

U.S. Customs and Border Protection

19 CFR PART 122

CBP DEC. 21-14

TECHNICAL AMENDMENT TO LIST OF USER FEE AIRPORTS: ADDITION OF THREE AIRPORTS, REMOVAL OF TWO AIRPORTS

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

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations by revising the list of user fee airports. User fee airports are airports that have been approved by the Commissioner of CBP to receive, for a fee, the customs services of CBP officers for processing aircraft, passengers, and cargo entering the United States, but that do not qualify for designation as international or landing rights airports. Specifically, this technical amendment reflects the designation of user fee status for three additional airports: Witham Field Airport in Stuart, Florida; Plattsburgh International Airport in Plattsburgh, New York; and Fort Worth Meacham International Airport in Fort Worth, Texas. This document also amends CBP regulations by removing the designation of user fee status for two airports: Griffiss International Airport in Rome, New York, and Cobb County International Airport in Kennesaw, Georgia.

DATES: *Effective date:* September 23, 2021.

FOR FURTHER INFORMATION CONTACT: Ryan Flanagan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at Ryan.H.Flanagan@cbp.dhs.gov or 202-550-9566.

SUPPLEMENTARY INFORMATION:

Background

Title 19, part 122 of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft engaged in international commerce and the transportation of

persons and cargo by aircraft in international commerce.¹ Generally, a civil aircraft arriving from outside the United States must land at an airport designated as an international airport. Alternatively, the pilot of a civil aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.²

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 Stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an alternative option for civil aircraft that desire to land at an airport that is neither an international airport nor a landing rights airport. This alternative option allows the Commissioner of U.S. Customs and Border Protection (CBP) to designate an airport, upon request by the airport authority, as a user fee airport.³ Pursuant to 19 U.S.C. 58b, a requesting airport may be designated as a user fee airport only if the Commissioner of CBP determines that the volume or value of business at the airport is insufficient to justify the unreimbursed availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business cleared through this type of airport is insufficient to justify the availability of customs services at no cost, customs services provided by CBP at the airport are not funded by appropriations from the general treasury of the United States. Instead, the user fee airport pays for the customs services provided by CBP. The user fee airport must pay the fees charged, which must be in an amount equal to the expenses incurred by the Commissioner of CBP in providing customs services at the user fee airport, including the salary and expenses of CBP employees to provide the customs services. *See* 19 U.S.C. 58b.

The Commissioner of CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and 19 CFR 122.15. The Commissioner designates user fee airports on a case-by-case basis. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is

¹ For purposes of this technical rule, an “aircraft” is defined as any device used or designed for navigation or flight in air and does not include hovercraft. 19 CFR 122.1(a).

² A landing rights airport is “any airport, other than an international airport or user fee airport, at which flights from a foreign area are given permission by Customs to land.” 19 CFR 122.1(f).

³ Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the newly established U.S. Department of Homeland Security. The Secretary of Homeland Security delegated the authority to designate user fee facilities to the Commissioner of CBP through Department of Homeland Security Delegation, Sec. II.A., No. 7010.3 (May 11, 2006).

executed between the Commissioner of CBP and the sponsor of the user fee airport. Pursuant to 19 CFR 122.15(c), the designation of an airport as a user fee airport must be withdrawn if either CBP or the airport authority gives 120 days written notice of termination to the other party or if any amounts due to be paid to CBP are not paid on a timely basis.

The list of designated user fee airports is set forth in 19 CFR 122.15(b). Periodically, CBP updates the list to include newly designated airports that were not previously on the list, to reflect any changes in the names of the designated user fee airports, and to remove airports that are no longer designated as user fee airports.

Recent Changes Requiring Updates to the List of User Fee Airports

This document updates the list of user fee airports in 19 CFR 122.15(b) by adding the following three airports: Witham Field Airport in Stuart, Florida; Plattsburgh International Airport in Plattsburgh, New York; and Fort Worth Meacham International Airport in Fort Worth, Texas. The Commissioner of CBP has signed MOAs with the respective airport authorities designating each of these three airports as a user fee airport.⁴

Additionally, this document updates the list of user fee airports in 19 CFR 122.15(b) by removing two airports: Griffiss International Airport in Rome, New York, and Cobb County International Airport in Kennesaw, Georgia. After the airport authority of Griffiss International Airport requested to terminate its user fee status on August 5, 2020, the airport authority and CBP mutually agreed to terminate the user fee status of Griffiss International Airport effective on October 10, 2020. The airport authority of Cobb County International Airport requested to terminate its user fee status on July 1, 2020, and the airport authority and CBP mutually agreed to terminate the user fee status of Cobb County International Airport effective on October 10, 2020.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency is exempted from the prior public notice and comment procedures if it finds, for good cause, that such procedures are impracticable, unnecessary, or contrary to the public interest. This final rule

⁴ Then-Commissioner Kevin K. McAleenan signed MOAs designating Witham Field Airport on November 5, 2018, and Fort Worth Meacham International Airport on August 29, 2017. Then-Acting Commissioner Mark A. Morgan signed an MOA designating Plattsburgh International Airport on August 28, 2019.

makes conforming changes by updating the list of user fee airports to add three airports that have already been designated by the Commissioner of CBP as user fee airports and by removing two airports for which the Commissioner has withdrawn the user fee airport designation, in accordance with 19 U.S.C. 58b. Because this conforming rule has no substantive impact, is technical in nature, and does not impose additional burdens on or take away any existing rights or privileges from the public, CBP finds for good cause that the prior public notice and comment procedures are impracticable, unnecessary, and contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

Paperwork Reduction Act

There is no new collection of information required in this document; therefore, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b). Acting Commissioner Troy A. Miller, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122, of title 19 of the Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

■ 1. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1415, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * *

- 2. In § 122.15, amend the table in paragraph (b) as follows:
 - a. Add a second entry for “Fort Worth, Texas” immediately following the existing entry for “Fort Worth, Texas”;
 - b. Remove the entry for “Kennesaw, Georgia”;
 - c. Add an entry for “Plattsburgh, New York” in alphabetical order;
 - d. Remove the entry for “Rome, New York”; and
 - e. Add an entry for “Stuart, Florida” in alphabetical order.

The additions read as follows:

§ 122.15 User fee airports.

* * * * *

(b) * * *

Location	Name
Fort Worth, Texas	Fort Worth Meacham International Airport.
Plattsburgh, New York	Plattsburgh International Airport.
Stuart, Florida	Witham Field Airport.

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ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, September 23, 2021 (85 FR 52823)]

HARBOR MAINTENANCE FEE

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

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

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

DATES: Comments are encouraged and must be submitted (no later than October 18, 2021) to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR 35816) on July 07, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions

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

Overview of This Information Collection

Title: Harbor Maintenance Fee.

OMB Number: 1651-0055.

Form Number: CBP Form 349 and 350.

Current Actions: Extension with an increase in burden hours.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The Harbor Maintenance Fee (HMF) and Trust Fund is used for the operation and maintenance of certain U.S. channels and harbors by the Army Corps of Engineers. U.S. Customs and Border Protection (CBP) is required to collect the HMF from importers, domestic shippers, and passenger vessel operators using federal navigation projects. See 19 CFR 24.24. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent of its value if the loading or unloading occurs at a port that has been designated by the Army Corps of Engineers. 19 CFR 24.24(a). The HMF also applies to the total ticket value of embarking and disembarking passengers and on cargo admissions into a Foreign Trade Zone (FTZ). See 19 CFR 24.24(e)(2)(iii).

CBP Form 349, *Harbor Maintenance Fee Quarterly Summary Report*, and CBP Form 350, *Harbor Maintenance Fee Amended Quarterly Summary Report* are completed by domestic shippers, foreign trade zone applicants, and passenger vessel operators and submitted with payment to CBP. 19 CFR 24.24(e).

CBP uses the information collected on CBP Forms 349 and 350 to verify that the fee collected is timely and accurately submitted. These forms are authorized by the Water Resources Development Act of 1986 (26 U.S.C. 4461, *et seq.*) and provided for by 19 CFR 24.24, which also includes the list of designated ports. CBP Forms 349 and 350 are accessible at <http://www.cbp.gov/newsroom/publications/forms> or they may be completed and filed electronically at www.pay.gov.

Type of Information Collection: CBP Form 349.

Estimated Number of Respondents: 846.

Estimated Number of Annual Responses per Respondent: 4.

Estimated Number of Total Annual Responses: 3,384.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 1692.

Type of Information Collection: CBP Form 350.

Estimated Number of Respondents: 23.

Estimated Number of Annual Responses per Respondent: 4.

Estimated Number of Total Annual Responses: 92.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 46.

Type of Information Collection: Record Keeping.

Estimated Number of Respondents: 869.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 869.

Estimated Time per Response: 0.166 hours.

Estimated Total Annual Burden Hours: 144.

Dated: September 14, 2021.

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

[Published in the Federal Register, September 17, 2021 (85 FR 51910)]



CREWMAN'S LANDING PERMIT (CBP FORM I-95)

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act

of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than October 18, 2021) to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 31331) on June 11, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of

information technology, e.g., permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Crewman's Landing Permit.

OMB Number: 1651-0114.

Form Number: CBP Form I-95.

Current Actions: Extension.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: CBP Form I-95, *Crewman's Landing Permit*, is prepared and presented to CBP by the master or agent of vessels and aircraft arriving in the United States for non-immigrant crewmembers applying for landing privileges. This form is provided for by 8 CFR 251.1(c) which states that, with certain exceptions, the master, captain, or agent shall present this form to CBP for each non-immigrant crewmember on board. In addition, pursuant to 8 CFR 252.1(e), CBP Form I-95 serves as the physical evidence that a non-immigrant crewmember has been granted a conditional permit to land temporarily, and it is also a prescribed registration form under 8 CFR 264.1 for crewmembers arriving by vessel or air. CBP Form I-95 is authorized by Section 252 of the Immigration and Nationality Act (8 U.S.C. 1282) and is accessible at: <https://www.cbp.gov/sites/default/files/assets/documents/2018-Nov/CBP%20Form%20I-95.pdf>.

Type of Information Collection: CBP Form I-95.

Estimated Number of Respondents: 433,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 433,000.

Estimated Time per Response: 0.067 Hours.

Estimated Total Annual Burden Hours: 29,011.

Dated: September 14, 2021.

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

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 September 22, 2021 and will remain in effect until 11:59 p.m. EDT on October 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 September 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of September 5, 2021, there have been over 220 million confirmed cases globally, with over 4.5 million confirmed deaths.³ There have been over 40.3 million confirmed and probable cases within the United States,⁴ over 1.5 million confirmed cases in Canada,⁵ and over 3.4 million confirmed cases in Mexico.⁶

DHS also notes that the Delta variant continues to drive an increase in cases, hospitalizations, and deaths in the United States.⁷ Canada and Mexico are also seeing increased case counts and deaths.⁸

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

² See 86 FR 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 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 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 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 (Sept. 7, 2021), Continued available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed Sept. 9, 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 Sept. 9, 2021).

⁵ WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Sept. 9, 2021).

⁶ *Id.*

⁷ See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Sept. 9, 2021).

⁸ See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Sept. 9, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Aug. 16, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), *Reportes*, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Sept. 9, 2021).

virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

In March 2020, U.S. and Canadian officials mutually determined that non-essential travel between the United States and Canada posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States 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.

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—

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).

- 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 October 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. In coordination with public health and medical experts, DHS continues working closely with its partners across the United States and internationally to determine how to safely and sustainably resume normal travel.

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, September 22, 2021 (85 FR 52609)]



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 September 22, 2021 and will remain in effect until 11:59 p.m. EDT on October 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 published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on September 21, 2021.²

DHS continues to monitor and respond to the COVID-19 pandemic. As of the week of September 5, 2021, there have been over 220 million confirmed cases globally, with over 4.5 million confirmed deaths.³ There have been over 40.3 million confirmed and probable cases within the United States,⁴ over 1.5 million confirmed cases in Canada,⁵ and over 3.4 million confirmed cases in Mexico.⁶

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also 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. 85 FR 16548 (Mar. 24, 2020).

² See 86 FR 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 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 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 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).

³ WHO, Coronavirus disease 2019 (COVID-19) Weekly Epidemiological Update (Sept. 7, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed Sept. 9, 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 Sept. 9, 2021).

⁵ WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Sept. 9, 2021).

⁶ *Id.*

DHS also notes that the Delta variant continues to drive an increase in cases, hospitalizations, and deaths in the United States.⁷ Canada and Mexico are also seeing increased case counts and deaths.⁸

Notice of Action

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

In March 2020, U.S. and Mexican officials mutually determined that non-essential travel between the United States and Mexico posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States 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

⁷ See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Sept. 9, 2021).

⁸ See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Sept. 9, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Sept. 9, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Sept. 9, 2021).

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).

have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

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

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

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

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

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on October 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. In coordination with public health and medical experts, DHS continues working closely with its partners across the United States and internationally to determine how to safely and sustainably resume normal travel.

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, September 22, 2021 (85 FR 52611)]

**PROPOSED MODIFICATION OF ONE RULING LETTER
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
ROOIBOS TEA**

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of Rooibos Tea.

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 modify one ruling letter concerning tariff classification of Rooibos Tea 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 November 5, 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: Michael J. Dearden, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of Rooibos Tea. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N280540,

dated November 18, 2016 (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 N280540, CBP classified Rooibos Tea in heading 1211, HTSUS, specifically in subheading 1211.90.40, HTSUS, which provides for "Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Mint leaves: Other." CBP has reviewed NY N280540 and has determined the ruling letter to be in error. It is now CBP's position that Rooibos Tea is properly classified, in heading 1211, HTSUS, specifically in subheading 1211.90.92, HTSUS, which provides for "Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Other: Fresh or dried."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N280540 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H320527, 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

N280540

November 18, 2016

CLA-2-09:OT:RR:NC:N4:232

CATEGORY: Classification

TARIFF NO.: 0902.10.1050; 0902.30.0090;

1211.90.4020

Ms. NELI ANDERSEN
W31 LLC
1237 *SMOKETREE DR.*
FOREST, VA 24551

RE: The tariff classification of flavored green tea, black tea and herbal tea from India and South Africa

DEAR Ms. ANDERSEN:

In your letter dated October 17, 2016, you requested a tariff classification ruling. Descriptive literature and samples of the product packaging accompanied your letter.

The subject merchandise is described as flavored green tea, various black teas and rooibos tea, all bearing the product name “Royal T-Stick”. “Green Tea” consists of 93 percent green tea and 7 percent natural flavor from lemons. “Moroccan” consists of 93 percent green tea and 7 percent natural flavor from mint leaves. “Earl Grey” consists of 93 percent black tea and 7 percent natural flavor from bergamot oranges. “Forest Fruits Tea” consists of 93 percent black tea and 7 percent natural flavor from blueberries and blackberries. “Lemon Tea” consists of 93 percent black tea and 7 percent natural flavor from lemons. “Orange Tea” consists of 93 percent black tea and 7 percent natural flavor from oranges. “Peach Tea” consists of 93 percent black tea and 7 percent natural flavor from peaches. “Strawberry Tea” consists of 93 percent black tea and 7 percent natural flavor from strawberries. “Rooibos Tea” consists of 100 percent rooibos tea (*Aspalathus linearis*).

The green and black teas are products of India and the rooibos tea is a product of South Africa. According to the information provided, you have stated to this office during a telephone conversation on November 17, 2016 that the green and black teas are flavored in India. However, you also submitted conflicting information from the manufacturer that the green and black teas are flavored (or blended) in the Netherlands.

All of the Royal T-Stick products are packaged in the Netherlands. They will be imported into the United States in cardboard boxes, containing either 15 or 30 individually wrapped oriented polypropylene micro-perforated foil pouches or “sticks”. The products are intended for both the wholesale and retail market. Boxes with 15 units have a net weight of 28.5 grams and boxes with 30 units are said to have a net weight of 57 grams. The product is steeped in a cup of hot water to make a beverage.

The applicable subheading for “Green Tea” and “Moroccan” Royal T-Sticks will be 0902.10.1050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Green tea (not fermented) in immediate packings of a content not exceeding 3kg...flavored...other. The general rate of duty will be 6.4 percent ad valorem.

The applicable subheading for the “Earl Grey”, “Forest Fruits Tea”, “Lemon Tea”, “Orange Tea”, “Peach Tea”, and “Strawberry Tea” Royal T-Sticks will be 0902.30.0090, Harmonized Tariff Schedule of the United States (HTSUS),

which provides for Tea, whether or not flavored: Black tea (fermented) and partly fermented tea, in immediate packings of a content not exceeding 3kg...Other. The general rate of duty will be Free.

The applicable subheading for the “Rooibos Tea” Royal T-Sticks will be 1211.90.4020, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Plants and parts of plants (including seeds and fruits) of a kind used primarily in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh or dried, whether or not cut, crushed, or powdered: Other: Mint leaves: Other: Herbal teas and herbal infusions (single species, unmixed). The general rate of duty will be 4.8 percent ad valorem.

Additional U.S. Note 4 to Chapter 9 provides that all immediate containers and wrappings, and all intermediate containers of tea in packages of less than 2.3 kilograms, net, each are dutiable at the rates applicable to such containers and wrappings if imported empty.

The submitted samples of the product packaging (cardboard boxes) are not properly marked with the country of origin because they all state on side panels that the teas are “Made in the Netherlands” along with the name, address and website of the manufacturer in the Netherlands.

Section 134.11 of the Customs Regulations (19 C.F.R. 134.11) provides in part:

Unless excepted by law...every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article, at the time of importation into the Customs territory of the U.S.

Therefore, if imported as is, these containers will not meet the country of origin marking requirements.

Pursuant to 19 U.S.C. § 1304 (f), the marking requirements of subsections (a) and (b) shall not apply to articles described in subheadings 0901.21, 0901.22, 0902.10, 0902.20, 0902.30, 0902.40, 2101.10, and 2101.20 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995. As a result, due to the fact that “Green Tea”, “Moroccan”, “Earl Grey”, “Forest Fruits Tea”, “Lemon Tea”, “Orange Tea”, “Peach Tea”, “Strawberry Tea” are all classified in subheadings 0902.10 and 0902.30, neither the imported products nor their containers are required to be marked with the foreign country of origin. This statutory exemption is effective for goods entered, or withdrawn from warehouse, for consumption on or after October 11, 1996.

However, the Miscellaneous Trade and Technical Corrections Act of 1996 does not apply to the “Rooibos Tea” Royal T-Stick classified under 1211.90.4020, Harmonized Tariff Schedule of the United States (HTSUS) and this merchandise is required to be marked with the foreign country of origin, namely South Africa.

Although we note the discrepancies provided to this office concerning the manufacturing process (the green and black teas were flavored in India/the blending of ingredients was performed in the Netherlands), it is actually immaterial to determining the country of origin for these products, because blending or flavoring of tea does not constitute a substantial transformation.

Based on the information provided, the “Green Tea”, “Moroccan”, “Earl Grey”, “Forest Fruits Tea”, “Lemon Tea”, “Orange Tea”, “Peach Tea”, and

“Strawberry Tea” Royal T-Sticks are products of India and the “Rooibos Tea” Royal T-Stick is a product of South Africa.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301–575–0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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 Frank Troise at frank.l.troise@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H320527
OT:RR:CTF:FTM H320527 MD
CATEGORY: Classification
TARIFF NO.: 1211.90.92

MS. NELI ANDERSEN
W31 LLC
1237 SMOKETREE DRIVE
FOREST, VIRGINIA 24551

RE: Modification of NY N280540; Tariff Classification of Rooibos Tea from South Africa

DEAR MS. ANDERSEN:

This is in reference to New York Ruling Letter (“NY”) N280540, dated November 18, 2016, which was issued to you concerning the tariff classification of various teas. Specifically, U.S. Customs and Border Protection (“CBP”) found that “Rooibos Tea” from South Africa was classified within subheading 1211.90.4020, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”), which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Mint leaves: Other: Herbal teas and herbal infusions (single species, unmixed).” The general, column one duty rate was 4.8 percent *ad valorem*.

We have reviewed NY N280540 and determined the tariff classification of “Rooibos Tea” to be in error. As such, this ruling serves to modify NY N280540 with regard to the tariff classification of the “Rooibos Tea” from South Africa. CBP’s determination with respect to the remainder of NY N280540, including the tariff classifications of the other varieties of teas, is not affected by this action.

FACTS:

In NY N280540, the “Rooibos Tea” from South Africa was described as follows:

The subject merchandise is described as [...] rooibos tea, [] bearing the product name “Royal T-Stick.” [...] “Rooibos Tea” consists of 100 percent rooibos tea (*Aspalathus linearis*).

[...]

The applicable subheading for the “Rooibos Tea” Royal T-Sticks will be 1211.90.4020, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “Plants and parts of plants (including seeds and fruits) of a kind used primarily in perfumery, in pharmacy or for insecticidal, fungicidal, or similar purposes, fresh or dried, whether or not cut, crushed, or powdered: Other: Mint leaves: Other: Herbal teas and herbal infusions (single species, unmixed). The general rate of duty will be 4.8 percent *ad valorem*.

While previously classified within subheading 1211.90.4020, HTSUSA, CBP now believes that the proper classification for the “Rooibos Tea” from South Africa is under subheading 1211.90.9280, HTSUSA.

ISSUE:

What is the tariff classification of the “Rooibos Tea” from South Africa?

LAW AND ANALYSIS:

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

The 2021 HTSUS provisions under review are as follows:

1211	Plants and parts of plants (including seeds and fruits), of a kind primarily used in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered:
1211.90	Other:
	Mint leaves:
1211.90.40	Other:
1211.90.4020	Herbal teas and herbal infusions (single species, unmixed).
	* * *
	Other:
1211.90.92	Fresh or dried:
	Other:
1211.90.9280	Herbal teas and herbal infusions (single species, unmixed)
	* * *

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

In relevant part, the ENs to heading 1211 provide:

Certain plants or parts of plants (including seeds or fruits of this heading may be up (e.g. in sachets) for making herbal infusions or herbal “teas.” Such products consisting of plants or parts of plants (including seeds or fruits of a single species (e.g., peppermint “tea”) remain classified in this heading.

* * *

As noted, the “Rooibos Tea” from South Africa is understood to consist of “100 percent rooibos tea (*Aspalathus linearis*).” Further described within NY N280540, “[a]ll of the Royal T-Stick products are packaged [...] [in] individual wrapped oriented polypropylene micro-perforated foil pouches or ‘sticks’

[which are] steeped in a cup of hot water to make a beverage.” While not discussed in earnest within NY N280540, it is important to note that the “Rooibos Tea” is properly classified within heading 1211, HTSUS, as opposed to heading 0902, which provides for teas exclusively derived from the botanical genus *Thea*. Specifically, the ENs to heading 0902 state, in pertinent part that “this heading covers the different varieties of tea derived from the plants of the botanical genus *Thea* (*Camellia*).” Moreover, the ENs elaborate that “the heading further excludes products not derived from the plants of the botanical genus *Thea* but sometimes called “teas,” e.g.: ... (b) Products for making herbal infusions or herbal “teas.” These are classified, for example, in headings 08.13, 09.09, 12.11 or 21.06.” Although the preparation of the “Rooibos Tea” may mirror that of traditionally prepared teas, its composition of “100 percent rooibos tea (*Aspalathus linearis*),” which is not within the *Thea* genus precludes classification therein. Thus, we find the exclusion of the “Rooibos Tea” from heading 0902, HTSUS, to be proper because the plant from which it is derived is not of the *Thea* genus. The ENs for heading 1211 allow for “Certain plants or parts of plants (including seeds or fruits of this heading may be up (e.g. in sachets) for making herbal infusions or herbal ‘teas.’ Such products consisting of plants or parts of plants (including seeds or fruits of a single species (e.g., peppermint ‘tea’) remain classified in this heading.” Here, the “tea” made from the rooibos plant meets this definition and is properly classified therein. Accordingly, the “Rooibos Tea,” at the heading level, is properly classified within heading 1211, HTSUS, as an “herbal tea” derived from the “plants or parts of plants” typically classified therein.

