

U.S. Customs and Border Protection



PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION AND ELIGIBILITY OF CERTAIN BED LINEN PRODUCTS FOR PREFERENTIAL TARIFF TREATMENT UNDER THE UNITED STATES-ISRAEL FREE TRADE AGREEMENT

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification and eligibility of certain bed linen products for preferential tariff treatment under the United States-Israel Free Trade Agreement.

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

DATE: Comments must be received on or before March 11, 2022.

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

inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0062.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification and eligibility of certain bed linen products for preferential tariff treatment under the United States-Israel Free Trade Agreement ("U.S.-Israel FTA"). Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N313390, dated August 21, 2020 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N313390, CBP classified a bed linen set containing a pillow sham, duvet cover, flat sheet, fitted sheet, and pillowcases in heading 6302, HTSUS, specifically in subheading 6302.21.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Not napped” and in subheading 6302.31.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped.” CBP has reviewed NY N313390 and has determined that it classified the wrong bed linen set composition and failed to address the eligibility of the bed linen products for preferential tariff treatment under the U.S.-Israel FTA. It is now CBP’s position that the bed linen set containing a flat sheet, fitted sheet, and pillowcase does not qualify as a set under the HTSUS and must be entered individually. Additionally, the bed linen set containing a flat sheet, fitted sheet, and pillow sham does qualify as a set under the HTSUS and may be entered under one subheading. Classification remains in 6302.21.90, HTSUS, or 6302.31.90, HTSUS. Furthermore, it is now CBP’s position that the flat sheet, fitted sheet, duvet cover, and the set containing sheets and pillow shams are not eligible for preferential tariff treatment under the U.S.-Israel FTA. The pillowcase and pillow sham, when entered individually, are eligible for preferential tariff treatment under the U.S.-Israel FTA.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N313390 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H315294, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H315294

OT:RR:CTF:FTM H315294 TJS

CATEGORY: Classification

TARIFF NOs.: 6302.21.90; 6302.31.90;

6304.92.00

Ms. SHIRLY STREZHEVSKY
GOLDFARB SELIGMAN & Co.
98 YIGAL ALON STREET
TEL AVIV, 6789141
ISRAEL

RE: Modification of NY N313390; Bed Linen; U.S.-Israel Free Trade Agreement

DEAR Ms. STREZHEVSKY:

This is in reference to your correspondence, dated October 20, 2020, requesting reconsideration of New York Ruling Letter (“NY”) N313390, dated August 21, 2020, concerning U.S. Customs and Border Protection’s (“CBP”) tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) and the country of origin marking of certain bed linen products imported from Israel. Upon review, we have determined that NY N313390 classified the incorrect bed linen set composition and failed to address whether the goods qualify for preferential tariff treatment under the United States-Israel Free Trade Agreement (“U.S.-Israel FTA”), as requested in your initial ruling request. We have determined NY N313390 to be correct with respect to the classification and the country of origin of the individual items. Thus, the pillowcase, fitted sheet, flat sheet, and duvet cover, when entered separately, remains classified in either subheading 6302.21.90 or 6302.31.90, HTSUS, and the pillow sham remains classified in subheading 6304.92.00, HTSUS. Furthermore, the country of origin of the flat sheet remains India and the country of origin of the pillowcase, fitted sheet, duvet cover, and pillow sham is Israel. Our decision takes into consideration supplemental submissions, dated November 16, 2020, and December 16, 2021. For the reasons set forth below, we hereby modify NY N313390.

FACTS:

The subject merchandise is bed linen consisting of pillowcases, fitted sheets, flat sheets, duvet covers, and pillow shams of 100% cotton woven (percale or satin weave) fabric. The fabric is not napped, and the finished items do not contain any embroidery, lace, braid, edging, trimming, piping or applique work. The items will be imported in sets or in individual packages. A set will include a fitted sheet, flat sheet, and either pillowcases or pillow shams, packaged together for retail sale. NY N313390 stated that the set would include the duvet cover, however, you clarify that the duvet cover will be packed separately.

NY N313390 described the manufacturing process as follows:

India:

- fabric is woven.
- fabric is bleached, dyed and/or printed.
- rolls of fabric are shipped to Israel.

Israel:

- fabrics are cut to size and shape of the various components. Specifically,
 - o duvet covers are cut to the needed size. (For purposes of this ruling we assume they will always be cut on all four sides.)
 - o pillowcases are made from one piece of fabric cut on all four sides.
 - o pillow shams are made from three pieces of fabric cut on all four sides.
 - o fitted sheets are cut to needed size on all four sides.
 - o flat sheets are cut to needed size on all four sides.
- components are sewn/hemmed/elasticized, creating duvet covers, pillowcases, pillow shams, and sheets. Specifically,
 - o duvet covers are [folded over and] sewn [together] on three sides [leaving a partial opening on one side that is hemmed 5 centimeters]. Inner ties are added on all four corners to secure the comforter and eight buttons and buttonholes are added [at the opening].
 - o pillowcases are sewn to form a standard pillowcase with inner flap.
 - o pillow shams are sewn to form a standard sham with an overlapping opening on the back.
 - o fitted sheets are sewn around the edges incorporating an elastic string.
 - o flat sheets are sewn on all four sides with a 10 centimeter top hem and a 1.5 centimeter hem on the other edges.
- sheets and pillowcase are packaged together or separately, depending on the customer's order, and shipped directly to the United States.

NY N313390 classified the pillowcases, fitted sheets, flat sheets, and duvet covers under heading 6302, HTSUS, when entered separately. Specifically, when printed, these items are classified in subheading 6302.21.90, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Not napped." When not printed, these items are classified in subheading 6302.31.90, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped." NY N313390 classified the pillow shams in subheading 6304.92.00, HTSUS, which provides for "Other furnishing articles, excluding those of heading 9404: Other: Not knitted or crocheted, of cotton." Furthermore, CBP applied the rules of origin set forth in section 102.22, CBP Regulations (19 C.F.R. § 102.22), and determined that the pillowcase, fitted sheet, duvet cover, and pillow sham were substantially transformed in Israel, thereby becoming products of Israel. However, the Israeli processing did not substantially transform the flat sheet and consequently the country of origin of the flat sheet was India, where the fabric was woven.

In your November 16, 2020, submission you provided a costs breakdown of the manufacturing processes in Israel as follows:

	Processing cost in Israel	FOB price of the product	Israeli added content without the fabric cost (in percentage)
Duvet	\$7.845	\$26.68	29%
Pillowcase	\$2.054	\$5.47	38%
Pillow sham	\$2.054	\$5.47	38%
Fitted sheet	\$4.087	\$13.20	31%
Flat sheet	\$4.008	\$12.33	33%

ISSUES:

- (1) What is the tariff classification under the HTSUS of the bed linen when imported as a set containing a fitted sheet, a flat sheet, and either pillowcases or pillow shams?
- (2) Whether the bed linen imported into the United States from Israel is eligible for preferential tariff treatment under the U.S.-Israel FTA.

LAW AND ANALYSIS:

(1) Tariff Classification

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI 2 through 6 may then be applied in order. Pursuant to GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level.

The relevant 2021 HTSUS provisions are as follows:

6302:	Bed linen, table linen, toilet linen and kitchen linen:
	Other bed linen, printed:
6302.21:	Of cotton:
	Other:
6302.21.90:	Not napped...
	Other bed linen:
6302.31:	Of cotton:
	Other:
6302.31.90:	Not napped...
6304:	Other furnishing articles, excluding those of heading 9404
	Other:
6304.92.00:	Not knitted or crocheted, of cotton...

GRI 3(a) and (b) provide as follows:

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

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * * * *

In understanding the language of the HTSUS, the Explanatory Notes (“EN”) of the Harmonized Commodity Description and Coding System may be utilized. The EN, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

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

- (VI) This second method relates only to:
 - (i) Mixtures.
 - (ii) Composite goods consisting of different materials.
 - (iii) Composite goods consisting of different components.
 - (iv) Goods put up in sets for retail sales.
It applies only if Rule 3(a) fails.
- (VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
- (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.
[. . .]
- (X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:
 - (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

* * * * *

In the instant case, the linen set consists of a fitted sheet, a flat sheet, and either pillowcases or pillow shams. The set containing sheets and pillow shams meets the requirements of goods put up for retail sale. The set consists of at least two different articles classifiable in different headings because the set contains sheets of heading 6302 and pillow shams of heading 6304, HTSUS. The sheets and pillow shams are packaged together to carry out the specific activity of furnishing a bed and they are packaged for sale directly to users without repackaging. Thus, the set of sheets and pillow shams is a set per GRI 3(b). We find that the sheets impart the essential character to the set. This is consistent with previous CBP rulings wherein CBP classified a set of sheets and shams under the heading for sheets. *See, e.g.*, Headquarters Rulings Letter (“HQ”) 955473 (June 23, 1994); NY F86161 (Apr. 25, 2000); and NY F84299 (Mar. 28, 2000). Therefore, the entire set is classified under heading 6302, HTSUS, and specifically in subheading 6302.21.90, HTSUS, when printed and 6302.31.90, HTSUS, when not printed.

The set containing sheets and pillowcases does not qualify as a good put up for retail sale because it does not meet the first requirement. Since the sheets and pillowcases are all classified in heading 6302, HTSUS, the set does not consist of at least two different articles classifiable in different headings. Nor do we have sets at the subheading level because the sheets and pillowcases are altogether classified in either subheading 6302.21.90 or 6302.31.90, HTSUS. Therefore, the pillowcases and sheets are not considered a “set” for classification purposes and will be classified separately in subheading 6302.21.90, HTSUS, when printed and 6302.31.90, HTSUS, when not printed.

(2) U.S.-Israel FTA

The U.S.-Israel FTA is implemented in the HTSUS in General Note (“GN”) 8. Per GN 8(b), HTSUS, goods imported into the United States are eligible for duty-free treatment under the U.S.-Israel FTA if:

- (i) each article is the growth, product or manufacture of Israel or is a new or different article of commerce that has been grown, produced or manufactured in Israel;
- (ii) each article is imported directly from Israel (or directly from the West Bank, the Gaza Strip or a qualifying industrial zone as defined in general note 3(a)(v)(G) to the tariff schedule) into the customs territory of the United States; and
- (iii) the sum of—
 - (A) the cost or value of materials produced in Israel, and including the cost or value of materials produced in the West Bank, the Gaza Strip or a qualifying industrial zone pursuant to general note 3(a)(v) to the tariff schedule, plus
 - (B) the direct costs of processing operations performed in Israel, and including the direct costs of processing operations performed in the West Bank, the Gaza Strip or a qualifying

industrial zone pursuant to general note 3(a)(v) to the tariff schedule, is not less than 35 percent of the appraised value of each article at the time it is entered.

GN 8(c), HTSUS, provides in pertinent part as follows:

No goods may be considered to meet the requirements of subdivision (b)(i) of this note by virtue of having merely undergone—

- (i) simple combining or packaging operations;

* * * * *

Under the U.S.-Israel FTA, eligible articles which are the growth, product, or manufacture of Israel and are imported directly into the United States from Israel qualify for duty-free treatment provided the sum of 1) the cost or value of materials produced in Israel, plus 2) the direct costs of processing operations performed in Israel is not less than 35% of the appraised value of each article at the time it is entered. We initially note that, per your ruling request, the articles are imported directly from Israel to the United States without passing through the territory of any intermediate country and therefore meet GN 8(b)(ii), HTSUS.

“Product of” Requirement

Section 102.22, CBP Regulations (19 C.F.R. § 102.22), applies for the purposes of determining whether a textile or apparel product is considered a product of Israel. In NY N313390, CBP applied section 102.22 and determined that the duvet cover, fitted sheet, pillowcase, and pillow sham were products of Israel. However, CBP determined that the flat sheet was a product of India. Because the flat sheet is not a product of Israel, it does not meet GN 8(b)(i), HTSUS, and is therefore ineligible for preferential tariff treatment under the U.S.-Israel FTA.

GN 8(c)(i) provides that a good will not be considered to be a product of Israel by virtue of merely having undergone simple combining or packaging operations. *See also* 19 C.F.R. § 102.22(c)(2). As discussed above, the set consisting of sheets and a pillow sham is classified as a set under a single subheading pursuant to GRI 3(b). Since this set includes a flat sheet, which is not a product of Israel and is simply packaged together with the fitted sheet and pillow sham, the set as a whole is not considered a product of Israel. Therefore, the set is ineligible to receive preferential tariff treatment under the U.S.-Israel FTA. *See* Treasury Decision 91–7, 25 Cust. B. & Dec. No. 2 (1991). *See also* HQ 963453 (Feb. 26, 2001) (determining that a set consisting of a towel, brush, and retriever was ineligible for preferential tariff treatment under the U.S.-Israel FTA as one item in the set was not a product of Israel).

35% Value-Content Requirement

We must next determine whether the duvet cover, fitted sheet, pillowcase, and pillow sham meet the 35% value-content requirement. GN 8(b)(iii), HTSUS, requires that the cost or value of materials produced in Israel plus the direct costs of processing equal not less than 35% of the appraised value of the good at the time it is entered. Based on the costs breakdown you provided, only the pillowcase and pillow sham meet the 35% value-content requirement without taking into consideration the imported fabric. Therefore, the pillowcase and pillow sham are eligible for preferential tariff treatment under the U.S.-Israel FTA.

The remaining question is whether the duvet cover and fitted sheet meet the 35% value-content requirement. If an article is produced from materials which are imported into Israel, as in this case, the cost or value of those imported materials may be counted toward the 35% value-content requirement only if they undergo a double substantial transformation in Israel. Here, the fabric from India may be considered as part of the value of material produced in Israel for purposes of the 35% value-content requirement, provided the foreign fabric is substantially transformed in Israel and this different product is then transformed into yet another new and different product which is exported directly to the United States. You believe that the processing in Israel constitutes a double substantial transformation and that the imported fabric and the direct costs of processing operations performed in Israel meet the 35% value-content requirement for duty-free treatment under the U.S.-Israel FTA. As support, you cite HQ 559810, dated August 16, 1996, NY C87902, dated June 16, 1998, NY N009941, dated May 8, 2007, and NY 805935, dated February 13, 1995.

In HQ 559810, CBP considered sweatshirts assembled in Israel from a variety of components. The sweatshirts were produced from fabric, a precut embroidered front panel, and rib trim from China. In Israel, the fabric was cut to shape and the rib trim was cut to length and/or width. With regard to the fabric used for the sleeves and back panel of the sweatshirts, CBP determined that the cutting to shape of the imported Chinese fabric substantially transformed the foreign fabric into a new and different intermediate article, ready to be put into the stream of commerce, where they could be bought and sold. While the assembly operation of sewing the sleeves and back panel of the sweatshirt into a finished sweatshirt was not complex enough to constitute a substantial transformation by itself, CBP ascertained that the overall processing operations (i.e., cutting and sewing) performed in Israel were substantial. For this reason, and in view of the production in Israel of distinct articles of commerce in the form of a sweatshirt, CBP held that the double substantial transformation requirement was satisfied with respect to the sleeves and the back panel. However, CBP held that the precut front panel and the rib trim underwent only one substantial transformation.

NY C87902 involved a welder's top and pants assembled in Israel from fabric exported from third country. In Israel, the fabric was cut to shape into panels, pockets, collars, belt loops, and waistbands and then the components were assembled by sewing and hemming. CBP held that the cutting to shape of the imported fabric substantially transformed the foreign fabric into new and different articles of commerce, and that the cut-to-shape components were intermediate articles of commerce ready to enter the stream of commerce where they could be bought and sold. Although the assembly operation was not complex enough to constitute a substantial transformation by itself, CBP ascertained that the overall processing operations (i.e., cutting and sewing) performed in Israel were substantial and therefore the fabric used for these items could be considered towards satisfying the 35% value-content requirement. Furthermore, CBP determined that the processing in Israel was not the type of minimal "pass-through" operation that should be disqualified from receiving duty-free treatment under the U.S.-Israel FTA.

NY N009941 involved a woman's dress produced of fabric from Hong Kong and Korea and cut and assembled in Sri Lanka. In that ruling, similar to NY C87902, CBP determined that the assembly operation of sewing the component parts into a finished dress was not complex enough to constitute a

substantial transformation by itself. Nevertheless, the overall processing operations (i.e., cutting and sewing) performed in Sri Lanka satisfied the double substantial transformation requirement for purposes of duty-free treatment under the Generalized System of Preferences.

NY 805935 involved a comforter cover and a pillow. In that ruling, the fabric was woven, printed or dyed, and finished in Indonesia and then shipped to Israel where it was cut and sewn to form the products. CBP held that both the comforter cover and the pillow sham underwent a substantial transformation in Israel under 19 C.F.R. § 12.130 (the predecessor to section 102.22). We note that this ruling addresses country of origin and not double substantial transformation for the 35% value-content requirement under the U.S.-Israel FTA.

In the instant case, we find that the Israeli cutting and sewing operations—which involve cutting fabric to length and width in straight lines, attaching elastic, ties, and buttons, and hemming—is significantly simpler than the cutting and sewing operations in HQ 559810, NY C87902, and NY N009941, which involved cutting specific shapes and sewing the components into garments. As indicated by these cases, CBP has consistently held that cutting specific pattern pieces for garments amounts to a substantial manufacturing operation. Conversely, CBP has held that cutting simple geometric shapes, which merely involves cutting straight lines, does not amount to a substantial manufacturing operation. For example, HQ 557672, dated April 29, 1994, involved fabric that was produced in Pakistan, cut to length and width in Puerto Rico, and then shipped to the Dominican Republic where the components were sewn and hemmed into sheets and pillowcases. CBP determined that cutting the fabric involved straight line cuts and did not rise to the complexity of cutting shaped pattern pieces for wearing apparel. Moreover, CBP held that even before the cutting operation, the fabric was readily identifiable as being intended for sheets and pillowcases. Thus, the Puerto Rican cutting operation did not substantially transform the imported fabric into a product of the United States. Similarly, HQ 957314, dated March 27, 1995, addressed a scenario wherein fabric for a fitted sheet was woven and precut in Indonesia and then transported to Malaysia or Singapore where it was elasticized and sewn into a finished fitted sheet. CBP determined that attaching the elastic and the subsequent finishing operations were simple and did not substantially transform the precut fabric. Therefore, the country of origin of the fitted sheet was Indonesia.

We find that the cutting and sewing operations in Israel do not result in a double substantial transformation because neither the cutting nor the sewing, by itself, constitutes a single substantial transformation. We find that the Israeli processing does not transform the imported fabric into distinct intermediate articles ready to enter commerce, but altogether transforms the fabric into duvet covers and fitted sheets. Accordingly, the full cost or value of the imported fabric is not included towards the 35% value-content requirement for purposes of qualifying for preferential duty treatment under the U.S.-Israel FTA. Based on the costs breakdown you provided, the duvet cover and fitted sheet do not meet the 35% value-content requirement. Therefore, the duvet cover and fitted sheet are not eligible for preferential tariff treatment under the U.S.-Israel FTA.

HOLDING:

By application of GRI 1 and 3, the set containing flat sheets, fitted sheets, and pillowcases will be classified on an individual basis. When printed, each component is classified in subheading 6302.21.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Not napped.” When not printed, these items are classified in subheading 6302.31.90, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped.” The set containing flat sheets, fitted sheets, and pillow shams will be classified as a set in subheading 6302.21.90, HTSUS, when printed, and in subheading 6302.31.90, HTSUS, when not printed. The column one, general rate of duty is 6.7% *ad valorem*.

