

U.S. Customs and Border Protection



APPLICATION FOR ALLOWANCE IN DUTIES

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 September 15, 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 30325) on June 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: Application for Allowance in Duties.

OMB Number: 1651–0007.

Form Number: CBP Form 4315.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 4315, “*Application for Allowance in Duties*,” is submitted to CBP in instances of claims of damaged or defective imported merchandise on which an allowance in duty is made in the liquidation of the entry. The information on this form is used to substantiate an importer’s claim for such duty allowances. CBP Form 4315 is authorized by 19 U.S.C. 1506 and provided for by 19 CFR 158.11, 158.13, and 158.23. This form is accessible at: <https://www.cbp.gov/sites/default/files/assets/documents/2020-Mar/CBP%20Form%204315.pdf>.

This collection of information applies to the importing and trade community who are familiar with import procedures and with the CBP regulations.

19 CFR 158.11—Merchandise completely worthless at time of importation.

The allowance in duties may be made to nonperishable merchandise if found without commercial value at the time of the importation by reason of damage or deterioration. For perishable merchandise an allowance in duties may be made if an application, on Customs Form 4315, or its electronic equivalent, is filed within 96 hours after the unloading of the merchandise and before any of the shipment involved has been removed from the pier, and only on such of the merchandise as is found by the port director to be entirely without commercial value by reason of damage or deterioration. If an application is withdrawn, the merchandise involved shall thereafter be released upon presentation of an appropriate permit.

19 CFR 158.13—Allowance for moisture and impurities.

An application for an allowance in duties is made by the importer on Customs Form 4315, or its electronic equivalent, for all detectable moisture and impurities present in or upon imported petroleum or petroleum products. For products, other than petroleum or petroleum products, with excessive moisture or other impurities, not usually found in or upon such or similar merchandise, an application for an allowance in duties shall be made by the importer on Customs Form 4315, or its electronic equivalent. If the port director is satisfied after any necessary investigation that the merchandise contains moisture or impurities, the Center director will make allowance for the amount thereof in the liquidation of the entry.

19 CFR 158.23—Filing of application and evidence by importer. Within 30 days from the date of his discovery of the loss, theft, injury, or destruction, the importer shall file an application on Customs Form 4315, or its electronic equivalent and within 90 days from the date of discovery shall file any evidence required by § 158.26 or § 158.27.

Type of Information Collection: Application for Allowance in Duties (CBP Form 4315).

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 12,000.

Estimated Time per Response: 0.1333 hours.

Estimated Total Annual Burden Hours: 1,600.

Dated: August 10, 2021.

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

U.S. CUSTOMS DECLARATION (CBP FORM 6059B)

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 September 15, 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 29273) on June 01, 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: U.S. Customs Declaration.

OMB Number: 1651-0009.

Form Number: CBP Form 6059B.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: CBP Form 6059B, Customs Declaration, is used as a standard report of the identity and residence of each person arriving in the United States. This form is also used to declare imported articles to U.S. Customs and Border Protection (CBP) in accordance with 19 CFR 122.27, 148.12, 148.13, 148.110, 148.111; 31 U.S.C. 5316 and Section 498 of the Tariff Act of 1930, as amended (19 U.S.C. 1498).

Section 148.13 of the CBP regulations prescribes the use of the CBP Form 6059B when a written declaration is required of a traveler entering the United States. Generally, written declarations are required from travelers arriving by air or sea. Section 148.12 requires verbal declarations from travelers entering the United States, unless an inspecting officer requires a written declaration on CBP Form 6059B. Generally, verbal declarations are required from travelers arriving by land.

CBP continues to find ways to improve the entry process through the use of mobile technology to ensure it is safe and efficient. To that end, CBP is testing the operational effectiveness of a process which allows travelers to use a mobile app to submit information to CBP prior to arrival. This process, called Mobile Passport Control (MPC) which is a mobile app that allows travelers to self-segment upon arrival into the United States—a process also known as intelligent

queuing. The submission of information in advance using MPC allows CBP to direct travelers to the appropriate queue in primary or self-segment directly to secondary if additional inspection is necessary. The continued testing also helps determine under what circumstances CBP should require a written customs declaration (CBP Form 6059B) and when it is beneficial to admit travelers who make an oral customs declaration during the primary inspection. MPC eliminates the administrative tasks performed by the officer during a traditional inspection and in most cases will eliminate the need for respondents/travelers to fill out a paper declaration. MPC provides a more efficient and secure in person inspection between the CBP Officer and the traveler.

Another electronic process that CBP is testing in lieu of the paper CBP Form 6059B is the Automated Passport Control (APC). This is a CBP program that facilitates the entry process for travelers by providing self-service kiosks in CBP's Primary Inspection area that travelers can use to make their declaration.

Both APC and MPC allow an electronic method for travelers to answer the questions that appear on CBP Form 6059B without filling out a paper form.

A sample of CBP Form 6059B can be found at <https://www.cbp.gov/newsroom/publications/forms?title=6059>. This collection is available in the following languages: English, French, Vietnamese, German, Italian, Japanese, Korean, Polish, Portuguese, Russian, Chinese, Hebrew, Spanish, Dutch, Arabic, Farsi, and Punjabi.

Type of Information Collection: Customs Declaration (Form 3059B).

Estimated Number of Respondents: 34,006,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 34,006,000.

Estimated Time per Response: 4 minutes or 0.067 hours.

Estimated Total Annual Burden Hours: 2,278,402.

Type of Information Collection: Verbal Declarations.

Estimated Number of Respondents: 233,000,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 233,000,000.

Estimated Time per Response: 10 seconds or 0.003 hours.

Estimated Total Annual Burden Hours: 699,000.

Type of Information Collection: APC Terminals.

Estimated Number of Respondents: 70,000,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 70,000,000.

Estimated Time per Response: 2 minutes or 0.033 hours.

Estimated Total Annual Burden Hours: 2,310,000.

Type of Information Collection: MPC App.

Estimated Number of Respondents: 500,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 500,000.

Estimated Time per Response: 2 minutes or 0.033 hours.

Estimated Total Annual Burden Hours: 16,500.

Dated: August 10, 2021.

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

[Published in the Federal Register, August 16, 2021 (85 FR 45747)]

GRANT OF “LEVER-RULE” PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-rule” protection to The Procter & Gamble Company’s federally registered and recorded “VICKS” trademark. Notice of the receipt of an application for “Lever-rule” protection was published in the July 21, 2021, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Tracie Siddiqui, Intellectual Property Rights Branch, Regulations and Rulings, tracie.r.siddiqui@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-rule” protection for the following foreign made antitussive drug products that bear the recorded “VICKS” mark (U.S. Trademark Registration No. 867,818 / CBP Recordation

No. TMK 89–00470): (1) Vicks VapoRub intended for sale in India; and (2) Vicks VapoRub intended for sale in the United Kingdom.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market Vicks VapoRub antitussive drug products differ physically and materially from the Vicks VapoRub antitussive drug products authorized for sale in the United States with respect to the following product characteristics: compliance with regulatory requirements regarding labelling, concentrations of active ingredients, and identified distributor.

ENFORCEMENT

Importation of Vicks Vaporub antitussive drug products intended for sale in India and the United Kingdom is restricted, unless the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: August 12, 2021

ALAINA VAN HORN

Chief,

*Intellectual Property Rights Branch
Regulations and Rulings, Office of Trade*

U.S. Court of International Trade

Slip Op. 21–99

LG CHEM, LTD., et ano., Plaintiffs, v. UNITED STATES, Defendant, and
COALITION FOR ACETONE FAIR TRADE, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 20-00096

[The court denies Plaintiffs’ motion for judgment on the agency record and grants judgment for Defendant and Defendant-Intervenor.]

Dated: August 13, 2021

Daniel L. Porter and *James P. Durling*, Curtis, Mallet-Prevost, Colt & Mosle LLP of Washington, DC, argued for Plaintiffs. With them on the reply brief was *James C. Beaty*.

Kyle S. Beckrich, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Daniel L. Schneiderman, King & Spalding, LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief was *Stephen J. Orava*.

OPINION

Baker, Judge:

In this case, a Korean acetone producer challenges its antidumping duties, arguing that the Department of Commerce improperly calculated its cost of production and impermissibly rejected certain factual submissions. The court concludes that the producer’s challenge to Commerce’s cost calculation fails, and that any error in rejecting the producer’s factual submissions was harmless. The court therefore sustains the Department’s decision imposing antidumping duties.

Statutory Background

The Tariff Act of 1930, as amended, provides a mechanism to combat dumping, that is, the sale of imported merchandise in the United States at “less than its fair value.” 19 U.S.C. § 1673(1). Under the statute, domestic producers and other affected entities can petition Commerce and the International Trade Commission to investigate alleged dumping and its effects on U.S. industry. If Commerce deter-

mines that dumping is occurring, and the ITC determines that such dumping is injuring domestic industry, the former can impose anti-dumping duties.

To determine whether dumping is occurring, the statute requires Commerce to make “a fair comparison” between the price charged by the foreign producer-exporter to U.S. customers “and normal value.” 19 U.S.C. § 1677b(a). “Normal value” is generally “the price a producer charges in its home market.” *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed. Cir. 2010); *see also* 19 U.S.C. § 1677b(a)(1)(B)(i) (defining normal value by reference to home market sales “in the ordinary course of trade”). Commerce calculates an antidumping margin based on the difference between the U.S. customer price and the normal value. *Uttam Galva Steels Ltd. v. United States*, 997 F.3d 1192, 1194 (Fed. Cir. 2021).

In determining “normal value” based on the home market sales price, Commerce may disregard sales made for “less than the cost of production.” 19 U.S.C. § 1677b(b)(1). The statute defines the cost of production as “the sum of” three distinct categories of costs, *id.* § 1677b(b)(3), two of which (as relevant here) are “the cost of materials and of fabrication or other processing of any kind,” *id.* § 1677b(b)(3)(A), and overhead costs described as “selling, general, and administrative expenses,” *id.* § 1677b(b)(3)(B).

If, after disregarding home country sales made at less than the cost of production, “no sales made in the ordinary course of trade remain,” *id.* § 1677b(b)(1), then Commerce must base “normal value . . . on the constructed value of the merchandise,” *id.* The statute also allows Commerce to base normal value on “constructed value” if for any reason the Department cannot determine the normal value of the imported goods using the sales price in the home country pursuant to § 1677b(a)(1)(B)(i). *See id.* § 1677b(a)(4).

Constructed value, defined in 19 U.S.C. § 1677b(e), and the cost of production, defined in § 1677b(b)(3), “are closely related.” *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011). Constructed value under § 1677b(e) “generally includes the same or similar elements as [cost of production defined in § 1677b(b)(3)], but with the additional component of profit.” *Id.* (citing § 1677b(e)); *see also Uttam Galva*, 997 F.3d at 1194 (“Constructed value is essentially the cost of production plus profit.” (citing § 1677b(e))).

Whether Commerce calculates the cost of production pursuant to § 1677b(b)(3) for determining normal value, or instead pursuant to § 1677b(e) for determining constructed value, “[f]or purposes of” both provisions

[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

Id. § 1677b(f)(1)(A).

Factual and Procedural Background

In 2019, the Coalition for Acetone Fair Trade—a group of several domestic acetone producers—petitioned Commerce asserting that producers in Korea and several other countries were dumping acetone in the U.S. market. Appx1000. In response, Commerce commenced several antidumping investigations covering calendar year 2018. *Acetone from Belgium, the Republic of Korea, the Kingdom of Saudi Arabia, Singapore, the Republic of South Africa, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 84 Fed. Reg. 9755, 9756 (Dep’t Commerce Mar. 18, 2019).

As relevant here, Commerce selected two Korean producers, LG Chem, Ltd.,¹ and Kumho P&B Chemicals, Inc., as mandatory respondents. Appx1569; Appx1461.² Commerce then issued questionnaires to both companies requesting information on various topics, including—in accordance with the statutory requirement that “[c]osts shall normally be calculated based on the records of the exporter or producer,” 19 U.S.C. § 1677b(f)(1)(A)—information on how they calculate their “cost[s] of materials and of fabrication or other processing of any kind,” *id.* § 1677b(b)(3)(A).

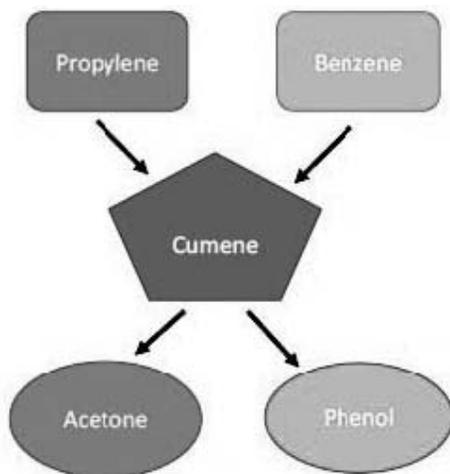
LG Chem’s and Kumho’s questionnaire responses revealed that they calculate their costs of materials and processing using two different methodologies. ECF 36, at 8–9. To understand them, it is helpful to understand how both companies produce acetone using the “cumene process.” Appx1576.

The cumene process requires two inputs, benzene and propylene. Appx1576. These inputs react to form a new molecule, cumene. *Id.* The cumene molecule has a part corresponding to each input: a benzene part and a propylene part. *Id.* The cumene molecule breaks down to create two outputs, phenol and acetone. *Id.* The benzene part of the cumene molecule becomes phenol, and the propylene part of the

¹ The investigation of LG Chem also included one of its corporate affiliates, LG Chem America, Inc., co-plaintiff in this action. For convenience, the court refers to them collectively as LG Chem.

² For an explanation of the role mandatory respondents play in antidumping investigations, see *New Am. Keg v. United States*, Ct. No. 20–00008, Slip Op. 21–30, at 5–6, 2021 WL 1206153, at *2 (CIT Mar. 23, 2021).

cumene molecule becomes acetone. *Id.* In sum, the benzene input becomes the phenol output, and the propylene input becomes the acetone output. The following diagram describes this process visually in material part:



Appx1576 (describing chemical process); ECF 36, at 8 (containing diagram).

Kumho allocates its cost of materials and processing based on what the parties call a “direct-assignment methodology,” which essentially states that the cost of acetone equals the cost of the *input*, propylene, contained within the acetone. Appx1576.

By contrast, LG Chem allocates its cost of materials and processing based on what the parties call a “value-based” methodology, which allocates the *joint* costs for the benzene and propylene inputs between acetone and phenol based on the “net realizable value” of the acetone and phenol *outputs*. *Id.* That is, LG Chem first determines the relative value of the acetone and phenol outputs, and then applies the ratio of those respective values to allocate the joint input costs of propylene and benzene between the acetone and phenol outputs.³ To calculate the net realizable value of acetone and phenol, LG Chem’s methodology relies on the prices of acetone and phenol in China. Appx1467; Appx1576.

³ To illustrate, assume that LG Chem’s cumene process yields 100 kilograms of acetone priced at \$5.00 per kilogram (totaling \$500.00 in value) and 30 kilograms of phenol priced at \$10.00 per kilogram (totaling \$300.00 in value). The “net realizable value” of the coproducts produced by the cumene process is \$800.00. In this hypothetical, five-eighths of the joint production costs of the cumene process would be assigned to acetone, and three-eighths would be assigned to phenol.

After receiving this (and other) information, the Department preliminarily determined that acetone imported from Korea was being dumped in the United States at less than fair value and assigned LG Chem, the plaintiff in this case, a 7.67 percent estimated weight-averaged dumping margin. *Acetone from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 84 Fed. Reg. 50,005, 50,005–06 (Dept Commerce Sept. 24, 2019); Appx1452. In contrast, the Department assigned a much steeper 47.70 percent dumping margin to Kumho. 84 Fed. Reg. at 50,006; Appx1452.

In assigning LG Chem’s preliminary dumping margin, Commerce concluded that certain aspects of the company’s cost of production of acetone were “not appropriately quantified or valued.” Appx1467.⁴ As relevant here, the Department identified two specific problems.

First, LG Chem’s value-based methodology relied on Chinese non-market economy prices to determine the net realizable value of the acetone and phenol outputs. Appx1467–1468. Commerce accordingly swapped out the Chinese pricing data for Southeast Asian pricing data from market economies, *id.*, while otherwise retaining the company’s value-based methodology.

Second, LG Chem improperly excluded certain company-wide overhead costs from its calculation of “general and administrative expenses,” 19 U.S.C. § 1677b(b)(3)(B). Appx1468. Commerce therefore included those expenses in its cost calculations. *Id.*

After issuing its preliminary determination, Commerce received full briefing from the parties and held a public hearing. Thereafter, the Department issued a final decision reaffirming its preliminary determination that Korean producers were dumping acetone in the United States. In so doing, however, Commerce assigned LG Chem a substantially higher 25.05 percent estimated weight-averaged dumping margin. *Acetone from Belgium, the Republic of South Africa, and the Republic of Korea: Antidumping Duty Orders*, 85 Fed. Reg.

⁴ Commerce’s preliminary determination memorandum stated that the Department calculated the cost of production pursuant to § 1677b(b)(3), Appx1464, and (incongruously) that it calculated normal value based on constructed value (where the cost of production is calculated pursuant to § 1677b(e)), *id.* In any event, the cost of production provisions under § 1677b(b)(3) and § 1677b(e) are materially identical except for the latter’s inclusion of profits, and both (as discussed in detail below) are subject to § 1677b(f)(1)(A). *Cf. Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321 n.1 (Fed. Cir. 2020) (observing that it was unclear in Commerce’s final decision whether the Department’s “calculation of normal value involved determining constructed value (determining the sum of ‘the cost of materials and fabrication or other processing of any kind employed in producing the merchandise’ and other factors under 19 U.S.C. § 1677b(e)), or involved determining cost of production so as to exclude home market sales made below cost of production under § 1677b(b)(3),” but that § 1677b(f) applies “[i]n either event”).

17,866, 17,866 (Dep't Commerce Mar. 31, 2020); Appx1661; *see also Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Acetone from the Republic of Korea* (Feb. 6, 2020), Appx1568–1585.

As relevant here, Commerce explained that in accordance with 19 U.S.C. § 1677b(f)(1)(A), it “normally relies on data from a respondent’s . . . books and records” to calculate costs, and in its preliminary determination it had found that “LG Chem’s reported costs did not reasonably reflect the cost associated with the production and sales of acetone because [among other reasons] the joint cost allocation factors were based on non-market economy prices.” Appx1576. Based on that finding, the Department’s preliminary determination had adjusted LG Chem’s joint costs for acetone and phenol based on Southeast Asian market index prices in lieu of the Chinese price index used by the company. Appx1576–1577.

Commerce then noted that although its preliminary determination had accepted LG Chem’s value-based methodology (*as adjusted* using Southeast Asian rather than Chinese prices), for the final determination the Department had “reevaluated whether it is appropriate” to use that methodology to determine the company’s acetone production costs “considering specific facts surrounding this investigation.” Appx1577.

Commerce explained that a value-based methodology such as LG Chem’s “can be problematic in an antidumping context.” *Id.* First, there is the problem of “circularity,” meaning that “prices are used to determine the product-specific costs which in turn are either compared to those same prices or are used to construct prices (*i.e.*, through the sales-below-cost test and constructed value).” *Id.* Second, “market factors may also create problems with using prices as a basis of allocation,” including “volatile market prices” and “temporary surges in supply and demand.” *Id.* Finally, “the statute directs Commerce to determine the actual cost to produce the merchandise under consideration and establishes that cost as a floor for the comparison prices.” *Id.*

Commerce also observed that although it previously accepted the value-based methodology in certain cases involving the joint production of coproducts, in view of these problems it did so “as a last resort because using an alternative methodology such as a volume-based or a direct assignment allocations [*sic*] were [*sic*] either not possible or would lead to an unreasonable result.” *Id.* None of those cases involved fact patterns such as this case’s, “where the inputs consumed in the joint production process can be clearly traceable to specific-

output coproducts.” *Id.* The Department explained how “acetone and phenol are produced from the same joint production process where . . . the benzene portion of the cumene molecule becomes phenol and the propylene portion of the cumene molecule becomes acetone through the purification process.” Appx1578.

Commerce concluded that it was still “distortive and unreasonable to rely on the value-based allocation methodology used in LG Chem’s normal books and records,” even as adjusted by the preliminary determination’s use of Southeast Asian rather than Chinese prices, for three reasons. *Id.*

First, LG Chem’s use of a third-party price index to determine the value of its acetone and phenol coproducts created the problem of “circularity” described above. *Id.* Second, because of price volatility in the Southeast Asian prices used by Commerce in its preliminary determination to adjust the company’s costs, “the potential problems inherent in the value-based allocation methodology still [were] not eliminated.” *Id.* Finally, in view of these circularity and price volatility problems, it was “distortive and unreasonable to rely on the value-based allocation methodology used in LG Chem’s normal books and records, particularly when the production process in this case allow[ed] for an accurate tracing of input raw materials to the output finished products (i.e., [Kumho’s] direct assignment methodology).” *Id.*

Because of these problems, Commerce applied Kumho’s direct-assignment methodology, which used “a formula that incorporates the cost of the propylene input (*i.e.*, the component of cumene that eventually becomes acetone) Under this approach, propylene costs are assigned to acetone, whereas benzene costs are assigned to phenol.” *Id.* (footnote reference omitted). The Department stated that it found this “formula reasonable because it recognizes the actual chemical reactions associated with acetone production, the relative quantity and value of propylene contained in acetone, and the relative production quantity of acetone during” the relevant period. *Id.*

Finally, Commerce stated that it would adhere to its previous conclusion (in the preliminary determination) that LG Chem’s calculation of its acetone production costs had improperly excluded various company-wide general and administrative costs, and the Department therefore included those costs in calculating LG Chem’s dumping margin. Appx1584–1585.

LG Chem thereafter brought this action under 19 U.S.C. § 1516a to contest Commerce’s final decision. *See* ECF 10 (complaint). LG Chem

now moves for judgment on the agency record. ECF 38; *see also* USCIT R. 56.2. The government and the Coalition oppose. ECF 37 (government); ECF 36 (Coalition). The court thereafter heard oral argument. ECF 41.

Jurisdiction and Standard of Review

The court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(c).

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

As to evidentiary issues, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce’s conclusion, even if the court might have weighed the evidence differently:

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

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

Discussion

I.

The principal issue raised in LG Chem’s motion is Commerce’s adjustment of the company’s costs using Kumho’s direct-assignment methodology. ECF 38, at 22. LG Chem first argues that 19 U.S.C. § 1677b(f)(1)(A) creates a presumption in favor of using a respondent’s records to calculate the cost of production, and that Commerce can depart from those records only if they are not kept in accordance with the exporting country’s generally accepted accounting principles, or if they do not reasonably reflect a respondent’s cost of production. ECF 38, at 22–28.

As the first of the two statutory requirements is not at issue here,⁵ LG Chem challenges Commerce’s conclusion that the company’s

⁵ It is undisputed that LG Chem’s value-based cost allocation methodology is consistent with generally accepted accounting principles in Korea.

value-based methodology—*as adjusted* by the preliminary determination’s substitution of Southeast Asian prices for Chinese prices—still did not reasonably reflect the cost of production. *Id.* at 28–48. LG Chem argues that Commerce’s conclusion is not supported by substantial evidence, and as a result, the Department’s *further* adjustment of its costs in the final decision by using Kumho’s direct-assignment methodology is unlawful. *Id.*

A.

As a threshold matter, the Coalition disputes how LG Chem has framed the issue. The Coalition observes that the company “[does] not contend that Commerce erred in rejecting LG Chem’s use of [Chinese] prices and in reallocating costs” using Southeast Asian prices. ECF 36, at 10. “To the contrary, [LG Chem] argue[s] that this adjustment (made in the preliminary determination) already remedied any significant distortions in reported costs, thereby obviating the need to jettison a sales value-based allocation in favor of direct assignment.” *Id.* at 10 (citing ECF 38, at 41).

As a result, the Coalition argues, there is no dispute that Commerce permissibly departed from LG Chem’s records in calculating the cost of production. *Id.* at 11. Thus, according to the Coalition, the issue here is not whether Commerce’s departure from the company’s records was warranted—the issue is Commerce’s choice between two different departures: (1) the preliminary determination’s substitution of Southeast Asian prices for Chinese prices, and (2) the final decision’s substitution of the Kumho direct-assignment methodology for the value-based methodology. *Id.* at 11–12.

This framing is significant, the Coalition argues, because where (as here) an adjustment is appropriate due to a respondent’s records not reasonably reflecting the cost of production, 19 U.S.C. § 1677b(f)(1)(A) imposes no impediment to Commerce’s discretionary choice of the most reasonable adjustment. *Id.* at 12. Therefore, to justify its adjustment using the Kumho direct-assignment methodology, in the final decision “Commerce was obligated only to show that the originally reported costs were distorted (a point that is uncontested), not that the costs as reallocated in the preliminary determination were still distorted notwithstanding the elimination of nonmarket pricing.” *Id.*⁶

⁶ The government, for its part, does not challenge LG Chem’s framing of the issue; instead, the government argues that substantial evidence supports Commerce’s conclusion in the final decision that the company’s value-based methodology remained unreasonably distorted even after the replacement of nonmarket Chinese pricing with Southeast Asian pricing. *See* ECF 37, at 26–33.

On reply, LG Chem responds that Commerce’s cost adjustment in its preliminary determination (swapping out Chinese prices for Southeast Asian prices while retaining the company’s value-based methodology) and its later decision to abandon the company’s methodology altogether “were made pursuant to separate legal authority with different legal requirements.” ECF 39, at 12.

Specifically, LG Chem observes that Commerce invoked 19 U.S.C. § 1677b(b)(3) in adjusting costs in its preliminary determination. *See* ECF 39, at 12–13 (citing Appx1464). The company then argues that unlike § 1677b(f)(1)(A), § 1677b(b)(3) “does not address the reasonability of the method used by the respondent before making an adjustment.” ECF 39, at 13. It further argues that Commerce’s preliminary determination accepted its value-based methodology as reasonable, and “only adjust[ed] the benchmark [the price index] that feeds into the methodology pursuant to 19 U.S.C. § 1677b(b)(3), a different section of the statute with different legal requirements.” *Id.* at 14.

What LG Chem overlooks, however, is that § 1677b(f)(1)(A) reads onto § 1677b(b)(3). The former provides:

(f) Special rules for calculation of cost of production and for calculation of constructed value

For purposes of subsections (b) and (e)—

(1) Costs

(A) In general

Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A) (emphasis added).