That said, in NY N280540, the “Rooibos Tea” from South Africa was incorrectly classified in subheading 1211.90.4020, HTSUSA. Subheading 1211.90.4020, HTSUSA explicitly provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: *Mint leaves*: Other: Herbal teas and herbal infusions (single species, unmixed).” While the “Rooibos Tea” is derived from the “plants or parts of plants” of heading 1211, HTSUS, and is an “herbal tea [or] herbal infusion” made from a single plant species, there is no information to suggest that the “Rooibos Tea” at issue contains any mint leaves. Additionally, there is no information, legal or biological, to suggest that mint (*Mentha*) and rooibos (*Aspalathus*) are similar enough to one another that they could be classified interchangeably.

Accordingly, we determine that the “Rooibos Tea” from South Africa are properly classified under subheading 1211.90.9280, HTSUSA, which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Other: Fresh or dried: Other: Herbal teas and herbal infusions (single species, unmixed).”

HOLDING:

Under the authority of GRIs 1 and 6, the “Rooibos Tea” from South Africa is classified under subheading 1211.90.9280, HTSUSA, which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or

powdered: Other: Other: Fresh or dried: Other: Herbal teas and herbal infusions (single species, unmixed).” The general rate of duty is free.

EFFECT ON OTHER RULINGS:

NY N296408, dated May 16, 2018, is hereby MODIFIED.

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

Sincerely,

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 21–118

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff, and THAI PREMIUM PIPE COMPANY LTD. and PACIFIC PIPE PUBLIC COMPANY LIMITED, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00214

[Sustaining the U.S. Department of Commerce’s second remand results in the 2016–2017 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand.]

Dated: September 17, 2021

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiff Saha Thai Steel Pipe Public Company Limited.

Robert G. Gosselink, *Jonathan M. Freed*, and *Aqmar Rahman*, Trade Pacific PLLC, of Washington, D.C., for Consolidated Plaintiff Thai Premium Pipe Company Ltd.

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for Consolidated Plaintiff Pacific Pipe Public Company Limited.

In K. Cho, Trial Attorney, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Brendan S. Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Roger B. Schagrin and *Elizabeth J. Drake*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

OPINION

Choe-Groves, Judge:

Plaintiff Saha Thai Steel Pipe Public Company Limited (“Saha Thai”) and Consolidated Plaintiffs Thai Premium Pipe Company Ltd. (“Thai Premium”) and Pacific Pipe Public Company Limited (“Pacific Pipe”) filed this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. See Circular Welded Carbon Steel Pipes and Tubes from Thailand (“*Final Results*”), 83 Fed. Reg. 51,927 (Dep’t of Commerce Oct. 15, 2018) (final results of antidumping duty admin. review; 2016–2017); *see also* Decision Mem. for the Final Results of Antidumping Duty Admin.

Review; 2016–2017 (Oct. 4, 2018), PR 143. Before the Court are the Final Results of Redetermination Pursuant to CIT Order, ECF No. 83 (“*Second Remand Results*”), which the Court ordered in *Saha Thai Steel Pipe Public Co. v. United States* (“*Saha Thai II*”), 44 CIT __, 487 F. Supp. 3d 1323 (2020). For the reasons discussed below, the Court sustains the *Second Remand Results*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinions and recounts the facts relevant to the Court’s review of the Second Remand Results. See *Saha Thai Steel Pipe Pub. Co. v. United States* (“*Saha Thai I*”), 43 CIT __, __, 422 F. Supp. 3d 1363, 1365–67 (2019); *Saha Thai II*, 44 CIT at __, 487 F. Supp. 3d at 1326–27.

The Court concluded in *Saha Thai I* that Commerce’s particular market situation adjustment to the cost of production for the purpose of the sales-below-cost test was not in accordance with the law and remanded to Commerce for further consideration. 43 CIT at __, 422 F. Supp. 3d at 1369–70, 1371. Because the Court concluded that the particular market situation adjustment was not in accordance with the law, the Court did not consider whether the particular market situation adjustment, without a duty drawback adjustment for Saha Thai, was supported by substantial evidence; and whether Commerce conducted the underlying administrative review in a fair and impartial manner in accepting the particular market situation allegation submitted by Wheatland Tube Company and in the opportunity Commerce gave to interested parties to offer information. *Id.* at __, 422 F. Supp. 3d at 1371–72.

In the Final Results of Redetermination Pursuant to Remand, ECF Nos. 62, 63 (“*Remand Results*”), filed under respectful protest, Commerce made a particular market situation determination under 19 U.S.C. § 1677(15)(C), disregarded all home market sales without conducting a sales-below-cost test, and calculated normal value based on constructed value. *Remand Results* at 1–2, 7–8. Commerce also made a particular market situation determination under 19 U.S.C. § 1677b(e) and calculated constructed value with an adjustment to the cost of production as an alternative calculation methodology. *Id.* at 8–11. The Court concluded in *Saha Thai II* that Commerce’s exclusion of home market sales, Commerce’s particular market situation determination under 19 U.S.C. § 1677(15)(C), Commerce’s particular market situation determination under 19 U.S.C. § 1677b(e), and Commerce’s application of an alternative calculation methodol-

ogy under 19 U.S.C. § 1677b(e) were not in accordance with the law and remanded. 44 CIT at __, 487 F. Supp. 3d at 1331–35.

On second remand, Commerce “continue[d] to find that a particular market situation existed in Thailand during the period of review that distorted the price of hot rolled coil.” *Second Remand Results* at 1–2, 5. Under respectful protest, however, Commerce recalculated the dumping margins without a particular market situation adjustment. *Id.* at 2, 5–6.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record 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

Saha Thai, Pacific Pipe, and Defendant United States ask the Court to sustain the *Second Remand Results*. Pl.’s Comments Supp. Remand Redetermination Results at 2, ECF No. 87; Consol. Pl.’s Comments Supp. Remand Redetermination Results at 2, ECF No. 88; Def.’s Comments Supp. Second Remand Results at 2, ECF No. 89. Defendant-Intervenor Wheatland Tube Company supports Commerce’s redetermination filed under protest. *See* Def.-Interv. Wheatland Tube Company’s Comments Commerce’s Second Redetermination Remand at 3, ECF No. 86. No party filed comments opposing the *Second Remand Results*.

The U.S. Court of Appeals for the Federal Circuit has held that when Commerce advocates a position zealously and must abandon that position in order to comply with a ruling of the U.S. Court of International Trade, Commerce preserves its right to appeal if it adopts a complying position under protest. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003). In this case, under protest, Commerce recalculated the weighted-average dumping margins for Pacific Pipe, Saha Thai, and Thai Premium without a particular market situation adjustment. *Second Remand Results* at 5–6. The weighted-average dumping margins changed from 30.61% to 7.38% for Pacific Pipe, 28% to 0% for Saha Thai, and 30.98% to 5.23%

for Thai Premium. *Id.* at 6. Commerce’s recalculation of the weighted-average dumping margins without a particular market situation adjustment, under protest, is consistent with the Court’s prior opinions and orders in *Saha Thai I* and *Saha Thai II*.

Commerce maintained its determination that a particular market situation distorted the cost of production. *Second Remand Results* at 1–3, 5–6. The reiterated determination has no effect on the dumping margins because Commerce recalculated the dumping margins without a particular market situation adjustment. No party challenges the determination.

Because the Court sustains Commerce’s removal of the particular market situation adjustment, consideration of Commerce’s reiterated particular market situation determination in the *Second Remand Results* would have no practical significance and is mooted. *See Morton Int’l, Inc. v. Cardinal Chem. Co.*, 967 F.2d 1571, 1574 (Fed. Cir. 1992) (Nies, C.J., dissenting from the orders declining suggestions for rehearing en banc) (citations omitted) (“An issue is also said to be ‘mooted’ when a court, having decided one dispositive issue, chooses not to address another equally dispositive issue.”); *Daewoo Elecs. Co. v. Int’l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1513 (Fed. Cir. 1993) (“[O]ur disposition of the tax incidence issue moots two other issues . . .”).

The Court sustains the *Second Remand Results* without considering Commerce’s reiterated particular market situation determination in the *Second Remand Results*.

CONCLUSION

The Court sustains the *Second Remand Results*.

Judgment will be entered accordingly.

Dated: September 17, 2021
New York, New York

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

Slip Op. 21–119

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00208

[Sustaining the U.S. Department of Commerce’s remand results in the 2017–2018 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand.]

Dated: September 17, 2021

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiff Saha Thai Steel Pipe Public Company Limited.

In K. Cho, Trial Attorney, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Brendan S. Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Roger B. Schagrin and *Elizabeth J. Drake*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

Alan H. Price, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Tubular Products Inc.¹

OPINION

Choe-Groves, Judge:

Plaintiff Saha Thai Steel Pipe Public Company Limited (“Saha Thai” or “Plaintiff”) filed this action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2017–2018 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand (“Final Results”)*, 84 Fed. Reg. 64,041 (Dep’t of Commerce Nov. 20, 2019) (final results of antidumping duty admin. review; 2017–2018); *see also* Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review; 2017–2018 (Nov. 13, 2019) (“Final IDM”), PR 121. Before the Court are the Final Results of Redetermination Pursuant to CIT Order, ECF No. 53 (“*Remand Results*”), which the Court ordered in *Saha Thai Steel Pipe Public Co. v. United States (“Saha Thai I”)*, 44 CIT ___, 476 F. Supp. 3d 1378 (2020). For the reasons discussed below, the Court sustains the *Remand Results*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinion and recounts the facts relevant to the Court’s review of the *Remand Results*. *See Saha Thai I*, 44 CIT at ___, 476 F. Supp. 3d at 1380–81.

¹ Nucor Tubular Products Inc. was formerly Independence Tube Corporation and Southland Tube, Incorporated. [Revised] Disclosure of Corporate Affiliations and Financial Interest, ECF No. 34.

The Court concluded in *Saha Thai I* that Commerce’s particular market situation adjustment to the cost of production while basing normal value on home market sales was not in accordance with the law and remanded. *Id.* at ___, 476 F. Supp. 3d at 1386. Plaintiff had challenged in the alternative the underlying determination that a particular market situation distorted the cost of production, arguing that “[e]ven assuming that Commerce has the statutory authority to alter a respondent’s actual costs of production (for purposes of the below-cost test), Commerce’s determination in this case is still contrary to law because Commerce did not apply the appropriate legal criteria for determining the existence of a particular market situation.” Pl. *Saha Thai*’s Opening Br. Supp. Its Mot. J. Agency R. at 15–20, ECF Nos. 32, 33. Because the Court remanded the particular market situation adjustment as not in accordance with the law, the Court did not consider whether the particular market situation adjustment was supported by substantial evidence, whether Commerce should have made a duty drawback adjustment in calculating the particular market situation adjustment, Plaintiff’s alternative argument that Commerce’s particular market situation determination was not in accordance with the law, or whether the particular market situation determination was supported by substantial evidence. *See Saha Thai I*, 44 CIT at ___, 476 F. Supp. 3d at 1385–86.

On remand, under respectful protest, Commerce recalculated *Saha Thai*’s dumping margin without a particular market situation adjustment. *Remand Results* at 2–4.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record 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

Plaintiff and Defendant United States ask the Court to sustain the *Remand Results*. Pl.’s Comments Supp. Remand Redetermination Results at 2, ECF No. 56; Def.’s Comments Supp. Remand Results at 2, ECF No. 57. Defendant-Intervenor Wheatland Tube Company sup-

ports Commerce's *Remand Results* filed under protest. See Def.-Interv. Wheatland Tube Company's Comments Commerce's Redetermination Remand at 3, ECF No. 55. No party filed comments opposing the *Remand Results*.

Commerce's *Remand Results* are consistent with the Court's prior opinion and order in *Saha Thai I*. Commerce has recalculated, under protest, the weighted-average dumping margin for Saha Thai without a particular market situation adjustment. *Remand Results* at 4. The weighted-average dumping margin for Saha Thai changed from 5.15% to 0%. *Id.*

Because the Court concludes that the *Remand Results* are in accordance with the law and comply with the Court's remand order, the Court sustains the *Remand Results*.

CONCLUSION

The Court sustains the *Remand Results*.

Judgment will be entered accordingly.

Dated: September 17, 2021

New York, New York

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



Slip Op. 21-120

ACQUISITION 362, LLC DBA STRATEGIC IMPORT SUPPLY, Plaintiff, v.
UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-03762

[Denying Plaintiff's Motion for Reconsideration and Leave to Amend Its Complaint.]

Dated: September 20, 2021

Heather L. Marx, Cozen O'Connor, of Minneapolis, MN, for Plaintiff Acquisition 362, LLC DBA Strategic Import Supply. With her on the brief were *Thomas G. Wallrich* and *Cassandra M. Jacobsen*.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY for Defendant United States. With him on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance, *Aimee Lee*, Assistant Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of Counsel was *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Vaden, Judge:

On May 19, 2021, Plaintiff Acquisition 362, LLC, doing business as Strategic Import Supply, filed a motion under USCIT Rule 59(a)(1)(B) for reconsideration of the Court's April 21, 2021 decision and the accompanying judgment that dismissed Plaintiff's case for lack of subject matter jurisdiction. *See Acquisition 362, LLC v. United States*, 517 F.Supp.3d 1318 (Ct. Int'l Trade 2021) (*Acquisition 362 I*). In that decision, the Court found that the precondition for the Court's 28 U.S.C. § 1581(a) jurisdiction, a valid protest under 19 U.S.C. § 1514, was absent; and the Court therefore lacked subject matter jurisdiction. In its Motion for Reconsideration, Plaintiff cites newly discovered evidence that it argues merits reconsideration of the Court's order dismissing its action. *See* Pl.'s Mot. for Recons. (Pl.'s Mot.) at 4, ECF No. 31. Plaintiff also seeks leave of the Court to amend its complaint to assert jurisdiction under 28 U.S.C. § 1581(i).¹ Pl.'s Mot. at 5, ECF No. 31. Defendant filed a response to Plaintiff's Motion on June 23, 2021. Def.'s Resp. in Opp'n to Pl.'s Mot. for Recons. (Def.'s Resp.), ECF No. 33. Defendant argues that Plaintiff's evidentiary arguments are without merit and that Plaintiff's request to amend its complaint is both procedurally inappropriate and futile. *See id.* Plaintiff filed a reply brief on July 14, 2021, and the Motion is ripe for consideration. Pl.'s Reply in Supp. of Mot. for Recons. (Pl.'s Reply), ECF No. 34. For the reasons that follow, Plaintiff's Motion is denied.

BACKGROUND

The Court presumes familiarity with the facts of this case as set forth in its previous opinion, *see Acquisition 362 I*, 517 F.Supp.3d at 1320–22, and recounts those facts relevant to the disposition of this Motion. Plaintiff imported tires from China on several occasions throughout 2016. Compl. ¶ 7, ECF No. 5; Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss (Pl.'s Mem.) at 2, ECF No. 27. These tire imports were subject to a 2015 countervailing duty order issued by the U.S. Department of Commerce (Commerce). Consequently, Plaintiff deposited payment at the then-current countervailing duty rate – 30.61%. Pl.'s Mem. at 2, ECF No. 27. U.S. Customs and Border Protection (Customs) liquidated Plaintiff's entries between October 19, 2018 and November 9, 2018, at the 30.61% countervailing duty rate. Compl. ¶ 11, ECF No. 5; Summons, ECF No. 1–1. On June 17,

¹ Plaintiff improperly seeks leave to amend its complaint via a Rule 59 motion for reconsideration rather than a Rule 15 motion to amend pleadings. Nonetheless, the Court will consider Plaintiff's request because, even if properly filed, it would fail for futility.

2019, Commerce concluded an administrative review, initiated by other parties, determining that the applicable countervailing duty amount for tires from China should be nearly cut in half – from 30.61% to 15.56%. See *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China: Amended Final Results of Countervailing Duty Administrative Review*; 2016, 84 Fed. Reg. 28,011 (June 17, 2019); Pl.’s Mem. at 2, ECF No. 27.

In *Acquisition 362 I*, Plaintiff, claiming jurisdiction under 28 U.S.C. § 1581(a), sought to protest Customs’s failure to assess the amended countervailing duties on Plaintiff’s 2016 entries. Pl.’s Mem. at 1, ECF No. 27; Compl. ¶ 2, ECF No. 5. Despite acknowledging filing its protests outside the required 180-day post-liquidation time period, Plaintiff urged this Court to identify an alternative starting point for the 180-day clock. See Pl.’s Mem. at 7, ECF No. 27. Specifically, Plaintiff argued this Court should recognize the date Customs received amended countervailing duty rates from Commerce as the starting date for the 180-day time period to file a valid protest. *Id.* at 7.

Defendant argued that the alleged decision Plaintiff sought to protest was not a Customs decision for which Plaintiff could assert a valid protest. See Def.’s Reply in Supp. of Mot. to Dismiss (Def.’s Reply) at 9, ECF No. 28. Further, because the Plaintiff failed to file its protests within 180-days of a recognized Customs decision, Defendant argued Plaintiff failed to meet the jurisdictional prerequisites necessary to bring a successful challenge before this Court under 28 U.S.C. § 1581(a). See Def.’s Mot. to Dismiss (Def.’s Mot.) at 12, ECF No. 25.

On April 21, 2021, the Court granted Defendant’s Motion to Dismiss. See *generally Acquisition 362 I*, 517 F.Supp.3d 1318. In its decision, the Court found that the Plaintiff’s challenge failed for two reasons. *Id.* First, Plaintiff invoked the wrong jurisdictional statute to challenge the actual decision with which it took issue – the countervailing duty rate determined by Commerce rather than by Customs. *Id.* at 1322–24. Second, even if Plaintiff’s protests were permissible, because they were filed outside the required 180-day time period, they would be untimely and thus deprive the Court of jurisdiction. *Id.* at 1324. Plaintiff subsequently moved on May 19, 2021, for this Court to reconsider its decision in *Acquisition 362 I*. Pl.’s Mot., ECF No. 31.

Plaintiff argues that newly-discovered, previously-unavailable evidence warrants reconsideration of the Court’s Order. Pl.’s Mot. at 4, ECF No. 31. Plaintiff’s newly-discovered evidence consists of a protest

filed with Customs that is allegedly similar to the protests in *Acquisition 362 I* yet was decided differently. Decl. of Heather Marx in Supp. of Pl.'s Mot. for Recons. (Decl.), ECF No. 32. On May 1, 2020, Customs liquidated one of Plaintiff's entries from December 2015. Decl., ECF No. 32–1 at 2. On August 5, 2020, less than 180 days later, Plaintiff filed a protest with Customs on the same grounds argued in the protests at issue in *Acquisition 362 I*. *Id.* Nine days after this Court issued its opinion in *Acquisition 362 I*, Customs issued a decision regarding Plaintiff's August 2020 protest, assessing a lower countervailing duty rate of 15.53%.² Decl., ECF No. 32–2 at 2.

The Government opposes Plaintiff's Motion. *See* Def.'s Resp., ECF No. 33. It argues that Plaintiff's alleged newly-discovered evidence fails to show that the Court erred in dismissing this case for lack of subject matter jurisdiction. *Id.* at 3. Unlike the protests at issue in *Acquisition 362 I*, Plaintiff's August 2020 protest was timely filed – within 180 days of liquidation. *Id.* Therefore, the Government argues, this newly-discovered evidence fails to undermine the Court's rationale for dismissing Plaintiff's original challenge for lack of subject matter jurisdiction. *Id.*

The Government also opposes the Plaintiff's request for leave to amend its complaint to assert jurisdiction under 28 U.S.C. § 1581(i) for two reasons. Def.'s Resp. at 4, ECF No. 32. First, the Government argues the Plaintiff's amendment to its complaint would improperly create jurisdiction by alleging an entirely new claim based on events after Plaintiff's filing suit. *Id.* Second, any amendment alleging jurisdiction under 28 U.S.C. § 1581(i) would be futile because such jurisdiction is not available in this case. Def.'s Resp. at 5, ECF No. 32.

STANDARD OF REVIEW

Plaintiff moves the Court to reconsider, alter, or amend its prior decision under USCIT Rule 59(a)(1)(B), which is a mechanism for requests for reconsideration in the Court of International Trade.³

² This rate differs from the 15.56% rate listed in Commerce's 2019 final order establishing a reduced duty. *Cf. Amended Final Results of Countervailing Duty Administrative Review*, 84 Fed. Reg. at 28,012. The discrepancy of 0.03% is not explained in the materials before the Court; however, it is immaterial to the disposition of the Motion.

³ Despite the plain text of Rule 59 referring to "actions which have been tried and gone to judgment," longstanding decisions of this Court identify Rule 59 as allegedly broad enough to include "rehearing of any matter decided by the court without a jury." *Nat'l Corn Growers Ass'n v. Baker*, 623 F.Supp. 1262, 1274 (Ct. Int'l Trade 1985). Regardless of whether USCIT Rule 59 or USCIT Rule 60 is the more textually appropriate basis for Plaintiff's Motion, this Court has the power to reconsider its prior opinion. *Compare* USCIT Rule 59(a)(1)(B) (invoked by Plaintiff here and providing for rehearing "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court"), *with* USCIT Rule 60(b) (providing that the Court "may relieve a party or its legal representative from a *final judgment, order, or proceeding*" for any of the listed reasons (emphasis added)).

See *United States v. UPS Customhouse Brokerage, Inc.*, 714 F. Supp.2d 1296, 1300 (Ct. Int'l Trade 2010). Under USCIT Rule 59(a)(1)(B), “The court may, on motion, grant a new trial or rehearing on all or some of the issues – and to any party... after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.” USCIT Rule 59(a)(1)(B). The grant of a motion for reconsideration is within the sound discretion of the Court. *UPS Customhouse Brokerage, Inc.*, 714 F.Supp.2d at 1300 (citing *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990)).

Reconsideration or rehearing of a case is proper when “a significant flaw in the conduct of the original proceeding” exists. *Union Camp Corp. v. United States*, 963 F.Supp. 1212, 1213 (Ct. Int'l Trade 1997) (quoting *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). Examples include:

(1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party’s ability to adequately present its case[,] and must be addressed by the Court.

Id. at 1213 (quoting *United States v. Gold Mountain Coffee, Ltd.*, 601 F.Supp. 212, 214 (Ct. Int'l Trade 1984)).

The purpose of a Rule 59 motion is not to allow the losing party to reargue its case. *Peerless Clothing Int'l, Inc. v. United States*, 991 F.Supp.2d 1335, 1337 (Ct. Int'l Trade 2014). The Court should not disturb its prior decision unless it is manifestly erroneous. *Papierfabrik August Koehler SE v. United States*, 44 F.Supp.3d 1356, 1357 (Ct. Int'l Trade 2015).

DISCUSSION

Plaintiff requests that the Court reconsider its decision in *Acquisition 362 I*. See Pl.’s Mot., ECF No. 31. Plaintiff submits as new evidence a successful protest filed with Customs that Plaintiff argues is identical to the protests at issue in *Acquisition 362 I*. See Decl., ECF No. 32. Both the protest submitted as new evidence in this Motion and the protests at issue in *Acquisition 362 I* relate to the Plaintiff’s assertion that the countervailing duties assessed against it should have been reduced following Commerce’s administrative review. Compare Protests, ECF Nos. 11–21, 24, with Decl., ECF. No 32. Customs denied the protests in *Acquisition 362 I* as untimely; therefore, no reduction in countervailing duties resulted. Protests, ECF

Nos. 11–21, 24. Conversely, Customs granted the protest submitted by Plaintiff as new evidence; and Plaintiff received a reduction in the countervailing duties assessed. Decl. at 13, ECF No. 32. To the Plaintiff, the difference in results between these protests indicates Customs was incorrect in denying the original protests adjudicated in *Acquisition 362 I*.

