

U.S. Customs and Border Protection

19 CFR PARTS 4, 122, 123, 145 AND 149

CBP DEC. 21-04

RIN 1651-AB33

MANDATORY ADVANCE ELECTRONIC INFORMATION FOR INTERNATIONAL MAIL SHIPMENTS; RE-OPENING OF COMMENT PERIOD

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule; reopening of comment period.

SUMMARY: On March 15, 2021, U.S. Customs and Border Protection (CBP) published in the **Federal Register** an Interim Final Rule (IFR), which amends the CBP regulations to provide for mandatory advance electronic data (AED) for international mail shipments. Although the comment period for this IFR closed on May 14, 2021, CBP has decided to reopen the comment period for an additional 30 days.

EFFECTIVE DATE: The interim final rule published on March 15, 2021 (86 FR 14245), was effective March 15, 2021.

COMMENT DATE: The comment period for the interim final rulemaking published on is reopened for an additional 30 days. Comments must be received on or before June 24, 2021.

FOR FURTHER INFORMATION CONTACT: For policy questions related to mandatory AED for international mail shipments, contact Quintin Clarke, Cargo and Conveyance Security, Office of Field Operations, U.S. Customs & Border Protection, by telephone at (202) 344-2524, or email at quintin.g.clarke@cbp.dhs.gov.

ADDRESSES: Please submit any comments, identified by docket number [Docket No. USCBP-2021-0009; CBP Dec. 21-04] by the following method:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name, docket number for this rulemaking and must reference docket number [Docket No. USCBP–2021–0009; CBP Dec. 21–04]. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on the IFR. Comments that will provide the most assistance to CBP will reference a specific portion of the IFR, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

To address the threat of synthetic opioids and other dangerous items entering the United States through international mail shipments and to implement the requirements of the Synthetics Trafficking and Overdose Prevention Act of 2018 (STOP Act), Public Law 115–271, CBP amended its regulations on March 15, 2021 through publication in the **Federal Register** (86 FR 14245) of an IFR entitled “Mandatory Advance Electronic Information for International Mail Shipments.” These amended regulations require the United States Postal Service (USPS) to transmit certain electronic information in advance to CBP. Specifically, these regulations provide that, for certain international mail shipments, CBP must electronically receive from USPS certain mandatory advance electronic data (AED) within specified time frames. These regulations describe the new mandatory AED requirements, including the inbound international mail shipments for which AED is required, the time frame for which USPS must provide the required AED to CBP, and the criteria for exclusion from AED requirements. Further, the regulations address compliance dates and the necessary remedial actions required for shipments in which USPS has not complied with AED requirements.

To increase public participation and in the interest of good governance, CBP is reopening the comment period for an additional 30 days to allow for further comments to be submitted on the IFR. Comments must be received on or before June 24, 2021.

Dated: May 20, 2021,

JOANNE R. STUMP,
*Acting Executive Director,
Regulations and Rulings, Office of Trade,
U.S. Customs and Border Protection.*

[Published in the Federal Register, May 25, 2021 (85 FR 27973)]

CBP Dec. 21-09

**TUNA TARIFF-RATE QUOTA FOR CALENDAR YEAR 2021
TUNA CLASSIFIABLE UNDER SUBHEADING 1604.14.22,
HARMONIZED TARIFF SCHEDULE OF THE UNITED
STATES (HTSUS)**

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

ACTION: Announcement of the quota quantity of tuna in airtight containers for Calendar Year 2021.

SUMMARY: Each year, the tariff-rate quota for tuna described in subheading 1604.14.22, Harmonized Tariff Schedule of the United States (HTSUS), is calculated as a percentage of the tuna in airtight containers entered, or withdrawn from warehouse, for consumption during the preceding calendar year. This document sets forth the tariff-rate quota for Calendar Year 2021.

DATES: The 2021 tariff-rate quota is applicable to tuna in airtight containers entered, or withdrawn from warehouse, for consumption during the period January 1, 2021 through December 31, 2021.

FOR FURTHER INFORMATION CONTACT: Julia Peterson, Chief, Quota and Agricultural Branch, Interagency Collaboration Division, Trade Policy and Programs, Office of Trade, U.S. Customs and Border Protection, Washington, DC 20229-1155, at (202) 384-8905 or by email at HQQUOTA@cbp.dhs.gov.

Background

It has been determined that 18,345,004 kilograms of tuna in airtight containers may be entered, or withdrawn from warehouse, for consumption during Calendar Year 2021, at the rate of 6.0 percent *ad valorem* under subheading 1604.14.22, Harmonized Tariff Schedule

of the United States (HTSUS). Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent *ad valorem* under subheading 1604.14.30, HTSUS.

Dated: May 21, 2021.

JOHN P. LEONARD,
*Acting Executive Assistant Commissioner,
Office of Trade.*

[Published in the Federal Register, May 26, 2021 (85 FR 28371)]



19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on May 22, 2021 and will remain in effect until 11:59 p.m. EDT on June 21, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security (DHS) published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as fur-

ther defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on May 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of May 10, 2021, there have been over 157 million confirmed cases globally, with over 3.2 million confirmed deaths.³ There have been over 32 million confirmed and probable cases within the United States,⁴ over 1.2 million confirmed cases in Canada,⁵ and over 2.3 million confirmed cases in Mexico.⁶

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

² See 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (May 11, 2021), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19--11-may-2021>.

⁴ CDC, COVID Data Tracker (accessed May 14, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

⁵ WHO, COVID–19 Weekly Epidemiological Update (May 11, 2021).

⁶ *Id.* On April 20, 2021, the Department of State issued Level 4 (Do Not Travel) Travel Advisories for Canada and Mexico due to COVID–19. See Department of State, Canada Travel Advisory (Apr. 20, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed May 6, 2021); Department of State, Mexico Travel Advisory (Apr. 20, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (last visited May 6, 2021). On April 2, 2021, the CDC issued similar travel notices for Canada and Mexico. See CDC, Travel Notice: COVID–19 in Canada (Apr. 2, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed May 6, 2021) (noting a very high level of COVID–19 in Canada and advising that travelers avoid all travel to Mexico); CDC, Travel Notice: COVID–19 in Mexico (Apr. 2, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed May 6, 2021) (noting a very high level of COVID–19 in Mexico and advising that travelers avoid all travel to Mexico).

Notice of Action

Given the outbreak and continued transmission and spread of COVID-19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C)

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support Federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on June 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions as soon as possible to support U.S. border communities.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of

economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, May 24, 2021 (85 FR 27802)]



19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on May 22, 2021 and will remain in effect until 11:59 p.m. EDT on June 21, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security (DHS) published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as

further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on May 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of May 10, 2021, there have been over 157 million confirmed cases globally, with over 3.2 million confirmed deaths.³ There have been over 32 million confirmed and probable cases within the United States,⁴ over 1.2 million confirmed cases in Canada,⁵ and over 2.3 million confirmed cases in Mexico.⁶

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⁶ *Id.* On April 20, 2021, the Department of State issued Level 4 (Do Not Travel) Travel Advisories for Canada and Mexico due to COVID–19. See Department of State, Canada Travel Advisory (Apr. 20, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed May 6, 2021); Department of State, Mexico Travel Advisory (Apr. 20, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (last visited May 6, 2021). On April 2, 2021, the CDC issued similar travel notices for Canada and Mexico. See CDC, Travel Notice: COVID–19 in Canada (Apr. 2, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed May 6, 2021) (noting a very high level of COVID–19 in Canada and advising that travelers avoid all travel to Mexico); CDC, Travel Notice: COVID–19 in Mexico (Apr. 2, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed May 6, 2021) (noting a very high level of COVID–19 in Mexico and advising that travelers avoid all travel to Mexico).

Notice of Action

Given the outbreak and continued transmission and spread of COVID-19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C)

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support Federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on June 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions as soon as possible to support U.S. border communities.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of

economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, May 24, 2021 (85 FR 27800)]



RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from LifeScan IP Holdings, LLC, seeking “Lever-Rule” protection for the federally registered and recorded “ONETOUCH,” “ONETOUCH ULTRA,” and “ONETOUCH VERIO” 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 LifeScan IP Holdings, LLC seeking “Lever-Rule” protection. Protection is sought against importations of foreign made blood glucose testing strips and blood glucose monitors intended for sale outside the United States that bear the recorded “ONETOUCH” mark, U.S. Trademark Registration No. 2,863,393/ CBP Recordation No. TMK 12–00526. In addition, protection is sought against importations of foreign made blood glucose monitors intended for sale outside the United States that bear the recorded “ONETOUCH ULTRA” mark, U.S. Trademark Registration No. 2,538,658/ CBP Recordation No. TMK 03–00074. Finally, protection is sought against importations of foreign made blood glucose testing strips intended for sale outside the United States that bear the recorded “ONETOUCH VERIO” mark, U.S. Trademark Registra-

tion No. 4,112,124/ CBP Recordation No. TMK 20–00237. In the event that CBP determines that the blood glucose testing strips and blood glucose monitors under consideration are physically and materially different from the blood glucose testing strips and blood glucose monitors authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2(f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different blood glucose testing strips and blood glucose monitors.

Dated:

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



**PROPOSED MODIFICATION OF ONE RULING LETTER
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF A
PORTABLE FOOD ALLERGEN DETECTION DEVICE,
SINGLE-USE PODS AND A STARTER KIT FROM CHINA
AND VARIOUS OTHER COUNTRIES**

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

ACTION: Notice of proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit.

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 a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit 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.

DATES: Comments must be received on or before July 9, 2021.

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

FOR FURTHER INFORMATION CONTACT: 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 a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N305614, dated August 30, 2019 (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 N305614, CBP classified a Portable Food Allergen Detection Device and a Starter Kit in heading 9027, HTSUS, specifically subheading 9027.50.80, HTSUS, which provides for "Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other." In NY N305614, CBP explicitly stated that the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, does not apply to the Portable Food Allergen Detection Device and the Starter Kit.

In addition, CBP classified the Single Use Pods in heading 3822, HTSUS, specifically in subheading 3822.00.5090, HTSUS, which provides for "Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials: Diagnostic or laboratory reagents on a backing, prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other."

CBP has reviewed NY N305614 and has determined the ruling letter to be in error with respect to the applicability of the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, HTSUS. It is now CBP's position that the Portable Food Allergen Detection Device and a Starter Kit (constituting of a Portable Food Allergen Detection Device and Single-Use Pods), which are classified in heading 9027, HTSUS, specifically subheading 9027.50.80,

HTSUS, are subject to the Section 301 remedy pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, and therefore must also be entered under subheading 9903.88.01, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N305614 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H316429, 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

N305614

August 30, 2019

CLA-2-90:OT:RR:NC:N1:105

CATEGORY: Classification

TARIFF NO.: 9027.50.8015, 3822.00.5090

LINDA WEINBERG
BARNES & THORNBURG LLP
1717 PENNSYLVANIA AVE. NW SUITE 500
WASHINGTON DC 20006

RE: The tariff classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit from China and various other countries.

DEAR MS. WEINBERG:

In your letter dated August 2, 2019, on behalf of your client DOTS Technology Corp., you requested a tariff classification ruling. Your request involves the classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit when imported separately.

The food allergen detection device is a device used by consumers to test food for the presence of certain common food allergens. The food allergen detection device consists of numerous components including a detector unit, which contains an optical detection mechanism, lithium-ion battery and homogenization motor to drive the rotor in the pod. The fluorescent detection mechanism detects signals generated by the Signaling Polynucleotides (SPN) chemical reaction in the pod. The detector includes a light-emitting diode (LED) that excites fluorescent SPN, optical components that guide the LED to the detection chamber, lenses that collect the fluorescence, an imaging printed circuit board assembly, a fluorescence detector for measuring the emitted light, and a signal processor that analyzes fluorescence signals and transmits the identity of the allergen of interest to the visual display panel.

The DOTS' single-use pod consists of a stadium-shaped plastic base and top, a fluidics panel, a rotor, and other components and is filled with SPN and a buffer solution. The fluidics panel component contains the assay that binds the active molecule, which detects the presence of the allergen protein. The chemical reaction between the SPN and assay yields a detectable signal indicating the presence of the target allergen. In use, the pod is inserted into the food allergen device. The pod's rotor "blends" a cut food sample and releases protein from the food. The protein is then mixed with the SPN and buffer. When the SPN is bound to the assay via DNA: DNA interactions, a signal is produced that indicates the absence of the allergen protein in the protein extracted from the food sample. If the allergen protein is present in the protein extracted from the food sample, the binding interaction does not occur and no signal is produced. The user is alerted to the test results on the device.

The Starter Kits consist of one food allergen device packaged together with one or more pods.

General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), states in part that for legal purposes, classification shall be determined according to the terms of the headings, any relative section or chapter notes and, unless otherwise required, according to the

remaining GRI's taken in order. Goods that are, prima facie, classifiable under two or more headings, are classifiable in accordance with GRI 3. GRI 3(a) states that the heading that provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings refer to only part of the items in a composite good, those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the good. As such, they are regarded as equally specific and classification of the composite good is to be determined by GRI 3(b) or GRI 3(c) taken in the appropriate order in which they are set out in GRI 3. GRI 3(b) states in part that composite goods, which cannot be classified by reference to GRI 3(a), are to be classified as if they consisted of the component that gives them their essential character. GRI 3(c) provides that when goods cannot be classified by reference to GRI 3(a) or GRI 3(b), they are to be classified in the heading that occurs last in numerical order among the competing headings which equally merit consideration.

After examining the facts concerning the starter kits, this office is of the opinion that the food allergen device and single-use pods, imported together, constitute a set with the food allergen device being the item which provides the essential character, GRI 3(b) noted.

The applicable subheading for the Portable Food Allergen Detection Device and the Starter Kit will be 9027.50.8015, HTSUS, which provides for Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other: Chemical analysis instruments and apparatus. The rate of duty will be free.

The applicable subheading for the Single-Use Pods will be 3822.00.5090, HTSUS, which provides for Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other: Other. The rate of duty will be free.

In your request, you questioned the applicability of section 301 trade remedies for the Starter Kits. The Portable Food Allergen Detection Device and the Single-Use Pods, when imported separately, would not be subject to the section 301 trade remedies. When applying GRI 3(b) for the Starter Kit, the essential character was determined to be the Portable Food Allergen Detection Device. This item is not subject to the section 301 trade remedies, thus the Starter Kit would also not be subject.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <https://hts.usitc.gov/current>.

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

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

Sincerely,
STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H316429
OT:RR:CTF:EMAIN: H316429 PF
CATEGORY: Classification
TARIFF NO.: 9027.50.8015, 3822.00.5090,
9903.88.01

LINDA WEINBERG
BARNES & THORNBURG LLP
1717 PENNSYLVANIA AVENUE, NW, SUITE 500
WASHINGTON, DC 20006

Re: Modification of NY N305614; Tariff Classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit from China and various other countries

DEAR MS. WEINBERG:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N305614, dated August 30, 2019, which you requested on behalf of your client, DOTS Technology Corp. NY N305614 involves the classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit when imported separately. We have determined that this ruling is incorrect with respect to the applicability of the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, Harmonized Tariff Schedule of the United States (HTSUS). Accordingly, for the reasons set forth below, CBP is modifying NY N305614.

In NY N305614, the Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit were described as follows:

The food allergen detection device is a device used by consumers to test food for the presence of certain common food allergens. The food allergen detection device consists of numerous components including a detector unit, which contains an optical detection mechanism, lithium-ion battery and homogenization motor to drive the rotor in the pod. The fluorescent detection mechanism detects signals generated by the Signaling Polynucleotides (SPN) chemical reaction in the pod. The detector includes a light-emitting diode (LED) that excites fluorescent SPN, optical components that guide the LED to the detection chamber, lenses that collect the fluorescence, an imaging printed circuit board assembly, a fluorescence detector for measuring the emitted light, and a signal processor that analyzes fluorescence signals and transmits the identity of the allergen of interest to the visual display panel.

The DOTS’ single-use pod consists of a stadium-shaped plastic base and top, a fluidics panel, a rotor, and other components and is filled with SPN and a buffer solution. The fluidics panel component contains the assay that binds the active molecule, which detects the presence of the allergen protein. The chemical reaction between the SPN and assay yields a detectable signal indicating the presence of the target allergen. In use, the pod is inserted into the food allergen device. The pod’s rotor “blends” a cut food sample and releases protein from the food. The protein is then mixed with the SPN and buffer. When the SPN is bound to the assay via DNA: DNA interactions, a signal is produced that indicates the absence of the allergen protein in the protein extracted from the food sample. If the allergen protein is present in the protein extracted from the food sample,

the binding interaction does not occur and no signal is produced. The user is alerted to the test results on the device.

The Starter Kits consist of one food allergen device packaged together with one or more pods.

In NY N305614, CBP classified the Portable Food Allergen Detection Device and the Starter Kit in subheading 9027.50.8015, HTSUS Annotated, which provides for “Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other: Chemical analysis instruments and apparatus.” In addition, CBP classified the Single-Use Pods in subheading 3822.00.5090, HTSUSA, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other: Other.”

CBP also determined, without clarifying the country of origin of the subject merchandise, that the Portable Food Allergen Detection Device, the Starter Kits (constituting the Portable Food Allergen Detection Device and Single-Use Pods), and Single-Use Pods, would not be subject to section 301 trade remedies.

ISSUE:

Whether the Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit are subject to the Section 301 Trade Remedy?

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.

There is no dispute that the Portable Food Allergen Detection Device is classified in subheading 9027.50.80, HTSUS, which provides for “Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other.” There is also no dispute that the Starter Kit, constituting the Por-

table Food Allergen Device and Single-Use Pods, constitute a set with the Portable Food Allergen Device being the item which provides the essential character pursuant to GRI 3(b). Accordingly, the Starter Kit is also classified in 9027.50.80, HTSUS. Moreover, when imported separately, the Single-Use Pods are classified in subheading 3822.00.50, HTSUS, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other.”

The issue in this case is whether the Portable Food Allergen Detection Device, the Starter Kit and the Single-Use Pods are subject to the 301 Trade Remedy pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS. Since the Portable Food Allergen Device and the Starter Kit are classified in subheading 9027.50.80, HTSUS and goods of subheading 9027.50.80, HTSUS, are expressly included in U.S. Note 20 to Subchapter III, Chapter 99, the subject Portable Food Allergen Detection Device and the Starter Kit are subject to the 301 Trade Remedy *if the Portable Food Allergen Device is a product of China*.

HOLDING:

By application of GRIs 1 and 6, the Single-Use Pods are classified in subheading 3822.00.50, HTSUS, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other.” The general, column one rate of duty for goods of subheading 3822.00.50, HTSUS, is Free.

By application of GRIs 1 and 6, the Portable Food Allergen Detection Device is classified in subheading 9027.50.80, HTSUS, which provides for “Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other.”

By application of GRIs 1, 3(b), and 6, the Starter Kits consisting of one Portable Food Allergen Detection Device and one or more Single-Use Pods are also classified in subheading 9027.50.80, HTSUS. The general, column one rate of duty for goods of subheading 9027.50.80, HTSUS, is Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9027.50.80, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, such products must be reported under the relevant 99 subheading, i.e., 9903.88.01, in addition to subheading 9027.50.80, HTSUS, listed above.

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, including information on exclusions and their effective dates, 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>, respectively.

EFFECT ON OTHER RULINGS:

NY N305614, dated August 30, 2019, is hereby MODIFIED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



19 CFR PART 177

**MODIFICATION OF SIX RULING LETTERS AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF TEXTILE LEG COVERINGS**

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

ACTION: Notice of modification of six ruling letters and of revocation of treatment relating to the tariff classification of textile leg coverings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying six ruling letters concerning tariff classification of textile leg coverings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 8, 2021.

FOR FURTHER INFORMATION CONTACT: Parisa J. Ghazi, Food, Textile & Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021, proposing to modify six ruling letters pertaining to the tariff classification of textile leg coverings. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322, CBP classified certain textile leg coverings in heading 6117, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories." CBP has reviewed NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322 and has determined the ruling letters to be in error. It is now CBP's position that the textile leg coverings are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.15, HTSUS, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer

soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H239482, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

Attachment

HQ H239482

May 21, 2021

OT:RR:CTF:FTM H239482 PJG

CATEGORY: Classification

TARIFF NO.: 6406.90.15

MS. CHRISTIAN LEE
HANDERSON HANDICRAFT MFG. CO.
11F/6, No.2 JIAN-BA ROAD, CHUNG-HO
TAIPEI, TAIWAN

RE: Modification of NY N086942, NY N080395, NY N003909, NY G88706,
NY D85843 and NY D83322: Classification of Textile Leg Coverings

DEAR MS. LEE:

This is in reference to New York Ruling Letter (“NY”) N086942, dated December 29, 2009, issued to you concerning the tariff classification of five different adult costumes under the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, NY N086942 classified the following costumes: Style W-3030-01 Countryside Lady Costume; Style M-1639-00 Robin Hood Costume; Style W-3221-00 Maid Marian Costume; Style M-1623-01 Mad Hatter Costume; and Style W-3223-00 Darkness Alice Costume. This decision concerns Style M-1639-00 Robin Hood Costume, and in particular, two knee-high, polyester leg coverings, which are referred to as “boot covers” in NY N086942, designed to resemble the boots worn by the character Robin Hood when worn over the consumer’s shoes.

In NY N086942, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 6117.80.95, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.” We have reviewed NY N086942 and find it to be in error with regard to the tariff classification of the leg coverings. For the reasons set forth below, we hereby modify NY N086942 and five other rulings with substantially similar merchandise: NY N080395, dated November 6, 2009, NY N003909, dated December 21, 2006, NY G88706, dated April 18, 2001, NY D85843, dated January 8, 1999, and NY D83322, dated October 29, 1998.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on March 17, 2021, in Volume 55, Number 10, of the *Customs Bulletin*. No comments were received in response to this notice. However, upon further consideration, we have edited the sentence in the proposed ruling that read “[l]ike leggings and gaiters, the leg coverings extend over the ankle and up to the knee” to now read instead as “[l]ike leggings and gaiters, the leg coverings provide coverage extending to the ankle or up to the knee.” The purpose of this change is to clarify that leggings and gaiters do not always extend over the ankle and up to the knee.

FACTS:

The Robin Hood polyester leg coverings have elastic straps on the bottom. These elastic straps secure the leg coverings around the shoe. The leg coverings extend up to the consumer’s knees and have cuffs. They are trimmed

with gold-colored trim. When the consumer pulls the leg coverings on top of regular shoes, the leg coverings resemble the boots worn by the character Robin Hood.

ISSUE:

Whether the leg coverings are classified as clothing accessories under heading 6117, HTSUS, or as gaiters, leggings and similar articles under heading 6406, HTSUS.

LAW AND ANALYSIS:

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

The 2021 HTSUS provisions under consideration are as follows:

6117	Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: * * *
6117.80	Other accessories: * * * Other: * * *
6117.80.95	Other * * *
6406	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
6406.90	Other: * * *
	Of other materials:
6406.90.15	Of textile materials

Note 1(n) to Section XI, HTSUS, provides as follows:

1. This section does not cover:

(n) Footwear or parts of footwear, gaiters or leggings or similar articles of chapter 64;

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). 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 id.*

EN 64.06(II) provides as follows:

(II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

In accordance with Note 1(n) to Section XI, HTSUS, Section XI, which consists of Chapters 50–63, HTSUS, does not cover “[f]ootwear or parts of footwear, gaiters or leggings or similar articles of chapter 64.” Therefore, if the leg coverings are classifiable under heading 6406, HTSUS, they are precluded from classification under heading 6117, HTSUS.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.¹ Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) a “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. See PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). See also HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase”, the United States Court of International Trade has used the rule of *ejusdem generis*. See *A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int’l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite the listed examples preceding the general term or phrase.’” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg

¹ “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. See *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the Robin Hood leg coverings share the same characteristics as leggings and gaiters of heading 6406, HTSUS. Like leggings and gaiters, the leg coverings provide coverage extending to the ankle or up to the knee. Like some leggings that are secured to the foot with a strap, these leg coverings are secured to the shoe with a strap. Finally, consistent with EN 64.06(II), the subject leg coverings do not cover the entire foot. Accordingly, the subject leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters and are therefore precluded from classification in heading 6117, HTSUS, pursuant to Note 1(n) to Section XI, HTSUS. The subject leg coverings are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

HOLDING:

By application of GRI 1 and 6, the Robin Hood leg coverings are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N086942, dated December 29, 2009, is MODIFIED with regard to the tariff classification of the Style M-1639-00 Robin Hood Costume “boot covers.”

NY N080395, dated November 6, 2009, is MODIFIED with regard to the tariff classification of the French Kiss™ Eskimo Tease Costume “leg covers” Styles 673S1139 XS, 6731140 S, 6731141 M and 6731142 L.

NY N003909, dated December 21, 2006, is MODIFIED with regard to the tariff classification of the Deluxe Pirate Costume (style M-1320-00) “boot tops.”

NY G88706, dated April 18, 2001, is MODIFIED with regard to the tariff classification of the Style #41028 Knight costume “boot covers.”

NY D85843, dated January 8, 1999, is MODIFIED with regard to the tariff classification of the Millennium Woman costume (style numbers 1032 and 1032H) “boot tops.”

NY D83322, dated October 29, 1998, is MODIFIED with regard to the tariff classification of the Cap’n Skulley Costume (style #136) “boot tops.”

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

Sincerely,

YULIYA A GULIS

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 21–64

GUIZHOU TYRE CO., LTD., and GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., Plaintiffs, CHINA MANUFACTURERS ALLIANCE LLC, SHANGHAI HUAYI GROUP CORPORATION LIMITED, and QINGDAO JINHAOYANG INTERNATIONAL CO., LTD., Consolidated-Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Consol. Court No. 19–00032
PUBLIC VERSION

[Final Determination sustained in part and remanded in part.]

Dated: May 19, 2021

Andrew T. Schutz, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY argued for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the brief were *Ned H. Marshak* and *Jordan C. Kahn*.

Matthew P. McCullough, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC argued for consolidated plaintiffs China Manufacturers Alliance LLC, Shanghai Huayi Group Corporation Limited and Qingdao Jinhaoyang International Co., Ltd. With him on the brief were *Tung Nguyen* and *Kimberly Reynolds*.

Kara M. Westercamp, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC argued for defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Daniel Calhoun*, Legal Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Phil (portrayed by Bill Murray): “Rita, I’m reliving the same day over and over.”¹

* * *

Reif, Judge:

This action arises from a challenge by plaintiffs, Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (together, “Guizhou” or “plaintiff”), consolidated plaintiffs China Manufacturers Alliance LLC (“CMA”) and Shanghai Huayi Group Corporation Limited (formerly Double Coin Holdings Ltd.) (“Double Coin”) (together, “consolidated plaintiffs”), and consolidated plaintiff Qingdao Jinhaoyang International Co., Ltd. (“Jinhaoyang”) (all collectively “plain-

¹ GROUNDHOG DAY (Harold Ramis/Columbia Pictures 1993).

tiffs”), to certain aspects of the final results published by the Department of Commerce (“Commerce”) of the underlying administrative review of the countervailing duty (“CVD”) order on *Truck and Bus Tires From the People’s Republic of China*, 82 Fed. Reg. 8,606 (Dep’t Commerce Jan. 27, 2017) (final determination) (“Final Determination”), as amended by *Truck and Bus Tires From the People’s Republic of China*, 84 Fed. Reg. 4,434 (Dep’t Commerce Feb. 15, 2019) (am. final determination) (“CVD Order”). Commerce’s findings accompanying its Final Determination were contained in an Issues and Decision Memorandum. Department of Commerce’s Issues and Decision Memorandum, PD 480 (Jan. 24, 2019) (“IDM”).

Plaintiff and consolidated plaintiffs filed motions for judgment on the agency record challenging the CVD Order with respect to: (1) Commerce’s issuance of the CVD Order; (2) Commerce’s determination to apply adverse facts available to certain previously unreported grants and loans by Guizhou just prior to and at verification; (3) Commerce’s decision to apply adverse facts available to the Export Buyer’s Credit Program; (4) Commerce’s calculation of benchmarks regarding ocean freight and import duties in relation to certain less than adequate remuneration (“LTAR”) findings; and, (5) Commerce’s use of Double Coin’s import purchase prices as a benchmark for synthetic rubber and butadiene. Mem. of Law in Supp. of Pls.’, Guizhou Tyre Co., Ltd., and Guizhou Tyre Import and Export Co., Ltd., Mot. for J. on the Agency R., ECF No. 39 (“Pl. Br.”); Consolidated Pls.’ Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 41 (“Consol. Pls. Br.”). Jinhaoyang filed a separate motion for judgment on the agency record challenging Commerce’s decision not to assign Double Coin’s cash deposit rate to Jinhaoyang. Jinhaoyang’s Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 36 (“Jinhaoyang Br.”). Defendant United States (“Government”) contends that the Final Determination is supported by substantial evidence and otherwise in accordance with law. Def.’s Resp. to Mot. for J. Upon the Administrative R., ECF No. 49 (“Def. Br.”).

For the reasons discussed below, the court is sustaining in part the Final Determination with respect to: (1) the issuance of the CVD Order and (2) Commerce’s application of adverse facts available to the loans presented at verification. The court is remanding in part the Final Determination with respect to: (1) Commerce’s decision to not assign Jinhaoyang a combination cash deposit rate; (2) Commerce’s application of adverse facts available to the grants presented at verification; (3) Commerce’s application of adverse facts available with respect to the Export Buyer’s Credit Program; (4) Commerce’s

adjustment of ocean freight and import duties; and, (5) Commerce's selection of actual import prices as a benchmark for synthetic rubber and butadiene.

BACKGROUND

On February 25, 2016, Commerce published its initiation of a countervailing duty investigation on truck and bus tires from the People's Republic of China ("PRC"). The period of investigation ("POI") was January 1, 2015, through December 31, 2015. *Truck and Bus Tires From the People's Republic of China*, 81 Fed. Reg. 9,428 (Dep't Commerce Feb. 25, 2016) (initiation of CVD investigation). Commerce selected Guizhou and Double Coin as mandatory respondents and required Jinhaoyang, an unaffiliated exporter of the subject merchandise produced by Double Coin, to participate in Commerce's investigation. IDM at 3,17; see Letter Pertaining to Comment on Final Determination Regarding Cash Deposit Rate for Jinhaoyang at 2, PD 482 (Jan. 25, 2017).

Between April 15, 2016, and June 23, 2016, Commerce received responses from the GOC and the mandatory respondents to Commerce's initial and supplemental questionnaires, including information related to potentially countervailable subsidy programs. Department of Commerce's Preliminary Decision Memorandum at 3, PD 342 (June 28, 2016) ("PDM"); see Department of Commerce's Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in part, and Alignment of Final Determination with Final Antidumping Determination Unpublished Federal Register, PD 341 (June 28, 2016) ("Preliminary Determination"). These programs included the Export Buyer's Credit Program ("EBCP") and the Government Policy Lending Program.

Commerce also investigated the provision of four inputs for LTAR: carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene. Commerce requested information from the GOC regarding the specific companies that produced the input products that Double Coin and Guizhou purchased during the POI. Specifically, Commerce asked the GOC for information that would allow Commerce to determine whether the producers were "authorities" within the meaning of section 771(5)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677(5)(B).² PDM at 9–10, 29. Guizhou and Double Coin reported that they purchased all four inputs during the POI. *Id.* at 29.

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

I. Preliminary Determination

On June 28, 2016, Commerce issued its Preliminary Determination. Commerce found, based on an analysis of monthly shipment data submitted by Double Coin and Guizhou, that “critical circumstances exist with respect to imports of truck and bus tires from the PRC for mandatory respondent [Guizhou],” Preliminary Determination at 3–4, but that critical circumstances did not exist with respect to exports from Double Coin and all other producers or exporters. PDM at 7–8. Commerce assigned a preliminary rate of 17.06% for Double Coin, a rate of 23.38% for Guizhou, and an all-others rate of 20.22%. Preliminary Determination at 5. Jinhaoyang was not included in the rate assigned to Double Coin. *Id.*

A. LTAR Benchmarks

Commerce found that the GOC did not act to the best of its ability in responding to Commerce’s requests for information about the ownership of the suppliers of carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene. Commerce found that the GOC did not provide any information on the record for Commerce to “analyze for purposes of determining whether [the input suppliers] are under the management or control of the GOC.” PDM at 10. Consequently, Commerce applied adverse facts available (“AFA”) to find that these suppliers were “authorities” within the meaning of 19 U.S.C. § 1677(5)(B), and as such, the provision of carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene constituted a financial contribution under 19 U.S.C. § 1677(5)(D)(iii). *Id.* at 29.

Because Commerce determined that the input suppliers were “authorities,” Commerce also found that prices from the suppliers did not constitute market-determined prices. *Id.* at 23. Thus, Commerce turned to comparative benchmarks for determining whether a government good or service was provided for LTAR. In determining benchmarks for carbon black, Commerce preliminarily found that the domestic market for carbon black was distorted and relied on world market prices as the Tier 2 benchmark. *Id.* at 23. For nylon cord, Commerce preliminarily relied on Chinese import prices as the Tier 1 benchmark. For natural rubber and synthetic rubber and butadiene, Commerce looked to actual monthly weighted-average import prices of natural and synthetic rubber reported by respondents during the POI as a basis for calculating Tier 1 benchmark prices. *Id.* at 24.

For all of these inputs, Commerce preliminarily included, when it considered that it was necessary, ocean freight and inland freight charges that would have been incurred to deliver the input to the

respondents' production facilities. *Id.* at 30. The benchmark prices were then compared to respondents' reported purchase prices for individual domestic transactions, including VAT and any delivery charges. *Id.* Based on this comparison, Commerce preliminarily found that all four inputs were provided for LTAR. *Id.*

B. Government Policy Lending

Commerce preliminarily found that there was a program of preferential policy lending specific to producers of truck and bus tires. Commerce found that the loans from the state-owned commercial banks ("SOCBs") under this program constituted a financial contribution pursuant to 19 U.S.C. § 1677(5)(B)(i) and 19 U.S.C. § 1677(5)(D)(i), because the SOCBs are authorities. *Id.* at 27.

C. Export Buyer's Credit Program

Commerce preliminarily determined that the EBCP provided no benefit to Double Coin and Guizhou based on their self-reporting that their customers did not use the financing available under the program. *Id.* at 40.

II. Final Determination

In its IDM, Commerce addressed arguments from the GOC, Guizhou and Double Coin regarding the Preliminary Determination on LTAR benchmarks, Government Policy Lending Program and the EBCP.

1. Less Than Adequate Remuneration Benchmarks

Commerce continued to use world market prices as the Tier 2 benchmark for carbon black, Chinese import prices as the Tier 1 benchmark for nylon cord, and respondents' import prices as the Tier 1 benchmark for natural rubber and synthetic rubber and butadiene. IDM at 18–19. Pursuant to Commerce regulations, past practice and prior court rulings, Commerce in the Final Determination continued to include freight and actual prices in the benchmarks, relying on data from Maersk for ocean freight rates. *Id.* at 37, 39.

2. Government Policy Lending

Commerce conducted verification of Guizhou from November 14, 2016, through November 18, 2016. Department of Commerce's Memorandum Pertaining to Guizhou Tyre's Verification Report at 1, CD 406; PD 449 (Dec. 12, 2016). In early November, just prior to verification, counsel for Guizhou informed Commerce of loans that the

company had not identified in its questionnaire responses.³ IDM at 13. At that time, Commerce informed Guizhou that Commerce would not accept the information at verification. Department of Commerce's Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016). At verification, Guizhou presented information on a number of grants that the company had not identified in its questionnaire response. IDM at 15. Commerce determined that Guizhou had failed to cooperate to the best of its ability and applied AFA to find that the unreported loans and grants constituted countervailable subsidies. *Id.* at 14–16.

