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## The Enforce and Protect Act: A Primer on the Administrative CBP Process and Summary of Judicial Decisions

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# The Enforce and Protect Act: A Primer on the Administrative CBP Process and Summary of Judicial Decisions

Michael E. Roll\* & Ashley Akers\*\*

## ABSTRACT

*Enacted in 2015, the Enforce and Protect Act (EAPA) gave U.S. Customs & Border Protection (CBP) new powerful tools to enforce U.S. antidumping laws that protect U.S. domestic industry. This Article provides a primer on the EAPA process before CBP and notes challenges for interested parties that appear before CBP in EAPA proceedings. The Article also provides a summary of key U.S. Court of International Trade decisions, as of September 2023, that have attempted to resolve disputes regarding CBP's administration of the EAPA.*

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## I. INTRODUCTION

Enacted in 2015, the Enforce and Protect Act (EAPA)<sup>1</sup> gives U.S. Customs & Border Protection (CBP) enhanced tools to enforce U.S. antidumping and countervailing duty (AD/CVD) laws and to protect US industry, which has complained for years that importers and foreign sellers were evading US AD/CVD orders.<sup>2</sup> From the point of view of many in US industry, by the time CBP took enforcement action, violators would disappear and CBP would be unable to collect AD/CVD owed for products imported into the United States.<sup>3</sup> As a result, US industry would contend that the intended effects of the AD/CVD order, namely, a more level playing field, were often not realized. US industry successfully lobbied for Congress to give CBP increased powers to fight AD/CVD evasion. The EAPA is the result of those efforts.

Prior to the EAPA, the U.S. International Trade Commission (ITC) and U.S. Department of Commerce (Commerce) would conduct AD/CVD investigations and, if the results of the investigation warranted, Commerce would issue an AD/CVD order. Importers would, per the mandate of 19 U.S.C. § 1484,<sup>4</sup> then exercise reasonable care and be required to determine whether the goods they import were

1. *See generally* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 122, 155; 19 U.S.C. § 4301 note (2015) (Statutory Notes and Related Subsidiaries ¶ 2).

2. *See, e.g.*, Bernd G. Janzen & Jean–Rene Broussard, *New Directions in the Perennial Struggle to Detect and Fight the Evasion of Antidumping and Countervailing Duties*, 9 GLOB. TRADE & CUSTOMS J. 1, 38 (2014).

3. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-542, ANTIDUMPING AND COUNTERVAILING DUTIES: CBP ACTION NEEDED TO REDUCE DUTY PROCESSING ERRORS AND MITIGATE NONPAYMENT RISK 39 (July 14, 2016).

4. *See* 19 U.S.C. § 1484.

subject to an AD/CVD order. A failure of an importer to exercise reasonable care subjected the importer to possible civil penalties under 19 U.S.C. § 1592 or, in more egregious (willful) cases, criminal prosecution under 18 U.S.C. § 545.<sup>5</sup>

For goods subject to an order, importers would be required to file the requisite AD/CVD entry with CBP (called an “03” type of entry)<sup>6</sup> and pay the applicable amount of estimated AD/CVD duties. Because CBP is an agency of limited resources and has to police 37 million import transactions per year valued at over \$2.8 trillion,<sup>7</sup> it was (and is) entirely possible for importers to evade AD/CVD orders by misdescribing their goods or reporting a false (incorrect) country of origin—either willingly, negligently, or as a result of being duped by their foreign suppliers.

Of course, even after passage of the EAPA in 2015, the requirement for importers to exercise reasonable care remains a cornerstone of US import laws, and CBP still retains, and often exercises, the power to enforce AD/CVD laws through civil penalties under 19 U.S.C. § 1592 and/or 18 U.S.C. § 545. None of that changed as a result of the EAPA, but the EAPA is a powerful, relatively new tool in CBP’s toolbox for administering and enforcing the nation’s AD/CVD laws. Since the enactment of the EAPA, CBP has used it to identify underpaid AD/CVD as follows:<sup>8</sup>

FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
\$15 million	\$250 million	\$215 million	\$112 million	\$97 million

## II. THE ENFORCE AND PROTECT ACT

Section 411 of the EAPA resulted in the creation of a Trade Remedy Law Enforcement Directorate (TRLED) within CBP’s Office of Trade. The EAPA charged TRLED with, among other things, conducting investigations as to whether any person is importing products into the United States in violation of US trade laws, specifically AD/CVD laws.<sup>9</sup> Most importantly, at least from the perspective of US industry, Section 517(c) of the EAPA charged TRLED

5. 19 U.S.C. § 1592(c); 18 U.S.C. § 545.

6. See U.S. CUSTOMS & BORDER PROT., FORM 7501 (Dec. 2019), [https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/CBP%20Form%207501\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/CBP%20Form%207501_0.pdf), [https://perma.cc/32LJ-M2JK] (archived July 19, 2023).

7. See U.S. CUSTOMS & BORDER PROT., CBP TRADE AND TRAVEL REPORT: FISCAL YEAR 2021 (Apr. 2022), [https://www.cbp.gov/sites/default/files/assets/documents/2022-Apr/FINAL%20FY2021\\_%20Trade%20and%20Travel%20Report%20%28508%20Compliant%29%20%28April%202022%29\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-Apr/FINAL%20FY2021_%20Trade%20and%20Travel%20Report%20%28508%20Compliant%29%20%28April%202022%29_0.pdf) [https://perma.cc/5BKD-W7CN] (archived July 19, 2023).

8. See *Trade Statistics*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/trade> (last updated Oct. 6, 2023) [https://perma.cc/BHM2-MU3U] (archived Oct. 6, 2023).

9. See 19 U.S.C. § 1517(a).

with conducting these investigations rapidly—requiring that the investigation be completed within less than one year (300 days) from the time it was initiated.<sup>10</sup> A distinguishing and defining feature of the EAPA is, therefore, speed.

#### A. *Initiation of an EAPA Investigation*

In the overwhelming majority of cases, an EAPA investigation starts when an “interested party”<sup>11</sup> files an allegation with CBP alleging that an importer is evading an AD/CVD order. Usually, the “interested party” filing the allegation is a company in the US domestic industry. However, at least one recent EAPA case involved one importer alleging another importer was evading AD/CVD.<sup>12</sup> The EAPA regulations also allow another government agency, such as Commerce, to request that CBP conduct an EAPA investigation.<sup>13</sup>

Currently, requests for an EAPA investigation must be filed through CBP’s EAPA online portal<sup>14</sup> and must contain the following:<sup>15</sup>

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10. 19 U.S.C. § 517(c).

11. An “interested party” is defined in 19 C.F.R. § 165.1 (2016) as any one of the following six (6) parties:

(1) A foreign manufacturer, producer, or exporter, or any importer (not limited to importers of record and including the party against whom the allegation is brought), of covered merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise;

(2) A manufacturer, producer, or wholesaler in the United States of a domestic like product;

(3) A certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product;

(4) A trade or business association a majority of the members of which manufacture, produce, or wholesale a domestic like product in the United States;

(5) An association a majority of the members of which is composed of interested parties described in paragraphs (2), (3), and (4) of this definition with respect to a domestic like product; or,

(6) If the covered merchandise is a processed agricultural product, as defined in 19 U.S.C. 1677(4)(E), a coalition or trade association that is representative of any of the following: processors; processors and producers; or processors and growers.

12. See U.S. Customs & Border Prot., EAPA Case 7651: Charman Manufacturing, Inc. (Notice of Initiation of Investigation and Interim Measures) (Oct. 7, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2022-May/10-07-2021%20-%20TRLED%20-%20Notice%20of%20Initiation%20and%20Interim%20Measures%20%28508%20compliant%29%20-%20%287651%29%20-%20PV.pdf> [<https://perma.cc/PX9J-L7QJ>] (archived July 19, 2023).

13. 19 C.F.R. § 165.14 (2016).

14. *Id.* § 165.11(a); see also *EAPA Portal*, U.S. CUSTOMS & BORDER PROT., <https://eapallegations.cbp.gov/s/> [<https://perma.cc/2LNN-7EQE>] (archived July 19, 2023).

15. *Id.* § 165.11(b).

- (1) Name of the interested party making the allegation and identification of the agent filing on its behalf, if any, and the email address for communication and service purposes;
- (2) An explanation as to how the interested party qualifies as an interested party pursuant to § 165.1;
- (3) Name and address of importer against whom the allegation is brought;
- (4) Description of the covered merchandise;
- (5) Applicable AD/CVD orders; and
- (6) Information reasonably available to the interested party to support its allegation that the importer with respect to whom the allegation is filed is engaged in evasion.

The party petitioning for the investigation also must consent to public release of items (1) through (5) above<sup>16</sup> and must certify that all statements in its submission are accurate and true to the best of the submitter's knowledge and belief.<sup>17</sup>

The target of the EAPA investigation is not notified or served with the allegation at the time the petitioner submits the allegation or at the time CBP initiates the EAPA investigation. Rather, CBP notifies the importer within ninety-five calendar days after CBP decides to initiate an EAPA investigation.<sup>18</sup> Thus, for roughly three months after an EAPA investigation commences, an importer is unaware of the existence of the EAPA investigation.

CBP must make a determination as to whether to initiate an EAPA case within fifteen business days of receipt of a properly filed allegation.<sup>19</sup> While an EAPA proceeding may start (in the non-legal sense) when the interested party files the allegation, the regulations contemplate that CBP initiates an EAPA investigation if the information in the allegation (or agency request, if the case is requested by another federal agency) "*reasonably suggests*" evasion.<sup>20</sup> The only limits on CBP at this point of the EAPA process are clerical errors and withdrawals of an allegation or request.<sup>21</sup> In those two instances, CBP may not initiate an EAPA investigation. In all other instances, CBP will initiate as long as it believes the information in the allegation (or agency request) "*reasonably suggests*" evasion.

If, at any time point after receipt of an allegation, CBP is unable to determine whether merchandise is "covered merchandise," it can refer the matter to Commerce to make a scope determination.<sup>22</sup> Commerce is instructed to make that determination and "promptly"

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16. *Id.* § 165.11(c).

17. *Id.* § 165.5(b)(2).

18. 19 C.F.R. § 165.15(d)(1) (2016).

19. *Id.* § 165.12(a).

20. *Id.* § 165.15(b)(2).

21. *Id.* § 165.15(c).