Defendant opposes Plaintiff's Motion, arguing the Plaintiff's new evidence fails to satisfy the burden for reconsideration. Def.'s Resp. at 3, ECF No. 33. Without addressing the issues raised by the Plaintiff in each protest, the Defendant notes the important timeline differences between the original protests and the August 2020 protest submitted as new evidence. *Id.* Defendant argues the timeline differences alone are enough to reject Plaintiff's Motion. *Id.* The Defendant also objects to Plaintiff's belated attempt to assert jurisdiction under 28 U.S.C. § 1581(i). *Id.*

Plaintiff's claims failed in *Acquisition 362 I* not because of substance but because of procedure. The law requires any protest of a Customs decision to be filed within 180 days of that decision. *See* 19 U.S.C. § 1514(c). The decision at issue was Customs's liquidations of Plaintiff's entries. *Acquisition 362 I*, 517 F.Supp.3d at 1324. Filing a timely protest is a mandatory prerequisite to invoking this Court's jurisdiction to review Customs's protest decision. *See* 19 U.S.C. § 1514(a) (providing that Customs's liquidation "shall be final and conclusive upon all persons . . . unless a protest is filed" timely); *U.S. JVC Corp. v. United States*, 15 F.Supp.2d 906, 909 (Ct. Int'l Trade 1998) ("[A] protest must have been timely filed under 19 U.S.C. § 1514(c)(3) for this Court to obtain jurisdiction over a suit that contests its denial."). Plaintiff frankly acknowledged it filed its protests more than 180 days following the entries' liquidation. Pl.'s Mem. at 9, ECF No. 27. Thus, it matters not that Customs applied the "wrong" rate; this Court lacks jurisdiction to hear Plaintiff's suit to contest the error because Plaintiff waited too long to protest.

Not so with the August 2020 protest. Customs liquidated the entry at issue on May 1, 2020. Decl., ECF No. 32–1 at 2. Ninety-six days later, Plaintiff filed its protest on August 5, 2020, well within the 180-day deadline. *See id.* Having filed both a timely protest *and* a valid protest, Plaintiff received the lower rate it sought. Decl., ECF No. 32–2 at 2. The lesson is both clear and stark: Don't sit on your rights. *See JVC Corp.*, 15 F.Supp.2d at 909. That Plaintiff later filed a timely protest of a different liquidation cannot grant the Court jurisdiction to review previous, untimely protests. Plaintiff's Motion for Reconsideration is denied.

Regarding Plaintiff's request to amend its complaint to state a new claim under Section 1581(i), Section 1581(i) embodies a "residual" grant of jurisdiction and may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available. *Sunpreme, Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002)). Plaintiff had at least one clear route to properly invoke this Court's jurisdiction. Had Plaintiff filed its protest within 180 days of Customs's liquidation of the challenged entries, this Court would have had jurisdiction to review Customs's decision.⁴ See *JVC Corp.*, 15 F.Supp.2d at 909. Because "another subsection of § 1581 is or could have been available" and that remedy would not be "manifestly inadequate," Section 1581(i) "may not be invoked." *Sunpreme, Inc.*, 892 F.3d at 1192 (quoting *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). Plaintiff's proposed complaint amendment would be of no use, and its Motion to do so is denied as futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962).

CONCLUSION

Plaintiff has failed to identify a "significant flaw" in the Court's opinion. Cf. *Union Camp Corp.*, 963 F.Supp. at 1213. It has also failed to provide a basis for invoking this Court's residual jurisdiction under Section 1581(i) via an amended complaint. Plaintiff's Motion is **DENIED**.

Dated: September 20, 2021
New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 21-121

NTSF SEAFOODS JOINT STOCK COMPANY and VINH QUANG FISHERIES CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, ALABAMA CATFISH INC., AMERICA'S CATCH, CONSOLIDATED CATFISH COMPANIES LLC, DELTA PRIDE CATFISH, INC., GUIDRY'S CATFISH, INC., HEARTLAND CATFISH COMPANY, MAGNOLIA PROCESSING, INC., and SIMMONS FARM RAISED CATFISH, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19-00063

⁴ In addition to jurisdiction under Section 1581(a) to protest Customs's actions, Plaintiff may also have had resort to Section 1581(c) to contest Commerce's determination of the duty rate if Plaintiff instead wished to challenge that decision. See *Acquisition 362 I*, 517 F.Supp.3d at 1324.

[Sustaining the remand results of the U.S. Department of Commerce in the 2016–2017 administrative review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: September 20, 2021

Jonathan M. Freed, Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs NTSF Seafoods Joint Stock Company and Vinh Quang Fisheries Corporation.

Kara M. Westercamp, 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, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Jonathan M. Zielinski, *James R. Cannon, Jr.*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenors Catfish Farmers of America, Alabama Catfish Inc., America's Catch, Consolidated Catfish Companies LLC, Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc.

OPINION

Choe-Groves, Judge:

This case involves frozen fish fillets, including regular, shank, and strip fillets and portions thereof, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*) and *Pangasius Micronemus*. Plaintiffs NTSF Seafoods Joint Stock Company (“NTSF”) and Vinh Quang Fisheries Corporation (“Vinh Quang”) (collectively, “Plaintiffs”) filed this action challenging the final results of the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (“Final Results”)*, 84 Fed. Reg. 18,007 (Dep’t of Commerce Apr. 29, 2019) (final results, and final results of no shipments of the antidumping duty administrative review; 2016–2017); *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Mem. for the Final Results of the Fourteenth Antidumping Duty Admin. Review: 2016–2017* (Dep’t of Commerce Apr. 19, 2019), ECF No. 24–3 (“Final IDM”). Before the Court are the Final Results of Redetermination Pursuant to Court Remand (“*Remand Results*”), ECF No. 78–1, which the Court ordered in *NTSF Seafoods Joint Stock Co. v. United States* (“*NTSF*”), 44 CIT ___, 487 F. Supp. 3d 1310 (2020). For the following reasons, the Court sustains the *Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination to grant offsets for NTSF's fish oil and fish meal byproducts is supported by substantial evidence; and
2. Whether Commerce's determination that the GTA Data are the best available information to calculate a surrogate value for NTSF's fish oil and fish meal byproducts is supported by substantial evidence.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinion and recounts the facts relevant to the Court's review of the *Remand Results*. See *NTSF*, 44 CIT at ___, 487 F. Supp. 3d at 1314–16.

In the *Final Results*, Commerce granted offsets for fish head and bone byproducts when calculating normal value for NTSF, but denied offsets for fish oil and fish meal byproducts because Commerce determined that NTSF failed to demonstrate that NTSF actually produced and sold fish oil and fish meal byproducts during the last three months of the period of review. Final IDM at 52–53. Plaintiffs challenged Commerce's determination. The Court held in *NTSF* that Commerce's denial of byproduct offsets for fish oil and fish meal was unsupported by substantial evidence in light of potentially contradictory evidence on the record and viewing the record as a whole, and remanded the case for further proceedings. *NTSF*, 44 CIT at ___, 487 F. Supp. 3d at 1321–23.

Commerce filed the *Remand Results* on March 23, 2021. On remand, Commerce reversed its *Final Results* determination and granted NTSF byproduct offsets for fish oil and fish meal. See *Remand Results* at 1. Based on Commerce's remand redetermination, Commerce calculated a revised dumping margin of \$1.28 per kilogram for NTSF. *Id.* at 16. Commerce based the all-others rate applied to separate rate-eligible respondents not selected for individual examination on NTSF's calculated margin. *Id.* at 16–17; see *Final Results*, 84 Fed. Reg. at 18,008; Final IDM at 49. Commerce adjusted the all-others rate applied to Vinh Quang accordingly. *Remand Results* at 17.

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). The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record 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

Plaintiffs and Defendant United States (“Defendant”) ask the Court to sustain the *Remand Results*. See Pls.’ Comments Final Results Remand Redetermination, ECF No. 85; Def.’s Resp. Supp. Remand Redetermination, ECF No. 90. Defendant-Intervenors Catfish Farmers of America, Alabama Catfish Inc., America’s Catch, Consolidated Catfish Companies LLC, Delta Pride Catfish, Inc., Guidry’s Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc. (collectively, “Defendant-Intervenors” or “Def.-Intervs.”) filed Defendant-Intervenors’ Comments in Opposition to Remand Results, ECF Nos. 83, 84 (“Def.-Intervs.’ Cmts.”).

I. Commerce’s Determination to Grant Byproduct Offsets

Commerce determined on remand that the record supported granting an offset for NTSF’s sales of fish oil and fish meal byproducts during the last three months of the period of review. See *Remand Results* at 4–6. Defendant-Intervenors argue that NTSF failed to reconcile its byproduct data and support an offset as required and, therefore, Commerce’s redetermination granting offsets for fish oil and fish meal byproducts is unsupported by substantial evidence. Def.-Intervs.’ Cmts. at 3–10.

For antidumping proceedings in which the subject merchandise is exported from a non-market economy and available information does not permit the normal value of subject merchandise to be determined using sales in the home market, normal value is based on the value of the factors of production utilized in the production of the subject merchandise. 19 U.S.C. § 1677b(c)(1). The statute provides that Commerce shall value factors of production based on the best available information from a surrogate market economy country or countries. *Id.*

The statute states that factors of production include, but are not limited to: hours of labor required; quantities of raw materials employed; amounts of energy and other utilities consumed; and representative capital cost, including depreciation. *Id.* § 1677b(c)(3). As not all raw materials are incorporated into the final product, Commerce provides offsets for byproducts generated during the production process. See *Arch Chems., Inc. v. United States*, 33 CIT 954, 956 (2009); *Ass’n of Am. School Paper Suppliers v. United States*, 32 CIT 1196,

1205 (2008); see also *Tianjin Magnesium Int'l Co. v. United States*, 34 CIT 980, 993 (2010) (stating that the antidumping statute does not prescribe a method for calculating byproduct offsets, instead leaving the decision to Commerce). The producer bears the burden of substantiating any byproduct offsets and must present Commerce with sufficient information to support its claims for offsets. See *Arch Chems.*, 33 CIT at 956. The producer must show that the byproduct of the production of the subject merchandise “is either resold or has commercial value and re-enters the [producer’s] production process.” *Id.*; see *Am. Tubular Prods., LLC v. United States*, 38 CIT __, __, Slip Op. 14–116 at 17 (Sept. 26, 2014).

Commerce determined on remand that NTSF reconciled its byproduct reporting properly and substantiated an offset because NTSF’s reporting accounted for the byproducts generated during the period of review. *Remand Results* at 4–6, 10–12. Commerce cited a processing contract between NTSF and an unaffiliated third-party processor for the production of fish oil and fish meal, which was in effect during the last three months of the period of review. See *id.* at 5–6 (citing *Frozen Fish Fillets from Vietnam – NTSF’s Resp. to the Department’s Suppl. Sections C & D Questionnaire at Supp CD-43, Ex. Supp CD-47, PR 370, CR 179–97* (May 15, 2018) (“NTSF Suppl. Resp.”)).¹ Based on its review of NTSF’s processing contract, Commerce determined that NTSF did not sell fish head and bone byproducts to the processor and that fish oil and fish meal byproducts were produced pursuant to a tolling agreement. *Id.* (citing *NTSF Suppl. Resp. Ex. Supp CD-47*). Commerce also cited NTSF’s production data in support of its determination that during the last three months of the period of review, NTSF transferred fish head and bone byproducts to the unaffiliated processor for processing into fish oil and fish meal byproducts, which NTSF subsequently sold. See *id.* at 11 (citing *Frozen Fish Fillets from Vietnam – Section D Resp. & Section D App. Resp. at D-16, Ex. D-13, PR 181, CR 92–95* (Jan. 18, 2018) (“NTSF Section D Resp.”)).

Commerce reviewed NTSF’s financial statements and production data and determined that NTSF sold fish head and bone byproducts during the first nine months of the period of review and sold fish oil and fish meal byproducts during the last three months of the period of review. *Id.* at 10–12 (citing *NTSF Section D Resp. Ex. D-13; NTSF Suppl. Resp. Ex. Supp CD-44*). Commerce determined that NTSF’s reporting accounts for byproducts generated during the period of review and that a “miniscule discrepancy” in the reporting of 0.036

¹ Citations to the administrative record reflect public record (“PR”) and confidential record (“CR”) document numbers.

percent did not render the reconciliation invalid. *Id.* at 10–11 (citing NTSF Section D Resp. Ex. D-13; NTSF Suppl. Resp. Ex. Supp CD-44). Commerce rejected Defendant-Intervenors’ argument that NTSF allegedly failed to reconcile its byproduct transfers independently from sales. *Id.* at 11. Commerce determined that NTSF and non-NTSF byproducts processed by a third-party were not comparable, due to potential differences in the inputs used for non-NTSF products. *Id.* at 12 (citing NTSF Suppl. Resp. Ex. Supp. CD-47). Commerce noted that the record did not indicate that NTSF’s production data reporting was unreliable and that NTSF had provided all requested documentation regarding its byproduct generation. *Id.* at 11. Commerce concluded that NTSF had reconciled its byproduct production and presented sufficient information to substantiate byproduct offsets for fish oil and fish meal. *Id.*

The Court notes that the processing contract cited by Commerce shows that NTSF transferred fish head and bone byproducts to a processor, but NTSF retained ownership of the byproducts and the processed fish oil and fish meal byproducts. *See* NTSF Suppl. Resp. Ex. Supp CD-47. The production data cited by Commerce account for the amount of byproducts generated during the period of review because the data show fish head and bone byproduct generation, along with fish head and bone byproduct transfers to an unaffiliated processor and the output of fish oil and fish meal byproducts from the processor. *See* NTSF Section D Resp. Ex. D-13. The Court observes that NTSF’s financial statements cited by Commerce support Commerce’s determination that NTSF retained ownership of the byproducts sent to the processor and show that NTSF sold fish oil and fish meal, but did not sell fish head and bone, during the last three months of the period of review. *See* NTSF Suppl. Resp. Ex. Supp CD-44. NTSF’s financial statements and production data reviewed by Commerce account for NTSF’s byproducts generated during the period of review. *See id.*; NTSF Section D Resp. Ex. D-13. The Court concludes, therefore, that Commerce’s determinations that NTSF reconciled its byproduct reporting properly and that NTSF substantiated its fish oil and fish meal byproducts sufficiently to receive an offset are supported by substantial record evidence cited by Commerce, including NTSF’s processing contract, financial statements, and production data.

II. Commerce’s Valuation of NTSF’s Byproduct Offsets

In calculating NTSF’s byproduct offsets, Commerce valued NTSF’s byproducts based on surrogate values from Indonesian import data from the *Global Trade Atlas* (“GTA Data”), published by Global Trade

Information Services, Inc. See *Remand Results* at 12. Commerce selected Indonesia as the surrogate country during earlier proceedings in the administrative review. See *NTSF*, 44 CIT at __, 487 F. Supp. 3d at 1314. Defendant-Intervenors argue that Commerce’s surrogate value calculation for NTSF’s byproducts should be remanded because Commerce’s use of import data to calculate surrogate values for NTSF’s byproducts is not supported by substantial evidence and Commerce should have used domestic Indonesian prices to calculate surrogate values. Def.-Intervs.’ Cmts. at 10–13.

When valuing factors of production, such as byproduct offsets, the statute requires Commerce to use the best available information regarding the value of the factors from a surrogate market economy country or countries. 19 U.S.C. § 1677b(c)(1); see also *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1256, 1273 (2017). The statute instructs Commerce to use the prices or costs of factors of production in one or more market economy countries that are (1) at the level of economic development comparable to that of the nonmarket economy country, and (2) significant producers of comparable merchandise. 19 U.S.C. § 1677b(c)(4). Commerce has broad discretion to determine what constitutes the best available information. *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1364–65 (Fed. Cir. 2019). The Court evaluates whether Commerce’s selection of the best available information is reasonable and supported by substantial evidence. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1379 (Fed. Cir. 2015).

Commerce valued NTSF’s fish oil and fish meal byproducts using Indonesian import GTA Data under headings of the Harmonized Tariff Schedule from the Indonesian Tariff Commission (“HTS”): heading 2301.20.20 “Flours, meals and pellets, of fish, with a protein content of 60% or more by weight” for fish meal byproducts; and heading 1504.20.90 “Fats and oils and their fractions, of fish, other than liver oils: Other” for fish oil byproducts. *Remand Results* at 13. Commerce rejected Defendant-Intervenors’ proposed data, Indonesian price quotes for *pangasius* fish oil and fish meal, as not the best available information. *Id.*

The U.S. Court of Appeals for the Federal Circuit has affirmed that when determining what constitutes the best available information, Commerce’s standard practice is to select, to the extent practicable, surrogate value data that are publicly available, product-specific, reflective of a broad market average, contemporaneous with the period of review, and tax and duty exclusive. See *Jacobi Carbons AB v. United States*, 619 F. App’x 992, 996 (Fed. Cir. 2015). In this case,

Commerce applied the same standard criteria articulated in *Jacobi Carbons* to determine what data constitutes the best available information to calculate NTSF's byproduct offsets. *See Remand Results* at 12–13.

Commerce determined that the GTA Data are the best available information because the GTA Data meet all of Commerce's standard surrogate value selection criteria as publicly available, product-specific, reflective of a broad market average, contemporaneous with the period of review, and tax and duty exclusive. *Id.* at 13–16. In contrast, Commerce determined that Defendant-Intervenors' proposed price quotes are not publicly available, product-specific, representative of a broad market average, or fully contemporaneous with the period of review. *Id.*

Defendant-Intervenors do not contest Commerce's determinations with respect to four of the five standard surrogate value selection criteria, that the GTA Data are publicly available, representative of a broad market average, contemporaneous, or tax and duty exclusive. *See* Def.-Interv.' Cmts. at 10–13. Defendant-Intervenors challenge only Commerce's determination that the GTA Data are product-specific. *See id.*

Based on the factor of product-specificity, Commerce valued NTSF's byproducts using GTA Data under HTS headings that correspond directly with NTSF's fish oil and fish meal byproducts. *Id.* at 14–15. Commerce determined that the GTA Data are product-specific and constitute the best available information because the fish meal HTS heading corresponds closely with the protein content of the fish meal byproducts, a determining factor in their valuation, and because the fish oil byproducts are oils with high protein content that fall under the fish oil HTS heading. *Id.* In contrast, Commerce determined that despite being species-specific, Defendant-Intervenors' proposed Indonesian price quotes do not discuss the protein content, thereby failing to establish that the price quotes are product-specific. *Id.* at 15.

The Court notes that record evidence supports Commerce's determination that the GTA Data are product-specific. For example, Commerce used the HTS heading 2301.20.20 "Flours, meals and pellets, of fish, with a protein content of 60% or more by weight" for NTSF's fish meal byproducts and heading 1504.20.90 "Fats and oils and their fractions, of fish, other than liver oils: Other" for NTSF's fish oil byproducts. Record evidence cited by Commerce indicates that NTSF's fish oil and fish meal were of a high protein content within the HTS headings used by Commerce. *See* NTSF Suppl. Resp. Ex. Supp. CD-47; *see also Remand Results* at 13. Because the HTS headings in the GTA Data cited by Commerce correspond directly to NTSF's fish

oil and fish meal byproducts, the Court concludes that Commerce's determination that the GTA data are product-specific is supported by substantial evidence. *See* NTSF Suppl. Resp. Ex. Supp. CD-47; *Remand Results* at 13; *see also* Submitted GTA Data.

CONCLUSION

The Court holds that Commerce's determination to grant NTSF offsets for fish oil and fish meal byproducts is supported by substantial evidence and that Commerce's determination that the GTA Data are the best available information to calculate a surrogate value for NTSF's fish oil and fish meal byproducts is supported by substantial evidence. The Court concludes that Commerce supported its remand redetermination with substantial evidence and sustains Commerce's *Remand Results*. Judgment will be entered accordingly.

Dated: September 20, 2021
New York, New York

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



Slip Op. 21–122

PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., and PIRELLI TIRE LLC,
Plaintiffs, v. UNITED STATES, Defendant, and the UNITED STEEL,
PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,
CLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00115

[Granting Defendant's Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce and granting the Partial Consent Motion to Intervene as of Right as Plaintiff-Intervenor and Respond to Defendant's Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce.]

Dated: September 20, 2021

Daniel L. Porter and *Ana Amador*, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

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

Roger B. Schagrin, Geert De Prest, and Nicholas J. Birch, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the results of the U.S. Department of Commerce (“Commerce”) in the antidumping administrative review of certain passenger vehicle and light truck tires from the People’s Republic of China (“China”) for the period of August 1, 2017 through July 31, 2018. Compl. at 1, ECF No. 6. Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC (collectively, “Plaintiffs” or “Pirelli”) filed this action pursuant to 28 U.S.C. § 1581(c) contesting Commerce’s final results in *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China* (“Final Results”), 85 Fed. Reg. 22,396 (Dep’t of Commerce Apr. 22, 2020) (final results of antidumping duty admin. review; 2017–2018). *See id.* Plaintiffs bring this suit to challenge (1) whether Commerce had statutory authority to issue a China-wide entity rate, (2) whether Commerce properly applied the applicable legal criteria for analyzing Plaintiffs’ separate rate eligibility, and (3) Commerce’s conclusion that Plaintiffs were controlled by the Chinese government through Chem China’s ownership. *See id.* at 5–7.

Defendant United States (“Defendant”) filed Defendant’s Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce, ECF No. 29 (“Defendant’s Motion” or “Def.’s Mot.”). Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“Defendant-Intervenor”) supports Defendant’s request to lift the stay and remand. Def.-Interv.’s Resp. Mot. Lift Stay & Voluntarily Remand at 1, ECF No. 35 (“Def.-Interv.’s Resp.”). Plaintiffs support Defendant’s request to lift the stay and oppose Defendant’s request for remand. Pls.’ Opp’n Def.’s Mot. Voluntary Remand at 1–2, ECF No. 30 (“Pls.’ Resp.”). Shandong New Continent Tire Co., Ltd. (“SNC”) filed a Partial Consent Motion to Intervene as of Right as Plaintiff-Intervenor and Respond to Defendant’s Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce, ECF No. 31 (“Motion to Intervene” and “Mot. Intervene”). Plaintiffs consent to SNC’s Motion to Intervene. Mot. Intervene at 3. Defendant-Intervenor opposes SNC’s Motion to Intervene. Def.-Interv.’s Opp’n Shandong New Continent’s Mot. Intervene

at 1, ECF No. 36 (“Def.-Interv.’s Opp’n Mot. Intervene”). For the following reasons, the Court grants Defendant’s Motion and grants SNC’s Motion to Intervene.

BACKGROUND

Plaintiffs filed their complaint on May 21, 2020. Before dispositive motions were filed, Plaintiffs filed an Unopposed Motion to Stay Proceedings, ECF No. 23 (“Motion to Stay”), on July 27, 2020. Defendant consented to Plaintiffs’ request to stay the proceedings until a final decision was rendered in the appeal of *China Manufacturers Alliance, LLC v. United States* (“*China Manufacturers*”), 43 CIT ___, 357 F. Supp. 3d 1364 (2019). This Court granted the Motion to Stay on August 6, 2020. *See* Order, ECF No. 25. The U.S. Court of Appeals for the Federal Circuit issued a decision on June 10, 2021 reversing and remanding *China Manufacturers*. *See China Mfrs. All., LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021). A mandate was issued on August 2, 2021, after which Defendant filed its motion requesting that the Court lift the stay.

JURISDICTION

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order.

DISCUSSION

I. Lifting the Stay of Proceedings

Defendant’s Motion seeks to lift the stay in this action. *See* Def.’s Mot. at 4; *see also* Order, ECF No. 25. Plaintiffs and Defendant-Intervenor do not oppose lifting the stay. *See* Pls.’ Resp. at 1–2; Def.-Interv.’s Resp. at 7–8.

