

U.S. Customs and Border Protection



PROPOSED REVOCATION OF ONE RULING LETTER, PROPOSED MODIFICATION OF TWO RULING LETTERS, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CORAL BEADS FOR JEWELRY AND JEWELRY WITH ABALONE

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

ACTION: Notice of proposed revocation of three ruling letters and proposed revocation of treatment relating to the tariff classification of coral beads for jewelry and jewelry with abalone.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters concerning tariff classification of coral beads for jewelry and jewelry with abalone under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before May 28, 2021.

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

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke three ruling letters pertaining to the tariff classification of coral beads for jewelry and jewelry with abalone. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) N285626, dated May 1, 2017 (Attachment A), NY N123795, dated October 13, 2010 (Attachment B), and NY N284708, dated April 7, 2017 (Attachment C), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N284708 and N285626, CBP classified a pair of earrings with genuine abalone sheets in heading 7116, HTSUS, specifically in subheading 7116.20.05, HTSUS, which provides for “Articles of natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or reconstructed): Articles of jewelry: Valued not over \$40 per piece: Other.” Similarly, in NY N123795, CBP classified coral beads for jewelry in heading 7116, HTSUS, specifically in subheading 7116.20.40, HTSUS, which provides for “Articles of precious and semiprecious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or reconstructed): Other: Of semiprecious stones (except rock crystal): Other.”

CBP has reviewed NY N285626, NY N123795 and NY N284708, and has determined the ruling letters to be in error. It is now CBP’s position that jewelry with abalone are properly classified in heading 7117, HTSUS, specifically in subheading 7117.90.90, HTSUS, which provides for “Imitation jewelry: Other: Other: Other: Other.” In addition, the coral beads for jewelry are properly classified in heading 9601, HTSUS, specifically in subheading 9601.90.40, HTSUS, which provides for “Worked ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearl and other animal carving material, and articles of these materials (including articles obtained by molding): Other: Coral, cut but not set, and cameos, suitable for use in jewelry”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N285626, to modify NY N123795 and NY N284708, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H293170, set forth as Attachment D to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: March 24, 2021

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

Attachments

N285626

May 1, 2017

CLA-2-71:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 7116.20.0580

DIONISIA MELMAN
CUSTOMS COMPLIANCE AND LOGISTICS MANAGER
THE JEWELRY GROUP
1411 BROADWAY, 3RD FLOOR
NEW YORK, NY 10018

RE: The tariff classification of a pair of earrings from China.

DEAR MS. MELMAN:

In your letter dated April 21, 2017, on behalf NWH Jewelry Group, you requested a tariff classification ruling. Illustrative literature, description and a sample were received.

Style number 60469065–284 is a pair of earrings identified as the Lonna & Lilly “PE Stone Drop – WSL/Abalone.” Each earring consists of 1–12.5 by 32mm genuine green [Abalone] sheet covered by 1–12.5 by 32mm blue faceted, epoxy (plastic) imitation gemstone; 1 brass casting plated in imitation worn gold; and 1 brass eurowire plated in imitation worn gold. Company provided information in the aggregate indicates that the weight and cost of the brass castings exceeds that of the weight and cost of the genuine Abalone sheets and faceted epoxy imitation gemstones.

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

Legal Note 11 to Chapter 71 of the Harmonized Tariff Schedule of the United States (HTSUS) provides that for the purposes of heading 7117, the expression “imitation jewelry” means articles of jewelry within the meaning of paragraph (a) of note 9 above (but not including buttons or other articles of heading 9606, or dress combs, hair slides or the like, or hairpins, of heading 9615), not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal. See Legal Note 9 (a) to Chapter 71, HTSUS, for exemplars of articles of jewelry.

The applicable subheading for style number 60469065–284, Lonna & Lilly “PE Stone Drop – WSL/Abalone,” will be 7116.20.0580, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Articles of natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or reconstructed): Articles of jewelry: Valued not over \$40 per piece: Other.” The rate of duty will be 3.3% ad valorem.

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

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

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

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

N123795

October 13, 2010

CLA-2-71:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 7117.90.7500; 7116.20.4000;

3926.90.3500

NICOLE TRIMBLE
IMPORT SUPERVISOR
AGRA SERVICES BROKERAGE CO., INC.
221-20 147TH AVENUE
JAMAICA, NY 11413

RE: The tariff classification of a plastic beaded bracelet, coral beads, and plastic beads from China.

DEAR Ms. TRIMBLE:

In your letter dated September 3, 2010, on behalf of Gems Resources Enterprises Inc., you requested a tariff classification ruling. As requested, the samples submitted will be returned to you.

Sample 1, identified simply as style A, is a ladies' elastic bracelet covered with coral-colored, red plastic beads. The bracelet is composed of plastic beaded chips designed to look like natural or synthetic (simulant) coral jewelry. This necklace has a wide natural shape imparted by the cluster of chips that encircle one's wrist.

The applicable subheading for the bracelet, composed of plastic beads, will be 7117.90.7500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Imitation jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Other: Of plastics." The rate of duty will be free.

Sample 2, identified simply as style B, are several small coral beads, each having holes for stringing, and that have been polished and dyed a red coral color. The coral beads have not been identified as either being of natural or simulant material. Although not specified, the coral beads have inserts for being strung, thereby making them appropriate for creating items of jewelry like necklaces & bracelets.

Legal Note 4 to Chapter 96, Harmonized Tariff Schedule of the United States (HTSUS) provides: Articles of this chapter, other than those of headings 9601 to 9606 or 9615, remain classified in the chapter whether or not composed wholly or partly of precious metal or metal clad with precious metal, of natural or cultured pearls, or precious or semiprecious stones (natural, synthetic or reconstructed). However, headings 9601 to 9606 and 9615 include articles in which natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal constitute only minor constituents. Based on the description provide, we find that the small coral beads are beyond minor constituents, in that they are wholly of either natural or simulant material. Accordingly, classification falls to subheading 7116.20.4000, HTSUS – the provision in pertinent part for articles of precious and semi-precious stones; other.

The applicable subheading for the several small coral beads, made from either natural or simulant material, will be 7116.20.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in pertinent part for "Articles of precious and semiprecious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or recon-

structed): Other: Of semiprecious stones (except rock crystal): Other.” The rate of duty will be 10.5% ad valorem.

Sample 3, identified simply as style C, are two ½ inch barrel-shaped plastic beads colored red. These beads are coral colored and feature an insert hole allowing them to be strung for the making of jewelry, such as bracelets & necklaces.

The applicable subheading for the coral colored, red plastic beads, will be 3926.90.3500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Other articles of plastic...: Other: Beads, bugles and spangles, not strung (except temporarily) and not set; articles thereof, not elsewhere specified or included: Other.” The rate of duty will be 6.5% ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733-3036.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

N284708

April 7, 2017

CLA-2-71:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 7116.20.0580; 7117.19.9000;

7117.90.9000; 7117.90.7500

DIONISIA MELMAN
CUSTOMS COMPLIANCE AND LOGISTICS MANAGER
THE JEWELRY GROUP
1411 BROADWAY, 3RD FLOOR
NEW YORK, NY 10018

RE: The tariff classification of two bracelets and three pairs of earrings from China.

DEAR Ms. MELMAN:

In your letter dated March 22, 2017, on behalf NWH Jewelry Group, you requested a tariff classification ruling. Samples, illustrative literature and description were received. For purposes of this ruling epoxy is considered to be of plastics.

Style number 60468706-C48 is a bracelet identified as the “BR Velvet Flex – WGD/NTRL.” The bracelet consists of 1–15 by 20mm faceted, epoxy (plastic) imitation gemstone; 2–22 by 26.8mm filigree zinc castings plated in imitation worn gold; 10–1.6mm diamond-like, faceted, glass imitation gemstones; 1–0.78 by 18cm mesh metal chain plated in imitation worn gold; 2–1.5 by 4 by 12mm magnet (closures), 2–10 by 18mm felt straps; 1–10 by 18mm velvet strap; and 1–18cm herringbone metal chain plated in imitation brown gold. Company provided information in the aggregate indicates that the weight and cost of the zinc castings and metal chains (the base metals) exceed that of the epoxy imitation gemstone, glass imitation gemstones and textile straps.

Style number “1203-Purple” is a stretch bracelet. The bracelet consists of 19–10mm purple rubber beads, and 3 casted base metal rondel beads set with diamond-like, faceted, glass imitation gemstones. Company provided information in the aggregate indicates that the weight and cost of the purple rubber beads exceed that of the base metal castings and glass imitation gemstones.

Style number 60457943–887 is a pair of earrings identified as the “Earring w/White Howlite + post – nickel free 12k gold plated+Lt. antique.” Each earring consists of 1 oval-shaped, white [Howlite] gemstone; 2 white metal castings plated in 12K gold with an antique finish; and 1 surgical steel post with clutch. Company provided information in the aggregate indicates that the cost of the Howlite stones exceeds that of the white metal castings plated in 12K gold, while the weight of the white metal castings plated in 12k gold exceeds that of the Howlite stones.

Style number 60468619–276 is a pair of earrings identified as the Lonna & Lilly “PE Square Stud.” Each earring consists of 1–8 by 12mm genuine [Abalone] sheet covered by an 8 by 12mm faceted, epoxy imitation gemstone, and 1 zinc casting plated in worn silver. Company provided information in the aggregate indicates that the weight and cost of the zinc castings exceed the cost of the abalone sheets and faceted, epoxy imitation gemstones.

Style number 60468635–906 is a pair of earrings identified as the Lonna & Lilly “PE Agate Drop – WGD/GRAY.” Each earring consists of 1–6 by 8mm

pink, epoxy imitation Druzu gemstone; 1–20 by 26mm gray, epoxy imitation Druzu gemstone; 2 zinc castings plated in imitation worn gold; and 1 brass eurowire (leverback) plated in imitation worn gold. Company provided information in the aggregate indicates that the weight and cost of epoxy imitation Druzu gemstones exceed that of the two zinc castings.

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

Legal Note 1 (a) and Legal Note 2 part (b) to Chapter 71 of the HTSUS is applicable to the classification of the merchandise concerned. Legal Note 1 (a) provides in pertinent part that all articles consisting wholly or partly of natural or cultured pearls or of precious and semiprecious stones (natural, synthetic or reconstructed) are to be classified in Chapter 71, HTSUS. Legal Note 2 (b) provides that heading 7116, HTSUS, does not cover articles containing precious metal or metal clad with precious metal (other than as minor constituents). Review of the material breakdown tables indicate no precious metals or metal clad with precious metal for style number 60457943–887, “Earring w/White Howlite + post – nickel free 12k gold plated+Lt. antique,” and style number 60468619–276, the Lonna & Lilly “PE Square Stud,” and as such these two pairs of earrings are classifiable in heading 7116, HTSUS, in accordance with GRI 1.

The applicable subheading for style number 60457943–887, “Earring w/White Howlite + post – nickel free 12k gold plated+Lt. antique,” and style number 60468619–276, Lonna & Lilly “PE Square Stud,” 2 pairs of earrings, will be 7116.20.0580, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Articles of natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or reconstructed): Articles of jewelry: Valued not over \$40 per piece: Other.” The rate of duty will be 3.3% ad valorem.

We find that GRI 2 and GRI 3 (a) are not applicable to style number 60468706-C48, “BR Velvet Flex – WGD/NTRL,” bracelet; style number “1203-Purple” stretch bracelet; and style number 60468635–906, Lonna & Lilly “PE Agate Drop – WGD/GRAY,” pair of earrings. GRI 3 (b) states as follows: (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

In the United States Court of International Trade, *The Home Depot, U.S.A., Inc., v. the United States*, Slip Op. 06–49, Court No. 00–00061, dated April 7, 2006, the Court considered all factors in evidence to determine essential character and that these factors were to be reviewed as a whole. See Slip Op. 06–49, for a listing of factors reviewed. Consistent with *The Home Depot* case, we will consider all facts as presented, assign weight to those facts, and if possible decide which of the constituent materials or components impart the essential character to the items referenced above.

Style number 60468706-C48, “BR Velvet Flex – WGD/NTRL,” bracelet; style number “1203-Purple” stretch bracelet; and style number 60468635–906, Lonna & Lilly “PE Agate Drop – WGD/GRAY,” pair of earrings; are composed of different components (base metals, glass, epoxy, rubber and textiles) and are considered composite goods. The Explanatory Notes to the Harmonized Tariff Schedule of the United States (HTSUS), GRI 3 (b) (VIII), state that “the factor which determines essential character will vary between different kinds of goods. It may for example, be determined by the nature of the materials or components, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” When the essential character of a composite good can be determined, the whole product is classified as if it consisted only of the material or component that imparts the essential character to the composite good.

In the case of style number 60468706-C48, “BR Velvet Flex – WGD/NTRL,” bracelet, the metal mesh chain, the herringbone metal chain, and filigree zinc castings shaped like fans weigh and cost more than the faceted, epoxy imitation gemstone, and more importantly, the metal mesh chain, the herringbone metal chain, and filigree zinc castings shaped like fans surrounding the epoxy imitation gemstone all significantly contribute to the overall design and aesthetics of the bracelet. The large-size, faceted, epoxy imitation gemstone is down-played by the inclusion of the two metal chains and the fan-shaped filigrees that contribute to the overall design of this jewelry piece. Upon careful consideration of the totality of essential character factors, it is our opinion that the essential character of this good is imparted by the base metal components, and as such is classified in subheading 7117.19, HTSUS.

In the case of style number “1203-Purple” stretch bracelet, it is the quantity of purple colored rubber beads, as reflected by the weight and cost of those beads, which dominates the visual appearance of the bracelet. It is our opinion that the purple colored rubber beads impart the essential character of the bracelet. As such, the bracelet is classified as imitation jewelry, other, in subheading 7117.90, HTSUS.

In the case of style number 60468635–906, Lonna & Lilly “PE Agate Drop – WGD/GRAY,” pair of earrings, it is the four epoxy Druzy imitation gemstones that catches one’s eye, as reflected by the weight and cost of those imitations gemstones. The epoxy Druzy imitation gemstones provide the overall design and aesthetics to the pair of earrings. It is our opinion that the epoxy Druzy imitation gemstones impart the essential character to the pair of earrings. As such, the pair of earrings is classified as imitation jewelry of plastics, in subheading 7117.90.75, HTSUS.

The applicable subheading for style number 60468706-C48, “BR Velvet Flex – WGD/NTRL,” bracelet, will be 7117.19.9000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Imitation Jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other.” The rate of duty will be 11% ad valorem.

The applicable subheading for style number “1203-Purple” stretch bracelet, will be 7117.90.9000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Imitation Jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Other: Other.” The rate of duty will be 11% ad valorem.

The applicable subheading for style number 60468635–906, Lonna & Lilly “PE Agate Drop – WGD/GRAY,” pair of earrings, will be 7117.90.7500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for

“Imitation jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Other: Of plastics.” The rate of duty will be free.

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

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

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

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H293170
OT:RR:CTF:CPMMA H293170 AJK
CATEGORY: Classification
TARIFF NO: 7117.90.90; 9601.90.40

Ms. DIONISIA MELMAN
CUSTOMS COMPLIANCE AND LOGISTICS MANAGER
THE JEWELRY GROUP
1411 BROADWAY, 3RD FLOOR
NEW YORK, NY 10018

RE: Revocation of NY N285626; Modification of NY N123795 and NY N284708; Classification of Coral Beads for Jewelry and Jewelry with Abalone

DEAR Ms. MELMAN:

This letter is reference to your New York Ruling Letters (NY) N284708, dated April 7, 2017, and NY N285626, dated May 1, 2017, concerning the tariff classification of jewelry with abalone. In NY N284708 and NY N285626, U.S. Customs and Broder Protection (CBP) classified the merchandise in heading 7116, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings, and have determined that the classification of the subject merchandise in heading 7116, HTSUS, was incorrect.

We have also reviewed NY N123795, dated October 13, 2010, concerning the tariff classification of coral beads for jewelry, and have determined that the ruling was incorrect. For the reasons set forth below, we revoke one ruling letter and modify two ruling letters.

FACTS:

The jewelry with abalone was described in NY N284708 as follows:

Style number 60468619–276 is a pair of earrings identified as the Lonna & Lilly “PE Square Stud.” Each earring consists of 1–8 by 12mm genuine [Abalone] sheet covered by an 8 by 12mm faceted, epoxy imitation gemstone, and 1 zinc casting plated in worn silver. Company provided information in the aggregate indicates that the weight and cost of the zinc castings exceed the cost of the abalone sheets and faceted, epoxy imitation gemstones.

The subject merchandise in NY N285626 was substantially similar to the product described above.

The coral beads for jewelry were described in NY N123795 as follows:

Sample 2, identified simply as style B, are several small coral beads, each having holes for stinging [*sic*], and that have been polished and dyed a red coral color. The coral beads have not been identified as either being of natural or simulant material. Although not specified, the coral beads have inserts for being strung, thereby making them appropriate for creating items of jewelry like necklaces & bracelets.

ISSUE:

Whether the coral beads for jewelry and jewelry with abalone are classified in heading 7116, HTSUS, as articles of precious or semi-precious stones, heading 7117, HTSUS, as imitation jewelry, or heading 9601, HTSUS, as worked coral.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions at issue are as follows:

- 7116: Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed):
- 7116.20: Of precious or semiprecious stones (natural, synthetic or reconstructed):
- 7116.20.05: Articles of jewelry: Valued not over \$40 per piece
- 7116.20.40: Other: Of semiprecious stones (except rock crystal): Other
- 7117: Imitation jewelry:
- 7117.90: Other:
- 7117.90.90: Other: Valued over 20 cents per dozen pieces or parts: Other:
Other
- 9601: Worked ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearl and other animal carving material, and articles of these materials (including articles obtained by molding):
- 9601.90: Other:
- 9601.90.40: Coral, cut but not set, and cameos, suitable for use in jewelry

* * * * *

Note 11 to Chapter 71, HTSUS, provides as follows:

For the purposes of heading 7117, the expression “imitation jewelry” means articles of jewelry within the meaning of paragraph (a) of note 9 above (but not including buttons or other articles of heading 9606, or dress combs, hair slides or the like, or hairpins, of heading 9615), not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal.

* * * * *

Notes to Chapter 96, HTSUS, provides, in pertinent:

1. This chapter does not cover:
 - ...
 - (c) Imitation jewelry (heading 7117);
 - ...
4. Articles of this Chapter, other than those of headings 96.01 to 96.06 or 96.15, remain classified in the Chapter whether or not composed wholly or partly of precious metal or metal clad with precious metal, of natural or cultured pearls, or precious or semi-precious stones (natural, synthetic or reconstructed). However, headings 96.01 to 96.06 and

96.15 include articles in which natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal constitute only minor constituents.

* * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 71.13 provides, in pertinent part:

To fall in this heading these articles must contain precious metal or metal clad with precious metal (including base metal inlaid with precious metal) to an extent exceeding minor constituents; (thus a cigarette case of base metal with a simple monogram of gold or silver remains classified as an article of base metal). Subject to this condition the goods may also contain pearls (natural, cultured or imitation), precious or semi-precious stones (natural, synthetic or reconstructed), imitation stones, or parts of tortoise-shell, mother of pearl, ivory, amber (natural or agglomerated), jet or coral.

* * * * *

EN 71.17 provides, in pertinent part, as follows:

For the purposes of this heading, the expression imitation jewellery, as defined in Note 11 to this Chapter, is restricted to small objects of personal adornment, such as those listed in paragraph (A) of the Explanatory Note to heading 71.13, e.g., rings, bracelets (other than wrist-watch bracelets), necklaces, ear-rings, cuff-links, etc., but not including buttons and other articles of heading 96.06, or dress combs, hair-slides or the like, and hair-pins of heading 96.15, provided they do not incorporate precious metal or metal clad with precious metal (except as plating or as minor constituents as defined in Note 2 (A) to this Chapter, e.g., monograms, ferrules and rims) nor natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

The heading also covers unfinished or incomplete articles of imitation jewellery (ear-rings, bracelets, necklaces, etc.)

* * * * *

EN 96.01 provides, in pertinent part, as follows:

For the purposes of this heading, the expression “worked” refers to materials which have undergone processes extending beyond the simple preparations permitted in the heading for the raw material in question (see the Explanatory Notes to headings 05.05 to 05.08). The heading therefore covers pieces of ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearl, etc., in the form of sheets, plates, rods, etc., cut to shape (including square or rectangular) or polished or otherwise worked by grinding, drilling, milling, turning, etc. However, pieces which are identifiable as parts of articles are excluded from this heading if such parts are covered by another heading of the Nomenclature.

...

This heading also excludes:

...

(d) Articles of imitation jewellery (heading 71.17)

* * * * *

As a preliminary matter, we note that the EN's Annex to Chapter 71, HTSUS, lists various minerals that are classified as precious or semi-precious stones. The Annex does not include organic materials, such as abalone or coral. Within the context of classification under HTSUS, therefore, abalone and coral do not constitute precious or semi-precious stones. Moreover, in regard to coral beads for jewelry, the fact that coral does not qualify as precious or semi-precious stones is further supported by EN 71.13, which identifies "precious or semi-precious stones" separately from "coral".

Note 11 to Chapter 71 provides that "imitation jewelry" means articles of jewelry that does not incorporate precious or semi-precious stones. EN 71.17 further explains that heading 7117, which provides for imitation jewelry, includes small objects of personal adornment that do not contain precious or semi-precious stones. Accordingly, any jewelry that does not incorporate precious or semi-precious stones are, *prima facie*, classified in heading 7117, HTSUS. In the instant case, the jewelry with abalone is not classifiable in other headings as abalone is not specifically identified in HTSUS with the exception of headings 0307 and 1605, HTSUS, which are located in section I of live animals, and in section IV of prepared foodstuffs, *respectively*. Thus, under GRI 1, the instant jewelry with abalone in NY N284708 and NY N285626 are, *prima facie*, classified under heading 7117, HTSUS, as imitation jewelry. *See e.g.*, NY N242292, dated June 7, 2013; NY L88978, dated December 2, 2005; NY K82175, dated January 12, 2004; NY K82176, dated January 6, 2004; and NY K82174, dated January 6, 2004.

Although coral is not a precious or semi-precious stones under HTSUS, the instant coral beads for jewelry in NY N123795 are not classifiable in heading 7117, HTSUS, as imitation jewelry. First, the coral beads do not constitute imitation jewelry because they are not in the form of jewelry at the time of importation. Second, *generally*, coral beads are considered as their own entity as identified in heading 9601, HTSUS, and thus, do not constitute parts of jewelry. Although EN 71.17 provides that heading 7117, HTSUS, includes "unfinished or incomplete articles of imitation jewellery", the instant coral beads are not parts of imitation jewelry because they are explicitly identified in heading 9601, HTSUS, which provides for worked coral that are "cut to shape (including square or rectangular) or polished or otherwise worked by grinding, drilling, milling, turning, etc." EN 96.01. While not dispositive of a heading level dispute, we note that subheading 9601.90.40, HTSUS, provides for "[c]oral, cut but not set, ... suitable for use in jewelry". This supports our conclusion that the instant coral beads—which have been cut into small shapes of beads, polished, and drilled with small holes for stringing to create jewelry—are classified in subheading 9601.90.40, HTSUS, as worked coral for jewelry.

Pursuant to GRI 1, coral beads for jewelry are classified in heading 9601, HTSUS, as worked coral, and jewelry with abalone are classified in heading 7117, HTSUS, as imitation jewelry.

HOLDING:

By application of GRI 1, coral beads for jewelry are classified in heading 9601, HTSUS, specifically, subheading 9601.90.40, HTSUS, which provides for “[w]orked ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearl and other animal carving material, and articles of these materials (including articles obtained by molding): [o]ther: [c]oral, cut but not set, and cameos, suitable for use in jewelry”. The 2021 column one, general rate of duty is 2.1 percent *ad valorem*.

In addition, jewelry with abalone are classified in heading 7117, HTSUS, specifically subheading 7117.90.90, HTSUS, which provides for “[i]mitation jewelry: [o]ther: [o]ther: [o]ther: [o]ther”. The 2021 column one, general rate of duty is 11 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N284708, dated April 7, 2017, is hereby revoked. In addition, NY N285626, dated May 1, 2017, and NY N123795, dated October 13, 2010, are modified as noted above.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: Ms. Nicole Trimble
Import Supervisor
Agra Services Brokerage Co., Inc.
221–20 147th Avenue
Jamaica, NY 11413


19 CFR PART 177**REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF ORGANIC DATE JUICE
CONCENTRATE OR DATE SYRUP**

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of Organic Date Juice Concentrate or Date Syrup.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises inter-

ested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of Organic Date Juice Concentrate or Date Syrup under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 27, 2021.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of Organic Date Juice Concentrate or Date Syrup. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions

or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter (“NY”) N307283, dated November 22, 2019, CBP classified Organic Date Juice Concentrate or Date Syrup in heading 2009, HTSUS, specifically in subheading 2009.89.7091, HTSUSA, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Juice of any other single fruit or vegetable: Other: Other.” CBP has reviewed NY N307283 and has determined the ruling letter to be in error. It is now CBP’s position that Organic Date Juice Concentrate or Date Syrup is properly classified, in heading 1702, HTSUS, specifically in subheading 1702.40.4000, HTSUSA, which provides for “Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel: Glucose and glucose syrup, containing in the dry state at least 20 percent but less than 50 percent by weight of fructose, excluding invert sugar: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N307283 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H312829, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H312829

April 13, 2021

OT:RR:CTF:FTM H312829 MD

CATEGORY: Classification

TARIFF NO.: 1702.40.4000

MS. CARLA GRACA

ALL-WAYS FORWARDING INTL INC.

701 NEWARK AVENUE

ELIZABETH, NEW JERSEY 07208

RE: Revocation of NY N307283; Tariff Classification of “Organic Date Juice Concentrate” or Date Syrup

DEAR MS. GRACA:

On November 22, 2019, U.S. Customs and Border Protection (“CBP”) issued New York Ruling Letter (“NY”) N307283 to you, which you filed on behalf of your client Soleil Foods LLC. The ruling letter pertained to the tariff classification of “Organic Date Juice Concentrate” from Belgium under the Harmonized Tariff Schedule of the United States (“HTSUS”). In NY N307283, CBP classified the product at issue under subheading 2009.89.7091, HTSUSA, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Juice of any other single fruit or vegetable: Other: Other.” The general rate of duty is 0.5 cents per liter.

We have since reviewed NY N307283 at the request of our National Commodity Specialist Division (“NCSD”) and determined it to be in error. For the reasons set forth below, we hereby revoke NY N307283. It is now CBP’s position that the product described as “Organic Date Juice Concentrate” in NY N307283 is classified under subheading 1702.40.4000, HTSUSA. The general rate of duty is 5.1% *ad valorem*.

Pursuant to Section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 55, No. 9, on March 10, 2021, proposing to revoke NY N307283, and revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

In NY N307283, the organic date juice concentrate was described as follows:

The product consist[s] of 72 percent dates and 28 percent water. The Organic Date Juice Concentrate will be used in the food industry for energy preparations such as cereal bars. The product will be imported in 25 kg bags.

The product information was also submitted with the original request for a ruling, which indicated the presence of fructose, glucose, and sucrose in the product, but this fact was not addressed in NY N307283. Additionally, in requesting a binding ruling on the classification of the “Organic Date Juice Concentrate,” you stated that to your knowledge, there were no issues or

requests for advice, concerning this commodity. However, in 2018, this product, imported by Soleil Foods LLC, was subject to CBP's verification concerning its tariff classification. In CBP New York Laboratory ("CBP Laboratory") Report no. NY20181570, dated January 2, 2018, the "Organic Date Juice Concentrate" was analyzed and described as:

The sample is [a] dark brown viscous liquid described as date syrup in a glass jar. The jar is labeled "Concentré de dates BIO; Organic Date Juice Concentrate; LOT: M 18 01 00047; Brix: 75°; Batch: 16.01.2018; Made by Siroperic Meurens SA" and contains 18.4% fructose, 20.2% glucose, and 38.1% sucrose, all on a dry basis, and 21.1% of water. No lactose or maltose was observed.

In light of the fact that NY N307283 failed to account for the presence of fructose, glucose, and sucrose, the analysis provided by CBP Laboratory Report No. NY20181570, and other precedential rulings, it is now CBP's position that the product described as "Organic Date Juice Concentrate" was incorrectly classified in NY N307283. While previously classified under subheading 2009.89.7091, HTSUSA, CBP now believes that the proper classification of the "Organic Date Juice Concentrate" is under subheading 1702.40.4000, HTSUSA.

ISSUE:

Whether the "Organic Date Juice Concentrate" at issue is classified under subheading 2009.89.7091, HTSUSA, or subheading 1702.40.4000, HTSUSA.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States ("HTSUS") is determined in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5.

The 2020 HTSUS provisions under review are as follows:

1702	Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with honey; caramel: * * *
1702.40	Glucose and glucose syrup, containing in the dry state at least 20 percent but less than 50 percent by weight of fructose, excluding invert sugar:
1702.40.4000	Other * * *
2009	Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter:

	Juice of any other single fruit or vegetable:	*	*	*
2009.89	Other:			
	Fruit Juice:	*	*	*
	Other:			
2009.80.70			Berry Juice:	
2009.80.7091			Other	
		*	*	*

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

The EN to heading 1702, states, in pertinent part, the following:

This heading covers other sugars in solid form, sugar syrups and also artificial honey and caramel.

* * *

(B) SUGAR SYRUPS

This part covers syrups of all sugars (including lactose syrups and aqueous solutions **other than** aqueous solutions of chemically pure sugars of **heading 29.40**), **provided** they do not contain added flavouring or colouring matter (see Explanatory Note to heading 21.06).

In addition to the syrups referred to in Part (A) above (i.e., glucose (starch) syrup, fructose syrup, syrup of malto-dextrins, inverted sugar syrup as well as sucrose syrup), this heading includes:

- (1) **Simple syrups** obtained by dissolving sugars of this Chapter in water.
- (2) **Juices and syrups** obtained during the extraction of sugars from sugar beet, sugar cane, etc. These may contain pectin, albuminoidal substances, mineral salts, etc., as impurities.
- (3) **Golden syrup**, a table or culinary syrup containing sucrose and invert sugar. Golden syrup is made from the syrup remaining during sugar refining after crystallisation and separation of refined sugar, or from cane or beet sugar, by inverting part of the sucrose or by the addition of invert sugar.

* * *

Classification under heading 1702 is proper for all sugars, other than chemically pure sugars of heading 2902, given that these sugars contain neither added flavoring nor coloring materials. Visual and laboratory analysis confirms that the “Organic Date Juice Concentrate” meets both requirements. The CBP Laboratory report conspicuously identified that the “Organic Date Juice Concentrate” consists of three component sugars – fructose, glucose, and sucrose – each of which is among those sugars individually excluded

from classification under heading 2902. The same report neither indicates nor identifies the presence of any added flavoring or coloring materials within the product.

Subheading 1702.40, HTSUS, specifically refers to “[g]lucose and glucose syrup, *containing in the dry state at least 20 percent but less than 50 percent by weight of fructose.*” Turning to the CBP Laboratory analysis, we find that the “Organic Date Juice Concentrate” satisfies this criteria. CBP Laboratory Report no. NY20181570 supports classification of the “Organic Date Juice Concentrate” under subheading 1702.40, HTSUS, by conspicuously identifying the product’s component ingredients in a percentile format. Namely, the laboratory report identified that the “Organic Date Juice Concentrate” consists of “18.4% fructose, 20.2% glucose, and 38.1% sucrose, *all on a dry basis*, and 21.1% of water.” For a product to be considered a “[g]lucose or glucose sugar” classifiable under subheading 1702.40, HTSUS, it must consist of at least 20% glucose. Here, the “Organic Date Juice Concentrate” consists of 20.2% glucose, satisfying the classification threshold. Classification under 1702.40, HTSUS, also requires that the product also consist of less than 50% fructose. The “Organic Date Juice Concentrate” consists of 18.4% fructose, satisfying the second necessary prong for classification under the subheading. With specific identification of the component ingredients of the product, and their necessity in determining its classification, CBP Laboratory Report no. NY20181570 supports the classification of the “Organic Date Juice Concentrate” under subheading 1702.40, HTSUS; specifically, 1702.40.4000, HTSUSA.

Classification of the “Organic Date Juice Concentrate” under subheading 1702.40, HTSUS, is further supported by NY N287187, dated January 4, 2018, concerning the classification of “Date Syrup from the United Arab Emirates.” The date syrup in NY N287187 was manufactured via a heat process and was intended to be used as “a sweetening alternative” in the industrial food service production of “bakery and confectionary products, juice bars, etc.” alongside retail sale. CBP classified the date syrup under subheading 1702.40.4000, HTSUSA. The basis for this classification were the results of CBP Laboratory Report no. 20170925, dated December 21, 2017. Analysis of the date syrup found that it was “a brown paste packaged in a [labelled] plastic bottle” and that “[t]he product contain[ed] 32.1 percent fructose (*41.4% on a dry basis*), 17.4 percent glucose (*22.5% on a dry basis*) and 22.5 percent water.”

The “Organic Date Juice Concentrate” (NY N307283) and the “Date Syrup” (NY N287187) both meet the percentile requirements for classification under 1702.40, HTSUS. Additionally, both the “Organic Date Juice Concentrate” and “Date Syrup” were intended to be used in the food industry. While the former was intended to be used for “energy preparations such as cereal bars”, the latter was to be used for “bakery and confectionary products, juice bars, etc.” Implicitly and explicitly, both products serve as a “sweetening alternative” within the food industry. Accordingly, it is now CBP’s position that the “Organic Date Juice Concentrate” is properly classified in heading 1702, HTSUS, and specifically in subheading 1702.40.4000, HTSUSA.

HOLDING:

Under the authority of GRIs 1 and 6, the “Organic Date Juice Concentrate” is classified under subheading 1702.40.4000, HTSUSA, which provides for “Other sugars, including chemically pure lactose, maltose, glucose and fruc-

tose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel: Glucose and glucose syrup, containing in the dry state at least 20 percent but less than 50 percent by weight of fructose, excluding invert sugar: Other.” The 2020 general rate of duty is 5.1 percent *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N307283, dated November 22, 2019, is hereby REVOKED.

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

*Sincerely,
For*

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF SPIDER WEB LIGHTS**

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

ACTION: Notice of proposed revocation of one ruling letter

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters and modify one ruling letter concerning tariff classification of black and white-corded light sets under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before May 28, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the

title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0974.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke 1 ruling letter pertaining to the tariff classification of spider web lights. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N284187, dated March 24, 2017 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer’s failure to advise CBP of substantially identical transac-

tions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N284187, CBP classified spider web lights in heading 9405, HTSUS, specifically in subheading 9405.30.00, HTSUS, which provides for “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Lighting sets of a kind used for Christmas trees.” It is now CBP’s position that spider web lights are properly classified, in subheading 9405.40.84, HTSUS, which provides for “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N284187 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H289250, set forth as Attachment J to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: March 28, 2020

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

N284187

March 24, 2017

CLA-2-94:OT:RR:NC:N4:110

CATEGORY: Classification

TARIFF NO.: 9405.30.0010

MR. JOSEPH STINSON
OMNI GLOBAL SOURCING SOLUTIONS, INC.
4050 S. 26TH ST., #200
PHILADELPHIA, PA 19112

RE: The tariff classification of an incandescent light from China

DEAR MR. STINSON:

In your letter dated February 28, 2017, you requested a tariff classification ruling. A representative sample was submitted with your letter and will be returned to you.

The merchandise is identified as the 24" UL Halloween Corner Spider Web Lights, Rite Aid Item #9041392, and Mfg. #ES65-771AST. The product is light strings comprised of two black insulated wire conductors measuring 6 feet, incorporating 20 sockets. Each socket has a miniature incandescent lamp that is available in two different colors; orange and purple. The lamps are equally spaced at approximately 5 inches apart along the triangular spider web light string. The corner web size is 24 inches by 24 inches. The light string is designed for both indoor and outdoor use and may be connected end-to-end with additional light strings.

The Rite Aid Item #9041392 is a light string also known as electric garland. Electric garland was defined in HQ 963311 as "an article...able to be hung or displayed and is composed of a string of light bulbs which are powered by an electrical source either attached by a battery, cord, or plug."

In your ruling request you suggested an alternative classification in subheading 9405.40.8410, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Lamps and lighting fittings...: Other electric lamps and lighting fittings: Other: Other light sets." However, although the light strings are referenced as Halloween Corner Spider Web Lights and are designed for both indoor and outdoor use, they are of a kind used for Christmas trees by virtue of their design, which is specifically provided for in subheading 9405.30, HTSUS.

The applicable subheading for the 24" UL Halloween Corner Spider Web Lights, Rite Aid Item #9041392, and Mfg. #ES65-771AST, will be 9405.30.0010, HTSUS, which provides for "Lamps and lighting fittings...and parts thereof not elsewhere specified or included: Lighting sets of a kind used for Christmas trees: Miniature series wired sets." The general rate of duty will be 8 percent ad valorem.

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

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

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

Sincerely,
STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H289250
OT:RR:CTF:CPMM H289250 MMM
CATEGORY: Classification
TARIFF NO.: 9405.40.84, 9903.88.03

MR. JOSEPH STINSON
OMNI GLOBAL SOURCING SOLUTIONS, INC.
4050 S. 26TH ST., #200
PHILADELPHIA, PA 19112

RE: Revocation of NY N284187; Revocation of HQ H072441, NY N027262, HQ H070673, HQ H095410, HQ 952513, and HQ 953932 and modification of NY I83133 and HQ 955758 by Operation of Law; Classification of spider web lights

DEAR MR. STINSON,

This is in reference to the New York Ruling Letter (NY) N284187, issued to you by U.S. Customs and Border Protection (CBP) on March 24, 2017, concerning classification of spider web lights from China under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are revoking your ruling.

We have also reviewed Headquarters Ruling Letter (HQ) H072441, dated September 19, 2011, NY N027262, dated May 20, 2008, HQ H070673, dated September 19, 2011, HQ 095410, dated September 19, 2011, HQ 952513, dated April 26, 1993, HQ 953932, dated April 10, 1993, NY I83133, dated July 10, 2002, and HQ 955758, dated April 15, 1994 HQ H066795, dated March 30, 2010, and HQ H070671, dated September 19, 2011, all issued before the decision in *Target Gen. Merch., Inc. v. United States*, 392 F. Supp. 3d 1326, 1335 (Ct. Int'l Trade 2019), and to the extent they are inconsistent with the holding there, are revoked or modified by operation of law.¹

FACTS:

In your ruling NY N284187, CBP stated as follows in reference to the subject merchandise:

The merchandise is identified as the 24" UL Halloween Corner Spider Web Lights, Rite Aid Item #9041392, and Mfg. #ES65-771AST. The product is light strings comprised of two black insulated wire conductors measuring 6 feet, incorporating 20 sockets. Each socket has a miniature incandescent lamp that is available in two different colors; orange and purple. The lamps are equally spaced at approximately 5 inches apart along the triangular spider web light string. The corner web size is 24 inches by 24 inches. The light string is designed for both indoor and outdoor use and may be connected end-to-end with additional light strings.

¹ In HQ H072441, NY N027262, HQ H070673, HQ H095410 and NY I83133, CBP classified black and white-corded light sets with orange and purple light bulbs. CBP classified all of the above merchandise in subheading 9405.30.00, HTSUS.

Also, in HQ 952513, HQ 953932, and HQ 955758, CBP classified light sets with plastic fittings in the form of objects such as pumpkins, witches, and skulls. CBP classified all of the above merchandise in subheading 9405.30.00, HTSUS.

CBP classified the merchandise in NY N284187 in subheading 9405.30.00, HTSUS.

ISSUE:

Whether the subject spider web light set should be classified under subheading 9405.40, HTSUS, as “other electric lamps,” or under subheading 9405.30, HTSUS, as “lighting sets of a kind used for Christmas trees?”

LAW AND ANALYSIS:

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

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

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

The 2020 HTSUS provisions under consideration are as follows:

9405 :	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees...
9405.30.0010	Miniature series wired sets...
9405.40	Other electric lamps and lighting fittings: Of base metal: Other:
9405.40.82	Light-emitting diode (LED) backlights modules, the foregoing which are lighting sources that consist of one or more LEDs and one or more connectors and are mounted on a printed circuit or other similar substrate, and other passive components, whether or not combined with optical components or protective diodes, and used as backlights illumination for liquid crystal displays(LCDs)

9405.40.84

Other...

In examining the competing subheadings within heading 9405, HTSUS, we note that subheading 9405.30.00, HTSUS, is a “principal use” provision within the meaning ascribed in *Target Gen. Merch., Inc. v. United States*, 392 F. Supp. 3d 1326, 1335 (Ct. Int’l Trade 2019).² In *Target Inc.*, the court concluded that because subheading 9405.30.00, HTSUS, is a principal use provision, it is therefore subject to Additional U.S. Rule of Interpretation 1(a), HTSUS, which states as follows:

A tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

The CIT in *Target Inc.*, in discussing principal use held, that based on the plain language of subheading 9405.30, that the provision applies only to lights used on Christmas trees and the goods must meet the following two requirements:

1) the good is a “lighting set,” including those goods that are part of the “general class of lights on strings,” and 2) the principal use of the lighting sets is for use on Christmas trees, not “lighting sets used for other purposes,” such as a general decoration or source of illumination.³

Therefore, to classify the subject merchandise, it is necessary to determine whether it belongs to the class or kind of goods that are recognized as being principally used for the decoration of Christmas trees. Courts have provided several factors to apply when determining whether merchandise falls within a particular class or kind of good. They include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (e.g. the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use.⁴

In *Target Inc.*, the CIT found that the merchandise in dispute, a black-corded light set (with green, purple, and orange light bulbs) and a white-corded light set (with red, blue, purple, amber, light blue, and green light bulbs), were not classified in subheading 9405.30 because “...the black-corded light sets are principally used as Halloween decorations and ... the white-corded light sets are principally used for general decorative purposes” and neither light set is principally used on Christmas trees and their packaging do no suggest that the goods were designed for such use.⁵

Additionally, The CIT goes on to establish that green-corded light sets are “of a kind used for Christmas trees,” and the black and white-corded light

² See also *Primal Lite v. United States*, 15 F. Supp. 2d 915 (CIT 1998); aff’d 182 F. 3d 1362 (Fed. Cir. 1999).

³ See also *Id.* at 918.

⁴ See *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979.

⁵ *Target Inc.* at 1335–1336.

sets are not commercially fungible to goods with green-corded lights sets, as their use, the consumer expectations, and the environment of sale of the black and white-corded lights sets are distinct from the green-corded lights sets.⁶

Furthermore, in *Primal Lite*, the CIT found that the merchandise at issue did not belong to the class or kind of merchandise used for Christmas trees because “plastic shapes in the form of objects such as fruits, vegetables, hearts, rearing horses, guitars and American flags” were included to be fitted over the lights and “are used for indoor and outdoor lighting decoration and illumination purposes unrelated to Christmas trees or the Christmas holiday.”⁷

The triangular spider web shaped corner light set in NY N284187 is likewise distinguishable from Christmas themed light sets. Not only is the cord not green, but the spider web’s triangular shape for use in a corner of a room or doorway prevents it from use on a Christmas tree. Hence, while the merchandise is not identical to the string light sets discussed in *Target Inc.* or *Primal Lite*, the analysis applies and the subject merchandise is correctly classified as other lighting fittings, described in subheading 9405.40.84, HTSUS. Furthermore, all prior rulings classifying black and white-corded light sets or containing non-Christmas light covers in subheading 9405.30, HTSUS, are revoked or modified by operation of law.

HOLDING:

By application of GRIs 1 and 6, the spider web lights are classified in subheading 9405.40.84, HTSUS, which provides for: “Lamps and lighting fittings...and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other: Other.” The 2020 column one general rate of duty for subheading 9405.40.84, HTSUS, is 3.9% *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9405.40.84, HTSUS, unless specifically excluded, are subject to an additional 25% *ad valorem* rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 9405.40.84, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china> respectively.

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

⁶ *Id* (The black-corded light sets are not commercially fungible with the green-corded light sets because the actual use, consumer expectations, and environment of sale demonstrate that the black-corded lights sets are more appropriately viewed as Halloween decorations. The white-corded lights sets are also not commercially fungible as the consumer expectations and environment of sale establish that the lights are not interchangeable with green-corded lights sets as they are sold year round and its advertisement does not mention the Christmas holiday.)

⁷ *Primal Lite v. United States*, 15 F. Supp. 2d 915, 916 (CIT 1998).

