. 32 (“Def.-Intervenors’ Br.”).

For the reasons discussed below, the court sustains Commerce’s Final Determination.

BACKGROUND

On August 10, 2018, Commerce initiated the thirteenth administrative review of the antidumping duty order covering chlorinated isos from the People’s Republic of China (“China”). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 39,688 (Dep’t Commerce Aug. 10, 2018) (initiation of antidumping and countervailing duty administrative review). The review covered two producers and exporters, Heze Huayi and Kangtai, during the period from June 1, 2017, to May 31, 2018. *Id.*; *see also Chlorinated Isocyanurates from the People’s Republic of China*, 84 Fed. Reg. 42,891 (Dep’t Commerce Aug. 19, 2019) (preliminary results) (“Preliminary Determination”) and accompanying preliminary decision memorandum (“PDM”).

Because China is a non-market economy country, the Tariff Act of 1930 (“Tariff Act”) requires Commerce to calculate the normal value of chlorinated isos based on surrogate values offered in a comparable market economy. *See* Tariff Act of 1930, § 773, 19 U.S.C. § 1677b(c)(1) (2015).²

On October 3, 2018, Commerce placed on the record a list of potential surrogate countries that were comparable in terms of economic development to China and solicited comments from interested parties. *See* PDM at 6–7, 10. This list included Romania, Malaysia, Russia, Brazil, Mexico and Kazakhstan. Pls. Br. at 10; Def. Br. at 3; *id.* Commerce considered production of comparable merchandise (calcium hypochlorite and sodium hypochlorite) and identical merchandise (chlorinated isos) in its primary surrogate country inquiry. PDM

² Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2015 edition.

at 6–8. Commerce found that each country listed preliminarily exported either comparable merchandise, identical merchandise or both. PDM at 6–7.

On December 4, 2018, Commerce received comments from respondents (now plaintiffs) and petitioners (now defendant-intervenors) on the list of potential surrogate countries. *See* Plaintiffs’ Letter on Comments of Surrogate Country Selection, PD 35 (Dec. 4, 2018); *see also* Letter from Petitioners on Comments on Primary Surrogate Country Selection, PD 32–34 (Dec. 4, 2018) (“Petitioners’ Letter”). Plaintiffs argued that Brazil, Malaysia and Romania were suitable as surrogate countries, and defendant-intervenors argued that Mexico had the highest quality surrogate values. Petitioners’ Letter, PD 32–34; PDM at 6, 10–14; IDM at cmt. 1. Plaintiffs and defendant-intervenors submitted surrogate value information on February 19, 2019, and rebuttal surrogate value information on February 26, 2019. *See* Plaintiffs’ Letter on Surrogate Values for the Preliminary Results, PD 44–49 (Feb. 19, 2019); *see also* Petitioners’ Letter on Initial Surrogate Value Data, CD 30, PD 51–54 (Feb. 19, 2019); *see also* PDM at 8. Plaintiffs submitted their final surrogate value information on July 10, 2019. *See* Plaintiffs’ Letter on Final Surrogate Value (“SV”) Submission (Jul. 10, 2019).

I. Preliminary Determination

On August 19, 2019, Commerce preliminarily determined that each country on the surrogate country list was a significant producer of merchandise comparable to the subject merchandise — calcium hypochlorite and sodium hypochlorite. PDM at 11–14. However, Commerce found that only Mexico was a significant producer of *identical* merchandise — chlorinated isos. *Id.*

In reaching this decision, Commerce relied on information demonstrating that a Mexican company named Aqua-Clor S.A. de C.V. (“Aqua-Clor”) produced chlorinated isos and exported a confirmed amount of over 1.6 million kilograms of chlorinated isos during the relevant period of review (“POR”). PDM at 12; IDM at 11; Pls. Br. at 8. Commerce also examined the financial statements of four Malaysian companies — Mey Chern Chemicals SDM (“Mey Chern”), Whiting Sdn. Bhd. (“Whiting”), Accot Technologies Sdn. Bhd. (“Accot”) and CCM Chemicals Sdn. Bhd. (“CCM”) — and website information for two additional Malaysian producers — Leesonics and Setia Maju. PDM at 12–13. Of these companies, Commerce determined preliminarily that there was sufficient information on the record showing CCM to be a producer of comparable merchandise and Setia Maju to

be a producer of identical merchandise but that there was no information on the record that either company was a “significant producer.” *Id.* Commerce noted its “preference to select a surrogate country that produces identical merchandise over one that only produces comparable merchandise” and that the selection of Mexico as the surrogate country was consistent with three prior administrative reviews. *Id.* at 13–14.

Commerce noted that there were “a number of factors of production (“FOPs”) for which we require [surrogate value] data, with chlorine and caustic soda considered among the most significant inputs used in the production of chlorinated isos. Commerce also requires usable financial statements from a producer of identical or comparable merchandise surrogate country.” *Id.* at 14. As there were no surrogate value data or any surrogate financial statements on the record for Brazil, Kazakhstan and Russia, Commerce was “left with Malaysia, Mexico, and Romania as options for potential primary surrogate country.” *Id.*

Commerce weighed the quality of the Mexican data against the Malaysian and Romanian data and found that Mexico had “better [surrogate value] data because it ha[d] usable [surrogate values] for all inputs.” *Id.* at 16. Commerce specified that “we preliminarily find the Malaysian [surrogate values] for raw materials, packing, and energy other than electricity, unusable because they are sourced from Trade Data Monitor (“TDM”), a subscription-based database.” *Id.* at 16. Commerce found that the Romanian data were inadequate for calculating surrogate financial ratios because of a lack of usable financial statements by producers in Romania. Commerce found that the Mexican data were stronger because the financial statements of CYDSA, a Mexican conglomerate with a large chemicals division, were “contemporaneous and indicative of a producer that sells comparable merchandise.” IDM at 7–8. PDM at 16.

II. Final Determination

On February 24, 2020, Commerce published its Final Determination and continued to select Mexico as the primary surrogate country, which yielded a 32.23 percent margin for Heze Huayi and a 58.07 percent margin for Kangtai. IDM at 7–15; Pls. Br. at 2, 4, 29. Commerce’s selection of CYDSA’s financial statement to calculate the financial ratios and of the data sourced from Global Trade Atlas (“GTA”) remained unchanged from the Preliminary Determination. IDM at 2, 15–17.

Commerce made only one change to the Preliminary Determination in deciding to adjust the Mexican FOB import values to a CIF basis

to include international freight costs. *Id.* Commerce explained that, pursuant to a recent administrative review, “respondents are correct that Commerce’s practice is to adjust the import value in situations where the primary surrogate country’s import statistics do not include international freight costs.” *Id.* at 16 (citing *Hydrofluorocarbon Blends from the People’s Republic of China*, 84 Fed. Reg. 17,380 (Dep’t Commerce Apr. 25, 2019) (final results) and accompanying Issues and Decision Memorandum at Comment 4). Commerce explained that it rejected the argument that an adjustment would produce an unacceptable distortion into the margin calculations because “the addition of international freight and marine insurance to FOB values results in no double counting, and that limiting the selection of surrogate countries to countries that report import data on a CIF basis could have the effect of unreasonably limiting the potential pool of surrogate value source countries.” *Id.* Commerce also noted that respondents could have provided alternative information pertaining to the FOB/CIF adjustment “but did not do so, despite the fact that they are the party that has raised the concern with the FOB terms of the Mexican data.” *Id.* at 17.

STANDARD OF REVIEW

The court will uphold Commerce’s determination if it is supported by “substantial evidence on the record” and is otherwise “in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is “more than a mere scintilla” of evidence to support the underlying conclusions. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence must be measured by a review of the record in its entirety, “including whatever fairly detracts from the substantiality of the evidence.” *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

The court may draw two inconsistent conclusions from the record; however, this “does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966) (citation omitted). Where, as here, Congress has entrusted an agency to administer a statute requiring fact-intensive inquiries, the agency’s conclusion should be reversed only if the record is “so compelling that no reasonable factfinder” could reach the same conclusion. *INS v. Elias-Zacarias*, 502 U.S. 478, 483–484 (1992); *accord Nucor Corp. v. United States*, 33 CIT 207, 232, 612 F. Supp. 2d 1264, 1287 (2009).

Ultimately, under the substantial evidence standard, “the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is

some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 159 F. Supp. 2d 714, 718 (2001), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). Where "there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

LEGAL FRAMEWORK

In proceedings involving a non-market economy (NME), such as China, Commerce determines the normal value of the subject merchandise by evaluating the "best available information" from a market economy country — or market economy countries — to derive surrogate valuations for factors of production including raw materials, labor and utilities. 19 U.S.C. § 1677b(c). The statute requires that Commerce "shall utilize, to the extent possible," surrogate factors of production from one or more market economy countries that are: (1) "at a level of economic development comparable to that of the non-market economy country," and, (2) "significant producers of comparable merchandise." *Id.* § 1677b(c)(4)(A)-(B) (emphasis supplied). If more than one market economy country meets both requirements, Commerce's policy is to evaluate and compare the reliability and completeness of the record data from those countries. Import Admin., U.S. Dep't of Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004) <http://enforcement.trade.gov/policy/bull04-1.html> (last visited June 9, 2021) ("Policy Bulletin 04.1").³

The statute specifies that Commerce must use "best available information" when valuing factors of production. 19 U.S.C. § 1677b(c)(1)(B). The statute does not define "best available information," which means that Commerce has "broad discretion" to decide which information in the record meets this standard. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed.