In light of the U.S. Court of Appeals for the Federal Circuit’s decision and mandate in *China Manufacturers Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021), this Court concludes that the stay ordered in Order, ECF No. 25, is no longer necessary. The Court grants Defendant’s Motion and lifts the stay in this action.

II. Defendant’s Request for Remand

Defendant’s Motion also seeks a remand to consider new information regarding SNC’s invoices allegedly showing inaccuracies in SNC’s reported sales prices on imports of passenger vehicles and light truck tires from China during the period of review and significant undervaluation by affiliated companies. Def.’s Mot. at 1–2. Defendant

explains in its motion that SNC was the sole mandatory respondent and received a calculated zero rate, which served as the basis for the rate assigned to companies eligible for a separate rate. *Id.* Plaintiffs oppose Defendant's Motion, arguing that SNC's calculated rate is irrelevant and "the remand request has absolutely nothing to do with Pirelli." Pls.' Resp. at 2. Defendant-Intervenor consents to Defendant's Motion. *See* Def.-Interv.'s Resp. at 1.

The Court has considerable discretion in deciding whether to grant a request by the Government for remand. *See SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1378 (Fed. Cir. 2011). If the agency's concern is substantial and legitimate, a remand may be appropriate. *SKF*, 254 F.3d at 1029. This Court has concluded that an agency's concern is substantial and legitimate if: (1) the agency has provided a compelling justification for its remand request, (2) the need for finality does not outweigh the agency's justification, and (3) the scope of the remand request is appropriate. *See, e.g., Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1330, 1335–36 (2020) (quoting *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 3d 1330, 1336–39 (2005)).

Remand is warranted when Commerce establishes an interest in protecting the integrity of its proceedings, particularly when the agency's determination may have been tainted by fraud. *See Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361–62 (Fed. Cir. 2008). An agency "possesses inherent authority to protect the integrity of its yearly administrative review decisions, and to reconsider such decisions on proper notice and within a reasonable time after learning of information indicating that the decision may have been tainted by fraud." *Id.*; *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 67, 71, 882 F. Supp. 2d 1337, 1381 (2013) (stating that the need for finality does not outweigh a justification seeking to protect an administrative proceeding from fraud or material inaccuracy). Commerce may not reopen an administrative proceeding while an appeal is pending before this Court until the case has been remanded. *See Home Prods. Int'l*, 633 F.3d at 1377. The U.S. Court of Appeals for the Federal Circuit has held that it was an abuse of discretion to decline to remand a case to allow Commerce to consider reopening proceedings when presented with clear and convincing evidence of fraud, particularly in light of Commerce's inability to reopen a proceeding while an appeal is pending and Commerce's inherent authority to reopen a case to consider new evidence that its proceedings were tainted by fraud. *See id.*

Defendant seeks a remand based on new information that U.S. Customs and Border Protection provided to Commerce, including inaccuracies in the reported sales prices on imports of passenger vehicles and light truck tires from China during the 2017–2018 period of review, and potential fraud based on significant undervaluation by affiliated companies of approximately \$2.6 million lower than values submitted to Commerce. See Def.’s Mot. at 2. The Court notes that while this action is pending, Commerce is unable to reopen the administrative proceedings to consider evidence of inaccuracies and potential fraud absent a remand order from the Court. Because Defendant’s remand request is based on alleged inaccuracies and potential fraud, and the Government has a substantial and legitimate interest in protecting the integrity of its proceedings from fraud, the Court concludes that Defendant has provided a compelling justification for its remand request.

The Court considers whether the scope of Defendant’s remand request is appropriate. The scope of any litigation is confined to the issues raised in a plaintiff’s complaint. See *Zhaoqing Tifo New Fibre Co. v. United States*, 41 CIT __, __, 256 F. Supp. 3d 1314, 1327 (2017) (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944)). Plaintiffs’ complaint challenges (1) whether Commerce had statutory authority to issue a China-wide entity rate, (2) whether Commerce properly applied the applicable legal criteria for analyzing Plaintiffs’ separate rate eligibility, and (3) Commerce’s conclusion that Plaintiffs were controlled by the Chinese government through Chem China’s ownership. See Compl. at 5–7. Plaintiffs oppose Defendant’s Motion, arguing that SNC’s calculated rate is irrelevant and “the remand request has absolutely nothing to do with” Plaintiffs. Pls.’ Resp. at 2. Plaintiffs maintain that “the instant action . . . is limited to Pirelli challenging Commerce’s refusing to grant Pirelli separate rate status.” *Id.* at 5. Defendant-Intervenor argues that Plaintiffs’ complaint seeks to reverse Commerce’s determination assigning the China-wide entity rate to Plaintiffs and to obtain separate rate status for Plaintiffs. Def.-Interv.’s Resp. at 1–2. Defendant-Intervenor argues that the separate rate that Plaintiffs seek would be based on SNC’s calculated rate as the mandatory respondent. *Id.* The Court agrees that SNC’s calculated rate as the sole mandatory respondent could be relevant if Plaintiffs were to succeed on their separate rate claim. Because Defendant has provided a compelling justification for its remand request and the scope of Defendant’s remand request is appropriate, the Court grants Defendant’s remand request.

III. Motion to Intervene

SNC filed a Motion to Intervene as Plaintiff-Intervenor on August 9, 2021. *See* Mot. Intervene at 1. SNC moves to intervene as of right out of time under the good cause exception of USCIT R. 24(a)(3)(ii). *See id.* at 2–3. Plaintiffs consent to the Motion to Intervene. *Id.* at 3. Defendant-Intervenor opposes the Motion to Intervene. *See id.* at 4; Def.-Interv.’s Opp’n Mot. Intervene at 1.

A party must seek intervention as a matter of right no later than thirty days after the date of service of the complaint unless the party can show good cause for the delay. *See* USCIT R. 24(a)(3). To show good cause, a party must show that the motion was made out of time due to: (1) mistake, inadvertence, surprise or excusable neglect; or (2) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the thirty-day period. *Id.*

SNC claims that it is both an “interested party,” under 19 U.S.C. § 1677(9)(A), and a “party to the proceeding” who may intervene as of right under 28 U.S.C. § 2631(j)(1)(B). *See* Mot. Intervene at 2. SNC acknowledges that it did not move to intervene within the thirty-day period, but asserts that the good cause exception in USCIT Rule 24(a)(3)(ii) applies to its Motion to Intervene. *See id.* at 3. SNC asserts that its antidumping duty rate was not at issue in this action until Defendant’s Motion was filed and that, even by exercising due diligence, a motion to intervene could not have been made within the thirty-day period. *Id.* The Court agrees.

Intervening parties must take a case “as it stands” and are not permitted to enlarge the issues pending before the court in a proceeding. *Vinson*, 321 U.S. at 498. “The scope of any litigation is confined to the issues raised in the plaintiff’s complaint.” *Zhaoqing Tifo New Fibre*, 41 CIT at ___, 256 F. Supp. 3d at 1327 (citing *Vinson*, 321 U.S. at 498). SNC’s antidumping duty rate is relevant to the issues raised in Plaintiffs’ complaint because SNC’s calculated antidumping duty rate as the mandatory respondent serves as the basis for the rates assigned to companies eligible for separate rate status. SNC has made a sufficient showing that it would be adversely affected under 28 U.S.C. § 2631(j)(1)(B) if the Court remands for Commerce to consider new information, including allegations of fraud, regarding SNC’s antidumping duty rate. The Court concludes that SNC may intervene as of right and has shown good cause to permit its intervention out of time. The Court therefore grants SNC’s Motion to Intervene and deems as filed Proposed Plaintiff-Intervenor Shandong

New Continent Co., Ltd.’s Response to Defendant’s Motion to Lift the Stay and Voluntary Remand to the Department of Commerce, ECF No. 31–2 (“SNC’s Response”).

CONCLUSION

For the foregoing reasons, the Court grants the motion to lift the stay ordered in Order, ECF No. 25. The Court grants Defendant’s request for a remand and grants SNC’s motion to intervene.

Accordingly, it is hereby

ORDERED that Defendant’s Motion, ECF No. 29, is granted; and it is further

ORDERED that the stay in this action is lifted; and it is further

ORDERED that the *Final Results* are remanded to Commerce for further consideration; and it is further

ORDERED that SNC’s Motion to Intervene, ECF No. 31, is granted; and it is further

ORDERED that SNC be entered as a party to this action as Plaintiff-Intervenor; and it is further

ORDERED that SNC’s Response, ECF No. 31–2, is deemed filed; and it is further

ORDERED that this action shall proceed according to the following schedule:

- (1) Commerce shall file the remand results on or before January 18, 2022;
- (2) Commerce shall file the administrative record on or before February 1, 2022;
- (3) Comments in opposition to the remand results shall be filed on or before March 4, 2022;
- (4) Comments in support of the remand results shall be filed on or before April 1, 2022;
- (5) The joint appendix shall be filed on or before April 15, 2022; and
- (6) Motions for oral argument, if any, shall be filed on or before April 22, 2022.

Dated: September 20, 2021
New York, New York

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

Slip Op. 21–123

CALCUTTA SEAFOODS PVT. LTD., BAY SEAFOOD PVT. LTD., and ELQUE & CO., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 19–00201

[The court sustains Commerce’s Final Results of Redetermination.]

Dated: September 20, 2021

Neil R. Ellis, Sidley Austin LLP, of Washington, D.C., for Plaintiffs Calcutta Seafoods Pvt. Ltd, Bay Seafood Pvt. Ltd., and Elque & Co. With him on the brief were *Rajib Pal* and *Alexandra S. Mauever*.

Kara M. Westercamp, Trial Attorney, 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, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel *Spencer Neff*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce. With them on the post argument submission was *Jeffrey Bossert Clark*, Acting Assistant Attorney General.

Nathaniel Maandig Rickard and *Zachary J. Walker*, Picard Kentz & Rowe LLP, of Washington, D.C., for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION

Katzmann, Judge:

The court returns to litigation involving the application of a statute that enables small companies to receive additional assistance in antidumping duty (“AD”) reviews or investigations. *Calcutta Seafoods Pvt. Ltd. v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1318 (2021) (“*Calcutta I*”). Plaintiffs Calcutta Seafoods Pvt. Ltd., Bay Seafood Pvt. Ltd., and Elque & Co. (collectively, the “Elque Group” or “Plaintiffs”) brought this action to contest the final results of the Department of Commerce’s (“Commerce”) administrative review of the AD order on Certain Frozen Warmwater Shrimp from India for the period of review (“POR”) of February 1, 2017 to January 31, 2018. *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 84 Fed. Reg. 57,847 (Dep’t Commerce Oct. 29, 2019) (“*Final Results*”). Plaintiffs challenged Commerce’s *Final Results* on the basis that Commerce unlawfully applied adverse facts available (“AFA”) to the Elque Group for failing, in Commerce’s estimation, to cooperate to the best of its ability in responding to Commerce’s questionnaires. Compl., Nov. 20, 2019, ECF No. 4. The court determined that Commerce’s application of AFA was

unlawful and remanded the *Final Results* for reconsideration. *Calcutta I*, 495 F. Supp. 3d at 1335–36. The court now sustains Commerce’s Final Results of Redetermination Pursuant to Court Remand, May 4, 2021, ECF No. 49–1 (“*Remand Results*”).

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Calcutta Seafoods Private Ltd. v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1318 (2021). Information relevant to the instant opinion is set forth below.

On April 16, 2018, Commerce published a notice of initiation regarding its administrative review of the AD duty order covering warmwater shrimp from India. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 83 Fed. Reg. 16,298, 16,300–04 (Dep’t Commerce Apr. 16, 2018). Commerce ultimately selected Calcutta Seafoods Pvt. Ltd. as a mandatory respondent,¹ and after initial submissions collapsed Calcutta Seafoods Pvt. Ltd., Bay Seafood Pvt. Ltd., and Elque & Co. into the Elque Group for purposes of the administrative review. *See* Mem. from B. Bauer to M. Skinner, re: Selection of New Respondents for Individual Review (Aug. 7, 2018), P.R. 57; Mem. from B. Bauer to M. Skinner, re: Whether to Collapse Bay Seafood Pvt. Ltd., Calcutta Seafoods Pvt. Ltd., and Elque & Co. in the 2017–2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India (Oct. 19, 2018), P.R. 108. In the course of the review, the Elque Group responded to Commerce’s Section D Questionnaire and then replied to two supplemental questionnaires regarding Section D from Commerce. Section D Questionnaire; Letter from Elque Group to Commerce, re: Elque Group Resp. to Section D Questionnaire (Nov. 13, 2018), P.R. 117; Letter from Commerce to Elque Group, re: Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India (Suppl. Section D Questionnaire) (Dec. 17, 2018), P.R. 122; Resp. from Elque Group to Commerce, re: Submission of Suppl. Questionnaire Resp. Against Your Letter Dated

¹ In AD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Dec. 17, 2018 for Elque Group for Administrative Review of the Antidumping Duty on Frozen Warmwater Shrimp from India (Dec. 24, 2018), P.R. 138; Letter from Commerce to Elque Group, re: Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India (Second Suppl. Section D Questionnaire) (Mar. 5, 2019), P.R. 142; Resp. from Elque Group to Commerce, re: Submission of Suppl. Questionnaire Resp. Against Your Letter Dated Mar. 5, 2019 for Elque Group for Administrative Review of the Antidumping Duty on Frozen Warmwater Shrimp from India (Mar. 20, 2019), P.R. 150. Commerce also granted the Elque Group various extensions throughout the review. *See, e.g.*, Letter from Commerce to the Elque Group, re: 2017–2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Section D Resp. (Nov. 6, 2018), P.R. 114; Letter from Commerce to the Elque Group, re: 2017–2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Second Section D Response (Mar. 11, 2019), P.R. 144.

In its preliminary results, Commerce determined that the Elque Group had been a non-cooperative respondent and that it failed, despite multiple opportunities, to provide the necessary product-specific conversion costs and complete cost reconciliations for Commerce’s calculation of a final AD duty margin. Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Preliminary Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India at 7–15 (Apr. 9, 2019), P.R. 59 (“PDM”). Commerce also preliminarily relied on AFA in its calculation of a 110.90% AD margin. Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018, 84 Fed. Reg. 16,843, 16,844 (Dep’t Commerce Apr. 23, 2019) (“*Preliminary Results*”). Ultimately, Commerce maintained its application of AFA and the resultant 110.90% AD margin in its *Final Results* and stated that it had adequately considered the Elque Group’s small business status by providing extensions and supplemental questionnaires in the course of the review. Mem. From J. Maeder to J. Kessler re: Issues and Decision Mem. for the Final Results of the 2017–2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India 11–19 (Dep’t Commerce Oct. 21, 2019), P.R. 188 (“IDM”).

This action was initiated on November 20, 2019 by the Elque Group and a complaint was timely filed. Summons, ECF No. 1; Compl. Plaintiffs alleged in their complaint that Commerce’s application of a 110.90% weighted-average AD margin to the Elque Group was un-

supported by substantial evidence and not in accordance with law because (1) Commerce applied AFA without identifying deficiencies in the Elque Group's questionnaire responses and providing an opportunity to remedy those deficiencies; (2) the Elque Group cooperated to the best of its ability throughout the administrative review; (3) the 110.90% AFA rate was unduly punitive and not representative of the facts and circumstances of the review; and (4) Commerce failed to take into account the Elque Group's small company status in the course of the review. Compl. at 5–8. In light of these allegations, Plaintiffs requested that the court remand the *Final Results* to Commerce with instructions to “take into account the difficulties experienced by the Elque Group as a small company” and to recalculate the applicable AD margin. *Id.* at 9.

On November 22, 2019, the Ad Hoc Shrimp Trade Action Committee (“AHSTAC”) joined the litigation as Defendant-Intervenor. Order Granting Consent Mot. to Intervene, ECF No. 13. On February 26, 2020, the Elque Group filed a Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 20. The United States (“Government”) and AHSTAC each submitted a response to the Elque Group's motion on May 1, 2020. Def.-Inter.'s Resp. to Pls.' Mot. for J. on the Agency R., ECF No. 23; Def.'s Resp. to Pls.' Mot. for J. on the Agency R., ECF No. 25. Oral argument on the motion was held on November 16, 2020. Oral Argument, ECF No. 42. The court issued its ruling on February 3, 2021, concluding that Commerce failed to satisfy its statutory duty to provide further assistance to the Elque Group as a small company under 19 U.S.C. § 1677m(c)(2) and thus Commerce's application of AFA was unlawful. *Calcutta I*, 495 F. Supp. 3d at 1333–36. The court remanded Commerce's *Final Results* for further action consistent with the court's opinion. *Id.* at 1336. On remand, and under respectful protest, Commerce recalculated the weighted-average AD margin for the Elque Group using neutral facts available by analyzing existing sales data to reapportion the product-specific input costs and recalculating the general and administrative expenses. *Remand Results* at 5. Commerce ultimately assigned a revised AD rate of 27.66%. *Remand Results* at 8. On June 3, 2021, AHSTAC submitted comments requesting the court sustain the *Remand Results*, Def.-Inter.'s Cmts. on Remand Redeterm., ECF No. 51, and on June 17, 2021 the Government submitted reply comments further requesting the *Remand Results* be sustained, Def.'s Resp. to Cmts. on Remand Redeterm., ECF No. 52. Plaintiffs filed no additional comments before the court.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[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.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

In *Calcutta I*, the court held that the Elque Group adequately notified Commerce of its need for assistance, and that Commerce’s failure to provide sufficient assistance rendered its application of AFA unlawful. The court noted that “the Elque Group made multiple attempts to notify Commerce of its difficulties throughout the review,” including by directly informing Commerce that it was a small company respondent without previous experience with investigations and reviews, and providing abundant, albeit inadequate, responses to Commerce’s questionnaires. *Calcutta I*, 495 F. Supp. 3d at 1329–30. Given these attempts to communicate its difficulties to Commerce and to cooperate with the review, the court concluded that “it is clear that Commerce had sufficient notice that the Elque Group was having trouble providing the requested information and . . . needed additional help.” *Id.* at 1330. Because Commerce failed to “take into account any difficulties” experienced by the Elque Group during the review, as required by 19 U.S.C. § 1677m(c)(2), the court further concluded that Commerce did not provide adequate assistance to the Elque Group as a small company respondent. *Id.* (citing 19 U.S.C. § 1677m(c)(2)). Finally, because the application of AFA requires a determination, “[a]t a minimum, that a respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply,” the court concluded that the facts did not support application of AFA in this instance. *Nippon Steel Corp. v. United States*, 24 CIT 1158, 1171, 118 F. Supp. 2d 1366, 1378–79 (2000); *Calcutta I*, 495 F. Supp. 3d at 1334. The court remanded to Commerce with instructions to reconsider its decision to apply AFA, whether by reopening the record to provide further assistance to the Elque Group or by applying neutral facts available, and revising its *Final Determination* accordingly. *Calcutta I*, 495 F. Supp. 3d at 1335–36.

On remand, Commerce applied neutral facts available. Commerce stated that “while we continue to find that we cannot rely on the Elque Group’s submitted costs,” the record nevertheless “provide[s] some basis to calculate a dumping margin for the Elque Group as facts otherwise available.” *Remand Results* at 4–5. Accordingly, Commerce reallocated the Elque Group’s input costs using previously submitted sales data and recalculated its general and administrative expense ratio “using the information contained in the reported trial balance for the fiscal year ending March 31, 2018.” *Id.* at 5; *see generally*, Mem. From S. Medillo to N. Halper re Cost of Production and Constructed Value Calculation Adjustments for the Court Remand (Dep’t Commerce Apr. 21, 2021), R.P.R. 6 (“Cost Memo”). Commerce then recalculated the weighted average AD margin for the Elque Group to 27.66% and for non-examined companies to 6.13%. *Remand Results* at 8.

The court concludes that Commerce’s *Remand Results* comply with the court’s order requesting redetermination and are both supported by substantial evidence and in accordance with law. As requested by the court, Commerce recalculated the Elque Group’s AD duty rate without applying AFA. *Calcutta I*, 495 F. Supp. 3d at 1335–36. The recalculated AD rate reflects the evidence in the record and is sufficiently explained by Commerce. *See generally*, Cost Memo. The revised rate also adequately accounts for the Elque Group’s small company status under 19 U.S.C. § 1677m(c)(2) and does not penalize the Elque Group for failing to provide information it did not possess. *See Calcutta I*, 495 F. Supp. 3d at 1335 (citing *Tung Fong Indus. Co.*, 28 CIT 459, 476–77, 318 F. Supp. 3d 1321, 1335–36 (2004)). The *Remand Results* thus comply with Commerce’s legal obligations, as ordered by the court in *Calcutta I*, and are supported by substantial evidence in the record.

CONCLUSION

For the foregoing reasons, Commerce’s *Remand Results* are sustained. Judgment will enter accordingly in favor of the Defendant.

SO ORDERED.

Dated: September 20, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–124

GOVERNMENT OF ARGENTINA, Plaintiff, and LDC ARGENTINA, S.A., Consolidated Plaintiff, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 20–00119

[The court denies Plaintiffs' motion for judgment on the agency record and sustains Commerce's *Final Results*.]

Dated: September 21, 2021

Frank H. Morgan, Trade Law Defense PLLC, of Alexandria, VA, argued for Plaintiff Government of Argentina.

Jessica E. Lynd, White & Case, LLP, of Washington, D.C., argued for Consolidated Plaintiff LDC Argentina, S.A. With them on the joint brief was *Gregory J. Spak*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With him on the brief were *Brian M. Boyton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

Myles S. Getlan, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor National Biodiesel Board Fair Trade Coalition. With him on the brief were *Jack A. Levy*, *Thomas M. Beline*, and *Chase J. Dunn*.

OPINION

Katzmann, Judge:

This case involves a challenge to the Department of Commerce's ("Commerce") changed circumstances review ("CCR") of the countervailing duty ("CVD") order for biodiesel from Argentina. Plaintiff the Government of Argentina ("GOA") and Consolidated Plaintiff LDC Argentina S.A. ("LDC"), a processor and exporter of biodiesel from Argentina, (collectively, "Plaintiffs"), bring this action against the United States ("the Government") to appeal Commerce's *Biodiesel from Argentina: Final Results of Countervailing Duty Changed Circumstances Review*, 85 Fed. Reg. 27,987 (Dep't Commerce May 12, 2020) ("*Final Results*"). Specifically, Plaintiffs argue that Commerce's *Final Results* were: (1) not in accordance with law because they applied an impermissible statutory framework; (2) supported by speculation rather than substantial evidence; and (3) unlawfully issued after the regulatory deadline. Joint Mem. of Points and Auths. in Supp. of Pl.'s and Consol. Pl.'s Rule 56.2 Mot. for J. Upon the Agency R., Dec. 7, 2020, ECF No. 24 ("Pls.' Br."). The Government and Defendant-Intervenor the National Biodiesel Board Fair Trade Coalition ("NBB") oppose Plaintiffs' claims. Def.'s Resp. to Pls.' Rule 56.2 Mot. For J. Upon the Agency R., ECF No. 26, Feb. 22, 2021 ("Def.'s

Br.”); Def.-Inter. Nat’l Biodiesel Bd. Fair Trade Coal.’s Resp. to Pl.’s Rule 56.2 Mot. for J. on the Agency R., Feb. 22, 2021, ECF No. 25 (“Def.-Inter.’s Br.”). The court denies Plaintiffs’ motion for judgment on the agency record and sustains Commerce’s *Final Results*.

