

U.S. Customs and Border Protection

19 CFR PART 145

CBP DEC. 21-08

RIN 1651-AB33

MANDATORY ADVANCE ELECTRONIC INFORMATION FOR INTERNATIONAL MAIL SHIPMENTS; CORRECTION

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

ACTION: Interim final rule; correcting amendments.

SUMMARY: On March 15, 2021, U.S. Customs and Border Protection (CBP) published in the **Federal Register** an Interim Final Rule, which amends the CBP regulations to provide for mandatory advance electronic data (AED) for international mail shipments. That document inadvertently misnumbered the regulatory text listing the circumstances when AED is not required for international mail shipments and made a typographical error in the authority citation.

DATES: Effective July 22, 2021.

FOR FURTHER INFORMATION CONTACT: For policy questions related to mandatory AED for international mail shipments, contact Quintin Clarke, Cargo and Conveyance Security, Office of Field Operations, U.S. Customs and Border Protection, by telephone at (202) 344-2524, or email at quintin.g.clarke@cbp.dhs.gov. For legal questions, contact James V. DeBergh, Chief, Border Security Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, by telephone at 202-325-0098, or email at jamesvan.debergh@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION: On March 15, 2021, CBP published in the **Federal Register** (86 FR 14245) an Interim Final Rule entitled Mandatory Advance Electronic Information for International Mail Shipments. As published, the Interim Final Rule inadvertently misnumbered the regulatory text found in 19 CFR 145.74(b)(2), which lists circumstances when AED is not required for international mail shipments. Specifically, section 145.74(b)(2) contains two subparagraphs numbered “(iii)”. CBP is

correcting the numbering by re-numbering the current subparagraphs (iv) and (v) as subparagraphs (v) and (vi) respectively. CBP is further correcting the numbering by renumbering the second subparagraph (iii) as subparagraph (iv). Finally, CBP is correcting a typographical error in the Authority section.

List of Subjects in 19 CFR Part 145

Exports, Lotteries, Postal Service, Reporting and recordkeeping requirements.

For reasons stated in the preamble, 19 CFR part 145 is amended by making the following correcting amendments:

PART 145—MAIL IMPORTATIONS

■ 1. The general authority citation for part 145 is revised to read as follows:

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

* * * * *

Subpart G also issued under 19 U.S.C. 1415, 1436.

§ 145.74 [Amended]

■ 2. Amend § 145.74 by redesignating the second paragraph (b)(2)(iii), and paragraphs (b)(2)(iv) and (v) as paragraphs (b)(2)(iv), (v), and (vi).

Alice A. Kipel,
Executive Director,
Regulations and Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, July 22, 2021 (85 FR 38553)]

19 CFR CHAPTER I

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

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

ACTION: Notification of continuation of temporary travel restrictions.

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

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on July 22, 2021 and will remain in effect until 11:59 p.m. EDT on August 21, 2021, unless amended or rescinded prior to that time.

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

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later

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

published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on July 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of July 12, 2021, there have been over 186 million confirmed cases globally, with over 4 million confirmed deaths.³ There have been over 33.7 million confirmed and probable cases within the United States,⁴ over 1.4 million confirmed cases in Canada,⁵ and over 2.6 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of July 15, over 336 million vaccine doses have been administered in the United States and over 59% of adults in the United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID–19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

² See 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed July 15, 2021).

⁴ CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (accessed July 15, 2021).

⁵ WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed July 15, 2021).

⁶ *Id.*

⁷ See CDC, COVID Data Tracker: COVID–19 Vaccinations in the United States, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed July 15, 2021).

⁸ See CDC, Travel Notice; COVID–19 in Canada (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID–19 in Mexico (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed June 10, 2021).

Notice of Action

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

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada currently poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

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

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

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

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

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

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on August 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counterparts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

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

[Published in the Federal Register, July 22, 2021 (85 FR 38556)]

19 CFR CHAPTER I

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

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

ACTION: Notification of continuation of temporary travel restrictions.

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

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on July 22, 2021 and will remain in effect until 11:59 p.m. EDT on August 21, 2021, unless amended or rescinded prior to that time.

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

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later

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DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of July 12, 2021, there have been over 186 million confirmed cases globally, with over 4 million confirmed deaths.³ There have been over 33.7 million confirmed and probable cases within the United States,⁴ over 1.4 million confirmed cases in Canada,⁵ and over 2.6 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of July 15, over 336 million vaccine doses have been administered in the United States and over 59% of adults in the United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID–19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

² See 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4967 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

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⁶ *Id.*

⁷ See CDC, COVID Data Tracker: COVID–19 Vaccinations in the United States, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed July 15, 2021).

⁸ See CDC, Travel Notice; COVID–19 in Canada (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID–19 in Mexico (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed June 10, 2021).

Notice of Action

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U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico currently poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

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

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

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

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

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

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on August 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counterparts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

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

[Published in the Federal Register, July 22, 2021 (85 FR 38554)]

**PROPOSED REVOCATION OF A RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF A REFRIGERATOR
GASKET**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a refrigerator gasket.

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 a ruling letter concerning the tariff classification of a refrigerator gasket 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 September 3, 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: Nataline Viray-Fung, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov.

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 a ruling letter pertaining to the tariff classification of a refrigerator gasket. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N300351, dated September 26, 2018 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N300351, CBP classified a refrigerator gasket in subheading 8505.19.20, HTSUS which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent mag-

nets and articles intended to become permanent magnets after magnetization: Other: Composite good containing flexible magnets.” CBP has reviewed NY N300351 and has determined the ruling letter to be in error. It is now CBP’s position that the refrigerator gasket is properly classified in heading 8418, HTSUS specifically subheading 8418.99.80, HTSUS which provides for, “Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof: Parts: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N300351 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter H301861, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for

CRAIG C. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N300351

September 26, 2018

CLA-2-85:OT:RR:NC:N1:102

CATEGORY: Classification

TARIFF NO.: 8505.19.2000

Ms. CINDY INGELS
REHAU INDUSTRIES LLC
1501 EDWARDS FERRY ROAD NE
LEESBURG, VA 20176

RE: The tariff classification of a door gasket from Mexico

DEAR Ms. INGELS:

In your letter dated August 30, 2018, you requested a tariff classification ruling. Descriptive literature was submitted.

The article at issue is a door gasket. The gasket is a composite good that is described as a door seal. The article can be used in door applications, such as residential and commercial refrigerator door. The door gasket consists of an outer PVC material and has a flexible band insert. The polymer material allows the gasket to function as a seal and the magnetic insert allows the gasket to be affixed to a metal surface.

The classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (“GRIs”). General Rule of Interpretation 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order.

In your letter, you suggest that the door gasket is classified in subheading 8418.99.8060, HTSUS, which provides for refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof; other; other; other; other.

It is a long-standing CBP practice to define “parts” within the meaning of the HTSUS using the following two tests. It must be an “integral, constituent, or component, without which the article to which it is to be joined could not function as such article” to be a part of an article. *United States v. Willoughby Camera Stores, Inc.* An “imported item dedicated solely for use with another article is a “part” of that article within the meaning of the HTSUS.” *United States v. Pompeo.*

Based on the information provided, there is no indication that the refrigeration process completed by a residential and commercial refrigerator could not occur without the gasket. Also, the features of the gasket do not prevent this article from being used with other types of doors. As such, it is the opinion of this office that the door gasket is not a part of a refrigerator, freezer and other refrigerating or freezing equipment of heading 8418 within the CBP definition of a “part”. Thus, the door gasket is excluded from consideration of heading 8418.

Instead, the door gasket is considered to be a composite good within the meaning of GRI 3. Goods classifiable under GRI 3(b) shall be classified as if they consisted of material or a component which gives them their essential character.

The Explanatory Note to the HTSUS, GRI 3 (b) (VIII), states that the factors which determine 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. Inasmuch as no essential character can be determined for the instant item, GRI 3(b) does not apply.

GRI 3(c) states that when the essential character of a composite good cannot be determined, classification is based on the heading that occurs last in numerical order among those which equally merit consideration. In this case, the door gasket falls last within heading 8505, HTSUS, in accordance with GRI 3(c).

The applicable subheading for the door gasket will be 8505.19.2000, HTSUS, which provides for electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; composite good containing flexible magnet. The rate of duty will be 4.9 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on 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 Sandra Martinez at Sandra.Martinez@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H301861
CLA-2 OT:RR:CTF:EMAIN H301861 NVF
CATEGORY: Classification
TARIFF NO.: 8418.99.80

JOHN B. BREW
CROWELL MORING LLC
1001 PENNSYLVANIA AVE NW
WASHINGTON, DC 20004

RE: Revocation of NY N300351; Classification of Refrigerator Gaskets

DEAR MR. BREW:

This letter is in response to your request, dated November 16, 2018, for reconsideration of New York Ruling Letter (“NY”) N300351, which was issued to your client, REHAU Industries LLC (“Rehau”), on September 26, 2018. In NY N300351, U.S. Customs and Border Protection (“CBP”) classified a refrigerator gasket under subheading 8505.19.20 of the Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Composite good containing flexible magnets.” We have reviewed NY N300351, taken into consideration new factual information, and are revoking NY N300351 in accordance with the reasoning below.

FACTS:

The subject merchandise is a door gasket consisting of an outer PVC material with a flexible magnetic band insert. The article is used in doors of residential and commercial refrigerators. The polymer material allows the gasket to function as a seal and the magnetic insert acts to hold the door shut.

You also provide additional factual information that Rehau did not provide when submitting its initial ruling request. Specifically, in their condition as imported, the gaskets are cut to size and shaped to fit a specific refrigerator or freezer. The gaskets are attached to a refrigerator door after importation using various processes, including sliding the gasket into a channel in the door that is specifically designed to accept the gasket. After installation, the gasket acts as a seal between the refrigerator door and the cabinet. The magnet within the gasket assists the gasket in maintaining the seal by holding the door in place. In addition to holding the door shut, the magnet also provides some door-closing force for the door (*i.e.* if the door is left slightly open).

ISSUE:

Is a refrigerator gasket made from PVC and a magnetic strip classified under heading 8505, HTSUS as a magnet or under heading 8418, HTSUS as a part of a refrigerator?

LAW AND ANALYSIS:

The HTSUS provisions under consideration are as follows:

- | | |
|------|--|
| 8505 | Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof. |
| 8418 | Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof. |

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.

Note 2 to Section XVI, HTSUS, provides the following, in pertinent part:

Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

- (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517....

The term “part” is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct but reconcilable tests for determining whether a particular item qualifies as a part for tariff classification purposes. See *Bauerhin Technologies Limited Partnership, & John V. Carr & Son, Inc. v. United States*, 110 F.3d 774 (Fed. Cir. 1997). Under the first test, articulated in *United States v. Willoughby Camera Stores*, 21 C.C.P.A. 322 (1933), an imported item qualifies as a part only if can be described as an “integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.” *Bauerhin*, 110 F.3d at 779. Pursuant to the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9 (1955), a good is a “part” if it is “dedicated solely for use” with a particular article and, “when applied to that use...meets the Willoughby test.” *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int’l Trade 1999) (holding that a purported part must satisfy both the *Willoughby* and *Pompeo* tests). An item is not a part if it is “a separate and distinct commercial entity.” *Bauerhin*, 110 F.3d at 779.

In this case there is no dispute that that the instant merchandise is a “part” for the purposes of classification under the HTSUS and that the matter is therefore controlled by Note 2 to Section XVI, *supra*. As such, if the subject merchandise is *prima facie* classifiable under heading 8505, HTSUS, as a permanent magnet, then it will be classified under this provision per Note 2(a), thus eliminating the possibility of being classified as a part of the machine for which it is suitable for sole or principal use per Note 2(b). The instant gasket is comprised of a hollow PVC strip and a magnet that could be classified as a part of a refrigerator.

The merchandise at issue is comprised of both a PVC strip and a magnet combined to form an article that is ready for installation on a refrigerator door after importation. While heading 8505, HTSUS, covers part of the overall gasket (*i.e.*, the magnet), it does not cover the entire item at issue. It is therefore not classified under heading 8505, HTSUS, by operation of Note 2(a) to Section XVI.

The gaskets at issue are designed to be attached to a refrigerator door inasmuch as the magnet component and PVC strip are combined, and the combination is cut to specified size and shape and is ready for attachment to a specific model of refrigerator door. The gasket acts as a seal between the refrigerator door and the cabinet. In addition to holding the door shut, the magnet also provides some door-closing force for the door. Each imported gasket is dedicated solely for use with a specific refrigerator door and plays an integral role in containing cooled air inside a refrigerator cabinet. Therefore, we find that the gaskets at issue are suitable for sole or principal use with refrigerators of heading 8414, HTSUS, and are therefore properly classified as parts of refrigerators by operation of Note 2(b) to Section XVI.

HOLDING:

By application of GRIs 1 (Note 2(b) to Section XVI) and 6, the refrigerator gasket is classified under heading 8418, HTSUS specifically subheading 8418.99.80, HTSUS which provides for, “Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof: Parts: Other: Other.” The general column one rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8418.99.80, HTSUS, unless specifically excluded, are subject to an additional 25 percent 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 8418.99.80, HTSUS, listed above.

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

EFFECT ON OTHER RULINGS:

NY N300351, dated November 16, 2018, is REVOKED.

Sincerely,

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 THREE “POWER
RANGER” COSTUME ACCESSORY SETS**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of three “Power Ranger” Costume Accessory Sets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of three “Power Ranger” Costume Accessory 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 September 3, 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: Parisa J. Ghazi, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of three "Power Ranger" Costume Accessory Sets. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") M82946, dated May 3, 2006 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY M82946, CBP classified three "Power Ranger" Costume Accessory Sets in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." CBP has reviewed NY M82946 and has determined the ruling letter to be in error. It is

now CBP's position that three "Power Ranger" Costume Accessory Sets are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.15, HTSUS, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY M82946 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H239480, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

NY M82946

May 3, 2006

CLA-2-95: RR: NC: SP: 225 M82946

CATEGORY: Classification

TARIFF NO.: 9505.90.6000

Ms. MARIA JOHNSON
DISGUISE, INC.
11906 TECH CENTER COURT
POWAY, CA 92064

RE: The tariff classification of costume accessories from China.

DEAR Ms. JOHNSON:

In your letter dated April 17, 2006, you requested a tariff classification ruling.

You submitted the following costumes accessories, which are being returned upon your request.

Style 14747, Pink Ranger Accessory Set, style 14748, Red Ranger Accessory Set, and style 14749, Green Ranger Accessory Set, consists of three sets that contain a pair of polyester knit gloves and a pair of polyester knit boot covers that accessorize "Power Ranger" costumes. Each pair of gloves and pair of boot covers are identical except for color and are designed for a child.

The Explanatory Notes to the Harmonized Tariff System provide guidance in the interpretation of the Harmonized Commodity Description and Coding System at the international level. Explanatory Note X to GRI 3(b) provides that the term "goods put up in sets for retail sale" means goods that: (a) consist of at least two 2 different articles which are, *prima facie*, classifiable in different headings; (b) consist of articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. Goods classifiable under GRI 3(b) are classified as if they consisted of the material or component which gives them their essential character, which may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the article. GRI 3(c) provides that when goods cannot be classified by reference to GRI 3(a) or 3(b), they are to be classified in the heading that occurs last in numerical order among those which equally merit consideration.

Style 14747, Pink Ranger Accessory Set, style 14748, Red Ranger Accessory Set, and style 14749, Green Ranger Accessory Set, are considered to be sets for tariff classification purposes. No single component (gloves or boot covers) imparts their essential character, so the sets will be classified in accordance with GRI 3(c). In this set, the heading for the boot covers (9505) appears last in numerical order among the competing headings (gloves, 6116), which equally merit consideration.

The applicable subheading for style 14747, Pink Ranger Accessory Set, style 14748, Red Ranger Accessory Set, and style 14749, Green Ranger Accessory Set, will be 9505.90.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: 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/>.

Please note that separate Federal Trade Commission marking requirements exist regarding country of origin, fiber content, and other information that must appear on many textile items. You should contact the Federal Trade Commission, Division of Enforcement, 6th and Pennsylvania Avenue, N.W., Washington, D.C., 20580, for information on the applicability of these requirements to this item. Information can also be found at the FTC website www.ftc.gov (click on “For Business” and then on “Textile, Wool, Fur”).

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 Alice Wong at 646-733-3026.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

HQ H239480
OT:RR:CTF:FTM H239480 PJG
CATEGORY: Classification
TARIFF NO.: 6406.90.15

Ms. MARIA JOHNSON
DISGUISE, INC.
12120 KEAR PLACE
POWAY, CA 92064

RE: Revocation of NY M82946; Classification of Three “Power Ranger”
Costume Accessory Sets

DEAR Ms. JOHNSON:

This is in reference to New York Ruling Letter (“NY”) M82946, dated May 3, 2006, issued to you concerning the tariff classification of three “Power Ranger” Costume Accessory Sets under the Harmonized Tariff Schedule of the United States (“HTSUS”). Each of the three accessory sets consist of a pair of knit gloves and a pair of leg coverings, referred to as “boot covers” in NY M82946.

In NY M82946, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” We have reviewed NY M82946 and find it to be in error regarding the tariff classification of the leg coverings and the resulting classification of the three “Power Ranger” Costume Accessory Sets. Accordingly, for the reasons set forth below, NY M82946 is revoked.

FACTS:

In NY M82946, the merchandise is described as follows:

Style 14747, Pink Ranger Accessory Set, style 14748, Red Ranger Accessory Set, and style 14749, Green Ranger Accessory Set, consists of three sets that contain a pair of polyester knit gloves and a pair of polyester knit boot covers that accessorize “Power Ranger” costumes. Each pair of gloves and [each] pair of boot covers are identical except for color and are designed for a child.

The leg coverings are designed to resemble boots worn by the “Power Ranger” characters when worn over the consumer’s shoes.

In NY M82946, CBP classified the knit gloves in heading 6116, HTSUS, which provides for “Gloves, mittens and mitts, knitted or crocheted” and classified the leg coverings in heading 9505, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof.” CBP determined under GRI 3(c) that the “Power Ranger” Accessory Sets are classified under heading 9505, HTSUS. The tariff classification of knit gloves is not in dispute. This ruling only addresses the tariff classification of the knit shoe covers and the complete “Power Ranger” Accessory Sets.

ISSUES:

- 1) Whether the leg coverings are classified in heading 6406, HTSUS, as gaiters, leggings and similar articles, or under heading 9505, HTSUS, as festive articles.

- 2) Whether the “Power Ranger” Accessory Sets are classified in heading 6406, HTSUS, or 9505, HTSUS.

LAW AND ANALYSIS:

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

The 2021 HTSUS provisions under consideration are as follows:

6116	Gloves, mittens and mitts, knitted or crocheted: * * *
6406	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
6406.90	Other: * * *
	Of other materials:
6406.90.15	Of textile materials * * *
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: * * *
9505.90	Other: * * *
9505.90.60	Other

GRI 3 provides as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (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.

- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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

The EN to GRI 3(b) states, in pertinent part:

(VI) This second method relates only to:

- (i) Mixtures.
- (ii) Composite goods consisting of different materials.
- (iii) Composite goods consisting of different components.
- (iv) Goods put up in sets for retail sales.

It applies only if Rule 3 (a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

* * *

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which :

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

“Retail sale” does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking or incorporation with or into other goods.

The term “goods put up in sets for retail sale” therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together.

* * *

The EN to 64.06(II) provides as follows:

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

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from

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

The EN to 95.05(A)(3) provides as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

* * *

(3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche - **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.

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

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

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

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the leg coverings in the “Power Ranger” Costume Accessory Sets share the same characteristics as leggings and gaiters of heading 6406, HTSUS. The subject leg coverings provide leg coverage like leggings and gaiters, which provide leg coverage extending to the ankle or to the knee. Finally, consistent with EN 64.06(II), the subject leg coverings do not appear to cover the entire foot. Accordingly, the subject polyester leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters, and are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

In NY M82946, CBP classified the leg coverings in heading 9505, HTSUS. Heading 9505, HTSUS, provides, in relevant part, for festive articles and “parts and accessories” of festive articles. EN 95.05(A)(3) states that the heading covers costume accessories such as masks, false ears, noses, wigs, false beards, mustaches and paper hats. *See Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (stating that the Explanatory Notes do not narrow the scope of heading 9505, HTSUS, to only accessories to costumes). CBP has classified similar costume accessories under heading 9505, HTSUS. *See, e.g.*, NY N245614, dated August 29, 2013 (stretchable sleeves covered in fake tattoos are classifiable in heading 9505, HTSUS) and NY N162276 (butterfly wings and wand are classifiable in heading 9505, HTSUS). Similar to the articles described in the exemplars provided in EN 95.05(A)(3) and the cited rulings, the subject merchandise are costume accessories.

When goods are *prima facie* classifiable under two or more headings, we must proceed to GRI 3. According to GRI 3(a), “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In *Russ Berrie & Co. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) determined that Christmas and Halloween-themed lapel pins and earrings were *prima facie* classifiable as both imitation jewelry of heading 7117, HTSUS, and as festive articles of heading 9505, HTSUS. Applying GRI 3(a), the CAFC reasoned that:

We have recognized that festive articles include such disparate items as ‘placemats, table napkins, table runners, and woven rugs’ depicting ‘Christmas trees, Halloween jack-o-lanterns, [and Easter] bunnies,’ (citation omitted) ‘cast iron stocking hangers[;] ... Christmas water globes; ... [and] Easter water globes,’ (citation omitted) and jack-o-lantern mugs and pitchers (citation omitted).

Because heading 9505 covers a far broader range of items than heading 7117, the latter is more specific than the former. It is also more specific

because it describes the item by name ('imitation jewelry') rather than by class ('festive articles'). It therefore follows that the imported merchandise is classifiable under heading 7117 rather than under heading 9505.

Id. at 1338.

In the instant case, the "gaiters, leggings and similar articles" heading is more specific than the "festive articles" heading because "it covers a narrower set of items." *See id.* The relevant portion of heading 6406, HTSUS, pertains to leg coverings, whereas the relevant portion of heading 9505, HTSUS, specifically "'festive articles'... need only to be closely associated with and used or displayed during a festive occasion." *Id.* Accordingly, heading 6406, HTSUS, is more specific than heading 9505, HTSUS, and by application of GRI 3(a), the subject leg coverings are properly classified under heading 6406, HTSUS.

Next, we turn to the classification of the subject costume accessory sets, which consists of knit gloves and the leg coverings. In NY M82946, CBP classified the knit gloves in heading 6116, HTSUS, and that classification is not at issue in this ruling. As determined above, the leg coverings are classified in heading 6406, HTSUS. Applying the definition of the phrase "goods put up in sets for retail sale" provided in the EN(X) to GRI 3(b), the three "Power Ranger" Costume Accessory Sets meet the first requirement because the products each consist of articles that are *prima facie* classifiable in different headings of the HTSUS, specifically, the knit gloves and the leg coverings. In addition, the two products meet the second requirement because the articles are put up together to be used to carry out the specific activity of making the costume wearer look like a "Power Ranger." Finally, the two products are put up in a manner suitable for sale because they are packaged together for retail sale. Therefore, the three "Power Ranger" Costume Accessory Sets are "goods put up in sets for retail sale," which must be classified using GRI 3(b).

