

U.S. Customs and Border Protection



DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 21-17

EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL MATERIAL AND IMPOSITION OF IMPORT RESTRICTIONS ON ETHNOLOGICAL MATERIAL OF EGYPT

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

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension and amendment of import restrictions on certain archaeological material and the imposition of import restrictions on ethnological material of the Arab Republic of Egypt (Egypt). The restrictions on archaeological material, which were originally imposed by CBP Dec. 16–23, were extended and amended on November 30, 2021. The Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending and updating the import restrictions that previously existed, and the Governments of the United States and Egypt entered into a new agreement to reflect the extension of these import restrictions. Additionally, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for adding import restrictions on certain categories of ethnological material. The new agreement, which entered into force on November 30, 2021, supersedes the existing Memorandum of Understanding (MOU) that became effective on November 30, 2016, and enabled the promulgation of the existing import restrictions. Accordingly, the current import restrictions and new import restrictions will be effective until November 30, 2026, and the CBP regulations are being amended to reflect this extension and imposition. To fulfill the terms of the new MOU, the Designated List of cultural property, which was described in CBP Dec. 16–23, is amended in this document

to reflect the addition and revision of categories of archaeological material of Egypt ranging in date from approximately 300,000 B.C. to A.D. 1750, and to include certain ethnological material ranging from A.D. 1517 to 1914.

DATES: Effective on December 1, 2021.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov*. For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.* (hereinafter, “the Cultural Property Implementation Act”), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter, “the Convention” (823 U.N.T.S. 231 (1972))), the United States entered into a bilateral agreement with the Arab Republic of Egypt (Egypt) on November 30, 2016. The Memorandum of Understanding (MOU) enabled the promulgation of import restrictions on certain archaeological material representing Egypt’s cultural heritage ranging from approximately 300,000 B.C. to A.D. 1750.

On December 6, 2016, U.S. Customs and Border Protection (CBP) published CBP Dec. 16–23 in the **Federal Register** (81 FR 87805), which amended § 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a)) to reflect the imposition of import restrictions and included a list designating the types of archaeological material covered by the restrictions.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists. *See* 19 CFR 12.104g(a).

On February 5, 2021, the United States Department of State proposed in the **Federal Register** (86 FR 8476), to extend and amend the MOU between the United States and Egypt concerning the im-

port restrictions on certain categories of archeological material of Egypt. On August 15, 2021, after consultation with and recommendations by the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that: (1) Egypt's cultural heritage continues to be in jeopardy from pillage of archeological resources and that the import restrictions should be updated and extended for an additional five years; and (2) Egypt's cultural heritage is in jeopardy from pillage of certain types of ethnological material, from Egypt, ranging in date from A.D. 1517 to A.D. 1914, and import restrictions on such types of ethnological material should be imposed.

Subsequently, on November 30, 2021, the Governments of the United States and Egypt entered into a new agreement, titled "Memorandum of Understanding Between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning the Imposition of Import Restrictions on Categories of Cultural Property of Egypt." The new MOU supersedes the existing agreement that first entered into force on November 30, 2016. Pursuant to the new MOU, the import restrictions for archaeological material are updated and will be effective until November 30, 2026, along with the imposition of additional import restrictions on certain categories of ethnological material, which will also be effective until November 30, 2026.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions and amending the Designated List of cultural property described in CBP Dec. 16–23 with the addition and revision of categories of archaeological material of Egypt ranging in date from approximately 300,000 B.C. to A.D. 1750, as set forth below. The Designated List of cultural property described in CBP Dec. 16–23 is also amended by adding certain categories of ethnological material of Egypt ranging in date from A.D. 1517 to 1914, as set forth below. The restrictions on the importation of archaeological and ethnological material will be in effect through November 30, 2026. Importation of such material of Egypt, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions> by selecting the material for "Egypt."

Designated List of Archaeological and Ethnological Material of Egypt

The Designated List contained in CBP Dec. 16–23, which describes the types of articles to which the import restrictions apply, is amended to reflect the inclusion of additional archaeological material and certain ethnological material in the Designated List. In order to clarify certain provisions of the Designated List contained in CBP Dec. 16–23, the amendment also includes minor revisions to the language and numbering of the Designated List. For the reader's convenience, CBP is reproducing the Designated List contained in CBP Dec. 16–23 in its entirety, with the changes, below.

The Designated List includes archaeological material from Egypt ranging in date from approximately 300,000 B.C. to A.D. 1750, and certain ethnological material from Egypt ranging in date from A.D. 1517 to 1914.

Categories of Archaeological and Ethnological Material

I. Archaeological

- A. Stone
- B. Metal
- C. Ceramic and Clay
- D. Wood
- E. Faience and Glass
- F. Ivory, Bone, and Shell
- G. Plaster and Cartonnage
- H. Textile, Basketry, and Rope
- I. Leather and Parchment
- J. Papyrus
- K. Painting and Drawing
- L. Mosaics
- M. Writing
- N. Human and Animal Remains

II. Ethnological

- A. Stone
- B. Metal
- C. Ceramic and Clay
- D. Wood
- E. Bone, Ivory, and Shell
- F. Glass and Semi-Precious Stone
- G. Leather, Parchment, and Paper
- H. Textiles

Approximate chronology of well-known periods and sites:

- (a) Paleolithic period (c. 300,000–8800 B.C.): Bir Sahara East, Bir Tarfawi, el-Kab (Nekheb), Jebel Sahaba, Taramsa-1, Wadi Tushka
- (b) Neolithic period (c. 8800–4000 B.C.): Armant, Bir Kiseiba, Deir Tasa, el-Badari, el-Omari, el Tarif, Hammamiya, Hierakonpolis (Nekhen), Merimde Beni-salame, Nabta Playa
- (c) Predynastic period (c. 4000–3200 B.C.): Abydos, Adaïma, Deir el Ballas, el-Amra, el-Badari, el-Mahasna, Gerza, Hierakonpolis (Nekhen), Ma'adi, Minshat Abu Omar, Mostagedda, Naga ed-Deir, Naqada, Tell el-Fara'in (Buto), Tell el-Farkha, Tjenu (Thinis), Wadi Digla
- (d) Early Dynastic period (c. 3200–2686 B.C.): Abusir, Abydos, Coptos/Koptos, Giza, Elephantine, Memphis, Minshat Abu Omar, Helwan, Hierakonpolis (Nekhen), Saqqara, Tarkhan, Tell el-Fara'in (Buto), Tell el-Farkha
- (e) Old Kingdom period (c. 2686–2125 B.C.): Ayn Sokhna, Abu Ghurob, Abusir, Abydos, Aswan, Bet Khallaf, Dashur, Dendera, Elephantine, Giza, Heliopolis, Hierakonpolis (Nekhen), Kom el-Hisn, Maidum/Meidum, Memphis, Naga el-Deir, Naqada, Sais, Saqqara, Tell Edfu, Wadi Maghara, Zawiyet el-Aryan
- (f) First Intermediate period (c. 2125–2055 B.C.): Asyut, Hierakonpolis (Nekhen), Ihnasya el-Medina (Herakleopolis), Kom Dara, Memphis, Naga el-Dier, Saqqara, Tell Edfu
- (g) Middle Kingdom period (c. 2055–1650 B.C.): Asyut, Abydos, Beni Hasan, Dashur, Deir el-Bahri, Crocodopolis (Fayum) Deir el Ballas, Hawara, Elephantine, Heliopolis, Herakleopolis, Hierakonpolis (Nekhen), Kahun, Karnak/Thebes, Lisht, Memphis, Qau el-Kebir, Tell el-Dab'a (Avaris), Tell Edfu, Wadi Hammamat, Wadi el-Hudi
- (h) Second Intermediate period (c. 1650–1550 B.C.): Abydos, Bubastis, Tell el-Daba, Karnak/Thebes, Deir el Ballas, el-Kab, Memphis, Tell el-Yahudiyeh, Tura
- (i) New Kingdom period (c. 1550–1069 B.C.): Abydos, Abu Simbel, Akhmim, Armant, Asyut, Aswan, Bubastis, Coptos/Koptos, Dakhla Oasis, Deir el-Medina, Dendera, Elephantine, Heliopolis, Hermopolis, el-Kab, Karnak/Thebes, Kharga Oasis, Luxor, Medamud, Memphis, Qantir, Saqqara, Serabit el-Khadim, Tell el-Amarna, Tell el-Daba, Tod, Wadi Hammamat, Wadi Natron

- (j) Third Intermediate period (c. 1069–664 B.C.): Abusir, Armant, Bubastis, Elephantine, el-Kab, el-Asasif, el-Hiba, Herakleopolis, Hermopolis, Karnak/Thebes, Kharga Oasis, Leontopolis, Memphis, Tell el-Fara'in (Buto), Tanis, Tell Defanna, Tell el Herr, Tell el-Maskhuta, Tanis, Wadi Tumilat
- (k) Late period (c. 664–332 B.C.): Bubastis, Busiris, Dendera, Heliopolis, Herakleopolis, Hermopolis, el-Hiba, Karnak/Luxor, Kom Ombo, Kharga Oasis, Memphis, Mendes, Philae, Sais, Saqqara, Sebennytos, Siwa Oasis, Tell Edfu
- (l) Greco-Roman/Ptolemaic period (332 B.C.–A.D. 395): Abu Sha'ar, Ain el-Tabinieh, Alexandria, Amheida (Trimithis), Antinoöpolis, Antinoe, Aswan (Syene), Bahariya Oasis, Berenike, Busiris, Canopus, Coptos/Koptos, Dakhla Oasis, Damietta, Dendera, Farafra Oasis, el-Haiz, Karanis, Kellis, Kharga Oasis, Kom Ombo, Hawara, Marina al-Alamein, Medinet Madi, Memphis, Naukratis, Oxyrhynchus, Philae, Ptolemais, Quseir el-Qadim (Myos Hormos), Soknopaiou Nesos, Tebtynis (Tebtunis), Tell Edfu
- (m) Byzantine period (c. A.D. 395–640): Abu Fano, Alexandria, el-Kab, Abu Mina, Arsinoe, Aswan, Athribis (both Delta Athribis and Sohag Athribis), Bawit, Coptos/Koptos, Dakhla Oasis, Dayr el-Muharraq, Dendur, Douch, Tell Edfu, Fayoum monasteries (Dayr al-Malek Gabriel), Herakleopolis Magna, Hermopolis Magna (city and necropolis Tuna el-Gebel), Jeme (Medinet Habu), Karanis, Kellia, Kharga Oasis, Kom el-Dikka, Medinet Madi, Menouthis, Mons Claudianus, Mons Porpyrites, Mount Sinai, Nag Hammadi, Old Cairo, Oxyrhynchus, Panopolis (Akhmim) and area monasteries, Pelusion, Philae, Raithou, Red Sea Monasteries (SS. Antony and Paul), Saqqara, Sinai, Sohag, Tall al-Farama, Tell el-Amarna, Thebes, Wadi Natrun, Wadi Pharan (Sinai, Monastery)
- (n) Islamic/Medieval period (A.D. 640–1517): Alexandria, al-Ashmunayn, Aswan, Athribis (Sohag), Aydhab, al-Bahnasa, al-Fustat, al-Rashid (Rosetta), Antinoopolis, Aswan, Cairo, Damietta, Tell Edfu, Giza, Hamouli, Jeme, Luxor, Madinat al-Fayyum, Minya, Qūs, Qusayr, Red Sea Monasteries (SS. Antony and Paul), Rosetta, Sohag, Thebes, Wadi Natrun
- (o) Ottoman and early Muhammad 'Ali periods (A.D. 1517–1914): Alexandria, al-Rashid (Rosetta), Aswan, Asyut, Cairo, Damietta, Ibrim, Red Sea Monasteries (SS. Antony and Paul), Tanta, Qusayr, Salihyya, Suez, Thebes

I. Archaeological Material

Archaeological material includes categories of objects from the Paleolithic to the middle of the Ottoman period in Egypt, ranging in date from approximately 300,000 B.C. to A.D. 1750.

A. Stone

1. Sculpture

i. Architectural Elements—This category includes architectural elements from temples, tombs, palaces, mosques, churches, monasteries, commemorative monuments, and domestic architecture, including doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, roofs, pediment, archways, friezes, pilasters, engaged columns, prayer niches (*mihrabs*), fountains, inlays, and blocks from walls, floors, and ceilings. Examples are often decorated in relief with ornamental Pharaonic, Greco-Roman, Coptic, and Islamic motifs and inscriptions. Limestone, sandstone, and granite are most commonly used. Stone is often reused.

ii. Statues—Types include large- and small-scale representations of humans, animals, and hybrid figures with a human body and animal head. Human figures may be standing, usually with the left foot forward, seated on a block or on the ground, kneeling, or prone. Figures in stone may be supported by a slab of stone at the back. Greco-Roman examples use traditional Egyptian poses with Hellenistic modeling. Limestone, granite, basalt, sandstone (including greywacke), and diorite are most commonly used. Reuse of statues is common with re-inscription of cartouche and other visible re-carving.

iii. Relief Sculpture—Types include large- and small-scale sculpture, including Neolithic and Predynastic greywacke votive and cosmetic palettes, limestone wall reliefs depicting scenes of daily life and rituals, and steles/stelae and plaques in a variety of stones for funerary and commemorative purposes.

iv. Tombstones—This category includes tombstones and grave markers made of marble, limestone, or other kinds of stone. They may be carved in relief and/or have decorative moldings.

2. Vessels and Containers—This category includes conventional shapes such as bowls, cups, jars, and lamps. This category also includes vessels having the form of human, animal, hybrid, plant, hieroglyphic signs, and combinations or parts thereof.

3. Funerary Objects and Equipment

i. Sarcophagi and Coffins—This category includes sarcophagi and coffins with separate lids, either in the form of a large rectangular box, or human-shaped (anthropoid) and carved with modeled human features. Both types are often decorated outside, and sometimes inside, with incised or painted images and text inscriptions.

ii. Canopic Shrines—This category includes shrines in the form of a box with space inside for four canopic jars.

iii. Canopic Jars—This category includes jars with plain lids or lids in the form of human or animal heads and used to hold the internal organs of the deceased. A full set includes four jars. Sometimes these jars are dummies, carved from a single piece of stone with no interior space.

4. Objects of Daily Use—This category includes chests and boxes, furniture, headrests, writing and painting equipment, games, and game pieces.

5. Tools and Weapons—Chipped stone types include large and small blades, borers, scrapers, sickles, burins, notches, retouched flakes, cleavers, knives, chisels, awls, harpoons, cores, loom weights, and arrowheads. Ground stone types include grinders (*e.g.*, mortars, pestles, millstones, whetstones, querns), choppers, axes, hammers, molds, weights, and mace heads.

6. Jewelry, Amulets, and Seals

i. Jewelry—This category includes jewelry of colored and semi-precious stones for personal adornment, including necklaces, chokers, pectorals, pendants, crowns, earrings, bracelets, anklets, belts, girdles, aprons, and finger rings.

ii. Amulets—This category includes amulets of colored and semi-precious stones in the form of humans, animals, hybrids, plants, hieroglyphic signs, and combinations or parts thereof.

iii. Stamp and Cylinder Seals—These are small devices with at least one side engraved (in intaglio and relief) with a design for stamping or sealing. The most common type is the scarab, in the form of a beetle with an inscription on the flat base.

7. Ostraca—Chips of stone used as surfaces for writing or drawing.

B. Metal

1. Sculpture

i. Statues—Types include large- and small-scale, including human, animal, and hybrid figures similar to those in stone. Metal statues usually lack the support at the back. The most common materials are bronze and copper alloys, but gold and silver are used as well.

ii. Relief sculpture—Types include plaques, appliques, and mummy masks. Reliefs may include inscriptions in various languages.

2. Vessels and Containers—This category includes conventional shapes such as bowls, cups, jars, plates, cauldrons, lamps, lamp-stands, scroll and manuscript containers, reliquaries, incense burners, and vessels in the form of humans, animals, hybrids, plants, hieroglyphic signs, and combinations or parts thereof.

3. Objects of Daily Use—This category includes musical instruments, including trumpets, clappers, and sistra.

4. Tools—Types include axes, adzes, saws, scrapers, trowels, locks, keys, nails, hinges, mirrors, ingots, thimbles, fibulae (for pinning clothing), drills, chisels, knives, hooks, needles, tongs, tweezers, and weights in copper alloy, bronze, and iron.

5. Weapons and Armor

i. Weapons—Types include mace heads, knives, daggers, swords, curved swords, axes, arrows, javelins, arrowheads, and spears in copper alloy, bronze, and iron.

ii. Armor—Early armor consisted of small metal scales, originally sewn to a backing of cloth or leather, later augmented by helmets, body armor (cuirasses, bracers, shin guards), shields, and horse armor.

6. Jewelry, Amulets, and Seals

i. Jewelry—This category includes jewelry made of gold, silver, copper, and iron for personal adornment, including necklaces, chokers, pectorals, finger rings, beads, pendants, bells, belts, buckles, earrings, diadems, straight pins and fibulae, bracelets, anklets, girdles, wreaths and crowns, cosmetic accessories and tools, metal strigils (scrapers), crosses, and lamp holders.

ii. Amulets—Types include amulets in the form of humans, human organs and parts, animals, hybrids, plants, hieroglyphic signs, deities, religious symbols, and combinations or parts thereof.

7. Late Antique Christian, Greek Orthodox, and Coptic Liturgical Objects—Types include censers, crosses, Bible caskets, lamps, patens, Eucharistic goblets, icons, and iconostases.

8. Coins—Types appear in copper or bronze, silver, and gold.

i. Dynasty 30—Coins of this type have the hieroglyphs *nwb nfr* on one side and a horse on the other.

ii. Dynasty 31—Coins of this type are Egyptian imitations of silver Athenian coins that depict the helmeted head of Athena on the obverse and owl on the reverse with an inscription in Demotic (looks cursive) to the right of the owl. There are similar coins in silver but with an inscription in Aramaic (look angular) to the right of the owl. The former were struck under the authority of the Persian Great King Artaxerxes III when he recaptured Egypt in the mid-4th B.C.; the latter were struck under the Persian satraps of Egypt Sabaces and Mazakes in the 330s B.C. There are rare silver drachms marked NAU (Naucratis) instead of AΘE.

iii. Hellenistic and Ptolemaic—Coins of this type are struck in gold, silver, and bronze at Alexandria and any other mints that operated within the borders of the modern Egyptian state. Gold coins of and in

honor of Alexander the Great, struck at Alexandria and Memphis, depict a helmeted bust of Athena on the obverse and a winged Victory on the reverse. Silver coins of Alexander the Great, struck at Alexandria and Memphis, depict a bust of Herakles wearing the lion skin on the obverse, or “heads” side, and a seated statue of Olympian Zeus on the reverse, or “tails” side. Gold coins of the Ptolemies from Egypt will have jugate portraits on both obverse and reverse, a portrait of the king on the obverse and a cornucopia on the reverse, or a jugate portrait of the king and queen on the obverse and cornucopias on the reverse. Silver coins of the Ptolemies from Egypt tend to depict a portrait of Alexander wearing an elephant skin on the obverse and Athena on the reverse or a portrait of the reigning king with an eagle on the reverse. Some silver coins have jugate portraits of the king and queen on the obverse. Bronze coins of the Ptolemies commonly depict a head of Zeus (bearded) on the obverse and an eagle on the reverse. These iconographical descriptions are non-exclusive and describe only some of the more common examples. There are other types and variants among the Hellenistic and Ptolemaic coinage. Approximate date: ca. 332 B.C. through ca. 31 B.C.

iv. Roman—Coins of this type are struck in bronze, silver, or gold at Alexandria and any other mints that operated within the borders of the modern Egyptian state until approx. A.D. 498. The iconography of the coinage in the Roman period varied widely, although a portrait of the reigning emperor is almost always present on the obverse of the coin. Approximate dates: ca. 31 B.C. through ca. A.D. 498.

v. Byzantine and Arab Byzantine—Coins of these types are struck in bronze and gold at Alexandria, Fustat, and other mints that operated within the borders of the modern Egyptian state between A.D. 498 and ca. A.D. 696. Iconography may include one, two, or three persons (busts or standing figures); large letters in Latin script (sometimes with smaller Latin, Greek, or Arabic letters along the edge); and crosses, stars, moons, and other symbols.

vi. Islamic/Medieval and Ottoman—Coins of this type are struck in copper, bronze, silver, and gold at Cairo, Fustat, Alexandria, and other mints that operated within the borders of the modern Egyptian state under the Umayyad, ‘Abbasid, Tulunid, Ikhshidid, Fatimid, Ayyubid, Mamluk, and Ottoman (up to A.D. 1750) dynasties. Iconography is mostly writing in Arabic script, sometimes with stars, circles, flowers, or other ornaments placed at center or among the text, and rarely with human figures or trees.

C. Ceramic and Clay

1. Sculpture—This category includes terracotta statues and statuettes (figurines), including human, animal, and hybrid figures. Ceramic sculptures may be undecorated or decorated with paint, appliques, or inscribed lines.

2. Architectural Decorations—These are baked clay (terracotta) elements used to decorate buildings. Examples include carved and molded brick, panels, acroteria, antefixes, painted and relief plaques, revetments, carved and molded bricks, knobs, plain or glazed roof tiles, and glazed tile wall ornaments and panels.

3. Vessels and Containers

i. Neolithic—Types are made of red Nile clay with blackened rim, thin walls, and rippled surface. Others have smoothed surfaces, but otherwise plain. Decorations may include painting or incised designs.

ii. Predynastic Period—Types typically have a burnished red body with or without a white-painted decoration, or a burnished red body and black top, or a burnished black body sometimes with incised decoration, or an unburnished light brown body with dark red painted decoration, including human and animal figures and boats, spirals, or an abstract design.

iv. Dynastic Periods—Types are primarily utilitarian but also come as ornate forms, typically undecorated and sometimes burnished. New Kingdom examples may have elaborate painted, incised, and molded decorations, especially floral motifs depicted in blue paint.

v. Greco-Roman Period—Types include vessels with riled decoration, pilgrim flasks, and *terra sigillata*, a high-quality table ware made of red to reddish brown clay and covered with a glossy slip.

vi. Byzantine Period/Coptic—pilgrim flasks and decorated ceramic jars and bowls.

vii. Islamic/Medieval and Ottoman Periods—Types include glazed, molded, and painted forms in a variety of shapes and sizes.

4. Coffins—This category includes baked clay coffins, either rectangular or human-shaped (anthropoid). Examples are sometimes painted.

5. Objects of Daily Use—This category includes game pieces carved from ceramic sherds, loom weights, toys, incense burners, tobacco pipes, andirons, and lamps.

6. Writing

i. Ostraca—Ostraca are pottery sherds used as surfaces for writing or drawing.

ii. Cuneiform Tablets—These objects are typically small pillow-shaped rectangles of unbaked clay incised with patterns of wedge-shaped cuneiform symbols.

D. Wood

1. Sculpture

i. Statues—Types include large- and small-scale examples, including human, animal, and hybrid figures. Shabti statuettes and small mummiform human figures are especially common. Wood statues usually lack the support at the back.

ii. Relief sculpture—Types include large- and small-scale examples, including relief plaques for funerary purposes.

2. Architectural Elements

i. Late Antique Christian, Greek Orthodox, and Coptic—This category includes carved and inlaid panels, doors, ceilings, altars, episcopal thrones, pulpits, lecterns, and iconostases, often decorated with floral, geometric, and Christian motifs.

ii. Islamic/Medieval—This category includes carved and inlaid wood rooms, balconies, stages, panels, ceilings, and doors.

3. Funerary Objects and Equipment

i. Sarcophagi and Coffins—This category includes sarcophagi and coffins with separate lid, either in the form of a large rectangular box or human-shaped and carved with modeled human features. Both types are often decorated inside and outside with painted, inlaid, or incised images, and with inscriptions.

ii. Mummy masks—This category includes masks that were laid over the face of the deceased. They were often painted, inlaid, and covered with gold foil.

iii. Funerary models—Types include boats, buildings, food, and activities from everyday life.

iv. Shrines—This category includes shrines used to house sarcophagi or statuettes of deities.

v. Food Containers—Types include containers in the shape of the product they contain, such as a loaf of bread or a duck.

4. Objects of Daily Use—This category includes furniture such as chairs, stools, beds, chests and boxes, headrests, writing and painting equipment, musical instruments, game boxes and pieces, walking sticks, chariots, and chariot fittings.

5. Tools and Weapons—This category includes adzes, axes, bow drills, carpenter's levels and squares, bows, arrows, and spears.

6. Vessels and Containers—This category includes wooden vessels and containers including ciboria (Christian shrine-shaped receptacles for the Eucharist).

7. Furniture—This category includes moveable furniture, such as iconostases, lecterns, pulpits, and episcopal thrones.

E. Faience and Glass

1. Egyptian Faience—This category includes objects made from faience: A glossy, silicate-based fired material, is usually blue or turquoise, but other colors are found as well. Object types include vessels and containers, canopic jars, game pieces, seals, amulets, jewelry, inlays, and statuettes in human, animal, and hybrid forms.

2. Glass

i. Pharaonic—This category includes parts of statues, and glass containers that are typically small and often elaborately decorated with multi-colored bands.

ii. Roman—Types in this category include a great variety of hand-blown vessel and container shapes.

iii. Byzantine—Types include hand-blown vessels, hanging lamps, and chandeliers (polycandela), painted windows, stained glass, and mosaic tesserae.

iv. Islamic/Medieval and Ottoman—This category includes vessels and containers such as glass and enamel mosque and sanctuary lamps, coin weights, and architectural elements including glass inlay and tesserae pieces from floor and wall mosaics, mirrors, and windowpanes.