Thus, § 1677b(f)(1)(A) requires that Commerce undertake cost of production calculations under § 1677b(b)(3) and § 1677b(e)⁷ based on the respondent’s records, “if such records . . . reasonably reflect the costs associated with the production and sale of the merchandise.” *Id.* Consistent with this reading of the statute, Commerce’s final decision explained that its preliminary determination “found that LG Chem’s reported costs did not *reasonably reflect* the cost associated with the production and sales of acetone because the joint cost allocation

⁷ *See above* note 4.

factors were based on non-market economy prices.” Appx1576 (emphasis added). Therefore, contrary to the company’s argument, Commerce’s adjustment of its costs in the Department’s preliminary determination was very much an exercise of § 1677b(f)(1)(A) authority, because Commerce read § 1677b(b)(3) through the prism of § 1677b(f)(1)(A) as the statute requires.

That said, there remains the question of the meaning of § 1677b(f)(1)(A). The statute directs Commerce to calculate costs under § 1677b(b)(3) and § 1677b(e) using a producer’s records, “if such records are kept in accordance with the generally accepted accounting principles . . . and reasonably reflect the costs associated with the production and sale of the merchandise.” 19 U.S.C. § 1677b(f)(1)(A) (emphasis added).

The statute unambiguously imposes two binary yes/no conditions—either the respondent’s records (1) “are kept in accordance with the generally accepted accounting principles” and (2) “reasonably reflect the costs associated with the production and sale of the merchandise,” or they do not. *Id.*; see also *Dillinger*, 981 F.3d at 1321–22 (“The dual nature of the test seems apparent from the face of the statute and is clear as well from our prior decisions and the legislative history.”). Once Commerce concludes that a producer’s records do not satisfy one of these conditions—which the Department did in its preliminary determination, a finding that is undisputed here—the statute relieves it of any further obligation to use those records in adjusting costs.

One might argue that 19 U.S.C. § 1677b(f)(1)(A) should be read to permit Commerce to make cost of production adjustments only *insofar* as a respondent’s records do not satisfy the statute’s two conditions. Such an interpretation, however, is impermissible.

The statute’s text does not qualify the two conditions with “insofar,” “to the extent,” or similar language that in effect would operate as a severability clause, requiring Commerce to apply whatever portion of a producer’s cost calculations that might be salvaged. Instead, the statute uses binary yes/no conditions, presumably as a matter of administrative convenience. Diluting the force of those binary conditions with qualifiers violates the omitted-case canon, the principle that an “absent provision cannot be supplied by the courts.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012); cf. *Comm’r v. Asphalt Prods. Co.*, 482 U.S. 117, 120 (1987) (tax statute that provided for 5 percent underpayment penalty “if any part of any underpayment” were due to negligence could not be read as limiting the penalty to the portion of the underpayment due to negligence).

In § 1677b(f)(1)(A), Congress directed Commerce to “normally” use a respondent’s records in calculating costs *if* two conditions were satisfied. No conclusion can be drawn from the statute other than that if either of those conditions were unsatisfied, Congress desired Commerce to adjust the respondent’s costs as necessary (in the Department’s discretion) to ensure the most accurate dumping margin.

At oral argument, LG Chem’s counsel stated that the company does not dispute the reasonableness of Commerce’s adjustment of its costs using Kumho’s direct-assignment methodology—that is, that Commerce’s choice of the direct-assignment methodology is supported by substantial evidence. Instead, LG Chem contends that the statute precluded Commerce from making that choice unless the Department permissibly found that the company’s value-based methodology—as *adjusted by Commerce using Southeast Asian market prices*—was unreasonable. The company argues that the Department’s finding to that effect was not supported by substantial evidence.

But LG Chem does not challenge the Department’s conclusion that the company’s use of Chinese pricing rendered its value-based methodology unreasonable. Because that determination is uncontested, the statute did not require Commerce to undertake a severability analysis to determine whether the company’s methodology could be saved with use of another pricing index. Therefore, the court need not determine whether substantial evidence supported Commerce’s determination that LG Chem’s methodology, as adjusted in the preliminary determination with Southeast Asian prices, *still* did not reasonably reflect the company’s costs.

Instead, the Department having made the unchallenged determination that LG Chem’s use of Chinese pricing rendered its methodology unreasonable, the statute allowed Commerce to adjust the company’s costs in whatever manner the Department thought advisable. Contrary to LG Chem’s argument, there was no statutory impediment to Commerce’s replacement of the company’s value-based methodology with Kumho’s direct-assignment methodology in the final decision.

B.

Commerce, of course, decided this matter on a different basis, i.e., that LG Chem’s value-based methodology—as adjusted with Southeast Asian prices—still did not reasonably reflect the cost of production. Appx1577–1578. Nevertheless, the court can affirm on a ground not addressed by the Department where “the agency would have reached the same ultimate result under the court’s legal theory,” provided that “there is no room for the agency to exercise discretion in

deciding the legal issue under review.” *Grabis v. Off. of Pers. Mgmt.*, 424 F.3d 1265, 1270 (Fed. Cir. 2005) (cleaned up); *see also McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1373 (Fed. Cir. 2016); *In re Comiskey*, 554 F.3d 967, 974–75 (Fed. Cir. 2009).

In concluding that 19 U.S.C. § 1677b(f)(1)(A) permitted Commerce to adjust LG Chem’s costs using Kumho’s direct-assignment methodology based on the Department’s unchallenged finding that use of Chinese pricing rendered the value-based methodology distortive, the court does not tread upon Commerce’s authority to interpret the statute. Under the familiar “step one” of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), there is no room for the agency to exercise discretion (and hence no deference) when “traditional tools of statutory construction” make it clear that Congress “has directly spoken to the precise question at issue.” *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1362 (Fed. Cir. 2005).

Here, employing traditional tools of statutory construction, the court concludes that § 1677b(f)(1)(A) unambiguously imposes two binary yes/no conditions. Once Commerce found in its preliminary determination that LG Chem’s records did not satisfy either of these binary conditions, the statute relieved the Department of any further obligation to use those records in adjusting the company’s costs. No exercise of the Department’s interpretative authority was necessary here, as Congress has directly spoken to the precise question at issue.

C.

LG Chem’s opening brief argues—in passing, and without citation to authority—that Commerce’s final decision needed to explain the Department’s change in approach from the preliminary determination. *See* ECF 38, at 41–42. LG Chem fleshes out this argument in its reply with citations to authority. *See* ECF 39, at 14.

This argument is unavailing. To begin with, LG Chem waived it by only raising the argument in passing in its opening brief. *See I.D.I. Int’l Dev. & Inv. Corp. v United States*, Ct. No. 20–00107, Slip Op. 21–82, at 32, 2021 WL 3082807, at *11 (CIT July 6, 2021) (“Passing references do not raise arguments.”) (citing *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1325 n.6 (Fed. Cir. 2012)).

In any event, any error by Commerce in failing to adequately explain its change of view amounted to harmless error because, as discussed above, it is undisputed here that (1) LG Chem’s value-based methodology did not reasonably reflect its cost of production due to its use of Chinese prices and (2) the Department’s adjustment of LG Chem’s costs using Kumho’s direct-assignment methodology was sup-

ported by substantial evidence. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659–60 (2007) (“In administrative law, as in federal civil and criminal litigation, there is a harmless error rule[.]”) (quoting *PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004)).⁸ Because the statute did not require Commerce to determine that LG Chem’s methodology, as adjusted with Southeast Asian prices, was still unreasonable, any deficiency in the Department’s explanation for its change of view was not prejudicial.

II.

The second issue raised in LG Chem’s motion is Commerce’s rejection—after its preliminary determination—of certain factual information submitted by the company as untimely. *See* Appx1484 (Commerce’s explanation of its rejection). Commerce did not consider this information in rendering its final decision.

LG Chem now contends that Commerce erred as a matter of law in rejecting its factual information as untimely, ECF 38, at 13–15, or alternatively abused its discretion in so doing, *id.* at 15–22. The government contests both propositions on the merits. ECF 37, at 13–23. The Coalition, for its part, argues that the court should not consider this issue because the company failed to raise it before Commerce’s final decision and thereby failed to exhaust its administrative remedies. ECF 36, at 4–7.⁹

⁸ Section 706 of the Administrative Procedure Act provides that when a court hears a challenge to an agency action, “due account shall be taken of the rule of prejudicial error.” 5 U.S.C. § 706. Section 706 thus “requires application of a traditional harmless-error analysis and . . . the person seeking relief from the error has the burden of showing prejudice caused by the error.” *Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1368 (Fed. Cir. 2017) (citing *Shinseki v. Sanders*, 556 U.S. 396, 406, 409 (2009)). In this case brought under 28 U.S.C. § 1581(c), review “is under 28 U.S.C. § 2640(b), which does not expressly refer to section 706. Even so, section 706 review applies since no law provides otherwise.” *SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (citing *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

⁹ Congress has mandated that “the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). This provision “indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies.” *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)).

“The [statutory] requirement that invocation of exhaustion be ‘appropriate,’ however, requires that it serve some practical purpose when applied.” *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013). Here, the government is conspicuously agnostic on the question of exhaustion—at argument, it confirmed that it takes no position. In the court’s view, the government’s agnosticism is tantamount to a concession “that additional filings with [Commerce] would [have been] ineffectual.” *Id.* at 1146. As it would have been futile for LG Chem to reargue its position, requiring exhaustion here is inappropriate because it would serve “no agency or judicial interest.” *Id.*

Curiously, the parties do not describe the actual substance of the factual information rejected by Commerce,¹⁰ but pulling the curtain back reveals that any error by the Department was harmless. Commerce required LG Chem to withdraw factual information supporting the propositions that (1) LG Chem’s value-based methodology is consistent with generally accepted accounting principles in Korea, Appx1444 (LG Chem submission), and (2) the Chinese acetone prices used in LG Chem’s methodology were not, in fact, volatile and distortive, as compared to prices in other markets. Appx1446–1447 (LG Chem submission); Appx1471–1473 (LG Chem defending its submission); Appx 1484 (Commerce directing LG Chem to withdraw identified portions of LG Chem’s submission).

The first of these issues—that LG Chem’s value-based methodology is consistent with generally accepted accounting principles in Korea—is not in dispute. Remanding for Commerce to consider this factual information could make no difference to the outcome. Likewise, the second issue—the volatility of Chinese market prices—is no longer in dispute, as LG Chem does not challenge Commerce’s conclusion in its preliminary determination that Chinese market prices *were* distortive. Remanding for Commerce to consider this information would be pointless—even under LG Chem’s theory of the case, which focuses on the reasonableness of its value-based methodology *as adjusted* with Southeast Asian prices. As a result, any error by the Department in rejecting LG Chem’s factual information was harmless. *See above* note 8.

III.

The final issue raised by LG Chem’s motion is Commerce’s calculation of the company’s general and administrative expenses on a company-wide basis. Appx1584. LG Chem argues that because acetone accounted for a small fraction of its total sales of all products, one-half of one percent, Commerce should have calculated LG Chem’s general and administrative expenses on a more tailored “division-specific” basis. ECF 38, at 49–51; ECF 39, at 25–27. Specifically, LG Chem argues that Commerce should have used the profit and loss statement for the company division that produced acetone—a division that accounted for about 55 percent of total sales—“and excluded the very different and unrelated expenses for the other LG Chem divisions that had nothing to do with manufacturing a basic chemical like acetone.” ECF 38, at 49.

¹⁰ LG Chem glosses over the substance of the rejected information, characterizing it as “new factual information that directly rebutted the new factual allegations regarding the cost allocation that [the Coalition] made in its pre-preliminary comments,” ECF 38, at 9, while the government and the Coalition ignore it altogether.

The government and the Coalition disagree, arguing that consistent with both the law and its practice, Commerce properly calculated LG Chem's general and administrative expenses on a company-wide basis. ECF 37, at 33–36; ECF 36, at 21–22.

The “cost of production” under 19 U.S.C. § 1677b(b)(3) includes “an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question” *Id.* § 1677b(b)(3)(B).¹¹ LG Chem argues that “the statute requires a focus on the ‘foreign like product’—the product being investigated—and not overall production operations,” and that by “ignoring the divisional breakdown of [general and administrative] expenses, Commerce wandered too far afield from the product under investigation.” ECF 38, at 50.

The government argues, however, and on reply the company does not dispute, that *Chevron* deference applies to the government's interpretation of § 1677b(b)(3). *See* ECF 37, at 33. “Under that standard, a court must defer to an agency's construction of a statute governing agency conduct if the court finds that the statute in question is ambiguous and the agency's interpretation is reasonable.” *Cathedral Candle*, 400 F.3d at 1361.

Section 1677b(b)(3)(B) is ambiguous, in that it does not speak “to the precise question at issue,” *id.* at 1362, i.e., how general and administrative expenses” are to be allocated to a “foreign like product,” 19 U.S.C. § 1677b(b)(3)(B). As a result, the court must defer to Commerce's interpretation if “the agency's answer is based on a permissible construction of the statute.” *Cathedral Candle*, 400 F.3d at 1362 (quoting *Chevron*, 467 U.S. at 843).

Commerce's reading is surely permissible, if not the better reading. The CIT has previously construed “general and administrative expenses” to “relate to the activities of the company as a whole rather than to [the] production process.” *U.S. Steel Grp. a Unit of USX Corp. v. United States*, 998 F. Supp. 1151, 1154 (CIT 1998) (quoting *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (1995)). LG Chem's statutory interpretation challenge therefore fails.

That leaves the company's substantial evidence challenge to Commerce's allocation of general and administrative expenses on a

¹¹ As explained above, the statute requires that Commerce base its cost of production calculations under § 1677b(b)(3)—including the calculation of “general and administrative expenses” under subparagraph (B)—on the exporter's records if the two conditions of 19 U.S.C. § 1677b(f)(1)(A) are satisfied. Nevertheless, the parties have briefed the question of Commerce's calculation of “general and administrative expenses” under § 1677b(b)(3)(B) without any discussion of how § 1677b(f)(1)(A) informs—or should have informed—that calculation. Accordingly, the court addresses Commerce's treatment of general and administrative expenses as the parties have, in isolation and without regard to § 1677b(f)(1)(A).

company-wide rather than division-specific basis. Before the Department, LG Chem argued that (1) it is a large and diversified chemical manufacturer; (2) the general and administrative expenses of manufacturing basic chemicals such as acetone are different from LG Chem's other expenses; (3) most of the company's general and administrative expenses are not allocated, but tracked separately by division; (4) the company uses this allocation system in the ordinary course of business; and (5) the divisional general expenses more closely resemble the general and administrative expenses of producing acetone. ECF 38, at 51. And so, LG Chem asked that Commerce use its division-specific financial statement to calculate general and administrative expenses.

Commerce, however, declined, explaining that general and administrative expenses "by their nature are indirect expenses incurred by the company as a whole, and are not directly related to a process or product." Appx1585. Commerce accordingly included company-wide general and administrative expenses "as recorded on company-wide financial statements" in its calculation despite LG Chem's effort to exclude them. *Id.*; *cf.* Appx1583 (summarizing LG Chem's arguments for excluding the broader data).

Here, Commerce weighed the evidence and chose to base its general and administrative calculations on LG Chem's company-wide financial statements rather than its division-specific financial statements. In so doing, Commerce captured all the company's general and administrative expenses in its calculations. Whether or not the court agrees with that determination, it is reasonable and supported by substantial evidence; the court has no basis upon which to remand and require Commerce to recalculate LG Chem's general and administrative expenses on a division-specific basis merely because acetone accounted for one-half of one percent of the company's sales.

Conclusion

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

Dated: August 13, 2021
New York, NY

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

Slip Op. 21–100

HABAŞ SINAI VE TIBBI GAZLAR İSTİHSAL ENDÜSTRİSİ A.Ş., Plaintiff, v.
UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION,
Defendant-Intervenor.

Before: Judge Gary S. Katzmman
Court No. 20–00065

[Plaintiff’s Motion for Judgment on the Agency Record is denied, and Commerce’s *Final Results* are sustained.]

Dated: August 18, 2021

David L. Simon, Law Office of David L. Simon, of Washington, D.C., argued for plaintiff.

Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel *Reza Karamloo*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Maureen E. Thorson, Wiley Rein LLP, of Washington, D.C., argued for defendant-intervenor. With her on the brief were *John R. Shane*, *Stephanie M. Bell*, *Jeffrey O. Frank*, *Cynthia A. Galvez*, and *John Allen Riggins*.

OPINION

Katzmann, Judge:

This case involves a challenge to the Department of Commerce’s (“Commerce”) use of a tier-three benchmark in its determination of countervailing duties (“CVD”)s in the administrative review of steel concrete reinforcing bar (“rebar”) from Turkey. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 16,056 (Dep’t Commerce Mar. 20, 2020) (“*Final Results*”) PR 147. Plaintiff Habaş Sinai ve Tibbi Gazlar İstihsal Endüstrisi A.Ş. (“Habaş”), a Turkish rebar producer, specifically challenges Commerce’s selection of a tier-three benchmark for Habaş’s purchases of natural gas from Turkish government-owned entity Botaş. Habaş argues that Commerce impermissibly rejected viable tier-two benchmarks, and that Commerce’s ultimate calculation of a tier-three benchmark was arbitrary and capricious and unsupported by substantial evidence. Pl.’s Mot. for J. on the Agency R. 23–33, Aug. 21, 2020, ECF No. 23 (“Pl.’s Br.”). The court sustains Commerce’s *Final Results*.

BACKGROUND

I. Legal Background

A countervailable subsidy exists when (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). To empower Commerce to offset economic distortions caused by countervailable subsidies, 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 Private Ltd. v. United States*, 42 CIT ___, ___, 322 F. Supp. 3d 1365, 1366 (2018). The Tariff Act authorizes Commerce to investigate potential countervailable subsidies and, where such subsidies are identified, issue orders on the subject merchandise imposing duties equal to the net countervailable subsidies. *Sioux Honey*, 672 F.3d at 1046–47; *ATC Tires*, 322 F. Supp. 3d at 1366–67; 19 U.S.C. §§ 1671, 1673. Beginning on the anniversary of publication of a CVD order, if Commerce has received a request for administrative review of that order, Commerce is required to review and determine the amount of the countervailable subsidy at issue. 19 U.S.C. § 1675(a)(1).

In determining whether a benefit has been conferred upon the recipient of a financial contribution under 19 U.S.C. § 1677(5), Commerce considers (among other factors) whether a good or service has been provided to the recipient for less-than-adequate remuneration (“LTAR”). 19 U.S.C. § 1677(5)(E)(iv); *see also Nucor Corp. v. United States*, 927 F.3d 1243, 1245 (Fed. Cir. 2019). To identify such benefits,

[T]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

19 U.S.C. § 1677(5)(E)(iv). In practice, Commerce determines if goods or services are being provided for LTAR by conducting an analysis under 19 C.F.R. § 351.511. *See Nucor Corp.*, 927 F.3d at 1246; 19 C.F.R. § 351.511(a)(2). Section 351.511 requires Commerce to follow a three-tier analysis to identify a “suitable benchmark” that will be used to determine “the existence and amount of a benefit conferred.” *ArcelorMittal USA LLC v. United States*, 42 CIT ___, ___, 337 F. Supp. 3d 1285, 1291 (2018); *see Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273 (Fed. Cir. 2012) (“Commerce must determine the proper benchmark price in order to determine if the goods were sold for ‘less than adequate remuneration.’”). Typically, Commerce employs a tier-one benchmark by measuring the government price of the good or service against a “market-determined price” based on “actual transactions in the country in question.” 19 C.F.R. § 351.511(a)(2)(i). If

“there is no useable market-determined price” available for comparison, Commerce employs a tier-two benchmark by measuring the government price against a “world market price” that is “available to purchasers in the country in question.” 19 C.F.R. § 351.511(a)(2)(ii). Where there is more than one commercially available world market price, Commerce considers an average of the available world market prices. *Id.* If neither a market-determined price nor a world market price is available, Commerce employs a tier-three benchmark by evaluating whether the government price is “consistent with market principles.” 19 C.F.R. § 351.511(a)(2)(iii); see *POSCO v. United States*, 977 F.3d 1369, 1372 (Fed. Cir. 2020). Commerce’s tier-three analysis considers “such factors as the government’s price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.” *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep’t Commerce Nov. 25, 1998). These factors are not hierarchical in application, and Commerce may rely on one or more factors to calculate a tier-three benchmark in any particular case. *Id.*

II. Factual Background

On May 22, 2017 and July 14, 2017, respectively, Commerce published the CVD order and amended CVD order on rebar from Turkey. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Affirmative Countervailing Duty Determin.*, 82 Fed. Reg. 23,188 (Dep’t Commerce May 22, 2017); *Steel Concrete Reinforcing Bar From the Republic of Turkey: Am. Final Affirmative Countervailing Duty Determin. and Countervailing Duty Order*, 82 Fed. Reg. 32,531 (Dep’t Commerce Jul. 14, 2017) (together, “Initial Orders”). Collectively, the Initial Orders set out Commerce’s determination that countervailable subsidies were being provided to producers and exporters of Turkish rebar, and calculation of estimated net countervailable subsidy rates for Habaş and other producers.

On July 3, 2018, Commerce published a notice of opportunity to request administrative review of the Initial Orders for the period of March 1, 2017 through December 31, 2017. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 83 Fed. Reg. 31,121 (Dep’t Commerce Jul. 3, 2018). Habaş timely submitted a request for review, and Commerce published a notice initiating its review of Habaş’s countervailable subsidy rates on September 10, 2018. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 83 Fed. Reg. 31,121 (Dep’t Commerce Jul. 3, 2018). At Commerce’s request, Habaş and the Government of Turkey submitted questionnaire responses. Section III Questionnaire Response of Habaş Sinai ve Tibbi Gazlar

Istihsal Endüstrisi A.Ş. (Apr. 15, 2019), P.R. 20, C.R. 6–17; Letter from Ministry of Trade, Directorate Gen. for Exports, Republic of Turkey to Sec’y Commerce, re: First Administrative Review of Countervailing Duty Order on Steel Concrete Reinforcing Bar from Turkey: Questionnaire Response of the Government of Turkey 35 (Apr. 15, 2019), P.R. 21–42, C.R. 18–44 (“Questionnaire Response of the Government of Turkey”). Rebar Trade Action Coalition (“RTAC”) joined the administrative review initiated by Habaş as a petitioner, and on August 7, 2019, both Habaş and RTAC submitted benchmark proposals to Commerce. Letter from Wiley Rein LLP to Dep’t Commerce re RTAC Benchmark Submission, P.R. 79–81 (“RTAC Submission”); Letter from D.L. Simon to Dep’t Commerce re Habaş Benchmark Submission (“Habaş Submission”), P.R. 76–79, C.R. 75–77. In relevant part, Habaş’s benchmark submission provided data from the United Nations Comtrade database on natural gas purchase prices in dollars per kilogram, and proposed conversion factors for the conversion of Habaş natural gas purchases from cubic meters and kilowatt hours to kilograms. Habaş Submission at 2–3. Habaş’s submission also requested that Commerce employ the Comtrade data to calculate a tier-two benchmark based on Russian natural gas prices and included additional data in support of Habaş’s contention that Russian natural gas prices are market-driven, not politically determined, and are thus appropriate for benchmark calculation. *Id.* at 3–7. RTAC’s benchmark submission provided natural gas price data from the IEA, along with source documentation and additional natural gas import data from Eurostat, and requested that Commerce employ the IEA data in its benchmark calculations. RTAC Submission at 1–2. Both Habaş and RTAC subsequently submitted benchmark rebuttals. Letter from Wiley Rein LLP to Sec’y. of Commerce, re Steel Concrete Reinforcing Bar from Turkey: RTAC’s Rebuttal Benchmark Submission (Aug. 19, 2019), P.R. 89–92 (“RTAC’s Rebuttal Benchmark Submission”); Letter from D.L. Simon to Dep’t Commerce re Habaş Benchmark Rebuttal (Aug. 19, 2019), P.R. 88.

In September of 2019, Commerce issued its preliminary results of administrative review. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Prelim. Results of Countervailing Duty Administrative Review; 2017*, 84 Fed. Reg. 48,583 (Dep’t Commerce Sept. 16, 2019), P.R. 115 (“*Preliminary Results*”); *see also* Mem. from J. Maeder to J. Kessler re Decision Mem. for the Prelim. Results of the Countervailing Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2017 (Dep’t Commerce Sept. 6, 2019), P.R. 106 (“PDM”). In the *Preliminary Results* and accompanying Preliminary Decision Memorandum, Commerce preliminarily de-

terminated that Habaş had been receiving countervailable subsidies through the purchase of natural gas from Botaş, a state-owned natural gas company. *Preliminary Results* at 48,583; PDM at 8. In making its determination, Commerce undertook an LTAR analysis of Habaş's natural gas purchases from Botaş pursuant to 19 C.F.R. 351.511(a)(2)(ii) and preliminarily found, consistent with its prior determinations, that (1) the only applicable tier-two benchmark price for natural gas in Turkey is the price valid in countries "connected to Turkey through natural gas pipelines" (i.e. Russia, Azerbaijan, and Iran)" and (2) natural gas prices from Russia, proposed by Habaş as a tier-two benchmark, are distorted and therefore unsuitable for the construction of a natural gas benchmark.¹ PDM at 10–11 (quoting *Steel Concrete Reinforcing Bar From the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Intent To Rescind the Review in Part; 2016*, 83 Fed. Reg. 63,472 (Dep't Commerce Dec. 10, 2018), and accompanying Preliminary Decision Memorandum at 23). Accordingly, Commerce concluded that no viable tier-two benchmarks were available on the record. *Id.* at 12. Next, Commerce preliminarily found the Comtrade data submitted by Habaş to be unreliable, and therefore unsuitable for the calculation of a tier-three natural gas benchmark. *Id.* at 13. In particular, Commerce explained that the Comtrade data were not accompanied by an underlying document explaining the reporting, collection, and conversion of the data; that use of the Comtrade data would require conversion of Habaş's own natural gas purchase data; and that the Comtrade data were inconsistent with other data on the record. *Id.* Commerce therefore rejected the Comtrade data submitted by Habaş and calculated a preliminary tier-three benchmark using the IEA data submitted by RTAC.

In March of 2020, Commerce issued its final results of administrative review, which determined that Habaş received countervailable subsidies and reiterated the findings of the *Preliminary Results. Final Results.*² In the accompanying Issues and Decision Memorandum, Commerce concluded that the IEA data submitted by RTAC are "accurate and reliable, and otherwise free of methodological uncer-

¹ Commerce further noted in its PDM that neither Azerbaijani nor Iranian natural gas prices were proposed during the course of the review as alternative tier-two benchmarks (whether by RTAC or Habaş) and that Azerbaijani natural gas prices had "previously [been] found to be unusable for benchmark purposes." PDM at 11.