³ Policy Bulletin 04.1 outlines a four-step approach to surrogate country selection:

- (1) the Office of Policy ("OP") assembles a list of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country;
- (2) Commerce identifies countries from the list with producers of comparable merchandise;
- (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and
- (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Jiaying Bro. Fastener Co. v. United States, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citation omitted); *see also* Policy Bulletin 04.1.

Cir. 2011) (citations omitted). In practice, Commerce seeks to fulfill its statutory duty by selecting, “to the extent practicable, surrogate values that are product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review, and tax and duty exclusive.” *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016); *see also* Policy Bulletin 04.1.

In cases involving NME countries, although “the standard of review precludes the court from determining whether the Department’s choice of surrogate value was the best available on an absolute scale, the court may determine the reasonableness of Commerce’s selection of surrogate prices.” *Citic Trading Co. v. United States*, 27 CIT 356, 366 (2003). As mentioned above, Commerce has broad discretion to determine what record material constitutes best available information. However, “[t]his discretion . . . is constrained by the underlying objective of the statute; to obtain the most accurate dumping margins possible.” *Id.* at 365 n.12 (citations omitted).

This Court has spoken on the meaning of “best available information” in the context of 19 U.S.C. § 1677b(c). In *Dorbest*, this court provided that:

The term “best available” is one of comparison, i.e., the statute requires Commerce to select, from the information before it the best data for calculating an accurate dumping margin. The term “best” means “excelling all others.” Oxford English Dictionary 139 (2d 1989); Webster’s II new Riverside University Dictionary 168 (1988) (“[e]xceeding all others in excellence, achievement, or quality”). This “best” choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.

Dorbest Ltd. et al. v. United States, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262, 1268 (2006) (citation omitted). The *Dorbest* court also clarified that “[o]n *factual issues*, the court’s role ‘is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.’” *Id.* at 1676 (citing *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)) (citations omitted).

The parties differ as to the standard that applies to this Court’s review of Commerce’s selection of data, and, in particular, the level of specificity required by Commerce in demonstrating that its choice

was made using the best available information. Defendant argues that Commerce is not obligated to provide an “explicit explanation . . . where the agency’s decisional path is reasonably discernible.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citation omitted). Plaintiffs cite *Dorbest*, which states: “For the court to conclude that a reasonable mind would support Commerce’s selection of the best available information, Commerce needs to justify its selection of data with a reasoned explanation.” *Dorbest*, 462 F. Supp. 2d at 1269; *see also Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998) (“Commerce has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable.”). Plaintiffs argue also that “best available information” in the present case means “quality available surrogate values that are most similar to the subject merchandise production in China.” Pls. Reply Br. at 2.

DISCUSSION

I. Commerce’s Selection of Mexico as Primary Surrogate Country

As outlined above, 19 U.S.C. § 1677b(c)(4) (section 1677b(c)(4)) requires that, in valuing factors of production, Commerce must select surrogate countries that are “significant producers of comparable merchandise.” In making this determination, Commerce must use the “best available information.” 19 U.S.C. § 1677b(c)(1)(B). The court will address first whether Commerce’s findings were based on a permissible construction of the terms “significant producers” and “comparable merchandise” before turning to whether Commerce met its obligation to use “best available information” as required by statute.

A. Whether Commerce’s Finding that Mexico Was a “significant producer[] of comparable merchandise” Was Reasonable and Based on a Permissible Construction of the Statute

The court begins by considering whether Commerce’s finding that Mexico is a significant producer within the meaning of section 1677b(c)(4) was reasonable. Because the term “significant producers” is left undefined and ambiguous, the court must determine whether Commerce’s interpretation “is based on a permissible construction of the statute.” *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017) (quoting *Chevron, U.S.A., Inc. v. Nat’l Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

Plaintiffs define significant producer as a country “whose domestic production could influence or affect world trade.” Plaintiffs argue that this definition is suggested by the court in *Fresh Garlic Producers Ass’n v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1313, 1338 (2015) (“*FGPA*”); see also Pls. Br. at 9. Continuing to rely on *FGPA*, plaintiffs maintain that the plain meaning of “significant” is “having or likely to have influence or effect” and add that it is inherently a comparative term. *FGPA*, 121 F. Supp. 3d at 1338; see also Pls. Br. at 9. Plaintiffs submit that Commerce did not conduct a comparison before determining that Mexico was a “significant producer” because Mexico was found to be the only country with production of identical merchandise. Pls. Br. at 9. This omission, plaintiffs conclude, means that the record indicated only *some*, rather than *significant*, production of chlorinated isos. *Id.*

The Government rejects plaintiffs’ definition of “significant producer” as overly narrow and adds that this Court declined to apply this definition in plaintiff Kangtai’s challenge to “significant production” in a similar, prior action. *Juancheng Kangtai Chem. Co. v. United States*, 41 CIT ___, Slip Op. 17–3, 2017 WL 218910 (CIT Jan. 19, 2017) (“*Kangtai*”). In the determination subject to review in *Kangtai*, Commerce interpreted “significant” to mean “a noticeably or measurably large amount,” and the court confirmed that this interpretation was entitled to *Chevron* deference. *Id.* at *4.

The Government contends further that the court in *FGPA* acknowledged that plaintiffs’ definition of “significant producer” was “an interpretation,” implying that other interpretations of the statute may be permissible. *FGPA*, 121 F. Supp. 3d at 1338 (emphasis supplied). The *FGPA* court added that “Commerce is free to depart from its prior practice in evaluating whether a country is a significant producer, so long as that evaluation rests on a reasonable interpretation of the statutory language.” *Id.* at 1339.

The Government is correct in noting that the definition of “significant producer” applied by the court in *FGPA* is not apt here. This court in *Heze Huayi Chem. Co. v. United States* confirmed “that the ability to influence world trade is not a standard required by the statute, ‘it is only one of many criteria the Department may use to determine whether a country is a significant producer.’” Slip Op. 18–57, 2018 WL 2328183 at *4 (CIT May 22, 2018) (citing *Chlorinated Isocyanurates From the People’s Republic of China*, 82 Fed. Reg. 4852 (Dep’t Commerce Jan. 17, 2017) (final results of antidumping duty admin. review; 2014–2015) and accompanying Issues and Decision Memorandum at 5). Rather than adopting a single definition of “significant producers,” this court has recognized instead that “Com-

merce identifies a significant producer based on a totality of the circumstances, and makes its decision concerning significance on a case-by-case basis.” *Dorbest*, 30 462 F. Supp. 2d at 1274.

As noted, the court in *FGPA* did not endorse a single interpretation of “significant producer.” However, the court did speak to which interpretations of the statute are *impermissible*. For example, the court held that Commerce determined improperly that a country was a significant producer simply because it had “any commercially meaningful production” when, at the same time, the record indicated that Commerce’s selection had only “miniscule” levels of production as described by the court. *FGPA*, 121 F. Supp. 3d at 1339. The court concluded further that when there are more than a “handful” of countries competing in the global market for a good, “significant production” may not simply mean “non-zero production.” *Id.* (internal citation omitted).

Plaintiffs here have failed to show that Mexico’s production of comparable merchandise was either “miniscule” or only marginally more than “non-zero production.” *Id.* Plaintiffs have similarly not provided any record material demonstrating that Mexico’s production of chlorinated isos was so minimal that it failed to affect world trade — even if influence on world trade were a statutorily required component of significance. *Kangtai*, 2017 WL 218910 at *4 (“Even assuming that significance required an influence on world trade . . . Kangtai has not identified any record evidence that the Philippines’ production of the comparable merchandise, sodium hypochlorite, was so low that it completely failed to affect world trade.”).

Plaintiffs, however, are correct in arguing that the phrase “significant producer” involves an aspect of comparison. *See Jacobi Carbons AB v. United States*, 42 CIT ___, ___, 313 F. Supp. 3d 1344, 1358 (2018) (“Commerce’s Policy Bulletin 04.1 recognizes the comparative aspect of the phrase ‘significant production.’”). However, the court does not agree with plaintiffs’ contention that Commerce overlooked this comparative aspect in its reasoning for selecting Mexico as a primary surrogate country. Here, Commerce specifically compared Mexico to Malaysia. In fact, plaintiffs argue that Commerce “continued its analysis of the comparative Mexico and Malaysia surrogate value records before selecting the primary surrogate country because Malaysia has some production of identical merchandise.” *See PDM* at 7. Commerce made this comparison, although it claimed that it was “not required to consider parties’ arguments for comparable merchandise.” *IDM* at 11.

Plaintiffs’ approach to the comparative element inherent in the phrase “significant producer” would require the court to find that the

comparison in this case must be between production of *identical* merchandise in Mexico and production of *comparable* merchandise in Malaysia. The court declines to do so and determines instead that a comparison between identical production in Mexico and identical production in Malaysia was reasonable in the instant case. Accordingly, the court concludes that Commerce properly determined that Mexico was a “significant producer” based on a reasonable interpretation of 19 U.S.C. § 1677b(c)(4).

**B. Commerce’s Reliance on Record Information
Showing Production of Identical Merchandise in
Mexico in Interpreting “Comparable Merchandise”
under the Statute**

The court turns next to the requirement in section 1677b(c)(4) that Commerce select a surrogate country that is a “significant producer[] of *comparable* merchandise” in valuing factors of production. (Emphasis supplied). At issue here is Commerce’s decision to value factors of production using data from primary surrogate countries with production of *identical merchandise* when that method presents no data difficulties.⁴

Plaintiffs contend that the statute does not specify whether identical merchandise is superior to comparable merchandise and argue that a robust market of comparable merchandise in this case is “equally probative” in the surrogate value determination. Pls. Br. at 10–11. Plaintiffs do not dispute that identical merchandise meets the definition of comparable merchandise. Pls. Rep. Br. at 2. Plaintiffs argue instead that Commerce should have considered the quality of the information and the specific facts of the case before deciding if record data on comparable or identical production better represented “best available information.” *Id.* Accordingly, plaintiffs argue that Commerce should have given greater weight to data on the production of comparable merchandise in Malaysia. Pls. Br. at 11.