F. Ivory, Bone, and Shell

1. Sculpture—This category includes statuettes of human, animal, and hybrid figures in bone or ivory.

2. Objects of Daily Use—This category includes writing and painting equipment, musical instruments, games, cosmetic containers, combs, tools (such as awls, burnishers, needles, spatulas and fish-hooks), jewelry, amulets, and seals. This category also includes inlays of these materials from luxury objects including furniture, chests, and boxes.

3. Reliefs, Plaques, Steles, and Inlays—These are carved and sculpted and may have figurative, floral, and/or geometric motifs. Examples may also have inscriptions in various languages.

G. Plaster and Cartonnage

1. Plaster—This category includes objects made of plaster, such as mummy masks, jewelry, and other objects in imitation of expensive materials. They are typically molded and then decorated with paint or gilding. Plaster objects also occur as life masks and sculptor's models.

2. Cartonnage—This category includes pieces of papyrus or linen covered with plaster and molded into a shape, similar to *papier-mâché*, and then painted or gilded. Cartonnage was used for coffins and mummy masks. Today, cartonnage objects are sometimes dismantled in hopes of extracting inscribed papyrus fragments.

3. Stucco—This category includes architectural decoration in stucco. Stucco is a fine plaster used for coating wall surfaces, or molding and carving into architectural decorations, such as reliefs, plaques, steles, and inlays

H. Textile, Basketry, and Rope

1. Textile

i. Linen—This category includes Pharaonic and Greco-Roman period mummy wrapping, shrouds, garments, and sails made from linen cloth.

ii. Late Antique Christian, Greek Orthodox, and Coptic—This category includes Christian garments and hangings made from linen and wool.

iii. Islamic/Medieval and Ottoman—This category includes textile fragments in linen, wool, and cotton.

2. Basketry—This category includes baskets and containers in a variety of shapes and sizes, sandals, and mats made from plant fibers.

3. Rope—This category includes rope and string from archaeological contexts. Rope and string were used for a great variety of purposes, including binding planks together in shipbuilding, rigging, lifting water for irrigation, fishing nets, measuring, and stringing beads for jewelry and garments.

I. Leather and Parchment

1. Leather—This category includes shields, sandals, clothing (including undergarments), and horse trappings made from leather. It also includes leather sheets used occasionally as an alternative to papyrus as a writing surface.

2. Parchment—This category includes documents such as illuminated ritual manuscripts that may occur in single leaves or bound as a book or “codex” written or painted on specially prepared animal skins (cattle, sheep/goat, camel) known as parchment.

J. Papyrus—This category includes scrolls, books, manuscripts, and documents, including religious, ceremonial, literary, and administrative texts written on papyrus. Scripts include hieroglyphic, hieratic, Aramaic, Syriac, Hebrew, Greek, Latin, Coptic, Arabic, Georgian, Slavonic, Ethiopian, Armenian, and Persian.

K. Painting and Drawing

1. Tomb Paintings—This category includes paintings on plaster or stone, either flat or carved in relief. Typical subjects include the tomb owner and family, gods, and scenes from daily life.

2. Domestic Wall Paintings—This category includes paintings on stone, mud plaster, or lime plaster (wet—*buon fresco*—and dry—*secco fresco*), sometimes to imitate marble. Types include simple applied

color, bands and borders, landscapes, and scenes of people and/or animals in natural or built settings.

3. Rock Art—Rock art can be painted and/or chipped and incised drawings on natural rock surfaces. Common motifs include humans, animals, geometric, and/or floral elements.

4. Ostraca—This category includes paintings and drawings on stone chips, bone, and pottery shards.

5. Mummy Portrait Panels and Funerary Masks—This category includes panels and masks that either covered the upper body of the deceased or appear on the outer coffin/sarcophagus. These objects were made in wood, plaster, and cartonnage, and they were often painted to depict the head and upper body of the deceased.

6. Late Antique Christian, Greek Orthodox, and Coptic Painting

i. Wall and Ceiling Paintings—This category includes paintings on various kinds of plaster, and which generally portray religious images and scenes of biblical events. Surrounding paintings may contain animal, floral, or geometric designs, including borders and bands.

ii. Panel Paintings (Icons)—This category includes smaller versions of the scenes on wall paintings, and may be partially covered with gold or silver, sometimes encrusted with semi-precious or precious stones or glass, and are usually painted on a wooden panel, often for inclusion in a wooden screen (iconostasis). Icons also occur painted on ceramic.

L. Mosaics

1. Floor Mosaics—Floor mosaics are made from stone cut into small bits (tesserae) or glass and laid into a plaster matrix. Subjects may include landscapes, scenes of humans or gods, and activities such as hunting and fishing. There may also be vegetative, floral, or decorative motifs.

2. Wall and Ceiling Mosaics—Wall and ceiling mosaics are made from stone or glass cut into small bits (tesserae) and laid into a plaster matrix. Subjects may include religious images and scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs.

M. Writing—This category includes objects made from papyrus, wood, ivory, stone, metal, textile, clay, and ceramic that exhibit forms of writing including hieroglyphic, hieratic, Aramaic, Assyrian, Babylonian, Persian, Hebrew, Greek, Latin, Coptic, Syriac, Georgian, Slavonic, Ethiopian, Armenian, Persian, and Arabic scripts.

N. Human and Animal Remains—This category includes human and animal mummies.

II. Ethnological Material

Ethnological material covered by the Agreement includes architectural elements, manuscripts, ecclesiastical objects, and ceremonial and ritual objects of the Islamic culture, ranging in date from A.D. 1517 to 1914. This would exclude Jewish ceremonial or ritual objects.

A. Stone

1. Architectural Elements—This category includes doors, door frames, window fittings, columns, capitals, plinths, bases, lintels, jambs, roofs, archways, friezes, pilasters, engaged columns, altars, prayer niches (*mihrab*s), screens, fountains, inlays, and blocks from walls, floors, and ceilings of buildings. Architectural elements may be plain, molded, or carved and are often decorated with motifs and inscriptions. Marble, limestone, and sandstone are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes slabs, plaques, steles, capitals, mosaic panels, and plinths carved with religious, figural, floral, or geometric motifs or inscriptions in Arabic for ceremonial and ritual use. Examples occur primarily in marble, limestone, and sandstone.

3. Memorial Stones and Tombstones—This category includes tombstones, grave markers, and cenotaphs. Examples occur primarily in marble and are engraved with Arabic script.

4. Vessels and Containers—This category includes ceremonial and ritual stone lamps and containers.

B. Metal

1. Architectural Elements—This category includes doors, door fixtures, such as knockers, bolts and hinges, chandeliers, screens, taps, spigots, fountains, and sheets. Copper, brass, lead, and alloys are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes appliques, plaques, and steles, primarily made of bronze and brass, for ceremonial and ritual use. Examples often include religious, figural, floral, or geometric motifs. They may also have inscriptions in Arabic.

3. Lamps—This category includes handheld lamps, candelabras, braziers, sconces, chandeliers, and lamp stands for ceremonial, ritual, and funerary use.

4. Vessels and Containers—This category includes containers used for religious services, such as Koran (*Qur'an*) cases, Greek Orthodox and Coptic Bible caskets, patens, Eucharistic goblets, amulet boxes, and incense burners. Brass, copper, silver, and gold are most commonly used. Containers may be plain, engraved, hammered, or oth-

erwise decorated. Bible caskets may be made of wood and covered with embossed silver sheets attached by nails.

5. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals such as cymbals and trumpets.

C. Ceramic and Clay

1. Architectural Elements—This category includes carved and molded brick and engraved and/or painted and glazed tile wall ornaments and panels, sometimes with Arabic script.

2. Lamps—This category includes glazed mosque and sanctuary lamps that may have straight or round, bulbous bodies with a flared top and several branches.

D. Wood

1. Architectural Elements—This category includes doors, door frames and fixtures, windows, window frames, panels, beams, balconies, stages, screens, prayer niches (*mihrabs*), minbars, icons, wall shelves, cupolas, and ceilings. Examples may be decorated with religious, geometric, or floral motifs or inscriptions, and may be either carved, turned (on a lathe), and/or painted. Icons may be partially covered with gold or silver, sometimes encrusted with semi-precious or precious stones or glass, and are usually painted on a wooden panel, often for inclusion in a wooden screen (iconostasis).

2. Architectural and Non-Architectural Relief Sculpture—This category includes panels, roofs, beams, balconies, stages, panels, ceilings, and doors for ceremonial and ritual use. Examples are carved, inlaid, or painted with decorations of religious, floral, or geometric motifs or Arabic inscriptions.

3. Furniture—This category includes furniture, such as minbars, *dikkas*, professorial chairs, episcopal thrones, lectures, divans, stools, altars, and tables from Islamic, Greek Orthodox, and Coptic ceremonial or ritual contexts. Examples can be carved, inlaid, or painted and are made from various types of wood.

4. Vessels and Containers—This category includes containers used for religious purposes such as Koran (*Qur'an*) cases or Greek Orthodox and Coptic Bible caskets and ciboria. Examples may be carved, inlaid, or painted with decorations in religious, floral, or geometric motifs, or Arabic script. Bible caskets may be covered with embossed silver sheets attached by nails.

5. Writing Implements—This category includes printing blocks, writing tablets, and Islamic study tablets inscribed in Arabic and used for teaching the Koran (*Qur'an*).

6. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as frame drums (*banadir*).

7. Beads—This category includes Islamic prayer beads (*mas'baha*). Examples may be plain or decorated with carved designs.

E. Bone, Ivory, and Shell

1. Architectural Elements—This category includes lintels and door-frames (often carved), and inlays for religious decorative and architectural elements.

2. Ceremonial Paraphernalia—This category includes boxes, reliquaries (and their contents), plaques, pendants, candelabra, and stamp and seal rings.

F. Glass and Semi-Precious Stone

1. Architectural Elements—This category includes windowpanes, mosaic elements, inlays, and stained glass from ceremonial or ritual contexts.

2. Vessels and Containers—This category includes glass and enamel lamps and vessels used for Islamic, Greek Orthodox, and Coptic religious services. It also includes Greek Orthodox and Coptic Bible caskets that may include glass decoration (cabochons) as part of the embossed silver cover.

3. Beads—This category includes Islamic prayer beads (*mas'baha*) in glass or semi-precious stones.

G. Leather, Parchment, and Paper

1. Books and Manuscripts—Manuscripts can be written or painted on paper or papyrus. They occur as single leaves, bound with leather or wood as a book or codex, or rolled into a scroll. Types include the Koran (*Qur'an*) and other Islamic books, Greek Orthodox and Coptic Bibles, prayer books, and manuscripts. Books and manuscripts are often written in black or brown ink, and sometimes embellished with painted colorful floral, geometric, or human motifs.

2. Vessels and Containers—This category includes containers used for Islamic, Greek Orthodox, and Coptic religious services, such as leather Koran (*Qur'an*) cases or pouches.

3. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as leather drums (*banadir*).

H. Textiles—

This category includes hangings, curtains, shrine covers, prayer rugs used in Islamic/Sufi religious ceremonies or rituals, and Greek Orthodox and Coptic funeral shrouds and tapestries. Examples can be made from linen, silk, cotton, and/or wool.

References

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- Arts of the City Victorious: Islamic Art and Architecture in Fatimid North Africa and Egypt*, 2008, J.M. Bloom, American University in Cairo Press, Cairo and New York.
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- The Cambridge History of Egypt*, Volumes 1 and 2, 1998, C.F. Petry and M.W. Daly (editors), Cambridge University Press, Cambridge, UK.
- The Tetradrachms of Roman Egypt*, 1969, J.W. Curtis, Argonaut, Chicago.
- The Treasures of Islamic Art in the Museums of Cairo*, 2006, B. O’Kane (editor), American University in Cairo Press, Cairo and New York.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury’s authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

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

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612

* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Egypt to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
* * *	* * *	* * *
Egypt	Archaeological material representing Egypt's cultural heritage ranging approximately from 300,000 B.C. to A.D. 1750, and ethnological material ranging from A.D. 1517 to 1914.	CBP Dec. 21-17.
* * *	* * *	* * *
	* * *	* * *

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

Approved:

TIMOTHY E. SKUD,
Deputy Assistant
Secretary of the Treasury.

[Published in the Federal Register, December 3, 2021 (85 FR 68546)]

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 21-18

**EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON
 CERTAIN ARCHAEOLOGICAL AND ETHNOLOGICAL
 MATERIAL OF BOLIVIA**

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain archaeological and ethnological material of the Plurinational State of Bolivia (Bolivia). The restrictions, which were originally imposed by Treasury Decision (T.D.) 01-86 and last extended by CBP Decision (CBP Dec.) 16-24, are due to expire on

December 4, 2021. The Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that factors continue to warrant the imposition of import restrictions and no cause for suspension exists. Pursuant to the exchange of diplomatic notes to extend the agreement, the import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension until December 4, 2026. T.D. 01–86 contains the Designated List of archaeological and ethnological material from Bolivia to which the restrictions apply.

DATES: Effective December 4, 2021.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Branch Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, ot-otrrculturalproperty@cbp.dhs.gov. For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, 1USGBranch@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.*, which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)), the United States entered into a bilateral agreement with the Plurinational State of Bolivia (Bolivia)¹ on December 4, 2001, concerning the imposition of import restrictions on certain archaeological and ethnological material of Bolivia. On December 7, 2001, the U.S. Customs Service (U.S. Customs and Border Protection’s predecessor agency) published Treasury Decision (T.D.) 01–86 in the **Federal Register** (66 FR 63490), which amended section 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions and included a list designating the types of articles covered by the restrictions.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period may be

¹ In 2009, the new constitution of Bolivia changed the country’s official name from the “Republic of Bolivia” to the “Plurinational State of Bolivia.”

extended for additional periods of not more than five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists.

Since the initial final rule was published on December 7, 2001, the import restrictions were subsequently extended three (3) times. First, on December 1, 2006, following the exchange of diplomatic notes, U.S. Customs and Border Protection (CBP) published a final rule (CBP Dec. 06–26) in the **Federal Register** (71 FR 69477) to extend the import restrictions for a period of five years to December 4, 2011. Second, on December 1, 2011, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 11–24) in the **Federal Register** (76 FR 74690) to extend the import restrictions for an additional five-year period to December 4, 2016. Third, on December 6, 2016, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 16–24) in the **Federal Register** (81 FR 87804) to extend the import restrictions for an additional five-year period to December 4, 2021.

On September 14, 2020, the United States Department of State proposed in the **Federal Register** (85 FR 56681) to extend the Memorandum of Understanding (MOU) between the United States and Bolivia concerning the imposition of import restrictions on certain categories of archaeological and ethnological material from Bolivia. On April 20, 2021, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendations by the Cultural Property Advisory Committee, determined that the cultural heritage of Bolivia continues to be in jeopardy from pillage of certain archaeological and ethnological material, and that the import restrictions should be extended for an additional five years. Pursuant to the exchange of diplomatic notes to extend the agreement, the import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension until December 4, 2026.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The restrictions on the importation of archaeological and ethnological material are to continue in effect until December 4, 2026. Importation of such material from Bolivia continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions> by selecting the material for “Bolivia.”

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

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

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Bolivia to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
* * *	* * *	* * *
Bolivia	Archaeological and Ethnological Material from Bolivia	T.D. 01–86 ex- tended by CBP Dec. 21–18.
* * *	* * *	* * *

* * * * *

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

Approved: November 30, 2021.

TIMOTHY E. SKUD,
Deputy Assistant
Secretary of the Treasury.

[Published in the Federal Register, December 3, 2021 (85 FR 68544)]

**TRUSTED TRAVELER PROGRAMS AND U.S. APEC
BUSINESS TRAVEL CARD**

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 February 7, 2022) 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 1651–0121 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: Trusted Traveler Programs and U.S. APEC Business Travel Card.

OMB Number: 1651–0121.

Form Number: 823S (SENTRI) and 823F (FAST).

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Individuals and Businesses.

Abstract: This collection of information is for CBP's Trusted Traveler Programs including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows expedited entry at specified southwest land border ports of entry; the Free and Secure Trade program (FAST), which provides expedited border processing for known, low-risk commercial drivers; and Global Entry which allows pre-approved, low-risk, air travelers expedited clearance upon arrival into the United States.

The purpose of all of these programs is to provide prescreened travelers expedited entry into the United States. The benefit to the traveler is less time spent in line waiting to be processed. These Trusted Traveler programs are provided for in 8 CFR 235.7 and 235.12.

This information collection also includes the U.S. APEC Business Travel Card (ABTC) Program, which is a voluntary program that allows U.S. citizens to use fast-track immigration lanes at airports in the 20 other Asia-Pacific Economic Cooperation (APEC) member countries. This program is mandated by the Asia-Pacific Economic Cooperation Business Travel Cards Act of 2011, Public Law 112–54 and provided for by 8 CFR 235.13.

These collections of information include the data collected on the applications and kiosks for these programs. Applicants may apply to participate in these programs by using the Trusted Traveler Program (TTP) at <https://ttp.cbp.dhs.gov/>. Or at Trusted Traveler Enrollment Centers.

After arriving at the Federal Inspection Services area of the airport, participants in Global Entry can undergo a self-serve inspection process using a Global Entry kiosk. During the self-service inspection, participants have their photograph and fingerprints taken, submit identifying information, and answer several questions about items they are bringing into the United States. When using the Global Entry kiosks, participants are required to declare all articles being brought into the United States pursuant to 19 CFR 148.11.

Type of Information Collection: SENTRI (823S).

Estimated Number of Respondents: 276,579.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276,579.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 185,308.

Type of Information Collection: FAST (823F).

Estimated Number of Respondents: 20,805.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20,805.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 13,939.

Type of Information Collection: Global Entry.

Estimated Number of Respondents: 1,392,862.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,392,862.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 933,217.

Type of Information Collection: ABTC.

Estimated Number of Respondents: 9,858.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 9,858.

Estimated Time per Response: 10 minutes (0.17 hours)

Estimated Total Annual Burden Hours: 1,676.

Type of Information Collection: Kiosks.

Estimated Number of Respondents: 3,161,438.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 3,161,438.

Estimated Time per Response: 1 minute (0.016 hours).

Estimated Total Annual Burden Hours: 50,583.

Dated: December 3, 2021.

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

RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Monster Energy Company (“Monster”) seeking additional “Lever-Rule” protection for the federally registered and recorded “M & DESIGN,” “MONSTER ENERGY,” and “M DESIGN” trademarks.

FOR FURTHER INFORMATION CONTACT: Tracie Siddiqui, Intellectual Property Rights Branch, Regulations & Rulings, tracie.r.siddiqui@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Monster seeking to expand the scope of goods receiving “Lever-Rule” protection. On August 10, 2020, CBP granted protection against importations of Monster Energy 250ML beverages intended for sale in the Netherlands that bear the “M & DESIGN” mark, U.S. Trademark Registration No. 3,434,822/CBP Recordation No. TMK 10–00656; the “MONSTER ENERGY” mark, U.S. Trademark Registration No. 3,044,315, CBP Recordation No. TMK 15–01223; the “M & DESIGN” mark, U.S. Trademark Registration No. 3,434,821, CBP Recordation No. TMK 15–01224; and the “M DESIGN” mark, U.S. Trademark Registration No. 5,580,962, CBP Recordation No. TMK 19–00076. On April 5, 2021, CBP granted Lever-Rule protection against importations of gray market Monster Energy 500ML beverages bottled in Ireland, Netherlands and Poland, intended for sale in Europe, and bearing the same trademarks listed above. On September 9, 2021, CBP granted Lever-Rule protection against importations of gray market 500ML beverages bottled in South Africa, intended for sale in South Africa, and bearing the same trademarks listed above. Monster now seeks protection against importations of Monster Energy 450ML and 500ML beverages bottled in Russia, intended for sale in Eurasia, and bearing the same trademarks listed above. In the event that CBP determines that the Monster Energy 450ML and 500ML beverages under consideration are physically and materially different from the Monster Energy beverages intended for sale in the United States,

CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different beverages.

Dated: December 8, 2021

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



**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF ENGINE MUFFLERS**

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of engine mufflers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of engine mufflers 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 January 21, 2022.

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: Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of engine mufflers. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N239500, dated March 26, 2013 (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 N239500, CBP classified the engine mufflers in heading 8431, HTSUS, specifically in subheading 8431.49.90, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8426, 8429 or 8430: Other: Other.” CBP has reviewed NY N239500 and has determined the ruling letter to be in error. It is now CBP’s position that the engine mufflers are properly classified, in heading 8431, HTSUS, specifically in subheading 8431.20.00, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8427.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N239500 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H321275, 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.

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N239500

March 26, 2013

CLA-2-84:OT:RR:NC:N1:106

CATEGORY: Classification

TARIFF NO.: 8431.49.9085

JANEL L. HUETHER, GLOBAL IMPORT/EXPORT
COMPLIANCE ANALYST
DOOSAN BOBCAT COMPANY
210 1ST AVENUE NE
GWINNER, ND 58040-4209

RE: The tariff classification of an engine muffler from Canada

DEAR Ms. HUETHER,

In your letter dated March 11, 2013, you requested a tariff classification ruling.

The item under consideration has been identified as “Mufflers”. You state that the “Mufflers” (1) are attached directly to the engine, (2) designed solely to reduce noise produced by the engine, (3) do not control emissions and (4) are constructed of steel.

In your ruling request, you suggested classification in heading 8487.90.0080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Machinery parts, not containing electrical connectors, insulators, coils, contacts or other electrical features, and not specified or included elsewhere in this chapter: ... Other, Other.”

Mufflers classified in heading 8487 are ones used with multiple machines/applications. You indicate that the subject mufflers are designed specifically for use with the Bobcat “Skid Steer” and the Bobcat “Compact Track Loaders” equipment. As per Section XVI, Note 2(b), other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading are to be classified with the machines of that kind or in heading 8409, 8431...Thus, heading 8487 is not applicable.

Therefore, the applicable classification subheading for the “Mufflers” will be 8431.49.9085, HTSUS, which provides for, “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8426, 8429 or 8430: Other: Other: Other: Other: Other: Other.” The general rate of duty will be Free.

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, please contact the National Import Specialist at 646-733-3013.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H321275

CLA-2 OT:RR:CTF:EMAIN H321275 PF

CATEGORY: Classification

TARIFF NO.: 8431.20

JANEL L. HUETHER, GLOBAL IMPORT/EXPORT
COMPLIANCE ANALYST
DOOSAN BOBCAT COMPANY
210 1ST AVENUE NE
GWINNER, ND 58040-4209

RE: Revocation of NY N239500, dated March 26, 2013; Tariff classification of an engine muffler for compact track loader or skid steer loader

DEAR JANEL L. HUETHER:

On March 26, 2013, U.S. Customs and Border Protection (“CBP”) issued to you New York Ruling Letter (“NY”) N239500. It concerned the tariff classification of an engine muffler under the Harmonized Tariff Schedule of the United States (“HTSUS”). We have reviewed NY N239500 and determined that it is incorrect. For the reasons set forth below, we are revoking that ruling.

FACTS:

In NY N239500, the subject engine muffler was described as follows:

The item under consideration has been identified as “Mufflers”. You state that the “Mufflers” (1) are attached directly to the engine, (2) designed solely to reduce noise produced by the engine, (3) do not control emissions and (4) are constructed of steel. . . . You indicate that the subject mufflers are designed specifically for use with the Bobcat “Skid Steer” and the Bobcat “Compact Track Loaders” equipment.

In NY N239500, CBP classified the engine muffler in 8431.49.90, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8426, 8429 or 8430: Other: Other.”

ISSUE:

Whether the engine mufflers are classified as parts of works trucks fitted with lifting or handling equipment of heading 8427, HTSUS, or as parts of self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers of heading 8429, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or

chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings under consideration are as follows:

- 8427 Fork-lift trucks; other works trucks fitted with lifting or handling equipment
- 8429 Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers
- 8431 Parts suitable for use solely or principally with the machinery of headings 8425 to 8430
 - 8431.20 Of machinery of heading 8427
 - 8431.49 Of machinery of heading 8426, 8429 or 8430

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

EN 84.27 states in pertinent part:

[T]his heading covers works trucks fitted with lifting or handling equipment.

Works trucks of this description include, for example:

(A) FORK-LIFT AND OTHER ELEVATING OR STACKING TRUCKS

* * *

The lifting device of the above trucks is normally powered by the motive power unit of the vehicle, and is usually designed to be fitted with various special attachments (forks, jibs, buckets, grabs, etc.) according to the type of load to be handled.

* * *

(B) OTHER WORKS TRUCKS FITTED WITH LIFTING OR HANDLING EQUIPMENT

This group includes:

* * *

(2) **Other trucks** fitted with lifting or handling equipment including those specialised for use in particular industries (e.g., in the textile or ceramic industries, in dairies, etc.).

PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the trucks of this heading are classified in **heading 84.31**.

EN 84.29 provides in relevant part:

The heading covers a number of earth digging, excavating or compacting machines which are explicitly cited in the heading and which have in common the fact that they are all self-propelled.