22. 19 U.S.C. § 1517(b)(4); 19 C.F.R. § 165.16(a) (2016).

transmit it back to CBP. While the matter is referred to Commerce, the EAPA statutory deadlines are stayed.<sup>23</sup>

### B. Interim Measures

After initiating an investigation, CBP has a maximum of ninety calendar days to determine whether there is a “reasonable suspicion” that the importer is evading an AD/CVD order.<sup>24</sup> Neither the EAPA nor its implementing regulations provide any guidance on what factors to consider in determining whether there is a reasonable suspicion. Instead, the criteria to use is left to CBP.

CBP bases its reasonable suspicion decision on information provided in the petition, as well as other information obtained by CBP, such as through issuance of CBP Form 28 (known as a “Request for Information”) to the importer, CBP’s own research, reports from customs and other attaches in foreign embassies, etc. A CBP Form 28 is pictured below:

DEPARTMENT OF HOMELAND SECURITY U.S. Customs and Border Protection REQUEST FOR INFORMATION 19 CFR 151.11			OMB APPROVAL NO. 1551-0023 EXPIRATION DATE: 09-30-2019 ESTIMATED BURDEN:	
1. Date of Request (mm-dd-yyyy)		2. Date of Entry and Importation (mm-dd-yyyy)		
3. Manufacturer/Seller/Shipper		4. Carrier		5. Entry No.
5a. Invoice Description of Merchandise		5b. Invoice No.	5. HTSUS Item No.	
7. Country of Origin/Exportation		8. CBP Broker and Reference or File No.		
9. TO:		10. FROM:		
Production of Documents and/or Information Required by Law: If you have provided the information requested on this form to U.S. Customs and Border Protection at other ports, please indicate the port of entry to which it was supplied, and furnish a copy of your reply to this office, if possible.		11a. Port	11b. Date Information Furnished (mm-dd-yyyy)	
General Information and Instructions				
12. Please Answer Indicated Question(s)		13. Please Furnish Indicated Item(s)		
<input type="checkbox"/> A. Are you related (see reverse) in any way to the seller of this merchandise? If you are related, please describe the relationship, and explain how this relationship affects the price paid or payable for the merchandise.  <input type="checkbox"/> B. Identify and give details of any additional costs/expenses incurred in this transaction, such as: <input type="checkbox"/> (1) packing <input type="checkbox"/> (2) commissions <input type="checkbox"/> (3) proceeds that accrue to the seller <input type="checkbox"/> (4) assists <input type="checkbox"/> (5) royalties and/or license fees		<input type="checkbox"/> A. Copy of contract (or purchase order and seller's confirmation thereof) covering this transaction, and any revisions thereto.  <input type="checkbox"/> B. Descriptive or illustrative literature or information explaining what the merchandise is, where and how it is used, and exactly how it operates.  <input type="checkbox"/> C. Breakdown of components, materials, or ingredients by weight and the actual cost of the components at the time of assembly into the finished article.  <input type="checkbox"/> D. Submit samples: Article number: _____ Article description: _____  Number from container: _____ Mark(s) and number: _____  Samples consumed in analysis, and other samples whose return is not specifically requested, will not normally be returned.  <input type="checkbox"/> E. See item 14 below.		
14. CBP Officer Message				
15. Reply Message (Use additional sheets if more space is needed.)				
16. CERTIFICATION: It is required that an appropriate corporate/company official execute this certificate and/or endorse all correspondence in response to the information requested. (NOTE: NOT REQUIRED IF FOREIGN FIRM COMPLETES THIS FORM.) I hereby certify that the information furnished herewith or upon this form in response to this inquiry is true and correct, and that any samples provided were taken from the shipment covered by this entry.				
		16a. Name and Title/Position of Signer (Owner, Inspector, or Corporate/Company Official)		16b. Signature
				16c. Telephone No.
				16d. Date (mm-dd-yyyy)
17. CBP Official		18. Team Designation		19. Telephone No.
20. Fax No.		21. Email		

CBP Form 28 (07/18)

In Box 14 of the CBP Form 28, CBP usually requests that the importer provide CBP with information about the origin of the goods on a particular shipment or shipments within thirty days of CBP’s

23. § 1517(b)(4)(C).

24. 19 U.S.C. § 1517(e); 19 C.F.R. § 165.24(a) (2016).



request.<sup>25</sup> CBP may request any or all of the following information in the CBP Form 28 in order for CBP to make an assessment about the accuracy of the origin the importer declared:<sup>26</sup>

- All bills of lading showing movement of the goods from outside the factory through to the place of delivery in the United States.
- Purchase order and any revisions from the manufacturer to the importer of record.
- Manufacturer invoices and proof of payments from importer to manufacturer for the shipment.
- Records from the factory demonstrating that raw materials were obtained by the factory and were available for production, i.e., purchase order for raw materials, invoices for raw materials, shipping records for raw materials, proof of payment for raw materials, customs clearance records for raw materials imported into the country of manufacture.
- Importer of Record copy of commercial invoice, if purchased.
- Production records for products produced.
- Assembly or production records maintained on the factory floor by the production manager.
- Timecards to show that employees were working during the time the goods were manufactured.
- Export documentation showing the goods purported to be produced by the factory were the ones exported.
- Complete description of all production processing steps and dates they were performed and provide photos.
- Pictures of the factory inside and out.
- Factory inspection reports conducted by the importer or their agent.
- A complete list and types of machinery available for the production process, including pictures.
- Any other documents you can provide that may substantiate origin, e.g., bill of lading, truck waybill, etc. showing movement of this shipment.

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25. See Request for Information, Form 28, U.S. Customs & Border Prot.

26. See *id.*

Whether an importer can provide such information depends heavily upon the cooperation of the foreign manufacturer since the documentation requested in the typical CBP Form 28 is documentation that is mainly within the purview of the foreign manufacturer, not the importer. If the importer is fortunate enough to be related to the foreign manufacturer, the importer may find it easier to obtain such information. By contrast, if the importer is unrelated to the foreign manufacturer, the foreign manufacturer may be reluctant to share such information with the importer and, in the best case for the importer, might share such information directly with CBP. In the worst-case scenario for the importer, the foreign manufacturer may not wish to share any of the information, may not understand the request (or not accurately understand it), or may not have the staff and resources to compile the information within the relatively short time frame.

The response to the CBP Form 28 is an important consideration in CBP's determination that there is a reasonable suspicion of evasion. After all, one would expect an allegation to be biased in favor of the party who is making the allegation; CBP, while it may do its own research, may not be in a position (at least at this stage of the investigation) to necessarily have detailed knowledge about the production and origin of the goods at issue in the EAPA investigation. For these reasons, an accurate and thorough response to a CBP Form 28 asking about origin is of paramount importance. A good response allows CBP to have additional data from the importer or foreign manufacturer as to what is happening in the transactions, although it bears repeating that at this stage (the CBP Form 28 stage) the importer may still be completely unaware that an EAPA allegation has been filed against the importer.

If, at the end of the ninety-day maximum time period, CBP concludes (based on the petition, the CBP Form 28 response, and any other information gathered by CBP during the ninety-day time period) that there is a *reasonable suspicion* that an importer is evading an AD/CVD order, CBP will implement "*interim measures.*"<sup>27</sup> Interim measures are highly significant in the EAPA proceedings. When CBP implements interim measures, it means that, for any/all unliquidated entries as of the date interim measures are implemented, CBP will: extend the liquidation of such entries, suspend the liquidation of any entries filed on/after the date of initiation, protect the revenue of the government by requiring the importer to use single transaction bonds or to make cash deposits of antidumping duties on all future imports made during the remainder of the case.<sup>28</sup> For any liquidated entries, CBP takes other measures it believes are appropriate to protect the revenue of the government outside of the EAPA proceedings.

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27. 19 C.F.R. § 165.24.

28. *Id.* § 165.24(b).

The significance of CBP's interim measures decision may be illustrated by the following example. For purposes of the example, assume the antidumping duty rate that would apply in the event an importer is evading antidumping duties is 50% and that the products subject to AD/CVD are widgets from China. Assume further that the importer (called "Acme Imports") imports \$2 million of widgets from Thailand per month and has consistently done so over the past five years and that the importer would like to continue to import widgets into the future. Acme Imports has been paying 2% in "regular" customs duties on its imports. Also assume that the EAPA case initiated on widgets from Thailand imported by Acme Imports is initiated on July 1, 2022, and that interim measures are implemented on October 1, 2022. Lastly, assume that prior to the EAPA case, Acme Imports' entries were liquidating within the normal 314 liquidation cycle.

In the above example, Acme Imports would:

- Face potential AD/CVD liability on its entries from roughly November 2021 through September 30, 2022, of **\$11 million** (\$2 million entered value per month X 11 months X 50% AD/CVD duties).<sup>29</sup>
- Face ongoing liability of **\$1 million per month** (\$2 million entered value per month X 50% AD/CVD duties)
- Face potential collection actions from CBP on shipments prior to November 2021 equal to **tens of millions of dollars**.
- Face demands from CBP to increase its import bond to at least **\$13.2 million**—which would also result in the surety asking the importer for collateral equal to at least that much and likely more in the **\$20 million plus range**.<sup>30</sup>

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29. Assuming a normal 314 liquidation cycle, one would expect entries from late November 2021 to remain unliquidated as of October 1, 2022. *See, e.g.*, U.S. Customs & Border Prot., CAMS #48407264 – Bulletin on Enhancements to ACE Entry Summary: 314-day Liquidation Cycle Mass Processing Now Available (June 4, 2021), <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/2e2a2e0> [<https://perma.cc/W2PH-G6C2>] (archived July 19, 2023); *see also* Announcement of a General Program Test Regarding Post-Entry Amendment Processing, 65 Fed. Reg. 70,872 (Nov. 28, 2000) (explaining that entries liquidate roughly 314 days after the date of entry, upon which an importer may file a protest).

30. In order to import, an importer must have a customs bond on file with CBP. 19 C.F.R. § 142.4 (2012). CBP generally requires bonds to be equal to 10% of the duties paid over the last 12 month period. MONETARY GUIDELINES FOR SETTING BOND AMOUNTS, U.S. CUSTOMS & BORDER PROT., Customs Directive 3510-004 (1991), [https://www.cbp.gov/sites/default/files/documents/3510-004\\_3.pdf](https://www.cbp.gov/sites/default/files/documents/3510-004_3.pdf) [<https://perma.cc/R4HU-RQKA>] (archived July 19, 2023). However for AD/CVD situations, CBP generally requires the bond to be equal to the AD/CVD owed on 12 months of imports. *See* Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements, 71 Fed. Reg. 62,276 (Oct. 24, 2006). Sureties, in turn, particularly for commonly used "continuous" entry bonds (meaning bonds that cover multiple entries) typically request the importer to put up collateral for

Should the AD/CVD order at issue be one involving China, it will also face liability for Section 301 tariffs, currently at 25% for many products and 15% for others.<sup>31</sup> Using the 25% Section 301 rate, that means the importer would face additional liability of:

- **\$5.5 million** in Section 301 tariffs for shipments from roughly November 2021 through September 2022 (\$2 million entered value per month X 11 months X 25% Section 301 tariffs)—this means the importer’s exposure for shipments from November 2021 through September 2022 is **\$16.5 million** (\$11 million in AD/CVD + \$5.5 million in Section 301 tariffs)
- **\$500,000 per month** in Section 301 tariffs on shipments after October 1, 2022 (\$2 million per month X 25%)—this means the importer’s ongoing, increased duty payments (i.e., beyond the regular 2% duties it has already been paying) during the investigation would be **\$1.5 million per month**

The importer will also face demands from CBP to increase its import bond to more like **\$20 million** and resulting collateral requests by the surety of closer to **\$40 million**.