Based on the information provided, the flat sheet, fitted sheet, duvet cover, and the set containing sheets and pillow shams are not eligible for preferential tariff treatment under the U.S.-Israel FTA. The pillowcase and pillow sham, when entered individually, are eligible for preferential tariff treatment under the U.S.-Israel FTA.

EFFECT ON OTHER RULINGS:

NY N313390, dated August 21, 2020, is hereby MODIFIED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division


19 CFR CHAPTER I**NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS
APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES
SERVICE BETWEEN THE UNITED STATES AND CANADA**

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

ACTION: Notification of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (“Secretary”), after consulting with inter-agency partners, to temporarily restrict travel by certain noncitizens into the United States at land ports of entry, including ferry terminals (“land POEs”) along the United States-Canada border. These restrictions only apply to noncitizens who are neither U.S. nationals nor lawful permanent residents (“noncitizen non-LPRs”). Under the temporary restrictions, DHS will allow processing for entry into the United States of only those noncitizen non-LPRs who are fully vac-

cinated against COVID–19 and can provide proof of being fully vaccinated against COVID–19 upon request. The restrictions provide for limited exceptions, largely consistent with the limited exceptions currently available with respect to COVID–19 vaccination in the international air travel context. Unlike past actions of this type, this Notification does not contain an exception for essential travel.

DATES: These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on January 22, 2022, and will remain in effect until 11:59 p.m. Eastern Daylight Time (EDT) on April 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Petra Horne, Office of Field Operations, U.S. Customs and Border Protection (CBP), 202–325–1517.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security (“DHS”) published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPRs into the United States at land POEs along the United States-Canada border to “essential travel,” as further defined in that document.¹ The March 24, 2020 Notification described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak, continued transmission, and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” Under the March 24, 2020 Notification, DHS continued to allow certain categories of travel, described as “essential travel.” Essential travel included travel to attend educational institutions, travel to work in the United States, travel for emergency response and public health purposes, and travel for lawful cross-border trade. Essential travel also included travel by U.S. citizens and lawful permanent residents returning to the United States.

From March 2020 through October 2021, in consultation with interagency partners, DHS reevaluated and ultimately extended the restrictions on non-essential travel each month. The most recent action of this type, published on October 21, 2021, continued the

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPR persons into the United States at land POEs along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

restrictions until 11:59 p.m. EST on January 21, 2022.² In that document, DHS acknowledged that notwithstanding the continuing threat to human life or national interests posed by COVID-19—as well as recent increases in case levels, hospitalizations, and deaths due to the Delta variant—COVID-19 vaccines are effective against Delta and other known COVID-19 variants. These vaccines protect people from becoming infected with and severely ill from COVID-19 and significantly reduce the likelihood of hospitalization and death. DHS also acknowledged the White House COVID-19 Response Coordinator’s September 2021 announcement regarding the United States’ plans to revise standards and procedures for incoming international air travel to enable the air travel of travelers fully vaccinated against COVID-19 beginning in early November 2021.³ DHS further stated that the Secretary intended to do the same with respect to certain travelers seeking to enter the United States from Mexico and Canada at land POEs to align the treatment of different types of travel and allow those who are fully vaccinated against COVID-19 to travel to the United States for non-essential reasons.⁴

On October 29, 2021, following additional announcements regarding changes to the international air travel policy by the President of the United States and the Centers for Disease Control and Prevention (“CDC”),⁵ DHS announced that beginning November 8, 2021, non-essential travel of noncitizen non-LPRs would be permitted through land POEs, provided that the traveler is fully vaccinated against COVID-19 and can provide proof of full COVID-19 vaccina-

² See 86 FR 58218 (Oct. 21, 2021) (extending restrictions for the United States-Canada border); 86 FR 58216 (Oct. 21, 2021) (extending restrictions for the United States-Mexico border).

³ See Press Briefing by Press Secretary Jen Psaki (Sept. 20, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/20/press-briefing-by-press-secretary-jen-psaki-september-20-2021/> (“As was announced in a call earlier today . . . [w]e—starting in . . . early November [will] be putting in place strict protocols to prevent the spread of COVID-19 from passengers flying internationally into the United States by requiring that adult foreign nationals traveling to the United States be fully vaccinated.”).

⁴ See 86 FR 58218; 86 FR 58216.

⁵ Changes to requirements for travel by air were implemented by, *inter alia*, Presidential Proclamation 10294 of October 25, 2021, 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation), and a related CDC order, 86 FR 61224 (Nov. 5, 2021) (CDC Order). See also CDC, *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, <https://www.cdc.gov/quarantine/pdf/Global-Testing-Order-10-25-21-p.pdf> (Oct. 25, 2021); *Requirement for Airlines and Operators to Collect Contact Information for All Passengers Arriving into the United States*, <https://www.cdc.gov/quarantine/pdf/CDC-Global-Contact-Tracing-Order-10-25-2021-p.pdf> (Oct. 25, 2021). CDC later amended its testing order following developments related to the Omicron variant. See CDC, *Requirement for Proof of Negative COVID-19 Test Result or Recovery from COVID-19 for All Airline Passengers Arriving into the United States*, https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12-02-2021-p.pdf (Dec. 2, 2021).

tion status.⁶ DHS also announced that beginning in January 2022, inbound noncitizen non-LPRs traveling to the United States via land POEs—whether for essential or non-essential reasons—would be required to be fully vaccinated against COVID–19 and provide proof of full COVID–19 vaccination status.⁷

DHS has continued to monitor and respond to the COVID–19 pandemic. On December 14, 2021, at DHS’s request, CDC provided a memorandum to DHS describing the current status of the COVID–19 public health emergency. The CDC memorandum warned of “case counts and deaths due to COVID–19 continuing to increase around the globe and the emergence of new and concerning variants,” and emphasized that “[v]accination is the single most important measure for reducing risk for SARS–CoV–2 transmission and avoiding severe illness, hospitalization, and death.”⁸ Given these considerations, CDC recommended that proof of COVID–19 vaccination requirements be expanded to cover both essential and non-essential noncitizen non-LPR travelers.

According to CDC, studies indicate that individuals vaccinated against COVID–19 are five times less likely to be infected with COVID–19 and more than eight times less likely to require hospitalization than those who are unvaccinated. Further, unvaccinated people are 14 times more likely to die from COVID–19 than those who are vaccinated. Such increases in hospitalization and death rates strain critical healthcare resources, which in some parts of the United States may be in short supply.⁹ As CDC wrote, “proof of vaccination of travelers helps protect the health and safety of both the personnel at

⁶ See, e.g., DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (updated Nov. 23, 2021). See also 86 FR 72842 (Dec. 23, 2021) (describing the announcement with respect to Canada); 86 FR 72843 (Dec. 23, 2021) (describing the announcement with respect to Mexico).

⁷ See DHS, DHS Releases Details for Fully Vaccinated, Non-Citizen Travelers to Enter the U.S. at Land and Ferry Border Crossings, <https://www.dhs.gov/news/2021/10/29/dhs-releases-details-fully-vaccinated-non-citizen-travelers-enter-us-land-and-ferry> (Oct. 29, 2021); DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (updated Nov. 23, 2021); see also DHS, Frequently Asked Questions: Guidance for Travelers to Enter the U.S., <https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us> (updated Nov. 23, 2021).

⁸ See Memorandum from CDC to CBP re Public Health Recommendation for Proof of COVID–19 Vaccination at U.S. Land Borders (Dec. 14, 2021).

⁹ At the time of the memorandum, CDC noted that the Delta variant was still the predominant variant in the United States, but that ongoing research indicated that the Omicron variant may spread more easily than the original SARS–CoV–2 virus. CDC noted that further studies are underway to assess concerns about whether the Omicron variant may have increased transmissibility, confer resistance to therapeutics, or partially escape infection- or vaccine-induced immunity.

the border and other travelers, as well as U.S. destination communities. Border security and transportation security work is part of the nation's critical infrastructure and presents unique challenges for ensuring the health and safety of personnel and travelers.”

CDC's memorandum also acknowledged that because of operational considerations, requirements at land POEs may differ from those implemented for air travel. CDC recognized the operational challenges, as described by DHS, with imposing a testing requirement at land POEs, and noted key differences between land travel and air travel with respect to the volume of travel, predictability, and infrastructure involved.¹⁰ In the absence of required pre-entry COVID-19 testing, CDC described a proof of COVID-19 vaccination requirement as “essential as a matter of public health.”¹¹

In a January 14, 2022 update, also at the request of DHS, CDC confirmed its prior recommendation. Specifically, CDC noted the “rapid increase” of COVID-19 cases across the United States that have contributed to high levels of community transmission and increased rates of new hospitalizations and deaths. According to CDC, between January 5 and January 11, 2022, the seven-day average for new hospital admissions of patients with confirmed COVID-19 increased by 24 percent over the prior week, and the seven-day average for new COVID-19-related deaths rose to 2,991, an increase of 33.7 percent compared to the prior week. CDC emphasized that this increase has exacerbated the strain on the United States' healthcare system and again urged that “[v]accination of the broadest number of people best protects all individuals and preserves the United States' critical infrastructure, including healthcare systems and essential workforce.” CDC thus urged “the most comprehensive requirements possible for proof of vaccination” and specifically recommended against exceptions for specific worker categories as a public health matter.¹²

DHS has conferred with interagency partners, taken into account all relevant factors, including economic considerations and CDC's public health input, and concludes that a broad COVID-19 vaccination requirement at land POEs is necessary and appropriate. In

¹⁰ CBP assesses that a testing option is not operationally feasible given the significant number of land border crossers that go back on forth on a daily, or near-daily basis, for work or school. A negative COVID-19 test requirement would mean that such individuals would have to get tested just about every day. This is not currently feasible, given the cost and supply constraints, particularly in smaller rural locations. Further, CBP reports additional operational challenges associated with verifying test results, given the wide variation in documentation.

¹¹ See Memorandum from CDC to CBP (Dec. 14, 2021).

¹² Memorandum from CDC to CBP re Public Health Recommendation for Proof of COVID-19 Vaccination at U.S. Land Borders—Addendum (Jan. 18, 2022).

particular, DHS notes that, according to the information provided by CDC, those who are not fully vaccinated against COVID-19 have proven to be more likely to be infected by COVID-19, to spread COVID-19 to others, to suffer severe symptoms, and to require the use of scarce hospital resources. DHS acknowledges that in past actions of this type, it has continued to allow essential travel by certain noncitizen non-LPRs who are not fully vaccinated against COVID-19. The assessment has, however, changed in light of the following two factors: (1) The rapid increase of COVID-19 cases; and (2) the increasing availability of COVID-19 vaccines.

With respect to the increasing availability of COVID-19 vaccines, at this point, COVID-19 vaccines—which according to CDC are “the single most important measure” for responding to COVID-19¹³—are widely available and have been increasingly available for months. In Canada, 77.1 percent of the entire population is now fully vaccinated against COVID-19, while 87.8 percent of individuals 12 years and older are fully vaccinated against COVID-19.¹⁴ In Mexico, 55.9 percent of the population is fully vaccinated against COVID-19,¹⁵ while as of October 2021, 72 percent of those living in border regions were fully vaccinated against COVID-19.¹⁶ In October 2021, DHS announced its intention to expand the temporary travel restrictions applicable to land POEs by applying the COVID-19 vaccination requirement to those traveling for essential reasons, thus recognizing the importance of fair notice and allowing ample time for noncitizen non-LPR essential travelers to get fully vaccinated against COVID-19. For these reasons, DHS believes that it is now necessary and appropriate to align COVID-19 vaccine restrictions at land POEs to current U.S. government policy governing incoming international air travel.¹⁷

Moreover, COVID-19 cases continue to increase rapidly across the United States, as described below. This surge is currently driven by the Omicron variant, which CDC’s Nowcast model projects may account for approximately 98.3 percent of cases.¹⁸ On January 5, 2022,

¹³ See Memorandum from CDC to CBP (Dec. 14, 2021).

¹⁴ Canadian statistics may be found at: <https://health-infobase.canada.ca/covid-19/vaccination-coverage/> (Jan. 17, 2022).

¹⁵ Mexican statistics may be found at: <https://ourworldindata.org/covid-vaccinations?country=MEX> (Jan. 17, 2022).

¹⁶ Government of Mexico briefing for the NSC-led Mexico-U.S. International Travel Working Group, October 2021.

¹⁷ For a discussion of the current U.S. government policy regarding international air travel, see, *supra*, n. 45.

¹⁸ Variant Proportions, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (week ending Jan. 8, 2022).

705,264 new COVID–19 cases were reported, more than double the peak in January 2021. Communities across the United States are now experiencing high levels of community transmission, and hospitalizations and deaths are also on the rise.¹⁹ This surge underscores the need for the policy that DHS previously announced, and is an important reason why DHS, in consultation with interagency partners, is declining to implement broad exceptions for certain categories of travelers.

In reaching this conclusion, DHS weighed the concerns of industry and, in particular, firms employing or relying on long-haul truck drivers and persons engaged in freight rail operations.²⁰ DHS carefully considered alternative approaches, including exceptions for these categories of workers. As a public health matter, CDC strongly discouraged additional exceptions, particularly in light of the current increase in COVID–19 cases and related resulting strains on the healthcare system. Even if such workers do not engage in extended interaction with others, they still engage in activities that involve contact with others, thereby increasing the risk of contributing to community spread of COVID–19. Such workers also may enter the United States after contracting COVID–19, become seriously ill after arrival, and require scarce healthcare resources as a result. Given CDC’s recommendation, and after extensive consultation with interagency partners, DHS has determined that such activities do not warrant an exception from these restrictions because these persons still present a public health risk. A COVID–19 vaccination requirement at land POEs helps protect the health and safety of the personnel at the border, other travelers, and the U.S. communities where these persons may be traveling and spending time among the public. A COVID–19 vaccination requirement for these individuals also reduces burdens on local healthcare resources in U.S. communities. This approach aligns the U.S. COVID–19 policies applicable to land POEs with air travel restrictions that require noncitizen non-LPRs traveling by air to the United States for both essential and non-essential reasons to be fully vaccinated against COVID–19 and provide related proof of vaccination, with very few exceptions. This approach also aligns with new travel restrictions imposed by Canada

¹⁹ COVID Data Tracker Weekly Review: Interpretive Summary for the Centers for Disease Control and Prevention, *COVID Data Tracker Weekly Review: Interpretive Summary for January 7, 2022*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (Jan. 7, 2022).

²⁰ DHS acknowledges that past actions of this type exempted freight rail, but DHS notes that the considerations applicable to other forms of travel previously designated as essential apply equally in the freight rail context.

on January 15, 2022, which similarly impose a COVID–19 vaccination requirement on cross-border travel, with no exception for truck drivers or freight rail operators.²¹

DHS also acknowledges concerns among some industry stakeholders that this policy, however necessary to protect the American public, could disrupt cross-border economic activity. In consultation with interagency partners, DHS has carefully considered these concerns. DHS has conferred with interagency partners and determined that these concerns are outweighed by the competing public health concerns and the wide availability of COVID–19 vaccines, coupled with the growing body of evidence that employment-related COVID–19 vaccine mandates result in high levels of COVID–19 vaccine acceptance among employees.²² A recent White House analysis highlights the ways in which COVID–19 vaccine requirements that cover whole industries or sectors can be particularly effective in persuading employees to become fully vaccinated against COVID–19.²³ The incentive effects of industry-wide requirements, as well as the introduction of a range of other policies intended to incentivize vaccination against

²¹ Public Health Agency of Canada website *Requirements for Truckers entering Canada in effect as of January 15, 2022*, <https://www.Canada.ca/en/public-health/news/2022/01/requirements-for-truckers-entering-canada-in-effect-as-of-january-15-2022.html>; Public Health Agency of Canada website: *Minimizing the Risk of Exposure to COVID–19 in Canada Order (Prohibition of Entry into Canada from the United States)*, Section 10 of order is the provision that went into place on 15 January 2022, <https://orders-in-council.canada.ca/attachment.php?attach=41322&lang=en>.

²² See, e.g., David Koenig, Associated Press, American, Alaska, JetBlue join growing list of airlines requiring employees to be vaccinated against COVID–19, <https://www.usatoday.com/story/travel/airline-news/2021/10/02/american-joins-list-airlines-requiring-employee-vaccinations/5968626001/> (Oct. 2, 2021) (“United Airlines took an early and tough stance to require vaccination. United said Thursday that 320 of its 67,000 U.S. employees faced termination for not getting vaccinated or seeking a medical or religious exemption by a deadline earlier in the week.”); Novant Health, Novant Health update on mandatory COVID–19 vaccination program for employees, <https://www.novanthealth.org/home/about-us/newsroom/press-releases/newsid33987/2576/novant-health-update-on-mandatory-covid-19-vaccination-program-for-employees.aspx> (Sept. 21, 2021) (“Today, 98.6% of more than 35,000 team members are compliant with Novant Health’s mandatory COVID–19 vaccination program.”); Houston Methodist Requires COVID–19 Vaccine for Credentialed Doctors, <https://www.houstonmethodist.org/leading-medicine-blog/articles/2021/jun/houston-methodist-requires-covid-19-vaccine-for-credentialed-doctors/> (June 8, 2021) (“As of June 1, more than 99% of the system’s 26,000 employees and physicians have received the vaccine” following issuance of a vaccine mandate in April 2021); Alison Kosik, CNN Business, 96% of Tyson’s Active Workers are Vaccinated, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/26/business/tyson-covid-vaccine/index.html> (“Tyson’s President and CEO Donnie King said in a blog post ‘we couldn’t be happier to say that, as of today, over 96% of our active team members are vaccinated—or nearly 60,000 more than when we made the announcement on August 3.’”). See also generally Dave Muoio, Fierce Healthcare, How many employees have hospitals lost to vaccine mandates? Here are the numbers so far, <https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far> (last updated Jan. 5, 2022) (collecting examples).

²³ See White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID–19, and Strengthen the Economy (Oct. 7, 2021).

COVID–19, reduce the likelihood of a significant disruption in cross-border economic activity, while protecting public health.²⁴

DHS acknowledges that some persons engaged in essential travel, in particular long-haul truck drivers and persons engaged in freight rail operations, do not engage in work-related activities that involve extended exposure to others in congregate settings. However, there are also important differences between (1) commercial truck, rail, and ferry operators; and (2) air crews and sea crew members traveling pursuant to a C–1 or D nonimmigrant visa. In the international air travel context, under the Presidential Proclamation 10294 of October 25, 2021²⁵ (“the Presidential Proclamation”), as implemented by CDC’s Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic²⁶ and Technical Instructions²⁷ (“the CDC Order”), commercial air crews are excepted from COVID–19 vaccination requirements only if they follow industry standard protocols for the prevention of COVID–19 as set forth in relevant Safety Alerts for Operators (“SAFO”) issued by the Federal Aviation Administration.²⁸ SAFO 20009 includes a range of measures for air crew to protect their health and the health of others. Sea crew members traveling pursuant to a C–1 or D nonimmigrant visa are similarly excepted from international air travel COVID–19 vaccine requirements only if they adhere to all industry standard protocols for the prevention of COVID–19, as set forth in relevant CDC guidance for crew member health.²⁹ Importantly, unvaccinated noncitizen mariners must take a predeparture COVID–19 test within one day of travel and show a

²⁴ On October 30, 2021, the Government of Canada imposed a separate domestic mandate on federally regulated railways, and their rail crew and track employees, along with air and marine operators. Each organization is required to have a process for employee attestation of their vaccination status; provide a description of consequences for employees who do not comply or who falsify information; and meet standards consistent with the approach taken by the Government of Canada for the Core Public Administration. See Transport Canada, *Mandatory COVID–19 vaccination requirements for federally regulated transportation employees and travellers*, <https://www.canada.ca/en/transport-canada/news/2021/10/mandatory-covid-19-vaccination-requirements-for-federally-regulated-transportation-employees-and-travellers.html> (updated Oct. 30, 2021).