Plaintiffs argue also that examining export data on production of comparable merchandise (as opposed to restricting consideration to data on identical merchandise alone) avoids the unnecessary narrowing of countries that can be used as primary surrogate countries. Pls. Br. at 10. Plaintiffs add that the approach of examining data on production of comparable merchandise has the benefit of broadening the number of countries that Commerce may compare, in turn allowing for a better estimation of which countries serve as significant

⁴ While “data difficulties” is not defined in section 1677b, this court has recognized that it is necessary “for Commerce to feel assured that the data it is employing is sufficient and reliable.” *Dorbest Ltd. et al. v. United States*, 30 CIT 1671, 1682, 462 F. Supp. 2d 1262, 1273 (2006).

producers. *Id.* Plaintiffs conclude that Commerce failed to use “best available information” because Commerce based its primary surrogate country selection on production of identical merchandise. *Id.*

The Government argues that because the statute does not define “comparable,” Commerce has discretion to determine its own methodology for assessing comparability, so long as Commerce’s interpretation is reasonable. Def. Br. at 13; *see also Heze Huayi*, 2018 WL 2328183 at *4 (“[t]he statute does not speak directly to the meaning of ‘comparable’; therefore, Commerce’s interpretation will govern if it is reasonable.”) (citation omitted). To this end, Commerce has established a methodology for selecting primary surrogate countries. The Government emphasizes that Policy Bulletin 04.1, which describes Commerce’s non-market economy surrogate country selection process, specifies that “where identical merchandise is not produced, the team must determine if other merchandise that is comparable is produced.” Policy Bulletin 04.1 at 2, cited in Def. Br. at 14. The Policy Bulletin clarifies further that “[i]f considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise.” Policy Bulletin 04.1 at n. 6.

The Government argues that this approach implies that when identical merchandise is produced, Commerce’s practice does not require consideration merely of comparable merchandise. Def. Br. at 14. The Government also notes that this Court has upheld the methodology for selecting primary surrogate countries as outlined in Policy Bulletin 04.1. *Id.* The Government cites *Heze Huayi*, 2018 WL 2328183, which involved the same antidumping duty order and the same selected surrogate country at issue here. Def. Br. at 13. There, the court held specifically that “production of identical merchandise is production of ‘comparable’ merchandise.” *Heze Huayi*, 2018 WL 2328183 at *4.

In addition to finding that identical merchandise meets the statutory requirement of “comparable merchandise,” this Court has also found that the analysis outlined in Policy Bulletin 04.1 n.6 “is in accordance with the legislative history of the governing statute.” *Dorbest*, 462 F. Supp. 2d at 1682. This part of the Policy Bulletin dictates: “If considering a producer of identical merchandise leads to data difficulties, [Commerce] may consider countries that produce a broader category of reasonably comparable merchandise.” Policy Bulletin 04.1 n.6.

In this case, the Government explains that Commerce prefers to select surrogate values based on data showing production of identical merchandise. Def. Br. at 14. This practice allows Commerce to avoid

adjustments that may introduce error or inaccuracy. Avoiding adjustments is a factor that Commerce considers when determining what constitutes “best available information.” *Id.*; see *Mid Continent Nail Corp. v. United States*, 34 CIT 512, 712 F. Supp. 2d 1370 at n.7 (2010) (“adjustments provide an opportunity for the introduction of inaccuracies into the process”).

The court holds that Commerce’s interpretation in this case of “comparable merchandise” is reasonable, especially in light of the *Dorbest* court’s finding that identical merchandise is a reasonable interpretation of “comparable merchandise” as outlined in Policy Bulletin 04.1, and given Commerce’s reasoning in this case supporting its preference for data on identical production.

C. Commerce’s Finding that Mexican Data Constituted “Best Available Information” on Significant Production of “Comparable Merchandise”

Plaintiffs do not dispute that Mexico produces identical merchandise, nor do they dispute that Mexico produces comparable merchandise. Pls. Br. at 11. Instead, plaintiffs argue first that Malaysia is a significant producer of both identical and comparable merchandise and that Malaysian surrogate values are “by far the best available information” for purposes of surrogate data comparison in this case. *Id.* Next, plaintiffs argue that there were flaws in the data substantiating production of identical merchandise in Mexico. *Id.* at 12. The court addresses each of these arguments below in turn.

1. Malaysian Data

Plaintiffs argue that Commerce failed to consider properly record material detailing the size and prevalence of the Malaysian market for identical merchandise. Pls. Br. at 8. Specifically, plaintiffs contend that Commerce did not weigh adequately material confirming first that Malaysia produces chlorinated isos, and, second, that Malaysia and Mexico have the same market size of a variant of chlorinated isos. *Id.* This record material included the financial statements and information from the selected webpages of four Malaysian producers and/or suppliers of chlorinated isos. PDM at 12; see also Pls. Br. at 13–15. At the same time, plaintiffs concede that none of this record material specified the actual level of production in Malaysia. Pls. Br. at 8.

Plaintiffs argue also that the record contains information demonstrating that Malaysia is a significant producer of sodium hypochlorite and calcium hypochlorite, both of which are considered by plain-

tiffs to be “highly comparable.”⁵ Plaintiffs point to the record, which contains export data on production of comparable merchandise in Malaysia, indicating that Malaysia is the second-most significant exporter of comparable merchandise among listed surrogate countries. Pl. Rep. Br. at 4.

By contrast, the Government and defendant-intervenors argue that Commerce examined adequately data on Malaysian production of identical merchandise and that Commerce provided detailed reasoning as to why it found this information insufficient. Def. Br. at 17; Def.-Intervenors Br. at 8–9. Specifically, Commerce found that plaintiffs did not provide any corroborating information on production data that could substantiate the claim that either Malaysian companies or Malaysia as a whole served as a significant producer of identical merchandise during the POR. IDM at 11.

As to record material showing Malaysian production of comparable goods, the Government does not dispute that Malaysia was shown to be a significant producer of comparable goods. Def. Br. at 19. In fact, Commerce found that all countries listed initially as surrogate country options were significant producers of comparable goods. PDM at 14. However, the Government argues that the record was stronger for Mexico than Malaysia because Mexico was a significant producer of *both* identical and comparable merchandise. Def. Br. at 16; *see also* IDM at 11–12.

In this case, plaintiffs demonstrated the existence of some production of identical merchandise, though they failed to substantiate this claim with any record material specifying the level of chlorinated isos production in Malaysia. Def. Br. at 16. At the same time, the record also indicates that Commerce considered adequately Malaysian data on both comparable and identical production. PDM at 12. In fact, Commerce provided detailed reasons that it found the Malaysian data to be flawed. *Id.*

Commerce stated that the first reason for its finding is that only one of the four financial statements for a Malaysian company called Setia Maju indicated some production of chlorinated isos in Malaysia. PDM at 12. Notably, plaintiffs did not provide any additional corroborating information showing production data that could substantiate the claim that either Setia Maju or Malaysia as a whole were significant producers of identical merchandise during the POR. IDM at 11. Second, Commerce explained that plaintiffs’ submission of a

⁵ During Oral Argument, plaintiffs explained that they “use[d] the term highly comparable, just to make the point that we’re not talking about a giant basket of categories of very different chemicals with very different raw materials.” Oral Argument Tr. at 49. The Government describes sodium hypochlorite and calcium hypochlorite as “comparable product[s]”. Def. Br. at 21.

subscription-based market research report on the world pool chemical industry did not provide any specific information on Malaysian producers. IDM at 14. Third, Commerce noted that Malaysia did not have a separate Harmonized Tariff Schedule (HTS) classification for chlorinated isos, making it difficult to measure exports and, therefore, production in the country. PDM at 12. Commerce found the four Malaysian financial statements used by plaintiffs as support to be either unusable or less reliable than the Mexican financial statements. *Id.*

In sum, Commerce not only considered record information showing production of comparable and identical merchandise in Malaysia, but also provided detailed explanations of the deficiencies that Commerce found in this information. Accordingly, Commerce considered appropriately Malaysian data on both comparable and identical merchandise, and this consideration indicates that Commerce's selection of Mexico rather than Malaysia as primary surrogate country was reasonable.

2. Mexican Data

Plaintiffs next argue that Commerce encountered factor valuation difficulties such that the use of Mexico as a primary surrogate country was not reasonable. Pls. Br. at 7–12. Commerce considered arguments related to factor valuation issues in Mexico and found that “the selection of the Mexican data has not led to factor valuation difficulties.” IDM at 18. Moreover, Commerce found that Mexico was the only potential surrogate country that produced *quantifiable* amounts of identical merchandise. Def. Br. at 12; PDM at 14; IDM at 11, 18.

Commerce found that the information submitted by petitioners was sufficient to support the conclusion that Mexico was a significant producer of chlorinated isos during the POR. IDM at 11. For example, the record contained: an affidavit and attached joint venture agreement demonstrating Mexican production of chlorinated isos by Aqua-Clor; product registrations filed with the U.S. Environmental Protection Agency for specific brand names of subject merchandise; and, information that corroborated the extensive Port Import/Export Reporting Service (“PIERS”) cross-border trade data for shipments of subject merchandise with export data of identical merchandise from the Global Trade Atlas (“GTA”). *Id.*

These three types of information were more reliable than the information on the record pertaining to Malaysian producers, Commerce reasoned, because Mexico had export statistics that included a precise HTS classification for chlorinated isos, which allowed Commerce to quantify levels of production in Mexico. Def. Br. at 17. The Gov-

ernment adds that in three prior administrative reviews of the same antidumping order on chlorinated isos from China, Commerce similarly selected Mexico as a primary surrogate country because it was the sole “economically comparable country that was also a significant producer of both comparable and identical merchandise.” Def. Br. at 4.

