U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 24–13

RIN 1515–AE90

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CERTAIN ARCHAEOLOGICAL MATERIAL OF ALGERIA

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to extend import restrictions on certain archaeological material from the People's Democratic Republic of Algeria. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions, which were originally imposed by CBP Decision 19–09. Accordingly, these import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension through August 15, 2029.

DATES: Effective August 15, 2024.

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

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological material. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in § 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On August 15, 2019, the United States entered into a bilateral agreement with the People's Democratic Republic of Algeria (Algeria) to impose import restrictions on certain archaeological material representing Algeria's cultural heritage that is at least 250 years old, dating from the Paleolithic (approximately 2.4 million years ago), Neolithic, Classical, Byzantine, and Islamic periods and into the Ottoman period to A.D. 1750 (2019 MOU). On August 16, 2019, CBP published a final rule (CBP Dec. 19–09) in the **Federal Register** (84 FR 41909), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, including a list designating the types of archaeological material covered by the restrictions.

On December 13, 2023, the United States Department of State proposed in the **Federal Register** (88 FR 86437) to extend the 2019 MOU. On April 23, 2024, after considering the views and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the necessary determinations to extend the import restrictions for an additional five years. Following an exchange of diplomatic notes, the United States and the Government of the People's Democratic Republic of Algeria have agreed to extend the restrictions for an additional five-year period, through August 15, 2029.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of these import restrictions. The restrictions on the impor-

tation of archaeological material from Algeria will continue in effect through August 15, 2029. Importation of such material from Algeria continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

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

Inapplicability of Notice and Delayed Effective Date

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

Executive Orders 12866 and 13563

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

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

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

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

Amendment to the CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

* * * * *

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

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * * *	
Algeria	Archaeological material representing Algeria's cultural heritage that is at least 250 years old, dating from the Paleolithic (approximately 2.4 million years ago), Neolithic, Classical, Byzantine, and Islamic periods and into the Ottoman period to A.D. 1750.	CBP Dec. 19–09, extended by CBP Dec. 24–13.
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Robert F. Altneu,
Director, Regulations and
Disclosure Law Division,
Regulations and Rulings,
Office of Trade,
U.S. Customs and Border Protection.

CBP Dec. 24–14

TUNA TARIFF-RATE QUOTA FOR CALENDAR YEAR 2024 FOR 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 for tuna in airtight containers for calendar year 2024.

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 2024.

DATES: The 2024 tariff-rate quota is applicable to tuna in airtight containers entered, or withdrawn from warehouse, for consumption during the period January 1, 2024 through December 31, 2024.

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.*

SUPPLEMENTARY INFORMATION:

Background

It has been determined that 15,226,726 kilograms of tuna in airtight containers may be entered, or withdrawn from warehouse, for consumption during Calendar Year 2024, 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: August 6, 2024.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

GRANT OF “LEVER-RULE” PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted an application from LifeScan IP Holdings, LLC seeking “Lever-Rule” protection against importations of certain blood glucose monitoring test trips that bear the federally registered and recorded “ONE TOUCH ULTRA” trademark and are intended for sale outside of the United States. Notices of the receipt of an application for “Lever-rule” protection were published in the March 13, 2024, and May 1, 2024, issues of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Morgan McPherson, Intellectual Property Enforcement Branch, Regulations & Rulings, Morgan.N.McPherson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-rule” protection for the following blood glucose monitoring test strips products manufactured abroad and intended for sale in countries outside the United States, that bear the “ONE TOUCH ULTRA” trademark (U.S. Trademark Registration No. 2,538,658 / CBP Recordation No. TMK 03–00074):

Model No.	Item	Product	Intended Market	Country of Origin on Packaging	Description
1146012	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 10 CA (LE)
2290103	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 2x50 CA (LE)
2290204	Strips	Ultra Strips	Canada	Switzerland	OTUltra Strip 1x50 CA (LE)
2077105	Strips	Ultra Strips	Mexico & Chile	United Kingdom	OTUltra Strip 50 LAM p/s (LE)
2116005	Strips	Ultra Strips	Mexico & Chile	United Kingdom	OTUltra Strip 25 LAM p/s (LE)
2214705	Strips	Ultra Strips	Mexico	United Kingdom	OTUltra Strip 10 LAM p/s (LE)

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market ONE TOUCH ULTRA Strips products manufactured abroad and not labelled for sale in the United States differ physically and materially from ONE TOUCH ULTRA Strips products authorized for sale in the United Sates with respect to the following product characteristics: product warnings, contact information, and measurements.

ENFORCEMENT

Importation of the foreign manufactured ONE TOUCH ULTRA products referenced *supra*, which are not labelled for sale in the U.S., are restricted, unless the labeling requirements of 19 CFR 133.2 (b) are satisfied.

Dated: August 14, 2024

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit (CBP Form 7512, 7512A)

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

ACTION: 60-Day notice and request for comments.

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

DATES: Comments are encouraged and must be submitted (no later than October 11, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0003 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of infor-

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

Overview of This Information Collection

Title: Transportation Entry and Manifest of Goods Subject to CBP. Inspection and Permit.

OMB Number: 1651–0003.

Form Number: 7512, 7512A.

Current Actions: This submission is being made to extend the expiration date with an increase to the estimated annual burden hours. No change to the information collected or method of collection.

Type of Review: Extension (w/change).

Affected Public: Businesses

Abstract: 19 U.S.C. 1552–1554 authorizes the movement of imported merchandise from the port of importation to another Customs and Border Protection (CBP) port prior to release of the merchandise from CBP custody. Forms 7512, "Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit," and 7512A, "Continuation Sheet," allow CBP to exercise control over merchandise moving in-bond (merchandise that has not entered the commerce of the United States). Forms 7512 and 7512A are filed by importers, brokers, or carriers, and they collect information such as the names of the importer and consignee, a description of the imported merchandise, and the ports of lading and unlading. Use of these forms is provided for by various provisions in 19 CFR to include 19 CFR 10.60, 19 CFR 10.61, 19 CFR 123.41, 19 CFR 123.42, 19 CFR 122.92, and 19 CFR part 18. These forms are accessible at: *http://www.cbp.gov/xp/cgov/toolbox/forms/*.

Type of Information Collection: Forms 7512 and 7512A.

Estimated Number of Respondents: 6,200.

Estimated Number of Annual Responses per Respondent: 871.

Estimated Number of Total Annual Responses: 5,400,200.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 900,033.

Dated: August 6, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Revision; Automated Clearinghouse (CBP Form 400, 401)

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

ACTION: 60-Day notice and request for comments.

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

DATES: Comments are encouraged and must be submitted (no later than October 11, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0078 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

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

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

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

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

Overview of This Information Collection

Title: Automated Clearinghouse.

OMB Number: 1651–0078.

Form Number: 400, 401.

Current Actions: This submission will extend the collection's expiration with an increase in the estimated annual burden hours. CBP Form 401's corresponding burden has been added to the collection. No change to the program or method of collection.

Type of Review: Revision.

Affected Public: Companies enrolled in the Automated Broker Interface (ABI).

Abstract: The Automated Clearinghouse (ACH) allows participants in the Automated Broker Interface (ABI) to transmit daily statements, deferred tax, and bill payments electronically through a financial institution directly to a CBP account. ACH debit and credit allow the payer to exercise more control over the payment process. In order to participate in ACH debit or credit, companies must complete CBP Form 400 (for debit) or 401 (for credit), *ACH Application.* Participants also use this form to notify CBP of changes to bank information or contact information. The ACH procedure is authorized by 19 U.S.C. 58a-58c and 66 and provided for by 19 CFR 24.25 and 24.26. CBP Forms 400 and 401 are accessible at *https://www.cbp.gov/newsroom/publications/forms*.

Type of Information Collection: Form 400 ACH Debit.

Estimated Number of Respondents: 6,710.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 6,710.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 559.

Type of Information Collection: Form 401 ACH Credit.