GRI 3(b) states, in relevant part, that retail sets shall be classified as if they consisted of the component which gives them their essential character. The EN to GRI 3(b) (VIII) lists factors to help determine the essential character of such goods: "the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." The U.S. Court of International Trade ("CIT") has indicated that the factors listed in the EN to GRI 3(b) (VIII) are "instructive" but "not exhaustive" and has indicated that the goods must be "reviewed as a whole." *The Home Depot, U.S.A., Inc. v. United States*, 30 Ct. Int'l Trade 445, 459–460 (2006) (citing *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 384 (1971) (citation omitted)). With regard to the good which imparts the essential character, the court has stated that it is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Id.* at 460 (citing *A.N. Deringer, Inc.*, 66 Cust. Ct. at 383).

Applying the aforementioned factors, the leg coverings and the gloves are both comprised of polyester fabric. There are two leg coverings and there are two gloves. We do not know whether one of the goods consists of more material or is more valuable. However, it is evident that the role of these goods is essentially equivalent, i.e., creating the appearance of a "Power Ranger" character for the wearer. Considering the merchandise as a whole, neither of these goods imparts the essential character to the set.

In accordance with GRI 3(c), "[w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs

last in numerical order among those which equally merit consideration.” Therefore, while considering headings 6116, HTSUS, and 6406, HTSUS, we conclude that the three “Power Ranger” Costume Accessory Sets are classified under heading 6406, HTSUS, because it occurs last in numerical order.

HOLDING:

By application of GRI 3(c), the “Power Ranger” Costume Accessory Sets are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY M82946, dated May 3, 2006, is REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., Plaintiff-Appellee
UNITED STATES, Defendant v. AMERICAN CAST IRON PIPE COMPANY,
BERG STEEL PIPE CORP., BERG SPIRAL PIPE CORP., DURA-BOND
INDUSTRIES, STUPP CORPORATION, Individually and AS MEMBERS OF THE
AMERICAN LINE PIPE PRODUCERS ASSOCIATION, GREENS BAYOU PIPE
MILL, LP, JSW STEEL (USA) INC., SKYLINE STEEL, TRINITY PRODUCTS
LLC, WELSPUN TUBULAR LLC USA, Defendants-Appellants

Appeal No. 2020–2014

Appeal from the United States Court of International Trade in Nos. 1:19-cv-00056-JAR, 1:19-cv-00080-JAR, Senior Judge Jane A. Restani.

Decided: July 20, 2021

JULIE MENDOZA, Morris, Manning & Martin, LLP, Washington, DC, argued for plaintiff-appellee. Also represented by DONALD CAMERON, JR., SABAHAT CHAUDHARY, EUGENE DEGNAN, MARY HODGINS, BRADY MILLS, R. WILL PLANERT, EDWARD JOHN THOMAS, III.

TIMOTHY C. BRIGHTBILL, Wiley Rein LLP, Washington, DC, argued for defendants-appellants. Also represented by TESSA V. CAPELOTO, LAURA EL-SABAAWI, MAUREEN E. THORSON, ENBAR TOLEDANO.

Before MOORE*, Chief Judge*, DYK, and REYNA, Circuit Judges.

Opinion for the court filed by Circuit Judge REYNA.

Dissenting opinion filed by Circuit Judge DYK.

REYNA, Circuit Judge.

The American Cast Iron Pipe Company and other domestic producers of large diameter welded pipe appeal a judgment by the Court of International Trade involving certain price adjustments that were made in the course of an antidumping duty investigation. Appellee Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. claims that it is entitled to a post-sale price adjustment based on the total value of penalties it paid for late delivery of product to a customer. The Court of International Trade agreed and remanded to the U.S. Department of Commerce with instructions to grant the claimed post-sale price adjustment and recalculate the resulting antidumping duty margins. On remand, the Department of Commerce granted the post-sale price adjustment, which produced a *de minimis* antidumping duty rate. This appeal followed. Because we conclude that the Department of

* Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

Commerce's original post-sale price adjustment was supported by substantial evidence and in accordance with law, we reverse.

BACKGROUND

Generally, antidumping duty rates are determined by price comparison. The U.S. Department of Commerce ("Commerce") compares the price of sales of the product under investigation that were made during the period of investigation in both the home (foreign) market and in the U.S. market. The difference in the prices is referred to as the less than fair value margin. 19 U.S.C. § 1677f-1(d). The less than fair value margin is the basis for the establishment of antidumping duty rates.

Differences in circumstances of sale can affect the level of prices respectively in both the U.S. market and the (foreign) home market, such as rebates, taxes, shipping, and fuel. Because of these differences in circumstances, prices must be adjusted to ensure an apples-to-apples comparison. *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995). Specifically, prices must be net of any "price adjustment." 19 C.F.R. § 351.401(c). Because post-sale price adjustments¹ may significantly affect the level of antidumping duty margins, post-sale price adjustments are not permitted unless a party can show that it is entitled to the adjustment.

This appeal involves whether Borusan Mannesmann Boru Sanayi Ve Ticaret A.S ("Borusan") is entitled to a post-sale price adjustment. We start with the observation that the record indicates that if the post-sale price adjustment here is permitted, the antidumping duty margin falls to a *de minimis* level, a zero margin. If the post-sale adjustment is not permitted, Borusan could be subject to 5.11 percent antidumping duty margin. Whether the post-sale price adjustment should be permitted in this case turns on the question of whether the circumstances underlying the adjustment were established and known to Borusan's customer at the time the sale was made to the customer.

Borusan is a Turkish producer of large diameter welded pipe ("LD WP"), a type of welded pipe used in the construction of oil and gas pipeline projects. J.A. 5092–94. On September 10, 2013, Borusan and two other Turkish LD WP producers (collectively, the "JVA members") entered into a Joint Venture Agreement ("JVA"). J.A. 17, 2277–80. Specifically, the JVA members entered into the JVA for the purpose of

¹ A post-sale price adjustment is an "adjust[ment] due to differences in the circumstances of sales" made after a sale. *NTN Bearing Corp. of Am. v. United States*, 295 F.3d 1263, 1267 (Fed. Cir. 2002).

bidding on a pipeline project² in Turkey, which would span hundreds of miles and required multiple sizes of LD WP. J.A. 2915–19. The three JVA members agreed to be jointly and severally liable for failures to perform under the contract. J.A. 17, 22–23. Each member agreed to reimburse the other two for any damages resulting from that specific member's failure to fulfill its obligations. J.A. 2278.

On March 3, 2014, the JVA members entered into a Consortium Agreement which, like the JVA, stated that the parties would be jointly and severally responsible and liable towards the client. J.A. 2286, 2903. The Consortium Agreement also provided that the parties would share equally in the award, if obtained, and would take equal shares of responsibility for fulfilling the requirements. J.A. 17. A copy of the original Consortium Agreement was sent to the client. J.A. 2904.

The JVA members were successful and won the bid on the gas pipeline project. On October 14, 2014, the JVA members and the client entered into a sales contract titled "Procurement Contract relating to the Supply of Line Pipes and Hot Bends" ("Sales Contract"). J.A. 2781. The Sales Contract incorporated the Consortium Agreement as Appendix L. J.A. 2903–04. It did not, however, incorporate the JVA. Like the JVA and the Consortium Agreement, the Sales Contract provided that the three JVA members were jointly and severally liable to the client for damages resulting from the members' failure to fulfill their obligations. J.A. 2867–68.

Under the Sales Contract, the JVA members agreed to provide 56" and 48" LD WP to the client per a set schedule. The parties subsequently amended the Sales Contract to change the amount of 56" LD WP required and to revise the delivery and completion schedule and pricing schedule. J.A. 4359. Due to delay, the JVA members incurred late delivery penalties for both 56" and 48" LD WP. *See, e.g.*, J.A. 4360.

On June 9, 2017, after the JVA members delivered all the ordered 56" LD WP, the client notified the members that it sought an amount of money as a penalty for late deliveries of 56" pipe. *Id.* The JVA members responded with a letter requesting that the client withdraw its damages demand, arguing that factors beyond the JVA members' control, including the client's own procedural changes, caused the delivery delays. J.A. 4361.

On September 6, 2017, after all ordered 48" pipe was delivered, the client notified the JVA members that it sought an additional amount as a penalty for late deliveries of the 48" pipe. *Id.* The members again responded the following month in a letter asking the client to cancel

² The JVA referred to the pipeline project as the "client." *See* J.A. 17.

its damages demand, reiterating substantially the same arguments they had made with respect to the late delivery penalties for the 56” pipe. *Id.* Negotiations between the client and the JVA members regarding damages continued well into 2018.

On January 17, 2018, the appellants, domestic producers of LD WP, requested that Commerce and the U.S. International Trade Commission initiate antidumping duty investigations on U.S. imports of LD WP from Turkey. Petitioners alleged that the U.S. LD WP industry was materially injured by sales of imports at less than fair value from six countries, including Turkey.³ J.A. 85–92. Commerce initiated an antidumping duty investigation in February 2018, covering a review period from January 1, 2017 through December 31, 2017. J.A. 85–86 (Large Diameter Welded Pipe from Canada, Greece, India, the People’s Republic of China, the Republic of Korea, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations, 83 Fed. Reg. 7,154 (Feb. 20, 2018)).

Commerce issued antidumping duty questionnaires to several Turkish producers of LD WP, including Borusan. In its initial questionnaire response dated April 23, 2018, Borusan claimed that it was entitled to a post-sale price adjustment to account for the late delivery penalties it had incurred in the pipeline project. J.A. 1216. Specifically, Borusan sought a post-sale price adjustment equal to the entire value of the penalty and represented that it had “agreed to pay its customer” that amount for a “disputed penalty for late delivery on sales.” *Id.* Borusan, however, had not yet made any penalty payment and, in fact, the JVA members including Borusan were still negotiating the penalty amount with the client. On May 28, 2018, the client responded to the JVA members’ July 2017 and October 2017 letters stating that the client agreed that it had contributed to the delivery delays and accordingly lowered the penalties for both the 56” pipe and the 48” pipe. J.A. 4361. On June 11, 2018, after further discussions with the client, the JVA members agreed to the reduced penalty amounts. *Id.* That same day, the JVA members created a protocol that allocated the total penalty among the three members proportionally to each member’s responsibility for the delay. J.A. 3003. The JVA members further agreed Borusan would be responsible for the largest share of the total penalty (“final allocation”). J.A. 3004.

On June 15, 2018, Borusan informed Commerce that it had reached an agreement with the client and the JVA members as to its final allocation of the penalty. J.A. 2230–31. Borusan further stated that the penalty was subject to an ongoing dispute among the JVA mem-

³ The U.S. International Trade Commission’s participation in the ensuing underlying antidumping duty investigation is not relevant to this appeal.

bers, such that no final payment had been made, but the penalty was being allocated to the members proportionally to their share of responsibility, i.e., per the final allocation. J.A. 2230–32. Borusan explained:

Under [the Sales Contract], the [JVA] members agreed to provide a designated quantity of various sizes and dimensions of LD pipe as a group. No individual agreements were made between [the client] and the [three] producers. The [JVA] members in the [Joint Venture Agreement] dated [September 10, 2013] . . . agreed that each company would supply [one-third] of the total contracted quantity. [The client] was not a party to this agreement and considered the supply contract to be with [the JVA members as an entity]. The supply contract between [the client and JVA members] includes a delivery schedule with deadlines (guaranteed completion dates). Unfortunately, due to various reasons beyond their control, none of the members could fully comply with the contractual delivery schedule. The majority of the delay and the liquidated damages claim were due to delays by [Borusan].

J.A. 2231.

On June 29, 2018, the JVA members and the client executed a settlement agreement in which the members promised to pay the agreed-upon penalty amount. In accordance with the Sales Contract, each JVA member was billed one-third of the penalty (“initial allocation”), but Borusan assumed responsibility for its final allocation of the total penalty, a larger sum. J.A. 4362. The members signed a mutual release based on the settlement agreement. On July 6, 2018, Borusan filed the executed settlement agreement with Commerce. J.A. 5072–73. Of note, the original Sales Contract with the client was executed in October 2014, while this final allocation was established years after execution of the settlement agreement.

On August 27, 2018, Commerce published a Preliminary Determination, assigning Borusan an antidumping duty rate of 5.29 percent *ad valorem*. J.A. 3577 (Large Diameter Welded Pipe from the Republic of Turkey: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 83 Fed. Reg. 43,646, 43,647 (Aug. 27, 2018)). In September 2018 in response to Commerce’s request, Borusan provided Commerce with sales verification documentation pertaining to Borusan’s payment of its share of the penalty to the client. J.A. 3580.

On February 27, 2019, Commerce published its Final Determination in which Commerce rejected Borusan’s claimed post-sale price adjustment and assigned Borusan an antidumping duty rate of 5.11

percent *ad valorem*. J.A. 5092 (Large Diameter Welded Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value, 84 Fed. Reg. 6,362 (Feb. 27, 2019)); J.A. 5101. Commerce explained that, under its regulations, it “generally will not consider a price adjustment that reduces or eliminates dumping margins unless the party claiming such price adjustments demonstrates that the conditions of the adjustment were established and known to the customer at the time of sale.” J.A. 5071 (quoting Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,642 (Mar. 24, 2016) (“Modification”)). Commerce further explained that it considers a number of factors in determining whether a party has demonstrated entitlement to a post-sale price adjustment:

- (1) Whether the terms and conditions of the adjustment were established and/or known⁴ to the customer at the time of sale, and whether this can be demonstrated through documentation;
- (2) How common such post-sale adjustments are for the company and/or industry;
- (3) The timing of the adjustment;
- (4) The number of such adjustments in the proceeding; and
- (5) Any other factors tending to reflect on the legitimacy of the claimed adjustment.

J.A. 5071 (quoting Modification, 81 Fed. Reg. at 15,644–45).

Applying these factors, Commerce determined that Borusan was entitled to a post-sale price adjustment for the penalties paid to the client. J.A. 5073. Commerce, however, calculated the post-sale price adjustment on the basis of one-third of the full penalty amount (the initial allocation) and not Borusan’s final allocation of the penalty. *Id.* Commerce used the one-third figure because it determined that the one-third allocation method was the allocation established and known to the client at the time of the sale. Commerce noted that the JVA members did not begin to negotiate the final allocation until after the date of sale, and the final allocation was not agreed upon until

⁴ Although Commerce used the phrase “established and/or known” in other sections of the Modification, Commerce requires that the terms and conditions be established *and* known. See Modification, 81 Fed. Reg. at 15,642 (“Since enacting these regulations, the Department has consistently applied its practice of not granting [post-sale] price adjustments where the terms and conditions were not *established and known* to the customer at the time of sale.” (emphasis added)); *id.* (“[T]he Department generally will not consider a [post-sale] price adjustment that reduces or eliminates dumping margins unless the party claiming such [post-sale] price adjustment demonstrates that the terms and conditions of the adjustment were *established and known* to the customer at the time of sale.” (emphasis added)).

June 2018. J.A. 5071–74, 5053. For these reasons, Commerce concluded, final allocation of the penalty among the JVA members could not have been established and known to the client at the time of sale. J.A. 5071–72.

Commerce further explained that using the JVA members’ final allocation of the penalty would give Borusan an opportunity to manipulate the post-sale price adjustment “because the terms of the amount and allocation were not fixed at the time of sale and the consortium did not determine the final apportionment until after the initiation of the investigation.” J.A. 5074. Commerce expressed concern about the legitimacy of the claimed adjustment because Borusan, for example, “changed the amount of this adjustment, at times significantly, in its home market sales database, with little or no explanation”; had “provided no exhibits, supporting documentation, or calculation worksheets” for these modifications; and did not report the final amount of late delivery damages owed until a “little over a month before the *Preliminary Determination*.” J.A. 5072–73. Thus, consistent with the “terms and conditions of the adjustment [that] were established and known to the customer at the time of sale,” Modification, 81 Fed. Reg. at 15,644–45, Commerce determined a post-sale price adjustment based on the initial allocation (one-third of the total penalty), which it considered a “reasonable way to address” its concerns regarding any potential manipulation by Borusan, J.A. 5073–74.

Borusan filed suit in the U.S. Court of International Trade (“CIT”) on May 2, 2019, pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). Borusan alleged, among other things, that Commerce had erroneously determined Borusan’s post-sale price adjustment based on the one-third initial allocation rather than Borusan’s final allocation of the penalty. J.A. 8. Defendants-appellants also filed suit in the CIT, alleging that Commerce erred in its determination that Borusan was entitled to *any* post-sale price adjustment. J.A. 8, 16. Specifically, the appellants argued that Commerce should have applied an adverse inference based on “facts otherwise available” under 19 U.S.C. § 1677e to determine Borusan’s entitlement to an adjustment because Borusan was not forthcoming during the investigation about circumstances involving the post-sale adjustment. J.A. 16. The CIT consolidated the two cases and both parties subsequently moved for judgment on the agency record. J.A. 8.

* * *

On January 7, 2019, the CIT issued its decision sustaining Commerce’s determination to grant Borusan a post-sale price adjustment.

See J.A. 20. The CIT, however, concluded that Commerce erred by basing the post-sale price adjustment on the initial one-third allocation of the total penalty assumed by the three JVA members. J.A. 26–27, 35. The CIT noted that, prior to the sales in question, the JVA established that penalties for the JVA members’ failure to perform under the contract would be apportioned among the JVA members based on their responsibility. J.A. 21–23. The CIT stated that the JVA was incorporated by reference into the Sales Contract, and therefore the client should be deemed aware of the JVA’s provisions because that provision was established and known to the client at the time of sale. *Id.* The CIT further reasoned that it was only necessary that the “terms and conditions” be established at the time of sale, not the final amount actually allocated to Borusan. J.A. 23.

The CIT acknowledged Commerce’s concern about the potential for Borusan to manipulate the post-sale price adjustment, but it rejected Commerce’s concern because “Commerce point[ed] to nothing that suggests an improper manipulation of the adjustment.” J.A. 26. The CIT concluded that Commerce “would have accepted the full penalty adjustment” had Borusan not been a party to the JVA. *Id.* The CIT remanded for Commerce to review the record and recalculate the post-sale price adjustment “for whatever amount [Borusan] established it was liable for and *actually paid* or was credited, as authorized by the pre-investigation contract obligations, unless Commerce has evidence not previously cited that shows” manipulation by Borusan. J.A. 26–27 (emphasis added).

On March 9, 2020, Commerce issued its remand determination. J.A. 5413. “Consistent with the [CIT’s] remand, and under protest,” Commerce granted Borusan a post-sale price adjustment based on Borusan’s final allocated share of the penalty. J.A. 5418–19. As a result, Borusan’s weighted-average dumping margin was reduced to a *de minimis* amount. J.A. 5413. As a result, Borusan’s antidumping duty margin dropped from 5.11 percent to zero. The CIT affirmed Commerce’s redetermination on May 22, 2020. J.A. 36–49. This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

Standard of Review

This court reviews decisions of the CIT *de novo* and applies the standard of review the CIT applies in its review of appeals of Commerce’s antidumping duty determinations. See, e.g., *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992). Under the applicable standard, we affirm a decision by Commerce where it is supported by substantial evidence and in accordance with the law. 19

U.S.C. § 1516a(b)(1)(B)(i); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1307–08 (Fed. Cir. 2001). “Substantial evidence” is “more than a mere scintilla” and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002). Reasonable minds may differ on the outcome, but “a determination does not fail for lack of substantial evidence on that account.” *See, e.g., Pastificio Lucio Garofalo, S.p.A. v. United States*, 783 F. Supp. 2d 1230, 1233 (Ct. Int’l Trade 2011) (citation and quotation omitted). To determine if substantial evidence supports a decision by the CIT, we review the record as a whole, including evidence that adds to, and evidence that detracts from, the “substantiality of the evidence.” *Ta Chen*, 298 F.3d at 1335 (citation and quotation omitted).

That highly deferential review standard recognizes Commerce’s special expertise in antidumping duty investigations. *Heveafil Sdn. Bhd. v. United States*, 58 F. App’x 843, 847 (Fed. Cir. 2003). Commerce has “broad discretion in executing” antidumping law, *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), and we afford “tremendous deference” to Commerce’s administration of those laws, *id.* at 1582. As we explained in *Fujitsu Gen. Ltd. v. United States*:

Antidumping and countervailing duty determinations involve complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts. This deference is both greater than and distinct from that accorded the agency in interpreting the statutes it administers, because it is based on Commerce’s technical expertise in identifying, selecting and applying methodologies to implement the dictates set forth in the governing statute, as opposed to interpreting the meaning of the statute itself where ambiguous.

88 F.3d 1034, 1039 (Fed. Cir. 1996) (citations omitted). Factual determinations supporting antidumping margins are thus “best left to the agency’s expertise,” *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000), so we review those determinations for substantial evidence, 19 U.S.C. § 1516a(b)(1)(B)(i).

* * *

Commerce determines sales price in antidumping duty calculations net of any post-sale price adjustment that is reasonably attributable to sale of the subject merchandise made during the applicable period

of investigation. 19 U.S.C. § 351.401(c). The CIT has recognized that post-sale price adjustments, as in this case, present opportunity for manipulation by investigated parties, which arises from “the possibility that companies would grant rebates after it became known that certain sales would be subject to [antidumping duty] review, thus decreasing an already established sales price, and thus decreasing margins.” *China Steel Corp. v. United States*, 393 F. Supp. 3d 1322, 1347 (Ct. Int’l Trade 2019). To avoid such manipulation, Commerce’s regulations provide that an investigated party seeking a post-sale price adjustment must prove that “buyers were aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale.” *Id.* (internal citation and quotation omitted).

We hold that Commerce’s original Final Determination that Borusan was entitled to a post-sale price adjustment based on the one-third initial allocation agreed to by the JVA members because the one-third allocation was known and established at the time of sale is supported by substantial evidence and in accordance with the law.

Commerce determined that the circumstances surrounding the timing of the agreement allocating the total penalty fee weighed against valuing the post-sale price adjustment based on the full amount of Borusan’s final penalty allocation. We agree. In its Final Determination, Commerce specifically analyzed whether the JVA members’ allocation of the total penalty fee was established and known to the client at the time of sale. J.A. 5071–72; *see also* Large Diameter Welded Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value, 84 Fed. Reg. 6,362 (Feb. 27, 2019). Commerce determined that the final allocation method was not established or known to the client “because the parties negotiated their shares of the fee after the fee was imposed.” J.A. 5072. Although the client was aware that the three members would eventually evenly split responsibility for any damages, the client was not aware of the method the JVA members actually adopted. Commerce reached this conclusion based not only on the timeline of the contracts, but also because Borusan repeatedly changed its claimed post-sale price adjustment amount during the investigation without providing “exhibits, supporting documentation, or calculation worksheets,” instead relying “only [on] vague statements.” *Id.* Commerce stated that the changing terms after the initiation of the investigation cast “significant doubt on the legitimacy of the allocation.” *Id.*

Borusan admitted that the JVA members’ agreement on the penalty allocation did not materialize until June 2018, “well after the initiation of this investigation.” *Id.* (noting that the investigation was initiated on January 17, 2018, and the penalty was not finalized until

June 2018). Commerce found that only after the final penalty amount was determined “did the [JVA] members apportion among themselves the penalties for which each [JVA] member was responsible.” *Id.* Indeed, the JVA members “negotiated their shares of the fee after the fee was imposed.” J.A. 5071–72.