The Government argues further that the court in *Heze Huayi* relied on similar information in accepting Commerce’s decision to use Mexico as the primary surrogate country. *Heze Huayi Chemical*, 2018 WL 2328183, at [*4]; Def. Br. at 14–15. There, the court addressed Commerce’s finding in an administrative review of a similar record that Mexico was a significant producer of chlorinated isos.⁶ *Heze Huayi Chemical*, 2018 WL 2328183 at *5. The court ultimately upheld Commerce’s choice of Mexico based on a consideration of much of the same information as in this case. *Id.*

Here, Commerce’s selection of Mexico as the primary surrogate country was based on a reasonable interpretation of “comparable merchandise.” Despite record information showing *some level* of production of identical merchandise in Malaysia, Commerce found that the record did not support a finding of *significant* production of identical merchandise in Malaysia, IDM at 10–11⁷, and, consequently, used “best available information” in its selection of Mexico. Def. Br. at 19–24. Commerce explained adequately its finding that the Malaysian data that plaintiffs argue are more probative were insufficient. *Id.* In doing so, Commerce met its obligation to evaluate and compare the reliability and completeness of the record data on potential primary surrogate countries as required by Policy Bulletin 04.1.

Moreover, plaintiffs’ argument that Malaysia produced more *comparable* merchandise than did Mexico neither negates that finding nor addresses the issue of whether there is significant production of *identical* merchandise in Mexico. As a result, Commerce was reasonable in finding that Mexico was the only country at the same level of economic development that had production of chlorinated isos during

⁶ Specifically, the court in *Heze Huayi* upheld Commerce’s finding that there was significant production of chlorinated isos in Mexico by Aqua-Chlor, based on “petitioners’ submission of a certain affidavit and joint venture agreement.” The data there were also corroborated by “extensive PERS cross-border trade data on shipments of subject merchandise on the record.” 2018 WL 2328183 at *5 (citation omitted); see also Def. Br. at 19.

⁷ See also IDM at 11: “Commerce continued to find that record evidence in this review shows that Mexico is the only surrogate country producing identical merchandise in significant quantities In the case of Malaysia, we preliminary found only one Malaysian company, Setia Maju, to be a producer of identical merchandise; however, no Malaysian product information was provided by the respondents to corroborate whether this producer or Malaysia, in general, had significant production of identical merchandise during the POR.”

the POR. *See* IDM at 11 (the record shows that “Mexico is the only surrogate country producing identical merchandise in significant quantities” and “no Malaysian production information was provided . . . to corroborate . . . significant production [there]”).

In sum, Commerce’s determination that Mexico was a “significant producer[] of comparable merchandise” was based on a permissible construction of those terms within the meaning of section 1677b(c)(4). Consequently, Commerce met its obligation to use “best available information” when Commerce valued factors of production using Mexico as a primary surrogate country.

II. Commerce’s Selection of Information

A. Financial Statements

Plaintiffs argue that Commerce should have used Malaysian surrogate values because Malaysian producers have superior financial statements that constitute the best available information. Pls. Br. at 12–18. In response, the Government contends that “the data contained in the financial statements of the Mexican company, CYDSA, were the best available information on the record to value surrogate financial ratios” and that the selection of CYDSA’s statements to value surrogate financial ratios is in accordance with law and supported by substantial evidence.⁸ Def. Br. at 20. The court holds that Commerce’s determination that CYDSA’s financial statements was the best available information is supported by substantial evidence.

In non-market economy antidumping proceedings, Commerce “relies upon financial statements from surrogate producers of ‘identical or comparable merchandise’ to determine surrogate values for manufacturing overhead, general expenses, and profit” *Globe Metallurgical Inc. v. United States*, 35 CIT 705, 720, 781 F. Supp. 2d 1340, 1354 (2011) (citing 19 C.F.R. § 351.408(c)(4)). “The data on which Commerce relies to value inputs must be the ‘best available information,’ but there is no requirement that the data be perfect.” *Home Meridian Int’l Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014). “Commerce’s ‘best available information’ analysis is context and fact dependent.” *Seah Steel Vina Corp. v. United States*, 950 F.3d

⁸ While the Government in its brief stated that CYDSA was “the only company with significant production of identical merchandise,” Def. Br. at 20, the Government conceded during Oral Argument that CYDSA does not produce *identical* merchandise but, rather, CYDSA produces only *comparable* merchandise. *See* Oral Argument Tr. at 72–73 (emphasis supplied).

833, 842 (Fed. Cir. 2020) (citing *Dorbest Ltd. v. United States*, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262, 1268 (2006) (citation omitted)).⁹

Commerce's practice is to "generally select[], to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1365 (Fed. Cir. 2019) (citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)). "[T]he court's role 'is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Dorbest*, 462 F. Supp. 2d at 1268 (citing *Goldlink Indus. Co., Ltd. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

Commerce determined that reliance on CYDSA's financial statements to calculate financial ratios was appropriate. IDM at 12. Since there was information regarding "the production of identical merchandise in Mexico" and "selecting Mexican data did not lead to factor valuation difficulties," Commerce explained that "[Commerce was] not required to consider parties' arguments for comparable merchandise." *Id.* at 11. Commerce noted that "[Commerce] preliminarily found only one Malaysian company, Setia Maju, to be a producer of identical merchandise," but that "there is no evidence of what quantities . . . or when it may have produced subject merchandise." *Id.* Additionally, in its Preliminary Determination, Commerce examined and dismissed, for the reasons stated, financial statements from four other Malaysian companies — Mey Chern, Whiting, Accot and CCM. PDM at 7–8. Finally, Commerce addressed plaintiffs' concerns on CYDSA's "level of integration and having its own energy division," explaining that "[o]ur finding in this review is consistent with past reviews" and noting that "the CIT has upheld our recent decision to use CYDSA's financial statements." IDM at 12 (citing *Heze Huayi Chemical Co., Ltd. and Juancheng Kangtai Chemical Co., Ltd. v. United States*, Slip Op. 18–57 (CIT 2018) at 20 (upholding the selection of CYDSA's financial statements)).

Plaintiffs argue that Commerce should have used Malaysian surrogate values because Malaysia has superior financial statements that constitute the best available information. Pls. Br. at 12–18. Plaintiffs explain: "Not only does Malaysia source multiple financial

⁹ Commerce's Policy Bulletin dictates consideration of whether "crucial factor price data . . . are inadequate or unavailable." Policy Bulletin 04.1 at 4. In general, however, "the criteria outlined in the section of Policy Bulletin 04.1 captioned 'Data Considerations' were developed to serve as a 'tie-breaker,' if necessary, in Commerce's identification of a surrogate country." *Jinan Yipin Corp., Ltd. v. United States*, 800 F. Supp. 2d 1226, n. 7 (2011).

statement [*sic*] instead of one, but each of the companies is more comparable than the sole Mexican company, CYDSA.” *Id.* at 15. Plaintiffs argue further that CYDSA, as a massive conglomerate, operates under “radically dissimilar” circumstances from the respondent company. *Id.* at 16–17. Plaintiffs conclude “that the Malaysian surrogate values are the best available information and, according to past Department practice to prefer the country with multiple financial statements, the Department should have relied on Malaysia.” *Id.* at 18.

The Government responds that “the data contained in the financial statements of the Mexican company, CYDSA, were the best available information on the record to value surrogate financial statements” and that “Commerce’s selection of [CYDSA]’s financial statement to value surrogate financial ratios is in accordance with law and supported by substantial evidence.” Def. Br. at 20. The Government relies on the fact that “Mexico is the only country with significant production of identical merchandise” and that “CYDSA provides a usable financial statement.” *Id.* at 22. Further, the Government explains that plaintiffs’ financial statement information regarding three of the Malaysian companies — Accot, May Chern and Whiting — was “completely unusable to value surrogate financial ratios” and that a fourth company — CCM — “did not provide any corroborating information to support that CCM is a significant producer of comparable merchandise.” *Id.* at 22.

For the following reasons, the court holds that Commerce’s determination that CYDSA’s financial statements were the best available information is supported by substantial evidence.

1. Mexican Production of Identical and Comparable Merchandise

In its Preliminary Determination and Final Determination, Commerce found that the record indicated that there was Mexican production of identical merchandise by Aqua-Clor. PDM at 12; IDM at 11. However, here, the data used by Commerce in the calculation of surrogate financial ratios are from CYDSA, which produces comparable — not identical — merchandise.¹⁰ *See* IDM at 8; Def. Br. at 22; *see also* Oral Argument Tr. at 57.¹¹ The Government argues that the

¹⁰ *See* footnote [8], above.

¹¹ At Oral Argument, the Government provided several justifications for its use of CYDSA’s financial statements. First, the Government noted that Commerce “uses the import data into the country, not specifically [*sic*] to a particular producer.” Oral Argument Tr. at 56. Second, the Government noted that Commerce prefers data from the primary surrogate country. *Id.* at 57. And third, “[Commerce] needs something that is publicly available and in English” and also takes into consideration the data quality from producers in Malaysia, “which are less reliable than that from Mexico.” *Id.* at 58.

fact that “Mexico is the only country with significant production of identical merchandise” supports that “CYDSA’s financial statement is the best available information in this review for selecting surrogate financial ratios.” *Id.* Plaintiffs counter that “the suggestion that financial ratios from a company that does not produce identical merchandise are somehow more comparable . . . because a company exists in the same country that produces identical merchandise is utterly illogical.” Pls. Reply Br. at 6.