BACKGROUND

I. Legal & Regulatory Framework

To empower Commerce to offset economic distortions caused by countervailable subsidies and dumping, Congress promulgated the Tariff Act of 1930. *Sioux Honey Ass’n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012); *ATC Tires Priv. Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366 (2018). That Act, “as amended, allows Commerce to impose . . . duties on imports that injure domestic industries.” *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014). “Under the Tariff Act’s framework, Commerce may -- either upon petition by a domestic producer or of its own initiative -- begin an investigation into potential countervailable subsidies and, if appropriate, issue orders imposing duties on the subject merchandise.” *ATC Tires*, 322 F. Supp. 3d at 1366–67; *see also* 19 U.S.C. §§ 1671, 1673; *Sioux Honey*, 672 F.3d at 1046–47. A subsidy is countervailable if the following elements are satisfied: (1) a government or public authority has provided a financial contribution; (2) a benefit is thereby conferred upon the recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. 19 U.S.C. § 1677(5). If Commerce determines that the government of another country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, sold, or likely to be sold for import, into the United States, and the International Trade Commission (“ITC”) determines that an industry in the United States is materially injured or threatened with material injury thereby, then Commerce shall impose CVDs upon such merchandise equal to the amount of the net countervailable subsidy. *See* 19 U.S.C. § 1671(a).

Usually, antidumping (“AD”) and CVD orders undergo periodic administrative review pursuant to 19 U.S.C. § 1675(a). CCRs, on the other hand, are authorized by 19 U.S.C. § 1675(b) and occur when Commerce “receives information concerning, or a request from an interested party for a review of . . . a final affirmative determination” that “shows changed circumstances sufficient to warrant a review of such determination.” 19 U.S.C. § 1675(b)(1). Under Commerce’s implementing regulation, “[a]n interested party may request a

changed circumstances review . . . of an order” and the Secretary “will determine whether to initiate a changed circumstances review” within forty-five days after such a request is filed. 19 C.F.R. § 351.216(b). “Unless the Secretary finds that good cause exists, the Secretary will not review a final determination in an investigation . . . less than 24 months after the date of publication of notice of the final determination.” 19 C.F.R. § 351.216(c). On the other hand, “if the Secretary decides that changed circumstances sufficient to warrant a review exist, the Secretary will conduct a changed circumstances review.” 19 C.F.R. § 351.216(d).

A changed circumstances review is conducted in accordance with 19 C.F.R. § 351.221. *Id.* Procedurally, that regulation provides that “after receipt of a timely request for a review, or on the Secretary’s own initiative when appropriate, the Secretary will:” (1) publish the notice of review initiation in the Federal Register; (2) send questionnaires requesting factual information to appropriate interest parties; (3) conduct a verification if appropriate; (4) issue a preliminary determination and publish the notice of the preliminary determination in the Federal Register, including rates determined and an invitation for argument; (5) issue a final determination and publish the notice of the final decision in the Federal Register; and (6) instruct the Customs Service to collect cash deposits at the revised rates on future entries, if cash deposit rates were revised. 19 C.F.R. § 351.221(b). The final decision in a changed circumstances review must be issued “within 270 days after the date on which the changed circumstances review is initiated, or within 45 days if all parties to the proceeding agree to the outcome of the review.” 19 C.F.R. § 351.216(e). Substantively, “a CCR may address a broad range of matters and the only limitation in the statute is the requirement that there be changed circumstances sufficient to warrant a review.” *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 35 CIT 222, 228 (2011) (“*Marsan Gida*”); see also *Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1543–44 (Fed. Cir. 1988).

II. Factual and Procedural History

A. The Underlying CVD Investigation

On April 12, 2017, Commerce initiated a CVD investigation into imports of biodiesel from Argentina and Indonesia, based on a petition filed by NBB. *Biodiesel from Argentina and Indonesia: Initiation of Countervailing Duty Investigations*, 82 Fed Reg. 18,423, 18,424 (Dep’t Commerce Apr. 19, 2017). During this investigation, Commerce selected LDC as a mandatory respondent, as well as its affiliate Louis

Dreyfus Claypool.¹ See *Biodiesel from the Republic of Argentina: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 53,477 (Dep’t Commerce Nov. 16, 2017). On November 16, 2017, Commerce published its final determination in the CVD investigation. *Id.* Commerce concluded that the GOA’s export tax on soybeans, which was thirty percent higher than the export tax on biodiesel, was designed to benefit biodiesel producers, since soybeans are the primary input for biodiesel. Mem. from G. Taverman to J. Maeder “Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Biodiesel from the Republic of Argentina 25–28 (Dep’t Commerce Nov. 6, 2017). Consequently, Commerce determined that LDC was the beneficiary of a subsidy program and received soybeans for less-than-adequate remuneration (“LTAR”) due to export taxes. *Id.* On January 4, 2018, Commerce published its CVD Order, setting the duty rate for biodiesel from Argentina at 72.28%. *Biodiesel from the Republic of Argentina and the Republic of Indonesia: Countervailing Duty Orders*, 83 Fed. Reg. 522 (Dep’t Commerce Jan. 4, 2018).²

B. The CCR Investigation

On September 21, 2018, the GOA petitioned Commerce to undertake a CCR of the CVD Order. GOA’s Letter re Biodiesel from Argentina: Request for Changed Circumstances Review (Sept. 21, 2018), P.R. 1. The GOA wanted Commerce to adjust the cash deposit rates on biodiesel to reflect purported changes in Argentina’s export tax regime. *Id.* On November 13, 2018, Commerce initiated a CCR of the

¹ In CVD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—

(i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or

(ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or

(B) determine a single country-wide subsidy rate to be applied to all exporters and producers.

The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

² A clerical error correction was issued on January 23, 2018. *Biodiesel from the Republic of Argentina and the Republic of Indonesia: Countervailing Duty Orders*, 83 Fed. Reg. 3,114 (Dep’t Commerce Jan. 23, 2018).

CVD Order. See *Biodiesel from Argentina: Initiation of Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders*, 83 Fed. Reg. 56,300 (Dep't Commerce Nov. 13, 2018) (“*CCR Initiation*”). On July 9, 2019, Commerce issued preliminary results in the CCR, stating that it had found changed circumstances warranting calculation of a new cash deposit rate. *Biodiesel from Argentina: Preliminary Results of Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders*, 84 Fed. Reg. 32,714, 32,719 (Dep't Commerce July 9, 2019) (“*Preliminary Results*”). In particular, Commerce found that Argentine export taxes on soybeans and biodiesel had converged since the original investigation, demonstrating that the GOA was no longer using these export taxes to encourage development of the Argentine biodiesel industry. *Id.* at 32,718–19. Commerce preliminarily determined that the CVD rate for biodiesel should be decreased from 72.28% to 0.19%. *Id.* at 32,719.

On July 12, 2019, NBB and LDC submitted additional factual information as interested parties. See Issues and Decisions Mem. For the Final Results of the Changed Circumstances Review of the Countervailing Duty Order: Biodiesel from Argentina 2 (May. 5, 2020), P.R. 128 (“*IDM*”). On August 26, 2019, at the request of NBB, Commerce conducted a verification of the GOA in connection with the CCR and successfully verified the accuracy and completeness of the information the GOA had provided. NBB’s Letter re Biodiesel from Argentina: Petitioner’s Request for Verification (July 29, 2019), P.R. 66; Mem. from M. Hoadley to File re Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina; Verification of Information Submitted by the Government of Argentina (Sept. 5, 2019), P.R. 81. In the following months, Commerce and interested parties placed additional factual information on the record to reflect continuing changes to the GOA’s export tax regime and the biodiesel market.³ First, on October 16, 2019, Commerce placed additional factual information on the record regarding current biodiesel prices. *IDM* at 3. On October 24, 2019, NBB placed additional factual information on the record regarding the biodiesel market. *Id.* On December 17, 2019, Commerce placed additional factual information on the record regarding tax regime changes, in the form of a decree made by the newly elected president of Argentina, Alberto Fernandez. *Id.* The GOA and NBB then submitted additional information and comments

³ Between issuing the *Preliminary Determination* and the *Final Determination*, Commerce had several meetings with the interested parties. Pls.’ Br. at 7. During this time, Commerce also discussed the CCR with Governor Reynolds, Congressman LaHood, Senator Alexander and Senator Grassley via email and during ex parte discussions. *Id.* at 7–8 (setting forth record citations).

in response. *Id.* at 4. On March 11, 2020, Commerce placed additional factual information on the record regarding another decree issued by the GOA concerning export taxes, upon which the parties also commented. *Id.* At the end of Commerce's CCR investigation, the record showed that, between December 17, 2019, and March 11, 2020, the GOA increased the export tax on soybeans from roughly twenty-five to thirty-three percent due to multiple changes to the GOA's export tax regime. *Id.* at 5–6.

Of further relevance to Plaintiffs' challenge is the timeline and extensions of Commerce's investigation. After initiating the CCR in November 2018, on January 28, 2019, Commerce tolled all deadlines affected by a partial government shutdown. Mem. from G. Taverman to Record re Deadlines Affected by the Partial Shutdown of the Fed. Gov't (Jan. 28, 2019), P.R. 20. Subsequently, on August 2, 2019, Commerce placed a thirty-four day hold on the deadlines relevant to this specific case. Mem. from C. Baskin-Gerwitz to File re Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Holding of Deadlines (Aug. 2, 2019), P.R. 69. Commerce reinstated the deadlines for the case on September 5, 2019. Mem. from C. Baskin-Gerwitz to File re Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Publ'n of Verification Rep. and Reinstatement of Deadlines (Sept. 5, 2019), P.R. 79. On September 11, 2019, NBB requested an indefinite suspension of the deadlines for briefs and the final decision. NBB's Letter re Biodiesel from Argentina: Request for Meeting and Extension of Briefing Schedule (Sept. 11, 2019), P.R. 82. On the same day, NBB requested that Commerce accept additional factual information. *IDM at 3*. The next day, the GOA responded, stating that a brief extension of deadlines was acceptable, and Commerce issued a short extension of the deadlines. *Id.*

On May 12, 2020, Commerce issued its final results of the CCR. *See generally Final Results*; *IDM*. The *Final Results* concluded that there were not changed circumstances sufficient to warrant a recalculation of the cash deposit rate for biodiesel. 85 Fed. Reg. at 27,989. Commerce issued its *Final Results* 546 days after initiating the CCR, 294 days past the regulatory deadline for CCR determinations. *See CCR Initiation*; *Final Results*; 19 C.F.R. § 351.216(e).

C. Procedural History of the Litigation

The GOA initiated this litigation on June 11, 2020, and filed its complaint on July 10, 2020. Summons, ECF No. 1; Compl., ECF No. 9. LDC initiated a similar challenge on June 11, 2020, and filed its

complaint on July 10, 2020. LDC's Summons, *LDC Argentina S.A. v. United States*, No. 20–119, June 11, 2020, ECF No. 1; LDC's Compl., *LDC Argentina S.A. v. United States*, No. 20–119, July 10, 2020, ECF No. 10. On August 13, 2020, the court granted a consent motion to consolidate the two cases, and LDC was added as a Consolidated Plaintiff to this action. Consol. Order, Aug. 13, 2020, ECF No. 17. On December 7, 2020, Plaintiffs filed a joint motion for judgment on the agency record, arguing that Commerce's *Final Results* were not supported by substantial evidence, otherwise not in accordance with law, and untimely decided. Pls.' Br. at 1–3, 15–17. The Government and NBB filed response briefs to Plaintiffs' motion on February 22, 2021. Def.'s Br.; Def.-Inter.'s Br. Plaintiffs filed their joint reply brief on March 22, 2021. Joint Reply in Supp. Of Pl.'s and Consol. Pl.'s Rule 56.2 Mot. For J. Upon the Agency R., Mar. 22, 2021, ECF No. 27 ("Pls.' Reply Br."). Oral argument was held on July 8, 2021. Oral Arg., ECF No. 37. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Ct.'s Letter re: Questions for Oral Arg., June 24, 2021, ECF No. 32; Joint Resp. to Oral Arg. Questions Addressed to Pl. and Consol. Pl., July 2, 2021, ECF No. 34 ("Pls.' Resp. to Oral Arg. Questions"); Def.'s Resp. to Ct.'s June 24, 2021 Questions for Oral Arg., July 2, 2021, ECF No. 35 ("Def.'s Resp. to Oral Arg. Questions"); Def.-Inter Nat'l Biodiesel Bd. Fair Trade Coal.'s Response to the Ct.'s Questions in Advance of Oral Arg., July 2, 2021, ECF No. 33. As directed by the court, the parties also filed briefs following oral argument. Pl. and Consol.-Pl.'s Joint Post-Arg. Submission, July 15, 2021, ECF No. 39; Def.'s Suppl. Submission, July 15, 2021, ECF No. 40; Def.-Inter. Nat'l Biodiesel Bd. Fair Trade Coal.'s Suppl. Comments Following Oral Arg., July 15, 2021, ECF No. 38.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[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." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). "That there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence." *Haixing Jingmei Chem. Prod. Sales Co. v. United States*, 42 CIT __, __, 335 F. Supp. 3d 1330, 1346 (2018) (citation omitted).

DISCUSSION

Plaintiffs argue that: (1) the *Final Results* were not in accordance with law or the applicable statutes; (2) Commerce's determination that Argentina's export tax regime was in flux was not supported by substantial evidence; and (3) Commerce's *Final Results* were unlawfully issued after the regulatory deadline. Pls.' Br. at 9–21; Pls.' Reply Br. at 3–13. The Government and NBB respond that: (1) Commerce conducted the CCR within its broad discretion; (2) substantial record evidence supports the conclusion that Argentina's export tax regime was in flux; and (3) Plaintiffs failed to exhaust their administrative remedies regarding timeliness, and the timeliness claim is otherwise meritless. Def.'s Br. at 6–25; Def.-Inter.'s Br. at 12–30. The court concludes that Commerce's interpretation of the CCR statute was reasonable, that the *Final Results* were supported by substantial evidence, and that Plaintiffs failed to exhaust administrative remedies regarding timeliness of the decision. The court denies Plaintiffs' motion for judgment on the agency record and sustains Commerce's *Final Results*.

I. Commerce Conducted the CCR in Accordance with Law.

Plaintiffs argue that Commerce applied the incorrect statutory analysis in its CCR. Pl.'s Br. at 13. Plaintiffs acknowledge that Commerce correctly initiated the CCR pursuant to 19 U.S.C. § 1675(b) but contend that Commerce improperly revisited its initiation decision in the *Final Results*, rather than performing an analysis of countervailability under 19 U.S.C. § 1677(5)(B)(iii), (D)(iii) and (E)(iv), as it did in its *Preliminary Determination*. *Id.* at 11, 13. The Government argues that Commerce reconsidered its initial decision and ultimately concluded that there were not sufficient changed circumstances under 19 U.S.C. § 1675(b), upon which it could accurately review the underlying CVD Order or adjust the cash deposit rates. Def.'s Br. at 13–14. The Government argues that Commerce thus reasonably determined that it did not need to make a further determination about whether there was a countervailable subsidy under 19 U.S.C. § 1677(5). *Id.* Similarly, NBB argues that Commerce is not required by statute to undertake any particular analysis during a CCR. Def.-Inter.'s Br. at 22 (citing *Marsan Gida*, 35 CIT at 228). NBB notes that Commerce is given significant discretion in conducting CCRs, and that in the past, Commerce has refrained from changing cash deposit rates or re-analyzing countervailability except under extremely narrow circumstances where it has found “clear cut and discrete” changes to subsidy programs. *Id.*

Throughout the CCR investigation, Commerce relied upon both the CCR provision, 19 U.S.C. § 1675(b), and the CVD provision, 19 U.S.C. § 1677(5), of the Tariff Act of 1930 to conduct its analysis. Upon initiating the CCR, Commerce noted that “pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR § 351.216(d), Commerce will conduct a CCR” of the CVD determination. *CCR Initiation*, 83 Fed. Reg. at 56,301. Specifically, Commerce noted that although “[it] may not conduct a CCR of an investigation within 24 months of the date of the investigation determination in absence of ‘good cause’” pursuant to 19 U.S.C. § 1675(b)(4), the GOA had provided information indicating changes to Argentina’s export tax regime. *Id.* Commerce concluded that there was good cause to initiate a CCR pursuant to 19 U.S.C. § 1675(b)(1), (4) and 19 C.F.R. § 351.216. *Id.* at 56,301–02.

In the *Preliminary Results*, Commerce explained that the purpose of its CCR was “not to reconsider the validity of the determinations made in the AD or CVD investigations . . . [but] to consider whether circumstances have changed since the end of the POIs such that the cash deposit rates established by the final determinations . . . are no longer the best estimates for prospective dumping and subsidization and are therefore no longer appropriate for purposes of collecting deposits.” 84 Fed. Reg. at 32,716. Commerce preliminarily concluded that, pursuant to 19 U.S.C. § 1675(b) and 19 C.F.R. § 351.216, there were changed circumstances warranting recalculation of the CVD cash deposit rates and preliminarily calculated revised cash deposit rates accordingly. *Id.* Commerce did not refer to a specific statute in its analysis, but its calculation of new tentative CVD rates demonstrates an analysis of whether a subsidy existed pursuant to 19 U.S.C. § 1677(5). *See id.*

However, after receiving additional factual information, Commerce reversed its position in the *Final Results*. Commerce concluded that, pursuant to 19 U.S.C. § 1675(b)(1) and 19 C.F.R. § 351.216, “changed circumstances warranting a cash deposit adjustment [did] not exist,” due largely to changes in the record. *Final Results* at 27,989; *IDM* at 4, 12. Commerce further determined that “the issue of whether a financial contribution exists under the current circumstances [was] now moot.” *IDM* at 18. Commerce did not explicitly state which statute it was interpreting in conducting this analysis, but the lack of discussion of countervailability in the *Final Results* reflects its decision to forego an analysis under 19 U.S.C. § 1677(5).

The court concludes that Commerce did not err in revising its initial decision that changed circumstances exist because: (1) the statute,

while silent as the substantive analysis required by Commerce in a CCR, requires changed circumstances to exist in order for Commerce to alter the cash deposit rate; and (2) neither the *CCR Initiation* nor the *Preliminary Results* were final agency decisions. First, the lack of statutory guidance regarding Commerce's CCR analysis and process means Commerce's interpretation of the statute is subject to *Chevron* deference. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The court finds persuasive the reasoning in *Marsan Gida*, which noted that "the statute authorizing Commerce to conduct a changed circumstances review, 19 U.S.C. § 1675(b)(1), does not explicitly define what a CCR is or what a CCR entails." 35 CIT at 228; cf. *Or. Steel Mills Inc.*, 862 F.2d at 1544 (noting that 19 U.S.C. § 1675(b) "sets out no specific conditions for setting aside an extant . . . affirmative determination" in the changed circumstances review of an AD order). In *Marsan Gida*, the court reasoned that Commerce has discretion to construe the breadth of its CCRs because statutory silence expressly delegates authority to the agency to "elucidate a specific provision of the statute by regulation." 35 CIT at 228 (quoting *Chevron*, 467 U.S. at 843–44). The court noted that it must "defer to Commerce's reasonable interpretation of the antidumping and countervailing duty statute" and that Commerce's interpretation "need not be the only reasonable interpretation or even the most reasonable interpretation." *Id.* at 230 (citations omitted).

The Government explains that, at each stage of its investigation, Commerce interpreted 19 U.S.C. § 1675(b) to require "the existence of changed circumstances . . . be demonstrated, not merely to initiate the CCR, but to revise the final determination from the CVD investigation." Def.'s Resp. to Oral Arg. Questions at 3. The Government correctly notes that the statute also requires that "the party seeking revocation of an order or finding . . . shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant such revocation." See *id.* at 3–4 (citing 19 U.S.C. § 1675(b)(3)(A)). This language demonstrates that changed circumstances must be found at each stage of a CCR, a decision that Commerce is free to revise until the results of its investigation are final. Contrary to Plaintiffs' claims, this conclusion does not render the statute's requirement that Commerce "conduct a review," 19 U.S.C. § 1675(b)(1), meaningless, but rather appropriately affords Commerce the discretion to review the entirety of a situation when conducting a CCR. See Pls.' Resp. to Oral Arg. Questions at 3.

In sum, as set forth by the Government, Commerce conducts a two-step review at each stage of the CCR process. See Def.'s Br. at 9. Commerce first determines whether changed circumstances sufficient

to warrant a review exist pursuant to 19 U.S.C. § 1675, and then, if such circumstances are present, whether the program in question is still countervailable or an adjustment is warranted. *See id.* This is evident in the *Final Results*, where Commerce concluded that there were “insufficient changed circumstances” and, as a result, expressly declined to “revisit issues concerning the existence of a financial contribution.” IDM at 12. The court concludes that Commerce’s interpretation of the statutory framework was reasonable and in accordance with law.

Second, preliminary determinations such as the *CCR Initiation* and *Preliminary Results* are not final. *See, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (“Preliminary determinations are ‘preliminary’ precisely because they are subject to change”). The court has specifically held that initiation decisions are preliminary and not final agency determinations. *See, e.g., Tokyo Kikai Seisakusho v. United States*, 29 CIT 1280, 1286, 403 F. Supp. 2d 1287, 1293 (2005) (“Commerce’s initiation of the changed circumstances review is a preliminary agency action.”); *see also Gov’t of People’s Republic of China v. United States*, 31 CIT 451, 458, 483 F. Supp. 2d 1274, 1280 (2007) (holding that Commerce’s initiation of a CVD investigation is not a final agency decision reviewable by the court). As such, Commerce may change its stance on issues decided preliminarily in its final determinations, so long as it explains the reasoning for the change and “its decision is supported by substantial evidence and in accordance with law.” *Hyundai Steel v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1327, 1343 (2018) (citing *Timken Co. v. United States*, 23 CIT 509, 515, 59 F. Supp. 2d 1371, 1376 (1999)). Commerce therefore acted in accordance with law in deciding to revisit its initial determination that changed circumstances existed in the *Final Results*.

Plaintiffs’ argument that Commerce incorrectly applied the CCR statute, rather than the CVD statute, characterizes the CCR statute too narrowly. Plaintiffs unpersuasively contend that this case presents an issue of first impression under the CCR statutory provision: whether Commerce may return to its initiation decision in the *Final Results*. Pls.’ Resp. to Oral Arg. Questions at 1–2. However, as explained above, this question was addressed by the court’s decision in *Marsan Gida*, which the court finds persuasive in this case. Plaintiffs argue that the context of *Marsan Gida*, referring to a successor-in-interest analysis, differs meaningfully from the present case, and insist that a substantive analysis pursuant to 19 U.S.C. § 1677(5) is required. Pls.’ Resp. to Oral Arg. Questions at 2–3. However, the court finds that this argument does not overcome the preliminary nature of

the *CCR Initiation* and *Preliminary Determination*, and the broad discretion afforded to Commerce in conducting CCRs.

The court concludes that Commerce's *Final Results* were in accordance with law because Commerce reasonably interpreted the statute to require changed circumstances at every stage of its CCR, and because the *CCR Initiation* and *Preliminary Results* were preliminary rather than final decisions that Commerce was entitled to revisit.

II. Commerce's Final Results were Supported by Substantial Evidence.

Plaintiffs next challenge Commerce's *Final Results* as not supported by substantial evidence because they claim that: (1) Commerce ignored evidence that undermined its determination; and (2) Commerce otherwise based its decision on speculation rather than record evidence.

As Commerce explained, during the underlying CVD investigation it examined soybean export restraints that benefited the biodiesel industry in Argentina through a program "designed and structured to entrust and direct soybean producers to provide Argentine biodiesel producers with soybeans for LTAR." *Preliminary Results*, 84 Fed. Reg. at 32,717–18. The GOA, in its request for initiation of a CCR, indicated changes in its soybean subsidy program and "attached three legislative decrees effecting changes across its export tax regime, including changes to the export taxes applied to soybeans, soybean oil, soymeal, and biodiesel." *CCR Initiation*, 83 Fed. Reg. at 56,301. The GOA also submitted information showing that Argentina's export tax on soybeans had been reduced from its rate of roughly twenty-seven to thirty percent during the CVD investigation to only eighteen percent. *Id.* Meanwhile, Argentina's export tax on biodiesel had increased from zero percent to fifteen percent, "reducing the export tax differential from approximately [thirty] percent to [three] percent." *Id.* In addition, the GOA pointed out that "there [had] been no shipments which could be the subject of an administrative review" since the CVD investigation. *Id.* at 56,302. Based on this information, Commerce preliminarily concluded that changed circumstances warranting a change to the cash deposit rates existed and initiated a CCR. *Id.* at 56,302. In its *Preliminary Results*, Commerce cited the GOA's changes "to the export tax on soybeans as well as to the export taxes on downstream products (including biodiesel)" to preliminarily determine that the countervailable LTAR program no longer existed. 84 Fed. Reg. at 32,718. Commerce also explained that it considered the "export tax on biodiesel in relation to the export

tax on soybeans” and found the convergence between the two tax rates to demonstrate that the tax regime was no longer “benefitting or encouraging the development of the domestic biodiesel industry.” *Id.* at 32,718–19.