² A correction to the *Final Results* was subsequently issued, clarifying that the countervailable subsidy rate set out in the *Final Results* is applicable to both Habaş and its cross-owned companies. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Correction to Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 20,665 (Dep't Commerce Apr. 14, 2020). For purposes of this opinion, "*Final Results*" refers to Commerce's final determination in toto, including the subsequent correction.

tainty,” and rejected Habaş’s arguments to the contrary. Mem. to J. Kessler from J. Maeder re Issues and Decision Mem. for the Final Results of Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2017 14 (Dep’t Commerce Mar. 13, 2020), P.R. 143 (“IDM”). Commerce further concluded, in line with the PDM and *Preliminary Results*, that the Comtrade data provided by Habaş are unreliable, and that Russian natural gas prices are distorted and cannot be used as a benchmark. IDM at 17–18.

III. Procedural History

On March 26, 2020, Habaş initiated the instant case. Summons, ECF No. 1. The following day, Habaş timely filed a complaint challenging Commerce’s *Final Results*. Compl., Mar. 27, 2020, ECF No. 10. The complaint alleged three specific objections to the *Final Results*: first, that Commerce’s use of International Energy Agency (“IEA”) tables as a benchmark for Habaş’s natural gas purchase prices was unsupported by the record or otherwise unlawful; second, that Commerce’s rejection of European Union (“EU”) natural gas import prices from Russia as a tier-two or -three benchmark was unsupported by the record or otherwise unlawful; and three, that Commerce’s rejection of EU natural gas import prices from Norway, Algeria, Libya, and Ukraine as a tier-two or -three benchmark was unsupported by the record or otherwise unlawful. Compl. at 5. On April 2, 2020, RTAC joined the action as Defendant-Intervenor. Order Granting Mot. to Intervene as Def.-Inter., ECF No. 18. On August 21, 2020, Habaş filed a motion for judgment on the agency record. Pl.’s Br. The United States (“Government”) filed a response on November 10, 2020, and RTAC filed a response on November 11, 2020. Resp. to Mot. for J. on Agency R., ECF No. 26 (“Def.’s Br.”); Conf. Resp. to Mot. for J. on Agency R., ECF No. 27; Def.-Inter.’s Resp. to Mot. for J. on Agency R., ECF No. 28 (“Def.-Inter.’s Br.”). On December 26, 2020, Habaş filed its reply brief. Reply Br. of Pl. ECF No. 29 (“Pl.’s Reply”). On April 27, 2021, at the request of the court, the parties filed supplemental briefs prior to oral argument. Conf. Resp. of Pl. to Court’s Letter of Apr. 15, ECF No. 36; Resp. of Pl. to Court’s Letter of Apr. 15, ECF No. 37; Def.’s Resp. to Court’s Apr. 15 Order, ECF No. 38; Def.-Inter.’s Resps. to Questions for Oral Arg., Conf., ECF No. 39; Def.-Inter.’s Resps. to Questions for Oral Arg., ECF No. 40. Oral argument was held on May 19, 2021. Oral Arg., ECF No. 41. Habaş and RTAC each filed post-argument briefs on May 26, 2021. Cmets. of Pl. Following Oral Arg., ECF No. 42; Post-Arg. Submission of Def.-Inter., Conf., ECF No. 43; Post-Arg. Submission of Def.-Inter., ECF No. 44.

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.” See also *N.M. Garlic Growers Coal. v. United States*, 953 F.3d 1358, 1368 (Fed. Cir. 2020). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 299 (1938)). Support from substantial evidence is satisfied by “less than the weight of the evidence but more than a mere scintilla of evidence.” *Elbit Systems of America, LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1356 (Fed. Cir. 2018) (quoting *In re Nuvasive, Inc.*, 842 F.3d 1376, 1379 (Fed. Cir. 2016)). “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999) (alteration in original) (quoting *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)). Rather, for the court to sustain the *Final Results*, Commerce must simply demonstrate a “rational connection between the facts found and the choice made.” *Nucor Corp. v. United States*, 32 CIT 1380, 1384, 594 F. Supp. 2d 1320, 1331–32 (2008) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

DISCUSSION

As set out above, Habaş argues that Commerce’s *Final Results* are unsupported by substantial evidence and not in accordance with law because (1) Commerce wrongly rejected the Comtrade data on natural gas imports from Russia in calculating a tier-two benchmark for Habaş’s natural gas purchase prices; (2) Commerce similarly wrongly rejected the Eurostat data on natural gas imports from Russia in calculating a tier-two benchmark; and (3) Commerce wrongly rejected the Eurostat data on natural gas import prices from Norway, Algeria, Libya, and Ukraine in calculating a tier-three benchmark. Compl. at 5. The court finds that, contrary to Habaş’s allegations, Commerce’s *Final Results* are supported by substantial evidence and in accordance with law.

I. Commerce Reasonably Determined There Were No Data on the Record Suitable for the Calculation of a Tier-Two Benchmark.

Where the record cannot support calculation of a tier-one benchmark, Commerce is permitted to employ a tier-two benchmark in its LTAR analysis. 19 C.F.R. § 351.511(a)(2)(i)–(ii). To calculate a tier-two benchmark, Commerce must rely on a world market price that is both “available to purchasers in the country in question,” pursuant to 19 C.F.R. § 351.511(a)(2)(ii), and reliable based on the evidence in the record.³ See *QVD Food Co. Ltd. v. United States*, 658 F.3d 1318, 1325–26 (Fed. Cir. 2011) (sustaining Commerce’s decision to reject appellant’s more recent financial statements because evidence on the record “undermined the reliability of the data”); see also *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 770–71, 917 F. Supp. 2d 1331, 1343 (2013) (upholding Commerce’s decision to utilize tier-two prices when reliable tier-one prices are unavailable). For a tier-two benchmark to be sustained by the court, it must be supported by sufficient evidence for there to be a reasonable connection between the evidence in the record and Commerce’s conclusion. See *Nippon Steel Corp.*, 337 F.3d at 1379.

Habaş alleges that the evidence on the record was adequate for the calculation of a tier-two benchmark, and that Commerce was therefore obligated, pursuant to 19 C.F.R. § 351.511(a)(2)(ii), to employ a tier-two benchmark in its LTAR analysis. Pl.’s Br. at 5. Habaş specifically argues that Commerce erred by rejecting its proffered Comtrade data, and by failing to consider the Eurostat data also on the record as a potential tier-two benchmark. *Id.* The Government and RTAC respond that Commerce permissibly rejected the Comtrade and Eurostat data, and reasonably determined that there were no viable tier-two benchmarks available for its LTAR analysis. Def.’s Br. at 6–7; Def.-Inter.’s Br. at 4, 8–9. The court concludes that Commerce’s determination, and its rejection of the Comtrade and Eurostat data, was supported by substantial evidence and in accordance with law.

A. Commerce Reasonably Determined that the Comtrade Data Are Unsuitable for the Calculation of a Tier-Two Benchmark.

Commerce rejected Habaş’s Comtrade submission as unreliable for three reasons. First, Commerce noted that “there is no explanation of

³ It is undisputed that Commerce could not determine a tier-one benchmark based on the evidence on the record. See Pl.’s Br. at 5 (“[T]he parties agree that there is no tier-one benchmark.”); Def.’s Br. at 8 (“[Habaş] does not challenge Commerce’s finding that there were no usable tier-one prices.”) (citing Pl.’s Br. at 5). The court therefore only considers the parties’ arguments regarding the calculation of tier-two and tier-three benchmarks.

the methodology used to calculate the COMTRADE data or the methodology the original sources (i.e., each country) used to collect the data.” IDM at 24. This includes whether the data were in fact initially collected in kilograms or whether they were converted post hoc, thereby risking varying conversion amounts due to temperature and density factors. *Id.* Second, Commerce explained that, because the Comtrade data are reported in kilograms and Habaş’s own data are reported in a price per unit of energy basis, using the Comtrade data in an LTAR analysis would require conversion and would further risk varying conversion amounts. *Id.* Finally, Commerce noted that the Comtrade data were distorted by the inclusion of Russian export prices, which are themselves distorted by the Government of Russia’s “monopoly over the sales and distribution of natural gas” domestically, and its “position as a dominant supplier in the international market, which enables it to leverage natural gas prices and supplies for geopolitical purposes.” *Id.* at 25 (citing *Steel Concrete Reinforcing Bar From the Republic of Turkey; 2016*, 83 Fed. Reg. 63,472, and accompanying Preliminary Decision Memorandum at 22).

Commerce’s rejection of the Comtrade data is supported by substantial evidence and in accordance with law. First addressing Commerce’s collection methodology and conversion-factor concerns, the court concludes that Commerce reasonably determined that the data were unreliable for purposes of an LTAR analysis. Commerce is correct that the record provides no explanation of the initial collection and conversion of the Comtrade data. IDM at 24; Def. s Br. at 11. Despite Habaş’s assertions to the contrary, the court agrees with the Government and RTAC that the explanatory documentation accompanying the Eurostat data cannot be imputed wholesale to the Comtrade data without more evidence, and without an explanation of the various discrepancies between the two datasets. Pl.’s Br. at 26–28; Def.’s Br. at 12; Def.-Inter.’s Br. at 9–10. Nor is the court persuaded by Habaş’s argument that Commerce has previously employed Comtrade data in its investigations regarding non-natural gas products, and should therefore do so here: rather, “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.” *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014); see also Def.’s Br. at 12. Here, Commerce has reasonably differentiated its review by explaining that an understanding of data-reporting and conversion methodology is “particularly important for a good such as natural gas, where conversion rates can vary based on factors such as pressure and temperature.” IDM at 24. Given that there is no evidence in the record regarding the collection or reporting

of the Comtrade data, and that Commerce has clearly explained its reasons for requiring documentation of the collection and conversion of any tier-two benchmark data, the court concludes that “the record adequately supports” Commerce’s decision that the Comtrade data were unreliable. *Daewoo Elecs. Co. v. Int’l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL–CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993); *see also* Def.’s Br. at 11; IDM at 24.

Even if Commerce’s collection methodology and conversion-factor concerns were not adequate basis for its rejection of the Comtrade data, its determination that the data were unreliable due to distortion by Russian natural gas export prices is supported by substantial evidence and in accordance with law. Commerce’s decision to reject Russian pricing data is supported by the record: in its rebuttal benchmark submission, RTAC provided evidence of Russian price distortion in the form of a study from the European Parliament and a collection of additional publications. *See* RTAC’s Rebuttal Benchmark Submission at Exhibits 3–10. Commerce explicitly weighed RTAC’s submissions against the evidence submitted by Habaş and determined that “due to the [Government of Russia’s] practice of distorting the natural gas market for its own geopolitical purposes, Russian export prices are unsuitable for use in constructing” a tier-two benchmark. IDM at 25–26. Furthermore, as the Government notes, the court has previously sustained Commerce’s decision to reject Russian natural gas prices for the purposes of benchmark calculation because the Russian prices were distorted by the Russian Government’s political pricing. IDM at 25; Def.’s Br. at 8–9 (“This Court has previously sustained Commerce’s decision to reject using Russian natural gas prices as a benchmark because those figures were distorted.” (first citing *Rebar Trade Action Coal. v. United States*, 43 CIT ___, ___, 398 F. Supp. 3d 1374, 1378–79 (2019) (“RTAC”); and then citing *Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. v. United States*, 44 CIT ___, ___, 459 F. Supp. 3d 1341, 1347–49 (2020) (“Habaş”))). Given the foregoing, the court concludes that Commerce’s rejection of the Comtrade data for purposes of calculating a tier-two LTAR benchmark is supported by substantial evidence and in accordance with law.

B. Commerce Reasonably Determined that the Eurostat Data Are Unsuitable for the Calculation of a Tier-Two Benchmark.

Commerce rejected the Eurostat data for largely the same reasons it rejected the Comtrade data. First, Commerce noted that there is no record evidence suggesting the Eurostat data are unconverted (i.e., reported natively in kilograms), and there is therefore a risk of varying conversion factors both in the potential conversion of the initial

data to kilograms, and in the conversion of the collected data to price per unit of energy for the LTAR analysis. IDM at 24. Second, Commerce determined that the Eurostat data were distorted by the inclusion of distorted Russian export pricing data. Def.'s Br. at 9, PDM at 11–12; IDM at 25–26.

The court concludes that Commerce's rejection of the Eurostat data for purposes of calculation of a tier-two benchmark is supported by substantial evidence and in accordance with law. As noted above, Commerce adequately explained its determination that data requiring conversion is unsuitable for investigation of the provision of natural gas for LTAR. IDM at 24. Furthermore, Commerce's determination that Russian pricing data are distorted by the manipulation of the Russian government is supported by evidence on the record and in line both with prior determinations by Commerce and with prior decisions of the court. IDM at 25; Def.'s Br. at 8–9; *RTAC*, 398 F. Supp. 3d at 1378–79; *Habaş*, 459 F. Supp. 3d at 1347–49.

Nor is the court persuaded by Habaş's argument that Commerce failed to consider the Eurostat data as a potential tier-two benchmark. Pl.'s Br. at 22, 28. Commerce explicitly considered "the suitability of COMTRADE and Eurostat data" in the Issues and Decision Memorandum accompanying its *Final Results*. IDM at 23. Commerce nevertheless rejected the data after determining it was unsuitable for the calculation of a tier-two benchmark for the reasons described above. Accordingly, the court concludes that Commerce's rejection of the Eurostat data is supported by substantial evidence and in accordance with law.

II. Commerce's Calculation of a Tier-Three Benchmark Using the IEA Data Was Supported by Substantial Evidence and In Accordance With Law.

Where the record cannot support calculation of a tier-two benchmark, Commerce is permitted to employ a tier-three benchmark in its LTAR analysis. 19 C.F.R. § 351.511(a)(2)(ii)–(iii). To calculate a tier-three benchmark, Commerce "measure[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). For a tier-three benchmark to be sustained by the court, it must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Nippon Steel Corp.*, 337 F.3d at 1379 (quoting *Consol. Edison Co.*, 305 U.S. at 299).

Habaş alleges that, even if it were appropriate for Commerce to employ a tier-three benchmark, Commerce's selection of a tier-three benchmark was unsupported by substantial evidence and not in accordance with law. Pl.'s Br. at 33. Habaş first argues that Commerce

erred by failing to consider Eurostat data for countries other than Russia (namely, Algeria, Libya, Norway and Ukraine) as a potential tier-three benchmark.⁴ *Id.* at 34. Habaş then argues that the IEA data are fatally flawed because they are “not restricted to natural gas in its gaseous form, but, rather, encompass liquid natural gas as well” and are therefore not comparable to Habaş’s purchases of gaseous natural gas. *Id.* at 35. Finally, Habaş argues that the “multitude of adjustments that Commerce had to make to the IEA figures,” along with its annual reporting, render the IEA data unsuitable for benchmark calculation. *Id.* at 38. The Government and RTAC respond that Commerce permissibly rejected the Eurostat data for purposes of tier-three benchmark calculation because of the conversion issues inherent in that data. Def.’s Br. at 15; Def.-Inter.’s Br. at 15. The Government further responds that Commerce explicitly adjusted the IEA data to include only gaseous natural gas prices. Def.’s Br. at 16. RTAC also notes that Habaş’s own natural gas purchases are comparable to the natural gas purchases recorded by the IEA data. Post-Arg. Submission of Def.-Inter. at 1. Finally, the Government and RTAC respond that the adjustments Commerce made to the IEA data were reasonable and increased the overall accuracy of the data, and that the more-frequent reporting of the Comtrade and Eurostat data cannot outweigh their overall unreliability. Def.’s Br. at 16–17; Def.-Inter.’s Br. at 16–17. The court concludes that Commerce’s reliance on the IEA data for the calculation of a tier-three benchmark, and its rejection of the non-Russian Eurostat data, was supported by substantial evidence and in accordance with law.

For the same reasons set out above, Commerce reasonably found that the Eurostat data (and indeed, the Comtrade data) were unsuitable for the calculation of a tier-three benchmark. The record clearly shows that Commerce determined that both the Comtrade and Eurostat data were unreliable because the conversion from kilograms to price per energy units risks varying conversion amounts due to temperature and density factors. IDM at 24–25; Def.’s Br. at 15; Def.-Inter.’s Br. at 15. The Comtrade data, although not emphasized as a potential tier-three benchmark in Habaş’s briefing, is further unsuitable because there is no explanation on the record of data the collection methodology employed by the participating countries. *See* IDM at 24; Def.’s Br. at 11. As the court has previously stated, “Commerce must justify why the data set it chooses is appropriate” — and Com-

⁴ Although Habaş further argues that Eurostat’s Russian import pricing data could provide a viable tier-three benchmark, the court rejects this argument for the reasons set forth in Section I and declines to further discuss Russian pricing data here. *See, e.g.*, Pl.’s Br. at 22.

merce has explicitly done so here. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1717, 462 F. Supp. 2d 1262, 1302 (2006). Therefore, regardless of whether Commerce were to consider Russian export pricing data or data sourced from EU natural gas imports from Algeria, Libya, Norway and Ukraine, the court concludes that Commerce's rejection of the Comtrade and Eurostat data for purposes of tier-three benchmark calculation is supported by substantial evidence and in accordance with law.

Commerce's use of the IEA data to calculate a tier-three benchmark is also supported by substantial evidence and in accordance with law. Contrary to Habaş's assertions, there is no evidence that Commerce failed to consider (and adjust for) the IEA dataset's inclusion of liquid natural gas pricing data as well as gaseous natural gas pricing data. Rather, the IEA data Commerce relied upon for purposes of its tier-three benchmark calculation included only "end-use" pricing data: in other words, data regarding the sale price of natural gas when it is sold to ultimate consumers. IDM at 19; Def. s Br. at 15–16. As the Government notes in its brief, "liquefied natural gas is not a product purchased by companies and households for their own energy consumption purposes," — thus, liquefied natural gas is inherently excluded from the IEA data considered by Commerce in its tier-three benchmark calculation. Def.'s Br. at 16.

Habaş further argues that the end-use, gaseous natural gas is comprised of both gaseous natural gas imports and re-gasified liquid natural gas imports and is therefore unsuitable for comparison purposes under 19 C.F.R. § 351.511(a)(2)(iii). However, there is no clear regulatory requirement that Commerce consider "product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability," as in a tier-one analysis, or "[make] due allowance for factors affecting comparability," as in a tier-two analysis, for purposes of its tier-three analysis. 19 C.F.R. § 351.511(a)(2)(i)–(ii). Rather, Commerce is only expressly required by 19 C.F.R. § 351.511 to consider price comparability when conducting a tier-one or tier-two analysis. *Id.* In any case, even if such requirement were imputed to Commerce's tier-three analysis, it is likely satisfied here. The Government of Turkey acknowledged in its submissions to Commerce that Botaş provides end-use consumers with a commingled product of gaseous and re-gasified natural gas. Questionnaire Response of the Government of Turkey at 35; Post-Arg. Submission of Def.- Inter. at 1, 12. Habaş's purchase data and the IEA pricing data therefore relate to directly comparable products. Accordingly, the court rejects Habaş's assertions that by calculating a tier-three benchmark based

on the IEA data, Commerce failed to comply with the comparability requirements of 19 C.F.R. § 351.511.

Nor is the court persuaded by Habaş’s arguments that the IEA data are insufficiently accurate. Pl.’s Br. at 38. Habaş asserts that Commerce’s adjustments to the IEA data, among them “indexing, averaging between values for industrial users and electricity generators, [and] constructing a framework to ‘eliminate’ the impact of Russian figures from the data, etc.” render the data unreliable for a tier-three determination because “[e]ach of these adjustments introduces an approximation into the benchmark, taking it further away from empirical accuracy.” *Id.* at 38–39. Habaş further argues that the annually-reported IEA data fails to comply with Commerce’s stated preference for monthly data, and therefore fail to account for the volatility of the energy market. *Id.*; IDM at 26. Habaş concludes that the IEA data are inaccurate and unsuitable for the calculation of a tier-three benchmark. Pl.’s Br. at 38. These arguments are unavailing because, as Commerce explained, “the best available information [on the record] is in the IEA report.” IDM at 26. Specifically, Commerce concluded that the IEA data were the most reliable data on the record because the Comtrade and Eurostat data required the conversion of kilograms to price per energy units whereas the adjustments required by the IEA data involved no conversions, and because the IEA expressly recognizes volatility concerns. IDM at 19. Commerce further stated that its preference for monthly data was “superseded by the need to select the best available information on the record for purposes of determining a benchmark.”⁵ IDM at 26. Commerce has therefore provided a reasonable explanation for its reliance on the IEA data, and despite Habaş’s disagreement, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *AK Steel Corp.*, 192 F.3d at 1371. Accordingly, given its conclusion that the other data on the record were unsuitable for the calculation of a tier-three benchmark, the court concludes that Commerce reasonably relied upon the IEA data in calculating a tier-three benchmark.

CONCLUSION

Based on the evidence in the record, Commerce reasonably rejected the Comtrade and Eurostat data on natural gas imports from Russia

⁵ Nor is Commerce precluded from relying on annual benchmarks. Def.’s Br. at 17; *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 23,188 (Dep’t Commerce May 15, 2017) and accompanying Issues and Decision Memorandum; see also *Rebar Trade Action Coal. v. United States*, 43 CIT ___, ___, 389 F. Supp. 3d 1371, 1383 (2019), *aff’d*, *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 992 F.3d 1348 (Fed. Cir. 2021).

in calculating a tier-two benchmark for its LTAR analysis of Habaş's natural gas purchase prices, reasonably rejected the Eurostat natural gas import data from Norway, Algeria, Libya, and Ukraine in calculating a tier-three benchmark, and reasonably relied upon the IEA data in calculating its ultimate tier-three benchmark. For the foregoing reasons, Commerce's *Final Determination* is sustained.

SO ORDERED.

Dated: August 18, 2021
New York, New York

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

Slip Op. 21–101

AG DER DILLINGER HÜTTENWERKE, Plaintiff, and ILSENBURGER GROBBLECH GmbH, SALZGITTER MANNESMANN GROBBLECH GmbH, SALZGITTER FLACHSTAHL GmbH, SALZGITTER MANNESMANN INTERNATIONAL GmbH, and FRIEDR. LOHMANN GmbH, Consolidated Plaintiffs, and THYSSENKRUPP STEEL EUROPE AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

[Commerce's *Final Determination* remanded in part.]

Dated: August 18, 2021

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Robert L. LaFrankie, Crowell & Moring LLP, of Washington, D.C. for Plaintiff-Intervenor thyssenkrupp Steel Europe AG.

Kelly Ann Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C. for Defendant United States. On the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Vito S. Solitro*, Trial Attorney. Of counsel were *Natan P. L. Tubman* and *Ayat Mujais*, Attorneys, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Alan H. Price, Christopher B. Weld, and Stephanie M. Bell, Wiley Rein LLP of Washington, D.C. for Defendant-Intervenor Nucor Corporation.

OPINION and ORDER

Gordon, Judge:

This consolidated action involves a challenge to the final determination in the antidumping duty investigation conducted by the U.S. Department of Commerce (“Commerce”) of certain carbon and alloy steel cut-to-length plate (“CTL plate”) from the Federal Republic of Germany. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep’t of

Commerce Apr. 4, 2017) (“*Final Determination*”), and accompanying Issues and Decision Memorandum, A-428–844 (Mar. 29, 2017), <http://enforcement.trade.gov/frn/summary/germany/2017-06628-1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court are the motions for judgment on the agency record of Plaintiff AG der Dillinger Hüttenwerke (“Dillinger”) and Consolidated Plaintiffs Ilseburger Grobblech GMBH, Salzgitter Mannesmann Grobblech GMBH, Salzgitter Flachstahl GMBH, and Salzgitter Mannesmann International GMBH (collectively “Salzgitter”). See Pl. Dillinger Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 40¹ (“Dillinger Br.”); Salzgitter Consol. Pls.’ Rule 56.2 Mot. for J. on the Agency R., ECF No. 43 (“Salzgitter Br.”); Def.’s Mem. Opp. Pls.’ Rule 56.2 Mots. for J. on the Admin. R., ECF No. 55 (“Def.’s Resp.”); Def.-Int. Nucor Corporation Resp. Br., ECF No. 58; Reply Br. of Pl. Dillinger, ECF No. 62 (“Dillinger Reply”); Reply in Supp. of Consol. Pls.’ Rule 56.2 Mot. for J. on the Agency R., ECF No. 64 (“Salzgitter Reply”). Plaintiff-Intervenor thyssenkrupp Steel Europe AG (“thyssenkrupp”) also filed a brief in support of Plaintiff Salzgitter’s Rule 56.2 Motion. See Pl.-Int.’s Memorandum of Law in Support of Pl. Salzgitter’s Rule 56.2 Mot., ECF No. 41 (“thyssenkrupp Br.”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),² and 28 U.S.C. § 1581(c) (2018).

The court previously addressed Dillinger and Salzgitter’s claims regarding the application of partial adverse facts available by Commerce for certain home market CTL plate sales made by Dillinger and Salzgitter’s respective affiliates. See *AG der Dillinger Huttenwerke v. United States*, 43 CIT ___, 399 F. Supp. 3d 1247 (2019) (“*Dillinger I*”). Subsequently, the court remanded the action to Commerce. See Remand Order, ECF No. 83. Before the court are Commerce’s Final Results of Redetermination Pursuant to Court Remand (“*Remand Results*”), ECF No. 85–1, filed pursuant to *Dillinger I* and the Remand Order. See Def.-Int. SSAB Enter. LLC’s Comments Opposing Remand Results, ECF No. 96; Def.-Int. Nucor Corp.’s Revised Comments on Remand Determin., ECF No. 100; Def.’s Resp. to Comments on Remand Redeterm., ECF No. 104; Consol. Pls.’ Resp. Comments in Support of Remand Determin., ECF No. 106.

The court again remands the *Final Determination* to Commerce for reconsideration of Dillinger’s challenges to non-prime CTL plate cost

¹ All citations to the parties’ Rule 56.2 briefs and the agency record are to their confidential versions unless otherwise noted.

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

shifting, application of the major input rule, treatment of certain general and administrative (“G&A”) expenses, and the AFA issue. The court, in a separate opinion, *see AG der Dillinger Huttenwerke v. United States*, 45 CIT ___, Slip Op. 21–102 (Aug. 18, 2021), sustains the *Final Determination* as to Dillinger’s challenges on differential pricing and adjustment of interest expenses to include a portion of Dillinger’s parent holding company’s interest expense.