Commerce’s determination that the final allocation was not established and known to the client at the time of sale is supported by substantial evidence. Only the JVA—not the Consortium Agreement or the Sales Contract—provided that any penalties the JVA members incurred would be reimbursed by the party failing to fulfill its obligations. J.A. 2278. The client was not a party to the JVA, J.A. 2231 (Borusan admitting that the client “was not a party to [the joint venture] agreement”); the client did not receive the full JVA, J.A. 2776, 2903–04; Opening Br. 17–19; and the client was not informed of the final allocation method prior to the investigation, Response Br. at 14 (“[N]either the Sales Contract nor the Consortium Agreement documents addressed at all the issue of allocation.”). The CIT incorrectly concluded that “[t]he Sales Contract expressly incorporates the [JVA] by reference,” J.A. 21–23, when in fact it was the Consortium Agreement, Appendix L, not the JVA, that was incorporated by reference into the Sales Contract. J.A. 2903–04 (the Consortium Agreement, Appendix L to the Sales Contract). The Consortium Agreement does not provide that the parties would apportion the penalties among themselves according to blame or reimburse one another. Rather, the Consortium Agreement incorporated into the Sales Contract assigns each JVA member a one-third share of responsibility and provides that the JVA members shall be jointly and severally liable towards the client. *Id.*; Response Br. 14. Thus, the client did not have before it the provisions in the JVA regarding apportionment by blame and therefore could not have known at the time of sale of those provisions. That the client understood that allocation among the JVA members would be in equal shares is supported by the record evidence that the client billed all three JVA members an equal share of the total penalty. J.A. 5173.

Commerce’s determination of the post-sale price adjustment was also in accordance with law. *See* Modification, 81 Fed. Reg. at 15,645. We disagree that there must be actual manipulation of post-sale price adjustment data in order for Commerce to reject a proposed post-sale price adjustment. Commerce’s regulation speaks to potential, not actual, manipulation of data. To be clear, this does not mean that Commerce can or must reject a proposed post-sale price adjustment solely upon a showing of potential manipulation. Whether or not to accept a proposed post-sale price adjustment must be based, as it is in

this case, on the circumstances surrounding the proposed post-sale price adjustments. Here, Commerce determined, in the course of applying the proper factors provided in its regulations, that a potential existed for manipulating the post-sale price adjustment because the claimed adjustment was not tethered to what was established and known to the client at the time of sale. Consistent with its legitimate goal of avoiding such manipulation, Commerce correctly set the post-sale price adjustment in a reasonable manner, based on evidence that existed at the time of sale, that addressed its manipulation concerns. J.A. 5073–54. Commerce’s determination is supported by substantial evidence, and we find no reason to disturb that determination.

CONCLUSION

We hold that Commerce’s Final Determination assigning Borusan one-third the full penalty in the post-sale price adjustment calculation and a 5.11 percent antidumping duty rate was supported by substantial evidence and in accordance with the law. Accordingly, we reverse the CIT’s judgment to the contrary. The court has considered the parties’ remaining arguments and does not find them persuasive.

REVERSED

COSTS

No costs.

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., Plaintiff-Appellee
UNITED STATES, Defendant v. AMERICAN CAST IRON PIPE COMPANY,
BERG STEEL PIPE CORP., BERG SPIRAL PIPE CORP., DURA-BOND
INDUSTRIES, STUPP CORPORATION, INDIVIDUALLY AND AS MEMBERS OF THE
AMERICAN LINE PIPE PRODUCERS ASSOCIATION, GREENS BAYOU PIPE
MILL, LP, JSW STEEL (USA) INC., SKYLINE STEEL, TRINITY PRODUCTS
LLC, WELSPUN TUBULAR LLC USA, Defendants-Appellants

Appeal No. 2020–2014

Appeal from the United States Court of International Trade in Nos. 1:19-cv-00056-JAR, 1:19-cv-00080-JAR, Senior Judge Jane A. Restani.

DYK, *Circuit Judge*, dissenting.

As the United States Court of International Trade (Trade Court) held, I think that the Department of Commerce’s decision here was not supported by substantial evidence and, on its face, was arbitrary and capricious. I respectfully dissent.

I

In antidumping proceedings, the prices used by Commerce to calculate normal value are subject to several adjustments. *See* 19 C.F.R. § 351.401(b). One such adjustment is a price adjustment, which is defined as “a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale . . . , that is reflected in the purchasers net outlay.” *Id.* § 351.102(b)(38) (citing *id.* § 351.401(c)). When determining normal value on the basis of home-market sales prices, Commerce “normally will use a price that is net of price adjustments . . . that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).” *Id.* § 351.401(c). However, Commerce “will not accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of [Commerce], its entitlement to such an adjustment.” *Id.*

Commerce adopted “a non-exhaustive list of factors that it may consider in determining whether to accept a price adjustment that is made after the time of sale.” Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,641 (Mar. 24, 2016). Commerce concluded that,

[i]n determining whether a party has demonstrated its entitlement to such an adjustment, the Department may consider: (1) Whether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation; (2)

how common such post-sale price adjustments are for the company and/or industry; (3) the timing of the adjustment; (4) the number of such adjustments in the proceeding; and (5) any other factors tending to reflect on the legitimacy of the claimed adjustment. The Department may consider any one or a combination of these factors in making its determination, which will be made on a case-by-case basis and in light of the evidence and arguments on each record.

Id. at 15,644–45. The purpose of the rule, as applied here, is to avoid manipulation. *Id.* at 15,644 (“These final modifications continue to . . . prevent the potential manipulation of dumping margins through certain post-sale price adjustments.”). The concern with manipulation arises because decreases in the home-market price (normal value) as a result of a downward price adjustment reduce the magnitude of dumping.

II

To understand the arbitrary nature of Commerce’s decision in this case, it is necessary to briefly describe the underlying facts. This case centers around the sale of large-diameter pipe to construct a pipeline in Turkey. On September 10, 2013, almost four-and-a-half years prior to the filing of the petition for the antidumping investigation, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and two other suppliers signed a joint venture agreement forming a consortium to bid on a solicitation for large-diameter pipe. In this agreement, each of the consortium members agreed to be responsible for any damages payments to the customer stemming from the pipeline project contract that was caused by that individual member’s failure to perform its obligations. Each party was responsible for about one-third of the deliverables.

Shortly thereafter, on October 14, 2014, over three years prior to the filing of the petition for antidumping investigation, the consortium members entered into the sales agreement with the customer for the pipes. This agreement included a liquidated damages clause (governing the delayed delivery of goods), a joint and several liability clause, and a summary of the consortium’s 2013 joint venture agreement (titled, “Consortium Agreement”), among other provisions. The summary did not address how the consortium members planned to split any damages flowing from breach of the customer agreement. The liquidated damages clause required the consortium to pay the customer an established penalty rate for each day that the delivery of goods was delayed. The joint and several liability clause stated that

the consortium members were jointly and severally responsible for the obligations under the sales agreement.

On June 9, 2017, and September 6, 2017, prior to the initiation of the antidumping investigation, the customer informed the consortium that, based on delayed deliveries, it calculated that the consortium owed it millions of dollars in damages stemming from the sales agreement's liquidated damages clause. Commerce initiated the present investigation on February 9, 2018. On May 28, 2018, the customer adjusted its demand downward by about 50% of the original total. Following receipt of the lowered demand, the customer and the consortium reached an agreement to settle the liquidated damages claim for an even lesser amount on or around June 11, 2018, and on that same day, the consortium members agreed to a protocol dividing the customer's damages claim based on the delay caused by each consortium member as they had agreed in their joint venture agreement. Borusan was responsible for more than one-third of the liquidated damages because it was responsible for more than one-third of the late deliveries. The required payments to the customer were made in late June 2018, and Borusan reimbursed its joint-venture partners in early July 2018. On August 20, 2018, Commerce issued its preliminary determination decision memorandum.

III

Commerce determined that, while Borusan was entitled to a post-sale price adjustment equal to one-third of the amount paid to the customer, Borusan was not entitled to the amount that it actually paid (over twice the one-third amount) by virtue of its agreement with its joint venture partners. If Commerce had granted the post-sale adjustment as claimed by Borusan in the first instance, Borusan would have had a *de minimis* dumping margin (as evidenced by Commerce's decision on remand).

Commerce did not rely on factors (2), (3), and (4) of the rule in rejecting the claimed adjustment. There is no suggestion that that the type of liquidated damages penalty at issue here (delay damages) would be uncommon in this industry (factor (2)); the timing the adjustment itself was not suspect (factor (3)); and this was the only adjustment (factor (4)). Commerce's decision relying on the other two factors is without a reasonable basis for at least three reasons.

First, Commerce denied Borusan's claimed post-sale price adjustment as inappropriate because the adjustment was not determined in the customer agreement (factor (1)). But Commerce failed to explain why there was any relevant difference between a sales agreement with a customer and a consortium agreement among suppliers. In

antidumping investigations, like all other areas of agency action, “it is well-established that ‘an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.’” *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (alteration in original) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)). Commerce’s rationale for distinguishing between the two agreements here was completely unexplained.

In particular, Commerce provided no rationale as to why the consortium agreement between suppliers, as compared to the agreement between the suppliers and the customer, was more susceptible to manipulation and thus should be discounted. Much like the sales agreement with the customer, which was signed over three years prior to the antidumping investigation, Borusan and the other two suppliers signed the consortium agreement over four years before the antidumping investigation. The terms of the consortium agreement as signed could not be, and were not, changed as a result of the investigation.

Second, Commerce’s suggestion that the amount paid by Borusan was suspect (factor (5))—because it was not calculated until the investigation began—is inconsistent with Commerce’s willingness to accept a post-investigation calculation of the amount paid to the customer as “legitimate,” J.A. 5073, even though calculated after the proceeding began. In each case, the principle governing the calculation was established before the proceeding began.

Third, contrary to the majority’s conclusion, the record does not support Commerce’s characterization that the changing terms of Borusan’s requested price adjustment was somehow suspicious (factor (5)). Commerce concluded that “[t]he changing terms of the late penalty fee after the initiation of the investigation cast[] significant doubt on the legitimacy of the allocation of this expense among the consortium members.” *Id.* at 5072. The timeline, however, simply shows that Borusan was negotiating the liquidated damages penalty that led to the requested adjustment with its customer in an attempt to reduce the penalty as the investigation was ongoing and periodically reported this to Commerce. This reduction resulted in a higher normal value, which would have been unfavorable to Borusan in the antidumping proceeding. The amount of Borusan’s requested adjustment changed because the customer’s demand changed and because Borusan did not reach a settlement agreement with the customer until on or around June 11, 2018.

Commerce also faults Borusan because it “did not file the final settlement agreement until July 6, 2018, which was little over a

month before the *Preliminary Determination*.” *Id.* at 5072–73. This ignores that Borusan did not reach a final settlement agreement with the customer until around mid-June and did not make the payment required by the settlement to the customer until late June 2018. There was no delay in providing Commerce with the relevant information. And, as emphasized by the Trade Court, Commerce “independently verified [Borusan’s] post-sale price adjustment based upon information that [Borusan] placed on the record.” *Id.* at 25.

CONCLUSION

In my view, Commerce’s determination that Borusan was not entitled to a post-sale price adjustment in the amount claimed was not supported by substantial evidence and was arbitrary and capricious. I respectfully dissent.

U.S. Court of International Trade

Slip Op. 21–82

I.D.I. INTERNATIONAL DEVELOPMENT AND INVESTMENT CORPORATION,
Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF
AMERICA, et al., Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 20–00107

[The court denies Plaintiff’s motion for judgment on the agency record and grants judgment for Defendant and Defendant-Intervenors.]

Dated: July 6, 2021

Robert L. LaFrankie, Crowell & Moring LLP of Washington, DC, for Plaintiff.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, for Defendant. With her on the brief were *Brian Boynton*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Kirrin A. Hough*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Jonathan M. Zielinski, Cassidy Levy Kent (USA) LLP of Washington, DC, for Defendant-Intervenors. With him on the brief was *James R. Cannon, Jr.*

OPINION

Baker, Judge:

In this case, a Vietnamese fish exporter challenges the Department of Commerce’s denial of its application for a separate antidumping rate and imposition of the far higher country-wide rate generally applicable to frozen fish imports from Vietnam. For the reasons explained below, the court sustains Commerce’s decision.

Regulatory Background

When Commerce imposes antidumping duties on imports from countries with non-market economies, it presumes that all exporters in such countries are controlled by the government. *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1340–41 (CIT 2020). Any exporter in a country with a non-market economy will accordingly receive that country’s antidumping duty rate unless the exporter applies for a separate rate and demonstrates that it is both *de jure* and *de facto* independent of the government. *Id.*¹ If Commerce determines that the applicant failed to demonstrate either type of

¹ The relevant statute itself is silent about the presumption of government control. *See An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 203 F. Supp. 3d 1256, 1289 & n.46 (CIT 2017) (referring to Commerce implementing the presumption “[t]hrough practice” and noting that 19 U.S.C. § 1677f-1 does not prescribe the presumption).

independence, Commerce denies the separate rate and the applicant receives the country-wide rate. *See 53-Foot Domestic Dry Containers from the People's Republic of China: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value* at 53 (Dep't Commerce Apr. 15, 2015).² Thus, Commerce assigns an exporter the country-wide rate by default unless the exporter applies for, and receives, a separate rate.

A separate-rate applicant has the burden of rebutting the presumption of government control. *Zhejiang Zhaofeng Mech. & Elec. Co. v. United States*, 355 F. Supp. 3d 1329, 1333 (CIT 2018) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1406 (Fed. Cir. 1997)). The applicant has this burden because it is the party with “the best access to information pertinent to the ‘state control’ issue.” *Sigma Corp.*, 117 F.3d at 1406 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (“The burden of production should belong to the party in possession of the necessary information.”)).

Factual and Procedural Background

In 2003, Commerce issued an antidumping order applicable to frozen fish imported from Vietnam. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003). In that order, Commerce found that certain frozen fish fillets from Vietnam were being sold in the U.S. at less than normal value and imposed duties accordingly. The order imposed specific rates for certain exporters and a “Vietnam-wide” rate for exporters not specifically listed. *See id.* at 47,909–10. In the intervening years, that order has undergone multiple administrative reviews.³

This case stems from the 15th such administrative review, which Commerce initiated at the request of Catfish Farmers of America⁴ and several of its constituent members. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 50,077, 50,080–81 (Dep't Commerce Oct. 4, 2018).

In an administrative review involving a non-market economy country such as Vietnam,⁵ Commerce does not review the country-wide

² <https://enforcement.trade.gov/frn/summary/prc/2015-08903-1.pdf> (accessed July 6, 2021).

³ For an explanation of the purpose of an administrative review in the regulatory scheme, *see Hung Vuong*, 483 F. Supp. 3d at 1334–35.

⁴ Catfish Farmers of America is a trade association representing domestic catfish farmers and processors.

⁵ *See Notice of Final Antidumping Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116, 37,119 (Dep't Commerce June 23, 2003) (designating Vietnam as a non-market economy for purposes of U.S. antidumping laws).

rate unless either a party requests such review or Commerce initiates it. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018*, 84 Fed. Reg. 56,420, 56,421 (Dep’t Commerce Oct. 22, 2019).

In the review at issue here, no party requested a review of the Vietnam-wide rate and Commerce declined to initiate such a review. Accordingly, the country-wide rate of \$2.39 per kilogram that was already in effect did not change. *Id.* This rate therefore automatically applied to all Vietnamese exporters that did not receive separate rates.

I.D.I. International Development and Investment Corporation, a Vietnamese exporter and the plaintiff in this case, submitted a separate rate application to Commerce and subsequently submitted three supplemental applications. Appx1012–1059 (original); Appx1065–1113 (first supplemental); Appx1114–1128 (second supplemental); Appx1129–1145 (third supplemental). Catfish Farmers opposed IDI’s application. Appx1151–1156.

As it was undisputed that IDI was free from *de jure* control of the Vietnamese government, Appx1206 & n.149, Commerce’s decision focused on the *de facto* control test, under which a separate-rate applicant “‘must show [among other things] that the government neither actually selects management nor directly or indirectly involves itself in the day-to-day management of the company’ to demonstrate independence from the government.” Appx1206 (quoting *An Giang*, 203 F. Supp. 3d at 1289–90). Commerce determined that IDI did not meet that standard for several reasons.

First, Commerce found that a government official and Communist Party member—referred to as Mr. X⁶—represented the Vietnamese government on the boards of both IDI and its corporate parent, Company Y.⁷ Commerce cited IDI’s submissions in finding that the boards “are charged with making ‘important decisions of the company’ as required by law” and are responsible for selecting the com-

⁶ During the period of review, Mr. X served as deputy of the People’s Council of An Giang Province. Appx1207.

⁷ [[]—referred to in this opinion as Company Y—is a [[] shareholder of IDI. Appx80023; Appx80075. (Redacted information provides name of Company Y and describes its ownership share of IDI.) Company Y in turn is publicly traded, Appx80075, with “thousands of individuals and entities” holding shares and no “entity shareholder” owning more than [[]]. Appx80075–80076, Appx80077. (Redacted information describes maximum percentage ownership by any shareholder in Company Y.) The Vietnamese government has no ownership interest in either IDI or Company Y. Appx80025–80026.

panies' management, "who in turn handle the day-to-day operations of the company, including setting import prices." Appx1207 (citing Appx1192 and Appx1028).⁸

Second, Commerce observed that Mr. X was also a "Deputy General Director" of Company Y, where he was "in charge of external affairs . . . and thus responsible for arranging and attending meetings with the company's investors, customers, partners[,] and visitors from other companies." Appx1207 (omission in original) (quoting Appx1119–1120). Commerce concluded that this meant Mr. X—and by extension, the Vietnamese government—was involved in the day-to-day management of both Company Y and IDI. Appx1207. Commerce also noted that Mr. X's meetings with customers and external parties likely included price negotiations and discussions of export practices. Appx1207 n.156.

Third, Commerce found that Mr. X's influence on IDI's board of directors was "heightened and expanded" because [[]] of both IDI's and Company Y's boards were Communist Party members. Appx80388; Appx80392 (citing Appx80305–80308). (Redacted information describes extent of party membership among IDI and Company Y board members.) Although Commerce acknowledged that party membership is not the same thing as holding government office, it reasoned that " 'mere' [party] membership" is not meaningless for the government control analysis. Appx1207 (quoting Appx1189).

Specifically, Commerce determined that in a one-party state like Vietnam, party membership

signifies that an individual is not just sympathetic to the ruling Vietnamese government's goals, but is an active participant in furthering those goals. Accordingly, when a government official, such as Mr. X, is in a position of authority and power in companies such as IDI and Company Y, absent record information to the contrary, it is reasonable to presume that members of the Communist Party of Vietnam also in power in those companies will support and affirm the votes and influence of that government official to further the goals of the Vietnamese government.

Appx1207–1208. Thus, Commerce found that Mr. X's position as a government official meant that he effectively led the other party members on the two company boards.

⁸ Commerce cited IDI's description of a document attached to the company's separate rate application as showing "the decision of the Board of Directors appointing the General Director of the company," which IDI stated "evidences IDI's independence in the selection of management." Appx1028.

Fourth, the influence of the Communist Party in the affairs of Company Y and IDI wasn't limited to party members [[

]]

(Redacted information provides specific examples of party involvement in the affairs of Company Y and IDI.)

Finally, Commerce noted that there was no evidence in the administrative record suggesting that any of the Communist Party members on the board of either IDI or Company Y had ever voted or acted in a way contrary to Mr. X. Appx1208. Commerce also found that the specific powers of the two companies' boards, including selection of management, as well as the "particular decisions" of the boards demonstrated the "actual impact" of Mr. X and his party colleagues on IDI's operations. Appx1208.

Based on these findings, Commerce found that the presence of Communist Party members on both companies' boards "emboldened and furthered" Mr. X's authority and control over those companies, such that his presence was representative of the government's interests. Appx1208. Commerce reasoned that "the presence of a government official on the board of IDI/Company Y, in addition to the existence of multiple associates or members of the Communist Part [sic] of Vietnam, *taken together*, for the reasons explained above, supports a finding of *de facto* control." Appx1208 n.158 (emphasis added).

Commerce concluded as follows:

To summarize, there are several avenues through which the [government of Vietnam] can and does impact the operation of IDI. A manager of IDI's parent company, *i.e.*, Company Y, is a government official. That same government official plays a role in the boards of directors, which perform oversight of IDI and its parent and are involved in the selection of management. On both boards, members and associates of the Communist Party of Vietnam who are loyal to the ruling politicians in the [government of Vietnam] hold powerful positions. Taken together, these factors indicate that the government can control the company through traditional corporate control. Accordingly, we continue to find that IDI is *de facto* controlled by the [government of Vietnam] and is not entitled to a separate rate.

Appx1208. Commerce therefore deemed IDI to be "part of the Vietnam-wide entity." *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 23,756, 23,757 (Dep't Commerce Apr. 29, 2020). This finding

meant IDI received the \$2.39-per-kilogram rate. *Id.* The successful separate-rate applicants, in contrast, received a rate of 15¢ per kilogram. *Id.*

In response to Commerce’s final decision, IDI filed this suit pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) (authorizing “an interested party who [was] a party to the proceeding in connection with which the matter [arose]” to commence an action in this court contesting Commerce’s final determination in an administrative review of an antidumping order). *See also* 28 U.S.C. § 2631(c) (authorizing “any interested party who was a party to the proceeding in connection with which the matter arose” to commence an action in this court contesting a determination “listed in” § 1516a).

IDI’s complaint asks the court to hold that Commerce’s final decision denying IDI’s separate rate application is “not supported by substantial evidence on the record and otherwise not in accordance with law” and requests a remand to Commerce “for disposition consistent with the final opinion and order of this Court.” ECF 7, at 12. Catfish Farmers intervened as of right to defend Commerce’s final decision. ECF 15. IDI then filed the pending motion for judgment on the agency record. ECF 28 (public); ECF 27 (confidential). The court thereafter heard oral argument on IDI’s motion. ECF 58.

Jurisdiction and Standard of Review

The court has jurisdiction to hear this case under 28 U.S.C. § 1581(c), which grants this court exclusive jurisdiction over civil actions commenced pursuant to 19 U.S.C. § 1516a.

In actions such as this brought under 19 U.S.C. § 1516a(a)(2), “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

Under this standard, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record permitted Commerce to reach the conclusion it did even if the court would have reached a different result:

Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

Discussion

IDI argues that Commerce’s decision to deny the separate rate application was both contrary to law and not supported by substantial evidence. The court considers these arguments in turn.

I.

A.