However, based on additional evidence placed on the record after the *Preliminary Results*, Commerce reversed this conclusion in the *Final Results*. By the time the *Final Results* were issued, Commerce instead found that “there [were] no longer clear cut and discrete changes to examine.” IDM at 5. Commerce relied on evidence that since 2016, the tax regime had changed at least seven times: (1) calling for a monthly reduction of the tax on soybeans by half a percent; (2) increasing the tax on biodiesel to eight percent; (3) increasing the tax on biodiesel to fifteen percent; (4) reducing the tax on soybeans to eighteen percent and imposing temporary taxes on soybeans and biodiesel; (5) setting the taxes on soybeans and biodiesel at thirty and twenty-seven percent respectively; (6) giving the administration authority to set taxes up to thirty-three percent on soybeans and biodiesel; and (7) setting the taxes on soybeans and biodiesel at thirty-three and thirty percent respectively. *Id.* at 5–6. The last of these changes was included in Decree 230/2020, added to the record in March 2020, which also stated that “it [was] essential to establish inclusive policies for the export activity of regional economies that improve their performance and increase the competitiveness of the export of goods and services as their added value increases.” *Id.* at 6.

Commerce also found that the new GOA administration showed “signs of resorting once again to the use of differential export taxes as a development tool for specific industries, and potentially abandoning the policy of neutrality underlying the initiation of this CCR.” *Id.* Commerce noted that a draft version of a bill enacted in 2019 stated that export taxes would be “reduced for goods whose production implies a greater added value from the inputs used and the National Executive Power [would] develop stimulus policies for the producer.” *Id.* Commerce also cited a platform development document from the Justicialist Party, a member of the coalition supporting President Fernandez, proposing to increase soybean production and adopt policies promoting the development of exports and products associated with soybeans that added value. *Id.* Commerce concluded that the “evidence cited . . . demonstrates a renewed interest in developing value added industries and soybean derivatives in particular.” *Id.* at 7.

Thus, in the *Final Results*, Commerce ultimately concluded that changed circumstances warranting a change to the cash deposit rates did not exist. Specifically, Commerce found that “Argentina’s export

tax regime [was] in flux, leading Commerce to conclude that there [were] not sufficient changed circumstances to warrant such an adjustment. Therefore, Commerce [made] no changes to the cash deposit rates as listed in the order.” *Final Results*, 85 Fed. Reg. at 27,989. Commerce noted that in the past, it had adjusted cash deposit rates outside of administrative reviews when the alleged changes were “clear cut and discrete, and the effect on the cash deposit rate was likewise straightforward.” IDM at 5. Commerce found that “there [were] no longer clear cut and discrete changes to examine” based on the seven times since the underlying CVD investigation in 2016 that Argentina’s export tax regime had changed. *Id.* at 4–6. In order to avoid “speculative and incomplete results,” Commerce determined that the GOA had not “demonstrated sufficient changes to warrant a revision to the cash deposit rates.” *Id.* at 7–8.

For the reasons stated below, the court holds that Commerce supported its *Final Results* with substantial record evidence. First, case law establishes that it was within Commerce’s discretion to reconsider its analysis of evidence between the preliminary and final determinations. Second, the court concludes that Commerce’s *Final Results* were not based on speculation.

A. Commerce Lawfully Weighed the Record Evidence and Supported its Final Results with Substantial Evidence.

In arguing that the *Final Results* of the CCR were not supported by substantial evidence, Plaintiffs emphasize that the original CVD rate was set due to the export tax differential between soybeans and biodiesel, not the individual export taxes for these two goods. Pls.’ Reply Br. at 8. Plaintiffs argue that Commerce relied on the export duty differential between soybeans and biodiesel in its original CVD investigation and in the *Preliminary Results* but changed its focus to the individual export taxes in its *Final Results* without providing any explanation for this change. *Id.* at 7–8. Plaintiffs claim that Commerce ignored the fact that the export tax differential between soybeans and biodiesel remained constant at three percent throughout the CCR period, and thus did not account for evidence that detracted from its conclusion. Pls.’ Br. at 14–15 (citing 19 U.S.C. § 1516a(b)(1)(B)(i); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)). Plaintiffs further argue that the consistent export tax differential establishes changed circumstances and no other evidence on the record can sufficiently support Commerce’s conclusion in the *Final Results* that changed circumstances did not exist. *Id.* at 15, 20

While the Government acknowledges that the export tax differential between soybeans and biodiesel remained at three percent throughout the review, it responds that Commerce did not rely solely on this evidence to conclude that there were no changed circumstances sufficient to allow Commerce to determine the prospective subsidization rate for biodiesel. Def.'s Br. at 16 (citing IDM at 5, 12). Rather, the Government explains that Commerce initiated the CCR based on the GOA's "assertion that there was a straightforward and 'dramatic' change to the export tax regime," that were not proven during the review. Def.'s Br. at 16; *see also* Def.-Inter.'s Br. at 14–15. The Government characterizes the actual changes to the GOA administration's export tax regime as "concrete fluctuations" and asserts that relying on a regime "subject to such continual and rapid change" would have amounted to speculation by Commerce as to the precise changed circumstances. Def.'s Resp. to Oral Arg. Questions at 9–10; *see also* Def.-Inter.'s Br. at 14–15. NBB similarly explains that the GOA's multiple revisions to its export duty regime led Commerce to reasonably conclude that a subsidy analysis would be futile. Def.-Inter.'s Br. at 4, 24–25. Finally, the Government emphasizes that preliminary determinations are subject to change and that Commerce may change its views based on briefing, arguments, or additional record evidence in making final determinations. Def.'s Br. at 11–12.

The court holds that the *Final Results* were supported by substantial evidence. As an initial matter, Plaintiffs are incorrect in stating that Commerce did not address the export tax differential in its analysis of the evidence. Commerce acknowledged that "the GOA is correct that the three percent differential has been maintained for approximately a year and a half," but, nevertheless, noted that there is no Argentine "statutory requirement that a three percent differential be maintained" and explained that it had concluded that "more changes [were] likely and that such changes might implement the GOA's stated goal of encouraging value added industries, such as biodiesel." IDM at 12. Furthermore, Commerce cited to additional factual evidence on the record, including information regarding biodiesel prices, the biodiesel market, a new decree setting Argentine export taxes on soybeans and biodiesel at thirty and twenty-seven percent, respectively, and a second new decree setting Argentine export taxes on soybeans and biodiesel at thirty-three and thirty percent, respectively. IDM at 5–6. These facts reasonably support Commerce's conclusion that, despite the temporarily consistent export tax differential, there were no changed circumstances indicating

that the LTAR program no longer existed. Thus, Commerce’s change in position was explained and based on substantial evidence in light of the additional information placed on the record after the *Preliminary Results*.⁴ See *Hyundai Steel*, 319 F. Supp. 3d at 1343 (citing *Timken Co.*, 23 CIT at 515, 59 F. Supp. 2d at 1376).

Plaintiffs rely too heavily on the export tax differential between soybeans and biodiesel. While the consistent export tax differential between soybeans and biodiesel may detract from Commerce’s final negative CCR determination, the numerous changes to Argentina’s export tax regime and the draft bill stating that export duties would be reduced for goods that added value through their production detract from a conclusion that the countervailable subsidies found in the underlying investigation were no longer in place. See IDM at 6. Plaintiffs’ assertion amounts to a “mere disagreement” with Commerce’s conclusion and weight of the evidence rather than an assertion that Commerce’s conclusion was not based on substantial evidence. *Haixing Jingmei*, 335 F. Supp. 3d at 1346. Therefore, the court concludes that Commerce adequately explained its decision, including by addressing its weighing of the evidence regarding the export tax differential, and based its decision on substantial record evidence.

B. Commerce’s Final Results Were Not Based on Speculation.

Plaintiffs also contend that Commerce’s *Final Results* were based on impermissible speculation rather than substantial evidence. Pls.’ Br. at 18–21. Plaintiffs characterize the *Final Results* as based on Commerce’s mere speculation that Argentina’s export duties could be subject to change based on a rejected draft version of Argentine legislation and a political party platform document. *Id.* at 20. Plaintiffs further note that the draft language Commerce relied upon was “rejected and deleted” from the final bill. Pls.’ Resp. to Oral Arg. Questions at 14.

The Government and NBB argue that Commerce’s determination was based on substantial record evidence, including evidence placed on the record after the *Preliminary Results* were issued, rather than mere speculation. Def.-Inter.’s Br. at 13; Def.’s Br. at 17–19. The Government and NBB contend that, instead, Commerce found that Argentina issued seven decrees altering its export tax regime since

⁴ The court notes that even where the record does not change between the preliminary and final determinations, Commerce may change its analysis of the same factual record evidence before the final determinations. *E.g.*, *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1357 (2015) (“*Husteel*”) (holding that Commerce may “reverse course on [an] issue in the Final Determination without having received any new evidence following the Preliminary Determination.”). Specifically, “Commerce [is] not prohibited from reconsidering its analysis of the evidence.” *Id.*

the original investigation, and that certain of those decrees were set to expire. Def.'s Br. at 10, 18; Def.-Inter.'s Br. at 14–17. At the time that the *Preliminary Results* were issued, Commerce found that Argentina had submitted an economic reform proposal to the IMF, corroborating the GOA's claims that it had shifted the focus of its export tax regime from selective economic development to general revenue collection and economic stability. 84 Fed. Reg. at 32,716. However, as NBB notes, after the *Preliminary Results* were issued, Argentina elected a new president whose administration began “unraveling” these changes and intended to renegotiate the IMF deal. Def.-Inter.'s Br. at 12, 24; Mem. from M. Hoadley to File re New Factual Information Attach. 1 (Dec. 17, 2019), P.R. 108. NBB notes that in the past, Commerce has refrained from changing cash deposit rates or re-analyzing countervailability except under extremely narrow circumstances where it has found “clear cut and discrete” changes to subsidy programs. Def.-Inter.'s Br. at 22 (quoting IDM at 7). NBB claims that Commerce acted in line with its past practice here by not finding clear cut and discrete changed circumstances sufficient to warrant a change in the cash deposit rates for biodiesel from Argentina. *Id.* at 22–23.

The court concludes that Commerce's *Final Results* were supported by substantial evidence and not based on speculation. First, the court acknowledges that there are limits to Commerce's discretion in evaluating record evidence — namely, Commerce may not base its conclusions on speculation. *OSI Pharm., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382–83 (Fed. Cir. 2019) (citing *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1331 (Fed. Cir. 2017)); see also *Maverick Tube Corp. v. United States*, No. 14–00229, 2016 CIT LEXIS 17, at *8 (Feb. 22, 2016); *Wash. Int'l Ins. Co. v. United States*, 33 CIT 1023, 1027 n. 6, 1036–38 (2009). However, the court concludes that Commerce's *Final Results* were not based on mere speculation.

Although Commerce based its conclusions in part on predictions about Argentina's export tax regime in the immediate future, these predictions were based on trends established by substantial record evidence and existing circumstances. Commerce specifically made note of seven completed changes to Argentina's tax regime that affected the export taxes on soybeans and biodiesel. IDM at 5–6. Commerce also cited a platform development document and draft bill from the Justicialist Party that supported its conclusion. IDM at 6. Commerce's *Final Results* did not reflect anticipated future changes to Argentina's export tax regime, rather, Commerce assessed the state

of Argentina's export tax regime at the time of the *Final Results*.⁵ This is not mere speculation as Plaintiffs contend. The Government correctly notes that Commerce has no obligation to change cash deposit rates at the conclusion of a CCR and provide prospective relief to Plaintiffs, even while acknowledging Plaintiffs' claims about ceased shipments of biodiesel that would have precluded a change to the CVD Order through administrative review. Def.'s Br. at 9. Rather, Plaintiffs carry the burden of persuasion "with respect to whether changed circumstances sufficient to warrant" revocation of a CVD order exist. See 19 U.S.C. § 1675(b)(3)(A). That Plaintiffs failed to carry that burden throughout the investigation does not mean that Commerce's decision was based on speculation alone.

In short, the court concludes that Commerce's *Final Results* were based on substantial evidence and not mere speculation.

III. Plaintiffs Failed to Exhaust Administrative Remedies Regarding Timeliness.

Pursuant to 19 C.F.R. § 351.216(e), Commerce must issue the final results of a CCR within 270 days of initiation. However, due to various delays, Commerce issued its final determination 546 days after initiating this CCR. See *CCR Initiation; Final Results*. Plaintiffs challenge Commerce's *Final Results* as untimely. Pls.' Br. at 15–18. The Government and NBB argue that the court should not consider Plaintiffs' timeliness argument, because Plaintiffs failed to raise this issue at the administrative level and exhaust their administrative remedies. Def.'s Br. at 20; Def. Inter.'s Br. at 25. The Government further observes that in September 2019, after the tolling period caused by the Government shutdown and after Commerce had issued a case-specific hold on deadlines, there were significant outstanding issues to resolve in the CCR. Def.'s Br. at 20. As such, the Government argues that Plaintiffs had "ample notice" that Commerce would issue its *Final Results* after the 270-day deadline. Def.'s Br. at 20.

Under 28 U.S.C. § 2637(d), a party must present "all arguments . . . relevant to the . . . final [determination]" directly to Commerce before bringing those challenges to the court. Four narrow exceptions exist to relieve a party from this exhaustion requirement, where: "(1)

⁵ Plaintiffs point out that CVD law includes a prospective method for setting cash deposit rates and a retrospective method for assessing duties, arguing that the purpose of a CCR is to reset the cash deposit rate and later assess final duty rates based on actual imports. Pls.' Br. at 18–19 (citing *Sioux Honey*, 672 F.3d at 1047). Plaintiffs claim that the dual prospective and retrospective systems show Congressional intent for a CCR to capture only changes that have already occurred at the time of the review. *Id.* at 18. Because the court finds that Commerce supported its conclusion with substantial record evidence and assessed the state of the Argentine export tax regime at the time of its *Final Results*, the court need not address this contention.

plaintiff's argument involves a pure question of law; (2) there is a lack of timely access to the confidential record; (3) a judicial decision rendered subsequent to the administrative determination materially affected the issue; or (4) raising the issue at the administrative level would have been futile." *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 3d 1370, 1377 (2009) (citation omitted).

As they acknowledge, Plaintiffs failed to raise timeliness in their briefs of September 2019 or at any time between September 2019 and May 2020, when Commerce issued its *Final Results*.⁶ See Case Br. of the Gov't of Argentina (Sept. 17, 2019), P.R. 89; Rebuttal Br. of the Gov't of Argentina in the CVD Changed Circumstances Review (Sept. 23, 2019), P.R. 93; Pls.' Reply Br. at 12–13. Plaintiffs argue that the futility exception applies such that the court should not require exhaustion of this argument, as they could only have raised the issue after the deadline had already passed. Pls.' Reply Br. at 13. Plaintiffs also note that timeliness is not within the scope of 28 U.S.C. § 2637(d), because it is not a substantive issue that would affect the CCR. *Id.* at 12–13. However, the futility exception is narrow. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Pursuant to 28 U.S.C. § 2637(d), the court must, "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. 2637(d); see also *Corus Staal*, 502 F.3d at 1379. "Although the statutory injunction is not absolute, it indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Id.* "The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Id.*

The court concludes that Plaintiffs failed to exhaust administrative remedies regarding timeliness. Commerce granted an extension to the briefing deadlines to the parties, so that briefs were due just one day before the regulatory deadline for the CCR results. Mem. from M. Hoadley to All Interested Parties re Changed Circs. Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Deadline for Case and Rebuttal Brs. And Hr'g Requests;

⁶ Plaintiffs later assert that they "raised the issue [of timeliness] with Commerce five months before the final results were issued," citing a memorandum placed on the factual record. Pl. and Consol-Pl.'s Joint Post-Arg. Submission at 4. However, the cited memorandum only states that Argentina's Ambassador to the United States "asked . . . where the decision-making process stood and . . . when a determination would be made." Mem. from A. Rankin to File re Telephone call with Ambassador Fernando Oris de Roa to discuss Changed Circumstances Reviews (CCR) of Biodiesel from Argentina 1 (Dec. 5, 2019), P.R. 104. There is no mention of the regulatory deadline, potential prejudice to any party, or even an outright objection to the delays. The court finds this memorandum insufficient to constitute exhaustion of administrative remedies.

Rejection of New Factual Information (Sept. 12, 2019), P.R. 85. Commerce also scheduled and held a hearing on September 26, 2019, just after the deadline would have passed. Def.'s Br. at 4. Plaintiffs thus had sufficient opportunity to raise their concerns regarding timeliness, both in their briefs before the deadline and during the hearing after the deadline. At both times, it was clear that Commerce would not meet the 270-day deadline so that it would not have been futile for Plaintiffs to attempt to raise this issue so that Commerce could have at least addressed this point prior to Plaintiffs bringing this challenge. The court also declines to apply the narrow futility exception to this issue.⁷

In sum, given the notice that Plaintiffs had regarding the delayed issuance of the *Final Results* and their failure to address timeliness before Commerce, the court concludes that Plaintiffs failed to exhaust their administrative remedies on this issue and therefore declines to address it.⁸

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Final Results* and denies Plaintiffs' motion for judgment on the agency record.

SO ORDERED.

Dated: September 21, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

⁷ Indeed, Plaintiffs do not request that the court vacate Commerce's *Final Results* due to the delay.

⁸ Even if Plaintiffs had raised their concerns regarding timeliness at the administrative level, the court notes that Commerce's delayed issuance of the *Final Results* was a harmless error. Statutory deadlines, much less the regulatory deadline in this case, are not mandatory in the absence of an express statement of consequences from Congress. See *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, __, 396 F. Supp. 3d 1334, 1335 (2019). Furthermore, Commerce has discretion to modify deadlines so long as the modification does not substantially prejudice a complaining party. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). Plaintiffs argue that the delayed results negatively affected the shipments and economy of LDC and the GOA, respectively, and furthermore that Commerce used the additional time to collect information that it ultimately used to rule against Plaintiffs. Pls.' Resp. to Oral Arg. Questions at 16, 18. However, the examples Plaintiffs provide presume a positive outcome in the CCR. The GOA also agreed to a "short extension" only twelve days before the 270-day deadline of September 24, 2019. IDM at 3. The lack of substantial prejudice disposes of the timeliness issue under the harmless error rule.

Slip Op. 21–126

HiSTEEL CO., LTD., and KUKJE STEEL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., and ATLAS TUBE AND SEARING INDUSTRIES, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 20–00146

[The court grants Plaintiffs’ motion for judgment on the agency record and remands Commerce’s *Final Results*.

Dated: September 23, 2021

Michael J. Chapman, Winton & Chapman PLLP, of Washington, D.C., argued for Plaintiffs HiSteel Co., Ltd. and Kukje Steel Co., Ltd. With him on the briefs were *Jeffrey Winton*, *Amrietha Nellan*, and *Vi N. Mai*.

Kara Marie Westercamp, Trial Attorney, 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, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Robert DeFrancesco, III, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor, Nucor Tubular Products, Inc. With him on the brief were *Enbar Toledano* and *Jake R. Frischknecht*.

Elizabeth J. Drake, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor, Atlas Tube, a division of Zekelman Industries, and Searing Industries. With her on the brief were *Roger B. Schagrin*, *Christopher T. Cloutier*, and *Luke A. Meisner*.

OPINION

Katzmann, Judge:

This case involves a challenge to the Department of Commerce’s (“Commerce”) determination that Korean producers of heavy walled rectangular welded carbon steel pipes and tubes (“HWR”) sold HWR into the United States at prices below fair value. The challenge raises three primary questions. First, does the Trade Preferences Extension Act of 2015 (“TPEA”) give Commerce statutory authority to make a contested adjustment to the cost of production in an antidumping (“AD”) proceeding? Second, may Commerce employ a “totality of the circumstances” approach to demonstrate that a particular market situation (“PMS”) existed during the period of review (“POR”)? Finally, are Commerce’s identification of a PMS in this case and resultant PMS adjustment to the cost of production supported by substantial evidence?

In its final results of antidumping duty administrative review, published July 10, 2020, Commerce determined that Korean HWR

producers were properly subject to AD duties and accordingly imposed duties of 53.80% for Dong-A Steel, 26.20% for HiSteel, 35.11% for Kukje Steel, and 29.07% for all non-selected respondents. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 85 Fed. Reg. 41,538, 41,539 (Dep't Commerce July 10, 2020), P.R. 402 (“*Final Results*”). On August 7, 2020, Plaintiffs HiSteel Co., Ltd. (“HiSteel”) and Kukje Steel Co. Ltd., (“Kukje”) (collectively, “Plaintiffs”) initiated this suit against the United States (“Government” or “Defendant”) to challenge the *Final Results*. Summons, ECF No. 1. Plaintiffs specifically contest Commerce’s application of a PMS adjustment to the costs of hot-rolled steel coils (“HRC”), an input to HWR, before conducting a sales-below-cost test to determine the normal value of HWR. Pls.’ Mot. for J. on the Agency R. 2, Jan. 4, 2021, ECF No. 33 (“Pls.’ Br.”). Plaintiffs argue that (1) Commerce does not have the authority to apply a PMS adjustment to cost of production when conducting a sales-below-cost test; (2) a PMS does not exist in the Korean market for HRC; and (3) Commerce’s PMS adjustment is not supported by substantial evidence. Pls.’ Br. at 2–4. The court grants Plaintiffs’ motion for judgment on the agency record and remands Commerce’s determination that a PMS affected the price of hot-rolled steel coils during the POR and resultant application of an upward adjustment to the price of HRC prior to conducting a sales-below-cost test.

BACKGROUND

I. Legal Background

Under the Tariff Act of 1930, Commerce is authorized to investigate potential dumping activity and, if dumping is found, levy AD duties on the unfairly priced goods. *Sioux Honey Ass’n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Dumping occurs when a foreign company sells a product in the United States for less than its fair value. 19 U.S.C. § 1677b(a). Accordingly, to impose AD duties, Commerce must first determine whether a good is being sold at less than its fair value. *Id.*; 19 U.S.C. § 1673. In so determining, Commerce compares the product’s export price or constructed export price (export price adjusted for various additional expenses pursuant to 19 U.S.C. § 1677a(c)–(d)) with the product’s normal value. 19 U.S.C. § 1677b(a). Next, the International Trade Commission (“ITC”) must determine whether the domestic industry that produces the product under investigation is materially injured, is threatened with material injury, or if the establishment of a domestic industry is materially

retarded by the sale of the dumped product. *Id.* If dumping has occurred, and has been found to injure, threaten, or retard domestic industry, Commerce may impose AD duties on the dumped product. *Id.* The duty imposed should be equal to the “dumping margin,” which is the calculated difference between the export price or constructed export price and the normal value of the merchandise. *Id.*

A. Standard Normal Value Calculation Methodology

Pursuant to 19 U.S.C. § 1677b, there are three possible ways to calculate normal value when the exporting country is a market economy.¹ First, Commerce may average the product’s prices in the home market (“the home market methodology”). 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce believes that some sales in the home market were made at prices below the cost of production, Commerce may conduct a sales-below-cost test, wherein Commerce determines that sales in the home market were made at prices below the cost of production and disregards those sales when calculating normal value. 19 U.S.C. § 1677b(b). Second, where the product or an identical product is not offered for sale in the home market, Commerce can average the product’s prices in a third country. 19 U.S.C. § 1677b(a)(1)(B)(ii). Third, if the product or an identical product is not offered for sale in the home market, and notwithstanding the availability of third country sales data, Commerce may determine the product’s normal value by calculating its constructed value. 19 U.S.C. § 1677b(a)(4). Constructed value is calculated by summing the costs of production and processing of the product, and costs incurred by the exporter under investigation (or other representative exporters under investigation) in the course of the export and sale of the product. 19 U.S.C. § 1677b(e).