²⁵ 86 FR 59603 (Oct. 28, 2021).

²⁶ 86 FR 61224 (Nov. 5, 2021).

²⁷ CDC, *Technical Instructions for Implementing Presidential Proclamation Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic and CDC’s Order*, <https://www.cdc.gov/quarantine/order-safe-travel/technical-instructions.html> (last reviewed Nov. 30, 2021).

²⁸ 86 FR 61224 (Nov. 5, 2021) (citing FAA, SAFO 20009, COVID–19: Updated Interim Occupational Health and Safety Guidance for Air Carriers and Crews, https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safo/media/2020/SAFO20009.pdf (last updated May 25, 2021)).

²⁹ Information on maritime COVID–19 guidance may be found at: <https://www.cdc.gov/quarantine/index.html>.

negative result prior to boarding a plane, attest that they will self-quarantine upon arrival in the United States, and have access to shipboard quarantine options as needed.³⁰ Currently, commercial truck drivers and freight rail and ferry operators are not subject to similar industry-wide requirements. They are therefore not amenable to parallel treatment at this time.

DHS, in consultation with its interagency partners, also has considered the operational effect of these requirements. While these changes potentially bring risk of increased wait times at land POEs in the passenger and commercial environments and delays in cargo shipments if vaccinated truck drivers and persons engaged in freight rail operations are unavailable, DHS projects minimal, short-term operational impacts as travelers become familiar with the new requirements. The enforcement of these requirements will mirror the enforcement practices implemented for non-essential travel restrictions on November 8, 2021 which yielded minimal operational disruptions. This assessment is based in part on observations from the implementation of the November 8, 2021 Title 19 restrictions and on the successful implementation of similar requirements by the Canadian government on January 15, 2022.

Notice of Action

Following consultation with CDC and other interagency partners, and after having considered and weighed the relevant factors, I have determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Canada, including the associated burden on already stressed health-care resources, poses an ongoing “specific threat to human life or national interests.” Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),³¹ I have determined, in consultation with interagency partners, that land POEs along the

³⁰ See CDC, *Requirement for Proof of COVID-19 Vaccination for Air Passengers*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/proof-of-vaccination.html> (last updated Dec. 21, 2021); see also, e.g., CDC, *Technical Instructions for CDC’s COVID-19 Program for Cruise Ships Operating in U.S. Waters*, <https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html> (updated Jan. 14, 2022) and *Interim Guidance for Ships on Managing Suspected or Confirmed Cases of Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/quarantine/maritime/recommendations-for-ships.html> (Updated Nov. 5, 2021). As noted above, DHS considered but rejected a testing requirement due to operational considerations. DHS notes that sea crew members are not exempted under this Notification.

³¹ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland

United States-Canada border will continue to suspend normal operations and will allow processing for entry into the United States of only those noncitizen non-LPRs who are “fully vaccinated against COVID–19” and can provide “proof of being fully vaccinated against COVID–19” upon request, as those terms are defined under the Presidential Proclamation and CDC Order. This action does not apply to U.S. citizens, U.S. nationals, lawful permanent residents of the United States, or American Indians who have a right by statute to pass the borders of, or enter into, the United States. In addition, I hereby authorize exceptions to these restrictions for the following categories of noncitizen non-LPRs:³²

- Certain categories of persons on diplomatic or official foreign government travel as specified in the CDC Order;
- persons under 18 years of age;
- certain participants in certain COVID–19 vaccine trials as specified in the CDC Order;
- persons with medical contraindications to receiving a COVID–19 vaccine as specified in the CDC Order;
- persons issued a humanitarian or emergency exception by the Secretary of Homeland Security;
- persons with valid nonimmigrant visas (excluding B–1 [business] or B–2 [tourism] visas) who are citizens of a country with limited COVID–19 vaccine availability, as specified in the CDC Order;
- members of the U.S. Armed Forces or their spouses or children (under 18 years of age) as specified in the CDC Order; and,

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

³² The exceptions to this temporary restriction are generally aligned with those outlined in the Presidential Proclamation and further described in the CDC Order, with modifications to account for the unique nature of land border operations where advance passenger information is largely not available.

- persons whose entry would be in the U.S. national interest, as determined by the Secretary of Homeland Security.

In administering such exceptions, DHS will not require the Covered Individual Attestation currently in use by CDC for noncitizens who are nonimmigrants seeking to enter the United States by air travel, or similar form, but DHS may, in its discretion, require any person invoking an exception to provide proof of eligibility consistent with documentation requirements in CDC's Technical Instructions.³³

This Notification does not apply to air or sea travel between the United States and Canada. This Notification does apply to passenger/freight rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until the date indicated on this Notification, unless modified or rescinded at any point prior to that date, including to conform these restrictions to any intervening changes in the Presidential Proclamation and implementing CDC orders. In conjunction with interagency partners, I will closely monitor the effect of the requirements discussed herein, especially as they relate to any potential impacts on the supply chain and will, as needed and warranted, exercise my authority in support of the U.S. national interest.

I intend for this Notification and the restrictions discussed herein to be given effect to the fullest extent allowed by law; in the event that a court of competent jurisdiction stays, enjoins, or sets aside any aspect of this action, on its face or with respect to any person, entity, or class thereof, any portion of this action not determined by the court to be invalid or unenforceable should otherwise remain in effect for the duration stated above.

This action is not a rule subject to notice and comment under the Administrative Procedure Act (APA). It is exempt from notice and comment requirements because it concerns ongoing discussions with Canada and Mexico on how best to control COVID-19 transmission over our shared borders and therefore directly "involve[s] . . . a . . . foreign affairs function of the United States." Even if this action were subject to notice and comment, there is good cause to dispense with prior public notice and the opportunity to comment. Given the public health emergency caused by COVID-19, including the rapidly evolving circumstances associated with elevated rates of infection due to

³³ CDC, Technical Instructions for Implementing Presidential Proclamation Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic and CDC's Order, <https://www.cdc.gov/quarantine/order-safe-travel/technical-instructions.html> (last reviewed Nov. 30, 2021).

the Omicron variant, it would be impracticable and contrary to the public health, and the public interest, to delay the issuance and effective date of this action.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the implementation of the temporary measures set forth in this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian or emergency reasons or for other purposes in the national interest, permit the processing of travelers to the United States who would otherwise be subject to the restrictions announced in this Notification.

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

[Published in the Federal Register, January 24, 2022 (85 FR 03429)]



19 CFR CHAPTER I

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

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

ACTION: Notification of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (“Secretary”), after consulting with interagency partners, to temporarily restrict travel by certain noncitizens into the United States at land ports of entry, including ferry terminals (“land POEs”) along the United States-Mexico border. These restrictions only apply to noncitizens who are neither U.S. nationals nor lawful permanent residents (“noncitizen non-LPRs”). Under the temporary restrictions, DHS will allow processing for entry into the United States of only those noncitizen non-LPRs who are fully vaccinated against COVID-19 and can provide proof of being fully vaccinated against COVID-19 upon request. The restrictions provide for limited exceptions, largely consistent with the limited exceptions currently available with respect to COVID-19 vaccination in the international air travel context. Unlike past actions of this type, this Notification does not contain an exception for essential travel.

DATES: These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on January 22, 2022, and will remain in effect until 11:59 p.m. Eastern Daylight Time (EDT) on April 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Petra Horne, Office of Field Operations, U.S. Customs and Border Protection (CBP), 202-325-1517.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security (“DHS”) published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPRs into the United States at land POEs along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The March 24, 2020 Notification described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak, continued transmission, and spread of the virus associated with COVID-19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Mexico posed a “specific threat to human life or national interests.” Under the March 24, 2020 Notification, DHS continued to allow certain categories of travel, described as “essential travel.” Essential travel included travel to attend educational institutions, travel to work in the United States, travel for emergency response and public health purposes, and travel for lawful cross-border trade. Essential travel also included travel by U.S. citizens and lawful permanent residents returning to the United States.

From March 2020 through October 2021, in consultation with interagency partners, DHS reevaluated and ultimately extended the restrictions on non-essential travel each month. The most recent action of this type, published on October 21, 2021, continued the restrictions until 11:59 p.m. EST on January 21, 2022.² In that document, DHS acknowledged that notwithstanding the continuing threat to human life or national interests posed by COVID-19—as well as recent increases in case levels, hospitalizations, and deaths

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPR persons into the United States at land POEs along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

² See 86 FR 58218 (Oct. 21, 2021) (extending restrictions for the United States-Canada border); 86 FR 58216 (Oct. 21, 2021) (extending restrictions for the United States-Mexico border).

due to the Delta variant—COVID–19 vaccines are effective against Delta and other known COVID–19 variants. These vaccines protect people from becoming infected with and severely ill from COVID–19 and significantly reduce the likelihood of hospitalization and death. DHS also acknowledged the White House COVID–19 Response Coordinator’s September 2021 announcement regarding the United States’ plans to revise standards and procedures for incoming international air travel to enable the air travel of travelers fully vaccinated against COVID–19 beginning in early November 2021.³ DHS further stated that the Secretary intended to do the same with respect to certain travelers seeking to enter the United States from Mexico and Canada at land POEs to align the treatment of different types of travel and allow those who are fully vaccinated against COVID–19 to travel to the United States for non-essential reasons.⁴

On October 29, 2021, following additional announcements regarding changes to the international air travel policy by the President of the United States and the Centers for Disease Control and Prevention (“CDC”),⁵ DHS announced that beginning November 8, 2021, non-essential travel of noncitizen non-LPRs would be permitted through land POEs, provided that the traveler is fully vaccinated against COVID–19 and can provide proof of full COVID–19 vaccination status.⁶ DHS also announced that beginning in January 2022, inbound noncitizen non-LPRs traveling to the United States via land POEs—whether for essential or non-essential reasons—would be re-

³ See Press Briefing by Press Secretary Jen Psaki (Sept. 20, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/20/press-briefing-by-press-secretary-jen-psaki-september-20-2021/> (“As was announced in a call earlier today . . . [w]e—starting in . . . early November [will] be putting in place strict protocols to prevent the spread of COVID–19 from passengers flying internationally into the United States by requiring that adult foreign nationals traveling to the United States be fully vaccinated.”).

⁴ See 86 FR 58218; 86 FR 58216.

⁵ Changes to requirements for travel by air were implemented by, *inter alia*, Presidential Proclamation 10294 of October 25, 2021, 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation), and a related CDC order, 86 FR 61224 (Nov. 5, 2021) (CDC Order). See also CDC, *Requirement for Proof of Negative COVID–19 Test or Recovery from COVID–19 for All Air Passengers Arriving in the United States*, <https://www.cdc.gov/quarantine/pdf/Global-Testing-Order-10-25-21-p.pdf> (Oct. 25, 2021); *Requirement for Airlines and Operators to Collect Contact Information for All Passengers Arriving into the United States*, <https://www.cdc.gov/quarantine/pdf/CDC-Global-Contact-Tracing-Order-10-25-2021-p.pdf> (Oct. 25, 2021). CDC later amended its testing order following developments related to the Omicron variant. See CDC, *Requirement for Proof of Negative COVID–19 Test Result or Recovery from COVID–19 for All Airline Passengers Arriving into the United States*, https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12-02-2021-p.pdf (Dec. 2, 2021).

⁶ See, e.g., DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (updated Nov. 23, 2021). See also 86 FR 72842 (Dec. 23, 2021) (describing the announcement with respect to Canada); 86 FR 72843 (Dec. 23, 2021) (describing the announcement with respect to Mexico).

quired to be fully vaccinated against COVID–19 and provide proof of full COVID–19 vaccination status.⁷

DHS has continued to monitor and respond to the COVID–19 pandemic. On December 14, 2021, at DHS’s request, CDC provided a memorandum to DHS describing the current status of the COVID–19 public health emergency. The CDC memorandum warned of “case counts and deaths due to COVID–19 continuing to increase around the globe and the emergence of new and concerning variants,” and emphasized that “[v]accination is the single most important measure for reducing risk for SARS–CoV–2 transmission and avoiding severe illness, hospitalization, and death.”⁸ Given these considerations, CDC recommended that proof of COVID–19 vaccination requirements be expanded to cover both essential and non-essential noncitizen non-LPR travelers.

According to CDC, studies indicate that individuals vaccinated against COVID–19 are five times less likely to be infected with COVID–19 and more than eight times less likely to require hospitalization than those who are unvaccinated. Further, unvaccinated people are 14 times more likely to die from COVID–19 than those who are vaccinated. Such increases in hospitalization and death rates strain critical healthcare resources, which in some parts of the United States may be in short supply.⁹ As CDC wrote, “proof of vaccination of travelers helps protect the health and safety of both the personnel at the border and other travelers, as well as U.S. destination communities. Border security and transportation security work is part of the nation’s critical infrastructure and presents unique challenges for ensuring the health and safety of personnel and travelers.”

CDC’s memorandum also acknowledged that because of operational considerations, requirements at land POEs may differ from those implemented for air travel. CDC recognized the operational chal-

⁷ See DHS, DHS Releases Details for Fully Vaccinated, Non-Citizen Travelers to Enter the U.S. at Land and Ferry Border Crossings, <https://www.dhs.gov/news/2021/10/29/dhs-releases-details-fully-vaccinated-non-citizen-travelers-enter-us-land-and-ferry> (Oct. 29, 2021); DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (updated Nov. 23, 2021); see also DHS, Frequently Asked Questions: Guidance for Travelers to Enter the U.S., <https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us> (updated Nov. 23, 2021).

⁸ See Memorandum from CDC to CBP re Public Health Recommendation for Proof of COVID–19 Vaccination at U.S. Land Borders (Dec. 14, 2021).

⁹ At the time of the memorandum, CDC noted that the Delta variant was still the predominant variant in the United States, but that ongoing research indicated that the Omicron variant may spread more easily than the original SARS–CoV–2 virus. CDC noted that further studies are underway to assess concerns about whether the Omicron variant may have increased transmissibility, confer resistance to therapeutics, or partially escape infection- or vaccine-induced immunity.

lenges, as described by DHS, with imposing a testing requirement at land POEs, and noted key differences between land travel and air travel with respect to the volume of travel, predictability, and infrastructure involved.¹⁰ In the absence of required pre-entry COVID–19 testing, CDC described a proof of COVID–19 vaccination requirement as “essential as a matter of public health.”¹¹

In a January 14, 2022 update, also at the request of DHS, CDC confirmed its prior recommendation. Specifically, CDC noted the “rapid increase” of COVID–19 cases across the United States that have contributed to high levels of community transmission and increased rates of new hospitalizations and deaths. According to CDC, between January 5 and January 11, 2022, the seven-day average for new hospital admissions of patients with confirmed COVID–19 increased by 24 percent over the prior week, and the seven-day average for new COVID–19-related deaths rose to 2,991, an increase of 33.7 percent compared to the prior week. CDC emphasized that this increase has exacerbated the strain on the United States’ healthcare system and again urged that “[v]accination of the broadest number of people best protects all individuals and preserves the United States’ critical infrastructure, including healthcare systems and essential workforce.” CDC thus urged “the most comprehensive requirements possible for proof of vaccination” and specifically recommended against exceptions for specific worker categories as a public health matter.¹²

DHS has conferred with interagency partners, taken into account all relevant factors, including economic considerations and CDC’s public health input, and concludes that a broad COVID–19 vaccination requirement at land POEs is necessary and appropriate. In particular, DHS notes that, according to the information provided by CDC, those who are not fully vaccinated against COVID–19 have proven to be more likely to be infected by COVID–19, to spread COVID–19 to others, to suffer severe symptoms, and to require the use of scarce hospital resources. DHS acknowledges that in past actions of this type, it has continued to allow essential travel by certain noncitizen non-LPRs who are not fully vaccinated against

¹⁰ CBP assesses that a testing option is not operationally feasible given the significant number of land border crossers that go back on forth on a daily, or near-daily basis, for work or school. A negative COVID–19 test requirement would mean that such individuals would have to get tested just about every day. This is not currently feasible, given the cost and supply constraints, particularly in smaller rural locations. Further, CBP reports additional operational challenges associated with verifying test results, given the wide variation in documentation.

¹¹ See Memorandum from CDC to CBP (Dec. 14, 2021).

¹² Memorandum from CDC to CBP re Public Health Recommendation for Proof of COVID–19 Vaccination at U.S. Land Borders—Addendum (Jan. 18, 2022).

COVID-19. The assessment has, however, changed in light of the following two factors: (1) The rapid increase of COVID-19 cases; and (2) the increasing availability of COVID-19 vaccines.

With respect to the increasing availability of COVID-19 vaccines, at this point, COVID-19 vaccines—which according to CDC are “the single most important measure” for responding to COVID-19¹³—are widely available and have been increasingly available for months. In Canada, 77.1 percent of the entire population is now fully vaccinated against COVID-19, while 87.8 percent of individuals 12 years and older are fully vaccinated against COVID-19.¹⁴ In Mexico, 55.9 percent of the population is fully vaccinated against COVID-19,¹⁵ while as of October 2021, 72 percent of those living in border regions were fully vaccinated against COVID-19.¹⁶ In October 2021, DHS announced its intention to expand the temporary travel restrictions applicable to land POEs by applying the COVID-19 vaccination requirement to those traveling for essential reasons, thus recognizing the importance of fair notice and allowing ample time for noncitizen non-LPR essential travelers to get fully vaccinated against COVID-19. For these reasons, DHS believes that it is now necessary and appropriate to align COVID-19 vaccine restrictions at land POEs to current U.S. government policy governing incoming international air travel.¹⁷

Moreover, COVID-19 cases continue to increase rapidly across the United States, as described below. This surge is currently driven by the Omicron variant, which CDC’s Nowcast model projects may account for approximately 98.3 percent of cases.¹⁸ On January 5, 2022, 705,264 new COVID-19 cases were reported, more than double the peak in January 2021. Communities across the United States are now experiencing high levels of community transmission, and hospitalizations and deaths are also on the rise.¹⁹ This surge underscores

¹³ See Memorandum from CDC to CBP (Dec. 14, 2021).

¹⁴ Canadian statistics may be found at: <https://health-infobase.canada.ca/covid-19/vaccination-coverage/> (Jan. 17, 2022).

¹⁵ Mexican statistics may be found at: <https://ourworldindata.org/covid-vaccinations?country=MEX> (Jan. 17, 2022).

¹⁶ Government of Mexico briefing for the NSC-led Mexico-U.S. International Travel Working Group, October 2021.