IDI identifies what it contends are three legal errors by Commerce, the first of which is that the Department only considered record evidence pertaining to one element of its four-part test for determining independence from *de facto* control. That test is:

- (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the [exporter] has authority to negotiate and sign contracts and other agreements; (3) whether the [exporter] has autonomy from the government in making decisions regarding the selection of management; and (4) whether the [exporter] retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Zhejiang, 355 F. Supp. 3d at 1333 (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1315, 1320 n.21 (CIT 2013), and *Silicon Carbide from the People’s Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep’t Commerce May 2, 1994)); see also Appx1205 (Commerce’s recitation of the test).⁹

In its opening brief, IDI argued that it was “unlawful” for Commerce to address only the third element— management autonomy— because “Commerce may not simply base its separate rate findings only on one ‘single criterion’ (*i.e.*, management control), thereby ignoring ‘the other three prongs.’” ECF 49, at 17–18 (citing *Shandong Rongxin Imp. & Exp. Co. v. United States*, 203 F. Supp. 3d 1327, 1348 (CIT 2017) (hereinafter *Rongxin II*)).

But in its reply brief, IDI clarified its argument, stating that

IDI does not dispute as a legal matter (as the Court held in *Yantai [CMC Bearing Co. v. United States]*, 203 F. Supp. 3d 1317 (CIT 2017)¹⁰) that “Commerce [permissibly] requires that ex-

⁹ At argument, counsel for IDI confirmed that IDI does not challenge the validity of Commerce’s four-part test.

¹⁰ In *Yantai*, the court held that a separate-rate applicant’s failure to demonstrate any one of the four elements meant that Commerce had no need to examine the remaining elements. See 203 F. Supp. 3d at 1326 (“*Yantai CMC* failed to meet the third factor of the test. Given that all four factors must be satisfied, Commerce had no further obligation to continue with the analysis.”).

porters satisfy all four factors of the *de facto* control test in order to qualify for separate rate.”

ECF 51, at 7 n.3.

IDI instead argues that even though a separate-rate applicant must “satisfy all four factors of the *de facto* control test in order to qualify,” *id.*, Commerce nonetheless is obligated “to review the *evidence submitted, including the evidence provided for all four criteria.*” *Id.* (emphasis added and citing *Rongxin II*, 203 F. Supp. 3d at 1348, and *Shandong Rongxin Imp. & Exp. Co. v. United States*, 331 F. Supp. 3d 1390, 1400–03 (CIT 2018) (hereinafter *Rongxin III*)).

IDI reads too much into *Rongxin II* and *Rongxin III*. In the earlier decision, the court sustained Commerce’s determination that the separate-rate applicant did not demonstrate that it selected management autonomously, and, as IDI notes, the court nevertheless remanded for Commerce to address the remaining elements. What IDI fails to acknowledge, however, is that the *Rongxin II* court remanded so Commerce could better explain the nature of the four-part test. *See* 203 F. Supp. 3d at 1348 (remanding for an explanation of the “ultimate calculus”). “In so doing,” the court expressly reserved judgment on whether a separate-rate applicant

must satisfy each of the four criteria, or whether, for example, the failure to establish autonomy from the government in the selection of management, or a finding of lack of such autonomy, can alone justify denial of a separate rate, even when there is evidence supportive of the exporter offered with respect to the other criteria. These are issues that may be addressed on remand.

Rongxin II, 203 F. Supp. 3d at 1348–49. Thus, the court in *Rongxin II* required Commerce to address evidence pertaining to all four elements because of its uncertainty as to Commerce’s actual standard.

In the next round following remand, the court answered the question that it reserved in *Rongxin II*: “a respondent must demonstrate that it meets *each criterion* of the analysis in order to be considered *de facto* independent of the government” *Rongxin III*, 331 F. Supp. 3d at 1403 (emphasis added) (citing *Yantai*, 203 F. Supp. 3d at 1326 (CIT 2017)); *see also id.* at 1406 (“[T]o be eligible for a separate rate, a company from [a non-market economy] country must establish *each* of the four factors to rebut the presumption of government control.” (emphasis in original) (citing *Yantai*, 203 F. Supp. 3d at 1326)).

In view of this legal conclusion and the court’s earlier determination in *Rongxin II* that the applicant failed to establish the third element, the *Rongxin III* court’s sustaining of Commerce’s remand determination as to the remaining elements simply amounted to

affirming on alternative grounds, *see* 331 F. Supp. 3d at 1400–03. That the *Rongxin III* court took this additional work upon itself hardly obligated Commerce here to review evidence pertaining to the remaining elements that were no longer material after the Department concluded that IDI failed to establish the third element.

Administrative agencies—no less than courts, private litigants, and the Justice Department’s litigating divisions—have finite resources. To require Commerce to needlessly address evidence that is no longer material to the task at hand would be at best nonsensical. “The law does not require a vain and useless thing . . .” *McMicking v. Schields*, 238 U.S. 99, 103 (1915).

Here, Commerce found that IDI was unable to demonstrate “that the government neither actually selects management nor directly or indirectly involves itself in the day-to-day management of the company.”¹¹ Appx1206 (cleaned up) (citing *An Giang*, 203 F. Supp. 3d at 1289–90); *see also Shandong Rongxin Imp. & Exp. Co. v. United States*, 415 F. Supp. 3d 1319, 1323 (CIT 2019) (hereinafter *Rongxin 2019*) (affirming Commerce’s finding of *de facto* control when respondent “fail[ed] . . . to show independence in the selection of management, a dispositive prong in rebutting the presumption of *de facto* government control”). As the four-part test for *de facto* control requires the exporter to satisfy all four elements to demonstrate independence, Commerce was entitled to stop there: “Because Plaintiffs failed to satisfy one *de facto* criterion, Commerce had no further obligation to continue with the analysis.” *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 350 F. Supp. 3d 1308, 1321 (CIT 2018) (cleaned up). Contrary to IDI’s argument, Commerce did not act contrary to law by declining to consider evidence pertaining to the remaining elements that were unnecessary to address.

B.

IDI asserts that Commerce’s second legal error was to “appl[y] the wrong overall legal standard” in considering the *de facto* control test. ECF 49, at 20–21. Specifically, IDI characterizes Commerce as having determined that the Vietnamese government only

¹¹ The court observes that the standard Commerce applied here—“that the government neither actually selects management *nor directly or indirectly involves itself in the day-to-day management of the company*,” Appx1206 (emphasis added)—arguably deviates somewhat from the actual third element of Commerce’s ostensible four-part test, i.e., “whether the [exporter] has autonomy from the government in making decisions regarding the selection of management.” Appx1205. IDI has not challenged this aspect of Commerce’s determination, and the parties have treated Commerce’s consideration of the Vietnamese government’s involvement in day-to-day management as part and parcel of the applicable third element. Accordingly, the court assumes the same.

had the *potential* to control IDI and not that it *actually* controlled IDI. This is clear from Commerce’s statement that “the government can control the company through traditional corporate control.” Thus, Commerce only found that the [government of Vietnam] had the ability to control IDI, and it did not explicitly find that the [government] actually controlled IDI.

ECF 49, at 22 (all emphasis in original) (citation to Appx1208 omitted).

To begin with, even if IDI’s characterization of Commerce’s decision were correct, the Department’s determination that an exporter is *potentially* controlled by the government—in the sense that the government has the “*ability* to exercise actual control (even without exercising it)” —suffices to establish that the exporter has failed to demonstrate its independence from *de facto* government control. *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350, 1359 (CIT 2018) (emphasis added); *see also Zhejiang*, 350 F. Supp. 3d at 1318 (noting that where a non-market economy country’s government holds a majority stake in an exporter, the *potential* for the government to exert the control it is entitled to exercise suffices for Commerce to find *de facto* control). A puppet master is not in control when the strings are slack.

In any event, IDI mischaracterizes Commerce’s decision, which found that government official Mr. X and his fellow Communist Party members on the boards of IDI and Company Y select company management and make “important decisions,” Appx1207, while the company management in turn handles day-to-day operations. “Mr. X’s presence on the board of IDI and Company Y, along with his role in Company Y’s management, indicates that the [government of Vietnam] *is involved* in company-level decision making.” *Id.* (emphasis added).

Commerce thus found that the Vietnamese government, through the presence of Mr. X and his party colleagues on the IDI and Company Y boards, controls the selection of IDI’s management and hence has at least an indirect involvement in day-to-day affairs, while Mr. X himself has direct involvement in such affairs as an executive in Company Y. Commerce therefore did not rely on just the *ability* of the Vietnamese government to control IDI; the Department determined that the Vietnamese government *actually* controls IDI through the involvement of Mr. X and his party colleagues.

C.

The third and final legal error asserted by IDI is that Commerce failed to consider that the Vietnamese government has no actual ownership interest in the company. IDI argues that as a matter of law, “it is unreasonable for Commerce to find *de facto* control . . . where the Government has no known ownership in the [separate-rate applicant], whether direct or indirect.” ECF 49, at 26. In effect, IDI asks the court to hold that a separate-rate applicant rebuts the presumption of control as a matter of law when it demonstrates the absence of any ownership interest by the government of a country with a non-market economy.

Congress, however, delegated to Commerce—not the court—“broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate.” *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). The court has no authority to foist IDI’s proposed *per se* rule upon Commerce, and therefore declines IDI’s invitation to do so.

II.

IDI argues that Commerce’s decision “is not only unlawful . . . but it is also otherwise unsupported by substantial evidence.” ECF 49, at 28. IDI asserts essentially three reasons why substantial evidence is lacking.

First, IDI asserts that its evidentiary submissions in the record demonstrate that it sets its own export prices, that it has authority to sign agreements and negotiate prices, and that it retains the proceeds of its export sales—the three elements of Commerce’s test for rebutting the presumption of *de facto* governmental control that the Department did not address. ECF 49, at 29–32. But as explained above, to rebut the presumption of governmental control, IDI needed to establish *all four* elements of the test. Thus, IDI’s evidence as to the three elements not addressed by Commerce is irrelevant here except insofar as it *also* bears on the fourth element considered by the Department, IDI’s autonomy in the selection of management. And if that evidence is relevant here, IDI has not explained how.

Second, IDI points to its evidentiary submissions confirming that it “autonomously selects its own management.” ECF 49, at 32. This evidence included various certifications and statements by IDI that its management is selected without governmental involvement. *Id.* IDI then asserts that it “satisfied this factor.” *Id.* But “[i]t is not within the Court’s domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on

grounds of a differing interpretation of the record.” *Timken Co. v. United States*, 699 F. Supp. 300, 306 (CIT 1988). Commerce weighed the evidence and reached a different conclusion. It’s not for the court to reweigh the evidence as IDI requests.

Finally, IDI takes aim at the evidence upon which Commerce based its conclusion—“the presence of a government official on the board of IDI and Company Y, in addition to the existence of multiple associates or members of the Communist Party of Vietnam on these boards, *taken together*, . . . supports a finding of *de facto* control.” Appx1208 n.158 (emphasis added).

IDI argues that Mr. X’s role as a provincial governmental official is irrelevant because his duties have nothing to do with the national government, ECF 49, at 34–36; that regardless of what governmental position he holds, Mr. X casts only one vote on the nine-member boards of Company Y and IDI, *id.* at 36–39; and that Commerce “has not pointed to any actual decision of the company that was impacted or affected by the [Vietnamese government] acting through Mr. X,” *id.* at 40 (emphasis removed). IDI further argues Communist Party membership by Mr. X and [[]] IDI and Company Y board colleagues is “meaningless” and based on “outdated stereotypes.” *Id.* at 43. (Redacted information describes extent of party membership among IDI and Company Y board members.)¹²

Once again, IDI asks the court to weigh the evidence. As to Mr. X’s position in provincial government, Commerce specifically gave respondents notice that its analysis might examine “whether any managers hold government positions at the national or *sub-national government levels*.” *De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Countries*, 78 Fed. Reg. 40,430, 40,432 (Dep’t Commerce July 5, 2013) (emphasis added); *see also* Appx1208 n.158 (citing that same statement).¹³

Commerce was entitled to take Mr. X’s official role into consideration, and the Department’s inference that Mr. X seeks to further government policy is not unreasonable. *See Can Tho Imp.-Exp. Joint Stock Co. v. United States*, 415 F. Supp. 3d 1187, 1192 (CIT 2019) (“Commerce considers the totality of the circumstances for a given period of review and *may draw reasonable inferences* that the respondent company does not control its export activities.”) (emphasis

¹² In response to a question at oral argument, IDI’s counsel stated that there is no evidence in the administrative record indicating whether Communist Party membership in Vietnam is open to anyone who wishes to join.

¹³ IDI’s second supplemental separate rate application admitted that local authorities are part of the government of Vietnam. *See* Appx1124. Moreover, Commerce noted that the provincial government in question [[]]. Appx80393. (Redacted information describes provincial government actions in connection with Company Y.)

added) (citing, *inter alia*, *Domestic Dry Containers from China*, above, at 46–53).

Shifting gears, IDI argues that whatever Mr. X’s role was in the Vietnamese government, Commerce ascribed far too much significance to him because his was only one of nine votes on the IDI and Company Y boards: “Mr. X is but one of 9 members with the power to vote. As such, he clearly does not have the power to control the company on his own.” ECF 49, at 37; ECF 51, at 17 (quoting same). IDI devotes the better part of five pages of its opening brief explaining that the relevant governing documents do not allow a single board member to exercise control. ECF 49, at 35–39.

But Commerce’s decision did not rest solely on Mr. X’s status as a government officeholder. Critically for present purposes, Commerce coupled that finding with an additional finding that

Communist Party of Vietnam members and associates [sat] on the boards of both companies. Accordingly, we find that the [government of Vietnam’s] interests are represented in IDI (and Company Y) by the presence of the government official, and furthered and expanded by the additional key Communist Party of Vietnam associates/members on the decision-making boards of those companies.

Appx1208. Commerce went on to cite “the actual impact of *Mr. X and the members and associates of the Communist Party of Vietnam* in IDI’s operations.” Appx1208 (emphasis added).

Thus, IDI’s argument that “Mr. X was certainly not in a position to ‘control’ any actions of either company on his own,” ECF 49, at 39, misses the point because Commerce did not find that he controlled either company by himself. Rather, Commerce found that Mr. X *and* his fellow Communist Party members who voted in lockstep with him effectively controlled the company boards. Unlike in *An Giang*, where the court found that Commerce failed to explain its conclusion that smaller shareholders “could not band together” to overcome the government’s minority share, *see* 203 F. Supp. 3d at 1293, in this case Commerce explained that the evidence in the administrative record showed that the Communist Party members, led by Mr. X, voted as a bloc so as to give the government actual control in practice.

Commerce’s conclusion is reinforced by the confidential addendum to its decision, which was drawn from [[

]].

The confidential addendum explained that [[

]]. Appx80392 (citing

Appx80305–80308). (Redacted information describes extent of party membership among IDI and Company Y board members.) This is significant because Commerce found that [[

]]. Appx80392 (citing Appx80305–80312 and Appx80034–80042). (Redacted information describes authority of IDI and Company Y boards.)

And as to the Communist Party membership of Mr. X and [[] his IDI and Company Y board colleagues, it isn't for the court to decide whether IDI is correct about "outdated stereotypes." (Redacted information describes extent of party membership among IDI and Company Y board members.) Commerce found that although party membership does not carry the same weight as holding governmental office, it is still relevant: "Although we do not disagree with IDI that there are differences between government positions and Communist Party of Vietnam membership, we do not agree that 'mere' membership in the Communist Party of Vietnam is meaningless for purposes of an analysis of government control." Appx1207. Commerce explained its reasons for that finding. See Appx1207–1208.

Whether the court agrees or disagrees with that analysis, Commerce was entitled to make it, and it is not for this court to revisit. *Cf. Rongxin 2019*, 415 F. Supp. 3d at 1325 n.3 ("Because inconsistent conclusions could be drawn, Commerce reasonably concluded that [the respondent] did not rebut the presumption that [the government] retained potential de facto control of [the respondent's] Board.") (citing *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994)).

In any event, Commerce did not rely on its inference regarding the presumed voting behavior of the Company Y and IDI board members who are Communist Party members—it determined that in practice, those board members voted in lockstep with Mr. X, the government official also serving on the boards. Appx1208.

Finally, in its reply brief, IDI argues for the first time that the court should remand and order Commerce to address the power of the Company Y and IDI shareholders to "ratify the 'election, dismissal, and replacement'" of board members and to approve all changes in the organizational structure or changes to the charter. ECF 51, at 26–27 (quoting IDI's opening brief, ECF 49, at 38, which in turn

quoted Article 14.2.e of IDI's charter, Appx80111).¹⁴ IDI argues that *even if the Vietnamese government "somehow controll[s] the Board[s], the [Vietnamese government] still cannot control the shareholders."* ECF 51, at 26 (emphasis added).

Before Commerce, however, IDI did not argue that the shareholders' authority negated any control by the government over the company boards; to the contrary, IDI argued that the shareholders' authority was of no moment.¹⁵ Having told Commerce that the shareholders' authority was of no consequence (and in effect, not worth considering), IDI is now judicially estopped from contending otherwise.

"The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Judicial estoppel "applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts." *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000)).

Considerations that inform application of judicial estoppel in the administrative law context include

- (1) whether the party's later position is clearly inconsistent with its earlier position;
- (2) whether the party has succeeded in persuading [the agency] to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the [agency]

¹⁴ In the quoted passages from IDI's opening and reply briefs, IDI characterized the shareholders' power as the power to "ratify" the "election, dismissal, and replacement" of board members. The court's review of the English translation of the IDI and Company Y corporate charters indicates that the shareholders have the power to "adopt decisions in writing" regarding, among other things, the "[t]he election, dismissal, and replacement" of board members. See Appx80111 (IDI charter Article 14.2.e); Appx80159 (Company Y charter Article 14.2.e). The court construes these provisions as providing that the shareholders may elect, dismiss, and replace board members, not merely "ratify" the election, dismissal, and replacement of board members.

¹⁵ See Appx1023 (IDI's statement to Commerce that it "is a publicly-listed company on the Ho Chi Minh city stock exchange. As such, there are thousands of individuals and entities who buy and sell shares of IDI on a daily basis. As such, it is not possible for IDI to report information on those shareholders, as they are constantly in flux. *However, since those shares are bought and sold on the Ho Chi Minh city stock exchange, these shareholders are mere stock holders, and do not have the ability to control or influence the day-to-day operations of IDI.*") (emphasis added); see also Appx1075–1076 (IDI making the identical argument regarding the authority of Company Y's shareholders, with this additional sentence: "By way of example, General Motors' day-to-day operations are not 'controlled' by the thousands of individuals/entities that own a share of General Motors.").

or the [reviewing] court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. (cleaned up).

Each of these considerations applies here. IDI's position in this court—that Commerce should have addressed the shareholders' authority—is inconsistent with its position below, where IDI effectively told the Department not to do so because the shareholders' authority was insignificant. Commerce accordingly did not address the shareholders' authority. To require Commerce on remand to now address an issue that IDI told it not to consider would be to give the latter an unfair advantage. Not only that, it would incentivize parties in administrative proceedings to plant remand booby traps by affirmatively down playing issues.

And even if IDI is not judicially estopped from raising its new shareholder authority argument, it waived that argument by failing to raise it in its opening brief in this court. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (“Raising the issue for the first time in a reply brief does not suffice; reply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration.”) (emphasis in original). In its opening brief, IDI at most made a passing reference to its new shareholder authority argument. *See* ECF 49, at 40 (arguing that “Commerce has not explained how” the Vietnamese government “exerted control over Mr. X This is particularly true in light of the operational procedures (discussed above) specified in the corporate charters”). Passing references do not raise arguments. *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1325 n.6 (Fed. Cir. 2012) (“ArcelorMittal makes passing reference to other [issues], but ArcelorMittal has not briefed those issues sufficiently to preserve them.”).

Finally, even if IDI had properly raised it in its opening brief, this argument fails on the merits because the shareholders' authority to elect and dismiss board members does not fairly detract from Commerce's decision. *Cf. Hung Vuong*, 483 F. Supp. 3d at 1366 (Commerce must address information in the record that “fairly detracts” from its decision).

To begin with, IDI—the entity at issue—is [[

] by Company Y, Appx80075 (redacted information describes ownership proportion), which Commerce has found is controlled by the government through Mr. X and his party colleagues on the board. If the shareholders' authority actually matters, as IDI now belatedly

contends, the Vietnamese government (according to Commerce) *can* control [[]] of IDI's shares. (Redacted information describes ownership proportion.)

More importantly, IDI was right the first time when it told Commerce that the shareholders' authority was of no moment in this context. IDI's *board*—not its shareholders, much less Company Y's shareholders—selects IDI's management, which “in turn handle[s] the day-to-day operations of the company, including setting export prices.” Appx1207. Commerce concluded that during the period of review here, the Vietnamese government effectively controlled the IDI and Company Y boards through the good offices of Mr. X and his party colleagues. Whatever their nominal authority to do otherwise, in practice the IDI and Company Y shareholders placed agents of the Vietnamese government in control of the company boards, which in turn selected management. Accordingly, the nominal authority of the IDI and Company Y shareholders to replace the Vietnamese government's agents on the company boards does not fairly detract from Commerce's decision.

* * *

In antidumping proceedings involving imports from a country with a non-market economy such as Vietnam, Commerce presumes that all producers and exporters are under government control, and their burden is to prove otherwise. In this case, substantial evidence permitted Commerce to conclude that the Vietnamese government exercised control over IDI and Company Y through the presence of Mr. X and fellow Communist Party members on the company boards who followed his lead. As those boards selected management of both companies, and as Mr. X was also involved in the management of Company Y, Commerce reasonably concluded that IDI did not rebut the presumption of *de facto* government control because “autonomy from the government in making decisions regarding the selection of management” is one of the four elements a party seeking a separate rate must demonstrate.

Conclusion

For the reasons explained above, the court denies IDI's motion for judgment on the agency record and grants judgment on the agency record in favor of the government and Catfish Farmers. *See* USCIT 56.2(b) (authorizing the court to enter judgment in favor of a party opposing a motion for judgment on the agency record, “notwithstanding the absence of a cross-motion”). A separate judgment will enter. *See* USCIT R. 58(a).

Dated: July 6, 2021
New York, NY

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

Slip Op. 21–83

GARG TUBE EXPORT LLP and GARG TUBE LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00026
PUBLIC VERSION

[Remanding the U.S. Department of Commerce’s final determination in the 2017–2018 administrative review of the antidumping duty order covering welded carbon steel standard pipes and tubes from India.]

Dated: July 9, 2021

Ned H. Marshak and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiffs Garg Tube Export LLP and Garg Tube Limited. Also on the briefs was *Jordan C. Kahn*.

Robert R. Kiepara, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. Also on the brief were *Jennifer B. Dickey*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Rachel A. Bogdan*, *Jon Zachary Forbes*, and *Shelby M. Anderson*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Tubular Products Inc. Also on the brief were *Alan H. Price* and *Cynthia C. Galvez*.