* * *

In NY N239500, CBP correctly identified that the engine mufflers were parts of compact track and skid steer loaders and properly classified them under heading 8431, HTSUS. However, CBP has classified skid steer loaders and compact track loaders in heading 8427, HTSUS versus heading 8429, HTSUS. For example, in Headquarters Ruling (“HQ”) H296917, dated August 27, 2018, CBP held that Michelin Tweels, which were parts of skid steer loaders, were classified under the parts provision for machines of heading 8427, HTSUS (i.e., subheading 8431.20, HTSUS). In HQ H296917, CBP discussed the Court of International Trade (“CIT”) decision *Thomas Equipment Limited v. United States*, where the CIT determined that skid steer loaders were “work trucks” with lifting and handling equipment of heading 8427, HTSUS. *See* 881 F. Supp. 611, Slip Op. 95–29 (Ct. Int’l Trade 1995). The CIT rejected the classification of skid steer loaders in heading 8429, HTSUS, and noted that heading 8429, HTSUS, covered more specialized kinds of machines that manipulated the earth. The CIT noted that [s]ubheading 8427.20.00 of the HTSUS . . . refers to work trucks fitted with lifting or handling equipment, without limitation.”¹ The CIT determined that skid steer loaders remained classified in heading 8427, HTSUS, based on a finding of a uniform and established classification practice. Moreover, in NY J81427, dated March 7, 2003, CBP classified an all-surface loader that was designed for working in compact areas and used attachments such as buckets, pallet forks, power augers, snow blowers, among other attachments, was classified in heading 8427, HTSUS. Like the all-surface loader in NY J81427, compact track loaders have lifting, pushing, pulling and handling capabilities that are consistent with the term “works truck” of heading 8427, HTSUS. For example, compact track loaders have lift arms and a wide variety of attachments can be added to these arms, including pallet forks, augers, buckets, backhoes, snowblowers, landscape rakes, landplanes that can be used for lifting, pushing, and pulling. EN 84.27, HTSUS, also supports the classification of a compact track loader in heading 8427, HTSUS, because it is a work truck “designed to be fitted with various special attachments (forks, jibs, buckets, grabs, etc.) according to the type of load to be handled.” *See* EN 84.27(A)(1).

Because both skid steer loaders and compact track loaders are classified in heading 8427, HTSUS, their corresponding parts are classified in subheading 8431.20, HTSUS, as part of an “other truck fitted with lifting or handling equipment” of heading 8427, HTSUS. Therefore, the engine mufflers in NY N239500, are classified in 8431.20, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the engine mufflers are classified in heading 8431, HTSUS, specifically subheading 8431.20, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8427.” The 2021 column one, general rate of duty is free.

¹ *Thomas Equipment Limited, supra*, 881 F. Supp. at 615.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading.

For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at: <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>

Duty rates are subject to change. The text of the most recent HTSUS and the accompany duty rates are provided at www.usitc.gov. A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

EFFECT ON OTHER RULINGS:

NY N239500, dated March 26, 2013, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 21–160

BLUESCOPE STEEL LTD., BLUESCOPE STEEL (AIS) PTY LTD., and
BLUESCOPE STEEL AMERICAS, INC., Plaintiffs, v. UNITED STATES,
Defendant, and UNITED STATES STEEL CORP., et al., Defendant-
Intervenors.

Before: Richard K. Eaton, Judge

Court No. 19–00057

PUBLIC VERSION

[Final Results are remanded to Commerce.]

Dated: November 30, 2021

Christopher A. Dunn and *Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington D.C., argued for Plaintiffs BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Americas, Inc. With them on the brief was *Gina Colarusso*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Sarah E. Shulman, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant-Intervenor United States Steel Corp. With her on the brief was *Thomas M. Beline*.

OPINION AND ORDER

Eaton, Judge:

Before the court is the motion for judgment on the agency record of Plaintiffs BlueScope Steel Ltd., an Australian steel company, and its affiliates BlueScope Steel (AIS) Pty Ltd. (its Australian producer and exporter), and BlueScope Steel Americas, Inc. (its U.S. affiliated importer) (collectively, “Plaintiffs”).¹ By their motion, Plaintiffs challenge the final results of the U.S. Department of Commerce’s

¹ Parent company BlueScope Steel Ltd. has two other affiliates that are not parties in this action: BlueScope Steel Distribution Pty Ltd. (an Australian affiliate), and Steelscape LLC (an affiliated U.S. processor). The parent company and its two Australian affiliates BlueScope Steel (AIS) Pty Ltd. and BlueScope Steel Distribution Pty Ltd. were collapsed by Commerce at the investigation stage and are referred to in this opinion collectively as “BlueScope.” See *Certain Hot-Rolled Steel Flat Products From Australia*, 81 Fed. Reg. 53,406, 53,407 (Dep’t Commerce Aug. 12, 2016) (final determination). The collapsing determination is not at issue here.

(“Commerce” or the “Department”) first administrative review of the antidumping duty order on hot-rolled steel flat products from Australia. *See Certain Hot-Rolled Steel Flat Products From Australia*, 84 Fed. Reg. 18,241 (Dep’t Commerce Apr. 30, 2019) (“Final Results”) and accompanying Issues and Decision Mem. (Apr. 23, 2019) (“Final IDM”), PR 122; *see also Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom*, 81 Fed. Reg. 67,962 (Dep’t Commerce Oct. 3, 2016) (“Order”). Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018).

Plaintiffs contend that Commerce’s use of “total” adverse facts available² in the Final Results cannot be sustained. *See* Pls.’ Mem. Supp. Mot. J. Agency R., ECF No. 34 (“Pls.’ Br.”); Pls.’ Reply, ECF No. 43. That is, Plaintiffs maintain that Commerce’s decision to replace all of BlueScope’s information with facts available and then apply adverse inferences to those facts is based on a misinterpretation of the antidumping statute and is unsupported by substantial evidence. According to Plaintiffs, BlueScope fully and accurately complied with Commerce’s requests for information, and to the extent that there were any deficiencies in its initial responses to Commerce’s questionnaires, it remedied them by timely responses to the supplemental questionnaires issued by the Department when permitted to do so. *See* Pls.’ Br. 7; *see also* 19 U.S.C. § 1677m(d). Plaintiffs ask the court to remand the Final Results for a recalculation of the BlueScope’s dumping margin without the use of either facts available or adverse inferences.

For its part, Defendant maintains that Commerce’s use of adverse facts available is supported by substantial evidence and otherwise in accordance with law, and asks the court to sustain the Final Results. *See* Def.’s Resp. Pls.’ Mot. J. Agency R., ECF No. 39; *see also* U.S. Steel Corp.’s Resp. Pls.’ Mot. J. Agency R., ECF No. 41.

Because Commerce’s decision to replace all of BlueScope’s submitted information with facts available was not supported by substantial evidence, the court remands the Final Results.

² “Total adverse facts available” is not defined by statute or agency regulation. Commerce uses this term “to refer to [its] application of adverse facts available . . . to the facts respecting *all of respondents’ production and sales information that the Department concludes is needed for an investigation or review.*” *Nat’l Nail Corp. v. United States*, 43 CIT ___, ___, 390 F. Supp. 3d 1356, 1374 (2019) (emphasis added) (citation omitted). In other words, Commerce assigns an antidumping rate based entirely on facts selected using an adverse inference, ignoring all of a respondent’s information. The court declines to adopt Commerce’s language here. The dispositive question is whether Commerce’s decision to replace all of BlueScope’s information with facts available, while applying adverse inferences, was supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. §§ 1516a(b)(1)(B)(i), 1677e(a), (b).

BACKGROUND

In 2017, BlueScope Steel Ltd., BlueScope Steel Americas, Inc., and Steelscape LLC (the U.S. affiliated processor) asked Commerce to conduct an administrative review of BlueScope Steel Ltd.'s and its affiliates' sales under the Order during the period of review from March 22, 2016 to September 30, 2017. BlueScope's Req. for Admin. Rev. (Oct. 31, 2017), PR 1. In response, Commerce initiated the first administrative review. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 57,705 (Dep't Commerce Dec. 7, 2017).

On December 7, 2017, Commerce issued its initial questionnaire to BlueScope. *See Dep't Commerce Initial Quest.* (Dec. 7, 2017) ("Initial Quest."), PR 4. Subsequently, Commerce issued Section A supplemental questionnaires relating to the quantity and value of BlueScope Steel Ltd.'s and its affiliates' U.S., home market, and third-country market sales. *See Dep't Commerce Sec. A Suppl. Quest.* (Feb. 2, 2018), PR 34; *Dep't Commerce Secs. A-C Suppl. Quest.* (July 2, 2018) ("Secs. A-C Suppl. Quest."), PR 75. In addition, Commerce issued supplemental questionnaires asking for further information and clarifications as to BlueScope's sales in the home market (Section B) and the United States (Section C). *See Dep't Commerce Secs. B & C Suppl. Quest.* (Feb. 26, 2018), PR 47; *Dep't Commerce Secs. B-E Suppl. Quest.* (Apr. 9, 2018) ("Secs. B-E Suppl. Quest."), PR 57; *see also Secs. A-C Suppl. Quest.*

BlueScope timely responded to all of Commerce's questionnaires.³ Importantly, in its initial responses and in its supplemental responses, BlueScope reported that all of its U.S. sales of subject merchandise were made by its affiliated company BlueScope Steel (AIS) Pty Ltd. ("Australian Iron & Steel") to another affiliated company, BlueScope Steel Americas, Inc. BlueScope further stated that BlueScope Steel Americas entered the merchandise and then resold the product to Steelscape LLC, BlueScope's U.S. affiliated processor. *See, e.g., BlueScope's Sec. A Quest. Resp.* at 14–15. Steelscape then "further processed the subject merchandise into coated and galvanized steel" before making "the first [U.S.] sale to an unrelated customer."

³ For reference, BlueScope's responses to Commerce's initial and supplemental questionnaires are cited and short-cited as follows: BlueScope's Sec. A Quest. Resp. (Jan. 8, 2018), CR 1–12, PR 16–19; BlueScope's First Sec. A Suppl. Quest. Resp. (Feb. 22, 2018), PR 44–45; BlueScope's First Secs. B & C Suppl. Quest. Resp. (Mar. 12, 2018), PR 51–52; BlueScope's Secs. B-E Suppl. Quest. Resp. (Apr. 30, 2018), CR 158–189, PR 64–65; BlueScope's Sec. A-C Suppl. Quest. Resp. for Sec. A (July 16, 2018) ("BlueScope's Second Sec. A Suppl. Quest. Resp."), PR 78–79; BlueScope's Secs. A-C Suppl. Quest. Resp. for Secs. B & C (July 20, 2018) ("BlueScope's Second Secs. B & C Suppl. Quest. Resp."), PR 82–83; BlueScope's Secs. A-C Suppl. Quest. Partial Resp. (July 24, 2018), PR 84–85.

See BlueScope's Sec. A Quest. Resp. at 3. In other words, throughout the review, BlueScope reported that its only sales in the United States to unaffiliated customers⁴ were of further processed merchandise, processed and sold by its affiliate Steelscape.

Commerce published the preliminary results of its review on November 14, 2018. See *Certain Hot-Rolled Steel Flat Products From Australia*, 83 Fed. Reg. 56,817 (Dep't Commerce Nov. 14, 2018) ("Preliminary Results"), and accompanying Preliminary Decision Mem. (Nov. 1, 2018) ("PDM"), PR 95. It published the Final Results on April 30, 2019. See 84 Fed. Reg. at 18,241.

In the Final Results,⁵ Commerce determined that necessary information was missing from the record because BlueScope had failed to provide, in the form and manner requested by the Department, usable information (1) to determine the total quantity and value of U.S. sales (Section A), and (2) to reconcile a mismatch between the total U.S. sales quantity reported in Section A, and the total quantity of sales reported for BlueScope's U.S. sales in Section C (*i.e.*, the U.S. sales database). Commerce further found that the record lacked a usable home market sales reconciliation of its home market sales databases (Section B) because of deficiencies in BlueScope's final consolidated Section B database. See Final IDM at 11, 18.

The Department ultimately concluded that none of BlueScope's information was usable and that all of its submissions should be replaced with facts available, and applied adverse inferences to all of the facts. See Final IDM at 18. Commerce did not address Section D of BlueScope's questionnaire responses, concerning cost of production, in either the Preliminary or Final Results. Thus, Commerce did not calculate an antidumping margin, but instead assigned an ad-

⁴ Under the antidumping statute, Commerce determines if goods are being sold, or are likely to be sold, in the United States at less than fair value by finding the amount by which normal value (home market price) exceeds export price (U.S. price) or constructed export price. See 19 U.S.C. § 1673. The margin between the two is used to calculate an antidumping duty rate. *Id.* § 1677(35)(A).

When a respondent producer-exporter has no sales of subject merchandise to unaffiliated customers in the United States during the period of review, Commerce looks to "constructed export price." *Id.* § 1677a(b) (emphasis added) ("The term 'constructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted[.]").

⁵ After the Preliminary Results were issued, BlueScope asked Commerce to conduct verification of its submitted data, contending that this would resolve the "misunderstandings" on which the Preliminary Results were based. See BlueScope's Req. for Verification (Nov. 9, 2018) at 2, PR 100. In the Final Results, Commerce declined to conduct a verification. See Final IDM at 16 ("Commerce cannot conduct verification when the record is missing necessary information and verification is not an opportunity to provide new information."). For Commerce, BlueScope's responses were deficient not because of a misunderstanding, but because information was missing from the record.

verse facts available antidumping duty rate of 99.20 percent.⁶ See Final IDM at 15–16, 19.

Plaintiffs commenced this action to challenge Commerce’s decision to use facts available to replace all of BlueScope’s information, and to apply adverse inferences to those facts.⁷

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

Under the antidumping statute, Commerce determines if goods are being sold, or are likely to be sold, in the United States at less than fair value by finding the amount by which normal value exceeds export price or constructed export price. See 19 U.S.C. § 1673. The margin between the two is used to calculate an antidumping duty rate. *Id.* § 1677(35)(A).

During an administrative review, “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce],” “fails to provide such information by the deadlines for submission of the information or in the form and manner requested,” or

⁶ The margin alleged in the petition was 99.20 percent—the highest rate on the record. See PDM at 10–11 (“Commerce’s practice in reviews, in selecting a rate as total [adverse facts available], is to use the highest rate on the record of the proceeding”); see also 19 U.S.C. § 1677e(b)(2) (“An adverse inference under paragraph (1)(A) may include reliance on information derived from . . . the petition.”). In other words, because Commerce determined that “total” adverse facts available should be used in this case, it simply assigned an adverse rate to the BlueScope. See 19 U.S.C. § 1677e(a) (directing that, if “necessary information is not available on the record,” Commerce “shall . . . use the facts otherwise available in reaching the applicable determination”); see also *id.* § 1677e(b)(1) (directing that, if Commerce makes the separate, subsequent determination that a respondent “has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department],” it “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available”).

⁷ While the use of facts available and the application of an adverse inference is what the statute directs under the proper circumstances, this substitution of the facts sought in an investigation or review is a common feature of Commerce’s determinations. While there is some confusion as to the legality of this practice, there can be little doubt as to the truth of this Court’s observation that a “rate, standing alone, is not a ‘fact.’” *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 944 (2007), *superseded by statute as discussed in Deosen Biochemical Ltd. v. United States*, 42 CIT ___, ___, 307 F. Supp. 3d 1364, 1372 (2018), *aff’d*, 767 F. App’x 1008 (Fed. Cir. 2019). Nor can there be any doubt that the statute provides a roadmap for the source of adverse facts available. See 19 U.S.C. § 1677e(b)(2) (“An adverse inference under paragraph (1)(A) may include reliance on information derived from—(A) the petition, (B) a final determination in the investigation under this subtitle, (C) any previous review under section 1675 of this title or determination under section 1675b of this title, or (D) any other information placed on the record.”).

“significantly impedes a proceeding,” Commerce uses the facts otherwise available in place of the missing information. 19 U.S.C. § 1677e(a)(1)-(2)(A)-(C).

Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts when replacing an interested party’s information only if it makes the requisite additional finding that that party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1). The application of *adverse* facts available is, then, a two-step process. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (“The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination. . . . The focus of subsection (a) is respondent’s *failure to provide information*. The reason for the failure is of no moment.”).

Thus, generally only after Commerce has determined that there is information missing, creating a gap in the record, can it apply an adverse inference when selecting among the facts otherwise available. *See id.* (alteration in original) (“As a separate matter, subsection (b) permits Commerce to ‘use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,’ only if Commerce makes the separate determination that the respondent ‘has failed to cooperate by not acting to the best of its ability to comply.’ The focus of subsection (b) is respondent’s *failure to cooperate to the best of its ability*, not its failure to provide requested information.”). Importantly, the use of facts available generally requires a finding of missing information. The application of an adverse inference is based on a respondent’s behavior.

At all times, the overriding purpose of the statute is to determine an accurate antidumping margin for a respondent when one is warranted. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1234 (2021) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (“An overriding purpose of Commerce’s administration of antidumping laws is to calculate dumping margins *as accurately as possible*.”). In line with this purpose, Commerce generally must provide proper notice to respondents when their responses are deficient, and provide an opportunity to fix deficiencies, before relying on facts available. *See* 19 U.S.C. § 1677m(d) (“If [Commerce] determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] shall promptly

inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency”); *see also* 19 U.S.C. § 1677e(a) (emphasis added) (requiring that Commerce “shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination”).

DISCUSSION

In the Final Results, Commerce determined that it was necessary to use facts available with respect to *all* of BlueScope’s submitted information, because it found that it was not possible to calculate a dumping margin for BlueScope without (1) a usable total consolidated U.S. sales quantity for the period of review, (2) a usable U.S. sales reconciliation, and (3) a usable home market sales reconciliation. *See* Final IDM at 11. Before concluding that it needed to replace all of BlueScope’s information and apply adverse inferences to the facts available, Commerce was required to support, by substantial evidence, its conclusion that there was no usable information on the record. *See Nat’l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1373 (2019) (citing *Nippon Steel*, 337 F.3d at 1381) (“[T]he use of ‘facts otherwise available,’ to fill in gaps, applies when necessary information is lacking, regardless of the reason for its absence.”).

The court finds that Commerce failed to justify its use of facts available in two respects. First, as to BlueScope’s U.S. sales quantity and value reporting, the Department failed to demonstrate that BlueScope’s responses created a gap in the record. Second, as to BlueScope’s U.S. and home market sales reconciliations, the Department did not comply with 19 U.S.C. § 1677m(d), which requires it to provide a respondent with notice of deficient responses, and an opportunity to remediate, before deciding to rely on facts available. Because the use of facts available was not warranted, there was no opportunity for the Department to apply adverse inferences. Accordingly, because the replacement of all BlueScope’s information with adverse facts available was unsupported by substantial evidence, the court remands for further action consistent with this Opinion and Order.

I. Commerce Failed to Show that There Was a Gap in the Record with Respect to the Quantity and Value of BlueScope’s U.S. Sales

In Section A of its initial questionnaire, Commerce asked BlueScope to provide general information about the quantity and value of all of

its U.S., home market, and third-country market sales. *See* Initial Quest. (Sec. A). In the Final Results,⁸ Commerce found that BlueScope’s quantity and value reporting for its U.S. sales was not submitted in the form and manner requested by the Department.⁹

When determining whether to use facts available because a respondent has not provided usable information, Commerce must explain “exactly what information is missing from the record.” *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019); *see also* 19 U.S.C. § 1677e(a)(2)(B).¹⁰ For Commerce to reasonably declare the existence of a gap, it is not enough that the information be present but that Commerce objects to its form. *See, e.g., Agro Dutch Indus. Ltd. v. United States*, 31 CIT 2047, 2055 (2007) (not reported in Federal Supplement) (“If the deficiency [is] cured . . . , whatever reasons for its having been deficient earlier in the proceeding are rendered irrelevant, because there is now no longer a ‘gap’ in the information necessary for the proceeding.”).

From the outset of the review, BlueScope’s narrative responses stated that, for purposes of determining constructed export price, only its U.S. affiliate Steelscape made U.S. sales (of further processed merchandise) during the period of review. For purposes of determining how *subject* merchandise entered the United States, BlueScope has consistently stated that only its Australian affiliate Australian Iron & Steel sold subject merchandise to the United States, in an

⁸ Commerce did not change its facts available determination as to all of BlueScope’s information, nor its decision to apply adverse inferences to those facts, between the Preliminary and Final Results. *See generally* PDM; Final IDM.

⁹ Commerce cited the language of subsections (A)-(C) of the facts available statute when stating its grounds for rejecting BlueScope’s quantity and value information. *See, e.g.,* Final IDM at 11 (“[B]ecause BlueScope withheld information requested by Commerce, failed to report its [quantity and value] information in the form and manner requested by Commerce - despite multiple requests for this information - thereby significantly impeding this review, recourse to the facts available was appropriate under [19 U.S.C. § 1677e(a)(2)(A)-(C)].”). The Department points to nothing, however, that would provide evidence substantial enough to support a finding that BlueScope significantly impeded the proceeding. Therefore, the court will focus on the Department’s discussion of what information BlueScope provided, and the form and manner of its questionnaire responses, when determining whether Commerce reasonably relied on facts available. *See* 19 U.S.C. § 1677e(a)(2)(A)-(C).

¹⁰ Commerce shall use facts available when a respondent “fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) [corroboration of secondary information] and (e) of section 1677m of this title.” 19 U.S.C. § 1677e(a)(2)(B) (emphasis added). Subsection 1677m(e) limits the application of § 1677e(a)(2)(B) by providing that Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the [Department]” if certain circumstances exist. *See id.* § 1677m(e)(1)-(5) (providing that such information shall be used if it is timely, verifiable, “not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,” provided by a respondent that has cooperated “to the best of its ability,” and “can be used without undue difficulties”).

affiliated transaction. *See, e.g.*, BlueScope’s Sec. A Quest. Resp. Ex. A-1; BlueScope’s First Sec. A Suppl. Quest. Resp. at 1 & Ex. SA1–1.

In addition, BlueScope eventually provided charts linking its affiliates (by name) to the figures it reported for total quantity and value of U.S. sales. In response to the Department’s final supplemental questionnaire for quantity and value (Section A), BlueScope timely provided two charts—one showing totals for its constructed export price sales, and entries of subject merchandise in the United States (“Final Quantity and Value Chart”), and one showing the total amount of Steelscape’s sales of further processed merchandise, and the total quantity of Australian Iron & Steel’s sales of subject merchandise into the United States through affiliated transactions (“Final Reconciliation Chart”).¹¹ *See* BlueScope’s Second Sec. A Suppl. Quest. Resp. Ex. SA3–1 (Final Quantity and Value Chart) & Ex. SA3–2 (Final Reconciliation Chart).

A review of the charts themselves reveals that the quantity of Steelscape’s sales of further processed merchandise to unaffiliated U.S. customers exactly matches the quantity of constructed export price sales. Similarly, the quantity of Australian Iron & Steel’s sales to BlueScope Steel Americas exactly matches the quantity of entries into the United States. *See* BlueScope’s Sec. A Quest. Resp. at 14; BlueScope’s Second Sec. A Suppl. Quest. Resp. Ex. SA3–1 & Ex. SA3–2.

BlueScope believed that the Final Reconciliation Chart, combined with its other submissions, showed that *only Steelscape made sales that could serve as the basis of constructed export price*. BlueScope also believed that it had consistently supported its claim that Australian Iron & Steel’s sales to BlueScope Steel Americas represented the *only subject merchandise entered into the United States during the period of review*. *See* BlueScope’s Second Sec. A Suppl. Quest. Resp. at 2–4; *see also* BlueScope’s Case Br. (Dec. 14, 2018) at 12–13, PR 106. The two charts seem to support BlueScope’s narrative statement that there was only one channel of distribution, linking all constructed export price sales to Steelscape, and all entries of subject merchandise to sales from Australian Iron & Steel to BlueScope Steel Americas.

In the Final Results, however, Commerce disregarded BlueScope’s U.S. sales quantity and value reporting, and found that the record

¹¹ Along with the Final Reconciliation Chart, BlueScope submitted a shipment list, showing, *inter alia*, invoice numbers, quantities, and values of sales made by Australian Iron & Steel to BlueScope Steel Americas. *See* BlueScope’s Second Sec. A Suppl. Quest. Resp. Ex. SA3–2. The total quantity and value reported in this list matches the total quantity and value for sales made by Australian Iron & Steel to BlueScope Steel Americas reported in the Final Reconciliation Chart.

lacked (1) “the total quantity and value of sales during the [period of review] by Steelscape of further processed merchandise made using the subject merchandise that entered during the [period of review]”; and (2) “the total quantity and value of the subject merchandise that entered into the United States during the [period of review].” Final IDM at 12. Despite BlueScope’s submission of the Final Quantity and Value Chart and the Final Reconciliation Chart, Commerce found that BlueScope never provided additional responsive information in the form and manner requested. *See* Final IDM at 12 (“We twice requested that BlueScope . . . separately report [total quantity and value for Steelscape’s sales and for entries of subject merchandise made during the period of review]. . . . However, on both occasions, BlueScope simply referred Commerce to the consolidated [quantity and value] chart that we had previously found to be deficient.”). Commerce rejected the Final Reconciliation Chart, finding that it was “was not responsive to Commerce’s request because it was not submitted in the form and manner requested by Commerce, nor does the quantity reported in the reconciliation tie to the U.S. sales database.” Final IDM at 12–13.