3. *Export Buyer's Credit Program*

Commerce found that the GOC did not respond to Commerce's questionnaire with respect to the EBCP. In particular, the GOC refused to provide information to Commerce, including answers to questions regarding the involvement of third-party banks in the program, that Commerce considered essential to verifying the respondents' claims of non-use. *Id.* at 12. As a result, Commerce was unable to verify the respondents' claims and changed its Preliminary Determination, which had been based on those claims. *Id.* at 12–13. Accordingly, Commerce used AFA to find that there was a benefit for both Double Coin and Guizhou and assigned a subsidy rate based on AFA. *Id.* at 11–13, 20.

Commerce assigned final rates as follows: a rate of 38.61% for Double Coin, 65.46% for Guizhou, and 52.04% for all others. *See* Final Determination. No rate was assigned to Jinhaoyang, consistent with the Preliminary Determination. On February 15, 2019, Commerce published the amended CVD Order in the Federal Register and issued an amended subsidy margin of 20.98% for Double Coin, 63.34% for Guizhou, and 42.16% for all others. *Truck and Bus Tires From the People's Republic of China*, 84 Fed. Reg. 4,434, 4,435 (Dep't Commerce Feb. 15, 2019) (am. final determination). The amended CVD Order did not assign an individual rate to Jinhaoyang. *Id.*

STANDARD OF REVIEW

The court exercises jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain a determination by Commerce unless

³ Commerce records indicate that this communication occurred on November 8, 2016, Department of Commerce's Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016), while Guizhou maintains that counsel called Commerce on Tuesday, November 1, 2016, to notify Commerce of the bill discounting. Letter Pertaining to Guizhou Tyre Request for Reconsideration, CD 350; PD 433 (Nov. 11, 2016).

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 Tariff Act of 1930, as amended, Commerce will impose a countervailable duty if: (1) Commerce determines that a foreign government or public entity “is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States;” and, (2) the U.S. International Trade Commission (“the Commission”) determines that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded as a result of the subsidized imports. 19 U.S.C. § 1671(a). A subsidy is countervailable when a government or any public entity within a territory or country provides a contribution to a specific industry and a benefit is thereby conferred. *See* 19 U.S.C. § 1677(5)(B).

DISCUSSION

Plaintiffs challenge Commerce’s actions to: (1) issue the CVD Order immediately upon completion by the Commission of its determination on remand; (2) apply AFA to the loans and grants presented just prior to and at verification; (3) apply AFA to the EBPC; (4) calculate benchmarks measuring adequate remuneration for carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene; (5) select actual import prices as a benchmark for synthetic rubber and butadiene; and, (6) decline to assign Double Coin’s cash deposit rate to Jinhaoyang.

I. Commerce’s Issuance of the CVD Order

After Commerce issued its Final Determination, the Commission issued a negative final injury determination, which was appealed to this Court. *See* International Trade Commission’s Notice of Remand Determinations, PD 511 (Feb. 12, 2019) (“Notice of Remand Determinations”). The Court remanded the Commission’s original negative determination. *See United Steel Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int’l Union v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1328, 1339–40 (2018). On remand, the Commission reversed itself and issued affirmative injury determinations. *See* Notice of Remand Determinations. The Commission notified Commerce of its remand determination and noted that the determination was subject to ongoing appeal before the Court. *Id.* After the notification by the Commission of its remand determination,

Commerce issued the CVD Order. *Truck and Bus Tires from the People's Republic of China*, 84 Fed. Reg. 4,434 (Dep't Commerce Feb. 15, 2019) (am. final determination).

Plaintiff seeks review of Commerce's CVD Order on the grounds that the issuance of the CVD Order was premature and contrary to law. Pl. Br. at 44–45. The Government argues that Commerce properly issued the CVD Order in accordance with the statute and Commerce regulations and that the issuance of the CVD Order was consistent with the Federal Circuit's decision in *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374 (Fed. Cir. 2010). Def. Br. at 13–15. The court agrees with the Government and sustains Commerce's issuance of the CVD Order.

A. Legal Framework

19 U.S.C. § 1671e(a) governs the procedures of a CVD investigation. The statute provides that “[w]ithin 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority shall publish a countervailing duty order” 19 U.S.C. § 1671e(a). Commerce's regulations further establish that: “Not later than seven days after receipt of notice of an affirmative final injury determination by the Commission under section 705(b) or section 735(b) of the Act . . . the Secretary will publish in the Federal Register an ‘Antidumping Order’ or ‘Countervailing Duty Order’ that . . . [i]nstructs the Customs Service to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise, in accordance with the Secretary's instructions at the completion of each review” 19 C.F.R. § 351.211(b)(1).

Both plaintiff and the Government reference the Federal Circuit's decision in *Diamond Sawblades* as support for their respective arguments. Pl. Br. at 44–45; Def. Br. at 13–15. In that case, the Federal Circuit addressed the statutory interpretation of 19 U.S.C. § 1673e(a), which provides the procedures that Commerce is required to follow in antidumping (“AD”) investigations. *Diamond Sawblades*, 626 F.3d at 1378–1383. The Federal Circuit held that “the statutory scheme imposes a mandatory duty on Commerce to issue antidumping duty orders covering the subject entries upon being notified of the Commission's final determination” *Id.* at 1383; *see also* 19 U.S.C. § 1673e(a). Accordingly, the Federal Circuit determined that the U.S. Court of International Trade (“USCIT”) did not abuse its discretion in ordering Commerce to publish AD orders upon receipt of notice from the Commission of a final affirmative injury determination on remand

despite the pending litigation challenging the Commission's remand determination. *Diamond Sawblades*, 626 F.3d at 1383.

B. Positions of the Parties

Guizhou claims that Commerce's issuance of the CVD Order was not in accordance with *Diamond Sawblades* and seeks to distinguish the present case in two respects. First, Guizhou notes that the Federal Circuit affirmed the issuance of an AD order only after the USCIT affirmed the affirmative redetermination, not while the Commission's remand determination was still pending before the Court. Pl. Br. at 44. Second, Guizhou concedes that "the [Federal Circuit] in *dicta* indicated that the correct statutory procedure would have been to issue the AD order beforehand," *id.*; however, Guizhou argues that this language "was not a holding of the case and accordingly such dictum is not binding" on this Court. *Id.* (quoting *Zoltek Corp. v. United States*, 672 F.3d 1309, 1320 (Fed. Cir. 2012)).

Guizhou argues that the court should reconsider the "ill-advised *dicta*." *Id.* Guizhou maintains that because "all other trade redeterminations made on remand lack legal effect until affirmed by this Court," it is unreasonable for the CVD Order to have been issued before such affirmance. *Id.* Guizhou further claims that its argument is supported by the statutory language and judicial precedent. *Id.* at 44–45. (citing 19 U.S.C. § 1516a, 1673d, 1673e; *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990); *Hosiden v. United States*, 85 F.3d 589 (Fed. Cir. 1996)). In sum, Guizhou argues that, notwithstanding the *Diamond Sawblades dicta*, the court should find that Commerce prematurely issued the CVD Order "to avoid an inefficient result whereby remand determinations are given effect prior to judicial affirmance." *Id.* at 45.

The Government asserts that plaintiff's argument lacks merit. The Government maintains that "the operative language pertaining to the issuance of [CVD orders] in 19 U.S.C. § 1671e(a) mirrors that of 19 U.S.C. § 1673e(a)," which the Federal Circuit applied in *Diamond Sawblades*. Def. Br. at 15. Accordingly, the Government argues that the holding in *Diamond Sawblades* applies to CVD orders. *Id.* In addition, the Government argues that 19 C.F.R. § 351.211(b)(1) applies to both AD and CVD orders and requires Commerce to publish the order upon "receipt of notice of an affirmative final injury determination by the Commission." *Id.* (quoting 19 C.F.R. § 351.211(b)).

C. Analysis

Guizhou does not dispute the Government's claim that the relevant language for CVD orders in 19 U.S.C. § 1671e(a) mirrors the language

for AD orders in 19 U.S.C. § 1673e(a), which was at issue in *Diamond Sawblades*. Pl. Br. at 44–45; Pls.’ Reply Br., ECF No. 50 (“Pl. Reply Br.”) at 19; see *Diamond Sawblades*, 626 F.3d at 1376–1381. In addition, Guizhou does not dispute that 19 C.F.R. § 351.211(b)(1) does not distinguish between AD and CVD orders with regard to Commerce’s obligations to publish an order upon receipt of notice of an affirmative final injury determination from the Commission. *Id.* Rather, Guizhou seeks to distinguish the Federal Circuit’s decision in *Diamond Sawblades* from this case on the grounds that the Federal Circuit affirmed the issuance of an AD order *after* the USCIT affirmed an affirmative remand determination, not during ongoing litigation, as occurred here. Pl. Br. at 44. Plaintiffs assert that it was only in dicta that the Federal Circuit stated that the correct statutory procedure is for Commerce to issue an AD order *before* the USCIT rules on a remand determination. *Id.*

To address this issue, the court turns first to the meaning and scope of dicta. “Dicta” is an abbreviation for “obiter dicta,” the singular being “obiter dictum.” *Dictum*, BLACK’S LAW DICTIONARY (11th ed. 2019). Obiter dictum is defined as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” *Id.* Obiter dictum includes “a remark made or opinion expressed by a judge, in his decision upon a cause, ‘by the way’ — that is, incidentally or collaterally, and not directly upon the question before the court” *Id.* (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 304) (internal citation omitted). By contrast, *Black’s* defines a “holding” as a “court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision” or a “ruling on evidence or other questions presented at trial.” *Holding*, BLACK’S LAW DICTIONARY (11th ed. 2019).

The Government argues that the Federal Circuit’s holding in *Diamond Sawblades* is not dicta because the Federal Circuit addressed directly the issue of Commerce’s statutory duty to issue AD orders upon being notified of the Commission’s final determination. Def. Br. at 15. The court agrees with the Government.

In *Diamond Sawblades*, the Federal Circuit stated that the question before it was: “whether, in a case in which the Court of International Trade has remanded a negative injury determination to the Commission, and the Commission on remand has made an affirmative injury determination and notified Commerce of that determination, Commerce must issue antidumping duty orders and begin collecting cash deposits of the antidumping duties *while a challenge to the material injury determination is still pending before the courts.*”

Diamond Sawblades, 626 F.3d at 1378 (emphasis supplied). The Federal Circuit held that the statute requires Commerce to issue an AD order “when the Commission issues a material injury determination, regardless of whether that determination is made in the first instance or on remand, and regardless of whether there is any subsequent judicial review of that determination.” *Id.* at 1381.

The Federal Circuit’s statement was not an “incidental” comment or a judicial comment that was unnecessary to decide the case. *See dictum*, BLACK’S LAW DICTIONARY (11th ed. 2019). Rather, the Federal Circuit’s holding was a necessary statement of the law to address the specific question presented in the case and as such is not dicta. The Federal Circuit stated clearly that the statutory scheme imposes a mandatory duty on Commerce to issue an AD order upon notification of the Commission’s final determination, regardless of whether the determination is on remand or subject to judicial review. *See Diamond Sawblades*, 626 F.3d at 1381. If the Federal Circuit had limited its holding to affirming the sequence of events in the case (*i.e.*, the issuance of the AD order after the USCIT affirmed an affirmative redetermination), the holding would have been, at the minimum, an incomplete statement of the law. Applying this same principle to the circumstances in this case, the court holds that Commerce’s decision to issue the CVD Order is in accordance with law.

II. Commerce’s Application of Adverse Facts Available to Additional Loans and Grants Presented at Verification

On April 1, 2016, Commerce issued its initial questionnaire to the GOC, requesting information from Guizhou and Double Coin related to the Government Policy Lending Program. Countervailing Duty Investigation of Certain Truck and Bus Tires from the People’s Republic of China: Countervailing Duty Questionnaire (“Initial Questionnaire”), PD 122 (Apr. 1, 2016). The petitioner alleged that, under this program, the GOC “subsidiz[ed] producers of truck and bus tires through preferential loans at interest rates that [were] considerably lower than market rates.” PDM at 26. Commerce’s initial questionnaire required company respondents to identify affiliated companies by April 15, 2016, and to respond to program-specific questions by May 8, 2016. Initial Questionnaire at 1.

On April 15, 2016, Guizhou submitted its response to Commerce’s initial questionnaire identifying affiliated companies. Guizhou Tyre Affiliation Response, barcode 3459832–01 (April 15, 2016). On May 2, 2016, Guizhou sent a letter to Commerce requesting an extension to submit its program-specific responses to the questionnaire. Guizhou Tyre Initial Questionnaire Extension Request, bar code 3465661–01 (May 2, 2016). Commerce granted the extension in part and set a new

deadline of May 19, 2016. Request for Extension for Initial Questionnaire Response, bar code 3466094–01 (May 3, 2016). Guizhou submitted its responses for the program specific section of the initial questionnaire on May 20, 2016, after the deadline. Guizhou Tyre Program Specific Response, CD 210, 213; PD 238, 240 (May 20, 2016).

In its response, Guizhou reported having loans outstanding from SOCBs in China during the POI. *Id.* at 10–12; *see* PDM at 26. Commerce’s initial questionnaire also requested that respondents report “other subsidies,” including “any other forms of assistance” from the GOC related to subsidy programs not alleged or identified in the petition. Initial Questionnaire at 19; *see* IDM at 15. Guizhou answered that it had identified 114 government grants from 2003 to 2015. Guizhou Tyre Program Specific Response at 45–46, Exhibit P.F.1., CD 210, 213; PD 238, 240 (May 20, 2016); *see* Pl. Br. at 5. On June 10, 2016, Commerce issued a second supplemental questionnaire.⁴ Department of Commerce’s Second Supplemental Questionnaire for Guizhou Tyre, bar code 3477665–01 (June 10, 2016). In response to Commerce’s second supplemental questionnaire, Guizhou submitted a revised grant list. Letter Pertaining to Guizhou Tyre’s Second Supplemental Response, CD 280, 300–301 (June 24, 2016). In total, Guizhou reported “around 180 grants” in response to Commerce’s inquiries. Pl. Br. at 5, 17.

On October 28, 2016, following Commerce’s issuance of the Preliminary Determination, Commerce sent its Verification Outline⁵ to Guizhou, asking the company to identify any errors in its questionnaire responses. Department of Commerce’s Verification Pertaining to Guizhou Tyre, PD 420 (Oct. 28, 2016). The Verification Outline provided that the “verifiers will examine the errors to determine if they are minor. Further, depending upon the nature of the errors that you identify (*e.g.*, the discovery of unreported loans), you should contact the officials in charge prior to the start of verification.” *Id.* at 7.

Prior to verification, Guizhou determined that it had not reported commercial bill exchange discounting, which is a type of loan and a part of a program known as Government Policy Lending. Department of Commerce’s Memorandum Pertaining to Conversation with Coun-

⁴ Commerce issued its first supplemental questionnaire to Guizhou on May 6, 2016, to clarify Guizhou’s responses to Commerce’s initial questionnaire with regard to affiliated companies. Department of Commerce’s First Supplemental Questionnaire for Guizhou Tyre, bar code 3466800–01 (May 6, 2016).

⁵ The Verification Outline is an agenda sent by Commerce to respondents in advance of the verification. The Verification Outline informs respondents about the nature of the verification process, including the relevant documentation Commerce will review and the personnel Commerce will ask to speak to concerning the respondents’ questionnaire responses and other information on the record.

sel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016). In early November,⁶ two weeks prior to verification, counsel for Guizhou informed Commerce about the new loan program.⁷ *Id.*; see also Pl. Br. at 6–7. Commerce informed Guizhou that in light of the company’s failure to report the loan information that Commerce had requested, it would not verify Guizhou’s reported use of Government Policy Lending. Department of Commerce’s Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016). Guizhou objected to Commerce’s decision. *Id.*; see also Letter Pertaining to Guizhou Tyre Request for Reconsideration, CD 350; PD 433 (Nov. 11, 2016).

At verification, Guizhou presented information about the loans; however, Commerce declined to accept this information, maintaining Commerce’s decision not to verify Guizhou’s use of the program on account of Guizhou’s failure to report this information in response to Commerce’s initial or supplemental questionnaires. IDM at 13–14; Department of Commerce’s Memorandum Pertaining to Guizhou Tyre’s Verification Report at 2, CD 406; PD 449 (Dec. 12, 2016).

At verification, Guizhou also presented information about grants that were not reported in its responses to Commerce’s questionnaires. Department of Commerce’s Memorandum Pertaining to Guizhou Tyre’s Verification Report at 2, CD 406; PD 449 (Dec. 12, 2016). Commerce also declined to accept this information. *Id.* Commerce did not accept information concerning the amount of each grant, the date that it was received or the program under which it was provided. Letter Pertaining to Guizhou Tyre’s Pre-Verification Corrections (Rejected), CD 387; PD 442 (Nov. 23, 2016); Department of Commerce’s Memorandum Pertaining to Rejection of New Factual Information Filing by Guizhou Tyre, PD 445 (Nov. 29, 2016). Instead, Commerce noted simply the receipt of “more than 40 grants.” IDM at 15; see also Department of Commerce’s Memorandum Pertaining to Guizhou Tyre’s Verification Report at 2, CD 406; PD 449 (Dec. 12, 2016).

Commerce subsequently applied AFA to these unreported loans and grants. IDM at 13–16; Pl. Br. at 6–12. Commerce applied an AFA rate of 10.54% to Guizhou’s loans and used an AFA rate of 0.58% for each grant. IDM at 15. Because Commerce concluded that the record demonstrated that there were “more than 40” unreported grants,

⁶ See *supra* note 3.

⁷ Guizhou explained that the discovered financing consisted of “bill discounting,” which the company uses for “certain domestic sales wherein [Guizhou] received payment for goods sold by a commercial bill of exchange, which is a promise to pay in a specified amount of time. Guizhou sold these commercial bills of exchange to the bank at a discount to receive early payment and the bank retained a small fee taken off the total amount of the bill of exchange.” Letter Pertaining to Guizhou Tyre’s Request for Reconsideration, CD 350; PD 433 (Nov. 11, 2016).

Commerce multiplied the 0.58% rate by 41, resulting in a 23.48% *ad valorem* rate. *Id.* at 16.

A. Legal Framework

During a countervailing duty proceeding, Commerce requires information from the foreign government alleged to have provided a subsidy and the respondent company alleged to have received the subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014); *see also Essar Steel*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1296 (2010), *rev'd on other grounds by* 678 F.3d 1268 (Fed. Cir. 2012). Information submitted to Commerce during an investigation is subject to verification. 19 U.S.C. § 1677m(i)(1).

When a respondent (1) withholds information requested by Commerce, (2) fails to provide such information by the deadlines established by Commerce for submitting the information or in the form and manner requested, (3) significantly impedes proceedings, or (4) provides information that cannot be verified, Commerce shall “use the facts otherwise available in reaching the applicable determination under this subtitle.” 19 U.S.C. § 1677e(a)(2). Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available” in reaching a determination if Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1)(A). A respondent’s failure to cooperate to “the best of its ability” is determined by “assessing whether [the] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

When applying AFA, Commerce may use any information on the record, including information in the petition, a final determination or a previous administrative review. 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c)(1)-(2). Commerce is “not required to determine, or make any adjustments to, a countervailable subsidy rate . . . based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.” 19 U.S.C. § 1677e(b)(1)(B).

B. Positions of the Parties

Guizhou argues that Commerce should have accepted the information on grants and financing presented at verification, and, as such, Commerce’s refusal to accept the information and Commerce’s subsequent application of AFA to the subsidy programs was not in accor-

dance with law or supported by substantial evidence. Pl. Br. at 14–41. To support its claim, Guizhou puts forward four main arguments: (1) the grants were “discovered” subsidies and Commerce’s decision to reject the grant information presented at verification, and subsequently to apply AFA, was contrary to Commerce’s regulations and past practice; (2) even if the grants are not considered discovered subsidies, the grants together with the loans should have been accepted as “minor corrections;” (3) Commerce’s application of AFA to the grants and loans was unsupported by substantial evidence; and, (4) even if AFA was appropriate, Commerce failed to consider the statutory mandate of taking into account the totality of circumstances in calculating the AFA rate. *Id.*

1. Discovered Subsidies

Guizhou presents two main lines of argument with respect to discovered subsidies. First, Guizhou asserts that the statute and Commerce’s regulations provide that if subsidy programs not alleged by the petitioner are discovered during the course of a proceeding, Commerce has only two options for dealing with such programs — either include and investigate the subsidies in the proceeding or defer the investigation of the subsidies until a subsequent administrative review. Pl. Br. at 16–18 (citing 19 C.F.R. § 351.311). Guizhou maintains that Commerce has followed this approach for discovered subsidies in prior reviews. Pl. Br. at 19–21. Guizhou argues that the list of grants presented at verification was “related to subsidy programs that had not been alleged in this investigation,” and, therefore, “represented ‘discovered’ subsidies.” *Id.* at 18. Accordingly, Guizhou asserts that, in accordance with Commerce’s regulation and past practice, Commerce should have followed procedures set forth in 19 C.F.R. § 351.311 and either investigated the information on the grants provided at verification or deferred investigation of the programs until a subsequent review. *Id.* at 18–23.

On this basis, Guizhou disputes Commerce’s finding in the underlying proceeding that — by failing to report all of the grants in response to Commerce’s questionnaire requesting information on “other subsidies,” including information on “any other forms of assistance to your company” — Guizhou failed to provide timely information, and, as a result, the statute permitted Commerce to include the grants in the investigation and apply AFA. Pl. Br. at 21 (citing IDM at 61); *see Id.* at 22–23. *Id.*

Guizhou further argues that Commerce, by its own admission, had a practice with respect to subsidies discovered at verification and that Commerce has changed its practice since 2012. Pl. Br. at 24–25 (citing

IDM at 67); Oral Argument Tr. at 9–10. Guizhou argues that while Commerce is permitted to change the way in which it applies its regulations, this authority is not without limits. *Id.* at 24 (citing *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 CIT __, __, 625 F. Supp. 2d 1339, 1351–1356 (2009); *Shikoku Chems. Corp. v. United States*, 16 CIT __, __, 795 F. Supp. 417, n.8 (1992)). In particular, Guizhou submits that Commerce did not provide a valid reason for its change in practice. Pl. Br. at 24. Accordingly, Guizhou asks the court to conclude that, since that change is unexplained and is, therefore, arbitrary on its face, Commerce’s change in practice renders Commerce’s Final Determination contrary to law. *Id.* at 23–25.

Guizhou’s second argument is that Commerce can use facts otherwise available pursuant to 19 U.S.C. 1677e(a) only if there is necessary information missing from the record, thereby “creating a ‘gap’ on the record to be filled with facts available.” Pl. Br. at 32–33 (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (stating that “Commerce can only use facts otherwise available to fill a gap in the record”)). Guizhou asserts that because the grants were not alleged in the petition, the information regarding these grants was not “necessary information,” there was no gap in the record, and, therefore, Commerce’s application of AFA to the grants was contrary to law. *Id.* at 35.

Guizhou argues that Commerce’s position of requiring that respondents report all unalleged subsidies through Commerce’s “other assistance” question, and then applying AFA if respondents do not comply and unalleged programs are later discovered in the investigation, is contrary to law. Pl. Br. at 33–34; Pl. Reply Br. at 6–7. Guizhou asserts that 19 U.S.C. § 1671a limits Commerce’s inquiry to the “four corners of its initial investigation,” and does not include unalleged subsidies. Pl. Br. at 33.⁸

In response to Guizhou’s claims that Commerce in this case departed from a prior practice without adequate explanation, the Government asserts that the treatment of subsidies discovered at verification is a “fact-specific determination.” Def. Br. at 21. The Government denies that Commerce had a prior practice and states that: “Commerce has frequently relied on adverse inferences in making a finding on unreported potential subsidies discovered or ‘pre-

⁸ Guizhou argues that initiation procedures under 19 U.S.C. § 1671a require that each subsidy program alleged in a petition be supported by sufficient evidence. Pl. Br. at 34. Guizhou maintains that if respondents are required to report all unalleged subsidy programs, then “a petition would only need to include one sufficiently supported subsidy program in order to have Commerce initiate an investigation and then the burden would be on the respondent to report all unalleged subsidies received.” *Id.* Guizhou asserts that such a result was not intended by Congress or the World Trade Organization. *Id.*

sented’ at verification.” Def. Br. at 21 (citing IDM at 16, 67; *Super-calendered Paper From Canada*, 80 Fed. Reg. 63,535 (Dep’t Commerce Oct. 20, 2015) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 12–13, 153–155; *Certain Frozen Warmwater Shrimp From the People’s Republic of China*, 78 Fed. Reg. 50,391 (Dep’t Commerce Aug. 19, 2013) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 15–16, 75–78); *see also* Oral Argument Tr. at 5–7. The Government argues that had Commerce accepted or deferred the subsidies presented at verification, as suggested by Guizhou, Commerce would have created a “disincentive for parties to report all of the government assistance received” in response to Commerce’s questionnaires. Def. Br. at 21. The Government asserts that taking this approach would have hindered Commerce’s ability to consolidate all relevant subsidy programs into a single investigation. *Id.* at 20–21 (citing *Ansaldo Comptoni, S.p.A. v. United States*, 10 CIT 28, 36, 628 F. Supp. 198, 205 (1986)).⁹

In response to Guizhou’s second line of argument, the Government notes that Commerce specifically requested that Guizhou report “all forms of financing outstanding during the POI, not only traditional loans.” *Id.* at 18; *see also* Initial Questionnaire, Section III at 9. Commerce also asked respondents to report “other subsidies,” including other forms of assistance. Initial Questionnaire, Section III at 19. The Government maintains that this combination of both specific and broad requests is necessary and appropriate to satisfy the mandate of the CVD law to investigate all potential countervailing subsidies and “to consolidate all relevant subsidies into a single investigation.” Def. Br. at 19 (citing *Allegheny Ludlum Corp. v. United States*, F. Supp. 2d at 1150 n. 12). The Government argues that Guizhou’s failure to provide full and complete answers to Commerce’s requests for information justified Commerce’s application of AFA in accordance with 19 U.S.C. § 1677e(b). *Id.* at 22.

2. Minor Corrections

Guizhou next argues that even if the unalleged grants are not properly categorized as discovered subsidies, information about the grants, along with information about the bill discounting presented prior to verification, should have been accepted as “minor corrections”

⁹ Defendant cites to the section of the IDM that discusses discovered subsidies. Commerce explained that it has an “affirmative obligation” to “consolidate in one investigation all subsidies known by petitioning parties to the investigation or by the administering authority relating to that merchandise” to ensure “proper aggregation of subsidization practices.” IDM at 27 (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT __, __, 112 F. Supp. 2d 1141, 1150 n. 12 (2000)).

to information already on the record. Pl. Br. at 25. Guizhou submits that, upon receipt of the information about the loans and grants just prior to and at verification, Commerce was required to examine the “errors” to determine if they were minor and include the proffered information in Commerce’s Verification Report along with Commerce’s assessment as to whether the information constituted a minor correction. *Id.* at 26–27. Guizhou notes that these procedures were followed by Commerce in five prior instances.¹⁰ Pl. Br. at 27–28.

Guizhou maintains that by rejecting — and “removing” from the record — all information offered as minor corrections, Commerce prevented Guizhou from presenting an effective argument to the court that the information was not new factual information and was not required to be reported, or, in the alternative, that the grant and loan information provided by Guizhou constituted corrections that were, in fact, minor. Pl. Reply Br. at 11. Guizhou argues that Commerce’s rejection of the loans and grants at verification is subject to judicial review and urges the court to consider the rejected information, which Guizhou submitted in this proceeding in the form of the attachments to its Memorandum of Law in Support of Judgment on the Agency Record, to determine whether Commerce’s decision was supported by substantial evidence. Pl. Br., Attachments 1–4;¹¹ *see also* Pl. Reply Br. at 12–13 (citing *Eregli Demir v. Celik Fabrikalari T.A.S.*, 42 CIT __, __, 308 F. Supp. 3d 1297, 1328 (2018)).

Guizhou concedes that Commerce has discretion to decide whether to accept “corrective information” from respondents; however, Guizhou argues that if “Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce’s actions will have been arbitrary.” Pl. Br. at 31 (quoting *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003)). Guizhou notes that Commerce in the past has “contemplated” and accepted similar grants and bill discounting as minor corrections. Pl. Br. at 29–30.

¹⁰ *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea*, 77 Fed. Reg. 17,410 (Dep’t Commerce Mar. 26, 2012) (final determination countervailing duty (“CVD”) investigation) and accompanying Issues and Decision Memorandum at Comment 19; *53-Foot Domestic Dry Containers From the People’s Republic of China*, 80 Fed. Reg. 21,209 (Dep’t Commerce Apr. 17, 2015) (final determination CVD investigation); *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t Commerce Aug. 12, 2016) (final determination CVD investigation); *Certain Polyethylene Terephthalate Resin From the People’s Republic of China*, 81 Fed. Reg. 13,337 (Mar. 14, 2016) (final determination CVD investigation); *Certain Iron Mechanical Transfer Drive Components From the People’s Republic of China*, 81 Fed. Reg. 75,037 (Oct. 28, 2016) (final determination CVD investigation).

¹¹ In its Confidential Motion for Judgment on the Agency Record, Guizhou Tyre submitted six attachments. Two attachments are labeled “Attachment 1” and two attachments are labeled “Attachment 2”.

Moreover, Guizhou asserts that “Commerce abuse[s] its discretion [when it] refus[es] to accept updated data when there [i]s plenty of time for Commerce to verify or consider it.” Pl. Br. at 31 (quoting *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016) (citations omitted)).

The Government asserts that the new factual information proffered by Guizhou at verification cannot be accepted as “minor corrections,” as defined by Commerce’s Verification Outline, because the loans and grants do not “corroborate, support, and clarify factual information already on the record.” Def. Br. at 19 (quoting the Department of Commerce’s Verification Pertaining to Guizhou Tyre at 2, PD 420 (Oct. 28, 2016)). Accordingly, Commerce did not collect information on the loans and grants, noting that the bill discounting and “more than 40 grants” were presented and rejected by Commerce at verification. *Id.* at 19 (citing IDM at 15).

The Government maintains that Commerce’s decision to reject Guizhou’s untimely information was in accordance with law. The Government argues that Commerce is not permitted under its regulations to consider or keep on the official record of the proceeding any factual information that the Secretary rejects as untimely. Def. Br. at 18 (citing 19 C.F.R. § 351.302(d) and 19 C.F.R. § 104(a)(2)(iii)). The Government states that Guizhou informed Commerce about the loans “just prior to verification” and “long after the deadline for submitting such factual information.” *Id.* Similarly, the Government notes that Guizhou did not report certain grants in response to the initial questionnaire and instead presented this information at verification. *Id.* at 18–19. As a consequence, the Government maintains that Commerce properly rejected Guizhou’s presentation of the grants and loans at verification because this information was untimely and should have been included in Guizhou’s response to Commerce’s initial questionnaire. *Id.* at 19.

The Government further contends that Commerce properly rejected the untimely factual information about the loans and grants in accordance with 19 C.F.R. § 351.104(a)(2)(iii) and 19 C.F.R. § 351.302(d), because, as a respondent, Guizhou had the “burden of creating an adequate record to assist Commerce’s determinations,” but failed to do so. *Id.* at 23–24 (quoting *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 920, 890 F. Supp. 1106, 1110 (1995)). The Government maintains that Commerce was not obligated to collect or analyze the information that Guizhou submitted at verification, and that Commerce’s rejection of the loans and grants is consistent with the purpose of verification — “to verify the accuracy and completeness of

submitted factual information.” *Id.* at 22 (citing *Tianjin Mac. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1644, 353 F. Supp. 2d 1294, 1304 (2004), *aff’d* 146 F.App’x 493 (Fed. Cir. 2005) (citing 19 C.F.R. § 351.307(d)).

The Government further argues that the Court’s authority for judicial review is generally restricted to examining an administrative proceeding based on the record of that proceeding and, therefore, the court in this case should not consider the previously rejected information that was presented by Guizhou at verification. Def. Br. at 23–24.

3. Insufficient basis to apply AFA to missing information

The third argument that Guizhou presents is that Commerce had no basis to apply AFA. Pl. Br. at 36. Guizhou argues that for Commerce to rely on AFA, Commerce cannot simply determine that certain information was not on the record. Rather, Guizhou maintains that Commerce must also determine that a respondent has failed to cooperate by not acting to the best of its ability. *Id.* Guizhou asserts that the “best of ability” standard does not require perfection and “recognizes that mistakes sometimes occur.” *Id.* at 37 (quoting *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1352 (2015))¹². Guizhou presents various arguments to demonstrate that it cooperated to the best of its ability, including that Guizhou reported other subsidies in response to Commerce’s questionnaire.¹³

The Government argues that Commerce’s use of adverse facts available is supported by substantial evidence because Guizhou failed to provide by the established deadlines the requested information regarding the loans and grants. Def. Br. at 24–28. The Government contends that the purpose of 19 U.S.C. § 1677e is to “ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” *Id.* at 25 (citing Statement of Administrative Action for Uruguay Round Agreements Act, H.R. Reply No.

¹² The correct citation for the quoted text is *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 1315, 1356 (2015) (citations omitted).

¹³ Guizhou presents a number of additional arguments to demonstrate that it cooperated to the best of its ability: (1) AFA is not an appropriate remedy where “there was never any reason for Commerce to think . . . [the respondent’s] . . . data [were] false,” Pl. Br. at 37; (2) Guizhou was cooperative throughout the review and submitted thousands of documents to Commerce covering subsidies over a 14-year period, *Id.* at 29; (3) Commerce should not have applied AFA to the unreported loans because Guizhou never attempted to hide this information from Commerce, and, upon discovering the unreported loans in a separate account, promptly notified Commerce of the omission, *Id.* at 38; and (4) Guizhou did not report the loans because it did not consider the bill discounting to be loans since the bill discounting consists of money that the company was owed and was not treated as loans on the company’s books. *Id.* at 38.

103–316, vol. I, at 870 (1994)). Accordingly, the Government argues that “[b]y failing to cooperate and exhibiting inattentiveness and careless [sic] in not providing full and complete answers to Commerce’s inquiries,” Guizhou failed to cooperate to the best of its ability and, therefore, Commerce’s application of adverse facts available is in accordance with 19 U.S.C. § 1677e(b). *Id.* at 25.

4. Totality of the Circumstances

Last, Guizhou argues that Commerce did not consider the totality of circumstances in selecting the 23.78% AFA rate for unalleged grants and the 10.54% AFA rate for bill discounting. Pl. Br. at 39–41. Guizhou maintains that, with the exception of the loans and grants presented at verification, Guizhou was a “full cooperating respondent.” *Id.* at 29. Accordingly, Guizhou maintains, citing *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019), that Commerce did not consider the underlying facts of the case, including (a) that Guizhou was a “full cooperating respondent” and (b) “the seriousness of the conduct of the cooperating party.” Pl. Br. at 29, 39–41. Guizhou, therefore, asserts that the selected AFA rates were “punitive and aberrational.” *Id.* at 40.

The Government argues that Commerce’s selection of the highest AFA rate available was a reasonable exercise of Commerce’s “wide, though not unbounded, discretion to select adverse facts that will create the proper deterrent to non-cooperation with its investigations.” Def. Br. at 26 (citing *Papierfabrik*, 843 F.3d at 1380; *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002)). The Government argues that Commerce selected the AFA rate in accordance with Commerce’s three-step methodology for selecting AFA rates in CVD proceedings. *Id.* at 27. The Government notes that the Federal Circuit sustained this methodology as permissible under the previous iteration of the statute. *Id.*

The Government further asserts that *BMW* is not applicable to this case because that case involved an antidumping proceeding, not the application of the hierarchy for selecting an AFA rate in a countervailing duty proceeding at issue here. *Id.* at 28. The Government also notes that *BMW* involved a “much higher” AFA rate. *Id.* The Government maintains that the AFA rates in this proceeding are not “punitive, aberrational, or uncorroborated” and, as such, the court should sustain Commerce’s selected rates. *Id.* (quoting language from *BMW*, 926 F.3d at 1302).