¹⁷ For a discussion of the current U.S. government policy regarding international air travel, see, *supra*, n. 45.

¹⁸ Variant Proportions, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (week ending Jan. 8, 2022).

¹⁹ COVID Data Tracker Weekly Review: Interpretive Summary for the Centers for Disease Control and Prevention, *COVID Data Tracker Weekly Review: Interpretive Summary for January 7, 2022*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (Jan. 7, 2022).

the need for the policy that DHS previously announced, and is an important reason why DHS, in consultation with interagency partners, is declining to implement broad exceptions for certain categories of travelers.

In reaching this conclusion, DHS weighed the concerns of industry and, in particular, firms employing or relying on long-haul truck drivers and persons engaged in freight rail operations.²⁰ DHS carefully considered alternative approaches, including exceptions for these categories of workers. As a public health matter, CDC strongly discouraged additional exceptions, particularly in light of the current increase in COVID-19 cases and related resulting strains on the healthcare system. Even if such workers do not engage in extended interaction with others, they still engage in activities that involve contact with others, thereby increasing the risk of contributing to community spread of COVID-19. Such workers also may enter the United States after contracting COVID-19, become seriously ill after arrival, and require scarce healthcare resources as a result. Given CDC's recommendation, and after extensive consultation with interagency partners, DHS has determined that such activities do not warrant an exception from these restrictions because these persons still present a public health risk. A COVID-19 vaccination requirement at land POEs helps protect the health and safety of the personnel at the border, other travelers, and the U.S. communities where these persons may be traveling and spending time among the public. A COVID-19 vaccination requirement for these individuals also reduces burdens on local healthcare resources in U.S. communities. This approach aligns the U.S. COVID-19 policies applicable to land POEs with air travel restrictions that require noncitizen non-LPRs traveling by air to the United States for both essential and non-essential reasons to be fully vaccinated against COVID-19 and provide related proof of vaccination, with very few exceptions. This approach also aligns with new travel restrictions imposed by Canada on January 15, 2022, which similarly impose a COVID-19 vaccination requirement on cross-border travel, with no exception for truck drivers or freight rail operators.²¹

²⁰ DHS acknowledges that past actions of this type exempted freight rail, but DHS notes that the considerations applicable to other forms of travel previously designated as essential apply equally in the freight rail context.

²¹ Public Health Agency of Canada website *Requirements for Truckers entering Canada in effect as of January 15, 2022*, <https://www.Canada.ca/en/public-health/news/2022/01/requirements-for-truckers-entering-canada-in-effect-as-of-january-15-2022.html>; Public Health Agency of Canada website: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, Section 10 of order is the provision that went into place on 15 January 2022, <https://orders-in-council.canada.ca/attachment.php?attach=41322&lang=en>.

DHS also acknowledges concerns among some industry stakeholders that this policy, however necessary to protect the American public, could disrupt cross-border economic activity. In consultation with interagency partners, DHS has carefully considered these concerns. DHS has conferred with interagency partners and determined that these concerns are outweighed by the competing public health concerns and the wide availability of COVID–19 vaccines, coupled with the growing body of evidence that employment-related COVID–19 vaccine mandates result in high levels of COVID–19 vaccine acceptance among employees.²² A recent White House analysis highlights the ways in which COVID–19 vaccine requirements that cover whole industries or sectors can be particularly effective in persuading employees to become fully vaccinated against COVID–19.²³ The incentive effects of industry-wide requirements, as well as the introduction of a range of other policies intended to incentivize vaccination against COVID–19, reduce the likelihood of a significant disruption in cross-border economic activity, while protecting public health.²⁴

²² See, e.g., David Koenig, Associated Press, American, Alaska, JetBlue join growing list of airlines requiring employees to be vaccinated against COVID–19, <https://www.usatoday.com/story/travel/airline-news/2021/10/02/american-joins-list-airlines-requiring-employee-vaccinations/5968626001/> (Oct. 2, 2021) (“United Airlines took an early and tough stance to require vaccination. United said Thursday that 320 of its 67,000 U.S. employees faced termination for not getting vaccinated or seeking a medical or religious exemption by a deadline earlier in the week.”); Novant Health, Novant Health update on mandatory COVID–19 vaccination program for employees, <https://www.novanthealth.org/home/about-us/newsroom/press-releases/newsid33987/2576/novant-health-update-on-mandatory-covid-19-vaccination-program-for-employees.aspx> (Sept. 21, 2021) (“Today, 98.6% of more than 35,000 team members are compliant with Novant Health’s mandatory COVID–19 vaccination program.”); Houston Methodist, Houston Methodist Requires COVID–19 Vaccine for Credentialed Doctors, <https://www.houstonmethodist.org/leading-medicine-blog/articles/2021/jun/houston-methodist-requires-covid-19-vaccine-for-credentialed-doctors/> (June 8, 2021) (“As of June 1, more than 99% of the system’s 26,000 employees and physicians have received the vaccine” following issuance of a vaccine mandate in April 2021); Alison Kosik, CNN Business, 96% of Tyson’s Active Workers are Vaccinated, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/26/business/tyson-covid-vaccine/index.html> (“Tyson’s President and CEO Donnie King said in a blog post ‘we couldn’t be happier to say that, as of today, over 96% of our active team members are vaccinated—or nearly 60,000 more than when we made the announcement on August 3.”). See also generally Dave Muoio, Fierce Healthcare, How many employees have hospitals lost to vaccine mandates? Here are the numbers so far, <https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far> (last updated Jan. 5, 2022) (collecting examples).

²³ See White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID–19, and Strengthen the Economy (Oct. 7, 2021).

²⁴ On October 30, 2021, the Government of Canada imposed a separate domestic mandate on federally regulated railways, and their rail crew and track employees, along with air and marine operators. Each organization is required to have a process for employee attestation of their vaccination status; provide a description of consequences for employees who do not comply or who falsify information; and meet standards consistent with the approach taken by the Government of Canada for the Core Public Administration. See Transport Canada, *Mandatory COVID–19 vaccination requirements for federally regulated transportation*

DHS acknowledges that some persons engaged in essential travel, in particular long-haul truck drivers and persons engaged in freight rail operations, do not engage in work-related activities that involve extended exposure to others in congregate settings. However, there are also important differences between (1) commercial truck, rail, and ferry operators; and (2) air crews and sea crew members traveling pursuant to a C-1 or D nonimmigrant visa. In the international air travel context, under the Presidential Proclamation 10294 of October 25, 2021²⁵ (“the Presidential Proclamation”), as implemented by CDC’s Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic²⁶ and Technical Instructions²⁷ (“the CDC Order”), commercial air crews are excepted from COVID-19 vaccination requirements only if they follow industry standard protocols for the prevention of COVID-19 as set forth in relevant Safety Alerts for Operators (“SAFO”) issued by the Federal Aviation Administration.²⁸ SAFO 20009 includes a range of measures for air crew to protect their health and the health of others. Sea crew members traveling pursuant to a C-1 or D nonimmigrant visa are similarly excepted from international air travel COVID-19 vaccine requirements only if they adhere to all industry standard protocols for the prevention of COVID-19, as set forth in relevant CDC guidance for crew member health.²⁹ Importantly, unvaccinated noncitizen mariners must take a predeparture COVID-19 test within one day of travel and show a negative result prior to boarding a plane, attest that they will self-quarantine upon arrival in the United States, and have access to shipboard quarantine options as needed.³⁰ Currently, commercial

employees and travellers, <https://www.canada.ca/en/transport-canada/news/2021/10/mandatory-covid-19-vaccination-requirements-for-federally-regulated-transportation-employees-and-travellers.html> (updated Oct. 30, 2021).

²⁵ 86 FR 59603 (Oct. 28, 2021).

²⁶ 86 FR 61224 (Nov. 5, 2021).

²⁷ CDC, Technical Instructions for Implementing Presidential Proclamation Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic and CDC’s Order, <https://www.cdc.gov/quarantine/order-safe-travel/technical-instructions.html> (last reviewed Nov. 30, 2021).

²⁸ 86 FR 61224 (Nov. 5, 2021) (citing FAA, SAFO 20009, COVID-19: Updated Interim Occupational Health and Safety Guidance for Air Carriers and Crews, https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safo/media/2020/SAFO20009.pdf (last updated May 25, 2021)).

²⁹ Information on maritime COVID-19 guidance may be found at: <https://www.cdc.gov/quarantine/index.html>.

³⁰ See CDC, *Requirement for Proof of COVID-19 Vaccination for Air Passengers*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/proof-of-vaccination.html> (last updated Dec. 21, 2021); see also, e.g., CDC, *Technical Instructions for CDC’s COVID-19 Program for*

truck drivers and freight rail and ferry operators are not subject to similar industry-wide requirements. They are therefore not amenable to parallel treatment at this time.

DHS, in consultation with its interagency partners, also has considered the operational effect of these requirements. While these changes potentially bring risk of increased wait times at land POEs in the passenger and commercial environments and delays in cargo shipments if vaccinated truck drivers and persons engaged in freight rail operations are unavailable, DHS projects minimal, short-term operational impacts as travelers become familiar with the new requirements. The enforcement of these requirements will mirror the enforcement practices implemented for non-essential travel restrictions on November 8, 2021 which yielded minimal operational disruptions. This assessment is based in part on observations from the implementation of the November 8, 2021, Title 19 restrictions and on the successful implementation of similar requirements by the Canadian government on January 15, 2022.

Notice of Action

Following consultation with CDC and other interagency partners, and after having considered and weighed the relevant factors, I have determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Mexico, including the associated burden on already stressed health-care resources, poses an ongoing “specific threat to human life or national interests.” Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),³¹ I have determined, in

Cruise Ships Operating in U.S. Waters, <https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html> (updated Jan. 14, 2022) and *Interim Guidance for Ships on Managing Suspected or Confirmed Cases of Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/quarantine/maritime/recommendations-for-ships.html> (Updated Nov. 5, 2021). As noted above, DHS considered but rejected a testing requirement due to operational considerations. DHS notes that sea crew members are not excepted under this Notification.

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

consultation with interagency partners, that land POEs along the United States-Mexico border will continue to suspend normal operations and will allow processing for entry into the United States of only those noncitizen non-LPRs who are “fully vaccinated against COVID–19” and can provide “proof of being fully vaccinated against COVID–19” upon request, as those terms are defined under the Presidential Proclamation and CDC Order. This action does not apply to U.S. citizens, U.S. nationals, lawful permanent residents of the United States, or American Indians who have a right by statute to pass the borders of, or enter into, the United States. In addition, I hereby authorize exceptions to these restrictions for the following categories of noncitizen non-LPRs:³²

- Certain categories of persons on diplomatic or official foreign government travel as specified in the CDC Order;
- persons under 18 years of age;
- certain participants in certain COVID–19 vaccine trials as specified in the CDC Order;
- persons with medical contraindications to receiving a COVID–19 vaccine as specified in the CDC Order;
- persons issued a humanitarian or emergency exception by the Secretary of Homeland Security;
- persons with valid nonimmigrant visas (excluding B–1 [business] or B–2 [tourism] visas) who are citizens of a country with limited COVID–19 vaccine availability, as specified in the CDC Order;
- members of the U.S. Armed Forces or their spouses or children (under 18 years of age) as specified in the CDC Order; and,
- persons whose entry would be in the U.S. national interest, as determined by the Secretary of Homeland Security.

In administering such exceptions, DHS will not require the Covered Individual Attestation currently in use by CDC for noncitizens who are nonimmigrants seeking to enter the United States by air travel, or similar form, but DHS may, in its discretion, require any person threat. Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

³² The exceptions to this temporary restriction are generally aligned with those outlined in the Presidential Proclamation and further described in the CDC Order, with modifications to account for the unique nature of land border operations where advance passenger information is largely not available.

invoking an exception to provide proof of eligibility consistent with documentation requirements in CDC's Technical Instructions.³³

This Notification does not apply to air or sea travel between the United States and Mexico. This Notification does apply to passenger/freight rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until the date indicated on this Notification, unless modified or rescinded at any point prior to that date, including to conform these restrictions to any intervening changes in the Presidential Proclamation and implementing CDC orders. In conjunction with interagency partners, I will closely monitor the effect of the requirements discussed herein, especially as they relate to any potential impacts on the supply chain and will, as needed and warranted, exercise my authority in support of the U.S. national interest.

I intend for this Notification and the restrictions discussed herein to be given effect to the fullest extent allowed by law; in the event that a court of competent jurisdiction stays, enjoins, or sets aside any aspect of this action, on its face or with respect to any person, entity, or class thereof, any portion of this action not determined by the court to be invalid or unenforceable should otherwise remain in effect for the duration stated above.

This action is not a rule subject to notice and comment under the Administrative Procedure Act (APA). It is exempt from notice and comment requirements because it concerns ongoing discussions with Canada and Mexico on how best to control COVID-19 transmission over our shared borders and therefore directly "involve[s] . . . a . . . foreign affairs function of the United States." Even if this action were subject to notice and comment, there is good cause to dispense with prior public notice and the opportunity to comment. Given the public health emergency caused by COVID-19, including the rapidly evolving circumstances associated with elevated rates of infection due to the Omicron variant, it would be impracticable and contrary to the public health, and the public interest, to delay the issuance and effective date of this action.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the implementation of the temporary measures set forth in this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian or emergency reasons or for other purposes in the national interest,

³³ CDC, Technical Instructions for Implementing Presidential Proclamation Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic and CDC's Order, <https://www.cdc.gov/quarantine/order-safe-travel/technical-instructions.html> (last reviewed Nov. 30, 2021).

permit the processing of travelers to the United States who would otherwise be subject to the restrictions announced in this Notification.

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

[Published in the Federal Register, January 24, 2022 (85 FR 03425)]

**RECORD OF VESSEL FOREIGN REPAIR OR EQUIPMENT
PURCHASE (CBP FORM 226)**

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

ACTION: 60-Day notice and request for comments; revision 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 March 28, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0027 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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 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: Record of Vessel Foreign Repair or Equipment Purchase.

OMB Number: 1651-0027.

Form Number: CBP Form 226.

Current Actions: Revision of an existing information collection.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: 19 U.S.C. 1466(a) provides for a 50 percent *ad valorem* duty assessed on a vessel master or owner for any repairs, purchases, or expenses incurred in a foreign country by a commercial vessel registered in the United States. CBP Form 226, Record of Vessel Foreign Repair or Equipment Purchase, is used by the master or owner of a vessel to declare and file entry on equipment, repairs, parts, or materials purchased for the vessel in a foreign country. This information enables CBP to assess duties on these foreign repairs, parts, or materials. CBP Form 226 is provided for by 19 CFR 4.7 and 4.14 and is accessible at: <https://www.cbp.gov/document/forms/form-226-record-vessel-foreign-repair-or-equipment-purchase>.

Proposed Change:

This form is anticipated to be submitted electronically as part of the maritime forms automation project through the Vessel Entrance and

Clearance System (VECS), which will eliminate the need for any paper submission of any vessel entrance or clearance requirements under the above referenced statutes and regulations. VECS will still collect and maintain the same data, but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

Type of Information Collection: Record of Vessel Foreign Repair or Equipment Purchase.

Estimated Number of Respondents: 421.

Estimated Number of Annual Responses per Respondent: 27.

Estimated Number of Total Annual Responses: 11,788.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 23,576.

Dated: January 24, 2022.

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

[Published in the Federal Register, January 27, 2022 (85 FR 04262)]

U.S. Court of International Trade

Slip Op. 22–5

NEXTEEL Co., LTD. et al., Plaintiff and Consolidated Plaintiffs, and HUSTEEL Co., LTD. and HYUNDAI STEEL COMPANY, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALIFORNIA STEEL INDUSTRIES, INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 20–03898

[Denying the motion to stay.]

Dated: January 21, 2022

Elizabeth J. Drake Schagrin Associates of Washington, D.C. for defendant-intervenors California Steel Industries, Inc. and Welspun Tubular LLC USA. Also on the brief were *Roger B. Schagrin*, and *Michelle R. Avrutin*.

J. David Park Arnold & Porter Kay Scholer LLP of Washington, D.C. for plaintiff NEXTEEL Co., Ltd. Also on the brief were *Henry D. Almond*, *Daniel R. Wilson*, *Leslie C. Bailey*, and *Kang Woo Lee*.

Jeffery M. Winton Winton & Chapman PLLC of Washington, D.C. for consolidated plaintiff SeAH Steel Corporation. Also on the brief were *Michael J. Chapman*, *Amrietha Nellan*, *Vi Mai*, and *Jooyoun Jeong*.

Jarrod M. Goldfeder Trade Pacific PLLC, of Washington, D.C. for consolidated plaintiff and plaintiff-intervenor Hyundai Steel Company. Also on the brief was *Robert G. Gosselink*.

Donald B. Cameron Morris, Manning & Martin, LLP of Washington D.C. for plaintiff-intervenor Husteel Co., Ltd. Also on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, and *Jordan L. Fleischer*.

OPINION AND ORDER

Kelly, Judge:

Before the court is Defendant-Intervenors California Steel Industries, Inc.’s (“CSI”) and Welspun Tubular LLC USA’s (“Welspun”) partial consent motion to stay proceedings pending the final disposition of *Hyundai Steel Co. v. United States*, Fed. Cir. Appeal No. 21–1748. Partial Consent Mot. to Stay, Jan. 13, 2022, ECF No. 84 (“Mot. to Stay”). For the reasons that follow, CSI’s and Welspun’s motion to stay is denied.

BACKGROUND

Plaintiff NEXTEEL Co., Ltd. (“Nexteel”) commenced this action pursuant to 516A(d) of the Tariff Act of 1930, as amended, 19 U.S.C.

§ 1516a(d) and 28 U.S.C. § 2631(c)¹ contesting certain aspects of Commerce final results of the third administrative review of the antidumping duty (“ADD”) order on welded line pipe from the Republic of Korea (“WLP from Korea”).² See Summons, Mar. 30, 2020, ECF No. 1; Compl., Dec. 11, 2020, ECF No. 11; see also [WLP from Korea], 85 Fed. Reg 76,517 (Dep’t Commerce Nov. 30, 2020) (Final Results of [ADD] Admin. Review; 2018–2018) (“*Final Results*”). On May 24, 2021, Nexteel, Husteel Co., Ltd. (“Husteel”), SeAh Steel Corporation (“SeAH”), and Hyundai Steel Company (“Hyundai”) (collectively “Plaintiffs”), motioned for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2. ECF Nos. 58–63. Among the issues raised was Commerce’s decision to apply a particular market situation (“PMS”) adjustment when it conducted the sales-below-cost test to calculate normal value. Pl.-Intervenor [Husteel’s] Br. in Supp. of Mot. for J. Agency Record 7–10, May 24, 2021, ECF No. 58–2; Memo. in Supp. of Pl. and Consol. Pl. [Nexteel’s] R. 56. 2 Mot. for J. Agency Record 18–21, May 24, 2021, ECF No. 60–2; Br. of [SeAH] in Supp. of R. 56.2 Mot. for J. Agency Record 5–8, May 24, 2021, ECF No. 62–1; Memo. in Supp. of Mot. of Consol. Pl. and Pl.-Intervenor [Hyundai], for J. Agency Record 7–9, May 24, 2021, ECF No. 63–1. The case is fully briefed, see ECF Nos. 69–71, 74–77, and the court has scheduled Oral Argument for February 4, 2022. Order, Nov. 19, 2021, ECF No. 83.