From the point of view of the domestic industry, which sought speed in the enforcement of US AD/CVD laws, the result is exactly what one would hope for: within ninety days of the case initiation, CBP is now assessing and collecting AD/CVD. From the point of view of the importer, Acme Imports went from paying no AD/CVD and only \$480,000 in “regular” duties per year (with a corresponding minimum import bond of \$50,000 that is not backed by any collateral) to needing to pay literally *tens of millions of dollars*—only for the ability to try to continue to exist while the importer defends itself against the allegations that it evaded AD/CVD based solely on a “reasonable suspicion.”

If, of course, Acme Imports is *actually* evading the AD/CVD order, then this financial hurricane may<sup>32</sup> be warranted and the EAPA is

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*more than* one year of imports – and can demand collateral equal to two or three years’ worth of imports since surety liability under the bond is equal to the bond amount for every year the bond is in effect. See, e.g., April Collier, *The Potential Perils Of Anti-Dumping And Countervailing Duties*, PCB (Jan. 16, 2019), <https://www.pcbusa.com/post/ignorance-is-not-bliss-the-potential-perils-of-antidumping-and-countervailing-duties-8077> [<https://perma.cc/C6QP-GJ3S>] (archived Aug. 3, 2023).

31. Although CPB may charge the Section 301 tariffs, it is an open legal question as to whether the EAPA statute gives CBP sufficient legal authority to also render a decision that the goods are of Chinese origin for purposes of Section 301 tariffs.

32. It is important to note that the party under review in an EAPA investigation, and about whom a determination is made to as evasion, is the importer – not the foreign manufacturer or foreign shipper. See 19 C.F.R. § 165.1 (2016) (defining “parties to the investigation”). As a result, in some instances, the importer may be unaware of any evasion done by the foreign shipper or foreign manufacturer and be more akin to an “innocent bystander.” In other instances, of course, the importer may know (or should

having its intended effect. However, if the importer is *actually not evading* the AD/CVD order, then the importer will view the financial hurricane as unjust and unfair. This is particularly true since at the interim measures stage, the regulations do not require CBP to have determined that the importer is actually evading any AD/CVD order, or even that there is substantial evidence of any evasion. Rather, the standard for the imposition of interim measures is a determination that there exists a *reasonable suspicion* of evasion.

To date, at least one court has held that an importer *can* challenge CBP's determination of reasonable suspicion in the context of the imposition of interim measures.<sup>33</sup>

After the imposition of interim measures, CBP continues to conduct an investigation about whether the importer is evading an AD/CVD order. The EAPA ultimately requires CBP to determine whether there is substantial evidence, not just a reasonable suspicion, that an importer is evading an AD/CVD order. As with the reasonable suspicion standard, neither the EAPA nor its implementing regulations delineate what constitutes substantial evidence, but the CIT has adopted a definition from the Federal Circuit, holding that “substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>34</sup>

CBP must conclude the EAPA investigation within 300 calendar days from the date CBP initiates the EAPA investigation, although CBP is authorized to extend the deadline by an additional sixty calendar days<sup>35</sup> if additional time is needed to make a determination and the investigation is extraordinarily complicated because of: “(i) the number and complexity of the transactions to be investigated; (ii) the novelty of the issues presented; or (iii) the number of entities to be investigated[.]”<sup>36</sup>

During the investigation stage, CBP will gather information from various sources. One of the most important sources of information will again be information from the importer, the manufacturer, and the exporter/shipper (if the exporter/shipper is not the manufacturer). CBP gathers this information by issuing detailed questionnaires to the importer, foreign producer, and/or foreign exporter. An example of a questionnaire is attached as an Appendix to this Article. While the

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know) about the evasion either explicitly or implicitly, such as through pricing terms that are unrealistic for goods unless those goods are being “dumped” or “subsidized” in contravention of the AD/CVD laws.

33. See *Am. Pac. Plywood Inc., v. United States*, No. 20-03914, slip op. at 5 (Ct. Int'l Trade filed June 22, 2023) (finding jurisdiction to review a challenge to the imposition of interim measures after the final determination had been issued, because the imposition of interim measures was subsumed into the final determination, which was subject to judicial review).

34. See *id.* at \*12 (quoting *Nippon Steel Corp. v United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (defining substantial evidence as “more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).

35. *Id.* § 1517(c)(1)(B).

36. 19 C.F.R. § 165.22(c)(1).

CBP Form 28 referenced earlier may ask for detailed information about one or a few shipments, a hallmark characteristic of the questionnaire is that it asks for such information for all shipments during the period of investigation (POI)—which is usually about one year prior to initiation of the EAPA investigation through the date the questionnaires are issued.

The questionnaires require the parties to provide volumes of information about all activity during the POI. The parties must translate into English all information and documents that they submit if that information or those documents are not in English. The due date on these questionnaires is usually no more than three or four weeks, but CBP will consider extensions if the parties submit a request to CBP at least three business days before any due date.<sup>37</sup> The EAPA regulations allow for extensions to be made within the three business day time period, but only if there are “extraordinary circumstances” shown as to why the three business day rule could not be met.<sup>38</sup> Given the various statutory and regulatory milestones in a case, CBP does not generally grant long extensions of time.

To incentivize compliance with CBP’s questionnaire requests, the EAPA regulations allow CBP to apply “adverse inferences” if the importer or foreign producer or exporter fails to answer CBP’s request in a timely manner.<sup>39</sup> The EAPA regulations allow CBP to apply adverse inferences if the importer or foreign producer/exporter does not cooperate and comply to the best of their ability with a request for information made by CBP.<sup>40</sup> CBP may apply a similar inference against the party that requested the EAPA proceeding, but since requests for information are usually not issued to that party (because the party making the allegation does not normally receive questionnaires from CBP regarding its own imports or allegations), the threat of adverse inferences seems more academic than real.

The EAPA regulations establish procedures for the conduct of the EAPA investigation.<sup>41</sup> These procedures require the creation of an administrative record that must contain at least the following information:<sup>42</sup>

- Materials obtained and considered by CBP during the course of [the] investigation under [§ 165.21]
- Factual information submitted to [CBP] pursuant to § 165.23

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37. *Id.* § 165.5(c)(1).

38. An “extraordinary circumstance” is, per the EAPA regulations, “an unexpected event that could not have been prevented even if reasonable measures had been taken.” *Id.* § 165.5(c). The EAPA regulations make clear that it is within CBP’s reasonable discretion to determine what constitutes extraordinary circumstances, what constitutes good cause, and to grant or deny a request for an extension.

39. *Id.* § 165.6.

40. *Id.* § 165.6(a) (2016).

41. *Id.* §§ 165.21–165.28.

42. *Id.* § 165.21(a).



All factual information and written arguments submitted to CBP, including questionnaire responses and any voluntarily produced factual information, generally must be served on other interested parties on the same day as they are filed with CBP.

The EAPA and its regulations currently do not have any type of administrative protective order (APO) procedure, such as that used in AD/CVD proceedings at the Department of Commerce,<sup>43</sup> whereby at least the attorneys for each interested party are able to view the confidential information (assuming they are on the administrative protective order). As a result, in an EAPA proceeding, generally only CBP sees all of the confidential information that is submitted.<sup>44</sup>

In the case of confidential information submitted to CBP, the party filing the information must bracket the information it claims is confidential and explain why such information qualifies as confidential.<sup>45</sup> It also must create a public version of the information and serve the public, rather than the confidential, version on other interested parties. The public version must “contain a summary of the bracketed confidential information in sufficient detail to permit a reasonable understanding of the substance of the information. If the submitting interested party claims that summarization is not possible, the claim must be accompanied by a full explanation of the reasons supporting that claim.”<sup>46</sup>

As a result of these filing requirements, each interested party (allegor (petitioner), alleged violator (respondent)) is dependent upon the adequacy of the public summary provided in terms of evaluating information filed by other interested parties.

While creating a public version of a confidential document sounds simple enough, there have been many disputes around public versions (as explored *infra* Part III), such as disputes as to whether information qualifies as confidential, disputes as to the adequacy of public summary, and disputes regarding claims that summarization is not possible. During the course of the EAPA investigation, CBP resolves disputes between the parties as to what is confidential, whether public summaries are adequate, etc.

The voluntary submission of factual information by interested parties generally ends at the 200-calendar-day mark of the EAPA investigation,<sup>47</sup> although CBP is allowed to place factual information on the administrative record after the 200-calendar-day mark.<sup>48</sup> In

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43. *See id.* §§ 351.305–351.306.

44. *But see* *Royal Brush Mfg., Inc. v. U.S.*, 75 F.4th 1250, 1256 (Fed. Cir. 2023) (holding that CBP deprived the importer of due process by failing to provide all information to the importer during the administrative proceeding, and noting that CBP had inherent authority to create an APO); *see also* *Ad Hoc Shrimp Trade Enft Comm. v. United States*, 632 F. Supp. 3d 1369, 1372 (Ct. Int'l Trade 2023) (ordering the joint protective order at the CIT to extend to the remand proceedings).

45. Release of Information Provided by Interested Parties, 19 C.F.R. § 165.4 (2016).

46. *Id.* § 165.4(a)(2)

47. *Id.* § 165.23.