I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-dumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

II. Discussion

A. Cost Shifting (Non-Prime Plate Adjustment)

Dillinger challenges Commerce’s cost of production (“COP”) determination for its prime and non-prime plates. Dillinger Br. at 33–37;

see also 19 U.S.C. § 1677b(e) & 19 U.S.C. § 1677b(f)(1)(A). Commerce found that Dillinger uses an internal “factory results report” to “value[] non-prime products at their likely selling price, and uses this value as an offset to prime production.” *Decision Memorandum* at 90 (footnote omitted). Commerce considered it reasonable to rely on this report to reallocate cost between prime and non-prime plates. *Id.* at 89–90. Dillinger argues that this reallocation contravened the statute and applicable case law. See *Dillinger Br.* at 33–37.

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has held that Commerce’s decision to rely on information reflecting a respondent’s “likely selling price,” rather than actual cost data, violates the requirements of § 1677b(f). *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321–24 (Fed. Cir. 2020) (“*Dillinger France II*”). Accordingly, the court remands this issue to Commerce to reconcile its COP determination with the Federal Circuit’s decision in *Dillinger France II*.

B. Major Input Rule (re: Blast Furnace Coke)

Dillinger describes itself as an “integrated” steel mill, meaning that it performs all steps necessary for producing steel internally from raw materials, such as iron ore and blast furnace coke, to the finished rolled steel product. *Dillinger Br.* at 37. During the period of investigation (“POI”), Dillinger obtained pig iron, a major raw material input used to produce CTL plate, from its affiliated producer, Rogesa Roheisengesellschaft (“Rogesa”). Rogesa obtained blast furnace coke, a major raw material input used to produce pig iron, from an affiliated producer, Zentralkokerei Saar Gesellschaft (“ZKS”). See *Decision Memorandum* at 90.

Dillinger challenges Commerce’s use of Rogesa’s affiliated and unaffiliated consumption values in applying the major input rule. See *Dillinger Br.* at 39–44; *Dillinger Reply* at 18–19; see also 19 U.S.C. § 1677b(f)(3) (major input rule); 19 C.F.R. § 351.407(b). Dillinger argues that Commerce deviated from the requirements of the applicable regulation, 19 C.F.R. § 351.407(b), when it selected Rogesa’s reported consumption values instead of Rogesa’s spot purchases of coke from unaffiliated suppliers as the basis for determining the value of coke under the major input rule. See *Dillinger Br.* at 38–39; *Dillinger Reply* at 17–20. The court does not agree.

19 C.F.R. § 351.407(b) provides that Commerce “normally” will determine the value of a major input purchased from an affiliated person based on the “higher” of the price paid to an affiliated party, the amount usually reflected in sales of the major input, or the affiliate’s cost of producing the input. The regulation does not “require” Commerce to use unaffiliated purchase prices as the basis for

the valuation. Here, Commerce explained that the Rogesa's consumption values were usable as opposed to most companies Commerce deals with that typically "co-mingle the physical inventory and records for purchases of raw materials from differing suppliers, and thus are not able to provide consumption value information by input and supplier." *Decision Memorandum* at 93. Commerce preferred the reported Rogesa consumption values for coke as more accurate than the recorded purchase prices because the consumption values reflected both affiliated and unaffiliated suppliers (enabling a comparison) and because ZKS also reported its COP information on a consumption-value basis. *See id.* Since Rogesa provided consumption values for its coke by supplier, Commerce reasonably decided to use those values in applying the major input rule. Accordingly, the court is not persuaded by Dillinger's argument that Commerce contravened § 351.407(b) by selecting consumption values over purchase prices for determining coke value under the major input rule.

Dillinger next argues that Commerce's use of coke consumption values unreasonably distorted the coke value calculations because Commerce's comparison of affiliated and unaffiliated consumption values failed to properly account for (1) contemporaneity, (2) freight expenses, (3) a certain credit note that ZKS issued to Rogesa, and (4) G&A and interest expenses. *See Dillinger Br.* at 39–42; *Dillinger Reply* at 22–25.

Dillinger notes that the recorded consumption values reflect the value of coke purchased "in large part prior to the POI." *Dillinger Br.* at 40. Dillinger also notes that Rogesa's purchases of blast furnace coke during the POI from unaffiliated suppliers involved different countries and significantly lower prices than purchases prior to the POI. *Id.* Dillinger argues that because Rogesa's consumption values reflect the value of coke purchased prior to the POI "at a time when market prices were considerably higher and are obviously influenced by higher freight costs," the consumption values "cannot reasonably be used as an indicator of what the transfer price of ZKS' coke sales during the POI would have been had it not been affiliated with R[ogesa]." *Id.* Defendant notes that "[n]othing in the regulation places a temporal limitation on the data that Commerce may use." *Def.'s Resp.* at 36. Defendant adds that "Commerce's selection of consumption values from Rogesa's records, some of which were during the [POI], ensured that the transfer prices reflected the market under consideration, of which Rogesa was indisputably a participant." *Id.* These two responses, although true in the abstract, do not address the issue Dillinger is arguing—that the consumption values selected distort the input calculation. The regulation, of course, has

an *implicit* temporal limitation on the data Commerce selects, and it is foolish for Commerce to contend otherwise. Likewise, saying that *some* of the records were during the POI does not respond to Dillinger's contention that most (or "in large part") were not. The upshot is that the court cannot sustain this aspect of Commerce's decision as reasonable. More explanation is needed. The court will therefore remand this issue to Commerce for further analysis and explanation, and if necessary, reconsideration.

As for freight expenses (and potential distortions), Commerce acknowledged that it was necessary to adjust Rogesa's coke consumption values to ensure that those values were on the same basis as unaffiliated consumption values. *See Decision Memorandum* at 93. Commerce explained:

Rogesa's coke consumption values from ZKS are freight exclusive (because both companies are located on the same factory premises), while the unaffiliated coke consumption values are freight inclusive. As a result, to ensure that the comparison between the affiliated and unaffiliated consumption values is on the same basis, we adjusted the unaffiliated consumption values to reflect freight-exclusive values. Therefore, for the final determination, we adjusted Rogesa's reported coke cost to reflect the higher of ... Rogesa's consumption value of coke from its affiliate, ZKS, Rogesa's adjusted consumption value of coke from unaffiliated suppliers, or the reported COP of coke.

Id.

Dillinger contends that Commerce did not have information on the historic inventory values Commerce was using net of freight expenses because it never requested such information, having changed its methodology for the final determination. Dillinger Br. at 40. Dillinger explains that Rogesa's inventory of unaffiliated coke purchases made prior to the POI came from different countries than its unaffiliated purchases of coke during the POI, and thus they involved significantly different per ton freight costs. *See id.* at 41. Dillinger highlights that Commerce calculated an average per ton freight cost based upon purchases of blast furnace coke from unaffiliated suppliers during the POI. *See id.* at 40–41. Therefore, according to Dillinger, Commerce's freight adjustment to Rogesa's unaffiliated consumption values unreasonably assumes that the freight expense for its pre-POI inventory is the same as that for unaffiliated purchases of coke during the POI. *See id.* Adjusting consumption values to ensure either a freight inclusive or freight exclusive comparison does seem reasonable. The court remands this issue to Commerce to for further analysis and explanation, and, if necessary, reconsideration.

Dillinger also argues that Commerce erred in multiplying the freight cost per-ton by the quantity of coke on a dry basis and should have adjusted for the fact that the freight factor used by Commerce was based on the wet weight of coke. Dillinger Br. at 42; Dillinger Reply at 22. Commerce did not address this issue below, believing it was moot because Commerce used reported coke consumption values that were on the same weight basis, rather than purchase prices that may have reflected either a dry-weight or wet-weight basis. *See Decision Memorandum* at 93. Commerce though does need to address the potential unreasonableness of using a *wet-weight* basis freight factor for the adjustment of *dry-weight* basis consumption values. Therefore, the court remands this issue to Commerce for further analysis and explanation, and if necessary, reconsideration.

As for the credit note (and its potential distortionary effect), Commerce reduced the reported affiliated coke consumption values used in applying the major input rule by the credit note issued by ZKS to Rogesa. *See id.* Dillinger challenges this adjustment, which resulted in an additional cost to ZKS's reported cost of manufacture. *See Dillinger Br.* at 41–42; Dillinger Reply at 24. Defendant explains that to the extent Commerce's methodology resulted in a larger adjustment associated with ZKS's coke sales to Rogesa, it nevertheless more accurately reflects the average unit consumption values. Def.'s Resp. at 39. This though is a post hoc rationale that the court cannot sustain. *See Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action" (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))). Commerce should have requested a remand to address this issue directly in the first instance (if in fact it has a material effect on the margin). Accordingly, the court remands this issue to Commerce for further analysis and explanation, and if necessary, reconsideration.

Dillinger also maintains that to have a comparison on the same basis, Commerce must use the "full value including G&A and INTEX (interest expenses) in analyzing whether the affiliated transfer price is below comparable market value." Dillinger Br. at 41. Defendant responds that Commerce's use of consumption values as a basis for comparison obviated the need to make Dillinger's suggested adjustments to G&A and interest expenses, Def.'s Resp. at 39, but here again, this is post hoc rationalization of agency counsel, and the court will therefore remand this issue to Commerce for further consideration.

C. Expenses for Inputs & Services Provided to Affiliates

Commerce adjusted the COP of the inputs and services that Dillinger provided to Rogesa and ZKS to include a portion of Dillinger's G&A expenses. *Decision Memorandum* at 96. Commerce explained:

Because the G&A expense ratio is calculated using Dillinger's unconsolidated financial statements, the transactions between Dillinger and its affiliates, Rogesa and ZKS, have not been eliminated from these financial statements. Thus, Dillinger's cost of goods sold includes both the cost of the inputs and services that Dillinger sold to Rogesa and ZKS, as well as the cost of the CTL plate that Dillinger sold to third parties. In producing CTL plate, Dillinger consumes inputs produced by Rogesa and ZKS (*e.g.*, pig iron); thus, embedded in the cost of the CTL plate Dillinger sold is also the cost the inputs provided by Rogesa and ZKS, including the inputs and services that Rogesa and ZKS obtained from Dillinger.

Therefore, in calculating the G&A expense ratio, we have essentially included the cost of the inputs and services provided to Rogesa and ZKS in the denominator twice; once when they were sold to the affiliates, and again when Dillinger consumed the inputs provided by Rogesa and ZKS.

Based on this calculation, in order to account for all of Dillinger's G&A expenses, it is appropriate to apply Dillinger's G&A expense ratio to both the costs of: 1) the CTL plate; and 2) the inputs and services. As a result, we disagree with Dillinger that application of the G&A expense ratio to the cost of the inputs and services Dillinger provided to its affiliates results in the double counting of Dillinger's G&A expenses.

Id.

Dillinger provided the labor to Rogesa and ZKS for production of blast furnace coke and pig iron. Commerce found that the provision of these services by Dillinger, and the cross-charges for them by Dillinger to its affiliates and from its affiliates to Dillinger, is ultimately both cost and income to Dillinger. Dillinger argues that "any increase in the transfer price would merely result in other income being realized by Dillinger" and "[t]herefore it makes no sense to increase G&A expenses at one level and offset them by income at another level." Dillinger Br. at 43. Dillinger points to Commerce's long-standing practice of using "other income" to offset to G&A expenses. *See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 79 Fed. Reg. 37,284 (Dep't of Commerce July 1, 2014) (Final Results), and accompanying Issues and Decision Memorandum at cmts. 3 & 4.

Commerce, however, explained that its determination to rely on Dillinger's unconsolidated financial statements as the basis for the G&A expense ratio is consistent with its past practice. *See Decision Memorandum* at 96 & n.279 (citing *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (Dep't of Commerce Dec. 26, 2012), and accompanying Issues and Decision Memorandum ("*Korean Washers IDM*") at cmt. 7)). Commerce's "methodology is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales, and not on a consolidated, divisional, or product-specific basis." *Korean Washers IDM* at 44. When relying on unconsolidated financial statements as the basis of the G&A expense ratio, Commerce must account for transactions between affiliates that otherwise are not eliminated from those statements. *Decision Memorandum* at 96 & n.280.

Commerce appears to have first determined the difference between the transfer price and market price for pig iron. Def.'s Resp. at 42 (citing Final Dillinger COP Memorandum, CD 767, Attach. 3). Commerce then multiplied the above difference by the percentage of Rogesa's operations related to the production of pig iron, and further multiplied this by the percentage of pig iron used in the cost of manufacturing CTL plate to calculate the total adjustment to add to Dillinger's cost of manufacturing. *Id.* The calculated total reflects only the percentage of Rogesa's production pertaining to pig iron used in the manufacture of CTL plate. *Id.* Commerce used the same methodology for its calculations with respect to ZKS and coke. *Id.*

Defendant dismisses Dillinger's argument that Commerce allegedly "treats the entire absolute cost of manufacture (COM) of plate and then builds a ratio where the denominator is limited only to COM of plate," Dillinger Br. at 44, as lacking merit because the contested increase was already calculated to pertain solely to the cost of pig iron and coke used in manufacturing CTL plate. *See* Def.'s Resp. at 42 (citing Final Dillinger COP Memorandum, CD 767, Attach. 3). Defendant maintains that Commerce thus built a denominator likewise limited to the cost of manufacturing CTL plate.

Dillinger argues that Commerce ignores the fact that the same total increase in the amount of the costs paid by the affiliates for Dillinger's labor services would have resulted in an equal amount of income to Dillinger for those services, and additional income to Dillinger is used as an offset to G&A expenses under Commerce's long-standing practice. *See* Dillinger Br. at 43 (citing *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 79 Fed. Reg. 37,284 (Dep't of Commerce July 1, 2014) (Final Results), and accompanying Issues and

Decisions Memorandum at cmts. 3 & 4). Dillinger notes that Commerce failed to address its “prior” (or current) practice of off-setting G&A expenses with other income in its *Decision Memorandum*. Moreover, in its response brief, Defendant states only that “Dillinger’s earnings on other activities simply do not relate to the cost of producing subject merchandise.” See Def.’s Resp. 41. Dillinger contends that this statement has no support in the record and that the labor services provided by Dillinger to Rogesa and ZKS are directly related to the production of pig iron and blast furnace coke and have been included in Dillinger’s reported COPs. Therefore, Dillinger argues that any income earned on providing these labor services to Rogesa and ZKS are, by definition, activities directly related to the cost of producing subject merchandise.

Dillinger further contends that Commerce has provided no response to Dillinger’s argument that Commerce’s adjustment results in an illogical multiplication of G&A expenses by having Dillinger charge itself its own G&A expenses and then having these expenses flow into the total cost of manufacture for the end product, which is again charged with G&A expenses. See Dillinger Br. at 43. Dillinger insists that prior to Commerce’s final adjustment there has been no double-counting of the cost of Dillinger’s labor services to Rogesa and ZKS in the G&A expense ratio denominator. Dillinger argues that the record shows pig iron produced by Rogesa was used in the production of both subject and non-subject merchandise, and that the remaining pig iron was consumed by a different company to make non-subject merchandise. *Id.* at 43–44. Defendant dismisses Dillinger’s argument, contending that “Commerce took account of [the fact that not all of the pig iron produced by Rogesa was consumed by Dillinger for subject merchandise] by utilizing a methodology that only included pig iron used in the production of CTL plate.” Def.’s Resp. at 43. Dillinger, however, rightfully highlights that Commerce’s calculations for this adjustment on the record appear to be inconsistent with the agency’s purported acknowledgment that not all pig iron produced by Rogesa was consumed in the production of subject merchandise. See Dillinger Reply at 27–28.

In support of its argument, Dillinger highlights that on the third line of Attachment 3 to the Cost Calculation Memorandum, Commerce lists a certain amount in Euros as the adjustment for the labor services Dillinger provided to Rogesa, which is based upon 100% of the labor services provided by Dillinger to Rogesa. Dillinger points out that the amount is not in any way reduced to reflect the fact that more than half of Rogesa’s pig iron was used in non-subject products. See *id.* Dillinger further notes that on the fourth line of the same

attachment, Commerce calculates a “Percentage of Operations Related to the Production of Pig Iron,” but this percentage only shows that a certain percentage of Rogesa’s total sales related to pig iron, with the rest relating to non-pig iron products or other operating income. *Id.* at 28. Dillinger argues that this calculation does not take into account the fact that of these pig iron sales, less than half were consumed in the production of subject CTL plate. Further, Dillinger offers that the rate of the certain percentage used by Commerce on the fifth line of Attachment 3 also does not adjust for the fact that most of the pig iron was used in non-subject products, but rather indicates the percentage of the total cost of CTL plate that is accounted for by pig iron. *Id.* Dillinger contends that the calculation for ZKS follows the same pattern and does not adjust for the pig iron and coke consumed in the production of non-subject merchandise. In summary, Dillinger argues that Commerce is simply taking the entire amount of the adjustment related to pig iron sales and applying it exclusively to subject CTL plate. *Id.*

Commerce’s explanation in the *Decision Memorandum* does not reasonably address or resolve Dillinger’s arguments. This issue therefore requires further explanation or consideration, and accordingly is remanded.

D. Remand Results on Partial Adverse Facts Available

In *Dillinger I*, the court sustained Commerce’s application of partial AFA, but remanded the *Final Results* for Commerce to review whether the same correction made to partial AFA by Commerce in a parallel proceeding, *Dillinger France S.A. v. United States*, 43 CIT ___, 350 F. Supp. 3d 1349 (2019) (“*Dillinger France I*”), involving the same issue, “would have any material effect on the margins in this case, or if it would be immaterial.” *Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1257. Commerce determined that a similar correction as ordered in *Dillinger France I* would have a material effect, and the court remanded to Commerce to recalculate the antidumping duty margin for Salzgitter. *See* Remand Order.

On remand, Commerce, under protest, recalculated Salzgitter’s antidumping duty margin. Commerce noted that “the Court’s order did not provide Commerce with the opportunity to consider an alternative partial AFA methodology, in light of the factual differences between the two cases.” *See Remand Results* at 4. Commerce observed:

[I]t is the role of Commerce to consider, in the first instance, whether a particular AFA methodology complies with the statute’s directive in any particular case. Pursuant to the Court’s order, Commerce was unable to consider whether an alternative

methodology would have been more appropriate in the instant case. Due to this limitation, Commerce further agrees with Nucor that the Court's order deprives Commerce of the ability to further consider whether the purpose of section 776 of the Act, *i.e.*, inducing cooperation, has been satisfied. Accordingly, it is under respectful protest that Commerce has followed the Court's instructions directing us to recalculate Salzgitter's margin utilizing the partial AFA methodology discussed above.

Id. As the court explained in *Dillinger I*, “[r]easoned decision-making requires a certain measure of consistency, which is not present across the French and German investigations. As noted, the cases share near identical (almost verbatim) Issues and Decision Memoranda on the AFA issue.” See *Dillinger I*, 43 CIT at ___, 399 F. Supp. 3d at 1257. Commerce now argues in the *Remand Results* that the French and German investigations are somehow factually distinguishable so that the AFA methodology applied in the *Dillinger France* decisions may not be appropriate for the German investigation. Given the remand for the other issues, the court will also remand the AFA issue so that Commerce may explain why, if there were material factual differences between the French and German investigations on the AFA issue, those differences were not reflected in the decision memoranda or Commerce's handling of AFA between the cases, which the court noted were nearly identical (*virtually verbatim*). Commerce may reconsider this issue and may explain why an alternative AFA methodology might be appropriate, but Commerce must first provide a reasoned explanation for issuing virtually identical decision memoranda and AFA treatment across the two investigations, and then arguing on remand that there were material factual differences not previously identified or explained that warrant differing AFA treatment across the two investigations. If Commerce wishes to apply a different AFA approach in this proceeding than the one it ultimately applied in the French investigation, the agency must explain why such a disparate approach is reasonable.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce address the issues remanded above; and it is further

ORDERED that Commerce shall file its remand results on or before November 16, 2021; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: August 18, 2021
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 21–102

AG DER DILLINGER HÜTTENWERKE, Plaintiff, and ILSENBURGER GROBBLECH GmbH, SALZGITTER MANNESMANN GROBBLECH GmbH, SALZGITTER FLACHSTAHL GmbH, SALZGITTER MANNESMANN INTERNATIONAL GmbH, and FRIEDR. LOHMANN GmbH, Consolidated Plaintiffs, and THYSSENKRUPP STEEL EUROPE AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

[Commerce’s *Final Determination* sustained in part.]

Dated: August 18, 2021

Marc E. Montalbine, Gregory S. Menegaz, and Alexandra H. Salzman, deKieffer & Horgan, PLLC of Washington, D.C. for Plaintiff AG der Dillinger Hüttenwerke and Consolidated Plaintiff Friedr. Lohmann GmbH.

Robert L. LaFrankie, Crowell & Moring LLP, of Washington, D.C. for Plaintiff-Intervenor thyssenkrupp Steel Europe AG.

Kelly Ann Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C. for Defendant United States. On the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Vito S. Solitro*, Trial Attorney. Of counsel were *Natan P. L. Tubman* and *Ayat Mujais*, Attorneys, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Alan H. Price, Christopher B. Weld, and Stephanie M. Bell, Wiley Rein LLP of Washington, D.C. for Defendant-Intervenor Nucor Corporation.

OPINION

Gordon, Judge:

This consolidated action involves a challenge to the final determination in the antidumping duty investigation conducted by the U.S. Department of Commerce (“Commerce”) of certain carbon and alloy steel cut-to-length plate (“CTL plate”) from the Federal Republic of Germany. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep’t of Commerce Apr. 4, 2017) (“*Final Determination*”), and accompanying Issues and Decision Memorandum, A-428–844 (Mar. 29, 2017), <http://enforcement.trade.gov/frn/summary/germany/2017–06628–1.pdf> (last visited this date) (“*Decision Memorandum*”).

Plaintiff AG der Dillinger Hüttenwerke (“Dillinger” or “Plaintiff”) challenges several aspects of Commerce’s *Final Determination*. See Pl. Dillinger Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 40 (“Dillinger Br.”);¹ Def.’s Mem. Opp. Pls.’ Rule 56.2 Mots. for J. on the Admin. R., ECF No. 55 (“Def.’s Resp.”); Def.-Intervenor Nucor Corporation Resp. Br., ECF No. 58; Reply Br. of Pl. Dillinger, ECF No. 62 (“Dillinger Reply”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),² and 28 U.S.C. § 1581(c) (2018).

In a separate opinion, the court remanded several issues from the *Final Determination* for reconsideration (non-prime CTL plate cost shifting, application of the major input rule, the treatment of certain general and administrative (“G&A”) expenses, and an adverse facts available issue). See *AG der Dillinger Huttenwerke v. United States*, 45 CIT ___, Slip Op. 21–101 (Aug. 18, 2021). In this opinion, the court sustains the *Final Determination* for other issues Dillinger challenged that the court has determined lack merit: differential pricing and interest expense adjustments.

I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evi-

¹ Citations to the parties’ Rule 56.2 briefs and agency record are to confidential versions unless otherwise noted.

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

dence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-dumping statute. See *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

II. Discussion

A.1. Differential Pricing Methodology

In the underlying investigation, Commerce found that there “is a meaningful difference between using the different comparison methods” and ultimately determined that the agency would “apply[] the A-to-T method to Dillinger’s U.S. sales that pass the Cohen’s *d* test and the A-to-A method to Dillinger’s U.S. sales that do not pass the Cohen’s *d* test to calculate the weighted-average dumping margin for Dillinger.” *Decision Memorandum* at 17; see also 19 C.F.R. § 351.414(c)(1). Commerce’s differential pricing methodology (“DPM”) has been described extensively in other cases. See, e.g., *Stanley Works (Langfang) Fastening Systems Co. v. United States*, 41 CIT ___, ___, 279 F. Supp. 3d 1172, 1176–79 (2017) (“*Stanley Works*”).

Dillinger argues that Commerce’s DPM failed to show that Dillinger’s prices differed significantly among purchasers, regions, or periods of time pursuant to 19 U.S.C. § 1677f-1(d)(1)(B). Specifically, Dillinger contends that Commerce (i) failed to find a “pattern” of differences and (ii) unreasonably aggregated price differences across the categories of purchasers, region, and time. See *Dillinger Br.* at 27–31; *Dillinger Reply* at 8–12. The court disagrees.

Before Commerce, Dillinger argued that its made-to-order sales and various other economic considerations meant that DPM would only detect random variations, rather than a significant pattern of price differences. See *Decision Memorandum* at 13. Dillinger, however, provides no support to demonstrate that its made-to-order sales would cause distortions in Commerce’s calculations. Commerce explained that a company’s economic goals were reflected through its pricing behavior and that the DPM was designed to reveal when a company resorted to targeted dumping. *Decision Memorandum* at 20–21. Relying on the Statement of Administrative Action (“SAA”), Commerce explained:

The SAA states that “targeted dumping” is where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.” For “targeted” or masked dumping to exist, there must be both lower-priced U.S. sales which evidence dumping as well as higher-priced, non-dumped U.S. sales which “conceal,” mask, hide this evidence of dumping. Therefore, since the purpose of section 777A(d)(1)(B) is to provide a remedy for “targeted dumping,” pursuant to which the Department must satisfy the pattern requirement to demonstrate that the respondent’s pricing behavior in the U.S. market exhibits characteristics “where targeted dumping may be occurring,” the Department continues to find reasonable and logical its approach of including both lower-priced and higher-priced U.S. sales as part of a potential pattern of prices that differ significantly.

Decision Memorandum at 21 (internal citations omitted). Commerce further addressed Dillinger’s concerns about the made-to-order nature of its products by explaining that the CONNUMs³ used by Commerce in its analysis accounted for variations among Dillinger’s products:

Dillinger further asserts that its made-to-order products are so unique and embrace such a wide range of grades within a given CONNUM that any comparison of U.S. prices on a CONNUM basis must take into account these inter-CONNUM variations. The Department disagrees. The CONNUM and its constituent physical characteristics are all subject to comment during this investigation. Dillinger provided comments, and Dillinger’s arguments have been fully considered. The established CONNUMs are the foundation for reporting not only comparison and U.S. market sales, but also Dillinger’s costs of production, and are the basis for comparison of U.S. prices with normal value. Since the purpose of the differential pricing analysis is to consider whether the A-to-A method is appropriate to calculate Dillinger’s weighted-average dumping margin, and the comparisons on which this calculation is based are defined by CONNUMs, the Department finds that it is appropriate, and reason-

³ A “CONNUM” is a contraction of the term “control number,” and is Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as “identical” merchandise for purposes of the price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the merchandise under investigation.

able, to use these same CONNUMs as the basis for the comparisons of U.S. prices in the differential pricing analysis.

Id. at 20.

Nonetheless, Dillinger now argues that aggregation of price differences across the categories of purchasers, region, and time “completely failed to establish any pattern of price differences with respect to each category on its own” in contravention of the statute. Dillinger Br. at 29.