Contemporaneously, the United States Court of Appeals for the Federal Circuit (“Court of Appeals”) held that the Trade Preferences Extension Act of 2015 did not enable Commerce to apply a PMS adjustment to the calculation of costs of production under the sales-below-cost test when calculating normal value. *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352–1356 (Fed. Cir. 2021). Welspun, the appellant in *Hyundai*, filed a motion to extend the time to file a petition for a rehearing en banc until February 8, 2022. Mot. to Stay at 2; see also *Def.-Appellant [Welspun]’s Unopposed Mot. for an Ex-*

¹ 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.

² On January 21, 2021 the court granted a motion for consolidation. Order on Consent Mot. to Consol. Cases, Jan. 21, 2021, ECF No. 50 (consolidating *NEXTEEL Co. Ltd. v. United States*, Ct. No. 20–03898, *SeAH Steel Corporation v. United States*, Ct. No. 20–3935, and *Hyundai Steel Company v. United States*, Ct. No. 20–03940 under *NEXTEEL Co., Ltd. v. United States*, Ct. No. 20–3898); Def.’s Mot. to Consol. Cases, Jan. 7, 2021, ECF No. 26. The court issued several orders granting motions to intervene. ECF Nos. 18 (designating Husteel Co., Ltd. as a plaintiff-intervenor), 46 (designating Hyundai Steel Company as a plaintiff-intervenor), 47 (designating CSI and Welspun as defendant-intervenor), 48 (designating American Cast Iron Pipe Company and Stupp Corporation as defendant-intervenor), 51 (designating Maverick Tube Corporation and IPSCO Tubulars Inc. as defendant-intervenor), 54 (designating CSI and Welspun as defendant-intervenor in member Ct. Nos. 20–03935 and 20–03940).

tension of Time, *Hyundai Steel Co. v. United States*, No. 21–1748 (Fed. Cir. Dec. 28, 2021), ECF No. 72 (“Welspun’s Mot. to Extend”). The Court of Appeals granted Welspun’s motion on January 3, 2022. Mot. to Stay at 2; *see also* Order, *Hyundai Steel Co. v. United States*, No. 21–1748 (Fed. Cir. Jan. 3, 2022), ECF No. 74. On January 13, 2022 CSI and Welspun filed a motion to stay these proceedings until the final disposition of *Hyundai*. Mot. to Stay. On January 20, 2022, Plaintiffs filed their joint opposition to the Mot. to Stay. Pls.’ Joint Opp. To [Mot. to Stay.], Jan. 20, 2022, ECF No. 85. (“Pls.’ Resp.”)

JURISDICTION AND STANDARD OF REVIEW

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

The power to stay proceedings “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Although the decision to grant or deny a stay rests within the court’s sound discretion, courts must weigh and maintain an even balance between competing interest when deciding whether a stay is appropriate. *See id.* at 254–55; *see also Cherokee Nation v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). If there is “even a fair possibility that [a] stay” will do damage to the opposing party, the movant “must make out a clear case of hardship or inequity in being required to go forward[.]” *See Landis*, 299 U.S. at 255.

DISCUSSION

CSI and Welspun submit that granting the stay would promote judicial economy because *Hyundai* concerns Commerce’s statutory authority to make a PMS adjustment when conducting the sales-below-cost test, an issue virtually identical to an issue before this court, and the Court of Appeals’ decision in *Hyundai* will “dictate the outcome of this appeal.” Mot. to Stay at 1. Furthermore, CSI and Welspun argue that a stay will not cause undue harm or prejudice. *Id.* at 2. Plaintiffs argue that CSI and Welspun failed to show any hardship or inequity that would follow if the case proceeded in the normal course, however a stay would materially injure Plaintiffs. Pls.’ Resp. at 2, 6. Plaintiffs also argue that granting a stay does not serve the public interest of “just, speedy, and inexpensive determination of every action and proceeding,” the Court’s paramount obligation. *Id.* at 7 (quoting U.S. Ct. of Int’l Trade R. 1).

On a motion to stay, the court considers whether the proposed stay promotes judicial economy. *See, e.g., Diamond Sawblades Mfrs’ Coal.*

v. United States, 34 CIT 404, 406–08 (2010). Generally, speculative claims regarding the possible impact of a future decision on the disposition of the case at bar do not suffice to warrant a stay. *See e.g.*, *Georgetown Steel Co. v. United States*, 27 CIT 550, 552–56 (2003) (denying a motion to stay pending resolution of an appeal with speculative relevance to the case at bar); *Ethan Allen Global, Inc. v. United States*, Slip Op. 14–76, 2014 WL 2898617 (Ct. Int’l Trade June 27, 2014) (denying a motion to stay pending the final resolution of a petition for a writ of certiorari to the U.S. Supreme Court). However, the court has granted stays pending ongoing litigation of issues that are central to the court’s decision. *See e.g.*, *RHI Refractories Liaoning Co. v. United States*, 35 CIT 407, 411–12 (2011) (granting a stay pending ongoing litigation of an important question of law before the Court of Appeals).

Here CSI’s and Welspun’s suggestion that a stay will promote judicial economy is speculative. CSI and Welspun are hopeful that the Court of Appeals will reverse course on the statutory issue recently decided in *Hyundai*. Yet, the Court of Appeals has not granted rehearing. Indeed, rehearing has yet to be sought.³ Thus far Welspun has only requested additional time to petition for rehearing. *See* Welspun’s Mot. to Extend at 2, *Hyundai Steel Co. v. United States*, No. 21–1748 (Fed. Cir. Dec. 28, 2021), ECF No. 72 (requesting an extension of time “to allow adequate time for Welspun to determine whether a petition for rehearing or rehearing en banc is warranted in this appeal”). Therefore, the court cannot be certain that granting a stay at this time would serve any purpose other than to delay the resolution of this case in contravention of the Court’s objective to ensure the “just, speedy, and inexpensive determination of every action and proceeding.” U.S. Ct. of Int’l Trade R. 1.

Nor do CSI and Welspun point to any harm they will endure if the court denies the motion to stay. If rehearing is granted and the Court of Appeals reverses course on the issue at hand, the movants would be able to take advantage of that change either before this Court or the Court of Appeals. No party suggests otherwise. Without more, the court lacks a compelling reason to stay the case. *See Giorgio Foods, Inc. v. United States*, 37 CIT 152, 155 (2013).

CONCLUSION

For the foregoing reasons, it is

ORDERED that California Steel Industries Inc.’s and Welspun Tubular LLC USA’s motion to stay is denied.

³ CSI and Welspun assert that Welspun will be petitioning for rehearing. Mot. to Stay at 4.

Dated: January 21, 2022
New York, New York

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

Slip Op. 22–6

GUIZHOU TYRE CO., LTD. and GUIZHOU TYRE IMPORT AND EXPORT CO.,
LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 19–00031

[Remanding to the issuing agency final determinations resulting from an antidumping duty investigation of imports of certain truck and bus tires from the People’s Republic of China.]

Dated: January 24, 2022

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the brief were *Jordan C. Kahn*, *Elaine F. Wang*, and *Brandon M. Petelin*.

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle, LLP, of Washington, D.C., for consolidated plaintiffs Shanghai Huayi Grp. Corp. Ltd., formerly known as Double Coin Holdings Ltd., and China Manufacturers Alliance LLC. With him on the brief were *James P. Durling* and *Kimberly Reynolds*.

L. Misha Preheim, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., and *Kara M. Westercamp*, Trial Attorney. Of counsel on the brief was *Elio Gonzalez*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs contest a final affirmative less-than-fair-value determination of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) in an antidumping duty investigation of certain truck and bus tires from the People’s Republic of China (“China” or the “PRC”) and the resulting antidumping duty order. Before the court are plaintiffs’ motions for judgment on the agency record. Concluding that the less-than-fair-value determination is contrary to law in certain respects, the court remands this determination to Commerce for reconsideration.

I. BACKGROUND

A. The Parties to this Consolidated Case

There are two groups of plaintiffs in this consolidated action. One group, to which the court refers collectively as “Guizhou Tyre,”

consists of Guizhou Tyre Co., Ltd. (“GTC”), a Chinese producer of truck and bus tires, and its affiliated exporter, Guizhou Tyre Import and Export Co., Ltd. (“GTCIE”), a Chinese exporter of this merchandise. Compl. ¶ 3 (Apr. 15, 2019), ECF No. 7. The other group of plaintiffs consists of a Chinese producer and exporter of truck and bus tires, Shanghai Huayi Group Corporation Ltd., to which its counsel refers by its former name, Double Coin Holdings Ltd., and its affiliated U.S. importer, China Manufacturers Alliance LLC (“CMA”). Compl. ¶ 3 (Mar. 18, 2019), Ct. No. 19–00034, ECF No. 7. The court refers to these two plaintiffs collectively as “Double Coin.” Defendant is the United States.¹

B. The Antidumping Duty Investigation and the Contested Determinations

Two related agency decisions stemming from an antidumping duty investigation are contested in this consolidated action.² They are a Final “Less-Than-Fair Value (LTFV)” Determination, *Truck and Bus Tires From the People’s Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 Fed. Reg. 8,599 (Int’l Trade Admin. Jan. 27, 2017) (the “*Final LTFV Determination*”), and the subsequently-issued antidumping duty order (“Order”), *Truck and Bus Tires From the People’s Republic of China: Antidumping Duty Order*, 84 Fed. Reg. 4,436 (Int’l Trade Admin. Feb. 15, 2019) (the “*Order*”). Incorporated by reference in the Final LTFV Determination is an “Issues and Decision Memorandum” containing specific findings and explanatory discussion. *Truck and Bus Tires from the People’s Republic of China: Issues and Decision Memorandum for the Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances* (Int’l Trade Admin. Jan. 19, 2017) (P.R. Doc. 855) (“*Final I&D Mem.*”).³

Commerce initiated the antidumping duty investigation of certain truck and bus tires from the PRC (the “subject merchandise”) in early

¹ The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW”), the petitioner in the antidumping duty investigation, was a defendant-intervenor in this action from May 7, 2019 until its withdrawal from the litigation on August 19, 2019. See The USW’s Consent Mot. to Intervene (May 2, 2019), ECF No. 9; Order (May 7, 2019), ECF No. 16; [USW]’s Consent Mot. to Withdraw as Def.-Int. (Aug. 16, 2019), ECF No. 32; Order (Aug. 19, 2019), ECF No. 33.

² Consolidated with the lead case, *Guizhou Tyre Co., Ltd. et al. v. United States*, Court No. 19–00031, is *China Mfrs. All. LLC et al. v. United States*, Court No. 19–00034. See Order (June 7, 2019), Ct. No. 19–00031, ECF No. 24.

³ All citations to documents from the administrative record are to public documents. These documents are cited as “P.R. Doc. ___.”

2016, *Truck and Bus Tires From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 81 Fed. Reg. 9,434 (Int'l Trade Admin. Feb. 25, 2016), with a period of investigation ("POI") of July 1, 2015 through December 31, 2015, *id.* at 9,435. Commerce published a Preliminary Affirmative LTFV Determination later that year, *Truck and Bus Tires From the People's Republic of China: Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination*, 81 Fed. Reg. 61,186 (Int'l Trade Admin. Sept. 6, 2016), which incorporated by reference the "Preliminary Decision Memorandum." *Truck and Bus Tires from the People's Republic of China: Decision Memorandum for the Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination* (Int'l Trade Admin. Aug. 26, 2016) (P.R. Doc. 716) ("*Prelim. Decision Mem.*"). Commerce also published an Amended Preliminary LTFV Determination. *Truck and Bus Tires From the People's Republic of China: Amended Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 71,051 (Int'l Trade Admin. Oct. 14, 2016).

In the Final LTFV Determination, Commerce calculated an estimated weighted average dumping margin of 22.57% for what it considered to be a nationwide entity (the "PRC-wide" or "China-wide" entity) consisting of all exporters of the subject merchandise that it determined not to have rebutted its presumption of control by the PRC government. *Final LTFV Determination*, 82 Fed. Reg. at 8,604. Commerce included in the China-wide entity 102 companies that did not respond to the Department's requests for information during the preliminary phase of the antidumping duty investigation, *Prelim. Decision Mem.* at 4, and ten other companies that responded but were determined by Commerce to have failed to rebut its presumption of government control, *Prelim Decision Mem.* at 16–17; *Final I&D Mem.* at 6–8. Among the ten companies were Double Coin, *Prelim. Decision Mem.* at 16; *Final I&D Mem.* at 11–13, and GTCIE, *Prelim Decision Mem.* at 16; *Final I&D Mem.* at 24–28. Commerce calculated an individually determined estimated weighted average dumping margin of 9.00% for Prinx Chengshan (Shandong) Tire Co., Ltd., the other mandatory respondent, which Commerce considered to have rebutted its presumption of government control and thus was a "separate rate" respondent, i.e., a respondent entitled to receive a margin separate from the rate assigned to the PRC-wide entity. *Final I&D Mem.* at 6–7. Commerce assigned the 9.00% rate to the numerous other companies that Commerce also determined to have rebutted the pre-

sumption of government control and therefore qualified for a separate rate but, not having been individually investigated, did not receive an individually determined margin. *Final LTFV Determination*, 82 Fed. Reg. at 8,600–04; *Final I&D Mem.* at 6–7.

C. Proceedings Before the Court

Guizhou Tyre and Double Coin commenced their respective actions on March 15, 2019. Summons, Ct. No. 19–00031, ECF No. 1; Compl. (Apr. 15, 2019), Ct. No. 19–00031, ECF No. 7; Summons, Ct. No. 19–00034, ECF No. 1; Compl. (Mar. 18, 2019), Ct. No. 19–00034, ECF No. 7. The actions were consolidated on June 7, 2019. Order, Ct. No. 19–00031, ECF No. 24.

Before the court are the Rule 56.2 motions for judgment on the agency record of Guizhou Tyre, *see* Mot. for J. on the Agency R. of Pls. [GTC] and [GTCIE] (Oct. 2, 2019), ECF Nos. 39 (conf.), 40 (public) (“Guizhou Tyre’s Br.”), and Double Coin, *see* Consolidated Pls.’ Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. (Oct. 2, 2019), ECF No. 41–1 (“Double Coin’s Br.”). Defendant opposes both motions in all respects. Def.’s Resp. to Pls.’ Rule 56.2 Mots. for J. on the Admin. R. (Feb. 7, 2020), ECF Nos. 48 (conf.), 49 (public) (“Def.’s Br.”). Plaintiffs filed their replies to defendant’s opposition on March 16, 2020. Reply of Pls. [GTC] & [GTCIE], ECF Nos. 50 (conf.), 51 (public) (“Guizhou Tyre’s Reply”); Consolidated Pls.’ Reply Br., ECF No. 52 (“Double Coin’s Reply”).

Guizhou Tyre submitted a Notice of Supplemental Authority in April 2021. Notice of Suppl. Authority (Apr. 30, 2021), ECF No. 61. Defendant filed a Notice of Supplemental Authority in June 2021. Notice of Suppl. Authority (June 28, 2021), ECF No. 62.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the “Tariff Act”), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.⁴

In reviewing a final determination, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance

⁴ All citations to the United States Code herein are to the 2012 edition, except where otherwise indicated.

with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat’l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)).

B. Plaintiffs’ Motions for Judgment on the Agency Record

Guizhou Tyre raises three claims in contesting the Final LTFV Determination. One of its claims contests the legal basis for the Order: it asserts that the Order was invalid when issued because no affirmative finding of injury or threat by the U.S. International Trade Commission (“ITC” or “Commission”) was in effect at that time. Guizhou Tyre’s Br. 39–41. Guizhou Tyre claims, second, that the denial of its separate rate application was contrary to law because Commerce, abandoning its prior test for separate rate status without proper notice or explanation, failed to consider whether the government control it found was, specifically, control over export activities. *Id.* at 19–24. Its remaining claim is that the Department’s determination that Guizhou Tyre did not rebut Commerce’s presumption of *de facto* government control is unsupported by substantial evidence on the record. *Id.* at 24–30.

Double Coin asserts four claims. It claims that Commerce lacked statutory authority to establish a dumping margin for a nationwide entity. Double Coin’s Br. 7–27. Its second and third claims, which parallel those of Guizhou Tyre, are that Commerce failed to apply its established separate rate methodology, *id.* at 27–29, and that Commerce was unsupported by substantial evidence in deciding that Double Coin did not rebut Commerce’s presumption of *de facto* government control, *id.* at 30–49. Finally, Double Coin claims that Commerce contravened the antidumping duty statute when it selected Double Coin for individual investigation and then failed to verify Double Coin’s relevant factual information. *Id.* at 49–53.

C. Guizhou Tyre’s Claim that the Antidumping Duty Order Was Invalid at the Time of Issuance

Guizhou Tyre claims that the Order was invalid when Commerce issued it on February 15, 2019, arguing that no affirmative injury or threat determination of the ITC had gone into effect as of that date. Guizhou Tyre’s Br. 39–41. According to Guizhou Tyre, Commerce, before issuing the Order, should have awaited the outcome of litigation in this Court contesting the initial final determination of the ITC, which reached a negative finding of injury or threat to the domestic

industry. Guizhou Tyre’s Reply 18; see *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers, Int’l Union, AFL-CIO, CLC v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1328, 1339 (2018) (“*USW I*”). Upon the conclusion of that litigation on February 18, 2020—approximately a year after Commerce issued the Order—this Court entered a judgment sustaining an affirmative final injury determination that the ITC submitted on remand. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers, Int’l Union, AFL-CIO, CLC v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1374, 1381 (2020) (“*USW II*”). The court finds merit in Guizhou Tyre’s claim.

Upon issuing the Order on February 15, 2019, Commerce, as background, referred to the Commission’s initial, negative final determination, stating that “[o]n March 13, 2017, the ITC notified Commerce of its final determination that an industry in the United States is not materially injured or threatened with material injury within the meaning of section 735(b)(1)(A) of the Act [19 U.S.C. § 1673d(b)(1)(A)] by reason of imports of truck and bus tires from China at less than fair value.” *Order*, 84 Fed. Reg. at 4,436 (footnote omitted). “Accordingly, Commerce instructed CBP [U.S. Customs and Border Protection] to liquidate entries of subject merchandise without regard to antidumping duties.” *Id.* (footnote omitted). The Commission published its negative final determination four days later. *Truck and Bus Tires From China*, 82 Fed. Reg. 14,232 (Int’l Trade Comm’n Mar. 17, 2017).

On April 14, 2017, the petitioner in the antidumping duty investigation commenced an action in this Court according to section 516A of the Tariff Act, 19 U.S.C. § 1516a, to contest the ITC’s negative final determination. Summons (Apr. 14, 2017), Ct. No. 17–00078, ECF No. 1; Compl. (Apr. 14, 2017), Ct. No. 17–00078, ECF No. 6. Reviewing that determination, this Court held on November 1, 2018, that some, but not all, of the Commission’s material findings of fact in the negative final determination were supported by substantial record evidence. *USW I*, 42 CIT at __, 348 F. Supp. 3d at 1339–40. On that basis, this Court remanded the negative material injury determination back to the Commission for reconsideration of various findings. *Id.*

On January 30, 2019, the ITC issued its redetermination in response to this Court’s order of remand in *USW I*. See *Order*, 84 Fed. Reg. at 4,436. This redetermination concluded that imports of truck and bus tires from China materially injured the domestic

industry.⁵ See *USW II*, 44 CIT at ___, 425 F. Supp. 3d at 1377. On February 8, 2019, the ITC notified Commerce of its affirmative remand redetermination. *Order*, 84 Fed. Reg. at 4,436. Seven days later, on February 15, 2019, Commerce published the Order. *Id.* The ITC published a notice announcing its affirmative remand redetermination. *Truck and Bus Tires From China*, 84 Fed. Reg. 4,855 (Int'l Trade Comm'n Feb. 19, 2019).