48. *Id.*



that case, interested parties have ten calendar days to provide any rebuttal information.<sup>49</sup>

CBP also has the discretion to conduct a verification at the importer and/or the foreign producer or shipper.<sup>50</sup>

After the factual investigation period ends, “parties to the investigation”<sup>51</sup> may submit written arguments to CBP explaining why there is, or there is not, “substantial evidence” of evasion. The deadline for submitting written arguments to CBP is 230 calendar days after initiation of the EAPA investigation.<sup>52</sup>

As noted earlier, CBP must reach a decision as to whether there is substantial evidence of evasion no later than 300 calendar-days after initiation of an EAPA case. CBP must notify all parties to the investigation of its determination within five business days of the determination.<sup>53</sup>

Should CBP find that there is substantial evidence of evasion, with regard to entries that are unliquidated at the time of the determination, CBP will:<sup>54</sup>

- “[S]uspend the liquidation of unliquidated entries of covered merchandise that is subject to the determination and that entered on or after the date of the initiation of the investigation”; or
- Continue the suspension of liquidation (or extension of liquidation in the event CBP had extended the liquidation) of any such entries in the event CBP had already suspended (or extended) the liquidation of those entries.
- For entries where liquidation was not suspended, CBP will extend the period for liquidating the entries pursuant to CBP’s authority to do so under 19 U.S.C. 1504(b).

With regard to entries that are liquidated at the time of the determination, CBP will:<sup>55</sup>

- Initiate or continue “appropriate actions” separate from the EAPA proceeding.

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49. *Id.*

50. *See id.* § 165.25.

51. Foreign producers and shippers are not “parties to the investigation” under the EAPA regulations. Rather, the EAPA regulations limit the “parties to the investigation” to the interested party who filed the allegation and the importer(s) who allegedly engaged in evasion. *Id.* § 165.1.

52. *Id.* § 165.26.

53. *Id.* § 165.27(b).

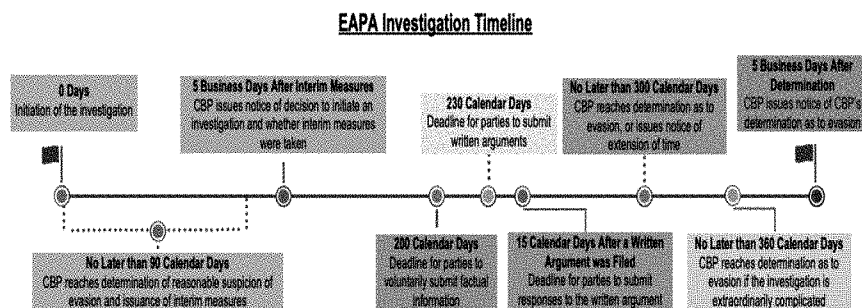
54. *Id.* §§ 165.28(a)(1)–(3).

55. *Id.* § 165.28(a).

Upon determining that there is substantial evidence of evasion, CBP will also notify the Commerce Department of its determination and request Commerce to:<sup>56</sup>

- Identify the applicable AD/CVD assessment rates and/or
- Identify the applicable AD/CVD cash deposit rate to be applied if there is no assessment rate and to ask Commerce to provide the applicable assessment rate as soon as that rate is available.
- Collect cash deposits and assess AD/CVD on entries subject to the determination.

In summary, the EAPA investigative timeline is as follows:<sup>57</sup>



### C. Appeals

Parties to the investigation (meaning the importer and/or the allegor, but not the foreign manufacturer or foreign shipper) may, but are not required to, ask CBP's Office of Regulations and Rulings (ORR) to review the "substantial evidence" determination TRLED made.<sup>58</sup> These administrative appeals are conducted on a *de novo* basis, but are based solely on the contents of the administrative record, the written appeal, and rebuttal arguments made by the parties to the investigation.<sup>59</sup> In other words, new facts cannot be introduced during the administrative review/appeal stage. The review must include

56. *Id.* § 165.28(b)(1)–(2).

57. U.S. CUSTOMS & BORDER PROT., CPB PUBL'N NO. 0590-1116, ENFORCE AND PROTECT ACT OF 2015: OVERVIEW OF THE INVESTIGATION PROCESS (2017), [https://www.cbp.gov/sites/default/files/assets/documents/2017-Apr/EAPA%20Investigation%20Process%20Overview\\_FINAL%20%28002%29.PDF](https://www.cbp.gov/sites/default/files/assets/documents/2017-Apr/EAPA%20Investigation%20Process%20Overview_FINAL%20%28002%29.PDF) [<https://perma.cc/S4BD-V9LW>] (archived July 20, 2023).

58. Filing a Request for Review of the Initial Determination, 19 C.F.R. § 165.41(a) (2023).

59. *See id.* § 165.45.

consideration of the entire administrative record.<sup>60</sup> The deadline for filing a request for an administrative review is thirty business days from issuance of the TRLED determination of which review is sought, and CBP's Office of Regulations and Rulings must complete the review within sixty business days of the commencement of the administrative review.<sup>61</sup>

A party to the investigation who is not satisfied with the results of the administrative review at the Office of Regulations and Rulings, or, if no administrative review is sought, the original TRLED determination as to substantial evidence (or lack thereof) of evasion, may file suit in the CIT.<sup>62</sup> Appeals to the U.S. Court of International Trade (CIT) are not de novo review cases by the CIT. Rather, 19 U.S.C. § 1517(g)(2) provides:

In determining whether a determination under subsection (c) or review under subsection (f) is conducted in accordance with those subsections, the United States Court of International Trade shall examine: “(A) whether the Commissioner fully complied with all procedures under subsections (c) [initial evasion determination] and (f) [administrative review]; and (B) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>63</sup>

#### D. EAPA Statistics

Since the enactment of the EAPA in 2015, there have been approximately 174 EAPA proceedings that TRLED has publicly discussed.<sup>64</sup> Certain products are by and far the most prevalent under review. Of the 174 proceedings, the products involved are as follows:

Product	# of Cases
Quartz Surface Products	28
Steel Wire Garment Hangers	25
Wooden Cabinets & Vanities and Component Parts Thereof	21
Aluminum Extrusions	16
Xanthan Gum	12
Glycine	10
Hardwood plywood	9

60. *Id.* In several CIT cases, the court has granted a request for voluntary remand based on ORR's failure to receive or review the entire record reviewed by TRLED. *See, e.g., Ad Hoc Shrimp Trade Enft Comm. v. United States*, No. 21-00129, slip op. at 15 (Ct. Int'l Trade May 23, 2022).

61. 19 C.F.R. § 165.45.

62. *See* 19 U.S.C. § 1517(g)(1).

63. *Id.* § 1517(g)(2).

64. The statistics in this section represent an unofficial compilation of cases and case outcomes.

Carbon Steel Butt-Weld Pipe Fittings	8
Lightweight Thermal Paper	7
Cast Iron Soil Pipe	5
Diamond Sawblades	5
Steel Trailer Wheels 12 to 16.5 Inches in Diameter	3
Amorphous Silica Fabric	2
Cast Iron Soil Pipe Fittings	2
Common Alloy Aluminum Sheet	2
Stainless Steel Flanges	2
Steel Grating	2
Activated Carbon	1
Cased Pencils	1
Certain Steel Wheels 22.5 and 24.5 Inches in Diameter	1
Circular Welded Carbons Steel Pipes and Tubes	1
Circular Welded Pipe	1
Forged Steel Fittings	1
Fresh Garlic	1
Frozen Warmwater Shrimp	1
Hydrofluorocarbon Blends	1
Magnesia Carbon Brick	1
Malleable Cast Iron Pipe Fittings	1
Oil Country Tubular Goods	1
Polyethylene Retail Carrier Bags	1
Uncovered Inner Springs Units	1
Wooden Bedroom Furniture	1
<b>Total</b>	<b>174</b>

As shown in the following chart, nearly 80 percent of CBP's investigations have resulted in affirmative final determinations by TRLED. Note that while only five cases in the total are currently pending due to scope referrals, several more of CBP's investigations involved scope referrals that were ultimately addressed by Commerce.

<b>Outcome</b>	<b># of Cases</b>
Affirmative Final Determination	138
Interim Measures	16
Negative Final Determination	8

Scope Referral <sup>65</sup>	5
Withdrawn	4
Initiation	2
Non-Initiation	1
<b>Total</b>	<b>174</b>

As discussed earlier in this Article, parties to the investigation may request ORR to review, de novo, TRLED's evasion determination. Of the 174 EAPA proceedings, that relief has been pursued in roughly one-third of the proceedings, for a total of fifty-two ORR reviews. Overwhelmingly, ORR affirms TRLED's affirmative evasion determination.

<b>Administrative Reviews</b>	<b># of Cases</b>
Affirmed	42
Reversed	5
Affirmed (Reversed on Remand)	3
Affirmed (Affirmed on Remand)	1
Mixed (Affirmed in Part; Reversed in Part)	1
<b>Total</b>	<b>52</b>

In recent years, the CIT has had occasion to adjudicate a number of EAPA-related disputes. A summary of several recent cases is set forth below.

### III. CIT DECISIONS REGARDING EAPA

As of this writing, there have been a total of thirty-four appeals of CBP's EAPA determinations docketed at the CIT, and, taking into account consolidations, there have been twenty-seven cases presented to CIT judges.

To date, three cases have been appealed to the Federal Circuit, and the Federal Circuit has issued one opinion. That opinion—*Royal Brush Manufacturing, Inc. v. United States* 75 F.4th 1250 (Fed. Cir. 2023)—is instructive on common issues that have emerged in EAPA litigation at the CIT. In this Article, we briefly summarize *Royal Brush*, including its procedural history that has been cited in numerous other EAPA cases, as well as briefly summarize several recent opinions that are relevant in understanding key issues in EAPA litigation.

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65. The figure here for scope referrals only refers to those EAPA investigations without a final determination that are currently pending because of a scope referral to Commerce. It does not indicate how many EAPA cases overall have had scope referrals.

A. *Royal Brush Manufacturing Inc. v. United States, Court No. 19-cv-00198, Chief Judge Barnett; 22-1226 (Fed. Cir.)*

*Royal Brush* was the first EAPA case heard on the merits at the CIT and at the Federal Circuit, and thus addresses several issues of first impression. At the CIT, Chief Judge Barnett faced the gamut of EAPA issues, including (1) CBP's interpretation of "new factual information" in the context of a verification report, and (2) the public summary requirement when business proprietary information is placed on the record during the investigation.<sup>66</sup>

First, Chief Judge Barnett considered whether CBP properly declined to accept the importer's rebuttal submission during the administrative proceeding, which turned on the question of whether CBP's verification report constituted "new factual information."<sup>67</sup> After the deadline had passed for parties to submit factual information, CBP conducted an on-site verification of the foreign manufacturer's facility to interview company officials, tour the facilities, and review original records to verify the on-the-record responses.<sup>68</sup>

Afterward, CBP placed on the record a "verification report" that, according to CBP, summarized the relevant facts and observations from the on-site verification.<sup>69</sup> The report included, for example, available payroll records to assess whether sufficient personnel worked the number of shifts required to meet the purported production capacity.<sup>70</sup> CBP explained in the report that it found "discrepancies" in the record based on information collected during the on-site verification, and it documented those discrepancies in the report.<sup>71</sup>

After CBP placed the verification report on the record, Royal Brush submitted rebuttal information to the verification report.<sup>72</sup> CBP rejected the submission, concluding that the verification report did not contain "new factual information" and thus Royal Brush was not permitted to submit rebuttal information.<sup>73</sup> CBP, however, failed to identify the standard that it used to define factual information. Royal Brush disagreed and, borrowing from Commerce's AD/CVD proceedings the definition of "factual information," argued that the verification report contained new factual information in the form of expert analysis and, thus, that CBP's rejection of its rebuttal submission was unlawful.<sup>74</sup>

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66. See *Royal Brush Mfg., Inc. v. U.S.*, 483 F. Supp. 3d 1294 (Ct. Intl. Trade 2020).