EFFECT ON OTHER RULINGS

NY N284187, dated March 24, 2017, is hereby REVOKED. HQ H072441, dated September 19, 2011, NY N027262, dated May 20, 2008, HQ H070673, dated September 19, 2011, and HQ H095410, dated September 19, 2011, are hereby REVOKED by operation of law in accordance with the holding in *Target, Inc.* NY I83133, dated July 10, 2002, HQ H066795 dated March 30, 2010, and HQ H070671, dated September 19, 2011, are hereby MODIFIED by operation of law in accordance with the holding in *Target, Inc.*

HQ 952513, dated April 26, 1993, and HQ 953932, dated April 10, 1993, are hereby REVOKED by operation of law in accordance with the holding in *Primal Lite*. HQ 955758, dated April 15, 1994, is hereby MODIFIED by operation of law in accordance with the holding in *Primal Lite*.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF TWO RULING LETTERS,
PROPOSED MODIFICATION OF TWO RULING LETTERS,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF TEXTILE
COVER FOR UNSPRUNG MATTRESS FOUNDATION**

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

ACTION: Notice of proposed revocation of two ruling letters, proposed modification of two ruling letters, and proposed revocation of treatment relating to the tariff classification of a textile cover for unsprung mattress foundation.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke two ruling letters and modify two ruling letters concerning the tariff classification of a textile cover for unsprung mattress foundation under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before May 28, 2021.

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

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke two ruling letters and modify two ruling letters pertaining to the tariff classification of a textile cover for unsprung mattress foundation. Although in this notice, CBP is specifically referring to NY N187630, dated October 24, 2011 (Attachment A), HQ H254127, dated May 15, 2015 (Attachment B), NY L81761, dated January 21, 2005 (Attachment C), and NY L81762, dated January 24, 2005 (Attachment D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice

memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N187630, HQ H254127, NY L81761, and NY L81762, CBP classified textile covers for unsprung mattress foundations in heading 9403, HTSUS, specifically in subheading 9403.90.60, HTSUS, which provides for "other furniture and parts thereof: parts: other: of textile material except cotton". CBP has reviewed the aforementioned rulings and has determined the ruling letters to be in error. It is now CBP's position that textile covers for unsprung mattress foundations are properly classified in heading 6307, HTSUS, specifically in subheading 6307.90.9891, HTSUS, which provides for "other made up articles, including dress patterns: other: other: other: other: other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N187630 and HQ H254127, to modify NY L81761, and NY L81762, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H281803, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: March 7, 2021

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

Attachments

N187630

October 24, 2011

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.90.6080

BRETT IAN HARRIS
PISANI & ROLL LLP
ATTORNEYS AT LAW
1629 K STREET NW, SUITE 300
WASHINGTON, DC 20006

RE: The tariff classification of textile mattress foundation covers from China.

DEAR MR. HARRIS:

In your letter dated October 3, 2011, on behalf of Tempur-Pedic North America, LLC, you requested a tariff classification ruling.

Samples and photographs of textile foundation covers (top and bottom) have been submitted to this office. The foundation covers are designed to be placed and stapled to a Medium Density Fiberboard (MDF) mattress foundation, which is used in conjunction with a Tempur-Pedic mattress. The foundation covers typically consist of three different fabrics: a rectangular 100 percent polyester stitch-bonded platform piece sewn to single warp, 100 percent polyester knit side panels, and a separate rectangular 100 percent polyester non-woven dust cover stapled to the bottom of the foundation. These foundation covers are not designed to cover a mattress, only the foundation that the mattress will rest on.

The General Explanatory Notes (ENs) to Chapter 94, of the Harmonized Tariff Schedule of the United States (HTSUS) state, in relevant part, with regard to the meaning of furniture, at (A): for the purposes of this Chapter, the term “furniture” means: Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals. . . . Further, the ENs to heading 9403, HTSUS, in relevant part, list “beds” as one exemplar included under the category of furniture. It is the opinion of NIS 433 that the wooden (MDF) mattress foundation is akin to a platform bed ready to accept a mattress on its top surface.

The applicable subheading for the textile mattress foundation covers, used in the finishing of the foundation, will be 9403.90.6080, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Other furniture and parts thereof: Parts: Other: Of textile material, except cotton; Other.” The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is

imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733-3036.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

HQ H254127

May 15, 2015

CLA-2 OT: RR: CTF: TCM H254127 ERB

CATEGORY: Classification

TARIFF NO.: 9403.90.60

MR. BRETT IAN HARRIS
PISANI & ROLL LLP
1629 K STREET NW
SUITE 300
WASHINGTON, DC 20006

RE: Tariff classification of Tempur-Up, Tempur-Ergo Grand, and Tempur-Ergo Premier textile mattress foundation covers

DEAR MR. HARRIS:

This is in reply to your letter of March 14, 2014, to the U.S. Customs and Border Protection (CBP) National Commodity Specialist Division (NCS) in New York, on behalf of Tempur-Pedic North America, LLC (Tempur-Pedic or Protestant). Therein, you sought a binding ruling regarding the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain mattress foundation covers. Your request was forwarded to this office for a response.

FACTS:

Tempur-Pedic is a designer, manufacturer and distributor of mattresses and beds, along with accompanying accessories. Customers purchase: (1) a mattress foundation, which incorporates a bed frame and sits directly on the ground, and, (2) a mattress which sits atop the foundation. The mattress foundation incorporates characteristics of a bed frame, in that it sits directly on the floor, and it replaces a standard box spring for this specialized adjustable bed. The foundation is composed of a wooden frame (medium-density fiberboard or MDF) with various adjustable steel parts which allow the head portions and/or the foot portions of the bed to raise and lower electronically. Due to this adjustability, the bed needs a non-conventional mattress. The mattress foundation does not contain any springs or wire mesh or stuffing of any kind.

The Tempur-Pedic mattress used in this combination contains a laminated support for pressure-relief comprising an upper layer of visco-elastic foam, a middle layer of visco-elastic foam having a greater hardness, and a bottom layers of highly resilient polyurethane foam. The layers are sandwiched between two layers of reticulated filter polyurethane foam. The patented mattress is designed only to fit with Tempur-Pedic's mattress foundation. It is not designed to fit or work as intended on a firm, solid-surface, non-spring foundation or other adjustable bed base.¹ The pieces described above are purchased only through the Tempur-Pedic company and its representatives.

The subject merchandise are three different styles of textile mattress foundation covers, which are placed on the mattress foundation and secured via staples post-importation. The styles are the Tempur-Up, Tempur-Ergo Grand, and the Tempur-Ergo Premier. Each features a rectangular stitch bonded or woven fabric platform piece sewn to decorative knit or woven side

¹ Doing so would void the warranty. <http://www.tempurpedic.com/customer-service/25-year-warranty-toppers.asp>

panels. The Tempur-Up style also features a separate rectangular non-woven fabric dust cover stapled to the bottom of the mattress foundation. The products are not used as bed covers or used to cover the mattress layer, rather, they are only attached to the mattress foundation.

ISSUE:

Whether a textile mattress foundation cover is considered a “part” of goods classified as “other furniture” under heading 9403, HTSUS, or whether it is considered “other made up articles” of heading 6307, HTSUS?

LAW AND ANALYSIS:

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

The HTSUS headings discussed herein are the following:

6307	Other made up articles, including dress patterns:
6307.90	Other

9403	Other furniture and parts thereof:
9403.90	Parts:
	Other:
9403.90.60	Of textile material, except cotton

Note 2 to Chapter 94 states the following, in relevant part:

The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the proper classification of merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN to Chapter 94 provides, in relevant part:

This Chapter covers, subject to the exclusions listed in the Explanatory Notes to this Chapter:

- (1) All furniture and parts thereof (headings 94.01 to 94.03).

For the purposes of this Chapter, the term “furniture” means:

- (A) Any “moveable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels...

The EN to 94.03 provides in relevant part:

This heading covers furniture and parts thereof, **not covered** by the previous headings. It includes furniture for general use...and also furniture for special uses.

The heading includes furniture for:

- (1) Private dwellings, hotels, etc., such as: cabinets...beds (including wardrobe beds, camp-beds, folding beds, cots, etc.)...

The General EN to Chapter 94 continues in relevant part:

PARTS

This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings. They are classified in this Chapter when not more specifically covered elsewhere.

The General ENs to Chapter 94 state, in relevant part, with regard to the meaning of furniture at subpart (A): “For the purposes of this Chapter, the term “furniture” means: Any “moveable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings...”. See also Note 2 to Chapter 94. In HQ 964352, dated September 11, 2000, Customs cited The Random House Dictionary of the English Language (1973), which defines the word “equip” as meaning: “To furnish or provide with whatever is needed for service or for any undertaking.” A bed is a piece of furniture, commonly understood to equip a bedroom with a place to lie, sleep, or relax. Further, the ENs to heading 9403, HTSUS, list “beds” as one exemplar included under the category of furniture.

The Tempur-Pedic products described in your submission as a “mattress foundation” sits directly on the floor of one’s bedroom and is a permanent structure or arrangement for sleeping upon. The Tempur-Pedic bed is a regular household piece of furniture, insofar as it is recognized as a “bed”, albeit with the enhanced characteristic of allowing users to raise and lower their head and/or feet in a supine or alpine position. Therefore, classification of the various models of Tempur-Pedic mattress foundations as a whole are within Chapter 94, which provides for furniture, and also comport with Note 2 to Chapter 94.

The Tempur-Pedic mattress foundation itself is constructed of MDF pieces with adjustable steel elements installed in the interior which permit multiple mattress positions. MDF is an engineered wood product made by breaking down hardwood or softwood residuals into wood fibers and combined with wax and a resin binder and forming panels by applying high temperature and pressure. Therefore, classification of the mattress foundation is specifically provided for in heading 9403, HTSUS, which provides for bedroom furniture².

² The mattress foundation is composed of different components, MDF and steel, and is considered a composite good. The Explanatory Notes to the HTSUS, GRI 3(b)(VIII) instruct that classification is thus determined by the component which imparts the goods’ essential character. However, a full essential character analysis need not be done in the instant case, because whether the steel components or the MDF components impart the bed’s essential character, the classification at the heading level will not change. The issue in this case is only whether the textile is a “part” of any bed of heading 9403, HTSUS.

The next step in this analysis is to determine whether the subject textile mattress foundation covers are considered “parts” of furniture classified in heading 9403, HTSUS. The Courts have adopted two tests for determining whether merchandise may be classified as a part of an article. The first is when the article of which the merchandise in question is claimed to be a part of “could not function as such article” without the claimed part. *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 321, Treas. Dec. 46851 (1933), *see also id* at 326 (merchandise is legally a part of another article if that article is “not capable of the use for which it was intended” without the merchandise in question; *see also Bauerhin Techs. Ltd. P’ship, v. United States*, 110 F.3d 774, 778 (Fed. Cir. 1997) (relying on this “oft-quoted passage” of *Willoughby*)). Thus, for example, a lens that allows a camera to take colored photos is properly a part of such cameras – without such lens, “cameras could not perform one of their proper functions – the taking of colored pictures,” *Willoughby*, 21 C.C.P.A. at 326-7. The second test is if, when imported, the claimed part is “dedicated solely for use” in such article and, “when applied to that use,” the claimed part meets the *Willoughby* test. *See Pomeroy Collection Ltd. v. United States*, 783 F. Supp. 2d 1257, 1260 (Ct. Int’ Trade 2011), citing *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955) (*see also Bauerhin*, 110 F.3d at 779 (“[*Willoughby* and *Pompeo*] must be read together. [...] *Willoughby* [] does not address the situation where an imported item is dedicated solely for use with an article. *Pompeo* addresses that scenario and states that such an item can also be classified as a part.”)). With this framework in mind, CBP will now consider the textile mattress foundation cover.

The subject merchandise are different styles though they are substantially similar and perform the same function on each of three styles of foundations.³ Each style is cut and shaped specifically to fit only the model to which it belongs. They are not interchangeable among the various Tempur-Pedic models, nor are they interchangeable with any other type of fitted sheet or mattress cover available on the market. Once affixed to the mattress foundation, they are not removed. They are permanently attached. Given that these covers are specially cut so as to fit over the mattress foundation, and around the various mechanical parts in the mattress foundation, and are permanently affixed to the underside in specified places, the covers would be ill-fitting at best, and useless at worst, on a standard box spring or box mattress foundation. The covers are designed to provide a permanent decorative look and cover part of the mattress foundation which would otherwise be exposed, including the various steel mechanical parts. It thus meets the various tests developed by the Courts for such an analysis, in that, the mattress foundation covers are dedicated solely for use with the models in which they are designed, and the product will be considered incomplete without the cover attached. The subject covers have no distinct commercial identity outside of its use with the Tempur-Pedic bed frames and mattresses. This analysis also comports with the ENs to Chapter 94, which provides for “parts” so long as they are identifiable by their shape or other specific features as designed solely or principally for an article of those headings. *See* General ENs to Chapter 94.

³ Also, each of the bed frames come in different sizes including twin, twin long, double, queen, split queen, king, split king, California king and split California long.

Therefore, the subject merchandise are “parts” of an article classifiable in heading 9403, HTSUS, and as such, they too are classified therein. This is consistent with previous CBP rulings on textile mattress foundation covers. See NY N187630, dated October 24, 2011 (classifying Tempur-Pedic textile mattress foundation covers substantially similar to the subject merchandise in subheading 9403.90.60, HTSUS, which provides for, “Other furniture and parts thereof: Parts: Other: Of textile material, except cotton”); see also NY N058761, dated May 20, 2009 (distinguishing between a mattress cover, classified as a textile in heading 6304, HTSUS, and a foundation cover, classified in subheading 9403.90.60, HTSUS, which provides for parts of furniture).

HOLDING:

By application of GRI 1, the subject merchandise, textile mattress foundation covers, is classified in heading 9403, HTSUS. It is specifically provided for in subheading 9403.90.60, HTSUS, which provides for “Other furniture and parts thereof: Parts: Other: Of textile material except cotton”. The 2014 column one, general rate of duty is free.

Sincerely,

IEVA K. O’ROURKE,
Chief

Tariff Classification & Marking Branch

NY L81761

January 21, 2005

CLA-2-94:RR:NC:TA:349 L81761

CATEGORY: Classification

TARIFF NO.: 9403.90.6000; 9404.29.9090;

6307.90.9889

MR. GREG WIND
BOYD FLOTATION, INC./ BOYD SPECIALTY SLEEP
2440 ADIE ROAD
MARYLAND HEIGHTS, MISSOURI 63043

RE: The tariff classification of a foundation cover, bed top cover and upper unit from China.

DEAR MR. WIND:

In your letter dated December 20, 2004 you requested a tariff classification ruling.

You will be importing a Silent Night foundation cover, Silent Night bed top cover and a Silent Night upper unit sides and bottom. Samples of the foundation cover and bed top cover were submitted with your request. The fiber content of all three items is stated to be 59 percent polyester and 41 percent polypropylene fabric with polyester fiber and nylon netting. The foundation cover is comprised of a rectangular non-woven platform sewn to quilted side panels. The bottom portion of the cover is open. After importation the cover will be placed over and stapled to a wooden frame with slats. This foundation is used to support a mattress but it would not be considered a mattress support of heading 9404 as it is not filled with springs or steel wire mesh.

The bed top cover is an unfinished mattress. It is comprised of a padded top portion attached to an unfilled bottom by means of a full zipper. The unfilled bottom consists of a non-woven base sewn to quilted fabric sides. After importation the bottom portion will be filled with various types of plastic foam in different densities. The padded top will be zippered to the bottom finishing the pillow top style mattress. The mattress may also be filled with air or fluid chambers in addition to the plastic foam.

The upper unit sides and bottom is essentially the lower section of the bed top cover. It will be made of a non-woven base sewn to quilted sides and will not have a zipper. After importation it will be filled and a top panel will be sewn to it.

In your letter you suggest classification under heading 6304.91.0040 as an other furnishing. The General Rules of Interpretation (GRI's) governs classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Heading 9404, HTSUS provides for, among other things, articles of bedding and similar furnishings, provided that such articles are fitted with springs or stuffed or internally fitted with any material. GRI 2(a) provides the following:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Given the general appearance of the submitted sample the unfinished mattress (bed top cover) has the essential character of the finished article. Although the main section is not filled, the top panel is sufficiently stuffed so that it may be classified in heading 9404. The upper unit sides and bottom is not sufficiently stuffed nor does it have the essential character of a finished mattress. It is a mattress part. As heading 9404 does not provide for parts it will be classified as a made up textile article. The foundation cover is not a part of a sprung mattress support but rather a part of the wooden mattress foundation. It will be classified as parts of furniture.

The applicable subheading for the foundation cover will be 9403.90.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other furniture and parts thereof: parts: other: of textile material except cotton. The rate of duty will be free.

The applicable subheading for the bed top cover (unfinished mattress) will be 9404.29.9090, HTS, which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: mattress supports... mattresses: of other materials: other... other. The duty rate will be 6 percent ad valorem.

The applicable subheading for the upper unit sides and bottom will be 6307.90.9889, HTS, which provides for other made up textile articles, other. The rate of duty will be 7 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Hansen at 646-733-3043.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

NY L81762

January 24, 2005

CLA-2-94:RR:NC:TA:349 L81762

CATEGORY: Classification

TARIFF NO.: 9403.90.6000; 9403.90.8050;
9404.29.9090; 9404.29.1000; 6307.90.9889

MR. GREG WIND
BOYD FLOTATION, INC./ BOYD SPECIALTY SLEEP
2440 ADIE ROAD
MARYLAND HEIGHTS, MISSOURI 63043

RE: The tariff classification of a foundation cover, bed top cover and upper unit from China.

DEAR MR. WIND:

In your letter dated December 20, 2004 you requested a tariff classification ruling.

You will be importing a Vesper foundation cover, Vesper bed top cover and a Vesper upper unit sides and bottom. Samples of the foundation cover and bed top cover were submitted with your request. The fiber content of all three items is stated to be either 100 percent cotton or 100 percent polyester fabric with polyester fiber and nylon netting. The foundation cover is comprised of a rectangular non-woven platform sewn to quilted side panels. The bottom portion of the cover is open. After importation the cover will be placed over and stapled to a wooden frame with slats. This foundation is used to support a mattress but it would not be considered a mattress support of heading 9404 as it is not filled with springs or steel wire mesh.

The bed top cover is an unfinished mattress. It is comprised of a padded top portion attached to an unfilled bottom by means of a full zipper. The cover features an overlay flap that hides the zipper. The unfilled bottom consists of a non-woven base sewn to quilted fabric sides. After importation the bottom portion will be filled with various types of plastic foam in different densities. The padded top will be zippered to the bottom finishing the pillow top style mattress. The mattress may also be filled with air or fluid chambers in addition to the plastic foam.

The upper unit sides and bottom is essentially the lower section of the bed top cover. It will be made of a non-woven base sewn to quilted sides and will not have a zipper. After importation it will be filled and a top panel will be sewn to it.

In your letter you suggest classification under heading 6304.91.0040 as an other furnishing. The General Rules of Interpretation (GRI's) governs classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Heading 9404, HTSUS provides for, among other things, articles of bedding and similar furnishings, provided that such articles are fitted with springs or stuffed or internally fitted with any material. GRI 2(a) provides the following:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that

article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Given the general appearance of the submitted sample the unfinished mattress (bed top cover) has the essential character of the finished article. Although the main section is not filled, the top panel is sufficiently stuffed so that it may be classified in heading 9404. The upper unit sides and bottom is not sufficiently stuffed nor does it have the essential character of a finished mattress. It is a mattress part. As heading 9404 does not provide for parts it will be classified as a made up textile article. The foundation cover is not a part of a sprung mattress support but rather a part of the wooden mattress foundation. It will be classified as parts of furniture.

The applicable subheading for the 100 percent polyester foundation cover will be 9403.90.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other furniture and parts thereof: parts: other: of textile material except cotton. The rate of duty will be free.

The applicable subheading for the 100 percent cotton foundation cover will be 9403.90.8050, HTS, which provides for other furniture and parts thereof: parts: other: other... of cotton, cut to shape. The rate of duty will be free.

The applicable subheading for the 100 percent polyester bed top cover (unfinished mattress) will be 9404.29.9090, HTS, which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: mattress supports... mattresses: of other materials: other... other. The duty rate will be 6 percent ad valorem.

The applicable subheading for the 100 percent cotton bed top cover (unfinished mattress) will be 9404.29.1000, HTS, which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: mattress supports... mattresses: of other textile materials: of cotton. The duty rate will be 3 percent ad valorem.

The applicable subheading for the upper unit sides and bottom will be 6307.90.9889, HTS, which provides for other made up textile articles, other. The rate of duty will be 7 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Hansen at 646-733-3043.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

HQ H281803
OT:RR:CTF:CPMMA H281803 AJK
CATEGORY: Classification
TARIFF NO: 6307.90.9891

MR. BRETT IAN HARRIS
PISANI & ROLL LLP
ATTORNEYS AT LAW
1629 K STREET NW, SUITE 300
WASHINGTON, DC 20006

RE: Revocation of NY N187630 and HQ H254127; Modification of NY L81761 and L81762; Classification of Textile Cover for Unsprung Mattress Foundation

DEAR MR. HARRIS:

This letter is in reference to your New York Ruling Letter (NY) N187630, dated October 24, 2011, and Headquarter Ruling Letter (HQ) H254127, dated May 15, 2015, concerning the tariff classification of textile covers for unsprung mattress foundations. In the aforementioned rulings, U.S. Customs and Border Protection (CBP) classified the merchandise in heading 9403, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N187630 and HQ H254127, and have determined that the classification of the merchandise in heading 9403, HTSUS, was incorrect.

We have also reviewed NY L81761, dated January 21, 2005, and NY L81762, dated January 24, 2005, and have determined that they were incorrect. For the reasons set forth below, we revoke two ruling letters and modify two ruling letters.

FACTS:

The subject merchandise was described in NY N187630 as follows:

The foundation covers are designed to be placed and stapled to a Medium Density Fiberboard (MDF) mattress foundation, which is used in conjunction with a Tempur-Pedic mattress. The foundation covers typically consist of three different fabrics: a rectangular 100 percent polyester stitch-bonded platform piece sewn to single warp, 100 percent polyester knit side panels, and a separate rectangular 100 percent polyester non-woven dust cover stapled to the bottom of the foundation. These foundation covers are not designed to cover a mattress, only the foundation that the mattress will rest on.

The subject merchandise was described in HQ H254127 as follows:

The mattress foundation incorporates characteristics of a bed frame, in that it sits directly on the floor, and it replaces a standard box spring for this specialized adjustable bed. The foundation is composed of a wooden frame (medium-density fiberboard or MDF) with various adjustable steel parts which allow the head portions and/or the foot portions of the bed to raise and lower electronically.... The mattress foundation does not contain any springs or wire mesh or stuffing of any kind.

...

The subject merchandise are three different styles of textile mattress foundation covers, which are placed on the mattress foundation and secured via staples post-importation. The styles are the Tempur-Up,

Tempur-Ergo Grand, and the Tempur-Ergo Premier. Each features a rectangular stitch bonded or woven fabric platform piece sewn to decorative knit or woven side panels. The Tempur-Up style also features a separate rectangular non-woven fabric dust cover stapled to the bottom of the mattress foundation. The products are not used as bed covers or used to cover the mattress layer, rather, they are only attached to the mattress foundation.

The subject merchandise was described in NY L81761 as follows:

The fiber content ... is stated to be 59 percent polyester and 41 percent polypropylene fabric with polyester fiber and nylon netting. The foundation cover is comprised of a rectangular non-woven platform sewn to quilted side panels. The bottom portion of the cover is open. After importation the cover will be placed over and stapled to a wooden frame with slats. This foundation is used to support a mattress but ... it is not filled with springs or steel wire mesh.

The subject merchandise in NY L81762 is substantially similar to the product described in NY L81761.

ISSUE:

Whether the textile cover for unsprung mattress foundation is classified in heading 6307, HTSUS, as other made up textile articles, heading 9403, HTSUS, as other furniture and parts, or heading 9404, HTSUS, as mattress supports.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

* * * * *

The HTSUS provisions at issue are as follows:

6307: Other made up articles, including dress patterns.

9403: Other furniture and parts thereof.

9404: Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

Note 7 to Section XI, which provides for textiles and textile articles, provides:

7. For the purposes of this section, the expression “made up” means:

...

(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);

Note 2 to Chapter 94, HTSUS, provides, in pertinent part:

2. The articles (other than parts) referred to in headings 94.01 to 94.03 are to be classified in those headings only if they are designed for placing on the floor or ground.

* * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The General EN to Chapter 94, HTSUS, provides, in pertinent part:

For the purposes of this Chapter, the term “furniture” means:

(A) Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport....

The Parts EN to Chapter 94, HTSUS, provides in pertinent part:

This Chapter only covers parts, whether or not in the rough, of the goods of headings 94.01 to 94.03 and 94.05, when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings. They are classified in this Chapter when not more specifically covered elsewhere.

EN 63.07 provides as follows:

This heading covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature.

EN 94.03, provides, in pertinent part:

The heading does not include:

...

(n) Mattress supports (heading 94.04)

EN 94.04 provides, in pertinent part, as follows:

(A) Mattress supports, i.e., the sprung part of a bed, normally consisting of a wooden or metal frame fitted with springs or steel wire mesh (spring or wire supports), or of a wooden frame with internal springs and stuffing covered with fabric (mattress bases).

* * * * *

As a preliminary matter, we clarify the difference between each textile cover for unsprung mattress foundations in the aforementioned rulings. Although all of the subject merchandise are designed to cover mattress foundations without springs or wires, each has minor distinguishable characters. First, the textile covers in NY L81761 and NY L81762 are designed to be stapled to unsprung mattress foundations while leaving the bottom portions open. Similarly, the merchandise in NY N187630 and HQ H254127 are

designed to be stapled to the mattress foundations; however, they contain additional dust covers that are stapled to the bottom of the foundations. Second, unlike the unsprung mattress foundation in HQ H254127 that is designed and intended to be placed directly on the floor, the descriptions of unsprung mattress foundations in NY N187630, NY L81761 and NY L81762 suggest that they are designed to be used in conjunction with bed frames. As explained below, however, the differences in the placement of the covers and unsprung mattress foundations do not affect our analysis.

Note 2 of Chapter 94 states that heading 9403, HTSUS, includes articles and parts that are designed to be placed directly on the floor or ground only. The General EN to Chapter 94 further explains that “furniture” means any movable articles that are designed to be placed on the floor or ground and used to equip private dwellings. Accordingly, the mattress foundation in HQ H254127, which is intended to be placed directly on the floor, constitutes furniture for classification purposes under HTSUS. The mattress foundations in NY N187630, NY L81761 and NY L81762, however, do not qualify as “furniture” because they are designed to be placed on bed frames, not on the floor.

The Parts EN to Chapter 94 provides that “[chapter 94] only covers parts ... of the goods of heading[] ... 94.03 ..., when identifiable by their shape or other specific features as parts designed solely or principally for an article of those headings.” The term “part”, however, is not defined in HTSUS or ENs. In the absence of a statutory definition, courts have applied two tests to determine whether a merchandise constitutes a part of an article. See *Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997). First, as set forth in *United States v. Willoughby Camera Stores, Inc.*, a “part” of an article is “an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.” 21 C.C.P.A. 322, 324 (1933). Second, as held in *United States v. Pompeo*, an item is a “part” if (1) “at the time of importation [it is] dedicated solely for use” with a particular article, and (2) “when applied to that use ... meet[s] the definition of “parts” established by the Willoughby case.” 43 C.C.P.A. 9, 14 (1955). Moreover, an item is not a part if it is “a separate and distinct commercial entity.” *Bauerhin*, 110 F.3d at 779.

Although the mattress foundation in HQ H254127 is classifiable as furniture under heading 9403, HTSUS, the textile cover does not constitute a part of furniture for classification purposes because it fails to satisfy the two tests of *Willoughby* and *Pompeo*. Under *Willoughby*, the textile cover is not a part because the cover is not necessary for the mattress foundation to perform its function of supporting a mattress. In HQ H254127, CBP held that the textile covers are part of mattress foundations because the covers are specially cut to fit over mattress foundations, are permanently attached to mattress foundations, and provide a permanent decorative look by covering parts of the mattress foundations which would otherwise be exposed. Although the covers undeniably provide the aesthetics to the mattress foundations, we now hold that such aesthetical enhancement cannot be upheld as an integral part of the mattress foundations. Without the cover, the foundation is already capable of performing its function due to the wooden parts that establish the shape, strength, and utility of the foundation. The mere covering of the exposed wooden parts does not affect the functionality of the foundation

itself. Thus, under *Willoughby*, the cover does not constitute as “an integral, constituent, or component part” that the foundation cannot function without. Moreover, even if the cover is a distinguishable item that can be used solely with a particular mattress foundation, it still fails under *Pompeo*, because it does not meet the *Willoughby* test. Therefore, the textile cover cannot be classified as a part of the unsprung mattress foundations under heading 9403, HTSUS.

The unsprung mattress foundations in NY N187630, NY L81761 and NY L81762, which are not intended to be placed directly on the floor, are excluded from heading 9403, HTSUS; instead, they are, *prima facie*, classified in heading 9404, HTSUS, which is an *eo nomine* provision for mattress supports. EN 94.04 provides that heading 9404, HTSUS, includes wooden or metal frame fitted with springs, wires, or stuffing covered with fabric. In HQ H273340, dated July 26, 2016, however, CBP held that heading 9404, HTSUS, is not restricted to sprung mattress foundations because the fact that EN 94.04 states that mattress supports “normally” consists of springs or wire mesh does not preclude unsprung mattress foundations from heading 9404, HTSUS. Accordingly, the unsprung mattress foundations without springs and wires, which are used to support mattresses and placed on bed frames, are classified in heading 9404, HTSUS, as mattress supports. The wholly textile articles that are stapled to the mattress foundations, however, are not classifiable in heading 9404, HTSUS, because they are clearly not mattress support themselves. Furthermore, as there is no provision for parts within heading 9404, HTSUS, the textile covers cannot be classified as parts of mattress supports.

EN 63.07 provides that heading 6307, HTSUS, includes “made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature.” The term “made up” is defined in Note 7 to Section XI as textiles that are “[a]ssembled by sewing, gumming or otherwise”. See Note 7(f) to Section XI. Accordingly, the instant textile covers are classified in heading 6307, HTSUS, because the covers are made up articles that are sewn and do not fall under any other heading in HTSUS. In NY K81507, dated December 10, 2003, NY N024859, dated March 27, 2008, and HQ H273340, dated July 26, 2016, we found that similar textile covers for mattress foundations were classified in heading 6307, HTSUS. Therefore, the instant textile covers for unsprung mattress foundations, regardless of whether the foundations are designed to be placed directly on the floor, are classified in heading 6307, HTSUS, as made up textile articles.

Pursuant to GRI 1, the textile covers for unsprung mattress foundations are classified in heading 6307, HTSUS, as “[o]ther made up articles, including dress patterns”. This conclusion is consistent with prior CBP rulings classifying other textile covers for unsprung mattress foundations and similar articles under heading 6307, HTSUS.

HOLDING:

By application of GRI 1, the textile covers for unsprung mattress foundations are classified in heading 6307, HTSUS, specifically subheading 6307.90.9891, HTSUS, which provides for “[o]ther made up articles, including dress patterns: [o]ther: [o]ther: [o]ther: [o]ther: [o]ther”. The 2021 column one, general rate of duty is seven percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N187630, dated October 24, 2011, and HQ H254127, dated May 15, 2015, are hereby revoked. In addition, NY L81761, dated January 21, 2005, and NY L81762, dated January 24, 2005, are modified.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: Mr. Greg Wind
Boyd Flotation, Inc./ Boyd Specialty Sleep
2440 Adie Road
Maryland Heights, MO 63043



**VESSEL ENTRANCE OR CLEARANCE STATEMENT—CBP
FORM 1300**

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

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than May 10, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border

Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 6896) on January 25, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Vessel Entrance or Clearance Statement.

OMB Number: 1651–0019.

Form Number: CBP Form 1300.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 1300, Vessel Entrance or Clearance Statement, is used to collect essential commercial vessel data at time of formal entrance and clearance in U.S. ports. The form

allows the master to attest to the truthfulness of all CBP forms associated with the manifest package, and collects information about the vessel, cargo, purpose of entrance, certificate numbers, and expiration for various certificates. It also serves as a record of fees and tonnage tax payments in order to prevent overpayments. CBP Form 1300 was developed through agreement by the United Nations Intergovernmental Maritime Consultative Organization (IMCO) in conjunction with the United States and various other countries. This form is authorized by 19 U.S.C. 1431, 1433, and 1434, and provided for by 19 CFR part 4, and accessible at <http://www.cbp.gov/newsroom/publications/forms?title=1300>.

Type of Information Collection: CBP Form 1300.

Estimated Number of Respondents: 2,624.

Estimated Number of Annual Responses per Respondent: 72.

Estimated Number of Total Annual Responses: 188,928.

Estimated Time per Response: 0.50 hours.

Estimated Total Annual Burden Hours: 94,464.

Dated: April 5, 2021.

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

[Published in the Federal Register, April 9, 2021 (85 FR 18550)]

U.S. Court of International Trade

Slip Op. 21–37

REBAR TRADE ACTION COALITION, Plaintiff, v. UNITED STATES, Defendant,
and ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI A.S., Defendant-
Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 20–00071
Public Version

[Sustaining the U.S. Department of Commerce’s final results in the first administrative review of the antidumping duty order on steel concrete reinforcing bar from the Republic of Turkey.]

Dated: April 6, 2021

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Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Jeffrey B. Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Matthew M. Nolan and *Leah N. Scarpelli*, Arent Fox, LLP, of Washington, DC, argued for Defendant-Intervenor.

OPINION

Barnett, Chief Judge:

The agency determination at issue here is the first administrative review of the antidumping duty order on steel concrete reinforcing bar (“rebar”) from the Republic of Turkey (“Turkey”). While most administrative reviews cover a 12-month period preceding the anniversary month of the order, the first administrative review of an order may cover a longer period, beginning with the preliminary determination in the investigation and ending on the last day of the month before the first anniversary of the order. In this case, the first administrative review covered a 16-month period of review.

In order to determine whether dumping occurred during this period, the U.S. Department of Commerce (“Commerce” or “the agency”) compares U.S. price to normal value. Normal value is generally based on home market sales, subject to various conditions. One of those conditions involves determining whether the home market sales were made at prices that were less than the cost of production. For these purposes, Commerce often uses costs averaged over the entire period

of review, unless there are significant cost variations and those variations are linked to changes in sales prices. When those conditions are met, Commerce will normally use quarterly costs¹ in its cost analysis rather than period-wide average costs.

Here, Commerce addressed a situation in which the respondent argued that there were significant cost variations linked to price changes such that quarterly costs should be used in Commerce's dumping analysis, but the period of review did not divide evenly into three-month quarters. Rather, the 16-month period of review was divided into five three-month quarters and one remaining month, which Commerce determined to treat as the sixth quarter. When analyzing the costs based on those quarters, Commerce found that the variations exceeded its threshold for deviating from period-wide cost averages and used the reported quarterly costs. It is against this backdrop that the instant case arises.

Plaintiff Rebar Trade Action Coalition ("RTAC") moves, pursuant to United States Court of International Trade Rule 56.2, for judgment on the agency record, challenging Commerce's final results in the first administrative review of the antidumping duty order on rebar from Turkey for the period of review March 7, 2017, to June 30, 2018.² See *Steel Concrete Reinforcing Bar From the Republic of Turkey*, 85 Fed. Reg. 15,765 (Dep't Commerce Mar. 19, 2020) (final results of antidumping duty admin. review; 2017–2018) ("*Final Results*"), ECF No. 20–4, and accompanying Issues and Decision Mem., A-489–829 (Mar. 13, 2020) ("I&D Mem."), ECF No. 20–5.

RTAC challenges Commerce's cost averaging methodology and reliance on one month's data for one of the quarters for purposes of determining whether to depart from using period-wide average costs in its antidumping analysis for Defendant-Intervenor Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas"). See Confidential [RTAC]'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 26, and accompanying Confidential [RTAC]'s Mem. in Supp. of its Rule 56.2 Mot. for J. Upon the Agency R. ("RTAC's Mem."), ECF No. 26–1;³

¹ Commerce refers to the three-month periods as quarters, however, the periods do not necessarily correlate to calendar quarters. Instead, Commerce begins the first quarter with the first month of the period of investigation or review. The court similarly refers to these three-month periods as quarters.

² The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 20–1, and a Confidential Administrative Record ("CR"), ECF No. 20–2. Parties submitted joint appendices containing record documents cited in their briefs. See Public J.A. ("PJA"), ECF No. 38; Confidential J.A. ("CJA"), ECF No. 39. The court references the confidential versions of the relevant record documents unless indicated otherwise.

³ On September 4, 2020, the court granted RTAC's motion for errata to correct a citation in its brief. See Order (Sept. 4, 2020), ECF No. 30.

Confidential Reply Br. of Pl. [RTAC] (“RTAC’s Reply”), ECF No. 35. Defendant United States (“the Government”) and Icdas filed responses supporting the *Final Results*. See Confidential Def.’s Resp. to Pl.’s Mot. for J. on the Agency R. (“Gov’t’s Resp.”), ECF No. 31; Confidential Resp. Br. of Def.-Int. [Icdas] to Pl.’s Rule 56.2 Mot. for J. on the Agency R. (“Icdas’s Resp.”), ECF No. 33.

For the following reasons, the court denies RTAC’s motion and sustains Commerce’s *Final Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)⁴ and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

Commerce initiated this first administrative review on September 10, 2018, see *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 45,596, 45,604 (Dep’t Commerce Sept. 10, 2018), PR 10, CJA Tab 1, and selected Icdas and Kaptan Demir Celik Endüstrisi ve Ticaret A.S. (“Kaptan Demir”) as mandatory respondents, see Respondent Selection for the Antidumping Duty Admin. Review of Steel Concrete [Rebar] from [Turkey] (Oct. 30, 2018) at 5, CR 3, PR 13, CJA Tab 2.

In response to section D of Commerce’s initial questionnaire, Icdas requested “a quarterly comparison of prices as well as usage of quarterly costs in its margin calculation.” Questionnaire Resp. of [Icdas] and its Affiliates to Sec. D of the [Agency’s] Antidumping Duty Questionnaire (Feb. 5, 2019) (“DQR”) at D-11, CR 143–72, PR 43–44, CJA Tab 4. Icdas explained that costs for three significant inputs consumed in producing rebar changed substantially during the period of review. See *id.* Icdas reported its monthly consumption and associated costs for inputs consumed in producing the top-five selling CONNUMs⁵ in the U.S. and home markets. See *id.*, Ex. D-4; Suppl. Sec. D Questionnaire Resp. of [Icdas] and its Affiliates, (July 22, 2019) (“SDQR”) at S2–1, Ex. S2–1, CR 351–73, PR 147, CJA Tab 7. Icdas

⁴ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

⁵ CONNUM refers to “control number,” which is a number designed to reflect the “hierarchy of certain characteristics used to sort subject merchandise into groups” and allow Commerce to match identical and similar products across markets. *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1344, 1347 (2018).

also reported the total cost of manufacturing and total direct material costs for each CONNUM, broken down by quarters, and identified the changes between the highest and lowest quarters for those costs. *See* DQR, Ex. D-4; SDQR, Ex. S2–2. Icdas broke down its costs into the following periods:

- Quarter One: March 2017–May 2017;
- Quarter Two: June 2017–August 2017;
- Quarter Three: September 2017–November 2017;
- Quarter Four: December 2017–February 2018;
- Quarter Five: March 2018–May 2018; and
- Quarter Six: June 2018.

See SDQR at S2–1. Quarter six contained cost information only for June 2018, the last month of the period of review. *See id.* RTAC objected that the June 2018 data were unsuitable for consideration as representative of a full quarter in the quarterly cost averaging analysis. [RTAC’s] Pre-Prelim. Results Cmts. on [Icdas] (Aug. 9, 2019) at 13–14, CR 376, PR 154, CJA Tab 9.

For the *Preliminary Results*, Commerce adopted Icdas’s proposed quarterly cost breakdown for the antidumping analysis. *See* Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review, A-489–829 (Sept. 6, 2019) (“Prelim. Decision Mem.”) at 14, PR 167, CJA Tab 11. Commerce explained that the difference “between [Icdas’s] high and low quarterly [costs of manufacturing] during the [period of review]” exceeded the threshold required to rely on quarterly averages. *Id.* at 14 & n.60 (citations omitted).⁶ Commerce also found a link between “changing sales prices and costs during the [period of review].” *Id.* at 14 & n.65 (citations omitted). Thus, Commerce relied on quarterly cost averages to determine Icdas’s cost of manufacturing. *Id.* at 14. Commerce preliminarily calculated margins of 1.57 percent for Icdas, 0.91 percent for Kaptan Demir, and 1.41 percent for the non-individually-examined respondents. *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 84 Fed. Reg. 48,588, 48,589 (Dep’t Commerce Sept. 16, 2019) (prelim. results of antidumping duty admin. review; 2017–2018), PR 183, CJA Tab 14.

RTAC challenged Commerce’s acceptance of the June 2018 data as the sixth quarter data. Pet’r’s Case Br. (Feb. 11, 2020) (“RTAC’s Case

⁶ For a 12-month period, Commerce normally uses a 25 percent threshold to determine whether “the changes in [cost of manufacturing] are significant enough to warrant a departure from [its] standard annual-average approach.” Prelim. Decision Mem. at 14 & n.58 (citation omitted); *see also Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi A.Ş. v. United States*, 43 CIT ___, ___, 361 F. Supp. 3d 1314, 1324 (2019) (discussing the circumstances under which Commerce departs from relying on period-wide average costs). In this case, Commerce used a 37.5 percent threshold because the period of review consisted of six quarters. Prelim. Decision Mem. at 14 n.59.

Br.”) at 13–19, CR 417– 18, PR 198, CJA Tab 15. RTAC contended that Commerce prefers quarterly averages to monthly averages in determining whether to depart from using a single, period-wide cost average “to ensure the change in cost is sustained for a reasonable time rather than for only an isolated month or two.” *Id.* at 18 & n.62 (citation omitted). RTAC further argued that distortions in the June 2018 data demonstrated that Commerce’s reliance on the data was unreasonable. *See id.* at 14–17.

For the *Final Results*, Commerce continued to rely on quarterly averages based upon the methodology used in the *Preliminary Results*. I&D Mem. at 22–23. Commerce explained:

[t]he months of the [period of review] do not allow for them to be divided equally into quarters. Therefore, Commerce reasonably relied on the partial quarter [i.e., June 2018]. To do otherwise would have required Commerce to rely on data outside the [period of review] or to ignore data inside the [period of review]. As there is no reason to believe that Icdas[’s] costs, as recorded in [its] normal books and records for the month of June 2018 are unreliable, [Commerce] will continue to rely on the reported June 2018 [cost of manufacturing] data for these final results.

Id. at 23. Commerce also rejected RTAC’s arguments that variances in Icdas’s June 2018 production experience rendered the data unreliable. *See id.*; Final Results Analysis Mem. [for] [Icdas], (Mar. 13, 2020) (“Icdas Final Analysis Mem.”) at ECF pp. 218–19, CR 430–36, PR 210, CJA Tab 18.⁷ Based on changes to Icdas’s and Kaptan Demir’s margin programs which are not relevant here, Commerce calculated final antidumping margins of 0.00 percent for both mandatory respondents and assigned the non-examined companies a rate of 0.00 percent. *See Final Results*, 85 Fed. Reg. at 15,766.

DISCUSSION

I. Legal Framework

Commerce calculates the normal value of the subject merchandise based on home market sales that are made “in the ordinary course of trade.” 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce disregards sales at prices that are less than the cost of production, *id.* § 1677b(b)(1), because those sales are not made in the ordinary course of trade, *id.* § 1677(15)(A). A major component of the cost of production is the cost

⁷ The Icdas Final Analysis Memorandum lacks internal pagination; thus, the court refers to the ECF page numbers provided in the confidential joint appendix.

of manufacturing. *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011). The cost of manufacturing equals the sum of “the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business.” 19 U.S.C. § 1677b(b)(3)(A). The cost of production is the cost of manufacturing plus “selling, general, and administrative expenses” incurred during production and sale of the foreign like product and “the cost of all containers and coverings . . . and all other expenses incidental to placing the foreign like product in condition packed and ready for shipment.” *Id.* § 1677b(b)(3)(B)–(C).