C. Analysis

1. Whether Commerce's Treatment of "Discovered" Subsidies Was Contrary to Law

The court first addresses Commerce's treatment of the grants presented at verification. Guizhou argues that Commerce's rejection of the grants presented at verification and subsequent application of AFA to the programs was contrary to law because the grants were "discovered subsidies." Guizhou maintains that the grants presented at verification as minor corrections were not alleged in the investigation, and, therefore, the grants represented discovered subsidies. Guizhou argues that if information regarding unalleged subsidy programs is discovered or presented during an investigation then 19 C.F.R. § 351.311 provides Commerce with only two options — examine the subsidy in the ongoing review or defer the examination until the next review. Pl. Br. at 18. Guizhou asserts that Commerce has followed this practice in numerous prior cases and maintains that the regulation provides no third option for Commerce to apply AFA. *Id.* at 18–21.

Guizhou also challenges Commerce's practice of requiring respondents to disclose all "other subsidies," including subsidies that are not included in an allegation by the petitioner and subsequently applying AFA if the requested subsidies are discovered or presented later in the investigation. Specifically, Guizhou argues that Commerce's "other subsidies" question cannot be used to "circumvent" 19 C.F.R. § 351.311 and Commerce's statutory obligation to investigate discovered subsidies. *Id.* at 23. Guizhou asserts that unalleged subsidies are not "necessary information" for the investigation of the subsidies identified in the petition and, therefore, the lack of such information on the record is not "missing" and, as a result, AFA cannot be applied. *Id.* at 33–34.

The Government counters that Commerce has no standard practice for subsidies presented at verification. Oral Argument Tr. at 5. Citing *Supercalendered Paper from Canada* and *Certain Frozen Warmwater Shrimp from the PRC*, the Government asserts that the treatment of subsidies discovered at verification is a "fact-specific determination" and notes that Commerce has previously relied on AFA in making a finding on unreported subsidies discovered at verification. Def. Br. at 21 (citing IDM at 16, 67; *Supercalendered Paper from Canada*, 80 Fed. Reg. 63,535 (Dep't Commerce Oct. 20, 2015) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 12–13, 153–155; *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 78 Fed. Reg. 50,391 (Dep't Commerce Aug.

19, 2013) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 15–16, 75–78).

a. Whether Commerce Has Discretion to Apply Adverse Facts Available to Discovered Subsidies

The statute directs that when Commerce discovers a practice that appears to be a countervailable subsidy, but was not alleged in the petition, then Commerce “shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to merchandise which is the subject of the proceeding.” 19 U.S.C. § 1677d(1). The Court has recognized that the statute “vests [Commerce] with broad investigative discretion” and, further, that “Commerce’s inquiry concerning the full scope of governmental assistance provided by [a government] and received by Respondents in the production of subject merchandise was within the agency’s independent investigative authority pursuant to 19 U.S.C. §§ 1671a(a) and 1677d” *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1346 (2016) (“*Changzhou I*”).¹⁴ The Court has also determined that in adding 19 U.S.C. § 1677(d) to the Tariff of Act of 1930, Congress intended “to avoid ‘unnecessary separate’ investigations” and that Congress “clearly intended that all potentially countervailable programs be investigated and catalogued” *Allegheny*, 112 F. Supp. 2d at 1150 n.12 (citing Sen. Rep. No. 96–249, at 98 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 484). Accordingly, the Court reasoned that Commerce had an “affirmative obligation” under the statute to consolidate all potential subsidies within the scope of an investigation.¹⁵ *Allegheny*, 112 F. Supp. 2d at 1150 n. 12.

¹⁴ In *Changzhou*, the court dismissed a similar argument made by plaintiff that Commerce’s inquiry regarding forms of governmental assistance beyond those that were alleged in the petition was contrary to law. In addressing plaintiff’s argument that such an inquiry “unlawfully circumvented the initiation requirements” set forth in 19 U.S.C. § 1671a, the court explained that “nowhere does the statute contemplate that the Petitioner’s failure to include all known potential subsidies in its petition thereby waives Commerce’s own, independent authority to investigate such programs” *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1342 (2016).

¹⁵ In support of its decision to ask the “other subsidies” question, Commerce explained that “[p]ursuant to Section 775 of the Act, the Department has an ‘affirmative obligation’ to ‘consolidate in one investigation . . . all subsidies known by petitioning parties to the investigation or by the administering authority relating to the merchandise’ to ensure ‘proper aggregation of subsidization practices.’” IDM at 27. In the corresponding footnote, Commerce cites *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 112 F. Supp. 2d 1141, 1150 n. 12 (2000) and Section 775 of the Tariff Act of 1930. Neither *Allegheny* nor the Tariff Act of 1930 uses this language.

The Court has also established that it is Commerce, not the respondent, that determines which information to include in the investigation. *Ansaldo Componenti*, 628 F. Supp. at 205. Accordingly, Guizhou's contention that information regarding the unalleged grants was not "necessary" for Commerce's investigation — and, therefore, Commerce's application of AFA was invalid — is not supported by the statute.

Pursuant to the statute, when a respondent fails to provide information requested by Commerce by the deadline or significantly impedes a proceeding, Commerce "shall . . . use the facts otherwise available in reaching the applicable determination . . ." 19 U.S.C. § 1677e(a)(2)(B)-(D). The Statement of Administrative Action for the Uruguay Round Agreements Act ("SAA") also confirms that Commerce is required to "make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example . . . it was provided late." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 869 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209 ("SAA"). Commerce regulations further provide that Commerce "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that [Commerce] rejects . . ." 19 C.F.R. § 351.302(d)(1)(i). Further, if Commerce determines that a respondent has failed to act to the best of its ability to comply with Commerce's requests for information, the statute provides that Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). Accordingly, it is clear that Commerce has the authority to investigate subsidies not alleged in the petition, and, therefore, in circumstances in which Commerce requests information on unalleged subsidies and such information is not provided to Commerce by the established deadline, Commerce may reject this information and rely on the best information available.

In exercising its broad investigative discretion, Commerce in this case requested that Guizhou provide information about other forms of governmental assistance received during the POI beyond those alleged in the petition. In its response, Guizhou reported receiving more than 180 grants, but did not report all of its additional governmental assistance. Instead, Guizhou waited until verification to present to Commerce more than 40 additional grants. Under the statute, if Commerce determines that a party withholds information or fails to provide such information by the established deadline, Commerce must use "facts otherwise available" to fill in the gaps in the record.

See 19 U.S.C. § 1677e(a). By failing to provide the information by the requested deadline, Guizhou triggered the statute, and, therefore, Commerce's decision to turn to facts available is supported by record evidence. The question of whether it was reasonable for Commerce to draw an adverse inference from those facts requires an assessment of Guizhou's actions during the investigation, taking into account whether Guizhou complied to the best of its ability with Commerce's requests for information. This assessment will be discussed below, *infra* Section II.C.3.

b. Whether Commerce Deviated from Past Practice Without an Adequate Explanation

The next issues presented are whether (1) Commerce, in exercising the authority described above, had adopted a *practice* in the exercise of this authority, (2) if so, whether Commerce departed from that practice in the instant case and, (3) if so, whether that departure requires an adequate explanation.

Guizhou argues that Commerce did in fact have a practice, departed from that practice in this case and did not provide “a reasonable explanation as to why it depart[ed] therefrom.” Pl. Br. at 13 (citing *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–1284 (Fed. Cir. 2004)); *see also* Pl. Br. at 24. Guizhou argues that this change is arbitrary on its face and renders the Final Determination contrary to law. *Id.* at 24. In support of its contention, Guizhou cites eight Commerce determinations between 1998 and 2012, in which Commerce reviewed new information provided at verification and either countervailed the subsidies based on the information provided or deferred investigation until a subsequent administrative review. *Id.* at 19–21.¹⁶

Commerce in its IDM acknowledged that it had a practice and that the practice had “evolved over time,” notwithstanding the Govern-

¹⁶ *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,975 (Dep't Commerce Dec. 26, 2012) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 18; *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 Fed. Reg. 17,410 (Dep't Commerce Mar. 26, 2012) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at Comment 17; *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final results CVD investigation) and accompanying Issues and Decision Memorandum at Comment 26; *Certain Oil Country Tubular Goods from the People's Republic of China*, 74 Fed. Reg. 64,045 (Dep't Commerce Dec. 7, 2009) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 24; *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37,122 (Dep't Commerce June 23, 2003) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at Comment 21; *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India*, 67 Fed. Reg. 34,905 (Dep't Commerce May 16, 2002) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at “B. Programs Determined Not to Confer Subsidies”;

ment's claim that Commerce's treatment of subsidies discovered at verification is always a "fact-specific" determination. IDM at 67; Def. Br. at 21. Commerce explained that "since 2012, it has determined that the proper course of action when an unreported potential subsidy is discovered or 'presented' at verification is to rely on adverse inferences in making a finding on that potential subsidy." IDM at 67.

The court concludes that Commerce did, in fact, have a practice prior to 2013 for subsidies discovered at verification and that Commerce has modified its practice. The court further concludes that Commerce provided an adequate explanation for its change in practice. See *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856 (1983) ("*State Farm*").

The Federal Circuit has held that "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change." *SKF USA*, 630 F.3d at 1373; see *State Farm*, 463 U.S. at 42; see also *Save Domestic Oil, Inc.*, 357 F.3d at 1283. The Federal Circuit has determined that an agency's "adequate explanation" for its change in practice must "address important factors raised by comments from petitioners and respondents." *SKF USA*, 630 F.3d at 1373–1374.

In *SKF USA*, the Federal Circuit found that Commerce did not adequately explain its change of methodology after 16 administrative reviews. *SKF USA*, 630 F.3d at 1373–1374. Specifically, the Federal Circuit in *SKF USA* determined that, despite Commerce's explanation of the reasons that the change would serve legitimate objectives, Commerce did not fulfill its "obligation to address important factors raised" by the parties. *SKF USA*, 630 F.3d at 1373–1374. Therefore, the Federal Circuit held that Commerce failed to provide an "adequate explanation" for its change in practice because Commerce did not sufficiently explain the reason that the respondent's concerns about the change were unjustified or the reasons that the concerns were "outweighed by competing considerations." *Id.* at 1374.

In the case before the court, Commerce directly addressed Guizhou's concerns and provided reasons that Guizhou's arguments were outweighed by competing considerations. During the investigation, Guizhou argued that Commerce's refusal to accept information on the grants first presented at verification did not correspond with Commerce's practice of examining discovered subsidies if Commerce

Stainless Steel Plate in Coils from Italy, 64 Fed. Reg. 15,508 (Dep't Commerce Mar. 31, 1999) (final determination CVD investigation) at "IV. Other Programs Examined"; *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 40,474 (Dep't Commerce July 29, 1998) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at Comment 18.

concludes that “sufficient time” remains before the final determination. IDM at 66. Guizhou further argued that Commerce’s change in practice was arbitrary because Commerce did not provide an explanation for the change in practice either at the time of verification or in Guizhou’s Verification Report. *Id.*

In response to Guizhou’s expressed concerns, Commerce in the IDM addressed directly the reasons that Guizhou’s concerns were outweighed by competing considerations, including legitimate policy objectives for Commerce’s change in practice. *Id.* Commerce explained that if it were to accept information presented at verification, Commerce would be deprived of “the opportunity to conduct a full analysis and issue a Preliminary Determination and implement the relevant cash deposit requirements, that reflect the subsidies received by the respondents.” *Id.* at 67. In addition, Commerce explained that if it deferred the examination of the discovered subsidies until a subsequent review, the exclusion of the subsidies could result in Commerce reaching a negative determination, or, at a minimum, allow a respondent to secure a lower cash deposit rate and avoid the consequences of its non-cooperation. *Id.* at 67–68.

Therefore, Commerce provided an adequate explanation for its change in practice for subsidies discovered at verification because the explanation addressed Guizhou’s arguments by explaining the reasons that Guizhou’s concerns were outweighed by competing considerations (*i.e.*, to create an incentive for respondents to report all government assistance in response to Commerce’s requests for specific types of information).¹⁷

Finally, the court takes note that the Federal Circuit in *SKF USA*, quoting an earlier opinion, stated: “the antidumping statute is ‘highly complex’ and ‘[t]he more complex the statute, the greater the obligation on the agency to explain its position with clarity.’” *SKF USA*, 630

¹⁷ In its IDM, Commerce cited prior proceedings in which it applied AFA to unreported subsidies presented at verification. IDM at 67. The court takes no position as to whether, in any of the prior administrative reviews cited by Commerce, it provided a reasonable explanation for its change in practice regarding the treatment of subsidies discovered at verification. In prior proceedings, Commerce has “acknowledge[d] that the Department’s practice regarding assistance discovered during verification has varied in past cases” and found that the particular facts of the prior cases merited the application of AFA. *See, e.g., Supercalendered Paper from Canada*, 80 Fed. Reg. 63,535 (Dep’t Commerce Oct. 20, 2015) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 155; *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China*, 79 Fed. Reg. 76,962 (Dep’t Commerce Dec. 23, 2014) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 88; *see also Certain Frozen Warmwater Shrimp From the People’s Republic of China*, 78 Fed. Reg. 50,391 (Aug. 19, 2013) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 78. In the instant case, Commerce provided an adequate explanation for its decision to change its practice to allow Commerce to rely on adverse inferences when subsidies are discovered or presented at verification.

F.3d at 1373 (citing *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)). In this case, as noted, Commerce provided an adequate explanation for its change of practice. Nonetheless, bearing in mind the language of the Federal Circuit, the court would like to underscore that it is critical that Commerce provide a full and clear exposition of its reasoning in each antidumping or countervailing duty case and as to each issue. Such an explanation serves to vindicate most effectively the decisions of the agency, inform parties and the public of the basis of a decision, and offer the court the most complete record on which to review any contested determinations.

2. Whether Commerce’s rejection of the loans and grants as “minor corrections” was reasonable

Guizhou presents three arguments to challenge Commerce’s decision to reject the additional loan and grant information presented at verification as “minor corrections” to the information on the record. First, Guizhou argues that Commerce’s rejection of all information presented at verification foreclosed Guizhou from being able to argue that the grants and loans were indeed minor corrections. Pl. Br. at 26–29. Therefore, Guizhou argues that the court should consider the rejected information to determine whether Commerce’s actions were supported by substantial evidence. Pl. Reply Br. at 12–13. Second, Guizhou argues that by rejecting the grants and loans, Commerce deviated without a reasonable explanation from its past practice, in which Commerce accepted similar information as minor corrections. Accordingly, Guizhou argues, Commerce’s action in this case was arbitrary. Pl. Br. at 31 (citing *Consolidated Bearings*, 348 F.3d at 1007). Third, Guizhou argues that Commerce abused its discretion in refusing to accept the additional information at verification when Commerce had “plenty of time” to verify or consider the information. Pl. Br. at 31 (quoting *Papierfabrik*, 843 F. 3d at 1384). The court addresses each of Guizhou’s arguments in turn.

a. Commerce’s Rejection of the Loans and Grants as “Minor Corrections” is Subject to Judicial Review

Before determining whether the loans and grants presented at verification constitute new factual information or “minor corrections,” the court addresses first Guizhou’s argument that the court should include the previously rejected information in its review. Guizhou argues that Commerce’s decision to reject the information is subject to judicial review and requests that the court consider the proffered documents attached to Guizhou’s briefs to determine “whether Com-

merce’s rejection of [Guizhou’s] minor correction claim was supported by substantial evidence and conformed to law.” Pl. Reply Br. at 12–13.

The Government argues correctly that the court’s review is confined to the administrative record. 19 U.S.C. 1516a(b)(i); *see, e.g., Hyundai Steel Co. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1327, 1342 n.13 (2018). However, Commerce’s discretion to reject new factual information is not unbounded and is subject to judicial review. *See Eregli Demir*, 308 F. Supp. 3d at 1328 (explaining that “the court must have some basis upon which to review Commerce’s decision that the corrections ‘were not minor’”). Therefore, the court will examine whether the decision by Commerce to reject the loans and grants as not constituting “minor corrections” is supported by substantial evidence on the record.

b. Whether Commerce Was Required to Include on the Record Information Presented at Verification

Guizhou challenges Commerce’s refusal to include on the record the additional information regarding the loans and grants presented at verification on the grounds that Commerce was required to examine the nature of the “error” in conjunction with the magnitude of the change that the error would have caused to the subsidy margin. Pl. Br. at 26. Guizhou maintains that this information should have been included in the Verification Report, together with Commerce’s opinion as to whether the information constituted a minor correction.¹⁸ *Id.* Guizhou notes that these procedures were followed by Commerce in prior cases,¹⁹ and that Commerce’s failure to do so here “foreclosed

¹⁸ Guizhou fails to cite a provision in the statute or regulations that requires that Commerce follow these particular verification procedures.

¹⁹ In its brief, Guizhou argues that Commerce followed the aforementioned verification procedures in past administrative reviews; however, Guizhou does not cite the verification reports from the previous reviews. Pl. Br. at 27–28. In the cited prior reviews, Commerce examined whether the magnitude of change prevented a classification as a minor correction. *See, e.g., 53 Foot Domestic Dry Containers From the People’s Republic of China*, 80 Fed. Reg. 21,209 (Dep’t Commerce Apr. 17, 2015) (final determination CVD investigation). Nevertheless, neither the cited prior reviews nor Guizhou provides any detail as to whether Commerce actually followed in those earlier cases the verification procedures that Guizhou asserts Commerce should have followed in the present case. In the IDM for this case, Commerce did in fact assess the nature of the errors and the magnitude of change. With regard to the loans, Commerce stated that the “magnitude of the unreported financing exceeds what can be considered ‘minor.’” IDM at 60. With regard to the grants, Commerce explained that it did not accept the information about the grants because “each grant potentially represents an individual program” and the number of grants presented at verification was “extensive.” *Id.* Commerce further stated that “whether a program was used or not by a company is not ‘minor’ in the view of the Department.” *Id.* (citing *Certain Passenger Vehicle and Light Track Tires From the People’s Republic of China Final Affirmative Determination*; and *Final Affirmative Critical Circumstances Determinations, in Part*, 80 Fed. Reg. 34,888 (Dep’t Commerce June 18, 2015) (final determination CVD investigation) and accompanying Issues and Decision Memorandum).

[Guizhou’s] ability to argue that the new information was not new factual information, was not information that was required to be reported or, in any event, that the corrections were not minor.” *Id.* at 28. Guizhou maintains that if this information had been placed on the record, Guizhou could have demonstrated that the corrections were minor and were not countervailable subsidies. *Id.* at 29.

The Federal Circuit has explained that “[a]lthough Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with interested parties and not with Commerce.” *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). As the Government points out, Guizhou failed to submit the relevant information to Commerce in response to the initial questionnaire within the established timeline.²⁰ Instead, Guizhou reported the information about the bill discounting and grants just prior to and at verification. See Department of Commerce’s Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016); Department of Commerce’s Memorandum Pertaining to Guizhou Tyre’s Verification Report at 2, CD 406; PD 449 (Dec. 12, 2016). Pursuant to Commerce’s regulations, Commerce is not required to consider or retain in the official record of the proceeding untimely filed factual information. 19 C.F.R. § 351.302(d); 19 C.F.R. § 351.301(c)(1).

Nonetheless, there must be a basis in the record for Commerce’s finding that the loans and grants are not minor corrections and constitute untimely filed factual information. See *Eregli Demir*, 308 F. Supp. 3d at 1328. Accordingly, the court will examine whether there is substantial evidence in the record to support Commerce’s finding that the proffered information on the grants and loans did not reflect minor corrections, and, therefore, was properly rejected as new factual information.

Commerce’s regulations address the submission of new factual information.²¹ 19 C.F.R. § 351.301 provides that, when factual informa-

²⁰ Guizhou sought an extension from Commerce to file its questionnaire response, which Commerce granted. Request for Extension for Initial Questionnaire Response, barcode 3466094–01 (May 3, 2016). Commerce at the time informed Guizhou that, pursuant to 19 C.F.R. § 351.302, “the Department will not accept any requested information submitted after the deadline and reject such submission as untimely. In such a case, the Department may have to use facts available” *Id.* Despite Commerce’s admonition, Guizhou did not report to Commerce by the extended deadline all of Guizhou’s grant and loan information.

²¹ 19 C.F.R. § 351.102(b)(21) defines “factual information” as:

(i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

tion is submitted in response to questionnaires, “[t]he Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses . . . or untimely filed questionnaire responses.” 19 C.F.R. § 351.301(c)(1). Initial questionnaire responses are due “30 days from the date of receipt of such questionnaire,” and “supplemental questionnaire responses are due on the date specified by the Secretary.” 19 C.F.R. § 351.301(c)(1)(i)-(ii).²² The Federal Circuit has also held that “Commerce is free to correct any type of importer error — clerical, methodology, substantive, or one in judgment . . . provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections.” *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006).

This Court has noted the differences between the submission of “corrective information” and untimely new factual information. The court in *Goodluck India Limited v. United States*, noted that “this [C]ourt has held that Commerce abuses its discretion by rejecting ‘corrective information,’ which includes submissions ‘to correct information *already provided* [to Commerce] . . . or to ‘clarif[y] information *already in the record*’ . . . but not to ‘fill [] gap[s] caused by [a respondent’s] failure to provide a questionnaire response” *Goodluck India Limited v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1352, 1357–1358 (2019) (emphasis supplied) (citing *Fischer S.A. Comercio v. United States*, 34 CIT 334, 344–349, 700 F. Supp. 2d 1364, 1373–1377 (2010)).

With respect to loans, the record in this case is clear. Commerce in its initial questionnaire, requested that Guizhou “[r]eport all financing to your company that was outstanding at any point during the POI, regardless of whether you consider the financing to have been provided under the [Government Policy Lending Program].” Initial Questionnaire at 8. Commerce explicitly asked Guizhou to “[e]nsure

(ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;

(iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and.

(v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)-(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

²² Additionally, 19 C.F.R. § 351.301(c)(v) provides that factual information submitted to rebut, clarify or correct questions are due “[w]ithin 14 days after an initial questionnaire response and within 10 days after a supplemental questionnaire response has been filed with the Department.”

that [Guizhou] report *all forms of financing* outstanding during the POI, not only traditional loans. This includes, but is not limited to, interest expenses on bank promissory notes, *invoice discounting*, and *factoring of accounts receivable*.²³ *Id.* (emphasis supplied); see also IDM at 13–14. Guizhou ignored Commerce’s clear request and waited until just two weeks prior to verification to report all of its financing. See Department of Commerce’s Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016). Guizhou itself admitted that the company should have reported the bill discounting in its initial questionnaire response,²⁴ and as Commerce explained, Guizhou’s failure “to report an entire type of financing and the magnitude of the unreported financing exceeds what can be considered ‘minor’ under the instructions of the verification outline.” IDM at 60.

Guizhou also challenges Commerce’s decision in this case as inconsistent with previous Commerce decisions, arguing that Commerce has accepted similar submissions as “minor corrections” in the past. Pl. Br. at 30. However, the administrative proceedings on which Guizhou relies are not apposite.²⁵ For example, with respect to the unreported loans, Guizhou points to Commerce’s determination in *Multilayered Wood Flooring From the People’s Republic of China*. *Id.* In that determination, Commerce accepted new policy loans at verification as minor corrections because Commerce agreed that its in-

²³ In Commerce’s memorandum discussing its conversation with Guizhou’s counsel, Commerce explained that “[a]ccording to [counsel] the [discovered financing] represented the financial expense ‘fees’ that the company pays when it sells its ‘commercial bills of exchange,’ *i.e.*, its invoices, to the bank account.” Department of Commerce’s Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016). During the administrative review, Guizhou challenged Commerce’s conclusion that the financing related to invoices, Letter Pertaining to Guizhou’s Request for Reconsideration at 2, n.1 CD 350; PD 433 (Nov. 11, 2016); however, in its briefs, Guizhou itself uses the terms “bill discounting” and “invoice discounting” interchangeably to describe the discovered financing. See Pl. Br. at 2; see also Pl. Reply Br. at 11–14.

²⁴ During the administrative review, Guizhou acknowledged that the company “should have reported the [discovered financing] in the initial questionnaire, especially in light of the question in the Department’s questionnaire, which specifically requests the company to report all financing, including invoice discounting.” IDM at 61–62.

²⁵ In its brief, Guizhou cites the BOSTD Verification Report (Nov. 1, 2016), Biaxial Integral Geogrids from China (A-570-037) to support its assertion that Commerce has accepted as minor corrections the identification of new loans or bill discounting in prior decisions. Pl. Br. at 38. At the oral argument, Guizhou explained that the correct citation for the document is: Document Bar Code – 3518388. Oral Argument Tr. at 128; see *id.* at 56. The cited document is a redacted public version of the Verification Report which states that Commerce accepted certain loans presented by BOSTD at verification as minor corrections. Due to the redacted nature of the document, the court cannot determine the magnitude or nature of the loans Commerce accepted at verification and, therefore, cannot conclude that Commerce has previously accepted financing similar to the bill discounting at issue in this case as a “minor correction.”

quiry about the loans in its questionnaire was misleading. *Multilayered Wood Flooring From the People's Republic of China*, 84 Fed. Reg. 38,221 (Dep't Commerce Aug. 6, 2019) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 3; *see also* Pl. Br. at 30. By contrast, as noted, Commerce's request to Guizhou in this case was explicit and clear — Commerce requested information about bill discounting, stated expressly in the questionnaire that the form of financing represented by bill discounting represents a loan and Guizhou, notwithstanding Commerce's clear and explicit direction, claimed that it “did not consider the bill discounting to be loans.”²⁶

Contrary to Guizhou's argument, the additional loan information presented at verification does not comprise either “corrective information” or “minor corrections.” Commerce's verification instructions specifically stated that: “[v]erification is not intended to be an opportunity for the submission of new factual information. Information will be accepted at verification only when the information is requested by verifiers . . . to corroborate, support, and clarify factual information already on the record.” Department of Commerce's Verification Pertaining to Guizhou Tyre at 2, PD 420 (Oct. 28, 2016). Guizhou's information about the loans submitted at verification did not “corroborate, support and clarify factual information on the record;” rather, it was an attempt by Guizhou to fill gaps in the record caused by Guizhou's own failure to respond fully to Commerce's questionnaires.

Commerce's finding with regard to the loans is supported by substantial evidence. The presentation of an entire new category of loans more than six months after the deadline to submit this information on its face is not a minor correction. Accordingly, Commerce acted within its statutory discretion to uphold the enforcement of its deadline for new factual information and correctly rejected the untimely information presented just prior to verification. *See Tianjin*, 353 F. Supp. 2d at 1303–1304 (“Both the statute and the regulation underscore the breadth of Commerce's discretion in fashioning the temporal parameters of administrative proceedings, and force parties to submit information within a specified time frame in the interests of fairness and efficiency.”).

With respect to the grants, Commerce's rejection of the “more than 40 grants” as minor corrections is not supported by substantial evidence. Commerce explained that its officials at verification did not

²⁶ During the proceeding and in its brief, Guizhou also explained that it failed to report the bill discounting because the financing was located in a “discrete account,” separate from the expense accounts where Guizhou records the other loans that were reported to Commerce during the questionnaire stage. IDM at 59; Pl. Br. at 7–8.

collect any information about the grants beyond noting the receipt of information about the “more than 40 grants” because Guizhou had failed to provide this information in its responses to Commerce’s questionnaires. IDM at 15. Commerce found that the grants presented were not minor corrections because “presenting information about more than 40 potential individual programs at verification is extensive.” *Id.* at 60. However, neither the Verification Report nor the IDM provides any information regarding even the exact number of grants. At oral argument, the Government explained that Commerce acknowledged receipt of “at least 40” grants at verification but rejected the list²⁷ of grants presented as untimely information. Oral Argument Tr. at 70.

Given that Commerce rejected all of the information pertaining to the grants presented at verification, there is no information on the record to substantiate the number or amount of grants presented, notwithstanding that Commerce noted that there were “more than 40 grants.” IDM at 15, 65. Accordingly, Commerce’s finding that the number of grants was “extensive,” Commerce’s estimates of the size of each grant, and Commerce’s conclusion that the number and size of the grants presented could not constitute a minor correction are not supported by substantial evidence and are, accordingly, remanded.

c. Whether Commerce Had Sufficient Time to Verify the Information Presented at Verification

Guizhou’s final argument is that Commerce abused its discretion by refusing to accept the additional loans and grants when it had “plenty of time” to verify or consider the information. Pl. Br. at 31. Guizhou cites *Papierfabrik August Koehler v. United States*, *Timken U.S. Corp v. United States* and *NTN Bearing Corp. v. United States* to support its argument. *Id.* With respect to loans, the court does not find those cases to be persuasive in the instant case. With respect to grants, the court reserves judgment on this issue, consistent with the court’s conclusion that Commerce’s rejection of the grants as a “minor correction” is not supported by substantial evidence.

Guizhou notes correctly that in *Papierfabrik* the Federal Circuit confirmed its previous conclusions in *Timken U.S. Corp* and *NTN Bearing* that “Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify

²⁷ Commerce’s and the Government’s language is unclear even as to the form in which Guizhou proffered information as to the additional grants. In the IDM, Commerce does not refer to either a list or a chart; rather, Commerce mentions the presentation of the grants. At oral argument, the Government referred variously to a “list” and a “chart.” *See, e.g.*, Oral Argument Tr. at 71.

or consider it.” Pl. Br. at 31 (citing *Papierfabrik*, 843 F.3d at 1384). However, Guizhou ignores the fact that the Federal Circuit in *Papierfabrik* indicated that not all information must be accepted. *Papierfabrik*, 843 F.3d at 1384. The Federal Circuit noted that, unlike in *Timken U.S. Corp.* and *NTN Bearing*, respondents presented information that was “deficient, incomplete, and fraudulent,” and, therefore, held that Commerce did not abuse its discretion in rejecting data. *Id.*

In *Timken U.S. Corp.* and *NTN Bearing*, the information that was at issue involved clerical errors and a mis-categorization of home market sales.²⁸ These “errors” differ from Guizhou’s complete failure to report the requested financing. In addition, the Federal Circuit in both cases determined that Commerce had “plenty of time” to consider the information because the respondents in both cases submitted the information at the “preliminary results stage”. *Timken U.S. Corp.*, 434 F.3d at 1353-1354; see *NTN Bearing Corp.*, 74 F.3d at 1208. By contrast, in this case, respondents submitted the information about the financing at a much later stage of the investigation — just prior to verification. See Department of Commerce’s Memorandum Pertaining to Conversation with Counsel for Guizhou Tyre, CD 337; PD 430 (Nov. 8, 2016); see also IDM at 13–14.

In its IDM, Commerce rejected Guizhou’s argument that Commerce had “plenty of time to review the information,” explaining that: “By its own actions, in not providing this information until the outset of verification, Guizhou Tyre precluded the Department from fully investigating and verifying this information. . . . Accepting this information at this point in the investigation would be inconsistent with the statute’s mandate that the Department ‘shall verify all information relied upon in making . . . a final determination.’” IDM at 61 (quoting 19 U.S.C. § 1677m(i)).

Commerce’s explanation is reasonable. The statute requires that Commerce verify all information in reaching a final determination. 19 U.S.C. § 1677m(i). As noted, verification is not a forum for respondents to provide or for Commerce to accept or collect new factual information. See *Borusan Mannesmann Boru Sanyi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1349 (2015). The purpose of verification is to “verify the accuracy and completeness of submitted factual information.” 19 C.F.R. § 351.307(d). Further, section 1677m(g) provides that before Commerce makes a final determination, it “shall cease collecting information and shall provide the

²⁸ In *Timken U.S. Corp.*, respondent submitted new information to support the reclassification of seventeen “miscategorized” home market sales to a different channel of distribution. *Timken U.S. Corp.*, 434 F.3d 1345, 1347 (Fed. Cir. 2006).

parties with a final opportunity to comment on the information obtained by [Commerce] . . . upon which the parties have not previously had an opportunity to comment.” 19 U.S.C. § 1677m(g).

Therefore, accepting new information at verification would not only deprive Commerce of the opportunity to investigate and verify the information, but also deny parties the opportunity to review and comment on that information. Oral Argument Tr. at 8; see *Chefline Corp. v. U.S.*, 26 CIT 878, 882, 219 F. Supp. 2d 1303, 1308 (2002) (explaining that section 1677m(g) requires that the record be closed prior to the time the agency’s determination is made and that parties in the proceeding have the final opportunity to comment on all information obtained by the agency) (citations omitted).²⁹

3. Whether Commerce’s Application of AFA to the Loans and Grants Was Reasonable

Commerce’s finding that Guizhou did not act to the best of its ability to comply with Commerce’s requests for information and Commerce’s application of AFA to the Government Policy Lending Program was reasonable; however, Commerce’s application of AFA to the grants is not supported by substantial evidence on the record.

19 U.S.C. § 1677e provides that Commerce can apply “facts otherwise available” when a respondent: (1) withholds information requested by Commerce; (2) fails to provide such information by Commerce’s deadlines for submitting the information or in the form and manner requested; (3) significantly impedes proceedings; or, (4) provides information that cannot be verified. 19 U.S.C. § 1677e(a). Commerce may apply AFA when Commerce finds that one or more of the above circumstances exists and if Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information” 19 U.S.C. § 1677e(b)(1). A respondent’s failure to cooperate to “the best of its ability” is “determined by assessing whether [it] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp.*, 337 F.3d at 1382.

With regard to the loans, Commerce’s application of AFA was reasonable. Commerce specifically asked Guizhou to report all financing outstanding during the POI, including invoice discounting, regard-

²⁹ The SAA states that the statute “restates the existing right of interested parties to comment on information submitted to the agencies, but requires that the record be closed prior to the time the agency’s determination is made, and that the parties to the proceeding be permitted a final opportunity to comment on all information obtained by the agency upon which the parties have not yet had an opportunity to comment. All final comments properly filed by the date reasonably specified by the agency will be accepted for the record, but the agencies will not obtain or accept for the record new factual information, argument, or comment after this date.” SAA at 871.

less of whether Guizhou considered the financing to have been provided under the Government Policy Lending Program. Guizhou failed to provide Commerce with the requested bill discounting information by the established deadline. Accordingly, substantial evidence supports Commerce's decision to apply facts otherwise available.

Guizhou argues that record evidence demonstrates that it cooperated to the best of its ability. Specifically, Guizhou argues that it was a "full cooperating respondent" throughout the proceeding,³⁰ Pl. Br. at 29, and notes that the Court has determined that "a completely errorless investigation is simply not a reasonable expectation. Even the most diligent respondents will make mistakes, and Commerce must devise a non-arbitrary way of distinguishing among errors." Pl. Br. at 37 (quoting *Fujian Machinery and Equipment Importer & Export Corp. v. United States*, 25 CIT 1150, 1157, 178 F. Supp. 2d 1305 (2001)).

Guizhou is correct that the statute does not mandate an errorless review; however, the magnitude of information that Guizhou failed to report to Commerce until verification (*i.e.*, an entire category of financing) cannot be considered "negligible or inconsequential." *JTEKT Corp. v. United States*, 33 CIT 1797, 1854, 675 F. Supp. 2d 1206, 1255 (2009).³¹

Guizhou attempts to attribute its failure to report the loans to an internal accounting decision to file in separate accounts the financing and loan interest payments that Guizhou reported to Commerce.³² This argument is not persuasive. As the Federal Circuit has stated, the "best of its ability" standard does not require perfection; however, it "does not condone inattentiveness, carelessness, or inadequate re-

³⁰ Guizhou argues that it reported [] RMB in loans and informed Commerce about [] RMB in bill discounting just two weeks prior to verification. Pl. Br. at 26. Similarly, at verification Guizhou reported "more than 40 grants" in addition to the 180 grants the company reported in its responses to Commerce. IDM at 15.