As stated, Commerce is justified in using facts available where necessary information is missing from the record or is otherwise unavailable. *See* 19 U.S.C. § 1677e(a). While a respondent’s failure to provide information in the “form and manner” requested by the Department may be a reason why necessary information is missing from the record, Commerce must explain “exactly what information is missing from the record.” *Jiangsu*, 43 CIT at ___, 405 F. Supp. 3d at 1333. Moreover, subject to certain conditions, Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the [Department].” 19 U.S.C. § 1677m(e).

Here, the Department failed to support, with substantial evidence, its use of facts available to replace BlueScope’s U.S. sales quantity and value reporting. The Department offered no underlying reasoning, beyond a cursory objection to “form and manner,” when refusing to rely on BlueScope’s Final Reconciliation Chart. It did not substantively address the Final Reconciliation Chart, which appears to provide the information Commerce requested with respect to Steelscape’s total quantity and value of constructed export price sales, and total quantity and value of subject merchandise sold to the United States by Australian Iron & Steel (in an affiliated transaction).

Further, Commerce’s “form and manner” analysis focuses on BlueScope’s perceived lack of cooperation throughout the review, rather

than the usability of the information it eventually produced. Under the facts of this case, whether or not BlueScope cooperated is only relevant *after* Commerce has first determined that necessary information is missing from the record. *See Nippon Steel*, 337 F.3d at 1381 (alteration in original) (“The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination. . . . [S]ubsection (b) permits Commerce to ‘use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,’ only if Commerce makes the separate determination that the respondent ‘has failed to cooperate by not acting to the best of its ability to comply.’”); *see also Agro Dutch Indus.*, 31 CIT at 2055 (finding that the reasons for a cured deficiency are “rendered irrelevant, because there is now no longer a ‘gap’”).

The court is not satisfied that necessary information is missing here, or that the form and manner of BlueScope’s responses created a gap in the record. The court had no trouble concluding, for example, that BlueScope represented that Steelscape was its only source of sales to unaffiliated customers in the United States, and the quantity and value of those sales.¹² BlueScope’s submissions, particularly its Final Quantity and Value Chart and its Final Reconciliation Chart, do not support Commerce’s conclusion that necessary information was missing from the record. Indeed, the evidence that Commerce itself cites to support this ultimate conclusion is primarily the information found in BlueScope’s responses and exhibits submitted *prior* to the Final Reconciliation Chart.¹³ *See* Final IDM at 12–13. By failing to discuss the information provided in the Final Reconciliation Chart, or explain why BlueScope’s evidence should not be credited,

¹² Somewhat confusingly, Commerce stated in the Final Results that contrary to BlueScope’s claim, the [quantity and value] charts submitted for its individual affiliates include information for both sales in the United States and home market. Indeed, during the review, we informed BlueScope that the information reported in the [quantity and value] charts submitted for its individual affiliates was inconsistent with its narrative response that only [Australian Iron & Steel] had any exports of subject merchandise to the United States.

Final IDM at 13 (footnote omitted). Yet the record appears consistent with BlueScope’s claims that only Steelscape made sales that could be the basis of constructed export price. *See* BlueScope’s Second Sec. A Suppl. Quest. Resp. Ex. SA3–1 (showing the total quantity of constructed export price sales as 8,825.67) & Ex. SA3–2 (showing the total quantity of Steelscape’s sales to unaffiliated customers as 8,825.67).

¹³ Specifically, Commerce relies on BlueScope’s initial and first supplemental questionnaire responses to Section A submitted prior to the Final Reconciliation Chart, and the Final Quantity and Value Chart (submitted with the Final Reconciliation Chart in response to Commerce’s second supplemental questionnaire for Section A). *See* Final IDM at 12.

Commerce failed to support, by substantial evidence, its finding that BlueScope never provided a usable total consolidated U.S. sales quantity for the period of review.

On remand, Commerce shall use BlueScope's quantity and value (Section A) submissions, unless it can support with substantial evidence its finding that the form and manner of BlueScope's submissions prevents it from determining the total consolidated quantity of constructed export price sales and their origin.

II. Commerce Failed to Justify Its Use of Facts Available Under 19 U.S.C. § 1677e(a) Because It Was First Required to Comply with the Requirements of § 1677m(d)

Commerce further found that it lacked a usable U.S. sales reconciliation and a usable home market sales reconciliation because of certain changes BlueScope had made to its U.S. and home market sales databases, submitted in response to the Department's supplemental questionnaires over the course of the review. For Commerce, these changes were unsolicited and unexplained, and resulted in irreconcilable differences in BlueScope's overall sales reporting, such that all of its information had to be replaced with facts available.

Commerce's reliance on facts available based on perceived deficiencies in BlueScope's sales database was premature, however, because the court is not satisfied that the Department first complied with the requirements of 19 U.S.C. § 1677m(d).

"The failure by Commerce to provide a respondent with the statutorily required notice of a deficiency in its questionnaire response 'can render the decision [to apply facts available] unsupported by substantial evidence and otherwise contrary to law.'" *Hyundai Steel Co. v. United States*, 45 CIT __, __, 518 F. Supp. 3d 1309, 1322 (2021) (alteration in original) (citation omitted) (cleaned up). To give respondents an opportunity to remedy deficient responses, Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d).

As to both BlueScope's U.S. sales reconciliation and its home market sales reconciliation, the court first finds that the changes BlueScope made to its sales databases were solicited by the Department. Moreover, because Commerce provided no explanation as to why it would not have been practicable to give BlueScope notice of, and an opportunity to fix, the deficiencies identified in its responses, the court remands so that the Department can comply with the requirements of § 1677m(d).

A. U.S. Sales Reconciliation: Changes Made to U.S. Sales (Section C) Database

Here, the presence or absence of returned sales information, and the claimed creation of a mismatch between BlueScope's Section A (quantity and value) and Section C (U.S. sales) responses, led Commerce to conclude that the record lacked a usable U.S. sales reconciliation. *See* Final IDM at 14. For Commerce, the lack of a U.S. sales reconciliation was further justification of its decision to replace all of BlueScope's information with facts available and to apply adverse inferences to those facts.

During the course of the review, Commerce issued a second supplemental questionnaire concerning Section C (U.S. sales), asking BlueScope to state whether there had been any "positive or negative adjustments to any of [its] U.S. sales during the [period of review] and [to] submit documentation to support [its] response." *See* Secs. B-E Suppl. Quest. at 11. In response, BlueScope identified certain U.S. sales, made by its affiliate Steelscape, that it had removed from its sales database. BlueScope stated that these returned sales had been "deleted from BlueScope's U.S. database" because the merchandise had been returned after the end of the period of review. *See* BlueScope's Secs. B-E Suppl. Quest. Resp. at 35–36.

In its narrative response, BlueScope identified the invoice numbers associated with the sales that were returned or partially returned. *See* BlueScope's Secs. B-E Suppl. Quest. Resp. at 35–36; *see also* Preliminary Propriety Info. Mem. (Nov. 1, 2018) ("BPI Memo") at 1 n.4, CR 264, PR 96 (identifying the same invoice numbers BlueScope had listed in its response). Further, BlueScope stated in its case brief (submitted before the Final Results) that the difference between the updated database and the total quantity of Steelscape's sales was the exact quantity of the returned sales.¹⁴ *See* BlueScope's Case Br. at 19.

BlueScope understood these changes to be responsive to Commerce's request that it report its U.S. sales "net of returns." *See* BlueScope Steel Ltd.'s Rebuttal to Pet'r's Req. for Application of Total AFA (Sept. 6, 2018) ("BlueScope's Rebuttal") at 7, PR 90; *see also* Initial Quest. at C-15 (asking BlueScope to "[r]eport the information requested concerning the quantity sold" as "net of returns where possible"). BlueScope further argued that the modification to its U.S.

¹⁴ BlueScope identified 21.77 metric tons as the quantity of returned merchandise: the exact difference between the final quantity of U.S. sales of further processed merchandise sold by Steelscape, 8,825.67 metric tons, and the adjusted quantity reported in its U.S. sales database, 8,803.90 metric tons, or only 0.24 percent of its total U.S. sales. *See* BlueScope's Case Br. at 19; *see also* BPI Memo at 1 n.3 (identifying the same difference in quantity of metric tons between BlueScope's Section A and Section C responses); Final IDM at 7 (noting 0.24 percent as the difference stated by BlueScope).

sales database was too insignificant to justify Commerce's use of facts available. The difference between the two databases was 0.24 percent—less than one quarter of one percent—of BlueScope's total sales quantity. *See* BlueScope's Case Br. at 19; Final IDM at 7; *see also* BPI Memo at 1 n.3.

Plaintiffs primarily claim that the Department failed to comply with the notice and remediation requirements of 19 U.S.C. § 1677m(d) before using facts available. *See* Pls.' Br. 42–43. After BlueScope made the changes to its Section C database that created the mismatch between its responses, and identified the invoices that had been fully or partially returned, Commerce issued another supplemental questionnaire for Sections A and C. *See* Secs. A–C Suppl. Quest. In this questionnaire, Commerce made no mention of the mismatch between BlueScope's updated U.S. sales database and its latest quantity and value chart, even though it asked questions about other aspects of BlueScope's Sections A and C reporting. *See* Secs. A–C Suppl. Quest. at 3–4, 13–15. Further, Commerce asked no questions about the invoice numbers BlueScope listed in its prior response identifying the sales it removed from the U.S. sales database. For Plaintiffs, “[i]f Commerce had required further documentation about the two returned sales, it needed to inform BlueScope of those requests and to provide BlueScope an opportunity to provide that documentation.” Pls.' Br. 43.

In the Final Results, Commerce found that BlueScope's modifications to its U.S. sales database to reflect returned Steelscape sales were both unsolicited and unexplained, and lacked supporting documentation. *See* Final IDM at 14 (footnote omitted) (“BlueScope's reporting in its U.S. sales database does not support BlueScope's explanation that these certain [products documented in the invoices it identified] were fully returned and the sales associated with these invoices were removed from the U.S. sales database. Further, the record lacks any documentation to support BlueScope's claim that these sales were returned.”). Based on the resulting mismatch between BlueScope's Section C database and its Section A quantity and value reporting, and the perceived deficiency of its supporting explanation (including a lack of documentation), Commerce concluded that BlueScope failed to submit a usable U.S. sales reconciliation.

The Department “satisfies its obligation under § 1677m(d) to place the respondent on notice of the nature of a deficiency in its initial questionnaire response where a supplemental questionnaire ‘*specifically point[s] out and request[s] clarification of [the] deficient responses,*’ and *identifies the information needed to make the required showing.*” *Hyundai Steel*, 45 CIT at ___, 518 F. Supp. 3d at 1322–23

(alterations in original) (emphasis added) (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007)).

Here, Commerce did not notify BlueScope of the deficiencies that formed the basis of its eventual facts available determination, with respect to BlueScope's response to the Department's initial request to report its sales "net of returns." Nor did the Department request remediation of the deficiencies. Specifically, Commerce did not ask BlueScope to clarify the mismatch between the Section A total quantity and Section C total quantity. Nor did Commerce request further documentation from BlueScope, even though it knew of the removal of sales, and the invoice numbers associated with them, more than six months before the Preliminary Results.

Rather, Commerce waited to disregard BlueScope's U.S. sales information because of the mismatch in quantity figures and the lack of supporting documentation—and indeed, to replace *all* of BlueScope's information with facts available—until it was too late for BlueScope to remediate any deficiency in its reporting. In its decision memoranda, Commerce gave no reason as to why it would have been impracticable to ask further questions about the mismatch, or to request additional documentation to support BlueScope's claim that the sales were returned, in the final supplemental questionnaire covering both sections relevant to the U.S. sales reconciliation, which was issued more than three months before the Preliminary Results. Under these circumstances, Commerce acted in violation of the statute by rejecting BlueScope's information and relying on facts available without giving it notice of the nature of the deficiencies in its responses, and an opportunity to remediate the mismatch between Section A and Section C. *See* 19 U.S.C. § 1677e(a) (emphasis added) (requiring that Commerce "shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination").

Therefore, the court finds that Commerce failed to comply with the requirements of § 1677m(d). The court remands on this issue and directs Commerce to give BlueScope an opportunity to remedy specific deficiencies identified in its Section A and Section C responses, before determining whether there is a usable U.S. sales reconciliation on the record.

B. Home Market Sales Reconciliation: Changes Made to Home Market Sales (Section B) Database

Commerce found further deficiencies in BlueScope's home market information (Section B). In response to Commerce's initial and supplemental questionnaires for Section B, BlueScope submitted four consolidated home market sales databases over six months. Com-

merce concluded that the fourth and final consolidated home market sales database, submitted more than three months before the Preliminary Results were issued, included “significant unsolicited and unexplained changes” to the data. *See* Final IDM at 14. These changes had, in Commerce’s view, so modified the information for the majority of BlueScope’s home market sales that the record lacked a usable home market reconciliation, because the consolidated database could not be reconciled with its previous submissions. *See* Final IDM at 14–15; BPI Memo at 2 n.7.

For Plaintiffs, the alleged “changes” that Commerce had identified with regard to the majority of BlueScope’s home market sales were made in compliance with Commerce’s instructions. That is, Plaintiffs claim that the sole modification found in BlueScope’s fourth and final consolidated database was the addition of two months of data to its individual databases, as requested by Commerce in a supplemental questionnaire. *See* BlueScope’s Second Secs. B & C Suppl. Quest. Resp. at 3 (emphasis added) (“BlueScope has provided *as requested* updated home market sales files for [Australian Iron & Steel], BSL, and [BlueScope Steel Distribution] to include October and November 2017 sales, which are the two months following the conclusion of the [period of review].”). Plaintiffs argue:

Other than adding two months of sales, . . . none of the underlying data BlueScope submitted changed. . . . [I]t is apparent that what appeared to be “changes” in Commerce’s eyes resulted from the fact that Commerce was simply comparing *sequence numbers* in the response. . . . When an additional sale results in additional sequence numbers, the price, quantity and CONNUM¹⁵ of the new sequence number necessarily changes from the old sequence number. The underlying data do not change; only the sequence number does.

See Pls.’ Br. 37–38. In other words, for Plaintiffs, the changes to the consolidated database were inevitable because, when BlueScope added sales to the individual company and affiliate databases, these additions flowed into the consolidated database. *See* BlueScope’s Rebuttal at 10 (explaining that the consolidated database “is simply a pasting together of each of the individual home market company databases”).

¹⁵ A CONNUM is a number composed of a series of digits each of which corresponds to a physical characteristic, as defined by Commerce in a questionnaire. Each CONNUM is assigned to a unique product and allows the Department “to match identical and similar products across markets.” *See Manchester Tank & Equip. Co. v. United States*, 44 CIT ___, __ n.3, 483 F. Supp. 3d 1309, 1312 n.3 (2020) (citation omitted).

To account for such shifting effects, BlueScope included information in its home market sales databases—individual and consolidated—for Commerce’s use in understanding the changes caused by its addition of the two months of sales data. This information included a particular database field or “variable,” “SEQH_OLD,” that BlueScope used in its individual databases and had been using to link old and new databases as early as six months prior to the issuance of the Preliminary Results. *See* BlueScope’s Rebuttal at 10 n.16 (“[SEQH_OLD] has been present since BlueScope’s April 30, 2018, response. The individual company database [sequence] number . . . directly ties to . . . the consolidated databases.”); *see also* BlueScope’s Secs. B-E Suppl. Quest. Resp. Ex. SB2–1.

Plaintiffs contend that, because of BlueScope’s history of using “SEQH_OLD,” and the explanations it provided throughout the review, Commerce’s rejection of its final consolidated home market database—and all of its other home market submissions—was contrary to § 1677m(d).¹⁶ *See* Pls.’ Br. 42 (“Commerce never provided BlueScope with timely notice of what it considered to be deficiencies in BlueScope’s responses or an opportunity to remedy or explain those alleged deficiencies.”). For Plaintiffs, if Commerce found that BlueScope was unable to tie “the fourth consolidated home market sales database to the previously submitted databases,” it should have asked BlueScope “to show it how to do so before it issued its preliminary determination.” Pls.’ Br. 42. Commerce’s finding was particularly unreasonable, Plaintiffs contend, because BlueScope had submitted its fourth and final consolidated database more than three months prior to the Preliminary Results, and had explained in its rebuttal brief submitted two months prior to the Preliminary Results how the individual and consolidated databases could be understood.¹⁷ *See* BlueScope’s Rebuttal at 10 n.16 (“[BlueScope] assume[s] that the Department itself was aware of [the use of SEQH_OLD in BlueScope’s individual databases], as BlueScope has received no questions

¹⁶ As has been noted, Commerce “shall promptly inform the person submitting [a deficient] response of the nature of the deficiency and . . . to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency . . .” 19 U.S.C. § 1677m(d).

¹⁷ BlueScope explained in its rebuttal brief that its consolidated database could not be viewed in a “vacuum.” Rather, it identified the relationship between a number of sequence-related fields, to instruct Commerce how to track the overall changes that occurred because of the added sales. *See* BlueScope’s Rebuttal at 10 & n.16 (“In [its individual company and affiliate] databases, BlueScope clearly provided a separate variable ‘SEQH_OLD’ . . . that tied to the prior-submitted database The individual company database SEQH number, then directly ties to field SELLER and SEQH_COMPANY variables in the consolidated databases.”). In other words, while SEQH_OLD did not appear in the final consolidated database, it was still present in the individual databases that contained all of the underlying data reported in consolidated form.

related to this issue from the Department, despite a lengthy and detailed supplemental [questionnaire].”)

Commerce had asked BlueScope to “report all home market sales in the two months following the last month of U.S. sales . . . [by] revis[ing its] database to include all sales by BlueScope in Australia in October and November 2017.” Secs. A-C Suppl. Quest. at 4. In the Preliminary and Final Results, however, Commerce rejected BlueScope’s fourth and final consolidated home market sales database, and all of its other home market databases, because the Department found that, contrary to its instructions to *only* submit “an additional two months of home market sales data,” BlueScope had submitted a new consolidated database in which over seventy percent of sequence numbers for home market sales had changed in one way or another.¹⁸ See Final IDM at 15 (“While Commerce may have requested that BlueScope submit an additional two months of home market sales data, we did not request that BlueScope make changes to the home market sales data already submitted on the record.”); see also PDM at 9; BPI Memo at 2 n.7.

As for the database field “SEQH_OLD,” which BlueScope claimed would show Commerce the original sequence number of a sale that had been shifted by the addition of new data, the Department found that this field itself did not appear in the changed consolidated database. See Final IDM at 15. Thus, Commerce insists that it “was never able to tie the consolidated home market sales database to the previously submitted databases during this review,” and there was no usable home market reconciliation on the record. See Final IDM at 15.

As noted, before Commerce may use facts available, it must comply with the notice and remediation requirements of § 1677m(d). See 19 U.S.C. §§ 1677e(a), 1677m(d) (requiring that, if a response is deficient, Commerce “shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency”). Generally, “[t]he failure by Commerce to provide a respondent with the statutorily required notice of a deficiency in its questionnaire response ‘can render the decision to apply facts available unsupported by substantial evidence and otherwise

¹⁸ In the BPI Memo accompanying the Preliminary Results, Commerce stated that, “[f]or over 70 percent of the sequence numbers, significant information, including the invoice number, price, quantity, and CONNUM” changed between the home market sales dataset submitted May 7, 2018, and the dataset submitted July 20, 2018. See BPI Memo at 2 n.7. “Further, [the July 20 dataset] appears to include additional sequence numbers for sales occurring during the period of review. However, due to the significant changes to the datasets, it is unclear which sales have been added.” BPI Memo at 2 n.7.

contrary to law.” *Hyundai Steel*, 45 CIT at ___, 518 F. Supp. 3d at 1322 (citation omitted) (cleaned up).

The court finds that Commerce has failed to support, with substantial evidence, its decision to disregard BlueScope’s home market sales information. First, it is worth noting that, at no point, does Commerce assert that it was not practicable to afford BlueScope the opportunity to remedy or explain the deficiencies it found. Absent such a finding, it was unreasonable for the Department to replace *all* of BlueScope’s information with facts available, when, up until that point, BlueScope had timely responded to Commerce’s requests for clarification and modification of its home market data. Moreover, Commerce never reveals why it did not notify BlueScope of the nature of the deficiency earlier than in the Preliminary Results, even though Commerce was familiar with the use of the SEQH_OLD variable and had been for months. Commerce was also aware of the allegedly deficient consolidated database, and BlueScope’s method of “linking” the individual and consolidated databases, two months prior to the Preliminary Results. *See* BlueScope’s Rebuttal at 10 & n.16.

Commerce’s conclusion that BlueScope’s submissions were unsolicited and unexplained is inconsistent with the Department’s supplemental questionnaire’s brief and non-specific request for additional data: “[P]lease report all home market sales in the two months following the last month of U.S. sales, as originally instructed. Specifically, please revise your database to include all sales by BlueScope in Australia in October and November 2017.” Secs. A-C Suppl. Quest. at 4–5. Commerce simply misunderstands its own questionnaire if it believes it was soliciting only a discrete additional two months of home market sales in a separate database. The words “please revise your database to include all sales by BlueScope in Australia in October and November 2017” do not permit that interpretation of what was being sought.

This Court has observed that “[b]roadly drawn initial or supplemental questionnaires may not sufficiently place a respondent on notice of the nature of the deficiency, and deprive it of the opportunity to remedy that deficiency.” *Hyundai Steel*, 45 CIT at ___, 518 F. Supp. 3d at 1322. Here, Commerce did not put BlueScope on notice of any deficiency concerning the addition of two months of sales through its questionnaires. The Department did not address how added data might change sequence numbers or other information before rejecting BlueScope’s explanations on the subject. Nor did Commerce address whether or not BlueScope’s method of tracking changes (*i.e.*, the use of “SEQH_OLD,” or the explanation in its rebuttal brief) might be inadequate. Thereafter, Commerce did not give BlueScope an oppor-

tunity to remedy the perceived deficiencies as required by the statute. Thus, Commerce's decision to use facts available as to BlueScope's home market information is not supported by substantial evidence, and the court remands on this issue for the Department to give BlueScope notice of its deficient responses and an opportunity to remediate.¹⁹

Finally, it bears noting that, in the Preliminary Results (and the accompanying BPI Memo), Commerce explained that its rejection of *all* of BlueScope's submissions was in response to the perceived deficiency of its final consolidated home market sales database. *See* PDM at 9 ("Rather than providing clarification about the previously submitted home market sales databases, the revisions to the fourth consolidated home market sales database have made the record even more unclear and calls into question the reliability of all the databases provided by BlueScope."); BPI Memo at 2 n.8 ("The significant changes to [the final home market sales database] call into question the reliability of all databases and reconciliations submitted by BlueScope."). It is unclear from the Final Results if Commerce's facts available determination continued to rely on this reasoning, but Commerce continued to disregard all of BlueScope's information without addressing the sufficiency of BlueScope's responses to Section D (cost of production) of the Department's questionnaires. *See generally* PDM & Final IDM. In light of the court's finding that Commerce has failed to establish the existence of a gap in BlueScope's home market sales reporting, this far-reaching, unexplained rejection of all of its submissions is likewise unsupported by substantial evidence.

CONCLUSION and ORDER

For the foregoing reasons, it is hereby

ORDERED that the Department's use of facts available, under 19 U.S.C. § 1677e(a) based on BlueScope's alleged withholding of re-

¹⁹ As noted, the court does not reach Plaintiffs' challenge to Commerce's application of adverse inferences to the facts available. Commerce found that BlueScope had failed to cooperate to the best of its ability by withholding information from the Department, and otherwise not complying with its instructions, and thus, all of its information should be replaced with facts available selected using adverse inferences. *See* Final IDM at 17 ("BlueScope withheld information that had been requested by Commerce by failing to provide it in the form and manner requested which significantly impeded the proceeding under [the statute]."). Commerce must first determine what, if any, gaps exist in the record, particularly with respect to BlueScope's submissions of quantity and value information, U.S. sales, and home market sales. Only if the Department substantiates the existence of a gap may it turn to the question of adverse inferences. BlueScope's cooperation (or lack thereof) is only relevant if information is, in fact, missing from the record. *See Guizhou Tyre Co. v. United States*, 43 CIT, ___, 389 F. Supp. 3d 1315, 1320 (2019) ("[B]efore Commerce can apply [adverse facts available], it must first determine under § 1677e(a) that information is missing from the record *and* that the gap was caused by a respondent's failure to cooperate.").

quested information by failing to provide it in the form and manner requested, is remanded for the agency to determine whether there was in fact a gap in the record; it is further

ORDERED that the Department shall use BlueScope's quantity and value (Section A) submissions, absent a reasoned explanation as to why the form and manner of its submissions prevents the Department from discerning (1) the total quantity and value of U.S. sales of further processed merchandise made by Steelscape LLC; (2) whether Steelscape made the only sales that could serve as the basis of constructed export price during the period of review; (3) the total quantity and value of subject merchandise entered into the United States; and (4) whether sales by Australian Iron & Steel to BlueScope Steel Americas represented the total quantity and value of those entries; it is further

ORDERED that, on remand, Commerce shall comply with its obligation, under 19 U.S.C. § 1677m(d), to notify BlueScope of the nature of the alleged deficiencies in its Section A and Section C responses concerning the U.S. sales reconciliation, and provide an opportunity to remediate; it is further

ORDERED that, on remand, Commerce shall likewise notify BlueScope of the nature of the alleged deficiencies in its Section B responses concerning its home market sales reconciliation, and provide an opportunity to remediate; it is further

ORDERED that if, on remand, Commerce continues to find that the use of facts available is warranted, and makes the additional, distinct finding that the application of adverse inferences is warranted because BlueScope failed to cooperate "to the best of its ability," under 19 U.S.C. § 1677e(b), then it shall support this finding with substantial evidence; and it is further

ORDERED that Commerce's remand redetermination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: November 30, 2021
New York, New York

/s/ Richard K. Eaton

JUDGE

Slip Op. 21–162

NLMK PENNSYLVANIA, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 21–00507

[Denying proposed defendant-intervenor United States Steel Corporation’s motion to intervene and motion to stay.]