Estimated Number of Respondents: 144.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 144.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 12.

Dated: August 6, 2024.

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

U.S. Court of Appeals for the Federal Circuit

SOLAR ENERGY INDUSTRIES ASSOCIATION, NEXTERA ENERGY, INC., INVENERGY RENEWABLES LLC, EDF RENEWABLES, INC., Plaintiffs-Appellees v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, ACTING COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION, Defendants-Appellants

Appeal No. 2022–1392

Appeal from the United States Court of International Trade in No. 1:20-cv-03941-GSK, Judge Gary S. Katzmann.

Decided: August 13, 2024

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

MATTHEW R. NICELY, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, filed a petition for rehearing en banc and reply for plaintiffs-appellees. Plaintiffs-appellees Solar Energy Industries Association, NextEra Energy, Inc. also represented by JULIA K. EPPARD, DEVIN S. SIKES, JAMES EDWARD TYSSE, DANIEL MARTIN WITKOWSKI.

JOHN BOWERS BREW, Crowell & Moring, LLP, Washington, DC, for plaintiff-appellee Invenergy Renewables LLC. Also represented by AMANDA SHAFER BERMAN, LARRY EISENSTAT, ROBERT L. LAFRANKIE; FRANCES PIERSON HADFIELD, New York, NY.

CHRISTINE STREATFEILD, Baker & McKenzie LLP, Washington, DC, for plaintiff-appellee EDF Renewables, Inc.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response for defendants-appellants. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY. Defendant-appellant United States also represented by MICHAEL THOMAS GAGAIN, Office of the General Counsel, Office of the United States Trade Representative, Washington, DC.

ANASTASIA P. BODEN, Cato Institute, Washington, DC, for amicus curiae Cato Institute. Also represented by NATHANIEL ABRAHAM LAWSON.

Before LOURIE, TARANTO, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

Solar Energy Industries Association, Nextera Energy Inc., Invenergy Renewables LLC, and EDF Renewables, Inc., Plaintiffs-Appellees (collectively, “Solar”), filed a petition for rehearing. In the Petition, Solar argues that the full court should reevaluate and replace its precedential decision in *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985), in which we explained we

would only set aside presidential actions taken pursuant to Sections 201–03 of Title II of the Trade Act of 1974, 19 U.S.C. §§ 2251–53, if the statutory interpretation underlying such acts constitutes "a *clear misconstruction of the governing statute*, a significant procedural violation, or action outside delegated authority" (emphasis added). The panel previously issued an opinion reversing the Court of International Trade's decision to enjoin the president from enforcing Proclamation 10101, which (among other things) removed the exclusion of bifacial solar panels from certain duties that had been imposed a few years earlier.[1] *See Solar Energy Indus. Ass'n v. United States*, 86 F.4th 885 (Fed. Cir. 2023) ("Panel Opinion"). In doing so, the Panel Opinion applied the *Maple Leaf* standard. *See id.* at 894–95.

Solar now argues that *Maple Leaf* conflicts with Supreme Court and Federal Circuit precedent. *See, e.g.*, Pet. at 6–7 (citing *Trump v. Hawaii*, 585 U.S. 667 (2018) (discussing presidential interpretation of Immigration and Nationality Act); *id.* at 8 (citing *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021) (reviewing presidential action under Section 232 of Trade Expansion Act of 1962). In its supplemental notice, Solar adds that *Maple Leaf* has now been overruled by the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244 (2024). Suppl. Notice (ECF No. 107) at 2. According to Solar, the panel's adherence to the "clear misconstruction" standard of *Maple Leaf* led the court to "abdicate[] its constitutional role." Pet. at 1; *see also id.* at 13 ("[T]he decision contravenes the constitutional design and binding precedent by giving the President largely unchecked power to determine the scope of his own delegated authority."). In Solar's view, we must instead review issues of statutory construction *de novo*, even when we are considering presidential interpretation of a statute governing a field of activity largely committed to the President's authority. *See* Pet. at 9–10, 14; *see also* Suppl. Notice at 2 ("[The] panel's view that it was not called upon to decide whether the government's interpretation of the statute is correct [in trade cases] . . . cannot be reconciled with *Loper Bright*.") (internal citation and quotation marks omitted).

The Petition is granted to the limited extent that the panel supplements the Original Opinion with the additional reasoning set out in this Supplemental Opinion. Specifically, we write to explain that whatever merit there may be to Solar's contention that our *Maple Leaf* standard would benefit from review in light of recent Supreme

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[1] Though *Maple Leaf* specifically concerned Sections 201 through 203 of the Trade Act of 1974, 19 U.S.C. §§ 2251–53, the parties appear to agree (and we have never suggested otherwise) that the same standard of review governs presidential actions pursuant to Section 204, 19 U.S.C. § 2254.

Court jurisprudence, this case does not present an appropriate vehicle for undertaking such a task. This is because, as we show below, the same conclusions result from application of *de novo* review that the Panel Opinion reached by application of *Maple Leaf*.

I

This appeal involves *Proclamation 10101: To Further Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, 85 Fed. Reg. 65639 (Oct. 10, 2020), issued by President Trump. Previously, in January 2018, President Trump had issued Proclamation 9693, which imposed duties on imports of solar panels into the United States. *See Proclamation 9693: To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes*, 83 Fed. Reg. 3541 (Jan. 23, 2018). After the issuance of Proclamation 9693, importers of a certain type of solar panels – called bifacial solar modules, which "consist of cells that convert sunlight into electricity on both the front and back of the cells," J.A. 4, 5 – petitioned the United States Trade Representative ("USTR") for an exclusion, asking that bifacial solar panels not be subjected to the duties. The USTR initially granted the exclusion, though shortly thereafter it attempted to withdraw it to again make bifacial solar panels subject to the duties. In Proclamation 10101, the President removed the exclusion of bifacial solar panels from the scheduled duties and increased the fourth-year duty from 15% to 18%. *See* 85 Fed. Reg. at 65639–40, Annex. In response to Proclamation 10101, importers of bifacial solar panels, including Solar, sued the United States in the Court of International Trade, contending that Proclamation 10101 exceeded the President's powers, as his pertinent statutory authority is purportedly limited to "modifying" Proclamation 9693, while Proclamation 10101 – in Solar's view – did something more than merely "modify." The Court of International Trade agreed with Solar, setting aside Proclamation 10101 and enjoining the government from enforcing it. The government appealed and, in the Panel Opinion, we reversed.

The Panel Opinion, in reviewing the President's interpretation of the applicable statutory provisions, explicitly applied *Maple Leaf's* "clear misconstruction" standard. *See* Panel Op. at 894. We explained:

> It is important to stress at the outset that our review of Proclamation 10101 is limited to whether the President *clearly misconstrued* Section 2254(b)(1)(B). . . . We are not called upon to

> decide whether the government's interpretation of the statute is correct or how we would have construed the statute as an original matter. Nor do we evaluate the relative merits of the parties' competing interpretations. Rather, our sole inquiry is whether the President's interpretation, that he is permitted to make trade-restricting modifications and not just trade-liberalizing ones, is a clear misconstruction of the statute.

Panel Op. at 895. Although the *Maple Leaf* standard does not require us to review the disputes in this case *de novo*, doing so leads us to the same conclusions we reached in the Panel Opinion, rendering it unnecessary to decide if the *Maple Leaf* standard conflicts with other precedents. We provide the analysis behind these conclusions below.

II

The principal issue raised by the government in this appeal is whether 19 U.S.C. § 2254(b)(1)(B)'s authorization that the President may grant a requested "reduction, modification, or termination" of an existing safeguard includes authorization to "modify" the safeguard to make it more trade restrictive (within the constraints of other applicable statutory provisions). Solar argued that the President's authority is limited to trade-liberalizing (or neutral) modifications. The government countered that, instead, the statute's structure, legislative history, and purpose all support the conclusion that the statute also authorizes the President to make trade-restrictive modifications. The Panel Opinion sided with the government. *See* Panel Op. at 896–98. Although our analysis in the Panel Opinion expressly applied *Maple Leaf*'s "clear misconstruction" standard, we considered the same sources and arguments that Solar now asserts must be evaluated *de novo*.