The Court has previously found, in the context of Commerce’s consideration of which financial statements qualify as best available information, “no support for any preference between identical versus comparable merchandise” and that “Commerce’s regulation does not forbid treatment of identical and comparable merchandise as equivalent.” *Jiaying Brother Fastener Co. v. United States*, 34 CIT 1455, 1462, 751 F. Supp. 2d 1345, 1353 (2010).

The Court of Appeals for the Federal Circuit (“Federal Circuit”) has more recently noted Commerce’s “practice . . . to ‘use, whenever possible, the financial statement of a producer of identical merchandise.’” *Seah Steel Vina Corp. v. United States*, 950 F.3d 833, 841 (Fed. Cir. 2020). In *Seah Steel*, the Federal Circuit agreed with Commerce’s determination that “while [the company] Bhushan operates at a different level of integration than [SeAH], ‘Bhushan[’s] financial statements are appropriate . . . because Bhushan produces identical merchandise.” *Id.* at 842. Notably, *Seah Steel* referenced a preference for production of identical merchandise by the company in question — not by the country as a whole — to determine the appropriateness of financial statements. *See id.*

If CYDSA produced identical merchandise, the court would agree that this fact would be relevant to determining that CYDSA’s financial statements were the best available information. In this instance, however, the court agrees with plaintiffs that the Government’s reliance on the fact that a *different* company in Mexico produces identical merchandise is not compelling here, and, therefore, would not of itself constitute a factor supporting Commerce’s conclusion that CYDSA’s financial statements were the best available information.

The court, accordingly, considers whether Commerce demonstrated sufficiently that CYDSA’s financial statements are nonetheless the best available information. For the following reasons, the court agrees that Commerce’s decision was reasonable.

2. CYDSA's Financial Statements

Plaintiffs argue that, based on the methodology that Commerce used to analyze the Malaysian companies' financial statements, Commerce should have found that CYDSA does not in fact produce a significant quantity of comparable merchandise. Pls. Br. at 15. Plaintiffs note that CYDSA is a massive conglomerate, with its chemicals division serving as only one of five such divisions, and that it operates under "radically dissimilar" circumstances than the respondent companies (*Heze Huayi* and *Kangtai*). *Id.* at 15–17. Plaintiffs maintain, for example, that the corporate configuration of CYDSA results in differences in marketing and branding expenses. *See Shenzhen Xinboda Indus. Co. v. United States*, 38 CIT __, __, 976 F. Supp. 2d 1333, 1383 (2014). Plaintiffs note further that CYDSA differs in its level of integration, and "the fact that CYDSA produces this energy and self-consumes" also makes it dissimilar. *See* Oral Argument Tr. at 68–69. Additionally, "[CYDSA] has incurred high SG&A costs¹² due to major expansions and investments." Pls. Reply Br. at 7.

The Government explains that "Commerce's selection of [CYDSA], in spite of those issues, is consistent with its selection in the last three reviews [I]n *Heze Huayi*, the Court [*sic*] sustained that decision in the face of these very same arguments." Oral Argument Tr. at 74 (*italics supplied*). The Government correctly notes that the court already addressed the internal energy generation issue in *Heze Huayi*. *See id.* (citing *Heze Huayi*, 2018 WL 2328183 at *6–8). In *Heze Huayi*, the court upheld Commerce's determination — that CYDSA's financial statements were suitable for calculating financial ratios — as supported by substantial evidence and in accordance with law, despite similar concerns raised on energy inputs. *See Heze Huayi*, Slip Op. 18–57, 2018 WL 2328183, at *9 (CIT May 22, 2018). The court also explained that "CYDSA is a producer of comparable merchandise, not identical merchandise, but Commerce 'has wide discretion in choosing among various surrogate sources.'" *Id.* (citing *FMC Corp. v. United States*, 27 CIT 240, 251 (2003)).

Moreover, the court in *Seah Steel* found that "where, as here, Commerce finds that better information is not available . . . Commerce may use the financial statements of 'companies with differing integration levels.'" *Seah Steel*, 950 F.3d at 841 (citing *Home Meridian*, 772 F.3d at 1296). Since, as discussed below, Commerce found that the Malaysian financial statements do not present a better alternative, the court agrees that Commerce's selection of CYDSA's financial

¹² SG&A costs represent selling, general and administrative expenses.

statement as the best available here was reasonable. “The data on which Commerce relies to value inputs must be the ‘best available information,’ but there is no requirement that the data be perfect.” *Home Meridian Int’l, Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014).

3. Malaysian Financial Statements

Plaintiffs argue that Commerce relied on only one financial statement from CYDSA when “[Commerce] has a strong preference to use multiple financial statements” to “reduce[] the potential for [cost] distortions in the comparable industry.” Pls. Br. at 17. Plaintiffs contend that Commerce has “often made surrogate country determinations based on the comparability and quantity of available financial statements” and has indicated a “preference for using multiple financial statements.” *Id.* at 12–13 (citing *Certain Activated Carbon From the People’s Republic of China*, 77 Fed. Reg. 67,337 (Dep’t Commerce Nov. 9, 2012) (final results ADD admin. review) and accompanying Issues Decision Memorandum at Comment 1F; *Steel Wire Garment Hangers from the People’s Republic of China*, 78 Fed. Reg. 28,803 (Dep’t Commerce May 16, 2013) (final results)). Here, plaintiffs argue that this practice weighs in favor of finding that multiple financial statements from multiple Malaysian companies were more suitable than financial statements from a single Mexican company. Pls. Br. at 17

Commerce considered and rejected reliance on the Malaysian statements, explaining that — as noted above — three of the four Malaysian financial statements were “unusable for various reasons.” PDM at 12–13; Def. Br. at 21. As to the fourth (CCM), Commerce determined that “CCM did not provide the best available information on the record.” Def. Br. at 21. Commerce found that CCM was a producer of comparable merchandise, but no corroborating information was presented to show that CCM was a *significant* producer of comparable merchandise. IDM at 9. Similarly, Commerce noted that no financial information was provided for the fifth producer, Setia Maju. PDM at 13.

The court agrees that Commerce typically “prefers to use multiple financial statements to normalize any potential distortions that may arise from using the statements of a single producer.” *NTSF Seafoods Joint Stock Co. v. United States*, Slip Op. 19–63, 2020 Ct. Intl. Trade LEXIS 189, at *15 (CIT Dec. 21, 2020). However, Commerce prefers multiple financial statements only “as long as those financial statements ‘are not distortive or otherwise unreliable.’” *Dorbest*, 604 F.3d at 1374. The court concludes, for the following reasons, that Com-

merce adequately explained why the preference for multiple financial statements was not dispositive here.

First, the record supports Commerce's conclusion that the financial statements of one of the Malaysian companies, Mey Chern, are not reliable. IDM at 9. PDM at 12. Its financial statements "are not contemporaneous with the POR" and it is not "a demonstrated producer of either identical or comparable merchandise." IDM at 9. Plaintiffs maintain that Mey Chern is a manufacturer and trader of ten chlor-alkali chemicals, including sodium hypochlorite, and that Commerce has found sodium hypochlorite to be highly comparable to chlorinated isocyanurates. Pls. Br. at 14. However, the Government correctly notes that "Mey Chern's financial statements did not identify the merchandise involved in its trading and/or manufacturing activities . . . and no record evidence corroborates the contention that Mey Chern produces sodium hypochlorite." Def. Br. at 21–22 (citing PDM at 12). Commerce noted in the PDM that the "website information only identifies the company as a *trader* of sodium hypochlorite." PDM at 12 (emphasis supplied).

Second, the financial statements from Mey Chern's holding company, Whiting, suffer from similar flaws. IDM at 9. Whiting's statements also "are not contemporaneous with the POR" and the company is not a demonstrated producer of either identical or comparable merchandise. *Id.* Plaintiffs maintain that Commerce could use Whiting's financial statements to capture "the financial ratios of the manufacturing company and not merely the investment company." Pls. Br. at 14. However, it is not clear how this would solve the flaws in these data identified in the Final Determination. The Government points out that "no record evidence corroborates the contention that Whiting is involved in 'trading and manufacturing' of chemicals such as sodium hypochlorite." Def. Br. at 21; *see also* PDM at 12. This lack of corroborating evidence weighs against plaintiffs' argument that the Malaysian financial statements were more suitable.

Third, the financial statements of Accot are flawed as well. According to those statements, Accot's principal activity is dealing with industrial chemicals. IDM at 9. While Accot's website references the sale of a comparable product, "the website also notes that it imports the bulk of its products." *Id.* A single product data sheet from Accot was on the record, and it showed "that the comparable product, calcium hypochlorite, originated from Japan." *Id.* According to plaintiffs, even if Accot sources one of its chemicals from Japan, that sourcing practice does not prove that other comparable products are sourced from Japan. Pls. Br. at 14. However, plaintiffs offer no record

evidence to support the argument that other comparable products produced by Accot are sourced from another place of origin.

Finally, the record does not support that CCM was a significant producer of comparable merchandise. IDM at 9. CCM is the only Malaysian company with “sufficient information on the record showing it to be a producer of comparable merchandise.” PDM at 13. However, the data suffer from flaws. First, no corroborating information demonstrates that CCM is a “significant producer of comparable merchandise.” *Id.* Second, Malaysian HTS numbers are less precise than Mexican HTS numbers. Mexico has an eight-digit level HTS number applicable to the subject merchandise, while the relevant Malaysian HTS number “does not separately break out chlorinated isos within the basket of products” included in the classification. *Id.* At Oral Argument, the Government further pointed out that CCM “had sales and marketing subsidiaries, was involved in an energy systems joint venture” and that it “had several of the same problems that are being alleged to exist with the CYDSA statement.” Oral Argument Tr. at 76. In light of the issues that were identified in the record, the court does not find a basis to support plaintiffs’ contention that CCM is “highly preferable” to CYDSA.