³¹ In *JTEKT*, the Court accepted plaintiffs' argument that the statute does not require an errorless review. *JTEKT Corp. v. United States*, 33 CIT 1797, 1854, 675 F. Supp. 2d 1206, 1255 (2009). (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). However, the Court determined that record evidence demonstrated that plaintiff "provided Commerce incorrect information on physical bearing characteristics at a frequency (nineteen errors affecting sixteen out of forty models reviewed) that cannot be described as negligible or inconsequential." *Id.* Therefore, the Court concluded that plaintiff's reporting of the data "fell short" of the "best of its ability" standard established by the statute and interpreted by the Federal Circuit in *Nippon Steel. Id.*

³² Guizhou explains that it missed the bill discounting in the questionnaire preparation stage because Guizhou did not treat the financing as loans in its books. Instead, Guizhou located the bill discounting in a "discrete account not identifiable as interest in the company's audited financial statement." Pl. Br. at 38. Guizhou further explains that "[t]his sub-account was different and distinct from the interest expense account where [Guizhou] records the short-term and long term loan interest payments that [Guizhou] had reported in its questionnaire response." *Id.* at 7-8.

cord keeping.”³³ *Nippon Steel Corp.*, 337 F.3d at 1382. Maintaining in a separate database information repeatedly and expressly requested by Commerce, and then repeatedly not searching that database constitutes “inattentiveness, carelessness, or inadequate record keeping.” *Id.*

Guizhou had the capacity to provide Commerce with the information; notwithstanding this fact, the company failed to put forward its maximum effort to respond to Commerce’s requests for information, and, as a consequence, failed to provide information pertaining to an entire type of financing specifically requested by Commerce. Therefore, the record demonstrates that Commerce’s application of AFA to the loans was reasonable.

With regard to the grants, Guizhou argues that as the grants were not alleged, the information regarding these grants was not “necessary information,” preventing the application of AFA. Pl. Br. at 32–35. The court is not convinced by Guizhou’s arguments in this case and has already discussed and affirmed Commerce’s discretion to investigate and apply AFA to unalleged programs. *See* discussion of application of AFA to unalleged subsidies, *supra* Section II.C.1.

Guizhou puts forward two additional arguments to challenge Commerce’s application of AFA to the grants: namely, that (1) the record demonstrates that Guizhou cooperated to the best of its ability, Pl. Br. at 36–39; (2) Commerce had no factual information on which to base its AFA for any of the subsidy elements — specificity, financial contribution, and benefit, *id.* at 36.

Without information on the record regarding the grants, the court does not examine whether Guizhou failed to cooperate to the best of its ability. Therefore, the court defers the discussion of Commerce’s application of AFA to the grants until Commerce completes its remand determination.

4. Commerce’s selection of the highest AFA rate was reasonable

Guizhou argues that even if the court finds that Commerce’s application of AFA was appropriate, the selected AFA rates for the loans and grants is “punitive and aberrational.” Pl. Br. at 40. The Govern-

³³ The Federal Circuit in *Nippon* explained that the best of ability standard “assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce’s inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers’ ability to do so.” *Nippon Steel Corp.*, 337 F.3d at 1382 (emphasis supplied).

ment maintains that Commerce’s selection of AFA rates for loans and grants is in accordance with Commerce’s established hierarchy for selecting AFA rates in CVD proceedings. Def. Br. at 26–28. Guizhou does not challenge Commerce’s methodology but rather contends that, in selecting the 23.78% AFA rate for the grants and the 10.54% AFA rate for bill discounting, Commerce did not consider the “totality of circumstances” as required by the Federal Circuit in *BMW*, 926 F.3d at 1301. Pl. Br. at 39–41.

In its final determination, Commerce selected as AFA, consistent with 19 U.S.C. § 1677e(d) and its established practice, the highest calculated rate for the same or a similar program. IDM at 9. The Government argues that the statute accords Commerce the discretion to use the highest rate available in applying an adverse inference. Def. Br. at 26.

In applying this statute, Commerce has established a three-step methodology for selecting an adverse rate to be used in CVD proceedings: namely, (1) Commerce will use the highest calculated rate for the identical program in the same investigation (excluding zero rates); (2) if no such identical program exists in the investigation, Commerce will use the highest calculated rate for the identical program in another CVD proceeding involving the same country; and, (3) if no identical program exists, Commerce will use the highest calculated rate (excluding *de minimis* rates) for a similar or comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country. IDM at 9–10. The Federal Circuit upheld this hierarchy under the previous version of the statute.³⁴ *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373–74 (Fed. Cir. 2014).

This Court has recognized that § 1677e(d)(1) “codifies Commerce’s hierarchy for selecting a rate in an adverse facts available situation.” *POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1339 (2018). Commerce in this case followed the hierarchy. Therefore, the court’s analysis will focus on whether Commerce was required to consider the “totality of the circumstances” in selecting an AFA rate, and, if so, whether Commerce did so in this review.

The statute provides that in selecting an AFA rate Commerce “may apply any of the countervailable subsidy rates . . . including the

³⁴ The previous iteration of the statute did not include subsection (d)(3) which states that when Commerce “uses an adverse inference . . . in selecting from among the facts otherwise available, [Commerce] is not required . . . to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate . . . had cooperated; or to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.” 19 U.S.C. § 1677e(d)(3).

highest such rate or margin, based on the *evaluation* by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.” 19 U.S.C. § 1677e(d)(2) (emphasis supplied). The language of the statute clearly grants Commerce the authority to select the highest available rate, provided that Commerce considers the particular facts of the case when exercising such discretion.

The Federal Circuit in *BMW* found that it could not determine whether the AFA rate selected by Commerce was “unduly punitive” because Commerce failed to address the importer’s argument regarding its “mitigating circumstances.” *BMW*, 926 F.3d at 1302. The Federal Circuit held: “Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.” *Id.* The Federal Circuit further explained that the appropriate rate should not “impose punitive, aberrational, or uncorroborated margins”; rather, the AFA rate should “be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” *Id.* at 1300 (citing *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).³⁵

The Government argues that *BMW* is not applicable because that case involved an antidumping proceeding, and the instant case concerns the application of the hierarchy for selecting AFA rates in a CVD proceeding.³⁶ Def. Br. at 28. The Government’s argument ignores that the statute granting Commerce the discretion to use the highest rate applies to both countervailing duty and antidumping proceedings. The statute states that Commerce “may apply any of the *countervailable subsidy rates or dumping margins . . .* including the highest [AFA] rate. . . .” 19 U.S.C. § 1677e(d)(2) (emphasis supplied).

³⁵ In a dissenting opinion, Chief Judge Prost concluded that “the Majority has erred by imposing new, extra-statutory limits on the discretion that Congress granted to Commerce.” *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1303 (Fed. Cir. 2019) (Prost, C.J., dissenting in part). The Chief Judge noted that under the statute, Commerce is already required to consider fully the circumstances that lead to a respondent’s non-cooperation before Commerce can rely on an adverse inference. *Id.* The Chief Judge explained: “The statute does not require Commerce, contrary to the Majority’s view, to *reconsider* those facts and circumstances when selecting an appropriate, non-punitive AFA rate. . . . Nor does our case law contemplate an inquiry into the ‘seriousness of the conduct of the uncooperative party’ . . . when selecting a non-punitive AFA rate” *Id.* at 1303–1304 (emphasis in original).

³⁶ The Government asserts that the AFA rate selected in *BMW* was a significantly higher rate than was applied in this case, that the rates selected in this case are not “punitive, aberrational, or uncorroborated” and that “Commerce is at liberty to exercise its judgment and select a rate it finds appropriate to deter non-compliance.” Def. Br. at 28 (citing *BMW*, 926 F.3d at 1302).

Therefore, the Federal Circuit’s holding in *BMW*, which states that the appropriate AFA rate “will depend upon the facts of a particular case” and “reflects the seriousness of the non-cooperating party’s misconduct,” is applicable to countervailing duty proceedings. *See BMW*, 926 F.3d at 1301 (citations omitted).

Moreover, this Court has recognized that in applying the hierarchy to select an AFA rate in CVD proceedings, the statute requires that Commerce make “an evaluation of the specific situation And, at a minimum, Commerce must apprise the court of the basis for its findings in this regard.” *POSCO*, 296 F. Supp. 3d at 1349 (citing *NMB Singapore*, 557 F.3d 1316, 1319 (Fed. Cir. 2009)). The Court has previously sustained Commerce’s selection of the highest AFA rate using the established hierarchy because the Court determined that, based on the record as a whole, Commerce’s explanation provided a reasonably “discernable path” for how the agency selected the rate. *Rebar Trade Action Coal. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1371, 1381–1382 (2019) (citing *NMB Singapore Ltd.*, 557 F.3d at 1321–22).

Turning to the question of whether Commerce provided a reasonable explanation for its selection of the AFA rate with respect to the loans, the court concludes that Commerce did. In particular, Commerce provided its reasoning for using the selected rates. For the loans, Commerce initially selected the highest calculated rate for the same or similar program. IDM at 14. However, the highest rate for the identical program in the investigation was Double Coin’s rate in the Preliminary Determination, which was lower than the rate calculated for Guizhou in the Preliminary Determination. *Id.* Commerce found that using the lower rate for Guizhou would “undermine Congress’ intent ‘that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.’” *Id.* (citing SAA at 870). Instead, Commerce selected the highest non-*de minimis* rate for the comparable or a similar program in another People’s Republic of China proceeding and selected the 10.54% rate from *Coated Paper from the People’s Republic of China*. *Id.* at 14–15.

Notably, Guizhou does not challenge the AFA rates applied to the loans as “punitive, aberrational, or uncorroborated.”³⁷ *See BMW*, 926 F.3d at 1301; *see also De Cecco*, 216 F.3d at 1032. Guizhou does not identify an alternative AFA rate that Commerce could have selected using its established hierarchy, nor does Guizhou propose a way in

³⁷ Guizhou’s argument against Commerce’s selection for the highest AFA rates focuses on the AFA rate selected for the grants. Pl. Br. at 39–41; Pl. Reply Br. at 14–16. Guizhou’s briefs do not directly challenge the AFA rate selected for the loans as punitive and aberrational. *Id.*

which Commerce may have selected a lesser non-*de minimis* rate after a consideration of the “totality of the circumstances.” Pl. Br. at 39–41; Pl. Reply Br. at 14–16; see *Rebar Trade*, 389 F. Supp. 3d at 1381.³⁸

Commerce explained that it applied AFA to the loans because Guizhou failed to report an entire type of financing in response to Commerce’s questionnaires. IDM at 14. Commerce further explained that it selected the AFA rate for the loans based on its established hierarchy and found that the 10.54% rate from *Coated Paper from the People’s Republic of China* was the “highest calculated rate for a similar program in another China CVD proceeding.” *Id.* Therefore, based on the record as a whole Commerce provided a reasonable explanation for its selection of the 10.58% AFA rate.

With regard to the grants, as the court is remanding Commerce’s application of AFA to these programs, the court defers consideration of the selection of the AFA rate applied to the grants.

III. Export Buyer’s Credit Program

The Export Buyer’s Credit Program (“EBCP”) of the People’s Republic of China Export-Import Bank (“China Export-Import Bank”) is a program that extends credit at preferential rates to foreign importers to promote the export of Chinese goods. See Administrative Measures of Export Buyer’s Credit of EIBC, Exhibit II.B.11.a (English trans.), bar code 3471115–11 (May 19, 2016) (“The export buyer’s credit managed by [the China Export-Import Bank] is an intermediate and long-term credit to foreigners, used for importers making payment at sight for goods to Chinese exporters, which may promote export of goods and technology services.”); see also *SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 1362, 1363 (2017) (noting that the China Export-Import Bank provides “preferential rates” under the EBCP); *Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1347 (“*Clearon I*”).

In the investigation, Commerce examined whether respondents, Double Coin and Guizhou, benefited from the EBCP. In pursuit of this examination, Commerce presented several rounds of requests for information from the GOC and the mandatory respondents. IDM at 11–13.

Turning first to the GOC, Commerce in its initial questionnaire, asked the GOC to “provide the information requested in the Standard Questions Appendix with regard to all types of financing provided by

³⁸ The Government at oral argument asserted that there is no basis in law for Guizhou’s argument that since it provided *some* information that Commerce should have weighed that positive behavior against Guizhou’s failure to provide certain other information. See Oral Argument Tr. at 61–62.

the [China Export-Import Bank] under the Buyer Credit Facility and other state-owned banks.” Initial Questionnaire, Section II at 7. In its response, the GOC provided none of the information requested and simply asserted, without substantiation, that “none of the U.S. customers of the respondents used the Export Buyers [sic] Credits from China Export-Import Bank during the POI.”³⁹ Letter Pertaining to the GOC’s Response to Section II of CVD Questionnaire at 23, CD 106, CD 160; PD 176, PD 204 (May 19, 2016).

Commerce sought and obtained information on the record from sources other than the GOC that the China Export-Import Bank had revised the EBCP in 2013 to eliminate the threshold requirement limiting the provision of Export Buyer’s Credits to business contracts exceeding USD 2 million. IDM at 11. Commerce also obtained information on the record from sources other than the GOC that indicated that the China Export-Import Bank was permitted to “disburse Export Buyer’s Credits directly or through a third party partner and/or correspondent banks.” *Id.* at 12.

Based on this information, Commerce issued a supplemental questionnaire in which it asked the GOC to provide documents pertaining to the 2013 *Administrative Measures* revisions and confirm whether the China Export-Import Bank extended credit through third-party banks, and, if so, to identify all participating banks. *Id.* at 11–12. In response, the GOC again failed to provide any documents related to the 2013 revisions, explaining that the “Export-Import Bank of China has also confirmed to the GOC that its 2013 internal guidelines/ revised Administrative Measures are internal to the bank, non-public, and not available for release.” GOC Second Supplemental Questionnaire Response at 2, PD 392 (Sept. 26, 2016). The GOC also stated that Commerce’s questions related to the disbursement of Export Buyer’s Credits through third-party banks were “not applicable” because “none of the U.S. customers of the respondents used the Export Buyer’s Credit from [the China Export-Import Bank] during the POI . . .” *Id.* Commerce found that the GOC’s responses to the questionnaires demonstrated that the GOC refused to provide the information about the internal administration of the EBCP. IDM at 13.

Turning next to Double Coin and Guizhou, both asserted in response to Commerce’s questionnaires that none of their U.S. custom-

³⁹ The GOC explained that it “checked with the mandatory responding companies regarding the usage information of the alleged program.” Letter Pertaining to the GOC’s Response to Section II of CVD Questionnaire at 23, CD 106, CD 160; PD 176, PD 204 (May 19, 2016). However, the GOC provided no further information as to how it confirmed non-usage of the Export Buyer’s Credit Program (“EBCP”) with the respondent companies. *See id.*

ers had used the EBCEP and the two respondents provided signed self-certifications from each of their customers attesting to non-use of the program. *Id.* at 28–29. However, absent the requested information from the GOC that it had refused to provide, Commerce concluded that it did not have a basis on the record, including the self-certifications provided by the respondent companies, to verify non-use.⁴⁰ *Id.* at 30–33. Accordingly, Commerce found that the GOC did not cooperate to the best of its ability and applied AFA to find that Guizhou and Double Coin used and benefited from the program. *Id.* at 13.

A. Legal Framework

As discussed in the prior section, during CVD proceedings, Commerce requires information from the respondent foreign government alleged to have provided the subsidy and the respondent company alleged to have received from the subsidy. *See* discussion of legal framework for AFA *supra* Section II.A. When necessary information is not available on the record, or a respondent significantly impedes an investigation, provides information that cannot be verified, or withholds or fails to provide Commerce with the requested information by the set deadline, then the statute directs Commerce to “use facts otherwise available in reaching the applicable determination.” 19 U.S.C. § 1677e(a); *see* discussion of legal framework for AFA *supra* Section II.A. Commerce may use an adverse inference in selecting from the facts available if Commerce finds that the respondent “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 “best of its ability” standard is “determined by assessing whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp.*, 337 F.3d at 1382.

A government’s failure to provide information can constitute a failure to cooperate to the best of its ability. *See Fine Furniture*, 748 F.3d at 1368. When a foreign government does not cooperate with Commerce’s investigation, an inference adverse to the interests of the

⁴⁰ Commerce explained that without the requested information:

[T]he Department determined that the information provided by the GOC on the record about this program was incomplete and that our understanding of this program was unreliable. As such, we recognized that we could not rely on information about this program provided by parties other than the GOC, *i.e.*, the respondents. Therefore, while we did consider the customer certifications provided by the respondents, without a complete and verifiable understanding of the program’s operation, especially with regard to the involvement of third party banks, the information provided by the respondents is also unverifiable.

IDM at 30.

non-cooperating government respondent may collaterally affect a respondent company, even if the respondent company was otherwise cooperative. *See id.* at 1373 (“Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce’s questions, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court’s precedent.”).

However, this Court has recognized that in such circumstances the application of AFA “may adversely impact a cooperating party, although Commerce should seek to avoid such impact if relevant information exists elsewhere on the record.” *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013). The Court has also held that: “To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter non-cooperation or ‘simply to punish’ — would make the agency’s determination based on an incomplete (and therefore, inaccurate) account of the record; that is a fate this court should sidestep.” *Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (“*Guizhou I*”).

B. Positions of the Parties

Plaintiffs argue that despite the GOC’s non-cooperation, Commerce could have verified non-use of the EBCP by relying on information provided by respondents during the proceeding. Pl. Br. at 41–43; Consol. Pls. Br. at 11–13. Plaintiffs maintain that Guizhou, Double Coin and their U.S. customers cooperated fully throughout the review. Plaintiffs note that Double Coin and Guizhou responded to Commerce’s inquiries and submitted information that none of their customers used the EBCP. *Id.* Double Coin and Guizhou maintain that they confirmed non-use of the program by contacting each of their U.S. customers and obtaining signed self-certifications of non-use of the program. *Id.*

Plaintiffs argue further that the Court has held repeatedly that Commerce’s failure to verify evidence of non-use of this program renders Commerce’s application of AFA unsupported by substantial evidence.⁴¹ Pl. Br. at 41; *see also* Consolidated Plaintiffs’ Reply Brief (“Consol. Pls. Reply Br.”) at 4. Plaintiffs argue that the Court has held

⁴¹ *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, 43 CIT __, 405 F. Supp. 3d 1317 (2019); *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 399 F. Supp. 3d 1346 (2019); *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 389 F. Supp. 3d 1315 (2019); *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344 (2019); *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316 (2018); *Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, 348 F. Supp. 3d 1261 (2018).

that it would be inappropriate for Commerce to apply AFA simply to punish the government's non-cooperation when relevant evidence exists elsewhere on the record. Pl. Br. at 42–43 (citing to *Changzhou Trina Solar Energy Co.*, 41 CIT __, __, 255 F. Supp. 3d 1312, 1313 (2017); *Guizhou I*, 348 F. Supp. 3d at 1270). Plaintiffs urge the court to make the same determination in this case. *Id.* at 43.

The Government argues that Commerce properly applied AFA in this case to determine that Guizhou's and Double Coin's customers used the EBCP because the GOC's failure to cooperate prevented Commerce from obtaining information necessary to verify non-use of the EBCP. Def. Br. at 38–39. The Government also argues that Commerce noted that the record indicated that the GOC amended the EBCP in 2013, and, based on this information, Commerce specifically asked the GOC to provide documents pertaining to the 2013 program revision. *Id.* at 38. The Government notes that the GOC did not provide the documents, nor did the GOC provide the information that Commerce requested in the Standard Questions Appendix to Commerce's Initial Questionnaire concerning "all types of financing provided by the [China Export-Import Bank] under the Export Buyer's Credit Facility and other state-owned banks." *Id.* (quoting Letter Pertaining to GOC's Supplemental Questionnaire Response Part 2 at 7, CD 323, CD 324; PD 398, PD 399 (Oct. 3, 2016)).

The Government argues that by failing to respond fully to Commerce's questions, the GOC did not provide the information necessary to permit Commerce to determine whether the EBCP provided a financial contribution or was specific. *Id.* at 39. Accordingly, Commerce found that the GOC did not cooperate to the best of its ability and determined, as AFA, that the EBCP "constitutes a financial contribution and meets the specificity requirements" under the statute.⁴² IDM at 13. Similarly, due to the GOC's failure to respond to Commerce's requests for information about the operation of the program, Commerce found that the plaintiffs used and benefitted from the program because the companies' claims of non-use of the program were unverifiable. Def. Br. at 39–40.

The Government asserts that Commerce considered all of the record information, including respondents' customer certifications of

⁴² Commerce has explained that "in instances in which the foreign government fails to adequately respond to [Commerce's] questionnaires, it is [Commerce's] practice to apply adverse inferences and assume that the alleged subsidy programs constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively." *Countervailing Duty New Shipper Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 Fed. Reg. 9,993 (Dep't Commerce Feb. 25, 2008) (final results CVD new shipper review) and accompanying Issues and Decision Memorandum at Comment 2.

non-use, but Commerce found that this information could not be verified because the GOC refused to cooperate and, thereby, failed to provide critical information. *Id.* at 40. The Government notes that the Court has previously held that only the GOC, and, in particular, the China Export-Import Bank, could provide the information necessary to determine whether respondents or their customers received a benefit from the EBCP during the period of review (“POR”). *Id.* at 36 (citing *Changzhou I*, 195 F. Supp. 3d at 1355). The Government argues further that, without the requested information, the GOC’s “unsubstantiated claim that the companies did not use the [EBCP] was not verifiable,” and, therefore, Commerce’s determination to apply AFA to find that Guizhou and Double Coin used and benefited from the program was supported by substantial evidence. *Id.* at 38–39.

C. Analysis

The Court has issued multiple opinions addressing Commerce’s use of adverse facts available to find that a cooperating party benefited from the EBCP because of the GOC’s failure to provide information requested by Commerce. *See, e.g.*, the line of cases captioned *Clearon Corp. v. United States*;⁴³ the line of cases captioned *Guizhou Tyre Co. v. United States*;⁴⁴ the line of cases captioned *Changzhou Trina Solar*

⁴³ *See Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1359–1360 (2019) (remanding to Commerce, noting that Commerce failed to explain why the information it sought related to the “inner workings” of the EBCP was “necessary to make a determination of whether the manufacture, production, or export of [respondent’s] merchandise has been subsidized”); *Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339, 1353 (2020) (remanding to Commerce, noting that Commerce explained the reason that it wanted the withheld information, but failed to make clear that “missing information was necessary” to determine whether the EBCP provided a benefit to the respondent); *Clearon Corp. v. United States*, Slip Op. 21–56, 2021 WL 1821448, at *2–3 (CIT May 6, 2021) (sustaining Commerce’s decision to accept, under protest, respondents’ claims of non-use).

⁴⁴ *See Guizhou Tyre Co. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1271 (2018) (remanding, holding that “Commerce had a clear path to find non-use by either accepting the declarations submitted by Plaintiffs and their U.S. customers or by verifying these declarations. Instead, Commerce has chosen a more convoluted route in substituting facts derived from the record with its own unsupported conclusions.”); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1346, 1350–1353 (2019) (remanding, noting that Commerce failed to explain the reason that the changes to the EBCP’s operation prevented Commerce from verifying claims of non-use); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) (remanding, explaining that Commerce must attempt verification before concluding that there is a “gap” in the record); *see also Guizhou Tyre Co. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1315, 1322 (2019) (remanding, explaining that Commerce did not explain why the respondents’ responses and customer declarations were unverifiable, or explain why the information about the EBCP’s operation was necessary to verify claims of non-use); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1342 (2019) (remanding, ordering Commerce “to pursue verification of the non-use affidavits on record from Plaintiffs; otherwise, as it stands, the Department’s use of adverse facts available to impute use of the EBCP is unlawful on the record of this case”);

Energy Co. v. United States;⁴⁵ the line of cases captioned *RZBC Grp. Shareholding Co. v. United States*;⁴⁶ the line of cases captioned *Yama Ribbons and Bows Co. v. United States*;⁴⁷ and, the line of cases

Guizhou Tyre Co. v. United States, 44 CIT __, __, 447 F. Supp. 3d 1373, 1376 (2020) (sustaining Commerce's Second Redetermination, determining that Commerce's conclusion that the factual record indicated non-use of the EBCP by Guizhou was supported by substantial evidence).

⁴⁵ Compare *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1355 (2016) (upholding Commerce's use of AFA because the GOC denied Commerce access to the China Export-Import bank records and Commerce explained that it was left without a means to verify non-use, but where there were no customer certifications of non-use on the record) with, *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1327 (2018) (remanding, holding that Commerce must explain "if and how certifications of non-use are unverifiable in the absence of the GOC's cooperation"); *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 19-137, 2019 WL 5856438, at *4 (CIT Nov. 8, 2019) (remanding, noting that the court "cannot sustain Commerce's determination that verification would be impossible or unduly onerous" because "it is still not entirely clear to the court that the missing information is required to effectively verify respondent's non-use of the program"); and, *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1287, 1291-93 (2020) (sustaining Commerce's decision to accept, under protest, respondents' claims of non-use, but noting that the court on remand directed Commerce and interested parties to collaborate to find a way for Commerce to verify the claims); see also *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 18-167, 2018 WL 6271653, at *3 (CIT Nov. 30, 2018) (remanding, noting that "Commerce does not explain why it was necessary for it to fully understand the EBCP in order to ascertain claims of non-use."); *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 19-143, 2019 WL 6124908, at *3 (CIT Nov. 18, 2019) (remanding, explaining that "[a]lthough Commerce has shown that the GOC failed to answer certain questions regarding the EBCP's operation, it is still not entirely clear to the court that the missing information is required to effectively verify respondent's nonuse of the program. . . . Commerce needs to at least attempt to verify the certifications of non-use in this case."); *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 20-109, 2020 WL 4464251, at *3 (CIT Aug. 4, 2020) (sustaining Commerce's decision on remand to accept the claims of non-use under protest, but noting that the court did not order this result and "Commerce has not persuaded the court that verification is impossible . . .").

⁴⁶ See *Yama Ribbons and Bows Co. v. United States*, 43 CIT __, __, 419 F. Supp. 3d 1341, 1356 (2019) (remanding, holding that Commerce "erred, specifically, when it ignored the considerable evidence Yama and the government of China provided indicating that Yama had not in fact benefited from the program and when it overlooked that there was a complete lack of evidence that Yama had obtained a benefit."); *Yama Ribbons and Bows Co. v. United States*, Slip Op. 20-107, 2020 WL 4386773, at *1 (upholding Commerce's decision to accept, under protest, that respondent and its customers did not use the program); see also *Yama Ribbons and Bows Co. v. United States*, Slip Op. 21-50, 2021 WL 1716644, at *7 (remanding, holding that "[t]here was no evidence on the record of the review to support a finding that any U.S. customer of Yama used the EBCP, and the record contained evidence refuting any such finding.").

⁴⁷ See *RZBC Group Shareholding Co., Ltd. v. United States*, Slip Op. 16-64, 2016 WL 3880773, at *6 (remanding, holding that "the record appears to present easily verifiable evidence that RZBC did not use the Buyer's Credit program because it never signed a sales contract above \$2 million."); *RZBC Group Shareholding Co., Ltd. v. United States*, 41 CIT __, __, 222 F. Supp. 1196, 1201 (2017) (sustaining Commerce's decision to apply AFA because "[t]he \$2 million threshold is ambiguous, and for that reason Commerce cannot ensure non-use of the Buyer's Credit program simply by examining the value of RZBC's contracts.").

captioned *Jiangsu Zhongji Lamination Materials Co. v. United States*.⁴⁸ In a number of opinions, the Court has found unreasonable Commerce’s determination that, despite customer certifications of non-use, there was still missing information about the EBCP that prevented Commerce from verifying use of the program. See, e.g., *Yama Ribbons and Bows Co. v. United States*, 43 CIT __, __, 419 F. Supp. 3d 1341, 1356 (2019); *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019) (“*Jiangsu I*”). Specifically, the Court has on occasion held that Commerce failed to explain its finding that the withheld information about the operation of the EBCP was necessary to verify non-use. See, e.g., *Jiangsu I*, 405 F. Supp. 3d at 1332; *Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339 (2020) (“*Clearon II*”).

In reaching these conclusions, the Court has determined that to apply an adverse inference to find that a cooperating party benefitted from the EBCP based on the GOC’s failure to cooperate, “Commerce must: (1) define the gap in the record explaining exactly what information is missing from the record necessary to verify non-use; (2) establish how the withheld information creates this gap by explaining why the information the GOC refused to give was necessary to verify claims of non-use; and (3) show that only the withheld information can fill the gap by explaining why other information, on the record or accessible by respondents, is insufficient or impossible to verify.” *Jiangsu I*, 405 F. Supp. 3d at 1333. Consistent with this reasoning, the court in the instant case will examine whether Commerce: (1) identified the missing information in the record; (2) explained the reason that the withheld information about the operation of the EBCP was necessary to verify the customers’ claims of non-use; and, (3) provided the reasons that Commerce could not rely on self-certifications from the respondents’ customers.

The court concludes that Commerce: (1) identified the gap in the record created by the failure of the GOC to provide requested information in regard to key aspects of the functioning of the EBCP; but (2) neglected to explain reasonably the reason that the missing information was a critical, if not essential, tool of verifying claims of non-use; and, (3) failed to articulate a reasonable explanation as to

⁴⁸ See *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333–34 (2019) (remanded, noting that Commerce must “explain why a complete understanding of the operation of the program is necessary to verify non-use of the program” and encouraging the parties to identify an alternative verification procedure); *Jiangsu Zhongji Lamination Materials Co. v. United States*, Slip Op. 20–39, 2020 WL 1456531, at *2 (CIT Mar. 24, 2020) (sustaining Commerce’s decision to accept, under protest, respondents’ claims of non-use, but noting that the court on remand ordered Commerce to “consider what information could be verified that would show nonuse” and directed all parties to “contemplate a solution to the impasse and to confer”).

why Commerce could not verify information on the record from respondents' customers. As a consequence, the court cannot at this time sustain Commerce's application of AFA because Commerce failed to explain reasonably the reason that the withheld information about the operation of the EBCP was necessary to verify company claims of non-use, and failed to outline for the court the reasons that the customer certifications were "insufficient or impossible to verify." See *Jiangsu I*, 405 F. Supp. 3d at 1333.

1. Whether Commerce Identified the Missing Information in the Record

In its Final Determination, Commerce stated expressly that there were two particulars related to the 2013 revisions to the EBCP that were missing from the record, whether: (1) the China Export-Import Bank eliminated the USD 2 million threshold for an applicant to receive the credit; and, (2) third-party banks were authorized to disburse program credits to respondents' customers. IDM at 11–13. Commerce in turn specifically asked the GOC to provide information on the 2013 revisions to allow Commerce to evaluate which respondents had received a possible subsidy and to verify the information.⁴⁹ *Id.*

With respect to the threshold, the GOC responded to Commerce's questionnaire with an assertion — submitted without any documentation or other substantiation — that the China Export-Import Bank had "confirmed [to the GOC] that [the USD 2 million] requirement for contract amount has been strictly implemented in practice and no business contract or purchase order without clearly noting the exact contract amount can be approved for loan support through export buyer's credits of [China Export-Import Bank]." Letter Pertaining to the GOC's Response to Section II of the CVD Questionnaire at 24, CD 106, CD 160; PD 176, PD 204 (May 19, 2016). Commerce explained that information on the record indicated that the GOC revised the EBCP in 2013 to eliminate the minimum requirement. IDM at 11. When Commerce asked the GOC to provide documents related to the 2013 program revision, the GOC refused to provide the documentation, stating that the "[China Export-Import Bank] has also confirmed to the GOC that its 2013 internal guidelines/revised Administrative Measures are internal to the bank, non-public, and not available for release." Letter Pertaining to GOC's Second Supplemental Questionnaire Response at 2, PD 392 (Sept. 26, 2016).

⁴⁹ See *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 36, 628 F. Supp. 198, 205 (1986) ("It is Commerce, not the respondent, that determines what information is to be provided for an administrative review.")

With respect to the involvement of third-party banks, Commerce asked the GOC to “provide a list of all partner/correspondent banks involved in the disbursement/settlement of export buyer’s credits.” *Id.* Again, the GOC did not provide the requested information. *Id.* Instead, the GOC once more responded with an undocumented assertion that “this question is not applicable” because “none of the U.S. customers of the respondents used the Export Buyer’s Credit from [China Export-Import Bank] during the POI.” *Id.* Commerce explained that the GOC’s failure to provide the requested information related to the alleged elimination of the threshold requirement and involvement of third-party banks left Commerce without the information necessary to make a determination as to program use or as to whether the program constitutes a financial contribution or is specific. IDM at 12–13.

In sum, Commerce requested information on the threshold requirement and involvement of third-party banks. In each instance, the GOC declined to provide the requested information. Commerce accordingly defined the gap in the record and identified “what information is missing from the record necessary to verify non-use.” *See Jiangsu I*, 405 F. Supp. 3d at 1333.

2. Whether Commerce Explained the Reason That the Withheld Information Was Necessary to Verify Non-Use

The court now turns to whether Commerce provided a reasonable explanation of why the missing information concerning the involvement of third-party banks and the existence of the threshold was necessary to verify non-use of the program.

The Government maintains that the GOC’s response to Commerce’s questionnaires was not sufficient because there continues to be ambiguity with regard to the threshold requirement and the GOC’s response does nothing to clarify the ambiguity. *See Oral Argument Tr.* at 102; *see also* IDM at 12. At oral argument, plaintiffs did not dispute that (1) there is ambiguity on the record as to the threshold and (2) the GOC failed to respond to Commerce’s requests with regard to the involvement of third-party banks. *Oral Argument Tr.* at 102–103. Further, in its brief, Double Coin concedes that the program “could operate in a number of ways that are unclear from the record.” *Consol. Pls. Br.* at 13. Notwithstanding plaintiffs’ explicit recognition of the ambiguity as to the threshold and the GOC’s failure to respond as to the involvement of third-party banks, plaintiffs assert that the self-certifications by respondents’ customers were sufficient to establish non-use of the EBCP, and, accordingly, Commerce should have relied on them.

Commerce in its Final Determination explained that without the requested information and documents from the GOC, Commerce did not have the information “critical to understanding how Export Buyer’s Credits flow to and from foreign buyers and the EX-IM Bank.” IDM at 30. Commerce found that “[a]bsent the requested information, the GOC’s claims that the respondent companies did not use this program are not verifiable. Moreover, without a full understanding of the involvement of third party banks, the respondent companies’ (and their customers’) claims are also not verifiable.” *Id.* Commerce further explained that it did not find it “appropriate” to verify the GOC’s claims of non-use due to its non-cooperation during the investigation and refusal to provide the requested information about the 2013 amendments to the operation of the program. *Id.* at 32. With regard to the respondents and their customers’ claims of non-use, Commerce explained that:

We also chose not to verify the information provided by the respondent companies because the Department’s incomplete understanding of the operation of this program prevented the Department from fully understanding what information an exporter would have regarding whether its buyers were using Export Buyer’s Credits, *e.g.*, whether an exporter would be aware of and would have documentation showing, by virtue of the operational requirements of the program, that its buyers were applying for or receiving credits under the program, and whether they meet the threshold requirements for financing, and what banking institutions were involved with providing the financing. Without the information the Department requested from the GOC, we lack an understanding of these aspects of the program which are *crucial to the verification of the program*. Therefore, the Department was hindered in developing a plan for verification of the respondents’ (and their customers’) and the GOC’s claims of non-use, *e.g.*, identifying appropriate accounting records.

Id. (emphasis supplied).