The Panel Opinion began its review with the statutory text itself, observing that the "statute does not expressly indicate whether 'modify' includes trade-restrictive changes or is limited to trade-liberalizing alterations." Panel Op. at 895. We viewed this "statutory silence as favoring the government's broader view," as the statute does not contain a "narrowing limitation." *Id.* We also noted that, "[o]rdinarily, Congress uses words consistent with their well-understood meaning." *Id.* In ascertaining the "well-understood" meaning of "modify," we cited Supreme Court precedent in which "modify" was held to include moderate changes in either direction. *Id.* at 896 (citing *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994)). We also pointed to dictionary definitions to the same effect. *See id.* at 895–96. We additionally observed that Solar "concede[d]

that the government's definition [of 'modify'] is a correct one." *Id.* at 896.

We also addressed legislative history, particularly an unenacted version of what became 19 U.S.C. § 2254(b)(1)(B), which would have expressly defined "modify" as *not* including "increase[s]" in tariffs (i.e., "modify (*but not increase*)"). *Id.* at 895 n.5. That unambiguous prohibition on trade-restrictive modifications was deleted during the legislative process, strong evidence that Congress ultimately chose not to limit the scope of the term "modify" only to trade-liberalizing changes. *See id.*

We then evaluated the term "modify" in the context of the broader structure and purpose of the Trade Act, as Solar had asked (and again in its Petition asks) us to do. *See* Panel Op. at 896–98; *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted). We began by addressing Solar's contention that Section 2251(a) supported its narrow interpretation of "modify." *See* SEIA Br.[2] at 20 (relying on Section 2251 as purportedly indicative of "Congress's explicit desire to ensure that safeguard measures impose no undue social or economic costs," and arguing Congress "surely did not invite the President in section 204(b)(1)(B) to further restrict trade *after* the [domestic] industry succeeds in positively adjusting"). We rejected this contention, explaining that instead "Section 2251 provides that the safeguard statute has a broad remedial purpose." Panel Op. at 896. Thus, we concluded that, rather than bolstering Solar's position, Section 2251 (to the extent it was applicable to the President's modification authority, as Solar advocated)[3] actually favored the government's view that the President is empowered to make modifications as necessary to provide continued relief to a domestic industry. *See id.*

We also looked at the Trade Act's general definition of "modification," noting it is open-ended and does not exclude anything, includ-

[2] Appellees SEIA and Nextera Energy, Inc. filed a joint brief (ECF No. 35) which we refer to as the "SEIA Brief" or "SEIA Br." Appellees Invenergy Renewables LLC and EDF Renewables, Inc. filed a separate brief (ECF No. 34) which we refer to as the "EDF Brief" or "EDF Br."

[3] Solar faults the Panel Opinion for "uncritically deferring to the President's internally inconsistent interpretation" of Section 2251, accusing us of concluding that this section "both does and does not apply to presidential modification authority *simultaneously*." Pet. at 16. This is incorrect. The Panel Opinion was consistent in its holding that Section 2251(a) does not operate to restrict the President's safeguard modification authority, whether by limiting permitted modifications to those that are trade-liberalizing or by requiring a cost-benefit analysis of a modification.

ing further restrictions. Panel Op. at 896 (discussing Section 2481(6)). Other provisions of the Trade Act too, we noted, use the term "modify" to include changes made in a trade-restrictive direction. *See id.* at 896–97 (discussing Sections 2252(e)(2)(C), 2253(a)(3)(C), and 2254(b)(3)).

Moreover, we rejected Solar's policy concern that permitting the President to make trade-restrictive modifications pursuant to Section 2254(b)(3) creates an impermissible loophole. We reasoned that Congress has cabined the President's modification authority in other significant ways (e.g., by imposing a phase-down requirement), though we also recognized that Congress is free to create "loopholes" if it wishes. Panel Op. at 897. Nor did historical practice help Solar because the record reflected at least one instance in which a President appears to have acted pursuant to Section 2254(b)(1) to take trade-restrictive action. Panel Op. at 897–98.

Finally, we addressed Solar's argument that it would be backwards for Congress to permit the President to "modify" trade restrictions to become more restrictive where domestic industry has positively adjusted to competition while depriving the President of such trade-restricting power where domestic industry has not. *See* SEIA Br. at 20–21 (noting distinction between subsection (b)(1)(A), which limits President only to "reduce" or "terminate" safe-guard when "domestic industry has not made adequate efforts to" adjust to import competition, and subsection (b)(1)(B), which permits President more broadly to "reduce, *modify*, or terminate" safeguard when "domestic industry has made a positive adjustment to import competition"). We disagreed with Solar, finding more persuasive the government's position that the "'distinction [between subsections (b)(1)(A) and (b)(1)(B)] logically suggests that Congress intended to give the President greater flexibility to take action when progress is being made, to protect and ensure the continuation of that progress.'" Panel Op. at 898 (quoting Opening Br. at 34).

All of the foregoing statements from the Panel Opinion are equally correct in the context of *de novo* review. Our review of the plain text of Section 2254(b)(1)(B), other provisions and the overall structure of the Trade Act, and legislative history leads us to agree with the government that "modify" here includes trade-restrictive changes. We reach this determination without according any deference to the President's interpretation. Our conclusion in the Panel Opinion based on the "clear misconstruction" standard of *Maple Leaf* remains unchanged under *de novo* review.

III

In addition to the proper construction of "modify," the Panel Opinion considered Solar's contention that the President committed procedural errors in connection with issuing Proclamation 10101. While the Panel Opinion applied the "clear misconstruction" standard of *Maple Leaf* to these issues as well, we again reach the same conclusions applying *de novo* review.

A

Section 2254(b)(1)(B) provides:

> (1) Action taken under section 2253 [i.e., a safeguard] . . . may be reduced, modified, or terminated by the President (but not before the President receives the [Commission's] report . . .) if the President . . . (B) determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination *on such basis*, that the domestic industry has made a positive adjustment to import competition.

19 U.S.C. § 2254(b)(1) (emphasis added). In the Panel Opinion, we endorsed the government's interpretation of this provision, such that a presidential reduction, modification, or termination of a safeguard must be made based on a report from the International Trade Commission. Panel Op. at 899. In other words, "on such basis" in Section 2254(b) refers to a Commission report. *See* Reply Br. at 29. Solar had argued, and reiterates in its Petition, that "on such basis" refers instead to a domestic industry request for a change, which must itself be based on the domestic industry's positive adjustment to import competition. *See* SEIA Br. at 53; Pet. at 15.

While both readings of the statute are broadly reasonable, we are persuaded that the government's position is more reasonable. Because "such" as used in text like this typically refers to something that has already appeared earlier in a sentence or paragraph, *see, e.g.*, *Such, Black's Law Dictionary* (11th ed. 2019) (definition including "[t]hat or those; having just been mentioned"), and the provision here refers to the domestic industry's positive adjustment to import competition only *after* "on such basis," the plain language of the statute is more supportive of the government's position. That is, because the plain meaning of "such" is to refer backward to something previously mentioned – and the provision mentions the Commission report before "such" – rather than referring forward to something not yet mentioned – and the provision does not mention the requirement of domestic industry positive adjustment until after "such" – the text

provides a strong indication that “on such basis” is referring to the Commission report and not to the domestic industry’s positive adjustment. That commas subdivide the provision into several clauses does not alter our conclusions. *See U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (“No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning.”).