The *Decision Memorandum* details how Commerce’s DPM evaluates such differences, consistent with the statute:

The Cohen’s *d* test compares the U.S. sale prices sequentially to each purchaser, region and time period, with all other U.S. sale prices (*i.e.*, the U.S. sales to all other purchasers, regions or time periods, respectively) of comparable merchandise. What appears to be the concern of Dillinger, for example with purchasers, is that the U.S. sales to each purchaser may not be evenly distributed across the other two types of groups, regions and time periods. Thus, Dillinger posits that the “Department therefore cannot determine whether a price difference is actually due to real differences between purchasers or simply due to the fact that the sales are to purchasers in different regions or during different time periods.”

The Department finds that this is neither a flaw in the Cohen’s *d* test nor a distortion of the results. The Department also does not find that there are flaws related to the other two groups (*i.e.*, U.S. sales to a particular region that are equally distributed across all purchasers and time periods, or U.S. sales in a particular time period that are equally distributed across all purchasers and regions). The one possible distortion that could arise, for example that each purchaser is located in a specific region, is that similar results would occur when comparing prices by purchaser and by region. However, the ratio test does not double-count the sales value when a given U.S. sale price is found to be significantly different by purchaser and region. There is no assumption about correlated distribution of sales between purchasers, regions or time periods, and indeed a given U.S. sale price may be found to be significantly different by all three categories. Yet the ratio test ensures that any such correlation between purchasers, regions and/or time periods does not distort the results of the test and result in a finding that a larger proportion of the U.S. sale value is at prices which differ significantly.

Decision Memorandum at 21–22.

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has already rejected similar arguments to those presented here challenging Commerce’s finding of a “pattern” under § 1677f-1. *See Dillinger France S.A. v. United States*, 981 F.3d 1318, 1324–26 (Fed. Cir. 2020) (rejecting Dillinger’s various challenges to Commerce’s finding of pattern in that matter, noting “there is nothing in § 1677f-1 or the regulations promulgated thereunder that requires Commerce to consider custom products differently when determining whether [a pattern exists pursuant to § 1677f-1(d)(1)(B)]”). As in *Dillinger France*, Commerce here accounted for Dillinger’s concerns and reasonably explained its finding of a pattern of significant price differences in the *Decision Memorandum*. Accordingly, Commerce’s determination as to Dillinger’s DPM challenge is sustained.

A.2. Zeroing as part of DPM

Dillinger next argues that Commerce’s use of zeroing as part of its DPM is unlawful under the statute. It contends that zeroing “distorts both of the requirements provided in section 1677f-1(d)(1)(B)” because it compares “a non-zeroed margin” with a “zeroed margin,” and the difference in result between the A-to-A and A-to-T method is due solely to this asymmetrical use of zeroing. Dillinger Br. at 32.

The Federal Circuit has upheld Commerce’s use of zeroing for its DPM. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1348 (Fed. Cir. 2017) (“We hold that Commerce’s meaningful difference analysis -- comparing the ultimate antidumping rates resulting from the A-A methodology, without zeroing; and the A-T methodology, with zeroing – was reasonable.”). That Court rejected the very same argument Dillinger raises here, stating:

[W]e find it immaterial whether the A-A and A-T margins would be nearly identical if zeroing were applied evenly or not at all ... The notion that Commerce’s chosen methodology is unreasonable because it only measures the effects of zeroing is misplaced ... [D]ifferences revealed by zeroing are not inconsequential or to be ignored ... In other words, the effects of zeroing are precisely what 19 U.S.C. § 1677f-1(d)(1)(B) seeks to address.

Id. at 1349 (citations omitted).

Dillinger attempts to distinguish *Apex* by arguing that the exception in § 1677f-1(d)(1)(B) applies only to significant differences for the same product among purchasers, regions, or time periods and does not relate to significant price differences between different products. Dillinger Br. at 30. Defendant responds that Dillinger failed to raise the issue of applying the A-to-T method between different products at the administrative level and therefore failed to exhaust its administrative remedies with respect to this argument. Def.’s Resp. at 26–27.

Dillinger replies that its inter-product argument is “part and parcel” of its argument that zeroing distorts the requirements under § 1677f-1(d)(1)(B)(i)-(ii) for application of the A-to-T method. Dillinger Reply at 12–13.

The court agrees with Defendant that Dillinger should have raised this argument before the agency. Here, Dillinger failed to exhaust its inter-product argument before Commerce when it did not argue whether § 1677f-1(d)(1)(B) permits using the A-to-T method when evaluating significant price differences between products. If the argument had been raised at the administrative level, Commerce would have had the opportunity to apply its expertise to assess its practice and statutory interpretation on the basis of a more developed record. *See Stanley Works*, 279 F. Supp. 3d at 1189. Dillinger’s contention that its argument is merely “part and parcel” of its zeroing allegations, *see* Dillinger Reply at 12–13, does not excuse its failure to explicitly expound on its inter-product argument at the administrative level because a challenge to the application of one aspect of § 1677f-1(d)(1)(B) “do[es] not incorporate any conceivable challenge to elements of that analysis.” *Id.* Despite Dillinger’s contentions to the contrary, none of the exceptions to administrative exhaustion apply. Accordingly, Commerce’s DPM determination is sustained.

B. Interest Expense Adjustment

During the investigation, Dillinger reported to Commerce what Dillinger believed to be its “full” general and administrative (G&A) expenses, including its share of the operating expenses incurred by the holding company SHS Stahl-Holdings-Saar (“SHS Holding”) with which Dillinger is affiliated. SHS Holding performs certain services for its affiliates and charges them for the cost of these services to cover SHS Holding’s operating expenses, such as personnel expenses. *See* Dillinger Br. at 44–45.

For the final determination, Commerce reiterated its practice to exclude investment-related gains and losses from the calculation of the cost of production because it considers them a separate profit-making activity unrelated to a company’s normal operations. *Decision Memorandum* at 97–98. Based on this, Commerce determined to increase a portion of SHS Holding’s “unrecovered costs” that should be allocated to its affiliates including Dillinger. The effect of the adjustment was to increase the portion allocated to and included in Dillinger’s G&A expenses. *See Decision Memorandum* at 97–98.

Dillinger challenges this adjustment as unreasonable given the record (unsupported by substantial evidence). *See* Dillinger Br. at 44–47; Dillinger Reply at 28–30. Dillinger argues that it complied

with Commerce’s instructions to report its own interest expenses based upon “the highest consolidation level available,” which was at the level of DHS-Dillinger Hütte Saarstahl AG because Dillinger is not consolidated with SHS Holding, and that Commerce verified Dillinger’s reported G&A without making any adjustment. Dillinger points out that the adjustment relates completely to interest expenses incurred by SHS Holding, arguing Commerce has a “long-standing and uniform practice” not to include interest expenses in a respondent’s G&A expenses as indicated by Commerce’s standard questionnaire requiring the calculation of the G&A expense ratio and the interest expense ratio separately based upon different and distinct methodologies. Dillinger Br. at 45–46 (citing Questionnaire at D-14 & D-15, PD 102). Alternatively, Dillinger argues Commerce erred by failing to offset the affiliate’s interest expenses by the affiliate’s significant income from shareholding, because holding investments *is* the “normal operation” or “ordinary business activity” of a holding company. *Id.* at 46–47.

These arguments are unpersuasive. They conflate financial expenses with Commerce’s treatment of investment activities and are contrary to Commerce’s practice to include the suppliers’ financial expenses in the cost of production as Commerce explained in the administrative proceeding. The court also perceives no inconsistency in requiring a respondent to report separate ratios for its own G&A and interest expenses versus Commerce’s treatment of supplier expenses attributable to the respondent. *See Decision Memorandum* at 87–88, 98. Accordingly, the court sustains Commerce’s determination for Dillinger’s interest expense adjustments.

III. Conclusion

For the foregoing reasons, the court sustains Commerce’s *Final Determination* as to Dillinger’s challenges to Commerce’s differential pricing and the interest expense adjustment.

Dated: August 18, 2021

New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON



Slip Op. 21–103

OTTER PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 13–00269

[Denying Plaintiff’s motions for leave to file a reply and to enforce judgment.]

Dated: August 18, 2021

Louis S. Mastriani and *Lydia C. Pardini*, Adduci, Mastriani & Schaumberg, L.L.P., of Washington D.C., for Plaintiff Otter Products, LLC.

Justin R. Miller, attorney-in-charge, International Trade Field Office, and *Beverly A. Farrell*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court are Plaintiff Otter Products, LLC's ("OtterBox") motions to enforce the court's June 2, 2015 judgment (*see* Judgment, June 2, 2015, ECF No. 57 ("Judgment")) and for leave to file a reply in further support of the motion to enforce the Judgment. *See* Pl.'s Mot. to Enforce Ct.'s J., June 2, 2021, ECF No. 71 ("Mot. to Enforce"); Pl.'s Mot. for Leave to File Reply in Supp. of Mot. to Enforce Ct.'s J., July 2, 2021, ECF No. 75 ("Mot. for Reply").¹

OtterBox asks the court to order Defendant United States to re-open a prior disclosure filed on December 5, 2013 with U.S. Customs and Border Protection's ("CBP") Fines, Penalties, and Forfeitures office in Los Angeles under Prior Disclosure No. 2013-1209-162817 (the "Prior Disclosure") and closed by CBP on November 18, 2014. Mot. to Enforce at 4-6, 9. OtterBox alleges that CBP was required to keep the Prior Disclosure open until final resolution of the above-entitled action and then liquidate the entries covered by the Prior Disclosure in accordance with the court's Judgment. *Id.* at 11. OtterBox argues that CBP erred in closing the Prior Disclosure and is required by the court's Judgment to re-open the Prior Disclosure and re-liquidate the entries in that prior disclosure in accordance with the Judgment.² *Id.*

Defendant opposes the Motion to Enforce on the grounds that payments made in connection with a prior disclosure are voluntary and not protestable, that neither the Prior Disclosure, nor the entries referenced in it, were part of the above-entitled action, and that therefore the Court does not have jurisdiction to grant the relief

¹ OtterBox's proposed reply brief ("Proposed Reply") is annexed to the Motion for Reply. *See* Mot. for Reply.

² Because OtterBox paid duties on the entries covered by the Prior Disclosure at a rate of 20% based on CBP's erroneous classification of OtterBox's merchandise under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 4202.99.9000, Otterbox asks the court to order CBP to re-open the Prior Disclosure and re-liquidate the covered entries, so that it would receive a refund for the duties it paid above the rate of 5.3% pursuant to HTSUS subheading 3926.90.9980, plus interest. *Id.* at 9.

OtterBox seeks in its Motion to Enforce. *See* Def.'s Resp. in Opp'n. to Pl.'s Mot. to Enforce Ct.'s J. at 4–11, June 25, 2021, ECF No. 74 (“Def. Opp.”). Defendant opposes the Motion for Reply on the grounds that OtterBox’s Proposed Reply does not contain any information or argument that could not have been or was not raised in its moving papers and that, in any event, the additional argumentation is irrelevant because “[t]he Court needs no help in construing the scope of its own jurisdiction, which is currently the only subject at issue regarding [OtterBox’s Motion to Enforce].” Def.’s Resp. in Opp’n. to Pl.’s Mot. for Leave to File Reply in Supp. of Mot. to Enforce the Ct.’s J. at 7–9, July 23, 2021, ECF No. 76.

For the following reasons, the court denies OtterBox’s Motion to Enforce and Motion for Reply.

BACKGROUND

The court presumes familiarity with the facts of this case as set forth in this court’s and the U.S. Court of Appeals for the Federal Circuit’s previous decisions, and now recites only those facts relevant to the disposition of OtterBox’s motions. *See Otter Products, LLC v. United States*, 39 CIT ___, 70 F. Supp. 3d 1281 (2015) (“*OtterBox I*”); *Otter Products, LLC v. United States*, 834 F.3d 1369 (Fed. Cir. 2016) (“*OtterBox II*”); Memo. & Order, Feb. 1, 2017, Dkt. 67 (“*OtterBox III*”). On August 2, 2013, OtterBox filed a complaint in this Court challenging CBP’s classification of certain of its merchandise under HTSUS subheading 4202.99.9000 at a duty rate of 20%. *See* Compl. ¶¶ 16–23, August 2, 2013, ECF No. 4. OtterBox contended that its merchandise was properly classified under HTSUS subheading 3926.90.9980 at a duty rate of 5.3%. *Id.* ¶ 23. The classification dispute affected the duty rate of the entire transaction value of the merchandise OtterBox entered, protested, and challenged, which included the value of any assists. *See OtterBox I*, 39 CIT at ___, 70 F. Supp. 3d at 1284. OtterBox alleged that it had not paid duty on certain assists upon entry of the merchandise, and those assists were the subject of post-entry tenders as well as reconciliation entries. Compl. ¶¶ 8–13; *see also* Pl.’s Memo. in Supp. of Mot. for Summ. J. at 26–27, Oct. 9, 2014, ECF No. 25–1 (“Pl. SJ Br.”); Answers to Questions Presented in Teleconf. of Apr. 2, 2015, Ex. 1, Apr. 17, 2015, Dkt. 50 (“Def. Suppl. Submission on Post-Entry Tenders”).

OtterBox’s Complaint asserted the Court possessed jurisdiction pursuant to 28 U.S.C. § 1581(a) because OtterBox challenged the denial of a protest it made pursuant to 19 U.S.C. § 1515. *Id.* ¶¶ 1, 7. OtterBox’s summons identified Protest No. 2006–13–101283 (the

“Subject Protest”), filed on July 2, 2013 and denied on August 1, 2013, which covered Entry Nos. 112-7334796-8, 112-7391483-3, 112-7967525-5, and 112-8546857-0 (the “Subject Entries”). See Summons, Aug. 2, 2013, ECF No. 1. OtterBox paid two post-entry tenders of additional duties on assists related to the Subject Entries that were not paid at the time of entry. See Compl. ¶ 11-12; Pl. SJ Br. at 26-27; Def. Suppl. Submission on Post-Entry Tenders, Ex. 1., On December 5, 2013, OtterBox filed the Prior Disclosure. Mot. to Enforce at 3-4.

After cross-motions for summary judgment, the court issued an opinion holding that CBP had erroneously classified the Subject Entries and entered a Judgment that ordered Defendant to reliquidate the Subject Entries under HTSUS subheading 3926.90.9980 at the lower duty rate of 5.3% and to refund all duties overpaid, plus interest, as provided by law. See *OtterBox I*, 39 CIT at ___, 70 F. Supp. 3d at 1295-98; see also Judgment. Defendant appealed the court’s decision that the Subject Entries were misclassified, and the Court of Appeals affirmed this court’s Judgment. See *OtterBox II*, 834 F.3d at 1381. Following the Court of Appeals’ decision, Defendant filed a motion for clarification of the Judgment regarding post-entry tenders relating to assists. See Def.’s Mot. for Clarification of Ct.’s J., Jan. 12, 2017, ECF No. 63 (“Mot. to Clarify Judg.”). The court denied the motion, holding,

The court’s opinion speaks for itself on the issue of whether the judgment requires a refund of overpayment duties associated with post-entry tenders. The court clearly determined that “the ad valorem duty rate of 5.3% applies to the entire transaction value of OtterBox’s entries, including the value of assists paid subsequent to importation.”

OtterBox III at 2 (quoting *OtterBox I*, 39 CIT at ___, 70 F. Supp. 3d at 1284).

OtterBox now brings the present Motion to Enforce and related Motion for Reply, asking the court to require Defendant to re-open the Prior Disclosure and reliquidate the associated entries on the grounds that the court’s Judgment applies not only to the Subject Entries that were covered by the protest identified on OtterBox’s Summons, but also to all other entries of the same or similar merchandise. Mot. to Enforce at 9-11. For the following reasons, the court declines to expand its Judgment beyond the entries that were the subject of OtterBox’s protest listed on the Summons and denies the Motion to Enforce and the Motion for Reply.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2018),³ and 28 U.S.C. § 1581(a) (2018).⁴ The Court has inherent authority to enforce its own judgments. See *B.F. Goodrich Co. v. United States*, 18 CIT 35, 36 (1994). This authority includes the “power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments.” *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996).

The Court grants motions to enforce a judgment “when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment.” *GPX Int’l Tire Corp. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1266, 1272 (2015) (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004)).

The Court has discretion to accept a reply brief on a non-dispositive motion. See *Retamal v. U.S. Customs & Border Prot., Dep’t of Homeland Sec.*, 439 F.3d 1372, 1377 (Fed. Cir. 2006) (noting that the court may allow reply briefs for non-dispositive motions).

DISCUSSION

OtterBox asks the court to order CBP to reopen the Prior Disclosure and reliquidate the associated entries at a duty rate of 5.3% pursuant to HTSUS subheading 3926.90.9980. Mot. to Enforce at 14. OtterBox asserts that the court’s Judgment applies to the Prior Disclosure, and therefore Defendant is required to reopen the Prior Disclosure and reliquidate the entries covered by the Prior Disclosure in accordance with the Judgment. *Id.* at 9. Defendant opposes the Motion to Enforce on the grounds that neither the Prior Disclosure nor the entries associated with it were part of the Subject Protest listed on the Summons and therefore are not within the Court’s subject matter jurisdiction in this action. Def. Opp. at 4. For the following reasons, the Court lacks jurisdiction over the entries encompassed by the Prior Disclosure and therefore denies OtterBox’s motion.

The Court of International Trade (“CIT”), like all federal courts established under Article III of the U.S. Constitution, is a court of limited jurisdiction. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006). The CIT is presumed to lack jurisdiction

³ Further citations to the Tariff Act of 1930, as amended, are to the relevant sections of Title 19 of the U.S. Code, 2018 edition.

⁴ Further citations to Title 28 of the U.S. Code are to the 2018 edition.

unless an affirmative basis for jurisdiction can be demonstrated. *Id.* When an action is brought under 28 U.S.C. § 1581(a), jurisdiction is predicated upon a denied protest of CBP action pursuant to 19 U.S.C. §§ 1514, 1515. *See id.* at 1314–15 (detailing statutory and regulatory framework for filing protests and appealing denied protests). If CBP denies a protest pursuant to 19 U.S.C. § 1515, an importer can challenge the denial pursuant to 19 U.S.C. § 1514(a) and 28 U.S.C. § 1581(a). *Id.* at 1319. Moreover, jurisdiction under 28 U.S.C. § 1581(a) attaches only to protests identified on the summons. *Id.* (“The plain language of the pertinent statutes establishes that the [CIT] has jurisdiction only to review ‘the denial of a protest,’ and that each protest denial is the basis of a separate claim.” (Emphasis in original) (citations omitted)).

The parties contested the scope of this Court’s jurisdiction in *Otter-Box I*. In briefing the cross-motions for judgment on the agency record, the parties disputed whether the Court had jurisdiction over Count II of OtterBox’s complaint, which sought the “refund [of] all additional overpayments of duties paid on assists, with all applicable interest” in addition to a refund of overpayments made upon the entry and liquidation of the Subject Entries. Compl. ¶ 26; *see also* Def.’s Cross-Mot. for Summ. J. at 22–23, Dec. 17, 2014, ECF No. 37; Pl.’s Resp. to Def.’s Cross-Mot. for Summ. J. & Reply to Def.’s Opp’n to Pl.’s Mot. for Summ. J. at 17–20, Jan. 26, 2015, ECF No. 39; Def.’s Reply Memo. of Law in Opp’n to Pl.’s Mot. for Summ. J. & in Further Supp. of Def.’s Cross-Mot. for Summ. J. at 12–13, Feb. 18, 2015, ECF No. 42. In *OtterBox I*, the court held that OtterBox’s challenge of the denial of the Subject Protest gave the Court jurisdiction over all payments made in connection with the Subject Entries, including payments made after entry. *OtterBox I*, 39 CIT at ___, 70 F. Supp. 3d at 1296 (“a protest as to classification and the associated rate of duty applies to all duties paid including those paid in the form of an assist”). As discussed, OtterBox tendered post-entry payment of assists for the Subject Entries. Def. Suppl. Submission on Post-Entry Tenders, Ex. 1. However, the court noted that

It is unclear if Plaintiff believes the court should exercise jurisdiction over two reconciliation entries but the court clearly cannot A reconciliation entry “is treated as an entry for purposes of liquidation, reliquidation, recordkeeping, and protest.” 19 U.S.C. § 1401(s); 19 U.S.C. § 1514(a)(5). The Summons, which is the initial pleading in a suit challenging the denial of a protest, lists only one protest, 2006–13101283. This protest, which forms the subject matter of this lawsuit, was filed on July 2, 2013 and was deemed denied on August 1, 2013. Reconcilia-

tion entry numbers 112-1776985-4 and 112-2136079-9 were entered on November 27, 2013 and March 4, 2014, well after OtterBox's protest was filed. OtterBox's protest could not have challenged the relevant reconciliation entries as they were not yet filed and they are not the subject of this case. Thus, the court does not have jurisdiction over these reconciliation entries.

OtterBox I, 39 CIT at __ n. 10, 70 F. Supp. 3d at 1297 n. 10 (some citations omitted).⁵

After an unsuccessful appeal (*see OtterBox II*), Defendant sought clarification of the court's Judgment in *OtterBox I*, asking the court to further explain whether the Judgment applied to post-entry tenders relating to unpaid assists for the Subject Entries. Mot. to Clarify Judg. at 2-3. The court denied the request for clarification explaining that the opinion spoke for itself in concluding that the classification rate would apply to the entire transaction value of the Subject Entries, including assists. *See OtterBox III* at 2.

Plaintiff claims that the court's Judgment reaches the Prior Disclosure. The approximately 100 entries included in the Prior Disclosure were entered between July 10, 2012 and April 19, 2013. Mot. to Enforce, Ex. 1, ECF No. 71-1.⁶ However, the entries included in the Prior Disclosure were not part of the Subject Protest which forms the basis of the Court's jurisdiction in this action. Because the entries associated with the Prior Disclosure were not part of the Subject Protest, they are not part of this action and the Court does not have jurisdiction to order the relief OtterBox requests.⁷ *See DaimlerChrysler*, 442 F.3d at 1319.

OtterBox is correct in arguing that the court's opinion in *OtterBox I* states that "the ad valorem rate of 5.3% applies to the entire transaction value of OtterBox's entries, including the value of assists paid subsequent to importation." Mot. to Enforce at 9 (quoting *OtterBox I*, 39 CIT at __, 70 F. Supp. 3d at 1284). However, that statement refers to the Subject Entries that OtterBox protested and summonsed in this case, which were the subject of the Court's jurisdiction; not to all other entries, whether entered before or after the Subject Entries,

⁵ The post-entry tenders for assists for the Subject Entries are distinct from tenders in connection with reconciliation entries as noted in *OtterBox I*. *Id.* In any event, the Prior Disclosure does not cover tenders for assists for the Subject Entries.

⁶ On February 3, 2014, OtterBox submitted a supplement to the Prior Disclosure that included an 87-page spreadsheet listing additional entries that were entered between June 30, 2011 and December 1, 2013. Mot. to Enforce, Ex. 4, ECF No. 71-4. None of those entries is listed on the Summons or the Subject Protest.

⁷ Indeed, OtterBox states in the Prior Disclosure that this action "could determine the proper future classification of products such as those that are subject to this prior disclosure." Mot. to Enforce, Ex. 1 at 5, n. 1.

that were not the subject of this action. *See OtterBox I*, 39 CIT at ___ n. 2, 70 F. Supp. 3d at 1285 n. 2. OtterBox seems to be arguing that *OtterBox I* mandates the return of any duties ever paid in connection with CBP's erroneous classification of the same or similar merchandise that was the subject of its Subject Protest. Mot. to Enforce at 9–11. OtterBox's argument fails. The court's classification Judgment does not automatically compel reliquidation of the entries associated with the Prior Disclosure, which are separate transactions.⁸ *See Avenues in Leather, Inc. v. United States*, 317 F.3d 1399, 1403 (Fed. Cir. 2003); *DaimlerChrysler*, 442 F.3d at 1321. Thus, OtterBox cannot use the court's Judgment relating to the misclassification of the Subject Entries to obtain reliquidation and/or refunds for entries that were not part of the Summons and thus not subject to the Court's jurisdiction.

OtterBox's contention that Defendant's actions subsequent to the court's Judgment demonstrate that Defendant understood the Court's jurisdiction to cover the Prior Disclosure is meritless. *See* Mot. to Enforce at 12. OtterBox argues, and Defendant does not dispute, that CBP reliquidated several thousand entries of OtterBox's merchandise, refunded to OtterBox duties that it had paid above 5.3% on those entries, held open three other prior disclosures, and liquidated the associated entries at the duty rate of 5.3% in accordance with the Judgment. *See id.* at 12–13; Def. Opp. at 8. However, it is axiomatic that parties cannot agree to give a federal court subject matter jurisdiction that it would not otherwise possess, and that the government cannot waive the defense that a court lacks subject matter jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“no action of the parties can confer subject-matter jurisdiction upon a federal court”); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (“subject matter jurisdiction . . . can never be forfeited or waived” (internal quotation marks omitted)). Nor is OtterBox's contention that it intended for this action to apply to the Prior Disclosure sufficient to subject the entries included in the Prior Disclosure to the Court's jurisdiction. *See* Mot. to Enforce at 10–13. The court's Judgment in this case did not and does not apply to

⁸ The court need not reach the question of whether payments made in connection with prior disclosures are voluntary and thus not protestable. *See* Def. Opp. at 5. It is undisputed that the entries associated with the Prior Disclosure were not part of the Subject Protest and not listed on the Summons, and the Prior Disclosure was closed approximately seven years ago. Mot. to Enforce at 3–5.

anything other than the Subject Protest and associated Subject Entries.⁹ The Motion to Enforce is denied.

OtterBox's Motion for Reply is also denied, as it does not contain any argument that could not have been made in OtterBox's moving papers, and because nothing in the Proposed Reply serves to aid in the court's understanding of the sole issue before the court, which is the scope of the Court's jurisdiction in this action.¹⁰ As stated above, the Court's jurisdiction is derived from the Summons, which lists only the Subject Protest and the Subject Entries; not any of the entries associated with the Prior Disclosure. OtterBox was aware of Defendant's position that the Court does not have jurisdiction over the Prior Disclosure and indeed addressed the jurisdictional arguments in its moving papers. Mot. to Enforce at 12. To the extent the Proposed Reply contains additional arguments as to the Court's purported jurisdiction over the Prior Disclosure, they should have been raised in the moving papers and, in any event, are meritless. The Motion for Reply is denied.

CONCLUSION

For the foregoing reasons, upon consideration of OtterBox's Motion to Enforce the Court's Judgment and Motion for Leave to File a Reply in Support of its Motion to Enforce the Court's Judgment, and upon due deliberation, it is

ORDERED that the Motion for Leave to File a Reply in Support of [OtterBox's] Motion to Enforce the Court's Judgment is denied; and it is further

ORDERED that the Motion to Enforce the Court's Judgment is denied.