In view of the foregoing, the court holds that Commerce sufficiently explained its concerns with the four Malaysian financial statements on the record and Commerce’s reasoning that CYDSA’s financial statement had the “highest quality [surrogate value] data on the record.” PDM at 16. While plaintiffs are correct in demonstrating that the Mexican data were flawed in certain respects, the fact that “the data may be imperfect” does not preclude Commerce’s decision from being considered reasonable. *See Jiaying Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1301 (Fed. Cir. 2016). The court finds here that, given these two choices, a “reasonable mind could conclude that Commerce chose the best available information” in selecting the Mexican data. *See Dorbest*, 462 F. Supp. 2d at 1258. Accordingly, the court holds that Commerce’s selection of the Mexican data is supported by substantial evidence and otherwise in accordance with law.

B. Commerce’s Reliance on Global Trade Atlas (GTA) data

Plaintiffs argue that Commerce’s determination that GTA data are superior to TDM data is arbitrary and capricious. Pls. Br. at 21–29. They argue that Commerce must provide a more robust explanation for rejecting the TDM data here because of Commerce’s prior reliance on TDM data. Pls. Reply Br. at 13. The Government claims that during the review, Commerce found plaintiffs’ argument in support of its Malaysian TDM data as moot and claims that Commerce’s selec-

tion of Mexican GTA import data is supported by substantial evidence. Def. Br. at 22–24. For the reasons discussed, the court concludes that the issue of Commerce’s database selection is moot — because Commerce acted within its discretion to use Mexican GTA data based upon its selection of Mexico as primary surrogate country.

Under Commerce’s sequential analysis, Commerce first considers economic comparability by compiling a list of potential surrogate countries that are at a comparable level of economic development to the NME country, identifies producers of comparable merchandise among the potential surrogates, then determines whether any of the producers of comparable merchandise are “significant” producers of that comparable merchandise. *Id.* at 2–3. It is only after that point — the fourth step in the process — that Commerce weighs data considerations. *Id.* at 3–4. However, the Policy Bulletin is not clear on the consideration of data when only a single country has survived the selection process to this point, as it did in this instance. *Id.* The Policy Bulletin instructs Commerce to consider whether crucial data from the selected surrogate country are “inadequate or unavailable.” *Id.*

As discussed above, Commerce’s practice is to “generally select[], to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review.” *Weishan Hongda Aquatic*, 917 F.3d at 1365 (citing *Qingdao Sea*, 766 F.3d at 1386). In accordance with 19 C.F.R. § 351.408(c)(1), Commerce considers “publicly available information to value factors [of production]” (“FOPs”). “The court will uphold Commerce’s surrogate value choices if the agency fairly considered record evidence when choosing surrogates, so that a reasonable mind could accept Commerce’s findings.” *Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States*, 37 CIT 1619, 1633, 949 F. Supp. 2d 1311, 1326 (2013) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938); *CITIC Trading Co. v. United States*, 27 CIT 356, 361 (2003)).

The governing statute specifies that Commerce must use “best available information” when valuing FOPs. 19 U.S.C. § 1677b(c)(1)(B). The statute does not define “best available information,” so Commerce has “broad discretion” to decide which record information meets this standard. *Zhejiang*, 652 F.3d at 1341 (citations omitted). The role of a reviewing court is “not to evaluate whether the information Commerce used was the best available, but rather whether Commerce’s choice of information is reasonable.” *Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003).

On October 3, 2018, Commerce invited the parties to comment on the selection of surrogate countries and provide surrogate valuations of FOPs of chlorinated isos. PDM at 2. Plaintiffs submitted Malaysian import data from TDM and petitioners submitted Mexican import data from GTA. *Id.* at 7–8. Commerce preliminarily found the Malaysian surrogate values to be “unusable because they are sourced from TDM, a subscription-based database.”¹³ PDM at 16. In its Final Determination, Commerce found “the issue of using TDM data as a source for Malaysian surrogate values to be moot” because “the record information shows Mexico as the only significant producer of identical merchandise and having usable surrogate value data for all FOPs.” IDM at 14.

Plaintiffs argue that Commerce’s decision to use GTA data for Mexico over TDM data for Malaysia is unreasonable because in taking that decision, Commerce favored arbitrarily one dataset over another. Pls. Br. at 21–29. According to plaintiffs, Commerce “acted arbitrarily not only in treating two data sources differently, when they are the same in reliability and access, but also acted arbitrarily in discounted [sic] an entire surrogate county [sic] for this issue in this review.” *Id.* at 21. Further, plaintiffs argue that Commerce’s statement that “TDM is unusable because it is subscription-based” is indicative of inconsistency in Commerce’s reasoning since both TDM and GTA are subscription-based. Pls. Reply Br. at 10.

Plaintiffs also argue that Commerce must provide a more robust explanation for rejecting TDM data in the present case because Commerce has relied on TDM data in previous cases. Pls. Reply Br. at 13. To support their argument, plaintiffs cite to previous Commerce decisions in which Commerce used Malaysian TDM import data. IDM at 14 (citing *Steel Propane Cylinders From the People’s Republic of China*, 83 Fed. Reg. 54,086 (Dep’t Commerce October 26, 2018) (preliminary countervailing duty determination) (“*Steel Propane Cylinders*”) and *Fresh Garlic From the People’s Republic of China*, 84 Fed. Reg. 27,585 (Dep’t Commerce June 13, 2019) (preliminary antidumping determination) (“*Fresh Garlic*”). Plaintiffs state that Commerce’s rejection of TDM data in the present case based on TDM’s purported unreliability is arbitrary and capricious because Commerce relied on TDM data in those prior decisions. Pls. Br. at 23.

The Government argues that Commerce’s selection of Mexican GTA import data is supported by substantial evidence. Def. Br. at 22–24. In its Final Determination, Commerce found that the issue of using

¹³ At Oral Argument, plaintiff pointed out the problematic nature of Commerce’s reasoning in its preliminary determination. As plaintiff explained, “Both GTA and TDM are paid subscription sources that gather data from the same official government source.” Oral Argument Tr. at 77.

TDM data as a source for Malaysian surrogate values was moot because “the record information shows Mexico as the only significant producer of identical merchandise and having usable surrogate value data for all FOPs.” IDM at 14. The Government points out that “no other country on the surrogate country list produced identical merchandise.” Def. Br. at 23. Because of Mexico’s status as the sole producer of identical merchandise out of the countries on the surrogate country list, it is the Government’s position that Commerce reasonably determined that the GTA data from Mexico were “superior” to the Malaysian TDM data because Malaysia is “a producer of comparable merchandise that Commerce did not select as the primary surrogate country.” *Id.* Because Mexico is the sole producer of identical merchandise, the Government maintains that Mexico “provides the best available information on the record to value all FOPs consistent with Commerce’s longstanding preference to value FOPs when possible from a single surrogate country.” Def. Br. at 24.

The Government also claims that Commerce “routinely relies” on GTA as a source of surrogate values and “declined to use TDM data as an uncorroborated, private, subscription-based database.” Def. Br. at 23 (citing *Steel Propane Cylinders from the People’s Republic of China*, 83 Fed. Reg. 66,675 (Dep’t of Commerce Dec. 27, 2018) and accompanying Prelim. Decision Memo at 11 (Unchanged in Final); *Certain Activated Carbon from the People’s Republic of China*, 84 Fed. Reg. 27,758 (Dep’t of Commerce June 14, 2019) (prelim. admin. review) and accompanying Prelim. Decision Memo at 15 (Unchanged in Final)). The Government states that plaintiffs fail to acknowledge the TDM data on the record “are not the best available information to value surrogate country data.” Def. Br. at 22.

The Government is correct in contending that the issue of Commerce’s database selection is moot because plaintiffs seek improperly to fuse the issue of Commerce’s selection of a surrogate country with Commerce’s selection of a database, which is a data consideration. Policy Bulletin 04.1 does not support plaintiff’s claim that Commerce erred in “treating two data sources differently.” Pls. Br. at 21. When Commerce has narrowed the selection process to a single country, the Policy Bulletin instructs Commerce to weigh if crucial factor price data from that country are “inadequate or unavailable.” Policy Bulletin 04.1 at 4. The Policy Bulletin does not instruct Commerce to select the country with the “best factors data” as the primary surrogate country, because that direction applies specifically to situations when “more than one country has survived the selection process.” *Id.*

Commerce’s use of GTA data rather than TDM data accords with its Policy Bulletin. The Policy Bulletin explicitly states that Commerce

data considerations are to be weighed in a “sequential” manner, following three other steps in the surrogate country selection process. Policy Bulletin 04–1 at 2. The Government explains that it used GTA data from Mexico because GTA data were the only available data on the record from the primary surrogate country that Commerce selected — Mexico. IDM at 14. Def. Br. at 23. As discussed above, Commerce’s decision to select Mexico as primary surrogate country was supported by substantial evidence and in accordance with law. *See supra* Section I. Since Commerce selected Mexico as the primary surrogate country, a determination of which database was “best” was unnecessary. Accordingly, Commerce’s use of GTA data was supported by substantial evidence.