67. *Id.* at 1303.

68. *Id.* at 1301.

69. *Id.* at 1303.

70. *Id.*

71. *Id.* at 1300.

72. *Id.* at 1301–02.

73. 19 C.F.R. § 165.23(c)(1) specifies that "[i]f CBP places new factual information on the administrative record on or after the 200th calendar day after the initiation of the investigation (or if such information is placed on the record at CBP's request), the parties to the investigation will have ten calendar days to provide rebuttal information to the new factual information."

74. *Id.*

The question presented at CIT was whether CBP properly concluded that the verification report did not contain new factual information. Chief Judge Barnett held that it was not appropriate to adopt a definition from Commerce unless expressly adopted by CBP and remanded the case. On remand, CBP provided its analysis and explanation, and CBP's explanation satisfied the court. CBP described the scope and purpose of the verification report as a tool that "documents the verification process," and determined that, as a matter of practice, a verification report is not itself "new factual information."<sup>75</sup> CBP explained that, if new information were discovered during verification, CBP would place such information on the record and permit rebuttal information.<sup>76</sup> CBP re-examined the verification report at issue and demonstrated that the findings in the report identified discrepancies in the record, which were simply the results of the verification and not new factual information.<sup>77</sup>

This case highlights an issue that has become familiar in EAPA cases—that is, the parties' tendency to borrow from Commerce's statutory and regulatory scheme and the deep library of case law interpreting them. When addressing the verification issue, Chief Judge Barnett noted that the government's reliance on various cases describing the purpose of verification reports in Commerce cases "indicate Commerce's views on verification, not Customs' views."

Royal Brush also raised, for the first time, various due process arguments regarding the administrative proceeding, which have continued to be litigated in nearly every subsequent EAPA case. Royal Brush argued that it was denied due process during the administrative process for a variety of reasons, including that CBP maintained a "secret" administrative record.<sup>78</sup> As explained above, the EAPA statute or regulations do not include an APO procedure.<sup>79</sup> Thus, when companies submit business proprietary information on the record, CBP is legally forbidden from disclosing that information. Royal Brush contended that it was constitutionally entitled to the information.

Chief Judge Barnett's discussion of the due process issues raised in *Royal Brush* has since been instructive in several cases involving public summaries of business confidential information, and thus warrants mention (though, as addressed below, this opinion was

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75. *Royal Brush Mfg., Inc. v. U.S.*, 1:19-cv-00198-MAB, ECF No. 55 at 6 (March 22, 2021).

76. *Id.*

77. *Id.* at 6–10.

78. *Royal Brush Mfg.*, 483 F. Supp. 3d at 1304–05.

79. 19 C.F.R. § 165.4(a) (2023) (stating that CBP's regulation permits interested parties to request confidential treatment for information that "consists of trade secrets and commercial or financial information obtained from any person, which is privileged or confidential in accordance with 5 U.S.C. [§] 552(b)(4)"); *id.* § 165.4(a)(2) (stating that a party seeking confidential treatment "must also file a public version of the submission" that "contain[s] a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information"); *see also id.* § 165.4(e) (extending the public summary requirement to confidential information placed on the record by CBP).

ultimately reversed by the Federal Circuit). Chief Judge Barnett recognized that an importer participating in an administrative proceeding has a procedural due process right to “notice and a meaningful opportunity to be heard,” but acknowledged that EAPA does not require or establish a procedure for the issuance of an administrative protective order.<sup>80</sup> Chief Judge Barnett recognized, however, that CBP’s regulations do establish a procedure regulating the release of information provided by interested parties. And although Royal Brush never cited this regulation in its briefing, the court held that CBP’s compliance with the regulation was relevant to assessing Royal Brush’s due process claims.<sup>81</sup> Because CBP did not provide the requisite public summaries, the court remanded to CBP with instruction to ensure that the requisite public summaries accompanied the confidential filings.<sup>82</sup>

After remand, Royal Brush argued that the public summaries, which contained descriptors (e.g., “number”) rather than substantive information (e.g., 42%), failed to meaningfully convey the information, in violation of Royal Brush’s due process.<sup>83</sup> The court rejected Royal Brush’s argument. Reiterating the absence of an APO process, Chief Judge Barnett analyzed the due process arguments under the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test<sup>84</sup> and held that Royal Brush failed to demonstrate that due process required CBP to disclose the substance of business confidential information during the course of the administrative proceeding.<sup>85</sup> The court explained that due process requires notice and an opportunity to be heard and held that both were provided in the form of public summaries and comment procedures.<sup>86</sup> The court further acknowledged that CBP is precluded from disclosing business proprietary information by statute and regulation (19 C.F.R. § 165.4(a) and 18 U.S.C. § 1905) and held that Royal Brush failed to identify how CBP could convey the substance, but not the specifics, of the information in a different manner.<sup>87</sup> At bottom, the court held that Royal Brush spoke only in “generalities” about its desire to access certain information but failed to demonstrate that due process requires access to such information.<sup>88</sup>

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80. Royal Brush Mfg., Inc., 483 F. Supp. 3d at 1304–05.

81. *Id.*

82. *Id.*

83. *Id.*

84. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The *Mathews* balancing test involves weighing three factors to assess whether there is a due process violation: (1) the private interest that will be affected by the official action, (2) the risk of erroneous deprivation of such interest through the procedures used, and (3) the government’s interest. *Id.* at 335.

85. Royal Brush Mfg., Inc., 483 F. Supp. 3d at 1305.

86. *Id.* at 1306.

87. *Id.* at 1308.

88. *Id.* at 1305–06.



On appeal, Royal Brush continued to argue that its due process rights were violated, that CBP erred by rejecting its rebuttal filing, and that the finding of evasion was arbitrary and capricious.<sup>89</sup>

The government moved to dismiss the appeal, arguing that the parties discovered all of Royal Brush's entries had been liquidated, divesting the court of jurisdiction.<sup>90</sup> The government cited the Federal Circuit's seminal case *Zenith Radio Corporation v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983), holding that, "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits of [the plaintiff's] challenge can have no effect on the dumping duties assessed on entries . . . during the . . . period of review."<sup>91</sup> The government argued that because Royal Brush failed to protest the liquidations within the statutory period, the liquidation became "final and conclusive."<sup>92</sup> From there, the government argued that neither the Federal Circuit nor the CIT possessed jurisdiction over Royal Brush's challenges to the evasion determination as it related to specific entries.<sup>93</sup>

In the first EAPA opinion at the Federal Circuit, the court ultimately sided with Royal Brush, and reversed and remanded the case to the CIT.<sup>94</sup>

First, the court held that it had jurisdiction over the appeal. The court construed Royal Brush's challenge as one to the evasion determination—not the liquidation determination.<sup>95</sup> For at least three of Royal Brush's entries, no duties were assessed.<sup>96</sup> Thus, the court held that "[a]t least as to these three entries it is clear that the case is not moot."<sup>97</sup> The court reasoned that, as a result of the evasion determination, Royal Brush may be liable for civil penalties, thus constituting a live controversy.<sup>98</sup>

Next, the court addressed Royal Brush's due process arguments, namely the contention that CBP relied on redacted information, thus depriving Royal Brush of due process under the Fifth Amendment.<sup>99</sup> The government argued that the public summaries provided to Royal Brush conveyed the substance of the information and was consistent with the procedure set forth in the regulations and thus did not violate Royal Brush's due process rights.<sup>100</sup> The government also argued that because the EAPA regulations do not provide for sharing business confidential information among the parties through an administrative

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89. *Id.* at 1306–07.

90. *Royal Brush Mfg., Inc. v. U.S.*, 22-1226, ECF No. 62-1 at 5–6 (January 12, 2023).

91. *Id.* at 13.

92. *Id.* at 12.

93. *Id.*

94. *See Royal Brush Mfg., Inc. v. U.S.*, 75 F.4th 1250 (Fed. Cir. 2023).

95. *Id.* at 1256.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1257.

100. *Royal Brush Mfg., Inc. v. U.S.*, 22-1226, ECF No. 29 at 30 (June 9, 2022).

protective order (APO), such disclosure would run afoul of the Trade Secrets Act.<sup>101</sup>

The court disagreed. It held that “the law is clear that, in adjudicative administrative proceedings, due process ‘includes the right to know what evidence is being used against one.’”<sup>102</sup> The court explained that there is no legitimate government interest in refusing to provide confidential business information to Royal Brush when all the government’s concerns about the necessity of secrecy can be alleviated by issuing a protective order.<sup>103</sup> Finally, the court explained that it has “no doubt that a release of information is ‘authorized by law’ within the meaning of the Trade Secrets Act if that release is required as a matter of constitutional due process.”<sup>104</sup>

The Federal Circuit did acknowledge that “release of confidential business information is generally governed and protected by statutes or regulations that provide for protective orders,”<sup>105</sup> but in the EAPA context, neither the statute or regulations set forth a mechanism to create an administrative protective order. Even so, the Federal Circuit held that administrative agencies have “the inherent authority to adopt procedures to manage their own affairs.”<sup>106</sup>

This holding will change the landscape of EAPA administrative proceedings. To date, nearly all EAPA cases at the CIT have raised similar arguments challenging the lack of access to information during the administrative proceedings or challenging the sufficiency of the public summaries provided during the administrative proceeding. And numerous courts have aligned with Judge Barnett, finding no due process violation.

Though CBP has not yet adopted an administrative protective order in EAPA cases, the Federal Circuit left little room for CBP’s current practice of providing public summaries of business confidential information in accordance with its regulations—rather than the underlying information—during the administrative proceedings.<sup>107</sup>

Finally, the Federal Circuit addressed Royal Brush’s argument regarding the right to submit rebuttal information. Disagreeing with the government again, the court held that CBP relied on “new factual information” when it cited a Verification Report.<sup>108</sup> The Federal Circuit held that the verification report provided “new factual information,” because the report did not rely simply on data previously provided, but cited information “obtained at verification.”<sup>109</sup> Thus, on remand, the Federal Circuit instructed that Royal Brush will have a right to rebut information contained in that report.<sup>110</sup>

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101. *Id.* at 36.