Roger B. Schagrin, Schagrin Associates, of Washington, DC, for defendant-intervenor Wheatland Tube. Also on the brief were *Christopher Cloutier*, *Elizabeth J. Drake*, and *Luke A. Meisner*.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiffs Garg Tube Export LLP and Garg Tube Limited’s (collectively, “Garg”) motion for judgment on the agency record, challenging aspects of the U.S. Department of Commerce’s (“Commerce”) final determination in its 2017–2018 administrative review of the antidumping duty (“ADD”) order covering welded carbon steel standard pipes and tubes (“CWP”) from India. *See* Pls.’ Mot. J. Agency R. & accompanying Supp. Memo. Confidential Version, Aug. 17, 2020, ECF No. 32 (“Pls.’ Mot.” and “Pls.’ Br.”, respectively); *see also* [CWP] *From India*, 85 Fed. Reg. 2715 (Dep’t Commerce Jan.

16, 2020) (final results of [ADD] admin. review; 2017–2018) (“*Final Results*”) and accompanying Issues and Decision Memo., A-533–502, (Jan. 9, 2020), ECF No. 24–5 (“Final Decision Memo”). Garg challenges as unsupported by substantial evidence Commerce’s finding that a particular market situation (“PMS”) in India distorts the cost of producing CWP, *see* Pls.’ Br. at 4–32, as well as Commerce’s methodology for calculating the PMS adjustment. *See id.* at 32–36. Moreover, Garg challenges as contrary to law Commerce’s application of the PMS adjustment to Garg’s reported costs for purposes of examining whether Garg’s home market sales of CWP were made below the cost of production. *See id.* at 36–38. Finally, Garg challenges as unlawful Commerce’s application of partial facts available with an adverse inference (“AFA”)¹ in response to its unaffiliated suppliers’ refusal to cooperate with Commerce’s requests for information during the administrative review. *See id.* at 38–49. For the following reasons, Commerce’s final determination is remanded for further explanation or reconsideration.

BACKGROUND

On July 12, 2018, in response to timely requests from interested parties, Commerce initiated an administrative review of the ADD order covering certain CWP from India, the period of review (“POR”) covering May 1, 2017 through April 30, 2018. *See generally Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 32,270, 32,270 (Dep’t Commerce July 12, 2018). Finding it impractical to subject all companies to individual review,² Commerce limited its examination to Apl Apollo Tubes Limited and Garg³ as

¹ Parties and Commerce sometimes use the shorthand “adverse facts available” or “AFA” 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 so as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *See* 19 U.S.C. § 1677e(a)–(b).

² Commerce is generally required to calculate individual weighted-average dumping margins for each known exporter and producer of the subject merchandise. 19 U.S.C. § 1677f-1(c)(1). However, Commerce may limit its examination to a reasonable number of exporters or producers if it determines that it is not practicable to determine individual weighted-average dumping margins “because of the large number of exporters or producers involved in the review.” *Id.* § 1677f-1(c)(2); 19 C.F.R. § 351.204(c)(2) (2019).

³ Commerce determined that Garg Tube Export LLP and Garg Tube Limited were affiliated and treated the entities as a single collapsed entity for purposes of Commerce’s dumping margin calculation. *See, e.g.*, Prelim. Decision Memo at 8 (citing 19 U.S.C. § 1677(33)(F); 19 C.F.R. § 351.401(f)).

mandatory respondents. *See* Resp't Selection Memo. at 2–4, PD 15, bar code 3743783–01 (Aug. 15, 2018).⁴

During an administrative review, Commerce calculates the dumping margin for a respondent's entries of subject merchandise during the POR by comparing prices for those U.S. sales to their normal value. *See* Sections 751 and 773 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1675, 1677b (2018).⁵ Here, Commerce attributed to Garg sales of certain unaffiliated suppliers of the foreign like product when determining the normal value of Garg's subject merchandise.⁶ *See [CWP] from India*, 84 Fed. Reg. 33,916 (Dep't Commerce July 16, 2019) (prelim. results of [ADD] admin. review; 2017–2018) (“Prelim. Results”) and accompanying Prelim. Decision Memo. at 16, A-533–502, PD 207, bar code 3859225–01 (July 11, 2019) (“Prelim. Decision Memo”). On November 30, 2018, Commerce issued to Garg a supplemental questionnaire requesting, in relevant part, that Garg obtain information from its unaffiliated suppliers regarding the actual costs of producing the purchased merchandise. *See* Letter Re: Suppl. Questionnaire to Garg's Section A–D Resps. at 12, PD 67, CD 32, bar codes 3778772–01, 3778771–01 (Nov. 30, 2018).

On December 21, 2018, Independence Tube Corporation and Southland Tube, Incorporated (collectively “Petitioners”)—later consolidated into Nucor Tubular Products Inc. (“Nucor”)⁷—submitted to

⁴ On March 10, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 24–2 and 24–1. All references to documents from the public and confidential record are identified by the numbers assigned by Commerce in the March 10th indices, *see* ECF Nos. 24–2 and 24–1, and preceded by “PD” or “CD” to denote public or confidential documents, respectively.

⁵ 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.

⁶ According to Commerce, it may exclude from calculation of a respondent's dumping margin sales of subject merchandise that the respondent purchased from an unaffiliated producer, provided, in relevant part, that the producer knew or should have known the merchandise was going to the United States. *[CWP] from India*, 84 Fed. Reg. 33,916 (Dep't Commerce July 16, 2019) (prelim. results of [ADD] admin. review; 2017–2018) (“*Prelim. Results*”) and accompanying Prelim. Decision Memo. at 16, A-533–502, PD 207, bar code 3859225–01 (July 11, 2019) (“Prelim. Decision Memo”). However, Garg reported to Commerce that its unaffiliated suppliers were not aware (nor had any reason to be aware) of the ultimate use or destination of Garg's purchases of pipe and tube. *See id.* (citing Resp. from [Garg] to [Commerce] Re: Section A Questionnaire Resp. at 35 & Ex. A-14, PDs 33–36, CDs 7–11, bar codes 3754219–01–04, 3754211–01–05 (Sept. 17, 2018)). Of the suppliers listed in the Section A Questionnaire Response, Garg challenges determinations made by Commerce based on Garg's dealings with []. *See generally* Compl., Jan. 30, 2020, ECF No. 6; *but see* Pls.' Br. At 41–49; *see also* Oral Arg., Apr. 29, 2021, ECF No. 62 and accompanying Digital Audio File, Apr. 30, 2021, ECF No. 63.

⁷ Defendant-Intervenors state that Independence Tube Corporation and Southland Tube initially filed written submissions during the underlying administrative review, and were later consolidated into a single entity—Nucor Tubular Products Inc. *See* [Def-Intervenors' Joint] Resp. to [Pls.' Mot.] Confidential Version at 1 n.1, Jan. 15, 2021, ECF No. 45 (citing Consent Mot. to Intervene as a Matter of Right at 1 n.1, Feb. 28, 2020, ECF No. 17).

Commerce an allegation that a PMS in India distorted the cost of producing CWP during the POR, and furnished information supporting their submission. *See* [PMS] Allegation, Resubmitted Market Viability Allegation, & Supp. Info., PDs 72–99, CDs 33–61, bar codes 3785365–01–28, 3785322-01–29 (Dec. 21, 2018) (“PMS Allegation”). On February 1, 2019, Petitioners supplemented their PMS allegation. *See* Letter Re: Other Factual Info. – Alternative PMS Valuation Calculation, PDs 102–04, CDs 62–68, bar codes 3789235–01–03, 3789217–01–07 (Feb. 1, 2019) (“PMS Allegation Suppl.”). Petitioners proposed various regression models for Commerce to use to quantify any adjustment made to the dumping margin should Commerce determine that a PMS in India distorted the cost of producing CWP in India during the POR. *See, e.g.*, PMS Allegation Suppl. at 14–17 & Ex. 1.1.

On February 19, 2019, Garg submitted its response to Commerce’s initial supplemental questionnaire. *See* Resp. to Commerce Re: Section A–D Suppl. Questionnaire, PDs 110–34, CDs 69–101, bar codes 3794286–01–25, 3794250–01–33 (Feb. 19, 2019) (“Garg’s Suppl. Resp.”). Pertinent here, Garg detailed unsuccessful efforts to persuade one of its unaffiliated suppliers to provide the cost information requested by Commerce.⁸ *See* Garg’s Suppl. Resp. at 51–53. On April 30, 2019, Commerce sent a second supplemental questionnaire to Garg, *see* Letter from Commerce Re: Second Suppl. Questionnaire, PD 173, CD 131, bar codes 3827345–01, 3827342–01 (Apr. 30, 2019), and, on May 2, 2021, Commerce directly requested information from Garg’s unaffiliated supplier. *See* Letter Re: Req. for Cost Info. from Supplier 1, PD 174, CD 132, bar code 3828743–01, 3828737–01 (May 2, 2019). Garg responded to the second supplemental questionnaire on May 16, 2019. *See* [Garg’s] Resp. to Commerce’s Second Suppl. Questionnaire, PDs 178–181, CDs 134–141, bar codes 3834711–01–04, 3834703–01–08 (May 16, 2019). Shortly thereafter, Garg submitted to Commerce copies of its communications with the

⁸ Garg explained that it sought to persuade [[]] to cooperate by: [having] several personal meetings with its senior management, wherein Garg Tube explained in detail the acute necessity to provide the specific CONNUM wise cost of production data and relevant company information . . . communicat[ing] with [[]] through numerous emails and telephonic conversations, further elaborating its requirements . . . threaten[ing] to discontinue its ongoing business with [[]] . . . [and s]imultaneously . . . obtain[ing] [[]] financial statements and Cost Audit reports[.]

Garg’s Suppl. Resp. at 51 (citations omitted). Garg informed Commerce that, despite these efforts, [[]] “finally communicated on December 31, 2018 its inability to comply with the necessary data and information[.]” Garg’s Suppl. Resp. at 52 (citation omitted). According to Garg, [[]] indicated that “it was not within [its] best interests to [cooperate.]” *Id.* at 52 (citation omitted).

unaffiliated supplier. *See* Letter from [Garg] Re: Supplier Communications, PD 182, CD 142, bar codes 3836053–01, 3836052–01 (May 20, 2019) (“Garg’s Letter”). According to Garg, these email communications document attempts to persuade the unaffiliated supplier to cooperate with Commerce’s examination.⁹ *See* Garg’s Letter at 1–3.

On July 16, 2019, Commerce published its preliminary determination. *See generally Prelim. Results*, 84 Fed. Reg. 33,916. Based on evidence cited by Petitioners in their PMS submissions regarding the collective impact on the Indian market of global steel overcapacity, Government of India trade interventions, and Garg’s nonpayment of antidumping and safeguard duties on imports of hot-rolled coil (“HRC”), Commerce determined that a PMS in India distorted the cost of producing CWP during the POR. *See* Prelim. Decision Memo at 19–21; *see also* Memo. Re: Decisions on [PMS] Allegations at 18–27, PD 209, bar code 3859233–01 (July 10, 2019) (“PMS Memo”). Commerce accounted for the distortion by upwardly adjusting Garg’s reported costs for HRC, a primary input in the production of subject CWP. *See* Prelim. Decision Memo at 19–21; Memo. Re: Prelim. Analysis for [Garg] at 5–6, PD 212, bar code 3859260–01 (July 10, 2019) (“Prelim. Analysis Memo”). Relevant here, Commerce made the adjustment for purposes of determining which of Garg’s sales were made below cost.¹⁰

Commerce calculated the adjustment by using a regression model provided in Petitioners’ PMS submissions. *See* Prelim. Analysis Memo at 6 & n. 12 (citing Letter from Petitioners Re: Revised PMS Valuation Methodology, PDs 152–64, CDs 107–26, bar codes 3810691–01–13, 3810640–01–20 (Mar. 22, 2019) (“Revised PMS Methodology Memo”)); *see also* Revised PMS Methodology Memo at 18–22, Ex. 1.1. The regression model, called “Ordinary Least Squares” (“OLS”), seeks to predict a counterfactual AUV for HRC imports into India in 2017, representing what the AUV would be “if the global steel industry had operated at a utilization rate of 85

⁹ Exhibit 1 of Garg’s submission contains a May 9, 2019 email to [[]] “urg[ing] [the company] to respond to [Commerce’s questionnaire] and submit the required information directly to [Commerce.]” *See* Garg’s Letter at Ex. 1. Exhibit 3 of Garg’s submission contains [[]] response, in which the company appears to decline, referring Garg instead to information the supplier already submitted as well as publicly available information, and stating further that the supplier is “not a[n] exporter.” *See* Garg’s Letter at Ex. 2.

¹⁰ When calculating normal value using home market sales, the statute permits Commerce to disregard sales made below the cost of production during an extended period of time and in substantial quantities. 19 U.S.C. § 1677b(b). Commerce later states that it “accounts for the cost-based PMS through its adjustment of the respondent’s COPs, which are then reflected in Commerce’s dumping calculations, including in the sales-below-costs test to identify comparison market sales which maybe outside of the ordinary course of trade.” Final Decision Memo at 50. Garg challenges Commerce’s PMS adjustment in the context of its below cost sales analysis. *See* Compl. ¶ 24, Jan. 30, 2020, ECF No. 6.

percent.” Revised PMS Methodology Memo at Ex. 1.1. Regressing data drawn from 38 countries, covering a period from 2008 through 2017, the OLS model predicted that the counterfactual AUV would be “38.54 percent higher than the actual 2017 Indian import AUV of \$575.12.” *Id.* Thus, Commerce increased the reported costs of Garg’s HRC inputs by using an adjustment factor of 38.54 percent. *See* Prelim. Analysis Memo at 6 & n. 12 (citing Revised PMS Methodology Memo).

Moreover, when calculating Garg’s dumping margin, Commerce purported to apply partial AFA to fill the gap in the record stemming from the refusal of Garg’s unaffiliated suppliers to provide the requested cost information. *See* Prelim. Decision Memo at 16–17. Commerce found that Garg’s unaffiliated suppliers were interested parties within the meaning of 19 U.S.C. § 1677(9)(A) because “they are producers of pipe and tube, which is merchandise subject to the [ADD] Order.” *Id.* at 17. Pursuant to 19 U.S.C. § 1677e(a), Commerce found the unaffiliated suppliers withheld information, failed to timely provide information, and significantly impeded the investigation because the suppliers “did not provide the cost information at issue[.]” *Id.* (citing 19 U.S.C. § 1677e(a)(2)(A)–(C)). Further, Commerce found it “appropriate to resort to partial facts available with adverse inferences regarding said suppliers’ missing cost information, pursuant to [19 U.S.C. § 1677e(b)]” when selecting amongst the available facts it would use to calculate surrogate costs because “the suppliers in question, as interested parties to this review, failed to cooperate to the best of their ability in responding to Commerce’s requests for information, given that they refused to provide the cost information on two separate occasions.” *Id.* Commerce calculated surrogate costs for the unaffiliated suppliers’ pipe and tube based on Garg’s “acquisition costs for the supplier-produced pipe and tube[,] plus amounts for Garg Tube’s further processing expenses, general and administrative expenses, and financial expenses, adjusted based on Garg Tube’s home market sale on which it realized the largest loss.” *Id.* (citing Prelim. Analysis Memo).

On January 16, 2020, Commerce published the final results of its administrative review. *See Final Results*, 85 Fed. Reg. 2715; *see also* Final Decision Memo. Commerce continued to quantify the adjustment to HRC costs based on the regression analysis, albeit with certain changes.¹¹ *See* Final Decision Memo at 63–66. Commerce

¹¹ Instead of AUVs of HRC imports into 38 countries (including India), Commerce used an OLS model that regresses domestic HRC prices from eight countries (including India). Final Decision Memo at 65. Additionally, “rather than calculating a counterfactual Indian HRC import AUV in 2017,” Commerce used an “estimated regression coefficient” to calculate the

made no other changes to its preliminary determination that are relevant to this dispute. Commerce assigned to Garg a weighted-average dumping margin of 11.83 percent. *See Final Results*, 85 Fed. Reg. at 2715–16.

On January 30, 2020, Garg commenced this action challenging Commerce's final determination. *See generally* Summons, Jan. 30, 2020, ECF No. 1; Compl., Jan. 30, 2020, ECF No. 6. On August 17, 2020, pursuant to U.S. Court of International Trade Rule 56.2, Garg moved for judgment on the agency record. *See generally* Pls.' Mot. By February 1, 2021, Defendant and Defendant-Intervenors submitted their responses. *See* Def.'s Resp. to [Pls.' Mot.] Confidential Version, Jan. 15, 2021, ECF No. 46 ("Def.'s Br."); [Def-Intervenors' Joint] Resp. to [Pls.' Mot.] Confidential Version, Jan. 15, 2021, ECF No. 45 ("Def-Intervenors' Joint Br."). On February 26, 2021, Garg submitted its reply in support of its motion for judgment. Pls.' Reply to Def. & Def.-Intervenors' Resps. to [Pls.' Mot.] Confidential Version, Feb. 26, 2021, ECF No. 48. On April 29, 2021, the court heard oral argument. *See* Oral Arg., Apr. 29, 2021, ECF No. 62 and accompanying Digital Audio File, Apr. 30, 2021, ECF No. 63 ("Oral Arg.").

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018),¹² 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).

DISCUSSION

I. Adjustment to Below Cost Sales

Pointing to rulings of this Court, Garg argues that Commerce's adjustment to its reported costs for purposes of determining which of its sales were made below cost contravenes the statute. *See* Pls.' Br. at 36–38 (citing, *inter alia*, *Husteel Co. v. United States*, 44 CIT __, 426 F. Supp. 3d 1376 (2020) ("*Husteel*"); *Saha Thai Steel Pipe Pub. Co. v. United States*, 43 CIT __, __, 422 F. Supp. 3d 1363, 1368–69 (2019) ("*Saha*"); *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, 44 CIT

PMS adjustment factor, which it derived from the domestic-price based OLS model. *See id.* at 65. Finally, Commerce adjusted its desired level of uneconomic capacity from 85 percent to 80 percent. *Id.*

¹² Further citations to Title 28 of the U.S. Code are to the 2018 edition.

___, ___, 426 F. Supp. 3d 1395, 1411 (2020) (“*Borusan*”). Defendant and Defendant-Intervenors submit that this Court’s rulings are not final or binding, and maintain that Commerce has authority to adjust reported costs to account for a PMS when determining which sales to disregard.¹³ See Def.’s Br. at 21–24; Def-Intervenors’ Joint Br. at 30–33. Defendant-Intervenors add that Garg failed to exhaust its remedies with respect to this point.¹⁴ Def-Intervenors’ Joint Br. at 33–35. For the following reasons, Commerce’s adjustment to reported costs is remanded for further explanation or reconsideration.

Commerce generally determines the normal value of a respondent’s entries of subject merchandise based on the price at which the foreign like product is sold in either the respondent’s home market, or a third country comparator market. See 19 U.S.C. § 1677b(a)(1). However, the statute permits Commerce to determine the normal value of the subject merchandise based on a constructed value where there is a PMS that prevents a proper comparison between prices in the foreign market and prices for U.S. sales. See 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), 1677b(a)(1)(C)(iii), 1677b(a)(4), 1677b(e); see also, e.g., *Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1382–89. Parties and Commerce sometimes refer to determinations made under § 1677b(a)(1)(B)(ii)(III) and 1677b(a)(1)(C)(iii) as “sales-based” PMS determinations. See, e.g., Final Decision Memo at 48; see also, e.g., *Saha Thai Steel Pipe Pub. Co. v. United States*, 44 CIT ___, 487 F. Supp. 3d 1323, 1329 (2020) (“*Saha II*”).

Commerce determines the constructed value of a respondent’s subject merchandise based on the sum of various costs incurred in the

¹³ This Court has addressed the issue of Commerce’s statutory authority to account for a PMS by adjusting the reported costs of a respondent’s home market sales for purposes of determining which of those sales were made below cost. See *Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1383–89; *Saha*, 43 CIT at ___, 422 F. Supp. 3d at 1368–70; *Borusan*, 44 CIT at ___, 426 F. Supp. 3d at 1411–12. Defendant and Nucor acknowledge that this case is not meaningfully different from those previously decided by this Court. See Oral Arg. at 00:02:35–00:04:48 (counsel for Nucor submitting that this case is distinct in its procedural posture because Plaintiffs did not argue the legality of the PMS adjustment in the context of determining costs of production).

¹⁴ With respect to Defendant-Intervenors’ argument that Garg failed to exhaust its administrative remedies, see Def-Intervenors’ Joint Br. at 33–35, the issue of Commerce’s adjustment to Garg’s reported costs is a pure legal question. The court has discretion not to require exhaustion of administrative remedies where a pure legal question arises. 28 U.S.C. § 2637(d); see also *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029–30 (Fed. Cir. 2007). As explained above, the Court has ruled on Commerce’s authority to adjust the reported costs of a respondent’s home market sales in order to account for a cost-based PMS under 19 U.S.C. § 1677b(e). Def-Intervenors’ Joint Br. at 34. Since the adjustment is unambiguously prohibited by the statute, see, e.g., *Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1383–89, Defendant-Intervenors’ argument that the pure legal exception does not apply is unavailing.

production of that merchandise. See 19 U.S.C. § 1677b(a)(4), (e). If, however, Commerce determines that a PMS interferes with its calculation of those costs, it may use any reasonable methodology when determining the constructed value of the subject merchandise. See 19 U.S.C. § 1677b(e); see also, e.g., *Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1386–67. Such determinations are sometimes referred to as “cost-based” PMS determinations. See, e.g., Final Decision Memo at 50; see also, e.g., *Saha II*, 44 CIT at ___, 487 F. Supp. 3d at 1329.

Although Commerce may use any reasonable methodology to determine constructed value where a cost-based PMS interferes with its calculations under 19 U.S.C. § 1677b(e), the statute does not empower Commerce to adjust a respondent’s reported costs to account for a cost-based PMS when Commerce relies on home market or third country market sales to determine normal value.¹⁵ See *Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1387. As explained by this court in *Husteel*:

the plain language of the statute provides: a definition of normal value as based on home market sales, third country sales, or constructed value, 19 U.S.C. § 1677b(a)(1), (4); sales to be disregarded, § 1677b(a)(1)(B)(i), (b)(1); available adjustments, § 1677b(a)(6), (7); and, alternatives where a PMS prevents a proper comparison between normal value and export price or constructed export price, § 1677b(a)(1)(B), (C); 1677b(a)(4). The statute separately provides that when Commerce is using con-

¹⁵ Defendant-Intervenors submit that this Court has erred in its analysis of this issue by failing to properly apply the *Chevron* framework. See Oral Arg. at 00:04:53; see also Def-Intervenors’ Joint Br. at 30–33; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”). Nucor argues that silence in one part of the statute does not necessarily mean that Congress has affirmatively spoken to an issue. See Oral Arg. at 00:04:53–00:07:52 (citing, *inter alia*, *Van Hollen v. FEC*, 421 U.S. App. D.C. 36, 811 F.3d 486, 492–95 (2016)). Nucor observes that the PMS language under 19 U.S.C. § 1677b(a), which directs Commerce not to use home market or third country sales where a PMS “prevents a proper comparison” between those sales and U.S. prices, existed prior to the Trade Preferences Extension Act of 2015’s (“TPEA”) amendments, and that it is not clear what Commerce means by “comparison.” See Oral Arg. at 00:07:52–00:10:58. Nucor submits that the below-cost sales provision of the statute “rolls into” the normal value and third country provisions of the statute, and that Congress’s use of the ambiguous word “comparison” could encompass a price-to-price comparison or a price-to-cost comparison. See *id.* at 00:07:52–00:12:15.