The overall structure of the Trade Act provides further support for the government’s view, as its reading of the statute promotes the Trade Act’s goals by predicating the President’s authority to act on his own Commission’s report – an independent, expert analysis – rather than leaving his authority entirely dependent on whether the domestic industry submits a petition expressly making the supposedly necessary representation. It would be an unusual choice for Congress to mandate that the President base his fact-finding on assertions by industry participants when, in the very same statutory provision, Congress requires that the President wait to act until after he receives a report from his own expert agency. We see nothing in the statute, including its text and structure, commending to us this improbable reading.

The government’s position is further favored by the inquiry into “context” that is essential to determining the best reading of statutory language. *See Loper Bright*, 603 U.S. at ___, 144 S. Ct. at 2261 n.4 (“[S]tatutes can be sensibly understood only by reviewing text in context.”) (internal quotation marks omitted). As we explained above, *see supra* Part II, the President only has power to modify a safeguard when domestic industry has made a positive adjustment to import competition. The President *lacks* authority to make a modification, and may only reduce or terminate a safeguard, when domestic industry has *not* made a positive adjustment, i.e., the situation governed by Section 2254(b)(1)(A). It follows that any industry petition seeking a modification under Section 2254(b)(1)(B) necessarily and inherently must be urging the President that there has been a positive adjustment, rendering it redundant for Congress to write into the text a requirement that the petition expressly recite that assertion. There is no such redundancy under the government’s reading.

The legislative history does not undermine our conclusion. A conference report Solar contends “unequivocally links the phrase ‘on such basis’ to the domestic industry’s petition, without referencing the ITC’s report or any presidential finding,” Pet. at 15 (citing 1988 U.S.C.C.A.N. 1547, 1721), does not overcome the plain meaning of “such.” *See generally Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 400 (Fed. Cir. 1990) (“[A]bsent a clearly expressed legislative

intention to the contrary, a statute's plain meaning must ordinarily be regarded as conclusive.") (internal citation and quotation marks omitted). Furthermore, the conference report's description of the statutory language does not match the enacted language in important respects, including in the specific standards of subsection (b)(1)(B). *Compare* 19 U.S.C. § 2254(b)(1)(B) (modification authorized if "*the President . . . determines*, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination on *such basis*, that the domestic industry has made a positive adjustment to import competition") (emphasis added), *with* 1988 U.S.C.C.A.N. at 1721 (modification authorized if "*a majority of representatives of the domestic industry request* such reduction, modification or termination on *the basis* that the domestic industry has made a positive adjustment to import competition") (emphasis added); *compare also* 19 U.S.C. § 2254(b)(1)(A) (limiting relief under (A) to "reduction" or "termination"), *with* 1988 U.S.C.C.A.N. at 1721 (describing (A) as including "modification"). Additionally, the relied-on language of the conference report does not by its terms require what Solar urges – an *express* recitation in the petition of positive adjustment even when the request for modification necessarily, inherently asserts such a positive adjustment. Thus, the conference report is simply not a reliable basis for adopting Solar's position on the meaning of the words of the actual legislation that became law.

In sum, we conclude that the best reading of Section 2254(b)(1)(B) is that the President's modification power requires (i) a Commission report, (ii) a request from a majority of representatives of the domestic industry, and (iii) a Presidential determination that the domestic industry has made a positive adjustment to import competition. The Presidential determination must be based at least on the Commission report and may also (but need not) be based on the industry petition. Accordingly, our resolution of the parties' dispute as to the meaning of "on such basis" is the same under *de novo* review as it is under *Maple Leaf*'s "clear misconstruction" standard of review.

B

Section 2254(b)(1)(B) further requires that the President determine "that the domestic industry *has made* a positive adjustment to import competition," before ordering a reduction, modification, or termination of a safeguard (emphasis added). On *de novo* review, we continue to read this provision as sufficiently broad to be satisfied by the

President's determination in connection with Proclamation 10101 that the applicable domestic industry "has begun to make" the required positive adjustment.

As we noted in the Panel Opinion, Section 2254(b)(1)(B) is written in the present perfect tense, which can be used to refer to an action that was completed entirely in the past *as well as* an action still in progress. Panel Op. at 901. This plain-meaning understanding of "has made" is supported by other parts of the Trade Act, *see, e.g.*, 19 U.S.C. § 2254(c)(1), (d)(1), which recognize that "positive adjustment" to import competition can be a process that takes some time. In addition, two of the conditions that the statutory scheme expressly identifies as constituting components of "a positive adjustment" – when "the domestic industry *experiences* an orderly transfer of resources" and "workers in the industry *experience* an orderly transition," *id*. § 2251 (emphasis added) – use the present tense, contributing to the understanding that a positive adjustment by domestic industry is not just an end goal but may also describe a domestic industry that is in the process of an orderly transfer and transition.

Accordingly, our resolution of the parties' dispute as to the meaning of "has made a positive adjustment" is the same under *de novo* review as it is under *Maple Leaf*'s "clear misconstruction" standard of review.

C

On *de novo* review, we also adhere to the Panel Opinion's conclusion that the President is not required to reweigh costs and benefits when modifying a safeguard pursuant to Section 2254(b)(1). As we explained in the Panel Opinion, Section 2254(b)(1) makes no mention whatsoever of cost-benefit determinations. *See* Panel Op. at 901. While Sections 2251(a) and 2253(a)(1)(A) set out presidential obligations to weigh costs and benefits, nothing in the Section 2254 safeguard statute ties these cost-benefit analysis requirements to the President's power to reduce, modify, or terminate a safeguard. In addition to the fact that the plain language of the statutory provisions does not require a cost-benefit analysis at the reduction, modification, or termination stage, we also explained in the Panel Opinion that the overall structure of the Trade Act supports our conclusion because only relatively small changes are permitted as "modifications" to safeguards and the overall phase-down requirement, *see* 19 U.S.C. § 2253(e)(5), already provides sufficient checks against the "absurd results" feared by the Court of International Trade. Panel Op. at 901–02.

Accordingly, our resolution of the parties' dispute over the need for a renewed cost-benefit analysis at the modification stage is the same

under *de novo* review as it is under *Maple Leaf*'s "clear misconstruction" standard of review.

IV

Solar denigrates the *Maple Leaf* standard as "breathtakingly deferential" and as springing from "an exaggerated misreading" of our earlier precedent. Pet. at 1, 9 (citing *Florsheim Shoe Co. v. United States*, 744 F.2d 787 (Fed. Cir. 1984)). It emphasizes that *Maple Leaf* is even more deferential than the now-discarded standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which was overruled in *Loper Bright*. *See* Pet. at 12 ("Even then, the Supreme Court has made clear that '[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'") (quoting *Chevron*, 467 U.S. at 843 n.9); *see also generally Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1363–67 (Fed. Cir. 2010) (suggesting link between *Maple Leaf* formulation and *Chevron*). As we have demonstrated, the outcome in this case is unaffected by whether or not we apply *Maple Leaf*'s "clear misconstruction" standard. Thus, we do not believe this case presents an appropriate vehicle for deciding whether the *Maple Leaf* standard should be retained.

U.S. Court of International Trade

Slip Op. 24–92

YAMA RIBBONS AND BOWS CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 21–00402

[Sustaining an agency decision issued in response to court order in litigation contesting a countervailing duty determination on narrow woven ribbons from the People's Republic of China]

Dated: August 13, 2024

John J. Kenkel, International Trade Law Counselors, PLLC, of Alexandria, Virginia, for plaintiff Yama Ribbons and Bows Co., Ltd.

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

OPINION

Stanceu, Judge:

Plaintiff Yama Ribbons and Bows, Co., Ltd. ("Yama") contested a determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in a countervailing duty ("CVD") proceeding. The contested determination (the "Final Results") concluded the eighth periodic administrative review ("eighth review") of a countervailing duty order on narrow woven ribbons with woven selvedge from the People's Republic of China ("China" or the "PRC").

