

U.S. Customs and Border Protection

CBP Dec. 22-12

**TUNA TARIFF-RATE QUOTA FOR CALENDAR YEAR 2022
TUNA CLASSIFIABLE UNDER SUBHEADING 1604.14.22,
HARMONIZED TARIFF SCHEDULE OF THE UNITED
STATES (HTSUS)**

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

ACTION: Announcement of the quota quantity of tuna in airtight containers for Calendar Year 2022.

SUMMARY: Each year, the tariff-rate quota for tuna described in subheading 1604.14.22, Harmonized Tariff Schedule of the United States (HTSUS), is calculated as a percentage of the tuna in airtight containers entered, or withdrawn from warehouse, for consumption during the preceding calendar year. This document sets forth the tariff-rate quota for Calendar Year 2022.

DATES: The 2022 tariff-rate quota is applicable to tuna in airtight containers entered, or withdrawn from warehouse, for consumption during the period January 1, 2022 through December 31, 2022.

FOR FURTHER INFORMATION CONTACT: Julia Peterson, Chief, Quota and Agricultural Branch, Interagency Collaboration Division, Trade Policy and Programs, Office of Trade, U.S. Customs and Border Protection, Washington, DC 20229-1155, at (202) 384-8905 or by email at HQQUOTA@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

It has been determined that 14,672,350 kilograms of tuna in airtight containers may be entered, or withdrawn from warehouse, for consumption during Calendar Year 2022, at the rate of 6.0 percent *ad valorem* under subheading 1604.14.22, Harmonized Tariff Schedule of the United States (HTSUS). Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5

percent *ad valorem* under subheading 1604.14.30, HTSUS.

Dated: June 8, 2022.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, June 14, 2022 (85 FR 35988)]



CUSTOMS AND BORDER PROTECTION RECORDKEEPING REQUIREMENTS

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

ACTION: 60-Day notice and request for comments; extension without change 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 August 9, 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 1651-0076 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: Customs and Border Protection Recordkeeping Requirements.

OMB Number: 1651-0076.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the recordkeeping requirements.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The North American Free Trade Agreement Implementation Act, Title VI, known as the Customs Modernization Act (Mod Act) amended Title 19 U.S.C. 1508, 1509 and 1510 by revising Customs and Border Protection (CBP) laws related to recordkeeping, examination of books and witnesses, regulatory audit procedures and judicial enforcement. Specifically, the Mod Act expanded the list of parties subject to CBP recordkeeping requirements; distinguished between records which pertain to the entry of merchandise and financial records needed to substantiate the correctness of information contained in entry documentation; and identified a list of records which must be maintained and produced upon request by CBP. The

information and records are used by CBP to verify the accuracy of the claims made on the entry documents regarding the tariff status of imported merchandise, admissibility, classification/nomenclature, value, and rate of duty applicable to the entered goods. The Mod Act recordkeeping requirements are provided for by 19 CFR 163. Instructions are available at: <http://www.cbp.gov/document/publications/recordkeeping>.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: Mod. Act Recordkeeping.

Estimated Number of Respondents: 5,459.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 5,459.

Estimated Time per Response: 1,040 hours.

Estimated Total Annual Burden Hours: 5,677,360.

Dated: June 7, 2022.

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

[Published in the Federal Register, June 10, 2022 (85 FR 35565)]

ADMINISTRATIVE RULINGS

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

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than August 9, 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 1651-0085 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: Administrative Rulings.

OMB Number: 1651-0085.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with an increase in the estimated burden hours previously reported. There is no change to the information being collected.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The collection of information in 19 CFR part 177 is necessary in order to enable Customs and Border Protection (CBP) to respond to requests by importers and other interested persons for the issuance of administrative rulings. These rulings pertain to the interpretation of applicable laws related to prospective and current or completed transactions involving, but not limited to classification, marking, valuation, carrier, and country of origin. The collection of information in part 177 of the CBP Regulations is also necessary to enable CBP to make proper decisions regarding the issuance of binding rulings that modify or revoke prior CBP binding rulings. This collection of information is authorized by 5 U.S.C. 301, 19 U.S.C. 66, 1202, (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625. The application to obtain an administrative ruling is accessible at: <https://erulings.cbp.gov/s/> or the public can submit a ruling request by mail (or email).

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

Type of Information Collection: Administrative Rulings.