Nucor’s submission fails to persuade. The TPEA’s amendments to 19 U.S.C §§ 1677 and 1677b(e) did not change the wording of 19 U.S.C. § 1677b(a)(1)(B)(i), which instructs Commerce to determine the normal value of the subject merchandise based on the “price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]” *Id.* And although § 1677b(b)(1) directs Commerce to disregard foreign market sales that “were made at less than the cost of production[.]” nothing in the statute empowers Commerce to adjust a respondent’s reported costs to account for a PMS without having made a determination to base normal value on constructed value.

structed value and encounters a PMS that it may resort to “any other calculation methodology.” 19 U.S.C. § 1677b(e).

44 CIT at ___, 426 F. Supp. 3d at 1387. Unlike the constructed value provisions of the statute, Congress has not enacted any amendments to the framework under 19 U.S.C. § 1677b for determining normal value based on foreign market sales that would enable Commerce to make a PMS adjustment to a respondent’s reported costs for purposes of determining whether those sales were made below cost. *See, e.g., Husteel*, 44 CIT at ___, 426 F. Supp. 3d at 1383–89; *Saha*, 43 CIT at ___, 422 F. Supp. 3d at 1368–70; *Borusan*, 44 CIT at ___, 426 F. Supp. 3d at 1411–12. Thus, Commerce’s adjustment to Garg’s reported costs is remanded for further explanation or reconsideration. Since the court is remanding Commerce’s adjustment to Garg’s reported costs when determining which home market sales were made below cost, the court does not reach the issue of whether or not Commerce’s PMS finding is supported by substantial evidence. The court also does not reach the issue of whether Commerce’s methodology for calculating the PMS adjustment is reasonable.

II. Partial AFA

Garg argues that Commerce erred in applying partial AFA because the record shows that there was nothing more it could have done to induce the cooperation of its unaffiliated supplier, and that valuing the supplier’s inputs using Garg’s costs would be a more accurate way to determine whether Garg is dumping. *See* Pls.’ Br. at 41–47. Nonetheless, Garg submits that Commerce failed to justify its decision to calculate Garg’s AFA rate using the home market sale on which it realized the largest loss. *See id.* at 47–49. Defendant and Defendant-Intervenor contend that Commerce’s application of partial AFA, as well as Commerce’s calculation of Garg’s rate, was reasonable in this instance. *See* Def.’s Br. at 35–45; Def-Intervenors’ Joint Br. at 35–43. For the following reasons, Commerce’s application of partial AFA and adjustment to Garg’s rate is remanded for further explanation or reconsideration.

During an administrative review, Commerce normally seeks to calculate an accurate dumping margin based on information submitted by parties. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016) (“accurate” means accurate as a mathematical and factual matter, and thus supported by substantial evidence). However, the statute directs Commerce to consider other available information in certain situations. *See* 19 U.S.C. § 1677e; *cf.*, also 19 U.S.C. § 1677m. Under § 1677e(a), Commerce shall use “facts otherwise available” where information necessary to calculate a re-

spondent's dumping margin is not available on the record; or, where an "interested party or any other person" withholds information requested by Commerce, untimely fails to provide such information, significantly impedes a proceeding, or provides information that cannot be verified, Commerce shall use "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a). Under § 1677e(b), once Commerce decides to act under § 1677e(a), Commerce may then apply "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]" *Id.* § 1677e(b)(1). However, 19 U.S.C. § 1677e(b) requires Commerce to "find[] that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" *Id.* § 1677e(b)(1). A respondent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

In some instances, Commerce may use adverse inferences under 19 U.S.C. § 1677e(a). In *Mueller Comercial De Mexico v. United States*, the Court of Appeals for the Federal Circuit ("Court of Appeals") held that, when acting pursuant to 19 U.S.C. § 1677e(a), Commerce may incorporate adverse inferences against a cooperative respondent, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. 753 F.3d 1227, 1332–36 (Fed. Cir. 2014) ("*Mueller*"). There, Commerce sought to incorporate adverse inferences against a cooperative respondent under the theory that the cooperative respondent could have induced the cooperation of a supplier that was also a mandatory respondent to the proceeding. *Id.* at 1229–30. The Court of Appeals concluded that Commerce may invoke such rationales under 19 U.S.C. § 1677e(a) but must balance its consideration against its obligation to calculate an accurate dumping margin. *Mueller*, 753 F.3d at 1332–36. If Commerce seeks to induce the cooperation of a non-cooperating supplier through a cooperating party, there must be, for example, substantial evidence that the cooperating party has leverage over the non-cooperating supplier, and that if Commerce is constrained from employing adverse inferences, the non-cooperating party will have an incentive to evade duties by selling merchandise into the United States through the cooperating party. *See, e.g., Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, 415 F. Supp. 3d 1326, 1334–35 (2019).

The court must remand Commerce's determination because it is not discernible from Commerce's analysis how it is applying 19 U.S.C. § 1677e in this instance. Commerce explains that it is defining Garg's unaffiliated supplier as a producer of the foreign like product and an

interested party within the meaning of 19 U.S.C. § 1677(9)(A), and that it is “resort[ing] to partial facts available with adverse inferences regarding said suppliers’ missing production cost information, pursuant to [19 U.S.C. § 1677e(b)].” Final Decision Memo at 37. Then, Commerce cites *Mueller* as “controlling judicial precedent for the circumstances at hand[.]” *Id.* at 39; *see also, id.* at 40 (stating that Commerce’s rationale rests on findings in *Mueller*). However, *Mueller* governs Commerce’s incorporation of adverse inferences under subsection (a), not subsection (b). *See Mueller*, 753 F.3d at 1332–36. Yet, Commerce later invokes the wording of 19 U.S.C. § 1677e(b) when observing that “[Garg] did not act to the best of its ability in attempting to obtain the suppliers’ costs.” Final Decision Memo at 41. It is unclear whether this statement indicates that Commerce is applying § 1677e(b) against the unaffiliated supplier, against Garg, or whether Commerce here acts pursuant to some other interpretation of 19 U.S.C. § 1677e(b). The court cannot discern Commerce’s analytical pathway, and thus Commerce’s final determination cannot be sustained. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947).

To the extent that Commerce applies 19 U.S.C. § 1677e(a) against Garg, Commerce must do more to support its determination. Commerce states that a partial AFA rate “potentially induces the cooperation” of Garg’s unaffiliated supplier. Final Decision Memo at 40 (quoting Prelim. Decision Memo at 40). However, Garg proffered evidence that it had insufficient market power to induce the cooperation of the unaffiliated supplier. *See Garg’s Suppl. Resp. at Ex. S1-D-2(f) Part-1 at 30, Part-2; Resp. from [Garg] to [Commerce] Re: Section A Questionnaire Resp. at Ex.A11(b),(d), PDs 33–36, CDs 7–11, bar codes 3754219–01–04, 3754211–01–05 (Sept. 17, 2018) (“Garg’s Section A Questionnaire Resp.”); see also Garg’s Section A Questionnaire Resp. at Part-1.* Commerce responds that it is “reasonable to assume that [Garg] maintained sufficient control [over the unaffiliated supplier]” because “it sourced a substantial volume of pipe and tube” from the supplier, *see* Final Decision Memo at 40; but whether or not that is a reasonable assumption to make, Commerce should reconcile that assumption with detracting evidence proffered by Garg. And with respect to Garg’s attempts to induce the unaffiliated supplier’s cooperation, Garg’s Suppl. Resp. at 51, Commerce faults Garg for “merely threaten[ing] once (by e-mail) to cancel all pending orders[.]” *Id.* at 41. However, not only does the record show that Garg took several actions leading up to the email that Commerce singles out and characterizes as a mere threat to cancel all orders, *see id.* (citing Garg’s Suppl. Resp. at 51), the email itself—which Garg described as an “ultimatum”—appears to be an explicit request to cancel all pend-

ing orders with the unaffiliated supplier. *See* Garg's Suppl. Resp. at 51.

Insofar as Commerce seeks to apply 19 U.S.C. § 1677e(b) to Garg, Commerce simply does not explain whether it is finding that Garg was an uncooperative party during the administrative review.¹⁶ It may be that Commerce's finding that Garg "failed to put forth its maximum efforts in inducing the suppliers in question to cooperate" is the basis for applying AFA against Garg. *See* Final Decision Memo at 41. However, since Commerce discusses Garg's efforts in the context of applying *Mueller's* framework, the court cannot say that it is reasonably discernible either way. *Id.* If Commerce means to apply § 1677e(b), it must indicate whether Garg was a cooperative respondent, and support any such determination with substantial evidence. Commerce's final determination is remanded for further explanation or reconsideration.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's final determination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

¹⁶ Regarding the requirement under *Mueller* that Commerce balance its policy considerations against its obligation to calculate an accurate dumping margin for a cooperative party under 19 U.S.C. § 1677e(a), *see* 753 F.3d at 1332–36, it is unclear whether Commerce's analysis relates to its determination of Garg's normal value, which here Commerce calculates based on home-market sales, *see* Final Decision Memo at 48–50, or whether it relates to Commerce's apparent decision to calculate a constructed value for Garg's unaffiliated suppliers. *See* Final Decision Memo at 48 ("Moreover, without the unaffiliated suppliers' costs, we cannot accurately calculate [constructed value] . . . [w]ithout [] actual costs of production underlying such [constructed value] comparisons, it is unknown whether and to what extent the [constructed value] for such comparisons is accurate."). On remand, if Commerce continues to apply partial AFA, it must clarify its methodology; it must clearly identify to what end it seeks to resort to facts available with an adverse inference. If it is employing partial AFA to calculate Garg's dumping margin, it should clearly explain how using the acquisition costs for the sale upon which Garg realized its largest loss as a surrogate for missing cost information furthers Commerce's predominant interest in calculating an accurate normal value for Garg's sales of subject merchandise. *See Mueller*, 753 F.3d at 1233.

Dated: July 9, 2021
New York, New York

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

Slip Op. 21–88

HYUNDAI STEEL COMPANY, Plaintiff, and SEAH STEEL CORPORATION,
Consolidated Plaintiff, v. UNITED STATES, Defendant, and
WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00154

[Remanding the second remand results by the U.S. Department of Commerce following the 2015–2016 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: July 19, 2021

J. David Park, Henry D. Almond, Daniel R. Wilson, and Kang Woo Lee, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Jeffrey M. Winton and Amrietha Nellan, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff and Plaintiff-Intervenor SeAH Steel Corporation.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company (“Hyundai Steel”) and Consolidated Plaintiff SeAH Steel Corporation (“SeAH”), (collectively, “Plaintiffs”), challenge the final determination in the 2015–2016 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (“Final Results”)*, 83 Fed. Reg. 27,541 (Dep’t Commerce June 13, 2018) (final results of antidumping duty administrative review; 2015–2016); *see also* Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review of Circular Welded Non-Alloy

Steel Pipe from the Republic of Korea; 2015–2016 (Dep’t Commerce June 7, 2018), ECF No. 51-22, PD 314 (“Final IDM”).¹

Before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 85–1 (“*Second Remand Results*”), which the court ordered in *Hyundai Steel Co. v. United States* (“*Hyundai Steel II*”), 44 CIT __, 483 F. Supp. 3d 1273 (2020). Because the *Second Remand Results* explained the basis for the remand particular market situation adjustment and determination by the U.S. Department of Commerce (“Commerce”), the court reviews both the Final Results of Redetermination Pursuant to Court Remand, ECF No. 73–1 (“*Remand Results*”), and the *Second Remand Results* in this opinion. Plaintiffs argue that Commerce failed to comply with the court’s remand instructions when Commerce repeated and explained its particular market situation determination and adjustment in the *Second Remand Results*. Pl. [Hyundai Steel]’s Comments Opp’n Second Remand Redetermination at 1–2, ECF No. 89 (“Hyundai Cmts.”); Comments [SeAH] Commerce’s Feb. 2, 2021, Redetermination at 2, ECF No. 88 (“SeAH Cmts.”). Hyundai Steel argues that Commerce’s particular market situation determination is not in accordance with the law and that the “underlying [particular market situation] determination and consequent calculations still remain unsupported by substantial record evidence and contrary to law.” Hyundai Cmts. at 2–3. Hyundai Steel reiterates its contention that Commerce’s particular market situation determination and subsequent adjustment to the cost of production are not authorized by statute. *Id.* at 3–12. Defendant United States (“Defendant”) argues that Commerce complied with the court’s remand order and made its particular market situation determination and adjustment in accordance with the law. Def.’s Resp. Comments Regarding Second Remand Redetermination at 6–9, ECF No. 90 (“Def. Cmts.”). Defendant-Intervenor Wheatland Tube Company did not file comments.

For the following reasons, the court remands the *Second Remand Results*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce’s particular market situation adjustment to the cost of production when conducting a sales-below-cost test is in accordance with the law; and
2. Whether Commerce’s particular market situation determination is in accordance with the law.

¹ Citations to the administrative record reflect the public record (“PD”) document numbers.

BACKGROUND

The court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the court's review of the *Second Remand Results*. See *Hyundai Steel II*, 44 CIT at __, 483 F. Supp. 3d at 1275–77; see also *Hyundai Steel Co. v. United States* (“*Hyundai Steel I*”), 43 CIT __, __, 415 F. Supp. 3d 1293, 1295–1301 (2019).

In the *Final Results*, Commerce determined that a particular market situation in Korea distorted the cost of production of CWP. Final IDM at 3. Commerce applied an upward adjustment to the cost of production of CWP based on the subsidy rate of hot-rolled steel coil. *Id.* (citing *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t Commerce Aug. 12, 2016) (final affirmative determination), as amended, 81 Fed. Reg. 67,960 (Dep’t Commerce Oct. 3, 2016)). Commerce conducted a sales-below-cost test and disregarded certain sales made at prices below the cost of production. See Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2015–2016 at 19–20, PD 275 (“Prelim. DM”); Final IDM at 3 (noting that Commerce used the same calculation methodology for the *Final Results* as explained in the Prelim. DM). Commerce calculated normal value from the remaining above-cost home market sales for mandatory respondents Hyundai Steel and Husteel Steel Company. Prelim. DM at 15, 19–20; Final IDM at 3.

In *Hyundai Steel I*, the court concluded that Commerce’s particular market situation determination was unsupported by substantial evidence. *Hyundai Steel I*, 43 CIT at __, 415 F. Supp. 3d at 1301. In the *Remand Results*, Commerce conducted a new review of the record and determined again that a particular market situation distorted the cost of hot-rolled steel coil in the Korean market. *Remand Results* at 4–5. Commerce made an upward adjustment to the cost of hot-rolled steel coil, performed the sales-below cost test, and calculated normal value from the remaining above-cost home market sales. See *id.* at 4 n.22.

Hyundai Steel argued for the first time on remand that Commerce’s particular market situation determination and subsequent upward adjustment to the cost of production for the sales-below-cost test contravened the statute. *Hyundai Steel II*, 44 CIT at __, 483 F. Supp. 3d at 1276–77; see also *Remand Results* at 24, 39. Commerce asserted that it was not required to address those legal arguments and Defendant argued that Hyundai Steel waived the arguments. *Hyundai Steel II*, 44 CIT at __, 483 F. Supp. 3d at 1276–77. The court concluded

that departure from the general rule of waiver was warranted and remanded for Commerce to explain the statutory authority to conduct a cost-based particular market situation analysis when normal value is based on home market sales and to adjust the cost of production for purposes of the sales-below-cost test of 19 U.S.C. § 1677b(b), specifically within the context of relevant caselaw from this Court. *Hyundai Steel II*, 44 CIT at ___, 483 F. Supp. 3d at 1276–77, 1281.

Commerce explained on second remand its view that Section 504 of the Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 114–27, § 504, 129 Stat. 362, 385, authorizes Commerce to make particular market situation determinations and adjust the cost of production for the sales-below-cost test when calculating normal value based on home market sales. *Second Remand Results* at 3.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 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 antidumping duty order. The court will uphold Commerce’s determinations unless they are unsupported by substantial record evidence, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT ___, ___, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Governing Law

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. 19 U.S.C. § 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).

First, the statute specifies the methodology for Commerce to determine which sales should be considered and disregarded in calculating normal value. Normal value is “the price at which the foreign like product is first sold . . . in the exporting country . . . in the ordinary course of trade.” *Id.* § 1677b(a)(1)(B)(i). Sales outside the ordinary

course of trade are excluded from normal value. “Ordinary course of trade” is defined in Section 1677(15) as excluding: (1) sales made at less than the cost of production, and (2) sales that cannot be compared properly with the export price or constructed export price due to a particular market situation. *Id.* § 1677(15)(A), (C). To determine whether “sales . . . have been made at prices that represent less than the cost of production,” the statute directs Commerce to conduct the sales-below-cost test. *Id.* § 1677b(b)(1). The cost of production is defined by statute to include the cost of materials and processing, amounts for selling, general, and administrative expenses, and the cost of all containers and expenses incidental for shipment. *Id.* § 1677b(b)(3). Sales that Commerce determines, by application of the sales-below-cost test, were made at prices below the cost of production or that Commerce determines were made in a particular market situation, are outside the ordinary course of trade and are disregarded from the calculation of normal value. *See id.* § 1677b(b)(1), (a)(1)(B)(i). “Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade.” *See id.* §§ 1677b(a)(1)(B)(i), (b)(1); 1677(15)(A), (C).

Second, when using market prices to determine normal value, Commerce may make certain adjustments to the remaining home market prices. The statute lists authorized adjustments for incidental shipping, delivery expenses, and direct taxes, and for differences between the subject merchandise and foreign like products in quantity, circumstances of sale, or level of trade. *Id.* § 1677b(a)(6), (7).

Third, when using home market sales for normal value, 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 a 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 processing 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.*

II. Particular Market Situation Adjustment to the Cost of Production for the Sales-Below-Cost Test

For purposes of determining whether sales were made at less than cost, Commerce adjusted the reported costs of production of hot-rolled steel coil, a primary CWP input, based on its determination that a particular market situation in Korea distorted the cost of hot-rolled steel coil. *See Remand Results* at 4; *see also Second Remand Results* at 3. Defendant argues that Commerce complied with the court's order to explain Commerce's statutory authority and that Commerce's particular market situation adjustment was in accordance with the law. Def. Cmts. at 6, 9. Plaintiffs oppose the *Second Remand Results* and argue that Commerce did not comply with the court's order. Hyundai Cmts. at 1; SeAH Cmts. at 2. Hyundai Steel maintains that Commerce's particular market situation adjustment calculation was unsupported by substantial evidence and not in accordance with the law. Hyundai Cmt. at 2. Hyundai Steel argues that Commerce's interpretation of the statute relied on critical omissions, was inconsistent with caselaw, and relied inappropriately on legislative history. Hyundai Cmts. at 3–12.

As this Court has held repeatedly, the statute does not authorize a particular market situation adjustment to the cost of production when Commerce applies the sales-below-cost test to determine which home market sales to exclude from the calculation of normal value. *See Saha Thai Steel Pipe Pub. Co. v. United States*, 43 CIT __, __, 422 F. Supp. 3d 1363, 1368–70 (2019); *Husteel Co. v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1376, 1383–89 (2020); *Borusan Mannesmann Boru Sanayi Ve Ticaret A. Ş. v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1395, 1411–12 (2020); *Dong-A Steel Co. v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1317, 1337–41 (2020); *Husteel Co. v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1363, 1370–73 (2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1378, 1382–86 (2020).

Commerce applied an adjustment to the cost of production calculation set forth in Section 1677b(b)(3) for purposes of the sales-below-cost test pursuant to Section 1677b(b)(1). *See Remand Results* at 4; *Second Remand Results* at 2. Commerce relied mistakenly on Section 504 of the TPEA for the authority to adjust the cost of production for the sales-below-cost test. Commerce explained that:

[W]here a [particular market situation] affects the [cost of production] of the foreign like product because it distorts the cost of inputs, it is reasonable to conclude that such a situation may prevent a proper comparison of the export price with normal value based on home market prices just as it would when normal

value is based on [constructed value]. . . . [A]n examination of a [particular market situation] for purposes of the sales-below-cost test is consistent with the Act when considering that the provision at issue, [19 U.S.C. § 1677b(e)], specifically includes the term “ordinary course of trade.” The definition of that term, again, found in [Section 1677(15)], is integral to that [particular market situation] provision. Accordingly, it is consistent with the Act for Commerce to analyze a [particular market situation] allegation in determining whether a company’s comparison-market sale prices were below cost, and therefore, are outside the “ordinary course of trade.”

Second Remand Results at 4–5. In Commerce’s view, the amendments provide Commerce “discretion to use ‘any other calculation methodology’ if costs are distorted by a [particular market situation], including for the purposes of [the cost of production]” *Id.* at 7. In other words, Commerce made a particular market situation adjustment to costs based on Section 1677b(e). Commerce asserted that the cost-based particular market situation analysis and alternative calculation methodology set forth in Section 1677b(e) are available whether Commerce bases normal value on home market sales or constructed value. Commerce also asserted that the sales-below-cost test set forth in Section 1677b(b)(1), by relying on the phrase “ordinary course of trade” defined in Section 1677(15)(C) as excluding sales made in a particular market situation, authorizes Commerce to conduct the particular market situation analysis and adjust costs based on Sections 1677b(b)(1) and 1677(15)(C). *Id.* at 4–5, 7.

Section 504 of the TPEA amended the statutory provisions governing constructed value. The amendment authorizes Commerce to use alternative cost methodologies when computing constructed value after making a particular market situation determination. The amended language provides:

For purposes of paragraph (1) [in reference to calculating constructed value], if 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 [Commerce] may use another calculation methodology under this part or any other calculation methodology.

19 U.S.C. § 1677b(e). The amended statute gives Commerce discretion to adjust the cost of production calculation methodology when determining constructed value if Commerce determines that a par-

ticular market situation exists. *See id.* Commerce cannot rely on Section 1677b(e) when Commerce bases normal value on home market sales. No part of the statute allows Commerce to use any other methodology when market sales are used for normal value. *Saha Thai Steel Pipe Pub. Co.*, 43 CIT at __, 422 F. Supp. 3d at 1368–70; *Husteel Co.*, 44 CIT at __, 426 F. Supp. 3d at 1383–89; *Borusan*, 44 CIT at __, 426 F. Supp. 3d at 1411–12; *Dong-A Steel Co.*, 44 CIT at __, 475 F. Supp. 3d at 1340–41; *Husteel*, 44 CIT at __, 476 F. Supp. 3d at 1371; *Saha Thai Steel Pipe Pub. Co.*, 44 CIT at __, 476 F. Supp. 3d at 1384. The “any other methodology” language is reserved solely for when normal value is determined by constructed value. *Husteel Co.*, 44 CIT at __, 426 F. Supp. 3d at 1388.

With respect to Sections 1677b(b)(1) and 1677(15)(C), Defendant argues that Section 1677b(b)(1)’s reference to the phrase “ordinary course of trade” authorizes Commerce to conduct a cost-based particular market situation analysis and make an adjustment in the course of the sales-below-cost test. Def. Cmts at 9–10.