Dated: December 3, 2021

Luke A. Meisner, Roger B. Schagrin, Jeffrey D. Gerrish, and Kelsey M. Rule, Schagrin Associates, of Washington, D.C., for proposed defendant-intervenor.

Sanford Litvack, Andrew L. Poplinger, and R. Matthew Burke, Chaffetz Lindsey LLP, of New York, NY, for plaintiff.

Tara K. Hogan, Assistant Director, and *Meen Geu Oh*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. Also on the brief were *Brian Boynton*, Acting Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Kenneth Kessler*, Office of Chief Counsel for Industry & Security, U.S. Department of Commerce, of Washington, D.C.

MEMORANDUM AND ORDER**Kelly, Judge:**

Before the court are proposed defendant-intervenor United States Steel Corporation’s (“U.S. Steel”) motions to intervene as a defendant-intervenor and to stay further proceedings in this action pending U.S. Steel’s appeal to the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”) of this Court’s denial of U.S. Steel’s motion to intervene in a different action. *See* Mot. to Intervene by [U.S. Steel] as Def.-Intvrnr., Oct. 27, 2021, ECF No. 14 (“Mot. to Intervene”);¹ Mot. to Stay Proceedings Pending Appeal, Oct. 27, 2021, ECF No. 15 (“Mot. to Stay”); *see also* *N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313 (Ct. Int’l Trade 2021) (“*NAI*”).

Plaintiff NLMK Pennsylvania, LLC (“NLMK”) commenced this action challenging the U.S. Department of Commerce’s (“Commerce”) denial of NLMK’s requests for certain imports of steel products to be excluded from tariffs imposed on steel imports pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (“Section 232”), Pub. L. 87–794, § 232, 76 Stat. 872, 877 (1962), codified in various sections of Titles 19 and 26 of the U.S. Code. *See* Compl., ¶ 1, Sept. 8, 2021, ECF No. 2. U.S. Steel, a domestic producer of steel mill products which opposed NLMK’s exclusion requests during the proceedings before Commerce, contends that it has a right to intervene under

¹ Pursuant to U.S. Court of International Trade (“CIT”) Rule 12(c), U.S. Steel’s Motion to Intervene is accompanied by an answer setting out the defense that U.S. Steel seeks to interpose. Answer to Compl. of [U.S. Steel], Oct. 27, 2021, ECF 14–1 (“Proposed Answer”).

CIT Rule 24(a) and, alternatively, that it should be permitted to intervene under CIT Rule 24(b). Mot. to Intervene at 4–8, 9–11. U.S. Steel also moves for a stay of all proceedings in this action pending U.S. Steel’s appeal of *NAI*. See Mot. to Stay. NLMK opposes the Motion to Intervene and the Motion to Stay. [NLMK’s] Opp’n to [Mot. to Intervene], Nov. 17, 2021, ECF No. 23 (“NLMK Intrvntn. Opp.”); [NLMK’s] Opp’n to [Mot. to Stay], Nov. 17, 2021, ECF No. 24 (“NLMK Stay Opp.”). Defendant United States (the “Government”) opposes U.S. Steel’s Motion to Intervene to the extent that U.S. Steel contends that it has a right to intervene, but the Government takes no position on U.S. Steel’s request to be permitted to intervene under CIT Rule 24(b). Def.’s Omnibus Resp. to [Mot. to Intervene and Mot. to Stay], 2–3, Nov. 17, 2021, ECF No. 25 (“Def. Br.”). The Government further opposes U.S. Steel’s Motion to Stay. *Id.* at 2. For the reasons that follow, the Motion to Intervene and the Motion to Stay are denied.

BACKGROUND

NLMK is a producer of finished steel products including coil and sheet used in a variety of industrial applications. Compl. ¶ 2. NLMK alleges that it requires a steady and substantial supply of both 200mm (8 inch) and 250 mm (10 inch) semi-finished steel slab (“steel slab”) to manufacture its products. *Id.* ¶¶ 2, 5–6. NLMK contends that it purchases as much steel slab as it can from domestic producers, but it has never been able to procure more than 20% of its monthly requirement of 8-inch slab from the U.S. market and 10-inch slab is not available in the U.S. market. *Id.* ¶¶ 3, 5–6. NLMK imports the remaining steel slab that it requires. *Id.* ¶¶ 3, 6.

On March 8, 2018, President Donald J. Trump issued Proclamation 9705, imposing additional tariffs on steel imports and instructing the Secretary of Commerce to grant requests for exclusions for, inter alia, any steel product that is not “produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” (a “Section 232 Exclusion”). *Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11625, 11627 (March 15, 2018) (Adjusting Imports of Steel Into the United States) (“Proclamation 9705”). Commerce subsequently published rules for requesting Section 232 Exclusions and for the domestic industry to object to such requests. See *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 12106 (March 19, 2018) (Filing of Objections to

Submitted Exclusion Requests for Steel and Aluminum); *Supplement No. 1 to Part 705—Requirements for Submissions Requesting Exclusions From the Remedies Instituted in [Proclamation 9705]*, 83 Fed. Reg. 46056 (Sept. 11, 2018); *Supplement No. 1 to Part 705—Requirements for Submissions Requesting Exclusions From the Remedies Instituted in [Proclamation 9705]*, 84 Fed. Reg. 26757 (June 10, 2019); *Supplement No. 1 to Part 705—Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Articles Into the United States*, 85 Fed. Reg. 64382 (Oct. 13, 2020); *Supplement No. 1 to Part 705—Requirements for Submissions Requesting Exclusions From the Adjustment of Imports of Aluminum and Steel Imposed Pursuant to [Section 232]*, 85 Fed. Reg. 81073 (Dec. 14, 2020). The interim final rule adopted by Commerce sets forth the procedures for Section 232 Exclusion requests, and permits domestic producers to object to a Section 232 Exclusion request if the domestic producer can “immediately”² supply a “sufficient and reasonably available and amount” of the imported product. 15 C.F.R. § Pt. 705, Supp. 1(c)–(d).

NLMK submitted Section 232 Exclusion requests in 2018, 2020, and 2021 alleging that it was unable to source the steel slab it needed from the U.S. market. Compl. ¶¶ 7, 10–12. This case involves only the 54 Section 232 Exclusion requests that NLMK submitted to Commerce in July 2020, March 2021, and April 2021 (the “Exclusion Requests”).³ *Id.* ¶¶ 10–12. U.S. Steel objected to, and Commerce subsequently denied, all of the Exclusion Requests.⁴ *Id.* ¶¶ 11–12. NLMK brought this action to challenge Commerce’s denials of the Exclusion Requests, asserting that the Section 232 Exclusion request review process Commerce undertook to deny NLMK’s Section 232 Exclusion Requests was arbitrary, capricious and contrary to law. *Id.* ¶¶ 27, 32. In support of its conclusion, NLMK alleges that Commerce did not verify U.S. Steel’s objections and ignored NLMK’s evidence that it could not obtain enough steel slab from domestic sources. *Id.* ¶ 14. NLMK further alleges that Commerce based its denials in part

² An objecting domestic producer can supply a product immediately if it “is currently being produced or could be produced ‘within eight weeks’ in the amount needed in the business activities of the user of steel in the United States described in the exclusion request.” 15 C.F.R. § Pt. 705, Supp. 1(c)(6)(i). The objecting domestic producer is required to “identify how it will be able to produce the article [for which the Section 232 Exclusion request applies] within eight weeks” if it is not currently producing the article. *Id.* § Pt. 705, Supp. 1(d)(4).

³ Fifty-two of the Exclusion Requests were for 10-inch slab and two were for 8-inch slab. Compl. ¶¶ 11–12.

⁴ Other domestic steel producers objected to the Exclusion Requests as well, but those producers are not parties to this action and do not seek to intervene. Thus, for the purposes of these motions, the court does not refer to the other domestic producers.

on ex parte communications with U.S. Steel that flouted the procedures for objecting to Section 232 Exclusion requests, and Commerce did not provide adequate reasons for the denials. *Id.* ¶¶ 14, 18.

U.S. Steel now seeks to intervene as a defendant in order to defend its purported interest in upholding Commerce’s denials of the Exclusion Requests and to stay this action pending U.S. Steel’s appeal of *NAI*. See *Mot. to Intervene* and *Mot. to Stay*. For the reasons set forth below, U.S. Steel’s motions are denied.

STANDARD OF REVIEW

CIT Rule 24(a)(2) provides, in relevant part,

On a timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

CIT Rule 24(a)(2). The court will grant a motion to intervene under CIT Rule 24(a)(2) when the movant establishes the following four elements: (1) the motion is timely; (2) the movant asserts a legally protectable interest in the property at issue; (3) the movant’s interest “must be of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment”; and (4) the movant’s interest will not be adequately represented by the government. *Wolfsen Land & Cattle Co. v. Pac. Coast Fed’n of Fisherman’s Associations*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (emphasis in original) (internal quotation marks omitted). The court will permit a party to intervene under CIT Rule 24(b)(1)(A) if the proposed intervenor has a “conditional right to intervene [under] a federal statute.” U.S. Steel contends that 28 U.S.C. § 2631(j)(1) provides such a conditional right. *Mot. to Intervene* at 9–10. That statute provides that any person that will be adversely affected or aggrieved by a decision in an action before the CIT may intervene with leave of the court. 28 U.S.C. § 2631(j)(1). Once a proposed intervenor demonstrates that it will be adversely affected or aggrieved, the court must “consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.* § 2631(j)(2).

Granting a motion to stay, on the other hand, is within the discretion of the court. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). The court must weigh the competing

interests when deciding a motion to stay. *See Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936). If there is “even a fair possibility” that the stay will damage a nonmovant, the movant “must make out a clear case of hardship or inequity in being required to go forward.” *Id.* at 255. “Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Id.*

DISCUSSION

U.S. Steel contends that it has a right to intervene because its interests will be directly affected by the court’s decision in this action. Mot. to Intervene at 3–6. Specifically, U.S. Steel argues that a ruling in favor of NLMK would “adversely impact the strides U.S. Steel has made since the implementation of the Section 232 steel action to increase its capacity utilization and contribute to the strengthening of U.S. national security.” *Id.* at 5. U.S. Steel further asserts that it has a “heightened interest” as a result of an action NLMK commenced against U.S. Steel in U.S. District Court for the Western District of Pennsylvania. *Id.*; *see also NLMK Pennsylvania, LLC v. United States Steel Corporation*, W. Dist. Penn. Case No. 2:21-cv-00273-WSS (the “WDPAAction”).⁵ According to U.S. Steel, the WDPAAction gives U.S. Steel an interest in “ensuring that the record in this action is both complete and accurate, and ensuring that the ultimate outcome in this case does not have any negative impact on the [WDPAAction].” Mot. to Intervene at 5–6. U.S. Steel also asserts a participatory interest in this action based on its objections to the Exclusion Requests as well as beneficiary interest as an alleged intended beneficiary of Section 232. *Id.* at 8. Alternatively, U.S. Steel contends that its Motion to Intervene should be granted pursuant to the court’s discretion to permit intervention under CIT Rule 24(b) because U.S. Steel will be adversely affected or aggrieved by a ruling in favor of NLMK and no party will be prejudiced by U.S. Steel’s intervention. *Id.* at 8–11. Finally, U.S. Steel asks the court to stay these proceedings pending its appeal of *NAI* to conserve judicial resources and because NLMK will not be prejudiced by a stay. Mot. to Stay at 4–5.

NLMK opposes the Motion to Intervene on the grounds that U.S. Steel is collaterally estopped from re-litigating the issues already decided in *NAI*. NLMK Intrvntn. Opp. at 2–7. NLMK further opposes the Motion to Intervene on the grounds that U.S. Steel does not meet

⁵ According to U.S. Steel, NLMK alleges in the WDPA Action that U.S. Steel “defrauded Commerce, causing the agency to wrongfully deny all of NLMK’s exclusion requests.” Mot. to Intervene at 5; *see also NLMK Intrvntn. Opp.* at 14 (the WDPA Action “alleges that U.S. Steel engaged in unfair competition by making various misrepresentations to [Commerce]” (internal quotation marks omitted)).

the requirements for intervention by right because the Government can adequately represent U.S. Steel's interests in this action, U.S. Steel has no direct interest in the outcome of this action, and that the WDPAAction does not provide any interest because the record in this case was created at the agency level and is now closed. *Id.* 7–15. Finally, NLMK contends that U.S. Steel should not be permitted to intervene because it will not be aggrieved by any decision in this action, and because U.S. Steel's intervention would prejudice NLMK by delaying the final resolution of the action. *Id.* 15–17. NLMK also opposes the Motion to Stay on the grounds that a stay would prejudice NLMK by potentially delaying the return of \$130 million that NLMK could use in its business operations, that U.S. Steel failed to meet its burden of demonstrating that it would be prejudiced without a stay, and that U.S. Steel's purported justification for a stay—to conserve resources—is insufficient and unsupported. NLMK Stay Opp. at 3–5.

The Government opposes U.S. Steel's Motion to Intervene as of right because “manufacturers, such as U.S. Steel, do not meet the standard for intervention as of right”, U.S. Steel identifies no interests that qualify for intervention, and “any interest that they have is not of such a direct and immediate character that they will gain or lose by direct effect of the judgment.” Def. Br. at 2. The Government further contends that U.S. Steel has not met its burden to demonstrate a stay is necessary. *Id.* Finally, the Government takes no position on U.S. Steel's request to be permitted to intervene under CIT Rule 24(b). *Id.* at 3.

I. Intervention as of Right

U.S. Steel has not met its burden to intervene as of right because it does not have a legally protectable interest that will be directly affected by the outcome of this action. U.S. Steel's asserted interest in this action amounts to a speculative contention that it will suffer economic harm in the form of potential lost sales if the court ultimately rules in favor of NLMK. Moreover, U.S. Steel's purported participatory interest resulting from its objection to the Exclusion Requests is unsupported by the statutory and regulatory scheme governing Section 232 tariffs, which also do not convey any beneficiary interest upon U.S. Steel.

U.S. Steel contends that its interests in developing the domestic steel industry in the name of national security will be harmed if the Government is ordered to refund to NLMK the Section 232 duties collected for the entries at issue in the Exclusion Requests. Mot. to Intervene at 5. Assuming U.S. Steel will indeed lose an advantage as a result of a ruling in NLMK's favor, that harm is both economic and

indirect. *See Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1561–62 (to intervene, interest in action must be direct, and economic interests are insufficient). This action concerns a limited number of imports, the duties for which have already been paid by NLMK; NLMK seeks a refund of the Section 232 duties for those entries. Compl. ¶ 31, Request for Relief. U.S. Steel does not identify any noneconomic harm that it will endure as a result of NLMK receiving refunds. Moreover, it is unclear from U.S. Steel’s papers what effect a ruling in this action would have as the Exclusion Requests relate to past entries.⁶ *See* NLMK Intervntn. Opp. at 16. U.S. Steel does not assert that the projects for which NLMK imported the steel that is the subject of the Exclusion Requests are still pending such that U.S. Steel could stand to gain or lose any sales based on this court’s ruling, *see* Mot. to Intervene; Proposed Answer, and NLMK does not challenge the legality of the Section 232 tariffs generally. *See* Compl. Therefore, U.S. Steel failed to show that it has any direct interest in the outcome of this case.

U.S. Steel further contends that it has a legally protectable interest in the outcome of this case based on its participation as an objector to NLMK’s Exclusion Requests before Commerce. Mot. to Intervene at 4. However, U.S. Steel’s limited right to object to the Exclusion Requests at the agency level does not extend to participating in this action.⁷ U.S. Steel does not have a statutory right to participate in the Section 232 Exclusion request process. *See* 19 U.S.C. § 1862. At most, Congress provided that Commerce should seek public comment “if it is appropriate.” *Id.* § 1862(b)(2)(A)(iii). U.S. Steel’s right to object to NLMK’s Exclusion Requests is a creation of Commerce itself, and by its own limited terms plainly does not create any right or “legally protectable interest” to participate in any action before the CIT. *See NAI*, 519 F. Supp. 3d at 1324–25.

Finally, U.S. Steel contends that it has a beneficiary interest because it is an “expressly identified beneficiary of Section 232 tariffs on steel articles.” Mot. to Intervene at 8. U.S. Steel cites no authority for this position. *See id.* Moreover, the goal of Section 232 is to protect the national security of the United States; any benefit to the domestic industry is secondary, and any benefit to specific domestic producers

⁶ At best, U.S. Steel speculates that if NLMK were to prevail in this case, and if NLMK were to obtain a future successful exclusion request on the same product (albeit on a different administrative record), and if U.S. Steel in the future were able to develop the ability and desire to compete for that business, U.S. Steel would be economically harmed.

⁷ Contrast the limited scope of 15 C.F.R. § Pt. 705, Supp. 1(d)–(g) with the broad statutory and regulatory rights interested parties have in antidumping and countervailing duty investigations. *See, e.g.*, 19 U.S.C. § 1671a; 28 U.S.C. § 2631(j)(1)(B); 19 C.F.R. §§ 351.102(b)(29), 351.201(a), 351.301.

is incidental. *See* 19 U.S.C. § 1862. As discussed, Section 232 provides no statutory authority for U.S. Steel to intervene as a matter of right whether U.S. Steel frames its purported interest as participatory or beneficiary. *Id.*

U.S. Steel contends that it is “uniquely qualified to apprise the Court of the potential harm to the domestic industry if this action is allowed to proceed and the product exclusions are granted.” Mot. to Intervene at 7. However, “the potential harm to the domestic industry” is not an issue before the court. As discussed, NLMK challenges Commerce’s decisions to deny the Exclusion Requests as arbitrary and capricious because NLMK alleges that the uncontroverted evidence demonstrated that the domestic industry could not supply the steel slab NLMK needed. Compl. ¶¶ 14, 18, 27. Moreover, exclusion requests are granted or denied based only on whether “an article is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality, or for specific national security considerations.” 15 C.F.R. § Pt. 705, Supp. 1(c)(5)–(6)(ii). “Potential harm to the domestic industry” is not a basis for an exclusion request to be denied. *Id.* § Pt. 705, Supp. 1(c)(6)(i)–(iii), (d)(4).

U.S. Steel asserts that its interest in the WDPa Action gives it an interest in this action. Mot. to Intervene at 7. In support of this theory, U.S. Steel contends that it has “an ongoing and direct interest in representing its own interests in this case, ensuring that the record in this action is both complete and accurate, and ensuring that the ultimate outcome in this case does not have any negative impact on the [WDPa Action].” *Id.* at 5–6. U.S. Steel further claims that “it is imperative that U.S. Steel be able to provide information and evidence on its own behalf in this proceeding.” *Id.* at 6. This line of argument relies on a fundamental misapprehension of the present action. NLMK has asked the court to review Commerce’s denials of the Exclusion Requests. Compl. ¶ 1. The court’s review of Commerce’s decisions is based solely on the record developed at the agency level; the court will not entertain submissions of new evidence or find facts. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706. The U.S. District Court for the Western District of Pennsylvania (“WDPa”), on the other hand, will accept submissions of evidence and find its own facts if it finds NLMK’s complaint is legally sufficient. U.S. Steel does not explain what if any precedential value this court’s determination of whether Commerce acted contrary to law would have in the WDPa action, and the WDPa will certainly make its own factual findings independent of this Court. The facts relevant to this action are set forth in the administrative record. *See* 5 U.S.C. § 706. Therefore, U.S. Steel’s purported interest based on the WDPa Action is insufficient to pro-

vide U.S. Steel with a right to intervene. Moreover, the Government is perfectly capable of defending the administrative record developed by Commerce.⁸

II. Permissive Intervention

U.S. Steel also fails to persuade the court that it should be permitted to intervene. U.S. Steel will not be aggrieved or adversely affected by any decision in this action because the only relief sought in this action is a refund of duties already paid on a limited number of entries. U.S. Steel's claim that a decision in favor of NLMK will have an effect on future entries subject to Section 232 tariffs is mistaken.⁹ Moreover, U.S. Steel's assertions that a ruling in favor of NLMK would have vast repercussions on the domestic steel market are speculative and irrelevant.

CIT Rule 24(b)(1)(A)¹⁰ provides that:

On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute.

No party disputes that U.S. Steel's motion is timely, so the court will only analyze the other requirements of CIT Rule 24(b)(1).

U.S. Steel asserts that it meets the requirements of CIT Rule 24(b)(1)(A) because 28 U.S.C. § 2631(j)(1) gives U.S. Steel a conditional right to intervene. Mot. to Intervene at 9–10. Section 2631(j)(1) provides, “[a]ny person who would be adversely affected or aggrieved by a [CIT] decision” may seek the Court's permission to intervene. 28 U.S.C. § 2631(j)(1). U.S. Steel reasons that it will be aggrieved or adversely affected by the outcome of this case because it objected to the Exclusion Requests¹¹ and because a ruling in favor of NLMK “would result in an increase in tariff-free imports of directly competitive products and directly competitive derivatives that would harm

⁸ U.S. Steel contends that the Government will not adequately represent U.S. Steel's interests because the Government has settled or mediated similar Section 232 Exclusion cases. Mot. to Intervene at 7. Since U.S. Steel has not identified a legally protectable interest that will be directly affected by the outcome of this action that is separate from the Government's interest, U.S. Steel cannot complain that the Government's hypothetical attempt to mediate its own interests harms U.S. Steel.

⁹ If NLMK, or any other importer, seeks Section 232 Exclusions on future entries, U.S. Steel will have the opportunity to voice its objections pursuant to the interim final rules promulgated by Commerce. Commerce must decide whether any future entries should or should not be excluded on case-by-case basis by determining if the domestic industry is capable of supplying the goods at issue. 15 C.F.R. § Pt. 705, Supp. 1(c)–(g).

¹⁰ U.S. Steel only moves for permissive intervention under CIT Rule 24(b)(1)(A). Mot. to Intervene at 8–11.

¹¹ As already discussed, U.S. Steel's objections to the Exclusion Requests do not confer any right to participate in this court proceeding, and furthermore do not confer any protectable interest in the outcome of this action.

U.S. Steel by suppressing prices and eliminating sales opportunities.” Mot. to Intervene at 10. U.S. Steel misstates the potential consequences of this case. The imports at issue have already entered and if NLMK succeeds in this case it will receive a refund. Compl. ¶ 31. U.S. Steel does not contend that it produced the steel slab for which NLMK sought exclusions. See Mot. to Intervene; Proposed Answer. Indeed, NLMK paid the increased Section 232 tariffs to import the slab it needed. Compl. ¶¶ 10–12, 31, Request for Relief. Any future disputes relating to Section 232 Exclusions will be decided by Commerce on a case-by-case basis. See 15 C.F.R. § Pt. 705, Supp. 1.

Moreover, U.S. Steel’s assertion that a ruling refunding duties to NLMK would result in future tariff-free imports, suppressed prices, or lost sales opportunities is unsupported. In support of its argument regarding the purported broad economic impact of a ruling in favor of NLMK, U.S. Steel offers nothing more than a few conclusory sentences in its Motion to Intervene. See Mot. to Intervene at 10. Likewise, in its Proposed Answer, U.S. Steel fails to allege any facts that would lead to the conclusion that this case would have an impact on anything other than the limited entries to which the Exclusion Requests relate. See Proposed Answer. U.S. Steel falls far short of its burden to demonstrate the type of injury it attempts to rely on. See *Gen. Electric Co. v. United Technologies Corp.*, 928 F.3d 1349, 1353–54 (Fed. Cir. 2019) (no standing to appeal based on purported competitive injuries without evidence of lost business or lost opportunities). Although U.S. Steel need not demonstrate standing, conclusory statements are insufficient to show that it will be aggrieved or adversely affected.¹²

¹² NLMK asserts that the standing analysis set forth in *NAI* should apply here. NLMK Intervtn. Opp. at 7, 16. Standing is not an issue in this case. Generally, standing is a requirement for plaintiffs, not defendants, and U.S. Steel seeks to intervene as a defendant. See *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (defendant-intervenor “did not need to establish standing” to participate but did need standing to appeal). U.S. Steel makes no claim and seeks no affirmative relief, and therefore does not invoke this Court’s jurisdiction. See Proposed Answer. The cases relied on in *NAI* and *PrimeSource Bldg. Prods., Inc. v. United States*, 494 F. Supp. 3d 1307, 1318–20 (Ct. Int’l Trade 2021) (Baker, J., concurring), mostly discuss intervenor standing in the context of either proposed plaintiff-intervenors or defendant-intervenors seeking to invoke appellate jurisdiction. See *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645 (2017) (plaintiff-intervenor); *Canadian Wheat Bd. v. United States*, 33 C.I.T. 1204 (2009) (same); *Samsung Electronics Co. v. Rambus, Inc.*, 523 F.3d 1374 (Fed. Cir. 2008) (plaintiff challenged its own standing to appeal order denying attorneys’ fees; no issue of intervenor standing); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (defendant-intervenor’s standing to appeal); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (same); *Diamond v. Charles*, 476 U.S. 54 (1986) (same). Only one case cited in either *NAI* or *PrimeSource* discusses the need for a proposed defendant-intervenor to demonstrate standing to defend in district court, and that case expressly did not decide the issue. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 233 (2003), overruled in part on other grounds, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). *McConnell*’s cursory discussion of the defendant’s standing is dicta. Moreover, defendants are generally

Even excusing the conclusory nature of U.S. Steel’s argument, the court does not agree that the type of economic impacts of which U.S. Steel warns logically stem from a ruling in favor of NLMK in this action. As discussed, this case involves duties that were already paid for steel slab that was already imported and presumably used. NLMK *Intrvntn. Opp.* at 16. U.S. Steel does not claim otherwise. NLMK does not request that the court strike down all Section 232 tariffs on steel slab, only that the specific entries at issue should be excluded. Thus, this case will not necessarily affect future requests for exclusions from the Section 232 tariffs.