On February 18, 2020, more than a year after Commerce issued the Order, the Court of International Trade sustained the ITC's remand redetermination. *USW II*, 44 CIT at ___, 425 F. Supp. 3d at 1381. This Court entered judgment the same day.⁶ Judgment (Feb. 18, 2020), Ct. No. 17-00078, ECF No. 120.

Guizhou Tyre argues that the ITC's remand redetermination had no legal effect at the time it was issued because it was merely a redetermination pending a decision of this Court. Guizhou Tyre's Br. 40 ("Just as all other trade redeterminations made on remand lack legal effect until affirmed by this Court, it is patently unreasonable for the *AD Order* to have issued before such affirmance."). It submits that "Commerce should not have issued the *AD Order* until after this Court affirmed the ITC redetermination." Guizhou Tyre's Reply 18.

Disagreeing with Guizhou's Tyre's argument, defendant responds that Commerce issued the Order in compliance with 19 U.S.C. § 1673e(a) (2018), which, according to defendant, required Commerce to issue an antidumping duty order within seven days of being notified by the Commission, on February 8, 2019, of the affirmative material injury determination. Def.'s Br. 30-31 (citing 19 U.S.C. § 1673e(a) (2018)). The government argues, in addition, that the Department's issuance of the Order following the ITC's notification to Commerce of the affirmative remand redetermination complied with its obligation under the relevant Tariff Act provisions as construed by the Court of Appeals for the Federal Circuit ("Court of Appeals" or "CAFC") in *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) ("*Diamond Sawblades IV*"). *Id.* Guizhou Tyre maintains that *Diamond Sawblades IV* does not control the outcome of this case, arguing that certain language in the opinion, which addresses a factual situation other than the one that was

⁵ While reaching an affirmative injury determination in its remand redetermination, "the ITC found that critical circumstances do not exist with respect to imports of subject merchandise from China that are subject to Commerce's final affirmative critical circumstances finding." *Truck and Bus Tires From the People's Republic of China: Antidumping Duty Order*, 84 Fed. Reg. 4,436, 4,436 (Feb. 15, 2019).

⁶ No notice of appeal having been filed in the *USW* litigation, the judgment of the Court of International Trade sustaining the ITC's affirmative injury determination became final and conclusive 60 days later, on April 18, 2020.

before the Court of Appeals, is *dicta*. Guizhou Tyre's Reply 18. For the reasons discussed below, the court agrees with Guizhou Tyre's argument.

Diamond Sawblades IV, which affirmed the decision of this Court in *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 1422, 650 F. Supp. 2d 1331 (2009) ("*Diamond Sawblades III*"), arose from facts that were dissimilar, in a critical respect, to those of this case. As discussed below, the antidumping duty orders involved in the *Diamond Sawblades* litigation were issued after this Court sustained an affirmative ITC determination reached on remand during the litigation. The pertinent facts in the *Diamond Sawblades* litigation, as presented in the various judicial opinions, are as follows.

Following an affirmative final LTFV determination by Commerce on May 22, 2006, the ITC, on July 11, 2006, published a negative final determination, concluding that the diamond sawblades industry in the United States was neither materially injured, nor threatened with material injury, by the subject imports from Korea and China. See *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29,303 (Int'l Trade Comm'n May 22, 2006), as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 35,864 (Int'l Trade Comm'n June 22, 2006); *Diamond Sawblades Mfrs. Coal. v. United States*, 32 CIT 134, 134 (2008) ("*Diamond Sawblades I*"). The petitioner in the antidumping duty investigation, the Diamond Sawblades Manufacturers Coalition, contested the Commission's negative final determination in an action brought in this Court, *Diamond Sawblades I* at 142, which ruled that the ITC had relied upon an unsupported finding and remanded the case to the Commission for further proceedings, *id.* at 150. On remand, the Commission, on May 14, 2008, reached a negative determination of injury, but an affirmative determination of threat, to the domestic industry; this Court sustained the ITC's remand redetermination on January 13, 2009. *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 48 (2009) ("*Diamond Sawblades II*").

On January 22, 2009, the Commission notified Commerce that the Court of International Trade had issued a final decision sustaining the ITC's affirmative remand redetermination, and in response, Commerce published a notice pursuant to 19 U.S.C. § 1516a(c)(1) (a "*Timken*" notice) on February 10, 2009. See *Diamond Sawblades III*,

33 CIT at 1424, 650 F. Supp. 2d at 1335; see also *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Notice of Court Decision Not in Harmony With Final Determination of the Antidumping Duty Investigations*, 74 Fed. Reg. 6,570 (Int'l Trade Admin. Feb. 10, 2009).⁷ The Department's *Timken* notice on the decision of this Court in *Diamond Sawblades II* announced that "[i]f the [Court of International Trade's] opinion in this case is not appealed, or is affirmed on appeal, then antidumping duty orders on diamond sawblades from the PRC and Korea will be issued." *Diamond Sawblades and Parts Thereof from the People's Republic of China and the People's Republic of Korea: Notice of Court Decision Not in Harmony With Final Determination of the Antidumping Duty Investigations*, 74 Fed. Reg. at 6,570. On March 13, 2009, parties who had been defendant-intervenors in the litigation before this Court filed notices of appeal of the judgment sustaining the Commission's affirmative redetermination. *Diamond Sawblades III*, 33 CIT at 1425, 650 F. Supp. 2d at 1335.

The dispute in *Diamond Sawblades III* arose when the petitioner in the antidumping duty investigation, the Diamond Sawblades Manufacturers Coalition, claimed that Commerce erred in declining to issue antidumping duty orders, and declining to order the collection of cash deposits, until the judgment entered by this Court in *Diamond Sawblades II* became final and conclusive, i.e., when appeals had been exhausted. The petitioner sought as a remedy a writ of mandamus to compel Commerce to issue antidumping duty orders and order the collection of cash deposits. *Id.*, 33 CIT at 1425, 650 F. Supp. 2d at 1336. In *Diamond Sawblades III*, this Court issued the writ of mandamus, and the Court of Appeals affirmed that decision in *Diamond Sawblades IV*, 626 F.3d at 1383. The Court of Appeals stated that "the statutory scheme imposes a mandatory duty on Commerce to issue antidumping duty orders covering the subject entries upon being notified of the Commission's final determination, a notification that in this case occurred on January 22, 2009," which was the date the ITC notified Commerce that the Court of International Trade, in *Diamond*

⁷ Sections 1516a(c)(1) and 1516a(e) of Title 19, United States Code, 19 U.S.C. § 1516a(c)(1), require publication of a notice of a final court decision of the Court of International Trade or the Court of Appeals for the Federal Circuit sustaining, in whole or in part, a cause of action brought under 19 U.S.C. § 1516a to contest a final determination of Commerce or the Commission, within 10 days of that court decision. *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), held that the notice of a decision of the Court of International Trade under this provision must be published within 10 days of such decision, regardless of whether the decision remains subject to appeal, and that Commerce must order the liquidation of entries of subject merchandise to be suspended until there is a "conclusive" judicial decision in the case, i.e., when the decision can no longer be attacked on appeal. *Id.* at 341-42.

Sawblades II, had sustained its remand redetermination. *Id.* The Court of International Trade had entered a judgment sustaining the Commission's remand redetermination on January 13, 2009, nine days prior to the ITC's notification. *Diamond Sawblades II*, 33 CIT at 48–49.

The issue before the Court of Appeals in *Diamond Sawblades IV* was whether the Court of International Trade erred in issuing a writ of mandamus to compel the immediate publication of the antidumping duty orders and order the collection of cash deposits. *Diamond Sawblades IV*, 626 F.3d at 1375–76. At that point in time, the Court of International Trade already had entered a judgment sustaining the ITC's remand redetermination, a judgment that was not yet “conclusive” as it still was subject to appeal. As the Court of Appeals explained,

Commerce took the position that under the governing statutes it was not required to issue antidumping duty orders or to collect cash deposits until the final conclusion of the litigation challenging the predicates for entering antidumping duty orders, i.e., until Commerce received notice from the Commission that no appeal would be taken to this court or, if an appeal was taken, until this court issued a “conclusive decision” upholding the decision of the Court of International Trade.

Diamond Sawblades IV, 626 F.3d at 1377. Rejecting the Department's position, the Court of Appeals resolved the issue before it by holding that Commerce erred in delaying the issuance of the antidumping duty orders, and ordering the collection of cash deposits, as it awaited a final and conclusive judicial determination in the parallel litigation contesting the ITC's negative final determination. *Id.* at 1383–84. The Court of Appeals ruled, therefore, that this Court had not abused its discretion in issuing the writ of mandamus to compel Commerce to issue the antidumping duty orders and collect cash deposits. *Id.*

The opinion in *Diamond Sawblades IV* contains the following passage:

To be sure, as we have noted, the Commission in this case issued its notification to Commerce at the time of the court decision upholding its remand determination, rather than at the time of the remand determination itself. In that respect, the Commission appears to have erroneously assumed that its obligation to issue a notice under section 1673d(d) was triggered by the court decision upholding its remand determination, rather than by the issuance of the remand determination itself. Nonetheless, the Commission's notice, even if late, still constituted a valid notification of the Commission's final determination on

remand for purposes of section 1673d(d), and it therefore triggered Commerce's obligation to issue an antidumping duty order under section 1673e(a). Nothing in *Timken [v. United States]*, 893 F.2d 337 (Fed. Cir. 1990) or any other decision of this court is to the contrary.

Id. at 1381. Earlier in the *Diamond Sawblades IV* opinion, in a footnote, the Court of Appeals stated that:

The Commission waited until after the Court of International Trade sustained its remand determination, even though the governing statute, 19 U.S.C. § 1673d(d), requires that notification of a determination be made “[w]henever the . . . Commission makes a determination” under section 1673d; the statute does not require or contemplate that the notification will issue only after court review of the Commission's remand redetermination.

Id. at 1378 n.1.

Guizhou Tyre argues that the conclusion by the Court of Appeals that the Commission's obligation to issue the *Timken* notice was triggered by the ITC's remand redetermination does not state the holding of *Diamond Sawblades IV* and is, instead, *dicta*. Guizhou Tyre is correct. The issue on appeal in *Diamond Sawblades IV* was whether Commerce unlawfully delayed the issuance of antidumping duty orders and cash deposit collection. The issue of whether the Commission erred in notifying Commerce of its remand redetermination only after that redetermination had been sustained by the Court of International Trade was not before, or decided by, the Court of International Trade in *Diamond Sawblades III* and accordingly was not before the Court of Appeals in *Diamond Sawblades IV*. Had that issue actually been before the Court of Appeals, and fully briefed on that basis, the appellate court may have reached a different conclusion. Although the opinion in *Diamond Sawblades IV* speculated that “the Commission appears to have erroneously assumed that its obligation to issue a notice under section 1673d(d) was triggered by the court decision upholding its remand determination, rather than by the issuance of the remand determination itself,” *id.* at 1381, this sentence does not state a holding of the case and, therefore, is not controlling on the claim Guizhou Tyre raises in this dispute.

Unlike *Diamond Sawblades IV*, this case squarely presents the question of whether Commerce, as Guizhou Tyre claims, erred in issuing the Order, and directing the collection of cash deposits pursuant to that Order, *before* the Court of International Trade had decided whether the ITC's affirmative remand redetermination should be sustained or remanded back to the Commission. The court next turns to this question.

The court considers, first, the immediate effect, and the continuing effect, of the ITC's negative final determination. The Commission notified Commerce of this determination on March 13, 2017.⁸ *See Order*, 84 Fed. Reg. at 4,436. On March 17, 2017, the Commission published this determination in the Federal Register. *Truck and Bus Tires From China*, 82 Fed. Reg. at 14,232. According to the Tariff Act, the immediate effect of publication was to terminate the antidumping duty investigation, both as to the Commission and as to Commerce. *See* 19 U.S.C. § 1673d(c)(2) (directing, in the event of a negative final determination of the ITC under § 1673d(b), that "the investigation shall be terminated upon the publication of notice of that negative determination.")⁹ The statute directed, further, that upon the publication of the Federal Register notice required by 19 U.S.C. § 1673d(d), Commerce "shall—(A) terminate the suspension of liquidation under section 1673b(d)(2) of this title, and (B) release any bond or other security, and refund any cash deposit, required under section 1673b(d)(1)(B) of this section."¹⁰ *Id.*

The continuing effect of the ITC's negative final determination is also defined by the Tariff Act. An affirmative final determination of the Commission being essential to the entry of an antidumping duty order, the effect of the Commission's negative final determination in this instance was to preclude the issuance of any antidumping duty order, from the date of publication (March 17, 2017) until invalidation of that negative final determination. *See* 19 U.S.C. §§ 1673, 1673d(c)(2) (requiring for the issuance of an antidumping duty order an affirmative final less-than-fair value determination by Commerce and an affirmative final injury or threat determination by the Commission).

The court considers, next, the effect of the Commission's submitting its remand redetermination for this Court's consideration on January

⁸ "Whenever the administering authority or the Commission makes a determination under this section [1673d], it shall notify the petitioner, other parties to the investigation, and the other agency of its determination and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register." 19 U.S.C. § 1673d(d).

⁹ The *USW* litigation in this Court continued for approximately the next three years, i.e., from April 14, 2017 to February 18, 2020, the date this Court entered its judgment in *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers, Int'l Union, AFL-CIO, CLC v. United States*, 44 CIT ___, 425 F. Supp. 3d 1374 (2020) ("*USW II*"). Therefore, the antidumping duty investigation, having been terminated by operation of 19 U.S.C. § 1673d(c)(2) on March 17, 2017, was not ongoing during the pendency of the *USW* litigation.

¹⁰ Commerce, on April 4, 2017, instructed U.S. Customs and Border Protection to liquidate all affected entries "without regard to antidumping duties." *Order*, 84 Fed. Reg. at 4,436 ("Accordingly, Commerce instructed CBP to liquidate entries of subject merchandise without regard to antidumping duties.") & 4,436 n.3 (citing CBP Message No. 7094307 dated Apr. 4, 2017).

30, 2019, during the *USW* litigation, and its notifying Commerce of its remand redetermination on February 8, 2019. The court concludes that neither event invalidated the ITC's negative final determination, and neither put the ITC's affirmative remand redetermination into effect.

The negative ITC determination was a *final* determination (as defined in 19 U.S.C. § 1673d(b)). By operation of 19 U.S.C. § 1673d(c)(2), it went into effect and was not invalidated by the subsequent commencement of the action under 19 U.S.C. § 1516a to contest it. After that action was brought, the Court of International Trade, on November 1, 2018, issued an interlocutory order directing the Commission to reconsider certain findings (on the nature of export subsidies and on price effects) it had made in reaching its negative determination and to submit a new decision upon remand. *USWI*, 42 CIT at __, 348 F. Supp. 3d at 1339–40. This Court ordered reconsideration of the negative final determination “consistent with this opinion.” *Id.* at 1339. The *USW* litigation continued for another year (until the entry of judgment on February 18, 2020) and entailed this Court's considering comments of the parties on the ITC's remand redetermination and an oral argument. *See USW II*, 44 CIT at __, 425 F. Supp. 3d at 1377. Necessarily, the litigation carried with it the possibility of further changes to the outcome prior to a final disposition. *See, e.g.*, USCIT R. 54(b) (stating the general rule that any decision of this Court that does not adjudicate all claims or the rights and liabilities of all parties “may be revised at any time before the entry of a judgment”).

While it is well established that the Court of International Trade, in conducting judicial reviews under section 516A of the Tariff Act, has the power to issue interlocutory orders, including orders for reconsideration of contested determinations of Commerce or the Commission, section 516A also contemplates that judicial review in the Court of International Trade will result in an agency “disposition” that is “consistent with the final disposition of the court.” 19 U.S.C. § 1516a(c)(3) (2018) (“If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.”). As of January 30, 2019, the date the ITC submitted its remand redetermination, as of February 8, 2019, the date the ITC notified Commerce of that redetermination, and as of February 15, 2019, the date Commerce published the Order, the Court of International Trade was far from reaching a final disposi-

tion, for it had yet even to decide whether the ITC's remand redetermination complied with the interlocutory order it had issued on November 1, 2018. Were that redetermination ultimately held by this Court not to so comply, it could not have been put into effect in any respect, including by the collection of cash deposits upon publication of an antidumping duty order. Nevertheless, Commerce took steps to effectuate the ITC's remand redetermination by issuing the Order and directing U.S. Customs and Border Protection ("Customs") to collect cash deposits thereunder. Those steps were authorized neither by the Tariff Act nor by the Court of International Trade, and in effect they usurped this Court's authority over the conduct of the judicial review proceeding.

In addition to arguing that the Department's action was in accord with the decision of the Court of Appeals in *Diamond Sawblades IV*, defendant also argues that Commerce was required to issue the Order when it did to comply with the directive in 19 U.S.C. § 1673e(a) (2018). Def.'s Br. 30–31. The court rejects this argument. The cited provision states that "[w]ithin 7 days after being notified by the Commission of an affirmative determination under section 1673d(b) of this title, the administering authority [i.e., Commerce] shall publish an antidumping duty order." 19 U.S.C. § 1673e(a) (2018). The "affirmative determination under section 1673d(b)" mentioned in this provision is a "final determination" of material injury or threat by the Commission, made in the ordinary course during an antidumping duty investigation, and following a final LTFV determination by Commerce. *See id.* § 1673d(b) (2018). That was not the situation at the time Commerce erroneously entered the Order. For the reasons the court discussed previously, the antidumping duty investigation, having been terminated upon the ITC's earlier negative final determination, was not ongoing at that time. Because finality—in any sense of the word—had not yet attached to the ITC's remand redetermination as of February 8, 2019, the date the ITC notified Commerce of it, Commerce did not have before it a notification by the Commission of a decision that was described by 19 U.S.C. § 1673e(a) (2018), and the Department's authority or duty to issue an antidumping duty order had not yet arisen.¹¹

The court's conclusion is further illustrated by an example. If, for instance, a contested final determination of the ITC were an affirma-

¹¹ In the *Diamond Sawblades* litigation, the Commission described its affirmative remand redetermination as "final" in the notification it submitted to Commerce. *See Diamond Sawblades IV*, 626 F.3d at 1379. As mentioned *supra*, this notification followed the entry of judgment by this Court sustaining the remand redetermination, an event that had not occurred as of the time the ITC notified Commerce of its remand redetermination in the *USW* litigation.

tive one instead of a negative one (followed, necessarily, by the publication of an antidumping duty order), and were the ITC's affirmative final determination contested in this Court with the result that the Commission submitted a negative determination on remand, it could not correctly be argued that the ITC's mere notification to Commerce of that negative remand redetermination, or the submission of that decision for the consideration of this Court, would have been sufficient to revoke the antidumping duty order. The ITC's negative determination on remand would not have been the equivalent of a negative determination under 19 U.S.C. § 1673d(b)(1) (2018), which, in order to effect a termination of an antidumping duty investigation by operation of 19 U.S.C. § 1673d(c)(2) (2018), must be one to which finality has attached. Under neither that factual scenario, nor the one presented by this case, does any provision in the Tariff Act attach finality to a redetermination by an administrative agency that is submitted for this Court's consideration in remand proceedings this Court conducts to adjudicate a challenge to a final agency determination brought under 19 U.S.C. § 1516a (2018).