Section 1677b(b)(1) provides:

(b) Sales at less than cost of production

(1) Determination; sales disregarded

Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

(A) have been made within an extended period of time in substantial quantities, and

(B) were not at prices which permit recovery of all costs within a reasonable period of time,

such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

19 U.S.C. § 1677b(b)(1). Section 1677b(b)(1) sets forth the sales-below-cost test based on the calculation specified in Section 1677b(b)(3) to confirm that sales were made at less than the cost of production. Within Section 1677b(b) for “Sales at less than cost of production,” the subsection 1677b(b)(1) for “Determination; sales disregarded” authorizes Commerce to disregard those below-cost sales as outside the ordinary course of trade. *Id.* § 1677b(b)(1).

The plain language of the reference to “ordinary course of trade” provides that sales on which normal value are based must be in the ordinary course of trade. *Id.* § 1677b(b)(1), (a)(1)(B)(i). Sales made at less than cost, between affiliates, and in a particular market situation are excluded from the definition of “ordinary course of trade” in Section 1677(15). Thus, sales in those three categories are disregarded for purposes of calculating normal value based on market sales. Nothing in the statute grants Commerce the authority to modify the sales-below-cost test to permit a particular market situation analysis or adjustment, and the specificity of the sales-below-cost test leaves no ambiguity. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

In sum, although Section 504 of the TPEA amended Section 1677b(e) for “Constructed value” to grant Commerce the discretion to use an alternative calculation methodology, and Section 1677(15) for “Ordinary course of trade” to grant Commerce an additional ground on which it may disregard sales from the normal value calculation when using home market sales, the Section 504 amendment did not amend Section 1677b(b), which sets out the calculation of the cost of production for the sales-below-cost test to determine whether and which sales should be disregarded as outside the ordinary course of trade when normal value is based on home market sales. “[W]here ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” *Thomas v. Nicholson*, 423 F.3d 1279, 1284 (Fed. Cir. 2005) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Thus, the statute authorizes Commerce to disregard certain sales when basing normal value on home market sales, or to use an alternative calculation methodology upon a cost-based particular market situation determination when basing normal value on constructed value.

Commerce applied a cost-based particular market situation adjustment for purposes of the sales-below-cost test of Section 1677b(b)(1), while basing normal value on home market sales. The statute does

not authorize Commerce to adjust the cost of production as an alternative calculation methodology when using normal value based on home market sales under Section 1677b(e) as claimed by Commerce. The statute also does not authorize Commerce to adjust the cost of production for purposes of the sales-below-cost test under Sections 1677b(b)(1) and 1677(15)(C) as claimed by Commerce. Section 1677b(e) applies only when Commerce bases normal value on constructed value. Because Commerce based normal value on home market sales, not constructed value, Section 1677b(e) is inapplicable. Nothing in Sections 1677b(b)(1) and 1677(15)(C) authorizes Commerce to adjust the cost of production for the sales-below-cost test. The court concludes, therefore, that Commerce's particular market situation adjustment to the cost of production is not in accordance with the law. Because Commerce may not adjust the cost of production when using normal value based on home market sales, the court does not consider the lawfulness or reasonableness of Commerce's adjustment calculation.

III. Particular Market Situation Determination

Commerce determined on remand that a particular market situation distorted costs based on the totality of five factors, namely: (1) Korean subsidies of hot-rolled steel coil; (2) Korean imports of hot-rolled steel coil from China; (3) strategic alliances between Korean hot-rolled steel coil producers and CWP producers; (4) distortions in the Korean electricity market; and (5) steel industry restructuring efforts by the Korean Government. *Remand Results* at 6. Plaintiffs argue that Commerce's particular market situation determination is not in accordance with the law and is unsupported by substantial record evidence. *Hyundai Cmts.* at 2; *SeAH Cmts.* at 3–4.

Commerce based its particular market situation determination on distortions in the cost of hot-rolled steel coil, a primary CWP input. *See Second Remand Results* at 3; *Remand Results* at 4. Commerce explained:

Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) added the concept of “particular market situation” in the definition of the term “ordinary course of trade,” for purposes of [constructed value] under section [1677b(e)], and through these provisions for purposes of the [cost of production] under section [1677b(b)(3)]. Section [1677b(e)] of the Act states that “if 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.” Thus, under section 504 of the TPEA, Congress has given Commerce the authority to determine whether a [particular market situation] exists within the foreign market from which the subject merchandise is sourced, and to determine whether the costs of materials, fabrication, or processing of such merchandise fail to accurately reflect the [cost of production] in the ordinary course of trade.

Second Remand Results at 3–4. Commerce made the particular market situation determination under Section 1677b(e) based on the assertion that Section 1677b(e)’s reference to “ordinary course of trade” incorporates Section 1677b(e) into the cost of production calculation in Section 1677b(b)(3). *Id.* at 4–5.

As discussed in the previous section, Section 1677b(e) applies expressly when Commerce bases normal value on constructed value. 19 U.S.C. § 1677b(e). Nothing in the statute can be read to authorize a cost-based particular market situation determination when Commerce bases normal value on home market sales. The statute does not provide for a cost-based particular market situation analysis when using home market sales to calculate normal value. Commerce made an unlawful particular market situation cost-based determination in this case, while basing normal value on home market sales. The court concludes that Commerce’s cost-based particular market situation determination is not in accordance with the law, and the court thus does not consider whether Commerce’s particular market situation determination is supported by substantial evidence on the record.

CONCLUSION

The court concludes that Commerce’s cost-based particular market situation determination and subsequent adjustment are not in accordance with the law.

Accordingly, it is hereby

ORDERED that the *Second Remand Results* are remanded for Commerce to reconsider its particular market situation determination and adjustment in light of this opinion; and it is further

ORDERED that this case will proceed according to the following schedule:

- (1) Commerce shall file the third remand results on or before September 13, 2021;
- (2) Commerce shall file the administrative record on or before September 27, 2021;

- (3) Comments in opposition to the third remand results shall be filed on or before October 12, 2021;
- (4) Comments in support of the third remand results shall be filed on or before November 8, 2021; and
- (5) The joint appendix shall be filed on or before November 15, 2021.

Dated: July 19, 2021
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–89

JARAMILLO SPICES CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 20–00148

[Dismissing action for lack of subject matter jurisdiction.]

Dated: July 19, 2021

Fabian Guerrero, Law Office of Fabian Guerrero, of McAllen, Texas, for plaintiff.
Jeffrey B. Clark, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Jason M. Kenner*, Senior Trial Counsel. Of counsel on the brief was *Brian N. Dunkel*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Stanceu, Judge:

Plaintiff Jaramillo Spices Corporation (“Jaramillo”) brings this action to contest a decision of United States Customs and Border Protection (“Customs” or “CBP”), which assessed Jaramillo liquidated damages of \$50,000 for failure to redeliver to CBP’s custody a shipment of tamarind imported from Mexico and determined by the Food and Drug Administration (“FDA”) to be adulterated. Before the court is defendant’s motion to dismiss this action for lack of subject matter jurisdiction under USCIT Rule 12(b)(1), which the court grants.

I. BACKGROUND

The jurisdictional facts stated in this Opinion are not in dispute.¹ This case arises from a shipment of tamarind imported from Mexico under cover of a single entry made at the Port of Hidalgo, Texas on May 6, 2018. Def.'s Mem. in Supp. of its Mot. to Dismiss Ex. 3 (Oct. 21, 2020), ECF No. 6 ("Def.'s Br."). On May 9, 2018, the FDA issued a Notice of FDA Action placing a hold on the tamarind shipment pending FDA review. Pet. For Jud. Rev. of Agency Decision ¶ 5, Ex. A (Sept. 25, 2020), ECF No. 4 ("Compl."). On May 10, 2018, the FDA issued another Notice of FDA Action detaining the shipment as potentially subject to refusal of admission for appearing to be adulterated in violation of the Food, Drug, and Cosmetic Act ("FD&C Act"). Def.'s Br. Ex. 1. On June 11, 2018, the FDA refused admission of the shipment upon determining that the tamarind contained a pesticide chemical residue (permethrins) rendering it "adulterated" for purposes of the FD&C Act. *Id.* at Ex. 2.

On June 13, 2018, Customs issued Jaramillo a "Notice to Redeliver" directing Jaramillo to export or destroy the tamarind within 90 days of the FDA's refusal of admission. *Id.* at 2–3, Ex. 3. Jaramillo did not do so.

On October 23, 2018, Customs issued a Notice of Liquidated Damages and Demand for Payment of \$50,000, representing liquidated damages assessed against Jaramillo for failure to comply with the Notice of Redelivery. *Id.* at Ex. 4. On November 27, 2018, Jaramillo sent Customs what it titled an "appeal for penalty or liquidated damages for extenuating circumstances." *Id.* at Ex. 5. Treating this submission as a petition to mitigate or cancel the liquidated damages claim, Customs denied all relief on April 19, 2019. *Id.* at Ex. 7. On May 29, 2019, plaintiff's counsel submitted to Customs a brief letter again seeking mitigation. *Id.* at Ex. 8. Treating this second submission as a supplemental petition for mitigation of the liquidated damages, Customs notified Jaramillo's counsel on February 25, 2020 of its denial of any relief. *Id.* at Ex. 9.

On March 17, 2020, in the United States District Court for the Southern District of Texas (the "District Court"), Jaramillo filed a "Petition for Judicial Review" against Customs. Pet'r's Pet. for Jud. Rev., 7:20-cv-00072 Entry No. 1 (*modified* Mar. 19, 2020) ("Pet. for Jud. Rev."). On June 10, 2020, the District Court stated that because "Plaintiff's 'Petition for Judicial Review' invoked jurisdiction under 28 U.S.C. § 1581, which describes the jurisdiction of the Court of Inter-

¹ The recitation of jurisdictional facts above is taken principally from defendant's submissions. Jaramillo expressly adopts the material facts in its response. See Pl.'s Resp. to Def.'s Mot. to Dismiss 2 (Nov. 13, 2020), ECF No. 7 ("Pl.'s Resp.").

national Trade” and because the complaint concerns a matter that “appears to be within the exclusive jurisdiction of the Court of International Trade The Court is not persuaded that it has jurisdiction over this case.” Order 1–2, 7:20-cv-00072 Entry No. 5. The District Court then queried whether Jaramillo was “attempting to appeal an adverse Court of International Trade ruling,” noting that “such appeal belongs in the Court of Appeals for the Federal Circuit.” *Id.* at 2. The District Court directed plaintiff to “file a brief explaining why this case should not be dismissed” and provided, alternatively, that “[p]laintiff may file dismissal documentation under Federal Rule of Civil Procedure 41.” *Id.*

On June 16, 2020, Jaramillo filed in the District Court a motion for voluntary dismissal without prejudice, stating that plaintiff would seek to file the proceeding before the United States Court of Appeals for the Fifth Circuit.² Mot. for Voluntary Dismissal 1, 7:20-cv-00072 Entry No. 6 (“Mot. for Voluntary Dismissal”). The District Court dismissed the case the same day, without opining on whether the dismissal vested jurisdiction in the appellate court. Order (June 16, 2020), 7:20-cv-00072 Entry No. 7.

Jaramillo commenced its action in this Court on September 1, 2020. Summons, ECF No. 1. Defendant filed its motion to dismiss and accompanying brief on October 21, 2020. Def.’s Br. Plaintiff responded on November 13, 2020. Pl.’s Resp. to Def.’s Mot. to Dismiss, ECF No. 7 (“Pl.’s Resp.”). On December 1, 2020, defendant filed a reply. Def.’s Reply to Pl.’s Resp. to Def.’s Mot. to Dismiss, ECF No. 8.

II. DISCUSSION

“It is a well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress.” *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (citations omitted). In the Customs Courts Act of 1980, Congress delineated the jurisdiction of the Court of International Trade over civil actions brought against the United States. Subsections (a)–(h) grant the Court jurisdiction over specific causes of action; subsection (i) contains a grant of residual jurisdiction. *See* 28 U.S.C. § 1581.³

Plaintiff attempts to invoke the court’s jurisdiction under 28 U.S.C. § 1581(a), *see* Compl. ¶ 3, a jurisdictional provision empowering this Court to hear actions commenced under Section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515, to contest the denial by Customs of an administrative protest. In the alternative, plaintiff argues in its re-

² It does not appear that Jaramillo initiated any appellate proceeding.

³ Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2018 edition.

sponse to defendant’s motion to dismiss that the court should exercise jurisdiction according to 28 U.S.C. § 1581(i), the court’s residual jurisdictional provision. Pl.’s Resp. 4–5. For the reasons discussed below, neither jurisdictional provision allows the court to hear this cause of action.

A. The Court Does Not Have Jurisdiction Under 28 U.S.C. § 1581(a)

The burden is on a plaintiff to demonstrate facts establishing subject matter jurisdiction. *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997), *opinion amended on reh’g*, 135 F.3d 760 (Fed. Cir. 1998). To avail itself of this Court’s jurisdiction according to 28 U.S.C. § 1581(a), plaintiff must show: (1) a valid and timely protest (i.e., a protest filed within 180 days of a protestable decision); (2) a protest denial by Customs; and (3) commencement of an action in this Court within 180 days of the date of mailing of a protest denial. 28 U.S.C. §§ 1581(a), 2636(a)(1); 19 U.S.C. §§ 1514(a), 1515.

The court need look no further than the third requirement, which is set forth in the Customs Courts Act of 1980 as a statute of limitations, as follows: “A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515] is barred unless commenced in accordance with the rules of the Court of International Trade . . . within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act.” 28 U.S.C. § 2636(a)(1). Jaramillo commenced this action by filing a summons on September 1, 2020.⁴ Therefore, to establish jurisdiction under 28 U.S.C. § 1581(a), plaintiff must show that an event qualifying as a denial by Customs of a protest occurred on or after March 5, 2020 and on or before September 1, 2020. Plaintiff has not directed the court’s attention to any event that occurred during such time period. Therefore, any action that plaintiff brought or could have brought according to 28 U.S.C. § 1581(a) is, or would be, barred by the statute of limitations.

In its response to defendant’s motion to dismiss, plaintiff states that “[t]he Plaintiff filed this civil action within six months of the decision of U.S. Customs denying its protest. The denial was on February 12,

⁴ Plaintiff did not file a summons in proper form for an action brought under the jurisdictional grant of 28 U.S.C. § 1581(a), for which a summons according to Form 1–1 would have been proper. Instead, plaintiff filed a summons in general form according to Form 4–1. The court does not reach the question of whether the incorrect summons defeats jurisdiction under § 1581(a), determining instead whether plaintiff has demonstrated any facts that could establish jurisdiction according to that provision. But had a summons in proper form been filed, it would have informed the court, *inter alia*, of essential jurisdictional facts including the date a protest was filed and the date the protest was denied. As discussed herein, plaintiff is not able to establish the requisite facts for the exercise of § 1581(a) jurisdiction.

2020.” Pl.’s Resp. 4. Under even plaintiff’s own version of the facts, the summons plaintiff filed on September 1, 2020 to commence this action was untimely.⁵

Moreover, to be considered a protestable decision as enumerated in 28 U.S.C. § 1581(a), a decision must be one made by Customs, not another agency. “Section 1514(a) does not embrace decisions by other agencies.” *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994). If Customs merely was effectuating a decision of the FDA to refuse admission, under which Customs lacked discretion over whether to issue a notice for redelivery, then the redelivery demand was not a protestable decision, and the court would lack jurisdiction even had plaintiff followed all procedural requirements for contesting a protest denial.

The “decision” by Customs to issue a notice of redelivery was, in fact, not within that agency’s discretion. The FDA’s refusal of admission provides that “[a] request has been made to Customs to order redelivery for all the above product(s), in accordance with 19 CFR 141.113. . . . Failure to redeliver into Customs custody will result in a claim for liquidated damages under the provisions of the entry bond.” Def.’s Br. Ex. 2 at 2. The provision of the Customs Regulations cited by the FDA, 19 C.F.R. § 141.113(c)(3), demonstrates that once the FDA reaches a determination to refuse admission of an imported food product, Customs may not decline to issue a notice of redelivery:

If FDA refuses admission of a food, drug, device, cosmetic, or tobacco product into the United States, or if any notice of sampling or other request is not complied with, FDA will communicate that fact to the Center director. An authorized CBP official *will* demand the redelivery of the product to CBP custody. CBP *will issue* a notice of redelivery within 30 days from the date the product was refused admission by the FDA or from the date FDA determined the non-compliance with a notice of sampling or other request. The demand for redelivery may be made contemporaneously with the notice of refusal issued by the FDA.

19 C.F.R. § 141.113(c)(3) (emphasis added). *See also United States v. Utex, Int’l Inc.*, 857 F.2d 1408, 1411 (Fed. Cir. 1988) (noting that “it is Customs’ responsibility to carry out the FDA decisions, in accordance

⁵ Plaintiff also states, in this regard, that it filed a protest with Customs at the Port of Hidalgo, Texas on January 27, 2018. Pl.’s Resp. 3. This is puzzling, as the date plaintiff identifies was prior to the May 6, 2018 date of entry. Defendant denies that any protest was ever filed, Def.’s Mem. in Supp. of its Mot. to Dismiss 6 (Oct. 21, 2020), ECF No. 6, but whether or not such a protest was filed is of no consequence for the reasons noted herein.

with customs law and regulation” and that “Customs is the enforcement arm of the process wherein admissibility is determined by the FDA.”).

In summary, under the uncontested jurisdictional facts, Jaramillo’s action could not be heard according to the court’s jurisdiction under 28 U.S.C. § 1581(a) because it was untimely, and even had it not been, the measure taken by Customs to effectuate the FDA’s decision to refuse admission of Jaramillo’s merchandise was not a protestable decision according to 19 U.S.C. § 1514(a).

B. The Court Does Not Have Jurisdiction Under 28 U.S.C. § 1581(i)

Jaramillo’s alternative argument, that the court should exercise jurisdiction according to 28 U.S.C. § 1581(i), is also meritless. Subsection (i)(3) of § 1581 provides as follows:

[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . embargoes or other quantitative restrictions on the importation of merchandise *for reasons other than the protection of the public health or safety*.

28 U.S.C. § 1581(i)(3) (emphasis added). In this case, Jaramillo’s tamarind was refused admittance to the United States for reasons relating to the protection of public health. *See* Def.’s Br. Ex. 2 at 2 (“The article is subject to refusal of admission . . . in that it appears to bear or contain a pesticide chemical residue, which causes the article to be adulterated. . . .”) & Ex. 3 (noting the FDA’s decision that the merchandise is in violation of the FD&C Act). Therefore, this Court lacks jurisdiction over this case according to 28 U.S.C. § 1581(i).

C. It is Not in the Interests of Justice to Transfer this Action to Another Court in Which the Action Could Have Been Brought

Finally, the court considers whether this case is appropriate for transfer to a court that could have jurisdiction over its claim. According to 28 U.S.C. § 1631, a court lacking jurisdiction over an action shall transfer that action to another court in which the action could have been brought if such a transfer is in the interest of justice and the transferee court would have had jurisdiction over the matter at the time it was filed. 28 U.S.C. § 1631.

The court concludes that it would not be “in the interest of justice” for the court to transfer this action. As mentioned above, Jaramillo, before commencing litigation here, filed in the District Court a petition relating to its entry. *See* Pet. for Jud. Rev. Jaramillo’s voluntary dismissal of that action on June 16, 2020 was without prejudice. Mot. for Voluntary Dismissal 1. (In moving for dismissal, Jaramillo indicated an intention to proceed in the United States Court of Appeals for the Fifth Circuit, but Jaramillo was not in a position to appeal a dismissal that was voluntary according to Federal Rule of Civil Procedure 41.) Jaramillo did not endeavor to bring a subsequent action in the District Court following that Court’s dismissal of its action without prejudice. Thus, Jaramillo denied the District Court not only once, but twice, the occasion to rule on whether that Court had jurisdiction over its action. Plaintiff has had the full opportunity to pursue any available remedy against defendant United States, and its purposeful actions mitigate against continuing this litigation to allow a third opportunity.

III. CONCLUSION

In conclusion, subject matter jurisdiction is lacking under 28 U.S.C. § 1581(a) because CBP’s issuance of a notice of redelivery effectuated a decision of the FDA, and because any action Jaramillo could have brought to contest a protest denial would have been untimely. The court may not exercise jurisdiction according to 28 U.S.C. § 1581(i) because the imported merchandise was excluded for reasons of “public health or safety,” 28 U.S.C. § 1581(i)(3). Transfer is not in the interests of justice. The court will grant defendant’s motion and enter judgment dismissing this action.

Dated: July 19, 2021

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

JUDGE

Slip Op. 21–90

SHELTER FOREST INTERNATIONAL ACQUISITION, INC., et al., Plaintiffs, and
IKEA SUPPLY AG, Consolidated Plaintiff, and TARACA PACIFIC, INC.
et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant,
COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-
Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 19–00212

[Commerce’s Remand Results concluding that inquiry merchandise does not constitute later-developed merchandise circumventing the Orders under 19 U.S.C § 1677j(d) is sustained.]

Dated: July 21, 2021

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs Shelter Forest International Acquisition, Inc., Xuzhou Shelter Import & Export Co., Ltd., and Shandong Shelter Forest Products Co., Ltd. With him on the brief was *James P. Durling*.

Kristen S. Smith and *Sarah E. Yuskaitis*, Sandler, Travis & Rosenberg, PA of Washington, DC, for Consolidated Plaintiff IKEA Supply AG.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff-Intervenors Taraca Pacific, Inc., Liberty Woods International, Inc., MJB Wood Group, Inc., and Patriot Timber Products, Inc. With him on the brief were *Bryan P. Cenko* and *Jill A. Cramer*.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff-Intervenors Shanghai Futuwood Trading Co., Ltd., Linyi Glary Plywood Co., Ltd., and Far East American, Inc. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

Sonia M. Orfield, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the brief was *Savannah R. Maxwell*, Of Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood. With him on the brief were *Elizabeth S. Lee*, *Stephanie M. Bell*, and *Tessa V. Capeloto*.

OPINION

Restani, Judge:

This action concerns the United States Department of Commerce’s (“Commerce”) remand redetermination that certain merchandise is not circumventing the antidumping and countervailing duty orders on hardwood plywood from China under 19 U.S.C § 1677j(d). Before the court is Commerce’s Final Results of Redetermination Pursuant to Court Remand, ECF No. 81 (May 10, 2021) (“*Remand Results*”) following the court’s opinion and order in *Shelter Forest Int’l Acquisition, Inc. v. United States*, 45 CIT ___, 497 F. Supp. 3d 1388 (2021) (“*Remand Order*”). Defendant-Intervenor, the Coalition for Fair Trade in Hardwood Plywood (the “Coalition”), challenges Commerce’s negative determination as unsupported by substantial evidence and not in accordance with law.¹ The Government and Consolidated Plaintiffs, Shelter Forest International Acquisition Inc., et. al. (“Shelter Forest”) and IKEA Supply AG., et al. (“IKEA”), and Plaintiff-Intervenors, Shanghai Futuwood Trading Co., et. al. (“Futuwood”) and Taraca Pacific Inc., et al. (the “Importer’s Alliance”), ask that the

¹ See Def. Intervenor’s Cmts. On Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 85 (confidential), 86 (public), at 5–14 (June 4, 2021) (“Coalition Br.”).

court sustain Commerce's negative anticircumvention determination as supported by substantial evidence.²

BACKGROUND

The court presumes familiarity with the facts of this case and recounts them only as necessary. Commerce issued orders on certain hardwood plywood products from China in January 2018. In relevant part, the Orders³ cover:

...hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. ...