Commerce’s explanation states its conclusion that, without an understanding of the operation of these specific aspects of the EBCP, Commerce was impeded from verifying the claims of non-use provided by the respondent companies and their customers; however, Commerce did not state the reasons that the missing information about two core elements in the operation of the program — the existence (or not) of a minimum dollar threshold and the participation of third-party banks — was “crucial to the verification of the pro-

gram.” *Id.*; see also *Jiangsu I*, 405 F. Supp. 3d at 1333; *Clearon I*, 359 F. Supp. 3d at 1360.

As noted by the Federal Circuit, “Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce’s decision must be reasonably discernable to a reviewing court.” *NMB Singapore*, 557 F.3d at 1319; see also *State Farm*, 463 U.S. at 43 (“We will . . . uphold a decision of less than ideal clarity if the agency’s path may be reasonably discerned.”) (citation omitted). Commerce in this determination did not demonstrate the ways in which the information about the threshold and third-party banks related to its verification of the claims of non-use.⁵⁰

Curiously, Commerce states that the GOC’s failure to answer Commerce’s questions about the threshold and third-party banks prevented Commerce from understanding “the flow to and from foreign buyers” of the export credits provided under the EBCP. IDM at 30. The underlying substance of Commerce’s assertion sounds reasonable; however, Commerce then failed to describe and explain the ways in which the missing information crippled Commerce’s efforts to detect and track the flow of the credits to and from foreign buyers so as to be able to verify non-use with respondents and its customers. See *id.*

⁵⁰ In contrast, in its remand redetermination pursuant to *Clearon I*, Commerce explained that the withheld information related to the threshold requirement was necessary because the threshold is:

an important limitation to the universe of potential loans under the program and can assist us in targeting our verification of non-use. However, if the program is no longer limited to USD 2 million contracts, this increases the difficulty of verifying loans without any such parameters Therefore, by refusing to provide the requested information, and instead providing unverifiable assurances that other rules regarding the program remained in effect, the GOC impeded Commerce’s understanding of how this program operates and how it can be verified.

Final Results Pursuant to Court Remand at 14, *Clearon Corp. v. United States*, 43 CIT ___, 359 F. Supp. 3d 1344 (2019) (Court No. 17–00171), ECF No.47–1 (“*Clearon Remand Results*”). In this way, by identifying the threshold requirement as an essential tool to narrow its review of customer records, Commerce provided a more complete explanation for its determination that the withheld information was necessary to verify claims of non-use.

Similarly, with regard to the information concerning the third-party banks, Commerce in the *Clearon Remand Results* explained that:

Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce’s complete understanding of how this program is administered is necessary to verify claims of non-use. Thus, the GOC’s refusal to provide the 2013 revisions, which provide internal guidelines for how this program is administered by the [China Export-Import Bank], as well as other requested information, such as key information and documentation pertaining to the application and approval process, interest rates, and partner/correspondent banks, impeded Commerce’s ability to conduct its investigation of this program and to verify the claims of non-use by Heze Huayi’s customers.

Id. at 16–17.

In sum, for the aforementioned reasons, Commerce did not provide an explanation as to the reasons that the information withheld by the GOC was necessary for Commerce to verify claims of non-use.

3. Whether Commerce Explained the Reason That Information on the Record Was Insufficient or Impossible to Verify

Finally, the court will examine whether Commerce's finding that customer certifications are unverifiable is supported by substantial evidence.

a. Standard for Cooperating Non-Government Respondents

As noted, Commerce may use facts otherwise available if necessary information is missing from the record, or if “an interested party or any other person . . . withholds information that has been requested . . . or provides such information but the information *cannot be verified* . . .” 19 U.S.C. § 1677e(a) (emphasis supplied); *see also* SAA at 869. This Court has concluded that, while it is permissible under the statute for Commerce to make an inference that is adverse to the cooperating non-government party, “it is disfavored and should not be employed when facts not collaterally adverse to a cooperative party are available.” *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 n.10, 865 F. Supp. 2d 1254, 1262 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014). In addition, the Court has noted and the Federal Circuit has affirmed that “[w]hen Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer . . . it is expected to consider such evidence.” *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015).

Commerce itself has explained that in instances in which a foreign government has failed to respond adequately to Commerce's questionnaires, Commerce will opt to calculate the benefit by relying, to the extent possible, on information provided by a respondent company. *See United States Steel Corp. v. United States*, 33 CIT 1935 (2009); *see also Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 Fed. Reg. 9,993 (Dep't Commerce Feb. 25, 2008) (final results CVD new shipper review) and accompanying Issues and Decision Memorandum (“Roasted Pistachios 2008 IDM”). Specifically, Commerce has found that “if a respondent has claimed that it can establish non-use of a program as a factual matter, without an accompanying or complete government response, [Commerce] has de-

terminated that it will analyze the responses provided by the company to determine if the information on the record is sufficient to establish non-use.” Roasted Pistachios 2008 IDM at Comment 2; see *Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 71 Fed. Reg. 27,682 (Dep’t Commerce May 12, 2006) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 2 (“Roasted Pistachios 2006 IDM”); see also *High Pressure Steel Cylinders from the People’s Republic of China*, 77 Fed. Reg. 26,738 (May 7, 2012) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 21 (Commerce explained that it would rely on a respondent company’s information to the extent that such information is “useable and verifiable.”).

By submitting customer self-certifications, respondents in this case provided information on the record to support their claims of non-use. Accordingly, the court will examine whether Commerce provided a reasonable explanation for its finding that the respondents’ information was insufficient to verify non-use.

b. Commerce Past Practice with Regard to Information from Cooperating Non-Government Respondents

Plaintiffs argue that the customer self-certifications of themselves should have been sufficient for Commerce to establish that none of the respondents’ customers used the program. Consol. Pls. Br. at 13. Plaintiffs note that Commerce found in its 2016 determination in *Solar Cells from China AR 2*⁵¹ that similar self-certifications were sufficient to establish non-use of the EBCP. Pl. Br. at 43.

In this case, Commerce explained that, despite plaintiffs’ assertions, the information on the record is not identical to the information submitted in *Solar Cells from China AR 2*. IDM at 30. Since *Solar Cells from China AR 2*, in which Commerce relied on customer self-certifications to establish non-use, Commerce has found that information placed on the record in subsequent administrative reviews of the EBCP indicates that the GOC revised the program in 2013 to eliminate the threshold requirement and permit the disbursement of buyer’s credits through a third-party partner bank and/or correspondent banks.⁵² *Id.*

⁵¹ *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China*, 81 Fed. Reg. 46,904 (Dep’t Commerce July 19, 2016) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 1.

⁵² In this proceeding, Commerce put information on the record, including: (1) the Memorandum from the Department of Commerce, “Administrative Review of Countervailing Duty on *Citric and Certain Citrate Salts*; Verification of the Questionnaire Response Submitted by the Government of the People’s Republic of China,” October 7, 2014; and,

As noted, when using an adverse inference, Commerce may rely on any information placed on the record, including information from the petition, final determination or a *previous administrative review*. 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c)(1)-(2). Here, Commerce explained that, unlike in *Solar Cells from China AR 2*, Commerce had information on the record from *Citric and Certain Citrate Salts and Certain Amorphous Silica Fabrics from the PRC* “regarding the 2013 revisions to the program and the involvement of third-party banks.” IDM at 30; *see also* IDM at 11–12 (citing Department of Commerce’s Memorandum Pertaining to Placing Information on the Record, PD 385 (Sept. 19, 2016)).⁵³ Accordingly, Commerce stated that it could not in this proceeding rely on customer self-certifications to verify non-use as Commerce had done in *Solar Cells from China AR 2*. *Id.* at 30.

Rather, Commerce in this proceeding found that the China Export-Import Bank is the only entity that can provide information about the operation of the EBCP; however, due to the GOC’s failure to cooperate and failure to respond fully to Commerce’s requests for information, Commerce “determined that the information provided by the GOC on the record about this program was incomplete and that our understanding of this program was unreliable.” *Id.* Therefore, Commerce concluded that without complete and verifiable documentation of the

(2) a Letter from the Government of China, “Certain Amorphous Silica Fabrics from the People’s Republic of China: CVD Investigation; GOC 7th Supplemental Response,” September 6, 2016. Department of Commerce’s Memorandum Pertaining to Placing Information on the Record, PD 385 (Sept. 19, 2016). In *Citric and Certain Citrate Salts*, Commerce met with China Export-Import Bank officials, Ms. Tao Hong, Division Chief, and Mr. Liao Junyu, International Export Credit Affairs Division of the Risk Management Department of the China Export-Import Bank. *Id.* at Attachment 1. Commerce explained that “[China Export-Import Bank] officials indicated the *Administrative Measures* was [sic] revised in 2013 and eliminated the contract minimum.” *Id.* In *Certain Amorphous Silica Fabrics*, the GOC explained that the China Export-Import Bank requires the buyer or seller to open accounts with either the Bank or one of its partner banks: “While these accounts are typically opened at the [China Export-Import Bank], sometimes a customer prefers another bank (*e.g.*, the Bank of China) which is more accessible than an account with the [China Export-Import Bank] The funds are first sent from the [China Export-Import Bank] to the borrower’s (importer) account at the [China Export-Import Bank]Ex-Im Bank (or other approved partner bank).” *Id.* at Attachment 2.

⁵³ Since *Solar Cells from China AR 2*, Commerce has placed on the record in subsequent administrative reviews that involve the EBCP — including administrative reviews from multiple different investigations — information from *Citric and Certain Citrate Salts and Certain Amorphous Silica Fabrics from the PRC* concerning possible 2013 program revisions to the EBCP. *See, e.g., Certain New Pneumatic Off-the Road Tires From the People’s Republic of China*, 81 Fed. Reg. 71,056 (Dep’t Commerce Oct. 14, 2016) (preliminary results CVD admin. review) and accompanying Preliminary Decision Memorandum at 13; *Certain Amorphous Silica Fabric from the People’s Republic of China*, 82 Fed. Reg. 8,405 (Dep’t Commerce Jan. 25, 2017) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 11–12, 61; *Chlorinated Isocyanurates From the People’s Republic of China*, 82 Fed. Reg. 27,466 (Dep’t Commerce June 15, 2017) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 2.

program's operation, especially with regard to the involvement of third-party banks, the customer self-certifications of non-use were unverifiable. *Id.*

Double Coin argues that by not relying on respondents' information, Commerce abandoned its longstanding practice of relying on information from respondent companies when a foreign government fails to cooperate. Consol. Pls. Br. at 11–13. (citing *Certain In-Shell Pistachios from the Islamic Republic of Iran*, 73 Fed. Reg. 9,993 (Dep't Commerce Feb. 25, 2008) (final results CVD new shipper review) and accompanying Issues and Decision Memorandum at Comment 2; *Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 Fed. Reg. 40,295 (Dep't Commerce July 14, 2008) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 6). Double Coin's characterization of Commerce's approach — asserting that Commerce has accepted automatically respondent companies' claims to establish non-use — is not accurate. Rather, as stated above, Commerce's approach has been to analyze the responses provided by a company respondent to determine if the respondent's information is sufficient to establish as a factual matter non-use of a program without government cooperation. See *Roasted Pistachios 2008 IDM* at Comment 2; *Roasted Pistachios 2006 IDM* at Comment 2.

Further, Commerce has clarified that it will “rely on the responsive producer [sic] or exporter's records to determine the existence and amount of the benefit to the extent that those records are useable *and verifiable*.” *High Pressure Steel Cylinders from the People's Republic of China*, 77 Fed. Reg. 26,738 (May 7, 2012) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at 21 (emphasis supplied). Accordingly, Commerce's action was consistent with past practice because Commerce in its Final Determination explained that it had in fact “considered all information on the record of this proceeding, including the certifications provided by the respondent companies.” IDM at 34. However, Commerce concluded that it was unable to rely on the self-certifications from respondents' customers due to “the lack of a verifiable understanding of the program.” *Id.*

c. Commerce's Decision Not to Verify Customers' Certifications of Non-Use

At oral argument, plaintiffs maintained that Commerce could “easily” have verified the non-use self-certifications by examining customer's loan application records, accounting and other records. Oral Argument Tr. at 92. Commerce in its IDM found that such an examination would not have been sufficient to verify the claims of

non-use because “without a complete understanding of the involvement of third-party banks and minimum lending thresholds, about which the GOC declined to provide information, the claims are not meaningful and are *unverifiable* because . . . the Department *cannot identify the appropriate records for review*.” IDM at 32 (emphasis supplied).

The statute and legislative history confirm that Commerce may use facts otherwise available if, among other requirements, necessary information is missing from the record, or if “an interested party or any other person . . . withholds information that has been requested . . . or provides such information but the information cannot be verified . . .” 19 U.S.C. § 1677e(a). The SAA further states that: “New section 776(a) requires Commerce . . . to make determinations on the basis of facts available where requested information is missing from the record or *cannot be used* because, for example, it has not been provided, it was provided late, or *Commerce could not verify the information*.”⁵⁴ SAA at 869 (emphasis supplied).

Commerce clearly has the authority to use facts otherwise available if information on the record cannot be verified. Nevertheless, as noted by the Court, to apply AFA Commerce cannot “simply declare” that evidence on the record is “unverifiable.” *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1343 (2019) (“*Guizhou V*”).⁵⁵ Rather, Commerce must explain that, due to a respondent’s

⁵⁴ The SAA further states that: “In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) *can be verified*.” SAA at 869 (emphasis supplied).

⁵⁵ *Guizhou IV* and *V* resulted from a countervailing duty investigation of off-the-road tires from the People’s Republic of China (“PRC”) during the period of review between January 1, 2015 and December 31, 2015. *See, e.g., Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1315, 1317 (2019) (“*Guizhou IV*”); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1337 (2019) (“*Guizhou V*”); *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 83 Fed. Reg. 16,055 (Dep’t Commerce Apr. 13, 2018) (final results CVD admin. review), amended by *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 83 Fed. Reg. 16,055 (Dep’t Commerce July 11, 2018) (am. final results) and accompanying Issues and Decision Memorandum. In contrast, *Guizhou I, II* and *III* resulted from a separate underlying administrative review of a countervailing duty investigation of off-the-road tires from the PRC during the period of review between January 1, 2014 and December 31, 2014. *See, e.g., Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (“*Guizhou I*”); *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1346, 1351 (2019) (“*Guizhou II*”); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1404 (2019) (“*Guizhou III*”); *see also Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 82 Fed. Reg. 18,285 (Dep’t Commerce Apr. 18, 2017) (final results CVD admin. review), amended by *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 82 Fed. Reg. 40,554 (Dep’t Commerce Aug. 25, 2017) (am. final results) and accompanying Issues and Decision Memorandum.

failure to cooperate by not acting to the best of its ability, information on the record is “unverifiable” because the information is “missing or otherwise deficient.” *Zhejiang*, 652 F.3d at 1348 (citations omitted); *see also Guizhou V*, 415 F. Supp. 3d at 1343. Therefore, in light of the claims on the record of non-use, Commerce must show that the self-certifications are “deficient” and are not a reliable means to confirm non-use.

The Court in previous cases has addressed two dimensions of assessing whether information from third parties⁵⁶ is verifiable. First, the Court has considered the question in general of verifying information received from third parties. *See CS Wind Vietnam Co., Ltd. v. United States*, 41 CIT __, 219 F. Supp. 3d 1273 (2017). Second, the Court has considered the question in particular of verifying third-party information related to the EBCP. *See, e.g. Jiangsu I*, 405 F. Supp. 3d at 1331–1334; *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1346, 1351 (2019) (“*Guizhou II*”). The Court has conducted this assessment, specifically in light of uncertainties created by the GOC’s repeated failure to respond fully and accurately to Commerce’s request for information about two key parameters of the program — (a) the participation of third-party banks in disbursing EBCP funds, and (b) the continued existence, or not, of a minimum threshold.

In this case, the court concludes that Commerce’s IDM fails to provide a reasonable explanation sufficient to identify a “reasonably discernible path” with respect to Commerce’s conclusion as to either issue. Accordingly, the court remands the decision to Commerce for further explanation in light of the court’s analysis below.

i. Verification Generally of Third Party Information

Plaintiffs assert that Commerce could establish non-use by contacting respondents’ customers directly. Consol. Pls. Br. at 14. However, it is notable that plaintiffs do not demonstrate that the respondents themselves (*i.e.*, without seeking extensive documentation from their

⁵⁶ The court uses this term to refer to customers of Guizhou and Double Coin. By statute and regulation, these entities are parties that are not “interested parties” to this investigation. *See* 19 U.S.C. § 1677 (9)(A)-(B), which defines “interested party,” in relevant part, as:

(A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise

(B) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported

See also 19 C.F.R. § 351.102(b)(29) (2016) and 19 C.F.R. § 351.102(b)(42) (2016) (which defines “[r]espondent interested party” as “an interested party described in subparagraph (A) or (B) of section 771(9) of the Act”).

customers) could establish non-use. *See* Pl. Br. at 41–43; Consol. Pl. Br. at 7–18 ; Pl. Reply Br. at 16–19; Consol. Pl. Reply Br. at 1–4. Plaintiffs also do not argue that they possess or even could possess the key missing information — which, plaintiffs appear to presume, may be in the possession of third parties — that has been requested by Commerce. *See id.*

The Court has recognized the considerable burden that Commerce faces when soliciting or verifying information from third parties. In *CS Wind Vietnam Co., Ltd. v. United States*, Commerce explained that it would not seek information from a third party because doing so would unnecessarily burden Commerce as it could neither “compel responses from third parties” nor guarantee “the timeliness or accuracy of such responses.” *CS Wind Vietnam*, 219 F. Supp. 3d 1273 at 1279. The court agreed with Commerce, noting that while the burden on Commerce to request information from third parties is “likely fairly low,” Commerce cannot ‘compel’ a timely or accurate response from . . . third part[ies], by applying adverse inferences to its use of facts otherwise available or by using subpoena power.” *Id.* at 1284.⁵⁷ The court further held that “[a]lthough Commerce appears to have the authority to verify a [third party’s] response as accurate . . . the verification process generally entails a significant burden on Commerce and the responder may choose not to allow verification.” *Id.* The court concluded that “[a]bsent the ability to obtain with some assurance a timely and accurate response, and given the significant burden Commerce would incur in attempting to obtain accurate information,” Commerce did not abuse its discretion in deciding to not solicit information from the third party “over whom it has no control.” *Id.*

Given the various obstacles that Commerce faces when dealing directly with third parties, it would be reasonable for Commerce to decide against obtaining and verifying information from the respondents’ customers. Even if Commerce were to assume full cooperation from the customers,⁵⁸ as the Government noted at oral argument,

⁵⁷ The court determined that “Commerce’s ability to apply adverse inferences to information under 19 U.S.C. § 1677e(b)(1) applies only to information submitted by interested parties, not by third parties, and unlike the International Trade Commission (ITC), Commerce does not have subpoena power over nonparties.” *CS Wind Vietnam Co., Ltd. v. United States*, 41 CIT ___, ___, 219 F. Supp. 3d 1273, 1284 (2017).

⁵⁸ Plaintiffs argue that Commerce could have “easily” verified the claims of non-use by contacting customers to review their accounts and financial statements, Oral Argument Tr. at 92; however, the record does not necessarily support plaintiffs’ assertion. During the investigation, the only information that the customers provided were self-certifications of non-use, which were submitted to Commerce by the respondent companies. *See* Guizhou Tyre Program Specific Response – Exhibit P.B.4, CD 210, 213; PD 238, PD 240 (May 20, 2016); Double Coin’s Factual Information Related to U.S. Customers’ Utilization of the Export Buyer’s Credit Program – Attachment 1, CD 241; PD 252 (May 31, 2016). Thus,

given the large number of customer certifications in this case, it may not have been feasible for Commerce to verify the certifications by contacting each customer and reviewing their records.⁵⁹ See Oral Argument Tr. at 105–106. Further, without the cooperation from the GOC, it is not clear how Commerce would have been able to ensure the accuracy of any information provided by the customers.

Commerce, however, did not include this reasoning in its Final Determination. See IDM at 11–13, 28–36. The court will not rely on the Government’s post-hoc explanation of Commerce’s inability to verify the self-certifications. In contrast to Commerce’s determination in *CS Wind Vietnam*, Commerce in the instant case did not articulate the burden and unreliability of working directly with third parties. In fact, Commerce in the Final Determination did not even mention — let alone present in a step-by-step manner for the benefit of the public, the parties and the court — the specific ways in which any attempt Commerce would have made to seek further information from the customers would have been futile or would otherwise have entailed an unreasonably burdensome effort. Without a more complete explanation from Commerce, the court is unable to determine the basis for Commerce’s refusal to rely on the self-certifications or solicit further information from customers in an attempt to fill the gap in the record. As such, the court cannot assess whether Commerce’s determination was reasonable.

ii. Verification of Third Party Information Related to the EBCP

As noted, the Court has considered on a number of occasions the question of whether Commerce has explained reasonably its decision

Commerce had no direct contact with customers during the review and the customers provided no further information beyond simple statements of non-use. The court cannot conclude that this minimal action by customers is a sufficient basis to support the conclusion that customers would have cooperated fully with: (1) Commerce’s direct requests for what would almost certainly be substantial amounts of additional information, including information that could be considered confidential business information or information sensitive to the GOC, which the GOC itself identified as “internal to the bank, non-public, and not available for release,” GOC Second Supplemental Questionnaire Response at 2, PD 392 (Sept. 26, 2016); and, (2) a verification process of the third parties that likely would have ensued from that, involving the same difficulties.

⁵⁹ At oral argument, the Government stated: “[T]here’s 61 or so of these certifications . . . that would essentially require Commerce to scan all those records of all those clients that submitted a non-use certification, and . . . potentially to guess which loans could be covered, since again we don’t know about . . . how that \$2 million threshold works at this point.” Oral Argument Tr. at 105. The Government further argued that “there’s also no information Commerce has available to it that gives it any parameters by which to determine whether a loan should fall into the [EBCP], or not. . . . But the problem is that even with these certifications, the tools that other judges on this Court have suggested are available to Commerce still don’t get to the heart of the issue, in that Commerce doesn’t know what it should even be looking at . . . in order to verify that those certifications are correct.” *Id.* at 105–106.

not to verify customer self-certifications related to the EBCP. *See, e.g., Clearon I*, 359 F. Supp. 3d at 1355–1360; *Jiangsu I*, 405 F. Supp. 3d at 1331–1334. The issue presented in all of these cases, as in the instant case, is whether the uncertainty related to key parameters of the program — an uncertainty created by the GOC’s refusal to provide information about the amendments to the program indicated on the record — prevents Commerce from being able to verify non-use of the EBCP. *See id.* The court addresses this point in detail in the hopes of creating, in this case, greater clarity on these critical issues.

In its prior decisions, the Court has rejected similar findings from Commerce: namely, that such an examination would not have been sufficient to verify the claims of non-use because Commerce lacked “a complete understanding of the involvement of third-party banks and minimum lending thresholds . . . [rendering] the claims . . . unverifiable because . . . the Department cannot identify the appropriate records for review.” IDM at 32. The Court has determined that Commerce failed to explain adequately the reason that the missing information was required to verify the self-certifications of the program. In reaching this conclusion, the Court has in some instances held that Commerce must at least attempt verification of non-use certifications or find an alternative method of verification. *See, e.g., Clearon II*, 474 F. Supp. 3d at 1354; *Jiangsu I*, 405 F. Supp. 3d at 1334; *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) (“*Guizhou III*”).

In *Guizhou III*, the court rejected in part Commerce’s redetermination.⁶⁰ In particular, the court took issue with Commerce’s continuing to find that there was a “gap” in the record that “prevent[ed] an accurate and effective verification of Guizhou Tyre’s customers’ certification of non-use and Xuzhou Xugong’s statements that its customers did not use the program.” *Guizhou III*, 415 F. Supp. 3d at 1405 (citing Final Results of Redetermination Pursuant to Court Remand, ECF 109–1 (Nov. 19, 2019)). The court determined that: “The Department has provided a myriad of [sic] reasons why verification *might* be onerous without additional information pertaining to the EBCP. . . . But until . . . the Department actually *attempts* verification and adequately confronts these (purportedly) insurmountable challenges, there is little for the Department to hang its hat on when it ‘continues to find a ‘gap’ in the record.’” *Id.* (emphasis supplied).

⁶⁰ In the redetermination under review, Commerce “complied, under protest, with the Court’s rulings” and relied on non-use certifications submitted by respondents and their customers in reaching its determination that neither of the respondents used the EBCP during the period of review. *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1404 (2019) (“*Guizhou III*”) (citation omitted).

Similarly, in *Jiangsu I*, the court was not convinced by Commerce’s explanation that only the China Export-Import Bank had the records sufficient to verify non-use. The court determined that Commerce failed to “explain why it could not identify the intermediate banks and the corresponding bank disbursement information by soliciting information from respondents.” *Jiangsu I*, 405 F. Supp. 3d at 1334. The court remanded the issue back to Commerce and directed the parties to develop a mutually acceptable solution to avoid continued remands. *Id.*

In particular, the Court in previous cases has concluded that evidence on the record submitted by company respondents demonstrated that neither the respondents nor their customers used the program, and determined that Commerce was not free to ignore such evidence on the record. *See, e.g., Clearon II*, 474 F. Supp. 3d at 1353 (“Evidence pertinent to this inquiry was on the record Rather than attempt to verify [the certifications of non-use], however, Commerce concluded it would be too onerous to do so without the information withheld by China”); *Guizhou V*, 415 F. Supp. 3d at 1343 (“There is evidence in the record that squarely detracts from Commerce’s inference that Plaintiffs used and benefitted from the EBCP. Commerce may not simply declare that the evidence cannot be verified and [sic] therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry.”).

This court, however, is not prepared to conclude that — in situations in which a respondent significantly impedes a CVD proceeding by repeatedly withholding information requested by Commerce or by providing incomplete responses to questionnaires — Commerce must attempt verification to conclude that verification is not possible or overly burdensome. *See* 19 U.S.C. § 1677e(a)-(b).

Plaintiffs maintain that Commerce has a “number of tools” available to verify the customer certifications, such as contacting the customers directly to review their records or going to the China Export-Import Bank to review the bank’s computer database. With regard to plaintiffs’ argument that Commerce could have verified the certifications by visiting the customers and reviewing their loan accounts, Consol. Pls. Br. at 14, Commerce explained that, without a full understanding of the third-party banks and the threshold, it could not “identify the appropriate records to review.” IDM at 32. Commerce further explained that without the additional information concerning the operation of the EBCP, Commerce’s understanding of the program was “unreliable.” *Id.* at 30. In this regard, Commerce determined that:

[W]e could not rely on information about this program provided by parties other than the GOC, *i.e.*, the respondents. Therefore, while we did consider the customer certifications provided by the respondents, without a complete and verifiable understanding of the program's operation, especially with regard to the involvement of third-party banks, the information provided by the respondents is also unverifiable.

Id.

Again, the court considers that Commerce's underlying logic is not unfounded. Notwithstanding evidence of non-use on the record — notably, self-certifications by Guizhou's and Double Coin's customers — Commerce explained that information on the record indicates that the 2013 amendments to the EBCP changed the structure of the program to eliminate the threshold requirement and allow for the use of intermediary banks to disburse export buyer's credits. *Id.* at 11–12. Based on the record, these amendments appear to have changed the legal parameters of the program, affecting which business contracts created eligibility for a business to participate in the program and modifying substantially the way in which funds are disbursed to the respondents' customers.⁶¹ *See id.* at 28–34. Given that information in the record indicated that the GOC implemented these critical changes to the operation of the program — and for which the GOC has repeatedly refused to provide any documentation — Commerce decided not to rely on unsubstantiated claims of non-use by the GOC and company respondents, or the self-certifications by the customers of the company respondents. *See id.*

Commerce in this review explained in detail its decision to not solicit further information from respondents. *Id.* at 33.⁶² Commerce could not or chose not to obtain missing information about the opera-

⁶¹ At oral argument, plaintiffs maintained that there are three actors involved in the EBCP — the Chinese exporter, “the foreign importer” and the China Export-Import Bank. Oral Argument Tr. at 79. Commerce in its determination pointed to information on the record that indicates that the 2013 revisions to the program added a fourth potential actor — third party banks. IDM at 12.

⁶² As stated above, Commerce explained that it did not verify the information on the record with company respondents because, without an understanding of the EBCP, Commerce was unable to determine “what information an exporter would have regarding whether its buyers were using Export Buyer's Credits, *e.g.*, whether an exporter would be aware and would have documentation showing, by virtue of the operational requirements of the program, that its buyers were applying for or receiving credits under the program, and whether they meet the threshold requirements for financing, and what banking institutions were involved, without providing the financing.” IDM at 32. Commerce concluded that, without the GOC's cooperation, Commerce lacked a “verifiable understanding of the program's operation,” and, therefore, was “unable to rely on the information provided by the respondents, and . . . did not issue supplemental questionnaires to the respondent companies regarding the information they submitted.” *Id.* at 33.

tion of the program, *e.g.* a list of third-party banks involved in the EBCP, by asking the customers directly. It is possible that this decision by Commerce was reasonable. However, the court does not have a basis in the record to make this determination because Commerce did not describe: (1) each of the specific ways in which its understanding of the operation of the program was “unreliable”; and, (2) each of the ways in which the uncertainty created by the gaps in the record concerning the operation of the program (a) reasonably prevented Commerce from relying on the self-certifications, and (b) created uncertainty as to whether Commerce would even be able to establish through verification, and having to rely on non-GOC sources, non-use of the EBCP. Commerce’s failure to elucidate these points in its explanation leaves unclear the basis for Commerce’s decision, particularly whether Commerce’s determination rests on the fact that the customers were non-respondent third parties in the CVD investigation.

Plaintiffs further argue that Commerce can verify the customer certifications by going to the China Export-Import Bank to review the bank’s computer database. Oral Argument Tr. at 107. The Court is not convinced by plaintiffs’ arguments. Commerce has previously attempted — on multiple occasions — to verify respondents’ claims of non-use by traveling to China to review the China Export-Import Bank records; however, the GOC has repeatedly denied Commerce access in not one but three separate respects: (1) by not allowing Commerce to go to the China Export-Import Bank, *see RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773 (CIT June 30, 2016); (2) by asserting that Commerce did not have the “proper authorization” to review the records, *id.*, *see also Changzhou I*, 195 F. Supp. 3d at 1354; and, (3) by asserting that the information explicitly sought by Commerce is “internal to the bank, non-public, and not available for release.” GOC Second Supplemental Questionnaire Response at 2, PD 392 (Sept. 26, 2016). Accordingly, the court is not persuaded that Commerce should expend additional resources to follow this method of verification, particularly given that the record demonstrates clearly that attempting this type of verification would in all likelihood be futile. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (the Federal Circuit recognized “the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources”).

In sum, the court is not persuaded by plaintiffs’ argument that Commerce should seek to verify non-use by going yet again to the

China Export-Import Bank; however, the court is unable to determine from the record that the customers' self-certifications are, as Commerce asserts, "unverifiable." See IDM at 30, 32. The court understands Commerce's assertion to mean that, without the withheld information from the GOC about the operational changes to the EBCP that are indicated in the record, Commerce was prevented from verifying the customer self-certifications in accordance with its verification methodology.

The court is aware that in *Clearon II* and *Guizhou II*, the Court did not sustain Commerce redeterminations pursuant to court remands in which Commerce outlined its methodology for verification⁶³ and explained that, without the withheld information from the GOC, verification "would be unreasonably onerous, if not impossible."⁶⁴ Specifically, the court in *Guizhou II* explained that:

Commerce does not state *why* the purported 2013 rule change gave the Department reason to think verification was "unreasonably onerous" or no longer possible. . . . Commerce offers only one reason for why verifying would be challenging – that it would require access to intermediate Chinese banks. But that does not address *why this challenge is insurmountable*, or why Commerce did not initially solicit information from Guizhou or Guizhou's U.S. customers that would enable it to gain access to

⁶³ See Final Results Pursuant to Court Remand at 7–8, *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344 (2019) (Court No. 17–00171), ECF No. 47–1; Final Results of Redetermination Pursuant to Remand at 8, *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 415 F. Supp. 3d 1402 (2019) (Court No. 17–00101), ECF No. 109–1.

⁶⁴ In the *Clearon* Remand Results and *Guizhou* First Remand Results, Commerce explained that, without the names of the intermediary banks, it would be "unreasonably onerous" for Commerce to conduct verification in accordance with its typical verification methodology. For example, Commerce explained that without the names of the third-party banks:

Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (no correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a sub-set of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan – *i.e.*, whether the loan was provided from the China [Export-Import] Bank via an intermediary bank. This would be an unreasonably onerous undertaking for any company that received more than a small number of loans.

Final Results Pursuant to Court Remand at 19–20, *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344 (2019) (Court No. 17–00171), ECF No. 47–1; *see also* Final Results of Redetermination Pursuant to Remand at 13, *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 415 F. Supp. 3d 1402 (2019) (Court No. 17–00101), ECF No. 109–1.

(or identify) the intermediate banks. Nor does Commerce adequately explain the connection between intermediate Chinese banks and verification⁶⁵

Guizhou II, 399 F. Supp. 3d at 1351 (emphasis supplied).

Based on the above, the court is not persuaded by plaintiffs' arguments that Commerce could have "easily" verified the self-certifications, or in the alternative, simply accepted the certifications to establish non-use as Commerce had previously done in *Solar Cells from China AR 2*. Oral Argument Tr. at 92; Pl. Br. at 43. The court concludes that the record is ambiguous as to the two key parameters of the EBCP — the involvement of third-party banks and the minimum threshold requirement. Due to the GOC's continued refusal to respond fully to Commerce's requests for information concerning the 2013 amendments, Commerce is unable to gain clarity as to the operation of the program. Given the ambiguous nature of the EBCP's operation, Commerce's concerns about the reliability and verifiability of the customer self-certifications, or any other information it may need to seek from customers due to the GOC's non-cooperation, is not unwarranted. Nevertheless, Commerce has failed to explain its decision not to verify the self-certifications. Accordingly, the court remands this matter back to Commerce for further explanation.

Accordingly, on remand, the court encourages Commerce to outline step-by-step its verification methodology, and articulate each of the reasons that verification of the self-certifications, whether Commerce were to use its typical methodology or by alternative feasible methods of verification, is "insurmountable" or would result in unreliable information. Only with this full elucidation will the court be able to determine whether Commerce has a reasonable basis on its existing record to decline to conduct the further verification that plaintiffs urge.

Given the extensive litigation and numerous remands on this issue, the court would like to make clear its direction to Commerce on remand. The court is not concluding that Commerce's finding as to the use of the EBCP is incorrect nor that verification of private parties may be futile. Rather, the court determines that Commerce has not articulated a reasonable explanation that buttresses its conclusions. In the Final Determination, Commerce concluded that without the information from the GOC regarding the threshold and third-party banks, Commerce could not verify claims of non-use; however, Com-

⁶⁵ The Court further determined that Commerce failed to support its conclusion that verification is "practically impossible" because Commerce had the opportunity to request additional information from respondents and their customers to allow Commerce to verify the self-certifications and failed to do so. *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT ___, 399 F. Supp. 3d 1346, 1352–1353 (2019) ("*Guizhou II*")

merce failed to explain why this information was critical to Commerce's verification process. Similarly, Commerce determined that it could not rely on information from the respondents and their customers to establish non-use, including the self-certifications, because the information was "unverifiable"; however, Commerce neglected to explain the reasoning behind this finding. The court will uphold a determination of "less than ideal clarity" if Commerce provides a reasonably discernible path of its decision, *Bowman Trans., Inc., v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438 (1974); however, Commerce's explanation must establish a reasonable connection between its determination and the record. See *CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1376–1377 (Fed. Cir. 2016).