Before the court is the Department's "Remand Redetermination," issued in response to the court's opinion and order in *Yama Ribbons and Bows Co. v. United States*, 47 CIT __, 653 F. Supp. 3d 1314 (2023) ("*Yama I*"). Final Results of Redetermination Pursuant to Court Remand (Int'l Trade Admin. Oct. 24, 2023), ECF No. 47 ("*Remand Redetermination*"). Yama opposes the Remand Redetermination, raising several objections. The court sustains the Remand Redetermination.

I. BACKGROUND

Background is provided in the court's previous opinion and order and is summarized and supplemented herein. *Yama I*, 47 CIT __, 653 F. Supp. 3d 1314 (2023) at 1316—1318.

A. The Contested Decision

The Final Results are published as *Narrow Woven Ribbons with Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review;* 2018, 86 Fed. Reg. 40,462 (Int'l Trade Admin. July 28, 2021) P.R. Doc. 176 ("Final Results").[1] Commerce incorporated by reference an accompanying "Issues and Decision Memorandum." *Issues and Decision Memorandum for the Final Results of 2018 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. July 22, 2021), P.R. Doc. 174 ("*Final I&D Mem.*"). The Final Results pertained to entries made during a "period of review" ("POR") of January 1, 2018, through December 31, 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 61,011, 61,018 (Int'l Trade Admin. Nov. 12, 2019). In the Final Results, Commerce determined that Yama benefited from 24 governmental programs and issued a total countervailable subsidy rate of 42.20%. *Final Results*, 86 Fed. Reg. at 40,462.

B. The Court's Previous Opinion and Order

In *Yama I,* the court ruled on Yama's USCIT Rule 56.2 motion for judgment on the agency record, in which Yama contested the Department's inclusion of the following three subsidy rates: (1) a rate of 10.54% for the finding that Yama was benefiting from the Export Buyer's Credit Program ("EBCP") administered by the Export-Import Bank of China ("Ex-Im Bank"), a program that provides loans to customers at preferential rates for purchasing Chinese exported goods; (2) a 27.74% rate for the provision of synthetic yarn for less than adequate remuneration ("LTAR"), and (3) a 0.27% rate for the provision of caustic soda for LTAR. Pl. Yama Ribbons and Bows Co., Ltd. Rule 56.2 Mot. for J. Upon the Agency R. (Feb. 4, 2022), ECF Nos. 27 (Conf.), 28 (Public); Mem. of Law in Supp. of Pl. Yama Ribbons and Bows Co., Ltd's 56.2 Mot. for J. Upon the Agency R. (Feb. 4, 2022), ECF No. 27–1 (Conf.), 28–1 (Public) ("Pl.'s Br.").

In *Yama I*, the court remanded the Final Results to Commerce with directions to reconsider the determination to apply the 10.54% subsidy rate for the EBCP. *Yama I*, 47 CIT at __, 611 F. Supp. 3d at 1326—1327. On the LTAR subsidy determinations for synthetic yarn and caustic soda, the court permitted Commerce, at defendant's re-

[1] Documents in the Joint Appendix (June. 17, 2022), ECF Nos. 42 (conf.), 43 (public), are cited herein as "P.R. Doc. __." Documents in the Remand and Joint Appendix (Jan. 5, 2024), ECF No. 52, are cited herein as "P.R.R. Doc. __." All citations to record documents are to the public versions.

quest, to supplement the administrative record with information consisting of a "New Subsidy Allegation" ("2015 NSA") submitted by the petitioner during the 2015 administrative review of the Order. This was information, previously omitted from the record, that Commerce considered in the eighth review and that was pertinent to whether there existed the "specificity" required by section 771(5A)(D) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677(5A)(D), for a countervailable subsidy.[2] *Id.*, 47 CIT at __, 611 F. Supp. 3d at 1328. Over Yama's objection, the court issued a remand order that directed as follows:

> Commerce shall allow plaintiff to submit comments to it that address this new information. To avoid a piecemeal approach, Commerce shall reconsider its LTAR determinations for these two inputs, in the entirety, based on the supplemented record and the comments plaintiff submits. Plaintiff then will have the opportunity to comment on the redetermination upon remand that Commerce submits to the court.

Id.

II. DISCUSSION

A. Jurisdiction and Standard of Review

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), grants this Court subject matter jurisdiction to review actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including actions contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *Id.* § 1516a(a)(2)(B)(iii).

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

B. The Remand Redetermination Issued in Response to *Yama I*

In the Remand Redetermination, Commerce reconsidered its assigning Yama a countervailing duty subsidy rate for the EBCP. Com-

[2] All citations to the United States Code herein are to the 2018 edition. All citations to the Code of Federal Regulations herein are to the 2018 edition.

merce determined, under protest, that Yama did not benefit from the program and consequently revised the total subsidy rate for Yama by excluding the 10.54% rate for the EBCP. *Remand Redetermination* at 2. Commerce also reconsidered its positions on the provision of synthetic yarn and caustic soda for LTAR based on the supplemented administrative record and Yama's responsive comments. Commerce maintained its previous positions on these two inputs and, therefore, did not change the subsidy rates of 27.74% and 0.27% for synthetic yarn and caustic soda, respectively. *Id*. As a result, Commerce determined a new total subsidy rate of 31.66%, i.e., 42.20% less 10.54%. *Id*. at 21.

Yama opposes the Department's retention of subsidies for the synthetic yarn and caustic soda inputs. Pl.'s Comments in Opposition to the Results of the Remand Redetermination (Nov. 24, 2023), ECF No. 49 ("Pl.'s Comments"). Defendant advocates the court's sustaining the Remand Redetermination. Def.'s Corrected Response to Comments on Remand Redetermination (Dec. 11, 2023), ECF No. 51 ("Def.'s Resp.).

C. Use of Facts Otherwise Available and Adverse Inferences when the Exporting Country Government Fails to Cooperate in a CVD Proceeding

In the Final Results, Commerce invoked its authority to use "the facts otherwise available" under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), and "adverse inferences" under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), with respect to both the EBCP and the provision of synthetic yarn and caustic soda. When using both the "facts otherwise available" and the "adverse inference" provisions, Commerce describes its action by using the term "adverse facts available" ("AFA"). Commerce may resort to facts otherwise available when "an interested party or any other person" withholds requested information, 19 U.S.C. § 1677e(a)(2)(A), or "significantly impedes a proceeding," *id*. § 1677e(a)(2)(C), or when the information offered "cannot be verified as provided in section 1677m(i) of this title [19 U.S.C. § 1677m(i)]," *id*. § 1677e(a)(2)(D). Moreover, 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, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id*. § 1677e(b)(1)(A). In some instances, Commerce may use an inference adverse to the interests of a cooperating party in the proceeding if the government of the exporting country fails to cooperate by not acting to the best of its ability in responding to a request for information on

an alleged countervailable subsidy. *See Yama I*, 47 CIT at __, 653 F. Supp. 3d at 1318.

D. The Export Buyer's Credit Program

In the Final Results, Commerce determined that the Export Buyer's Credit Program "provides medium and long-term loans at preferential, low interest rates" and "is administered by a government entity, the Export Import Bank of China." *Id.*, 47 CIT at __, 611 F. Supp. 3d at 1319 (citing *Final I&D Mem.* at 30). In *Yama I*, the court considered whether Commerce acted lawfully in assigning Yama a countervailable subsidy rate of 10.54% for the EBCP and, in particular, whether Commerce permissibly invoked its authorities under the "facts otherwise available" and "adverse inference" provisions of section 776 of the Tariff Act, 19 U.S.C. § 1677e.