...For purposes of [the Orders,] a “veneer” is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below. The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF).

AD Order, 83 Fed. Reg. at 512; *CVD Order*, 83 Fed. Reg. at 515. The Coalition requested that Commerce conduct an anticircumvention inquiry, *see Letter from Petitioner, Certain Hardwood Plywood Products from the People's Republic of China: Request for Anti-*

² See Def.'s Response to Cmts. On Remand Redetermination, ECF No. 90 (June 16, 2021) (“Gov. Br.”); Shelter Forest Cmts. in Supp. of Commerce's Remand Redetermination Results, ECF No. 83 (June 4, 2021); Shelter Forest Response Cmts. in Supp. of Commerce's Remand Redetermination Results, ECF No. 91 (June 16, 2021) (“Shelter Forest Reply”); IKEA Supply AG. Response Cmts. in Supp. of Remand Redetermination, ECF No. 93 (June 16, 2021) (“IKEA Reply”); Importer's Alliance Response to Cmts. On Final Remand Redetermination, ECF No. 88 (June 16, 2021) (“Importer's Alliance Reply”); Futuwood Response Cmts. in Supp. of Remand Redetermination, ECF No. 89 (June 16, 2021) (“Futuwood Reply”). Unless addressing an argument specific only to a certain plaintiff or plaintiff-intervenor, this opinion refers to Consolidated Plaintiffs and Plaintiff-Intervenors collectively as “Plaintiffs.”

³ See *Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (“*AD Order*”); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (“*CVD Order*”) (collectively, the “Orders”).

Circumvention Inquiry at 2–4, P.R. 1–4 (June 26, 2018) (“*Petitioner’s Request*”), and in September 2018, Commerce initiated this inquiry pursuant to 19 U.S.C. § 1677j(d) with respect to allegedly later-developed merchandise. See *Certain Hardwood Plywood Products from the People’s Republic of China: Initiation of Anti-Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 47,883 (Dep’t Commerce Sept. 21, 2018) (“*Initiation Notice*”). This inquiry sought to determine whether: (1) certain plywood with face and back veneers made of radiata and/or agathis pine, (2) “[h]as a Toxic Substances Control Act (TSCA) or California Air Resources Board (CARB) label certifying that it is compliant with TSCA/CARB requirements; and (3) is made with a resin, the majority of which is comprised of one or more of the following three product types—urea formaldehyde, polyvinyl acetate, and/or soy” (“inquiry merchandise”) is later-developed merchandise circumventing the Orders. *Id.* at 47,883, 47,885.

In November 2019, Commerce issued a final determination, finding circumvention of the Orders because no respondent had shown inquiry merchandise was commercially available prior to December 8, 2016. See *Certain Hardwood Plywood Products from the People’s Republic of China: Affirmative Final Determination of Circumvention of Antidumping and Countervailing Duty Orders*, 84 Fed. Reg. at 65,783 (Dep’t Commerce Nov. 29, 2019) (“*Final Determination*”); *Issues and Decision Memorandum for the Final Determination of the Anti-Circumvention Inquiry: Certain Hardwood Plywood Products from the People’s Republic of China*, A-570–051, C-570–052, P.R. 240 at 36, 44 (Dep’t Commerce Nov. 22, 2019) (“*I & D Memo*”). Specifically, Commerce determined that while Shelter Forest had sold products with two of the three characteristics of inquiry merchandise (plywood with radiata veneers with a CARB-certification label), it had failed to demonstrate that the glue used in this product was majority urea-formaldehyde and therefore, failed to satisfy the third criteria of inquiry merchandise. *I & D Memo* at 24–25. Plaintiffs challenged Commerce’s affirmative determination as unsupported by substantial evidence and not in accordance with law. See *Remand Order* at 1395. The court remanded for Commerce to consider, among other things, additional information from Shelter Forest, and to address or reconsider: (1) whether Commerce may accept other evidence indicating TSCA or CARB product compliance or otherwise explain why evidence of actual labels is required for its assessment, (2) the evidence Commerce requires with regard to the glue formulation used to produce inquiry merchandise, (3) lack of notice of identified deficiencies and an opportunity to submit supplemental information, (4) allowing

Lianyungang Yuantai International Co., Ltd. (“Yuantai”) an opportunity to correct or explain a translation error in submitted documentation, and (5) IKEA’s rebuttal brief. *See Remand Order* at 1396–1402, 1405–06.⁴

On remand, Commerce reviewed the additional information provided by Shelter Forest and determined that inquiry merchandise was available prior to December 8, 2016, and therefore, was not circumventing the Orders. *See Remand Results* at 4–5. Specifically, Commerce accepted information from Shelter Forest regarding the composition of its glue and linked this evidence to evidence of the CARB-labeled plywood products that constitute inquiry merchandise. *See Remand Results* at 11–14.⁵ Thus, Commerce concluded on remand that inquiry merchandise was commercially available prior to December 8, 2016, and revised its circumvention determination accordingly. *Id.* at 14.

The Coalition challenges Commerce’s negative circumvention determination on two bases. First, the Coalition argues that Shelter Forest did not provide sufficient evidence of the composition of its glue and that Commerce failed to sufficiently consider evidence on the record that undermines its conclusion. *See Coalition Br.* at 8–12. Second, the Coalition argues that if Shelter Forest produced inquiry merchandise prior to December 8, 2016, it obscured it from the public as a trade secret, and therefore, such merchandise cannot be considered commercially available under 19 U.S.C. § 1677j(d). *See Coalition Br.* at 13–14. For the reasons stated below, Commerce’s negative circumvention determination is sustained.

⁴ If Commerce continued to find circumvention on remand, the court also directed Commerce to consider whether its application of the China-wide rate as the cash deposit rate was reasonable, to amend the date of initiation effective date to the publication date, and to consider whether notification to the International Trade Commission is required by 19 U.S.C. § 1677j(e)(1) in the light of its prior assessment and conclusions regarding the limited scope of the Orders. *See Remand Order* at 1402–06. Commerce allowed Yuantai to correct its translation error and allowed IKEA to submit its rebuttal brief but did not assess either. *Remand Results* at 16–17, 19–20. In view of Commerce’s revised determination, these issues are now moot and the court does not address them. *See Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 20–109, 2020 WL 4464251, at *2 (CIT Aug. 4, 2020) (noting that a change in Commerce’s determination can render issues moot that would otherwise need to be addressed).

⁵ The extremely narrow definition of inquiry merchandise, resulting from Commerce’s adoption of the exact definition proposed by the Coalition, seems to have imposed nearly impossible requirements on respondents to show inquiry merchandise was commercially available prior to December 8, 2016. *Compare Petitioner’s Request*, at 7–9; *with Initiation Notice*, 83 Fed. Reg. at 47,883, 47,885. Because Shelter Forest was able to submit evidence meeting these requirements, Commerce did not directly address why this narrow definition of inquiry merchandise was reasonable. *See Remand Results* at 17–18. The court does not address this issue as Commerce revised its determination, but notes that an affirmative circumvention determination that is based on unreasonable inquiry merchandise requirements would not be consistent with 19 U.S.C. § 1677j(d).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi). The court “hold[s] unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1). The court assesses whether Commerce’s actions are reasonable on the record as a whole to determine whether Commerce’s actions are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). Remand redeterminations 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) (citation and quotation marks omitted).

DISCUSSION

On remand, Commerce considered additional evidence provided by Shelter Forest that inquiry merchandise was commercially available prior to December 8, 2016. *See Remand Results* at 11–14, 20–23. Based on Shelter Forest’s resubmission on March 8, 2021, of its July 3 letter, which included details of the composition of Shelter Forest’s E0 glue and production and sales documents from 2012, Commerce determined that Shelter Forest demonstrated that inquiry merchandise was commercially available prior to December 8, 2016. *Id.* at 11–14. Specifically, Commerce reviewed the contents of Shelter Forest’s March 8 letter submission, which included sales and production documents, a sworn declaration from President Ryan Loe, and:

- (1) Shelter Forest’s supplier’s recipe for E0 resin from 2012, demonstrating that the glue was a majority urea-formaldehyde;
- (2) “Materials Out-Going Form{s} for Production” showing Shelter Forest’s supplier produced radiata pine plywood with E0 grade urea-formaldehyde resin;
- (3) inspection reports that tested the emissions of the plywood and confirmed that it met the low-emissions criteria to be categorized as “E0”;
- (4) “Outbound Delivery Order” forms illustrating that this radiata pine plywood with E0 ureaformaldehyde glue was leaving the supplier’s premises;
- (5) the supplier’s CARB certificate, that was valid at the time of the production;
- (6) bills of lading that stated the merchandise was CARB-2 certified; and
- (7) supplier invoices that said the merchandise was CARB-2 certified.

Id. at 21; *see also Shelter Forest’s Response to Department Request*, C.R.R. 1, P.R.R. 6 (Mar. 8, 2021) (“*March 8 Letter Submission*”).

In response to comments by the Coalition, Commerce subsequently requested supplemental information from Shelter Forest regarding its glue. See *Letter from Commerce, Supplemental Questionnaire*, C.R.R. 6, P.R.R. 17 (Mar. 9, 2021). In its response, Shelter Forest discussed the later addition of melamine in the glue process, which Shelter Forest stated was part of a trade secret, and explained the apparent discrepancy in the marketing materials. See *Shelter Forest's Supplemental Questionnaire Response* at 2–5, 9, Exhibit 1 at 4–5, C.R.R. 11–12, P.R.R. 29–30 (Mar. 25, 2021) (“*Shelter Forest SQR*”). The Coalition maintained that Shelter Forest’s submissions “repeatedly contradicted other record information as well as [Shelter Forest’s] own documentation” such that it was not reasonable for Commerce to rely on them in its determination. *Coalition’s Comments on Shelter Supplemental Questionnaire Response* at 1–6, C.R.R. 13, P.R.R. 35 (Mar. 31, 2021).

Commerce issued a preliminary negative circumvention determination, finding that Shelter Forest’s *March 8 Letter Submission* demonstrated that inquiry merchandise was commercially available prior to December 8, 2016. See *Draft Results of Redetermination Pursuant to Court Remand, Consol. Court No. 19–00212, Slip Op. 20–121 (Apr. 5, 2021)* at 13–14, 22–23, P.R.R. 36 (Apr. 5, 2021) (“*Draft Remand Results*”).⁶ Upon review of the comments submitted by the parties and the evidence submitted, Commerce issued a final negative circumvention determination, concluding that inquiry merchandise was commercially available prior to December 8, 2016, and was not later-developed merchandise circumventing the Orders. *Remand Results* at 14, 23.

I. Commerce’s determination that Shelter Forest met the glue requirement of inquiry merchandise and that inquiry merchandise was not later-developed merchandise under 19 U.S.C. § 1677j(d) is supported by substantial evidence.

The parties dispute whether Shelter Forest adequately demonstrated that it used its E0 glue in CARB-certified plywood products to

⁶ Plaintiffs and the Coalition provided comments to the *Draft Remand Results*, through which Shelter Forest and the Coalition continued to spar over whether it was reasonable for Commerce to rely on Shelter Forest’s sales and production evidence when its glue recipe and marketing materials did not clearly detail the addition of melamine later in the production process. See *Shelter Forest’s Rebuttal Factual Information Attachment A* at 2, C.R.R. 14, P.R.R. 37 (Apr. 5, 2021) (“*Shelter Forest RFF*”); *Coalition’s Comments on Draft Results of Redetermination* at 4–7, C.R.R. 15, P.R.R. 45 (Apr. 13, 2021); see also *Importer’s Alliance Comments on Draft Remand Redetermination*, P.R.R. 43 (Apr. 13, 2021); *IKEA Supply AG’s Comments on Draft Remand Redetermination*, P.R.R. 44 (Apr. 13, 2021). Commerce did not agree with the Coalition that there were discrepancies in Shelter Forest’s evidence. *Draft Remand Results* at 19–22.

satisfy the requirements of inquiry merchandise.⁷ Commerce found that Shelter Forest's E0 glue was majority urea-formaldehyde. *Remand Results* at 11; see also *March 8 Letter Submission* Exhibit 1, Attachment B. Commerce then used sales documents to link the glue production documents submitted by Shelter Forest in its *March 8 Letter Submission*, to "the documentation Commerce relied on in finding that Shelter Forest had also sold CARB-labeled plywood with face and back veneers of radiata pine." *Remand Results* at 12–13. Commerce explained its analysis through an example linking production documents with a complete set of sales documents for a specific customer in 2012. See *Remand Results* at 20–22.

The Coalition challenges Commerce's negative circumvention determination as unsupported by substantial evidence on the basis that (1) Shelter Forest provided inadequate evidence to demonstrate inquiry merchandise because it could not link its E0 glue use to CARB-labeled plywood products prior to 2016, see *Coalition Br.* at 8–10, and (2) that Commerce did not consider contradictory evidence in making its determination, such that Commerce cannot reasonably conclude that inquiry merchandise was commercially available prior to the Orders, see *Coalition Br.* at 10–14.

The court sustains Commerce's determinations if they are reasonable and supported by consideration of the whole record. *Consolidated Edison v. NLRB*, 305 U.S. 197, 217 (1938) (finding that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); see also *Nippon Steel Corp.*, 458 F.3d at 1351–52. Two inconsistent conclusions may be able to be drawn from the evidence, without invalidating Commerce's conclusion. See *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT ___, ___, 887 F. Supp. 2d 1301, 1305 (2012). For the reasons that follow, Commerce's determination that Shelter Forest adequately demonstrated that its E0 glue was majority urea-formaldehyde and that it was used in plywood products satisfying all three criteria of inquiry merchandise, prior to December 8, 2016, is supported by substantial evidence.

At issue is whether Shelter Forest's glue satisfies the definition of inquiry merchandise. The Coalition avers that the characteristics of Shelter Forest's E0 glue recipe do not align with the characteristics of the glue used in its proposed inquiry merchandise because melamine was not included in the original glue recipe Shelter Forest provided.

⁷ See *Coalition Br.* at 1; *Gov. Br.* at 2; *Futuwood Reply* at 3; *IKEA Reply* at 1; *Importer's Alliance Reply* at 4–5; *Shelter Forest Reply* at 2.

See Coalition Br. at 8–11. The Coalition argues that this discrepancy makes Shelter Forest’s documentation unreliable to demonstrate that Shelter Forest used majority urea-formaldehyde glue, satisfying the third criteria of inquiry merchandise. See *id.*; see also *Remand Results* at 23–25. Commerce’s determination that Shelter Forest’s plywood products used a majority urea-formaldehyde glue is supported by numerous documents detailing the composition and production process of Shelter Forest’s E0 glue, and two sworn declarations by Mr. Loe. See *Remand Results* at 11–13, 20–23; see also *March 8 Letter Submission* Exhibit 1, Attachment B; *Shelter Forest SQR* Exhibit 1. Commerce found that Shelter Forest’s explanation that its practice was to add melamine to the product at the end of production, which is why it was not included in the original glue recipe it provided, was reasonable and supported by documentation on the record. See *Remand Results* at 26–27.⁸ The evidence that Commerce relied on to reach this determination included a production manual from 2011 showing the use of urea-formaldehyde glue and the later addition of melamine, sample purchase orders for inquiry merchandise, and a sworn declaration by Mr. Loe detailing the glue’s application in the plywood production process. See *Shelter Forest SQR* at 3–12, Exhibit 1 at 4–5, Attachment A, D; see also *Remand Results* at 27.

Based on this finding that Shelter Forest’s E0 glue was majority urea-formaldehyde, Commerce linked the glue to specific CARB-certified radiata plywood sales in 2012 to conclude that inquiry merchandise was not later-developed under 19 U.S.C. § 1677j(d). See *Remand Results* at 11–14. Commerce did this by connecting a series of production and sales documentation from 2012, which had unique contract and customer information, that showed Shelter Forest produced and sold CARB-certified radiata pine with E0 glue to a major U.S. retailer. See *id.* at 11–13, 21–22; *March 8 Letter Submission* Exhibit 1, Attachments B, C, D; *Shelter Forest RFI* Attachment A at 3. Commerce found that the E0 glue recipe submitted by Shelter Forest was the glue used in the 2012 sale of CARB-labeled radiata pine and therefore that the 2012 production and sales documentation established the commercial availability of inquiry merchandise. See *Remand Results* at 25–27.

The Coalition also contends that Commerce has not adequately considered the contradictory information that Shelter Forest provided in its 2012 catalog product descriptions of glues used in its

⁸ Shelter Forest explained that while modern practice includes introducing melamine into the glue during mixing, in 2012 pre-mixed melamine urea-formaldehyde was not available and melamine had to be added later in the production process. See *Shelter Forest SQR* at 5, Exhibit 1 at 5.

merchandise. *See* Coalition Br. at 11. The Coalition argues that this casts doubt on whether the glue recipe provided was in fact used in inquiry merchandise. *See id.* Commerce considered the marketing materials that the Coalition references, but concluded that Shelter Forest’s public catalogues did not undermine the submitted sales and production documents for specific sales showing that Shelter Forest produced inquiry merchandise prior to 2016. *Remand Results* at 28–30. In part because it was undisputed that the marketing materials did not contain a complete or definite description of Shelter Forest’s products, Commerce concluded that sales and production documents evidencing specific sales were sufficient to establish that Shelter Forest sold inquiry merchandise, “despite any apparent inconsistencies between those documents and the catalog.” *See Remand Results* at 29–30.⁹ The Coalition’s assertions regarding Shelter Forest’s marketing materials do not undermine the reasonableness of Commerce’s factual findings, which are supported by ample evidence on the record. Accordingly, Commerce’s determination that Shelter Forest’s sales and production documents show that inquiry merchandise was produced prior to December 8, 2016, is reasonable based on the record as a whole and is supported by substantial evidence.

II. Commerce’s determination that Shelter Forest’s product was commercially available is supported by substantial evidence.

The Coalition also challenges Commerce’s negative circumvention determination as not in accordance with law on the basis that if Commerce finds that the addition of melamine for a particular purpose is a trade secret, Shelter Forest’s product was obscured from the market and thus not commercially available within the meaning of 19 U.S.C. § 1677j(d). *See* Coalition Br. at 13–14.¹⁰ The Coalition cites prior case law that does not address trade secrets to argue that if Shelter Forest’s product included trade secret material, the product could not be actually “present in the market at the time of the []

⁹ Commerce also relied on two sworn declarations that asserted Shelter Forest did not make or use every product shown in its promotional catalog as well as evidence that the addition of melamine to accomplish a certain product improvement was a trade secret at the time. *See Remand Results* at 28–30; *Shelter Forest SQR* at 4, Exhibit 1 at 4; *Shelter Forest RFI* Attachment A at 2.

¹⁰ The Coalition likely did not exhaust this issue. It appears to raise it for the first time in its brief, *see* Coalition Br. at 13–14, although Shelter Forest first brought up that the use of melamine for a particular purpose was a trade secret in its supplemental questionnaire response dated March 25, 2021, *see Shelter Forest SQR* at 4, Exhibit 1 at 4, while the agency proceeding was still ongoing. Nonetheless, because the Government does not argue the lack of exhaustion, the court considers the issue, to the degree it is able to do so based on a record that was not developed by the Coalition on this point.

investigation.” See *id.* (citing *Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (later-patented technological advancement); *Tai-Ao Aluminum v. United States*, 43 CIT ___, ___, 391 F. Supp. 3d 1301, 1311 (2019) (later-developed substitute). The Coalition contends that the trade secret component of Shelter Forest’s product results in a product that was not commercially available prior to the Orders, making it later-developed merchandise under 19 U.S.C. § 1677j(d). Coalition Br. at 14. The Importer’s Alliance counters that just because Shelter Forest’s product contains melamine “does not in itself rebut Commerce’s commercial availability finding where the plain language definition of the inquiry does not specify that inquiry merchandise requires the inclusion of melamine.” See Importer’s Alliance Reply at 13. Because Shelter Forest provided sufficient evidence showing inquiry merchandise was commercially available prior to the Orders, the Importer’s Alliance argues, it is irrelevant that melamine was added during the production process of inquiry merchandise. See *id.* at 13.¹¹

The purpose of the later-developed merchandise provision is to prevent a substitute product developed after an antidumping or countervailing duty order from circumventing that order, even though it falls outside of its scope in literal terms. 19 U.S.C. § 1677j(d); see *Tai-Ao Aluminum*, 391 F. Supp. 3d at 1306 (“Anticircumvention inquiries prevent foreign producers from circumventing existing findings or orders through the sale of later-developed products . . .”) (internal citation and quotation marks omitted). Commerce has established a practice of applying a specific commercial availability test to determine whether merchandise is later-developed within the meaning of 19 U.S.C. § 1677j(d). See *Target Corp.*, 609 F.3d at 1357–60. Courts have upheld Commerce’s interpretation and practice as reasonable. *Id.*, 609 F.3d at 1359; see also *Tai-Ao Aluminum*, 391 F. Supp. 3d at 1311–13.¹² The Coalition has not established that this approach is either unreasonable or an abuse of discretion by Commerce.

The Coalition’s attempt to narrow Commerce’s discretion regarding the standard for commercial availability in the context of later-developed merchandise is unavailing. The inquiry here under 19 U.S.C. § 1677j(d) is whether a substitute plywood product made with low emissions glue, which makes it suitable for interior use, was

¹¹ The other parties do not directly respond to the Coalition’s argument on this issue.

¹² Commerce’s established past practice finds that a product is commercially available if it is either present in the commercial market or “fully developed, i.e., tested and ready for commercial production, but not yet in the commercial market.” *Target Corp.*, 609 F.3d at 1358. Commerce cited to this past practice in the Issues and Decision Memorandum accompanying its prior affirmative determination. See *I & D Memo* at 33.

later-developed to circumvent the Orders. *Remand Results* at 1–2, 5, 18; *Petitioner’s Request* at 6–7; *Shelter Forest SQR* at 2–3. Nothing of record indicates that melamine is essential to the pertinent inquiry and its addition in the production process is not required to be public knowledge for the merchandise to be found to be commercially available. The trade secret status of one component of the inquiry merchandise has no bearing on whether it was actually “present in the market” because the proprietary nature of this particular component appears irrelevant to the question at hand. *See Target Corp.*, 609 F.3d at 1363. As detailed above, Shelter Forest provided significant evidence on the record establishing that its product was commercially present in the market prior to the Orders, including sales and production documents showing a sale of inquiry merchandise to a major U.S. retailer in 2012. *See supra* Section I. Commerce’s finding that Shelter Forest demonstrated that inquiry merchandise was commercially available prior to December 8, 2016, and therefore not later-developed merchandise under 19 U.S.C. § 1677j(d) circumventing the Orders is substantially supported and in accordance with law. *See Remand Results* at 10–31.

CONCLUSION

For the foregoing reasons, Commerce’s negative circumvention determination is sustained. Judgment is entered accordingly.

Dated: July 21, 2021

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI, JUDGE

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