On remand, Commerce, after taking into consideration the foregoing analysis, is to: (1a) explain the reason that the information withheld by the GOC about the threshold requirement was necessary to verify non-use by describing how the missing information prevents Commerce from taking the steps that it considers necessary to verify non-use; (1b) explain the reason that the information withheld by the GOC about the third-party banks was necessary to verify non-use by describing how the missing information prevents Commerce from taking the steps that it considers necessary to verify non-use; (2) explain whether it would be feasible for Commerce to solicit and obtain the withheld information from customers — which are third parties to the investigation — by describing each step that Commerce would consider to be necessary to obtain such information, including stating clearly the reason(s) that Commerce considered each step necessary; (3) with respect to "(2)", above, describe with particularity any "significant burden" Commerce might or would likely incur in taking such action; (4) explain the extent to which Commerce would be able to rely on information from customers by identifying what information Commerce would seek from customers and explaining how, if at all, such information would be useful to Commerce to establish non-use; (5) explain why the claims of non-use are "unverifiable" by describing step-by-step Commerce's methodology for verifying non-use; (6) address whether, without information about the operational changes to the EBCP, verification of the customers' self-certifications in accordance with Commerce's methodology is (a) "insurmountable" based on Commerce's resources, (b) unlikely to yield relevant and reliable information or (c) both; (7) with respect to "(6)", above, were the question of sampling to arise, explain whether sampling would be (a) "insurmountable" based on Commerce's resources, (b) unlikely to yield relevant and reliable information or (c) both; (8a)

state whether Commerce has a practice of verifying information from third parties; (8b) if Commerce has such a practice, explain why it is reasonable for Commerce to refrain from verifying the information submitted by the customers, through the respondents, in this case; and, (9) explain whether the proposed solutions — such as Commerce visiting respondents’ customers and asking for a list of the banks or lenders that provided loans to the customers during the POI — are feasible alternative methods of verification for Commerce, and if Commerce concludes that these methods are not feasible, explain the reasons for this conclusion. The court emphasizes that each of the aforementioned instructions for Commerce on remand is a distinct inquiry that requires a distinct individual response as well as clarification from Commerce in its redetermination.

Finally, as noted, this Court is familiar with other actions concerning this program,⁶⁶ including the various explanations Commerce has provided in its remand redeterminations.⁶⁷ To date, Commerce has failed to provide a reasonable explanation for its refusal to rely on the customer certifications of non-use. Commerce is encouraged to use this remand as an opportunity to provide a complete and detailed explanation for its determination by carefully connecting the dots between each conclusion made and Commerce’s underlying reasoning for its findings. By doing so, Commerce will provide a basis for the court to determine whether Commerce’s findings are supported by substantial record evidence.

IV. Commerce’s Benchmarks in Relation to Certain Less Than Adequate Remuneration Calculations

In this case, the GOC failed to respond adequately to Commerce’s inquiries regarding the specific companies that produced the inputs at issue. PDM at 9–11, 29. As a result, Commerce found that the GOC failed to cooperate to the best of its ability and relied on AFA to find preliminarily that the suppliers of Double Coin and Guizhou were “authorities” within the meaning of 19 U.S.C. § 1677(5)(B). *Id.* at 10–11, 29. Plaintiffs do not contest this determination.⁶⁸

⁶⁶ See *supra* notes 43–48.

⁶⁷ See *e.g.*, Final Results Pursuant to Court Remand at 7–8, *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344 (2019) (Court No. 17–00171), ECF No. 47–1; Final Results of Redetermination Pursuant to Remand at 8, *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 415 F. Supp. 3d 1402 (2019) (Court No. 17–00101), ECF No. 109–1.

⁶⁸ Plaintiffs do not dispute the use of AFA in finding that plaintiffs’ suppliers were authorities. See Consol. Pls. Br. 18–28; Consol. Pls. Rep. Br. 4–11. In reaching the conclusion that Double Coin’s and Guizhou’s suppliers were “authorities,” Commerce first requested information from the GOC regarding the specific companies that produced the four inputs at issue here that were purchased by plaintiffs. PDM at 9–10. Specifically, Commerce asked the GOC to coordinate with plaintiffs to provide a list of each company’s input suppliers to

Based on this finding, Commerce turned to comparative benchmarks to determine whether a government good — in this case, four inputs: (1) carbon black, (2) natural rubber, (3) synthetic rubber and butadiene, and (4) nylon cord — was provided for less than adequate remuneration (“LTAR”). For carbon black, Commerce relied on world market prices as a Tier 2 benchmark and found that there was a benefit to Double Coin and Guizhou. IDM at 18. For natural rubber, and synthetic rubber and butadiene, Commerce found that the record evidence showed a high volume of imports as a percentage of both production and consumption and, consequently, that the market for those two inputs was not distorted. *Id.* at 19. As a result, Commerce relied on actual monthly weighted average import prices for the POI as reported by Double Coin as a Tier 1 benchmark. *Id.* Applying those prices, Commerce determined that a benefit had been conferred on both Double Coin and Guizhou. For nylon cord, Commerce relied on Chinese import prices⁶⁹ as the Tier 1 benchmark and found that there was no benefit for Double Coin and that there was a benefit for Guizhou. *Id.* at 21.

Commerce then adjusted each of these benchmarks to reflect “delivered prices” by including ocean freight and inland freight charges that would be incurred to deliver carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene to the respondents’ production facilities. *Id.* at 36–39. The countervailable subsidy rates that Commerce calculated for the provision of these four inputs at LTAR were as follows: for carbon black, 3.40% *ad valorem* for Double Coin and 3.77% *ad valorem* for Guizhou; for nylon cord, 0.00% *ad valorem* for Double Coin and 4.09% *ad valorem* for Guizhou; for natural rubber, 9.32% *ad valorem* for Double Coin and 0.01% *ad valorem* for Guizhou; and, for synthetic rubber and butadiene, 10.68% *ad valorem* for Double Coin and 6.78% *ad valorem* for Guizhou. *Id.* at 20–21.

A. Legal Framework

U.S. law requires that Commerce determine that a countervailable subsidy exists in cases in which an authority provides a financial contribution, a benefit is thereby conferred, and the subsidy is specific. 19 U.S.C. § 1677(5). When the financial contribution is a good or service, Commerce must determine whether these suppliers were authorities. *Id.* Plaintiffs and the GOC submitted inconsistent lists, obstructing Commerce from making a determination based on this information. *Id.* The GOC claimed that it did not have the requested information; however, Commerce determined that the GOC did have the requested information. *Id.* This finding by Commerce led to the application of AFA to determine preliminarily that plaintiffs’ suppliers of the four inputs in question were authorities. *Id.* Commerce did not change this AFA finding in the Final Determination. IDM at 8–9.

⁶⁹ These prices are general Chinese import prices. Commerce chose to rely on these prices because neither respondent reported actual imports of nylon cord during the period of investigation, so Commerce opted to use these data as a Tier 1 benchmark. IDM 18–19.

service, the statute defines a benefit as occurring in those cases in which those goods or services “are provided for less than adequate remuneration.” *Id.* at § 1677(5)(E)(iv).

The adequacy of remuneration “shall be determined in relation to prevailing market conditions for the good or service being provided” in the country that is subject to the investigation or review. *Id.* at § 1677(5)(E). Prevailing market conditions include “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.* If Commerce determines that the goods or services are provided for LTAR, then “a benefit shall normally be treated as conferred.” *Id.* at § 1677(5)(E)(iv).

Commerce’s regulations provide a methodology for measuring the adequacy of remuneration based on a three-tiered hierarchy. As a Tier 1 benchmark, Commerce “will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question.” 19 C.F.R. § 351.511(a)(2)(i). The preamble to Commerce’s countervailing duty regulations specifies that “[s]uch market-determined prices include actual sales involving private sellers and actual imports.” *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep’t Commerce Nov. 25, 1998) (preamble). As a part of selecting transactions or sales as a Tier 1 benchmark, “the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.” 19 C.F.R. § 351.511(a)(2)(i).

Commerce has a preference for Tier 1 benchmarks because they are most likely to reflect closely the prevailing market conditions experienced by the purchaser under investigation. IDM at 37. This Court has “acknowledge[d] the agency’s normal preference for tier one market prices.” *Borusan*, 661 F. Supp. at 1327, *aff’d sub nom. Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017).

If a Tier 1 benchmark is unavailable, Commerce will look to a Tier 2 benchmark. In this case, “the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question.” 19 C.F.R. § 351.511(a)(2)(ii). If Tier 1 and Tier 2 benchmarks are unavailable, Commerce will turn to a Tier 3 benchmark, in which case “the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.” *Id.* at § 351.511(a)(2)(iii).

B. Positions of the Parties

Plaintiffs first challenge Commerce's adjustments to the Tier 1 and Tier 2 benchmarks on the grounds that plaintiffs do not consider prevailing market conditions and consequently do not yield an accurate "delivered price." Consol. Pls. Br. at 20. Plaintiffs argue that Commerce's regulations call for the use of "delivered prices" that reflect the price that a firm actually paid or would have paid if it had imported the product. *Id.* at 19–20. Plaintiffs maintain that Commerce's delivery adjustments are not limitless because the statute provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review" *Id.* at 20 (quoting 19 U.S.C. § 1677(5)(E)(iv)). Plaintiffs argue that the use of the word "shall" in the statute requires that Commerce demonstrate how the benchmark Commerce chooses, and any adjustments made to that benchmark, relate to the conditions in the comparison market. *Id.* (citing *Amerikohl Mn., Inc. v. United States*, 899 F.2d 1210, 1213 (Fed. Cir. 1990)).

Plaintiffs further argue that in determining the benchmarks for measuring the adequacy of remuneration for carbon black, nylon cord, natural rubber, and synthetic rubber and butadiene, Commerce should have considered, consistent with the statute, the prevailing delivery costs within China for these goods. *Id.* at 21. Plaintiffs assert that this assessment requires that Commerce understand the market conditions in China and, in particular, the extent to which domestic supply and import supply service the market. *Id.* After examining these conditions, plaintiffs maintain, Commerce should have determined the extent to which specific delivery costs, such as ocean freight or import duties, prevail in China and, to that extent only, should have included those costs in any LTAR benchmark. *Id.*

Plaintiffs maintain that Commerce, instead of following those steps, utilized benchmarks that reflected full delivery costs for ocean freight and import duties and "presumed that prevailing market conditions in China included 100 percent import supply and no domestic supply of the inputs in question." *Id.* Plaintiffs argue that Commerce's presumption was not supported by the record, and that Commerce itself found that the inputs at issue in most cases were but a small fraction of deliveries in the Chinese market. *Id.* at 21–22.

The Government counters that Commerce's selection of benchmarks for the inputs in question and subsequent adjustments using ocean freight data and actual import transactions was reasonable. Def. Br. at 31. The Government explains that, as provided in the

regulations, and as explained in *Softwood Lumber from Canada*, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation. Def. Br. at 31 (citing *Final of Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 8,800 (Dep't Commerce Mar. 11, 1992) ("*Softwood Lumber from Canada*").⁷⁰ This preference is a result of observed market prices being the most likely to reflect closely the prevailing market conditions of the purchaser under investigation. *Id.*; see IDM at 37. As such, the import transactions that Double Coin reported and information obtained on actual shipping data from Maersk were preferred sources for adjusting the benchmarks for the four inputs at issue to match as closely as possible the "delivered price" of these inputs. Def. Br. at 31–32.

The Government argues that Commerce properly relied on Maersk data to adjust its selected benchmarks to calculate "the price that a firm actually paid or would pay if it imported the product." *Id.* at 32 (citing 19 C.F.R. § 351.511(a)(2)(iv)). The Government maintains that Commerce's reliance on Maersk data to calculate ocean freight was reliable and notes that Commerce's practice of using Maersk data to adjust benchmarks has been affirmed by this Court. *Id.* (citing *Jiangsu I*, 405 F. Supp. 3d at 1341; *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 42 CIT ____, ____, 352 F. Supp. 3d 1316, 1339 (2018) ("*Changzhou II*").

In response to Double Coin's argument that Commerce was required by law to adjust the benchmarks for prevailing market conditions, the Government first argues that its adjustments reflect both prevailing market conditions and an accurate "delivered" price. *Id.* at 31. Second, the Government contends that Double Coin provided no basis to select its proffered alternative adjustment, which in this case was a ratio of imported products relative to domestically-sourced products. *Id.* at 32. Moreover, the Government adds that Double Coin's suggested ratio would not reflect accurately the price that a firm actually paid or would have paid if it imported the product at

⁷⁰ The Government in its brief and Commerce in its IDM cite to "*Final of Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 FR 8800 (March 11, 1992) (*Softwood Lumber from Canada*) and accompanying Issues and Decision Memorandum at "Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit." IDM at 37, 43–44; see Def. Br. at 3. The cited Federal Register notice relates to Commerce's preliminary determination in the 1992 *Softwood Lumber from Canada* review. See *Certain Softwood Lumber Products From Canada*, 57 Fed. Reg. 8,800 (Dep't Commerce Mar. 12, 1992) (preliminary determination CVD investigation). Commerce explained the reason that its preferred benchmark is an observed market price in *Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15,545 (Dep't Commerce Apr. 2, 2002) (final determination CVD investigation) and accompanying Issues and Decision Memorandum at "Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit."

issue — the standard that the statute requires Commerce to meet. *Id.* at 34 (citing *Jiangsu I*, 405 F. Supp. 3d at 1341).

Plaintiffs next challenge Commerce’s use of Double Coin’s import purchase prices as a Tier 1 benchmark as not supported by substantial evidence and not in accordance with law. Specifically, for synthetic rubber and butadiene, plaintiffs contend that Commerce failed to consider adequately and account for factors affecting comparability as a result of differences in price, quantity and product similarity between Commerce’s chosen Tier 1 benchmark and prevailing market conditions in China. Plaintiffs present three arguments in this respect. First, plaintiffs argue that Commerce selected a narrow set of specific import prices when the record showed that there are more than 31 types of synthetic rubber products listed in China’s HS 4002. Consol. Pls. Br. at 26. Second, plaintiffs argue that the record shows that Double Coin’s import purchases were significantly higher priced than China’s aggregate import average unit value (“AUV”). *Id.* at 27. Third, plaintiffs argue that Double Coin’s imported inputs represent only a small quantity of high-value synthetic rubber and butadiene not available in the domestic market. Consol. Pls. Reply Br. at 10.

Based on these arguments, plaintiffs assert that Commerce used a benchmark that inflated the amount of the benefit to plaintiffs in that the benchmark failed to capture the breadth of synthetic rubber products purchased in the domestic market and utilized import prices that were significantly higher than prices of domestic product. Consol. Pls. Br. at 21–29. Accordingly, plaintiffs conclude that Commerce failed to consider factors affecting comparability. *Id.* Plaintiffs further propose that Commerce should have used China’s aggregate import AUV on the grounds that it was more comparable than respondents’ own actual import prices as a Tier 1 benchmark because it would have captured a broader portion of the domestic synthetic rubber market. *Id.* at 26.

In response, the Government reiterates Commerce’s position that “[t]here is no record evidence that distinguishes imports of synthetic rubber by Double Coin from its domestic purchases based on type and quality sufficient to render the preferred Tier 1 benchmark prices not comparable.” Def. Br. at 33 (citing IDM at 44). The Government adds that the methodology employed by Commerce in this case was in accordance with past practice and with the hierarchy established by its regulation. In addition, the Government emphasizes that Commerce utilized plaintiffs’ own data concerning their own import transactions. Def. Br. at 33.

C. Analysis

1. Ocean Freight Adjustment

The statute provides that the adequacy of remuneration in countervailing proceedings “shall be determined in relation to prevailing market conditions for the good or service being provided in the country that is subject to the investigation or review.” 19 U.S.C. § 1677(5)(E). “Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.*

When using Tier 1 and Tier 2 benchmarks, Commerce regulations direct Commerce to “adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.” 19 C.F.R. § 351.511(a)(2)(iv). Commerce has “broad discretion” to determine how to adjust the benchmark price to reflect delivery charges, provided that such adjustments are reasonable. *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1315, 1326 (2019) (“*Guizhou IV*”) (quoting *TMK IPSCO v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1306, 1320 (2017)).

Plaintiffs argue that in determining the benchmarks for the inputs at issue, the statute requires that Commerce consider the prevailing delivery costs for the goods in China. Consol. Pls. Br. at 21. Specifically, plaintiffs assert that Commerce should have limited any adjustments to its Tier 1 and Tier 2 benchmarks for ocean freight and import duties to “a representative level consistent with prevailing market conditions in China,” including the extent to which the market is served by domestic inputs. *Id.* In particular, plaintiffs argue that Commerce should have applied a supply ratio to the import duty and ocean freight adjustments, limiting the adjustments to the benchmark to the share of the market attributed to imports. *Id.* The Government argues that the LTAR calculations and selected benchmarks are in accordance with the statute and Commerce’s regulations and should be sustained by the court. Def. Br. at 29.

In its Final Determination, Commerce cited *Essar Steel Ltd. v. United States*, 678 F.3d 1267 (Fed. Cir. 2012) to support its finding that “[n]either the statute nor the regulations require or instruct the Department to conduct a market analysis of ocean freight rates.” IDM at 37. However, Commerce’s reliance on *Essar Steel* does not address plaintiffs’ argument that Commerce’s adjustment to the benchmarks should reflect the prevailing market conditions in China.

Plaintiffs make clear to the court that they are not challenging Commerce's ability to adjust benchmark prices to account for ocean freight and import duties, nor are they challenging Commerce's use of Maersk data as argued in *Essar Steel* and *Jiangsu I*, respectively.⁷¹ Consol. Pls. Reply Br. at 6. Rather, plaintiffs argue that the *extent* to which ocean freight and import duties are applied to the benchmark must reflect the prevailing market conditions for the good being purchased in China: in specific, that Commerce needed to adjust the benchmark "by the ratio of import supply of the product in question." Consol. Pls. Br. at 7, 23; *see also* Letter Pertaining to Double Coin's Case Brief at 14–15, PD 456 (Dec. 19, 2016).

As noted by plaintiffs, the Court has recently considered a similar argument in *Guizhou IV*, 389 F. Supp. 3d at 1325–1327. In that case, the court determined that due to Commerce's AFA finding that the supplying producers were "authorities," a supply ratio that would include plaintiff's domestic purchases, which were found to be an inappropriate comparative for benchmarking, would distort the benchmark analysis. *Id.* at 1326.⁷²

The court in *Guizhou* based its holding, in part, on Commerce's explanation for its decision to reject the proposed supply ratio benchmark adjustment. *Id.* (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 83 Fed. Reg. 16,055 (Dep't Commerce Apr. 13, 2018) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at 13). In the underlying Issues and Decision Memorandum at issue in *Guizhou IV*, Commerce stated: "We also find that the use of a supply ratio would not be appropriate in light of the AFA finding that the domestic producers of the inputs purchased by Guizhou Tyre are authorities." *Id.* In contrast, Commerce in the present case failed to provide such an explanation, and sidestepped Double Coin's supply ratio argument. IDM at 36–37.

⁷¹ In *Essar Steel*, plaintiff challenged Commerce's addition of freight and import costs to the benchmark. The Federal Circuit held that plaintiffs' argument ignored that the statute and regulation "require that these costs be added to the benchmark prices." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012) (citing 19 U.S.C. § 1677(5)(E)). In *Jiangsu I*, plaintiff challenged Commerce's reliance on Maersk data to calculate ocean freight benchmarks. *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT ___, ___, 405 F. Supp. 3d 1317, 1339 (2019) ("*Jiangsu I*"). The Court held that Maersk data is reliable and can be used to calculate freight costs. *Id.* at 1341.

⁷² Plaintiffs argue that the Court's reasoning in *Guizhou* misapprehends the proposed adjustment. Plaintiffs assert that the adjustment for ocean freight and import duties would not introduce respondents' domestic purchases into the benchmark price which would remain exactly as determined by Commerce. Consol. Pls. Reply Br. at 9. Plaintiffs further argue that the adjustments — ocean freight and import duties — do not include the respondents' domestic purchases. *Id.*

Commerce is required to explain the basis for its decision and the decision must be “reasonably discernable to a reviewing court.” *NMB Singapore*, 557 F.3d at 1319. (citations omitted). The Federal Circuit has noted that a “final determination by Commerce must include ‘an explanation of the basis for its determination that addresses relevant arguments [] made by interested parties who are parties in the investigation or review.’” *Id.* at 1320 (citing 19 U.S.C. § 1677f(i)(3)(A)).⁷³ Commerce failed to address the arguments related to the supply ratio adjustments raised by Double Coin in the administrative review. Accordingly, Commerce’s decision to reject Double Coin’s supply ratio argument and apply the full delivery costs of ocean freight and import duties to its adjustment calculation is not reasonable, and the court remands this issue back to Commerce to provide an explanation as a reason for its decision.

2. Selection of Tier 1 Benchmarks for Synthetic Rubber and Butadiene

When selecting a Tier 1 benchmark, “the Secretary *will* consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.” 19 C.F.R. § 351.511(a)(2)(i) (emphasis supplied). Use of the word “will” makes clear that consideration of these factors is mandatory. *See Amerikohl*, 899 F.2d at 1213. Plaintiffs have raised comparability issues regarding price, quantity and product similarity in the selection of Double Coin’s import purchase prices as a Tier 1 benchmark. The court addresses each issue in turn.

The court first examines the issue of comparability regarding price. As previously explained, the statute requires that “the adequacy of remuneration *shall* be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review.” 19 U.S.C. § 1677(5)(E) (emphasis supplied). “Prevailing market conditions include *price*, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.* (emphasis supplied).

As a general matter, when measuring the adequacy of remuneration, “[o]ften, the calculation of the benefit is drawn from the record submissions of the respondent companies.” *Fine Furniture*, 865 F. Supp. 2d at 1262. Specifically, Commerce has a preference for Tier 1 benchmarks because they are most likely to reflect closely the prevailing market conditions of the purchaser under investigation. *IDM* at 43 (citing *Softwood Lumber from Canada*).

⁷³ The Federal Circuit referred to this requirement in the antidumping context; however, the cited statutory provision, 19 U.S.C. § 1677f(i)(3)(A), applies to both antidumping and countervailing determinations.

As stated above, here Commerce prioritized appropriately the selection of a Tier 1 benchmark based on respondent's own data in accordance with the methodology established in 19 C.F.R. § 351.511(a)(2). At the same time, plaintiffs during the review proposed an alternate Tier 1 benchmark that, plaintiffs maintained, was substantiated with other record evidence. Letter Pertaining to Double Coin's Case Brief at 15–16, CD 408; PD 456 (Dec. 19, 2016); *see* Petitioner's Benchmark Factual Information at 6, PD 253 (May 31, 2016). Commerce's past practice suggests that where there are multiple prices that can be used as a viable benchmark on the record, Commerce will compare the prices to select the most comparable. For example, Commerce's Issues and Decision Memorandum in *Essar Steel* explained Commerce's consideration of the two proposed benchmark prices at issue there:

To the extent that there are differences between to [sic] the two prices that are substantiated with record evidence, the Department, where possible, will make the necessary adjustments to ensure an appropriate comparison. And, to the extent that substantiated record evidence demonstrates that the price of the good sold by the government is not comparable to the price of the proposed benchmark, the Department will not conduct its LTAR analysis using that benchmark.

Certain Hot-Rolled Carbon Steel Flat Products from India, 74 Fed. Reg. 20,923 (Dep't Commerce May 6, 2009) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 12 ("*Essar Steel* IDM").

Plaintiffs argue that China's import AUV would serve as a superior Tier 1 benchmark. Consol. Pls. Br. at 26. As support, plaintiffs maintain that there is a substantial price difference among the 31 different varieties of synthetic rubber as listed in China's HS Code 4002. *Id.* at 27. Specifically, plaintiffs state that the record demonstrates that Double Coin's synthetic rubber imports were priced roughly [[]] higher than the 2015 average China import AUV for HS Code 4002. *Id.* at 25. Notably, plaintiffs failed to provide reasons supported by record evidence as to why this price difference makes Double Coin's import purchases noncomparable. Double Coin points only to price differences and does not provide an explanation about comparability.

Double Coin during the investigation argued that this price difference:

[I]llustrates that Double Coin's import purchases are not indicative of the broader synthetic rubber market reflected in the aggregate AUV that encompasses all synthetic rubber products. As such, a benchmark based on those specific import purchases

is not comparable in terms of all synthetic rubber purchases made by Double Coin in the domestic market.

Letter Pertaining to Double Coin's Case Brief at 16, CD 408; PD 456 (December 19, 2016).

Commerce responded to both of Double Coin's arguments. As to the first argument, Commerce explained that it prefers to use observed market prices. Commerce in its IDM stated: "As provided in our regulations, and as we explained in *Softwood Lumber from Canada*, the preferred benchmark in the hierarchy is an *observed market price* from actual transactions within the country under investigation." IDM at 43 (emphasis supplied).

Commerce responded to Double Coin's arguments that its actual import prices were "not comparable in terms of all synthetic rubber purchases made by Double Coin in the domestic market" by stating that "there is no evidence on the record to support their claims." IDM at 44. Commerce further explained that "[t]here is no basis in the record to distinguish imports of synthetic rubber from the domestic purchases based on type and quality that would render the otherwise usable Tier 1 benchmarks prices not comparable. . . . We also disagree that the noted differences in prices between the domestic and imported purchases suggest that the purchases are not comparable and find that the actual import purchase price data is [sic] reliable."⁷⁴ *Id.* Accordingly, Commerce provided a reasonable explanation for its choice of a Tier 1 benchmark.

The court next turns to quantity. When selecting a Tier 1 benchmark, Commerce regulations require that it consider "quantities sold, imported, or auctioned" as a factor affecting comparability. 19 C.F.R. § 351.511(a)(2)(i). Here, plaintiffs argue that the difference between Double Coin's import purchase prices and China's aggregate import AUV suggests that Double Coin imported only a small quantity of specific high-valued synthetic rubbers not available in the domestic market. Consol. Pls. Reply Br. at 10. Plaintiffs maintain that this quantity of imports was significantly smaller than Double Coin's total domestic purchases during the POI. Consol. Pls. Br. at 25. Using such a relatively small quantity, plaintiffs contend, ultimately resulted in

⁷⁴ In the *Essar Steel* IDM, Commerce explained that Essar failed to demonstrate that the iron ore lumps allegedly purchased for LTAR were so "substantially different that they [were] incomparable" with the lumps Commerce used as a Tier 1 benchmark. *Essar Steel* IDM at Comment 12. Commerce added: "There is no requirement that the benchmark used in the Department's LTAR analysis be identical to the good sold by the foreign government." *Id.* Nonetheless, Commerce described the specific adjustments that it made to its benchmark to ensure comparability. Commerce added also that "Essar itself placed pricing data regarding lumps it purchased from the Brazilian supplier on the record of the prior review and advocated using the prices for purposes of a lumps benchmark." *Id.*

a finding of inflated benefits. *Id.* at 26. It is notable, however, that plaintiffs did not provide record evidence to Commerce quantifying the relative amounts in question, thereby failing to buttress plaintiffs' allegation concerning the relatively small quantities. *Id.* at 25.

Commerce in its analysis explained that the "the volume of imports was significant" such that "imports accounted for approximately 50 percent of the rubber consumed in the country during the POI." *See* PDM at 24. In this way, Commerce appears to have addressed, if in a somewhat cursory manner, the quantity of Double Coin's total domestic purchases of synthetic rubber and butadiene. Nonetheless, almost inexplicably, Commerce then stated: "respondent's argument regarding the quantity of such purchases is not relevant to our analysis." IDM at 44.

Commerce's second statement is inconsistent with its regulation, which requires specifically that Commerce consider "quantities sold, imported, or auctioned." 19 C.F.R. § 351.511(a)(2)(i). Moreover, Commerce's comments that Double Coin's import purchases are not sufficiently distinguishable from "domestic purchases" are not directly responsive on this point. IDM at 44. Notably, plaintiffs did not during the administrative proceeding point to — and have not in this proceeding pointed to — further record evidence to support their argument on quantity. However, Commerce's statement that a consideration of quantity was "not relevant to our analysis" directly contravenes its obligation under the regulation. *See* IDM at 44; 19 C.F.R. § 351.511(a)(2)(i).

The court turns finally to product similarity. In selecting a Tier 1 benchmark to measure the adequacy of remuneration, the regulation requires that Commerce consider "product similarity" as a factor affecting comparability. 19 C.F.R. § 351.511(a)(2)(i). In *Essar Steel*, Commerce used as a Tier 1 benchmark a price that Essar paid when purchasing iron ore lumps from a Brazilian supplier. *Essar Steel*, 712 F. Supp. 2d at 1289. Essar disputed this selection, raising product similarity issues due to differences, in Essar's view, in the chemical and physical composition among the lumps that Commerce selected. *Id.* at 1065. Essar offered an alternate Tier 1 benchmark, *id.*, which Commerce declined to use, finding that Essar failed to show that the lumps Commerce selected were "so substantially different that they [were] incomparable." *Essar Steel* IDM at Comment 12.

This Court upheld Commerce's benchmark selection, determining that Commerce "did not act contrary to law" in concluding that the Brazilian iron ore lumps were comparable despite Essar's arguments to the contrary. *Essar Steel*, 721 F. Supp. 2d. at 1294. The Federal Circuit also upheld Commerce's Tier 1 benchmark selection, finding

that “Commerce appropriately identified Essar’s purchase of iron ore lumps from the Brazilian supplier as a tier 1 benchmark for the iron ore lumps Essar purchased from NMDC.” *Essar Steel*, 678 F.3d at 1273.

Here, plaintiffs contend that, due to disparities in product similarity, factors affecting comparability were not adequately considered by Commerce in selecting a Tier 1 benchmark. Specifically, plaintiffs argue that (1) Commerce selected a narrow set of imports reflecting a small subset of the 31 synthetic rubber varieties available domestically in China and (2) there was a [[]] price difference between Double Coin’s actual imports and China import AUV. Consol. Pls. Br. at 26.

However, unlike the plaintiff in *Essar Steel*, Double Coin and Guizhou did not during the investigation present further record evidence to substantiate their claim that there were, in fact, physical or chemical differences between the allegedly LTAR purchases and Commerce’s chosen benchmark. Plaintiffs assert merely that “if synthetic rubber and butadiene was truly homogeneous (as Commerce’s selected benchmark implied) and subsidized, then Double Coin would have no incentive to import.” Consol. Pls. Br. at 27; *see* Consol. Pls. Reply Br. at 10.

The record does not support plaintiffs’ contention that there are demonstrable differences between imports and domestic purchases of synthetic rubber and butadiene based on type and quality that would render noncomparable Commerce’s chosen benchmark. As Commerce stated: “While both Double Coin and Guizhou Tyre argue that these import prices do not provide an appropriate benchmark because the type of synthetic rubber they import is not comparable to the allegedly LTAR purchases we are examining, there is no evidence on the record to support their claims. There is no basis in the record to distinguish imports of synthetic rubber based on type and quality that would render the otherwise usable Tier 1 benchmarks not comparable.” IDM at 44.

Further, as noted by the Government, this price difference among varieties “could result for a number of reasons.” Def. Br. at 33. *Essar Steel* further confirms that Commerce’s choice of a Tier 1 benchmark can be supported by substantial evidence even if the comparable products do have some physical or chemical differences. *Essar Steel*, 721 F. Supp. 2d at 1293–1294.

As a result, with respect to price and product similarity, Commerce demonstrated that it adequately considered “factors affecting comparability” sufficient to support its chosen Tier 1 benchmark as reflective of “prevailing market conditions” for synthetic rubber and butadiene as required by regulation and statute. Commerce’s explanation

that there was no record evidence to support Double Coin's claim that its imports were of a "type and quality" that materially affected comparability in this case was reasonable.

For the reasons noted above, Commerce satisfied its obligations under the statute and regulation; however, Commerce missed an opportunity to provide greater clarification of the reasons that respondents' arguments were insufficient. And, importantly, Commerce opted not to explain the reasons that it prioritized respondent-specific data in view of the fact that there is no specific provision in the statute or regulation that requires Commerce to do so. Providing such explanations serves the interests of the public, the parties and the court — and, ultimately, Commerce — by enabling the clearest possible understanding of a decision.

Commerce articulated the aforementioned shortcomings in Double Coin's position with respect to quality and price. In so doing, Commerce demonstrated that it considered adequately those two "factors affecting comparability" to support its choice of a Tier 1 benchmark as reflective of "prevailing market conditions" for synthetic rubber and butadiene as required by regulation and statute. However, as noted above, Commerce's proclamation that quantity was "not relevant" to its analysis contravenes Commerce's own regulations and was not reasonable under the statute. Accordingly, the court remands to Commerce the issue of consideration of the quantity of imports for further explanation consistent with this decision.

V. Combination Rate

Jinhaoyang is an unaffiliated trading company that exported subject merchandise produced by Double Coin during the POI. *See* Letter Pertaining to Comment on Final Determination Regarding Cash Deposit Rate for Jinhaoyang at 2, PD 482 (Jan. 25, 2017). Commerce individually examined Double Coin as a mandatory respondent and required Jinhaoyang to participate. *See* Letter Pertaining to Double Coin's 2nd Supplemental Questionnaire Response at 7, CD 263; PD 323 (June 23, 2016) (referring to the separate response of Jinhaoyang to the initial questionnaire at Exhibit 9). Jinhaoyang cooperated during Commerce's investigation of Double Coin. *See id.* In its Final Determination, Commerce calculated a subsidy margin of 38.61% for Double Coin, 65.46% for Guizhou and 52.04% for all others. *See* Final Determination. Commerce calculated the subsidies received by Jinhaoyang and attributed them to Double Coin. IDM at 17; Jinhaoyang Br. at 4. However, Commerce's Final Determination does not set forth a cash deposit rate for Jinhaoyang. *See* Final Determination; Consol. Pls. Reply Br. at 12. On February 15, 2019, Commerce published the

amended CVD Order and issued an amended subsidy margin of 20.98% for Double Coin, 63.34% for Guizhou and 42.16% for all others. *Truck and Bus Tires from the People's Republic of China*, 84 Fed. Reg. 4,434, 4,435 (Dep't Commerce Feb. 15, 2019) (am. final determination). The amended CVD Order did not identify a specific cash deposit rate for Jinhaoyang, and, as a result, Jinhaoyang was subject to the all-others rate, which is higher than the rate assigned to Double Coin. *Id.* ; Jinhaoyang Br. at 4; Consol. Pls. Reply Br. at 12.

The court concludes that Commerce's decision was not reasonable because it failed to provide a reasonable explanation.

A. Legal Framework

Once Commerce makes an affirmative final determination in a CVD proceeding, the statute requires that the agency “determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated, and . . . an estimated all-others rate for all exporters and producers not individually investigated and for new exporters and producers within the meaning of section 1675(a)(2)(B) of this title” 19 U.S.C. § 1671d(c)(1)(B)(i)(I). Commerce regulations in turn establish that “[b]enefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.” 19 C.F.R. § 351.525(c).