102. *Id.* at 1258 (quoting *Robings v. U.S. R.R. Ret. Bd.*, 594 F.2d 448, 452 (5th

103. *Royal Brush Mfg., Inc.*, 75 F.4th at 1258.

104. *Id.* at 1260.

105. *Id.* at 1261.

106. *Id.*

107. *See* 19 C.F.R. § 165.4(e).

108. *Royal Brush Mfg., Inc.*, 75 F.4th at 1262.

109. *Id.* at 1262–63.

110. *Id.*

As CBP explained throughout the litigation, verification is the process by which CBP checks, reviews, and corroborates factual information *previously* submitted or placed on the record.<sup>111</sup> Thus, to the extent that new information is discovered at verification, it may be the case that the party failed to provide such information as originally required. Thus, to allow a company to rebut information to correct verification failures *after* the deadline for submission of factual information has passed would undermine the verification process.<sup>112</sup> The government also explained that, if companies are permitted to correct their own failures to provide information until the verification process, another segment of submission and comment on factual information will have to be added to the administrative procedure after verification and any corrections or new arguments will then also be subject to verification. This cyclical process puts at risk CBP's ability to comply with statutory deadlines<sup>113</sup> and could incentivize parties in EAPA administrative proceedings to withhold factual information that, if later discovered during verification, the party would have a second opportunity to explain the information through the submission of rebuttal information. The court did not address the potential ramifications of this holding and, while the impacts of *Royal Brush* have not yet been untangled, this holding will also undoubtedly affect many EAPA proceedings going forward.

B. *All One God Faith, Inc. v. United States, Consol. Court No. 20-CV-00164* (Ascension Chem. LLC v. United States, *Court No. 20-cv-00160*; GLoB Energy Corp. v. United States, *20-cv-00161*; UMD Sol.LLC v. United States, *Court No. 20-cv-00162*; Crude Chem. Tech. LLC v. United States, *Court No. 20-cv-00163*), *Judge Katzmman; 23-1078 (Fed. Cir.)*

*All One God* is the second EAPA case on appeal to the Federal Circuit. The case involves a potentially overlapping question of jurisdiction and the viability of an EAPA challenge in light of final liquidation of entries, as the *Royal Brush* opinion addressed.

In this consolidated case, Judge Katzmman dismissed the complaint for lack of subject matter jurisdiction and denied the plaintiffs' remaining motions for judgment on the agency record.<sup>114</sup>

The case involved xanthan gum from China that was being transshipped through India in an effort to evade AD/CVD. The court first addressed jurisdiction. Of the seventeen entries at issue, five had been finally liquidated.<sup>115</sup> After the five entries had been liquidated, plaintiffs protested the liquidation. CBP denied the protest and

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111. See, e.g., *Royal Brush Mfg., Inc. v. U.S.*, 1:19-cv-00198-MAB, ECF No. 68 at 13 (June 9, 2021).

112. *Id.* at 15.

113. 19 U.S.C. § 1517(c)(1)(A); 19 C.F.R. § 165.22.

114. See generally *All One God Faith, Inc. v. U.S.*, 589 F. Supp. 3d 1238 (Ct. Intl. Trade 2022).

115. *Id.* at 1248.

plaintiffs did not appeal. Instead, plaintiffs initiated an action to challenge CBP's evasion determination.<sup>116</sup>

The court held that it lacked subject matter jurisdiction over any claims regarding the liquidated entries, because liquidation was final and conclusive.<sup>117</sup> The court reiterated the well-established principle that, although the court may review a claim of erroneous liquidation where that liquidation has been timely protested and the denial of such protest appealed, there was no appeal in this case and thus no jurisdiction over those final liquidated entries.<sup>118</sup>

As it relates to the unliquidated entries, plaintiffs raised two challenges. First, they argued that CBP was legally required to refer the matter to Commerce for a changed circumstances review, because record evidence showed that the domestic manufacturer that filed the EAPA allegation was no longer producing oilfield xanthan gum in the United States and thus was not at risk of injury from low-cost imports from China.<sup>119</sup> The court rejected this argument, finding it unsupported by the record and holding that plaintiff failed to plausibly allege that CBP was obligated to refer the matter to Commerce.<sup>120</sup> The EAPA statute only provides a mechanism for referral to Commerce when *CBP* is "unable to determine whether merchandise at issue is covered merchandise."<sup>121</sup> Nothing further is required.

Second, plaintiffs argued that CBP should not have applied adverse inferences to the alleged manufacturers of the subject entries, because *plaintiffs* cooperated with CBP to the best of their ability.<sup>122</sup> The court rejected this argument. It was undisputed that the foreign manufacturers did not cooperate, and thus CBP's application of adverse inferences to the *foreign manufacturers*—not the plaintiffs—was appropriate.<sup>123</sup>

Plaintiffs appealed to the Federal Circuit. Though the case is fully briefed at the Federal Circuit, the government filed a motion to stay until the Federal Circuit's opinion in *Royal Brush* became final and conclusive, because the *Royal Brush* decision is potentially pertinent to the liquidation issues raised.<sup>124</sup> Now that *Royal Brush* is final and conclusive, we can expect the Federal Circuit to schedule argument for this appeal and likely clarify the ramifications of liquidation in the EAPA context.

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116. *Id.* at 1240.

117. *Id.*

118. *Id.*

119. *Id.* at 1249–50.

120. *Id.* at 1250.

121. *Id.*

122. *Id.* at 1250–51.

123. *Id.* at 1250–51.

124. *All One God Faith, Inc., et al.*, Nos. 23-1078, 23-1081, ECF No. 48 at 1 (September 7, 2023).

C. *American Pacific Plywood Inc. v. United States, Consol. Court No. 20-cv-03914* (U.S. Global Forest v. United States, *Court No. 20-cv-03915*; *InterGlobal Forest LLC v. United States, Court No. 20-cv-03916*), *Judge Miller Baker; 23-2321 (Fed. Cir.)*

*American Pacific Plywood* is the third EAPA case on appeal to the Federal Circuit. This case started as the first EAPA case to request a three-judge panel. Plaintiffs argued that reassignment to a panel was appropriate to render a “decision on the constitutionality of the EAPA law and regulations.”<sup>125</sup> Plaintiffs generally argued that the case “concerns questions of the constitutionality of the EAPA statute and regulations.”<sup>126</sup> In support, plaintiffs supplied a bulleted list of alleged constitutional violations during the EAPA proceeding, including: CBP’s alleged failure to provide notice of visit to the manufacturing facilities before initiation of the investigation, failure to provide notice and an opportunity to defend before interim measures were applied, failure to provide unfettered access to other parties’ business confidential information, failure to provide CBP’s analysis of certain confidential information, and failure to inform parties of deficiencies or gaps in the submitted data.<sup>127</sup> Plaintiffs also complained that EAPA’s statute and regulations, which only allow “parties to an EAPA investigation” to request an administrative review, violate the law.<sup>128</sup>

The court denied the motion for reassignment. It held that plaintiffs’ broad references to the “EAPA statute” were too vague to support reassignment on the grounds of a constitutional due process challenge to the entire EAPA statute.<sup>129</sup> The court then decided the case on the merits and focused heavily on the challenges to the imposition of interim measures. As explained above, at the end of the ninety-day maximum time period after the initiation of the investigation, if CBP concludes that there is a “reasonable suspicion” that an importer is evading an AD/CVD order, CBP will implement “interim measures.”<sup>130</sup> The Court first held that it had jurisdiction to review a challenge to the imposition of interim measures, because that determination was subsumed into the final determination, which was subject to judicial review.<sup>131</sup>

Second, plaintiffs argued that CBP did not provide timely notice of an ongoing EAPA investigation and the impending interim measures, nor did CBP provide plaintiffs an opportunity to rebut and defend against the evasion allegation and imposition of the interim

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125. *Am. Pac. Plywood Inc., v. United States, No. 20-03914, ECF No. 21, at 5* (February 3, 2021).

126. *Id.* at 5.

127. *Id.* at 8-9.

128. *Id.* at 4.

129. *Am. Pac. Plywood Inc., v. United States, No. 20-03914, slip op. at 4* (Ct. Int’l Trade filed March 5, 2021).

130. 19 C.F.R. § 165.24.

131. *Am. Pac. Plywood Inc., v. United States, No. 20-03914, slip op. at 5* (Ct. Int’l Trade filed June 22, 2023).

measures.<sup>132</sup> Thus, plaintiffs allege their due process rights were violated. The court rejected this argument. The court first held that plaintiffs did not have a protected interest in the rate of a duty on future importations.<sup>133</sup> The court held that CBP complied with what the statute instructed; that is, upon a finding of reasonable suspicion of evasion, CBP must extend liquidation to unliquidated entries of covered merchandise that entered *before* the investigation starts.<sup>134</sup> Thus, plaintiffs' argument that prior notice is required was unsupported and at odds with the statute and regulations.<sup>135</sup> Finally, the court held that plaintiffs failed to establish any protected interest sufficient to give rise to a due process claim and to show how the alleged due process violations worked some sort of harm to that interest.<sup>136</sup>

The court next addressed plaintiffs' arguments on the standard for assessing "reasonable suspicion" of evasion—the prerequisite determination before the imposition of interim measures. The court ultimately construed "reasonable suspicion" in the EAPA context to be based on the "totality of the evidence and requiring a particularized and objective basis for that finding," but not one that imposes "a difficult burden on the agency."<sup>137</sup> The court held that, under the "reasonable suspicion" standard, even if other evidence fairly detracts from a conclusion, a conclusion may still be supported.<sup>138</sup> After articulating the appropriate standard of review in the EAPA context, the court ultimately determined that the totality of the evidence cited by CBP "is easily more than the 'slight evidence' or 'very small amount' needed to support a 'reasonable suspicion.'"<sup>139</sup>

Ultimately, this opinion is helpful for the broader EAPA context because it analyzes the difference between the standard for imposing interim measures—"reasonable suspicion" of evasion, 19 U.S.C. § 1517(e), from the standard for reaching a final determination of evasion—"substantial evidence," 19 U.S.C. § 1617(c)(1)(A).<sup>140</sup> The court confirmed that the CIT has jurisdiction to consider challenges to the imposition of interim measures—a challenge that's been raised several times in the EAPA context, and it addressed a slightly different due process challenge than that raised in *Royal Brush*.

Plaintiffs-appellants' opening brief at the Federal Circuit is due in late October 2023, with argument likely to be held next year.