Finally, NLMK argues that U.S. Steel is collaterally estopped from intervening in this case because NAI has already denied U.S. Steel’s attempts to intervene in other Section 232 exclusion cases brought by other steel slab importers, in which U.S. Steel asserted the same intervention rights based on the same arguments. NLMK *Intrvntn. Opp.* at 2–7. Because the court concludes that U.S. Steel has not met its burden to demonstrate that it is entitled to intervene, the court need not address NLMK’s defense that U.S. Steel is collaterally estopped from litigating these issues.¹³ See *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1367 n.2 (Fed. Cir. 2001) (“collateral estoppel is an affirmative defense” (internal quotation marks omitted)).

III. Motion to Stay

Finally, the court denies U.S. Steel’s motion to stay. U.S. Steel contends that this action should be stayed pending U.S. Steel’s appeal of *NAI*. *Mot. to Stay* at 1. U.S. Steel devotes the majority of its argument to the merits of its pending appeal. *Id.* at 2–4. Additionally, it contends that NLMK will not be prejudiced by a stay because it has already paid the duties at issue, and that a stay is in the interest of judicial economy. *Id.* at 4–5. U.S. Steel has not demonstrated that a stay is warranted.

U.S. Steel’s first justification for a stay—that NLMK will allegedly not be prejudiced—is both insufficient and incorrect. The lack of

not required to have standing at the district court level. *But see City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980 (7th Cir. 2011) (holding that an intervenor must satisfy standing requirements if it seeks relief different than the parties already in the case; the proposed intervenors, while seeking to intervene as defendants, also sought to interpose what amounted to a crossclaim for a declaratory judgment interpreting their contracts with the defendant, which required standing to assert). Defendants do not usually invoke a trial court’s jurisdiction and do not claim to have been injured unless they seek affirmative relief.

¹³ In any event, the court is skeptical of the applicability of the doctrine of collateral estoppel to this case. Although the imported products appear to be the same as those at issue in *NAI*, this proceeding is based on a different administrative record. Moreover, U.S. Steel asserts additional alleged interests that accrued after the Court’s decision in *NAI*, which could not be subject to collateral estoppel.

prejudice, by itself, is just one factor that may be considered on a motion to stay. The court must balance the competing interests weighing for and against a stay. *Landis*, 299 U.S. at 254–55. Here, the parties have an interest to quickly resolve the dispute before the court. NLMK commenced this action seeking a refund of some \$130 million in duties that it alleges should have been excluded from the Section 232 tariffs. Compl. ¶¶ 1, 31. In this case, assuming NLMK is ultimately successful in this action, the delay in being refunded that amount of money constitutes prejudice to NLMK inasmuch as it will not have access to \$130 million to which it is legally entitled. U.S. Steel, on the other hand, has no direct legally protectable interest in this action or in staying these proceedings. Moreover, having found that NLMK may be prejudiced by a stay, U.S. Steel was required to demonstrate “a clear case of hardship or inequity.” *Id.* at 255. U.S. Steel failed to make such a showing.

U.S. Steel’s second justification for a stay is likewise inadequate. U.S. Steel contends that a stay would “prevent the need for a lengthy round of briefing on [the Motion to Intervene] and thus conserve the resources of the Court and the parties.” Mot. to Stay at 4. But the parties already fully briefed the Motion to Intervene, so granting a stay would not have any conservational effect with respect to the briefing of that motion.¹⁴ Although a stay would temporarily conserve resources by pausing any litigation of this action, the stay would not have any effect on judicial or party resources in the long-run, as U.S. Steel only wants the action stayed until the Court of Appeals has decided U.S. Steel’s appeal of *NAI*. Once that decision has been made, the parties would be in the same position they are now, albeit with somewhat more clarity on U.S. Steel’s participation. The *NAI* appeal will not resolve any part of NLMK’s Complaint. Therefore, the proposed stay would not conserve any judicial or party resources.

Finally, having found that U.S. Steel has not met its burden to show that it is entitled or should be permitted to intervene, it is unclear the basis on which U.S. Steel, as a non-party, is permitted to seek any affirmative relief from the Court. If the Court of Appeals reverses *NAI*, U.S. Steel may renew its motion to intervene and explain to the court how any such Court of Appeals’ decision warrants a different decision on U.S. Steel’s request to intervene in this case.

¹⁴ U.S. Steel does not specify how a stay would conserve resources other than the erroneous contention that the parties would not have to brief the Motion to Intervene.

CONCLUSION


For the foregoing reasons, U.S. Steel's Motion to Intervene and Motion to Stay are denied, and it is

ORDERED that the Motion to Intervene and the Motion to Stay are **DENIED**.

Dated: December 3, 2021

New York, New York

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



Slip Op. 21–163

CHINA CUSTOM MANUFACTURING, INC. and GREENTEC ENGINEERING LLC,
Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS
FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-00121

[Sustaining Commerce's final scope determination.]

Dated: December 6, 2021

George R. Tuttle, III, Law Offices of George R. Tuttle, A.P.C., of San Rafael, California, for Plaintiffs. With him on the brief was *George R. Tuttle, Sr.*

Patricia McCarthy, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, *Jamie Shookman*, Trial Attorney, Commercial Litigation Branch, and *Savannah Rose Maxwell*, Of Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert E. DeFrancesco, Counsel for Aluminum Extrusions Fair Trade Committee, Wiley Rein, LLP, of Washington D.C., for Defendant-Intervenor. With him on the brief were *Alan H. Price* and *Elizabeth S. Lee*.

OPINION AND ORDER

Vaden, Judge:

This action involves a challenge to a U.S. Department of Commerce (Commerce or the Department) scope determination for the anti-dumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't of Com. May 26, 2011) (AD Order); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't of Com. May 26, 2011) (CVD Order) (collectively, the Orders). Plaintiffs China Custom Manufacturing, Inc. (CCM) and Greentec Engineering, LLC (together, Plaintiffs),

challenge a scope ruling in which Commerce determined that Plaintiffs' ROCK-IT 3.0 solar roof mountings (solar mounts) fall within the scope of the Orders. First Am. Compl. (Compl.) ¶ 1, ECF No. 10.

Before the Court is Plaintiffs' Motion for Judgment on the Agency Record, in which Plaintiffs argue that the Final Scope Ruling is contrary to law and that Commerce should have excluded the solar mounts from the scope of the Orders. *See* Pls.' Mot. for J. on the Agency R. (Pls.' Mot.), ECF No. 31–1. Commerce and Defendant-Intervenor Aluminum Extrusions Fair Trade Committee, a trade association of U.S. producers of aluminum extrusions and a petitioner in the antidumping and countervailing duty investigations, oppose Plaintiffs' Motion. *See* Def.'s Resp. to Pls.' Mot. for J. on the Agency R. (Def.'s Resp.), ECF No. 35; Def.-Intervenor's Resp. to Pls.' Rule 56.2 Mot. for J. on the Agency R. (Def.-Intervenor Resp.), ECF No. 36. For the reasons set forth below, the Court affirms Commerce's determination.

I. BACKGROUND

The merchandise at issue in this case is Rock-It 3.0 solar roof mounts sold by CCM. The Rock-It 3.0 mounts are solar panel mounts that are used with other parts in a downstream structure, the EcoFasten Rock-It System 3.0, to mount solar panels on a roof. J.A. at 1202. Plaintiffs' Scope Request specified that the solar mounts contain "aluminum exclusion [*sic*] parts . . . fabricated from an aluminum alloy corresponding to Alloy Series 6 published by the Aluminum Association and are machined to precise specifications." J.A. at 1015. The EcoFasten Rock-It System 3.0 consists of the Rock-It 3.0 solar mounts, the Rock-It slide, the level nut cap, the Rock-it 3.0 coupling and load bearing foot, and the Rock-It 3.0 array skirt. J.A. at 1202.

According to the Scope Request, the solar mounts consist of aluminum extrusion components that are fastened together with non-aluminum components. J.A. at 1010. The solar mounts are "fully and permanently assembled and complete at the time of entry [and] ready for installation as EcoFasten Rock-It 3.0 solar panel mounting system, a downstream structure." *Id.*

A. Relevant Scope Proceedings

Commerce issued antidumping and countervailing duty orders on aluminum extrusions from China in May 2011. *AD Order*, 76 Fed. Reg. 30,650; *CVD Order*, 76 Fed. Reg. 30,653. The scope of the Orders included:

The merchandise covered by the Orders is aluminum extrusions which are shapes and forms, produced by an extrusion process,

made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, the subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 1 contains not less than 99 percent aluminum by weight. The subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 3 contains manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. The subject merchandise is made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contains magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The subject aluminum extrusions are properly identified by a four-digit alloy series without either a decimal point or leading letter. Illustrative examples from among the approximately 160 registered alloys that may characterize the subject merchandise are as follows: 1350, 3003, and 6060.

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Aluminum extrusions are produced and imported with a variety of finishes (both coatings and surface treatments), and types of fabrication. The types of coatings and treatments applied to subject aluminum extrusions include, but are not limited to, extrusions that are mill finished (i.e., without any coating or further finishing), brushed, buffed, polished, anodized (including brightdip anodized), liquid painted, or powder coated. Aluminum extrusions may also be fabricated, i.e., prepared for assembly. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun. The subject merchandise includes alumi-

num extrusions that are finished (coated, painted, etc.), fabricated, or any combination thereof.

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

76 Fed. Reg. at 30,650–51. The Orders also included exclusions to the scope. The exclusion language explains:

The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the Orders merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the Orders merely by including fasteners such as screws, bolts, etc. in the packaging of an aluminum extrusion product.

76 Fed. Reg. at 30,651. Since the Orders were first issued, Commerce's interpretation of the scope has evolved extensively. In addition to the numerous scope rulings issued, the application of the finished merchandise exclusion in the Orders has been heavily litigated.

In one of the earliest scope rulings involving the Orders, Commerce examined whether a solar panel mounting system was included within the scope. In the Clenergy Solar Panel Mounting Systems Scope Ruling, Commerce examined whether an unassembled solar panel mounting system consisting of both aluminum extrusions and non-aluminum components would be excluded from the Orders under the finished merchandise exclusion. *See* Final Scope Ruling on Clenergy (Xiamen) Technology’s Solar Panel Mounting Systems, A-570–967, at 2 (Oct. 31, 2012), <https://enforcement.trade.gov/download/prc-ae/scope/21-Clenergy-Solar-Panel-Mounting-Systems-20121031.pdf> (last visited Dec. 6, 2021). The solar panel mounting system included all parts necessary to mount a solar panel on a roof. *Id.* Commerce concluded that, because the entry at issue contained all the parts necessary to assemble a finished product for mounting solar panels, the solar panel mounting system was excluded from the Orders under the finished merchandise exclusion. *Id.*

That same year, Commerce revised the way it determined whether a given product was finished merchandise or a finished goods kit in the Side Mount Valve Controls (SMVC) Scope Ruling. In this scope inquiry, Commerce examined whether certain side-mount valve controls used in pumping apparatuses that attach to fire engines could be excluded from the Orders under the finished merchandise exclusion. Final Scope Ruling on Side Mount Valve Controls, A-570–967, at 1 (Oct. 26, 2012), <https://enforcement.trade.gov/download/prc-ae/scope/27-Innovative%20Controls-Side-Mount-Valve-Controls-20121026.pdf> (last visited Dec. 6, 2021). Petitioners argued that, although the entry did not include all the parts of the downstream product — the fire engine — the side mount valve controls were fully assembled and complete products and therefore should qualify as excluded finished merchandise. *Id.* In its scope ruling, Commerce reexamined its prior interpretation of the finished merchandise and finished goods kit exclusions, which required all components of the downstream product be included in order to qualify for the exclusions. *Id.* Commerce determined the prior interpretation of the exclusions could inadvertently expand the scope of the order. It instead identified a new category of entries identified as subassemblies. *Id.* Commerce’s updated scope ruling defined subassemblies as “partially assembled merchandise” that could be excluded from the Orders provided they enter the United States as finished merchandise requiring no further finishing or fabrication. *Id.*

Commerce’s application of the subassembly test as applied to the finished merchandise exclusion was affirmed one year later in the

Valeo Final Remand Redetermination. *See* Final Results of Redetermination Pursuant to Court Remand Aluminum Extrusions from the People's Republic of China, *Valeo, Inc., et al v. United States*, No. 12–00381, at 8 (May 14, 2013). The products at issue were two distinct types of automotive heating and cooling components. In this remand redetermination, Commerce applied the subassemblies test the Department articulated in the SMVC Scope Ruling. *See id.* Commerce concluded that “at the time of importation, the products at issue contain all of the necessary components required for integration into a larger system[,]” the automotive unit, and thus qualified as subassemblies excluded from the Orders under the finished merchandise exclusion. *Id.*

The subassembly test as applied to the finished merchandise exclusion remained consistent through Commerce's scope rulings until the *Shenyang* case in 2015. *See Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015). In *Shenyang*, Commerce examined whether curtain wall units, which fastened together to form a completed curtain wall, should be excluded from the Orders under the finished merchandise exclusion. *Id.* at 1353–54. Plaintiff *Shenyang* argued the individual curtain wall units were finished merchandise because each unit was fully assembled and complete on entry to later be installed in a downstream product — a curtain wall. *Id.* at 1358. After a series of appeals and remands, the Court of Appeals for the Federal Circuit held that curtain wall units were subassemblies because they required installation into a downstream structure. *Id.* at 1358–59. The Court further held that subassemblies could *never* meet the conditions to be excluded under the finished merchandise exclusion because subassemblies are parts for a finished product and not the finished product itself. *Id.* at 1359. Consequently, Commerce adopted an updated interpretation of the finished merchandise exclusion in line with the Federal Circuit's holding. *See id.*

In 2019, Commerce's updated interpretation of the finished merchandise exclusion was affirmed by this Court in the *Meridian Door Handles* Second Remand Redetermination. *See Meridian Products LLC v. United States*, No. 13–00246, 2020 WL 1672840 at *2 (CIT 2020) (*Meridian*). The products at issue in *Meridian* were door handles for ovens that *Meridian* described as fully and permanently assembled and complete at the time of entry. *See id.* In the final redetermination, Commerce found that the door handles were subassemblies, as they were parts for a final finished good — the oven —

not the finished good itself. *Id.* Having determined the handles were subassemblies, Commerce determined they did not meet the criteria for the finished merchandise exclusion in the Orders and thus were subject to the duties. *Id.*

B. The Scope Ruling in Question

On May 10, 2019, Plaintiffs submitted a request for Commerce to issue a scope ruling that its Rock-It 3.0 solar mounts are not covered by the scope of the Orders. Commerce rejected this scope request for failing to include certain information necessary for Commerce to make a ruling. Along with the rejection, Commerce also included a Supplemental Questionnaire to Plaintiffs requesting the needed additional information. On October 4, 2019, Plaintiffs resubmitted their request that Commerce determine whether their solar mounts are subject to the Orders. *See* J.A. at 1009. Commerce issued an additional Supplemental Questionnaire to Plaintiffs on December 30, 2019, to clarify information contained in the October 4, 2019 submission. *Id.* at 1195. Plaintiffs responded to Commerce’s Supplemental Questionnaire on February 13, 2020. *Id.* at 1202.

In its Scope Request and Supplemental Questionnaire responses, Plaintiffs described the solar mounts as “finished merchandise containing aluminum and non-aluminum parts.” *Id.* at 1010, 1206. The mounts are further identified as “fully and permanently assembled and complete at the time of entry ready for installation into the EcoFasten Rock-It 3.0 solar panel mounting system.” *Id.* at 1010. Plaintiffs argued the solar mounts qualified as finished merchandise under the plain meaning of the finished merchandise exemption in the Orders because the solar mounts are imported fully and permanently assembled and require no further assembly. *Id.* at 1010–13. As such, Plaintiffs asserted the solar mounts meet the requirements for the finished merchandise exclusion in the scope of the Orders. *Id.* at 1027.

As part of its administrative inquiry, Commerce examined Plaintiffs’ Scope Request, Supplemental Questionnaire responses, and its previous scope rulings. *Id.* at 1225. Commerce found the description of the products, the scope language, and Commerce’s prior determinations to be dispositive as to whether the solar mounts are subject merchandise. *Id.* Commerce determined that, because the solar mounts are intermediary products that require incorporation into a downstream product to function, the solar mounts meet the definition of a subassembly as articulated and affirmed in the Meridian Door

Handles Second Remand. *See id.* at 1212. Thus, Commerce issued its Final Scope Ruling on May 14, 2020, in which it found that the solar mounts are within the scope of the Orders and therefore subject to the duties the Orders imposed. *See id.*

C. The Present Case

Plaintiffs commenced this action on June 11, 2020, seeking to overturn the scope decision. Summons, ECF No. 1. Before any substantive briefing on the issues, Plaintiffs filed a Motion to Remand the case to Commerce to supplement the administrative record. Pls.' Mot. to Remand, ECF No. 25. On December 8, 2020, the Court¹ denied Plaintiffs' Motion to Remand without prejudice to Plaintiffs' renewal of certain arguments in their Motion for Judgment on the Agency Record. Order at 3, ECF No. 30. On December 14, 2020, Plaintiffs filed their Motion for Judgment on the Agency Record. Pls.' Mot., ECF No. 31-1. In their Motion, Plaintiffs raise three arguments: first, that this Court should find that the solar mounts are "finished merchandise" as defined by the Orders' scope and therefore excluded from the Orders; second, that the Court should remand the case to Commerce with instructions that non-aluminum extrusion components that make up subassemblies are excluded from the Orders; and third, that alternatively, the Court should remand the case to Commerce to supplement the administrative record. *Id.* at 1. Defendant and Defendant-Intervenor responded on April 2, 2021 and May 5, 2021, respectively. Def.'s Resp., ECF No. 35; Def-Intervenor Resp., ECF No. 36.

The Court held oral argument on August 17, 2021. Counsel for all parties attended. The Court first addressed the issue of whether the non-aluminum extrusion components of the mounts were excluded from the Orders' scope. Tr. of Oral Arg. 6:9-24, ECF No. 43. In response to the Court's questions, Commerce confirmed "the scope does not include the non-aluminum extrusion components of subassemblies or subject kits." *Id.* at 7:5-6. Having heard Commerce's response, Plaintiffs' counsel confirmed agreement that there was no longer any dispute and that the non-aluminum extrusion components of the mount would not be subject to duties under Commerce's Orders. *Id.* at 9:3-6. The Court then turned to Plaintiffs' argument to remand the case to Commerce to supplement the administrative record. *Id.* at 9:10-25, 10:1-4. Specifically, Plaintiffs argued for remand to supplement the record to ensure the "*Meridian* second re-

¹ This case was originally assigned to The Honorable Mark A. Barnett, who ruled on the Plaintiffs' Motion to Remand to the Department of Commerce. Order, ECF No. 31. On January 8, 2021, the case was reassigned by then-Chief Judge Stanceu from Judge Barnett to Judge Vaden. Order, ECF No. 32.

mand decision is a part of the record.” *Id.* at 10:6–7. At the Court’s request, the Government confirmed the *Meridian* second remand decision is in the record. *Id.* at 10:8–10. Plaintiffs agreed that the issue of the state of the record was also no longer a live dispute. *Id.* at 10:5–7. Therefore, the only remaining contested issue before the Court is whether the solar mounts fall within the scope of the Orders.

II. JURISDICTION AND STANDARD OF REVIEW

The Court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930. 19 U.S.C. § 1516a(a)(2)(B)(vi). Section 516A provides for judicial review of a determination of “whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing order.” *Id.* This type of determination is known as a “scope ruling.” 19 C.F.R. § 351.225.

Scope rulings are “highly fact-intensive and case-specific determination[s].” *Global Commodity Grp., LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013) (quoting *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012)). As such, the Court “grant[s] significant deference to Commerce’s interpretation of a scope order.” *Id.* The Court must uphold a scope ruling unless it finds it to be “unsupported by substantial evidence on the record or otherwise not in accordance with the law.” *Sango Int’l, L.P. v. United States*, 484 F.3d 1371, 1378 (Fed. Cir. 2007) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). “[T]he court may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Goldlink Indus. Co. v. United States*, 431 F. Supp. 2d 1323, 1326 (CIT 2006) (citations omitted) (second alteration in original).

III. DISCUSSION

As outlined above, there no longer remain any contested questions regarding the exclusion of the mounts’ non-aluminum extrusion components or the sufficiency of the administrative record. *See supra* Part I. Plaintiffs’ only remaining argument is that the solar mounts at issue should be excluded from the Orders under the finished merchandise exclusion. Pls.’ Mem. of Law in Supp. of Pls.’ Rule 56.2 Mot. for J. on the Agency R. (Pls.’ Mem.) at 21, ECF No. 31–2; Tr. Of Oral Arg. 11:12–18. Commerce argues that the solar mounts do not qualify as finished merchandise and therefore should not be excluded from the Orders. *See* Def.’s Resp., ECF No. 35. After examining the plain language of the Orders and the descriptions contained in Plaintiffs’

Scope Request and Supplemental Questionnaire responses, Commerce found the solar mounts to be covered by the Orders' plain language. J.A. at 1212.

Plaintiffs' position is that the solar mounts are finished merchandise and therefore covered under the Orders' finished merchandise exclusion. During oral argument in this case, Plaintiffs confirmed that they are "making only a finished merchandise argument," not an argument for exclusion as a finished goods kit. Tr. of Oral Arg. 11:5–14. Although Plaintiffs acknowledge that the solar mounts do not meet Commerce's present interpretation of what constitutes finished merchandise, Plaintiffs argue that Commerce impermissibly modified its interpretation of the finished merchandise exclusion. *See* Pls.' Mem. at 30. Therefore, Plaintiffs argue that Commerce's actions were arbitrary, capricious, and contrary to law in determining that the solar mounts were not excluded from the Orders. *Id.*

Commerce argues that the solar mounts meet the definition of a subassembly as defined in the Orders and when considered alongside Commerce's prior scope proceedings. Def.'s Resp. at 19. Based on information in the administrative record, Commerce determined that, after importation, the solar mounts are combined with additional parts to form the Rock-It System 3.0. *Id.* at 22; J.A. at 1217. Accordingly, Commerce found that, despite the solar mounts' being fully assembled at the time of entry, they are subassemblies because the solar mounts are only intermediary products that require incorporation into a downstream product — the solar panel mounting system. *See* Def.'s Resp. at 22–23.

The question before the Court is whether substantial evidence supports Commerce's determination that the solar mounts do not meet the requirements for the finished merchandise exclusion and the mounts are therefore included within the scope of the Orders. After reviewing the scope language, the Plaintiffs' Scope Request, the Plaintiffs' Supplemental Questionnaire responses, and Commerce's prior scope rulings, the Court agrees that the solar mounts are subassemblies — not excludable as finished merchandise — and affirms Commerce's determination that the solar mounts are included within the scope of the Orders.

A. The Scope Language in the Orders

The relevant scope language reads:

The merchandise covered by the Orders is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Alu-

minum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).

. . . .

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods ‘kit’ defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

76 Fed. Reg. at 30,650–51. Plaintiffs do not contest that the solar mounts fall within the plain language of the Orders because “they are composed of aluminum extrusions from an aluminum alloy corresponding to the Aluminum Association series 6 alloy that are machined and fabricated.” J.A. at 1226. Instead, Plaintiffs argue the solar mounts meet the requirements to be excluded under the finished merchandise exclusion.

Despite acknowledging the solar mounts meet Commerce’s updated definition of a subassembly, which cannot be excluded under the finished merchandise exclusion, Plaintiffs nonetheless argue the solar mounts meet the plain language definition of finished merchandise. See Pls.’ Mem. at 29–30, ECF No. 31–2. The finished merchandise exclusion reads:

The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

76 Fed. Reg. at 30,651. In order to apply the product description from the Scope Request to the relevant finished merchandise exclusion language, Commerce evaluated the scope language while considering the series of scope rulings that followed the Orders. J.A. at 1225. Specifically, Commerce applied its updated interpretation of the finished merchandise exclusion as first outlined in *Shenyang* and later expounded on in *Meridian*. *Id.* at 1226. Under the updated interpretation, affirmed in the *Meridian* Redetermination, subassemblies are

not finished merchandise but rather parts later to be installed in a downstream product; and, as such, subassemblies are subject to the scope of the Orders. *See id.* at 1212.