“The statute does not define the time period over which cost of production is to be calculated and over which respondent’s various costs must therefore be averaged. Consequently, Commerce must select an appropriate time period for averaging the costs involved.” *Pastificio Lucio Garofalo, S.p.A. v. United States*, 35 CIT 630, 633, 783 F. Supp. 2d 1230, 1234 (2011), *aff’d* 469 F. App’x 901 (Fed. Cir. 2012). “Commerce is afforded considerable discretion in formulating its practices in this regard.” *SeAH Steel Corp. v. United States*, 34 CIT 605, 617, 704 F. Supp. 2d 1353, 1363 (2010) (citation omitted). Commerce’s practice is to calculate the cost of production using a single averaging period covering the entire period of investigation or review. See Issues and Decision Mem. for the Final Results of the Second Admin. Review of Carbon and certain Alloy Steel Wire Rod from Canada, A-122–840, (Jan. 24, 2006) at 17–18, *available at* <https://enforcement.trade.gov/frn/summary/canada/E6–823–1.pdf> (last visited Apr. 6, 2021). In many situations, this results in Commerce using a 12-month average. *Cf. Habaş*, 361 F. Supp. 3d at 1324 (“Commerce’s usual methodology is to rely on an annual weight-average cost for the period of investigation.”) (internal quotation marks omitted). However, Commerce will depart from its normal practice “and employ[] shorter (usually quarterly) cost-averaging periods” when two conditions are met: “(1) consistent and significant cost variation during the period of review, and (2) evidence of linkage between the cost variation and changes in sales prices within the shorter averaging period.” *SeAH Steel*, 34 CIT at 610–11, 704 F. Supp. 2d at 1358.

II. Analysis

A. RTAC's Challenge to Commerce's Methodology

1. Parties' Contentions

RTAC challenges Commerce's methodology in conducting the quarterly cost averaging analysis on two grounds. First, RTAC contends that Commerce has a practice of not examining monthly averages in determining whether to depart from using period-wide average costs and that Commerce deviated from this practice without providing sufficient explanation. *See* RTAC's Mem. at 13, 15, 18, 20, 23–24; Oral Arg. at 3:27–4:19, *available at* <https://www.cit.uscourts.gov/sites/cit/files/030821-20-00071MAB.mp3> (last accessed Apr. 6, 2021) (approximate time stamp from recording). In support of this assertion, RTAC cites four Commerce determinations in which Commerce allegedly stated that monthly averages were not appropriate for consideration in determining whether to depart from period-wide average costs. *See* RTAC's Mem. at 13; RTAC's Reply at 3–4.⁸ Second, RTAC contends that Commerce did not support its conclusion that relying on the June 2018 data as the sixth quarter was necessary to avoid including data outside the period of review or excluding data inside the period of review. *See* RTAC's Mem. at 12.

The Government and Icdas counter that Commerce does not have the practice RTAC describes and that the agency determinations RTAC cites are inapposite. *See* Gov't's Resp. at 11; Icdas's Resp. at 8. Next, the Government avers that Commerce reasonably explained its decision not to exclude the June 2018 data or include non-contemporaneous data. Gov't's Resp. at 14–15; *see also* Icdas's Resp. at 9–10. The Government contends that Commerce adhered to the statutory language directing it to consider all manufacturing costs incurred during the period of review. Gov't's Resp. at 14; *cf.* Icdas's Resp. at 9.

⁸ RTAC cites the following determinations: Issues and Decision Mem. for the Final Results of the Antidumping Duty Admin. Review of Stainless Steel Sheet and Strip in Coils from Mexico, A-201-822 (Feb. 3, 2010) ("Mexican Steel IDM") at 32, *available at* <https://enforcement.trade.gov/frn/summary/mexico/2010-2987-1.pdf> (last visited Apr. 6, 2021); Issues and Decisions for the Final Results of the Twelfth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy (2007–2008), A-475-818 (Feb. 2, 2010) ("Italian Pasta IDM") at 18, *available at* <https://enforcement.trade.gov/frn/summary/italy/2010-2802-1.pdf> (last visited Apr. 6, 2021); Antidumping Duty Admin. Review of Certain Welded Stainless Steel Pipes from the Republic of Korea: Issues and Decision Mem. for the Final Results, A-580-810, (June 22, 2009) ("Korean Pipe IDM") at 9, *available at* <https://enforcement.trade.gov/frn/summary/korea-south/E9-15492-1.pdf> (last visited Apr. 6, 2021); Issues and Decision Mem. for the Antidumping Duty Admin. Review on Certain Steel Concrete Reinforcing Bars from Turkey – April 1, 2006, through March 31, 2007, A-489-807 (Nov. 3, 2008) ("Turkish Rebar IDM") at 18, *available at* <https://enforcement.trade.gov/frn/summary/turkey/E8-26623-1.pdf> (last visited Apr. 6, 2021).

2. Commerce's Methodology in Conducting the Quarterly Cost Averaging Analysis is in Accordance with the Law.

a. Agency Practice

When Commerce considers whether to use quarterly cost averages, it is often able to divide the period of review into four three-month quarters, because each review of an antidumping duty order, excluding the first, normally covers a period of 12 months. *See* 19 C.F.R. § 351.213(e)(1)(i). However, the first administrative review period may exceed 12 months because the agency's regulations provide a different starting point for that period. *See id.* § 351.213(e)(1)(ii) (providing that the first administrative review "will cover . . . entries, exports, or sales during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the month immediately preceding the first anniversary month"). Consequently, in a first administrative review, the number of months in the period of review may not be evenly divisible by three, leaving a remainder period of less than a full quarter.

This combination of circumstances—a request to use quarterly costs during a first administrative review when the period of review is not evenly divisible by three—occurs infrequently, and thus, Commerce has limited practice regarding such remainder periods. *Cf.* Oral Arg. at 28:24–29:45 (wherein the Government explained that determinations involving the factual and procedural circumstances at issue are few; discussing Issues and Decision Mem. for the Final Results of the Antidumping Duty Admin. Review of Certain Corrosion-Resistant Steel Products from Taiwan, 2016–2017, A-583–856 (Dec. 10, 2018) ("Taiwan Steel IDM") at 8, *available at* <https://enforcement.trade.gov/frn/summary/taiwan/2018-27244-1.pdf> (last visited Apr. 6, 2021)).

The rarity with which this scenario occurs underscores the flaw in RTAC's agency-practice argument. RTAC cites four Commerce determinations in an effort to demonstrate that the agency has a practice of finding monthly averages unsuitable for consideration in determining whether to depart from using period-wide average costs. *See* RTAC's Mem. at 13 (citations omitted); *supra* note 8. But in all the determinations RTAC cites, the periods of review were 12 months long and, therefore, could be evenly divided into quarters. Thus, Commerce did not consider the issue presented in this case: whether the agency may consider a remainder period of one month as representative of a three-month quarter when the period of review cannot

be evenly divided into quarters.⁹ Rather, Commerce expressed its preference for using quarterly averages over monthly averages for the entire period of review in situations in which the period of review could be evenly divided into quarters. *See, e.g.*, Mexican Steel IDM at 32. Despite RTAC’s argument to the contrary, Commerce has not indicated that this preference extends to remainder-period data covering one month. *See* RTAC’s Reply at 8–9. Consequently, RTAC has failed to establish that Commerce has a practice of finding remainder-period data covering one month unsuitable for consideration to determine whether to depart from period-wide average costs.¹⁰ Thus, the court rejects RTAC’s argument that Commerce deviated from established practice and failed to provide an explanation for so doing.¹¹

b. *Excluding the June 2018 Data or Considering Non-Contemporaneous Data*

RTAC argues that Commerce failed to explain its decision to use the June 2018 data. *See* RTAC’s Mem. at 14–15. However, Commerce stated that it relied on the June 2018 data because the period of review could not be evenly divided into quarters and it had no reason to believe that the data were unreliable.¹² I&D Mem. at 23. This explanation is sufficient in light of the discretion afforded to Commerce “to develop a suitable methodology for calculating the costs of production.” *Ereğli Demir ve Çelik Fabrikalari T.A.Ş. v. United States*, 42 CIT ___, ___, 308 F. Supp. 3d 1297, 1322 (2018). Moreover, the mere existence of an alternative methodology for determining

⁹ In fact, in the determinations cited by RTAC, the interested parties did not argue for monthly averages to be used. *See* Mexican Steel IDM at 17–18 (respondent challenged Commerce’s reliance on quarterly averages instead of annual averages); Italian Pasta IDM at 12 (respondent challenged Commerce’s reliance on quarterly averages as opposed to annual averages or six-month averages); Korean Pipe IDM at 2 (respondent asserted that Commerce lacked “grounds for inferring that quarterly average costs are more accurate than are annual averages costs . . . if there is no direct linkage between changes in costs and changes in selling prices during the same quarter”); Turkish Rebar IDM at 12 (respondent argued that Commerce should use quarterly averages instead of annual averages).

¹⁰ As a methodological issue, RTAC also has failed to establish that Commerce has a practice of considering the “suitability” of data in evaluating whether to depart from period-wide average costs. *See, e.g.*, RTAC’s Mem. at 11. To the extent that RTAC contends that the June 2018 data were not suitable as a factual matter, the court explains below that substantial evidence supports Commerce’s reliance on the data.

¹¹ The Government contends that RTAC did not exhaust its administrative remedies in challenging Commerce’s alleged deviation from agency practice in relying on the June 2018 data. *See* Gov’t’s Resp. at 11–12. However, the court need not resolve this issue because RTAC fails to demonstrate that Commerce has such a practice.

¹² RTAC does not challenge Commerce’s finding that Icdas’s normal books and records accurately reflect its June 2018 production experience. *See* RTAC’s Reply at 11 (“RTAC’s claim is not that Icdas’s June 2018 costs were unreliable in the sense of not reflecting Icdas’s cost experience in that month.”); Oral Arg. at 22:07–22:35.

whether to depart from using a single, period-wide average does not establish that the methodology used by Commerce was unreasonable. *See, e.g., JMC Steel Grp. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1321 (2014) (deferring to the agency’s reasonable and factually supported methodologies).

RTAC also seeks to analogize its argument to Commerce’s use of “window period” sales in an attempt to explain how Commerce could have considered non-contemporaneous cost data. The term “window period” refers to home market sales made up to 90 days before or 60 days after the U.S. sales that may be matched if there are no comparable home market sales during the same month(s). *See* 19 C.F.R. § 351.414(f); *Fischer S.A. Comercio, Industria & Agricultura v. United States*, 36 CIT 1604, 1605, 885 F. Supp. 2d 1366, 1370 (2012). The regulation covering window period sales does not contemplate, much less provide for, Commerce’s consideration of non-contemporaneous data to determine a respondent’s cost of manufacturing and it only allows Commerce to consider window period sales data when there are no more-contemporaneous sales. *See* 19 C.F.R. § 351.414(f). Thus, RTAC’s argument lacks merit because there is contemporaneous cost data and the regulation is otherwise inapplicable.

For the foregoing reasons, Commerce’s quarterly cost averaging methodology is in accordance with the law.

B. RTAC’s Challenge Based on Variances in the June 2018 Data

1. Parties’ Contentions

RTAC contends that Commerce’s consideration of the June 2018 data in the quarterly cost averaging analysis was unsupported by substantial evidence in light of variances in Icdas’s June 2018 production experience as compared to the rest of the period of review. *See* RTAC’s Mem. at 15–24. RTAC contends that Icdas’s June 2018 scrap purchases, usage of self-produced billets, production volume, and the divergence between Icdas’s imported scrap purchase prices and its total cost of manufacturing indicate that Icdas’s cost data are likely distorted. *See id.* at 16–22.

The Government and Icdas contend that Commerce sufficiently explained that RTAC’s analyses of the variances were flawed, and thus, the agency appropriately rejected RTAC’s claims that the data were distorted. Gov’t’s Resp. at 19–25; *see also* Icdas’s Resp. at 7–9. The Government also contends that RTAC’s assessment of the divergence should be rejected as new factual information not submitted to Commerce. Gov’t’s Resp. at 22.

2. Substantial Evidence Supports Commerce's Finding that the June 2018 Data were Reliable

In finding Icdas's June 2018 cost data reliable, Commerce rejected RTAC's contentions that the data were unsuitable given the above-mentioned variances. *See* I&D Mem. at 22–23; Icdas Final Analysis Mem. at ECF pp. 218–19. Specifically, Commerce found that RTAC's comparison of Icdas's scrap purchases to Icdas's total raw material costs was flawed because Icdas's total raw material costs consisted of more than just scrap and because RTAC compared scrap purchases determined on different bases. *See* Icdas Final Analysis Mem. at ECF pp. 218–19.¹³ Commerce explained that a small variance in Icdas's use of self-produced billets in June 2018 did not disqualify the data from consideration.¹⁴ *See id.* at ECF p. 219. Similarly, Commerce concluded that the June 2018 data were reliable despite a minor difference in production volume.¹⁵ *See id.*

Before the court, RTAC repeats the contentions Commerce rejected. *Compare id.* at ECF pp. 216, 218–19, *with* RTAC's Mem. at 15–21. Thus, RTAC does little more than ask the court to reweigh the evidence considered by Commerce. This the court will not do. *See Haixing Jingmei Chem. Prods. Sales Co. v. United States*, 42 CIT ___, ___, 335 F. Supp. 3d 1330, 1346 (2018) (citing *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)).

Additionally, Commerce dismissed RTAC's claim that the June 2018 data were distorted based on the divergence between Icdas's cost of manufacturing and import scrap prices for June 2018 as compared to the full quarters of the period of review because RTAC's analysis "compare[d] scrap prices in [U.S. dollars] to Icdas's reported costs in Turkish lira." Icdas Final Analysis Mem. at ECF p. 219. Commerce concluded that the actual divergence was smaller than RTAC claimed. *Id.* While RTAC asserts that the agency's finding concerning comparisons of values in different currencies misses the mark, *see* RTAC's Mem. at 21–22 & n.8, it does not point to record evidence undermining the agency's conclusion that RTAC overstated the

¹³ RTAC's assertion that Commerce did not engage with the substance of its argument ignores the reasoned explanation Commerce provided for assigning the arguments little weight. *See* Icdas Final Analysis Mem. at ECF pp. 218–19.

¹⁴ Specifically, Commerce concluded that Icdas's [[]] reliance on self-produced billets in June 2018 was not representative of a [[]] in the company's production processes because "Icdas self-produced more than [[]] percent of billets used . . . during the [period of review]." *Id.* at ECF p. 219.

¹⁵ Commerce explained that the volume of rebar that Icdas produced in June 2018 ([[]]) was similar to the average-monthly production quantities in the [[]] quarters of the period of review, [[]]. *Id.* (citation omitted).

divergence,¹⁶ *see* Icdas Final Analysis Mem. at ECF p. 219. The court is satisfied that substantial evidence supports Commerce’s conclusion on this issue.¹⁷

For the foregoing reasons, the court finds that Commerce’s reliance on the June 2018 cost data as the sixth quarter for purposes of its quarterly cost averaging analysis is supported by substantial evidence.

C. RTAC’s Challenge to the Rate for Non-Individually Examined Respondents

Finally, RTAC asks the court to remand the rate Commerce assigned non-individually examined respondents. RTAC’s Mem. at 24. According to RTAC, Commerce erred in conducting the quarterly cost averaging analysis, and, as a result, the rate assigned to non-individually examined respondents, which is based in part on Icdas’s rate, is unsupported by substantial evidence and not in accordance with the law. *See id.* at 24–25; *see generally Final Results*, 85 Fed. Reg. at 15,766 (explaining that Commerce determined the dumping margin for non-individually examined respondents by averaging “the weighted-average dumping margin[s] calculated for the mandatory respondents (i.e., Kaptan Demir and Icdas)”). As discussed above, Commerce’s quarterly cost averaging analysis is supported by substantial evidence and in accordance with the law; consequently, the court rejects RTAC’s challenge to the rate assigned to non-individually examined respondents.

CONCLUSION

In accordance with the foregoing, it is hereby

¹⁶ RTAC argues that Commerce’s formula for computing the divergence was inaccurate. *See* RTAC’s Mem. at 21–23. But Commerce considered the calculations provided during the administrative review and explained that RTAC inaccurately calculated the divergence. *See* Icdas Final Analysis Mem. at ECF p. 219. RTAC now offers the court alternative calculations not provided to Commerce in an attempt to undermine the agency’s conclusion. *Compare* Rebuttal Br. of [Icdas], (Feb. 18, 2020) at 16, CR 419, CJA Tab 16, *with* RTAC’s Mem. at 23. Although the data underlying RTAC’s new calculations were in the record, the calculations and revised arguments based on these calculations were not. Thus, RTAC’s argument highlights its own failure to develop the record, not a failure in Commerce’s assessment of the record before it. “It is the responsibility of interested parties—not Commerce—to build the factual record supporting its position.” *Calgon Carbon Corp. v. United States*, 44 CIT ___, ___, 443 F. Supp. 3d 1334, 1345 (2020) (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)).

¹⁷ RTAC also contends that the fact that Commerce calculated a divergence in scrap prices in June 2018 (albeit a smaller divergence than RTAC calculated) demonstrates the unreasonableness of Commerce’s reliance on the June 2018 data. *See* RTAC’s Mem. at 21. But, as the Government points out, RTAC’s logic would lead to an absurd result in which “any divergence (no matter how small)” would undermine reliance on remainder-period data. Gov’t’s Resp. at 21–22.

ORDERED that Commerce's *Final Results* are sustained. Judgment will enter accordingly.

Dated: April 6, 2021

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21–39

ASPECTS FURNITURE INTERNATIONAL, INC., Plaintiff, and IMSS, LLC,
CONSOLIDATED Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 18–00222

[Granting Defendant's motion for summary judgment as to all subject entries and denying Plaintiff's and Consolidated Plaintiff's cross-motion for summary judgment. Denying as moot Defendant's motion for a protective order and Consolidated Plaintiff's motion to compel.]

Dated: April 9, 2021

Robert W. Snyder and *Laura A. Moya*, Law Offices of Robert W. Snyder, of Irvine, CA, argued for Plaintiff and Consolidated Plaintiff.

Marcella Powell, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, *Aimee Lee*, Assistant Director, and *Hardeep K. Josan*, Trial Attorney. Of counsel on the brief was *Paula Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Barnett, Chief Judge:

In this consolidated action, Plaintiff Aspects Furniture International, Inc. (“AFI”) and Consolidated Plaintiff IMSS, LLC (“IMSS”) (together, “Consolidated Plaintiffs”) contest the denial of their respective protests challenging U.S. Customs and Border Protection’s (“CBP” or “Customs”) allegedly untimely assessment of antidumping duties on the entries associated with those protests. The matter is before the court on Defendant’s (“the Government”) motion for summary judgment pursuant to U.S. Court of International Trade (“USCIT” or “CIT”) Rule 56 and Consolidated Plaintiffs’ cross-motion for summary judgment. *See* Def.’s Mot. for Summ. J., and accompanying Mem. in Supp. of its Mot. for Summ. J. in the Consol. Action (“Gov’t’s Mot. Summ. J.”), ECF No. 73; [Consol. Pls.’] Cross-Mot. for Summ. J. and Opp’n to [the Gov’s] Mot. for Summ. J., and accompanying Mem.

in Supp. of Their Cross-Mot. for Summ. J. and in Opp'n to [the Gov't's] Mot. for Summ. J. ("Consol. Pls.' Cross-Mot. & Opp'n"), ECF No. 79.

For the reasons discussed herein, the court will grant the Government's motion for summary judgment as to all subject entries and deny Consolidated Plaintiffs' cross-motion for summary judgment.

BACKGROUND

I. Facts Not in Dispute

The party seeking summary judgment must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). Movants should present material facts as short and concise statements, in numbered paragraphs, USCIT Rule 56.3(a), and cite to "particular parts of materials in the record" as support, USCIT Rule 56(c)(1)(A). In responsive papers, the opponent "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b).

In this case, Parties submitted a joint statement of undisputed material facts and a joint statement of undisputed facts except as to their materiality. *See* Jt. Stmt. of Undisputed Mat. Facts ("JSMF"), ECF No. 74 at ECF pp. 1–5; Jt. Stmt. of Undisputed Facts, Except as to Their Materiality ("JSF"), ECF No. 74 at ECF pp. 5–6. Consolidated Plaintiffs submitted additional facts they assert are material and not subject to genuine dispute, to which the Government has responded. *See* [Consol. Pls.] Rule 56.3 Stmt. of Add'l Mat. Facts as to Which There are no Genuine Issues to be Tried ("Consol. Pls.' SMF"), ECF No. 79; Def.'s Resp. to Pls.' Rule 56.3 Stmt. of Add'l Mat. Facts ("Gov't's Resp. to Consol. Pls.' SMF"), ECF No. 80.

Upon review of Parties' statements of facts (and supporting exhibits), the court finds there is no dispute regarding the following facts that are material to resolving the substantive issues in this case or relevant to the arguments presented.¹

A. The Underlying Administrative Review

The imported merchandise at issue in this case consists of wooden bedroom furniture from the People's Republic of China. JSMF ¶ 1.²

¹ Citations are provided to the relevant paragraph number of the joint statements of undisputed facts; Parties' citations to supporting documents generally have been omitted. Citations to the record are provided when a fact, though not admitted by both parties, is uncontroverted by record evidence. *See* USCIT Rule 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record.")

² Consolidated Plaintiffs are the importers of record for their respective entries. AFI made ten entries of wooden bedroom furniture on various dates in January, February, July, and December of 2014. *See* Summons (schedule of protests), ECF No. 1. IMSS made one entry

On April 11, 2016, the U.S. Department of Commerce (“Commerce”) published the final results of its tenth administrative review of the antidumping duty order on wooden bedroom furniture from China. *Id.* ¶ 3; see also *Wooden Bedroom Furniture From the People’s Republic of China*, 81 Fed. Reg. 21,319 (Dep’t Commerce Apr. 11, 2016) (final results and final determination of no shipments, in part; 2014 admin. review) (“*Final Results*”).

On April 26, 2016, the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. commenced an action challenging the *Final Results*. JSMF ¶ 4 (citing *Am. Furniture Mfrs. Comm. for Legal Trade, et al. v. United States*, Court No. 16-cv-00070 (CIT) (“the *AFMC* litigation”). On April 27, 2016, the court issued a statutory injunction to enjoin the liquidation of certain entries in the *AFMC* litigation. *Id.* ¶ 5. On March 13, 2017, the court dismissed that lawsuit for lack of subject matter jurisdiction. *Id.* ¶ 6 (citing, *inter alia*, *Op. & J., Am. Furniture Mfrs. Comm. for Legal Trade, et al. v. United States*, Court No. 16-cv-00070 (CIT Mar. 13, 2017), ECF Nos. 37–38 (“*AFMC Op. & J.*”). Neither the court’s judgment in the *AFMC* litigation nor the court’s opinion referenced any removal of the suspension of liquidation related to the statutory injunction. See generally *AFMC Op. & J.*³

On March 29, 2017, CBP published the court’s opinion in the *AFMC* litigation in its Customs Bulletin and Decisions Official Reporter. JSMF ¶ 7. “On May 12, 2017, the March 13[, 2017] judgment issued in the *AFMC* [litigation] became final and conclusive.” *Id.* ¶ 8.

B. Commerce’s Liquidation Instructions

Liquidation instructions concerning antidumping and countervailing duties “are created and issued in CBP’s Automated Commercial Environment (ACE).” *Id.* ¶ 9. Certain Commerce employees “have direct login access to ACE.” *Id.* ¶ 10. To issue liquidation instructions, a Commerce employee logs into ACE, creates a message and the content contained therein, and uploads that message into ACE. *Id.* ¶¶ 11–12. “ACE automatically assigns the message an internal message number” *Id.* ¶ 13. Customs personnel monitor ACE for new messages. *Id.* ¶ 14. When a new message appears, it is “assigned to a

on September 11, 2014. See *Summons, IMSS, LLC v. United States*, Court No. 19-cv-00029 (CIT Mar. 11, 2019), ECF No. 1.

³ While Parties cited to the court’s opinion and judgment in the *AFMC* litigation, they did not append copies of those documents to their statements of fact. In any event, judicial notice of documents filed in the *AFMC* litigation for the purpose of recognizing the adjudicative act is permissible here. See, e.g., *Los Angeles Biomedical Research Inst. at Harbor–UCLA Med. Ctr. v. Eli Lilly and Co.*, 849 F.3d 1049, 1062 n.6 (Fed. Cir. 2017) (observing that the court “can properly take judicial notice of the records of related court proceedings”); *United States v. New-Form Mfg. Co.*, 27 CIT 905, 917 n.14, 277 F. Supp. 2d 1313, 1325 n.14 (2003).

CBP employee.” *Id.* ¶ 14. That employee “reviews the message and ‘activates’ it in ACE.” *Id.* ¶ 15. “Upon activation, ACE assigns the message a ‘Message Number.’” *Id.* ¶ 15. “CBP does not change the content of the message in any manner.” *Id.* ¶ 16. Upon activation, “CBP personnel can view and implement the message.” *Id.* ¶ 17. Additionally, “[m]embers of the importing community can . . . view any unrestricted messages in ACE.” *Id.* ¶ 17.

On May 2, 2016, CBP activated a message created by a Commerce employee in ACE, and ACE designated the message as Message No. 6123302. JSF ¶ 1. Message No. 6123302 pertained to the statutory injunction entered in the *AFMC* litigation on April 27, 2016 and noted that the injunction was effective as of April 27, 2016. *Id.* ¶¶ 2, 5.

On May 30, 2017, a Commerce employee created and uploaded another internal message in ACE relevant to the *AFMC* litigation. JSMF ¶ 18. “CBP activated [that] message in ACE on May 30, 2017 without change, and ACE assigned it Message No. 7150306.” *Id.* Message No. 7150306 stated that the injunction entered in the *AFMC* litigation and to which Message No. 6123302 referred “dissolved on May 12, 2017.” *Id.* ¶ 19. Message No. 7150306 is dated May 30, 2017 and contained an effective date of May 12, 2017. *Id.* ¶¶ 20–21. Message No. 7150306 is publicly accessible. *See* Gov’t’s Mot. Summ. J., Ex. A., Decl. by Brad Dauble (“Dauble Decl.”), Ex. B (Message No. 7150306, designated as public), ECF No. 73–2.

C. Liquidation of the Subject Entries

1. AFI’s Entries

There are ten entries at issue with respect to AFI. On November 24, 2017, CBP liquidated nine of those entries (hereinafter, “AFI’s nine subject entries”).⁴ JSMF ¶ 26. The tenth entry, Entry No. W69–3327386–5 (hereinafter, “AFI’s tenth subject entry”), liquidated by operation of law (alternately referred to as a “deemed liquidation”). Consol. Pls.’ SMF ¶ 1; Gov’t’s Resp. to Consol. Pls.’ SMF ¶ 1. Customs did not provide notice of the deemed liquidation. Consol. Pls.’ SMF ¶ 3; Gov’t’s Resp. to Consol. Pls.’ SMF ¶ 3. Documents CBP filed with the court state that AFI’s tenth subject entry was “Liquidated” on December 1, 2017. JSMF ¶ 27.

A “final antidumping duty rate of 216.01 percent was assessed on [all ten AFI entries] . . . pursuant to Message No. 7150306.” *Id.* ¶ 28. The court previously held that AFI timely protested all ten liquidations before CBP “and CBP denied the protests.” *Id.* ¶ 29 (citing

⁴ AFI’s nine subject entries consist of Entry Nos. W69–3325900–5, W69–3325953–4, W69–3326026–8, W69–3329300–4, W69–3329302–0, W69–3329955–5, W69–3343109–1, W69–3345392–1, and W69–3368746–0. JSMF ¶ 26.

Aspects Furn. Int'l, Inc. v. United States (“*Aspects I*”), 43 CIT ___, 392 F. Supp. 3d 1317 (2019)).

2. IMSS’s Entry

At issue with respect to IMSS is Entry No. 201–3112876–0 (hereinafter, “IMSS’s subject entry”). *Id.* ¶¶ 22–25. IMSS’s subject entry liquidated by operation of law. *Id.* ¶ 22. Customs did not provide notice of the deemed liquidation. Consol. Pls.’ SMF ¶ 5; Gov’t’s Resp. to Consol. Pls.’ SMF ¶ 5. Customs reliquidated the entry “on February 28, 2018 at the final antidumping duty rate of 216.01 percent.” JSMF ¶ 23. That rate was assessed on the entry “pursuant to Message No. 7150306.” *Id.* ¶ 24. IMSS “timely protested the reliquidation and the protest was denied by operation of law.” *Id.* ¶ 25.

II. Procedural History of the Consolidated Cases

A. Lead Action, Court No. 18–00222

AFI timely commenced Court No. 18–00222 on October 27, 2018. *See* Summons. On June 21, 2019, the court denied the Government’s partial motion to dismiss for lack of subject matter jurisdiction. *Aspects I*, 392 F. Supp. 3d 1317. On August 17, 2020, the court granted AFI’s motion for leave to file a first amended complaint. *Aspects Furn. Int’l, Inc. v. United States*, 44 CIT ___, 469 F. Supp. 3d 1359 (2020). In that decision, the court denied as moot Defendant’s motion for judgment on the pleadings and AFI’s cross-motion for partial judgment on the pleadings. *See id.*

B. Member Action, Court No. 19–00029⁵

IMSS timely commenced Court No. 19–00029 on March 22, 2019. Summons. On April 10, 2020, the court denied the Government’s motion for judgment on the pleadings. Order (Apr. 10, 2020), ECF No. 34; Mem. (Apr. 13, 2020), ECF No. 36 (explaining the court’s rationale for its ruling). The court further lifted the stay on discovery, Order (Apr. 10, 2020), ECF No. 35, and entered a scheduling order, Scheduling Order (Apr. 17, 2020), ECF No. 38. On August 6, 2020, the Government moved for a protective order limiting the scope of discovery. Def.’s Mot. for a Protective Order, ECF No. 39.

C. Consolidation and Summary Judgment Briefing

On August 25, 2020, the court consolidated the cases under lead Court No. 1800222 for purposes of discovery and briefing. Order (Aug. 25, 2020), ECF No. 67. The court further stayed IMSS’s response to

⁵ Citations in this subsection are to court filings in *IMSS, LLC v. United States*, Court No. 19-cv-00029 (CIT).

the Government's motion for a protective order until September 30, 2020; ordered Parties to confer on the formation of a joint statement of material facts; and set November 12, 2020 as the deadline for dispositive motions. *Id.*; see also Order (Oct. 8, 2020), ECF No. 71 (extending the stay on IMSS's response to the Government's motion for a protective order until November 12, 2020).

On November 12, 2020, the Government filed its motion for summary judgment and the Parties' joint statements of facts. Gov't's Mot. Summ. J.; JSMF; JSF. That day, IMSS responded to the Government's motion for a protective order and moved to compel discovery. See [IMSS's] Resp. in Opp'n to Def. United States' Mot. for a Protective Order and Mot. to Compel, ECF No. 75.⁶ Thereafter, the court informed the Parties that it would defer ruling on the motion for a protective order during briefing on dispositive motions and stayed the Government's response to IMSS's motion to compel. Ltr. from the Court (Nov. 30, 2020), ECF No. 77; Order (Dec. 2, 2020), ECF No. 78.

On December 17, 2020, Consolidated Plaintiffs cross-moved for summary judgment and opposed the Government's motion. See Consol. Pls.' Cross-Mot. & Opp'n. On January 21, 2021, the Government filed a combined opposition to Consolidated Plaintiffs' cross-motion and reply to Consolidated Plaintiffs' opposition. Def.'s Mem. in Opp'n to Pls.' Cross-Mot. For Summ. J. and Reply in Further Supp. of Def.'s Mot. For Summ. J. ("Gov't's Opp'n & Reply"), ECF No. 80. On February 11, 2021, Consolidated Plaintiffs filed a reply. [Consol. Pls.] Reply in Further Supp. of their Cross-Mot. for Summ. J. ("Consol. Pls.' Reply"), ECF No. 81.

On March 5, 2021, the court ordered additional briefing with respect to AFI's tenth subject entry. Letter Order (Mar. 5, 2021) ("Ltr. Order"), ECF No. 82. On March 19, 2021, AFI filed its response. Pl. [AFI's] Add'l Br. Regarding the Applicability of the Principle of Harmless Error to the Liquidation of One of its Subject Entries ("AFI's Suppl. Br."), ECF No. 83. On March 22, 2021, the Government filed its response. Def.'s Resp. to the Court's Mar. 5, 2021 Order Requesting Suppl. Briefing ("Gov't's Suppl. Br."), ECF No. 84. On March 29, 2021, the court heard oral argument in connection with the supplemental briefing. Docket Entry, ECF No. 86; Oral Arg., <https://www.cit.uscourts.gov/sites/cit/files/032921-18-00222-MAB.mp3> (last accessed Apr. 9, 2021).

⁶ AFI also responded to the motion, though its reason for so doing is unclear. See [AFI's] Resp. in Opp'n to Def. United States' Mot. for a Protective Order Filed in Consol. Case No.: 19-00029, ECF No. 76.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012).⁷ The court reviews denial of protest claims arising under 19 U.S.C. § 1515 *de novo*, and “make[s] its determinations upon the basis of the record made before [it].” 28 U.S.C. § 2640(a)(1). The court may grant summary judgment when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); USCIT Rule 56(a).⁸

DISCUSSION

I. Legal Framework

When a statutory or court-ordered suspension of liquidation is lifted, Customs shall liquidate the relevant entry “within 6 months after receiving notice of the removal from [Commerce], [an]other agency, or a court with jurisdiction over the entry”; otherwise the entry will be deemed liquidated “at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.” 19 U.S.C. § 1504(d). Thus, for an entry to be deemed liquidated, “(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice.” *Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 (Fed. Cir. 2004) (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)). The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has interpreted the statute to require notice that is unambiguous and public. *See id.*

An entry that liquidated by operation of law may, however, be voluntarily reliquidated by CBP pursuant to 19 U.S.C. § 1501 within the time provided therein. The version of section 1501 that was in effect at the time of importation provided that

[a] liquidation made in accordance with section 1500 [i.e., a manual liquidation] or 1504 [i.e., a deemed liquidation] . . . may be reliquidated in any respect by [Customs], notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the

⁷ References to the United States Code are to the 2012 edition unless otherwise stated.

⁸ When, as here, Parties have filed cross-motions for summary judgment, the court generally must evaluate each party’s motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. *See, e.g., JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). Here, however, the material facts are undisputed.

importer, his consignee or agent. Notice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

19 U.S.C. § 1501. On February 24, 2016, Congress amended section 1501, *inter alia*, to provide for reliquidation “within ninety days from the date of the original liquidation.” Trade Facilitation and Enforcement Act of 2015, Pub. L. No. 114–125, § 911, 130 Stat. 122, 240 (2016). Thus, under the current version of the statute, the 90-day clock begins to run on the date of the manual liquidation or the date on which an entry deemed liquidated, not the date on which notice of such liquidation was provided. *Compare* 19 U.S.C. § 1501 (2012), *with* 19 U.S.C. § 1501 (2018).

II. The Parties’ Cross-Motions for Summary Judgment

The Government seeks summary judgment as to all entries at issue in the consolidated actions. *See* Gov’t’s Mot. Summ. J. at 10–18. Consolidated Plaintiffs counter that summary judgment is premature with respect to AFI’s nine subject entries and IMSS’s subject entry pending further discovery. Consol. Pls.’ Cross-Mot. & Opp’n at 15–22. In the alternative, Consolidated Plaintiffs seek summary judgment with respect to AFI’s nine subject entries and IMSS’s subject entry. *Id.* at 22–28. Consolidated Plaintiffs cross-move for summary judgment with respect to AFI’s tenth subject entry. *Id.* at 8–15. The court first addresses the motions concerning AFI’s nine subject entries and IMSS’s subject entry before turning to the cross-motions concerning AFI’s tenth subject entry.

A. AFI’s Nine Subject Entries and IMSS’s Subject entry

1. The Government’s Motion for Summary Judgment and Consolidated Plaintiffs’ Request for Discovery Pursuant to USCIT Rule 56(d)

a. Parties’ Contentions

The Government contends that Commerce’s issuance of liquidation instructions to CBP on May 30, 2017, ultimately designated by ACE as Message No. 7150306, constituted the requisite notice of the lifting of suspension of liquidation and triggered the start of the six-month liquidation period. Gov’t’s Mot. Summ. J. at 11. Thus, the Government contends, CBP timely liquidated AFI’s nine subject entries on November 24, 2017, and those entries did not liquidate by operation of law. *Id.* at 12. The Government further contends that CBP timely

reliquidated IMSS's subject entry on February 28, 2018. *Id.* at 18.

Consolidated Plaintiffs contend that summary judgment for the Government is premature pending discovery as to whether or when Customs was served with the court's judgment in the *AFMC* litigation. Consol. Pls.' Cross-Mot. & Opp'n at 16–21; *see also* Decl. of Robert W. Snyder in Supp. of [Consol. Pls.] Rule 56(d) Request (“Snyder Decl.”) ¶¶ 5–8, ECF No. 79–1; Consol. Pls.' Reply at 15–16. Consolidated Plaintiffs also contend that discovery is necessary to further understand a prior communication system, referred to as OTO3, utilized by CBP and Commerce. Consol. Pls.' Cross-Mot. & Opp'n at 21–22; *see also* Snyder Decl. ¶¶ 9–11; Consol. Pls.' Reply at 16. This discovery is necessary, Consolidated Plaintiffs contend, because judicial precedent cited by the Government to support the argument that the six-month liquidation period began on May 30, 2017 predates Customs' use of ACE. Consol. Pls.' Cross-Mot. & Opp'n at 22. Consolidated Plaintiffs ascribe importance to whether, prior to ACE, Commerce lacked “[the] same direct login access” that it has with ACE. *Id.*

The Government counters that Consolidated Plaintiffs' requests for discovery “should be rejected” as “irrelevant and immaterial” to the pending claims. Gov't's Opp'n & Reply at 15. The Government contends that any service of the court's judgment in the *AFMC* litigation by the court on CBP cannot fulfill the statutory requirements for notice; thus, discovery as to whether this occurred would be futile. *Id.* at 15–16. The Government further contends that Consolidated Plaintiffs failed to explain the materiality of facts concerning differences between the OTO3 and ACE communication systems. *Id.* at 16.⁹

b. There is No Genuine Dispute that Customs Received Notice of the Lifting of Suspension of Liquidation on May 30, 2017; Consolidated Plaintiffs' Request for Further Discovery Lacks Merit

Here, the undisputed facts establish that Customs received notice of the lifting of suspension of liquidation of subject entries covered by the statutory injunction entered in the *AFMC* litigation on May 30, 2017. On May 30, 2017, Commerce informed CBP, through an inter-

⁹ The Government argues that Consolidated Plaintiffs failed to timely “move[] for a continuance based on USCIT Rule 56(d).” Gov't's Opp'n & Reply at 14. Rule 56(d) contains no such requirement. Rather, the rule requires the nonmovant to “show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.” USCIT Rule 56(d). When the court finds the submission meritorious, the court may, *inter alia*, defer its consideration of the summary judgment motion or order further discovery. USCIT Rule 56(d)(1)–(2). As discussed, however, Consolidated Plaintiffs have not shown that discovery is necessary to establish facts that are essential to justify their opposition.

nal message in ACE, that the statutory injunction had dissolved on May 12, 2017. JSMF ¶¶ 18–19. Customs activated the message “on May 30, 2017[,] without change,” *id.* ¶ 18, thereby rendering Message No. 7150306 publicly available, Dauble Decl., Ex. B; JSMF ¶ 17 (noting that “the importing community can view any unrestricted messages in ACE”). Consolidated Plaintiffs do not dispute these facts. Instead, Consolidated Plaintiffs continue to press for further discovery on alternative theories of notice.

Consolidated Plaintiffs’ request for discovery concerning possible service of the CIT’s March 13, 2017 judgment in the *AFMC* litigation on CBP by the court is, however, unpersuasive. Notice of the removal of suspension must be unambiguous. *Cemex*, 384 F.3d at 1321. To the extent CBP received a copy of the judgment prior to May 12, 2017, such service would not constitute adequate notice. “Suspension of liquidation” pursuant to 19 U.S.C. § 1516a(c)(2) “cannot be removed until the time for [filing an appeal] expires.” *Id.* at 1320. Thus, “[t]he end of the suspension period . . . is a prerequisite for valid notice.” *Id.* at 1320–21. To the extent CBP received a copy of the judgment following the lifting of suspension on May 12, 2017, but before May 24, 2017, the judgment alone would not constitute adequate notice because it provides no indication of its finality or the corresponding removal of suspension. *See id.* at 1321 (explaining that one predicate for a deemed liquidation is unambiguous notice of the removal of suspension); *AFMC* Op. & J. (both the court’s opinion and judgment in the *AFMC* litigation are silent as to the removal of suspension); *cf. Fujitsu*, 283 F.3d at 1383 (finding that “publication of a court decision in a case does not necessarily result in Customs’ receipt of notice that a suspension of liquidation that was in effect during the case has been removed” and noting, by way of example, that the appellate court’s decision in a related case “does not even mention the suspension of liquidation that was ordered by the [CIT]”).¹⁰ Because service of the

¹⁰ Consolidated Plaintiffs’ attempts to dismiss the relevance of *Fujitsu* are unpersuasive. Consol. Pls.’ Reply at 15. Consolidated Plaintiffs first argue that the *Fujitsu* court opined on whether Commerce’s publication of notice of the court’s decision removing suspension constituted notice, not service of the court’s decision by the court upon Customs. *Id.* This is a distinction without a difference because 19 U.S.C. § 1504(d) provides for CBP’s receipt of notice of the removal from Commerce or the court. Consolidated Plaintiffs also argue that the *Fujitsu* court’s statement that publication of a court ruling does not necessarily constitute notice to Customs is mere *dicta*. Consol. Pls.’ Reply at 15. *Fujitsu* holds that Commerce’s publication of notice of a court decision in the *Federal Register* resulted in Customs’ receipt of notice that suspension of liquidation was removed *because* Commerce stated in the notice “that it would be instructing Customs to liquidate the [subject] entries.” 283 F.3d at 1382. The *Fujitsu* court declined, however, to find that a deemed liquidation occurred when Commerce failed to publish the notice within the time provided by 19 U.S.C. § 1516a(e)(2). *Id.* at 1382–83. The appellate court reasoned that doing so would equate the notice requirement in section 1504(d) with the publication requirement in section

court's judgment in the *AFMC* litigation by the CIT on CBP cannot, as a matter of law, fulfill the statutory notice requirements, ascertaining such immaterial facts would be futile and, thus, discovery is not merited.

Consolidated Plaintiffs' remaining arguments in this regard are also unpersuasive. Consolidated Plaintiffs suggest that an unfavorable ruling threatens to nullify the portion of the statute providing for notice from some "other agency" besides Commerce or a "court with jurisdiction over the entry." Consol. Pls.' Cross-Mot. & Opp'n at 19 (referring to CBP's and Commerce's "relentless[] attempt[s] to make such notice come exclusively in the form of liquidation instructions"); *see also* 19 U.S.C. § 1504(d). The court's ruling does no such thing. It simply holds, consistent with the statute and its interpretation by the Federal Circuit, that service of the CIT's judgment alone would not have constituted valid notice of the removal of suspension of liquidation and, thus, discovery on this matter is unnecessary. This conclusion does not preclude the court or another agency from issuing valid notice to CBP in another case presenting different facts.

Consolidated Plaintiffs express concern that if the court determines that valid notice was not provided until the liquidation instructions, such an interpretation of the "public and unambiguous notice" requirement might enable "the Government . . . to extend liquidation indefinitely." Consol. Pls.' Cross-Mot. & Opp'n at 19. Consolidated Plaintiffs' concern is speculative. There is no indication that Commerce routinely delays—or, in the instant case, in which no *Federal Register* notice of the court decision was necessary, delayed—issuing liquidation instructions.¹¹ In the event the date of Customs' publication of any liquidation instructions differs from the date of non-public transmission from Commerce to CBP (and there is no earlier date on which notice was transmitted), the court would need to identify the operative date of notice. This case does not, however, require the court to resolve that issue. *See* JSMF ¶¶ 17–18 (referencing Commerce's upload of the internal message to ACE on May 30, 2017 and CBP's

1516a(e)(2) and such an approach was disfavored because a court decision may not reference the removal of suspension. *See id.* While the facts underlying *Fujitsu* are distinct, the appellate court's rationale is consistent with the requirement that notice to Customs must be unambiguous regarding the removal of suspension and, in turn, supports this court's finding that any service of the court's decision in the *AFMC* litigation by the court on Customs would not constitute unambiguous notice because it does not reference the removal of suspension. *See AFMC Op. & J.*

¹¹ Indeed, several litigants have challenged Commerce's policy, now rescinded, of issuing liquidation instructions 15 days from publication of a final determination in certain anti-dumping and countervailing duty proceedings as too soon. *See, e.g., YC Rubber Co. (N. Am.) LLC v. United States*, 43 CIT ___, ___, 415 F. Supp. 3d 1240, 1246–48 (2019); *Notice of Discontinuation of Policy To Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Proceedings*, 86 Fed. Reg. 3,995 (Dep't Commerce Jan. 15, 2021).

activation of the message that same day); Double Decl., Ex. B (indicating that Message No. 7150306 was publicly available upon activation).