Estimated Number of Respondents: 3,500.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 3,500.

Estimated Time per Response: 20 hours.

Estimated Total Annual Burden Hours: 70,000.

Type of Information Collection: Appeals.

Estimated Number of Respondents: 100.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 100.

Estimated Time per Response: 30 hours.

Estimated Total Annual Burden Hours: 3,000.

Dated: June 7, 2022.

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

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE (COAC)

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

ACTION: Committee Management; notice of Federal Advisory Committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, June 29, 2022. The meeting will be open to the public via webinar only. There is no on-site, in-person option for the public to attend this quarterly meeting.

DATES: The COAC will meet on Wednesday, June 29, 2022, from 1 p.m. to 5 p.m. EDT. Please note that the meeting may close early if the committee has completed its business. Comments must be submitted in writing no later than June 24, 2022.

ADDRESSES: The meeting will be open to the public via webinar. The webinar link and conference number will be provided to all registrants by 9 a.m. EDT on June 29, 2022. For information or to request special assistance for the meeting, contact Ms. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344-1440 as soon as possible. Submit electronic comments and supporting data to www.regulations.gov or by email at tradeevents@cbp.dhs.gov. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing.

FOR FURTHER INFORMATION CONTACT: Ms. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344-1440; or Ms. Valarie M. Neuhart, Designated Federal Officer, at (202) 344-1440.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, 5 U.S.C. Appendix. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-registration: For members of the public who plan to participate in the webinar, please register online at <https://teregistration.cbp.gov/index.asp?w=265> by 5:00 p.m. EDT on June 28, 2022. For members of the public who are pre-registered to attend the meeting via webinar and later need to cancel, please do so by 5:00 p.m. EDT June 28, 2022, utilizing the following link: <https://teregistration.cbp.gov/cancel.asp?w=265>. The COAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Ms. Latoria Martin at (202) 344-1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

Comments must be submitted in writing no later than June 24, 2022 and must be identified by Docket No. USCBP-2022-0022. Comments may be submitted by one (1) of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov> and search for Docket Number USCBP-2022-0022. To submit a comment, click the “Comment!” button located on the top-right hand side of the docket page.
- *Email:* tradeevents@cbp.dhs.gov. Include the docket number in the subject line of the message.
- *Docket Instructions:* All submissions received must include the words “Department of Homeland Security” and the docket number for this action.

All comments received will be posted without change to <https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings> and www.regulations.gov, so please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice which is available via a link on the homepage of www.regulations.gov.

There will be multiple public comment periods held during the meeting on June 29, 2022. Speakers are requested to limit their comments to 2 minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: <https://www.cbp.gov/trade/stakeholder-engagement/coac>.

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed for its working groups. The Antidumping/Countervailing Duty (AD/ CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Intellectual Property Rights Process Modernization Working Group will provide updates regarding development of an electronic notice of detention and enhanced procedures for manipulation of shipments, in addition to other practical proposals for enhancing communication concerning intellectual property rights issues between the trade, the rights holders, and CBP. The Bond Working Group's updates will include the status of proposed revisions to Directive 3510-004, "Monetary Guidelines for Setting Bond Amounts," and the testing of electronic delivery of CBP Form 5955a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment. The Forced Labor Working Group will submit recommendations for the committee's consideration regarding the Uyghur Forced Labor Prevention Act (UFLPA) implementation as well as the UFLPA Importer Guidelines.

2. The Next Generation Facilitation Subcommittee will provide updates on its task forces and working groups, including an update on the progress of the 21st Century Customs Framework (21CCF) and E-Commerce Task Forces, and it is expected there will be recommendations for the committee's consideration in both areas. The Automated Commercial Environment (ACE) 2.0 Working Group will present recommendations for the committee's consideration stemming from the in-depth gap analysis of areas that may be improved when CBP embarks on ACE 2.0 modernization. Finally, the One U.S. Government Working Group will provide an update on the work planned for upcoming quarters of the 16th Term of the COAC.

3. The Rapid Response Subcommittee will provide updates for the Domestic Manufacturing and Production (DMAP) Working Group and the Broker Modernization Working Group. CBP formed the DMAP Working Group to collaborate and obtain input from industry stakeholders on trade enforcement areas impacting domestic manufacturers and producers. While this is a new group, the expectation is that recommendations will be developed and submitted for consideration at an upcoming COAC public meeting. The topics for discussion for the Broker Modernization Working Group will include the April 2022 broker exam, potential regulatory updates to 19 CFR part 111, and requiring continuing education for licensed customs brokers.