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132. *Id.*

133. *Id.* at 7.

134. *Id.*

135. *Id.*

136. *Id.* at 8.

137. *Id.*

138. *Id.* (citing *CEK Grp. LLC v. United States*, No. 22-00082, slip op. 23-69, at 7–8 (Ct. Int'l Trade May 2, 2023) (nothing that what level of suspicion is "reasonable" varies from statute to statute and expressing doubt that *Terry v. Ohio*, 392 U.S. 1 (1968) applies in the EAPA context because Fourth Amendment concerns are not present).

139. *Id.* at 9.

140. *Id.*

D. Vietnam Finewood Co. Ltd. et al. v. United States, *Court No. 19-cv-00218*, Chief Judge Barnett

*Vietnam Finewood* is an early CIT case that is instructive on EAPA jurisdiction. In this case, CBP initiated an investigation and imposed interim measures against the subject importer after finding reasonable suspicion of evasion. CBP then made a scope referral to Commerce. Before Commerce responded to the scope referral, plaintiffs filed suit in the CIT under the court's residual jurisdiction clause, 28 U.S.C. § 1581(i).

The government moved to dismiss, arguing that plaintiffs had a remedy under 28 U.S.C. § 1581(c) and that remedy was not manifestly inadequate.<sup>141</sup> The government further argued that the absence of a final agency action foreclosed judicial review at the time.<sup>142</sup> Plaintiffs contended, amongst other arguments, that CBP's failure to timely complete the investigation meant that CBP's stay of the proceedings and scope referral were untimely and void *ab initio*, thereby establishing § 1581(i) jurisdiction.<sup>143</sup> Plaintiffs further contended that they lacked recourse under § 1581(c) jurisdiction because CBP had not yet completed its investigation and lacked any time to do so.<sup>144</sup>

To assess jurisdiction, the court characterized the nature of plaintiffs' challenge as contesting CBP's alleged failure to complete the EAPA investigation within the statutory period and CBP's allegedly deficient and dilatory referral of the matter to Commerce for a scope determination. On those issues, the court held that plaintiffs had adequate remedies to challenge an adverse final determination and administrative review pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c).

As will be instructive in future cases, Chief Judge Barnett held that CBP's scope referral to Commerce—which can happen at any time during the proceeding when CBP “cannot determine whether the merchandise described in an allegation is properly within the scope” of an AD/CVD order—effectively stays the administrative proceeding and the statutory deadlines to make an evasion determination.<sup>145</sup> The court further held that the statute contains no explicit deadline by when CBP must refer a matter to Commerce for a scope determination.<sup>146</sup>

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141. Vietnam Finewood Co. Ltd. v. U.S., 466 F. Supp. 3d 1273, 1276 (Ct. Intl. Trade 2020).

142. *Id.* at 1282.

143. *Id.*

144. *Id.*

145. *Id.* at 1283.

146. *Id.* at 1284.

E. *Diamond Tools Tech. LLC v. United States, Court No. 20-cv-00060, Judge Reif*

In *Diamond Tools*, the court addressed for the first time an instructive issue regarding the impact of CBP's failure to meet the statutory deadline to impose interim measures and whether that failure nullified any interim measures imposed.<sup>147</sup> As noted above, section 1517(e) provides that, no later than ninety calendar days after initiating an investigation, CBP "shall decide" if there is a reasonable suspicion of evasion and, if so, impose interim measures.<sup>148</sup> In *Diamond Tools*, CBP did not meet the ninety-day deadline to impose interim measures because of discrepancies in the record.<sup>149</sup> Thus, plaintiff argued that the imposition of untimely interim measures was unlawful.<sup>150</sup>

The court held that the statutory deadline was precatory, not mandatory, and thus sustained CBP's implementation of interim measures.<sup>151</sup> Relying on a collection of Supreme Court and Federal Circuit precedent, the court held that the statute's use of "shall" does not alone limit the agency's power.<sup>152</sup> The court further held that, in the absence of a consequence for noncompliance with a statutory deadline, timing provisions are at best precatory, not mandatory.<sup>153</sup>

This opinion was the first of its kind in addressing the impact of a missed statutory deadline, and thus will likely be instructive on cases going forward.

F. *Aspects Furniture Int'l, Inc. v. United States, Court No. 20-cv-03824, Judge Choe-Groves*

*Aspects Furniture* involves an evasion determination regarding certain wooden bedroom furniture from China. After nearly four years of litigation and one remand, the CIT sustained CBP's evasion determination.<sup>154</sup>

During this investigation, at verification, CBP's employees reportedly witnessed Aspects Furniture employees deleting and destroying documents and correspondence. Plaintiffs challenged CBP's alleged reliance on these statements—calling them "hearsay"—in rendering the evasion determination.<sup>155</sup> In response, the government

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147. *Diamond Tools Tech. LLC v. U.S.*, No. 20-00060, 2023 WL 4842100, at \*1 (Ct. Int'l Trade July 28, 2023).

148. 19 U.S.C. § 1517(e).

149. *Diamond Tools Tech. LLC v. U.S.*, 545 F. Supp. 3d 1324, 1332 (Ct. Int'l Trade 2021).

150. *Id.* at 1333.

151. *Id.*

152. *Id.* at 1333–34.

153. *Id.* at 1334.

154. *Aspects Furniture Int'l, Inc. v. United States*, 2023 WL 5374441, \*1, \*14 (Ct. Int'l Trade 2023).

155. *Aspects Furniture Int'l, Inc., v. United States*, No. 20-03824, slip op. at 3 (Ct. Int'l Trade filed Nov. 28, 2022).



argued that the Administrative Procedure Act, and not the Federal Rules of Evidence (FRE), governs the admissibility of evidence in administrative proceedings.<sup>156</sup> Aspects Furniture also argued that CBP abused its discretion in failing to consider affidavits that were submitted as part of a voluntary submission, despite being submitted more than eighteen months after the deadline.<sup>157</sup>

The CIT sustained adverse inferences drawn against the importer based upon document destruction during the on-site verification and “pervasive” discrepancies in the entry documentation.<sup>158</sup> The court also found that CBP was entitled to rely upon personal observations by the agency’s verification team without giving the importer an opportunity to cure the spoliation.<sup>159</sup>

This opinion may serve to foreclose plaintiffs from making arguments based on the application of the Federal Rules of Evidence to administrative proceedings, an argument that has now been raised in more than one case.

G. Ad Hoc Shrimp Trade Enft Comm. v. United States, *Court No. 21-cv-00129, Judge Kelly*

In this first-of-its-kind CIT case, the Office of Regulations and Rulings (ORR) reversed the Remedy & Law Enforcement Directorate’s (TRLED) evasion determination and concluded that there was not sufficient record evidence of evasion. The case involves Indian frozen warm water shrimp allegedly transshipped through Vietnam. In rendering its affirmative evasion determination, TRLED applied adverse inferences after concluding that an affiliated importer failed to provide requested information and cooperate to the best of its ability.<sup>160</sup> ORR reversed, determining that the company had adequately complied with TRLED’s requests for information, even though it could not provide the information in the exact manner requested by TRLED.<sup>161</sup>

At the CIT, plaintiff challenged ORR’s substantive determination of non-evasion, ORR’s purported failure to review the entire administrative record in support of its decision, and TRLED’s alleged failure to follow CBP’s regulations requiring public summary of confidential documents or explanations of why such summary is impossible.<sup>162</sup>

At oral argument, government counsel conceded that TRLED failed to transmit the entire record to ORR.<sup>163</sup> As a reminder, CBP’s

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156. *Id.* at 5–6.

157. *Id.* at 45.

158. *Id.* at \*7.

159. *Id.* at \*7–\*10.

160. *Ad Hoc Shrimp Trade Enft Comm. v. United States*, 632 F. Supp. 3d 1369, 1372–73 (Ct. Int’l Trade 2023).

161. *Id.* at 1373.

162. *Id.*

163. *Ad Hoc Shrimp Trade Enft Comm. v. United States*, 578 F. Supp. 3d 1310, 1317 (Ct. Int’l Trade 2022).

regulations requires that ORR conduct a de novo review of the “entire administrative record.”<sup>164</sup> Because TRLED admittedly did not transmit the entire record, the court remanded the case to CBP.<sup>165</sup> In addition to reviewing the entire record, the court instructed CBP to explain why it accepted assertions regarding confidential information, how CBP evaluated the sufficiency of public summarization, or why it was unable to publicly summarize purportedly confidential documents.<sup>166</sup>

Interestingly, since the parties gained unfettered access to the confidential record at the CIT, the court ordered that the joint protective order extend to the remand proceedings, thereby permitting parties to make arguments based on the entire record.<sup>167</sup> This was the first order of this kind and, to date, has not been applied in other cases.

Ultimately, the court issued an opinion sustaining the results of the remand redetermination on the basis that the determination of non-evasion was reasonable.<sup>168</sup>

#### IV. CONCLUSION

The EAPA landscape is new and quickly developing. As we’ve explained, the statute and regulations set forth a comprehensive and expedited administrative process that requires respondent importers to be prepared to act quickly when an EAPA investigation begins. But as these cases work through the courts, the landscape is continually changing. Take *Royal Brush*, for instance, which seemingly alters and expands the substantive information that parties to the administrative proceedings are privy to. As the courts continue to hear EAPA cases and decide the contours of the law, and as CBP continues to adjust its administrative practices accordingly, parties will continue to have more clarity as to the process and expectations of EAPA litigation. For now, one thing seems to be clear, and that is the EAPA appears to have met its objective in terms of speedy enforcement of the AD/CVD laws and recovery of unpaid duties.

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164. See *supra* text accompanying notes 60–62.

165. *Ad Hoc Shrimp*, 578 F. Supp. 3d at 1322.

166. *Id.* at 1319–20.

167. *But see* *Fedmet Res. Corp. v. United States*, 21-cv-00248, slip op. at 3 (Ct. Int’l Trade filed Jan. 6, 2022) (expressing the government’s opposition to an order of this kind, arguing that “the JPO cannot govern the agency’s administrative proceedings conducted on remand”).

168. *Ad Hoc Shrimp Trade Enft Comm.*, 632 F. Supp. 3d at 1381.