⁹ OtterBox's reliance on *Pollack Import-Export Corp. v. United States*, 52 F.3d 303 (Fed. Cir. 1995), and *VWP of America, Inc. v. United States*, 30 CIT 1580 (2006), to argue that it need not include on the Summons every entry number that OtterBox intended to be subject to the Court's jurisdiction in this action is misplaced. See Mot. to Enforce at 10. In both *Pollack* and *VWP*, the importer failed to correctly list every entry number associated with the protest that was the subject of its summons. *Pollack*, 52 F.3d at 307-08; *VWP*, 30 CIT at 1580-82. However, the courts in those cases found that although it is not necessary in every instance to correctly identify each entry number associated with a denied protest, an importer must identify on the summons each protest the denial of which is being challenged. *Id.* at 306-08; *VWP*, 30 CIT at 1585-87. As the Court of Appeals held in *DaimlerChrysler*, the Court can only exercise jurisdiction over a protest, the denial of which is challenged, and the entries associated with that protest. *DaimlerChrysler*, 442 F.3d at 1320-21. Here, it is undisputed that OtterBox's Summons did not include any protest related to the entries at issue in the Prior Disclosure. See Mot. to Enforce at 10-13; Def. Opp. at 7-8.

¹⁰ OtterBox's Motion for Reply contains little more than a recitation of the standard of review for its motion and a conclusory statement that the Proposed Reply meets that standard. Mot. for Reply at 1-2. OtterBox offers no analysis as to why the Proposed Reply meets the standard and why the court should accept the additional brief.

Dated: August 18, 2021
New York, New York

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

Slip Op. 21–104

COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff, and FONTAINE INC., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and FONTAINE INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19–00122

[Sustaining the U.S. Department of Commerce’s remand determination that it lacked statutory authority to promulgate 19 C.F.R. § 351.214(k); vacating 19 C.F.R. § 351.214(k) and the Final Results of Countervailing Duty Expedited Review; setting parameters for prospective application of the vacatur.]

Dated: August 18, 2021

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Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him 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 *Nikki Kalbing*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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Richard L.A. Weiner, Sidley Austin LLP, of Washington, DC, for Defendant-Intervenors North American Forest Products Ltd, Parent-Violette Gestion Ltée, and Le Groupe Parent Ltée.

OPINION

Barnett, Chief Judge:

In this consolidated action, Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“Plaintiff” or “the Coalition”), challenged the U.S. Department of Commerce’s (“Commerce” or “the agency”) authority to promulgate a regulation establishing an expedited review process to determine individual countervailing duty (“CVD”) rates for exporters not individually examined in an investigation.¹ See Compl. ¶¶ 15–16, ECF No. 2. Plaintiff disputed the lawfulness of the regulation, 19 C.F.R. § 351.214(k), as part of its challenge to Commerce’s final results in the CVD expedited review of certain softwood lumber products from Canada. See Compl. ¶¶ 2, 14–22; see also *Certain Softwood Lumber Products From Canada*, 84 Fed. Reg. 32,121 (Dep’t Commerce July 5, 2019) (final results of CVD expedited review) (“*Final Results of Expedited Review*”), ECF No. 99–5, and accompanying Issues and Decision Mem. (“I&D Mem.”), C-122–858 (June 28, 2019), ECF No. 99–6.² Plaintiff alleged that Commerce’s reliance on section 103(a) of the Uruguay Round Agreements Act (“URAA” or “the Act”), Pub. L. No. 103–465, 108 Stat. 4809 (1994), as authority for its regulation was misplaced and, thus, that Commerce’s promulgation of the regulation and issuance of the *Final Results of Expedited Review* exceeded Commerce’s statutory authority. See Compl. ¶¶ 15–16.

In due course, the Coalition filed a motion for judgment on the agency record pursuant to U.S. Court of International Trade (“USCIT” or “CIT”) Rule 56.2 incorporating the foregoing claim. See Conf. Pl.’s Rule 56.2 Mot. for J. on the Agency R. and accompanying Conf. Mem. in Supp. of Pl.’s Rule 56.2 Mot. for J. on the Agency R. (“Pl.’s Mem.”), ECF No. 101. Defendant, United States (“Defendant” or “the Government”), and several Defendant-Intervenors consisting of Canadian softwood lumber producers and governmental entities, defended the lawfulness of 19 C.F.R. § 351.214(k) and the underlying proceeding. Conf. Def.’s Resp. [to] Pls.’ Mots. For J. on the Agency R., ECF No. 110; Joint Br. of Def.-Ints. Gov’t of Can. and Gov’t of Que. in Opp’n to Pl.’s Mot. for J. on the Agency R. (“Jt. Canada Br.”), ECF No. 120; [Resp.] of Def.-Ints. Les Produits Forestiers D&G Ltée and Mar-

¹ For ease of reference, the court characterizes the type of proceeding at issue in this case as a “CVD expedited review.”

² The administrative record associated with the *Final Results of Expedited Review* is divided into a Public Administrative Record (“PR”), ECF No. 99–2, and a Confidential Administrative Record, ECF Nos. 99–3, 99–4. Commerce also filed a public administrative record associated with the Remand Results. See Index to Admin. [Remand] R., ECF No. 177–2. Plaintiff filed a joint appendix of documents cited in Parties’ comments on the Remand Results. See J.A. to Comments After Remand (“PRJA”), ECF No. 191. .

cel Lauzon Inc in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 117; Resp. of Def.-Int. Scierie Alexandre Lemay & Fils Inc. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 119.³

In *Committee Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States* (“*Lumber III*”), the court held, *inter alia*, that “Commerce exceeded its authority to the extent that it promulgated 19 C.F.R. § 351.214(k) pursuant to URAA § 103(a).” 44 CIT ___, ___, 483 F. Supp. 3d 1253, 1263–64 (2020).⁴ The court remanded the *Final Results of Expedited Review* for Commerce to consider various *post hoc* justifications for the regulation offered by Defendant and the Governments of Canada and Québec and declined to vacate the regulation pending Commerce’s remand redetermination. *See id.* at 1272–73.

The matter is now before the court following Commerce’s redetermination upon remand. *See Final Results of Redetermination Pursuant to Court Remand* (“*Remand Results*”), ECF No. 173–1. On remand, Commerce addressed two issues: (1) whether any statutory authority existed for the agency’s promulgation of 19 C.F.R. § 351.214(k); and (2) in the absence of such authority, what actions Commerce should take with respect to entries of subject merchandise exported or produced by companies subject to the CVD expedited review (collectively referred to as “the subject companies”) in the event the court annuls the *Final Results of Expedited Review*. *See generally id.*

As will be discussed in further detail below, Commerce concluded that it could not identify an explicit or implicit statutory basis for its regulation that would be consistent with the court’s opinion in *Lumber III*. *See id.* at 9–12, 19–25. Commerce further indicated that it intended to follow the procedure set forth in 19 U.S.C. § 1516a(c)(1)

³ A complete list of Defendant-Intervenors in this action includes the Government of Canada, the Government of Québec, the Government of the Province of New Brunswick, Fontaine Inc. (“Fontaine”), Marcel Lauzon Inc. (“Lauzon”), Les Produits Forestiers D&G Ltee (“D&G”), North American Forest Products Ltd. (“NAFP”), Parent-Violette Gestion Ltee, Le Groupe Parent Ltee, Scierie Alexandre Lemay & Fils Inc. (“Lemay”), and Mobilier Rustique (Beauce) Inc. (“Rustique”). *See Docket.*

⁴ Prior to *Lumber III*, the court issued an opinion vacating a temporary restraining order requested by the Coalition barring U.S. Customs and Border Protection (“CBP”) from liquidating unliquidated entries of softwood lumber produced or exported by Canadian companies that received reduced or *de minimis* rates in the *Final Results of Expedited Review* and denying the Coalition’s corresponding request for a preliminary injunction. *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (“*Lumber I*”), 43 CIT ___, 393 F. Supp. 3d 1271 (2019). The court also issued an opinion denying the Government’s motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* (“*Lumber II*”), 43 CIT ___, ___, 413 F. Supp. 3d 1334 (2019). While the court summarizes the relevant legal and factual background herein, familiarity with prior opinions is presumed.

with respect to the subject companies, such that “the effect of this decision would be prospective” and “the rates established as a result of the [CVD] expedited review would cease to apply 10 days after publication of [a] Notice of Court Decision Not in Harmony in the *Federal Register*.” *Id.* at 28 & n.124 (citation omitted).⁵

The Coalition filed comments opposing Commerce’s decision to follow 19 U.S.C. § 1516a(c)(1) and arguing that the court should instead vacate 19 C.F.R. § 351.214(k) and annul the *Final Results of Expedited Review*. See Pl.’s Cmts. on [Remand Results] (“Pl.’s Opp’n Cmts.”), ECF No. 182. Defendant-Intervenors (collectively referred to herein as “the Canadian Parties”) filed comments arguing that Commerce’s analysis of its statutory authority for the regulation was perfunctory and deficient; considerations of equity preclude rescission of the *Final Results of Expedited Review*; and, to the extent the *Final Results of Expedited Review* are rescinded, any revised rates should be prospective only. See Consol. Def.-Ints.’ Cmts. in Resp. to [Commerce’s] February 17, 2021 [Remand Results] (“Def.-Ints.’ Opp’n Cmts”), ECF No. 183.

The Government filed comments arguing that Commerce’s Remand Results comply with the court’s directive in *Lumber III* to consider alternative legal bases for the regulation; Commerce is not precluded from relying on 19 U.S.C. § 1516a(c)(1) to implement the court’s judgment; and any equitable remedy lies solely within the court’s—not the agency’s—discretion. See Def.’s Resp. to the Parties’ Remand Cmts. (“Def.’s Reply Cmts.”), ECF No. 186. The Canadian Parties filed comments in reply to the Coalition’s opposition comments. See Consol. Def.-Ints.’ Cmts. in Resp. to Pl.’s March 19, 2021 Cmts. on

⁵ Section 1516a(c)(1) requires Commerce to publish in the *Federal Register* “a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with [the underlying] determination . . . within ten days from the date of the issuance of the court decision.” 19 U.S.C. § 1516a(c)(1). Such notice may be referred to as a “*Timken* Notice” pursuant to *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990). The statute further requires the *Timken* Notice to apply to imports entered or withdrawn from warehouse on or after the date of publication of the *Timken* Notice. 19 U.S.C. § 1516a(e)(1). When Commerce misses the ten-day deadline for publication of the *Timken* Notice, Commerce regularly applies its *Timken* Notices as of the date that is ten days following issuance of the court decision. See, e.g., *Large Power Transformers From the Republic of Korea*, 86 Fed. Reg. 38,980 (Dep’t Commerce July 23, 2021) (notice of court decision not in harmony with final results, notice of amended results of review; 2015–16) (where the court issued judgment on July 9, 2021 and the *Timken* Notice was effective as of July 19, 2021); *Drawn Stainless Steel Sinks From the People’s Republic of China*, 81 Fed. Reg. 57,474, 58,474 (Dep’t Commerce Aug. 25, 2016) (notice of court decision not in harmony with am. final determination pursuant to court decision) (where the court issued judgment on July 24, 2016 and the *Timken* Notice was effective as of July 24, 2016); *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China*, 78 Fed. Reg. 70,917 (Dep’t Commerce Nov. 27, 2013) (notice of decision of the [CIT] not in harmony and notice of amended final determination) (where the court issued judgment on October 30, 2013 and the *Timken* Notice was effective as of November 9, 2013). Commerce appears to have misstated its position in the Remand Results.

[Remand Results] (“Def.-Ints.’ Reply Cmts.”), ECF No. 187. The Coalition likewise filed comments in reply to the Canadian Parties’ opposition comments. *See* Pl.’s Cmts. in Supp. Of [Remand Results] (“Pl.’s Reply Cmts.”), ECF No. 188.

For the reasons discussed herein, the court will sustain Commerce’s Remand Results and vacate 19 C.F.R. § 351.214(k) and the *Final Results of Expedited Review*. The court further orders prospective application of its judgment in this case.

BACKGROUND

The URAA amended the domestic antidumping (“AD”) and CVD laws in connection with several international trade agreements referred to as the Uruguay Round Agreements. *See* 19 U.S.C. §§ 3511(a)(1), (d), & 3501(7).⁶ One such agreement is the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). *Id.* § 3511(d)(12); *see generally* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A, SCM Agreement. Pursuant to Article 19.3 of the SCM Agreement:

When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. *Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.*

SCM Agreement, art. 19.3 (emphasis added).

The Statement of Administrative Action (“SAA”) accompanying the URAA explains that “Article 19.3 of the [SCM] Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter.” URAA, SAA, H.R. Doc. No. 103–316, vol.1, at 941–42 (1994), *reprinted in* 1994 U.S.C.C.A.N.

⁶ Section 101(a) of the URAA reflects congressional approval of “the trade agreements described in subsection (d) resulting from the Uruguay Round of multilateral trade negotiations.” 19 U.S.C. § 3511(a)(1). Section 101(b) of the URAA provided for the President’s acceptance of the Uruguay Round Agreements. *See id.* § 3511(b).

4040, 4250–51.⁷ The SAA noted that “[s]everal changes must be made to the [Tariff Act of 1930] to implement the requirements of Article 19.3.” *Id.* Thereafter, while the SAA discusses several necessary changes to U.S. trade laws effectuated by sections 264, 265, and 269⁸ of the URAA, *id.* at 941–42, *reprinted in* 1994 U.S.C.C.A.N. at 4251, the SAA does not discuss the implementation of CVD expedited reviews.

Section 103 of the URAA delegated authority to Commerce, among others, to promulgate interim and final regulations implementing the provisions of the Act. *See* 19 U.S.C. § 3513. Section 103(a) of the URAA delegates authority to “appropriate officers of the United States Government [to] issue such regulations, as may be necessary to ensure that any provision of this Act, or amendment made by this Act, . . . is appropriately implemented.” *Id.* § 3513(a)(2). Section 103(b) of the URAA authorized the promulgation of “interim regulation[s] necessary or appropriate to carry out any action proposed in the [SAA] approved under section 3511(a) of this title to implement an agreement described in section 3511(d)(7), (12), or (13) of this title” within “[one] year after the date on which the agreement enters into force with respect to the United States.” *Id.* § 3513(b).

On May 11, 1995, Commerce issued interim regulations. *See Antidumping and Countervailing Duties*, 60 Fed. Reg. 25,130 (Dep’t Commerce May 11, 1995) (interim regulations; request for cmts.). Commerce’s interim regulations did not address CVD expedited reviews. *See id.* at 25,130–33 (discussing the regulations).

On May 19, 1997, Commerce published its final agency regulations concerning the implementation of the URAA. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep’t Commerce May 19, 1997) (final rule) (“*Preamble*”). These regulations finalized new provisions governing new shipper reviews. *See id.* at 27,318–22 (discussing 19 C.F.R. § 351.214). Subsection (k) of the new shipper regulation also provided for Commerce’s implementation of CVD expedited reviews. *See* 19 C.F.R. § 351.214(k) (1998); *Preamble*, 62 Fed. Reg. at 27,321.

Subsection (k) of the new shipper regulation permits a respondent that was not selected “for individual examination” or accepted “as a voluntary respondent” in a CVD investigation in which Commerce

⁷ Congress expressly approved the SAA in the URAA. *See* 19 U.S.C. § 3511(a)(2). Further, the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act [i.e., the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.” *Id.* § 3512(d).

⁸ The SAA misattributes changes made by URAA § 269 to URAA § 265. *See* SAA at 941–42, *reprinted in* 1994 U.S.C.C.A.N. at 4251; URAA § 269(a) (amending 19 U.S.C. § 1677f-1 to add new subsection (e)).

“limited the number of exporters or producers to be individually examined” to “request a review . . . within 30 days of the date of publication in the Federal Register of the [CVD] order.” 19 C.F.R. § 351.214(k)(1). Any company requesting a CVD expedited review must certify compliance with certain regulatory requirements. *See id.* § 351.214(k)(1)(i)–(iii). An expedited review will be initiated “in the month following the month in which a request for review is due.” *Id.* § 351.214(k)(2)(i). Additionally, the expedited review will be conducted “in accordance with the provisions of this section applicable to new shipper reviews,” subject to certain exceptions. *Id.* § 351.214(k)(3).⁹

On January 3, 2018, following affirmative determinations of countervailable subsidization and material injury, Commerce published the CVD order on certain softwood lumber products from Canada. *See Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep’t Commerce Jan. 3, 2018) (am. final aff. [CVD] determination and [CVD] order) (“*CVD Order*”). On March 8, 2018, Commerce initiated an expedited review of the *CVD Order* with respect to certain Canadian producers that were not selected for individual examination during the investigation and had been assigned the “all-others” rate of 14.19 percent. *See Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 9,833 (Dep’t Commerce Mar. 8, 2018) (initiation of expedited review of the [CVD Order]); *CVD Order*, 83 Fed. Reg. at 348–49 (noting the all-others rate).

On July 5, 2019, Commerce issued the *Final Results of Expedited Review*, pursuant to which the agency calculated reduced rates for Fontaine and its cross-owned affiliates, Rustique and its cross-owned affiliates, and Matra and Sechoirs de Beauce Inc. (together, “Matra”) and their cross-owned affiliate. *See* 84 Fed. Reg. at 32,122. Commerce calculated *de minimis* rates for D&G and its cross-owned affiliates, Lauzon and its cross-owned affiliates, NAFP and its cross-owned affiliates, Roland Boulanger & Cie Ltée (“Roland”) and its cross-owned affiliates, and Lemay and its cross-owned affiliates. *See id.*

⁹ Those exceptions are:

- (i) The period of review will be the period of investigation used by the [agency] in the investigation that resulted in the publication of the countervailing duty order;
- (ii) The [agency] will not permit the posting of a bond or security in lieu of a cash deposit under paragraph (e) of this section;
- (iii) The final results of a review under this paragraph (k) will not be the basis for the assessment of countervailing duties; and
- (iv) The [agency] may exclude from the countervailing duty order in question any exporter for which the [agency] determines an individual net countervailable subsidy rate of zero or *de minimis* . . . , provided that the [agency] has verified the information on which the exclusion is based.

19 C.F.R. § 351.214(k)(3) (citation omitted).

Because D&G, Lauzon, NAFP, Roland, Lemay, and their respective affiliates (collectively, “the excluded companies”) obtained *de minimis* rates, Commerce stated it would instruct CBP “to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by” those companies that were entered on or after July 5, 2019; “liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by” those companies; and “refund all cash deposits of estimated countervailing duties collected on all such shipments.” *Id.* With respect to the companies that received a lower—but not *de minimis*—rate (Fontaine, Rustique, Matra, and their respective affiliates) (collectively, “the non-excluded companies”), Commerce stated it would instruct CBP “to collect cash deposits of estimated countervailing duties” at the lower rates calculated in the *Final Results of Expedited Review*. *Id.*

For the *Final Results of Expedited Review*, Commerce relied on section 103(a) of the URAA as authority for 19 C.F.R. § 351.214(k) and its conduct of CVD expedited reviews. *See* I&D Mem. at 18–20. The court’s examination of the statutory text, structure, and legislative history compelled the court to conclude otherwise. *See Lumber III*, 483 F. Supp. 3d at 1263–64.

The court reasoned that, in section 103(a), Congress explicitly limited Commerce’s regulatory authority to *enacted* provisions and did not “encompass perceived international obligations that Congress did not implement through the URAA.” *Id.* at 1264; *see also id.* at 1264–66.¹⁰ With respect to statutory structure, the court explained, *inter alia*, that URAA § 103(b) did not authorize or otherwise support Commerce’s promulgation of 19 C.F.R. § 351.214(k) “because the SAA does not propose any action to implement CVD expedited reviews.” *Id.* at 1267. The court reviewed the SAA and other relevant legislative history and concluded that, on balance, it supported Plaintiff’s position. *See id.* at 1269. Lastly, the court rejected the argument that Congress has acquiesced to Commerce’s interpretation of section 103(a). *See id.* at 1269–71. The court remanded the *Final Results of Expedited Review* for Commerce to consider additional justifications for its regulation. *See id.* at 1271–73.

¹⁰ The court further explained that congressional silence concerning CVD expedited reviews did not confer authority on Commerce to conduct such reviews, *Lumber III*, 483 F. Supp. 3d at 1264–66; the court’s interpretation of URAA § 103(a) was “consistent with the non-self-executing nature of the Uruguay Round Agreements,” *id.* at 1366; and “[t]he judicial canon of statutory construction referred to as the *Charming Betsy* doctrine [did] not compel a different outcome” because “[s]ection 103(a) does not . . . directly implement the United States’ international obligations,” *id.* at 1267 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804)).

In the Remand Results, Commerce considered several alternative bases for its regulation.¹¹ With respect to section 103(b) of the URAA, Commerce opined that the statutory provision governing interim regulations, in conjunction with the reference to Article 19.3 of the SCM Agreement in the SAA, reflects congressional intent “for Commerce to have the inherent and implicit authority to conduct [CVD] expedited reviews and to issue regulations providing for such reviews.” Remand Results at 22. Commerce, however, considered itself “bound by the [c]ourt’s holding,” *id.* at 22–23 & n.100 (citing *Lumber III*, 483 F. Supp. 3d at 1267), and, thus, “presume[d]” that section 103(b) does not authorize the regulation, *id.* at 23.

Commerce also addressed congressional approval of the SCM Agreement in section 101(a) of the URAA and concluded that such a “general reference” does not confer “express” statutory authority for the regulation. *Id.* at 11. Commerce found, however, that section 101(a)–(b) of the URAA, together with section 103(a)–(b), affords Commerce “inherent authority” to promulgate 19 C.F.R. § 351.214(k) and conduct CVD expedited reviews. *Id.* at 23. Nevertheless, because the court previously found “that no provision of the URAA provides for CVD expedited reviews,” Commerce concluded that it lacked “inherent authority” to promulgate the regulation pursuant to URAA § 101. *Id.*

With respect to “sections 705(c), 751(a), 751(b), and 777A(e) of the [Tariff Act of 1930],” codified at 19 U.S.C. §§ 1671d, 1675(a),(b), and 1677f-1, Commerce concluded that none of those provisions provide authority for 19 C.F.R. § 351.214(k) or the conduct of CVD expedited reviews. *Id.* Specifically, Commerce explained that: (1) 19 U.S.C. § 1671d addresses final CVD investigation determinations, *id.* at 11; (2) 19 U.S.C. § 1675(b) governs changed circumstance reviews, *id.*; (3) 19 U.S.C. § 1677f-1 governs Commerce’s calculation of “individual subsidy rates for each known exporter or producer in investigations or administrative reviews” or a reasonable number thereof, *id.*; and (4), with respect to 19 U.S.C. § 1675(a), “[CVD expedited reviews and administrative reviews] are separate proceedings that are governed by different regulations, promulgated according to distinct authorities, and provide different remedies,” *id.* at 12 (quoting I&D Mem. at 26) (alteration in original); *see also id.* at 19–21.

¹¹ Commerce briefly revisited section 103(a) of the URAA. While Commerce “presume[d],” consistent with *Lumber III*, that the provision does not convey “explicit or implicit authority to conduct CVD expedited reviews,” Commerce stated that in promulgating 19 C.F.R. § 351.214(k), the agency “ensured that all provisions of U.S. law are consistent with U.S. obligations under the URAA.” Remand Results at 24. While Commerce presumably intended to refer to the Uruguay Round Agreements and not the URAA, Commerce did not, however, identify the particular obligation to which it referred.

Commerce also “presume[d]” that “Congress’s failure to prohibit CVD expedited reviews in recent amendments to the [Tariff Act of 1930]” does not signal congressional acquiescence to Commerce’s conduct of CVD expedited reviews. *Id.* at 10. Commerce further “concluded that Commerce’s inherent authority to reconsider prior decisions, and lack of an explicit prohibition on CVD expedited reviews, do not equate to specific statutory authorization under the URAA to conduct CVD expedited reviews and promulgate CVD expedited review regulations.” *Id.* at 10–11; *see also id.* at 21. Commerce therefore concluded that it lacked statutory authority to promulgate 19 C.F.R. § 351.214(k) and conduct CVD expedited reviews. *See id.* at 12.

With respect to Commerce’s treatment of companies covered by the *Final Results of Expedited Review*, Commerce explained that, pursuant to 19 U.S.C. § 1516(c)(1),¹² any change in the applicable rates “would be prospective.” *Id.* at 28.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(4).¹³ The court reviews an action commenced pursuant to 28 U.S.C. § 1581(i)(4) in accordance with the standard of review set forth in the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, as amended. *See* 28 U.S.C. § 2640(e). Section 706 directs the court, *inter alia*, to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

¹² The statute provides that,

“[u]nless such liquidation is enjoined by the court . . . , entries of merchandise of the character covered by a determination of [Commerce] contested under subsection (a) shall be liquidated in accordance with the determination . . . if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by [Commerce] of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination.”

19 U.S.C. § 1516a(c)(1). As noted, the court declined to enjoin liquidation of the subject companies’ entries pending the outcome of this litigation. *See Lumber I*, 393 F. Supp. 3d at 1278–79.

¹³ In *Lumber II*, the court denied the Government’s motion to dismiss, finding jurisdiction pursuant to section 1581(i)(4) and not under section 1581(c). *See* 413 F. Supp. 3d at 1343–47. CVD expedited reviews do not fall within the statutory provisions identified as a basis for the court’s review pursuant to 19 U.S.C. § 1516a and, consequently, the court’s section 1581(c) jurisdiction is not available. *See id.* at 1346.

DISCUSSION

I. Commerce's Authority to Promulgate 19 C.F.R. § 351.214(k) and Conduct CVD Expedited Reviews

A. Parties' Contentions

The Canadian Parties contend that, “with the partial exception of 19 U.S.C. § 1675(a)(1) and section 103(b) of the URAA,” Commerce did not meaningfully engage “with each of the alternative bases.” Def.-Ints.’ Opp’n Cmts. at 2. They urge the court to remand again for Commerce to do so. *See id.* at 4. The Canadian Parties further contend that 19 U.S.C. § 1675(a)(1) and URAA § 103(b) provide authority for Commerce to conduct CVD expedited reviews and request the court to reconsider its position concerning the language of section 103(b). *See id.* at 6–19. The Canadian Parties incorporate by reference prior arguments addressing additional statutory bases. *See id.* at 4 n.13 (citing Jt. Canada Br. at 22–29).