B. Particular Market Situation Determinations and Adjustments under the TPEA.

Broadly, a PMS exists when the market under investigation possesses a unique set of circumstances that “prevents a proper comparison” between a product’s normal value and its export price or constructed export price. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III). While the Tariff Act historically omitted explicit guidelines for the identification of a PMS, this changed with the passage of the Trade Preferences Extension Act of 2015 (“TPEA”), which amended the existing AD and

¹ Korea, the country at issue in this litigation, is undisputedly a market economy. *See* 9 U.S.C. 1677(18); *Countries Currently Designated by Commerce as Non-Market Economy Countries*, Int’l. Trade Admin., <https://www.trade.gov/nme-countries-list> (last visited Sept. 22, 2021).

countervailing duty statutes. *See* Tariff Act, Pub. L. 103–465, § 773 (1994) (amended 2015); Trade Preferences Extension Act of 2015 § 504, 19 U.S.C. §§ 1677(15), 1677b(e). Section 504 of the TPEA in particular provided greater color to the meaning and scope of particular market situations and clarified the circumstances under which Commerce may apply adjustments on the basis of a PMS determination. Section 504(a) further incorporated PMS determinations as a circumstance existing outside of a country’s ordinary course of trade. *See* 19 U.S.C. § 1677(15)(C). Finally, section 504(c) of the TPEA amended the calculation of constructed value to allow for PMS-specific adjustments. *See* 19 U.S.C. § 1677b(e). Section 504(c) expressly stipulates that a PMS exists when “the costs of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” impeding Commerce’s ability to accurately estimate a product’s constructed value. *See* 19 U.S.C. § 1677b(e)(3). Once Commerce determines that a PMS exists, the TPEA authorizes Commerce to use “any other calculation methodology” to determine the cost of production in the exporting country for the purposes of calculating constructed value. *Id.*

II. Factual Background

A. Commerce’s Administrative Review of HWR

On November 15, 2018, the Department of Commerce initiated a review on an AD order on HWR from Korea. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 57,411 (Dep’t Commerce Nov. 15, 2018), P.R. 5. Commerce selected HiSteel and Dong-A Steel Co., Ltd. (later replaced by Kukje) for individual examination as mandatory respondents.² Second Respondent Selection Memo (Dep’t Commerce Dec. 18, 2018), P.R. 17.

On April 2, 2019, Nucor Tubular Products, Inc. (“Nucor”) — then operating as Independence Tube Corporation and Southland Tube, Incorporated (together, “Petitioners”)—submitted to Commerce a cost-based PMS allegation for the price of HRC as an input for HWR.

² In AD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Pet'rs' April 2, 2019, PMS Allegation (Apr. 2, 2019), P.R. 51–236, C.R. 36–122. Petitioners' PMS allegation was based on four factors, including (1) the distortive effect of unfairly traded steel from China; (2) the subsidization of Korean hot-rolled steel production by the Korean government; (3) distortive government control over electricity prices in Korea; and (4) strategic alliances between Korean HRC suppliers and Korean HWR producers. *Id.* at 27–30. Additionally, Petitioners proposed a regression model to capture the distortive effect of the steel overcapacity on the Korean market, which Petitioners alleged amounted to a PMS in this instance. *Id.* at 43–60. Plaintiffs each subsequently submitted a PMS rebuttal, including additional facts and comments in response to Nucor's PMS allegation. *See* HiSteel's May 10, 2019 PMS Rebuttal (May 10, 2019), P.R. 257–259, C.R. 136–141, Kukje Steel's May 10, 2019 PMS Rebuttal (May 10, 2019), P.R. 262–274, C.R. 142–155.

B. Preliminary Results

On November 18, 2019, Commerce published its *Preliminary Results* stating that a cost-based PMS existed with respect to Korean HRC which distorted the market for HWR. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Prelim. Results of Antidumping Duty Administrative Review; 2017–2018*, Fed. Reg. 63,613 (Dep't Commerce Nov. 18, 2019), P.R. 348 (“*Preliminary Results*”); *see also* Decision Mem. for the Prelim. Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, (Dep't Commerce Nov. 6, 2019), P.R. 342 (“PDM”). This determination was based on the same four factors proposed by Petitioners: (1) the distortive effect of imported Chinese steel; (2) domestic subsidization of Korean hot-rolled steel; (3) distortive government control over electricity prices in Korea; and (4) strategic alliances between Korean HRC and HWR producers. PDM at 9, 14–15. In addition, Commerce found that it had the authority, upon determining that a PMS existed, to adjust the cost of production (“COP”) for a sales-below-cost test. *Id.* at 14–15, 20–24. Finally, Commerce accepted Petitioners' proposed regression model to quantify the effect of the PMS. *Id.* at 16.

C. Final Results

In response to the *Preliminary Results*, Korea's Ministry of Trade, Industry and Energy submitted a letter to Commerce detailing Korea's objections to the regression-based PMS adjustment applied in this case. *See* MOTIE Letter (Nov 26, 2019), P.R. 350. Additionally, Petitioners and Plaintiff Kukje each submitted case briefs responding

to Commerce's *Preliminary Results*. Petitioners, HiSteel, and Kukje each submitted rebuttal briefs. See HiSteel Rebuttal Br. (Feb. 3, 2020), P.R. 370–371, C.R. 205–206; Kukje Rebuttal Br. (Feb. 3, 2020), P.R. 369, C.R. 204; Pet'rs' Rebuttal Br. (Feb. 4, 2020), P.R. 373, C.R. 207.

After reviewing materials from the interested parties, Commerce issued its *Final Results*. *Final Results* at 41,538. In the issues and decision memorandum accompanying the *Final Results*, Commerce affirmed that a PMS existed with respect to Korean HRC which affected the market for HWR, that Commerce had the authority to apply a PMS adjustment before conducting a sales-below-cost test, and that Petitioners' regression model, with a few modifications, was acceptable to quantify the PMS adjustment. Issues and Decision Mem. For the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Dep't Commerce July 7, 2020), P.R. 395 ("IDM"). Commerce then employed the PMS-adjusted COP to calculate AD duty rates of 53.80% for Dong-A Steel, 26.20% for HiSteel, 35.11% for Kukje, and 29.07% for all non-selected respondents. *Final Results* at 41,539.

III. Procedural History

HiSteel and Kukje initiated this litigation on August 7, 2020 to challenge Commerce's *Final Results*. Summons. The court granted motions to intervene for both Nucor and Atlas Tube and Searing Industries ("Atlas") on September 25, 2020 and September 28, 2020, respectively. ECF No. 27, ECF No. 28. On January 4, 2021, Plaintiffs filed a Rule 56.2 Motion for Judgment on the Agency Record. Pls.' Br. Defendant the United States and Defendant-Intervenors Nucor and Atlas ("Defendant-Intervenors") each filed a response to Plaintiffs' motion. Def.-Inter.'s Mem. in Resp. to Pls.' Mot. for J. on the Agency R., Mar. 16, 2021, ECF No. 40 ("Def.-Inter.'s Br. (Atlas)"); Def.'s Resp. to Pls.' Mot. for J. on Agency R., Mar. 16, 2021, ECF No. 41 ("Def.'s Br."); Def.-Inter.'s Resp. to Pls.' Mot. for J. on the Agency R., Mar. 16, 2021, ECF No. 42 ("Def. Inter.'s Br. (Nucor)"). Plaintiffs subsequently submitted a reply brief. Reply Br. of HiSteel Co., Ltd. and Kukje Steel Co., Ltd., Apr. 13, 2021, ECF No. 43 ("Pls.' Reply Br.").

Preceding oral argument, the court presented questions to which the parties replied in writing. See Ct.'s Letter Regarding Questions for Oral Arg., July 1, 2021, ECF No. 49; Pls.' Resp. to the Ct.'s Questions for Oral Arg., July 12, 2021, ECF No. 51 ("Pls.' Resp. to the Ct.'s Questions"); Def.-Inter. Nucor's Resp. to Ct.'s Questions for Oral Arg., July 12, 2021, ECF No. 52; Def.'s Resp. to the Ct.'s Questions for

Oral Arg., July 12, 2021, ECF No. 53 (“Def.’s Resp. to the Ct.’s Questions”); Def.-Inter. Atlas’s Resp. to Ct.’s Questions for Oral Arg., July 12, 2021, ECF No. 54. The court filed additional questions for the parties to address at oral argument. *See* Ct.’s Letter Regarding Questions for Oral Arg., July 13, 2021, ECF No. 55. Oral argument was held on July 14, 2021 via videoconference. ECF No. 56. The parties filed additional post-argument submissions to address issues presented at argument. Def.-Inter.’s Suppl. Br. (Atlas), July 21, 2021, ECF No. 57; Pls.’ Suppl. Br., July 21, 2021, ECF No. 58; Def.-Inter.’s Suppl. Br. (Nucor), July 21, 2021, ECF No. 59; Def.’s Suppl. Br., July 21, 2021, ECF No. 60.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c), 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in AD duty proceedings is governed by 19 U.S.C. § 1516a(b)(1)(B)(i), which provides that “[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.” Agency determinations must be supported by substantial evidence. *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984).

DISCUSSION

Plaintiffs argue that Commerce’s *Final Results* should not be sustained because: (1) Commerce does not have the authority to adjust for a PMS prior to a sales-below-cost test under 19 U.S.C. §1677b(b); (2) Commerce fails to present substantial evidence that a PMS existed in the Korean market for HRC during the POR; (3) Commerce’s PMS adjustment is not supported by substantial evidence. The court agrees with Plaintiffs that Commerce does not have the authority to apply a PMS adjustment prior to a sales-below-cost test. The court further concludes that, even if Commerce had the authority to adjust apply a PMS adjustment prior to the sales-below-cost test, it fails to present substantial evidence that a PMS existed in this instance, or to support its PMS adjustment. The court accordingly remands Commerce’s determination that a PMS affected the price of HRC during the POR, and resultant application of an upward adjustment to the price of HRC prior to conducting a sales-below-cost test, for further proceedings consistent with this opinion.

I. Commerce Cannot Adjust for a PMS before Conducting a Sales-Below-Cost Test

In arguing that Commerce impermissibly applied a PMS adjustment prior to conducting a sales-below-cost test, Plaintiffs rely on both the plain language of the statute and on prior decisions of the court. Pls.' Br. at 4–7. Defendants oppose Plaintiffs' argument by contending that the plain language of the statute in fact gives Commerce the authority to apply a PMS adjustment prior to a sales-below-cost test. Def.'s Br. at 19–22. Additionally, Defendants contend that even if the statute does not directly speak on the issue, Commerce's interpretation of the statute was reasonable and should therefore be upheld. *Id.*

The court concludes that Commerce cannot adjust for a PMS before conducting a sales-below-cost test under 19 U.S.C. § 1677b(b). In determining whether Commerce exceeded its authority in this instance, the court finds that under a *Chevron* analysis, section 504 of the TPEA “directly spoke” on Commerce's authority to apply a PMS before a sale-below-cost test when calculating normal value, and if even if it did not, Commerce's interpretation of the statute was not reasonable. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

A. The Plain Language of the Statute Indicates that Commerce Cannot Apply a PMS Adjustment Prior to Conducting a Sales-Below-Cost Test

As has been noted, Plaintiffs assert that Commerce does not have the authority to adjust COP in a sales-below-cost test to account for a particular market situation (“PMS”). Pls.' Br. at 4. Plaintiffs argue that Section 504(a) of the Trade Preferences Extension Act (“TPEA”) permits Commerce to account for a PMS when using the constructed value method to calculate normal value under 19 U.S.C. § 1677b(c), but does not permit Commerce to account for a PMS when conducting a sales-below-cost test in its calculation of normal value from home market value under 19 U.S.C. § 1677b(b), as Commerce did here. Pls.' Br. at 4–5. The Government and Defendant-Intervenor Atlas argue that once Commerce has determined that a PMS exists, Commerce has broad authority to adjust input costs that are outside the ordinary course of trade. Def.'s Br. at 19–20; Def.-Inter.'s Br. (Atlas) at 5–7. Finally, Defendant-Intervenor Nucor contends that Plaintiffs' argument that Congress directly spoke on the issue by excluding PMS adjustments from the statutory language on the sales-below-cost test cannot survive a *Chevron* analysis because, in an administrative setting, a congressional mandate in one section and silence in

another suggests that Congress decided to leave the question to agency discretion rather than speaking directly to a prohibition. Def.-Inter.'s Br. (Nucor) at 19–21.

The court concludes that Commerce does not have the authority, based on the plain language of the statute, to apply a PMS adjustment in this instance. Despite Defendant and Defendant-Intervenor's attempts to argue that once a PMS is identified, Commerce can use "any other calculation methodology" to calculate cost of production,³ the statutory provision allowing for other calculation methodologies is modified by the language "for the purposes of paragraph (1)," where paragraph one pertains to the cost of materials in the calculation of constructed value under section 1677b(c).⁴ No similar language appears under the provisions for calculating normal value using the home market methodology set forth in section 1677b(a)(1). *See* 19 U.S.C. § 1677b(a)(1). Additionally, as Plaintiffs note, 19 U.S.C. § 1677b(f) explicitly lists "special rules" for calculating COP for a sales-below-cost test but does not mention PMS adjustments. 19 U.S.C. § 1677b(f); Pls.' Br. at 6–7. This language therefore does not apply when Commerce is using the home market methodology for calculating normal value under section 1677b(a)(1).

The court is not persuaded by Defendant-Intervenor Atlas's argument that Commerce's authority to use "any other calculation methodology" should not be limited to the calculation of constructed value simply because it appears in that statutory section. Indeed, Atlas's argument that the Federal Circuit has previously declined to limit plain language based on the section where that language appears relies on a case, *Genetech Inc. v. Eli Lilly & Co.*, 998 F.3d 931, 941–42 (Fed. Cir. 1993) (*abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)), which is inapposite here. Def.-Inter.'s Br. (Atlas) at 6–7. In *Genetech*, the court declined to limit the application of statutory language based on the heading under which it appeared where there was no further indication that narrow application was

³ "For purposes of paragraph (1), 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 part or any other calculation methodology." 19 U.S.C. § 1677b(e).

⁴ At oral argument, Plaintiffs asserted that the phrase "such that" in 19 U.S.C. § 1677b(e)(3) demonstrates that any PMS that Commerce finds must affect the COP so as to render the COP outside the ordinary course of trade. Oral Argument at 16:20. If the COP is outside the ordinary course of trade, then Commerce can adjust for a PMS when calculating constructed value. 19 U.S.C. 1677b(e). In their supplemental brief, Defendant-Intervenor Nucor objected to Plaintiffs' interpretation of this language and instead argued that "such that" indicated the subsequent language is illustrative rather than conditional. Def.-Inter.'s Suppl. Br. (Nucor) at 2–3. The court agrees with the Plaintiffs; if a PMS exists but has no impact on the COP, or the COP is not outside the ordinary course of trade, then the PMS is irrelevant to the calculation of normal value for purposes of a sales-below-cost test.

intended. *See* Def.-Inter.’s Br. (Atlas) at 7 (quoting *Genentech*, 998 F.3d at 941–42). In this instance, the statutory text itself limits the text’s cross-applicability since the relevant provision explicitly limits its application to the calculation of constructed value. *See* 19 U.S.C. § 1677b(e)(3) (“*For purposes of paragraph (1) . . . the administering authority may use another calculation methodology*”) (emphasis added).

Nor is the court persuaded by Defendant-Intervenor Nucor’s contention that Plaintiffs’ arguments fail to satisfy *Chevron*. Def.-Inter.’s Br. (Nucor) at 18–21. Nucor alleges that, as Congress has not spoken directly on the issue, *Chevron* requires that the court conclude that Congress intended to leave the interpretation of the statute to agency discretion. *Id.*; *see also Van Hollen, Jr. v. Fed. Election Comm’n*, 811 F.3d 486, 493 (D.C. Cir. 2016) (“The *expressio unius canon*⁵ operates differently in our review of agency action than it does when we are directly interpreting a statute.”); *and see Cheney R.R. Co. v. Interstate Com. Comm’n*, 902 F.2d 66, 69 (D.C. Cir 1990) (“Here the contrast between Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the ‘direct []’ congressional answer required by *Chevron*.” (citing *Chevron*, 467 U.S. at 842–43)) (emphasis in original). However, the cases that Nucor cites to reject the *expressio unius canon* in this instance are at odds with this court’s prior interpretation of the statute. In *Dong-A Steel v. United States*, for example, the court found that the plain language of the statute was sufficient to demonstrate that Commerce did not have the authority to apply a PMS adjustment before a sales-below-cost test. *Dong-A Steel v. United States*, 44 CIT ___, 475 F. Supp. 3d 1317, 1338–41 (2020). The court relied on Federal Circuit precedent stating that “where ‘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.’” *Id.* at 1339 (quoting *Thomas v. Nicholson*, 423 F.3d 1279, 1284 (Fed. Cir. 2005)). Here, the court again adopts the analysis set out in *Dong-A Steel* and finds that the plain language of the statute demonstrates that Commerce lacks the authority to apply a PMS in this instance.

⁵ “The statutory interpretive canon of *expressio unius est exclusio alterius*, provides that ‘expressing one item of [an] associated group or series excludes another left unmentioned.’” *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 425 (Fed. Cir. 2018) (quoting *N.L.R.B. v. SW Gen., Inc.*, 137 S.Ct. 929, 933 (2017)).

B. Commerce’s Interpretation of the Statute Was Not Reasonable

For the reasons stated above, the statute does, in fact, speak directly to Commerce’s ability to apply a PMS adjustment prior to a sales-below-cost test. In the interest of judicial economy, the court nevertheless proceeds to address the arguments by Defendant-Intervenors Atlas and Nucor that, in the case that the statute were ambiguous, Commerce reasonably interpreted the statute to permit its application of PMS adjustments.⁶ Under *Chevron*, if a statute does not “directly speak” to the issue at hand, the court must determine whether the agency’s interpretation of the statute was “reasonable,” meaning that the interpretation is not “arbitrary, capricious, or manifestly contrary to the statute.” 467 U.S. at 844. So long as the agency’s interpretation is reasonable, it must be upheld. *Id.* Here, the court rejects Defendant-Intervenors’ arguments because Commerce’s interpretation does not meet the standard set forth by *Chevron*. Accordingly, even if the statute did not directly address the question of Commerce’s ability to apply a PMS adjustment prior to a sales-below-cost test, Commerce’s interpretation of the statute was unreasonable and cannot be upheld.

Defendant-Intervenor Atlas first notes that the section addressing calculation of constructed value, 19 U.S.C. § 1677b(e), uses similar language to describe COP as the section outlining the sales-below-cost test as applied to home market value, 19 U.S.C. § 1677b(b)(3)(A), which does not mention PMS adjustments. Def.-Inter.’s Br. (Atlas) at 7–11. On the basis of the similar language, Atlas argues that the TPEA effectively added PMS adjustments to both provisions. *Id.* at 8. However, in *Husteel* the court specifically interpreted the difference between those two provisions to demonstrate that the statute intends for Commerce to permit a PMS adjustment for one methodology and not the other, as opposed interpreting the similarities in the provisions as effectively adding PMS adjustments to both methodologies, as Atlas contends. *Husteel v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1376, 1383 (2020). The court is persuaded by the analysis in *Husteel* and therefore rejects the argument now posed before us.

Second, both Atlas and Nucor allege that given that the term “ordinary course of trade” is used throughout the statute and refers to a scenario where costs and prices form the basis of a fair comparison, Commerce reasonably inferred they could adjust costs for a PMS to achieve a normal value “in the ordinary course of trade.” Def.-Inter.’s Br. (Atlas) at 8–10; Def.-Inter.’s Br. (Nucor) at 24. Once again, this is

⁶ Plaintiffs do not address whether, if the statute does not directly address the issue, Commerce’s interpretation of the statute was reasonable under *Chevron*.

an argument that the court has previously rejected. *See Husteel*, 426 F. Supp. 3d at 1388 (“Commerce apparently assumes . . . that when Congress amended the statute to define ‘ordinary course of trade’ in 2015, it enabled Commerce to make PMS adjustments to the COP for purposes of the below cost sales test However, Commerce is not authorized to tinker with the below cost sales calculation because of a PMS.”). As neither Atlas nor Nucor has provided sufficient grounds for departing from the analysis in *Husteel*, the court again adopts its analysis here.

Third, Atlas argues that it would be inconsistent of the statute to permit PMS adjustments when calculating normal value via constructed value but not when relying on home market value. Def.-Inter.’s Br. (Atlas) at 10. However, “[t]he plain meaning of the statutory scheme is not illogical.” *Husteel*, 426 F. Supp. 3d at 1388. Rather, the court finds that the statute permits Commerce to adjust for a PMS when determining home market value by allowing for the exclusion of sales below COP under 19 U.S.C. § 1677b(b). In the alternative, Commerce may determine normal value through the calculation of constructed value, or by relying on prices from a third country. 19 U.S.C. § 1677b(a)(1)(B)(ii), (a)(4). The court in *Husteel* persuasively explained that permitting a PMS adjustment to COP is illogical because “a PMS that affects costs of production would presumably affect prices for domestic sales and export sales so there would be no reason to adjust only the home market prices,” whereas “[i]f the PMS was of a kind that only affected domestic sales, then it would be one which prevented ‘a proper comparison with the export price or constructed export price’ and Commerce would move to either third country sales or constructed value.” 426 F. Supp. 3d at 1388–89 (quoting 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(iii)). Therefore, despite Defendants’ repeated attempts to assert otherwise, the court again concludes that the statute’s exclusion of PMS adjustments made prior to the sales-below-cost test does not create any inconsistency between the home market and constructed value methodologies.

Fourth, Atlas argues that, as the statute is intended to result in a fair comparison between export price and normal value, Commerce must be allowed to adjust for any identified PMS before conducting a sales-below-cost test. Def.-Inter.’s Br. (Atlas) at 11. Again, as discussed above, this argument is incorrect because if a PMS affects COP, then COP would be similarly distorted for both the export price and normal value, and therefore not prevent a fair comparison. *Husteel*, 426 F. Supp. 3d at 1388. If the PMS only affects domestic prices, Commerce is permitted to rely on third country prices, or to resort to the constructed value methodology, which explicitly permits a PMS

adjustment. *Id.* at 1389. Therefore, the court rejects Atlas’s argument that Commerce must be allowed to adjust for a PMS prior to conducting a sales-below-cost test to achieve a fair comparison.

Finally, Defendant-Intervenor Nucor offers an argument in support of Commerce’s interpretation based on the TPEA’s legislative history. Def.-Inter.’s Br. (Nucor) at 24–25. Nucor cites a Senate Finance Committee report to show that Congress intended PMS adjustments to correct for distortions in prices or costs and further intended to give Commerce “flexibility” to calculate a duty that was not based on such distortions.⁷ *Id.* at 25. However, nothing in the cited language evinces Congressional intent to allow Commerce to correct for PMS distortions to the home market value specifically. As discussed above, the TPEA does allow for flexibility to adjust for a PMS by providing alternative methodologies to calculate normal value. The court has already rejected an interpretation of the statute that imputes a PMS adjustment to the calculation of home market value simply because such adjustment is available in the calculation of constructed value. Nucor’s argument from legislative history provides no additional evidence that the plain language of the statute fails to adequately account for potential distortions such that the allowance made for PMS adjustments to constructed value should be imputed to home market value. 19 U.S.C. § 1677b(a)–(b), (e). The court thus rejects Nucor’s argument, and concludes that the legislative history presented provides no basis for departure from its prior decisions. Accordingly, the court concludes that Commerce’s interpretation of the statute was unreasonable and cannot be upheld.