Consolidated Plaintiffs' reliance on *International Trading Co. v. United States*, 281 F.3d 1268, 1273, 1276 (Fed. Cir. 2002), and *Fujitsu*, 283 F.3d at 1378, as disfavoring notice in the form of liquidation instructions, is misplaced. Consol. Pls.' Cross-Mot. & Opp'n at 19–20. While in each case the Federal Circuit rejected the date on which Commerce sent liquidation instructions to CBP as the operative date of notice, the court did so because, on an earlier date, Commerce had published in the *Federal Register* the final results or amended final results of an administrative review pursuant to court review that provided notice to CBP that the suspension of liquidation had been lifted. See *Fujitsu*, 283 F.3d at 1369, 1380; *Int'l Trading*, 281 F.3d at 1275–76. Here, there is no *Federal Register* or other earlier notice implicated in the court's resolution of the case.

Lastly, Consolidated Plaintiffs argue that “Customs should be deemed to receive the notice in cases such as this consolidated action, where the trial court’s decision is in harmony with [Commerce’s determination].” Consol. Pls.’ Cross-Mot. & Opp’n at 21 (emphasis omitted). Consolidated Plaintiffs appear to argue that because “Customs is *deemed* to receive . . . notice when it is done through the *Federal Register*” rather than “*direct* notice,” *id.* at 20 (first emphasis added), Customs should be deemed to receive notice of the lifting of suspension “through the publication or service of [the] court’s decision” in the *AFMC* litigation, *id.* at 21. Consolidated Plaintiffs’ argument is unpersuasive.

As previously noted, publication or receipt of “a court decision in a case does not necessarily result in Customs’ receipt of notice that a suspension of liquidation that was in effect during the case has been removed.” *Fujitsu*, 283 F.3d at 1383. Moreover, “[t]he end of the suspension period . . . is a prerequisite for valid notice under section 1504(d).” *Cemex*, 384 F.3d at 1320–21. While CBP published the court’s decision in the *AFMC* litigation on March 29, 2017, JSMF ¶ 7, the court-ordered suspension of liquidation did not end until the court decision became final on May 12, 2017, *id.* ¶ 8; see also 19 U.S.C. § 1516a(c)(2),(e) (providing for an injunction on liquidation pending the possibility of a “final court decision” adverse to the original Commerce determination”).¹²

¹² Consolidated Plaintiffs rely on language in section 1516a(e) providing for liquidation in accordance with a final court decision when “the cause of action is sustained in whole or in part” to suggest that the notice requirements should be interpreted differently when the cause of action is dismissed. Consol. Pls.’ Cross-Mot. & Opp’n at 21. Subsection (e) does not support Consolidated Plaintiffs’ argument. That statutory provision simply provides for

For these reasons, Consolidated Plaintiffs' request for discovery concerning any service of the court's judgment in the *AFMC* litigation by the court on CBP is denied.

Consolidated Plaintiffs' request for discovery concerning the OTO3 communication system likewise lacks merit. Consolidated Plaintiffs concede that the OTO3 system "was not in place" during any events material to this action. Consol. Pls.' Cross-Mot. & Opp'n at 22. Consolidated Plaintiffs also fail to identify the cases cited by the Government that purportedly predate ACE or explain how the transition from OTO3 to ACE undermines the courts' rulings in those cases. *See id.*; Consol. Pls.' Reply at 16 (stating, without further elaboration, that differences in the ACE and OTO3 systems render the need for discovery "even more apparent"). Simply put, Consolidated Plaintiffs fail to explain why it makes any difference, let alone "an important difference," whether Commerce lacked direct login capability "prior to ACE." Consol. Pls.' Cross-Mot. & Opp'n at 22. Thus, Consolidated Plaintiffs' request for discovery in this regard will be denied.¹³

c. Summary

The foregoing discussion demonstrates that there is no genuine dispute that CBP received notice of the lifting of suspension of liquidation on May 30, 2017, when Commerce uploaded an internal message in ACE on May 30, 2017; Commerce's notice was unambiguous; and CBP made the notice publicly available. Consolidated Plaintiffs' request to defer any ruling on the Government's motion for summary judgment pending further discovery will be denied. The court turns now to Consolidated Plaintiffs' alternative cross-motion for summary judgment.

liquidation in accordance with the court's decision—and not Commerce's original determination—when all or part of any challenge to that determination is meritorious. *See* 19 U.S.C. § 1516a(e). When an interested party's challenge wholly fails, liquidation would proceed in accordance with Commerce's determination. *See id.* Section 1516a(e) has no bearing on what constitutes adequate notice pursuant to section 1504(d).

¹³ Consolidated Plaintiffs assert, without elaboration, that the notice contained in messages that Commerce uploads to ACE is non-public and "not unambiguous." Consol. Pls.' Cross-Mot. & Opp'n at 26. While Commerce's message was internal to ACE, Consolidated Plaintiffs do not dispute that Message No. 7150306 is publicly available. JSMF ¶ 17; Double Decl., Ex. B. In their reply brief, Consolidated Plaintiffs argue that messages—such as Message No. 7150306—cannot "be considered the unambiguous notice required under section 1504(d)" because "a deeper inquiry is required," likely through litigation, "to ascertain when Customs received such messages." Consol. Pls.' Reply at 16 (emphasis omitted); *see also id.* at 19 (asserting that the absence of any statement concerning Customs' date of receipt in the liquidation instructions renders the instructions an ambiguous form of notice). Consolidated Plaintiffs erroneously conflate the separate requirements of public and unambiguous notice. Consolidated Plaintiffs also offer no authority for the notion that notice cannot be unambiguous for purposes of section 1504(d) when the contents of the notice do not publicly disclose the date on which Customs received such notice.

2. Consolidated Plaintiffs' Cross-Motion for Summary Judgment in the Alternative as to AFI's Nine Subject Entries and IMSS's Subject Entry

a. Parties' Contentions

Consolidated Plaintiffs contend they are entitled to summary judgment with respect to AFI's nine subject entries and IMSS's subject entry because those entries liquidated by operation of law on November 12, 2017. Consol. Pls.' Cross-Mot. & Opp'n at 22–26; Consol. Pls.' Reply at 17–20. Consolidated Plaintiffs base this argument on the inclusion of an effective date of May 12, 2017 in Message No. 7150306 and contend that the six-month liquidation period thus began to run on that date. Consol. Pls.' Cross-Mot. & Opp'n at 26; Consol. Pls.' Reply at 19. Consolidated Plaintiffs further contend they are entitled to summary judgment with respect to IMSS's subject entry because Customs failed to provide notice of the deemed liquidation prior to reliquidation. Consol. Pls.' Cross-Mot. & Opp'n at 26–28.

The Government contends that there is “no support for the notion” that the date of notice is retroactive to May 12, 2017. Gov't's Opp'n & Reply at 7. Accepting that position, the Government contends, would eliminate the requirement that CBP receive notice of the removal of suspension, which is, by law, separate from the act of removal. *Id.*¹⁴ The Government further contends that Customs' failure to provide notice of the deemed liquidation to IMSS prior to reliquidation does not invalidate the reliquidation both because IMSS failed to assert the claim in its complaint and because the amended version of 19 U.S.C. § 1501 does not require such notice. *Id.* at 14.

Consolidated Plaintiffs counter that their claim concerning Customs' failure to provide notice of the deemed liquidation prior to reliquidation “is not independent from [IMSS's] untimely liquidation argument” because notice of the deemed liquidation triggers the 90-day reliquidation period. Consol. Pls.' Reply at 20. Thus, Consolidated Plaintiffs contend, the argument is properly before the court. *Id.*

b. The Inclusion of an “Effective Date” in Message No. 7150306 Does Not Change the Liquidation Period

The crux of Consolidated Plaintiffs' argument is that the inclusion of an effective date of May 12, 2017 in Message No. 7150306 means that the six-month liquidation period began on that date. Consol. Pls.'

¹⁴ The Government asserts that Consolidated Plaintiffs impermissibly raised an untimely challenge to CBP's implementation of Commerce's liquidation instructions. Gov't's Opp'n & Reply at 7 n.1. Consolidated Plaintiffs subsequently clarified they are not challenging the implementation. Consol. Pls.' Reply at 18–19.

Cross-Mot. & Opp'n at 26; Consol. Pls.' Reply at 19. The statute is clear, however, that the liquidation period begins on the date CBP "receiv[es] notice of the removal" of the suspension of liquidation, not on the date on which suspension was lifted, to the extent those dates differ. 19 U.S.C. § 1504(d) (emphasis added); *see also Int'l Trading*, 281 F.3d at 1275 ("Even if suspension has been removed, section 1504(d) provides that the six-month period for deemed liquidation does not begin to run until CBP receives notice from Commerce that the suspension has been removed.").¹⁵ Consolidated Plaintiffs fail to reconcile their position with the clear statutory language or the Federal Circuit's interpretation of that language.

Instead, Consolidated Plaintiffs base their arguments on generalized discussion about the concept of "informed compliance" Congress implemented through passage of the Customs Modernization Act ("Mod Act") in 1993¹⁶ and Customs' purported failure to apply that concept "in the context of the removal of suspension of liquidation." Consol. Pls.' Cross-Mot. & Opp'n at 24. Consolidated Plaintiffs seek to demonstrate Customs' inconsistent adherence to the principle of informed compliance through the submission of declarations prepared by Customs' personnel in 2007 for purposes of an unrelated litigation. *See id.* at 24–25.¹⁷ Consolidated Plaintiffs rely on the declarations to argue that, when a message states the date on which suspension of liquidation lifted, Customs equates the date of removal with the date of notice of removal. *See id.* at 24–26.

Consolidated Plaintiffs fail, however, to explain why the court should treat these unrelated declarations as "Customs' own interpretation" of Message No. 7150306 or why the statements contained in the declarations should be considered "controlling." *See id.* at 26.

¹⁵ The *International Trading* court further observed that

section 1504(d) applies not only to the removal of suspension that occurs upon publication of the final results of an administrative review, but also to . . . the removal of a court-ordered suspension of liquidation. In that setting, the removal of suspension occurs as the result of court action, not a *Federal Register* publication, and the required notice must be provided by a separate mechanism. For that reason, it makes sense for section 1504(d) to refer separately to the acts of removal of suspension of liquidation and notification of the removal.

281 F.3d at 1276 (emphasis added).

¹⁶ The Mod Act was enacted as Title VI to the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993). "Informed compliance" represents the idea "that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that [CBP] will not unilaterally change the rules without providing importers proper notice and an opportunity for comment." S. Rep. No. 103–189 at 64 (1993).

¹⁷ Consolidated Plaintiffs submitted declarations prepared by Dirik J. Lolkus and David Genovese on November 16 and 26, 2007, respectively, and filed in *Travelers Indemnity Co. v. United States*, Court No. 06-cv-00151 (CIT). *See* Consol. Pls.' Cross-Mot. & Opp'n, Ex. 4 ("Lolkus Decl."), Ex. 5 ("Genovese Decl.").

Consolidated Plaintiffs aver that the court in *Travelers Indemnity Co. v. United States*, 32 CIT 1057, 580 F. Supp. 2d 1330 (2008), gave effect to the statements in the declarations in reaching its decision and the Government is acting inconsistently in requesting the court to disregard the declarations. *See* Consol. Pls.' Reply at 17–18. Consolidated Plaintiffs' arguments are not persuasive.

Travelers addressed whether “publication of a case in the *Customs Bulletin Weekly* (‘the *Bulletin*’)” constituted “sufficient notice to [Customs]” pursuant to 19 U.S.C. § 1504(d). 32 CIT at 1057, 580 F. Supp. 2d at 1331–32. The *Travelers* court relied on portions of the Lolkus and Genovese Declarations, among others, to conclude that publication in the *Bulletin* did not constitute notice to CBP because CBP “employees who are concerned with liquidation neither necessarily regularly read nor rely upon, the contents of that publication.” *Id.* at 1064, 580 F. Supp. 2d at 1337; *see also id.* at 1064–68, 580 F. Supp. 2d at 1337–40 (discussing four CBP declarations). The declarations constituted—and were treated as—“factual information” material to the narrow question before the court. *Id.* at 1064, 580 F. Supp. 2d at 1337. The court did not view the declarations as legal authority regarding notice pursuant to section 1504(d) generally or use them to make a finding regarding the date on which notice was provided in that case. Moreover, the portions of the declarations that Consolidated Plaintiffs quote in their brief appear nowhere in the court's opinion. *Compare* Consol. Pls.' Cross-Mot. & Opp'n at 24–25 (quoting Lolkus Decl. ¶ 7,¹⁸ Genovese Decl. ¶ 14), *with Travelers*, 32 CIT at 1065–67, 580 F. Supp. 2d at 1337–39.¹⁹

Consolidated Plaintiffs also rely on what they perceive as an inconsistency between Message No. 6123302 and Message No. 7150306. Consol. Pls.' Cross-Mot. & Opp'n at 25. Consolidated Plaintiffs argue that, although the effective date set forth in Message No. 6123302 “is the operative date,” the same cannot be said with respect to Message No. 7150306. *Id.* Consolidated Plaintiffs argue further that this inconsistency appears to undermine the effectiveness of the court order that resulted in the lifting of suspension of liquidation. *See id.* Consolidated Plaintiffs misapprehend the way the different messages function and their concerns are misplaced.

¹⁸ Consolidated Plaintiffs emphasize, *inter alia*, Mr. Lolkus's statement that “[a]n instruction posted on the OTO3 bulletin board will now either tell us the date on which suspension of liquidation was removed (that is, the date on which Customs received notice), or the deadline by which liquidation must be accomplished.” Consol. Pls.' Cross-Mot. & Opp'n at 24 (quoting Lolkus Decl. ¶ 7) (emphasis omitted).

¹⁹ While the *Travelers* court cites to paragraph 7 of the Lolkus Declaration, it does not reproduce language from that paragraph or otherwise discuss it.

Customs activated Message No. 6123302 on May 2, 2016. JSF ¶ 1. Message No. 6123302 informed Customs personnel that the court had entered a statutory injunction covering entries subject to the *AFMC* litigation on April 27, 2016 and that the injunction was effective as of that date. *Id.* ¶¶ 2, 5. In other words, Customs was enjoined from liquidating subject entries that remained unliquidated as of April 27, 2016. *See* 19 U.S.C. § 1516a(c)(2). Message No. 7150306 had an effective date of May 12, 2017. JSMF ¶ 21. The suspension of liquidation thus, in fact, ended on that date.

The question before the court is not, however, on what date suspension was removed, but on what date Customs received notice of the removal for purposes of starting the six-month liquidation period. That the removal of suspension and notice of that removal occurred on different dates does not mean, as Consolidated Plaintiffs suggest, that the judgment in the *AFMC* litigation did not “produc[e] binding effects.” Consol. Pls.’ Cross-Mot. & Opp’n at 25. It simply means that the time in which Customs had to liquidate a subject entry before it liquidated by operation of law did not begin until Customs received adequate notice that it could, in fact, liquidate the entry.²⁰

Accordingly, Consolidated Plaintiffs are not entitled to summary judgment with respect to AFI’s nine subject entries or IMSS’s subject entry under a theory that the entries liquidated by operation of law on November 12, 2017. However, resolving Consolidated Plaintiffs’ motion as to IMSS’s subject entry, i.e., whether CBP was required to convey notice of the deemed liquidation before reliquidating the entry, depends on the version of section 1501 that applies to Customs’ reliquidation of IMSS’s subject entry. The court now turns to that issue.

c. The Amended Version of Section 1501 Applies to the Reliquidation of IMSS’s Subject Entry

The Supreme Court of the United States has recognized that “the presumption against retroactive legislation is deeply rooted in our jurisprudence,” because “individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”

²⁰ Consolidated Plaintiffs also suggest that “Commerce’s and Customs’ practice . . . invalidates the congressional intent behind section 1504(d).” Consol. Pls.’ Cross-Mot. & Opp’n at 25. Consolidated Plaintiffs assert that “the main principle” underlying section 1504(d) is to preclude CBP or Commerce from “extend[ing] liquidation indefinitely.” *Id.* at 19; *see also id.* at 18–19 (discussing amendments to section 1504(d) and associated legislative history). Assuming Consolidated Plaintiffs’ characterization of the purpose behind section 1504(d) is true, Consolidated Plaintiffs have not explained how that intent was undermined with respect to AFI’s nine subject entries. Section 1504(d) afforded Customs until November 30, 2017 to liquidate the entries, and Customs timely liquidated the entries on November 24, 2017. JSMF ¶ 26. Thus, Consolidated Plaintiffs’ concerns are without merit.

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). However, a statute is not impermissibly retroactive “merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.” *Id.* at 269–70 (citations omitted); see also *Parkdale Int’l v. United States*, 475 F.3d 1375, 1378 (Fed. Cir. 2007) (quoting same). To that end, the court generally considers three *Landgraf* factors: “the ‘nature and extent of the change of the law,’ ‘the degree of connection between the operation of the new rule and a relevant past event,’ and ‘considerations of fair notice, reasonable reliance, and settled expectations.’” *Parkdale*, 475 F.3d at 1378–79 (quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1364 (Fed. Cir. 2005)); see also *Landgraf*, 511 U.S. at 270.²¹ The Federal Circuit has construed the second *Landgraf* factor as requiring inquiry into “the event that triggers application of [the relevant statutory provision]” and the timing of that event in relation to the amendment. *Travenol Lab’ys, Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997) (explaining that “prior [case] law . . . has focused on the inter-relationship between the new law and past conduct” and, thus, the court “must evaluate the importing process in an effort to find the event that triggers the application of [19 U.S.C. § 1505(c)]”). In *United States Tsubaki, Inc. v. United States*, 512 F.3d 1332, 1334–35 (Fed. Cir. 2008), the Federal Circuit dispensed entirely with the first and third *Landgraf* factors and focused solely on identifying the date on which the event that triggered application of 19 U.S.C. § 1504(d) occurred. Thus, if the conduct that triggers application of a statute follows an amendment to that statute, such that the provision does not confer new legal consequences to pre-amendment conduct, application of the amended statute to the conduct is not (or very likely not) impermissibly retroactive. Accordingly, the court first identifies the event that triggers application of 19 U.S.C. § 1501.

“While importers entering merchandise subject to an antidumping duty order are required to make a cash deposit of estimated antidumping duties, this rate is not final where an administrative review is initiated.” *Parkdale*, 475 F.3d at 1379. “This stems from the fact that ‘the United States uses a “retrospective” assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.’” *Id.* (quoting 19 CFR § 351.212(a)). Thus, “in cases involving importers’ challenges to the

²¹ This analysis is required when, as here, the statute does not expressly state its temporal applicability and application of the rules of statutory construction likewise do not indicate its temporal reach. See *United States v. Great Am. Ins. Co. of NY*, 41 CIT ___, ___, 229 F. Supp. 3d 1306, 1324 (2017).

application of new laws based on retroactivity,” liquidation often—but not always—constitutes “the paramount relevant ‘past event.’” *Id.* (citations omitted); *see also Travenol*, 118 F.3d at 753 (holding that the date of liquidation or reliquidation determines what version of 19 U.S.C. § 1505(c) applies because the provision, which governs the assessment of interest owing from the underpayment or overpayment of duties, is only implicated upon liquidation (or reliquidation)); *cf. Tsubaki*, 512 F.3d at 1335 (holding that “notice to Customs of the act of lifting the suspension of liquidation is the correct trigger for the application of 19 U.S.C. § 1504(d)”).

Consolidated Plaintiffs attempt to distinguish *Tsubaki* by arguing that that section 1501 lacks “any express language suggesting such a triggering event.” Consol. Pls.’ Reply at 10. Consolidated Plaintiffs also argue, in a conclusory manner, that “the triggering event cannot be the same as the subject matter of the statute” at issue, “i.e., liquidation and/or reliquidation.” *Id.*

Consolidated Plaintiffs are incorrect. Section 1501, like section 1504(d), explicitly states the predicate event that begins the time period within which CBP may or must act. In *Tsubaki*, Customs’ receipt of notice of the removal of suspension “impose[d] the burden of prompt liquidation on the government” and thereby triggered the application of the six-month liquidation period set forth in 19 U.S.C. § 1504(d). 512 F.3d at 1335. Thus, the court identified when Customs received notice to determine the applicable version of section 1504(d). *See id.* at 1337. Section 1501 provides that an original liquidation of an entry, whether deemed or manual, triggers Customs’ authority to reliquidate that entry within 90 days. 19 U.S.C. § 1501. Thus, the applicable version of section 1501 depends on when IMSS’s subject entry liquidated by operation of law. IMSS’s subject entry liquidated by operation of law on November 30, 2017; on that date, Customs’ authority to reliquidate the entry pursuant to 19 U.S.C. § 1501 arose. Because application of the amended version of section 1501 did not assign new legal consequences to pre-amendment conduct, the amended version of the statute applies to the court’s examination of the validity of Customs’ actions with respect to the liquidation or reliquidation of IMSS’s subject entry.

Consolidated Plaintiffs’ reliance on *Great American* to reach a contrary conclusion is misplaced. Consol. Pls.’ Cross-Mot. & Opp’n at 14–15; Consol. Pls.’ Reply at 12–14. There, the court held that the amended version of section 1501 did not apply to an entry made in made in 2006 when: the entry liquidated by operation of law in February 2009; Customs posted a notice of the deemed liquidation in December 2009; and, in January 2010, Customs reliquidated the

entry. *Great Am.*, 229 F. Supp. 3d at 1311–16, 1323–26. In reaching its decision, the court considered that all relevant CBP conduct *preceded* the statutory amendment and concluded that it would be unfair to CBP to measure the lawfulness of its conduct against a law that was not in effect when the conduct occurred. *See id.* at 1325. The court’s decision was thus tailored to “the facts of [that] case,” *id.* at 1325–26, which are distinct from the instant facts.

Consolidated Plaintiffs further attempt to align this case with *Great American* by arguing that “there is a strong ‘degree of connection between operation of the new rule and a relevant past event’” because “applying the 2016 version of section 1501 to the (alleged) reliquidation at issue here, which occurred without notice, but within 90 days of the deemed liquidation, would validate a reliquidation made *without observance of a legal requirement*—providing notice—and subject [AFI] to increased duties.” Consol. Pls.’ Reply at 13 (citing *Great Am.*, 229 F. Supp. 3d at 1325) (emphasis added). Consolidated Plaintiffs’ argument assumes the answer to the question before the court, namely, that there was a legal requirement to provide notice of the deemed liquidation before reliquidation. Whether that is true, however, turns on what version of section 1501 applies. More importantly, what counts as a “relevant past event” depends on whether the event occurred prior to enactment of the new statutory provision. *See Landgraf*, 511 U.S. at 269–70 (characterizing the inquiry into “the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a *relevant past event*” as “whether the new provision attaches new legal consequences to *events completed before its enactment*”) (emphasis added); *Travenol*, 118 F.3d at 754 (holding that “application of amended section 1505(c) to goods entered before, but liquidated (or reliquidated) after, its effective date . . . does not constitute a retroactive application of that provision”). As discussed above, *Great American* is distinct because there, both the original liquidation and the reliquidation occurred several years before Congress amended section 1501. 229 F. Supp. 3d at 1325.

To the extent the first and third *Landgraf* factors are implicated, they do not change the outcome in this case. “[T]he ‘nature and extent of the change of the law’ is significant because the amendment changes the starting point for computing the time that CBP has to voluntarily reliquidate an entry from the date of notice to the date of the liquidation.” *Great Am.*, 229 F. Supp. 3d at 1325. Thus, this factor would disfavor retroactivity.

With respect to “familiar considerations of fair notice, reasonable

reliance, and settled expectations,” *Landgraf*, 511 U.S. at 270, Consolidated Plaintiffs argue that it would be unfair and unreasonable to expect importers to stay informed about statutory changes occurring after the time of entry and potentially affecting their entries, Consol. Pls.’ Reply at 13–14. Consolidated Plaintiffs offer no persuasive argument or evidence, however, that they reasonably relied on, or had any settled expectations concerning, the notice requirement embedded in the pre-amendment version of section 1501 or lacked notice of the statutory amendment. *Cf. Princess Cruises*, 397 F.3d at 1366 (holding that a Customs ruling did not apply to pre-ruling conduct when it would have imposed “an evidentiary presumption that [could not] possibly be met” and the plaintiff had relied on a letter received from a Customs official indicating that the plaintiff would not be subject to the liability imposed by the new ruling); *Great Am.*, 229 F. Supp. 2d at 1325 (finding that application of the 2016 amendment to Customs’ pre-amendment conduct would “implicate[] fairness and reliance considerations” because, at the time of the reliquidation, “[section] 1501 plainly afforded Customs 90 days from the date on which it posted the bulletin notice to reliquidate the subject entry”).

In sum, the amended version of section 1501 applies to IMSS’s subject entry. Thus, CBP was not required to give notice of the deemed liquidation prior to reliquidating IMSS’s subject entry. Accordingly, Consolidated Plaintiffs are not entitled to summary judgment as to this entry based on the lack of notice of the deemed liquidation prior to reliquidation.²²

3. The Government is Entitled to Summary Judgment Regarding AFI’s Nine Subject Entries and IMSS’s Subject Entry

In addition to establishing May 30, 2017, as the date that started the six-month liquidation period, *see supra* p. 21, the undisputed facts demonstrate that Customs timely liquidated AFI’s nine subject entries on November 24, 2017, JSMF ¶ 26, and, thus, those entries did not liquidate by operation of law, 19 U.S.C. § 1504(d). Accordingly, the court will enter summary judgment for the Government with respect to AFI’s nine subject entries and deny Consolidated Plaintiffs’ alternative cross-motion.

The court further finds it undisputed that IMSS’s subject entry liquidated by operation of law, JSMF ¶ 22, and that the deemed liquidation occurred on November 30, 2017 (six months from May 30,

²² Because the court finds that CBP was not required to give notice of the deemed liquidation before reliquidating IMSS’s subject entry, the court need not address the Government’s contention that IMSS’s argument concerning CBP’s failure to provide notice amounts to an impermissible attempt to assert a new claim. Gov’t’s Opp’n & Reply at 13–14.

2017). Because CBP's reliquidation on February 28, 2018 coincided with precisely the 90th day thereafter, *see* JSMF ¶ 23, and CBP was not required to give notice of the deemed liquidation prior to reliquidation, the reliquidation was valid and timely pursuant to section 1501, as amended. Accordingly, the court will enter summary judgment for the Government with respect to IMSS's subject entry and deny Consolidated Plaintiffs' alternative cross-motion. Additionally, the court will deny as moot the Government's motion for a protective order as to IMSS and IMSS's motion to compel.

B. The Parties' Cross-Motions for Summary Judgment as to AFI's Tenth Subject Entry

1. Parties' Contentions

The Parties do not dispute that AFI's tenth subject entry liquidated by operation of law or that Customs did not provide notice of the deemed liquidation. Consol. Pls.' SMF ¶¶ 1, 3; Gov't's Resp. to Consol. Pls.' SMF ¶¶ 1, 3. Rather, the Parties dispute whether Customs' assessment of duties on December 1, 2017 constituted an untimely liquidation or a valid reliquidation pursuant to 19 U.S.C. § 1501. *Compare* Gov't's Mot. Summ. J. at 12–13, *and* Gov't's Opp'n & Reply at 8, 13, *with* Consol. Pls.' Cross-Mot. & Opp'n at 8–10, *and* Consol. Pls.' Reply at 4–9. The Parties also dispute what version of section 1501 applies to AFI's tenth subject entry. *Compare* Gov't's Mot. Summ. J. at 14–18, *and* Gov't's Opp'n & Reply at 9–12, *with* Consol. Pls.' Cross-Mot. & Opp'n at 14–15, *and* Consol. Pls.' Reply at 9–14.

The Government seeks summary judgment on the basis that CBP timely reliquidated AFI's tenth subject entry on December 1, 2017 and, pursuant to the amended version of section 1501, was not required to provide notice of entry's liquidation by operation of law prior to reliquidation. Gov't's Mot. Summ. J. at 12–13, 18; Gov't's Opp'n & Reply at 11–13. Consolidated Plaintiffs seek summary judgment on the basis that Customs could not have performed a voluntary reliquidation pursuant to section 1501 absent "knowledge and awareness of the error sought to be corrected." Consol. Pls.' Cross-Mot. & Opp'n at 11. Accepting the Government's position, Consolidated Plaintiffs contend, would reward Customs "with an automatic 90-day 'grace period' in which to liquidate entries." *Id.* at 12.

The court requested supplemental briefing as to whether "the principle of harmless error recognized by the . . . Federal Circuit in *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996), and its progeny, appl[ies] to the court's consideration of AFI's claim." Ltr. Order. Additionally, the court instructed AFI to explain "what, if any, cognizable harm" AFI suffered "as a result CBP's assessment of an-

tidumping duties pursuant to an alleged ‘liquidation’ of the entry within the time otherwise permitted by 19 U.S.C. § 1501, as amended, to ‘reliquidate’ the entry inclusive of antidumping duties?” *Id.*²³

In their supplemental filings, the Parties agreed that 19 U.S.C. § 1504(d) is not amenable to a harmless error analysis because the statute states a clear consequence for noncompliance—deemed liquidation. AFI’s Suppl. Br. at 3–6; Gov’t’s Suppl. Br. at 2. However, the Parties were unclear concerning their respective positions on whether 19 U.S.C. § 1501—the operative statute for purposes of resolving AFI’s claim—is amenable to a harmless error analysis. Notwithstanding that lack of clarity, AFI did argue that validating CBP’s action would cause harm in the form of expanding the reach of section 1501 to encompass “automatic reliquidation by operation of law” and, thus, permit CBP to extend the time for liquidation under 19 U.S.C. § 1504(d) by an additional 90 days. AFI’s Suppl. Br. at 7–8. The Government countered that that AFI has failed to demonstrate any “legally cognizable injury” with respect to CBP’s “liquidation” within the 90-day timeframe for reliquidation accorded by section 1501. Gov’t’s Suppl. Br. at 3–4 (noting that “AFI has not identified anything it would have done differently had CBP ‘reliquidated’ . . . the entry” and AFI has not “identified any deprivation of rights or actual prejudice it suffered”).

In order to clarify the Parties’ positions, the court heard oral argument on this issue. At the hearing, AFI sought to limit the applicability of a harmless error analysis to regulatory errors and argued that upholding CBP’s action would “obviate” the six-month deadline for liquidation contained in section 1504(d). Oral Arg., 5:10–26:15 (approximate time stamp from recording).²⁴ The Government argued that a harmless error analysis is not limited to regulations; CBP’s “liquidation” was the “functional equivalent” of a “reliquidation”; and any error was harmless because AFI “clearly had notice” of CBP’s assessment of antidumping duties and protested the assessment. *Id.*, 26:21–29:12.

²³ For purposes of supplemental briefing, the court instructed Parties to assume that the amended version of section 1501 applied, “such that CBP was not required to give notice of the original liquidation by operation of law prior to reliquidation.” Ltr. Order.

²⁴ AFI relied on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988), for the proposition that a harmless error analysis is improper with respect to statutory violations. Oral Arg., 24:33–26:23. *Torres* is inapposite for that purpose. 487 U.S. at 317–18 (finding the specificity requirement of Federal Rule of Appellate Procedure 3(c) to be “jurisdictional” and non-waivable for “good cause”). Moreover, *Intercargo* contemplates the application of a harmless error analysis to statutes. 83 F.3d at 396 (noting that, “[p]rejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect”) (emphasis added).

2. The Government is Entitled to Summary Judgment as to AFI's Tenth Subject Entry

As previously noted, the Parties do not dispute that AFI's tenth subject entry liquidated by operation of law. Thus, resolution of the cross-motions addressed to AFI's tenth subject entry turns on whether Customs ran afoul of the requirements of section 1501 when it assessed antidumping duties on the entry on December 1, 2017. To that end, as noted, the Parties also dispute what version of section 1501 applies to the court's examination of Customs' action.

The court dispenses with the latter issue first. The prior analysis concerning what version of section 1501 applies to Customs' reliquidation of IMSS's subject entry pertains equally to Customs' reliquidation of AFI's tenth subject entry. Customs' authority to reliquidate AFI's tenth subject entry pursuant to 19 U.S.C. § 1501 arose when the entry liquidated by operation of law on November 30, 2017. Consol. Pls.' SMF ¶ 1; Gov't's Resp. to Consol. Pls.' SMF ¶ 1; *see also* Consol. Pls.' Cross-Mot. & Opp'n at 14 (stating that "the only justifiable inference that the [c]ourt can make with respect to the liquidation status of [AFI's tenth subject entry] is that, on November 30, 2017, such entry deemed liquidated, pursuant to 19 U.S.C. § 1504(d)"). Thus, the amended version of section 1501 did not assign new legal consequences to pre-amendment conduct and is the operative version. Accordingly, section 1501 did not require Customs to give notice of the deemed liquidation to AFI before reliquidating the entry and Consolidated Plaintiffs are not entitled to summary judgment based on the lack of notice.

As to whether the December 1, 2017 event constituted a liquidation or a valid reliquidation, the Government does not dispute the factual record wherein CBP marked the event as a "liquidation." JSMF ¶ 27. The Government nevertheless argues that any liquidation within the 90-day period following a deemed liquidation is, as a matter of law, a timely reliquidation pursuant to 19 U.S.C. § 1501. *See* Gov't's Mot. Summ. J. at 13. Consolidated Plaintiffs counter that use of the term "voluntary" in the title to section 1501 and in Customs' implementing regulation, 19 C.F.R. § 173.3,²⁵ "requires Customs' knowledge and

²⁵ The regulation provides, *inter alia*, that Customs

may reliquidate on [its] own initiative a liquidation or a reliquidation to correct errors in appraisal, classification, or any other element entering into the liquidation or reliquidation, including errors based on misconstruction of applicable law. A voluntary reliquidation may be made even though a protest has been filed, and whether the error is discovered by [Customs] or is brought to [its] attention by an interested party.

19 C.F.R. § 173.3. Subsection (a) of Customs' regulation was amended in 2017 to provide for reliquidation by the "Center director" rather than the "port director," but otherwise remains

awareness of the error sought to be corrected” for the reliquidation to be valid, Consol. Pls.’ Cross-Mot. & Opp’n at 11. Consolidated Plaintiffs seek summary judgment based on the entry documentation on the record in which CBP marked the event as a liquidation. *See id.* at 8–10.²⁶

This case does not require the court to address whether section 1501 or *require* the relevant Customs official to be aware of the prior liquidation in order to implement a valid voluntary reliquidation. Assuming, *arguendo*, that the statute and regulation contain such a requirement, as discussed more fully below, the court finds that CBP committed a nonactionable error by liquidating an entry that CBP was, instead, permitted to reliquidate notwithstanding the deemed liquidation.²⁷ In either case, the effect of Customs’ action is (or would have been) the same: the assessment of applicable antidumping duties. Consolidated Plaintiffs do not argue otherwise and, thus, have failed to establish any cognizable injury from Customs’ alleged error.

“It is well settled that principles of harmless error apply to the review of agency proceedings.” *Intercargo*, 83 F.3d at 394. Agency action will be “set aside ‘only for substantial procedural or substantive reasons.’” *Id.* (quoting *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990), *aff’d and adopted*, 923 F.2d 838 (Fed. Cir. 1991)). When “neither the statute nor the regulation specifies the consequence of noncompliance” with a procedural requirement, the party seeking relief must demonstrate that it suffered substantial prejudice as a result of the contested action. *Cummins Engine Co. v. United States*, 23 CIT 1019, 1032–33, 83 F. Supp. 2d 1366, 1378 (1999); *see also PAM S.p.A. v. United States*, 463 F.3d 1345, 1346 (Fed. Cir. 2006) (CIT erred in ordering Commerce to rescind a completed administrative review of the plaintiff based on a lack of service of the domestic parties’ request for review of the

unchanged from the version in effect when the entries were made. *See Regulatory Implementation of the Ctrs. of Excellence and Expertise*, 81 Fed. Reg. 92,978, 92,999 (CBP Dec. 20, 2016) (interim final rule; *eff.* Jan. 19, 2017).

²⁶ Consolidated Plaintiffs also seek to rely on the Government’s original Answer. Consol. Pls.’ Cross-Mot. & Opp’n at 9. However, as Consolidated Plaintiffs acknowledge, that Answer has since been superseded by the Government’s Answer to AFI’s Amended Complaint. *Id.*; *see also* Ans. to First Am. Compl., ECF No. 72.

²⁷ The court does not need to address the extent of the factual record concerning CBP’s awareness of the prior deemed liquidation (or lack thereof). The record merely establishes that Customs labeled the event as a “liquidation” in the entry documentation filed with the court. JSMF ¶ 27. AFI bases its motion for summary judgment on the notion that the erroneous label on the entry documentation establishes CBP’s lack of awareness; AFI does not seek further discovery on this issue and the Parties have not addressed the extent of any factual dispute concerning the degree of knowledge held by the responsible CBP official. Nevertheless, as discussed, AFI is not entitled to relief even if the court adopts AFI’s interpretation of the statute and all inferences in its favor.

plaintiff absent a showing of substantial prejudice); *Intercargo*, 83 F.3d at 396 (reversing the CIT's grant of summary judgment for the plaintiff when the court was "unable to discern any prejudice" arising from Customs' defective notice of extension of liquidation).

Here, to the extent section 1501 requires CBP to be aware of an original liquidation pursuant to 19 U.S.C. §§ 1500 or 1504, the statute does not specify any consequence flowing from a reliquidation made without such awareness. *See* 19 U.S.C. § 1501. Customs' regulation, 19 C.F.R. § 173.3, likewise does not specify any consequence for the Center Director's lack of awareness of errors in the prior liquidation.²⁸ Consolidated Plaintiffs further fail to identify any actionable prejudice stemming from the fact that CBP performed a "liquidation" rather than a "reliquidation."

"A party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396. Consolidated Plaintiffs merely assert that accepting the Government's position would "mean that Customs has six months plus 90 days to liquidate" an entry, such that "Customs would be rewarded with an automatic 90-day 'grace period' in which to liquidate entries without any negative implications." *Consol. Pls.' Cross-Mot. & Opp'n* at 12; *see also* AFI's Suppl. Br. at 7–8. That is not a cognizable injury; rather, that is precisely the amount of time that sections 1501 and 1504(d), together, afford Customs to correctly assess the duties owed on an entry that first liquidates by operation of law. Finding that CBP committed harmless error in this case does not, therefore, obviate the timeframe set forth in section 1504(d). Absent a showing of prejudice, Consolidated Plaintiffs are not entitled to avoid the applicable antidumping duties that CBP was required to assess. Thus, the court will grant the Government's motion for summary judgment as to AFI's tenth subject entry and deny Consolidated Plaintiffs' cross-motion.

CONCLUSION

In accordance with the foregoing, the court will grant the Government's motion for summary judgment with respect to all subject entries and deny Consolidated Plaintiffs' cross-motion. The court will

²⁸ AFI argues that "procedural requirements should be liberally construed only when they are 'mere technicalities,' i.e., when the agency has essentially complied with the rule in a functionally equivalent manner." AFI's Suppl. Br. at 4 (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)). While the facts underlying the Court's decision in *Foman* are distinct, the stated principle undermines—rather than supports—AFI's position. Here, CBP was within its discretion to assess antidumping duties on AFI's tenth subject entry within 90 days from the original deemed liquidation. Regardless of the label attached to the action, the outcome pursuant to the alleged liquidation was the functional equivalent of a reliquidation.

further deny as moot the Government’s motion for a protective order as to IMSS and IMSS’s motion to compel. Judgment will be entered accordingly.

Dated: April 9, 2021
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21–40

NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY and NOVEX TRADING (SWISS) SA, Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 19–00172

[Denying Plaintiffs’ motion to alter and amend or reconsider.]

Dated: April 13, 2021

Valerie Ellis, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs Novolipetsk Steel Public Joint Stock Company and NOVEX Trading (Swiss) SA. Also on the briefs was *Daniel L. Porter*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Daniel J. Calhoun* Trial Attorney, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenor Nucor Corporation. Also on the brief were *Cynthia C. Galvez*, *Christopher B. Weld*, and *Jeffrey O. Frank*.

OPINION AND ORDER

Kelly, Judge:

Pursuant to U.S. Court of International Trade (“USCIT”) Rules 52(b), 54(b), 60, or in the alternative, 59(e), Plaintiffs Novolipetsk Steel Public Joint Stock Company (“NLMK”) and NOVEX Trading (Swiss) SA’s (“NOVEX”) (collectively, “Plaintiffs”) move for the court to alter and amend *Novolipetsk Steel Pub. Joint Stock Co. v. United States*, 44 CIT __, 483 F. Supp. 3d 1281 (2020) (“*Novolipetsk*”). *See* Mot. to Alter & Amend Slip Op. 20–170 & Mot. to Stay Judgment, Dec. 30, 2020, ECF No. 58 (“Pls.’ Mot.”).¹ Defendant and Defendant-

¹ Pin citations to Plaintiffs’ motion reference the document’s external pagination, with page one being the proposed order, as the document is not paginated.

Intervenor Nucor Corporation (“Nucor”) oppose. *See* Def.’s Resp. Opp’n [Pls.’ Mot.], Feb. 3, 2021, ECF No. 61 (“Def.’s Resp.”); Def.-Intervenor [Nucor’s] Opp’n [Pls.’ Mot.], Feb. 3, 2021, ECF No. 62 (“Nucor’s Resp.”). For the following reasons, the court denies Plaintiffs’ motion.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion sustaining the U.S. Department of Commerce’s (“Commerce”) final determination in the 2016–2017 administrative review of the antidumping duty (“ADD”) order on certain hot-rolled flat rolled carbon-quality steel products (“HRC”) from the Russian Federation (“Russia”), and only sets forth facts relevant to disposition of this motion. *See Novolipetsk*, 44 CIT at __, 483 F. Supp. 3d at 1284–85; *see also [HRC] from [Russia]*, 84 Fed. Reg. 38,948 (Dep’t Commerce Aug. 8, 2019) (final results and rescission of [ADD] admin. review; 2016–2017) (“*Final Results*”) and accompanying Issues & Decision Memo. for the [Final Results], A-821–809, (Aug. 2, 2019), ECF No. 21–5 (“*Final Decision Memo*”). In *Novolipetsk*, Plaintiffs challenged Commerce’s final determination that NLMK’s single U.S. sale of subject HRC was not bona-fide, as well as Commerce’s resultant decision to rescind the 2016–2017 administrative review, as contrary to law and unsupported by substantial evidence. 44 CIT at __, 483 F. Supp. 3d at 1283–85; *see also* Compl., Sept. 9, 2019, ECF No. 6; Summons, Sept. 9, 2019, ECF No. 1.

On November 30, 2020, the court sustained Commerce’s final determination. *See generally Novolipetsk*, 44 CIT __, 483 F. Supp. 3d 1281; *see also* Judgment, Nov. 30, 2020, ECF No. 52. The court held that it is reasonable for Commerce to interpret the statute as authorizing it to disregard transactions that it determines are not bona fide sales in an administrative review, *Novolipetsk*, 44 CIT at __, 483 F. Supp. 3d at 1286–88, and that Commerce reasonably exercised its discretion to examine the bona fides of NLMK’s sale of subject HRC. *Id.* at __, 483 F. Supp. 3d at 1288–89. Moreover, the court held that Commerce’s determination that NLMK’s entry is not a bona fide sale was supported by substantial evidence. *Id.* at __, 483 F. Supp. 3d at 1289–93. Thus, the court sustained Commerce’s decision to rescind the 2016–2017 administrative review and explained that the 184.56 percent all-others rate continues to apply to NLMK as a function of their failure to make a bona fide sale. *Id.* at __, 483 F. Supp. 3d at 1293–94.

On December 30, 2020, Plaintiffs moved to alter and amend *Novolipetsk* and for a stay of judgment. *See generally* Pls.’ Mot. On January 29, 2021, Plaintiffs filed a notice of appeal of the court’s judgment and order in *Novolipetsk* to the Court of Appeals for the Federal Circuit (“Court of Appeals”). Notice of Appeal, Jan. 29, 2021, ECF No. 60. Defendant and Defendant-Intervenor Nucor replied to Plaintiffs’ motion on February 3, 2021. *See generally* Def.’s Resp.; Nucor’s Resp. On February 4, 2021, the Court of Appeals issued an order deactivating the appeal in light of the pending motion, stating that the appeal would be reactivated upon final disposition of Plaintiffs’ motion. *See* Court of Appeals’ Order, Feb. 4, 2021, ECF No. 64; *see also* Court of Appeals’ Letter, Feb. 4, 2021, ECF No. 65. On March 1, 2021, after being granted a brief extension of time, Plaintiffs filed a reply in support of their motion to alter and amend. *See* [Pls.’] Reply Br. Supp. [Pls.’ Mot.], Mar. 1, 2021, ECF No. 68 (“Pls.’ Reply Br.”); *see also* Order, Feb. 23, 2021, ECF No. 67.