The record shows that Commerce exercised properly its broad discretion in selecting the best available information for the record from a reliable database. *See, e.g., Timken Co. v. United States*, 16 CIT 142, 147, 788 F. Supp. 1216, 1220 (1992) (clarifying that “[w]hen Commerce is faced with the decision to choose between two alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly if their selection is reasonable.” (citations omitted)). Here, there is no indication that Commerce abused its discretion because Commerce had reasonably selected Mexico as the primary surrogate country and the surrogate values from Mexico are in the form of GTA data.

Moreover, while Commerce used TDM data in past cases, it has also previously explained its preference for the GTA database as a source of reliable data. *See, e.g., Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Certain Activated Carbon from the People’s Republic of China*, 84 Fed. Reg. 27,758 (Dep’t Commerce June 14, 2019) and accompanying PDM at 15 (stating, “[GTA] is a source that is regularly used by Commerce because the data therein meet Commerce’s SV criteria.”); *see also, Steel Propane Cylinders from the People’s Republic of China*, 83 Fed. Reg. 66,675 (Dep’t Commerce Dec. 27, 2018) and accompanying PDM at 10 (stating, “...because TDM is a private, subscription-based, database, we are unable to corroborate the data submitted and preliminarily decline to use the TDM data as the source of SVs for the purposes of this investigation.”).

Plaintiffs argue that because Commerce used TDM data in the past, Commerce must provide an explanation here for rejecting the TDM data in the present case. Pls. Reply Br. at 11 (citing *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)). However, no authority mandates that Commerce provide an explanation for the

rejection of TDM data in the instant case. In *SKF USA Inc. v. United States*, Commerce defined inconsistently a statutory term (“foreign like product”) within a single proceeding. 263 F.3d at 1382. The court held that Commerce is required to provide an explanation for defining the same phrase in two different ways in the course of the same proceeding. *Id.* The court finds such a comparison inapposite to the use of different data in a different proceeding, which is at issue in this case.

In addition, the Government is correct to note that Commerce has a “longstanding preference” to value FOPs from a single surrogate country when possible. Def. Br. at 24. “Except for labor, as provided in paragraph (d)(3) of this section, the Secretary normally will value all factors in a single surrogate country.” 19 C.F.R. §351.408(c)(2). *See also Clearon Corp. v. U.S.*, 37 C.I.T. 220, 228, 2013 WL 646390, at *6 (CIT, 2013) (stating, “. . . the court must treat seriously the Department’s preference for the use of a single surrogate country.”).

Moreover, in response to plaintiffs’ reference to Commerce’s prior use of TDM data in *Fresh Garlic* and *Steel Propane Cylinders*, the Government notes that the circumstances of those two cases differ from the present one. Def. Br. at 23–24. The Government is correct to distinguish both cases from the instant case.

In *Fresh Garlic*, Commerce relied upon TDM data because “there [were] no usable alternative import statistics on the record, because those provided by [petitioners] were not translated.” *Fresh Garlic* IDM at 15. In that case, Commerce had determined that Romania and Mexico were significant producers of identical merchandise. *Fresh Garlic* PDM at 11. Commerce noted that “if more than one country meets the economic comparability and significant producer of comparable merchandise criteria, “then the country with the best factors data is selected as the primary surrogate country.” *Id.* at 12 (citing Policy Bulletin 04.1). Because the submitted Mexican import statistics were not translated, Commerce found that Mexico could not be selected as the primary surrogate country and, instead, relied on TDM data from Romania. *Id.* at 12–14. Reliance on *Fresh Garlic* does not aid plaintiffs’ argument here because, in that case, *both* Romania and Mexico were found to be significant producers of identical merchandise. *Id.* at 11. In the present case, Commerce determined that Mexico is the only significant producer of identical merchandise. IDM at 14.

Plaintiffs’ argument relating the instant case to *Steel Propane Cylinders* — to demonstrate that Commerce previously relied on TDM data — is also misplaced. In *Steel Propane Cylinders*, Commerce used TDM data, averaged with export prices submitted by respondents, to

develop benchmark data that themselves are averaged. *Steel Propane Cylinders* PDM at 15. Establishing a weighted average benchmark in a countervailing duty investigation is inapposite to selecting a surrogate country for FOPs in an antidumping investigation. See *Canadian Solar International Limited v. United States*, 378 F. Supp. 3d 1292 (finding Commerce’s reliance on negligible import quantities without addressing the impact this negligible volume has on reliability of the benchmark unreasonable).

The court recalls that Commerce “has wide discretion in choosing among various surrogate sources.” *FMC Corp. v. United States*, 27 CIT 240, 251 (2003), *aff’d*, 87 Fed. Appx. 753 (Fed. Cir. 2004). The court recognizes that “Commerce retains discretion over its preferred data, and on the record here, the court cannot intrude upon Commerce’s informed determination on this issue.” *Clearon Corp. v. United States*, Slip Op. 16–110, 2016 Ct. Int’l Trade LEXIS 110, at *35 (CIT Nov. 23, 2016). Commerce exercised reasonably this discretion in selecting GTA data that plaintiffs concede were valid.¹⁴ Commerce’s decision to select GTA data for Mexico and Commerce’s explanation thereof are supported by substantial evidence and are in accordance with law.

II. CIF Adjustment

Plaintiffs argue that Commerce’s CIF adjustment to Mexico’s FOB value was not supported by substantial evidence. Pls. Br. at 29–31. Plaintiffs argue that Commerce’s adjustment included values that were unreasonably inflated and do not reflect in two respects commercial reality. *Id.* First, plaintiffs argue that Commerce derived information regarding marine insurance prices from unreasonable sources. *Id.* at 30. Plaintiffs point in particular to Commerce’s use of marine insurance price data from 2010, seven years prior to the POR. *Id.* Additionally, the price relied upon involved the shipment of general merchandise to and from the United States and was not specific to marine insurance costs from Mexico to the United States or other economically comparable countries. *Id.* Second, plaintiffs argue that Commerce’s adjustment unreasonably added long-distance freight costs. *Id.* Plaintiffs argue that the freight costs of shipping inorganic chemicals from Shanghai to Long Beach or Houston, which Commerce relied upon, are based on “long [*sic*] expensive routes that are not specific or comparable to the costs that a Mexican chlor [*sic*] isos producer would incur.” *Id.* Instead, plaintiffs argue, “the vast majority of the imports are across a nearby land border.” *Id.*

¹⁴ Plaintiffs implicitly concede this validity by asserting: “The Department acted arbitrarily . . . in treating two data sources differently, when they are the same in reliability and access. . . .” Pls. Br. at 21.

The Government argues that its adjustment of FOB values to a CIF basis adhered to its past practice. Def. Br. at 25 (citing *Hydrofluorocarbon Blends from the People's Republic of China*, 84 Fed. Reg. 17,380 (Dep't Commerce Apr. 25, 2019) (final determination)). The Government states that "limiting the surrogate country selection process to countries that reported import data on a CIF basis may limit unreasonably the potential pool of possible surrogate countries." *Id.* Additionally, the Government argues that plaintiffs fail to show for two primary reasons that Commerce's CIF adjustment is not supported by substantial evidence.

First, the Government argues that plaintiffs "did not provide any alternative data for use in adjusting the FOPs to a CIF basis during review," including regarding Mexican import data and freight costs. *Id.* at 25–26. Second, the Government argues that plaintiffs failed to explain the reason that the adjustment disqualified Mexico as the preferred surrogate country given Commerce's stated "policy consideration of not limiting the potential pool of possible surrogate countries." *Id.* According to Commerce, limiting the surrogate country selection process to only those countries that report import data on a CIF basis may "unreasonably limit" the potential pool of countries. *Id.* (citing *Certain Quartz Surface Products From the People's Republic of China*, 84 Fed. Reg. 23,767 (Dep't of Commerce May 23, 2019) (final LTFV investing.), and accompanying IDM at cmt. 8).

The record demonstrates that Commerce's use of Mexican data and adjustment of those data to a CIF basis were reasonable. Commerce explained that its process reflected two purposes: (1) adherence to existing policy outlined in its Policy Bulletin and (2) enabling selection of primary surrogate countries from a broader pool. Additionally, plaintiffs failed to provide information demonstrating that Commerce failed to rely on "best available information" here. 19 U.S.C. § 1677b(c).

A. Commerce's Use and Adjustment of FOB Data

In the instant case, Commerce provided three rationales for its decision, each of which independently provides a sufficient basis for its decision to use FOB data and adjust it to a CIF basis. "Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Sing. Ltd v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).

First, as discussed above, Commerce reasonably selected Mexico as the primary surrogate country, and the Mexican import statistics are

reported on a FOB basis. Therefore, Commerce reasonably relied on the data that were available as a result of its selection of Mexico as the primary surrogate country.

Second, Commerce adhered to an existing stated practice. “[W]hen the import statistics of the surrogate country do not include [CIF] costs, [Commerce] has added surrogate values for international freight and foreign brokerage and handling charges to the calculation of normal value.” *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, FN 2 (2019) (quoting Policy Bulletin 10.2: Inclusion of International Freight Costs When Import Prices Constitute Normal Value (Nov. 1, 2010) (available at: <https://enforcement.trade.gov/policy/PB10.2.pdf>)). Plaintiffs argue that Commerce should not have adjusted the data to approximate CIF values, but Commerce’s Policy Bulletin anticipates explicitly that Commerce may perform these types of adjustments. See Policy Bulletin 10.2 (stating that “in situations where the surrogate country import statistics do not include international freight costs, the Department will add international freight and foreign brokerage and handling charges to the import value.”).