B. The Development of the Finished Merchandise Exclusion

Plaintiffs' primary argument is that the scope language of the Orders explicitly excludes finished merchandise and that the solar mounts consisting of aluminum extrusions connected by non-aluminum extrusion parts qualify as finished merchandise. Pls.' Mem. at 22–23. Plaintiffs argue that the solar mounts meet the “plain meaning of the finished merchandise exclusion . . . because they are fully and permanently assembled and complete at the time of entry, and ready for installation in the downstream structure: a rooftop mounted solar panel system.” *Id.* at 23. Plaintiffs contend that Commerce's determination was arbitrary, capricious, and contrary to law because Commerce “impermissibly[] modif[ied] its position on what constitutes finished merchandise for purposes of the finished merchandise exclusion provided in the Orders.” *Id.* at 21.

All parties have acknowledged that “the question of what constitutes finished merchandise has changed and evolved over time and has been the subject [of] numerous scope ruling[s] and litigation.” Pls.' Mem. at 9; *see also* Def.'s Mot. at 4. Over the past decade, Commerce, this Court, and the Court of Appeals for the Federal Circuit have all explored the parameters of the finished merchandise exclusion in the Orders. Decisions in previous cases that have progressed from a Commerce scope ruling, through the Court of International Trade, to the Federal Circuit, have provided this Court with valuable insights to guide its examination of the finished merchandise exclusion.

Although it initially recognized subassemblies as finished merchandise for purposes of the exclusion, Commerce reevaluated its interpretation of the finished merchandise exclusion in 2015 following a series of appeals and remands initiated by Shenyang Yuanda Aluminum Industry Engineering Company (Shenyang). In *Shenyang*, the Federal Circuit held that “parts for” and “subassemblies for” a finished product cannot qualify for the finished merchandise exclusion. 776 F.3d at 1358. Shenyang submitted a Scope Request to Commerce seeking to confirm whether curtain wall units and other parts of a curtain wall system are subject to the Orders. *Id.* at 1353. It argued that the curtain wall units were finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and complete at the time of entry and therefore should be excluded from the scope of the Orders. *Id.* at 1358.

In the course of its inquiry, Commerce determined that curtain wall units were “designed to be attached to other units to eventually form a completed curtain wall” and that “an individual curtain wall unit has no consumptive or practical use because multiple units are required to form the wall of a building.” *Id.* Because the individual curtain wall units were found to be a “part or subassembly” of a completed curtain wall, the Federal Circuit held they could not qualify as a finished product. *Id.* at 1359.

Although the Federal Circuit’s 2015 *Shenyang* decision triggered a reinterpretation of the finished merchandise exclusion by Commerce, subsequent appeals in the case provided further direction regarding the definition of subassemblies. See *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States*, 918 F.3d 1355 (Fed. Cir. 2019). After a series of appeals and redeterminations, in 2019, the Federal Circuit affirmed Commerce’s determination that the Orders “exclud[e] ‘subassemblies’ only if they are ‘imported as part of the finished goods ‘kit’” as defined.” *Id.* at 1367; see also 76 Fed. Reg. at 30,651. Because the curtain wall units were subassemblies but not part of a finished goods kit, the curtain wall units could not be excluded from the scope of the Orders. *Shenyang*, 918 F.3d at 1367. Most relevant to the present matter, the Federal Circuit also held that, for an item to qualify for the finished merchandise exclusion, the item must “be ready for installation ‘as is.’” *Id.* *Shenyang*’s administrative record indicated the curtain wall units being imported would not complete a curtain wall because they did not include all items necessary for installation. See *id.* at 1367–68. The curtain wall units thus did not qualify for the finished merchandise exclusion. *Id.*

Following the 2015 *Shenyang* case, Commerce reinterpreted the finished merchandise exclusion to conform with the Federal Circuit’s holdings. See *Shenyang*, 776 F.3d at 1358. In 2020, the courts affirmed Commerce’s updated interpretation of the finished merchandise exclusion following a series of appeals initiated by Meridian Products. See *Meridian Products L.L.C. v. United States*, 125 F.Supp.3d 1306 (CIT 2015); *Meridian*, 180 F.Supp.3d 1283 (CIT 2016); *Meridian*, 851 F.3d 1375 (Fed. Cir. 2017); *Meridian*, 890 F.3d 1272 (Fed. Cir. 2018); *Meridian*, 2020 WL 1672840 (CIT 2020).²

In its initial appeal, Meridian contested a 2013 Final Scope Ruling from Commerce that found certain kitchen appliance door handles to be within the scope of the Orders. See *Meridian*, 125 F.Supp.3d at 1308. Meridian argued the kitchen appliance door handles at issue

² Rather than list the cases in this string cite in accordance with the Order of Authorities, the cases are listed in chronological order to illustrate Meridian’s progression through the appeals process.

should be excluded from the Orders either because the handles were not included within the Orders' general scope or because they qualified under the Orders' finished merchandise exclusion. *See id.* In 2015, this Court held that Commerce did not base its conclusion that the handles were subject merchandise on a reasonable interpretation of the scope language. *Id.* at 1314. The Court further found Commerce's determination "fail[ed] to demonstrate the reasonableness of the Department's conclusion that the . . . handles do not satisfy the requirements of the finished merchandise exclusion when the scope language setting forth that exclusion is interpreted according to plain meaning." *Id.* at 1316. After remand, consistent with this Court's opinion, Commerce found the handles to be outside the scope of the Orders because there is no general scope language that covers such products. *Meridian*, 180 F.Supp.3d at 1289. Commerce did not address whether the handles were excluded under the finished merchandise exclusion. *Id.* Defendant-Intervenor Aluminum Extrusions Fair Trade Committee then appealed Commerce's Remand Redetermination.

On appeal, the Federal Circuit addressed whether the general scope language in the Orders included the appliance door handles. *See Meridian*, 890 F.3d at 1278–82. The Federal Circuit reversed this Court's order, finding that the handles were in fact within the Orders' general scope. *Id.* The Federal Circuit did not address the issue of whether the handles were excluded as finished merchandise and instead "direct[ed] Commerce to address the question of whether the . . . handles are excluded from the scope of the antidumping and countervailing duty order as 'finished merchandise.'" *Id.* at 1281–82.

Commerce issued a Second Remand Redetermination in which it found, after analyzing the scope language and structure as a whole, a delineation in the scope among three categories of products: (1) sub-assemblies, (2) finished goods kits, and (3) finished merchandise. *See* Final Results of Second Redetermination Pursuant to Court Remand at 23, *Meridian Products L.L.C. v. United States*, 2020 WL 1672840 (CIT 2020) (No. 13–00246). Commerce first recognized that subassemblies, defined as aluminum extrusion components that are attached by non-aluminum parts, are included in the Orders. *Id.* Second, applying the updated interpretation of the finished merchandise exclusion post *Shenyang*, Commerce determined that, because the kitchen appliance door handles would be installed in downstream products, the handles were subassemblies. *Id.* Therefore, Commerce concluded, and this Court affirmed, that "products which satisfy the subassemblies language cannot be excluded under the finished

merchandise exclusion.” *Id.* at 22; *see also Meridian*, 2020 WL 1672840, at *2.

C. Commerce’s Scope Ruling Is Supported by Substantial Evidence

In this case, Plaintiffs argue the solar mounts meet the plain language definition of finished merchandise in the finished merchandise exclusion. Pls.’ Mem. at 22. Relying on scope rulings predating the *Shenyang* and *Meridian* redeterminations, Plaintiffs argue the solar mounts meet the definition of finished merchandise because they are fully and completely assembled products at the time of entry. Pls.’ Mem. at 22–28. Plaintiffs have conceded that they do not argue the solar mounts are part of a finished goods kit so that, if the solar mounts do not qualify as finished merchandise, they will come within the Orders’ scope. Tr. of Oral Arg. 11:5–14.

Commerce’s application of the finished merchandise exclusion has evolved since it first issued the Orders in 2011. In response to multiple Federal Circuit holdings, Commerce updated its interpretation of the finished merchandise exclusion to ensure conformity with the law. Finished merchandise, as defined in the Orders’ scope, is merchandise that is fully and permanently assembled and complete at the time of entry. 76 Fed. Reg. at 30,651. The Federal Circuit has also held that there is a distinction between finished merchandise, which is excluded from the Orders, and subassemblies, which are included in the Orders. As articulated in *Shenyang*, 776 F.3d at 1358–59, and later expounded on in *Meridian*, 2020 WL 1672840, at *2, a subassembly is a *part* for a final finished good and intended to become part of a larger whole.

Despite this, Plaintiffs asks this Court to disregard Federal Circuit caselaw that has found subassemblies to be included in the scope of the Orders. Pls.’ Mem. at 28 (arguing Commerce failed to articulate a satisfactory rational explanation to preclude the finished merchandise exclusion from applying to subassemblies irrespective of prior caselaw). Plaintiffs’ argument can be essentially reduced to “Because an earlier scope request would have likely resulted in Plaintiffs receiving a different scope ruling, they should receive that ruling now.” Unfortunately for China Custom Manufacturing, timing matters; and neither this Court nor Commerce may disregard Federal Circuit precedent. Commerce followed the relevant caselaw when making its scope determination and reached the only result it could consistent with the rulings of the Federal Circuit. Substantial evidence therefore supports Commerce’s determination, and the Court will not disturb it.

The Court and Commerce are guided and constrained by the series of cases elucidated above that have shaped the parameters of the finished merchandise exclusion. In response to the Federal Circuit's holdings, Commerce appropriately modified its position on what constitutes finished merchandise for purposes of the exclusion. As Commerce correctly found here, a subassembly cannot qualify as finished merchandise. *See Shenyang*, 776 F.3d at 1358–59; *Meridian*, 2020 WL 1672840, at *2; J.A. at 1005–06. A subassembly is a part for a final finished good intended to become part of a larger whole. *Meridian*, 2020 WL 1672840, at *2. As China Custom Manufacturing noted in its Supplemental Questionnaire responses, the solar mounts require “other components with which the mounts and the solar panels are used to form the solar panel mounting system,” *ie.*, the finished merchandise. J.A. at 1202. The solar mounts themselves are not finished merchandise but rather a part or subassembly of the finished merchandise — the solar panel mounting system — and as such do not qualify as finished merchandise excluded from the scope of the Orders. *Accord Shenyang*, 776 F.3d at 1358–59; *Meridian*, 2020 WL 1672840, at *2.

IV. CONCLUSION AND ORDER

The Court is left with a single contested issue — whether the solar mounts should be excluded from the scope of the Orders under the finished merchandise exclusion. Because Commerce correctly applied the litany of Federal Circuit precedents interpreting the Orders to the solar mounts presented to it for review, substantial evidence supports Commerce's determination. The Court therefore **AFFIRMS** Commerce's scope ruling and **DENIES** Plaintiffs' Motion for Judgment on the Agency Record.

Dated: December 6, 2021

New York, New York

/s/ Stephen Alexander Vaden

JUDGE

Slip Op. 21–164

AIREKO CONSTRUCTION, LLC., Plaintiff, v. UNITED STATES, Defendant.

Before Claire R. Kelly, Judge

Court No. 20–00128

[Granting defendant's motion for partial summary judgment and denying in part and granting in part plaintiff's motion for summary judgment.]

Dated: December 7, 2021

Peter S. Herrick, Peter S. Herrick, P.A. of St. Petersburg, Florida for plaintiff Aireko Construction, LLC.

Hardeep K. Josan, International Trade Field Office, Department of Justice, Civil Division, Commercial Litigation Branch of New York, New York for defendant United States. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Aimee Lee*, Assistant Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of Counsel was *Valerie Sorensen-Clark*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION**Kelly, Judge:**

Plaintiff, Aireko Construction, LLC (“Aireko”), an importer of crystalline silicon photovoltaic (“CSPV”) products moves for summary judgment arguing that Customs and Border Protection (“CPB” or “Customs”) unlawfully liquidated three of its entries when it imposed antidumping and countervailing duties (“ADD” and “CVD,” respectively) upon them pursuant to instructions issued by the Department of Commerce (“Commerce”) because the “chosen entry dates preceded Commerce’s final [ADD and CVD] determination[s].” Aireko Construction LLC’s Mot. Summ. J., June 4, 2021, ECF No. 22; Memo. Law and Authorities in Supp. [Pl.’s] Mot. Summ. J. at 7, June 4, 2021, ECF No. 22 (“Pl.’s Br.”). Plaintiff protested the assessment of ADD and CVD on its entries and subsequently amended that protest, claiming the entries were entered prior to the issuance of the final determination and the corresponding ADD and CVD rates “could only be assessed and liquidated prospectively for entry dates prospectively.” Annexation Statement Material Facts for Which There is No Genuine Issue to be Tried to R. 56 Mot. for Summ. J. ¶¶ 7–8, Ex. B at 2–3, July 28, 2021, ECF No. 27 (“PSOF”). CBP denied Aireko’s protest on January 13, 2020. *Id.* at ¶ 10, Ex. D.

On July 10, 2020, Plaintiff commenced this action by filing a summons and complaint challenging the denial of the protest pursuant to 28 U.S.C. § 1581(a). Compl. for Damages, July 10, 2021, ECF No. 4

(“Compl.”); Summons, July 10, 2020, ECF No. 1 (“Summons”). Plaintiff asks the court to instruct CBP to reliquidate the entries at “antidumping and countervailing duty rates of zero.” Pl.’s Br. at 7; *see also* Compl. Prayer for Relief sub. para. 1. Defendant, the United States, cross moves for partial summary judgment arguing that although Commerce instructed CBP to assess ADDs, CBP assessed the ADDs at an incorrect rate. Def.’s Cross-Mot. Partial Summ. J., July 30, 2021, ECF No. 28; Def.’s Memo. of Law Opp’n Pl.’s Mot. Summ. J. in Part, and in Supp. of Def.’s Cross-Mot. for Partial Summ. J. at 7, July 30, 2021, ECF No. 28 (“Def.’s Br.”). Defendant and Plaintiff agree that the entries were improperly assessed CVDs. Def.’s Br. at 8. Defendant asks the court to instruct CBP to reliquidate the entries at the correct ADD rate of 42.33% and CVD rate of 0.00%, in conformity with Commerce’s instructions.¹ *Id.* For the reasons that follow, Plaintiff’s motion for summary judgment is granted in part and denied in part, and Defendant’s cross-motion for partial summary judgment is granted.

JURISDICTION AND STANDARD OF REVIEW

The court has “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930,² [as amended, 19 U.S.C. § 1515].” 28 U.S.C. § 1581(a) (2018). The court reviews the denial of a protest *de novo*, based upon the record made before the court. 28 U.S.C. § 2640(a)(1) (2018). The court will grant summary judgment when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a).

UNDISPUTED FACTS

The following facts are not in dispute.³ Aireko imports CSPV from People’s Republic of China (“PRC”). PSOF ¶ 1; DSOF ¶ 4. In January 2014, Commerce initiated an ADD investigation of CSPV products

¹ Commerce’s liquidation instructions directed CBP to liquidate entries of subject merchandise “entered or withdrawn from warehouse on or after 10/08/2014 and on or before 02/09/2015 . . . without regard to countervailing duties” *see* Def.’s Br. Ex. B Liquidation Instructions, July 30, 2021, ECF 28–1 (Message No. 613404 ¶ 5) (“Liquidation Instructions”), and “liquidate all entries for all firms except those listed in paragraph 3 and assess antidumping duties on the merchandise entered, or withdrawn from warehouse, for consumption at the cash deposit or bonding rate in effect on the date of entry.” *Id.* (Message No. 6123301 ¶ 2); *see also*; Def.’s Br. Ex. A Cash Deposit Instructions, ECF No. 28–1, (Message No. 4307307 ¶ 3) (“Cash Deposit Instructions”).

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

³ Plaintiff filed a statement of facts as required by USCIT Rule 56.3. *See* Pl.’s Br.; PSOF. However, Plaintiff’s Statement Of Facts was not annexed to its motion as required by the

from the PRC and Taiwan, *see Certain [CSPV] Products From the [PRC] and Taiwan*, 79 Fed. Reg. 4,661 (Dep't Commerce Jan. 29, 2014) (initiation of [ADD] investigations), and a CVD investigation of CSPV products from the PRC. *Certain [CSPV] From the [PRC]*, 79 Fed. Reg. 4,667 (Dep't Commerce Jan. 29, 2014) (initiation of [CVD] investigation); DSOF ¶ 1.

In June 2014 and July 2014, respectively, Commerce published the preliminary determinations of its CVD and ADD investigations. *Certain [CSPV] From the [PRC]*, 79 Fed. Reg. 33,174 (Dep't Commerce June 10, 2014) (prelim. affirmative [CVD] deter.); *Certain [CSPV] Products From the [PRC]*, 79 Fed. Reg. 44,399 (Dep't Commerce July 31, 2014) (affirmative prelim. deter. of sales at less than fair value and postponement of final deter.) (collectively, "*Preliminary Determinations*"); *Certain [CSPV] Products From Taiwan*, 79 Fed. Reg. 44,395 (Dep't Commerce July 31, 2014) (affirmative prelim. deter. of sales at less than fair value and postponement of final deter.); DSOF ¶ 2. Subsequently, Commerce instructed CBP to suspend liquidation of all entries of certain CSPV from the PRC and require a cash deposit for such entries. DSOF ¶ 3; Cash Deposit Instructions; Liquidation Instructions. In December 2014, Aireko imported CSPV from the PRC, exported by Wanxiang Import & Export Co. Ltd. and produced by Zhejiang Wanxiang Solar Co. Ltd.⁴ *See* Compl. ¶ 2; Ans. ¶ 2, Dec. 7,

rule, *see* USCIT R. 56.3(a), and was first filed on June 4, 2021, *see* Annexation of Statement of Material Facts for Which there is No Genuine Issue to be Tried to Rule 56 Mot. for Summ. J., June 4, 2021, ECF No. 23, and subsequently on July 28, 2021. PSOF. In filing its Statement Of Facts Plaintiff did not provide relevant citations as required by the Rule. USCIT R. 56.3(c) ("each statement by the movant . . . pursuant to rule 56(a) and (b) . . . will be followed by citation to evidence which would be admissible"). Defendant nonetheless replied to Plaintiff's Statement Of Facts on July 30, 2021. Def.'s Resp. to Pl.'s Statement of Material Facts, ECF No. 28–2, July 30, 2021 ("PSOF Resp."). Defendant annexed its Rule 56.3 statement of facts to its cross-motion for partial summary judgment. Def.'s Cross-Mot. for Partial Summ. J., July 30, 2021, ECF 28; Def.'s Statement of Undisputed Material Facts in Supp. of Cross-Mot. for partial Summ. J., July 30, 2021, ECF No. 28. Plaintiff failed altogether to respond to Defendant's Statement Of Facts and therefore the court considers the Defendant's Statement Of Facts undisputed for the purpose of this motion. USCIT R. 56(e)(1) ("If a party fails to . . . properly address another party's assertion of fact as required by Rule 56(c), the court may[] consider the fact undisputed for the purposes of the motion"); *see United States v. Harvic Int'l Ltd.*, 427 F. Supp. 3d 1349, 1353 (Ct. Int'l Trade 2020); *New Image Glob., Inc. v. United States*, 399 F. Supp. 3d 1257, 1262 (Ct. Int'l Trade 2019) (citing *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006)); *United States v. Univar USA Inc.*, 355 F. Supp. 3d, 1225, 1253 (Ct. Int'l Trade 2018).

⁴ Aireko filed entry documentation with CBP for the entries at issue in San Juan, Puerto Rico, indicating that they were not subject to ADDs or CVDs, by entering the goods as entry type "01" rather than entry type "03." PSOF Exs. G–I; *see* Pl.'s Memo. Law in Opp'n to Def.'s Cross-Mot. for Partial Summ. J. at 2, Sept. 13, 2021, ECF No. 31 ("Pl.'s Resp."). Aireko argues that CBP's failure to suspend the liquidation of the entries, require the deposit of estimated ADDs or CVDs, or reject the entries is evidence that CBP "did not view Aireko's solar panels within the scope of the Order." *See* Pl. Resp. at 2–3. Aireko is incorrect. As an initial matter, it is the responsibility of the importer—not CPB—to use reasonable care in completing its entry documentation so that CPB may properly assess duties. 19 U.S.C. § 1484(a)(1)(B). Further, contrary to Aireko's assertion, CBP sent Requests For Information

2021, ECF No. 17; Protests; Protests and Entries from the Port of San Juan Supplement, Nov. 13, 2020, ECF No. 16 (the “Protests Supplement”); DSOF ¶ 4; PSOF ¶ 6, Ex. A. For the entries at issue, Aireko selected entry dates of December 15, 2014, December 19, 2014, and December 22, 2014 on its CBP Form 3461. PSOF ¶¶ 17–19; Compl. ¶¶ 20–22; Ans. ¶¶ 20–22; DSOF ¶ 5.

On December 23, 2014, Commerce published its final determinations for the ADD and CVD investigations. *Certain [CSPV] Products From the [PRC]*, 79 Fed. Reg. 76,970 (Dep’t Commerce Dec. 23, 2014) (final deter. of sales at less than fair value) (the “*Final CSPV ADD Order*”); *CVD Investigation of Certain [CSPV] Products From the [PRC]*, 79 Fed. Reg. 76,962 (Dep’t Commerce Dec. 23, 2014) (final affirmative CVD deter.) (the “*Final CSPV CVD Order*”) (collectively, “*Final Determinations*”); DSOF ¶ 6. In February 2015, Commerce published the ADD and CVD orders on certain CSPV from the PRC. *Certain [CSPV] Products From the [PRC]*, 80 Fed. Reg. 8,592 (Dep’t Commerce Feb. 18, 2015) ([ADD] order and am. final affirmative [CVD] deter. and [CVD] order); DSOF ¶ 7.

On August 17, 2015, Aireko filed a scope ruling request with Commerce asking it to find that Aireko’s solar panels were outside of the ADD/CVD orders’ scope. PSOF ¶ 2; *see also Aireko Constr., LLC v. United States*, 425 F. Supp. 3d 1307, 1310 (Ct. Int’l Trade 2020). On November 12, 2015, Commerce issued its scope ruling, finding the merchandise at issue in scope. PSOF ¶ 3; *see also [CSPV] Products from the [PRC]*, (Dep’t Commerce Nov. 12, 2015) (scope ruling on [Aireko’s] solar modules composed of U.S.-origin cells). Aireko challenged that scope ruling in this court on December 12, 2015. PSOF ¶ 3; *see Aireko*, 425 F. Supp. 3d 1307. This court sustained Commerce’s scope determination.⁵ *Id.*

On May 2, 2016 and May 13, 2016, respectively, Commerce issued ADD and CVD liquidation instructions to CBP covering CSPV from the PRC. DSOF ¶ 8; Liquidation Instructions (Message Nos. 6123301 (May 2, 2016), 6134304 (May 13, 2016)). Regarding the ADD order, for the entries on January 26, 2015, requesting *inter alia* certificates of origin for the cells. Protests Supplement at 34–47. In March of 2015, CBP sent Aireko Notices of Action for the entries, informing Aireko that the entries were subject to ADD and CVD. *Id.* at 48–50, 77–80, 83–94. On September 2, 2016, CBP liquidated the entries and assessed ADDs and CVDs. PSOF ¶ 5; DSOF ¶ 11.

⁵ In addition to reviewing the scope ruling, Aireko argued that CBP had erroneously liquidated its entries. *Aireko*, 425 F. Supp. 3d at 1312–13. Aireko brought its case under 28 U.S.C. § 1581(c), which grants the court jurisdiction to review Commerce’s scope ruling determinations. 19 U.S.C. §1516a(a)(2)(B)(iv); 28 U.S.C. § 1581(c). The Court explained that “[t]he jurisdictional foundation for Aireko to contest a scope ruling does not also support a challenge to CBP’s actions which would include CBP’s decisions incident to liquidation” and declined to reach the merits of Aireko’s argument. *Aireko*, 425 F. Supp. 3d at 1313.

Commerce instructed CBP to liquidate entries of certain CSPV from the PRC for the period of July 31, 2014 through January 25, 2015, at the cash deposit rate in effect on the date of entry, which was 42.33%. DSOF ¶ 9; Cash Deposit Instructions (Message No. 4307307 ¶ 3); Liquidation Instructions (Message No. 6123301 ¶ 2). Regarding the CVD order, Commerce instructed CBP to liquidate entries of CSPV from the PRC for the period October 18, 2014 through February 9, 2015 without regard to CVD. DSOF ¶ 10; Liquidation Instructions (Message No. 6134304 ¶ 5).

On September 2, 2016, CBP liquidated the entries at issue at an ADD rate of 52.13% and a CVD rate of 26.89%. PSOF ¶ 5; DSOF ¶ 11; Protests at 11–12, 28–29, 39–40; Protests Supplement at 2, 57. On December 2, 2016, Aireko protested the assessment of ADD and CVD on the entries at issue asking CBP to take no further action on the entries until the conclusion of pending litigation to determine whether the entries were “properly deemed to be within the scope of the [ADD and CVD] [o]rdrers.” PSOF Ex. A. On November 12, 2019,⁶ Aireko amended its protest by letter stating that the entries were entered prior to the issuance of the *Final Determinations* and that the corresponding ADD and CVD rates could only be “assessed and liquidated prospectively for entry dates prospectively.” PSOF ¶¶ 7–8, Ex. B at 2–3. Aireko’s amendment letter further stated that the antidumping and countervailing duty rates “were assessed retroactively . . . which is contrary to law.” PSOF Ex. B at 3. CBP denied Aireko’s protest⁷ and no party disputes that this action is timely.⁸ *Id.* ¶ 10, Ex. D; see DSOF ¶ 13.