Plaintiffs assert that Counts I and V are relevant to consideration of their motion. *See* Pls.’ Mot. at 3. Count I of Plaintiffs’ complaint states “Commerce’s refusal to complete an administrative review and calculate an accurate assessment and deposit rate for the sale under review is not in accordance with the law.” Compl. at 4–5 (Count I). Count V of Plaintiffs’ complaint states “Commerce’s assessment of NLMK’s entry during the [period of review] at an AFA rate of 184.56 percent is not supported by substantial evidence and not in accordance with law.” *Id.* at 8 (Count V).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)² and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order.

As a threshold matter, Plaintiffs invoke USCIT Rules 54(b), 59(e), and 60, claiming that “fewer than all[] claims” were litigated and that amending the judgment would prevent manifest injustice or correct the court’s “oversight or omission.” *See* Pls.’ Reply Br. at 2. Entertaining Plaintiffs’ construction of their motion when setting forth the applicable standard of review would require the court to accept the premise that *Novolipetsk* did not adjudicate all of Plaintiffs’ claims. The court does not accept that premise. For the reasons set forth below, the court finds that the arguments underlying Plain-

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

tiffs' motion fail to articulate a reason to question the validity of the court's judgment based on any of the cited rules. Since Plaintiffs' arguments lack merit either way, for purposes of discussion, the court considers Plaintiffs' arguments in support of their premise and also examines Plaintiffs' motion as a request for reconsideration under USCIT Rule 59.

A motion for reconsideration rests within the sound discretion of the court. *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). The court will grant such a motion "to address a fundamental or significant flaw in the original proceeding." *USEC, Inc. v. United States*, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336–37 (2001) (citations omitted).

DISCUSSION

Plaintiffs argue that the court's opinion does not address Count I in full "because it does not speak to Commerce's statutory obligation to determine assessment rates." Pls.' Mot. at 5. According to Plaintiffs, "Commerce's bona fides findings do not relieve the agency of its statutory obligation to determine the actual margin of dumping for each entry and to calculate an importer-specific assessment rate," and the court's opinion only "speaks to the rate approximating the exporter's selling practices—the cash deposit rate." *Id.* Moreover, Plaintiffs submit that the court's opinion fails to address Count V of their complaint entirely because it does not speak to "whether imposition of an adverse facts available assessment rate is in accordance with law or . . . whether assessment at a 184.56% rate is supported by substantial evidence." *Id.* at 6. Defendant and Defendant-Intervenor counter that the court's holding that Commerce has authority to find that a U.S. sale is not bona fide, and to subsequently rescind the administrative review where there are no bona fide sales upon which to calculate a dumping margin, fully addresses Count I. *See* Def.'s Resp. at 3–4; Nucor's Resp. at 3–4. With respect to Count V, Defendant and Defendant-Intervenor submit that the court's observation that the 184.56% rate went unchallenged and continues to apply in the absence of a bona-fide U.S. sale addresses Plaintiffs' claim as to whether assessment at a 184.56% all-others rate is reasonable. *See* Def.'s Resp. at 5; Nucor's Resp. at 3–4. Defendant and Defendant-Intervenor add that the court is under no obligation to explicitly address every aspect of an argument raised by a party. *See* Def.'s Resp. at 3; Nucor's Resp. at 4 (citation omitted).

Plaintiffs' invocation of USCIT Rules 54(b), 59(e), and 60 in moving for adjudication of all claims, and seeking to prevent manifest injustice or correct the court's oversight or omission, is a veiled attempt to

re-litigate issues already addressed in *Novolipetsk*. First, *Novolipetsk's* ruling that Commerce lawfully rescinded the review adjudicates Count I, which challenges Commerce's refusal to complete the administrative review and calculate an accurate assessment and deposit rate for the sale under review. *Compare* Compl. at 4–5 (Count I), *with Novolipetsk*, 44 CIT at ___, 483 F. Supp. 3d at 1286–94. Plaintiffs characterize *Novolipetsk* as speaking to the cash deposit rate, as opposed to the assessment rate, *see* Pls.' Mot. at 5, but nowhere does the court purport to limit the scope of its ruling to calculation of either rate. *See generally*, 44 CIT ___, 483 F. Supp. 3d 1281. Rather, *Novolipetsk* speaks to Commerce's ability to rescind a review where there are no bona fide sales upon which to calculate an accurate dumping margin, which, as Plaintiffs themselves appear to acknowledge, *see* Pls. Mot. at 5,³ would serve the basis for determining company-specific assessment and cash deposit rates. *See, e.g., Novolipetsk*, 44 CIT ___, 483 F. Supp. 3d at 1288–89. Second, *Novolipetsk* addresses Count V, which challenges Commerce's assessment of NLMK's entry during the period of review at a rate of 184.56 percent, by ruling that Commerce's rescission was lawful and explaining that Commerce's assessment of NLMK's entry at a rate of 184.56 percent is a function of NLMK's failure to make a bona-fide sale. *See* 44 CIT at ___, 483 F. Supp. 3d at 1293–94. Insofar as Plaintiffs believe that Commerce has an independent statutory obligation to calculate a company-specific assessment rate even in the absence of any bona-fide U.S. sales, that argument is contemplated and debunked by this court's ruling that Commerce had statutory authority to rescind the

³ Plaintiffs argue that Commerce has a statutory obligation to calculate the actual dumping margin for each entry and to calculate an importer-specific assessment rate. *See* Pls.' Mot. at 5 (citation omitted). The court's ruling that Commerce need not rely on sales that it finds are not bona fide to calculate a dumping margin addresses the argument. Plaintiffs state that "[i]f it is the Court's ruling that an importer does not have the ability or legal right to 'take steps to eliminate dumping' independent from the rights of the exporter . . . the Opinion should make that clear." Pls.' Reply Br. at 5 (citing Pls.' Opening Br. Supp. 56.2 Mot. J. Agency R. Confidential Version at 48, Feb. 13, 2020, ECF No. 26–1). To the extent that Plaintiffs are trying to suggest that they asserted such sweeping and independent statutory claims on behalf NOVEX, *see, e.g.,* Pls.' Reply Br. at 2–3 & n.1 (asserting that Commerce has a statutory obligation to calculate an assessment rate applicable to the importer that is separate and apart from its obligation to calculate a cash deposit applicable to the exporter, and noting that NOVEX is a separate legal entity that has separate rights under the statute), that suggestion is plainly unsupported by the filings in this case. Neither Counts I nor V mention NOVEX, and mentions of an importer-specific assessment rate in Plaintiffs' opening brief are made in service of Plaintiffs' argument that Commerce acted unlawfully by rescinding its review of NLMK. *Novolipetsk* squarely answers the question of whether Commerce lawfully rescinded the administrative review of NLMK. The answer is yes. But for the sake of clarifying the matter for Plaintiffs, *see* Pls.' Reply Br. at 5, any arguments asserted by Plaintiffs seeking to vindicate "separate rights" on behalf of NOVEX were perfunctory at best and thus waived. *See id.* at 3 n.1; *see also Home Prods. Int'l, Inc. v. United States*, 36 CIT 665, 673, 837 F. Supp. 2d 1294, 1301 (2012) (citations omitted).

review. Moreover, Plaintiffs are incorrect to argue that an AFA rate was applied to Plaintiffs. As stated in the court's opinion:

Plaintiffs argue that Commerce's decision to rescind the administrative review impermissibly applies AFA to a cooperative respondent. *See* Pls.' Br. at 52–55. Plaintiffs argument fails because Commerce is simply not applying facts available. *See* Final Decision Memo at 18. Commerce uses facts available to address a gap in the record evidence when calculating a dumping margin for an exporter or producer. 19 U.S.C. § 1677e(a). Here, Commerce is rescinding the review, and declining to calculate a new dumping margin for NLMK. *See* Final Decision Memo at 17–18. The consequence is that the 184.56 percent rate continues to apply.

Novolipetsk, 44 CIT at ___, 483 F. Supp. 3d at 1293–94. Contrary to Plaintiffs' contentions, the opportunity to challenge the reasonableness of the all-others rate has passed. *Compare* Pls.' Mot. at 6–9, *with Novolipetsk Steel Pub. Joint Stock Co. v. United States*, 44 CIT ___, 456 F. Supp. 3d 1300 (2020).⁴

Plaintiffs also fail to persuade that the court should grant relief even if their motion is construed as seeking reconsideration. “[A] motion for reconsideration serves as ‘a mechanism to correct a significant flaw in the original judgment’ by directing the court to review material points of law or fact previously overlooked[.]” *RHI Refractories Liaoning Co. v. United States*, 35 CIT 130, 131, 752 F. Supp. 2d 1377, 1380 (2011) (quoting *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 745, 748, 714 F. Supp. 2d 1296, 1301 (2010)). However, “a court should not disturb its prior decision unless it is ‘manifestly erroneous.’” *Marvin Furniture (Shanghai) Co. v. United States*, 37 CIT 65, 66, 899 F. Supp. 2d 1352, 1353 (2013) (citation omitted). Grounds for finding a prior decision to be “manifestly erroneous” include “an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice.” *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006). A motion for reconsideration, however, is not an opportunity for the losing party “to re-litigate the case or present arguments it previously raised.” *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008).

⁴ NLMK states that “[i]n the alternative, the Court has the power to grant relief from its judgement issued in 19–194.” Pls.' Mot. at 9 n.4 (citing *Novolipetsk Steel Pub. Joint Stock Co.*, 44 CIT ___, 456 F. Supp. 3d 1300). If Plaintiffs seek to contest the ruling in *Novolipetsk Steel Pub. Joint Stock Co.*, the proper course of action would have been to file an appeal to the Court of Appeals.

Plaintiffs fail to present a clear factual or legal error that warrants disturbing the finality of the court's judgment. To the extent that Plaintiffs believe that the rationale underlying this court's ruling—i.e., it is reasonable for Commerce to take steps to ensure that it is calculating a dumping margin that approximates an exporter's selling practices—is inapposite with respect to calculation of a company-specific assessment rate, that position is simply a disagreement with the court's reasoning, which is insufficient to warrant reconsideration or amendment. *Compare* Pls.' Mot. at 5–6, with *Novolipetsk*, 44 CIT at __, 483 F. Supp. 3d at 1287.⁵

CONCLUSION

For the foregoing reasons, it is

ORDERED that Plaintiffs' motion to alter, amend or reconsider is denied.

Dated: April 13, 2021

New York, New York

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



Slip Op. 21–41

NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY and NOVEX TRADING (SWISS) SA, Plaintiffs, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC. and NUCOR CORPORATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00031

[Granting Defendant's motion to amend the administrative record, and the index to the administrative record, dismissing Plaintiffs' complaint challenging the U.S. Department of Commerce's final determination in the 2017–2018 administrative review of certain hot-rolled flat-rolled carbon-quality steel products from the Russian Federation, dismissing Plaintiffs' motion for judgment on the agency record and motion for discovery.]

Dated: April 13, 2021

Valerie Ellis, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for plaintiffs Novolipetsk Steel Public Joint Stock Company and NOVEX Trading (Swiss) SA. Also on the briefs were *Kimberly Reynolds* and *Daniel L. Porter*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. Also on the

⁵ Plaintiffs' arguments that Commerce is required to determine accurate assessment rates under 19 U.S.C. §§ 1673f(b), 1677m(e), and 1675, see Pls.' Mot. at 5–6, are addressed by *Novolipetsk's* holding that statute is capacious enough to accommodate Commerce's authority to examine the bona fides of U.S. sales and to rescind a review where there are no bona fide sales upon which to calculate a dumping margin. 44 CIT at __, 483 F. Supp. 3d at 1286–88.

briefs were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *John V. Coghlan*, Deputy Assistant Attorney General for the Federal Programs Branch performing the duties and assignments of Acting Assistant Attorney General, *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Brandon J. Custard* and *Daniel J. Calhoun*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Luke A. Meisner, Schagrin Associates, of Washington, D.C., argued for defendant-intervenor Steel Dynamics, Inc. Also on the briefs were *Roger B. Schagrin*, *Elizabeth J. Drake*, and *Kelsey M. Rule*.

Cynthia C. Galvez, Wiley Rein LLP, of Washington, D.C., argued for defendant-intervenor Nucor Corporation. Also on the briefs were *Alan H. Price* and *Christopher B. Weld*.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on several motions. Pursuant to U.S. Court of International Trade (“USCIT”) Rule 56.2, Plaintiffs Novolipetsk Steel Public Joint Stock Company (“NLMK”) and NOVEX Trading (Swiss) SA’s (“NOVEX”) move for judgment on the agency record challenging the U.S. Department of Commerce’s (“Commerce”) final determination in the 2017–2018 administrative review of the anti-dumping duty (“ADD”) order covering certain hot-rolled flat-rolled carbon-quality steel products (“HRC”) from the Russian Federation (“Russia”). See [NLMK & NOVEX’s 56.2] Mot. J. Agency R. & accompanying Br. Supp. 56.2 Mot. J. Agency R., Aug. 10, 2020, ECF No. 44 (“Pls.’ 56.2 Mot.” and “Pls.’ 56.2 Br.”); see also [HRC] From [Russia], 85 Fed. Reg. 299 (Dep’t Commerce Jan. 3, 2020) (final results of [ADD] admin. review; 2017–2018) (“*Final Results*”); Compl. ¶ 1, Mar. 4, 2020, ECF No. 15. Plaintiffs also move to compel completion of the administrative record, move to supplement the record, and move for permission to conduct discovery for purposes of completing and supplementing the record. See [Pls.’] Mot. to Compel Completion R. & Mot. Permission to Conduct Discovery at 1, Oct. 16, 2020, ECF No. 62 (“Pls.’ Mot. to Compel”).

Defendant, as well as Defendant-Intervenors Steel Dynamic, Inc. (“SDI”) and Nucor Corporation (“Nucor”) (collectively, “Defendant-Intervenors”), move to dismiss Plaintiffs’ complaint. See Def.’s Mot. Dismiss & Resp. to [Pls.’ 56.2 Mot.], Oct. 16, 2020, ECF No. 64 (“Def.’s Mot. & 56.2 Resp. Br.”); [SDI’s] Mot. Dismiss Pls.’ Compl. & accompanying Memo. Supp. Mot. Dismiss, May 18, 2020, ECF No. 32 (“SDI’s Mot. Dismiss & Supp. Br.”); [Nucor’s] Mot. Dismiss, May 22, 2020, ECF No. 33 (“Nucor’s Mot. Dismiss”); Memo. Supp. [Nucor’s] Mot. Dismiss Pls.’ Compl., May 22, 2020, ECF No. 33–2 (“Nucor’s Mot. Dismiss Br.”).

Defendant and Defendant-Intervenor contend that the court should dismiss certain counts of Plaintiffs' complaint for lack of subject matter jurisdiction. *See* Def.'s Mot. & 56.2 Resp. Br. at 8–13; SDI's Mot. Dismiss & Supp. Br. at 11–13; Nucor's Mot. Dismiss Br. at 7–12, 14–16. If any of Plaintiffs' claims fall within this court's jurisdiction, Defendant and Defendant-Intervenors argue that Plaintiffs' complaint should be dismissed for failure to exhaust administrative remedies and for failure to establish a case or controversy. *See* Def.'s Mot. & 56.2 Resp. Br. at 13–18, 28; SDI's Mot. Dismiss & Supp. Br. at 7–11; Nucor's Mot. Dismiss Br. at 16–22; *see also* Reply Supp. [SDI's Mot. Dismiss & Supp. Br.] at 2–9, July 23, 2020, ECF No. 40 (“SDI's Reply Supp. Mot. Dismiss”). Moreover, Defendant opposes Plaintiffs' motion to compel, and moves for leave to amend the index of the administrative record and correct the record to include March 29, 2019 liquidation instructions from Commerce to U.S. Customs and Border Protection (“CBP” or “Customs”) pertaining to NLMK's products. *See* Def.'s Mot. Leave to Amend Index of Admin. R., Nov. 6, 2020, ECF No. 65 (“Def.'s Mot. Leave to Amend”). For the following reasons, the court grants Defendant's motion for leave to amend the administrative record. The court also grants Defendant's and Defendant-Intervenors' motions to dismiss Plaintiffs' complaint. As such, the court dismisses Plaintiffs' 56.2 motion for judgment on the agency record, and dismisses Plaintiffs' motion to compel, supplement, and conduct discovery as moot.

BACKGROUND

On March 11, 2019, in response to requests from interested parties, Commerce initiated an administrative review of the ADD order covering certain HRC products from Russia, the period of review (“POR”) spanning December 1, 2017 through November 30, 2018. *See* Compl. ¶¶ 5–6; *see also* *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 9,297, 9,308 (Dep't Commerce Mar. 14, 2019) (“*Initiation Notice*”). Commerce selected NLMK, Severstal PAO, and Severstal Export GmbH to participate in the review as respondents. *See* *Initiation Notice*, 84 Fed. Reg. at 9,300.

On April 9, 2019, NLMK submitted a letter to Commerce certifying that it had no shipments of subject merchandise during the POR and requesting that Commerce rescind its administrative review of NLMK in accordance with 19 C.F.R. § 351.213(d)(3) (2019).¹ *See* Compl. ¶ 9; *see also* Memo. Re: Certification of No Shipments for

¹ Further citations to Title 19 of the Code of Federal Regulations are to the 2019 edition.

[NLMK], PD 18, bar code 3816827–01 (Apr. 9, 2019).² Commerce issued a “no shipment inquiry” to CBP and confirmed that none of the respondents had shipments of subject HRC during the POR. See Compl. ¶¶ 10–11; see also Memo. Re: [CBP] No-Shipment Inquiry Instructions, PD 25, bar code 3858656–01 (July 7, 2019). On October 7, 2019, Commerce published the results of its preliminary determination. Compl. ¶ 12; see also [HRC] from [Russia], 84 Fed. Reg. 53,408 (Dep’t Commerce Oct. 7, 2019) (prelim. no shipments determination of [ADD] admin. review; 2017–2018) (“*Prelim. Results*”). Although Commerce “preliminary determine[d] that NLMK, Severstal PAO, and Severstal Export GmbH had no shipments of subject merchandise during the POR[.]” Commerce, citing agency practice,³ found that it would not be appropriate to rescind the administrative review, and instead decided “to complete the review and issue appropriate instructions to CBP based on the final results[.]” See *Prelim. Results*, 84 Fed. Reg. at 53,411;⁴ see also *Antidumping & Countervailing Duty Proceedings*, 68 Fed. Reg. 23,954, 23,954 (Dep’t Commerce May 6,

² On April 10, 2020, Defendant submitted indices to the public and confidential administrative records underlying Commerce’s final determination. See ECF No. 27–1. Defendant later filed a corrected proposed index to the public record. For purposes of disposing of the pending motions, the court refers to the proposed index, located on the docket at ECF No. 65–3. All references to administrative record documents in this opinion are to the numbers Commerce assigned to the documents in the proposed index.

³ Commerce cites various administrative proceedings as well as its reseller policy, which states that:

[A]utomatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which does not have its own rate if no administrative review has been requested, either of the reseller or of any producer of merchandise the reseller exported to the United States. If the Department conducts a review of a producer of the reseller’s merchandise where entries of the merchandise were suspended at the producer’s rate, automatic liquidation will not apply to the reseller’s sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States, the reseller’s merchandise will be liquidated at the producer’s assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller’s merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all-others rate if there was no company-specific review of the reseller for that review period.

Reseller Policy, 68 Fed. Reg. at 23,954; see also *Prelim. Results*, 84 Fed. Reg. at 53,411 & nn. 10, 16 (citations omitted).

⁴ Regarding assessment rates, the *Prelim. Results* state:

If we continue to find that NLMK, Severstal PAO, and Severstal Export GmbH had no shipments of subject merchandise in the final results, we will instruct CBP to liquidate any existing entries of merchandise produced by NLMK, Severstal PAO, and Severstal Export GmbH, but exported by other parties, at the rate for the intermediate reseller, if available, or at the all-others rate.

Prelim. Results, 84 Fed. Reg. at 53,411.

2003) (notice of policy concerning assessment of antidumping duties) (“*Reseller Policy*”). On January 3, 2020, Commerce published the *Final Results*, which stated that “[t]he cash deposit rates for NLMK, Severstal PAO, and Severstal Export GmbH will remain unchanged from the rate assigned to them in the most recently completed review of those companies.” Compl. ¶ 14 (quoting *Final Results*, 85 Fed. Reg. at 301).⁵

Plaintiffs commenced the present action under 28 U.S.C. § 1581(c) (2018),⁶ seeking review of Commerce’s final determination pursuant to section 516A(a)(2)(A)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(I) and § 1516a(2)(B)(iii) (2018).⁷ See Summons, Feb. 3, 2020, ECF No. 1; Compl.;⁸ see also *Final Results*, 85 Fed. Reg. 299. In Counts I and II of the complaint, Plaintiffs allege that Commerce’s decision to complete the administrative review of NLMK despite determining that NLMK had no shipments for the POR, as well as CBP’s assignment to NLMK of a company-specific case number and, purportedly, the resultant assignment to NLMK of a company-specific rate, are unsupported by the agency record and otherwise unlawful. See Compl. at 5–6 (Counts I–II). Count III of Plaintiffs’ complaint alleges that Commerce’s application of a rate based on facts available with an adverse inference (“adverse facts available” or “AFA”) is unsupported by the agency record and otherwise unlawful.⁹ See *id.* at 6 (Count III). Counts IV

⁵ Regarding assessment rates, the *Final Results* state:

Further, because we continue to find in these final results that NLMK, Severstal PAO, and Severstal Export GmbH had no shipments of subject merchandise during the POR, any suspended entries that entered under NLMK, Severstal PAO, and Severstal Export GmbH case numbers (i.e., at that company’s rate) will be liquidated at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Final Results, 85 Fed. Reg. at 301.

⁶ Further citations Title 28 of the U.S. Code are to the 2018 edition.

⁷ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

⁸ Before filing the complaint, Plaintiffs moved for expedited document production under USCIT Rule 73.2(a), indicating that their “ability to seek judicial review is frustrated by the incompleteness of the administrative record.” See Pls.’ Mot. to Apply Rule 73.2(a) to Def.’s Produc. of Docs. & Mot. to Expedite Rule 73.2 Deadline at 3, Feb. 20, 2020, ECF No. 9. The court denied the motion, observing the “motion reveal[ed] Plaintiffs possess[ed] sufficient information to construct a complaint[.]” and citing the availability of other procedural paths for Plaintiffs to pursue that would not require the court to disrupt the usual course of litigation. See Memo. & Order at 2, Feb. 27, 2020, ECF No. 14.

⁹ In antidumping proceedings, Commerce estimates the “weighted average dumping margin for each exporter and producer individually investigated” and the “all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. §§ 1673b(d)(1)(A), 1673d(c)(1)(B)(i); see also 19 C.F.R. §§ 351.205, 351.210. The all-others rate is the “amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de

through V of Plaintiffs' complaint contests Commerce's application of its reseller policy in this administrative review as unsupported by the agency record and otherwise unlawful, and avers that the application of the reseller policy when reviewing a company subject to an all-others rate is unreasonable and inconsistent with the requirements of the statute. *See id.* at 6–7 (Count IV–V). Count VI of the complaint avers that Commerce's reseller policy “unlawfully assigns combination rates in market economy proceedings and frustrate[s] the remedial nature of the statute.” *See id.* at 7 (Count VI).

On May 18 and May 22, 2020, respectively, Defendant-Intervenors SDI and Nucor filed motions to dismiss the complaint. *See generally* SDI's Mot. Dismiss & Supp. Br.; Nucor's Mot. Dismiss. On July 2 and July 7, 2020, Plaintiffs filed separate responses to each motion. *See* Pls.' Resp. [SDI's] Mot. Dismiss, July 2, 2020, ECF No. 38 (“Pls.' Resp. to SDI's Mot. Dismiss”); Pls.' Resp. Opp'n [Nucor's] Mot. Dismiss Pls.' Compl., July 7, 2020, ECF No. 39 (“Pls.' Resp. to Nucor's Mot. Dismiss”). On July 23 and July 28, 2020, respectively, SDI and Nucor filed replies in support of their motions to dismiss. *See* SDI's Reply

minimis margins, and any margins determined entirely under section 1677e of this title” (i.e., based on facts available). 19 U.S.C. § 1673d(c)(5); *see also id.* at § 1677e.

In proceedings involving a nonmarket economy, Commerce presumes exporters and producers are under foreign government control with respect to export activities and will assign a single “country-wide” rate unless a respondent demonstrates it qualifies for a separate rate. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (“*Yangzhou*”) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)); *see also* 19 C.F.R. § 351.107(d) (1999).

In its initial ADD investigation of HRC from Russia, when Russia was considered a nonmarket economy, Commerce selected Novolipetsk Iron & Steel Corporation (“NISCO”) as a mandatory respondent. *See [HRC] from Brazil, Japan, and [Russia]*, 63 Fed. Reg. 56,607 (Dep't Commerce Oct. 22, 1998) (initiation of [ADD] investigations); *[HRC] from [Russia]*, 64 Fed. Reg. 9,312, 9,314 (Dep't Commerce Feb. 25, 1999) (notice of prelim. determination of sales at less than fair value). However, NISCO subsequently withdrew from participation in the investigation. *See [HRC] from [Russia]*, 64 Fed. Reg. 38,626, 38,628 (Dep't Commerce July 19, 1999) (notice of final determination of sales at less than fair value). Commerce used total facts available with an adverse inference to derive the Russia-wide rate because certain respondents did not respond to Commerce's request for information, and because Commerce could not verify, *inter alia*, NISCO's questionnaire response due to its withdrawal. *See id.*, 64 Fed. Reg. at 38,630. After granting Russia market economy status, Commerce set the cash deposit rate equal to margins calculated in the final determination of its initial investigation, using the 184.56 percent AFA-based Russia-wide rate as the all-others rate. *See id.*, 64 Fed. Reg. at 38,641; *see also Termination of the Suspension Agreement on [HRC] from [Russia], Rescission of 2013–2014 Administrative Review, and Issuance of [ADD] Order*, 79 Fed. Reg. 77,455, 77,456 (Dep't Commerce Dec. 24, 2014).

Parties and Commerce sometimes use the shorthand “AFA” or “adverse facts available” to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *See* 19 U.S.C. § 1677e(a)–(b).

Supp. Mot. Dismiss; [Nucor's] Reply Br. Supp. [Nucor's Mot. Dismiss], July 28, 2020, ECF No. 43.

On August 10, 2020, Plaintiffs moved for judgment on the agency record. *See generally* Pls.' 56.2 Mot. On September 2, 2020, the court submitted questions to the parties seeking clarification of issues related to the Court's jurisdiction and Commerce's completion of the administrative review. Ct.'s Letter, Sept. 2, 2020, ECF No. 45 ("Letter I"). The parties filed their responses to the court's letter on September 30, 2020,¹⁰ and replies on October 13, 2020. *See* [SDI's] Resp. to [Letter I], Sept. 30, 2020, ECF No. 49 ("SDI's Resp. to Letter I"); Def.'s Resp. to [Letter I], Sept. 30, 2020, ECF No. 50 ("Def.'s Resp. to Letter I"); [Nucor's] Resp. to [Letter I], Sept. 30, 2020, ECF No. 51 ("Nucor's Resp. to Letter I"); Pls.' Resp. to [Letter I], Sept. 30, 2020, ECF No. 52; [SDI's] Reply Re: [Letter I], Oct. 13, 2020, ECF No. 58 ("SDI's Reply Re: Letter I"); [Def.'s] Reply Re: [Letter I], Oct. 13, 2020, ECF No. 59; [Nucor's] Reply Re: [Letter I], Oct. 13, 2020, ECF No. 60 ("Nucor's Reply Re: Letter I"); Pls.' Reply Re: [Letter I], Oct. 13, 2020, ECF No. 61.

On October 16, 2020, Plaintiffs moved for permission to conduct discovery and for a court order compelling completion and supplementation of the administrative record. *See generally* Pls.' Mot. to Compel. Shortly thereafter, Defendant-Intervenors jointly responded to Plaintiffs' 56.2 motion for judgment on the agency record. *See* Def.-Intervenors' Joint Resp. Br. Opp'n [Pls.' 56.2 Mot.], Oct. 16, 2020, ECF No. 63 ("Def-Intervenors' Joint 56.2 Resp. Br."). Defendant also filed its response, and, in so doing, moved to dismiss Plaintiffs' complaint. *See generally* Def.'s Mot. & 56.2 Resp. Br. On November 23, 2020, Plaintiffs submitted a reply in support of their 56.2 motion and response to Defendant's motion to dismiss. Pls.' Reply to Def.'s Mot. Dismiss & Resp. [Supp.] [Pls.' 56.2 Mot.], Nov. 23, 2020, ECF No. 70 ("Pls.' 56.2 Reply & Resp. Def.'s Mot. Dismiss").

On December 18, 2020, the court held oral argument. *See* Oral Arg., Dec. 18, 2020, ECF No. 75 ("Oral Arg."). During oral argument, it became apparent that the parties disagreed as to whether Plaintiffs

¹⁰ In the interim, Defendant-Intervenors moved to stay deadlines pending resolution of their motions to dismiss, as well as for a twenty-one (21) day extension of current deadlines for briefing the merits of this action. *See generally* *Novolipetsk Steel Public Joint Stock Co. v. United States*, 44 CIT __, 474 F. Supp. 3d 1354 (2020). The court dismissed the motion to stay as untimely because, despite having ample opportunity to move for a stay, Defendant-Intervenors failed to do so until after Plaintiffs prepared and submitted their motion for judgment on the agency record and responses to the motions to dismiss. *See id.*, 44 CIT at __, 474 F. Supp. 3d at 1357–59. However, to accommodate the parties, the court extended the deadlines set forth in the briefing schedule by seven (7) days. *Id.*, 44 CIT at __, 474 F. Supp. 3d at 1358–59.

had been assigned a company-specific rate as a result of Commerce's decision to apply its reseller policy and complete the administrative review. *See, e.g.*, Oral Arg. at 00:16:00–00:19:10, 00:26:00–00:30:00; *but see* Compl. ¶ 19 (“The notice of Final Results and corresponding customs instructions issued in connection with this administrative review assign a company-specific case number to NLMK indicating the assignment of a corresponding company-specific rate to NLMK.”). Thus, the court requested additional submissions, seeking clarification regarding Commerce's application of the reseller policy to the underlying administrative proceeding, and enquiring whether the case was properly before the court in light of any such clarifications. *See* Oral Arg. at 02:00:25–02:02:19; *see also* Ct.'s Letter, Jan. 4, 2021, ECF No. 76 (“Letter II”). By January 26, 2021, the court received all submissions related to questions set out in its letter to the parties. *See* Def.'s Resp. to [Letter II], Jan. 19, 2021, ECF No. 79 (“Def.'s Resp. to Letter II”); Def.-Intervenors' Joint Resp. to [Letter II], Jan. 19, 2021, ECF No. 80 (“Def. Intervenors' Joint Resp. to Letter II”); Pls.' Resp. to [Letter II], Jan. 19, 2021, ECF No. 81 (“Pls.' Resp. to Letter II”);¹¹ Def.'s Reply to [Pls.' Resp. to Letter II], Jan. 26, 2021, ECF No. 83 (“Def.'s Reply Re: Letter II”).

JURISDICTION AND STANDARD OF REVIEW

The asserted basis for jurisdiction is 19 U.S.C. § 1516a(a)(2)(A)(I) and § 1516a(2)(B)(iii), which, under 28 U.S.C. § 1581(c), grant the court authority to review actions contesting a final determination in an administrative review. The court shall hold unlawful any determination found to be “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i). “The party invoking the [court's] jurisdiction bears the burden of establishing it. However, [the court] must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant.” *Juancheng Kangtai Chem. Co. v. United States*, 932 F.3d 1321, 1326 (Fed. Cir. 2019) (quoting *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016)). “In ascertaining whether jurisdiction is proper, [the court] look[s] to ‘the true nature of the action.’” *Id.* (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)).

¹¹ Pin citations to Plaintiffs' response to Letter II reference the document's external pagination, with the first page being the caption and title to Plaintiffs' response.

An agency enjoys a presumption of regularity as to the record it prepares.¹² See, e.g., *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 55–57 (D.D.C. 2003); *Pacific Shores Subd. v. U.S. Army Corps of Eng.*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (“*Pacific Shores*”); see also *Giorgio Foods, Inc. v. United States*, 35 CIT 297, 299–301, 755 F. Supp. 2d 1342, 1345–46 (2011) (citations omitted) (“In an administrative review case, it is rare that a federal court will consider information outside of the record submitted.”). However, a court may order completion or supplementation of the record in light of clear evidence that the record was not properly designated or the identification of reasonable grounds that documents considered by the agency were not included in the record. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); see also, e.g., *Pacific Shores*, 448 F. Supp. 2d at 5–7.

DISCUSSION

I. Leave to Amend the Index to the Administrative Record

Defendant moves for leave to amend the index to the administrative record to include previously omitted “liquidation instructions of [NLMK’s] products issued to [CBP] on March 29, 2019[.]”¹³ Def.’s Mot. Leave to Amend at 1–2; see also March 29, 2019 Liquidation Instructions to CBP, PD 51, bar code 4048144–01 (Mar. 29, 2019) (“March 2019 Liquidation Instructions”). Plaintiffs oppose, urging that the court treat Defendant’s motion as a responsive admission with respect to Plaintiffs’ motion to compel completion and supplementation of the record, and requesting the court otherwise deny Defendant’s motion as a prejudicial and unsupported attempt to impair Plaintiffs’ right to conduct discovery. See Pls.’ Resp. [Def.’s Mot. Leave To Amend] & Reply to Def.’s Opp’n [Pls.’ Mot. to Compel] at 3–13, Nov. 16, 2020, ECF No. 69 (“Pls.’ Resp. to Mot. for Leave &

¹² Pursuant to 19 U.S.C. § 1516a(b)(2)(A), unless otherwise stipulated by the parties, the record for review shall consist of

- (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by [19 U.S.C. §1677f(a)(3)]; and
- (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

¹³ Defendant moves to amend the index to the public record, but because the index before the court reflects the documents before Commerce during the administrative review, amending the index is effectively the same as correcting the record. As such, the court considers Defendant’s motion as a request to amend the index and to correct the record.

Reply”); *see also* Pls.’ Mot. to Compel. For the following reasons, the court grants Defendant’s motion for leave to amend the administrative index and correct the administrative record.

Although there are legitimate concerns regarding Defendant’s certification of the index to the administrative record, allowing leave to amend the index will not prejudice Plaintiffs. Under USCIT Rule 7(b)(1)(B), a request for a court order must be made by motion that, *inter alia*, states “with particularity the grounds for seeking the order[.]” As Plaintiffs point out, Defendant’s initial explanation for failing to include the March 2019 Liquidation Instructions is lacking.¹⁴ Def.’s Mot. Leave to Amend at 2; *but see* Pls.’ Resp. to Mot. for Leave & Reply at 7–8. However, Defendant later clarified during oral argument that the oversight was caused by counsel’s own error, explaining that the omission resulted from a lapse in communication between Defendant and Commerce in the midst of counsel’s busy trial schedule. Oral Arg. at 00:09:02–00:09:42.

Plaintiffs assert that Defendant mischaracterized the omitted instructions as liquidation instructions typically included at the end of the review, as opposed to automatic liquidation instructions included at the beginning. *See* Pls.’ Resp. to Mot. for Leave & Reply at 8. However, the court concludes that no prejudice results from any such misstatement by Defendant because Plaintiffs have not established the significance of the March 2019 Liquidation Instructions. Namely, Plaintiffs state

Plaintiffs ability to defend their interests was prejudiced by Commerce’s decision to withhold the March 29, 2019 instructions from the record. As Plaintiffs have said time and again, the information revealed in the March 29, 2019 CBP instructions is material to Plaintiffs complaint and indicates that other information has been omitted from the agency record. In this litigation, Plaintiffs have been prejudiced by Defendant’s failure to acknowledge the incompleteness of the administrative record in

¹⁴ Defendant stated that the liquidation instructions were “inadvertently omitted from the filed public record index.” Def.’s Mot. Leave to Amend at 2. According to Defendant, the liquidation instructions “are typically the last record document and, here, they were not caught-up to the record.” *Id.* Apparently as a result, Defendant claims to have “not notice[d] the error when filing the record index.” *See id.* Plaintiffs object because Defendant had been on notice for several months about the existence of the omitted instructions by the time Defendant moved for leave, and yet the motion arrives only after Plaintiffs moved for discovery. *See* Pls.’ Resp. to Mot. for Leave & Reply at 6–7. Moreover, Plaintiffs allege Defendant predicates its motion on factual misrepresentations. *See id.* at 7–9. According to Plaintiffs, the omitted instructions are not “liquidation instructions of [NLMK’s] products . . . but are instead the automatic liquidation instructions pertaining to those companies for which no review was initiated.” *Id.* at 8. Plaintiffs assert that these automatic liquidation instructions “are not typically ‘the last record document’ but rather, are one of the first.” *Id.* Thus, Plaintiffs urge the court to deny Defendant’s motion for “fail[ure] to state with particularity the grounds for seeking the order[.]” *Id.* at 7 (citing USCIT Rule 7(b)(1)(B)).

April when Defendant filed the record with this Court. A timely admission of incompleteness and the inclusion of this document on the record would have affected the arguments and issues addressed in the briefs. Had this document been on the record prior to briefing, Plaintiffs could have required Defendant to address its substantive content, rather than devoting resources to proving its existence. A timely admission would have likely altered the scope and content of the two dispositive motions filed by Defendant-Intervenors, both of which argue that the record is complete and that Plaintiffs had notice of Commerce's actions.

Pls.' Resp. to Mot. for Leave & Reply at 6. Notwithstanding expenditure of additional resources, Plaintiffs do not clarify how the "substantive content" of the omitted March 2019 Liquidation Instructions relates to Commerce's final determination. The March 2019 Liquidation Instructions do not contain information Commerce used to make a decision; rather, they reflect a decision that Commerce made. Moreover, despite Plaintiffs' insistence that the appearance of a company-specific case number in the March 2019 Liquidation Instructions would have given NLMK notice as to Commerce's intent to complete the administrative review (and purportedly assign a company-specific rate to NLMK), that information can be found in other record documents. *See* Oral Arg. at 00:50:38–00:52:39; *but see, e.g.*, Memo. Re: Draft Customs Instructions, PD 34, bar code 3898208–01 (Oct. 9, 2019) ("October 9th CBP Instructions"); Memo. Re: No Shipment Inquiry, PD 24, bar code 3856318–01 (July 1, 2019) ("July 1st No Shipment Inquiry").¹⁵ Consequently, Plaintiffs identify no harm suffered as a result of Defendant's omission of the March 2019 Liquidation Instructions from the administrative index or the record before Commerce during the administrative proceeding. Defendant and

¹⁵ Defendant explained during oral argument that the omitted document is a standard instruction directing automatic liquidation of entries except for any entries relating to firms listed in paragraph three (i.e., NLMK and others), which would not be new information to Plaintiffs given that the *Preliminary Results* announced that a review of NLMK had been requested, and that such instructions directing CBP not to liquidate entries for entities subject to an administrative review are standard. *See* Oral Arg. at 00:09:42–00:10:47; *see also* March 2019 Liquidation Instructions, ¶¶ 2–3, at 3. Plaintiffs submit that the company-specific case number in the March 2019 Liquidation Instructions would have alerted them to the fact that NLMK was receiving a company-specific rate, enabling them to challenge Commerce's refusal to rescind the administrative review with respect to NLMK. *See* Oral Arg. at 00:50:38–00:53:00 (arguing that the March 2019 Liquidation Instructions is the only document that makes clear NLMK was assigned a company-specific case number and, purportedly as a result, a company-specific rate). However, as the court will further explain, Plaintiffs' submission fails because: NLMK did not receive a company-specific rate in this proceeding; Commerce indicated its intention to complete the review in its preliminary determination; and, contrary to Plaintiffs' position, subsequent liquidation instructions to CBP included in the record do contain information indicating that NLMK was assigned a company-specific case number.

Commerce's omission is the kind of harmless procedural error that this Court has held should not constitute the basis for setting aside agency action. *Cf., e.g., AK Steel Corp. v. United States*, 21 CIT 1265, 1273, 988 F. Supp. 594, 602–03 (1997).

Plaintiffs allege that Defendant's motion is a deliberate attempt to mislead the court in order to restore an appearance of regularity and obstruct disposition of Plaintiffs' motion to compel completion and supplementation of the record. Pls.' Resp. to Mot. for Leave & Reply at 4–6, 9. Specifically, Plaintiffs maintain that

Defendant has knowingly mischaracterized this document to make it appear as though adding it to the record after publication of the final determination is consistent with ordinary administrative practice. It is a deliberate attempt to create the appearance of regularity where none exists. The Court should not accept or validate Defendant's false representations by granting the Motion for Leave.

Id. at 9. However, in light of Defendant's clarification during oral argument, Plaintiffs' position is supported only by speculation. And even if Plaintiffs correctly suppose that Defendant or Commerce deliberately waited to submit this document, a position for which Plaintiffs offer no support, Plaintiffs still fail to identify how they have been harmed in a way that would support the court denying Defendant's motion for leave to amend the administrative record. Prejudice means more than pointing to a mistake or even a deliberate act by the other side; prejudice results when, due to an act or omission by the other side, a litigant has been deprived of an opportunity which it cannot now be restored. *Cf., e.g., Vietnam Ass'n of Seafood Exporters & Producers v. United States*, 38 CIT __, __, Slip Op. 14–75 at 8 (June 26, 2014) (“The court finds that granting the motion will not prejudice any of the parties because no party will forgo any procedures to which it normally would be entitled.”); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 39 CIT __, __, 118 F. Supp. 3d 1368, 1373 (2015). Plaintiffs have not been foreclosed from advancing their submissions that the administrative record was incomplete and that they did not have notice of Commerce's actions during the underlying proceeding; the court's decision to grant Defendant's motion for leave to amend the index to the public record now before the court says nothing about the veracity of Plaintiffs' allegations regarding Commerce's actions during the course of the underlying administrative review. Even if Plaintiffs were successful in arguing that inclusion of the March 2019 Liquidation Instructions was necessary for Commerce to support its determination, and that absence of the instruc-

tions deprived Plaintiffs of the ability to make an argument or otherwise detracted from the reasonableness of Commerce's determination, the proper remedy would be a remand so that Plaintiffs could argue those points before Commerce. *See JSW Steel, Inc. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1320, 1327–34 (2020); *see also Guy v. Glickman*, 945 F. Supp. 324, 329 (D.D.C. 1996) (citations omitted). Accordingly, the court grants Defendant's motion for leave to amend the index to the administrative record and correct the record.