As defendant-intervenors argue in their brief, “Commerce reasonably treated the adjustment from FOB to CIF basis as a secondary adjustment *after* it applied the analysis set forth in Policy Bulletin 04.1.” Def.-Intervenors’ Br. at 17 (emphasis in original). Moreover, in prior investigations and reviews, Commerce has adjusted Mexican FOB values, demonstrating further that its methodology here represented an adherence to past practice. Def. Br. at 25. See *Hydrofluorocarbon Blends from the People’s Republic of China*, 84 Fed. Reg. 17,380 (Dep’t of Commerce April 25, 2019) (final admin. review) and accompanying Issues and Decision Memo at 13 (Commerce adjusted Mexican FOB values to account for movement expenses by adding an amount for international freight and marine insurance.).

Third, Commerce’s practice aligned with its stated goal “of not limiting the potential pool of possible surrogate countries.” Def. Br. at 26. Commerce’s ability to make adjustments allows it to use data from countries that report on an FOB basis as well as on a CIF basis, thereby enabling Commerce to consider a broader range of possible surrogate countries.

B. Whether Plaintiffs Demonstrated that Commerce’s CIF Adjustment Likely Distorted Surrogate Values

In examining Commerce’s use and adjustment of these data, the court must determine whether it is reasonable to conclude that Commerce’s treatment of the data aligned with the statute’s directive to

choose the “best available information.” 19 U.S.C. § 1677b(c). *See Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (stating “[t]he Court’s role . . . is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.”).

Jiangsu instructs that distortion occurs when a CIF value lacks a specific connection to the FOB value. In *Jiangsu*, the company used for CIF additions provided data from two South African ports. *Jiangsu Zhongji Lamination Materials Co., (HK)* at 1352. Despite the small sample size — which plaintiff argued was distortive — the court held that those “ports were of specific relevance to South African import data” (the two ports selected for the CIF adjustment were in South Africa, which was the surrogate country). *Id.* That specific connection contributed to the court’s finding that distortion had not occurred. *Id.*

Here, plaintiffs have not demonstrated that it would be unreasonable to conclude that Commerce chose the best available information by using and adjusting FOB data. To demonstrate that Commerce’s reliance on information in the record was unreasonable, plaintiffs must show that Commerce’s CIF adjustment is likely to distort surrogate values. *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, 1353 (2019) (holding that Commerce’s adjustment of surrogate data from FOB values to CIF values was not distortive because the surrogate to adjust from FOB to CIF came from ports with “specific relevance to South African import data [surrogate country]”).¹⁵ Plaintiffs argue that the addition of marine insurance and international freight costs distorted the surrogate values here. Pls. Br. at 29–30. However, plaintiffs fail to show that such distortion occurred.

Plaintiffs claim that the added shipping costs unreasonably doubled their margins and are contrary to commercial reality, thereby distorting the surrogate values. Pls. Br. at 29. However, plaintiffs have provided no evidence to support their assertion that “no reasonable commercial producer would pay as much or more for the transportation of a raw material than for the raw material itself.” *Id.*

Plaintiffs argue that the marine insurance price data that Commerce used in its adjustment are deficient for two reasons: (1) the prices are from 2010; and, (2) the prices are specific neither to Mexico nor to other economically comparable countries. Pls. Br. at 18–19.

¹⁵ *Jiangsu* emphasizes further that the “need for the adjustment [of FOB data] should . . . not weigh against the selection of [FOB data].” *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, 1353 (2019).

However, plaintiffs do not provide any information demonstrating that the price data are inaccurate such that they result in distorted CIF values. See *Jiangsu Zhongji Lamination Materials Co., (HK)* at 1352 (finding reasonable Commerce’s selection of FOB data even where the FOB data was not contemporaneous with the period of investigation). Commerce drew these data from petitioners’ initial surrogate value submission. IDM at 17. Plaintiffs neither objected to the marine insurance price data when they were initially used, nor did plaintiffs provide any alternative data when they were provided the opportunity to do so. *Id.*

Plaintiffs similarly fail to support their assertion that the international freight costs that Commerce used in its adjustment led to distorted values. Plaintiffs claim that Commerce’s decision to add international freight costs was unreasonable in two respects. Plaintiffs claim that Commerce should not have added ocean freight costs because most shipping from Mexico to the United States occurs by truck. Pls. Br. at 30. In making this argument, plaintiffs misstate the purpose of Commerce’s adjustment, which is to determine the plaintiffs’ production costs through use of data from a surrogate country. See IDM at 17 (“Under NME methodology, Commerce is tasked with determining what the respondents’ cost of producing subject merchandise would be if the NME country operated under market principles. To do this, Commerce determines a market-economy value for each input used to produce that merchandise, and then it computes the cost of transporting that input to the factory in the NME country.”). The “need for [] adjustment” is part of this process. *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 396 F. Supp. at 1353 (2019).

The Mexican import values used in this calculation do not include ocean freight costs, so Commerce factored in freight costs of shipping inorganic chemicals from Shanghai to Long Beach and Shanghai to Houston to reflect plaintiffs’ costs more accurately. See *Jiangsu Zhongji Lamination Materials Co.*, 43 CIT __, __, 396 F. Supp. 3d at 1352. (“The cost of international freight is included in the factors of production for which Commerce must obtain surrogate values.”).

In summary, Commerce both used and adjusted reasonably FOB data. Commerce provided a legitimate reason for using FOB data and adjusting the data from FOB to CIF basis. The agency’s decision-making process is “reasonably discernible” to the Court, *NMB Sing. Ltd.*, 557 F.3d at 1319, and plaintiffs have neither contested its accuracy nor demonstrated that Commerce’s data distorted surrogate values, such that their use is unreasonable.

CONCLUSION

It is not clear whether the swimming pool at the home of Benjamin Braddock's parents contained chlorinated isocyanurates. What is clear is that the swimming pool featured prominently in the movie about Ben, his parents, their neighbor, Mrs. Robinson, and her daughter, Elaine.¹⁶ In two of the pool scenes in *The Graduate*, the virtuosity of director Mike Nichols (who won an Academy Award for the film) and his hand-picked cinematographer Robert Surtees (winner of three prior Academy Awards, including for *Ben-Hur*, and nominated an additional thirteen times, including for *The Graduate*) is apparent. In both, the directorial and camera work alone carries the story line, not just punctuating the action and Buck Henry's phenomenal dialogue but earning equal rights in telling the story and its themes of generational disconnect and divide.

In the first scene, Ben's parents have invited what appear to be family friends for Ben's twenty-first birthday. Only one of the attendees is dressed to be poolside, the rest (including young children) look as though they are on the way to a cotillion. Ben's father, with a booming, irritating voice, repeatedly asks Ben to come out of a poolside changing room and trots back and forth inanely between the hidden Ben, whom we can hear but not yet see, and the Braddocks' guests. Ben keeps asking to speak to his father, clearly not wanting to come out for the dog and pony show his father has arranged. His father repeatedly ignores Ben's requests to speak with him.

"You're disappointing them, Ben, you're disappointing them."

"Dad, can you listen?"

Mr. Braddock trots back to his guests, announcing Ben's imminent appearance: "he is going to give us"

Finally, Braddock Senior trots back yet again and pushes open the door open to reveal Ben, attired in a deep sea diving suit complete with giant flippers, helmet and rod. Nichols and Surtees position the camera at the doorway. The camera, stationary, films Ben approaching ever closer, inane noise of the grownups and guests growing louder until, when Ben reaches the camera, it moves *inside* his helmet and we *see* what Ben sees — inanely gesticulating people, waving and smiling and clapping — and we *hear* what Ben hears — only the sound of his breathing, drawing in from the oxygen tank, and exhaling. (Likely the most memorable inhaling-exhaling movie sequence until the appearance, six years later, of Darth Vader.) As Ben approaches three descending stair steps, the camera tracks his head

¹⁶ THE GRADUATE (Mike Nichols/Lawrence Turman Productions 1967).

and we see just the steps and his giant flippers descending the stairs, then resumes his march toward the pool. He remains — together with us, the audience — enveloped in the sound of his own breathing.

The two perspectives of the camera and audio have become the two perspectives of the scene. When the camera is pointed from the outside toward Ben, we see and hear the clamorous perspective of his father and the other grown-ups gesticulating in ridiculous ways and contributing inane comments about Ben in the diving suit. When the camera is inside the helmet, we see and, most importantly, hear Ben's perspective: the sound of his breathing. It is an updated version of the grown-ups in the Peanuts cartoons — offering only “unintelligible warble,” rendered musically with the sounds “mwa-mwa-mwa-mwa.”¹⁷ The scene ends when Ben walks down the steps into the pool and floats to the bottom at the deep end, propping himself against the wall so as not to bob to the surface, enveloped in silence, detached, completely, from the inanity above.

The second scene opens with the camera faced up, directly into the sun, Ben's father's face silhouetted as a dark shape with barely discernible features.

Mr. Braddock, irritated, shrill voice: “Ben, what are you doing?”

“Well,” Ben starts, “I would say that I'm just drifting. Here in the pool.”

“Why?” Irritation rising. Camera pivots to Ben, seen completely clearly, except for his eyes, hidden behind sunglasses, glaring sun reflecting off them.

“Well, it's very comfortable just to drift here.”

Camera back into the sun, Mr. Braddock silhouetted: “Have you thought about graduate school?”

“No.”

“Would you mind telling me, then, what those four years of college were for? What was the point of all that hard work?”

Camera back to Ben, still in clear view: “You got me.”

In conclusion, Commerce's determination is supported by substantial evidence and is otherwise in accordance with law. Therefore, the court sustains Commerce's Final Determination. Judgment will enter accordingly.

¹⁷ Jake Rossen, *The Reason Adults Are Never Visible in Charles Schulz's Peanuts Comic Strips*, MENTAL FLOSS (Aug. 28, 2019), <https://www.mentalfloss.com/article/598218/peanuts-comic-strip-no-adults>.

Dated: August 5, 2021
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

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