The court noted in *Yama I* that Commerce did not make any "affirmative finding under 19 U.S.C. § 1677(5) that Yama was conferred a 'benefit' as a result of participation in the EBCP by one or more of its customers." *Id.,* 47 CIT at __, 611 F. Supp. 3d at 1319. Instead, Commerce imposed a countervailing duty upon "a 'double negative,' i.e., a conclusion that the record does *not* support a 'finding' that Yama did *not* benefit from the EBCP." *Id.* The court concluded that there was insufficient record evidence that any Yama customer participated in the EBCP during the POR and, moreover, that there was record evidence to the contrary. *Id.*

In the Final Results, Commerce invoked its right to use the "facts otherwise available" under 19 U.S.C. § 1677e(a) and "adverse inferences" under 19 U.S.C. § 1677e(b), finding that the Chinese government failed to provide Commerce with the information it needed to analyze the EBCP and "did not act to the best of its ability" in responding to the Department's inquiries. *Yama I,* 47 CIT at __, 653 F. Supp. 3d at 1319. Commerce did not find that Yama itself withheld information or failed to cooperate to the best of its ability in responding to the Department's requests for information. *Yama I,* 47 CIT at __, 653 F. Supp. 3d at 1320.

Commerce reasoned that "information about the operation of the EBCP it considered to be necessary but missing from the record 'prevents complete and effective verification of the customers' certifications of non-use.'" *Id.,* 47 CIT at __, 611 F. Supp. 3d at 1319 (citing *Final I&D Mem.* at 41). The court ruled to the contrary, stating in *Yama I* that "the record does not support the Department's conclusion that the information that Commerce requested and that the GOC [Government of China] failed to provide prevented Commerce from

determining that Yama did not benefit from the EBCP." *Id.,* 47 CIT at __, 611 F. Supp. 3d at 1326. The court remanded the Final Results, ordering Commerce to submit a Remand Redetermination "that reconsiders, based on the existing record, the Department's determination on the EBCP program and reaches a new determination that is in accordance with this Opinion and Order." *Id.,* 47 CIT at __, 611 F. Supp. 3d at 1329.

In the Remand Redetermination, Commerce stated that it "reconsidered its decision to apply adverse facts available (AFA) in evaluating use of the EBCP and determines, under respectful protest, that the EBCP was not used by Yama" and "revised Yama's overall subsidy rate to exclude the 10.54 percent AFA subsidy rate assigned to the EBCP." *Remand Redetermination* at 2. The court sustains the Department's new determination as to the EBCP, which is uncontested and supported by substantial evidence on the record.

E. Inclusion of Subsidy Rates for Yama's Purchases of Synthetic Yarn and Caustic Soda for "Less than Adequate Remuneration"

Under the Tariff Act, a countervailable subsidy may exist where an "authority," which is defined in 19 U.S.C. § 1677(5)(B) as a "government of a country or any public entity within the territory of the country," provides a good "for less than adequate remuneration," *id*. § 1677(5)(E)(iv), "and a benefit is thereby conferred," *id.* § 1677(5)(B). Before a countervailing duty may be imposed to address a domestic subsidy, the "specificity" requirement set forth in § 1677(5A)(D) must be satisfied.

For the Final Results of the eighth review, Commerce used facts otherwise available and an adverse inference to determine that Yama's input suppliers are "authorities" within the meaning of section 771(5)(B) of the Act. *Final I&D Mem.* at 16. Then, in examining the level of government ownership or control in the synthetic yarn and caustic soda sectors of the Chinese marketplace, Commerce, relying again on facts otherwise available and an adverse inference, determined that the markets for both of these inputs were distorted by government influence and control. *Id.,* at 14. Deciding for this reason that it could not use Chinese market prices to determine a "benchmark" price for each input, Commerce used data on world market prices to conclude that these goods were sold for less than adequate remuneration. *See Decision Memorandum for Preliminary Results of 2018 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* at

21—22 (Int'l Trade Admin. Jan. 19, 2021), P.R. Doc. 162 ("*Preliminary I&D Mem.*"). Finally, Commerce used facts otherwise available and an adverse inference to conclude that the provision of these inputs for LTAR was *de facto* specific. *Final I&D Mem.* at 19—20. Based on these various determinations, Commerce calculated a 27.74% subsidy rate for synthetic yarn and a 0.27% subsidy rate for caustic soda. *Id.* at 3.

In its Rule 56.2 motion, Yama challenges the department's LTAR determinations on three grounds. Yama maintains that Commerce erred in using facts otherwise available and an adverse inference to conclude that Yama's privately owned suppliers are "authorities" within the meaning of the Tariff Act. Pl.'s Br. 44. Similarly, Yama further contends that Commerce impermissibly found that the Chinese market for these two inputs was distorted by the presence of government ownership or control in the industry sectors producing synthetic yarn and caustic soda. *Id.* at 40. Finally, Yama contends that Commerce erred in concluding that the alleged subsidies were *de facto* specific. *Id.* at 47.

In the Remand Redetermination, Commerce, upon considering the record as supplemented by the 2015 New Subsidy Allegation and Yama's comments on this new information, reached the same findings it had reached in the Final Results as to the subsidies it alleged pertaining to the provision of synthetic yarn and caustic soda. Yama, incorporating its Rule 56.2 motion by reference, renewed its objections to the subsidy rates for these two inputs.[3]

1. The Department's Adverse Inferences that Yama's Suppliers of Synthetic Yarn and Caustic Soda Were "Authorities"

To determine whether any of the private companies that supply Yama with synthetic yarn or caustic soda was an "authority" within the meaning of section 771(5)(B) of the Tariff Act, 19 U.S.C. § 1677(5)(B), Commerce asked the Chinese government, as to these

[3] Plaintiff did not submit new substantive comments opposing the retained subsidies for synthetic yarn and caustic soda, instead explaining that it "stands by its opening and reply briefs, as well as the comments it submitted to the Department on September 14, 2023, pursuant to remand." Pl. Yama Ribbons and Bows., Ltd.'s Comments on Defendant's Final Results of Redetermination Pursuant to Court Remand (Nov. 24, 2023), ECF No. 49 at 2. Defendant argues that plaintiff waived its objections to these retained subsidies by failing to contest the Remand Redetermination on the merits. Def.'s Corrected Response to Comments on Remand Redetermination (Dec. 11, 2023), ECF No. 51 at 6. The court disagrees that waiver has occurred. The court did not rule previously on the merits of the claims contesting these subsidies as presented in plaintiff's briefs in support of its Rule 56.2 motion for judgment on the agency record. Plaintiff preserved those claims and the grounds it asserted therefor when it incorporated its previous submissions by reference.

companies, whether "any individual owners, members of the board of directors, or senior managers . . . were government or CCP [Chinese Communist Party] officials." *2018 Countervailing Duty Administrative Review of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Countervailing Duty Questionnaire* at II-27 (Nov. 20, 2019), P.R. Doc. 162 ("*GOC Initial Questionnaire*"). In response, the government of China informed Commerce that "[t]here is no central informational database to search for the requested information" and instructed them to "collect this information through the respondent, via its suppliers directly." *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, Case No. C -570 -953: Initial Questionnaire Response* at Ex. C-1, 17—18 (Jan. 10, 2020), P.R. Doc. 17–39 ("*GOC Initial Questionnaire Resp.*"). Commerce asked the Chinese government to trace the ownership of specific supply companies "back to the ultimate individual or state owners," receiving as a response that "the GOC [Government of China] does not have access to the company registration information." *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, Case No. C-570-953: First Supplemental Questionnaire Response* at 7 (Apr. 17, 2020), P.R. Doc. 140 ("*GOC First Suppl. Questionnaire Resp.*"). In the final questionnaire, Commerce again asked the government of China for "ownership structure and registration information" on Yama's suppliers of synthetic yarn. *2018 Countervailing Duty Administrative Review of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Second Supplemental Questionnaire* at 9 (July 24, 2020), P.R. Doc. 144 ("*GOC Second Suppl. Questionnaire")*. In response, the Chinese government provided "Exhibit C-29" to the Chinese government's Second Supplemental Questionnaire Response, which included information about the shareholders and partnership structure of these companies. *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, Case No. C-570-953: Second Supplemental Questionnaire Response* at Ex. C-29 (Aug. 14, 2020), P.R. Doc. 149 ("*GOC Second Suppl. Questionnaire Resp.")*.