II. Standing to Assert Claims Challenging the Completion of Review & Application of Reseller Policy

Defendant and Defendant-Intervenor argue that Plaintiffs' complaint should be dismissed because Plaintiffs do not present a case or controversy for this court to adjudicate. *See* Def.'s Mot. & 56.2 Resp. Br. at 7, 28 (“[G]iven that [P]laintiffs certified that they had no entries during the period of review and do not contend that they are a reseller, it is difficult to discern whether they have an injury-in-fact.”); Def-Intervenors' Joint 56.2 Resp. Br. at 7 (citing, *inter alia*, SDI's Resp. to Letter I at 4–5; Nucor's Resp. to Letter I at 2–6, 8–18; SDI's Reply Re: Letter I; Nucor's Reply Re: Letter I at 1–6)) (“[B]ecause there is no ‘case or controversy’ at issue in this action, Plaintiffs' complaint should be dismissed for being moot.”); *see also* Def.'s Resp. to Letter II at 9–10; Def.-Intervenors' Joint Resp. to Letter II at 7–9. Namely, Defendant and Defendant-Intervenor submit that the gravamen of Plaintiffs' complaint arises out of the mistaken impression that Commerce's refusal to rescind the underlying review resulted in NLMK receiving a company-specific rate. *See, e.g.*, Def-Intervenors' Joint 56.2 Resp. Br. at 7; Nucor's Mot. Dismiss Br. at 19–22 (“. . . Commerce's completion of its review as to NLMK had the same effect on the company as a rescission of the review on the company[.]”); SDI's Reply Supp. Mot. Dismiss at 2–5 (arguing the entire action should be dismissed because it is based on a fundamental misunderstanding of Commerce's final determination); Def.-Intervenors' Joint Resp. to Letter II at 7–9; Def.'s Resp. to Letter II at 4–10 (clarifying that NLMK did not receive a company-specific rate).¹⁶ Contrary to

¹⁶ Although Defendant's brief could be construed to implicitly acknowledge that NLMK received a company-specific rate, *see* Def.'s Mot. & 56.2 Resp. Br. at 28 (“[P]laintiffs have made no assertion or showing that they have suffered any injury as a result of CBP assigning a company-specific rate.”), Defendant has made clear in its filings that NLMK did not receive a company-specific rate. *See, e.g.*, Def.'s Resp. to Letter II at 9–10 (citations omitted) (“The previously determined rate applicable to NMLK is the all-others rate published in the final determination as reflected in the order . . . Put simply, the assessed rate

Plaintiffs' averments, Defendant and Defendant-Intervenors insist that "[i]f NLMK received an individual rate in a prior review, it would continue to retain the individual rate upon the publication of the notice of final results for this review." Def.'s Resp. to Letter I at 8 (citing, *inter alia*, *Parkdale Int'l, Ltd. v. United States*, 31 CIT 1229, 508 F. Supp. 2d 1338 (2007) ("*Parkdale II*")); *see also, e.g.*, SDI's Resp. to Letter I at 10 (describing NLMK's contention that the purported NLMK specific rate assigned in this review would replace any individual rate assigned in the 2016–2017 review as "categorically false."); Nucor's Resp. to Letter I at 14 (" . . . Nucor concurs with SDI that if NLMK had received an individual rate in a prior review, it would retain that rate despite the completion of this review."). Plaintiffs counter that standing "cannot be evaluated in a vacuum" and maintain that "[w]hen Congress has extended standing by statute," the question of whether NLMK has standing to challenge Commerce's application of the reseller policy "is evaluated under the zone of interests test[.]" Pls.' Resp. to Letter II at 7–8 (citing *Allen v. Wright*, 468 U.S. 737 (1984); *Bennett v. Spear*, 520 U.S. 154 (1997)). For the following reasons, Counts I and II of Plaintiffs' complaint, as well as Counts IV through VI,¹⁷ are dismissed for lack of standing.

The Constitution constrains the federal courts' jurisdiction to cases which involve "actual cases or controversies," and standing constitutes part of this limitation. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37–38 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *see also* U.S. CONST. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). To establish standing, a plaintiff must satisfy three elements. First, it must have suffered an "injury in fact," that is, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Id.* at 560 (citations omitted). Second, a causal connection must exist between the injury

would not have changed – NLMK would be assessed either way at the all other's rate."); *see also* Def.'s Resp. to Letter I at 8 (citation omitted) ("If NLMK received an individual rate in a prior review, it would continue to retain th[at] individual rate upon the publication of the notice of final results for this review.").

¹⁷ Neither Plaintiffs' complaint nor their subsequent filings makes clear whether Counts IV through VI are facial or as applied challenges. The court dismisses Counts IV through VI of Plaintiffs' complaint for lack of standing to the extent that they present an "as-applied" challenge to Commerce's reseller policy. If Counts IV through VI present a challenge to Commerce's liquidation instructions, the court also dismisses for lack of standing.

and the conduct complained of. *Id.* Third, the plaintiff must show a likelihood that the injury can be redressed by a favorable court decision. *Id.* at 561.

Plaintiffs lack standing with respect to Counts I and II of the complaint, as well as Counts IV through VI to the extent that these latter claims present an “as applied” challenge to Commerce’s reseller policy, because, contrary to Plaintiffs’ claims, Commerce did not assign NLMK a company-specific rate. *See, e.g.*, Pls.’ 56.2 Br. at 9 (“Commerce’s issuance of Final Results, manufacturer-specific assessment rate, and company-specific deposit rate to NLMK not based on a review of subject entries during the POR and the determinations reached is unlawful.”). Commerce’s decision to complete the administrative review pursuant to its reseller policy and to publish its final determination does not change NLMK’s assessment rate and cash deposit requirements.¹⁸ As Defendant-Intervenors point out, the *Final Results* state that the “[t]he cash deposit rate [] for NLMK . . . will remain unchanged from the rate assigned to [it] in the most recently completed review[.]” *See* 85 Fed. Reg. at 301; *but see* Compl. ¶¶ 19–20, 27. Underlying Plaintiffs’ objection to the *Final Results* appears to be Plaintiffs’ belief that CBP’s assignment of a company-specific case number necessarily reflects receipt of a company-specific rate. *See* Pls.’ Resp. to SDI’s Mot. Dismiss at 14–16. Responding to the court’s request for further clarification on the matter, Plaintiffs point to the following statement contained within Commerce’s Antidumping Manual:

Companies for which a cash deposit rate has been assigned will have their own profile in the module (at the nine-digit level from the -001 suffix and above), which identifies their respective applicable rate and a date that indicates when that rate became effective. Absent the assignment of a company-specific rate, merchandise must enter under a general profile in the module (usually designated with the -000 suffix).

Pls.’ Resp. to Letter II at 4 (citing Antidumping Manual, U.S. Dep’t of Commerce, Int’l Trade Admin. (“AD Manual”) (2015), available at <https://web.archive.org/web/20180417165209/https://enforcement.trade.gov/admanual/index.html> (last visited Apr. 8, 2021)). However,

¹⁸ Plaintiffs’ objection to the *Reseller Policy* as applied in this case appears to include an objection to Commerce’s decision to complete the review in furtherance of the stated objectives of the policy. Although the clarification of the *Reseller Policy* was published in 2003, *see generally* 68 Fed. Reg. 23,954, in 2010, Commerce announced that it would be “more consistent with the May 2003 clarification not to rescind the review” in cases where there are no shipments. *Magnesium Metal From the Russian Federation*, 75 Fed. Reg. 56,989, 56,990 (Dep’t Commerce Sept. 17, 2010) (final results of [ADD] admin. review) (“*Magnesium Metal*”).

the excerpt quoted by Plaintiffs does not support their position. That a company with its own rate will have its own case number does not necessarily mean that a company with its own case number has a company-specific rate. Further, as Defendant counters, the AD Manual states that it “is for the internal training and guidance of Enforcement and Compliance (E&C) personnel only . . . [and] cannot be cited to establish [Commerce’s] practice.”). See Def.’s Reply Re: Letter II at 3 (quoting, inter alia, AD Manual, ch. 1, at 1; *Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT __, __, 433 F. Supp. 3d 1309, 1323–24 (2020)). Defendant attests that “[i]f NLMK received an individual rate in a prior review, it would continue to retain th[at] individual rate upon the publication of the notice of final results for this review.” See Def.’s Resp. to Letter I at 8 (citing *inter alia*, *Parkdale II*, 31 CIT 1229, 508 F. Supp. 2d 1338). Thus, any company-specific rate assigned in the previous review would carry forward. See *id.*

Indeed, assigning a company-specific rate to NLMK would contradict the policy underlying Commerce’s methodology. As explained in *Parkdale II*, “Commerce has a stated policy that ‘company-specific assessment rates must be based on the sales information of the first company in the commercial chain that knew, at the time the merchandise was sold, that the merchandise was destined for the United States.’” 31 CIT at 1231, 508 F. Supp. 2d at 1343 (quoting *Antidumping & Countervailing Duty Proceedings*, 63 Fed. Reg. 55,361, 55,362 (Dep’t Commerce Oct. 15, 1998) (notice and request for comment on policy concerning assessment of antidumping duties)). “By identifying the party that had knowledge of the destination of the subject merchandise, Commerce determines which entity was the ‘price discriminator’ that engaged in the dumping, and hence which company’s dumping margin should apply to a given entry.” *Id.* (citing *Reseller Policy*, 68 Fed. Reg. at 23,960). Here, Commerce determined that none of the respondents had shipments of subject merchandise during the POR. See *Final Results*, 85 Fed. Reg. at 301. Since there is no sales information upon which to calculate a dumping margin, it follows that Commerce could not have calculated a company-specific rate for NLMK in this review.¹⁹ Nor do the *Final Results* indicate that NLMK received a company-specific rate. See *generally*, 85 Fed. Reg. 299. Instead, as Defendant explains, Commerce views it necessary to

¹⁹ To conclude otherwise would require the court to presume without evidence that Commerce here intentionally disregards its own policy and flouts its statutory duties under 19 U.S.C. § 1675(a)(2) by inventing a company-specific dumping margin—without any sales information—in order to establish a company-specific rate for NLMK. The court declines to do so. See *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238–43 (Fed. Cir. 2002).

complete the administrative review out of concern that, under 19 U.S.C. § 1675(a)(2)(C), Commerce would otherwise be unable to apply the reseller policy to entries of unknown resellers that later surface,²⁰ and would instead be required to liquidate at the entered rate—which may or may not be the appropriate rate for that POR under the reseller policy. Oral Arg. at 00:30:00–31:28:00, 01:27:30–01:30:27.

Commerce did not calculate and assign a company-specific rate for NLMK.²¹ Thus, NMLK's claims challenging the completion of the review—or the application of the reseller policy—and the purported assignment of a company-specific rate have lost their character as live controversies; adjudicating those claims would result in the sort of inappropriate advisory opinion “on abstract propositions of law” that Courts must avoid. *See Hall v. Beals*, 396 U.S. 45, 48 (1969).²² For these reasons, in addition to the reasons set forth below, the court dismisses NLMK's complaint.²³

²⁰ Plaintiffs themselves acknowledge how reseller entries may surface unbeknownst to an exporter or producer. In arguing their point that the reseller policy would result in the unlawful assignment of an AFA rate, Plaintiffs explain how an intermediary reseller may purchase large quantities of a given commodity during one POR and sell during a subsequent POR. *See* Oral Arg. at 00:23:40–00:25:00.

²¹ Plaintiffs intimate that Commerce's completion of the administrative review is unlawful with respect to NOVEX specifically. *See, e.g.*, Pls.' 56.2 Br. at 22 (“This required fact pattern that is particularly problematic for plaintiffs, given that all of NLMK's exports of hot rolled steel are made by its affiliated reseller NOVEX, who is also a plaintiff to this action.”). Insofar as Plaintiffs' reference to NOVEX amounts to an attempt at argumentation, it is perfunctory and thus waived. *See, e.g., Home Prods. Int'l, Inc. v. United States*, 36 CIT 665, 673, 837 F. Supp. 2d 1294, 1301 (2012)(citations omitted).

²² Plaintiffs' apparent position that the statute permits interested parties the ability to seek out declarations of lawfulness from the court absent a showing that there is a case or controversy is reductive and incorrect. Plaintiffs submit that 28 U.S.C. § 2643 indicates Congress's desire for the Court to review Commerce's actions and declare whether or not they are lawful, which is the relief Plaintiffs seek in this proceeding. *See* Oral Arg. at 01:20:07–01:21:00 (citing 28 U.S.C. § 2643); *see also* Summons at 1 (asserting 19 U.S.C. § 1516a(d) and 28 U.S.C. § 2631(c) as the basis for standing). Plaintiffs also assert that the zone of interest test applies when determining whether NLMK has standing to appear before the court is misplaced. *See* Pls.' Resp. to Letter II at 7–8 (citations omitted). Irrespective of whether Plaintiffs can show that NLMK has statutory standing, such a showing does not obviate constitutional constraints on Article III Courts to adjudicate actual cases and controversies. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–32 (2014). As such, any request for relief relating to Plaintiffs' position that the court may declare the lawfulness of Commerce's actions even absent a case or controversy fails. *See, e.g.*, Compl. ¶ 1 (“Additionally, Plaintiffs seek a judicial determination regarding the lawfulness of Defendant's action taken in the underlying administrative proceeding. Plaintiffs request an award of injunctive and declaratory relief from this Court.”).

²³ Defendant and Defendant-Intervenors also argue that any claims properly before the court pursuant to 28 U.S.C. § 1581(c) would nevertheless be dismissed because Plaintiffs failed to exhaust their administrative remedies. *See* Def.'s Mot. & 56.2 Resp. Br. at 13–18; SDI's Mot. Dismiss & Supp. Br. at 7–11; Nucor's Mot. Dismiss Br. at 16–19. Plaintiffs counter that they could not have exhausted their administrative remedies due to lack of notice. *See, e.g.*, Pls.' Resp. to SDI's Mot. Dismiss at 1–17; Pls.' Resp. to Nucor's Mot. Dismiss at 11–12.

III. The All-Others Rate

Defendant and Defendant-Intervenor argue that the court should dismiss Count III of Plaintiffs' complaint challenging the all-others rate as an untimely attempt to challenge Commerce's determination of the all-others rate. *See* SDI's Mot. Dismiss & Supp. Br. at 11–13; Nucor's Mot. Dismiss Br. at 14 (concurring with SDI's contention, with respect to Count III of Plaintiffs' complaint, that any challenge to the all-others rate is time-barred); SDI's Resp. to Letter I at 3; Def.'s Resp. to Letter I at 3; Def.'s Mot. & 56.2 Resp. Br. at 12–13, 28–29. Plaintiffs object to any such characterization of Count III of their complaint, arguing that “a plain reading of the complaint makes clear that [Count III] challenges Commerce's assignment of a company-specific AFA rate to NLMK.” Pls.' Resp. to SDI's Mot. Dismiss at 16. The court dismisses Count III's challenge to the all-others rate.

As explained, Commerce did not assign NLMK a company-specific rate, let alone an AFA rate. Instead, Commerce continued to assign to

Parties are required to exhaust administrative remedies before the agency by raising all issues in their initial case briefs before Commerce. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (“*Dorbest*”) (citing 19 C.F.R. §351.309(c)(2), (d)(2); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375 1383 (Fed. Cir. 2008)); *see also* *ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019). However, the court has discretion not to require exhaustion if a party was not afforded a full and fair opportunity to raise the issue before the agency. *Qingdao Taifa Group Co v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236–37 (2009) (citing *LTV Steel Co. v. United States*, 21 CIT 838, 868–69, 985 F. Supp. 95, 120 (1997)); *see also* 28 U.S.C. § 2637(d); *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007). Plaintiffs' claim that NLMK should be excused from having to exhaust its administrative remedies because it lacked notice of Commerce's intention to assign it a company-specific number and complete the review is contradicted by record documents.

First, Commerce expressly contemplates completion of the administrative review in the preliminary results. *See Prelim. Results*, 84 Fed. Reg. at 53,411 (“[c]onsistent with Commerce's practice . . . it is not appropriate to rescind the review with respect to NLMK . . . but, rather, to complete the review and issue appropriate instructions to CBP based on the final results of this review.”). Second, for all of Plaintiffs' objections regarding the purportedly anomalous nature (and ministerial significance) of Commerce's assignment of a company-specific case number ending in “002” to NLMK, Plaintiffs did not raise any concerns with respect to the case number's appearance next to “Novolipetsk Steel” in both the July 1, 2019 no shipment inquiry to CBP as well as Commerce's October 9, 2019 draft liquidation instructions. *See* October 9th CBP Instructions at 1 & Attach. I; July 1st No Shipment Inquiry. Given Commerce's declaration in the *Prelim. Results*, as well as the appearance of a company-specific number for NLMK in record documents—the importance of which Plaintiffs themselves assign significant weight—it is evident that Plaintiffs were afforded a full and fair opportunity to raise their concerns regarding Commerce's completion of the administrative review.

Therefore, any claims from Plaintiffs alleging that Commerce's adjustment to its application of the *Reseller Policy*—as illustrated in *Magnesium Metal*—is inconsistent with the policy or otherwise unlawful should have been exhausted before the agency. *See, e.g., Magnesium Metal*, 75 Fed. Reg. at 56,990 (“ . . . we continue to find that it is more consistent with the May 2003 clarification not to rescind the review in part in these circumstances but, rather, to complete the review[.]”). Nonetheless, the court need not reach these arguments because, as discussed, Plaintiffs' claims are dismissed for want of standing.

NLMK the all-others rate in this proceeding. *Final Results*, 85 Fed. Reg. at 301. Thus, Count III of Plaintiffs' complaint is dismissed.

IV. Facial Challenge to the Reseller Policy

Insofar as any of the counts of Plaintiffs' complaint present a facial challenge to Commerce's reseller policy or to Commerce's implementing instructions, Defendant and Defendant-Intervenor assert that the Court does not have subject matter jurisdiction under 28 U.S.C. § 1581(c). *See, e.g.*, Def.'s Mot. & 56.2 Resp. Br. at 9–12 (requesting the court dismiss any facial challenge as untimely and any challenge to Commerce's liquidation instructions for lack of subject matter jurisdiction); Nucor's Mot. Dismiss Br. at 8–16. According to Defendant-Intervenors, Plaintiffs' complaint cannot otherwise be heard under 28 U.S.C. § 1581(i) because Plaintiffs failed to concurrently file a summons and complaint. *See, e.g.*, Nucor's Mot. Dismiss Br. at 11, 15–16; SDI's Resp. to Letter I at 1–2; *see also* USCIT Rule 3(a)(3). Defendant adds that an action challenging the lawfulness of the reseller policy on its face under § 1581(i) would also be untimely, given the two-year statute of limitations. Def.'s Mot. & 56.2 Resp. Br. at 7, 9–11. Plaintiffs maintain that all of their claims are properly commenced pursuant to 28 U.S.C. § 1581(c). Pls.' 56.2 Reply & Resp. Def.'s Mot. Dismiss at 1–4. To the extent that Counts IV through VI present facial challenges to the reseller policy,²⁴ the claims are dismissed for lack of jurisdiction.

To commence an action pursuant to 28 U.S.C. § 1581(i), a party must concurrently file a summons and complaint. USCIT Rule 3(a)(3). A 28 U.S.C. § 1581(i) civil action is time-barred unless it is commenced within two years after the cause of action accrues. *See* 28 U.S.C. § 2636(i). Any facial challenge that Plaintiffs present to the reseller policy "accrue[s] at the time the rule was published, not when the [policy] is applied to [Plaintiffs.]" *Parkdale II*, 31 CIT at 1236–37, 508 F. Supp. 2d at 1347–48; *see also Parkdale Int'l, Ltd. v. United States*, 31 CIT 720, 491 F. Supp. 2d 1262 (2007) ("*Parkdale I*").

To the extent that Counts IV through VI present a facial challenge to Commerce's *Reseller Policy*, the cause of action would have accrued May 6, 2003 when Commerce published notice of clarification of its practice. *See generally* 68 Fed. Reg. 23,954. Plaintiffs have yet to commence an action in accordance with USCIT Rule 3(a)(3), well beyond two-years after the cause of action accrued. Plaintiffs suggest that, in the event that jurisdiction under 28 U.S.C. § 1581(c) is not

²⁴ For reasons explained, whether or not a challenge to Commerce's liquidation instructions is properly commenced pursuant to 28 U.S.C. § 1581(c), the court lacks jurisdiction over such a claim due to lack of standing.

proper, the Court's holding in *Parkdale I* would counsel granting Plaintiffs leave to amend their complaint, as opposed to dismissal. *See* Pls.' Resp. to Nucor's Mot. Dismiss at 7–8, 9–10 (citing *Parkdale I*, 31 CIT at 725–27, 491 F. Supp. 2d at 1269–70). However, in *Parkdale II*, the Court found that plaintiff's facial challenge to the reseller policy could proceed under 28 U.S.C. § 1581(i) where defendant in that case failed to raise statute of limitations as an affirmative defense. *See* 31 CIT at 1236–37 & n.6, 508 F. Supp. 2d at 1347–48 & n.6. Here, Defendant raised statute of limitations in their motion to dismiss, *see* Def.'s Mot. & 56.2 Resp. Br. at 7, 9–11, and Plaintiffs have not moved to amend their complaint to plead 28 U.S.C. § 1581(i) as a basis for jurisdiction. As a result, the court dismisses Plaintiffs' complaint for lack of jurisdiction.

V. Motions for Discovery

As discussed, the court dismisses Plaintiffs' complaint. Thus, Plaintiffs' motion for completion of the record, supplementation of the record, and discovery for purposes of completing and supplementing the record, is dismissed as moot. The court has considered the remainder of Plaintiffs' arguments and finds them to be without merit.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant's motion for leave to amend the administrative record is granted; and it is further

ORDERED that the amended administrative record is deemed filed; and it is further

ORDERED that Defendant's and Defendant-Intervenors' motions to dismiss are granted and Plaintiffs' complaint is dismissed; and it is further

ORDERED that Plaintiffs' motion for judgment on the agency record and motion for discovery are dismissed. Judgment will enter accordingly.

Dated: April 13, 2021

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

Slip Op. 21–42

SAO TA FOODS JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00205

[Sustaining the U.S. Department of Commerce’s second remand results in the twelfth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam.]

Dated: April 14, 2021

Matthew R. Nicely and Daniel M. Witkowski, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, DC, for plaintiffs

Ethan P. Davis and Brian M. Boynton, Acting Assistant Attorneys General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Kara M. Westercamp*, Trial Attorney. Of counsel was *Kirrin Hough*, Staff Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Nathaniel Maandig Rickard and Zachary J. Walker, Picard, Kentz & Rowe LLP, of Washington, DC, for defendant-intervenor.

OPINION**Kelly, Judge:**

Before the court is the U.S. Department of Commerce’s (“Commerce”) second remand redetermination in the twelfth administrative review of the antidumping duty (“ADD”) order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam (“Vietnam”) filed pursuant to the court’s order in *Sao Ta Foods Joint Stock Co. v. United States*, 44 CIT __, 475 F. Supp. 3d 1283 (2020) (“*Sao Ta II*”). See also Final Results of Redetermination Pursuant to Ct. Order in [*Sao Ta II*], Dec. 8, 2020, ECF No. 100–1 (“*Second Remand Results*”). In *Sao Ta II*, the court remanded for further consideration Commerce’s remand redetermination to continue to deny separate rate status to two factory names of Thuan Phuoc Seafoods and Trading Corporation (“Thuan Phuoc”), “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory.” See *Sao Ta II*, 44 CIT at __, 475 F. Supp. 3d at 1293. In the *Second Remand Results*, Commerce grants the two factories separate rate status as trade names of Thuan Phuoc, under respectful protest and limited to the twelfth administrative review. See *Second Remand Results* at 2.

Plaintiff agrees with Commerce's final decision. *See* Pl.'s Reply to Cmts. on Second Remand Redetermination Pursuant to Ct. Remand Order at 1, Feb. 12, 2021, ECF No. 106 ("Pl.'s Br.").

BACKGROUND

The court assumes familiarity with the facts of this case, as set out in its previous opinions ordering remand, *see Sao Ta Foods Joint Stock Co. v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1314, 1319–20 (2020) ("*Sao Ta I*"); *Sao Ta II*, 44 CIT at __, 475 F. Supp. 3d at 1286, and recounts those facts relevant to the court's review of the *Second Remand Results*. In this twelfth administrative review of the ADD order covering certain frozen warmwater shrimp from Vietnam, Commerce denied separate rate status to two factory names of Thuan Phuoc, "Frozen Seafoods Factory No. 32" and "Seafoods and Food-stuffs Factory," because neither factory name was listed on its respective valid business registration certificate.¹ *See* Decision Memo. for Prelim. Results of [ADD] Admin. Review at 9–10, A-552–802, PD 224, bar code 3679553–02 (Mar. 5, 2018); Names Not Granted Separate Rate Status at the Prelim. Results at 4, PD 225, bar code 3679580–01 (Mar. 5, 2018) ("Trade Names Memo.");² Certain Frozen Warmwater Shrimp from [Vietnam]: Issues and Decisions Memo. for the Final Results at 19–20, A-552–802, PD 292, bar code 3752460–01 (Sept. 7, 2018) ("Final Decision Memo.").

In *Sao Ta I*, the court held Commerce's determination that Thuan Phuoc's factories did not qualify for separate rate status was unsupported by substantial evidence, because Commerce failed to consider the documentary evidence included with Thuan Phuoc's separate rate certification, i.e., copies of the factories' business registration certificates and invoices, and explain why, in view of that evidence, the factory names did not qualify as trade names of Thuan Phuoc. *See Sao Ta I*, 44 CIT at __, 425 F. Supp. 3d at 1329–31. On remand, Commerce continued to find that neither factory qualifies for a separate rate because the factories are independent exporters and not trade names of Thuan Phuoc. *See* Final Results of Redetermination Pursuant to Ct. Order in [*Sao Ta I*] at 6–12, 17–21, Apr. 30, 2020, ECF No. 74 ("*Remand Results*").

¹ The factory names were identified on sales documents. *See* Trade Names Memo. at 4.

² On November 13, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination on the docket at ECF Nos. 19–2–3. Subsequently, on May 13, 2020, Defendant filed indices to the administrative record underlying Commerce's remand redetermination on the docket at ECF No. 75, and on December 22, 2020, Defendant filed indices to the administrative record underlying Commerce's second remand redetermination at ECF No. 101. Citations to the administrative record in this opinion are to the numbers Commerce assigned to such documents in the indices, and preceded by "PD" or "CD" to denote the public or confidential documents.

In *Sao Ta II*, the court found that Commerce’s denial of separate rate status to “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory” was unreasonable because Commerce failed to explain how it distinguishes when an entity is a “separate exporter[]” as opposed to a trade name of another company, and failed to address record evidence that detracts from its position that the factories are ineligible for a separate rate. *Sao Ta II*, 44 CIT at ___, 475 F. Supp. 3d at 1289–90, 1291–93. Moreover, although Commerce claimed that its practice with respect to trade names and separate rates had recently changed, the court held that Commerce’s change in practice regarding trade names was arbitrary and capricious because, apart from it being unclear whether a change actually occurred, Commerce did not give reasonable notice to interested parties of the change. *See id.* at 1290–91. In its *Second Remand Results*, Commerce grants, under respectful protest, separate rate status to “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory” as trade names of Thuan Phuoc. *See Second Remand Results* at 2. Plaintiff concurs in the result. *See Pl.’s Br.* at 1. Defendant-Intervenor, Ad Hoc Shrimp Trade Action Committee, argues that the *Second Remand Results* should be remanded for further consideration, because Commerce adequately explains why it did not grant separate rate status to the two factories. *See Def.-Intervenor Ad Hoc Shrimp Trade Action Committee’s Cmts. on the [Second Remand Results]*, Jan. 7, 2021, ECF No. 102.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)³ and 28 U.S.C. § 1581(c) (2012),⁴ which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

³ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

⁴ Further citations to Title 28 of the U.S. Code are to the 2012 edition.

DISCUSSION

Plaintiff challenged Commerce’s decision not to grant separate rate status to Thuan Phuoc’s factories, “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory,” despite granting separate rate status to Thuan Phuoc. *See* Compl. at ¶ 24, Oct. 2, 2018, ECF No. 7. The court remanded to Commerce to reconsider the separate rate status of the two factories, because Commerce failed to consider evidence that detracted from its determination in light of its stated practice. *See Sao Ta I*, 44 CIT at __, 425 F. Supp. 3d at 1329–30. Commerce, in its remand redetermination, again denied separate rate status to the two factories based on its view that each entity acts as an independent exporter. *See generally Remand Results*. The court remanded a second time for reconsideration. *See Sao Ta II*, 44 CIT at __, 475 F. Supp. 3d at 1293. Commerce, under respectful protest, grants separate rate status to “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory” as trade names of Thuan Phuoc, *see Second Remand Results* at 2, and Plaintiff agrees with Commerce’s final determination. *See* Pl.’s Br. at 1.

When Commerce investigates subject merchandise from a non-market economy (“NME”) country, such as Vietnam, Commerce presumes that the government controls the export-related decision-making of all companies operating within that NME. *See* Import Admin., [Commerce], Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving [NME] Countries, Pol’y Bulletin 05.1 at 1 (Apr. 5, 2005) (“Policy Bulletin 05.1”), available at <http://enforcement.trade.gov/policy/bull05-1.pdf> (last visited Apr. 8, 2021); *see also Antidumping Methodologies in Proceedings Involving [NME] Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,247 (Dep’t Commerce Mar. 21, 2007) (request for comment) (stating the Department’s policy of presuming control for companies operating within NME countries); *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (approving Commerce’s use of the presumption). Commerce assigns an NME-wide rate, unless a company successfully demonstrates an absence of government control, both in law (de jure) and in fact (de facto). *See* Policy Bulletin 05.1 at 1–2.⁵

⁵ Commerce examines the following factors to evaluate de facto control: “whether the export prices are set by, or subject to the approval of, a governmental authority;” “whether the respondent has authority to negotiate and sign contracts and other agreements;” “whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management;” and, “whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.” Policy Bulletin 05.1 at 2. With respect to de jure control,

To establish independence from governmental control, a company submits a separate rate application or a separate rate certification.⁶ See Policy Bulletin 05.1 at 3–4; see also Pls.’ Confidential Memo. Supp. R. 56.2 Mot. J. Agency R. at Annex 2 (“Separate Rate Application”), Annex 3 (“Separate Rate Certification”), Mar. 15, 2019, ECF No. 29. Under Commerce’s separate rate policy, recounted in Policy Bulletin 05.1 each company that exports subject merchandise to the United States must submit its own individual separate rate application, “regardless of any common ownership or affiliation between firms[.]” Policy Bulletin 05.1 at 5. Commerce limits its consideration to only companies that exported subject merchandise to the United States during the period of investigation or review.⁷ See *id.* at 4–5. In addition, applicants must identify affiliates in the NME that exported to the United States during the period of investigation or review and provide documentation demonstrating that the same name in its separate rate request appears both on the business registration certificate and on shipments declared to U.S. Customs and Border Protection (“CBP”). See *id.* at 4–5. The separate rate forms reflect these requirements. Question two of the separate rate application, like question seven of the separate rate certification, asks whether the applicant “is identified by any other names . . . (i.e., does the company use trade names)” and requests applicants to provide business registration certificates and “evidence that these names were used during the [period of investigation or review].” See Separate Rate Application at 10; see also Separate Rate Certification at 7. The separate rate application and separate rate certification instructions define a “trade name” as a “name[] under which the company does business.” Separate Rate Application at 10 n.3; Separate Rate Certification at 7 n.3.

Commerce, under respectful protest, granted separate rate status to “Frozen Seafoods Factory No. 32” and “Seafoods and Foodstuffs Factory” as trade names of Thuan Phuoc. See *Second Remand Results* at 2. Commerce’s decision is supported by substantial evidence because it is consistent with Commerce’s practice under the statute to

Commerce considers three factors: “an absence of restrictive stipulations associated with an individual exporter’s business and export licenses;” “any legislative enactments decentralizing control of companies;” and, “any other formal measures by the government decentralizing control of companies.” *Id.*

⁶ Firms that currently hold a separate rate submit a separate rate certification, while firms that do not hold a separate rate or have had changes to corporate structure, ownership, or official company name submit a separate rate application. See Separate Rate Application at 2. Both forms request similar information. Relevant here, in a separate rate certification, like a separate rate application, an applicant provides information and supporting documentation that it is not subject to NME control. See, e.g., Final Decision Memo. at 19.

⁷ Although Policy Bulletin 05.1 refers to investigations, the separate rate application and separate rate certification, which apply to investigations and reviews, incorporate Policy Bulletin 05.1 by reference. See, e.g., Separate Rate Application at 2.

grant separate rate status to so long as the same name in the company's separate rate request appears both on the business registration certificate and on commercial shipments. *See* Policy Bulletin 05.1 at 4–5.⁸ As discussed in *Sao Ta I*, Thuan Phuoc established its eligibility for a separate rate, *see Remand Results* at 6, and, in its separate rate certifications, also requested that its factories' names, "Frozen Seafoods Factory No. 32" and "Seafoods and Foodstuffs Factory," be granted separate rate status. *See* Separate Rate Certification of [Thuan Phuoc], PD 71, bar code 3572148–01 (May 15, 2017) ("Thuan Phuoc Separate Rate Certification"). Specifically, in its separate rate certification, Thuan Phuoc indicated the factories were under common ownership, identified them as trade names of Thuan Phuoc, and provided business registration certificates and export documentation. *See id.* at 1–8. As the court noted in its prior opinions, if the two factory names are names under which Thuan Phuoc does business, "then Commerce's finding that Thuan Phuoc operates independently of the government in its export activities would extend to these factories and their trade names" according to Commerce's policy. *See Sao Ta I*, 44 CIT at __, 425 F. Supp. 3d at 1329; *Sao Ta II*, 44 CIT at __, 475 F. Supp. 3d at 1289.

Commerce's policy as well as the instructions to the separate rate application and separate rate certification focus on whether a firm's export activities are sufficiently independent from the NME to qualify for a separate rate and recognize that a company may do business under one or more names. *See* Policy Bulletin 05.1 at 1–2; Separate Rate Application at 10 n.3; Separate Rate Certification at 7 n.3. As a result, Commerce's policy, reflected in the separate rate application and separate rate certification instructions, affords separate rate status to those trade names so long as the same name in the company's separate rate request appears both on the business registration certificate and on commercial shipments. *See* Separate Rate Application at 10 n.3; Separate Rate Certification at 7 n.3; *see also* Policy Bulletin 05.1 at 4–5. Although, in the narrative portion of the sepa-

⁸ Commerce's Policy Bulletin provides "[a]ll applicants must identify in the application any affiliates in the NME country that exported to the United States during the period of investigation the merchandise described in the petition, as well as any affiliates located in the United States involved in the sale of the subject merchandise[]" and "[a]ll shipments to the United States declared to U.S. Customs and Border Protection must identify the exporter by its legal business name. This name must match the name that appears on the exporter's business license/registration documents, a copy of which shall be provided to the Department as part of the exporter's request for separate rate status." *See* Policy Bulletin 05.1 at 4–5. As will be discussed further, Thuan Phuoc provided documentation to demonstrate that the substantive requirements set out in Commerce's policy were met for the two factories, *see* Separate Rate Certification of [Thuan Phuoc], PD 71, bar code 3572148–01 (May 15, 2017), but Commerce failed to address this evidence and instead evaluated the factories separate rate status on other grounds that are not part of its policy.

rate rate certification, Thuan Phuoc did not call the factories' names "trade names" or d/b/a names—instead referring to them as "separate factories" or "branch factories"—it checked off the form's boxes indicating that it sought separate rate status for these factory names through the conduit of "trade names." *See generally* Thuan Phuoc Separate Rate Certification. Thuan Phuoc also entitled one table column with "trade names," and listed the factory names within that category, in its response to question eight of the separate rate certification. *See id.* at 6–7. Finally, Commerce's decision is in compliance with the remand order which required that Commerce either reconsider, or further explain, its decision and supposed change in policy.

Although Commerce now reconsiders its position, and grants the two factories separate rate status, it does so under protest and continues to argue that separate rate status is inappropriate, repeating the same reasons given in its *Remand Results*. *See Remand Results; Second Remand Results*. Commerce reiterates its position that the two companies should have filed the separate rate application because they did not have a SR from the previous review. *See Second Remand Results* at 8–10. Commerce also restates its position that it has no basis to determine that the two factories, which are producers and exporters, are the same company as Thuan Phuoc and are just doing business as another name. *See id.* at n.48. However, in *Sao Ta II*, the court questioned how Commerce came to the conclusion that the two factories were "separate exporters."⁹ *See Sao Ta II*, 44 CIT at ___, 475 F. Supp. 3d at 1289. Relatedly, the court instructed Commerce to explain how it defines a company as an independent exporter versus a trade name. *See id.* at 1290. The court further ordered Commerce to substantiate its allegation that it changed its practice, and explain whether if it changed its practice, it gave "adequate explanation or notice" of the change. *See id.* at 1290. Finally, the court ordered Commerce to explain how it evaluated evidence that de-

⁹ Specifically, the court stated

Here, however, rather than determining whether the asserted trade names 'identify the exporter by its legal business name' and whether they 'match the name that appears on the exporter's business license/registration documents[,] see Policy Bulletin 05.1 at 4–5; Separate Rate Application at 10 n.3; Separate Rate Certification at 7 n.3, Commerce relies on the commercial business registration certificates and commercial documentation to assert the factory names are 'separate exporters' that must, themselves, apply for a separate rate. *See Remand Results* at 7–12, 24–25. Commerce, in characterizing the factories as 'separate exporters,' offers no definition for that term nor identifies where in the statute or regulations it bases the distinction it seeks to capture with this term. It may be that Commerce can point to both authority and rationale to support the distinction but the court will not speculate on its behalf. Commerce should state its position and explain why its approach is reasonable and how it squares with its policy as well as the separate rate application and separate rate certification instructions. *Cf.* Policy Bulletin 05.1 at 4–5; Separate Rate Application at 10 n.3; Separate Rate Certification at 7 n.3.

tracted from its determination. *See id.* at 1291. Commerce did not respond with any of the requested explanations. Instead, Commerce restates its position that it changed its practice in the tenth administrative review to deny SR status to any exporters that were separate companies or branches, and that the parties were on notice of the changes. *See Second Remand Results* at 12–13.¹⁰ Commerce fails to explain how its position, i.e., that every entity is its own exporter coheres with the policy and practice reflected in its separate rate instructions. Question two of the separate rate application, like question seven of the separate rate certification, asks whether the applicant “is identified by any other names . . . (i.e., does the company use trade names)” and requests applicants to provide business registration certificates and “evidence that these names were used during the [period of investigation or review].” *See Separate Rate Application* at 10; *see also Separate Rate Certification* at 7. The separate rate application and separate rate certification instructions define a “trade name” as a “name[] under which the company does business.” *Separate Rate Application* at 10 n.3; *Separate Rate Certification* at 7 n.3. The instructions therefore envision that there are times when a company may export under a trade name, i.e., a name other than the name of its separate rate application or separate rate certification. Despite its protestations, Commerce fails to support its contention that it changed its practice of allowing trade names on separate rate applications or separate rate certification, or that parties were on notice of that fact.¹¹

¹⁰ Commerce states that it is under no obligation to independently investigate the affiliation between exporters. *See Second Remand Results* at 9–10. However, the court did not ask Commerce to investigate the affiliation between exporters, rather it asked Commerce to explain why it denied separate rate status to two of Thuan Phuoc’s factories despite evidence that the factories were eligible for separate rate status. *See Sao Ta II*, 44 CIT at ___, 475 F. Supp. 3d at 1289–90, 1291–93.

¹¹ As discussed more fully in *Sao Ta II*, it is not clear that Commerce changed its practice or gave adequate notice of a change in practice to the parties. *See Sao Ta II*, 44 CIT at ___, 475 F. Supp. 3d at 1290–91. Commerce explains that it previously misapplied its practice when it granted separate rate status to these very factories in prior reviews. *See Remand Results* at 12, 29–30. Commerce then invokes the tenth administrative review, in which it denied separate rate status to Thuan Phuoc’s trade names, as providing notice of its practice. In that review it states a hypothetical: “[I]f Thuan Phuoc included these names as trade names but these names are, in fact separate companies or ‘branches,’ they are equally ineligible for separate rate status[.]” *See id.* at 30 n.102, 33 n.107 (citing *Certain Frozen Warmwater Shrimp from [Vietnam]: Issues and Decision Memo. for the Final Results* at 80, A-552–802, (Sept. 6, 2016), available at <https://enforcement.trade.gov/frn/summary/vietnam/2016–21882–1.pdf> (last visited Apr. 8, 2021)). The court thus stated

It is unclear how Commerce’s caution regarding separate companies or branches provides any insight to its finding, here, that the branch factories are separate exporters. It may be that Commerce now views a distinctly named factory as a distinct company that is, as a consequence, its own exporter. However, that view is not discernible from Commerce’s statement. Fairness demands that Commerce provide adequate notice, and

CONCLUSION

For the foregoing reasons, Commerce's *Second Remand Results* are supported by substantial evidence and comply with the court's order in *Sao Ta II*, and are therefore sustained. Judgment will enter accordingly.

Dated: April 14, 2021

New York, New York

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

Slip Op. 21-43

SEAH STEEL CORPORATION, Plaintiff, HUSTEEL Co., LTD., NEXTEEL Co., LTD., AJU BESTEEL Co., LTD., and ILJIN STEEL CORPORATION, Consolidated Plaintiffs, and HYUNDAI STEEL COMPANY and ILJIN STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, TENARIS BAY CITY, INC., IPSCO TUBULARS INC., VALLOUREC STAR, L.P., and WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19-00086

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2016-2017 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: April 14, 2021

Jeffrey M. Winton and *Amrietha Nellan*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiff SeAH Steel Corporation. With them on the brief was *Jordan L. Fleischer*, formerly Law Office of Jeffrey M. Winton PLLC, of Washington, D.C.

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it cannot be reasonably said that a statement, framed as a hypothetical, conveys a change in practice or a reason for that change.

Sao Ta II, 44 CIT at __, 475 F. Supp. 3d at 1291 (citing *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421-22 (1992); *Huwis Corp. v. United States*, 31 CIT 1803, 1811, 525 F. Supp. 2d 1370, 1378 (2007)).

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Joseph H. Hunt*, then-Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

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OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SeAH Steel Corporation (“SeAH”), Consolidated Plaintiffs Husteel Co., Ltd. (“Husteel”), NEXTEEL Co., Ltd. (“NEXTEEL”), AJU Besteel Co., Ltd. (“AJU”), and ILJIN Steel Corporation (“ILJIN”), and Plaintiff-Intervenors Hyundai Steel Company (“Hyundai”) and ILJIN, (collectively, “Plaintiffs”), bring this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on oil country tubular goods (“OCTG”) from the Republic of Korea (“Korea”). *See Certain Oil Country Tubular Goods From the Republic of Korea (“Final Results”)*, 84 Fed. Reg. 24,085 (Dep’t Commerce May 24, 2019) (final results of antidumping duty admin. review; 2016–2017); *see also* Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (May 17, 2019), ECF No. 20–5 (“OCTG III Final Issues & Decision Memorandum” or “Final IDM”).² Before the court are the Rule 56.2 motions for judgment on the agency record filed by Husteel, SeAH, ILJIN, NEXTEEL, Hyundai, and AJU. Consol. Pl. Husteel Co., Ltd.’s Mot. J. Agency R., ECF No. 59; Mot. Pl. SeAH Steel Corporation J. Agency R., ECF Nos. 60, 61; Consol. Pl./Pl.-Inter. Rule 56.2 Mot. J. Agency R., ECF No. 62; Rule 56.2 Mot. J. Agency R. Consol. Pl. NEXTEEL Co., Ltd., ECF Nos. 63, 66; Rule 56.2 Mot. J. Agency R. Pl.-Inter. Hyundai Steel Company, ECF No. 64; Consol. Pl.

¹ Defendant-Intervenor IPSCO Tubulars Inc. (formerly TMK IPSCO) is wholly owned by Defendant-Intervenor Maverick Tube Corporation. Letter, ECF No. 80.

² Citations to the administrative record reflect the public record (“PD”) document numbers.

AJU Besteel Co., Ltd.’s Rule 56.2 Mot. J. Agency R., ECF No. 65; *see also* Consol. Pl. Husteel Co., Ltd.’s Br. Supp. Its Mot. J. Agency R., ECF No. 59–2 (“Husteel Br.”);³ Br. SeAH Steel Corporation Supp. Its Rule 56.2 Mot. J. Agency R., ECF Nos. 60–1, 61–1 (“SeAH Br.”); Br. Consol. Pl./Pl.-Inter. ILJIN Steel Corporation Supp. Its Mot. J. Agency R., ECF No. 62–1 (“ILJIN Br.”);⁴ Mem. Supp. Consol. Pl. NEXTEEL Co., Ltd.’s Rule 56.2 Mot. J. Agency R., ECF Nos. 63–2, 66–2 (“NEXTEEL Br.”); Mem. Supp. Pl.-Inter. Hyundai Steel Company’s Rule 56.2 Mot. J. Agency R., ECF No. 64–2 (“Hyundai Br.”);⁵ Mem. Supp. Mot. Consol. Pl., AJU Besteel Co., Ltd., J. Agency R., ECF No. 65–1 (“AJU Br.”).⁶ For the following reasons, the court sustains in part and remands in part the *Final Results*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce’s application of its differential pricing analysis in calculating SeAH’s dumping margin is in accordance with the law;
2. Whether Commerce’s determination that a particular market situation existed in Korea is supported by substantial evidence;
3. Whether Commerce’s calculation of constructed value profit is supported by substantial evidence;
4. Whether Commerce’s reallocation of NEXTEEL’s reported costs for non-prime products is supported by substantial evidence;
5. Whether Commerce’s adjustment to NEXTEEL’s production line suspension costs is supported by substantial evidence;

³ Husteel joins NEXTEEL’s and SeAH’s arguments as to Commerce’s particular market situation adjustment, and adopts and incorporates by reference NEXTEEL’s and SeAH’s arguments as to the other issues contested in their briefs. Husteel Br. at 13, 29–30.

⁴ ILJIN agrees with and supports each of the counts in the complaints filed by NEXTEEL and SeAH, but addresses only Commerce’s particular market situation determination and adjustment in its brief. ILJIN Br. at 13.