For nonproducing exporters, Commerce “may establish a ‘combination’ cash deposit rate for each combination of the exporter and its supplying producer(s).” 19 C.F.R. § 351.107(b)(1)(i). Commerce has explained that combination rates may be appropriate in a countervailing duty proceeding because “rates established for particular combinations of exporters and producers are the most accurate rates.” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,303 (Dep't Commerce May 19, 1997) (final rule) (“Final Rule”). Given the position taken by Commerce in its Final Rule that all subsidies — those provided to the producer, the exporter or both — benefit the subject merchandise, countervailable subsidy rates that are established for certain exporter/producer combinations are likely to be the most accurate. *See id.*

B. Positions of the Parties

Consolidated plaintiffs claim that Commerce's refusal to assign Double Coin's cash deposit rate to Jinhaoyang is contrary to Com-

merce's past practice and is not in accordance with law.⁷⁵ Consol. Pls. Reply Br. at 11. Jinhaoyang argues in particular that in situations in which "(1) a cooperating unaffiliated trading company is examined [for purposes of subsidy attribution] along with the mandatory respondent in a CVD investigation. . . and (2) Commerce calculates a CVD margin for subsidies received by the trading company, Commerce's past practice is to assign the unaffiliated trading company the CVD rate for the mandatory respondent in the form of a combination rate under 19 C.F.R. § 351.107(b)." Jinhaoyang Br. at 5 (citing *Drawn Stainless Steel Sinks From the People's Republic of China*, 77 Fed. Reg. 46,717, 46,721–22, 46,730 (Dep't Commerce Aug. 6, 2012) (preliminary determination CVD investigation) ("DSSS");⁷⁶ *1, 1, 1,2 Tetrafluoroethane From the People's Republic of China*, 79 Fed. Reg. 62,594 (Dep't Commerce Oct. 20, 2014) (final determination CVD investigation) ("TFE") and accompanying Issues and Decision Memorandum at Comment 5 ("TFE IDM")).

Jinhaoyang notes that it cooperated with Commerce in the review and, in the Final Determination, Commerce attributed subsidies received by Jinhaoyang to Double Coin. Jinhaoyang Br. at 6–7. Jinhaoyang argues that Commerce should have consequently assigned Double Coin's rate to Jinhaoyang and further notes that Commerce did not provide a reason for its departure from past practice. *Id.* at 7–8. Jinhaoyang recalls that "[d]espite Commerce's statutory discretion . . . if Commerce had a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." *Id.* (quoting *Save Domestic Oil, Inc.*, 357 F.3d at 1283). Jinhaoyang further recalls that "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change." *Id.* at 8 (quoting *SKF USA Inc.*, 630 F.3d at 1373).

Jinhaoyang further challenges the Government's contention that "if Jinhaoyang appropriately indicates Double Coin as the producer of the goods to the Customs Service, [Jinhaoyang] will receive Double Coin's rate . . ." Consol. Pls. Reply Br. at 12 (citing Def. Br. at 35). Jinhaoyang explains that there is no guidance in Commerce's cash deposit instruction to Customs or in Commerce's Cash Deposit In-

⁷⁵ Jinhaoyang is the only party among the "consolidated plaintiffs" that has not been assigned a specific cash deposit rate and is not listed in Commerce's instructions to Customs. See *Truck and Bus Tires From the People's Republic of China*, 84 Fed. Reg. 4,434, 4,435 (Dep't Commerce Feb. 15, 2019) (am. final determination). Jinhaoyang, therefore, is subject to the all-others rate, despite the fact that Commerce attributed its subsidies to Double Coin.

⁷⁶ See also *Drawn Stainless Steel Sinks From the People's Republic of China*, 78 Fed. Reg. 13,017 (Dep't Commerce Feb. 26, 2013) (final determination CVD investigation).

structions as to which rate will apply if Jinhaoyang demonstrates that it exports Double Coin’s tires, and, as such, Jinhaoyang cannot rely on the Government’s *post hoc* assurance. *Id.* (citing Department of Commerce’s Cash Deposit Instructions, PR 514 (Feb. 21, 2019)).

The Government maintains that while Commerce may establish a combination cash deposit rate for the exporter and its supplying producer, Commerce is not required to do so. Def. Br. at 34. As reference, the Government cites the Preamble to 19 C.F.R. § 351.107: “as in AD proceedings, in CVD proceedings there may be situations in which it is not appropriate or practicable to establish combination rates. In such situations, [Commerce] will make exceptions to its combination rate approach on a case-by-case basis.” *Id.* at 35 (quoting *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep’t Commerce May 19, 1997) (final rule)).

The Government argues that “Commerce’s decision not to assign Double Coin’s rate to Jinhaoyang is both directly supported by the regulations and consistent with past practice.” *Id.* (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea* (“*CTL Plate from Korea*”), 81 Fed. Reg. 63,168 (Dep’t Commerce Sept. 14, 2016) (preliminary negative CVD determination and alignment of final determination with final antidumping duty determination) and accompanying Preliminary Determination Memorandum at 13). In *CTL Plate From Korea*, the Government contends that Commerce attributed subsidies of an unaffiliated trading company to a respondent without assigning the unaffiliated trading company and the respondent the same rate. *Id.*

Following its other argumentation, the Government further asserts that if Jinhaoyang “appropriately indicates” Double Coin as the producer of the goods to Customs, “Jinhaoyang will receive Double Coin’s rate for the purpose of cash deposits.” *Id.*

C. Analysis

1. Commerce’s Discretion to Apply a Combination Rate

For nonproducing exporters, Commerce “*may* establish a ‘combination’ cash deposit rate for each combination of the exporter and its supplying producer(s).” 19 C.F.R. § 351.107(b)(1)(i) (emphasis supplied). Notably, the word “*may*” in the regulation conveys that Commerce has discretion whether to apply a combination rate in any given instance — the regulation permits but does not require Commerce to apply combination rates. As recalled by the Government, the Preamble to 19 C.F.R. § 351.107 also provides that “[a]s in AD pro-

ceedings, in CVD proceedings there may be situations in which it is not appropriate or practicable to establish combination rates. In such situations, the Department will make *exceptions* to its combination rate approach on a case-by-case basis.” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep’t Commerce May 19, 1997) (final rule) (emphasis supplied); see Def. Br. at 35. The language of the Preamble — in particular, the use of the word “exception” — suggests that, as a general matter, combination rates are the preferred approach under Commerce’s regulations. See *id.*

This Court has confirmed the applicability of the Preamble: “The Preamble, although it was issued after the notice-and-comment rule-making procedure that went into 19 C.F.R. § 351.107, is a policy statement, and not an agency interpretation that holds the ‘force of law’” *Tung Mung Development Co., Ltd. v. United States*, Slip Op. 01–83, 2001 WL 844484, at *13 (CIT July 3, 2001). In *Tung Mung*, the court confirmed that Commerce has discretion to impose a single rate or a combination rate, see *id.*; however, in that case, the court remanded the issue because Commerce in that case declined to apply a combination rate notwithstanding that Commerce had applied such a rate in similar cases previously. The court directed Commerce either to provide a reasonable explanation for its change in practice or apply the “combination rate approach.” See *id.* at *16. Subsequently, the Federal Circuit affirmed that decision. See *Tung Mung Dev. Co. v. United States*, 354 F.3d 1371 (Fed. Cir. 2004).

2. Commerce’s Decision Not to Assign Double Coin’s Rate to Jinhaoyang

In this case, Commerce did not provide an adequate explanation of the reason that it did not assign Double Coin’s rate to Jinhaoyang. Commerce’s failure to do so is peculiar given that the Government suggests that Jinhaoyang can obtain Double Coin’s rate if only Jinhaoyang “appropriately indicates” to Customs that Double Coin is the producer of the goods that Jinhaoyang imported. See Def. Br. at 35.

Jinhaoyang cites *DSSS* and *TFE* to support its claim that in the past, Commerce has granted the combination cash deposit rate of the producer to an unaffiliated exporter that cooperates in Commerce’s investigation of that producer. See *Jinhaoyang Br.* at 5. In *DSSS*, an unaffiliated trading company that had exported the subject merchandise cooperated in the underlying CVD investigation by submitting requested information. See *DSSS*, 77 Fed. Reg. at 46,721–22. Commerce preliminarily attributed subsidies received by the trading company to the producer and determined that the trading company should receive a combination cash deposit rate. *Id.* at 46,730. In *TFE*, an administrative review that Commerce acknowledged was factually

similar to *DSSS*, Commerce determined that the unaffiliated trading company's cash deposit rate should be the same as the producer's rate. See *TFE* IDM at Comment 5. Both *DSSS* and *TFE* support the conclusion that Commerce has assigned combination rates in similar situations in the past.

In response to Jinhaoyang's argument, the Government relies on *CTL Plate from Korea* for the proposition that Commerce previously has decided *not* to apply a combination rate to a cooperating exporter. Def. Br. at 35 (citing *CTL Plate from Korea*, 81 Fed. Reg. 63,168 (Dep't Commerce Sept. 14, 2016) (preliminary negative CVD determination and alignment of final determination with final antidumping duty determination) and accompanying Preliminary Determination Memorandum at 13). In that investigation, Commerce preliminarily determined that the subsidy rate for the respondent in question was *de minimis*. *CTL Plate from Korea*, 81 Fed. Reg. at 63,168. In its final determination, Commerce established an all-others subsidy rate. *CTL Plate from Korea*, 82 Fed. Reg. 16,341 (Dep't Commerce Apr. 4, 2017) (final affirmative CVD determination and final negative critical circumstances determination). Commerce then applied 19 U.S.C. § 1671d(c)(5)(A)(ii), which provides that when subsidy rates for all exporters and producers individually investigated are zero or *de minimis*, Commerce "may use any reasonable method to establish an all-others rate." *Id.* Applying the statute, Commerce established that the all-others rate would be the same as the rate calculated for the sole mandatory respondent, following an approach that Commerce had taken in similar CVD investigations. *Id.* Neither the statutory provision applied by Commerce in *CTL Plate from Korea*, nor the facts of that investigation are apposite to the instant case.

The Government next relies on the language in *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,304 (Dep't Commerce May 19, 1997) (final rule), which provides that "the proper application of rates to entries for deposit purposes generally requires that the producer of the merchandise be identified." Def. Br. at 35. The Government asserts that this provision justifies a decision not to apply the combination rate to Jinhaoyang. *Id.* This argument is contradicted by the fact that Commerce treated Jinhaoyang as an unaffiliated trading company during the POI and attributed subsidies received by Jinahoyang to Double Coin. See Letter Pertaining to Comment on Final Determination Regarding Cash Deposit Rate for Jinhaoyang at 2, PD 482 (Jan. 25, 2017). In short, Commerce provided no explanation that would support Commerce applying here an "exception[] on a case-by-case basis" within the meaning of Com-

merce's regulation. See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,303 (Dep't Commerce May 19, 1997) (final rule); see *Tung Mung*, 25 CIT at 764, *aff'd Tung Mung*, 354 F.3d 1371; see also *NMB Singapore*, 557 F.3d at 1319–20 (stating that “while [Commerce’s] explanations do not have to be perfect, the path of Commerce’s decision must be reasonably discernable to a reviewing court [A] final determination by Commerce must include ‘an explanation of the basis of its determination that addresses relevant arguments [] made by interested parties who are parties to the investigation or review.’” (citing 19 U.S.C. § 1677f(i)(3)(A)).

The court concludes that Commerce failed to provide a reasonable explanation of its decision not to apply a combination rate to Jinhaoyang. Accordingly, the court remands the issue to Commerce and directs Commerce to (1) present an explanation of its decision, or (2) apply a combination rate to Jinhaoyang and list Jinhaoyang as an exporter to receive Double Coin’s cash deposit rate in Commerce’s instructions to Customs.

CONCLUSION

In the 1993 film, *Groundhog Day*, weatherman Phil (portrayed by Bill Murray) takes an overnight business trip to the small town of Punxsutawney, Pennsylvania to report on the town’s local Groundhog Day festivities. On February 2, Phil wakes up in the local bed and breakfast and heads to the town square to cover the town’s Groundhog Day events. Jaded and unimpressed with the small town and its inhabitants, Phil is eager to leave but due to a winter storm, he is forced to spend another night in Punxsutawney. The next day, Phil wakes up in the same bed and breakfast and begins to experience the previous day’s events. Unbeknownst to Phil, he has entered a time loop and is set to re-live February 2 for the foreseeable future. Phil, bewildered and concerned by what he believes to be a severe case of déjà vu, attempts to seek some guidance from the owner of the bed and breakfast, Mrs. Lancaster (portrayed by Angela Paton).

Phil: “Do you ever have déjà vu, Mrs. Lancaster?”

Mrs. Lancaster: “I don’t think so, but I could check with the kitchen.”⁷⁷

* * *

In conclusion, this case has presented a recurring issue before the court. Repeatedly, the issue of Commerce’s application of AFA to find use of the EBCP has come before the Court and repeatedly the Court has remanded back to Commerce for further explanation. The court

⁷⁷ See *supra* note 1.

encourages Commerce to use this remand finally to move beyond this endless loop by providing a further explanation for its decision to not verify the customer self-certifications and turn to AFA. On remand, Commerce is also directed to: (1) explain further its determination regarding the grants presented at verification; (2) explain its decision to not apply a supply ratio to the import duty and ocean freight adjustments; (3) address the issue of the quantity of imports in selecting its Tier 1 benchmark for synthetic rubber and butadiene; and, (4) explain its decision to not assign a combination rate to Jinhaoyang. Accordingly, the court grants in part and denies in part plaintiffs' Motions for Judgment on the Agency Record and remands in part the Final Determination to Commerce.

Based on the foregoing reasons, it is hereby

ORDERED that on remand Commerce explain further its decision to reject the grants as "minor corrections;" it is further

ORDERED that on remand Commerce describe: (1) each of the specific ways in which its understanding of the operation of the EBCP was "unreliable"; and, (2) each of the ways in which the uncertainty created by the gaps in the record concerning the operation of the program (a) reasonably prevented Commerce from relying on the self-certifications, and (b) created uncertainty as to whether Commerce would even be able to establish through verification, and having to rely on non-GOC sources, non-use of the EBCP; it is further

ORDERED that on remand Commerce: (1a) explain the reason that the information withheld by the GOC about the threshold requirement was necessary to verify non-use by describing how the missing information prevents Commerce from taking the steps that it considers necessary to verify non-use; (1b) explain the reason that the information withheld by the GOC about the third-party banks was necessary to verify non-use by describing how the missing information prevents Commerce from taking the steps that it considers necessary to verify non-use; (2) explain whether it would be feasible for Commerce to solicit and obtain the withheld information from customers — which are third parties to the investigation — by describing each step that Commerce would consider to be necessary to obtain such information, including stating clearly the reason(s) that Commerce considered each step necessary; (3) with respect to "(2)", above, describe with particularity any "significant burden" Commerce might or would likely incur in taking such action; (4) explain the extent to which Commerce would be able to rely on information from customers by identifying what information Commerce would seek from customers and explaining how, if at all, such information would be useful to Commerce to establish non-use; (5) explain why the claims of non-use are "unverifiable" by describing step-by-step Commerce's methodology for verifying non-use; (6) address whether, without information about the operational changes to the EBCP, verification of the cus-

tomers' self-certifications in accordance with Commerce's methodology is (a) "insurmountable" based on Commerce's resources, (b) unlikely to yield relevant and reliable information or (c) both; (7) with respect to "(6)", above, were the question of sampling to arise, explain whether sampling would be (a) "insurmountable" based on Commerce's resources, (b) unlikely to yield relevant and reliable information or (c) both; (8a) state whether Commerce has a practice of verifying information from third parties; (8b) if Commerce has such a practice, explain why it is reasonable for Commerce to refrain from verifying the information submitted by the customers, through the respondents, in this case; and, (9) explain whether the proposed solutions — such as Commerce visiting respondents' customers and asking for a list of the banks or lenders that provided loans to the customers during the POI — are feasible alternative methods of verification for Commerce, and if Commerce concludes that these methods are not feasible, explain the reasons for this conclusion. The court emphasizes that each of the aforementioned instructions for Commerce on remand is a distinct inquiry that requires a distinct individual response as well as clarification from Commerce in its redetermination; it is further

ORDERED that on remand Commerce (1) explain the basis for its decision not to apply a supply ratio to the import duty and ocean freight adjustments by addressing directly Double Coin's arguments on the issue, and (2) address the issue of consideration of the quantity of imports in selecting its Tier 1 benchmark for synthetic rubber and butadiene; it is further

ORDERED that on remand Commerce must either (1) present an explanation for its decision not to assign Double Coin's cash deposit rate to Jinhaoyang, or (2) apply a combination rate to Jinhaoyang and list Jinhaoyang as an exporter to receive Double Coin's cash deposit rate in Commerce's instructions to Customs; it is further

ORDERED that the remand results shall be due ninety (90) days following the date of this Opinion and Order; it is further

ORDERED that any comments on the remand results shall be submitted within 30 days of the filing of the results; and it is further

ORDERED that any replies to the comments are due 15 days thereafter.

Dated: May 19, 2021
New York, New York

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

Slip Op. 21–66

N. AM. INTERPIPE, INC., Plaintiff, v. UNITED STATES, Defendant.
Court No. 20–03825

EVRAZ INC. NA, et ano., Plaintiffs, v. UNITED STATES, Defendant.
Court No. 20–03869

AM/NS CALVERT LLC, Plaintiff, v. UNITED STATES, Defendant.
Court No. 21–00005

CALIFORNIA STEEL INDUS., INC., Plaintiff, v. UNITED STATES, Defendant.
Court No. 21–00015

VALBRUNA SLATER STAINLESS, INC., Plaintiff, v. UNITED STATES,
Defendant.
Court No. 21–00027

VOESTALPINE HIGH PERFORMANCE METALS CORP., et ano., Plaintiff, v.
UNITED STATES, Defendant.
Court No. 21–00093
Before: M. Miller Baker, Judge

[Denying motions to intervene.]

Dated: May 25, 2021

Matthew J. McConkey, Mayer Brown LLP of Washington, DC, on the papers for Proposed Defendant-Intervenor United States Steel Corporation in Court No. 20–3825.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth J. Drake*, and *Luke A. Meisner*, Schagrin Associates of Washington, DC, on the papers for Proposed Defendant-Intervenor United States Steel Corporation in Court No. 20–3869.

Timothy C. Brightbill, *Laura El-Sabaawi*, *Tessa V. Capeloto*, and *Adam M. Teslik*, Wiley Rein LLP of Washington, DC, on the papers for Proposed Defendant-Intervenors American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., and Stupp Corporation in Court No. 20–3869.

Thomas M. Beline and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP of Washington, DC, on the papers for Proposed Defendant-Intervenor United States Steel Corporation in Court Nos. 21–00005 and 21–00015.

John R. Magnus, TradeWins LLC of Washington, DC, on the papers for Proposed Defendant-Intervenor Electralloy/G.O. Carlson in Court Nos. 21–00027 and 21–00093, as well as for Proposed Defendant-Intervenors Crucible Industries LLC, Ellwood City Forge Company, and Ellwood Specialty Steel in Court No. 21–00093.

H. Deen Kaplan, *Craig A. Lewis*, and *Nicholas W. Laneville*, Hogan Lovells US LLP of Washington, DC, on the papers for Plaintiffs North American Interpipe, Inc., in Court No. 21–00005 and Evraz Inc. NA and Evraz Inc. NA Canada in Court No. 20–03869. *Messrs. Lewis* and *Laneville* were also on the papers for Plaintiff Valbruna Slater Stainless, Inc., in Court No. 21–00027.

Paul C. Rosenthal, *R. Alan Luberda*, *Joshua Morey*, and *Julia A. Kuelzow*, Kelley Drye & Warren LLP of Washington, DC, on the papers for Plaintiff AM/NS Calvert LLC in Court No. 21–00005.

Sanford Litvack, *Andrew L. Poplinger*, and *R. Matthew Burke*, Chaffetz Lindsey LLP of New York, NY, on the papers for Plaintiff California Steel Industries, Inc., in Court No. 21–00015.

Matthew M. Nolan, Nancy A. Noonan, Leah N. Scarpelli, and Jessica R. DiPietro, Arent Fox LLP of Washington, DC, on the papers for Plaintiffs Voestalpine High Performance Metals Corp. and Edro Specialty Steels, Inc., in Court No. 21-00093.

Tara K. Hogan, Assistant Director, *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the papers for Defendant United States in all six cases. The following counsel were also on the papers for Defendant United States in the specified matters: *Kyle S. Beckrich*, Trial Attorney, Cases 20-03825 and 21-00005; *Joshua E. Kurland*, Trial Attorney, Case 20-03869; *Ann C. Motto*, Trial Attorney, Cases 21-00015 and 21-00093; and *Stephen C. Tosini*, Senior Trial Counsel, Case 21-00027. Of counsel on the papers for Defendant United States in all six matters were *Anthony D. Saler* and *Kimberly Hsu*, Office of Chief Counsel for Industry & Security, U.S. Department of Commerce of Washington, DC.

OPINION

***Baker*, Judge:**

In these six cases, domestic entities that imported steel subject to national security tariffs challenge the Department of Commerce’s denial of their requests to be excluded (exempted) from paying such tariffs and seek refunds of tariffs so paid. Several domestic steel producers that objected to Plaintiffs’ exclusion requests before Commerce now seek to intervene in this litigation on the side of the government. The Court concludes that the proposed intervenors are ineligible to intervene as a matter of law and therefore denies their motions for the reasons explained below. Nevertheless, the Court reiterates its willingness to entertain motions to appear as *amici curiae*. See USCIT R. 76; see also *PrimeSource Bldg. Prods., Inc. v. United States*, 494 F. Supp. 3d 1307, 1335 (CIT 2021) (Baker, J., concurring) (“[E]xperienced litigators note that many of those benefits [of intervention] could be achieved simply by . . . outsiders . . . present[ing] their views as *amici*.”) (alterations in original) (quoting Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 391 (2020)).

Statutory and Regulatory Background

Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods to “[s]afeguard[] national security.” 19 U.S.C. § 1862. Pursuant to this authority, the President imposed a 25 percent ad valorem tariff on imports of certain steel products. See Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

Proclamation 9705 also directed the Secretary of Commerce to exclude from the proclamation’s duties “any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” and further authorized the Secretary “to provide such relief based upon specific national security considerations.” *Id.* at 11,627 ¶ 3.

Commerce accordingly issued an interim final rule authorizing U.S. importers to request an exclusion from Section 301 duties of any “[a]rticle [that] is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration.” *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; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106, 12,110 (Dep’t Commerce Mar. 19, 2018) (cleaned up).

Under this rule, exclusions do not relate to products generally—rather, they apply to specified quantities of subject products, and insofar as Commerce grants any importer’s exclusion request, the exclusion applies for one year or until the submitting party has imported the full volume of material subject to the exclusion, whichever comes first. U.S. Dep’t of Commerce, Bureau of Industry and Security, *232 Exclusion Process Frequently Asked Questions (FAQs)* Version 1.01, at 12 (June 18, 2019) (also noting that companies may obtain relief retroactive to the date the exclusion request was submitted) (accessed May 24, 2021).¹ Exclusions do not apply to other importers or purchasers, nor do they apply to other products. 83 Fed. Reg. at 12,107 (“Approved exclusions will be made on a product basis and will be limited to the individual or organization that submitted the specific exclusion request”); *232 Exclusion Process FAQs, above*, at 18 (“The company that filed the original exclusion request has exclusive rights[,] and a granted exclusion is non-transferable.”).

The interim final rule also allows “[a]ny individual or organization that manufactures steel articles in the United States” to object to exclusion requests. *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026, 46,058 (Dep’t Commerce Sept. 11, 2018). Insofar as an objector asserts “that it is not currently producing the steel identified in an exclusion request but can produce the steel within eight weeks,” the objector “must identify how it will be able to produce the article within eight weeks.” *Id.*

Factual Background

Plaintiffs in these six cases are domestic manufacturers and one domestic distributor that import various types of steel subject to

¹ <https://www.bis.doc.gov/index.php/documents/section232-investigations/2409-section-232-faq/file>.

Section 232 tariffs.² The plaintiffs applied to Commerce for exclusions from the tariffs, and other domestic companies objected to the requests on various grounds, typically based on the claim that they could satisfactorily produce all of, or sufficient substitutes for, the material that was the subject of the exclusion requests.

Commerce subsequently denied all (or, in one case, substantially all) of Plaintiffs' exclusion requests on various grounds. Significantly for present purposes, the plaintiff(s) in each case paid the challenged duties and imported the steel products in question notwithstanding the exclusion denials.³

The plaintiffs then brought these six suits under this Court's residual jurisdiction. *See* 28 U.S.C. § 1581(i). Plaintiffs assert Administrative Procedure Act claims contending that Commerce failed to consider relevant factors and evidence, failed to give adequate explanations for its decisions, and in some instances considered legally irrelevant factors. *See* 5 U.S.C. §§ 701–06. As relief, the plaintiffs ask this Court to order refunds or remand these cases back to Commerce for further proceedings.

The Pending Intervention Motions

Several domestic parties that asserted objections to Plaintiffs' exclusion requests before Commerce now move to intervene in these cases as party defendants and have tendered proposed answers. United States Steel Corporation seeks to intervene in four of these cases;⁴ four members of the American Line Pipe Producers Association seek to intervene in their individual capacities⁵ (collectively,

² Plaintiff North American Interpipe imports steel pipe products and then distributes them. *See* Case 20–3825, ECF 5, at 3, 5. Plaintiffs Evraz, AM/NS Calvert, California Steel, Valbruna, and Voestalpine manufacture various steel products and import steel used in such manufacturing. *See* Case 20–3869, ECF 35–2, at 4–5 (Evraz); Case 21–5, ECF 2, at 3–4 (AM/NS Calvert); Case 21–15, ECF 2, at 2–3 (California Steel); Case 21–27, ECF 4, at 3–4 (Valbruna); Case 21–93, ECF 2, at 3–5 (Voestalpine).

³ Case 20–3825, ECF 23, at 14–15 (“U.S. Steel never actually supplied the required steel inputs, and [North American Interpipe] was forced to pay the 25 percent duties in order to import the steel necessary to maintain its operations”); Case 20–3869, ECF 33, at 8 (Evraz, same argument as to Pipe Producers); Case 21–5, ECF 21, at 4 (Calvert noting it imported steel and paid the Section 232 duties); Case 21–15, ECF 18, at 5 (California Steel, same); Case 21–27, ECF 19, at 9 (“ . . . Valbruna was unable to, and therefore did not, purchase any of these products from Electralloy, but instead was forced to pay the 25 percent Section 232 tariffs”); Case 21–93, ECF 27, at 6 (Voestalpine stating it paid the Section 232 tariffs).

⁴ U.S. Steel seeks to intervene in Cases 20–3825 (ECF 12), 20–3869 (ECF 10), 21–5 (ECF 9), and 21–15 (ECF 12).

⁵ American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., and Stupp Corporation. In their supplemental briefing, the Pipe Producers clarified that the association itself does not seek to intervene. Case 20–3869, ECF 30, at 1.

“Pipe Producers”) in a single case;⁶ Electralloy/G.O. Carlson seeks to intervene in two others;⁷ and Crucible Industries LLC, Ellwood City Forge Company, and Ellwood Specialty Steel all seek to intervene in a single case.⁸

The plaintiffs oppose intervention. The government filed papers that fail to take a direct position but express doubts on the propriety of intervention.⁹

Discussion

All proposed intervenors move to intervene as a matter of right under Rule 24(a)(2) (based on a claimed interest in the transactions at issue) and, alternatively, for permissive intervention under Rule 24(b)(1)(B) (based on a claimed shared defense). Some of the intervenors also move for permissive intervention under Rule 24(b)(1)(A) (based on a claimed conditional right to intervene by statute).¹⁰ The Court considers each ground in turn, but first addresses the threshold question of the proposed intervenors’ standing.

I. Intervenors’ Article III standing burden

In a district court and the CIT, Article III requires as a threshold matter that a proposed intervenor—regardless of the basis upon which intervention is sought—demonstrate independent constitutional standing insofar as the proposed intervenor seeks any relief that is different from that sought by the existing parties to the case. *See PrimeSource*, 494 F. Supp. 3d at 1319–20 (Baker, J., concurring) (discussing *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645 (2017), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)). In view of this principle, a putative intervenor has the burden of demonstrating either its independent constitutional standing or its “piggyback standing,” i.e.,

⁶ The Pipe Producers seek to intervene in Case 20–3869 (ECF 17).

⁷ Electralloy seeks to intervene in Cases 21–27 (ECF 9) and 21–93 (ECF 10).

⁸ Crucible, Ellwood City, and Ellwood Specialty all seek to intervene in Case 21–93 (Crucible, ECF 13; Ellwood City and Ellwood Specialty, ECF 16). Because the two Ellwood entities filed a single motion that refers to them jointly as “Ellwood,” this opinion does the same.

⁹ Cases 20–3825 (ECF 33), 20–3869 (ECF 49), 21–5 (ECF 20), 21–15 (ECF 21), 21–27 (ECF 21), and 21–93 (ECF 28).

¹⁰ U.S. Steel invokes Rule 24(b)(1)(A) in Cases 20–3825 (ECF 22, at 14) and 20–3869 (ECF 32, at 14), but it does not do so in Cases 21–5 and 21–15. The Pipe Producers invoke Rule 24(b)(1)(A) in Case 20–3869 (ECF 17, at 5–6 (Pipe Producers discussing “conditional right to intervene by federal statute”). The other proposed intervenors do not invoke this provision.

standing based on seeking the same relief sought by an existing party to the case. *See id.*¹¹

In two of these cases, U.S. Steel disclaims seeking any relief separate from that sought by the government and has therefore established its piggyback standing.¹² On the other hand, in two of the other cases in which it seeks to intervene,¹³ U.S. Steel ignores the issue. Electralloy, Crucible, and Ellwood likewise ignore the issue in motions that are largely verbatim copies of the latter two filings from U.S. Steel. Therefore, the Court denies the latter two motions from U.S. Steel, as well as those from Electralloy, Crucible, and Ellwood, because they fail to even address, much less establish, either their independent constitutional standing or their piggyback standing as required by Article III.

In Case 20–3869, the Pipe Producers stated at the time of their filing that they did “not know what relief, if any, Defendant intends to seek with respect to each of Plaintiff’s claims.” Case 20–3869, ECF 30, at 2. That said, however, the Pipe Producers made clear that “[t]he only relief that Proposed Defendant-Intervenors seek is for Plaintiff’s [i.e., Evraz’s] line pipe [exclusion] claims to be denied.” *Id.* at 3. As the government’s since-filed answer also seeks rejection of those claims, *see* Case 20–3869, ECF 45, the Pipe Producers have satisfied their Article III burden of establishing their piggyback standing.¹⁴

II. Intervention as of right (Rule 24(a)(2))

All the proposed intervenors invoke Rule 24(a)(2), which provides in relevant part:

¹¹ In Cases 20–3825 and 20–3869, the proposed intervenors filed motion papers either prior to or contemporaneously with the issuance of the *PrimeSource* decision that denied intervention in several cases challenging the President’s Section 232 tariffs. The Court therefore directed the proposed intervenors in those cases to file supplemental papers addressing standing and other issues explored in the *PrimeSource* concurrence. Case 20–3825, ECF 18, at 2–3; Case 20–3869, ECF 26, at 2–3. As the later-filed moving papers of proposed intervenors in the other four cases indicated awareness of the *PrimeSource* decision generally, *see* Case 21–5, ECF 9, at 5 (generally citing *PrimeSource*), and of the issues explored in the concurrence specifically, *see id.* at 4 n.1; Case 21–15, ECF 12, at 4 n.1; Case 21–27, ECF 9, at 4 n.1; Case 21–93, ECF 10, 13, and 16, all at 6 n.2, the Court did not order supplemental briefing in those cases.

¹² *See* Case 20–3825, ECF 22, at 4 (“ . . . U.S. Steel seeks relief that is identical to that already sought by the federal government—*i.e.*, for this Court to uphold the government’s denial of the product exclusions requested by Plaintiff.”); Case 20–3869, ECF 32, at 4 (same). In those cases, U.S. Steel also asserts it has constitutional standing. Case 20–3825, ECF 22, at 14–15; Case 20–3869, ECF 32, at 14–15 (same). The Court addresses this contention below in connection with permissive intervention under Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1).

¹³ Cases 21–5 and 21–15.

¹⁴ The Pipe Producers also assert that they have independent constitutional standing. *See* Case 20–3869, ECF 30, at 14. The Court addresses this contention below in connection with permissive intervention under Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1).

Intervention of Right. On timely motion, the court must permit anyone to intervene who:

....

(2) . . . 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.

USCIT R. 24(a)(2).

This language is borrowed from Federal Rule of Civil Procedure 24, which the Federal Circuit has interpreted as imposing a four-part test: (1) the motion must be timely; (2) the moving party must claim an interest in the property or transaction at issue that is “‘legally protectable’—merely economic interests will not suffice,” *Wolfsen Land & Cattle Co. v. Pac. Coast Fed’n of Fishermen’s Ass’ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (quoting *Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989)); (3) “that interest’s relationship to the litigation 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,’” *id.* (quoting *Am. Mar.*, 870 F.2d at 1561) (emphasis in *Am. Mar.*); and (4) “the movant must demonstrate that said interest is not adequately addressed by the government’s participation,” *id.* (quoting *Am. Mar.*, 870 F.2d at 1560).¹⁵ As no party opposing intervention disputes—or could reasonably dispute—that the intervention motions were timely,¹⁶ the Court therefore addresses the remaining three elements.

A. Whether the proposed intervenors have legally protectable interests

The proposed intervenors all claim to have legally protectable interests in Commerce’s denials of the plaintiffs’ Section 232 exclusion requests. The reasons offered fall into two categories.

First, several of the proposed intervenors claim that they have various economic interests in preventing the plaintiffs from escaping

¹⁵ As explained in the *PrimeSource* concurrence, see 494 F. Supp. 3d at 1325 n.24 (Baker, J., concurring), while *Wolfsen* and *American Maritime* involved Court of Federal Claims Rule 24, the Federal Circuit applied authorities that interpreted Federal Rule of Civil Procedure 24. See *Wolfsen*, 695 F.3d at 1315–16; *Am. Mar.*, 870 F.2d at 1561. The relevant Court of Federal Claims rule is—like this Court’s Rule 24—drawn verbatim from Federal Rule of Civil Procedure 24, making the rationale of *Wolfsen* and *American Maritime* directly controlling in the Court of International Trade.

¹⁶ All of the intervention motions were filed shortly after the commencement of these actions.

Section 232 steel tariffs.¹⁷ In two cases, U.S. Steel implies, without directly stating, that it has an economic interest by arguing that it has a “direct interest” in Commerce’s decision on the exclusion requests because “U.S. Steel can produce the exact products Plaintiff sought exclusions for” and because “Plaintiff sought to undermine the purpose of the Section 232 tariffs and deprive U.S. Steel and other domestic producers of the benefits of the Section 232 tariffs.” Case 20–3825, ECF 22, at 6; Case 20–3869, ECF 32, at 6 (same). Such economic interests, however, do not establish a “legally protectable interest” under Rule 24. *See Wolfsen*, 695 F.3d at 1315 (“mere[] economic interests will not suffice”).

The Pipe Producers, in contrast, analogize these cases to antidumping or countervailing duty proceedings because Commerce’s exclusion procedure is “an adversarial administrative procedure through which interested parties in the United States could request and object to product-specific exclusions from Section 232 tariffs.” Case 20–3869, ECF 30, at 6. “Like antidumping and countervailing duty proceedings, and unlike the Proclamation at issue in *PrimeSource*, this framework ‘provide[s] specific rights to domestic producers to participate in administrative proceedings culminating in final agency action’ either granting or denying exclusions from Section 232 duties.” *Id.* at 7 (brackets in original) (quoting *PrimeSource*, 494 F. Supp. 3d at 1325 (Baker, J., concurring)).

For purposes of Rule 24(a)(2)’s “protectable interest” inquiry, however, Section 232 and its administrative scheme, differ in at least two critical respects from the Tariff Act of 1930, 19 U.S.C. § 1202 *et seq.*, and its administrative scheme governing antidumping and countervailing duties.¹⁸ First, unlike the Tariff Act, which confers an absolute right on domestic interested parties to request initiation of investigations and to participate in Commerce’s and the International Trade

¹⁷ *See* Case 21–15, ECF 12, at 6 (U.S. Steel arguing that Commerce’s decision on an exclusion request “has a direct commercial and economic impact on U.S. Steel, which is why domestic producers like U.S. Steel are provided an opportunity to object in the first instance.”); Case 21–5, ECF 9, at 6 (U.S. Steel making same argument); Case 21–27, ECF 9, at 5–6 (Electralloy, same argument); Case 21–93, ECF 10 (Electralloy), 13 (Crucible), and 16 (Ellwood), all at 9–10 (same argument).