The Department's original question sought information on the ownership structure of Yama's input suppliers and the involvement of the government or the Chinese Communist Party in senior management and board membership. While Exhibit C-29 addressed the issue of ownership, it left unanswered whether any government or Chinese Communist Party members were involved with Yama's input suppliers as board members or in senior management roles. Commerce invoked its authority to use facts otherwise available and an adverse inference, pursuant to 19 U.S.C. § 1677e(a) and (b), explaining that

the government of China "failed to cooperate by not acting to the best of its ability to comply with our requests for information [and]... withheld information." *Final I&D Mem.* at 17.

Yama challenges the Department's use of facts otherwise available with an adverse inference in designating the input suppliers as authorities. Yama maintains that the Chinese government provided sufficient responses to the questionnaires and that where it did not submit the requested information "either (1) it did not have such information to submit, or (2) the information would violate confidentiality provisions of Chinese law regarding private persons in China." Pl.'s Br. 38—39.

The Tariff Act, in 19 U.S.C. § 1677e(b), requires an interested party to act to the best of its ability in responding to an information request from Commerce. Even if, as the Chinese government reported, "[t]here is no central informational database to search for the requested information," *GOC Initial Questionnaire Resp*. at Ex. C-1, 17, Commerce permissibly found that the government failed to act to the best of its ability when it responded that Commerce should seek the information from Yama and its suppliers. Commerce reasonably could infer that the Chinese government was in at least as good a position to obtain the information on the government's role in owning and managing the input suppliers as was Yama. Yama maintains that "[t]he GOC cannot be forced to give that which it does not possess," Pl.'s Br. 39, but it does not refute the record evidence that the government of China made no serious effort to obtain the information Commerce requested.

Yama objects to the use of adverse inferences based only on the alleged failure of the government of China to act to the best of its ability. Pl.'s Br. 38—39. This argument is unconvincing. The Tariff Act defines an interested party to include "the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported." 19 U.S.C. § 1677(9)(B). When hindered in its inquiries by an uncooperative exporting government in a countervailing duty proceeding, Commerce is not necessarily precluded from invoking 19 U.S.C. § 1677e(b) by the prospect of a collateral adverse effect upon a cooperating party. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372–73 (Fed. Cir. 2014). Commerce should avoid such adverse effect if the necessary information is present elsewhere on the record, *see Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018), but that was not the case here.

Finally, Yama argues that "the facts on the record . . . make clear that the GOC [Government of China] and the CCP are prohibited by

law from interfering in the ordinary business operations and management of a company," maintaining that there is nothing "on the record suggesting that CCP's involvement in a private company is sufficient to transform the company into a government authority." Pl.'s Br. 45. This argument misses the point. Commerce did not find as a fact that Yama's suppliers were controlled by the government and instead used, permissibly under the circumstances, an adverse inference that these suppliers were subject to government control and, therefore, authorities. As defendant explained, "the GOC's noncooperation resulted in a gap of record information, which is necessary for Commerce's determination that Yama's input suppliers are independent from government control, and which could not be overcome by Yama's partial information." Def.'s Resp. at 9. Commerce acted within its authority in concluding that "[a]s AFA, we find that CCP officials are present in each of Yama's privately-owned input suppliers as individual owners, managers, and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources." *Final I&D Mem.* at 17. On the substantial record evidence of the noncooperation of the Chinese government, the Department's determination that Yama's input suppliers were authorities must be sustained.

2. The Adverse Inferences that the Markets for Synthetic Yarn and Caustic Soda Were Significantly Distorted by Government Involvement

The Tariff Act directs Commerce to determine "the adequacy of remuneration . . . in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review." 19 U.S.C. § 1677(5)(E)(iv). Addressing the statutory reference to "prevailing market conditions" in the subject country, the Department's regulation directs the Commerce Secretary to consider, first, a "tier-one" analysis, under which "[t]he Secretary 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 regulation provides, further, that "[i]f there is no useable market-determined price with which to make the comparison, . . . 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." *Id.* § 351.511(a)(2)(ii). As discussed below, Yama contests the Department's resort to § 351.511(a)(2)(ii), i.e., its resort to a "tier-two" analysis.

In the preamble accompanying the 1998 promulgation of the regulation, Commerce discussed the issue of when it would consider "market-determined" prices to be available and usable for a tier-one analysis in the presence of "government distortion of the market," explaining as follows:

> We normally do not intend to adjust such prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.

Countervailing Duties, 63 Fed. Reg. 65,348, 65,377 (Nov. 25, 1998).

In the eighth review, Commerce used facts otherwise available and adverse inferences, pursuant to 19 U.S.C. § 1677e, to determine that the markets for synthetic yarn and caustic soda were significantly distorted by involvement of the Chinese government in those markets and, accordingly, that a tier-one analysis under 19 C.F.R. § 351.511(a)(2)(i) was not feasible. *Final I&D Mem.* at 14. Commerce resorted "to the next alternative in the hierarchy," i.e., a "world price" analysis under tier two, § 351.511(a)(2)(ii). Explaining that it received no "benchmark" data from any interested party from which to determine a world price for each of these products, Commerce "relied on the 2017 average world market price" from the 2017 administrative review of the Order, i.e., the previous review, to determine world prices for the inputs, which it adjusted for inflation. *Preliminary I&D Mem.* at 21—22. Comparing these prices to the prices Yama paid for its inputs, Commerce calculated subsidy rates of 27.74% and 0.27% for Yama's purchases of synthetic yarn and caustic soda, respectively.

Yama contests the determinations Commerce reached under 19 U.S.C. § 1677e that the domestic markets in China for synthetic yarn and caustic soda were "distorted" by government involvement. Pl.'s Br. 40—44. Yama argues, first, that the record evidence refutes this determination and, second, that the adverse inferences of significant market distortion in the two markets were unlawful because the Chinese government did not fail to cooperate in responding to the Department's inquiries.

In support of its factual contention, Yama points to record evidence from the government of China's questionnaire responses that only a

small percentage of synthetic yarn producers are majority-government-owned and that these companies produce even a smaller percentage of the total production, arguing that this level of government ownership and production cannot control prices in the marketplace. *Id.* at 41. Yama makes a similar argument with respect to caustic soda producers. *Id.* Yama argues, further, that "the GOC stated that prices of these two raw materials are dictated by the market, not the government" and that "[t]here are no price controls. Nor . . . any export controls, export licensing restrictions, or export tariffs." *Id.* Yama adds that "[t]here are no government limitations on the use of these two raw materials" and that "[p]roducers are free to sell to any customer, domestic or foreign." *Id.* (citing *GOC Initial Questionnaire Resp*). In summary, Yama submits that "[t]here is not even a scintilla of evidence, much less substantial evidence on the record, to support a finding of distortion in these two markets." *Id.*

Yama's argument that the record lacked substantial evidence to support a finding of significant market distortion is unavailing. It was apparent to Commerce that government control could take forms other than majority ownership, such as a significant, albeit minority, ownership share or the presence of government officials on boards of directors or in senior management. *Remand Redetermination* at 11. Commerce reasonably sought information on these other forms of government involvement to determine whether it could conduct a tier-one inquiry under 19 C.F.R. § 351.511(a)(2)(i).

Commerce did not obtain the information it sought. Directing the Chinese government to two companies in a First Supplemental Questionnaire, Commerce asked the government to "trace the companies' ownership back to the ultimate individual or state owners." *2018 Countervailing Duty Administrative Review of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: First Supplemental Questionnaire* at 5 (April 2, 2020), P.R. Doc 138. The Chinese government responded that neither of these companies "are registered in mainland China. Thus, the GOC does not have access to the company registration information." *GOC First Suppl. Questionnaire Resp.* at 7. In a Second Supplemental Questionnaire, Commerce, again referring to producers in the market sectors of synthetic yarn and caustic soda, asked the government of China for "a list of the companies" in which the Chinese Government maintains a majority ownership or controlling management interest "either directly or through other Government entities" as well as "a list of the companies" where the government's interest "is less than 50 percent." *GOC Second Suppl. Questionnaire* at 8. The Chinese government informed Commerce that it does not "maintain the information requested."