In summary, the ITC's remand redetermination was not a determination described by 19 U.S.C. § 1673e(a) (2018) as of February 8, 2019, the date the ITC notified Commerce of this decision. Therefore, the Department's issuance of the Order on February 15, 2019, *Order*, 84 Fed. Reg. at 4,436, was premature.

The court next addresses the issue of the procedure Commerce should have followed with respect to issuance of an antidumping duty order. In provisions that do not refer specifically to judicial review, the Tariff Act specifies the normal procedures for issuance of an antidumping duty order when Commerce and the ITC have issued affirmative final determinations: "If the determinations of the administering authority and the Commission under subsections (a)(1) [19 U.S.C. § 1673d(a)(1) (2018), the final less-than-fair value determination by Commerce] and (b)(1) [19 U.S.C. § 1673d(b)(1) (2018), the final determination of the Commission] are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title." 19 U.S.C. § 1673d(c)(2) (2018). The Commission's affirmative remand redetermination was sustained in a judgment of this Court entered on February 18, 2020. Judgment, Ct. No. 17-00078, ECF No. 120. In accordance with the holding of *Diamond Sawblades IV*, Commerce was required to take steps to publish an antidumping duty order at that time rather than after any appeal of

the judgment entered in *USW II* had been exhausted.¹² Because the earliest date Commerce could have published an antidumping duty order in the Federal Register was February 21, 2020, the court, consistent with the holding in *Diamond Sawblades IV*, intends to adopt this date in fashioning a remedy for Guizhou Tyre's successful claim that the Order was issued prematurely.¹³

In issuing the Order on February 15, 2019, Commerce announced a series of implementing steps. It stated, first, that "Commerce will direct CBP to assess, upon further instruction by Commerce, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise, for all relevant entries of truck and bus tires from China." *Order*, 84 Fed. Reg. at 4,436. "These antidumping duties will be assessed on unliquidated entries of truck and bus tires from China entered, or withdrawn from warehouse, for consumption on or after the effective date of this antidumping duty order." *Id.* Second, Commerce announced that "effective the publication date of this order, we will instruct CBP to suspend liquidation on all entries of truck and bus tires from China" and that "[t]hese instructions suspending liquidation will remain in effect until further notice." *Id.* at 4,437. Third, Commerce announced that "[w]e will also instruct CBP to require cash deposits at rates equal to the estimated weighted-average dumping margins indicated below." *Id.* The notice specified the rate of 22.57% for the "China-Wide Entity" (which included GTCIE), *id.* at 4,440, and which cash deposit rate would be adjusted downward to 2.83% upon deducting the amended countervailing duty rate of 19.74% attributable to domestic pass-through subsidies and export subsidies, as determined in "the concurrent countervailing duty investigation," *id.* at 4,437 n.9.

¹² Under 19 U.S.C. § 1516a(c)(1) (2018) and the companion provision, 19 U.S.C. § 1516a(e) (2018), as interpreted by *Timken Co.*, 893 F.2d at 337, Commerce should have arranged for Federal Register publication of a *Timken* notice. The court is unable to find a *Timken* notice for the *USW II* decision of this Court in the Federal Register issues published for the ten-day period following February 18, 2020.

¹³ The court recognizes that as a practical matter, it would have been unlikely (but not impossible) that Commerce could have published an antidumping duty order on Friday, February 21, 2020. Under "regular schedule" procedures for Federal Register publication, doing so would have required Commerce to submit the document to the Federal Register by 2:00 p.m. on Tuesday, February 18, 2020, the same day this Court issued its judgment in *USW II*. See 1 C.F.R. § 17.2 (2019) (under which submission before 2:00 p.m. results in publication on the third day after submission). It would not appear that the publication under the "Criteria for emergency publication," *id.* § 17.3 ("prevention, alleviation, control, or relief of an emergency situation") would have been available, and even if it had been, publication earlier than February 21, 2020 would have been extremely unlikely. Based on the circumstances, court intends to adopt February 21, 2020 as the earliest date Commerce possibly could have published an antidumping duty order.

As the court noted previously, the effect of the publication of the ITC's initial, negative determination on March 17, 2017, as provided by 19 U.S.C. § 1673d(c)(2), was termination of the investigation, termination of the suspension of liquidation that previously had been imposed under 19 U.S.C. § 1673b(d)(2), the release of any security, and the refund of any cash deposits. By operation of that statutory provision, the investigation remained terminated until the first possible effective date of an antidumping duty order, which in this instance appears to have been February 21, 2020. In this situation, the Tariff Act requires that entries made prior to that date not be assessed antidumping duties. The court intends to order Commerce to direct Customs to liquidate these entries without regard to antidumping duties and to refund all cash deposits collected on these entries, with interest as provided by law, when it enters a judgment to conclude this judicial review proceeding. In the remand redetermination that Commerce will file in response to this Opinion and Order, Commerce may comment on the remedy the court intends to order, including in particular the court's choice of February 21, 2020 as the earliest possible date the Order could have been entered. The parties may address that remedy also, in their comment submissions on the Department's remand redetermination.

D. The Department's Denial of Separate Rate Status for GTCIE

In antidumping duty investigations of imports from nonmarket economy ("NME") countries, including the PRC, the Department's practice is to begin "with a rebuttable presumption that all companies within the country are subject to government control." *Final I&D Mem.* at 6. Under this practice, Commerce assigns all exporters and producers of investigated merchandise a single rate unless "an exporter can demonstrate that it is sufficiently independent to be entitled to a separate rate." *Id.* (footnote omitted). To rebut the presumption, an exporter or producer must demonstrate "*de jure*" and "*de facto*" independence from government control. *See id.* Commerce concluded that GTCIE had not rebutted its presumption of *de facto* control by the PRC government. *Id.* at 27.

Commerce noted, and it is not contested, that during the period of investigation the Guiyang Industry Investment Group Co., Ltd. ("GIIC") held a 25.20% ownership stake in GTC (which owned 100% of GTCIE), and that GIIC was 100% owned by a government entity, the Guiyang State-owned Assets Supervision and Administration Commission (the "Guiyang SASAC"). *See id.* at 24. In the Preliminary Decision Memorandum, Commerce preliminarily determined "that Guizhou Tyre Import & Export Co., Ltd. [GTCIE] did not rebut the

presumption of the *de facto* control over the company's selection of the board and management and profit distribution." *Prelim. Decision Mem.* at 16 (footnote omitted). In the Issues and Decision Memorandum, Commerce stated that "[f]or the final determination, we continue to deny separate rate eligibility for GTCIE." *Final I&D Mem.* at 27. Commerce again concluded that GTCIE failed to rebut the Department's presumption of *de facto* government control over GTC's selection of members of the board of directors, its selection of management, and its profit distribution. *Id.* As to selection of board members, Commerce referred to a shareholders' meeting held in May 2015, and another held in July 2015, concluding that "[r]ecord evidence does not support a finding that GTC's selection of the board took place in shareholders meetings available to all shareholders." *Final I&D Mem.* at 27; Guizhou Tyre's Br. 24–25. On profit distribution, Commerce referred to a 2014 preliminary profit distribution plan that was voted down at the May 2015 shareholders meeting and "passed in a shareholders meeting on July 16, 2015, in which the minority shareholders' rights were not protected, contrary to GTCIE's assertion." *Final I&D Mem.* at 28; Guizhou Tyre's Br. 25.

Guizhou Tyre argues that "Commerce's analysis is directly contrary to the record, which establishes that GTC's shareholders' meetings, in fact, were available to all shareholders." Guizhou Tyre's Br. 24. Guizhou Tyre identifies record evidence in support of its contention that the two shareholders' meetings that took place in May 2015 and July 2015, to each of which Commerce alluded in the Issues and Decision Memorandum, were announced to, and made available to, all shareholders. *Id.* at 25 (citing *GTCIE Second SRA Suppl. Ex. 3D* at "Resolution of the 2014 Annual Shareholders' General Meeting" ¶ I.1.6.). Commerce appears to have disregarded this evidence detracting from its conclusion.

Alluding to the July 2015 meeting, at which, as Guizhou Tyre acknowledges, "proposals favored by GIIC passed," *id.* at 24, defendant argues that "Commerce did not conclusively state and find that the shareholder meeting was not available to all shareholders." Def.'s Br. 14. This argument is unconvincing. Unquestionably, Commerce reached its decision after assuming that the meetings were not open to all shareholders. Defendant's assertion to the contrary impliedly acknowledges that this assumption might well have been false.

Under the standard of review it must apply, the court cannot sustain an agency determination that relies, in whole or in part, upon an invalid finding of material fact. Commerce built upon its invalid factual finding in stating that "[b]ecause of the type of shareholders meetings in which GIIC elected GTC's board members, we do not find

any practical difference between electing board members or appointing board members” and that “GIIC’s election of GTC’s board members was like an appointment of board members.” *Final I&D Mem.* at 27. The evidence upon which Commerce relied, which is that GIIC’s shareholders succeeded in electing board members at the July 2015 meeting after being unsuccessful in attempting to do so at the May 2015 meeting, is less than substantial evidence for the Department’s conclusion that GIIC effectively “appointed” board members at the July 2015 meeting. Because Commerce had no basis for a finding that the meetings were not open to all shareholders the court also must reject the derivative finding, that “record evidence demonstrates that GIIC intentionally selected a shareholders meeting that is most favorable to it to elect members of GTC’s board.” *Id.*

Commerce did not attempt to refute, and appears to have accepted, contentions by Guizhou Tyre that GIIC did not nominate board members during the period of investigation, and that the July 2015 shareholders meeting conformed to all applicable requirements for an election of board members, not an appointment process. Commerce itself acknowledges that “GIIC did not nominate any of the directors by itself under Article 82 of the articles of association.” *Id.* But according to Commerce, “the process of nomination for GTC’s board members was under the influence of GIIC.” *Id.* Commerce added, but failed to support or justify, a conclusion that “[w]hether those shareholders meetings complied with the relevant laws and the articles of association is irrelevant in the selection of a particular type of shareholders meetings to elect GTC’s board members.” *Id.* While attaching significance to the *result* of the nomination and election process, Commerce does not cite any evidence that GIIC’s shareholders exerted any irregular or improper influence over that process or did anything other than vote their shares, which, according to the evidence Commerce does not dispute, they were entitled to do. Commerce found that “GIIC’s shares that elected the board members of its preference were present in shareholders’ meetings,” *id.*, but missing from the Issues and Decision Memorandum is discussion of evidence as to whether, or how, GIIC acted to prevent other shareholders from exercising their voting rights at the July 2015 meeting, either as to the election of board members or as to the approval of a profit distribution plan.

Having begun its analysis with an unwarranted assumption that shareholder meetings, including in particular the July 2015 meeting, were not open to all shareholders, Commerce proceeded to conclude that:

Although the articles of association: (1) require the election of senior managers by the board members and (2) prevents [*sic*] a

person who is in a position other than a board of the controlling shareholders or the actual controllers of GTC from serving as a senior manager of GTC, we find that, given the specific nature of the election of the board members and the appointment of senior managers by the board, these provisions do not ensure the absence of the *de facto* control from the selection of management.

Id. The Department's invalid assumption concerning the unavailability of the meetings to all shareholders necessarily invalidates the Department's assumption about "the specific nature of the election of the board members." *Id.* As a result of these errors, Commerce proceeded to deny GTCIE a separate rate without a basis in substantial evidence for its finding that GIIC controlled the selection of board members and management of GTC and GTCIE.

The deficiency in the Department's analysis with respect to the findings on board member and manager selection, and on profit distribution, is not the only reason the court must remand to Commerce the decision to deny separate rate status to GTCIE. The court concludes, further, that the Department's reasoning is flawed, being vague and ambiguous as to whether its inquiry is focused on government control of export activities.¹⁴

In its Preliminary Decision Memorandum, Commerce stated that "[a]ccording to this separate rate test, the Department will assign a separate rate in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export activities." *Prelim. Decision Mem.* at 13 (emphasis added). Commerce identified criteria it considers when determining whether a company is free from "*de facto* government control of its export functions." *Id.* at 15 (emphasis added) (footnote omitted). Commerce stated the criteria as follows:

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

Id. Commerce explained that in instances of minority government ownership, "we will analyze the impact of

¹⁴ As the court discusses later in this Opinion and Order, this flaw also affected the separate rate analysis Commerce applied to the issue of whether Double Coin rebutted its presumption of government control.

government ownership within the context of the *de facto* criteria.” *Id.* at 13.

Commerce did not indicate in the Issues and Decision Memorandum that it intended to make a change to the methodology Commerce described in the preliminary phase of the investigation. Nevertheless, the analysis as to GTCIE in that document does not focus specifically on export activities or functions in addressing government control. As a result, the separate rate analysis Commerce applied to GTCIE failed to show a factual relationship between the findings it made as to selection of board members and distribution of profits and the purpose it identified for applying its *de facto* separate rate criteria in the preliminary phase, which was to determine whether the government of the PRC exercised control of GTCIE’s “export activities” or “export functions.”

In its brief, defendant argues that Commerce “may deny a request for a separate rate if an applicant fails to demonstrate separation from the government with respect to any one of the *de jure* or *de facto* criteria.” Def.’s Br. 9 (citing *Yantai CMC Bearing Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1317, 1326 (2017) (“*Yantai*”); *Advanced Tech. & Materials Co. v. United States*, 37 CIT 1487, 1490, 938 F. Supp. 2d 1342, 1345 (2013) (“*Advanced Tech. III*”), *aff’d*, 581 Fed. App’x 900 (Fed. Cir. 2014)). Defendant further elaborates that, “if an applicant fails to establish any one of the *de jure* or *de facto* criteria, Commerce is not required to continue its analysis and determine whether the applicant has, or has not, established the other applicable criteria.” *Id.* (citing *Yantai*, 203 F. Supp. 3d at 1326). For this argument, defendant relies on *Yantai* and *Advanced Tech. III*, but neither decision was based on facts analogous to those in this investigation, in which ownership by government-controlled entities was only 25.20%, with 74.80% owned by public shareholders. *Final I&D Mem.* at 24; Guizhou Tyre’s Br. 5; Def.’s Br. 10. In *Yantai*, the respondent had a “chain of ownership” that “extended to the Chinese government because Yantai CMC is more than majority owned by CMC, which is, in turn, more than majority owned by Genertec, and Genertec is wholly-owned by the State-owned Assets Supervision and Administration of the State Council (‘SASAC’).” 41 CIT at __, 203 F. Supp. 3d at 1323 (footnote omitted) (citation omitted). In *Advanced Tech. III*, the respondent was similarly majority owned by a company that was wholly-owned by the SASAC. 37 CIT at 1494, 938 F. Supp. 2d at 1348.¹⁵

¹⁵ *Advanced Tech. & Materials Co. v. United States*, 581 Fed. App’x 900 (Fed. Cir. 2014) was issued as a summary affirmance according to U.S. Court of Appeals for the Federal Circuit Rule 36 and therefore is not a precedential decision.

The question of majority or minority government ownership aside, the Department's analysis fails to clarify or explain whether its finding of government control extended, specifically, to GTCIE's export activities during the period of investigation. The Tariff Act contemplates a retrospective approach to the determination of antidumping duties under 19 U.S.C. §§ 1673a et seq. See *Thyssenkrupp Steel North Am., Inc. v. United States*, 886 F.3d 1215, 1218 (Fed. Cir. 2018) (“[T]he United States uses a ‘retrospective’ assessment system to determine the ‘final liability’ for antidumping duties.” (quoting 19 C.F.R. § 351.212(a) (2014))). The Department's rationale for placing GTCIE within the PRC-wide entity was that Commerce considered GTCIE, which Commerce determined not to have rebutted its presumption of *de facto* control, to be part of a single exporting entity consisting of all Chinese exporters of the subject merchandise that are under government control. See *Final I&D Mem.* at 27. Even if the court were to presume Commerce to be correct in its findings that GIIC controlled the selection of board members and the distribution of profits (and, as discussed above, the analysis Commerce has put forth does not allow it to so presume), the court could not conclude solely from those findings that the government of China exercised control of export “functions” or, specifically, the prices at which subject merchandise exported by GTCIE was sold during the period of investigation. Because the pricing decisions were already made by the time Commerce made its separate rate decision for GTCIE, a vague presumption that the government had the potential to control GTCIE's export activities and prices during the period of investigation is unconvincing and does not suffice for the purposes Commerce itself stated for its separate rate analysis.

Guizhou Tyre introduced evidence to support its contention that the Chinese government did not control GTCIE's export activities and in particular its export prices. See Guizhou Tyre's Br. 6–15, 24–30. Under the “rebuttable presumption” method of the Department's separate rate analysis, the information Guizhou Tyre put forward was sufficient to require Commerce to consider the record as a whole and make a factual determination on whether the Chinese government actually controlled Guizhou Tyre's export functions and export pricing decisions during the period of investigation. Having failed to address this pivotal inquiry, Commerce must do so on remand and reach a result supported by the record evidence.

E. Double Coin’s Challenge to the Establishment of a Rate for the PRC-Wide Entity and the Assignment of that Rate to Double Coin

Double Coin claims that, on the facts shown by the record of the subject investigation, Commerce acted without statutory authority in establishing an estimated dumping duty rate for the PRC-wide entity (specifically, 22.57%) and assigning that rate to Double Coin. Double Coin’s Br. 7–27. Directing the court’s attention to section 735(c)(1)(B)(i) of the Tariff Act, 19 U.S.C. § 1673d(c)(1)(B)(i), Double Coin argues that the PRC-wide rate was invalid because it was neither an estimated weighted-average dumping margin for an individually-investigated exporter or producer, as required by § 1673d(c)(1)(B)(i)(I), nor an “all-others rate” of the type the Tariff Act, in § 1673d(c)(1)(B)(i)(II), requires Commerce to assign to “all exporters and producers not individually investigated.” *Id.* at 8, 10–16. According to Double Coin, the “clear identification of these two options for antidumping rates necessarily forecloses Commerce from adopting and imposing a different kind of antidumping rate; one applying a country-wide [rate] *regardless* of whether a company has been ‘individually investigated.’” *Id.* at 8 (emphasis in original). For comparison, Double Coin points to countervailing duty provisions in the Tariff Act, 19 U.S.C. § 1671d, which specify three types of rates: (a) an “individual countervailable subsidy rate for each exporter and producer individually investigated,” (b) “an estimated all-others rate,” and (c) “a single estimated country-wide subsidy rate.” 19 U.S.C. § 1671d(c)(1)(B)(i). Noting that the first and second rates parallel those found in section 1673d(c) while the third is not explicitly included in the antidumping duty provisions, Double Coin argues that “when Congress explicitly grants some authority in one part of a statute, that is a clear indication Congress knows how to grant that authority and its failure to provide that authority elsewhere in the same statute is deliberate.” Double Coin’s Br. 8–9 (citing *Loughrin v. United States*, 573 U.S. 351, 358 (2014)). Double Coin maintains that Congress, having expressly provided for a country-wide rate in the countervailing duty provisions but having declined to do so in the antidumping duty provisions, did not intend for Commerce to establish a country-wide rate in an antidumping duty investigation. Double Coin’s Br. 8–9. For the reasons stated below, the court denies relief on Double Coin’s claim.