¹⁸ The two statutory schemes also differ in a third respect, but this difference is relevant to Rule 24(a)’s alternative pathway for intervention as of right, i.e., when a third party “is given an unconditional right to intervene by federal statute.” USCIT R. 24(a)(1). By statute, interested parties that participate in administrative proceedings before Commerce and the ITC in antidumping and countervailing duty matters may intervene as of right in any ensuing litigation in the CIT. *See* 28 U.S.C. § 2631(j)(1)(B). As a result, such interested parties intervene in this Court using the procedural mechanism of Rule 24(a)(1) rather than Rule 24(a)(2). Accordingly, the Court assumes—but does not decide—that absent the existing unconditional statutory right of intervention, interested parties that participated in administrative proceedings in antidumping and countervailing duty cases would have a protectable interest for purposes of intervention under Rule 24(a)(2).

Commission's antidumping and countervailing duty proceedings,¹⁹ Section 232 itself confers no such right to participate in agency proceedings. While Section 232 expressly permits Commerce to hear from domestic parties in connection with national security investigations,²⁰ the statute does not require Commerce to do so, nor does it impose any requirement that Commerce—much less this Court—permit outsiders to voice objections to any exclusions that the Department might grant under any administrative scheme implementing national security tariffs. *Cf. Am. Mar.*, 870 F.2d at 1562–63 (holding that statutory right of “all parties” to be heard in agency proceedings did not create a protected legal interest of such parties to litigate in what is now the Court of Federal Claims absent statutory recognition of such a right). That Commerce does so is, in effect, an act of administrative grace that creates no protected legal interests.

Second, the Tariff Act only permits narrowly defined parties—“interested parties”—to participate in antidumping and countervailing duty administrative proceedings. *See above* note 19. In contrast, Commerce's administrative scheme implementing Section 232 permits *any* domestic person or entity to voice objections to exclusion requests. For purposes of Rule 24(a)(2), any scheme such as Commerce's here that effectively permits *anyone* to participate in administrative proceedings confers a legally protectable interest on no one. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (stating that Congress may not “convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts”) (cleaned up).

In short, because Section 232 confers no statutory right to object to any exclusions that Commerce might grant, and because Commerce's administrative scheme indiscriminately permits anyone to voice such objections, the Court concludes that the Pipe Producers—the only proposed intervenors that made this argument—have no legally protectable interests for purposes of Rule 24(a)(2) notwithstanding their participation in Commerce's administrative proceedings.

¹⁹ *See, e.g.*, 19 U.S.C. §§ 1671a (initiation of countervailing duty investigation), 1673a (initiation of antidumping duty investigation), 1671b(b)(3) (referring to “interested party” participation in countervailing duty investigation), 1673b(b)(2) (same as to antidumping duty investigations), 1677(9)(C) (defining an “interested party” to include “a manufacturer, producer, or wholesaler in the United States of a domestic like product”).

²⁰ *See* 19 U.S.C. § 1862(b)(2)(A)(iii) (“In the course of any investigation conducted under this subsection, the Secretary shall . . . if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.”).

B. Whether the proposed intervenors will gain or lose by the direct legal operation and effect of the judgment

Even if the proposed intervenors have legally protected interests in defending Commerce's denials of the plaintiffs' exclusion requests, the intervenors must also establish that they "will either gain or lose by the *direct* legal operation and effect of the judgment." *Wolfsen*, 695 F.3d at 1315 (quoting *Am. Mar.*, 870 F.2d at 1561) (emphasis in *Am. Mar.*). They cannot satisfy this requirement.

In two of these cases, U.S. Steel argues that it has a "direct and immediate" interest because a ruling for Plaintiffs "will harm U.S. Steel's ability to protect its interest as a leading domestic market participant." Case 20-3825, ECF 22, at 9.²¹ U.S. Steel argues that it is the party "best placed to address" evidence about "its own ability to produce the subject products in sufficient quantities and qualities, and its delivery times." *Id.* U.S. Steel claims that if the Court orders Commerce to grant the requested exclusions, the result would be to "block U.S. Steel's reinvestment in domestic steel production, depress market prices, and necessarily foreclose sales opportunities, [which] would negatively impact U.S. Steel's production utilization." *Id.*

In the other two cases in which it seeks to intervene, U.S. Steel argues that "the potential adverse impact to U.S. Steel is not mere abstract 'competition,' and would occur by 'the *direct* legal operation and effect of the judgment' upon the tariff treatment of the products at issue." Case 21-15, ECF 12, at 7 (emphasis in original) (quoting *Am. Mar.*, 870 F.2d at 1561).²² U.S. Steel emphasizes its argument that it "was capable of producing and selling slab substantially similar to that which [Plaintiffs] sought to import tariff-free . . ." *Id.* at 8. Electralloy, Crucible, and Ellwood copy this argument essentially verbatim. Case 21-27, ECF 9, at 6; Case 21-93, ECF 10, at 10-11, ECF 13, at 10, and ECF 16, at 10-11.

Finally, the Pipe Producers argue that their interests are "direct and immediate" because "the product exclusion determinations at issue in this appeal relate to specific sales and projects. The purpose of Proposed Defendant-Intervenors' objections was to produce and sell line pipe for those specific projects. Their ability to do so turned directly on Commerce's decision to grant or deny Plaintiff's requests." Case 20-3869, ECF 30, at 8 (citation omitted). The Pipe Producers therefore conclude that their interests "include specific transactions that '[a]ny relief granted by this Court will . . . operate directly and

²¹ U.S. Steel's argument in Case 20-3869 is identical. ECF 32, at 9.

²² U.S. Steel's argument in Case 21-5 is identical. ECF 9, at 7.

immediately’ to affect.” *Id.* at 8–9 (alterations in original) (quoting *PrimeSource*, 494 F. Supp. 3d at 1326 (Baker, J., concurring)).

The problem with the proposed intervenors’ arguments is that upholding Commerce’s exclusions will not provide the intervenors with sales opportunities, because that ship has sailed. Plaintiff North American Interpipe explains the issue well in responding to U.S. Steel’s allegations about foreclosed “sale opportunities”:

However, despite denial of the exclusion requests, U.S. Steel did not subsequently supply the products at issue to [North American Interpipe]. Thus, the grant or denial of the exclusion requests that are at issue in this appeal will have no particularized impact on U.S. Steel. In reality, the only “interest” identified by U.S. Steel in this matter is the indirect economic benefit U.S. Steel believes it would receive by ensuring that [North American Interpipe] is injured by unfair tariff treatment.

Case 20–3825, ECF 23, at 7. The other plaintiffs make the same point.²³

Because the steel in question has long since been imported and used, whether the Court affirms or overturns Commerce’s exclusion denials can make no difference to the proposed intervenors. Moreover, the result here would be the same even *if*, hypothetically, the imports in question were suspended and gathering dust in port warehouses pending the outcome of this litigation. In that counterfactual scenario, there would still be no certainty that if Plaintiffs lost they would ship back their imports (if such a thing were even commercially feasible) and instead purchase from the proposed intervenors.

Thus, even if the imports could be rescinded if the government were to prevail and the world could be restored to the *status quo ante*, the proposed intervenors would still not “gain . . . by the *direct* legal operation and effect of the judgment,” *Wolfsen*, 695 F.3d at 1315 (quoting *Am. Mar.*, 870 F.2d at 1561) (emphasis in *Am. Mar.*). Any such gain would instead be both indirect and contingent, resulting

²³ See Case 21–27, ECF 19, at 9 (“Valbruna was unable to, and therefore did not, purchase any of these products from [objector] Electralloy, but instead was forced to pay the 25 percent Section 232 tariffs in order to continue to supply its operations in Fort Wayne.”); Case 21–5, ECF 21, at 4 (“[T]he litigation involves entries that are now almost two years old and have long ago been used or shipped.”); Case 21–93, ECF 27, at 8 (similar); Case 20–3869, ECF 25, at 8 (“If this Court were to grant the relief sought by Evraz, and were Commerce to retroactively grant Evraz’s requests for duty exclusions, this would merely result in a refund of Section 232 duties improperly paid on imports already made. In other words, the relief Evraz seeks could not deprive U.S. Steel of any theoretical sales opportunities and therefore could not positively impact U.S. Steel’s capacity utilization rate.”); Case 21–15, ECF 18 at 5 (noting the slabs in question have been imported and the duties paid).

not from the direct effect of the judgment, but instead from Plaintiffs' choice to purchase from the proposed intervenors rather than completing the imports. *Cf. Am. Mar.*, 870 F.2d at 1561 (observing that a putative intervenor's "interest is indirect, because no consequence to it flows directly from a Claims Court ruling, and contingent because of the uncertainty that other events will actually follow, causing [the putative intervenor] to suffer any harm").

In any event, given that the imports in question were completed long ago with the accompanying payment of duties, the only possible "gain" that the proposed intervenors can possibly obtain here is seeing economic harm inflicted on the plaintiffs as actual or potential competitors. The proposed intervenors, however, do not expressly claim to be competitors with the plaintiffs—rather, they claim that they can supply the products imported by the plaintiffs. But even if the proposed intervenors and the plaintiffs do compete, any competitive benefit—if it can be called that²⁴—to the former resulting from the latter losing here would be both indirect and contingent. *See id.*

C. Adequacy of government representation

The final element of the test for intervention as of right under Rule 24(a)(2) is whether the movant has demonstrated that its interest will not be adequately represented by the government. That requires "a compelling showing that [the movant's] interests may not be adequately protected by the government insofar as there are aspects of the case that the government might not—or might not be able to—pursue to their fullest" and overcoming "the presumption that the government as sovereign adequately represents the interest of citizens concerning matters that invoke 'sovereign interests.'" *Prime-Source*, 494 F. Supp. 3d at 1326 (Baker, J., concurring) (quoting *Wolfsen*, 695 F.3d at 1316).

One way to overcome the presumption is to seek different relief than the government, as then the proposed intervenor's "specific litigation goals" would not "identically match those of an existing party."²⁵ *Wolfsen*, 695 F.3d at 1318. For example, opposing a settlement agreed to by the government would surely constitute a divergence in litigation goals. To that end, the proposed intervenors express alarm that the government might settle these cases, and

²⁴ The Court need not resolve the question, but it doubts that inflicting retrospective harm that amounts to retaliation—as opposed to prospectively raising the prices of a competitor's products—is a cognizable "competitive benefit" for purposes of Rule 24(a)(2).

²⁵ Of course, overcoming the presumption by seeking different relief than the government would be at the price of incurring the burden of demonstrating independent constitutional standing. *See PrimeSource*, 494 F. Supp. 3d at 1319–20 (Baker, J., concurring).

intimate that they would oppose settlement. *See, e.g.*, Case 20–3825, ECF 22, at 11–12. “But these concerns [regarding potential settlement] are at this point speculative and cannot justify intervention unless and until there is such a settlement.” *Wolfsen*, 695 F.3d at 1318.

As the proposed intervenors here seek (so far) the same relief as the government, their “entry into [these] case[s] is presumptively barred” unless they “demonstrate that [their] participation could add some material aspect beyond what is already present.” *Id.*

The proposed intervenors make no such showing here. Instead they assert that the government’s sovereign interest in maintaining the Section 232 exclusion process does not encompass their proprietary interests in these specific transactions. *See, e.g.*, Case 20–3869, ECF 30, at 10 (Pipe Producers arguing that they “are seeking to protect a more ‘parochial’ financial interest not shared by other citizens” and that “there is no reason to believe that [the government] has any specific interest in defending the line pipe product exclusion determinations *in particular*” (emphasis in original) (quoting, for the “parochial interest,” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995)); Case 21–93, ECF 16, at 15 (Ellwood arguing that “the government may be content to litigate this matter with an objective of protecting the broader Section 232 process while granting the particular exclusions at issue to make this case go away”). *Wolfsen*, however, requires the Court to presume that the government’s sovereign interests and the proposed intervenors’ private interests are coincident. *See* 695 F.3d at 1317.²⁶

Finally, several proposed intervenors claim that they can make “factual contributions” that will cure “imperfect administrative records.”²⁷ The Court disagrees because, as Plaintiffs and the government point out, judicial review is confined to the existing administrative records in these matters. *See JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320, 1328 (CIT 2020) (stating that in APA

²⁶ Insofar as the proposed intervenors rely on *Vivitar Corp. v. United States*, 585 F. Supp. 1415 (CIT 1984), for the proposition that private commercial interests are not adequately represented by the government, *Vivitar* is no longer persuasive in light of *Wolfsen*. *See PrimeSource*, 494 F. Supp. 3d at 1327 (Baker, J., concurring).

²⁷ *See, e.g.*, Case 20–3825, ECF 22, at 12–13 (“Finally, as Section 1581(i) cases lack an administrative record until the record is created through the government’s answer and potential discovery, . . . U.S. Steel’s factual contributions concerning its production capacity will bolster its existing, truthful submissions to the administrative record.”); Case 21–5, ECF 9, at 10 (“Finally, as Section 1581(i) cases lack an administrative record until the record is created through the government’s answer and potential discovery, . . . U.S. Steel’s interests may be impaired or impeded by imperfect administrative records”); Case 21–27, ECF 9, at 8 (Electralloy, same argument as U.S. Steel in Case 21–5); Case 21–93, ECF 10, 13, and 16, all at 13 (Electralloy, Crucible, and Ellwood, same argument as U.S. Steel in Case 21–5).

cases, “judicial review is generally limited to the full administrative record before the agency at the time it rendered its decision” and explaining that the rationale behind this rule is “to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review” (cleaned up) (citing, for the rationale, *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)); *Giorgio Foods, Inc. v. United States*, 755 F. Supp. 2d 1342, 1346 (CIT 2011) (“In an administrative review case, it is rare that a federal court will consider information outside of the record submitted.”). Because the administrative records are closed, the proposed intervenors’ “factual contributions” would not “add some material aspect to the case beyond what is already present.” *Wolfsen*, 695 F.3d at 1318.

* * *

In sum, while the proposed intervenors’ motions are timely, they fail to satisfy the other three elements of the Federal Circuit’s test for intervention as of right under Rule 24(a)(2). The proposed intervenors lack any legally protectable interest; any interest that they do have is insufficiently direct and immediate; and they have not demonstrated that the government will not adequately protect whatever interest they have.

III. Permissive intervention under Rule 24(b)(1)

As an alternative to intervention as of right, the proposed intervenors seek leave to intervene under Rule 24(b)(1), which provides as follows:

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

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

(B) has a claim or defense that shares with the main action a common question of law or fact.

USCIT R. 24(b)(1).

Thus, Rule 24(b)(1) provides two pathways for permissive intervention. *If* a proposed intervenor is otherwise eligible to intervene under either pathway, in the exercise of its discretion the Court then “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” USCIT R. 24(b)(3).

A. Conditional right to intervene by statute (Rule 24(b)(1)(A))

Two of the proposed intervenors invoke the first pathway in Rule 24(b)(1)(A), that is, pursuant to statute. U.S. Steel does so in Cases 20–3825 and 20–3869, and the Pipe Producers do so in Case 20–3869.²⁸ In contending that a federal statute gives them a “conditional right to intervene” for purposes of the rule, U.S. Steel and the Pipe Producers cite 28 U.S.C. § 2631(j)(1), which provides that “any person who would be adversely affected or aggrieved by a decision in a civil action” pending in the CIT “may, by leave of court, intervene in such action.” 28 U.S.C. § 2631(j)(1).²⁹

1. Constitutional standing

To be “adversely affected or aggrieved by” a decision of the CIT for purposes of permissive intervention under 28 U.S.C. § 2631(j)(1), a proposed intervenor must demonstrate independent constitutional standing. *See PrimeSource*, 494 F. Supp. 3d at 1328–29 (Baker, J., concurring) (citing *Rohm & Haas Co. v. U.S. Int’l Trade Comm’n*, 554 F.2d 462, 463 (CCPA 1977)). That is, a proposed intervenor seeking permissive intervention pursuant to 28 U.S.C. § 2631(j)(1) must demonstrate that (1) it is threatened with injury in fact (2) from a decision of the court (3) that is redressable by a ruling in favor of the party on whose side the proposed intervenor seeks to intervene. *Cf. Mojave Desert Holdings, LLC v. Crocs, Inc.*, 987 F.3d 1070, 1078 (Fed. Cir. 2021) (“[T]he irreducible constitutional minimum of standing contains three elements: injury in fact, causation, and redressability.”) (cleaned up).

Both U.S. Steel (in Cases 20–3825 and 20–3869) and the Pipe Producers assert that they will suffer injury if the Court orders the government to refund the Section 232 duties to the plaintiffs. U.S. Steel’s supplemental brief in both cases asserts the following facts:

U.S. Steel produces and sells products substantially the same or identical to those that Plaintiffs sought to exclude. Thus, Plaintiffs requests to exclude these products from remedial Section

²⁸ Case 20–3825, ECF 22, at 14 (U.S. Steel referring to Rule 24(b)(1)(A)); Case 20–3869, ECF 32, at 14 (U.S. Steel, same); Case 20–3869, ECF 17, at 5–6 (Pipe Producers discussing “conditional right to intervene by federal statute”).

²⁹ In Cases 21–5 (U.S. Steel), 21–15 (U.S. Steel), 21–27 (Electralloy), and 21–93 (Electralloy, Crucible, and Ellwood), the proposed intervenors do not invoke Rule 24(b)(1)(A), and only mention the intervention statute (28 U.S.C. § 2631(j)(1)) in passing in connection with the “shared defense” pathway under Rule 24(b)(1)(B). Accordingly, by not expressly invoking Rule 24(b)(1)(A) and failing to develop any reasoned argument as to why they are eligible to intervene under 28 U.S.C. § 2631(j)(1), these proposed intervenors have waived any argument that they are eligible for permissive intervention by statute.

232 tariffs are adverse to U.S. Steel's economic interests. U.S. Steel has a private interest in rejection thereof.

As detailed [above], granting Plaintiff's requests would depress market prices for slab and downstream products, and foreclose sales to purchasers of imports or derivatives, thus harming U.S. Steel.

Case 20–3825, ECF 22, at 14–15; Case 20–3869, ECF 32, at 15 (same).³⁰

The Pipe Producers, for their part, assert in their supplemental brief that they would suffer “lower prices and lost sales as a result of greater import competition” if “Commerce’s line pipe product exclusion determinations were nullified.” Case 20–3869, ECF 30, at 14.

Neither U.S. Steel nor the Pipe Producers, however, have submitted any evidentiary materials establishing these facts asserted by counsel.³¹ Nor have they even alleged these asserted facts in their proffered answers.³²

A party with the burden of establishing independent constitutional standing must do so “in the same way as any other matter on which the [party] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Thus, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice” *Id.* But at the summary judgment stage, “the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts” *Id.* (cleaned up). And in the final stage, “those facts (if controverted) must be supported adequately by the evidence adduced at trial.” *Id.* (cleaned up).

In this context of permissive intervention pursuant to Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1), it is unclear what “manner and degree of evidence” is required from a proposed intervenor with the burden of establishing its independent constitutional standing. Nevertheless, at the very minimum, it must be that a proposed intervenor invoking Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1) to join a lawsuit—like a plaintiff commencing a lawsuit—has the burden of proffering a pleading with factual allegations establishing standing.

³⁰ U.S. Steel’s briefs contain no further “detail[]” regarding these asserted injuries, notwithstanding the prefatory “[a]s detailed [above]” characterization.

³¹ “Briefs,” of course, “are arguments, not evidence.” *Morgenstern v. Burton*, 86 F.2d 341, 342 (CCPA 1936); see also *Estee Lauder Inc. v. L’Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) (“[A]rguments of counsel cannot take the place of evidence lacking in the record.”).

³² See Case 20–3825, ECF 16 (U.S. Steel); Case 20–3869, ECF 11 (U.S. Steel) and ECF 24 (Pipe Producers).

See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (“Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element [of standing].” (cleaned up)). Here, neither the Pipe Producers nor U.S. Steel have alleged facts establishing standing in their proposed answers, which (in the absence of any evidentiary materials establishing their standing) defeats their invocation of Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1).

But even if the factual assertions by counsel in U.S. Steel’s and the Pipe Producers’ motions in Cases 20–3825 and 20–3869 could suffice in the absence of evidentiary submissions or factual allegations of standing in their proposed answers, the Court concludes that these entities lack constitutional standing.

Insofar as U.S. Steel and the Pipe Producers assert (through counsel) that they are injured by not making sales *to the plaintiffs*, that harm is no longer redressable. As discussed above, both North American Interpipe and Evraz completed the imports in question and paid the relevant duties. Case 20–3825, ECF 23, at 14–15 (“U.S. Steel never actually supplied the required steel inputs, and [North American Interpipe] was forced to pay the 25 percent duties in order to import the steel necessary to maintain its operations”); Case 20–3869, ECF 33, at 8 (Evraz, same argument as to Pipe Producers). That bell cannot be unrung, and there are no sales opportunities to gain if the Court sustains Commerce’s exclusions.

Even if that bell could be unrung, there is no certainty that North American Interpipe and Evraz would purchase the products in question from U.S. Steel and the Pipe Producers (rather than proceed with the imports anyway). That uncertainty means that the causation element of standing is also lacking here. *Cf. Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013) (“We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.”); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (holding that plaintiffs lacked standing when it was “purely speculative whether the denials of service specified in the complaint fairly [could] be traced” to the challenged regulation or “instead result[ed] from decisions made by” the third parties and that it was “equally speculative” whether the plaintiffs’ desired injunction would result in them receiving service).

Nor do U.S. Steel’s and the Pipe Producers’ factual assertions through counsel (if taken as true) establish that they will suffer cognizable competitive injury if the Court orders the government to refund Plaintiffs North American Interpipe and Evraz their duties. To begin with, U.S. Steel and the Pipe Producers do not assert that they

compete with North American Interpipe and Evraz as to domestic sales of the imports in question (or otherwise). That alone is reason to find that their counsel have not sufficiently asserted facts that, if taken as true, establish standing.

In any event, on this record, U.S. Steel and the Pipe Producers do not compete with North American Interpipe and Evraz as to the specific products that are the subject of the exclusion requests at issue. The facts are somewhat different in each case, so the Court addresses them separately.

Although North American Interpipe—which alleges that it is an importer and distributor—apparently resells on the domestic market the steel pipe it imports, the import transactions in question have been completed. Insofar as North American Interpipe and U.S. Steel compete in the domestic market as to such products (notwithstanding the lack of any factual assertion to that effect by U.S. Steel), such competition presumably has *already* occurred. Any decision by the Court requiring the government to refund North American Interpipe’s duties would not have “a natural price-lowering . . . effect on [U.S. Steel’s past] sales (compared to what prices . . . would be in the absence of [such ruling]), . . . by directly lowering . . . prices for [North American Interpipe’s] competing goods.” *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1364 (Fed. Cir. 2019). The Court’s decision therefore would not cause any injury to U.S. Steel even if it and North American Interpipe are direct competitors in the domestic market for the steel pipe products that the latter imports.³³

And insofar as U.S. Steel were to claim that it would suffer “competitive injury” if North American Interpipe obtains its duty refunds because the two companies compete generally as to products other than the transaction-specific steel pipe products at issue in the latter’s exclusion request, such competitive injury is not cognizable because it is insufficiently “particularized and [] concrete.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). In *Already*, a footwear manufacturer contended that it had standing to challenge the validity of a competitor’s trademark—even though the competitor, Nike, had covenanted not to sue for infringement of the mark—because both companies “compete[d] in the athletic footwear market.” *Id.* The Supreme Court easily rejected this “boundless theory of standing” that “a market participant is injured for Article III purposes when-

³³ In *PrimeSource*, by contrast, the plaintiffs sought prospective injunctive relief invalidating Section 232 national security tariffs on steel derivative imports. See 494 F. Supp. 3d at 1311–12 (discussing entry of consented preliminary injunctions against collection of duties). Had the Court granted such relief, it would have had a natural price-lowering effect on prices prospectively charged by the plaintiffs and thus inflicted competitive injury on the proposed intervenors that sold competing steel derivative products.

ever a competitor benefits from something allegedly unlawful.” *Id.* *Already* forecloses standing on the part of U.S. Steel to defend Commerce’s exclusion denials here on the theory that U.S. Steel and North American Interpipe compete outside of the context of the specific import transactions at issue in this case.

Already similarly forecloses standing on the part of proposed intervenors U.S. Steel and the Pipe Producers in Case 20–3869 brought by Evraz. Unlike North American Interpipe in Case 20–3825, Evraz is not a distributor—it is a *manufacturer*, and it used the imported steel in question for its manufacturing. Case 20–3869, ECF 25, at 2 (referring to Evraz as “a U.S. producer of steel pipe products”). Thus, any competition between U.S. Steel and the Pipe Producers on the one hand and Evraz on the other does not involve the specific products for which the latter sought an exclusion—rather, it involves *manufactured* products that are necessarily different from the steel inputs that are the subject of Evraz’s exclusion requests. Just because Evraz would benefit from duty refunds does not give standing to U.S. Steel and the Pipe Producers to challenge those refunds, any more than U.S. Steel and Pipe Producers would be injured for standing purposes by an IRS tax refund to Evraz that would improve its financial bottom line.

2. Prudential Standing

A proposed intervenor invoking permissive intervention under 28 U.S.C. § 2631(j)(1) must also demonstrate prudential standing. *See PrimeSource*, 494 F. Supp. 3d at 1330 n.34 (Baker, J., concurring) (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). But even if the statute does not require consideration of a proposed intervenor’s prudential standing, it invests the court with discretion to do so. *Id.*

One aspect of prudential standing is third-party standing. *See id.* at 1330–31 (Baker, J., concurring). This principle “limits access to the federal courts to those litigants best suited to assert a particular claim.” *Id.* at 1330 (cleaned up and quoting *Starr Int’l Co., Inc. v. United States*, 856 F.3d 953, 965 (Fed. Cir. 2017)). Assuming a litigant (or, as here, putative litigant) has constitutional standing, i.e., injury in fact, a court may nonetheless deny standing if the litigant seeks to vindicate not its own legal right or interest, but instead the “legal rights or interests of [a] third part[y].” *Id.*

Here, U.S. Steel (in Cases 20–3825 and 20–3869) and the Pipe Producers (in Case 20–3869) seek to defend Commerce’s denial of Plaintiffs’ exclusion requests, which is a sovereign interest of the government. To have third-party standing to defend the government’s sovereign interests, U.S. Steel and the Pipe Producers would have to

“demonstrate a close relationship with the person who possesses the right, i.e., the government, and a hindrance to the government’s ability to protect its own interests.” *Id.* at 1331 (cleaned up). Neither U.S. Steel nor the Pipe Producers make any attempt to satisfy these requirements.

Instead, both U.S. Steel and the Pipe Producers argue in effect that they have first-party standing because Commerce’s interim rule allowed them to object to Plaintiffs’ exclusion requests. Case 20–3825, ECF 22, at 16–18 (U.S. Steel); Case 20–3869, ECF 32, at 17–18 (U.S. Steel), and ECF 30, at 14–15 (Pipe Producers). According to U.S. Steel and the Pipe Producers, Commerce’s interim final rule conferred upon them a legally protected interest for standing purposes, and thus they need not satisfy the requirements of third-party standing.

Although Congress “has the power to create new interests, the invasion of which may confer standing,” *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976)), Section 232 confers no rights upon third parties to participate in administrative proceedings involving exclusion requests, much less for such third parties to initiate or participate in subsequent court challenges to the results of those proceedings. That alone defeats any argument that U.S. Steel and the Pipe Producers have any cognizable legal interest here for first-party standing purposes. And while Commerce’s interim final rule permits anyone to *voice* objections to exclusion requests, that is as far as it goes. It hardly creates—even assuming the Department could do so unilaterally, absent statutory authorization—any cognizable interest in either defending or challenging the results of those proceedings.³⁴

* * *

With the exception of U.S. Steel (in Cases 20–3825 and -3869) and the Pipe Producers, the proposed intervenors have waived any claim to permissive intervention pursuant to Rule 24(b)(1)(A) and 28 U.S.C. § 2631(j)(1). Although U.S. Steel (in those two cases) and the Pipe Producers expressly seek intervention on this basis, they have not demonstrated constitutional standing and therefore are not “adversely affected or aggrieved” as required by 28 U.S.C. § 2631(j)(1). Finally, even if U.S. Steel and the Pipe Producers have constitutional standing, they lack third-party standing and thus prudential standing, which 28 U.S.C. § 2631(j)(1) also requires or at least allows the Court in its discretion to consider.

³⁴ U.S. Steel’s and the Pipe Producers’ argument that they have a legally protected interest in defending Commerce’s exclusion denials is a two-way street; if their interest is sufficiently cognizable to allow them to defend such denials, then they would also necessarily have a cognizable interest in challenging any exclusions granted by the Department over their objections.

B. Permissive intervention based on a shared defense (Rule 24(b)(1)(B))

The second pathway of Rule 24(b)(1) allows permissive intervention if the putative intervenor “has a claim or defense that shares with the main action a common question of law or fact.” USCIT R. 24(b)(1)(B). As used in Federal Rule of Civil Procedure 24(b)(1)(B), and therefore by extension in this Court’s counterpart, the “words ‘claim[] or defense[]’ . . . ‘manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.’” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond v. Charles*, 476 U.S. 54, 76–77 (1986) (O’Connor, J., concurring in part and concurring in judgment)).

In other words, “claim or defense” in Rule 24(b)(1)(B) must be read in tandem with “claim” in Rule 8(a)(2) and “defense” in Rule 8(c)(1)(A).³⁵ *PrimeSource*, 494 F. Supp. 3d at 1333 (Baker, J., concurring); cf. *Amchem*, 521 U.S. at 623 n.18 (reading “claims or defenses” in Federal Rule of Civil Procedure 23(a)(3) (governing commonality for class certification) in tandem with “claim or defense” in Federal Rule of Civil Procedure 24(b) (governing permissive intervention)); *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1324 (Fed. Cir. 2007) (reading the “interest” requirement in Court of Federal Claims Rule 19(a)(2) (governing joinder of persons required to be joined) as having the same meaning as the “interest” requirement in Court of Federal Claims Rule 24(a)(2) (governing intervention of right based on a claimed “interest relating to the property or transaction that is the subject of the action”)).

Plaintiffs seek APA relief against the government for its collection of Section 232 duties. Here, the proposed intervenors share no “defense” with the government for purposes of Rule 24(b)(1)(B), because the antecedent requirement for a Rule 8(c)(1)(A) “defense” is a Rule 8(a)(2) “claim asserted *against* [the litigant]” proffering the defense. USCIT R. 8(c)(1)(A) (emphasis added).³⁶ The only Rule 8(a)(2) “claim” that Plaintiffs have here—or can conceivably have—is against the government.

³⁵ “A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief” USCIT R. 8(a)(2). “In responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim *asserted against it*” USCIT R. 8(c)(1)(A) (emphasis added).

³⁶ Rule 24(b)(1)(B) properly understood “is a mechanism for consolidating in a single action claims or defenses that might otherwise be litigated separately.” *PrimeSource*, 494 F. Supp. 3d at 1334 n.37 (Baker, J., concurring) (quoting Nelson, 106 Va. L. Rev. at 386). As such, it “offers a streamlined mechanism for an outside party to join pending litigation rather than filing a separate lawsuit and seeking consolidation.” *Id.* (quoting Nelson, 106 Va. L. Rev. at 386 n.572). It is assuredly not an open invitation for an outsider to inject itself as a defendant into litigation simply because it wants the plaintiff to lose.

Plaintiffs do not seek—and, more importantly, *cannot* seek—any relief against the proposed intervenors. As Plaintiff California Steel aptly explains, the question for this Court is whether Commerce—not the proposed intervenors—violated the APA when it denied the exclusion requests, and “[o]n that score, [an intervenor] is simply a bystander.” Case 21–15, ECF 18, at 2.

Put differently, how could Plaintiffs possibly sue domestic steel manufacturers for refunds of tariffs paid to the government? Obviously, they cannot. They therefore “have no cognizable ‘claim’ against [Proposed Defendant-Intervenors] within the meaning of the Federal Rules of Civil Procedure and our rules.” *PrimeSource*, 494 F. Supp. 3d at 1333–34 (Baker, J., concurring). It would be nonsensical (if not sanctionable) for Plaintiffs to attempt to sue the proposed intervenors in addition to the government, which means it is equally nonsensical for the proposed intervenors to claim a “shared defense” with the government. Therefore, for precisely the same reason that Plaintiffs could “seek no relief against the [proposed intervenors], in this suit or any other, the [proposed intervenors have] no ‘defense’ within the meaning of our Rules 8(c)(1)(A) and 24(b)(1)(B).” *Id.* (footnote omitted). The proposed intervenors are thus ineligible for permissive intervention under Rule 24(b)(1)(B). *See Diamond*, 476 U.S. at 76–77 (1986) (O’Connor, J., concurring in part and concurring in judgment) (observing that a physician was ineligible to permissively intervene to defend a state abortion law because plaintiffs lacked any cognizable claim against him); *DeOtte v. Azar*, 332 F.R.D. 173, 186 (N.D. Tex. 2019) (denying Nevada leave to permissively intervene in litigation challenging the Affordable Care Act because plaintiffs lacked any cognizable claim against that state).

C. Delay or prejudice

If a putative intervenor seeking permissive intervention is otherwise eligible for permissive intervention under either of Rule 24(b)’s pathways, the Court then “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” USCIT R. 24(b)(3). Because the proposed intervenors are ineligible for (or waived any claim to) permissive intervention pursuant to statute, *see* USCIT R. 24(b)(1)(A), and because none of them are eligible for permissive intervention based on a shared defense, *see* USCIT R. 24(b)(1)(B), the Court need not, and therefore declines to, consider the applicable discretionary factors of delay and prejudice.

Conclusion

For all the foregoing reasons, the Court will issue a separate order denying the various motions to intervene. *See* USCIT R. 58(a).

Dated: May 25, 2021
New York, NY

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

Index

Customs Bulletin and Decisions
Vol. 55, No. 22, June 9, 2021

U.S. Customs and Border Protection *CBP Decisions*

	CBP No.	Page
Mandatory Advance Electronic Information for International Mail Shipments; Re-Opening of Comment Period	21-04	1
Tuna Tariff-Rate Quota for Calendar Year 2021 Tuna Classifiable Under Subheading 1604.14.22, Harmonized Tariff Schedule of the United States (HTSUS)	21-09	3

General Notices

	Page
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada	4
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico	8
Receipt of Application for “Lever-Rule” Protection	12
Proposed Modification of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit from China and Various Other Countries	13
Modification of Six Ruling Letters and Revocation of Treatment Relating to the Tariff Classification of Textile Leg Coverings	23

U.S. Court of International Trade Slip Opinions

	Slip Op. No.	Page
Guizhou Tyre Co., Ltd., and Guizhou Tyre Import and Export Co., Ltd., Plaintiffs, China Manufacturers Alliance LLC, Shanghai Huayi Group Corporation Limited, and Qingdao Jinhaoyang International Co., Ltd., Consolidated-Plaintiffs, v. United States, Defendant.	21-64	33
N. AM. Interpipe, Inc., Plaintiff, v. United States, Defendant. . .	21-66	123
Evrz Inc. NA, et ano., Plaintiffs, v. United States, Defendant. . .	21-66	123
AM/NS Calvert LLC, Plaintiff, v. United States, Defendant. . .	21-66	123
California Steel Indus., Inc., Plaintiff, v. United States, Defendant.	21-66	123
Valbruna Slater Stainless, Inc., Plaintiff, v. United States, Defendant.	21-66	123
Voestalpine High Performance Metals Corp., et ano., Plaintiff, v. United States, Defendant.	21-66	123