C. Prior CIT Cases Support a Finding That Commerce Does Not Have Authority to Apply a PMS in This Instance

The court notes that prior CIT cases support Plaintiffs’ assertion that Commerce lacks authority to apply a PMS adjustment in this instance. Plaintiffs cite four prior cases, *Saha Thai*, *Husteel*, *Borusan*,

⁷ Nucor cites to a Senate Finance Committee report quoting Representative Patrick Meehan during the House floor debates on the TPEA to demonstrate that the TPEA was meant to empower Commerce to account for distorted prices or costs. Def.-Inter.’s Br. (Nucor) at 24–25. Based on this language, Nucor argues that the TPEA’s sections on PMS adjustments includes costs of production for a sales-below-cost test. *Id.* at 25. Plaintiffs note that Representative Meehan was referring to sections of the TPEA other than the section on PMS adjustments. See Pls.’ Suppl. Br. at 4–5. Additionally, Plaintiffs argue that “[t]o overcome the plain meaning of a statute, a party must show that the legislative history demonstrates an extraordinary showing of contrary intentions.” *Id.* at 5 (quoting *Res-Care v. United States*, 735 F. 3d 1384, 1389 (Fed. Cir. 2013)). The court agrees with Plaintiffs that the plain meaning of the statute is sufficiently clear that a PMS adjustment is not permitted prior to conducting a sales-below-cost test. Nucor’s cited language does not refer to the section at issue and is not otherwise persuasive that the intentions of Congress are inadequately conveyed by the plain language of the statute.

and *Dong-A Steel*, to demonstrate that this court has consistently rejected Commerce’s application of a PMS adjustment in a sales-below-cost test. Pls.’ Br. at 5–6. In *Saha Thai*, the court held that “[t]he TPEA did not provide a basis for calculating the cost of production in the sales-below-cost test.” *Saha Thai Steel Pipe v. United States*, 43 CIT __, __, 422 F. Supp. 3d 1363, 1371 (2019). The court reasoned that since Congress amended the sales-below-cost provision for a different purpose, Congress was aware of the sales-below-cost test when it enacted the TPEA and nevertheless declined to amend the provision to incorporate potential PMS adjustments. *Id.* In *Husteel*, the court held that Commerce’s application of a PMS adjustment prior to a sales-below-cost test was contrary to law based on the plain language of the statute. *Husteel*, 426 F. Supp. 3d at 1383 (“The plain language of the statute prohibits Commerce’s action and therefore its PMS adjustment is contrary to law.”). Both *Borusan* and *Dong-A Steel* followed similar reasoning in rejecting Commerce’s application of a PMS adjustment when conducting a sales-below-cost test. *See Borusan Mannesmann v. United States*, 44 CIT __, __, 426 F. Supp. 3d 1395, 1411 (2020) (“... in recent and thorough opinions the court has explained that no adjustment for a PMS is permitted for the sales-below-cost test.”), *Dong-A Steel*, 475 F. Supp. 3d at 1341 (“... Commerce would not be allowed to adjust the sales-below-cost calculation on account of a PMS determination.”).

Although the Government acknowledges that the court rejected Commerce’s approach in at least *Saha Thai*, it argues that the court’s determination in that case is not final, and that the Government has not yet decided whether to appeal that conclusion. Def.’s Br. at 21–22. The Government only attempts to distinguish this case from *Saha Thai*. The Government asserts that this case is distinguishable from other relevant CIT cases only insofar as other cases have not proceeded to final judgment and are based on a different record. *See* Def.’s Resp. to the Ct.’s Questions at 8 (citing *Husteel*, 426 F. Supp. 3d 1376, *Borusan*, 426 F. Supp. 3d 1395, and *Dong-A Steel*, 475 F. Supp. 3d 1317). Overall, the Government’s attempt to distinguish this case from prior cases is unpersuasive. The court thus adopts the conclusions of its previous decisions and finds that Commerce does not have authority to apply a PMS before a sales-below-cost test.

II. Commerce Did Not Present Substantial Evidence That a PMS Existed During the POR

Even if Commerce’s pre-test application of a PMS adjustment were permitted by law, Commerce nevertheless failed to provide substantial evidence that a PMS existed during the POR. Commerce’s allegation that a PMS existed during the review period and distorted the

market for HRC in Korea is based on a “totality of the circumstances” test that determined the presence of a PMS based on the cumulative effect of four different factors. *See* Def.’s Br. at 15–19. Plaintiffs argue that the court has previously rejected Commerce’s attempts to use a totality of the circumstances test to prove the existence of a PMS. Pls.’ Br. at 21. The Government, on the other hand, argues that Commerce has successfully established the existence of a PMS in the Korean market for HRC using a totality of the circumstances test in this instance. Def.’s Br. at 16–17. The court concludes that, while Commerce may be able to use a totality of the circumstances approach to prove the existence of a PMS even where no single factor would alone suffice, in this instance Commerce fails to present adequate evidence that a PMS existed and distorted the HRC market during the POR.

A. Commerce Could Find That the Four Factors Alleged in This Case Cumulatively Created a PMS Even if No One Factor Individually Created a PMS

Relying on the court’s reasoning in *Nesteel*, Plaintiffs argue that if no factor individually amounts to a PMS, then the cumulative effect of the factors cannot constitute a PMS. Pls.’ Br. at 21; *see Nesteel Co. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1336, 1349–51 (2019) (“*Nesteel I*”). The Government responds by acknowledging that the court has previously rejected Commerce’s finding of a PMS based on the totality of the circumstances when no one contributing factor satisfied the standard independently, but arguing that this case is distinguishable based on the court’s rulings in *Nesteel I*, *Hyundai*, and *Dong-A Steel*. Def.’s Br. at 15; *see Nesteel I*, 355 F. Supp. 3d at 1349, *Dong-A Steel*, 475 F. Supp. 3d at 1333–1335, *Hyundai Steel Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1293, 1300 (2019). The Government argues first that in prior cases the court did not reject the totality of the circumstances test itself but rather Commerce’s application of the test in those instances, in part because of a lack of supporting evidence. Def.’s Br. at 16–17. The Government and Atlas further argue that this case is distinguishable from prior cases because there is more evidence on the record to support Commerce’s identification of a PMS. Def.’s Br. at 17; Def.-Inter.’s Br. (Atlas) at 19–20.

The court determines that the Government is correct that prior CIT cases did not reject Commerce’s totality of the circumstances approach to PMS determinations. Although Plaintiffs assert that prior CIT cases rejected PMS determinations based on the four factors alleged here, their characterization of prior court cases is misleading. The five cases cited by Plaintiffs specifically conclude that Commerce presented insufficient evidence to support a PMS determination

based on those four factors. See *Nesteel I*, 355 F. Supp. 3d at 1346, *Nesteel Co. v. United States*, 44 CIT __, __, 392 F. Supp. 3d at 1276, 1287–88 (2019) (“*Nesteel II*”); *Dong-A Steel*, 475 F. Supp. 3d at 1333–1335; *Hyundai Steel Co.*, 415 F. Supp. 3d at 1300; *Husteel*, 426 F. Supp. 3d at 1391–92. Each determination was rejected in light of the specific circumstances at issue, rather than Commerce’s cumulative approach generally or even the factors considered. See *Nesteel I*, 355 F. Supp. 3d at 1346, 1349; *Nesteel II*, 392 F. Supp. 3d at 1287–88; *Dong-A Steel*, 475 F. Supp. 3d at 1333–1335, *Hyundai Steel Co.*, 415 F. Supp. 3d at 1300; *Husteel*, 426 F. Supp. 3d at 1391–92. Indeed, *Husteel* and *Nesteel I* specifically acknowledge the possibility that a PMS determination could be based on the cumulative effect of multiple distortive factors. See *Husteel*, 426 F. Supp. 3d at 1392 (“Although Commerce may rely on the cumulative effect of multiple distortions to arrive at a PMS determination, it cannot use that phrase to circumvent a meaningful review of the sufficiency of the record.”); *Nesteel I*, 355 F. Supp. 3d at 1349 (concluding that “Commerce’s particular market situation approach was reasonable in theory”). The court therefore concludes that Commerce has not been prohibited from reaching a PMS determination based on the four factors presented here using a totality of the circumstances test.

Nor is the court persuaded by Defendant-Intervenor Nucor’s argument that the *Nesteel* line of cases, which previously rejected Commerce’s totality of the circumstances test for identifying a PMS, were wrongly decided. Def.-Inter.’s Br. (Nucor) at 26–28; see *Nesteel I*, 355 F. Supp. 3d at 1351. Nucor first argues that *Nesteel I* and its progeny relied on the incorrect premise that Commerce cannot change its mind between preliminary and final determinations, whereas in fact preliminary determinations are nonbinding. Def.-Inter.’s Br. (Nucor) at 28–29 (citing 355 F. Supp. 3d at 1351). Nucor next alleges that the *Nesteel I* court “illogically” rejected Commerce’s determination on the basis that Commerce initially determined that the factors contributing to the alleged PMS could not substantiate such a finding individually, but nevertheless ultimately found the existence of a PMS under the totality of the circumstances. Def.-Inter.’s Br. (Nucor) at 30. Nucor argues that a totality of the circumstances “is, by definition, greater than the sum of its parts” and can therefore clearly be satisfied by the “totality” of factors even when no one factor could support the finding of a PMS individually. Def.-Inter.’s Br. (Nucor) at 30–31. Therefore, Nucor argues, *Nesteel* was wrongly decided and Commerce’s determination was reasonable based on the totality of the circumstances. *Id.* at 31–33.

The court finds that Nucor mischaracterizes the court's position in *Nesteel I*. Prior cases did not reject Commerce's PMS determination because Commerce changed its mind between its preliminary and final determinations, but because Commerce changed its mind without offering any additional evidence. 355 F. Supp. 3d at 1351. In the final determination at issue in *Nesteel I*, Commerce made no changes to its preliminary analysis beyond moving from the consideration of individual factors to the consideration of the factors combined, but nevertheless reached the opposite conclusion. *Id.* at 1346. The court determined that Commerce's reversal of its preliminary determination was unreasonable not because Commerce reached a different conclusion, but because the conclusion changed despite there being no changes to the evidence under consideration. *Id.* at 1351. "It does not stand to reason that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion." *Id.* Although, as Nucor contends, a totality of the circumstances test could be satisfied by the "totality" of factors even when no one factor would satisfy the test alone, this does not mean "that under a totality of the circumstances test, a collection of unsubstantiated allegations can be combined into a substantiated one." *Hyundai Steel Co.*, 415 F. Supp. 3d at 1301. Accordingly, Nucor's argument that the *Nesteel* line of cases incorrectly rejects the totality of the circumstances test lacks merit.

B. The Government Failed to Present Substantial Evidence of a PMS in the Korean Market for HRC During the POR

Substantial evidence "has been defined as 'more than a mere scintilla,' [and] as '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) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantiality of evidence must account for anything in the record that reasonably detracts from its weight. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Commerce must also examine the record and provide an adequate explanation for its findings such that the record demonstrates a "rational connection between the facts found and the [determination] made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins.*

Co., 463 U.S. 29, 43 (1983); see *Jindal Poly Films Ltd. of India v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1379, 1383 (2019). Commerce's findings may be found to be supported by substantial evidence even where two inconsistent conclusions could be drawn from the record. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373 (2012). However, agencies act contrary to law if their decision-making is not reasoned. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962).

Here, the Government asserts that this case is distinguishable from prior cases where the court did not find a PMS existed because in this case, “even if the four factors are the same, the underlying evidence on the record is different, and Commerce demonstrated that it considered the more expansive evidence.” Def.’s Br. at 17. Plaintiffs disagree, arguing that none of the four factors are adequately supported by record evidence. Pls.’ Br. at 13–21. The court concludes that there is not substantial evidence that the four factors considered by Commerce contributed to a PMS either individually or cumulatively. Although Commerce may in theory be able to determine the existence of a PMS based on the totality of the circumstances, or even on the individual factors alleged here, Commerce has failed to present sufficient evidence for either such determination. The court therefore declines to depart from its prior decisions rejecting Commerce’s PMS determination on the bases set forth here.

First, the court concludes that substantial evidence does not support a determination that the overcapacity of the Chinese steel market resulted in a PMS in Korea with respect to HRC. The Government argues that Commerce expressly considered “ample evidence” in support of the effect of overcapacity in Chinese steel production on Korean HRC prices, but neither the Government nor Commerce provide an explanation of how overcapacity distorted the Korean market beyond noting the Korean government’s subsidization of HRC. Def.’s Br. at 17; IDM at 19–20. However, Korean HRC subsidies are already one of the four factors allegedly contributing to a PMS in this case, so Commerce fails to provide any evidence that steel overcapacity independently contributed to a PMS during the POR. In addition, Plaintiffs, citing prior CIT cases, counter that the court should reject Commerce’s determination that overcapacity in the Chinese steel industry contributed to a PMS in Korea because Commerce failed to show that Korean HRC prices were inconsistent with global market prices. Pls.’ Br. at 18–20. Since the overcapacity of steel impacts all markets, Plaintiffs argue that any resulting distortion is not particular to Korea. *Id.* In its IDM, Commerce contends that overcapacity manifests itself differently in different markets, but again provides no

further explanation for its determination that Chinese steel overcapacity resulted in a PMS with respect to Korean HRC. IDM at 19–20. Accordingly, the court finds that Commerce has not adequately demonstrated that steel overcapacity itself contributed to the existence of a PMS in Korea during the POR.

Next, the court concludes that there is not substantial evidence that domestic HRC subsidies created or contributed to a PMS in Korea. In evaluating the potential impact of Korean HRC subsidies, Plaintiffs allege that Commerce failed to demonstrate that Korean HRC subsidies actually distorted HRC prices during the POR. Pls.' Br. at 14–15. While Commerce offers evidence that the mandatory respondents purchased HRC from subsidized companies, it provides no support for its conclusion that the prices were distorted. IDM at 15. Plaintiffs further note that Commerce has previously determined that the applicable Korean government subsidy rates for HRC were 0.54 percent and 0.58 percent, which Plaintiffs argue would have had a negligible effect on the market for HRC. Pls.' Reply Br. at 6–7 (citing *Certain Hot-Rolled Steel Flat Products from Korea*, 84 Fed. Reg. 28,461 (Dep't Commerce June 19, 2019) as amended by 84 Fed. Reg. 35,604 (Dep't Commerce July 24, 2019)). While the Government contends that Commerce does not have to demonstrate the downstream effects of a subsidy because it is measuring the distortions in the HRC market as a whole, and Korean HRC subsidies merely contribute to a larger PMS, this argument is unavailing. Def.'s Br. at 18 (citing IDM at 19). As Plaintiffs note, the countervailing duty statute requires Commerce to prove, not assume, that upstream subsidies affect downstream prices, and no provision exists under the anti-dumping statute that would authorize Commerce to assume a competitive benefit here. Pls.' Reply Br. at 7–9; *see* 19 U.S.C. § 1677–1(b)(1). Given the evidence that Commerce has previously calculated negligible subsidies for HRC, and further given Commerce's failure to demonstrate any downstream effects of the alleged subsidy, the court concludes that Commerce has not adequately shown that Korean HRC subsidies individually created a PMS in the market or contributed to a broader PMS during the POR.

Nor is the court persuaded that substantial evidence supports Commerce's finding that control of electricity prices by the Korean government resulted in distortion contributing to a PMS. In *Nexteel I*, this court rejected Commerce's claim that Korean government control over electricity created a PMS such that producers of HRC were charged prices that were outside the ordinary course of trade. 355 F. Supp. 3d at 1351. In the present case, Commerce appears to conflate subsidized prices with distorted prices. The IDM concludes that "sim-

ply because the Korean industrial electricity prices reported by the International Electricity Agency are comparable to other countries is not evidence that those rates are not subsidized.” IDM at 17. However, Commerce cannot merely show that electricity prices were subsidized; Commerce must show that the prices were outside the ordinary course of trade. *See* 19 U.S.C. § 1677(15). While Commerce indicated that record evidence supports a conclusion that prices were distorted during the POR, it failed to provide a further explanation for or citation to this evidence. IDM at 17. Accordingly, the court concludes that substantial evidence does not support either a determination that Korean government control of electricity prices created a PMS individually, or that electricity prices apparently comparable to those available in the ordinary course of trade have contributed to a PMS cumulatively.

Finally, the court concludes that Commerce has failed to provide substantial evidence for its determination that strategic alliances between Korean HRC and HWR manufacturers contributed to the existence of a PMS in Korea. While Commerce acknowledged that strategic alliances could not support a PMS determination individually, it nevertheless concluded that they supported the existence of a PMS under a totality of the circumstances test. IDM at 15–16. Commerce specifically concluded that “strategic alliances and price fixing schemes are prevalent in the Korean market, may have created distortions in the prices of HRC in the past, and may continue to impact HRC pricing in a distortive manner during the instant POR.” IDM at 16. However, as Plaintiffs note, Commerce’s conclusions were based on a prior bid-rigging scheme that occurred before the POR and did not involve the sale of HRC or any other HWR input. IDM at 16; Pls.’ Br. at 15–16. The court agrees with Plaintiffs and finds that the support for Commerce’s conclusions does not amount to “substantial evidence” that strategic alliances in Korea create a PMS individually. Rather, it is at best a speculative allegation that strategic alliances *may* have impacted HRC pricing during the POR for purposes of a cumulative assessment.

Ultimately, the court concludes that Commerce has not identified substantial evidence on the record suggesting that any of the four factors constitute a PMS individually or cumulatively. Indeed, Commerce’s totality of the circumstances analysis appears to be supported by negligible Korean HRC subsidies and speculative evidence that strategic alliances “may” have an impact on Korean HRC pricing, combined with unsupported conclusions that Korean electricity prices are distorted and that Chinese steel production overcapacity resulted in a market situation particular to Korea. Cumulatively, this

does not amount to “substantial evidence” that a PMS existed with respect to the Korean HRC market. Consistent with prior CIT decisions, the court here rejects Commerce’s PMS determination.

III. Commerce’s Adjustment on HRC Was Not Reasonable or Supported by Substantial Evidence

Finally, even if Commerce’s pre-test PMS adjustment was permitted by law, and the factors highlighted by Commerce substantiated the existence of a PMS, Commerce’s adjustment to HRC input costs was not supported by substantial evidence. As discussed above, Commerce applied an upward adjustment to HRC input costs prior to conducting a sales-below-cost test to calculate home market value. In so doing, Commerce relied on a regression model to quantify the effects of the PMS on the HRC market and calculate the appropriate upward adjustment.⁸ Def.’s Br. at 22–23. Plaintiffs allege that the regression model adopted by Commerce is unsupported by substantial evidence. Pls.’ Br. at 24–32. In relevant part, Plaintiffs argue that Commerce unreasonably employed data on HRC costs from 2017 when two-thirds of the POR falls within 2018. *Id.* at 30–31. The Government responds that it was appropriate for Commerce to use data on input costs from 2017 rather than 2018, even though most of the POR fell in 2018, because using 2018 data would reflect costs and sales that occurred after the POR. Def.’s Br. at 28–29. The Government further argues that while the regression model may be imperfect, Commerce nevertheless correctly determined that it was a reasonable method to quantify the PMS based on record evidence. Def.’s Br. at 25–26. The court is persuaded by Plaintiffs’ argument, and accordingly declines to sustain Commerce’s calculation of the PMS adjustment.⁹

⁸ Regression models quantify the relationship between variables. *See* Def.’s Br. at 23. The coefficients in a regression model represent the change in the dependent variable attributable to an increase or decrease in the corresponding independent variable. *Id.* Here, Commerce adopted Petitioners’ proposed regression model that quantifies the relationship between average unit imported values (“AUVs”) for HRC, the dependent variable, and certain “explanatory” or independent variables, including uneconomic capacity (deviations from normal capacity levels), exchange rates, gross fixed capital formation, and prices for iron ore, scrap, and aluminum. IDM at 36, 44. Commerce then replaced the actual data for uneconomic capacity with counterfactual data for uneconomic capacity based on a scenario where there was a higher capacity utilization rate in the steel industry to predict what the AUV for HRC *would have been* if there were no PMS distorting the market. IDM at 38. Commerce ultimately concluded that a 25.61 percent upward adjustment on HRC prices was appropriate to account for the effects of a PMS on input costs of HWR. IDM at 46.

⁹ Plaintiffs make two additional arguments for the rejection of Commerce’s PMS adjustment: (1) that the regression analysis is based on a false assumption that the relationship between the HRC AUVs and various independent variables remains stable over time; and (2) that Commerce’s reliance on data from 2008–2017 to populate the model resulted in unreasonable distortion. Pls.’ Br. at 25–26, 32. While the court need not address these

As has been noted, agency determinations must be supported by substantial evidence. *Atl. Sugar, Ltd.*, 744 F.2d at 1559. Commerce must also examine the record and provide an adequate explanation for its findings such that the record demonstrates a rational connection between the facts accepted and the determination made. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Jindal Poly Films Ltd.*, 365 F. Supp. 3d at 1383. Here, the POR began in September 2017 and concluded in August 2018. IDM at 36; Pls.' Br. at 30–31. Commerce justified its use of 2017, rather than 2018, data for input costs on the grounds that using 2018 data would include data from the four months of 2018 that were not part of the review period. IDM at 36. However, as Plaintiffs argue, using data from 2017 includes data from eight months of 2017 that were also not part of the review period. IDM at 36; Pls.' Br. at 31. Using data from 2017, which represents input costs for one-third of the review period, as opposed to 2018 data, which represents inputs costs from two-thirds of the review period, is neither reasonable nor supported by substantial evidence. Accordingly, the court rejects Commerce's use of 2017 data in its calculation of input costs and declines to sustain Commerce's calculation of the PMS adjustment based on the regression model.

CONCLUSION

The court concludes that Commerce cannot apply a PMS adjustment prior to conducting a sales-below-cost test when calculating home market value. Furthermore, even if Commerce could have applied a PMS adjustment in this case, it did not provide substantial evidence that a PMS distorted the market for HRC during the POR. Finally, the court concludes that Commerce fails to provide substantial evidence to support its methodology for calculating a PMS adjustment. For the foregoing reasons, the court grants Plaintiffs' motion for judgment on the agency record, and remands Commerce's determination that a PMS affected the price of hot-rolled steel coils during the POR and resultant application of an upward adjustment to the price of HRC prior to conducting a sales-below-cost test. Commerce shall file with this court and provide to the parties its remand

additional arguments in detail, neither is persuasive. First, the record adequately explains that any apparent instability in the relationship between steel cost and the explanatory variables is the result of errors in constructing and populating alternative models. See Pet'rs' Rebuttal Br. at 64–66. Second, while a regression model employing data from 2008–2017 is slightly less accurate than one employing data from 2013–2017, analysis of the two models indicates that the difference is negligible. See HiSteel NFI Rebuttal at 34, June 24, 2020, P.R. 391–394, C.R. 210–214. The court therefore finds that Commerce's use of the 2008–2017 data does not violate its obligation to employ an adjustment calculation methodology which is reasonable and supported by the record evidence. See *Hyundai Steel Co.*, 415 F. Supp. 3d 1293, 1297 (2019) (“Commerce has the ability to choose the appropriate methodology so long as it comports with its statutory mandate and provides a reasoned explanation.”); see also *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48–49.

results within ninety (90) days of the date of this order; thereafter, the parties shall have thirty (30) days to submit briefs addressing the revised final determination to the court, and the parties shall have fifteen (15) days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: September 23, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

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