The Tariff Act requires that Commerce, when making its final determination of whether the subject merchandise is being, or is likely to be, sold at less than fair value in the United States, “determine the estimated weighted average dumping *margin* for each ex-

porter and producer *individually investigated*, and . . . determine . . . the estimated all-others *rate* for all exporters and producers *not individually investigated*.” 19 U.S.C. § 1673d(c)(1)(B)(i) (emphasis added). In this language, the statute draws a distinction between an estimated weighted average dumping duty “margin,” which Commerce is to assign to each exporter or producer that it investigates individually, and a “rate” that Commerce is to assign to “all exporters and producers not individually investigated.” *Id.*

A related provision, 19 U.S.C. § 1677f-1(c), states that in determining the weighted average dumping margin under section 1673d(c), Commerce “shall determine the individual weighted average dumping margin *for each known exporter and producer* of the subject merchandise.” *Id.* § 1677f-1(c)(1) (emphasis added). The only exception the statute provides to this “[g]eneral rule,” stated in the next paragraph, applies when “it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation.” *Id.* § 1677f-1(c)(2). In this instance, Commerce may “determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . . [a] statistically valid [sample] . . . [of] exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.” *Id.* Commerce did not invoke this exception, either as to an individual investigation of Double Coin (which, to the contrary, it selected for individual investigation) or as to the PRC-wide entity, which Commerce did not identify as an entity that it was declining to investigate because of the large number of exporters or producers involved in the investigation.¹⁶ Moreover, Commerce did not state that it determined the 22.57% rate Commerce assigned to the PRC-wide entity according to the “[m]ethod for determining the all-others rate” that the statute specifies in 19 U.S.C. § 1673d(c)(5) (under which Commerce determined the 9.00% rate for the separate rate respondents). Instead, Commerce stated in the

¹⁶ In the investigation, Commerce invoked the exception in section 1677f-1(c), but not to avoid an individual investigation of Double Coin, which was one of the two companies Commerce selected for individual investigation due to their accounting for the largest volume of the subject merchandise during the period of investigation. See *Truck and Bus Tires from the People’s Republic of China: Decision Memorandum for the Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination 1–2* (Int’l Trade Admin. Aug. 26, 2016) (P.R. Doc. 716). Instead, Commerce followed its practice of presuming that all exporters and producers of subject merchandise in the nonmarket economy (“NME”) country that it considered not to have rebutted its presumption of government control, are to receive a single estimated weighted-average dumping margin. *Id.* at 12. Commerce concluded that the statute did not require it to assign Double Coin an individual margin because it found that Double Coin was part of the government-controlled PRC-wide entity. See *id.* at 3, 16.

Issues and Decision Memorandum that “[f]or the final determination, we continue to base the PRC-wide rate on AFA” and that “we have selected the highest petition rate[] to determine the AFA rate for the PRC-wide entity.” *Final I&D Mem.* at 7. In using the term “AFA,” Commerce used its acronym for “adverse facts available,” by which it meant a combination of the use of “facts otherwise available” under 19 U.S.C. § 1677e(a) and an “adverse inference” under 19 U.S.C. § 1677e(b). A “margin” can be based in part or entirely on § 1677e(a) and (b), *see, e.g.*, 19 U.S.C. § 1673d(c)(5), but only if the respective requirements of § 1677e(a) and (b) are met, which include, *inter alia*, a finding that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from Commerce. *See id.* § 1677e(b).

In its response to Double Coin’s Rule 56.2 motion, defendant argues that “Commerce’s PRC-wide rate is an individually investigated rate pursuant to 19 U.S.C. § 1673d(c)(1)(B)(i)(I).” Def.’s Br. 29. Addressing Double Coin’s argument, Double Coin’s Br. at 20–27, that the Department’s interpretation of the Tariff Act is unreasonable and therefore does not qualify for deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), defendant maintains that “Commerce’s PRC-wide rate is one of the two statutorily authorized rates under 19 U.S.C. § 1677d(c)(1)(B)(i), and thus, it is unnecessary to conduct a *Chevron* step two analysis.” Def.’s Br. 30. Because the PRC-wide rate was not determined according to 19 U.S.C. § 1673d(c)(1)(B)(i)(II), the court next considers whether the PRC-wide rate Commerce assigned to the PRC-wide entity conforms to the requirements of 19 U.S.C. § 1673d(c)(1)(B)(i)(I).

The provision at issue contains two specific requirements. In taking an action under this provision, Commerce must determine an “estimated weighted average dumping margin,” and it must assign that margin to “each exporter and producer” that is “individually investigated,” 19 U.S.C. § 1673d(c)(1)(B)(i)(I) (emphasis added), and as to the latter the statute provides, further, that in this circumstance Commerce “shall determine the individual weighted average dumping margin for each *known* exporter and producer of the subject merchandise.”¹⁷ *Id.* § 1677f-1(c)(1) (emphasis added). Adjudicating Double Coin’s claim, therefore, requires the court to answer two questions: was the 22.57% rate Commerce assigned to the PRC-wide

¹⁷ The Tariff Act specifies that “[t]he term ‘dumping margin’ means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise,” 19 U.S.C. § 1677(35)(A), and that “[t]he term ‘weighted average dumping margin’ is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer,” *id.* § 1677(35)(B).

entity an estimated “weighted average dumping margin,” and was the entity to which Commerce assigned it a “known” exporter or producer of the subject merchandise that was “individually investigated”?

The Court of Appeals provided the answers to both questions in *China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021), a precedential decision on material facts analogous to those of this case (and in which the plaintiff-appellee was Double Coin). Upon applying the facts of this investigation to the holding in *China Mfrs. Alliance*, which the court considers controlling on the claim Double Coin raises in this proceeding, the court concludes that the rate Commerce assigned to the PRC-wide entity qualifies as an “estimated weighted average dumping margin” within the meaning of that term as used in 19 U.S.C. § 1673d(c)(1)(B)(i)(I). Also based on the holding in *China Mfrs. Alliance*, the court concludes that the PRC-wide rate must be deemed to have been assigned to a known, “individually-investigated” exporter and producer consisting of the PRC-wide entity.

China Mfrs. Alliance involved the fifth administrative review of an antidumping duty order on certain off-the-road tires from China. In the investigation resulting in the antidumping duty order, “Commerce sent quantity and value questionnaires to ninety-four identified Chinese exporters, and received responses from only thirty.” *China Mfrs. Alliance*, 1 F.4th at 1037. The Court of Appeals noted that “[b]ased on that information, Commerce identified an entity composed of uncooperative exporters, who had failed to rebut the presumption of government control and for whom Commerce had no individual data” and that “[a]ccordingly, Commerce calculated an AFA rate for this PRC-wide entity.” *Id.* The Court of Appeals concluded from these facts that “[t]he PRC-wide entity rate resulting from Commerce’s initial investigation constitutes an ‘individually investigated’ weighted average dumping margin within the meaning of 19 U.S.C. § 1673d(c)(1)(B)(i)(I) because ‘Commerce treats the companies comprising the China-wide entity as a single entity and investigated them as such in the original investigation.’” *Id.* (citation omitted). The Court of Appeals held, further, that on the facts presented, Commerce may recognize a single NME-wide entity to include all exporters that fail to rebut the presumption of government control. *Id.*

In the investigation at issue, Commerce stated that “the Department did not receive responses to its Q&V [quantity and value] questionnaire from certain PRC exporters and/or producers of the merchandise under consideration that were named in the Petition

and received the Q&V questionnaires the Department issued.” *Prelim. Decision Mem.* at 17. “Because non-responsive PRC companies have not demonstrated that they are eligible for separate rate status, the Department finds that they have not rebutted the presumption of government control and, therefore, considers them to be part of the PRC-wide entity” and “preliminarily [is] determining the PRC-wide rate on the basis of AFA.” *Id.* In the final phase of the investigation, Commerce made no change to this methodology in determining “the AFA rate for the PRC-wide entity” by selecting “the highest petition rate,” *Final I&D Mem.* at 7, which was 22.57%, *Final LTFV Determination*, 82 Fed. Reg. at 8,604.

The material facts concerning the PRC-wide entity in the investigation at issue do not differ materially from the facts pertaining to the investigation that resulted in the antidumping duty order, and the establishment of a single, PRC-wide rate, upon which the Court of Appeals based its holdings in *China Mfrs. Alliance*. Because those holdings are controlling on the claim Double Coin directs to the Department’s authority to establish a rate for a PRC-wide entity and assign that rate to Double Coin, the court may not grant a remedy on this claim. Accordingly, the court next considers Double Coin’s claim that Commerce erred in denying separate rate status to Double Coin on a factual determination that Double Coin had failed to rebut the Department’s presumption of *de facto* control by the government of the PRC.

F. The Department’s Denial of Separate Rate Status for Double Coin

In the Issues and Decision Memorandum, Commerce noted, as stated in Double Coin’s response to Section A of the Department’s questionnaire, that “Double Coin is 72.15 percent owned by Shanghai Huayi, which is 100 percent owned by Shanghai SASAC.” *Final I&D Mem.* at 12. Here also, the Department’s reference to a “SASAC” was to a “State-owned Assets Supervision and Administration Commission.” *Id.* at 3. In the Preliminary Determination, *Prelim. Decision Mem.* at 16, and again in the Final LTFV Determination, Commerce found that “Shanghai SASAC controls Double Coin through Shanghai Huayi.” *Final I&D Mem.* at 22. Moreover, Commerce found that:

As the majority shareholder, Shanghai Huayi has rights to elect directors at the shareholders’ general meetings in accordance with the number of shares it owns, *i.e.*, 72.15 percent. Double Coin’s board appoints its general manager and the general man-

ager appoints other managers, including deputy general managers. Three of four directors are general manager and deputy general managers.

Id. at 12 Commerce concluded from these facts that “[t]herefore, Shanghai SASAC controls the selection of Double Coin’s management and the *de facto* control over Double Coin exists.” *Id.* (citing *Double Coin’s Section A Response* 11–19 (May 23, 2016)). While not contesting these factual findings, Double Coin argues, *inter alia*, that the record evidence does not establish “Chinese Government control over Double Coin’s export activities.” Double Coin’s Br. 31. Double Coin argued that it placed evidence on the record, which included excerpts from Double Coin’s Articles of Association, demonstrating, for example, that Double Coin, as a publicly listed company subject to China’s “Company Law,” was not under the control of its majority shareholder as to its “business” or its “financial and accounting activities.” *Id.* at 34 (quoting, *inter alia*, Article 25 (“ . . . Controlling shareholders shall respect the financial independence of the company and shall not interfere with the financial and accounting activities of the company.”) & Article 27 (“A listed company’s business shall be completely independent from that of its controlling shareholders.”)).

The court concludes that it must remand to Commerce the decision to deny separate rate status to Double Coin. A court is obligated to review a decision of an administrative agency according to the reasoning the agency puts forth. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). To do that, a court must be able to discern and evaluate that reasoning according to the applicable standard of review. Because, as discussed below, the reasoning underlying the Department’s decision, as stated in the Issues and Decision Memorandum, is unclear and ambiguous, the court is unable to proceed further in adjudicating Double Coin’s claim and instead must issue an order of remand with respect to the denial of separate rate status for Double Coin.

It is not clear to the court whether, or to what extent, the Department’s separate rate inquiry was focused on Double Coin’s *export* activities, as opposed to control of the selection of board members and management, and the Department’s statements on this question are internally inconsistent. As discussed earlier in this Opinion and Order, Commerce described its four-part test for *de facto* independence as one according to which a respondent “can demonstrate the absence of both *de jure* and *de facto* government control over its *export activities*.” *Prelim. Decision Mem.* at 13 (emphasis added). But at the same time, the Department’s depiction of its methodology indicates that a respondent situated as was Double Coin in the instant investigation

may lack a meaningful opportunity to make such a demonstration. The court notes, for example, that an analysis of the presence of, or extent of, government control over Double Coin's export activities—as opposed to the selection of board members and management—played no part in the explanation Commerce put forth, *Final I&D Mem.* at 22–24, to support its denial of separate rate status to Double Coin. To the contrary, Commerce went so far as to explain that control of any “daily operations”—including, impliedly, control of daily operations involving export sales—was not the issue with which it was concerned. *See id.* at 23 (“Whether or not Shanghai Huayi, which is Double Coin's majority owner, demonstrably exercised control over Double Coin's daily operations does not refute the fact that a government-owned entity appears to have near complete control of shareholder decisions of Double Coin.” (footnote omitted)).

As to “shareholder decisions,” Commerce explained that “[r]egardless of the restrictions of the PRC laws and the protection afforded to minority shareholders, Double Coin's articles of association demonstrate that a majority shareholder—and particularly one with 72.15 percent ownership—would be expected to have near complete control over any shareholder decisions, including decisions which may affect the management and operations of the company.” *Id.* (footnote omitted). Despite the evidence Double Coin placed on the record, including that pertaining to Articles 25 and 27 of the Articles of Association, which place restrictions on the authority of controlling shareholders, the court is asked to speculate that “shareholder” decisions “*may affect*” the management and operations of Double Coin. *Id.* (emphasis added). Even were the court to do so, it would require further speculation to conclude that the affected operations were equivalent to government control over Double Coin's export activities during the period of investigation.

The Department's analysis calls for other speculation as well. Addressing Double Coin's contention that “the price negotiations with unaffiliated U.S. customers for sales of subject merchandise were conducted by Double Coin's U.S. subsidiary, which is far removed from the PRC government,” *id.* at 22, Commerce responded that “the price negotiations between Double Coin's U.S. subsidiary and the unaffiliated U.S. customers do not rebut the presumption of the PRC government control.” *Id.* at 23. Commerce reasoned that “[t]he actual setting of price is only one of the four *de facto* criteria, ‘whereas government manipulation of the cost of inputs, . . . or rationalization of industry or output are among numerous other scenarios of concern that can affect seller pricing.’” *Id.* at 23–25 (quoting *Advanced Tech. & Materials Co., Ltd., et. al. v. United States*, 36 CIT __, __, 885 F.

Supp. 2d 1343, 1359–60 (2012)). Commerce would infer that majority ownership of Double Coin by a government-owned entity affected export pricing in these ways without pointing to record evidence or explaining the significance of these “concerns.” Commerce did not explain, for example, why government manipulation of input costs was “of concern” when input pricing in China is disregarded in the determination of normal value under the Department’s long-established NME country methodology as applied under the “surrogate value” provisions of 19 U.S.C. § 1677b(c). Nor did it shed any light on how the issue of “rationalization of industry or output” was pertinent to this investigation as it related to Double Coin.

Overall, the Department’s analysis is unclear and ambiguous as to whether, upon a finding by Commerce of majority ownership by a government entity allowing control of the selection of board and management, the Department’s presumption of control of export activities by the PRC government remains rebuttable or, in effect, becomes irrebuttable. Despite some indications to the contrary in the Issues and Decision Memorandum, the latter would appear to be the case, although the Department’s explanation of its decision, considered on the whole, is ambiguous on this point. While Commerce described the presumption as a rebuttable one, the Issues and Decision Memorandum appears to conclude that a majority shareholder would be “expected to” have control of the company through its “near complete control of any shareholder decisions,” *Final I&D Mem.* at 23, regardless of the absence of evidence to support a factual finding that a majority shareholder actually exercised control of business decisions, including, in particular, those involving export activities, during the period of investigation and regardless of evidence, such as, in this instance, evidence in the company’s Articles of Association, that would detract from any such finding.

Commerce has not promulgated a rule of general applicability for NME country investigations or reviews that addresses the question of whether government control of selection of board and management is either a rebuttable or irrebuttable presumption of government control over export activities.¹⁸ In the absence of such a rule, it is possible to construe some, but not all, of the relevant discussion in the Issues and Decision Memorandum to mean that the Department’s current practice, as applied to Double Coin in the investigation under review,

¹⁸ A rulemaking process with notice and comment procedures might provide much-needed clarity that could resolve the ambiguities the court has identified as well as allow comment on the validity and implementation of any such rule. As this Court has observed, Commerce has not developed its larger, and evolving, NME country policy through a rulemaking process. See *Jilin Forest Indus. Grp. Jinqiao Flooring Grp. Co., Ltd. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1240 (2021) (“The NME policy has not been codified by regulation and remains policy.”).

is that government control of selection of board and management is, in effect, an irrebuttable presumption of control of export activities. But if that is the current Commerce position, the discussion Commerce put forth in the Issues and Decision Memorandum cannot suffice as an explanation for adoption of such a rule or policy.

In light of the unclear and ambiguous reasoning the court has identified, the court is unable to sustain the Department's decision to deny Double Coin separate rate status. In its redetermination upon remand, Commerce must address the court's concerns by presenting a statement of the reasoning underlying any decision it reaches.

G. The Department's Decision Not to Conduct a Verification of Double Coin's Information

Double Coin claims that Commerce unlawfully denied it separate rate status without verifying the factual information upon which Commerce based its decision. Double Coin's Br. 49–53. Because the court is remanding to Commerce the decision denying Double Coin separate rate status, it is not known at this time what record information will form the basis for the Department's new decision, as set forth in a redetermination submitted upon remand, and whether any factual determinations underlying that redetermination will be in dispute. Therefore, the court defers any consideration of this claim.

III. CONCLUSION AND ORDER

Upon consideration of plaintiffs' motions for judgment on the agency record, all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Commerce shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order, in which it reconsiders its decisions not to accord separate rate status to GTCIE and to Double Coin; it is further

ORDERED that Commerce shall submit its Remand Redetermination within 90 days of the date of this Opinion and Order; it is further

ORDERED that comments of plaintiffs on the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; it is further

ORDERED that the response of defendant to the aforementioned comments must be filed no later than 15 days from the date on which the last comment is filed; and it is further

ORDERED that the joint request for oral argument of plaintiffs Guizhou Tyre and Double Coin, Joint Mot. for Oral Arg. (Mar. 30, 2020), ECF No. 53, is denied.

Dated: January 24, 2022
New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

JUDGE

Index

Customs Bulletin and Decisions
Vol. 56, No. 5, February 9, 2022

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Proposed Modification of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification and Eligibility of Certain Bed Linen Products for Preferential Tariff Treatment Under the United States-Israel Free Trade Agreement	1
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada	12
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico	24
Record of Vessel Foreign Repair or Equipment Purchase (CBP Form 226) .	36

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
NEXTEEL Co., Ltd. et al., Plaintiff and Consolidated Plaintiffs, and Husteel Co., Ltd. and Hyundai Steel Company, Plaintiff-Intervenors, v. United States, Defendant, and California Steel Industries, Inc. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.	22-5	41
Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd., et al., Plaintiffs, v. United States, Defendant.	22-6	45