The Government contends that Commerce adequately considered the alternative legal bases for CVD expedited reviews and, thus, “further remand is unnecessary.” Def.’s Reply Cmts. at 6; *see also id.* at 6–9.

The Coalition contends that the Canadian Parties misconstrue the standard of review. *See* Pl.’s Reply Cmts. at 4. According to the Coalition, the court’s review of the statutory bases considered by Commerce on remand “is predicated on the [c]ourt’s analysis of the statutory text, . . . not whether Commerce has provided sufficient explanation of its conclusion under the substantial evidence standard of review.” *Id.* at 5. The Coalition further contends that “the plain language of 19 U.S.C. §§ 1671d(c), 1675(b), and 1677f-1(e) is unambiguous” and does not authorize Commerce’s promulgation of 19 C.F.R. § 351.214(k). *Id.* at 5. The Coalition also contends that the court has previously found that 19 U.S.C. § 1675(a)(1) does not contemplate CVD expedited reviews, *see id.* at 6 (citing *Lumber II*, 413 F. Supp. 3d at 1343), and the court should decline the Canadian Parties’ invitation to reconsider its findings concerning URAA § 103(b), *see id.* at 7–8.

B. Commerce's Remand Results Will Be Sustained

The court remanded the *Final Results of Expedited Review* for Commerce to consider whether any statutory provision other than URAA § 103(a) “authoriz[ed] the agency’s promulgation of 19 C.F.R. § 351.214(k).” *Lumber III*, 483 F. Supp. 3d at 1272–73. Commerce considered the proffered bases; as to each, Commerce either presumed that it was incapable of conferring authority in light of the court’s prior statements, *see* Remand Results at 10, 22–24, or con-

cluded that the provision did not authorize the regulation, *see id.* at 11–12, 19–21.

The APA provides the scope of judicial review governing this action. The court therefore reviews Commerce’s determination that it lacks authority for its regulation pursuant to 5 U.S.C. § 706(2)(A). Thus, the court considers whether Commerce’s explanation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *cf., e.g., Serv. Women’s Action Network v. Sec’y of Veterans Affs.*, 815 F.3d 1369, 1374 (Fed. Cir. 2016) (applying the same standard to a denial of a petition for rulemaking); *Preminger v. Sec’y of Veterans Affs.*, 632 F.3d 1345, 1353 (Fed. Cir. 2011) (same).

While the Canadian Parties take issue with the depth of Commerce’s analysis of certain statutory provisions, *see, e.g., Def.-Ints.’ Opp’n Cmts.* at 2–4, Commerce considered these alternatives and explained its reasons for finding that the provisions do not support the regulation. *See* Remand Results at 9–12, 19–25. Thus, a remand for further consideration is unnecessary. Moreover, the Canadian Parties do not develop the argument that Commerce’s determination is arbitrary, capricious, or an abuse of discretion. Instead, they argue that Commerce’s statutory interpretations are largely incorrect. *See* Def.-Ints.’ Opp’n Cmts. at 4 n.13, 6–12. To resolve these contentions, the court is guided by the two-part framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984).¹⁴ *Cf. Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 96–97 (D.C. Cir. 1989) (explaining that the court will reverse “an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency,” and restating that, pursuant to *Chevron*, when congressional intent is unclear, the court must accept an agency’s reasonable interpretation of the substantive terms of a statute the agency is charged with administering); *Serv. Women’s Action Network*, 815 F.3d at 1375.

The Canadian Parties concede that there is no explicit statutory authority for CVD expedited reviews but argue instead that certain statutory provisions are nevertheless broad enough to encompass CVD expedited reviews pursuant to a *Chevron* prong two analysis.

¹⁴ Pursuant to *Chevron*, the court must first determine “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 842. If Congress’s intent is clear, “that is the end of the matter,” and the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. However, “if the statute is silent or ambiguous,” the court must determine whether the agency’s action “is based on a permissible construction of the statute.” *Id.* at 843.

See Def.-Ints.' Opp'n Cmts. at 4 n.13 (citing Jt. Canada Br. at 22–29); *id.* at 6–12. The court agrees with the Government, however, that Commerce analyzed each provision and explained its position as to why the provision did not confer authority for Commerce's promulgation of 19 C.F.R. § 351.214(k).

With respect to section 1675(a)(1), the statute provides for an administrative review of an order “[a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle.” 19 U.S.C. § 1675(a)(1)(A). The Canadian Parties' argument turns, in part, on the notion that there is nothing in the statute that “precludes reviews prior to the anniversary of the publication of an order, limits reviews to only one per each twelve-month period, or limits what can be reviewed with respect to an order.” Def.-Ints.' Opp'n Cmts. at 8. The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has, however, “squarely rejected” the argument that an agency may rely on statutory silence to conduct a proceeding in years other than those provided by statute. *Lumber III*, 483 F. Supp. 3d at 1264–65 (discussing *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), a case in which the appellate court rejected Commerce's reliance on statutory silence to conduct a duty absorption inquiry in years other than those identified in 19 U.S.C. § 1675(a)(4)). Section 1675(a)(1) plainly governs reviews beginning no sooner than one year following the date of publication of an order; thus, it cannot confer authority for a CVD expedited review proceeding initiated just two months after publication of an order. See 19 C.F.R. § 351.214(k)(1)–(2) (discussing deadlines governing requests for and initiation of CVD expedited reviews); Remand Results at 20–21 (noting the differing timelines for administrative reviews and CVD expedited reviews).

Section 1675(b)(1) governs changed circumstances reviews. Commerce may grant a request for such a review of a countervailing duty investigation determination when there are “changed circumstances sufficient to warrant a review.” 19 U.S.C. § 1675(b)(1). Absent good cause, however, Commerce may not conduct a changed circumstances review of a determination sooner than “24 months after the date of publication of notice of that determination.” *Id.* § 1675(b)(4). In prior briefing, the Governments of Canada and Québec argued, *inter alia*, that a non-individually examined company “can show ‘good cause’ that circumstances have changed” to the extent the company's assigned rate “bears little resemblance to the company's actual subsidy rate.” Jt. Canada Br. at 26. Setting aside the fact that the period of review for a CVD expedited review matches the period of investigation used in the investigation, 19 C.F.R. § 351.214(k)(3)(i), and Com-

merce therefore uses some of the same data, *see Preamble*, 62 Fed. Reg. at 27,321, the regulation does not contain a “good cause” requirement necessary to merit excusal from the statutory timeline, 19 C.F.R. § 351.214(k)(1) (stating the requirements for a request for a CVD expedited review). Thus, Commerce reasonably interpreted section 1675(b)(1) as not providing authority for the regulation.

Commerce also rejected 19 U.S.C. § 1671d as a basis for its regulation. *See Remand Results* at 19–21. Section 1671d governs final investigation determinations. The Governments of Canada and Québec pointed to statutory language requiring Commerce to “determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated,” 19 U.S.C. § 1671d(c)(1)(B)(i)(I), to argue that “nothing . . . in that language requir[es] such individual investigation to occur during the original investigation,” *Jt. Canada Br.* at 26. The Governments of Canada and Québec take the quoted statutory language out of context. Section 1671d(c) governs the effect of final affirmative determinations issued pursuant to section 1671d(a). *See* 19 U.S.C. § 1671d(c)(1). Subsection (a) provides, in general, for a final determination as to “whether or not a countervailable subsidy is being provided with respect to the subject merchandise” within 75 days of the preliminary determination. *Id.* § 1671d(a)(1). Commerce’s preliminary determination, in turn, is generally due within 65 days following the date on which Commerce initiated an investigation. *Id.* § 1671b(b)(1). Section 1671d(c)(1)(B)(i)(I) therefore states the requirements for Commerce’s subsidy calculations as part of its final investigation determination—not in some later-conducted and entirely separate segment of the proceeding. Accordingly, Commerce correctly interpreted 19 U.S.C. § 1671d as not providing authority for 19 C.F.R. § 351.214(k).¹⁵

The Canadian Parties also argue that Commerce correctly concluded that URAA § 103(b) authorized 19 C.F.R. § 351.214(k) and request the court to reconsider its position with respect to that provision. *See Def.-Ints.’ Opp’n* at 12–19.¹⁶

¹⁵ The Canadian Parties do not present (or incorporate by reference) any arguments addressing Commerce’s findings with respect to 19 U.S.C. § 1677f-1 functioning as sole authority for CVD expedited reviews or Commerce’s inherent authority to reconsider prior determinations. *See Remand Results* at 11, 19–21.

¹⁶ The Canadian Parties fail to identify any relevant rule or standard governing the court’s reconsideration with respect to this issue. *See Def.-Ints.’ Opp’n* at 12–19. Plaintiff argues that the Canadian Parties’ request for reconsideration “is equivalent to a motion for reconsideration under USCIT Rule 59.” Pl.’s Reply Cmts. at 8. Rule 59(e), which permits the court to consider “[a] motion to alter or amend a judgment” which is served “no later than 30 days after the entry of the judgment,” USCIT Rule 59(e), is inapplicable to a non-final order, *see Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986) (noting the general rule that “[a]n order remanding a matter to an administrative agency for further findings and proceedings is not final,” and, therefore, not appealable) (citation omitted).

As noted, section 103(b) authorized the issuance of “[a]ny interim regulation necessary or appropriate to carry out any action proposed in the [SAA] . . . to implement an agreement described in section 3511(d)(7), (12), or (13) of [Title 19],” 19 U.S.C. § 3513(b), which includes the SCM Agreement, *see id.* § 3511(d)(12). The court previously considered the language of section 103(b) in response to the argument that this provision’s authorization of an interim regulation indicated that Commerce had equal authority to issue the regulation as a final regulation pursuant to section 103(a). *See Lumber III*, 483 F. Supp. 3d at 1267. The court rejected the premise of that argument “because the SAA does not propose any action to implement CVD expedited reviews” that would meet the requirements of section 103(b). *Id.*

Regardless of the degree of discretion accorded by Congress’s use of the term “appropriate” to modify “interim regulation,” *see* Def.-Ints.’ Opp’n Cmts. at 14–15,¹⁷ the court is not persuaded by Commerce’s Remand Results or Parties’ briefing to reconsider its finding that the “SAA does not propose any [relevant] action” for purposes of the phrase “action proposed in the [SAA].” *See Lumber III*, 483 F. Supp. 3d at 1267; Remand Results at 22; Def.-Ints.’ Opp’n Cmts. at 14; Def.’s Reply Cmts. at 8.¹⁸

The Canadian Parties argue that “the SAA anticipated that there would be an expedited review procedure” and, thus, that the require-

Nevertheless, pursuant to USCIT Rule 54(b), “any order or other decision . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims” Accordingly, the Canadian Parties’ request is properly considered under USCIT Rule 54(b). *See ABB Inc. v. United States*, 42 CIT ___, ___, 375 F. Supp. 3d 1348, 1352 (2019) (considering a motion for reconsideration pursuant to USCIT Rule 54(b) instead of USCIT 59(e) when the motion pertained to an opinion remanding the matter to Commerce that was nonfinal and, thus, not appealable).

¹⁷ The Canadian Parties argue that the court should give “greater deference” to Commerce’s interpretation of section 103(b) than it did for section 103(a) because section 103(b) accords Commerce “substantial” discretion and applies solely to Commerce and the U.S. International Trade Commission. Def.-Ints.’ Opp’n Cmts. at 14 & n.31 (citing *Lumber III*, 483 F. Supp. 3d at 1262 n.16). The Canadian Parties fail to identify what level of deference the court should accord Commerce’s interpretation of section 103(b) in the event the court finds the pertinent language ambiguous. While the Canadian Parties cite to *City of Arlington v. FCC*, 569 U.S. 290, 297–97 (2013), Def.-Ints.’ Opp’n Cmts. at 14 n.32, in that case, the U.S. Supreme Court held that *Chevron* deference should be accorded to an agency’s “construction of a[n] ambiguous] jurisdictional provision of a statute it administers,” *City of Arlington*, 569 U.S. at 301 (citation omitted) (emphasis added). Commerce is not the administering authority for section 103(b). *See Lumber III*, 483 F. Supp. 3d at 1262 n.16 (discussing relevant provisions). In any event, the pertinent language in section 103(b) unambiguously precludes the Canadian Parties’ interpretation; thus, the court need not resolve this issue.

¹⁸ Parties also do not address what implications, if any, might arise from the fact that Commerce did not promulgate 19 C.F.R. § 351.214(k) as an interim regulation or within the time prescribed for interim regulations, but, instead, issued section 351.214(k) as part of its final regulations well after the time period provided in section 103(b). *See supra* pp. 9–10.

ment for a proposed action is met. Def.-Ints' Opp'n Cmts. at 15. An attempt "to re-litigate . . . arguments . . . previously raised" is not, however, a basis for reconsideration. *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008) (citation omitted); see also *Lumber III*, 483 F. Supp. 3d at 1267 (rejecting the argument that "the reference to expedited reviews pursuant to Article 19.3 in the SAA constitutes a 'proposed action'" for purposes of section 103(b)).

The court also is not persuaded to reconsider its finding with respect to section 103(b) as a result of Congress's statement of approval of the SCM Agreement in URAA §101(a). See Def.-Ints' Opp'n Cmts. at 15–16. The Canadian Parties appear to suggest that the court should interpret the language of section 103(b) more broadly given Congress's approval. See *id.* However, the statement of congressional approval was a statutory requirement pursuant to the legislative mechanism utilized for congressional implementation of the Uruguay Round Agreements. See 19 U.S.C. § 2191(b)(1)(A); 19 U.S.C. § 3511(a) (cross-referencing 19 U.S.C. § 2191). Further, the statement of congressional approval was required *in addition to* any new or amended statutory "provisions[] necessary or appropriate to implement [the Uruguay Round Agreements]." 19 U.S.C. § 2191(b)(1)(C). The SAA discusses what statutory "changes" Congress considered necessary "to implement the requirements of Article 19.3 of the [SCM] Agreement," SAA at 941, *reprinted in* 1994 U.S.C.C.A.N. at 4250, and a CVD expedited review process as conceived by Commerce was not among them, see *id.* at 941–42, *reprinted in* 1994 U.S.C.C.A.N. at 4251. Thus, the Canadian Parties' reliance on URAA § 101(a) to read into the SAA, and, thus, into URAA § 103(b), authority for an action that is unsupported by the text of the SAA lacks merit.

The court's finding that Congress intended the phrase "action proposed in the [SAA]" in section 103(b) to encompass the statutory changes discussed in connection with the implementing bill harmonizes section 103(b) with section 103(a), the scope of which is limited to enacted provisions. See *Lumber III*, 483 F. Supp. 3d at 1271. Finding authority in section 103(b) for a regulation that is plainly not authorized by section 103(a) would instead introduce a conflict between the provisions, which should be avoided. See, e.g., *Maracich v. Spears*, 570 U.S. 48, 68 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal*

Texts 180 (2012)) (alterations original).¹⁹ Accordingly, the court declines to reconsider its finding with respect to section 103(b).

In sum, the court will sustain Commerce's determination that the potential sources of authority considered on remand do not supply a legal basis for the adoption of 19 C.F.R. § 351.214(k) or Commerce's conduct of CVD expedited reviews.

II. Commerce's Treatment of Entries Made by the Subject Companies

A. Parties' Contentions

Plaintiff contends that the phrase "set aside" in 5 U.S.C. § 706 means "vacate" and, thus, the court should vacate 19 C.F.R. § 351.214(k) and the *Final Results of Expedited Review*. Pl.'s Opp'n Cmts. at 4 (citing *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006)). Plaintiff further contends that the court should restore the "cash deposit collection and liquidation status of the companies . . . to a state reflective of what would already be in place had Commerce not acted *ultra vires*." *Id.* at 7. Plaintiff also contends that section 1516a(c)(1) does not apply because a CVD expedited review is not a determination enumerated under that subsection. *See id.* at 7–8.

Plaintiff requests the court to order Commerce or Customs, as appropriate, to: (1) suspend the liquidation of unliquidated entries of subject merchandise produced or exported by the companies subject to the CVD expedited review; (2) include subject merchandise produced by the excluded companies in the *CVD Order*; (3) "[e]ffective as of the date of the [c]ourt's judgment, collect cash deposits on imports of subject merchandise produced and/or exported by the expedited review companies at that rate that would have been applicable to each of these companies had the [*Final Results of Expedited Review*] not been issued," which rate Plaintiff identifies as the rate "determined by the most recently completed and requested segment of the *CVD Order* for each of the expedited review companies"; and (4) "assess countervailing duties on the subject merchandise produced and/or exported by the expedited review companies" pursuant to "19 C.F.R. § 351.212 but without regard to the [*Final Results of Expedited Review*]." *Id.* at 11.²⁰

¹⁹ Having found no ambiguity in the scope of interim rulemaking authority conferred by section 103(b), the Canadian Parties' arguments that the *Charming Betsy* doctrine favors their interpretation of ambiguous language within that provision are immaterial. *See* Def.-Ints.' Opp'n Cmts. at 16. In any event, as with section 103(a), section 103(b) "does not . . . directly implement the United States' international obligations" but, instead, authorizes interim regulations implementing actions proposed in the SAA. *Lumber III*, 483 F. Supp. 3d at 1267. "Thus, *Charming Betsy* is inapposite." *Id.*

²⁰ Relevant here, section 351.212 governs the assessment of countervailing duties pursuant to an administrative review or new shipper review. *See* 19 C.F.R. § 351.212(b)(2).

The Canadian Parties contend that voiding the *Final Results of Expedited Review* would result in the assessment of countervailing duties in excess of the net countervailable subsidy conferred on the companies in violation of 19 U.S.C. §§ 1671(a), 1671e(a)(1). *See* Def.-Ints' Opp'n Cmts. at 19–22. The Canadian Parties further contend that principles of equity require that the subject companies retain the status and rates determined in the CVD expedited review even if the court vacates the regulation. *See id.* at 23 & n.57 (citing 28 U.S.C. § 1585);²¹ *see also id.* at 24 (stating that equity requires this decision to have “no [e]ffect” on the subject companies, such that the excluded companies remain excluded from the *CVD Order* and the court should resolve the remaining challenges of the non-excluded companies); *id.* at 31 (arguing that rescission may leave the subject companies in a worse position than if they had not requested a CVD expedited review because the all-others rate from the investigation (14.9 percent) is higher than the all-others rate from the first administrative review (7.26 percent and 7.42 percent for 2017 and 2018, respectively).

The Canadian Parties also contend that Commerce's conduct of the review amounted to harmless error because Plaintiff is unharmed by the *de minimis* margins received by the excluded companies or to which the non-excluded companies would be entitled pending their challenges. *See id.* at 32. Lastly, the Canadian Parties contend that, if the court vacates the *Final Results of Expedited Review*, the court “should order Commerce to initiate new reviews under the appropriate authority (e.g., a changed circumstances review) and adopt the substantive results from the expedited review, after allowing the other appeal issues to be heard.” *Id.* at 32–33.

The Government contends that Commerce is not prohibited from implementing the court's judgment consistent with 19 U.S.C. § 1516a(c)(1) even if such action is not required. Def.'s Reply Cmts. at 12. The Government further contends that because no statutory provision addresses how Commerce should treat the subject entries, the court should accord *Chevron* deference to Commerce's decision to rely on section 1516a(c)(1). *See id.* at 12–13. Following this approach, the excluded companies “will be brought back into the order prospectively at the 14.19 percent all-others rate calculated in the investigation” and the non-excluded companies “will receive prospectively either the all-others rate from the investigation, or the rate received in the most recently completed administrative review in which the company par-

²¹ Pursuant to 28 U.S.C. § 1585, “[t]he Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.”

ticipated.” *Id.* at 13–14.²² The Government also argues that formal revocation of 19 C.F.R. § 351.214(k) is unnecessary because the action is nonfinal pending all appeals and, “if the Remand Results are sustained after all appeals, Commerce would cease conducting expedited reviews.” *Id.* at 16.

The Government further relies on the court’s decision in *Lumber I* not to enter a preliminary injunction to infer that the court contemplated solely prospective relief. *See id.* at 14. According to the Government, retroactive application of the all-others rate determined in the investigation “would raise concerns about the procedure afforded” because the “excluded companies had no reason to request administrative reviews of their entries” and the non-excluded companies that “were satisfied with” the rates obtained in the *Final Results of Expedited Review* “also had no reason to request administrative reviews.” *Id.* at 14–15. The Government also contends that the Canadian Parties’ reliance on 19 U.S.C. §§ 1671(a) and 1671e(a)(1) is misplaced because those provisions govern investigations and, thus, Commerce would not violate those provisions by rescinding the results of the review and imposing countervailing duties. *See id.* at 10.²³

In their reply comments, the Coalition contends that Commerce’s statutory authority to assign an all-others rate to companies that are not individually investigated undermines the Canadian Parties’ argument that Commerce may not impose countervailing duties in excess of those determined in the *Final Results of Expedited Review*. *See* Pl.’s Reply Cmts. at 9–10. The Coalition also contends that the Canadian Parties’ reliance interests are irrelevant in light of the rule of retroactivity applicable to judicial decisions. *See id.* at 10–14 (citing, *inter alia*, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), and *Harper v. VA Dep’t of Taxation*, 509 U.S. 86, 97 (1993)). As to the asserted reliance interests, the Coalition also contends that it “raised the issue of statutory authority multiple times during the Commerce proceeding, including before Commerce initiated the review,” and, thus, the subject companies were on notice of the issue and “partici-

²² The non-excluded companies were included in the second administrative review of the *CVD Order*. *See* Def.-Ints.’ Reply Cmts. at 3 n.8. All subject companies (excluded and non-excluded) were included in the third administrative review of the *CVD Order*. *See id.*; Def.-Ints.’ Opp’n Cmts. at 30 n.77.

²³ The Government asserts that Plaintiff waived its request for “reliquidation of already liquidated entries” because it never requested that relief in its complaint. Def.’s Reply Cmts. at 15. The Government does not cite to the location of any such request, and the court does not understand Plaintiff to seek reliquidation. While Plaintiff argues that nullification of the *Final Results of Expedited Review* should reach previously entered but unliquidated entries of subject merchandise, Pl.’s Opp’n Cmts. at 9, 11, Plaintiff has not requested (or presented arguments supporting) reliquidation of liquidated entries.

pated . . . at their own risks.” *Id.* at 13 n.4 (citing Obj. to the Dep’t’s Conduct of Expedited Reviews (Jan. 23, 2018), PR 12, PRJA Tab 1).

The Coalition further contends that Commerce’s promulgation of the regulation and completion of the CVD expedited review are not amenable to a harmless error analysis because they are not procedural defects but, rather, “substantive unlawful agency action.” *Id.* at 15. Lastly, the Coalition contends that the court may not order Commerce to complete a new review adopting the results of the CVD expedited review given that Commerce lacked authority to conduct the review. *See id.*

The Canadian Parties filed reply comments in which they support Commerce’s reliance on 19 U.S.C. § 1516a(c)(1) and Commerce’s position that any relief should be prospective. *See* Def.-Ints.’ Reply Cmts. at 4–5. The Canadian Parties contend that prospective application of the court’s judgment is supported by the “presumption of correctness” that applies to Commerce findings and the expectations of the parties that make business decisions in reliance on those findings. *Id.* at 5–6. The Canadian Parties also contend that, to the extent there is a *statutory* requirement for retroactivity, the court can use its “equitable powers to provide otherwise.” *Id.* at 8–9 (citations omitted); *see also id.* at 11–12. Lastly, the Canadian Parties request the court to “stay the enforcement of its decision” pending all appeals if it does not allow the subject companies to retain the benefit of the *Final Results of Expedited Review*. *Id.* at 13.

B. Analysis

There are three issues before the court: (1) whether the court should vacate 19 C.F.R. § 351.214(k); (2) whether the court should vacate the *Final Results of Expedited Review*; and (3) in the event the court vacates the *Final Results of Expedited Review*, whether the vacatur should operate prospectively or retroactively. The court addresses each issue, in turn.

1. Commerce’s Regulation, 19 C.F.R. § 351.214(k), Will Be Vacated

With respect to the regulation, the issue is relatively straightforward. The court is guided by the standard of review set forth in the APA, which states that the court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).²⁴ “Set aside’ usually means ‘vacate.’”

²⁴ “[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

V.I. Tel. Corp., 444 F.3d at 671–72 (citing Black’s Law Dictionary 1404 (8th ed. 2004)).²⁵ Thus, “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not [just] that their application to the individual petitioners is proscribed.” *Nat’l Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989));²⁶ see also *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 & n.5 (D.C. Cir. 2014) (characterizing vacatur as the “normal remedy” when an agency action is unlawful and finding it “clearly appropriate . . . under the APA”); *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1291 (D.C. Cir. 2000) (vacating a rule the court found to be arbitrary and capricious and in excess of statutory authority under the APA); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 51–52 (D.D.C. 2020) (rejecting the argument that vacatur was “not appropriate in [that] case as a matter of the equities” and stating that “vacatur is the norm whe[n], as here, the deficiencies that the court has identified are substantively fatal”) (citation omitted). Indeed, the Federal Circuit has vacated an agency action in part—a precedential general counsel opinion issued by the U.S. Department of Veterans Affairs (“VA”)—when an opinion expressed therein incorrectly interpreted a statute and therefore exceeded the VA’s authority pursuant to 5 U.S.C. § 706(2)(A) and (C). See *Plane v. West*, 216 F.3d 1058, 1062, 1070 (Fed. Cir. 2000).²⁷

²⁵ The U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) interpreted the phrase “set aside” as it appeared in the FCC’s regulations pursuant to which the FCC vacated an order and “restored the *status quo ante*,” but noted that “[t]he result would be the same as if a court” had set aside the order “pursuant to . . . 5 U.S.C. § 706(2).” *V.I. Tel. Corp.*, 444 F.3d at 671–72.

²⁶ The opinions of the D.C. Circuit are not binding on this court. However, to the extent the Federal Circuit has not addressed any aspect of the issue of remedy pending before the court, the court finds judicial precedent from the D.C. Circuit instructive in light of the court’s expertise in the area of administrative law. See, e.g., *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 535 n.14 (1978) (observing that “the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit]”); see generally Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779 (2002). The Federal Circuit has done likewise. See *Nat’l Org. of Veterans Advocates, Inc. v. Sec’y of Veterans Affs.*, 260 F.3d 1365, 1367–68, 1379–81 (Fed. Cir. 2001) (following *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993)).