⁶ Both Defendant and Plaintiff mistakenly refer to the date of the amendment as November 12, 2016, but it is attached to Plaintiff’s Statement of Facts as Exhibit B and it was filed on November 12, 2019. 19 C.F.R. § 174.14(e) (2018) (“An amendment to a protest . . . shall be deemed filed on the date it is received by the Customs officer”); PSOF Exs. B, C (DHL proof of delivery receipt dated November 12, 2019 with the notation “Aireko Amended Protest delivered to Customs”).

⁷ Defendant’s Statement Of Facts states that CBP denied Aireko’s protest on June 11, 2020, see Def.’s Statement of Undisputed Material Facts in Supp. Cross-Mot. for Partial Summ. J. ¶ 13, July 30, 2021, ECF No. 28 (“DSOF”), however, evidence cited by Defendant in support of this fact indicates that the protest was denied on August 28, 2020. Protests and Entries from the Port of San Juan at 1, Oct. 5, 2020, ECF No. 11–1 (the “Protests”). Aireko attached the denied protest as Exhibit D of its Statement Of Facts, see PSOF Ex. D, showing that a protest officer denied the protest on January 13, 2020. *Id.* Regardless of the date that the protest was actually denied, Plaintiff timely commenced this action. See 28 U.S.C. § 2636(a)(1); PSOF Ex. D (indicating that the denied protest was received on June 15, 2020); Compl.; Summons. For the purpose of this motion, the court will use the denial date indicated on the protest form. PSOF Ex. D.

⁸ Plaintiff complains that it received its denied protest more than 90 days from the denial and thus “was deprived of the opportunity to request the denied protest voided under 19 U.S.C. § 1511(d).” Pl.’s Br. at 2–3. 19 U.S.C. § 1511(d) was repealed in 1978. See Pub. L. 95–410, Title I § 107, Oct. 3, 1978, 92 Stat. 892. To the extent that Plaintiff’s argument may refer to 19 U.S.C. § 1515(d), see PSOF Resp. ¶ 12, Plaintiff fails to address its materiality to the current motion. Thus, the court does not consider this argument.

DISCUSSION

Aireko argues that despite Commerce’s instructions in the *Final CSPV ADD Order* to impose ADDs on certain CSPV from the PRC entered beginning July 31, 2014 through January 25, 2015, CBP erroneously liquidated the entries because there “were no pending liquidation instructions . . . on Aireko’s entry dates.” Pl.’s Br. at 6. Implicit in Aireko’s argument is that Commerce’s instructions were unlawful because the scope language in Commerce’s *Final Determinations* changed between Commerce’s preliminary and final determinations such that the effectiveness of Commerce’s order could only begin on December 23, 2014, the date of the *Final Determinations*. See *id.* at 3–7. Defendant contends that Commerce issued valid instructions to CBP to liquidate certain CSPV from the PRC entered for the period at the cash deposit rate in effect on the date of entry, which was 42.33%. Def.’s Br. at 7, Cash Deposit Instructions (Message No. 4307307 ¶ 3), Liquidation Instructions (Message No. 6123301 ¶ 2). Defendant further argues that to the extent that Aireko challenges Commerce’s instructions, those instructions are not protestable and thus such a challenge is not properly before the Court. Def.’s Reply Memo. in Further Supp. of Def.’s Cross-Mot. for Summ. J. at 5–6, Oct. 4, 2021, ECF No. 32 (“Def.’s Reply”). For the following reasons the court orders partial summary judgment in favor of Defendant and partial summary judgment in favor of Plaintiff.

Aireko’s entries were subject to ADDs at the rate prescribed in Commerce’s liquidation instructions to CBP. See Liquidation Instructions (Message No. 6123301 ¶ 2). The ADD laws empower Commerce to investigate dumping allegations and establish ADD rates.⁹ 19

⁹ When a domestic industry in the United States believes it is being harmed by unfair trade practices it may petition the government to investigate those practices. 19 U.S.C. § 1673a(b). In an investigation, Commerce will determine whether sales of the investigated merchandise have been dumped, made at less than fair value, or whether a countervailable subsidy has been provided. See *id.* §§ 1673, 1671(a)(1). The International Trade Commission (“ITC”) determines whether the imported merchandise materially injures or threatens to materially injure the relevant domestic industry. *Id.* §§ 1673d(b)(1), 1671d(b)(1). If both Commerce and the ITC render affirmative determinations, Commerce issues an antidumping or countervailing duty order. *Id.* §§ 1673e(a), 1671e(a). Where Commerce has made an affirmative finding and there is injury to the domestic industry, Commerce will issue an order that identifies the scope of the merchandise to which it applies and assesses antidumping duties “in an amount equal to the amount by which the normal value exceeds the export price.” *Id.* §§ 1673, 1673e(a). Commerce’s order will “include[] a description of the subject merchandise, in such detail as the administering authority deems necessary.” *Id.* §§ 1673e(a)(2), 1671e(a)(2). “At least once during a 12-month period beginning on the anniversary date of the publication of countervailing or antidumping duty order,” Commerce, upon request, “shall review and determine the amount of any net countervailable subsidy, the amount of any antidumping duty, and review the status of and compliance with, any agreement [leading to the suspension of an investigation].” 19 U.S.C.S. § 1675(a)(1). The results of the administrative review, along “with notice of a duty to be assessed, estimated duty to deposited, or notice that an investigation is being resumed” shall be published in the Federal Register. *Id.* § 1675(a)(1)(c).

U.S.C. §§ 1673, 1673a–1673(h). Commerce will issue instructions to CBP to suspend the liquidation¹⁰ of entries subject to the order and to collect cash deposits to secure the ADD or CVD to be paid. 19 U.S.C. § 1673d(c)(1)(B)(ii). If a question arises as to the meaning of a particular order, an interested party may request that Commerce conduct a scope inquiry to clarify whether a particular type of merchandise is within the class or kind of merchandise described. 19 C.F.R. § 351.225 (2018). The ADD laws also limit CBP’s role to fulfilling Commerce’s instructions. *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (CBP cannot “modify . . . Commerce’s determinations, their underlying facts, or their enforcement.” (internal citations, brackets, and quotation marks omitted)). The contents of those instructions, as opposed to CBP’s adherence to them, is not a protestable event. *See* 19 U.S.C. §§ 1671, 1673, 1675 (Commerce, not CBP determines the rate and scope of AVD and CVD orders); *see also* 19 U.S.C. § 1514 (listing CBP’s decisions which may be protested); *Shinyei Corp. of America v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004) (“Because the alleged agency error in the present case is on the part of Commerce, and not Customs . . . section 1581(a) cannot vest the Court of International Trade with jurisdiction”). To the extent that Aireko challenges Commerce’s instructions, that challenge should have been brought under 28 U.S.C. § 1581(i) and would now be untimely.¹¹ *Shinyei*, 355 F.3d at 1304; *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (“Consequently, an action challenging Commerce’s liquidation instructions is . . . a challenge to the ‘administration and enforcement’ of those final results [and] [s]ection 1581(i)(4) grants jurisdiction to such an action”).

Here, Commerce commenced an investigation of CSPV from the PRC and subsequently issued its *Preliminary Determinations* and *Final Determinations*. Aireko entered subject merchandise on December 15, 2014, December 19, 2014, and December 22, 2014. PSOF at ¶¶ 17–19, Exs. G–I. In May of 2016, Commerce issued liquidation instructions to CBP to liquidate entries of certain CSPV from the PRC for the period of July 31, 2014 through January 25, 2015, at the cash deposit rate of 42.33% for ADD, *see* DSOF ¶ 9, Cash Deposit Instructions (Message No. 4307307 ¶ 3); Liquidation Instructions (Message No. 6123301 ¶ 2), and without regard to CVD for the period of October

¹⁰ “Liquidation” is defined as “the final computation or ascertainment of duties on entries for consumption or drawback entries.” 19 C.F.R. § 159.1 (2018).

¹¹ An action commenced pursuant to 28 U.S.C. §1581(i) “is barred unless commenced. . . within two years after the cause of action first accrues.” 28 U.S.C. § 2636(i). The instructions to liquidate the entries involved here were issued on May 2, 2016 and May 13, 2016. Liquidation Instructions (Message Nos. 6123301 (May 2, 2016), 6134304 (May 13, 2016)).

18, 2014 through February 9, 2015.¹² DSOF ¶ 10, Liquidation Instructions (Message No. 6134304 ¶ 5). CBP failed to follow Commerce’s instructions when it assessed ADDs at 52.13% and CVDs at 26.89%. Def.’s Br. at 7–8. Plaintiff may protest CBP’s failure to follow Commerce’s instructions, *see* 19 U.S.C. § 1514(a)(2); *see also Shinyei*, 355 F.3d at 1304, but it may not protest the content of the instructions. *Shinyei*, 355 F.3d at 1304.

Aireko mistakenly invokes *SunPower Corp. v. United States*, 253 F. Supp. 3d 1275 (Ct. Int’l Trade 2017) as the foundation for its challenge. Pl.’s Br. at 4–6. Aireko apparently contends that Commerce’s modification of the order language from the *Preliminary Determinations* to the *Final Determinations* renders any retroactive application of the language in the *Final Determinations* to merchandise contrary to law. *Id.* As a preliminary matter, Aireko reads *SunPower* for more than it is worth. In *SunPower*, U.S. producers of solar cells challenged Commerce’s final scope determination involving solar panels and modules from the PRC under 28 U.S.C. § 1581(c). *SunPower*, 253 F. Supp. 3d at 1283–1285. The investigations at issue in *SunPower* followed prior investigations of solar cells from the PRC and Taiwan.¹³ *Id.* at 1280.

SunPower involved an investigation in which Commerce initially proposed scope language setting forth a “two out of three rule” in which “a product would qualify as subject merchandise if it contained Chinese input (ingots, wafers, or partially manufactured cells) and assembly of the module occurred in China,” even if the cell was manufactured or completed in a third country. *Id.* at 1281. In the final determination issued on December 14, 2014, Commerce abandoned the two out of three rule and adopted language in which “country of origin would be determined by the country in which the assembly of

¹² These instructions followed a scope decision issued by Commerce, challenged in this court, and ultimately decided by this court on January 13, 2020. *Aireko*, 425 F.Supp. 3d 1307.

¹³ *See [CSPV] Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 76 Fed. Reg. 70,960 (Dep’t Commerce Nov. 16, 2011) (initiation of [ADD] investigation); *[CSPV] Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 76 Fed. Reg. 70,966, 70,967 (Dep’t Commerce Nov. 16, 2011) (initiation of [CVD] investigation) (“Solar I”). The Solar I PRC investigations covered solar cells from China, including Chinese cells assembled into modules outside of China but did not cover solar modules assembled in China using solar cells produced outside of China. *SunPower*, 253 F. Supp. 3d at 1278–1279. In these investigations Commerce considered the solar cell as the origin-conferring component. *See id.* Subsequently in response to another petition, Commerce investigated solar modules made with cells other than PRC cells. *See Certain [CSPV] Products from the [PRC] and Taiwan*, 79 Fed. Reg. at 4,661; *Certain [CSPV] Products from the [PRC]*, 79 Fed. Reg. at 4,667. These investigations resulted in two sets of orders. *Certain [CSPV] Products from the [PRC]*, 80 Fed. Reg. 8,592 (Dep’t Commerce Feb. 18, 2015) ([ADD] order; and amended final affirmative [CVD] deter. and [CVD] order); *Certain [CSPV] Products from Taiwan*, 80 Fed. Reg. 8,596 (Dep’t Commerce Feb. 18, 2015) ([ADD] order); *SunPower*, 253 F. Supp. 3d at 1280.

the panel occurred.” *Id.* at 1282. In *SunPower* the court ultimately upheld Commerce’s determination and addressed Plaintiff’s admonition that the order only be applied prospectively. *Id.* at 1293. The court concluded that the admonition was of no moment, as there was no dispute that the order had been applied prospectively. *Id.* Commerce issued the final order on December 14, 2014 and applied the order to entries made after December 14, 2014. *Id.* Thus, *SunPower* did not reach the question of whether application of the order to entries prior to the issuance of the final determination, but after the preliminary determination, would be an unlawful retroactive application of the order.

More importantly, the court need not reach the argument concerning the retroactive application of the order here. Aireko protested CBP’s liquidation of its entries. PSOF ¶¶ 6–8, Ex. A; DSOF ¶ 12. In doing so, it can only reach CBP’s decisions, namely whether CBP followed Commerce’s instructions. *Shinyei*, 355 F.3d at 1304. CBP’s role is to liquidate the goods pursuant to Commerce’s instructions. *Belgium v. United States*, 551 F.3d 1339, 1343 (Fed. Cir. 2009) (explaining that Customs performs a ministerial function in executing liquidation instructions issued by Commerce). CBP failed to follow Commerce’s instructions and therefore the court grants partial judgment in favor of the Plaintiff, to the extent necessary to assess the CVD rate at the rate Commerce instructed. Def.’s Br. at 7–8, Liquidation Instructions (Message No. 6134304 at ¶ 5). However, Commerce’s decision underlying the instructions is not a protestable event and Plaintiff’s motion for summary judgment is denied to the extent that it challenges the content of Commerce’s instructions. Defendant’s cross-motion for partial summary judgment is granted.

CONCLUSION

For the foregoing reasons, Aireko Construction, LLC’s motion for summary judgment is granted in part and denied in part. The United States’ cross-motion for summary judgment is granted. Judgment will enter accordingly.

Dated: December 7, 2021

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

Slip Op. 21–165

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

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

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

Dated: December 8, 2021

John R. Magnus, Tradewins LLC, of Washington, D.C., for plaintiff SolarWorld Americas, Inc.

Jonathan M. Freed, Trade Pacific PLLC, of Washington, D.C., for consolidated plaintiffs Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Trina Solar (U.S.) Inc.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd.

Richard L.A. Weiner, Sidley Austin, LLP, of Washington, D.C. for consolidated plaintiffs Yingli Green Energy Holding Co., Ltd.; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd.

Craig A. Lewis, Hogan Lovells US LLP, of Washington, D.C., for plaintiff intervenors Canadian Solar Inc.; Canadian Solar (USA) Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; Canadian Solar International Limited; BYD (Shangluo) Industrial Co., Ltd.; and Shanghai BYD Co., Ltd.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and *Brendan S. Saslow*, of counsel, Chief Counsel of Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, D.C., for defendant United States.

OPINION**Kelly, Judge:**

Before the court is the U.S. Department of Commerce’s (“Commerce”) fourth remand redetermination filed pursuant to the court’s order in *SolarWorld Americas, Inc. v. United States*, 532 F. Supp. 3d 1266 (Ct. Int’l Trade 2021) (“*SolarWorld V*”) in connection with Commerce’s second administrative review of the antidumping duty (“ADD”) order covering crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”), from the People’s Republic of China (the “PRC”), covering the period of December 1, 2013,

through November 30, 2014. *Final Results of Redetermination Pursuant to Ct. Remand in [SolarWorld V]*, Sept. 27, 2021, ECF No. 203–1 (“*Fourth Remand Results*”); see [*solar cells*], from the [*PRC*], 81 Fed. Reg. 39,905 (Dep’t Commerce June 20, 2016) (final results of [ADD] administrative review and final deter. of no shipments) and accompanying Issues and Decision Memo., A-570–979, (June 13, 2016), ECF No. 21–5 (“*Final Decision Memo*”). The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, and now only recounts those facts relevant to the court’s review of the *Fourth Remand Results*. See *SolarWorld V*, 532 F. Supp. 3d 1266; see generally *SolarWorld Americas, Inc. v. United States*, 273 F. Supp. 3d 1254 (Ct. Int’l Trade 2017) (“*SolarWorld I*”); *SolarWorld Americas, Inc. v. United States*, 320 F. Supp. 3d 1341 (Ct. of Int’l Trade 2018) (“*SolarWorld II*”); *SolarWorld Americas, Inc. v. United States*, 355 F. Supp. 3d 1306 (Ct. Int’l Trade 2018) (“*SolarWorld III*”), *aff’d in part, vacated in part, remanded*, *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351 (Fed. Cir. 2020) (“*SolarWorld IV*”).

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

In *SolarWorld V*, the court remanded Commerce’s third remand redetermination, due to Commerce’s continued reliance on Thai import data to value nitrogen consumed by Trina,² for reconsideration or explanation consistent with the Court of Appeals for the Federal

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

² Consolidated Plaintiffs Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd. are referred to, collectively, as “Trina.”

Circuit’s (“Court of Appeals”) opinion in *SolarWorld IV* and *SolarWorld V. SolarWorld V*, 532 F. Supp. 3d at 1273.

In the *Fourth Remand Results*, Commerce, under respectful protest,³ reconsidered its surrogate country selection and valued nitrogen using Bulgarian, rather than Thai import data. *Fourth Remand Results* at 1–2, 2 n.4. On September 2, 2021, Commerce released a draft of the remand redetermination and provided interested parties with an opportunity to comment. *Id.* at 4. No party provided comments. *Id.* at 4, 9. On September 26, 2021, Commerce issued the *Fourth Remand Results. Fourth Remand Results*. On October 7, 2021, Trina filed a consent motion to amend the scheduling order issued by the court, *see SolarWorld V*, 532 F. Supp. 3d at 1273, “eliminate the comment period and forego the filing of Joint Appendices.” Consol. Pls.’ Consent Mot. to Cancel the Schedule for Parties to File Comments, Replies, and J.A.s on the Remand Redetermination, Oct. 7, 2021, ECF No. 204. The court granted this motion. Order, October 7, 2021, ECF No. 205. For the following reasons, the court sustains Commerce’s decision to use Bulgarian import data to value Trina’s nitrogen input.

Commerce explains that the record does not contain sufficient evidence to undertake the analysis to support the use of the Thai import data required in *SolarWorld V. Fourth Remand Results* at 7–8. Therefore, Commerce examined the Global Trade Atlas data on record for nitrogen imports into five other possible surrogate countries. *Id.* Commerce selected Bulgaria from the list of potential surrogate countries, consistent with its practice of selecting the country with the highest import volume for the period of review if multiple countries equally satisfy Commerce’s selection criteria. *Id.* at 9, n.38. The record indicates that Bulgaria had the highest import volume for the period of review; therefore, Commerce’s decision to use Bulgarian import data is supported by substantial evidence. *See SolarWorld’s Submission of Publicly Available Factual Information to Rebut, Clarify or Correct*, Ex. 5B, PDs 497–499, bar codes 3411020–1–3 (Oct. 29, 2015).⁴ No party objects to Commerce’s surrogate country selection, the surrogate country selection is reasonable, and complies with the court’s remand order, *see Xinjiamei*, 968 F. Supp. 2d at 1259.

³ By adopting a position “under protest,” Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

⁴ On September 13, 2016, Defendant filed an index to the public (“PD”) administrative record underlying Commerce’s final determination, on the docket, at ECF No. 21–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the index.


CONCLUSION

For the foregoing reasons, the *Fourth Remand Results*, are supported by substantial evidence and comply with the court's order in *Canadian Solar V*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: December 8, 2021

New York, New York

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



Slip Op. 21–166

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

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

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

Dated: December 8, 2021

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

Richard L.A. Weiner, Sidley Austin, LLP, of Washington, D.C., for plaintiff intervenors Yingli Green Energy Holding Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Shenzhen Yingli New Energy Resources Co., Ltd.; Yingli Green Energy International Trading Co., Ltd.; Yingli Green Energy Americas, Inc.; and Yingli Energy (China) Co., Ltd.

Adams C. Lee, Harris Bricken McVay Sliwoski, LLP, of Seattle, Washington, for plaintiff intervenor Ningbo Qixin Solar Electrical Appliance Co., Ltd.

John R. Magnus, Tradewins LLC, of Washington, D.C., for defendant intervenor and consolidated plaintiff SolarWorld Americas, Inc.

Joshua E. Kurland, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and of counsel *Brendan S. Saslow*, Chief Counsel of Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C., for defendant.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) fourth remand redetermination filed pursuant to the court’s order in *Canadian Solar Int’l Ltd. v. United States*, 532 F. Supp. 3d 1273 (Ct. Int’l Trade 2021) (“*Canadian Solar V*”) in connection with Commerce’s third administrative review of the antidumping duty (“ADD”) order covering crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”), from the People’s Republic of China (the “PRC”), covering the period of December 1, 2014, through November 30, 2015. *Final Results of Redetermination Pursuant to Ct. Remand in [Canadian Solar V]*, Sept. 27, 2021, ECF No. 196–1 (“*Fourth Remand Results*”); see [solar cells], from the [PRC], 82 Fed. Reg. 29,033 (Dep’t Commerce June 27, 2017) (final results of [ADD] administrative review and final deter. of no shipments; 2014–15) and accompanying Issues and Decision Memo., A-570–979 (June 20, 2017), ECF No. 44–5.

The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, and now only recounts those facts relevant to the court’s review of the *Fourth Remand Results*. See *Canadian Solar V*; see generally *Canadian Solar Int’l Ltd. v. United States*, 378 F. Supp. 3d 1292 (Ct. Int’l Trade 2019) (“*Canadian Solar I*”); *Canadian Solar Int’l Ltd. v. United States*, 415 F. Supp. 3d 1326 (Ct. Int’l Trade 2019) (“*Canadian Solar II*”); *Canadian Solar Int’l Ltd. v. United States*, 448 F. Supp. 3d 1333 (Ct. Int’l Trade 2020) (“*Canadian Solar III*”), judgment vacated on reconsideration, *Canadian Solar Int’l Ltd. v. United States*, 471 F. Supp. 3d 1379 (Ct. Int’l Trade 2020) (“*Canadian Solar IV*”).

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)¹ and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 968 F.

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274 (2008)).

DISCUSSION

In *Canadian Solar V*, the court remanded Commerce's third remand redetermination, due to its continued reliance on Thai import data to value nitrogen consumed by Canadian Solar,² for reconsideration or further explanation consistent with the Court of Appeals for the Federal Circuit's ("Court of Appeals") opinion in *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351 (Fed. Cir. 2020) ("*SolarWorld*") and *Canadian Solar V*. *Canadian Solar V*, 532 F. Supp. 3d at 1281.

In the *Fourth Remand Results*, Commerce, under respectful protest,³ reconsidered its surrogate country selection and valued nitrogen using Mexican, rather than Thai import data. *Fourth Remand Results* at 1–2, 2 n.4. On September 2, 2021, Commerce released a draft of the remand redetermination and provided interested parties with an opportunity to comment. *Id.* at 4. No party provided comments. *Id.* at 4, 9. On September 27, 2021, Commerce issued the *Fourth Remand Results*. *Fourth Remand Results*. On October 18, 2021, Plaintiffs Canadian Solar and Consolidated Plaintiff Shanghai BYD Co., Ltd. filed an unopposed motion to amend the scheduling order issued by the court, *see Canadian Solar V*, 532 F. Supp. 3d at 1281, "to eliminate the comment period and forego the filing of Joint Appendices." Pls.' and Consol. Pl.'s Unopposed Mot. Cancel Schedule for Parties to File Comments, Replies, and J.A.s on the Remand Redetermination at 2, Oct. 18, 2021, ECF No. 198. The court granted this motion. Order, Oct. 19, 2021, ECF No. 199. For the following reasons, the court sustains Commerce's decision to use Mexican import data to value Canadian Solar's nitrogen input.

Commerce explains that the record does not contain sufficient evidence to undertake the analysis to support the use of the Thai import data required by the court in *Canadian Solar V*. *Fourth Remand Results* at 7–8. Therefore, Commerce examined the Global Trade Atlas data on the record for nitrogen imports for five other possible surrogate countries. *Id.* Commerce selected Mexico from the list of potential surrogate countries, consistent with its practice of selecting the country with the highest import volume for the period of review if

² Plaintiffs Canadian Solar International Limited; Canadian Solar (USA), Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Cells Co., Ltd.; CSI-GCL Solar Manufacturing (Yancheng) Co., Ltd.; and CSI Solar Power (China) Inc. are referred to, collectively, as "Canadian Solar."

³ By adopting a position "under protest," Commerce preserves its right to appeal. *See Viraj Gp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

multiple countries equally satisfy Commerce's selection criteria. *Id.* at 9, 9 n.40. The record indicates that Mexico had the highest import volume for the period of review; therefore, Commerce's decision to use Mexican import data is supported by substantial evidence. See Solar World's Submission of Information to Rebut, Clarify, or Correct Information Pertaining to Surrogate Values, Ex. 3, PDs 397–98, CDs 482–84, bar codes 3490795–01–02, 3490786–01–03 (July 26, 2016).⁴ No party objects to Commerce's surrogate country selection, the surrogate country selection is reasonable, and complies with the court's remand order. See *Xinjiamei*, 968 F. Supp. 2d at 1259.

CONCLUSION

For the foregoing reasons, the *Fourth Remand Results* are supported by substantial evidence and comply with the court's order in *Canadian Solar V*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: December 8, 2021
New York, New York

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

⁴ On October 26, 2017, Defendant filed indices to the public ("PD") and confidential ("CD") administrative records underlying Commerce's final determination, on the docket, at ECF No. 44–2–4. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

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