⁵ Hyundai concurs with and incorporates by reference NEXTEEL’s arguments as to Commerce’s particular market situation determination and adjustment and NEXTEEL’s and SeAH’s arguments as to the other issues contested in their briefs, and does not make any independent arguments. *See* Hyundai Br. at 4–5.

⁶ AJU concurs with and incorporates by reference SeAH’s, NEXTEEL’s, Husteel’s, and ILJIN’s arguments as to the particular market situation adjustments and the constructed value profit calculations, and does not make any independent arguments. *See* AJU Br. at 7.

6. Whether Commerce's exclusion of freight revenue profit in calculating SeAH's constructed export price is in accordance with the law;
7. Whether Commerce's application of SeAH's affiliated seller's general and administrative expense ratio to both further manufactured and non-further manufactured products is in accordance with the law;
8. Whether Commerce's inclusion of a penalty in SeAH's general and administrative expense ratio is supported by substantial evidence; and
9. Whether Commerce's inclusion of SeAH's inventory valuation losses in its general and administrative expense ratio is supported by substantial evidence.

BACKGROUND

Commerce initiated this third administrative review ("OCTG III") of the antidumping duty order on OCTG from Korea for the period covering September 1, 2016 through August 31, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 52,268, 52,271 (Dep't Commerce Nov. 13, 2017) (initiation notice). Commerce selected NEXTEEL and SeAH as mandatory respondents for individual examination. *Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 51,442, 51,442 (Dep't Commerce Oct. 11, 2018) (prelim. results of the antidumping duty admin. review; 2016–2017).

In the *Final Results*, Commerce assigned weighted-average dumping margins of 32.24% for NEXTEEL, 16.73% for SeAH, and 24.49% for non-examined companies. *Final Results*, 84 Fed. Reg. at 24,086; see Final IDM at 5–6. Commerce based normal value on constructed value for NEXTEEL and SeAH because neither mandatory respondent had a viable home market or third-country market during the period of review. Final IDM at 49.

Commerce applied a differential pricing analysis and calculated SeAH's weighted-average duty margin by the alternative average-to-transaction method. *Id.* at 60–71. Commerce determined that a particular market situation existed in Korea based on a totality-of-the-circumstances assessment of the same four conditions that were alleged in the first administrative review covering 2014–2015 ("OCTG I") and the second administrative review covering 2015–2016 ("OCTG II"), namely: (1) subsidies from the Government of Korea to producers of hot-rolled coil; (2) the deluge of Chinese hot-rolled products exerting downward pressure on Korean domestic hot-rolled coil

prices; (3) strategic alliances between Korean hot-rolled coil suppliers and Korean OCTG producers; and (4) the Government of Korea's influence over the cost of electricity. *See id.* at 10. Commerce adjusted for the particular market situation determination by increasing the reported hot-rolled coil costs by the revised AFA-based subsidy rate of 41.57% assigned to POSCO. *See id.* at 41–42 (citing *POSCO v. United States*, 43 CIT ___, 378 F. Supp. 3d 1348 (2019), *subsequently vacated and remanded*, Appeal No. 192095 (Fed. Cir. Mar. 4, 2021) (order issued as a mandate vacating and remanding for further proceedings consistent with *POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020) (vacating and remanding for further proceedings regarding the final affirmative determination in the countervailing duty investigation of certain cold-rolled steel flat products from Korea)); *see also Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (countervailing duty investigation final affirmative determination), *amended by* 81 Fed. Reg. 67,960, 67,961 (Dep't Commerce Oct. 3, 2016) (countervailing duty investigation amended final affirmative determination), *amended by* 84 Fed. Reg. 23,019 (Dep't Commerce May 21, 2019) (notice of court decision not in harmony with amended final determination of the countervailing duty investigation) (reducing POSCO's total AFA subsidy rate from 58.68% to 41.57%); SeAH Final Calculations Mem. at 2, PD 358 (May 17, 2019); NEXTEEL Final Calculations Mem. at 4, PD 356 (May 17, 2019). Commerce applied the constructed value profit and selling expense ratios calculated for SeAH in OCTG I to determine SeAH's constructed value profit and selling expenses here in OCTG III. Final IDM at 48–49. Commerce adjusted NEXTEEL's reported costs for non-prime products, *id.* at 91–93; calculated as general and administrative (“G&A”) expenses NEXTEEL's costs related to the suspension of two production lines, *id.* at 95–96; deducted SEAH's reported freight revenue up to actual freight cost, *id.* at 73–74; and included affiliate indirect selling expenses, a penalty, and inventory losses in SeAH's G&A expenses, *id.* at 77–80, 83–84, 82–83.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The court will uphold Commerce's determinations unless the findings are unsupported by substantial record evidence or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Statutory Framework

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. *Id.* § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a).

Commerce normally determines dumping margins “by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise” or “by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.” *See id.* § 1677f1(d)(1)(A)(i)–(ii); *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364–65 (Fed. Cir. 2015). Commerce may “compar[e] the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise,” if two statutory conditions are met: “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time,” and “[Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).” 19 U.S.C. § 1677f-1(d)(1)(B).

If Commerce cannot determine the normal value of the subject merchandise based on home market sales, then Commerce may use qualifying third-country sales or constructed value as a basis for normal value. *Id.* § 1677b(a)(4), (a)(1)(B)(ii), (b)(1). Constructed value represents: (1) the cost of materials and fabrication or other processing of any kind used in producing the merchandise; (2) the actual amounts incurred and realized for selling, general, and administrative expenses, and for profits, in connection with the production and sales of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the cost of packing the subject merchandise. *Id.* § 1677b(e). When calculating constructed value, if Commerce determines that a particular market situation exists “such that the cost of materials and fabrication or other pro-

cessing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [then] [Commerce] may use . . . any other calculation methodology.” *Id.* The statute directs Commerce to calculate cost of production and constructed value “based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.” *Id.* § 1677b(f)(1)(A).

When Commerce is required to calculate constructed value for a respondent, Commerce must utilize the respondent’s actual selling, general, and administrative expenses and profits from the home market or a third-country market. *Id.* § 1677b(e)(2)(A). If those data are unavailable, the statute provides Commerce with three alternatives:

- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
- (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
- (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(2)(B).

The statute also dictates the steps by which Commerce is to calculate export price or constructed export price (collectively, “U.S. price”). Export price is:

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,

subject to certain adjustments. *Id.* § 1677a(a). Constructed export price is:

the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,

subject to certain adjustments. *Id.* § 1677a(b). The statute provides for increases to export price and constructed export price for packing expenses, certain rebated or uncollected import duties, and countervailing duties; and reductions for additional charges to transport the subject merchandise to the place of delivery in the United States and any export charge imposed by the exporting country. *Id.* § 1677a(c). The statute provides for additional reductions when calculating constructed export price for selling commissions, expenses directly related to the sale, expenses paid by the seller on behalf of the purchaser, further manufacture or assembly costs, and profit earned for the previously listed services. *Id.* § 1677a(d).

II. Differential Pricing Analysis

Commerce determined that the results of the differential pricing methodology justified using the alternative average-to-transaction methodology to calculate SeAH's dumping margin. *See* Final IDM at 71. SeAH argues that because the differential pricing methodology was not implemented through notice and comment rulemaking, Commerce was required to demonstrate a factual justification for applying the differential pricing methodology and the relevant numerical thresholds but did not. SeAH Br. at 36, 38–39. SeAH contends that Commerce's application of the Cohen's *d* test to the non-normal distribution of SeAH's U.S. sales was inappropriate and Commerce did not explain the use of the 0.8, 33%, and 66% thresholds and why the average-to-average method was inadequate to account for the pattern of differences. *Id.* at 39–43.

Commerce ordinarily uses an average-to-average ("A-to-A") comparison of "the weighted average of the normal values [of subject

merchandise] to the weighted average of export prices (and constructed export prices) for comparable merchandise” when calculating a dumping margin. *See* 19 U.S.C. § 1677f1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). The statute allows Commerce to depart from using the A-to-A methodology and instead use an average-to-transaction (“A-to-T”) comparison of the weighted average of normal values to the export prices and constructed export prices of individual transactions for comparable merchandise when: (1) Commerce observes “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time;” and (2) “[Commerce] explains why such differences cannot be taken into account using [the A-to-A methodology].” 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). In contrast to the A-to-A method, which may mask dumped sales at low prices by averaging them with sales at higher prices, the A-to-T method allows Commerce “to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it.” *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017) (citation and internal quotation marks omitted). Commerce may apply the alternative A-to-T methodology on the same basis in administrative reviews as in antidumping investigations. *See JBF RAK LLC*, 790 F.3d at 1364–65.

The U.S. Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g., Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen’s *d* test); *Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1314–35 (2016) (discussing application of the A-to-T method, the Cohen’s *d* test, the meaningful difference analysis, zeroing, and the “mixed comparison methodology” of applying the A-to-A method and the A-to-T method when 33–66% of a respondent’s sales pass the Cohen’s *d* test), *aff’d*, 862 F.3d 1337; *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test). Commerce’s use of the differential pricing analysis was not subject to the notice and comment requirements of the Administrative Procedure Act. *See Apex Frozen Foods Priv. Ltd.*, 40 CIT at __, 144 F. Supp. 3d at 1321, *aff’d on other grounds*, 862 F.3d 1337.

In *Apex Frozen Foods Private Ltd. v. United States* (“*Apex Frozen Foods*”), 862 F.3d 1337, 1342–43 (Fed. Cir. 2017), Commerce applied a two-step differential pricing analysis to determine whether there

was an unaccountable pattern of significant price differences warranting the alternative A-to-T comparison. First, Commerce applied the Cohen's *d* test and the ratio test to determine whether application of the A-to-T method was warranted for a portion or all of a respondent's sales. *See id.* at 1343; Prelim. Decision Mem. at 11–12, PD 274 (Oct. 3, 2018) (“Prelim. DM”). The Cohen's *d* test is “a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group.” *Apex Frozen Foods*, 862 F.3d at 1342 n.2. The Cohen's *d* test yields a coefficient that expresses the extent of the difference between the means relative to three fixed thresholds: the small threshold of 0.2, the medium threshold of 0.5, and the large threshold of 0.8. *See id.*; Final IDM at 66. In Commerce's application of the Cohen's *d* test, Commerce chose to consider only the large 0.8 threshold. *See Apex Frozen Foods*, 862 F.3d at 1342 n.2. If the coefficient exceeded 0.8, the large threshold, the sales “pass[ed]” and gave “the strongest indication[] that there [wa]s a significant difference between the means” *See id.* In its ratio test, Commerce considered the percentage of each respondent's sales that passed the Cohen's *d* test. *See id.* Commerce decided that for the respondent with more than 66% of its sales passing, application of the A-to-T method to all sales was warranted. *Id.* For the respondent with between 33% and 66% of its sales passing, Commerce decided that application of the A-to-T method to the passing sales was warranted, but that the A-to-A method would be applied to sales not passing. *Id.* Second, Commerce applied the “meaningful difference” test, which is a comparison of the weighted-average margin computed using the A-to-A method to the weighted-average margin computed using the A-to-T method. *Id.* at 1344–45, 1343. For the A-to-T method, Commerce applied its practice of “zeroing,” by which Commerce gives a value of zero to negative dumping margins (sales at non-dumped prices), and averages only positive dumping margins (sales at dumped prices) to “reveal[] masked dumping.” *Id.* at 1342 (“When examining individual export transactions, using the [A-to-T] comparison methodology, prices are not averaged and zeroing reveals masked dumping.” (quoting *Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013))) (additional citation omitted). The margins calculated for the two respondents by the A-to-A method were 0% and the margins calculated by the A-to-T method were 1.97% and 3.01%. *Id.* at 1343. Commerce explained that the A-to-A method could not account for the pattern of price differences because the differences crossed the *de minimis* threshold of 0.5%, making them “meaningful.” *Id.* at 1343, 1345. The U.S. Court of Appeals for the Federal Circuit held that the statute is silent on how

Commerce should identify a pattern of differing prices and how Commerce should determine that the A-to-A method cannot account for differences, and upheld Commerce's differential pricing methodology as a "reasonable implementation of the statutory scheme." *Id.* at 1346.

As in *Apex Frozen Foods*, Commerce applied its two-step differential pricing methodology here. *See* Prelim. DM at 11–13; Final IDM at 5–6, 71 (applying the same methodology as in the Prelim. DM without change to its differential pricing methodology). Commerce applied the Cohen's *d* test and determined that 79.77% of SeAH's U.S. sales and 93.19% of NEXTEEL's U.S. sales passed. SeAH Final Calculations Mem. at 2–3; NEXTEEL Final Calculations Mem. at 4–5. Commerce also applied its meaningful difference test to determine whether the A-to-A method could account for the identified pattern of price differences by comparing the weighted-average dumping margins calculated by the A-to-A method and the A-to-T method with zeroing. *See* Prelim. DM at 11–12. Because the percent of relative change between SeAH's margin calculated by the A-to-A method and SeAH's margin calculated by the A-to-T method with zeroing was greater than 25%, Commerce determined that the A-to-A method could not account for the pattern of price differences. *See* SeAH Final Calculations Mem. at 3. Commerce applied the A-to-T method to all of SeAH's U.S. sales because more than 66% of SeAH's U.S. sales had passed the Cohen's *d* test. *See id.* For NEXTEEL, Commerce determined that there was no meaningful difference between the margin calculated by the A-to-A method and the margin calculated by the A-to-T method with zeroing, and applied the A-to-A method to calculate NEXTEEL's dumping margin. NEXTEEL Final Calculations Mem. at 4–5. The court notes that Commerce used the same differential pricing methodology steps and analysis here as were upheld by the U.S. Court of Appeals for the Federal Circuit in *Apex Frozen Foods*.

A. Whether Commerce Must Justify Application of the Differential Pricing Analysis on a Case-by-Case Basis

SeAH argues that Commerce must explain why application of its differential pricing analysis and the numerical thresholds are appropriate in the context of each administrative review. *See* SeAH Br. at 36. SeAH cites *Washington Red Raspberry Commission v. United States*, 859 F.2d 898 (Fed. Cir. 1988), and *Carlisle Tire & Rubber Co., Division of Carlisle Corp. v. United States* ("Carlisle Tire"), 10 CIT 301 (1986), as support for the proposition that Commerce can apply mathematical assumptions and numerical thresholds that have not been adopted in accordance with the Administrative Procedure Act only if

Commerce explains the basis for its decision “in light of specific factual findings showing that [application] was appropriate in that case.” SeAH Br. at 38. Both cases concerned only Commerce’s application of the 0.5% *de minimis* standard in antidumping investigations and thus are distinguishable from the instant case. See *Wash. Red Raspberry Comm’n*, 859 F.2d at 902–04; *Carlisle Tire*, 10 CIT at 302, 304–06. While it may have been necessary for the *de minimis* standard to be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act, see *Carlisle Tire*, 10 CIT at 305, that is not true of Commerce’s differential pricing analysis. See *Apex Frozen Foods Priv. Ltd.*, 40 CIT at ___, 144 F. Supp. 3d at 1321 (“Commerce’s shift from the *Nails* test to the differential pricing analysis is not subject to notice and comment requirements.”), *aff’d on other grounds*, 862 F.3d 1337. Because Commerce is not required to apply only mathematical assumptions and numerical thresholds that have been adopted in accordance with the Administrative Procedure Act if the record contains substantial evidence supporting the application, as alleged by SeAH, the court need not disturb Commerce’s practice.

B. Commerce’s Use of the Cohen’s *d* Test and the 0.8 Threshold

SeAH contends that Commerce’s use of the Cohen’s *d* test was contrary to well-recognized statistical principles. SeAH Br. at 40–41. Specifically, SeAH argues that the Cohen’s *d* test can only be used when comparing “random samples drawn from Normal (*i.e.*, bell-curve shaped) distributions with roughly equal variance containing a sufficient number of data points.” *Id.* at 40. SeAH asserts also that Commerce must justify its use of the 0.8 threshold. *Id.* at 39–40.

The statute does not set forth the analysis for how Commerce is to identify a pattern of price differences. See 19 U.S.C. §§ 1677, 1677f-1; see also *Apex Frozen Foods*, 862 F.3d at 1346; *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1325 (Fed. Cir. 2020). The Court affords Commerce deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature . . .” See *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). However, Commerce still “must [] explain [cogently] why it has exercised its discretion in a given manner . . .” See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (citation omitted).

Commerce chose the Cohen’s *d* test “to evaluate the extent to which the prices to a particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchan-

dise.” Final IDM at 62 (quoting Prelim. DM at 11–12) (internal quotation marks omitted). Commerce explained that application of the Cohen’s d test was appropriate because “the U.S. sales data . . . reported to Commerce constitute[] a population. As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to Commerce’s analysis.” *Id.* at 66. Commerce determined that of the fixed small, medium, and large thresholds of the Cohen’s d test, 0.2, 0.5, and 0.8, respectively, application of the 0.8 large threshold was reasonable and consistent with its statutory authority because the large threshold was the strongest indicator that the difference between the mean of the test group and mean of the comparison group was significant. *Id.*

Commerce’s application of the Cohen’s d test to determine whether there was a significant pattern of differences was reasonable. Commerce did not need to consider sample size, sample distribution, and the statistical significance of the sample. See *NEXTEEL Co. v. United States* (“*NEXTEEL II First Op.*”), 43 CIT __, __, 392 F. Supp. 3d 1276, 1295 (2019) (citing *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1302 (2016)). Commerce explained its use of the 0.8 threshold and the U.S. Court of Appeals for the Federal Circuit has upheld the 0.8 “rigid measure of significance” for the Cohen’s d test as an exercise of Commerce’s discretion under 19 U.S.C. § 1677f-1(d)(1)(B). See Final IDM at 66; *Mid Continent Steel & Wire*, 940 F.3d at 673 (“[T]he 0.8 standard is widely adopted as part of a commonly used measure of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size.” (citation and internal quotation marks omitted)). Commerce’s decision to apply one of the three thresholds widely used with the Cohen’s d test and explanation for selecting the large threshold are reasonable. The court concludes that Commerce’s approach regarding use of the Cohen’s d test and application of the 0.8 threshold is in accordance with the law.

C. The Ratio Test Thresholds

When more than 66% of a respondent’s sales pass the Cohen’s d test, Commerce determines that the pattern of price differences may warrant application of the A-to-T method to all of the respondent’s sales (pending the outcome of the meaningful difference test). Final IDM at 67. Because 79.77% of SeAH’s U.S. sales passed the Cohen’s d test, Commerce applied the A-to-T method to all of SeAH’s U.S. sales based on application of the ratio test. See SeAH Final Calculations Mem. at 3; Final IDM at 71. SeAH argues that Commerce did

not provide any evidence or reasonable explanation to support the 33% and 66% thresholds used in the ratio test portion of the differential pricing analysis. SeAH Br. at 42–43.

“The statute provides no methodology for how Commerce identifies and measures a pattern of export prices, how significantly those prices must differ among purchasers, regions, or periods of time, or what form of ‘export prices’ Commerce must consider in its pattern analysis.” *U.S. Steel Corp. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1300, 1308–09 (2017) (citing 19 U.S.C. § 1677f-1(d)(1)(B)(i)); see 19 U.S.C. §§ 1677, 1677f-1; see also *Apex Frozen Foods*, 862 F.3d at 1346; *Dillinger France*, 981 F.3d at 1325. The Court affords Commerce deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature” See *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (citation omitted). However, Commerce still “must [] explain [cogently] why it has exercised its discretion in a given manner” See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 48 (citation omitted).

Commerce explained that “when a third or less of a respondent’s U.S. sales are not at prices that differ significantly, then these significantly different prices are not extensive enough to satisfy the first requirement of the statute.” Final IDM at 67. Commerce stated that “when two thirds or more of a respondent’s sales are at prices that differ significantly, then the extent of these sales is so pervasive that it would not permit Commerce to separate the effect of the sales where prices differ significantly from those where prices do not differ significantly,” so application of the A-to-T method to all sales is warranted. *Id.* “[W]hen Commerce finds that between one third and two thirds of U.S. sales are at prices that differ significantly, then there exists a pattern of prices that differ significantly, and [] the effect of this pattern can reasonably be separated from the sales whose prices do not differ significantly,” so application of the A-to-T method is warranted only for sales implicated in the pattern of significantly differing prices. *Id.*

Commerce’s use of the ratio test thresholds was reasonable because it is apparent to the court that Commerce developed its ratio test to identify the existence and extent of a pattern of export prices for comparable merchandise that differed significantly among purchasers, regions, or periods of time. The court concludes that Commerce’s use of the 33% and 66% thresholds in the ratio test is in accordance with the law.

D. Commerce’s Explanation as to Why the A-to-A Comparison Could Not Take the Alleged Pattern into Account

Commerce relied on the results of its meaningful difference test to justify application of the A-to-T method to SeAH’s U.S. sales. *Id.* at 70–71. SeAH argues that Commerce’s application of the A-to-T comparison was unlawful because Commerce’s “meaningful difference” test was insufficient to explain why the A-to-A comparison could not account for price differences. SeAH Br. at 43–44. Specifically, SeAH argues that Commerce is required to explain how record documents provide a factual basis for concluding that the results of the A-to-T calculation are more accurate than the results of the A-to-A calculation in this specific case. *Id.* at 44.

The statute does not set forth the analysis for how Commerce is to determine whether the A-to-A method can or cannot take price differences into account. *See* 19 U.S.C. §§ 1677, 1677f-1; *see also Apex Frozen Foods*, 862 F.3d at 1346. The U.S. Court of Appeals for the Federal Circuit has held that Commerce’s meaningful difference test, by which Commerce calculates weighted-average dumping margins by both the A-to-A method and the A-to-T method and considers the percent of relative difference between the two margins, is a reasonable method to determine whether the A-to-A method can or cannot account for price differences. *See Apex Frozen Foods*, 862 F.3d at 1346–48. The Court affords Commerce deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature” *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (citation omitted). However, Commerce still “must [] explain [cogently] why it has exercised its discretion in a given manner” *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 48 (citation omitted).

Commerce asserted that the meaningful difference test indicates to Commerce the extent to which the A-to-A method “mask[s]” dumping due to higher prices offsetting lower prices in the test group average such that the A-to-A method would be unable to account for price differences. Final IDM at 68. The meaningful difference test is a “comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing)” *Id.* at 69. Commerce explained the five possible scenarios identified by the meaningful difference test and that Commerce regards only one scenario—a significant amount of dumping offset by a significant amount of non-dumped sales—as justification

for application of the A-to-T method because “there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method.” *Id.* at 69–70. Commerce defines the difference between the two weighted-average dumping margins as meaningful only when the margin including offsets from non-dumped sales is: (1) *de minimis* and “mask[s]” a non-*de minimis* amount of dumping or (2) 25% relative change lower than a margin excluding offsets. *Id.* at 70.

Commerce’s use of the meaningful difference test to determine whether the A-to-A method accounts for price differences is reasonable in light of the fact that “[a] meaningful difference test is not even required under the statute.” *Apex Frozen Foods*, 862 F.3d at 1347. The U.S. Court of Appeals for the Federal Circuit has upheld the meaningful difference test as reasonable. *See e.g., id.* at 1348. Commerce explained as required by 19 U.S.C. § 1677f-1(d)(1)(B)(ii) that the A-to-A method could not account for price differences when a significant amount of dumped sales was masked by a significant amount of non-dumped sales. The court concludes that Commerce’s explanation as to why the A-to-A method could not account for SeAH’s pricing behavior is in accordance with the law.

In summary, the court holds that Commerce’s application of the Cohen’s *d* test, the 0.8 threshold, and the 33% and 66% ratio test thresholds are in accordance with the law; Commerce’s explanation for why the A-to-A method could not account for the pattern of price differences in SeAH’s sales is in accordance with the law; and Commerce’s use of the alternative A-to-T method to calculate SeAH’s dumping margin is in accordance with the law. The court sustains Commerce’s application of its differential pricing analysis in calculating SeAH’s dumping margin.

III. Particular Market Situation Determination

Commerce based normal value for NEXTEEL and SeAH on constructed value because neither respondent had a viable home market or third-country market during the period of review. Final IDM at 49. In calculating constructed value, Commerce determined that a particular market situation distorted the cost of production of OCTG. *Id.* at 6, 9.

Plaintiffs aver that the record does not support Commerce’s particular market situation determination. SeAH argues that Commerce’s reliance on the identical record developed during OCTG I necessitates the same conclusion—remand of the particular market situation determination as unsupported by substantial evidence. SeAH Br. at 21–22. NEXTEEL asserts that the more voluminous

record here than in OCTG I and OCTG II—with the additions consisting of “irrelevant news articles that covered periods predating [OCTG III] and various Commerce decision documents”—still does not support a particular market situation determination. NEXTEEL Br. at 15–17. Husteel argues that this court should follow its holding in *NEXTEEL Co. v. United States* (“*NEXTEEL I First Op.*”), 43 CIT __, __, 355 F. Supp. 3d 1336, 1351 (2019), because the additional record evidence introduced in OCTG III is “window dressing.” Husteel Br. at 14–15. Husteel faults Commerce for its particular market situation determination in OCTG III despite this court’s reversal of Commerce’s particular market situation determinations in OCTG I and OCTG II, when the additional documents submitted on the OCTG III record “did not add quantitatively nor qualitatively to support Commerce’s [particular market situation] determination.” See *id.* at 15. ILJIN contends that Commerce relied primarily in its OCTG III particular market situation determination on record documents from the OCTG I and OCTG II records, the additional OCTG III record documents did not resolve the deficiencies this court identified in remanding Commerce’s particular market situation determinations in the previous administrative reviews, and Commerce’s determination in this OCTG III review is likewise unsupported by the record. ILJIN Br. at 13–15, 20–22. ILJIN presents a juxtaposition of Commerce’s analysis of each of the four factors from its OCTG I final issues and decision memorandum with Commerce’s analysis in the OCTG III Final Issues & Decision Memorandum to assert “that [Commerce] is simply following its already rejected reasoning and conclusions from the first administrative review.” *Id.* at 15–18.

Defendant United States (“Defendant”) responds that additional record documents introduced on the OCTG III record on which Commerce extensively relied support Commerce’s determination of a particular market situation based on the confluence of “[a]ll four factors, taken together” Def.’s Resp. Opp’n Mots. J. Admin. R. at 19–20, 18, ECF No. 71 (“Def. Resp.”). Defendant-Intervenor United States Steel Corporation (“U.S. Steel”) asserts that Commerce supported each factor underpinning the particular market situation determination with record documents greater in number and detail and different in kind than the documents that comprised the OCTG I and OCTG II records. See *United States Steel Corporation’s Resp. Rule 56.2 Mots. J. Agency R.* at 28–30, ECF Nos. 70, 75, 76.

The Trade Preferences Extension Act amended certain subsections of the Tariff Act of 1930. See *Trade Preferences Extension Act of 2015*, Pub. L. No. 114–27, 129 Stat. 362 (2015). When calculating constructed value under the revised statute, if Commerce determines

that a particular market situation exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.” 19 U.S.C. § 1677b(e).

In OCTG I, Commerce reviewed the allegation made by Maverick Tube Corporation that each of four factors individually were responsible for a particular market situation in Korea that distorted the OCTG cost of production: (1) subsidization of Korean hot-rolled coil products by the Korean Government; (2) distortive pricing of unfairly-traded Chinese hot-rolled coil; (3) “strategic alliances” between Korean hot-rolled coil suppliers and Korean OCTG producers; and (4) distortive government control over electricity prices in Korea. *NEXTEEL I First Op.*, 43 CIT at __, 355 F. Supp. 3d at 1345–46. Commerce made a preliminary determination that the record did not support the existence of a particular market situation due to any of the four individually alleged factors. *Id.* at __, 355 F. Supp. 3d at 1346 (citation omitted). Without receiving any new record documents, Commerce reversed itself and determined in the final issues and decision memorandum that a particular market situation existed based on the “cumulative effect” of the four factors. *Id.* at __, 355 F. Supp. 3d at 1346, 1349. The court held that the determination was unreasonable and unsupported by substantial evidence because no reasonable mind could find that “individually the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion.” *Id.* at __, 355 F. Supp. 3d at 1351. On remand, Commerce recalculated the relevant dumping margins without a particular market situation adjustment. *NEXTEEL Co. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1353, 1357 (2019). No appeal was initiated of this court’s OCTG I rulings.

In OCTG II, Commerce determined again that a particular market situation in Korea distorted the OCTG cost of production. *NEXTEEL II First Op.*, 43 CIT at __, 392 F. Supp. 3d at 1287–88. Maverick Tube Corporation made the identical four particular market situation allegations in OCTG II that Commerce reviewed in OCTG I and submitted the same supporting exhibits. *Id.* at __, 392 F. Supp. 3d at 1288. Commerce abandoned the approach of examining each of the four factors individually and in OCTG II relied instead only on the “totality of circumstances” methodology it had applied in the final issues and decision memorandum in OCTG I. *See id.* at __, 392 F. Supp. 3d at 1287. Commerce determined that the circumstances present in the Korean market in the OCTG II review remained

“largely unchanged” since the prior OCTG I review because the “facts in the [OCTG II] administrative review [we]re largely identical to the facts in the [OCTG I] administrative review, and the same evidence [wa]s on the record of the instant [OCTG II] review.” *Id.* at __, 392 F. Supp. 3d at 1287–88. Commerce reasoned that the “collective impact” of the same four factors considered in its particular market situation analysis in OCTG I and the “largely identical” facts in OCTG II compelled the determination that a particular market situation existed. *Id.* at __, 392 F. Supp. 3d at 1288. Given that the OCTG I particular market situation determination was based on substantially the same facts and record evidence, the court concluded that Commerce’s particular market situation determination in OCTG II likewise was unsupported by substantial evidence. *Id.* On remand, Commerce examined the same four factors that Maverick Tube Corporation had alleged as creating a particular market situation (subsidization, effects of Chinese hot-rolled coil imports, strategic alliances, and government control over electricity prices), but also cited a new fifth factor as supporting a particular market situation—an allegation of a “steel industry restructuring effort by the Korean Government.” *NEXTEEL Co. v. United States* (“*NEXTEEL II Remand Op.*”), 44 CIT __, __, 450 F. Supp. 3d 1333, 1339 (2020) (brackets omitted). Commerce reasoned that the cumulative effect of these five factors supported a determination that a particular market situation distorted the cost of production of OCTG and compelled making an upward adjustment to the mandatory respondents’ reported costs based on the countervailing duty rate found in *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439, amended by *Certain Hot-Rolled Steel Flat Products From Brazil and the Republic of Korea*, 81 Fed. Reg. 67,960, amended by *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 23,019. *NEXTEEL II Remand Op.*, 44 CIT at __, 450 F. Supp. 3d at 1339, 1336 n.4. The court considered the record evidence on which Commerce relied for each of the five factors and found that Commerce’s determinations and explanations were unsupported by substantial evidence, when viewed both individually and collectively. *Id.* at __, 450 F. Supp. 3d at 1339–43.

First, the court reviewed Commerce’s determination that hot-rolled coil subsidization was a contributing factor in the existence of a particular market situation. *Id.* at __, 450 F. Supp. 3d at 1339–40. Although the review in *Certain Hot-Rolled Steel Flat Products From the Republic of Korea* of the countervailing duty order on hot-rolled coil covering calendar year 2016, which overlapped eight of the twelve months of the OCTG II period of review, yielded subsidy rates of

0.54% for POSCO, 0.58% for Hyundai Steel Co., Ltd., and 0.56% for all others, Commerce rejected those subsidy rates and chose to rely on the almost 60% AFA-based subsidy rate assigned to mandatory respondent POSCO in calendar year 2014. *Id.* at __, 450 F. Supp. 3d at 1340. The court found that Commerce’s determination that a particular market situation existed based on hot-rolled coil subsidization was not supported by substantial evidence. *Id.*

Second, the court reviewed Commerce’s determination that Chinese hot-rolled coil imports were a contributing factor in the existence of a particular market situation. *Id.* at __, 450 F. Supp. 3d at 1340–41. Commerce cited a January 2016 Asian Steel Watch article titled “China’s Steel Exports Reaching 100 Mt: What It Means to Asia and Beyond” (“Steel Watch Article (OCTG II)”), which discussed 2014 market conditions several months removed from the OCTG II period of review. *Id.* at __, 450 F. Supp. 3d at 1341. The court observed that the Steel Watch Article (OCTG II) described China and Korea as major steel producers and consumers with imports and exports, but did not support Commerce’s assertion that Chinese imports into Korea placed downward pressure on Korean domestic steel prices. *Id.* at __, 450 F. Supp. 3d at 1340–41. Commerce also cited a translated document excerpt, dated September 30, 2016, titled “Announcement for and Excerpts from Relevant Ministries of the Government of Korea, Proposal for Strengthening the Competitiveness of the Steel Industry” (“Announcement (OCTG II)”). *Id.* at __, 450 F. Supp. 3d at 1341. Commerce quoted the Announcement (OCTG II) as purported evidence that “Chinese excess supply is ‘especially targeted’ towards Korea,” although the full quote from the Announcement (OCTG II) stated that “China’s excess supply [is] *especially targeted towards Korea, ASEAN, and EU.*” *Id.* The court noted that it was unreasonable for Commerce to determine that this evidence demonstrated that Chinese excess supply was “especially targeted towards Korea” alone, when Chinese hot-rolled coil imports were also aimed at the ten countries comprising the Association of Southeast Asian Nations (ASEAN) and the twenty-eight countries comprising the European Union (prior to the United Kingdom’s exit from the European Union). *Id.* Commerce had conceded that “petitioners have not pointed to any evidence that Chinese overcapacity is directed toward the Korean market. That Chinese steel overcapacity affects the whole world is not disputed.” *Id.* The court found that Commerce’s determination that a particular market situation existed based on Chinese hot-rolled coil imports was not supported by substantial evidence. *Id.*

Third, the court reviewed Commerce’s determination that strategic alliances were a contributing factor in the existence of a particular

market situation. *Id.* at ___, 450 F. Supp. 3d at 1341–43. Commerce had conceded that nothing on the record showed that strategic alliances between Korean hot-rolled coil producers and Korean OCTG producers created a distortion in hot-rolled coil costs, but determined that the possibility of the strategic alliances’ past, present, and future impact on hot-rolled coil prices was “relevant.” *Id.* at ___, 450 F. Supp. 3d at 1342. The court noted that Commerce’s speculative conclusions that strategic alliances “may have created distortions” and “may continue to impact [hot-rolled coil] pricing in a distortive manner during the [OCTG II] [period of review] and in the future” were not themselves record evidence. *Id.* The court found that Commerce’s determination that a particular market situation existed based on strategic alliances was not supported by substantial evidence. *Id.* at ___, 450 F. Supp. 3d at 1342–43.

Fourth, the court reviewed Commerce’s determination that the Korean Government’s regulation of the Korean electricity market was a contributing factor in the existence of a particular market situation. *Id.* at ___, 450 F. Supp. 3d at 1343. Commerce relied on the Korean Government’s control of the electricity market and the impact of electricity prices on the OCTG manufacturing process without substantiating its assertion that any impact on electricity prices distorted the OCTG cost of production. *Id.* The court noted that Commerce had found in prior countervailing duty investigations, more than once, no evidence that Korean steel producers received countervailable subsidies as to electricity. *Id.* The court found that Commerce’s determination that a particular market situation existed based on government control over electricity was not supported by substantial evidence. *Id.*

Fifth, the court reviewed Commerce’s determination that the Korean Government’s steel industry restructuring efforts, the new fifth factor that Commerce introduced on remand, were a contributing factor in the existence of a particular market situation. *Id.* The court noted that Commerce cited a press release from the Korean Ministry of Strategy and Finance announcing the Korean Government’s “2017 Action Plan for Industrial Restructuring” dated five months after the OCTG II period of review ended. *Id.* Commerce had also considered an article from Invest Chosun, noting the investment industry’s support for additional restructuring. *Id.* The court observed that the record evidence cited by Commerce did not demonstrate actual restructuring during the OCTG II period of review. *Id.* The court held that Commerce’s determination that a particular market situation existed based on restructuring efforts was not supported by substantial evidence. *Id.*

In summary, the court held that Commerce's particular market situation determination on remand was unsupported by substantial evidence, whether the five alleged factors were viewed individually or collectively. *Id.* On second remand, Commerce recalculated the relevant dumping margins without a particular market situation adjustment. *NEXTEEL Co. v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1378, 1379–80 (2020), *appeal docketed*, Appeal No. 21–1430 (Fed. Cir. Dec. 21, 2020).

Here in OCTG III regarding the third administrative review for the period covering September 1, 2016 through August 31, 2017, Commerce determined that a particular market situation distorted the cost of production of OCTG based on the cumulative effect of the original four factors alleged in prior administrative reviews, namely: (1) Korean subsidies of the hot-rolled coil input; (2) imports of hot-rolled coil into Korea from China; (3) strategic alliances between Korean hot-rolled coil producers and Korean OCTG producers; and (4) government control over prices in the Korean electricity market. Final IDM at 23. Defendant-Intervenors Maverick Tube Corporation, Tenaris Bay City, Inc., United States Steel Corporation, IPSCO Tubulars Inc. (formerly TMK IPSCO), Vallourec Star, L.P., and Welded Tube USA Inc. collectively submitted in OCTG III a particular market situation allegation letter with fifty-two attached exhibits. Domestic Interested Parties' Particular Market Situation Allegation Submission, PD 116–33 (May 16, 2018) ("OCTG III Allegation"). The exhibits included the particular market situation allegation letter regarding electricity with twenty-six attached sub-exhibits submitted by Maverick Tube Corporation in OCTG I, Exhibit 21; the particular market situation allegation letter with twelve attached sub-exhibits submitted by Maverick Tube Corporation in OCTG II, Exhibit 24; and the particular market situation allegation letter with twenty-five attached sub-exhibits submitted by United States Steel Corporation in OCTG II, Exhibit 25. *See id.* at 9–11, Exs. 21 ("OCTG I Electricity Allegation"), 24 ("Maverick OCTG II Allegation"), 25 ("U.S. Steel OCTG II Allegation"). Although the record in OCTG III contains some additional documents not included on the OCTG I or OCTG II records, the court observes that Commerce's examination of the OCTG III record overall, including previously submitted documents and newly submitted documents, with related explanations, does not support Commerce's OCTG III determination that a particular market situation affected the cost of production of OCTG.⁷

⁷ NEXTEEL asserts that Commerce's determination that subsidies to POSCO, a producer of hot-rolled coil, contributed to a particular market situation distorting the cost of production of OCTG was not in accordance with the law because it amounted to consideration of an upstream subsidy. NEXTEEL Br. at 28. NEXTEEL argues that fundamental principles

As to the first factor, Commerce determined in OCTG III that the Government of Korea subsidized hot-rolled coil production, which contributed to the existence of a particular market situation. Final IDM at 23. Commerce supported its determination of subsidization of hot-rolled coil by citing to: Commerce’s final issues and decision memorandum from OCTG I, final issues and decision memorandum from OCTG II, and issues and decision memorandum from the countervailing duty investigation in *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*; the amended final calculation memorandum for POSCO in *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, dated August 23, 2016 (“POSCO Subsidy Calculation”); the Steel Watch Article (OCTG II); a Bloomberg article from the OCTG II record, dated January 28, 2016, titled “POSCO Posts Smallest Ever Profit Amid Chinese Steel Deluge” (“Bloomberg POSCO Article (OCTG II)”); and the Announcement (OCTG II). *Id.* at 23–24 & nn.179–82 (citing OCTG III Allegation Exs. 2, 1, 14, 15, 25 (U.S. Steel OCTG II Allegation Exs. 2, 4), 24 (Maverick OCTG II Allegation Ex. 5)).

The court observes that these record documents cited by Commerce do not demonstrate that subsidization of hot-rolled coil, considered with other factors, amounted to a particular market situation. Commerce determined that Korean steel production was “heavily subsidized” based on “subsidies received by Korean hot-rolled steel producers [that] totaled almost 60 percent of the cost of hot-rolled steel” in the countervailing duty investigation with a period of investigation covering calendar year 2014 in *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*.⁸ *Id.* at 23–24 (citing POSCO Subsidy Calculation). *But see* SeAH Final Calculations Mem. at 2 (applying the amended 41.57% subsidy); NEXTEEL Final Calculations Mem. at

of statutory construction require Commerce to address the hot-rolled coil subsidy under the specific upstream subsidy framework set forth in 19 U.S.C. § 1677–1 rather than the general particular market situation framework set forth in 19 U.S.C. § 1677b(e). *Id.* at 29–30. Commerce considered whether a particular market situation existed that affected the comparison of normal value to export price or constructed export price, not whether remediable subsidies existed in the Korean market. Because the court finds that the record evidence does not support Commerce’s determination that subsidies of hot-rolled coil contributed to the existence of a particular market situation, the court need not address NEXTEEL’s argument that “the statutory provisions remedying upstream subsidies preclude the use of the particular market situation provisions to remedy alleged market distortions that affect the cost of an input, where those alleged distortions include allegations of subsidies.” *See Husteel Co. v. United States*, 44 CIT __, __ n.16, 426 F. Supp. 3d 1376, 1390 n.16 (2020).

⁸ This court’s decision in *POSCO v. United States*, 43 CIT __, 378 F. Supp. 3d 1348 (2019), sustaining the AFA-based subsidy rate of 41.57% assigned in the countervailing duty investigation, was vacated and remanded for further proceedings consistent with *POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020), by an order issued as a mandate on March 4, 2021. *See POSCO v. United States*, Appeal No. 19–2095 (Fed. Cir. Mar. 4, 2021).

4 (applying the amended 41.57% subsidy); *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. at 23,019–20 (reducing POSCO’s total AFA subsidy rate from 58.68% to 41.57%). In the course of performing its first administrative review of the countervailing duty order with a period of review from August 12, 2016 (the date of publication of the countervailing duty investigation final affirmative determination) to December 31, 2016, Commerce assigned preliminarily lower subsidy rates of 1.73% for POSCO, 0.65% for Hyundai Steel Co., Ltd., and 1.21% for all others. *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 83 Fed. Reg. 55,517, 55,518 (Dep’t Commerce Nov. 6, 2018) (prelim. results of countervailing duty admin. review; 2016). Commerce’s reliance on the subsidy rate of nearly 60% or the revised subsidy rate of more than 40% from the countervailing duty investigation covering calendar year 2014 was unreasonable in light of available information of more contemporaneous subsidy rates of less than 2% for the period of review from August 12, 2016 to December 31, 2016, which overlaps partially with the OCTG III period of review from September 1, 2016 through August 31, 2017. The court observes that it is unreasonable for Commerce to determine that Korean steel production was “heavily subsidized” based on the subsidy rate of almost 60% from a timeframe outside the period of review, when other information that Commerce noted in the OCTG III Final Issues & Decision Memorandum demonstrates alternate subsidy rates of less than 2% for the relevant period of review. *See* Final IDM at 31 n.239 & 41.

In explaining its determination that hot-rolled coil subsidization contributed to a particular market situation, Commerce asserted that “as a result of significant overcapacity in Chinese steel production, which stems in part from the distortions and interventions prevalent in the Chinese economy, the Korean steel market has been flooded with imports of cheaper Chinese steel products, placing downward pressure on Korean domestic steel prices” based on the final issues and decision memorandum from OCTG II, the Steel Watch Article (OCTG II), the Announcement (OCTG II), and the Bloomberg POSCO Article (OCTG II). *Id.* at 23 & n.182. The court notes at the outset that citation to a prior issues and decision memorandum drafted by Commerce does not suffice as evidence that can be considered by the court or as substantial evidence upon which Commerce may rely. *Nucor Corp. v. United States*, 44 CIT __, __, 461 F. Supp. 3d 1374, 1379 (2020) (citing *Hyundai Heavy Indus., Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1349 (2018) (“Commerce’s Issues and Decision Memorandum, by itself, does not constitute substantial evidence.”)). The court notes further that the other cited record sources,

including the Steel Watch Article (OCTG II), the Announcement (OCTG II), and the Bloomberg POSCO Article (OCTG II), discussed the global increase in low-priced hot-rolled coil exports from China and its effect on the profits of POSCO, a Korean hot-rolled coil producer, and do not demonstrate subsidization of hot-rolled coil by the Korean Government or whether hot-rolled coil subsidization was a contributing factor in the existence of a particular market situation.

In summary, the court finds with respect to the first factor that Commerce's determination that "heavily subsidized" hot-rolled coil contributed to a particular market situation that distorted the cost of production is not supported by substantial evidence because the documents cited by Commerce do not address the issue of subsidization of hot-rolled coil by the Korean Government, and as noted earlier, Commerce's reliance on a subsidization rate of nearly 60% from a timeframe outside the relevant period of review is unreasonable in light of existing contrary record information referenced by Commerce of significantly lower subsidization rates of less than 2% from within the period of review.