²⁷ In *Dorbest Ltd. v. United States*, the Federal Circuit “invalidate[d]” 19 C.F.R. § 351.408(c)(3) based on the appellate court’s finding that it was inconsistent with 19 U.S.C. § 1677b(c)(4)(A), the statute pursuant to which Commerce promulgated the regulation. 604 F.3d 1363, 1372 (Fed. Cir. 2010). Section 351.408(c)(3) remains in the Code of Federal Regulations. See 19 C.F.R. § 351.408(c)(3) (2020). The facial attack on section 351.408(c)(3) at issue in *Dorbest* arose under 19 U.S.C. § 1516a as part of a challenge to a Commerce antidumping duty investigation determination. See 604 F.3d at 1366. The Federal Circuit thus had no occasion to address the requirements of the APA and did not explain its choice of terminology or the difference—if any—between vacating a regulation and invalidating it.

Accordingly, the court concludes that vacatur of the regulation is appropriate.²⁸

2. The Final Results of Expedited Review Will Be Vacated

Turning to the second issue, while vacatur of the regulation “re-store[s] the prior *regulatory* status quo,” *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415–16 (D.D.C. 2020) (citing *Env’t Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004); *Nat’l Parks Cons. Ass’n v. Jewell*, 62 F. Supp. 3d 7, 21 (D.D.C. 2014)), vacatur does not necessarily “erase[] from legal existence all *past* adjudications under the vacated rule,” *id.* at 415 (citing *Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1366–67 (Fed. Cir. 2009)).²⁹ It is, however, “uncontroversial . . . that, when a court with jurisdiction finds that the plaintiffs before it were harmed by an agency decision issued under an illegal rule, the court should vacate that wrongful decision as a remedy.” *Id.* at 416 (citing *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987), a case in which the U.S. Court of Appeals for the Ninth Circuit vacated adverse decisions issued to a class of Social Security claimants pursuant to an invalid review program).³⁰

Accordingly, courts have invalidated specified agency actions taken pursuant to an invalid rule. *See, e.g., Kiakombua*, 498 F. Supp. 3d at 57–59 (requiring new credible fear determinations for plaintiffs negatively affected by prior determinations conducted in accordance with an invalid agency manual); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 35–37 (D.D.C. 2020) (setting aside removal orders for the five

²⁸ The Government asserts that Plaintiff has waived any request for the court to order formal revocation of the regulation because Plaintiff failed to request such relief in its complaint. Def.’s Reply Cmts. at 15; *see also* Pl.’s Opp’n Cmts. at 8–9, 10–11 (requesting the court to order Commerce to withdraw the regulation). Because “notice and comment procedure is not required whe[n] a court vacates a rule after making a finding on the merits,” *Nat’l Parks Cons. Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (citing *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)), the court declines to order Commerce to formally repeal 19 C.F.R. § 351.214(k).

²⁹ In *Heartland*, a case brought pursuant to the court’s jurisdiction under 1581(h) for pre-importation review of customs rulings in certain limited circumstances, the Federal Circuit held that a prior related decision “was retroactive with respect to entries made before the date the mandate issued in [that case],” but that did “not mean that final judicial or administrative decisions are to be reopened,” for example, liquidations that have since become final. 568 F.3d at 1366–67.

³⁰ *D.A.M.* addressed the propriety of a temporary restraining order barring removal of asylum seekers from the United States pursuant to an order of expedited removal issued under an invalid agency rule. *See* 486 F. Supp. 3d at 407. The *D.A.M.* court explained that vacatur of the rule meant that the government could not “issue any more orders of removal under that rule, but it [did] not mean that petitioners’ removal orders (along with thousands of others) were automatically extinguished by operation of [that] judgment.” *Id.* at 416. The court ultimately declined to invalidate the removal orders based on the conclusion that the court lacked subject matter jurisdiction to do so. *See id.* at 416–19.

plaintiffs before the court while declining to set aside orders for non-parties); *Waterkeeper All., Inc. v. Wheeler*, No. CV 18–2230 (JDB), 2020 WL 1873564, at *6–*7 (D.D.C. Apr. 15, 2020) (vacating agency approval of a state regulatory program following the D.C. Circuit’s vacatur of an agency policy necessary to the program’s approval); *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1085–89 (D. Idaho 2020) (vacating provisions of a land management policy and setting aside certain affected lease sales).

While examples in the trade context are few, those that exist are consistent with the foregoing cases. In *Dorbest*, for example, the Federal Circuit required Commerce to recalculate normal value without regard to the labor valuation regulation the court held to be invalid. See 604 F.3d at 1272–73. In *FAG Italia S.p.A. v. United States*, the CIT remanded an administrative review determination to Commerce “to annul all findings and conclusions made pursuant to [a] duty absorption inquiry” the agency lacked statutory authority to perform. 24 CIT 587, 596 (2000), *aff’d in part*, 291 F.3d 806 (Fed. Cir. 2002).

Accordingly, the court will vacate the *Final Results of Expedited Review*. The court must, however, address the implications of vacatur of the underlying determination.

3. Rescission Shall Operate Prospectively

In looking for judicial guidance with respect to how the court should direct implementation of its decision to vacate the *Final Results of Expedited Review*, the court has found *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281 (D.C. Cir. 1995), to be useful. Therein, the D.C. Circuit confronted the question whether the Federal Energy Regulatory Commission (“FERC”) erred in retroactively applying a prior appellate court decision that vacated an earlier FERC order. *Id.* at 1282–83. Upon review of judicial precedent concerning retroactive application of federal court decisions, the D.C. Circuit held that FERC’s decision to apply retroactively the appellate court’s vacatur of its order was lawful and that none of the recognized exceptions to retroactivity were met. See *id.* at 1286–90.

In so holding, the D.C. Circuit rejected the argument that an earlier three-part test³¹ providing for prospective application of a federal court decision “survived as a remedial doctrine under which [the

³¹ The three-part test was announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–08 (1971), and considered: “(1) whether the decision announced ‘a new principle of law’; (2) whether non-retroactive application would undermine the purpose of that decision; and (3) whether retroactive application would work a significant inequity.” *Natl’ Fuel*, 59 F.3d at 1284 (citation omitted); see also *Chevron Oil*, 404 U.S. at 106–07.

court] could grant relief to a party that had acted in reliance upon the law as it stood prior to [its] decision supposedly announcing a new rule of law.” *Id.* at 1287–88. The appellate court explained:

In *Hyde*, the Supreme Court clearly held that retroactive application of a judicial decision cannot, *except in certain limited and specifically defined circumstances*, be blunted at the remedial stage. The plaintiff in *Hyde* acknowledged that her case was governed by *Harper* and that a prior decision of the Supreme Court had “retroactively invalidated the tolling provision that [made] her suit timely.” She nevertheless asked the Court to allow her suit to go forward, “not[ing] the possibility of recharacterizing *Chevron Oil* as a case in which the Court simply took reliance interests into account in tailoring an appropriate remedy for a violation of federal law.” The Court per Justice Breyer, squarely rejected that argument

Id. at 1288 (quoting *Hyde*, 514 U.S. at 749, 752) (first and second alterations in original) (emphasis added) (citations omitted).³² The appellate court concluded that *Hyde* generally prevents a court from departing, “even at the remedial stage, from the rule of *Harper* requiring that a judicial decision be applied retroactively.” *Id.* Thus, when “*Harper* is applicable,” prospective “application of a prior decision can be awarded only in four specific circumstances,” *id.*, such as when

[a] court may find (1) an alternative way of curing the constitutional violation, (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications, or (4) a principle of law . . . that limits the principle of retroactivity itself.

Id. (quoting *Hyde*, 514 U.S. at 759) (second alteration in original).

The D.C. Circuit then turned to the question whether *Harper* and *Hyde* apply in the context of agency action. *See id.* The court explained that although the rule of retroactivity has constitutional dimensions, it is also based on the principle “that the ‘selective

³² *Harper* holds that the “Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.” 509 U.S. at 90; *see also id.* at 97 (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”). In *Hyde*, the Court recognized that “*Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law.” 514 U.S. at 752.

application of new rules violates the principle of treating similarly situated parties the same.” *Id.* at 1289 (quoting *Harper*, 509 U.S. at 95). Thus, the appellate court could “see no reason why that pre-constitutional rationale would apply with any less force when it falls to an agency rather than a court to apply a judicial decision.” *Id.* (citation omitted). The appellate court distinguished “between an administrative agency’s retroactive application of a judicial decision,” at issue in *National Fuel*, “and [an] agency’s retroactive application of its own adjudicative decision,” as to which an agency may have greater flexibility. *Id.* With respect to the former circumstance, the D.C. Circuit concluded that, absent compelling reasons, “the decision of a federal court must be given retroactive effect regardless whether it is being applied by a court or an agency.” *Id.*³³

Accordingly, the court considers, consistent with *Hyde*, *Harper*, and *National Fuel*, whether there are compelling reasons to depart from the presumption that Commerce must apply retroactively this court’s decision to vacate the *Final Results of Expedited Review* by restoring the cash deposit and liquidation status of the subject companies and, in particular, their prior entries, to the position they would have been in had the proceeding never occurred. To that end, Congress has enacted a detailed statutory scheme governing AD/CVD proceedings which provides for both retrospective and prospective effect with respect to both Commerce and court decisions under specified circumstances. While this case is atypical given the lack of statutory authority for CVD expedited reviews, the court nevertheless finds that application of that congressionally approved scheme particular to trade cases, providing for prospective relief, is merited.

When Commerce finds that “countervailable subsidization is occurring,” 19 C.F.R. § 351.210(a) (defining “final determination[s]”), Commerce must determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated as well as an “estimated all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. § 1671d(c)(1)(B)(i)(I). Commerce must then “order the posting of a cash deposit, bond, or other security . . . for each entry of the subject merchandise in an amount

³³ The court elaborated that,

[b]ecause the decision of an Article III court . . . announces the law “as though [it] were finding it[,] discerning what the law is, rather than decreeing what it is . . . changed to, or what it will tomorrow be,” all parties charged with applying that decision, whether agency or court, state or federal, must treat it as if it had always been the law. The agency must give retroactive effect to the ruling of a federal court because of the nature of that court.

Nat’l Fuel, 59 F.3d at 1289 (quoting *James B. Beam Distilling Co. v. Ga.*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment)).

based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated countrywide subsidy rate.” *Id.* § 1671d(c)(1)(B)(ii). “[T]he cash deposit rates established in an investigation are prospective because they affect future entries, ‘not just those made within a specific time period.’” *Lumber I*, 393 F. Supp. 3d at 1278 (quoting *NSK Corp. v. United States*, 31 CIT 1962, 1965 (2007)).

Contrary to the prospective nature of cash deposits and “[u]nlike the systems of some other countries, the United States uses a ‘retrospective’ assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.” 19 C.F.R. § 351.212(a). This retrospective approach requires that “the amount of duties to be assessed is determined in a review of the order covering a discrete period of time.” *Id.* When an administrative “review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.” *Id.*

While assessment is therefore retrospective because it covers past entries, a decision of the CIT or the Federal Circuit “not in harmony with” Commerce’s determination in a CVD investigation or administrative review is prospective unless the court grants an interested party’s request for injunctive relief. 19 U.S.C. § 1516a(c)(1) (cross-referencing subsection (c)(2)).³⁴ In this case, the court denied Plaintiff’s request for preliminary injunctive relief. *See Lumber I*, 393 F. Supp. 3d at 1280.³⁵ Although the liquidation provisions set forth in 19 U.S.C. § 1516a(c)(1) are not directly applicable to CVD expedited reviews because they are not proceedings enumerated under section 1516a(a) (and otherwise lack statutory authority), the statute nevertheless reflects unambiguous congressional intent concerning the

³⁴ Specifically, section 1516a(c)(1) provides for the liquidation of entries subject to certain Commerce determinations in accordance with the agency determination “if they are entered, or withdrawn from warehouse, for consumption on or before the date” on which Commerce publishes a *Timken* Notice in the Federal Register, unless “such liquidation is enjoined by the court” pursuant to subsection (c)(2). 19 U.S.C. § 1516a(c)(1); *see also supra* note 5 (defining “*Timken* Notice”). Prospective application of adverse court decisions is rooted in the presumption of correctness that attaches to agency determinations. *See* H.R. Rep. No. 96–317, 96th Cong., 1st Sess. 182 (1979). While the presumption of correctness was “modified” when Congress authorized the CIT to enter statutory injunctions, section 1516a(c)(1) continues to reflect that presumption. *Id.*

³⁵ The court considered Plaintiff’s motion for a preliminary injunction pursuant to the traditional four factors set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). *See Lumber I*, 393 F. Supp. 3d at 1276. Consistent with the court’s exercise of jurisdiction pursuant to 28 U.S.C. § 1581(i), Plaintiff did not, strictly speaking, request statutory injunctive relief.

circumstances under which prospective relief is appropriate in trade cases.³⁶

The court finds that the principle of prospective application of a court decision not in harmony with Commerce AD/CVD determinations absent an injunction constitutes a sufficient limit on the retroactive application of the court's decision herein. *See Hyde*, 514 U.S. at 759 (providing for the identification of legal principles operating to "limit[] the principle of retroactivity itself"); *id.* at 761 (Kennedy, J., concurring) (stating that the majority opinion did not foreclose solely prospective effect in "exceptional cases"). Indeed, when the court denied Plaintiff's motion for a preliminary injunction, the court permitted the liquidation of subject entries in accordance with the *Final Results of Expedited Review*. The court anticipated that, if Plaintiff prevailed on count one of its complaint, the excluded companies "would be reinstated in the *CVD Order* with the concomitant collection of cash deposits and suspension of liquidation," *Lumber I*, 393 F. Supp. 3d at 1278,³⁷ and future entries "would be subject to the all-others rate established in the *CVD Order* pending a subsequent review," *id.* at 1279. The potential for retroactive collection of cash deposits and assessment of duties on past entries by the companies excluded by the *Final Results of Expedited Review* is solely a function of the fact that entries remain unliquidated by virtue of the suspension of liquidation in place in connection with the corresponding

³⁶ This case is governed by the APA as a result of the failure to ground CVD expedited reviews in the provisions of the URAA; however, the case otherwise reflects the characteristics of a trade case. *See, e.g.*, Order (Nov. 4, 2019), ECF No. 92 (requiring, with Parties' consent, the "filing and confidentiality protections afforded to all documents forming the administrative record underlying the challenged administrative determination" to "follow the procedures set forth in Rule 73.2" and the disposition of this case to "follow the procedures set forth in Rule 56.2"). Rules 56.2 and 73.2 generally apply to actions described in 28 U.S.C. § 1581(c), which includes actions arising pursuant to 19 U.S.C. § 1516a. *See* CIT Rule 56.2 ("Judgment on an Agency Record for an Action Described in 28 U.S.C. § 1581(c)"); CIT Rule 73.2 ("Documents in an Action Described in 28 U.S.C. § 1581(c), Except an Action Described in Section 517(g) of the Tariff Act of 1930, or (f)").

³⁷ This expectation is consistent with the statutory scheme. When Commerce issues a final affirmative determination following a CVD investigation but nevertheless excludes a company from the resulting CVD order, and the company is subsequently reinstated in the order following judicial review, Commerce does not collect cash deposits retroactively. Rather, pursuant to 19 U.S.C. § 1516a(c)(1), an erroneously excluded company's entries made before Commerce's publication of a *Timken* Notice would liquidate exclusive of countervailing duties. Following publication of the *Timken* Notice, the excluded companies would be reinstated in the relevant CVD order with the associated suspension of liquidation and collection of cash deposits on future entries in accordance with the CVD rate established in the investigation determination (subject to revision on judicial review). While CVD expedited reviews are not investigation determinations issued pursuant to Commerce's authority under 19 U.S.C. § 1671d, "the results of an expedited review are akin to a final investigation determination," *Lumber I*, 393 F. Supp. 3d at 1278, because they "provide a noninvestigated exporter with its own cash deposit rate prior to the arrival of the first anniversary month of the order, at which point the exporter may request an administrative review," *id.* (quoting *Preamble*, 62 Fed. Reg. at 27,321).

administrative review of the antidumping duty order on certain softwood lumber from Canada.³⁸ As discussed below, it is simply not possible to fully “unscramble the egg” for the unliquidated entries. *Cf. Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (declining to vacate unlawful agency action when the court had denied preliminary relief, leading to the establishment of a defective agency program pursuant to which land was plowed under; observing that “[t]he egg has been scrambled and there is no apparent way to restore the status quo ante”).³⁹

Plaintiff argues that the court must endeavor to place the subject companies—the “part[ies] subject to the agency action”—“in the position [they] would have been in, but for the wrongful agency action.” Pl.’s Opp’n Cmts. at 6.⁴⁰ That is, however, impossible. Through the passage of time, opportunities to request administrative reviews have come and gone with concomitant consequences. The excluded companies were unable to participate in the first or second administrative reviews,⁴¹ and the non-excluded companies elected not to participate in the first administrative review based on the

³⁸ In November 2017, Commerce issued a final affirmative determination in its antidumping duty investigation of certain softwood lumber products from Canada. *See Certain Softwood Lumber Products From Canada*, 82 Fed. Reg. 51,806 (Dep’t Commerce Nov. 8, 2017) (final aff. determination of sales at less than fair value and aff. final determination of critical circumstances); *see also Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 350 (Dep’t Commerce Jan. 3, 2018) (antidumping duty order and partial am. final determination).

³⁹ *Sugar Cane Growers* addressed the separate though related question of remand versus vacatur and declined to vacate the unlawful agency action when it was not possible to restore the status quo ante and it was possible for the relevant agency to cure the defect. *See* 289 F.3d at 97–98. While in this case the court finds it appropriate to vacate the *Final Results of Expedited Review* because the deficiency in Commerce’s regulation—a lack of statutory authority—cannot be cured on remand, the cases are analogous to the extent that subsequent events tied to the unlawful action have made full restoration impossible.

⁴⁰ Plaintiff cites to *Marshall v. HHS*, 587 F.3d 1310, 1317 (Fed. Cir. 2009), and *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984), but those opinions address employment reinstatement and backpay following successful litigation of wrongful termination claims and are inapposite to whether retroactivity is required here. *See* Pl.’s Opp’n Cmts. at 60.

⁴¹ Commerce rescinded the first administrative review for the excluded companies. *See Certain Softwood Lumber Products From Canada*, 85 Fed. Reg. 7,273, 7,274 (Dep’t Commerce Feb. 7, 2020) (prelim. results and partial rescission of the [CVD] admin. Review; 2017–2018). For the second administrative review, Commerce declined to review entries of subject merchandise produced and exported by the excluded companies based on their exclusion from the *CVD Order. Initiation of [AD] and [CVD] Admin. Reviews*, 85 Fed. Reg. 13,860, 13,875 nn.7–11 (Dep’t Commerce Mar. 10, 2020) (“*Initiation AR2*”). Commerce included all subject companies in the third administrative review, notwithstanding the fact that the excluded companies were not covered by the *CVD Order* at the time of initiation. *See Initiation of [AD] and [CVD] Admin. Reviews*, 86 Fed. Reg. 12,599 (Dep’t Commerce Mar. 4, 2021). However, the court recognizes that the third administrative review was initiated after Commerce issued the Remand Results.

favorable rate obtained in the underlying proceeding.⁴² See Def.-Int.'s Opp'n Cmts. at 29–30. Thus, applying a cash deposit rate based on either the all-others rate from the investigation or the final results of administrative review for the most recent review in which the company was reviewed constitutes the most appropriate means of effectuating the court's decision.

Additionally, while the court disagrees with the Government that *Chevron* provides the appropriate legal framework for resolving this issue, see Def.'s Reply Cmts. at 12,⁴³ there is some significance to the Government's position concerning prospective relief given that the Government—not Plaintiff—is the recipient of any duties ultimately assessed on the subject entries. Cf. *Lumber I*, 39 F. Supp. 3d at 1278–79 (finding no irreparable harm to Plaintiff from the liquidation of subject entries based, in part, on the absence of any “direct financial stake in the rate at which entries would be liquidated” and noting that Plaintiff “is not the recipient of the duties”). The interplay between the tripartite interests of domestic producers, foreign exporters/producers, and the U.S. government is a characteristic of trade cases and sets trade cases apart from other cases addressing the principle of retroactivity in which the proponent of retroactivity has a direct stake in its application. See, e.g., *Harper*, 509 U.S. at 91–92 (noting that petitioners sought tax refunds based on the retroactive application of a prior U.S. Supreme Court opinion that struck down a tax provision discriminating between retirement benefits paid by the federal government as compared to the state government and its subdivisions); *Hyde*, 514 U.S. at 751 (noting that the petitioner had avoided a lawsuit based on retroactive application of a prior Court decision that rendered the respondent's action untimely). This distinction, while not dispositive, further supports prospective relief.

In sum, the court finds that prospective application of the vacatur of the *Final Results of Expedited Review* is merited. Accordingly, upon entry of judgment, Commerce must issue a *Timken*-like Notice rescinding the *Final Results of Expedited Review*, consistent with the requirements set forth in 19 U.S.C. § 1516a(c)(1), reinstate the ex-

⁴² The Coalition also withdrew its request for the non-excluded companies to be included in the first administrative review. See *Lumber I*, 393 F. Supp. 3d at 1278–79. The non-excluded companies were included in the second administrative review of the *CVD Order, Initiation AR2*, 85 Fed. Reg. at 13,862–64, as well the third administrative review, as noted above.

⁴³ This is not a situation in which the statute is silent or ambiguous with respect to Commerce's treatment of entries covered by a CVD expedited review and Commerce gets to fill that “gap” subject to a *Chevron* prong two analysis. Rather, the court must address Commerce's treatment of entries subject to a determination subsequently vacated as without statutory authority. *Chevron* deference is not implicated in the court's resolution of this issue.

cluded companies in the *CVD Order* prospectively and, for all companies that were covered by the *Final Results of Expedited Review*, impose a cash deposit requirement based on the all-others rate from the investigation or the company-specific rate determined in the most recently completed administrative review in which the company was reviewed.

The court declines to reach the remaining challenges asserted by the Canadian Parties. *See* Def.-Ints.' Opp'n Cmts. at 6. Those issues pertain to the cash deposit rates established by the *Final Results of Expedited Review*. The results of that expedited review are being vacated and will have no further force or effect.⁴⁴ The cash deposit rates applicable to these companies will be based on the rates determined in the most recently completed administrative review or the investigation.⁴⁵ The court recognizes that this may result in a disparate effect on the excluded and non-excluded companies because the excluded companies remain free from countervailing duties until Commerce's publication of the *Timken Notice*;⁴⁶ however, the non-excluded companies cannot claim entitlement to the benefit of a correctly calculated CVD rate based on a review proceeding that is not grounded in the law.

The court has reviewed the Canadian Parties' remaining arguments and finds that they do not require a different outcome.⁴⁷

⁴⁴ Likewise, the court declines to reach the Coalition's challenges to the substantive aspects of the *Final Results of Expedited Review*, except to the extent indicated below. *See* Pl.'s Mem. at 33–47; *infra* note 46.

⁴⁵ To the extent the Canadian Parties assert that the non-excluded companies "would be entitled to" a *de minimis* margin if the court resolved their substantive challenges to Commerce's determination and, thus, exclusion from the *CVD Order*, Def.-Ints.' Opp'n Cmts. at 32, that argument is unpersuasive because the court is vacating the review and ordering the excluded companies to be reinstated in the *CVD Order*.

⁴⁶ In its Rule 56.2 Motion, Plaintiff also argued that Commerce violated 19 C.F.R. § 351.214(k)(3)(iii) when it ordered CBP to refund cash deposits paid by the excluded companies because the regulation provides that a determination issued pursuant to subsection (k) "will not be the basis for the assessment of countervailing duties." Pl.'s Mem. at 32. Subsection (k)(3)(iv) permitted Commerce to exclude from an order a company that obtained a zero or *de minimis* rate. *See* 19 C.F.R. § 351.214(k)(3)(iv). Regulations, like statutes, must be read "as a whole." *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1273, 1282–83 & n.33 (2015) (citations omitted). Thus, taking account of the court's denial of Plaintiff's motion for preliminary injunction, the nature of the prospective relief being provided, and notwithstanding the vacatur of the regulation, Plaintiff's argument lacks merit.

⁴⁷ The Canadian Parties' reliance on *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), to support the court's consideration of the subject companies' reliance on Commerce's past conduct of CVD expedited reviews is misplaced. *See* Def.-Ints.' Opp'n Cmts. at 24 & nn.61–62. In that case, the U.S. Supreme Court held that the Government's rescission of the Deferred Action for Childhood Arrivals ("DACA") program was arbitrary and capricious because it failed to consider whether there were reliance interests and, if so, whether they were significant, and to weigh any such interests against competing policy interests. *See Homeland Sec.*, 140 S. Ct. at 1913–15. *Homeland Security* addresses the requirement that an agency engage in reasoned decision-making that is

Further, the court declines to order Commerce to conduct a changed circumstances review and adopt the rates calculated in the *Final Results of Expedited Review*. See Def.-Ints.’ Opp’n Cmts. at 32–33. It is for the agency to decide, in the first instance, whether a changed circumstances review is merited upon receipt of an appropriate request and consistent with the relevant statutory and regulatory criteria. Lastly, the Canadian Parties request the court to stay Commerce’s enforcement of its decision. Def.-Ints.’ Reply Cmts. at 12–13. Such requests are governed by USCIT Rule 62 and the Canadian Parties may file a motion for the court’s consideration with briefing from all Parties at the appropriate time in accordance therewith.

CONCLUSION

In accordance with the foregoing, Commerce’s Remand Results will be sustained. Additionally, the court will vacate 19 C.F.R. § 351.214(k) and the *Final Results of Expedited Review*, with implementation consistent with this opinion.

With respect to the pending Rule 56.2 Motions, consistent with the court’s disposition herein, the court will grant in part Plaintiff’s motion with respect to Commerce’s promulgation of 19 C.F.R. § 351.214(k) and deny Plaintiff’s remaining arguments. The court will further deny as moot the Canadian Parties’ respective Rule 56.2 Motions. Judgment will be entered accordingly.

Dated: August 18, 2021

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

reviewable by a court pursuant to the “arbitrary and capricious” standard set forth in 5 U.S.C. § 706(2)(A) and explains that a prior illegality finding was limited to one aspect of the program (benefits) and did not consider whether another aspect of the program (forbearance) may have been treated separately. See *id.* at 1905, 1910–15. The Court’s discussion of the importance of considering reliance interests must therefore be viewed in that context. *Homeland Security* does not address the circumstances under which an agency may apply prospectively a decision of this court to vacate an agency action.

Additionally, Commerce’s conduct of the CVD expedited review was not harmless error. See Def.-Ints.’ Opp’n Cmts. at 31–33. While the APA directs the court to take “due account . . . of the rule of prejudicial error, 5 U.S.C. § 706, an agency action will be “set aside” for “substantial procedural or substantive” errors. *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). The Canadian Parties’ offer no authority for the notion that a regulation issued (and a proceeding conducted) *ultra vires* is not a substantial substantive error.

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