APPENDIX – EXAMPLE OF CBP QUESTIONNAIRE IN EAPA PROCEEDING

A. GENERAL INFORMATION

1. If the company has a website, identify the URL address and provide a copy of the site index. Do the same for any affiliated parties.
2. Provide a detailed explanation of the company's processes for the production, sale, and exportation of the merchandise. Support this detailed explanation with documentation, photographic evidence of the production space, and all correspondence records to illustrate the process from receiving an order through the payment and finalization of a transaction.
3. Identify the roles of all parties involved in sourcing, manufacturing, selling, transporting, and completing purchasing transactions and explain each party's role, including selling/buying agents.
4. Provide location(s) and address where the company's records are maintained; if multiple locations specify what is maintained at each location.
5. Are there any other payments, in addition to the invoice values, made/received to obtain the merchandise (e.g., commissions, royalties, license fees, currency fluctuations/conversions, interest payments, inspection fees, management fees, advertising or marketing costs, warranty, etc.)? If yes, identify the nature of the payment(s), the party providing the payment and the general ledger accounts/recording mechanism used to record such payments. If general ledger accounts are not used, explain how associated transactions are tracked/maintained.
6. What bank accounts are used to receive funds from sales and make payments? Provide the bank name, account holder(s) name, and account number(s).
7. Provide a catalog of products manufactured and/or sold for the years of 20\_\_ and 2019. Identify which products are manufactured by the company.
8. Identify procedures and the information/documents used in determining the proper classification of merchandise.

**B. CORPORATE STRUCTURE AND AFFILIATIONS**

1. Provide an organizational chart and description of the company's operating structure. Include any parent companies, subsidiaries and all affiliated persons<sup>1</sup> with the company along with a description explaining his or her affiliation.
2. Provide a list of all the production facilities, sales office locations, research and development facilities, and administrative offices involved in the development, production, sale, and/or distribution of the merchandise operated by the company and its affiliates. Briefly describe the purpose of each, the date operations began for each, and provide a complete address and telephone number for each of these plants, offices, and other facilities.
3. Provide a list of:
  - a) The shareholders who directly or indirectly own, hold, or control with power to vote, five (5) percent or more of the company's outstanding voting stock;
  - b) The ten (10) shareholders with the highest ownership percentage of the company;
  - c) All companies in which the company directly or indirectly owns, holds, or controls with power to vote, five (5) percent or more of the outstanding voting stock;
  - d) If the company is a subsidiary of another company, the ten (10) largest shareholders of the parent company and of the other subsidiaries of the parent company which are involved in the development, production, sale, and/or distribution of the merchandise under investigation; and

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1. The term affiliated persons (affiliates) includes: (a) members of a family; (b) an officer or director of an organization and that organization; (c) partners; (d) employers and employees; (e) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and that organization; (f) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (g) any person who controls any other person and that other person. Control exists when a person is legally or operationally in a position to exercise restraint or direction over another person. A control relationship should also have the potential to affect decisions concerning the production, pricing, or cost of the merchandise under investigation or review. Examples of situations which may indicate control include (but are not limited to): (a) joint ventures and franchises; (b) lender/borrower situations; (c) a close relationship with a supplier, (sub) contractor, lender, distributor, exporter or reseller, and (d) a group of companies controlled by, for example, a family, a corporation, or the same investors. An example of affiliation by common control may be the affiliation between the owners of a joint venture when each owner is in a control position with that joint venture.

The term person includes any interested party as well as any other individual, enterprise, or entity, as appropriate. It includes any company, individual, organization, partnership, or group.

- e) If the parent company is itself a subsidiary of another company, the ten (10) largest shareholders of its parent company.
4. For all of the above provide the following information:
    - a) State the percentage of voting stock owned, held, or controlled, directly or indirectly;
    - b) Fully explain any business relationships the company had or has with the owners of the companies listed above and the effect such relationships may have on the development, production, sales, or distribution of the merchandise under investigation; and
    - c) If any of the affiliated persons identified above are in turn affiliated with other persons that are involved in the development, production (including inputs), sale, and/or distribution of the merchandise under investigation, provide a list of those persons and describe the nature of the affiliation (e.g., shared directors or managers, equity ownership, close supplier relationship). Include any such affiliated persons in the chart you provided in response to this section. Also, describe the nature of each person's involvement with the merchandise under investigation.
  5. State whether the company is part of a group. Examples of groups include: (i) a parent company and its subsidiaries; (ii) a defined corporate group; (iii) a network of companies with cross ownership; and (iv) two or more companies involved in the development, production, sale, and/or distribution of the merchandise under investigation which are directly or indirectly controlled by a family or investor group.

If the company is part of a group, provide:

- a) An organization chart of the companies in the group;
- b) The amount of outstanding voting stock directly or indirectly owned, held, or controlled, with power to vote, of each company in the group by: (i) any other company in the group; (ii) any member of the family group; and/or (iii) any member of the investor group;
- c) The names of the officers, directors, and managers of each company in the group and indicate whether any of them are also: (i) an officer, director, or manager of another company in the group; (ii) a member of the family group; and/or (iii) a member of the investor group; and
- d) An explanation of all business or operational relationships affecting the development, production, sale, and/or

distribution of the merchandise under investigation which the company has or had with the parent company, any other company in the group, any member of the family group, and/or any member of the investor group. Such business or operational relationships may include, but are not limited to, shared managers, employees, facilities, and borrowings.

6. If the company is affiliated with another producer that manufactures or has the potential to manufacture the merchandise, identify that producer and explain whether the company and the affiliated producer manufactures or could manufacture identical or similar products without substantial retooling of either facility.
  - a) If there is such a relationship, describe the nature of the relationship (e.g., ownership percentage, common officers/directors), the business relationship with such company or person, and the effect such relationship may have on the development, production, sale, and/or distribution of the merchandise under investigation.
7. Identify all suppliers, contractors, subcontractors, lenders, exporters, distributors, resellers, and other persons involved in the development, production, sale, and/or distribution of the merchandise that CBP may also consider affiliated<sup>2</sup> with the company. Some factors which you should consider include, for example, whether you acquire a significant amount of a major input from only a single supplier, the length of time the company has had a relationship with a supplier, contractor, subcontractor, distributor, exporter or reseller, the exclusivity of the relationship, all business relationships the company has or had with these persons, and other business relationships the company has or had with the persons, and other relationships between the company and other person. (e.g., director/manager relationships).
8. Identify all business transactions that may directly or indirectly affect the development, production, sale, and/or distribution of the merchandise under investigation which the company has or had with any affiliate (except to the extent you have provided this in response to one of the questions above). Examples of such business transactions may include, but are not limited to, loans made by or to an affiliate, purchases and resales of the

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2. Reported affiliations, selling expenses shared by, or distributed to, business associates, and/or the existence of commissions may be used to further analyze the potential existence of affiliations between the respondent, its customers, and other relevant entities.

merchandise under investigation by an affiliated reseller, purchases made from a close supplier, and/or transactions with joint ventures, or a company acting as an agent for the company's sales.

9. Provide a copy of the company's business registration certificate that has been fully translated into English.

C. ACCOUNTING/FINANCIAL PRACTICES

Provide the following financial documents for the two most recently completed fiscal years plus all subsequent monthly or quarterly statements:

1. Trial Balance;
2. Provide all account payable records (including beginning and ending balances and detailed monthly activity reports/journal entries). If general ledger accounts are not used, provide all such information that would ordinarily be recorded in an accounts payable as maintained. Distinguish transactions for domestic companies from those for foreign companies;
3. Provide all account receivable records (including beginning and ending balances and detailed monthly activity reports/journal entries). If general ledger accounts are not used, provide all such information that would ordinarily be recorded in an accounts receivable as maintained. Distinguish transactions for domestic companies from those for foreign companies;
4. Provide an Excel spreadsheet listing all monetary transactions (including open liabilities – accounts and notes) between the company and its foreign suppliers;
5. Internal financial statements or profit and loss reports of any kind that are prepared and maintained in the normal course of business;
6. Audited, consolidated, and unconsolidated financial statements (including any footnotes and auditor's opinion);
7. Provide copies of all company bank statements from June 20\_\_ to present;
8. Financial statements or other relevant documents (i.e., profit and loss reports) of all affiliates involved in the production or sale of the subject merchandise, of all affiliated suppliers to these affiliates, and of the parent(s) of these affiliates; and,



9. Any financial statement or other financial report filed with the company's local or national government.

**D. PERTINENT SALES, PURCHASE/PROCUREMENT, AND DOCUMENTATION REQUESTS**

**Note:** The following questions apply to widgets and related products invoiced since June ---, 20 to the present.

1. Provide a list of all orders of widgets and related products produced at the facility (include invoice and purchase order numbers).
2. Provide a product list (include any product numbers and descriptions) of all widgets and related products that the company manufactures, sells, and/or purchases.
3. Provide a list of buyers (include names, locations, and point of contact information) of the items sold by the company; categorizing each buyer (e.g., distributor, wholesaler, retailer, end-user).
4. Provide employee records identifying all employees, including names, titles, job descriptions, hire dates, termination dates (if applicable), and payroll records. For the wages paid, provide support, i.e., payroll disbursement checks/records.
5. Provide quality inspection reports.
6. Provide purchase orders, raw materials invoices, freight bills and Customs clearance records, country of origin certificates for shipment of materials, and any other documentation related to raw materials. This includes all documentation beginning from the initial steps (i.e. sourcing of raw materials) up to the finished goods (i.e. shipment of finished goods to customer).
7. Provide purchase orders, materials invoices, shipping records, and any other documentation related to packaging material acquired by the company.
8. Provide purchase orders, invoices, and any other documentation related to the materials the company sources and/or provides to any of its suppliers.
9. Provide proof of payment (e.g. bank statements, canceled check, wire transfer, letter of credit, etc.) to foreign suppliers/manufacturers and/or other parties related to the

transaction.

10. Provide all correspondence related directly/indirectly to the shipment/order.
11. Provide all pertinent transportation documents (e.g., master and house bill of lading) from the source location and through to the U.S. buyer.
12. Provide payment for freight (e.g., freight bill along with wire transfers, cancelled checks, letters of credit, bank statements, etc.) for entire shipment process – from exporter/manufacturer/agents, as necessary.
13. Provide all correspondence related directly/indirectly to the sale.
14. Provide invoices and packing lists issued to U.S. buyers.
15. Provide receipt of payment for sales to U.S. buyers (e.g. bank statements, check images, incoming wire transfer, letters of credit etc.).

*Products/Manufacturing Process*

16. Provide a factory profile for all manufacturing facilities; including pictures and diagrams of how the manufacturing process is laid out and operates from the receipt of raw materials to the inventory, production, and shipment of finished goods to customers.
17. Describe all of the equipment used in production and provide photos of such equipment.
18. Describe the production capacity of all the equipment used to produce widgets.
19. Provide records of the equipment maintenance and quality inspections reports.
20. Provide a bill of material (or equivalent document) noting the raw materials/inputs needed to produce widgets, identify the amount of each raw material input needed.