As to the second factor, Commerce determined that an onslaught of imported "cheaper Chinese steel products" in the Korean steel market exerted "downward pressure on Korean domestic steel prices." Final IDM at 24. In addition to citing the Steel Watch Article (OCTG II) and the Bloomberg POSCO Article (OCTG II), Commerce also relied on the following record documents introduced on the OCTG III record: Global Trade Atlas, South Korea Import Statistics for Hot-Rolled Products, 2012–2017 ("GTA 2012–2017"); an article in *The Investor*, Korea Herald, dated September 20, 2016, titled "POSCO, Hyundai Steel merger to benefit industry: report;"⁹ an article in *Pulse* by Maeil Business Newspaper, dated November 23, 2016, titled "Hyundai Steel, Dongkuk Steel become latest beneficiaries of fast-track restructuring program;" an article in *Business Korea*, dated September 19, 2016, titled "Korean Steel Industry Advised to Reduce Number of Steel Plate Plants by Half;" an article in the *Korea Times*, dated September 22, 2016, titled "Voices growing for merger of POSCO, Hyundai Steel" ("Korea Times Article"); and *Korean Purchases of Hot-Rolled Coils – Calendar Year 2017*, United Nations

⁹ The OCTG III Allegation and the attached Exhibit List both refer to Exhibit 43 as "Ahn Sung-mi, *Hyundai Steel strongly denies merger with POSCO*, *The Investor*, Korea Herald (Nov. 1, 2016)." OCTG III Allegation at 17 & Ex. List. However, Exhibit 43 that was filed with the court in the Joint Appendix is an article in *The Investor*, Korea Herald, dated September 20, 2016, titled "POSCO, Hyundai Steel merger to benefit industry: report." J.A., ECF Nos. 92–7 at ECF pp. 644–45, 93–3 at ECF pp. 860–61. The court reviewed Exhibit 43 as filed with the court in the Joint Appendix.

COMTRADE (“COMTRADE”).*See id.* at 24 & nn.183–88 (citing OCTG III Allegation Exs. 38, 43, 44, 45, 47, 25 (U.S. Steel OCTG II Allegation Exs. 2, 4), 41); OCTG III Allegation at 16–18.¹⁰

The articles and statistics cited by Commerce do not support a determination that the influx of Chinese hot-rolled coil is particular to Korea because the record documents describe a global influx that affected many other countries in addition to Korea, rather than an effect that is unique or particular to Korea. *See, e.g.*, Korea Times Article (“The global market will likely be saddled with a supply glut for the foreseeable future because of China’s overcapacity.”). Commerce noted that Korea was China’s largest hot-rolled coil export market in 2014. Final IDM at 24 (citing Steel Watch Article (OCTG II)). Commerce also cited statistics that China was the top hot-rolled coil exporter into Korea from 2012 to 2017. *Id.* (citing GTA 2012–2017; COMTRADE). Commerce considered the challenges faced by POSCO, a Korean hot-rolled coil producer, in competing with low-priced Chinese hot-rolled coil imports. *Id.* (citing Bloomberg POSCO Article (OCTG II)). The court observes that the statistics and articles cited by Commerce do not indicate that the experience in Korea due to Chinese hot-rolled coil imports is distinct from the experience in other countries around the world, which were also inundated with the global oversupply of low-priced Chinese products. Although it is clear that the oversupply of low-priced Chinese products affects many countries in the global market, the court notes that Commerce has cited nothing on the record to support its determination that the oversupply of low-priced Chinese products is *particular* to the Korean market.

Commerce conceded that the global oversupply of Chinese hot-rolled coil depressed prices in other countries:

NEXTEEL’s point that its input costs are consistent with prices in other markets does not refute our finding that global excess steel capacity contributes to a [particular market situation] in Korea. As reported in Asian Steel Watch, “China’s oversupply situation . . . is expected to result in increased exports and price

¹⁰ Commerce also cited “Letter from the Domestic Interested Parties, ‘Oil Country Tubular Goods from the Republic of Korea: Factual Information Relating to the Particular Market Situation in Korea,’ dated August 20, 2018 (the Domestic Interested Parties’ Supplemental [Particular Market Situation] Allegation), at Exhibit 1 (The Investor, Korea Herald, ‘Hyundai Steel strongly denies merger with POSCO,’ by Ahn Sung-mi (November 1, 2016).” Final IDM at 24 n.184. It appears that the “Letter from the Domestic Interested Parties, ‘Oil Country Tubular Goods from the Republic of Korea: Factual Information Relating to the Particular Market Situation in Korea’ dated August 20, 2018 (the Domestic Interested Parties’ Supplemental [Particular Market Situation] Allegation),” was not included in the Joint Appendix so the court was unable to review it or any of its exhibits. *See J.A.*, ECF Nos. 92, 93 at Table of Contents.

decline pressures.” This global excess steel capacity has the potential to depress steel prices not just in Korea but in various markets. Although the effect may vary, steel prices in various countries are likely lower than they would be but for global excess capacity. Therefore, a comparison of [hot-rolled steel] prices in various countries does not prove that [hot-rolled steel] prices in Korea are not lower than they would be but for global excess steel capacity.

Id. at 28 (quoting Steel Watch Article (OCTG II)); *see also* Def. Resp. at 25–26. Commerce’s acknowledgment that any downward pressure caused by China’s oversupply was not specific to Korea undermined its determination that Chinese hot-rolled coil imports contributed to a particular market situation in Korea. *See Husteel Co. v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1349, 1391 (2020) (“Although 19 U.S.C. § 1677b may not demand that a [particular market situation] be such that it only affects the subject market, there is no evidence on the record that Chinese overcapacity affects the Korean market in some way that is specific to the Korean market at all.”).

The court observes that the record evidence cited by Commerce does not support a conclusion that the global glut of Chinese hot-rolled coil imports caused price distortions specific to the Korean steel market. The court finds that Commerce’s determination that excess capacity of Chinese hot-rolled coil imports contributed to a particular market situation in Korea is not supported by substantial evidence.

As to the third factor, Commerce determined that strategic alliances between certain Korean hot-rolled coil producers and Korean OCTG producers affected the cost of hot-rolled coil. Commerce cited new record documents introduced on the OCTG III record, including: a notice from the Korean Free Trade Commission, dated December 21, 2017, of penalties imposed on SeAH, other Korean OCTG producers, and Korean hot-rolled coil suppliers for engaging in bid-rigging schemes between January 2003 and December 2013; an article in the Korea Times, dated December 20, 2017, titled “Steelmakers fined W92 bil. for bid rigging;” a translated resolution of the Korean Fair Trade Commission, dated December 21, 2017, issuing a finding of unfair corporate action in bidding agreements on steel pipe orders between 2003 and 2014; a translated resolution of the Korean Fair Trade Commission, dated July 7, 1998, issuing a finding of unfair corporate action in coordinated price increases between April 1997 and March 1998; and a translated resolution of the Korean Fair Trade Commission, undated, issuing a finding of unfair corporate action in

bidding agreements on steel pipe orders in 1995 and 1996. *See* Final IDM at 25 & nn.189–90 (citing OCTG III Allegation Exs. 30–34). Despite these numerous documents added to the OCTG III record, Commerce conceded that the record does not show “that strategic alliances directly created a distortion in [hot-rolled coil] pricing in the current period of review.” *Id.* at 25. The record documents cited by Commerce relate to findings of unfair corporate action that occurred in 2014 or earlier, and no evidence relates to unfair corporate action or other strategic alliances during the relevant period of review from 2016–2017 in this case. Because none of the evidence pertains to the relevant period of review, Commerce’s purely speculative conclusions that strategic alliances “may have created distortions” and “may continue to impact [hot-rolled coil] pricing in a distortive manner during the [OCTG III] [period of review] and in the future” are not supported by the record. *See id.* The court finds that Commerce’s determination that strategic alliances between Korean hot-rolled coil producers and Korean OCTG producers affected prices in the Korean steel market during the OCTG III period of review and contributed to a particular market situation is not supported by substantial evidence.

As to the fourth factor, Commerce determined that the Korean Government’s regulation of the Korean electricity market contributed to a particular market situation. *Id.* Commerce relied on the Form 20-F annual report filed by Korea Electric Power Corporation (“KEPCO”) with the U.S. Securities and Exchange Commission on April 30, 2014¹¹ “[f]or the fiscal year ended December 31, 2013;” South Korea Import Statistics for January 2013 through December 2013 for Commodities “Containing a Volatile Matter Less than 22% By Weight (On A Dry, Mineral-Matter-Free Basis),” “Other,” and “Anthracite;” the U.S. Energy Information Administration’s full report on South Korea, last updated April 1, 2014; and the question-

¹¹ Commerce cited “Letter, ‘Certain Oil Country Tubular Goods from the Republic of Korea: Particular Market Situation Allegation on Electricity,’ dated February 3, 2016 (Maverick’s Electricity Allegation), at 3, referencing Korea Electric Power Corporation Form 20-F (April 30, 2016) (KEPCO 20-F)” Final IDM at 25 n.191 (emphasis added); *see also id.* at 25 n.192 (referencing Form 20-F as *Exhibit 2*). Page 3 of the allegation letter, which Commerce referred to as Maverick’s Electricity Allegation and the court refers to as OCTG I Electricity Allegation, cited “Korea Electric Power Corporation Form 20-F (Apr. 30, 2015) (“KEPCO 20-F”) at 82, attached as *Exhibit 2*” OCTG I Electricity Allegation at 3 n.3 (emphasis added). Exhibit 2 (KEPCO Form 20-F) of Exhibit 21 (OCTG I Electricity Allegation) of the Joint Appendix that was filed with the court is the Form 20-F filed by KEPCO on April 30, 2014. J.A., ECF Nos. 92 4 at ECF pp. 373–537, 93–6 at ECF pp. 985–1029 to 93–1 at ECF pp. 1–120. Commerce’s citations to pages 46, 47, and 82 of Exhibit 2 correspond with information on pages 46, 47, and 82 of the Form 20-F filed by KEPCO on April 30, 2014. *See* OCTG I Electricity Allegation Ex. 2. The document properly on the OCTG III record is Commerce’s Exhibit 2 of the OCTG I Electricity Allegation, Form 20-F filed by KEPCO on April 30, 2014.

naire response, dated January 21, 2015, and the supplemental questionnaire response on electricity rate, dated March 6, 2015, submitted by the Government of Korea in the countervailing duty investigation in *Welded Line Pipe From the Republic of Korea*. See *id.* at 25 & nn.191–94 (citing OCTG I Electricity Allegation Exs. 2, 8, 1, 4, 9). The two questionnaire responses from the countervailing duty investigation in *Welded Line Pipe From the Republic of Korea* refer to the period of investigation from January 1, 2013 through December 31, 2013. See *Welded Line Pipe From the Republic of Korea*, 80 Fed. Reg. 61,365 (Dep’t Commerce Oct. 13, 2015) (final negative countervailing duty determination).

The court observes that the record evidence does not support Commerce’s determination that a particular market situation existed in Korea based in part on government control over electricity during the OCTG III period of review from 2016–2017 because Commerce’s determination that the Korean Government’s control of electricity contributed to a particular market situation has a temporal problem. Commerce cited only record documents that relate to April 2014 or earlier to determine that the Korean Government controlled the supply and pricing of electricity and that KEPCO, the largest supplier of electricity in Korea, was government controlled. See Final IDM at 25 & nn.191–94 (citing OCTG I Electricity Allegation Exs. 1, 2, 4, 8, 9). The content of the record evidence relied upon by Commerce is at least two years removed from the OCTG III period of review of 2016–2017 and is inconclusive regarding government control over electricity during the OCTG III period of review. The court finds, therefore, that Commerce’s determinations that the Korean Government controlled the price of electricity and that government control over electricity contributed to a particular market situation during the OCTG III period of review are not supported by substantial evidence because none of the cited documents pertain to the relevant period of review in this case.

In summary, the court concludes that Commerce’s determination that a particular market situation affected the cost of production of OCTG in Korea is not supported by substantial evidence. Commerce based its particular market situation determination on the cumulative effect of four alleged factors, but the court observes that the record evidence does not support the existence during the OCTG III period of review of any of these factors. The court finds that Commerce’s assertions regarding the two factors that the Korean Government heavily subsidized hot-rolled coil and controlled electricity prices during the OCTG III period of review are not supported by record evidence. Commerce conceded that it presented no evidence to

support the existence of strategic alliances during the OCTG III period of review, and in the absence of evidence, the court cannot consider whether the possibility of a factor contributes to a particular market situation. As to the remaining factor, the record evidence does not support Commerce's assertion that the impact of Chinese hot-rolled coil imports is particular to Korea.

The court holds that substantial record evidence does not support Commerce's cumulative particular market situation determination in Korea for the 2016–2017 period of review because the record evidence does not demonstrate the existence during the period of review of the four factors allegedly underlying the particular market situation determination. The court remands Commerce's particular market situation determination and adjustment for further explanation or reconsideration consistent with this opinion.

IV. Constructed Value Profit Calculation

Commerce calculated constructed value profit by the third alternative method based on SeAH's profit on OCTG sales to the Canadian market during the OCTG I period of review, citing it as the best information available on the record. *Id.* at 48–49, 51; Def. Resp. at 36. NEXTEEL faults Commerce's use of: (1) non-contemporaneous data as unreasonable when there were important differences in the marketplace between the two periods of review; and (2) SeAH's Canadian market sales subject to a Canadian antidumping duty case with respect to subject merchandise as contradictory to Commerce's prior practice. NEXTEEL Br. at 36–42. SeAH argues that Commerce failed to apply a “profit cap” in accordance with the statute. SeAH Br. at 31–35.

When calculating constructed value by the third alternative method, Commerce may use “any other reasonable method” to calculate profits and selling, general, and administrative expenses. 19 U.S.C. § 1677b(e)(2)(B). “The objective is to find a good proxy (or surrogate) for the profits that the respondent can fairly be expected to build into a fair sales price of the particular merchandise.” *Mid Continent Steel & Wire*, 941 F.3d at 542 (citations omitted).

In calculating constructed value, Commerce determined that SeAH and NEXTEEL did not have a viable home market or third-country market during the period of review for purposes of calculating constructed value profits and selling expenses under 19 U.S.C. § 1677b(e)(2)(A). Final IDM at 49. When considering the statutory alternatives under 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii), Commerce eliminated subsection (i) because NEXTEEL's and SeAH's other steel

products were in different categories than OCTG, and subsection (ii) because NEXTEEL had no sales of OCTG in the home market of Korea. *Id.* at 50. Commerce calculated constructed value under subsection (iii). *Id.* The nine sources of information on the record identified by Commerce included SeAH's data from OCTG I of OCTG sales in Canada, NEXTEEL's data of home market sales of non-OCTG standard pipe, and the financial statements of seven non-Korean producers, "Nippon Steel," "Tenaris," "TMK," "Borusan Mannesmann," "Chung Hung Steel Corporation," "Maharashtra Seamless Limited," and "EVRAZ plc," many of which included significant sales of non-OCTG products. *Id.* at 50, 53–54. Commerce chose to calculate constructed value profit by utilizing SeAH's Canadian market profit data from OCTG I. *Id.* at 50–51. Commerce favored SeAH's data as the only data available on the record that reflected the profit of a Korean OCTG producer on sales of OCTG in the ordinary course of trade. *Id.* at 51–53.

NEXTEEL contends that the use of SeAH's data from the OCTG I review is unreasonable as applied to the current period of review because the OCTG market declined in the interim. NEXTEEL Br. at 37–38. NEXTEEL's first contention is incorrect. Using subsection (iii) to calculate constructed value, Commerce may use "any reasonable method" to determine constructed value. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce explained that "[w]hile the financial data from SeAH are less contemporaneous with the [period of review] than are the other alternative financial data sources, we continue to find that the specificity of the SeAH financial data outweighs concerns over contemporaneity." Final IDM at 51. Because SeAH's data reflect "profit from OCTG produced by a Korean producer in Korea," and profit made on comparison market sales in the ordinary course of trade, Commerce reasoned that using the data therefore "eliminates some of the inherent flaws that occur with using surrogate financial statements (*e.g.*, profits reflecting products that are not in the same general category of products as OCTG)." *Id.* The court regards as reasonable Commerce's explanation that SeAH's financial data are specific and relate to a Korean producer conducting production in Korea and are more accurate than surrogate financial statements from non-Korean producers or regarding a product other than OCTG. The court concludes that Commerce's use of SeAH's OCTG I data is reasonable and supported by substantial evidence.

In addition, NEXTEEL and SeAH contend that Commerce's use of SeAH's data is inconsistent with Commerce's prior practice of disregarding sales subject to antidumping duties. NEXTEEL Br. at 41–42; SeAH Br. at 32. On March 3, 2015, the Canadian Border Services

Agency made a final determination of dumping and assigned dumping margins of 8.8% to SeAH Steel Corporation and 37.4% to all other exporters. NEXTEEL's CV Profit and Selling Expenses Rebuttal Comments Exs. 8-b, 8-c, PD 208 (July 20, 2018); SeAH's CV Profit Rebuttal Submission Attachs. 2–4, PD 210–13 (July 19, 2018). Despite the Canadian antidumping determination, Commerce's use of SeAH's OCTG I data does not run afoul of the preference against using "dumped third country prices to calculate [normal value]," see *Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 341 (2002), because Commerce made adjustments for possible distortions. Commerce "subjected SeAH's Canadian market sales to a cost test, and only those sales that were made above the cost of production (*i.e.*, made in the ordinary course of trade) were used in constructing the aggregate [constructed value] profit and selling expenses." Final IDM at 54. Commerce explained that SeAH's OCTG I data were the most accurate because they were the only data available from a Korean producer of sales of OCTG and, with Commerce's exclusion of the dumped sales, they reflected sales made in the ordinary course of trade. *Id.* at 51–52, 54. The court's conclusion that Commerce's selection of SeAH's OCTG I data is reasonable is not altered by the existence of a Canadian antidumping determination because Commerce did not include the dumped sales in the constructed value profit calculation. The court finds that Commerce's use of SeAH's Canadian market sales of OCTG from OCTG I is reasonable.

SeAH also argues that Commerce's calculation of constructed value profit is inconsistent with the statute because Commerce did not apply a "profit cap" based on the financial statements of global OCTG producers. SeAH Br. at 33–34. Specifically, SeAH argues that Commerce's "use of the same figures to determine both the profit rate and the 'profit cap' . . . mean[s] that no 'profit cap' was actually applied" and that Commerce erred by not applying a profit cap based on the profit earned on all home-market sales of merchandise in the same general category of merchandise. *Id.*

In utilizing a "reasonable method" under subsection (iii), Commerce normally must apply an upward limit for profit commonly termed the "profit cap." *Atar S.r.l. v. United States*, 730 F.3d 1320, 1322 (Fed. Cir. 2013) (citation omitted). "This 'profit cap' prevents the 'various possible calculation methods from yielding anomalous results that stray beyond the amount normally realized from sales of merchandise in the same general category.'" *Mid Continent Steel & Wire*, 941 F.3d at 545 (quoting *Atar S.r.l.*, 730 F.3d at 1327). Congress contemplated situations, however, in which a profit cap would not be calculable:

[W]here, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a “profit cap” under alternative (3), it might have to apply alternative (3) on the basis of “the facts available.” This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

Id. (quoting H.R. Doc. No. 103–316, vol. 1 at 841 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177). When Commerce explains reasonably that information is not available for Commerce to calculate a profit cap, Commerce may calculate constructed profit under subsection (iii) without calculating a profit cap. *Id.* at 545–46.

Commerce explained that “[it] [wa]s unable to calculate a profit cap based on the actual amounts reported in accordance with the statutory intent under section [1677b(e)(2)(B)(iii)]” because “[t]here is no profit information for sales in Korea of OCTG and products in the same general category on the record.” Final IDM at 55; *see also Mid Continent Steel & Wire*, 941 F.3d at 545 (“[T]he statutorily specified information was not available to calculate a profit cap” when “there [wa]s no viable domestic market in the exporting country for merchandise that is in the same general category of products as the subject merchandise.”). The court observes that Commerce noted that the record did not contain any information regarding the profit for sales in Korea of OCTG and products in the same general category. *See* Final IDM at 55. Because Commerce “articulate[d] a reasonable justification for its decision, tied to the record in the proceeding,” Commerce’s decision not to calculate a profit cap when “the statutorily specified information was not available” is reasonable. *See Mid Continent Steel & Wire*, 941 F.3d at 545–46.

In contrast, Commerce asserted that SeAH’s Canadian OCTG I data were the best available data that “reflect the profit and selling expense experiences of a Korean OCTG producer, are based on OCTG sales to a viable comparison market[,] and are derived from sales made in the ordinary course of trade.” Final IDM at 48. The court finds that Commerce’s calculation of constructed value profit based on SeAH’s Canadian market sales during the OCTG I period of review is reasonable and supported by substantial evidence.

V. Costs for Non-Prime Products

Commerce decided not to allocate full costs for NEXTEEL’s downgraded merchandise because Commerce determined that the non-

prime products were not subject merchandise based on their unsuitability for the same applications as prime OCTG and their lower market value. *Id.* at 91–92. Commerce reduced NEXTEEL’s reported cost for the non-prime products to the sales price of the non-prime products and allocated the difference to the cost of prime OCTG. *Id.* at 92. NEXTEEL argues that the cost reallocation was contrary to Commerce’s prior practice of treating non-prime OCTG as subject merchandise and contrary to NEXTEEL’s records, which reported the same full cost to the downgraded products as to OCTG. NEXTEEL Br. at 42–43.

The statute directs Commerce to calculate costs for constructed value “based on the records of the exporter or producer of the merchandise, if such records . . . reasonably reflect the costs associated with the production and sale of the merchandise.” 19 U.S.C. § 1677b(f)(1)(A); *see also Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014). Commerce may determine that a respondent’s reported costs include costs incurred in the production of non-prime products, which are not included in the normal value calculation. *See, e.g., Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1381 (Fed. Cir. 2008) (citing *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1206 (Fed. Cir. 1995)) (additional citation omitted). The U.S. Court of Appeals for the Federal Circuit has affirmed that products may be non-prime if they have “material defects,” “[are] sold outside the ordinary course of trade,” or “ha[ve] commercially significant differences from prime merchandise.” *Id.* at 1381–82 (citations omitted).

Commerce determined that NEXTEEL’s non-prime products were not suitable for the same applications as prime OCTG and reallocated NEXTEEL’s reported costs for the non-prime products. Final IDM at 92. NEXTEEL’s non-prime pipes “w[ere] downgraded [from OCTG] to non-prime at the end of the production process and w[ere] never certified to be sold as OCTG.” *Id.* Commerce considered NEXTEEL’s explanation that downgraded pipes “do not meet the strict technical requirements” for use as OCTG and “are generally used for structural purposes such as pile.” *Id.* (citing NEXTEEL’s Suppl. Sections A–D Questionnaire Resp. at 4–6, PD 192 (June 7, 2018); NEXTEEL’s Second Suppl. Section D Questionnaire Resp. at 11–14, PD 237 (Aug. 13, 2018)). Commerce noted the unsuitability of the downgraded pipe for uses requiring the specialized, high-value OCTG resulting in considerably lower sales (market) prices “than the full production costs that [NEXTEEL] assigns to them in the normal course of business.” *Id.* (citing NEXTEEL’s Prelim. Cost Calculation Mem., Attachs. 4A, 4B). Commerce’s determination that the non-prime products are

not subject merchandise is reasonable based on the commercially significant differences between the non-prime products and prime OCTG in terms of usage and market value.

Commerce determined that “assigning full costs to these non-prime products d[id] not reasonably reflect the costs associated with the production and sale of the merchandise.” *Id.* Commerce reduced the reported cost of non-prime products to their market value and added the difference between full production cost and their market value to the reported cost of prime OCTG products. *Id.* In *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1324 (Fed. Cir. 2020), the U.S. Court of Appeals for the Federal Circuit remanded Commerce’s assignment of costs for Commerce to determine the actual costs of prime and non-prime products when Commerce calculated costs based on recorded projected sales prices rather than costs of producing and selling merchandise. The same defect impairs Commerce’s adjustment of NEXTEEL’s reported cost for non-prime products to market value and the subsequent adjustment to NEXTEEL’s reported cost for prime OCTG to include the net cost for non-prime products since neither adjustment reflects actual costs.

The court holds that Commerce’s determination that NEXTEEL’s non-prime products are not subject merchandise is supported by substantial evidence, but remands for Commerce to allocate costs based on the actual costs of prime and non-prime products.

VI. Production Line Suspension Costs

Two of NEXTEEL’s production lines were suspended temporarily, one for one month and the other for one year. NEXTEEL Sections C&D Resp. at D-10–D-11, PD 96 (Feb. 27, 2018); NEXTEEL Br. at 44. Commerce reallocated costs related to the production line suspensions from the cost of goods sold as reported by NEXTEEL to G&A expenses. Final IDM at 95; *see also* NEXTEEL Br. at 44–45. NEXTEEL argues that Commerce’s reallocation contravened 19 U.S.C. § 1677b(f)(1)(A) and that costs should be attributed to production costs, consistent with NEXTEEL’s normal books and records and “appropriately borne by the products manufactured on the lines that were shut down.” NEXTEEL Br. at 45.

The statute directs Commerce to calculate costs based on a respondent’s records if the records are compliant with generally accepted accounting principles (“GAAP”) and reasonably reflect production and selling costs. 19 U.S.C. § 1677b(f)(1)(A).

Here, Commerce reallocated the costs associated with the production line suspensions as G&A expenses consistent with its practice of distinguishing costs for routine shutdowns such as for maintenance

from costs for extended suspension of production. Final IDM at 95. Commerce's stated practice is to attribute costs for routine shutdowns as manufacturing costs and costs for extended shutdowns as G&A expenses "related to the general operations of the company as a whole, and not specific to products associated with that production line." *Id.* at 95–96. Commerce determined that NEXTEEL's production line suspensions of one month and one year were non-routine, extended suspensions, the costs of which should be attributed as G&A expenses. *Id.* at 95. Commerce explained that "unlike a routine maintenance shutdown, once a production line is suspended, it no longer relates to the ongoing or remaining production" and "[r]egardless of the reason for the suspension, in contrast to the routine maintenance shutdowns, there are no longer products produced on those production lines or current intentions to produce products on those lines that can bear the burden of the costs associated with those production lines." *Id.*

Section 1677b(f)(1)(A) directs Commerce to use NEXTEEL's records so long as the records are GAAP-compliant and reasonably reflect costs. Commerce explained its own practice, but did not explain the deficiency in NEXTEEL's records that warrants Commerce's departure from the statutory preference for determining costs according to an exporter's or producer's records. The court remands for further explanation or reconsideration consistent with this opinion.

VII. Exclusion of Freight Revenue Profit

Commerce capped the deduction for freight expenses at the amount actually incurred. *Id.* at 73–74; *see also* SeAH Br. at 7. SeAH argues that because the freight charges were billed separately, the freight charges were not included in the starting price of the merchandise and Commerce's adjustment was not permitted by statute. SeAH Br. at 8–9. SeAH asserts that Commerce's determinations that separately-invoiced freight revenue are included in the price of the merchandise and that the portion of freight revenue up to actual freight expenses, but not exceeding actual freight expenses, is included in the price of the merchandise are contrary to the law. *Id.* at 9. SeAH also contends that Commerce's cap at actual freight costs results in full deduction of freight revenue when SeAH's affiliate shipped at a loss, but partial deduction capped at actual freight cost when SeAH's affiliate shipped at a profit. *Id.* at 9–10. SeAH argues that Commerce must treat freight profits and losses uniformly, either ignoring both or including both. *Id.* at 10.

Export price or constructed export price is the price at which the subject merchandise is first sold in the United States. *See* 19 U.S.C. § 1677a(a), (b). Under 19 U.S.C. § 1677a(c)(2)(A),

[t]he price used to establish export price and constructed export price shall be reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States

Id. § 1677a(c)(2)(A). Commerce uses adjustments when calculating export price or constructed export price “to achieve ‘a fair, apples-to-apples comparison’ between U.S. price and foreign market value” *Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)). Such adjustments prevent exporters from improperly inflating the export price of a good by charging a customer for freight more than the exporter’s actual freight expenses. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 894 (2012). Commerce adjusts its price calculation using net freight revenue, and it is reasonable for Commerce not to consider freight revenue profit as part of the price of the subject merchandise in accordance with the statutory language. *See id.* at 894–95.

Here, Commerce determined that increasing the merchandise gross unit selling price with profit SeAH earned on the sale of freight would artificially inflate the constructed export price. *See* Final IDM at 74. Commerce isolated the price of SeAH’s merchandise alone without any additional charges by capping SeAH’s freight expenses at the actual cost incurred in order to exclude freight revenue profit. *Id.*

SeAH contends that Commerce’s treatment of freight revenue below the cap as part of the U.S. price in its calculations, and freight revenue above the cap as not part of the U.S. price in its calculations, is inconsistent with the statute. *See* SeAH Br. at 9–10. SeAH argues that under the language of 19 U.S.C. § 1677a(c)(2)(A), when Commerce deducted the actual freight costs for sales with separately-invoiced freight charges, it must have determined that those costs were included in the “price used to establish export price and constructed export price,” otherwise Commerce would not have been permitted to adjust them. *See id.* at 8–9 (quoting 19 U.S.C. § 1677a(c)(2)(A)). This is an incorrect reading of the statute. Section 1677a requires Commerce to make adjustments when calculating

export price or constructed export price “to achieve a fair, apples-to-apples comparison between U.S. price and foreign market value” *Fla. Citrus Mut.*, 550 F.3d at 1110 (citation and internal quotation marks omitted). A proper comparison between the U.S. price and foreign market value would not include a profit earned from freight rather than from the sale of subject merchandise. The court concludes that Commerce’s exclusion of freight revenue profit reflects the statutory method and is in accordance with the law.

VIII. Application of Affiliated Seller’s General and Administrative Expense Ratio to Both Further Manufactured and Non-Further Manufactured Products

The general activities of SeAH’s U.S. affiliated reseller, Pusan Pipe America, Inc. (“PPA”), include the further manufacture and sale of further manufactured OCTG pipe and the direct resale of non-further manufactured OCTG pipe. Final IDM at 78. Commerce applied PPA’s G&A expense ratio to calculate deductions from SeAH’s constructed export price for further manufacturing costs and indirect selling expenses. *Id.* at 77–79. “[F]or further manufactured products, Commerce applied PPA’s G&A expense ratio to the total cost of the further manufacturing plus the [cost of production] of the imported OCTG pipe and included the amount” in the further manufacturing cost deducted under 19 U.S.C. § 1677a(d)(2). *Id.* at 79. “[F]or products not further manufactured, Commerce applied PPA’s G&A expense ratio to the [cost of production] of the imported OCTG and included the amount” in the indirect selling expense deducted under 19 U.S.C. § 1677a(d)(1)(D). *Id.*

When a foreign producer or exporter sells a product to a U.S. selling affiliate, the law permits using “constructed export price” in calculating the dumping margin. 19 U.S.C. § 1677a(d). Constructed export price is the price at which the subject merchandise is first sold in the United States by a seller affiliated with the producer or exporter to a non-affiliated purchaser. *Id.* § 1677a(b).

Commerce must deduct both the selling expenses and cost of further manufacture from the price used to determine constructed export price. *Id.* § 1677a(d). The relevant provision provides:

(d) Additional adjustments to constructed export price. For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or

the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

- (A) commissions for selling the subject merchandise in the United States;
- (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
- (C) any selling expenses that the seller pays on behalf of the purchaser; and
- (D) any selling expenses not deducted under subparagraph (A), (B), or (C); [and]

(2) the cost of any further manufacture or assembly (including additional material and labor)

Id. § 1677a(d)(1)–(2). The selling expenses referenced in Section 1677a(d)(1)(D) are commonly referred to as “indirect selling expenses.” *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1306, 1310 (Fed. Cir. 2001).

A. Cost of Further Manufacturing

Commerce calculated the deduction for the portion of PPA’s G&A expenses attributable to further manufacturing under 19 U.S.C. § 1677a(d)(2) by applying “PPA’s G&A expense ratio to the total cost of the further manufacturing plus the [cost of production] of the imported OCTG pipe” Final IDM at 79. SeAH asserts that Commerce’s historical practice was to apply a company’s G&A expense ratio to the sum of the material, labor, and overhead expenses of further manufacturing but that Commerce’s recent practice in contravention of the statute is to apply the expense ratio to the cost of the imported pipe in addition to the cost of further manufacturing, as Commerce did here. *See* SeAH Br. at 11–12, 15.

Commerce asserted that “because the denominator of the G&A expense ratio as calculated by SeAH (*i.e.*, the cost of goods sold from the financial statements) includes both directly resold and further manufactured OCTG (*i.e.*, the cost of the imported pipe plus the further manufacturing cost), Commerce’s approach [wa]s balanced and reasonable.” Final IDM at 79. Commerce decided that “[a]pplying such a ratio to only the cost of further manufacturing would result in a mismatch between the figures used in the G&A expense ratio calculation” *Id.* The explanation as to balanced accounting does not address Commerce’s statutory authority or the reasonableness of

applying PPA's expense ratio to the cost of further manufacturing plus the cost of the imported OCTG pipe to calculate the amount deductible as the cost of further manufacturing under 19 U.S.C. § 1677a(d)(2). See *Husteel Co. v. United States*, 44 CIT __, __, 471 F. Supp. 3d 1349, 1370 (2020).

The statute authorizes Commerce to reduce the constructed export price by "the cost of any *further* manufacture or assembly (including *additional* material and labor) . . ." 19 U.S.C. § 1677a(d)(2) (emphasis added). The cost of production of the imported OCTG pipe is not a cost incurred for further manufacture. Commerce's application of PPA's G&A expense ratio to the cost of production of the imported OCTG pipe is not permitted by the statute. The court concludes that Commerce's calculation of further manufacturing cost is not in accordance with the law.

B. Indirect Selling Expenses

Commerce calculated the deduction for the portion of PPA's G&A expenses attributable to indirect selling expenses under 19 U.S.C. § 1677a(d)(1)(D) by applying "PPA's G&A expense ratio to the [cost of production] of the imported OCTG" for products not further manufactured. Final IDM at 79. SeAH contends that as PPA's activities included both manufacturing and sales, PPA's G&A expenses should have been classified as non-selling general expenses, not selling expenses. SeAH Br. at 3, 10–11.

In "calculating indirect selling expenses, Commerce generally will include G&A expenses incurred by the United States selling arm of a foreign producer." *Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101 (1995) (affirming Commerce's inclusion as indirect selling expenses of G&A expenses incurred by parent company that provided administrative, accounting, and finance services to subsidiary in the United States). The U.S. Court of Appeals for the Federal Circuit affords Commerce deference in developing a methodology for including G&A expenses in the constructed value calculation because it is a determination "involv[ing] complex economic and accounting decisions of a technical nature . . ." *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (citation omitted); see *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48–49 (reiterating that Commerce must provide a cogent explanation supporting its exercise of discretion).

To the extent that PPA directly resells SeAH's non-further manufactured OCTG pipe, the associated G&A expenses are properly understood as expenses facilitating sales, not manufacturing. Commerce's application of PPA's G&A expense ratio to the cost of production of the imported non-further manufactured OCTG pipe to

calculate the portion of PPA's G&A expenses attributable to resale of the non-further manufactured OCTG pipe is reasonable. The court concludes that Commerce's treatment of PPA's G&A expenses as indirect selling expenses of non-further manufactured OCTG pipe is in accordance with the law.

IX. SeAH's General and Administrative Expenses

"In calculating G&A expenses, it is Commerce's practice to include those expenses which relate to the activities of the company as a whole rather than to the production process." *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1357 (2015) (citations and internal quotation marks omitted). "Commerce typically excludes expenses from the G&A rate calculation only when the expenses are both: (1) unusual; and (2) infrequent in nature." *Id.* (citations and internal quotation marks omitted) (sustaining Commerce's exclusion of a loss because "guaranteeing loans was not an ordinary aspect of [steelmaker]'s business operations").

A. Penalty

Commerce included in SeAH's G&A expenses a penalty imposed by the Korean Fair Trade Commission related to bids for orders of line pipe in the Korean market between 2003 and 2013. Final IDM at 83. SeAH argues that inclusion of the penalty was improper because the penalty was unrelated to OCTG production, was imposed for actions taken before the period of review, and was unusual and infrequent. SeAH Br. at 19–20 (citing *Husteel Co.*, 39 CIT at __, 98 F. Supp. 3d at 1357).

Commerce explained that it included the penalty in SeAH's G&A expense calculation according to its practice of treating penalties as a cost of general operations "rather than the current production of a specific product." Final IDM at 83–84. For penalties incurred due to actions taken outside the period of review, Commerce's stated practice is to follow the treatment of the penalty in the respondent's GAAP-based financial statements. *Id.* at 84. SeAH reported the penalty as a "current year miscellaneous loss . . . under other non-operating expenses" in its financial statements for 2017. *Id.* (citing SeAH's Questionnaire Resp., App. S2D-9-A, PD 227 (Aug. 3, 2018)).

Commerce reasonably included the penalty in SeAH's G&A expenses. SeAH's business operations include production and sales of line pipe, which is related to the penalty SeAH incurred. Although the penalty was imposed for SeAH's actions taken before the period of review, SeAH reported the penalty in its 2017 financial statement and Commerce's inclusion of the penalty was based on SeAH's reporting of the penalty during the relevant period of review.

SeAH argues that the incurrence of the penalty was unusual. SeAH Br. at 20. Defendant responds that the penalty was not unusual or infrequent and cites record documents (described in Section III above) showing that SeAH incurred previous penalties for actions taken between 1995 and 1998. Def. Resp. at 59–60 (citing OCTG III Allegation Exs. 30–34). The court is not persuaded that Commerce’s practice of excluding expenses “only when the expenses are both: (1) unusual; and (2) infrequent in nature” is equivalent to a typical practice of excluding all unusual and infrequent expenses as SeAH asserts. *See* SeAH Br. at 20; *Husteel Co.*, 39 CIT at ___, 98 F. Supp. 3d at 1357 (citations and internal quotation marks omitted). The court finds that Commerce’s inclusion of the penalty in SeAH’s G&A expense ratio is supported by substantial evidence.

B. Inventory Valuation Losses

Commerce included inventory valuation losses related to raw materials and work-in-process in SeAH’s G&A expense ratio. Final IDM at 82. SeAH argues that the inventory valuation losses are not losses but rather a GAAP-required record of the difference between inventory market value and actual purchase price when the market value of the inventory falls below the actual purchase price. SeAH Br. at 16. SeAH contends that because SeAH’s cost of production already accounted for the actual historic price of materials, Commerce’s inclusion of the inventory valuation losses as G&A expenses resulted in double-counting. *Id.* at 17. Defendant-Intervenors Maverick Tube Corporation (“Maverick”) and Tenaris Bay City, Inc. (“Tenaris”) argue that because SeAH’s policy in its normal books and records is to restate its inventory market value and corresponding inventory valuation losses in an attempt to use the lower-valued inventory in a subsequent period to calculate its cost of production, Commerce properly used its discretion to include the inventory valuation losses in SeAH’s G&A expenses. Resp. Br. Def. Inters. Maverick Tube Corporation and Tenaris Bay City, Inc. at 20–21, ECF No. 72 (“Maverick Resp.”).

Here, SeAH reflected the net loss in the value of its inventory consistent with GAAP by comparing the purchase price with the current market value of raw materials and work-in-process on a quarterly basis and recording the loss on the balance sheet as a periodic adjustment when the market value was lower than the purchase price. Final IDM at 82. No periodic adjustment was recorded when the market value was higher than the purchase price. SeAH Br. at 16. Contrary to assertions by Maverick and Tenaris that SeAH attempted to use the lower market value to calculate its cost of

production, Commerce confirmed that the periodic adjustments for inventory losses did not alter the purchase price of consumed raw materials and work-in-process used in calculating the cost of production. Final IDM at 82; *see* Maverick Resp. at 21. Commerce included the inventory valuation losses reflected on the balance sheet as G&A expenses, explaining that as period expenses “related to an accounting period and not directly related to manufacturing merchandise,” the inventory valuation losses are related to the general operations of the company as a whole. Final IDM at 82.

It is unclear from the record or from Commerce’s explanation whether the inventory valuation losses related to SeAH’s raw materials and work-in-process were expenses. Commerce did not cite record evidence demonstrating that the inventory valuation losses became realized costs, which it seems would occur only if the raw materials and work-in-process were sold. *Cf. Torrington Co. v. United States*, 20 CIT 632, 640 (1996) (“Inventory carrying costs are designed to measure the cost to a company of holding merchandise that could be sold to generate revenue. Because raw materials and work in process are, by definition, not yet salable merchandise, [Commerce] bases inventory carrying cost on the value of finished goods only.”).

The court concludes, therefore, that because Commerce did not cite any relevant record evidence, Commerce’s decision to include SeAH’s inventory valuation losses as G&A expenses is not supported by substantial evidence. The court remands for further explanation or reconsideration consistent with this opinion.

CONCLUSION

For the foregoing reasons, the court sustains the following determinations of Commerce:

1. The court sustains Commerce’s calculation of constructed value profit based on SeAH’s OCTG I Canadian market sales and inclusion of a penalty in SeAH’s G&A expense ratio as supported by substantial evidence; and
2. The court sustains Commerce’s differential pricing analysis, exclusion of freight revenue profit, and application of PPA’s G&A expense ratio to SeAH’s non-further manufactured products as in accordance with the law.

The court remands the following determinations of Commerce:

1. The court remands for Commerce to further explain or reconsider its particular market situation determination and adjustment;

2. The court remands for Commerce to reallocate costs for NEXTEEL's non-prime merchandise based on the actual costs of prime and non-prime products;
3. The court remands for Commerce to further explain or reconsider its treatment of SeAH's production line suspension costs;
4. The court remands for Commerce to recalculate SeAH's further manufacturing cost; and
5. The court remands for Commerce to further explain or reconsider its decision to include SeAH's inventory valuation losses as G&A expenses.

Accordingly, it is hereby

ORDERED that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that this case will proceed according to the following schedule:

1. Commerce shall file the remand results on or before June 30, 2021;
2. Commerce shall file the remand administrative record on or before July 14, 2021;
3. Comments in opposition to the remand results shall be filed on or before August 13, 2021;
4. Comments in support of the remand results shall be filed on or before September 15, 2021; and
5. The joint appendix shall be filed on or before October 1, 2021.

Dated: April 14, 2021

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

Index

Customs Bulletin and Decisions
Vol. 55, No. 16, April 28, 2021

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Proposed Revocation of One Ruling Letter, Proposed Modification of Two Ruling Letters, and Proposed Revocation of Treatment Relating to the Tariff Classification of Coral Beads for Jewelry and Jewelry with Abalone	1
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Organic Date Juice Concentrate or Date Syrup	16
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Spider Web Lights	23
Proposed Revocation of Two Ruling Letters, Proposed Modification of Two Ruling Letters, and Proposed Revocation of Treatment Relating to the Tariff Classification of Textile Cover for Unsprung Mattress Foundation	32
Vessel Entrance or Clearance Statement—CBP Form 1300	51

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
Rebar Trade Action Coalition, Plaintiff, v. United States, Defendant, and Icdas Celik Enerji Tersane Ve Ulasim Sanayi A.S., Defendant-Intervenor.	21–37	57
Aspects Furniture International, Inc., Plaintiff, and IMSS, LLC, Consolidated Plaintiff, v. United States, Defendant.	21–39	69
Novolipetsk Steel Public Joint Stock Company and Novex Trading (Swiss) SA, Plaintiffs, v. United States, Defendant, and Nucor Corporation, Defendant-Intervenor.	21–40	95
Novolipetsk Steel Public Joint Stock Company and Novex Trading (Swiss) SA, Plaintiffs, v. United States, Defendant, and Steel Dynamics, Inc. and Nucor Corporation, Defendant-Intervenors.	21–41	101
Sao Ta Foods Joint Stock Company et al., Plaintiffs and Consolidated Plaintiff, v. United States, Defendant, and AD HOC Shrimp Trade Action Committee, Defendant-Intervenor and Consolidated Defendant-Intervenor.	21–42	121

SeAH Steel Corporation, Plaintiff, Husteel Co., Ltd., NEXTEEL Co., Ltd., AJU Besteel Co., Ltd., and ILJIN Steel Corporation, Consolidated Plaintiffs, and Hyundai Steel Company and ILJIN Steel Corporation, Plaintiff-Intervenors, v. United States, Defendant, and United States Steel Corporation, Maverick Tube Corporation, Tenaris Bay City, Inc., IPSCO Tubulars Inc., Vallourec Star, L.P., and Welded Tube USA Inc., Defendant-Intervenors.	21-43	129
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