GOC Second Suppl. Questionnaire Resp. at 11.

The Tariff Act allows Commerce to use an adverse inference "in selecting from among the facts otherwise available" when "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). Because the Chinese government made no meaningful effort to obtain the requested information, which was directly relevant to the issue of significant market distortion by government involvement, Commerce justifiably used adverse inferences that significant market distortion affected the two market sectors. While Commerce should avoid an inference adverse to a cooperating party (such as Yama) based on non-cooperation by the government of the exporting country where the necessary information is present elsewhere on the record, *see Changzhou Trina*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018), the specific information Commerce sought was not on the record of the eighth review. Yama points to the record evidence on the limited government majority ownership of companies in the industry sectors, but this evidence, while relevant, was not sufficient to establish that government involvement did not distort the domestic markets for these products. The court concludes, therefore, that Commerce permissibly invoked its "adverse inference" authority under 19 U.S.C. § 1677e(b) to determine that the synthetic yarn and caustic soda markets in China were significantly distorted by government involvement. That determination sufficed to support a decision to resort to a tier-two analysis under 19 C.F.R. § 351.511(a)(2)(ii), under which Commerce based its subsidy rates on world price information placed on the record from the previous review. While contesting the Department's decision to conduct a tier-two analysis, Yama did not contest the suitability of this world price information for use as benchmarks in its determinations that Yama obtained synthetic yarn and caustic soda at prices that were less than adequate remuneration.

Finally, citing the Chinese "Company Law" and the CCP Constitution, Yama argues that even if Chinese government officials were involved in the private companies, they would be legally prohibited from dictating "how each company is run." Pl.'s Br. 42. Yama does not address the consequence of the Chinese government's failure to cooperate, which Commerce reasonably found to have precluded it from making further inquiries on the issue of government involvement in the markets for synthetic yarn and caustic soda and, therefore, also precluded a tier-one analysis.

3. The Department's "Specificity" Determinations in the Remand Redetermination

Commerce may determine a subsidy to be *de facto* specific if "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." 19 U.S.C. § 1677(5A)(D)(iii)(I).[4] In the eighth review, Commerce determined that the LTAR subsidies it found for synthetic yarn and caustic soda were *de facto* specific according to this provision. *Remand Redetermination* at 20. In response to the court's order in *Yama I*, Commerce placed the 2015 New Subsidy Allegation on the record and reexamined the issue of specificity as to both inputs. *Id*. On remand, Commerce, again using facts otherwise available and adverse inferences, determined that "provision of these inputs is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act." *Id*.

According to the Remand Redetermination, the petitioner, in the 2015 New Subsidy Allegation, "provided information demonstrating that synthetic yarn is used solely by the textiles industry in China." *Remand Redetermination* at 19 (*Citing 2015 New Subsidy Allegation* Part 1F (Feb. 7, 2017) Exhibit II P "How Yarn is Made" P.R.R. Doc 7, (explaining that "[y]arn is used to make textiles . . . .")).

During the eighth review, Commerce requested that the Chinese government: "[p]rovide a list of the industries in China that purchase synthetic yarn directly. . . Please clearly identify the industry in which the companies under review are classified." *GOC Initial Questionnaire* at II-7. The Chinese government responded that "synthetic yarn has a wide range of uses, including but not limited to use in the narrow ribbon industry." *GOC Initial Questionnaire Response* at 19. In the First Supplemental Questionnaire, Commerce again asked the Chinese Government to provide a list of the industries in China that

[4] The provision reads as follows in the entirety:

Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
(II) An enterprise or industry is a predominant user of the subsidy.
(III) An enterprise or industry receives a disproportionately large amount of the subsidy.
(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

19 U.S.C. § 1677(5A)(D)(iii)

purchase synthetic yarn and caustic soda, and the government replied, "synthetic yarn and caustic soda have a wide range of uses, including, but not limited to, use in the narrow woven ribbon industry." *GOC First Suppl. Questionnaire Resp.* at 7.

The responses of the government of China did not contradict the evidence in the New Subsidy Allegation that the sole user of synthetic yarn is the textile industry. Yama argues that the textile "industry" consists of multiple industries, including "the ribbons industry, the thread industry, the unfinished textile industry, finished textile industry, shirt industry, etc." Pl.'s Br. 47. While the "textiles industry" in China undoubtedly can be considered to be comprised of multiple industries, as Yama argues, the specificity provision of the Tariff Act instructs that "any reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and *includes a group of such enterprises or industries*." *Id.* § 1677(5A)(D)(iii) (emphasis added). Under that standard, the record evidence suffices to support the Department's determination that the subsidy for the sale of synthetic yarn at less than adequate remuneration is "specific" as required by 19 U.S.C. § 1677(5A)(D)(iii)(I).

The 2015 New Subsidy Allegation asserted that caustic soda is used by a total of six industries. *Remand Redetermination* at 20 (*See New Subsidy Allegation Part 1G* (Feb. 7, 2017) *Exhibit III-H "GPS Safety Summary Sodium Hydroxide"* P.R.R. Doc 8, listing six industries that use caustic soda). The questionnaire response of the government of China referred generally to "a wide range of uses" without specifying industries in addition to those identified in the 2015 New Subsidy Allegation. *GOC Initial Questionnaire Response* at 27 ("As a general matter, caustic soda has a wide range of uses, including but not limited to use in the narrow ribbon industries."). Commerce reasonably concluded from the uncontradicted evidence in the New Subsidy Allegation that a limited number of industries, in this case six, used caustic soda and permissibly determined that the subsidy for caustic soda was *de facto* specific within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(I).

4. Yama's Contention of the Absence of a "Program"

Yama contests the specificity findings on which Commerce relied for its LTAR subsidies on synthetic yarn and caustic soda, on the ground that evidence does not demonstrate the existence of a government "program" to provide either of these inputs at less than adequate remuneration. Pl.'s Br. 48 ("Commerce states that the Statute does not require a 'program' but merely a subsidy . . . This is not accurate."). Plaintiff bases its argument on 19 U.S.C. § 1677(5A)(D)(iii)

("In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which *the subsidy program* has been in operation.") (emphasis added). The court is not persuaded by this argument.

As discussed previously, Commerce used world price information to conclude that Yama purchased synthetic yarn and caustic soda for prices at less than adequate remuneration. As also mentioned, Yama contested, unsuccessfully, the decision to conduct a tier-two analysis but did not contest the suitability of this information for use as world price benchmarks in determining that Yama obtained both inputs for less than adequate remuneration. Moreover, the record allowed Commerce to use facts otherwise available and adverse inferences to determine that Yama's suppliers were "authorities" and that the overall Chinese market for these inputs was significantly distorted by government involvement. From these determinations, Commerce permissibly used an adverse inference to determine that the Chinese government had significant involvement in Yama's suppliers and in the entire sectors of the Chinese domestic market for these two products. It was reasonable, therefore, for Commerce to consider this inferred government involvement as constituting "programs" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii). *See Yama Ribbons and Bows Co., Ltd. v. United States*, 46 CIT __, 606 F. Supp. 3d 1345, 1359 (2022).

III. CONCLUSION

The court sustains the Department's decision in the Remand Redetermination not to impose countervailing duties upon Yama with respect to the Export Buyer's Credit Program.

The court concludes that the Remand Redetermination remedied the deficiencies the court identified in *Yama I* with respect to synthetic yarn and caustic soda and reached results supported by substantial record evidence. The Department's inclusions of subsidy rates for the provision of synthetic yarn and caustic soda for less than adequate remuneration, therefore, were supported by substantial evidence and in accordance with law.

The court will enter judgment sustaining the Remand Redetermination.

Dated: August 13, 2024
New York, New York

/s/ Timothy C. Stanceu
Timothy C. Stanceu, Judge

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