4. The Secure Trade Lanes Subcommittee will provide updates on the progress and plans for the In-Bond Working Group and the Remote and Autonomous Cargo Processing Working Group. The Partnership Programs and Industry Engagement Working Group (formerly Trusted Trader Working Group) topics of discussion will include the inclusion of forced labor into the Customs Trade Partnership Against Terrorism (CTPAT) program, as well as the proposed requirements CTPAT members must meet to mitigate the risk of forced labor in their supply chains. The Export Modernization Working Group will provide updates regarding the development of policies for industry and government partners regarding data collection and sharing in all modes for exportation of goods out of the United States.

Meeting materials will be available by June 17, 2022, at: <https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings>.

Dated: June 7, 2022.

VALARIE M. NEUHART,
Acting Executive Director,
Office of Trade Relations.

[Published in the Federal Register, June 10, 2022 (85 FR 35563)]



**REVOCATION OF A RULING LETTER, AND REVOCATION
OF TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF A CHAFER SET**

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

ACTION: Notice of revocation of a ruling letter, and revocation of treatment relating to the tariff classification of a chafer set.

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) is revoking a ruling letter concerning tariff classification of a chafer set, Dura-Ware model 7800, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 17, on May 4, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 28, 2022.

FOR FURTHER INFORMATION CONTACT: Anthony L. Shurn, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0218.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 17, on May 4, 2022, proposing to revoke a ruling letter pertaining to the tariff classification of chafer set. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during 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 C88591, dated July 1, 1998, CBP classified a chafer set, Dura-Ware model 7800, in heading 8419, HTSUS, specifically in subheading 8491.81.90, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for

the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric; parts thereof: Other machinery, plant or equipment: For making hot drinks or for cooking or heating food: Other..." CBP has reviewed NY C88591 and has determined the ruling letter to be in error. It is now CBP's position that the subject chafer set is properly classified in heading 7321, HTSUS, specifically in subheading 7321.89.00, HTSUS, which provides for "Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Other appliances: Other, including appliances for solid fuel..."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY C88591 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H324203, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

HQ H324203

June 13, 2022

CLA-2 OT:RR:CTF:EMAIN H324203 ALS

CATEGORY: Classification

TARIFF NO.: 7321.89.00

MR. ALAN SIEGAL
GENGHIS KHAN FREIGHT SERVICE INC.
161-15 ROCKAWAY BLVD.
JAMAICA, NY 11434

RE: Revocation of NY C88591 (July 1, 1998); Tariff classification of a Chafer Set

DEAR MR. SIEGAL:

This letter is to inform you that we have reconsidered and revoked the above-referenced ruling. We ruled in NY C88591 that the subject chafer set, Dura-Ware model 7800, is properly classified under heading 8419, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY C88591 was published on May 4, 2022, in Volume 56, Number 17 of the Customs Bulletin. No comments were received in response to the notice.

FACTS:

The following are the facts as stated in NY C88591:

The subject chafer set is the Dura-Ware model 7800, complete with its water pan, food pan and cover. In your correspondence, you state that this chafer set is sold to distributors who sell to restaurants and catering establishments.

We also note that the Dura-Ware model 7800 is 14” wide, 22” long, and 13” high, is of rectangle shape, and has a bottom shelf upon which a heat source, such as a sterno candle, can be placed. The cover has a handle attached to its top center. The entire set is made of stainless steel.

ISSUE:

Is the chafer set, Dura-Ware model 7800, properly classified under heading 7321, HTSUS, which provides for steel stoves, ranges, cookers and similar nonelectric domestic appliances, or under heading 8419, HTSUS, as a part of machinery, plant or laboratory equipment for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes?

LAW AND ANALYSIS

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRI”) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (“ARI”). GRI 1 provides that the classification of goods shall be “determined according to the terms of the headings 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, GRIs 2 through 6 may be applied in order.

Note 1(d) to Chapter 84, HTSUS, provides that the “chapter does not cover: (d) Articles of heading 7321 or 7322 or similar articles of other base metals (chapters 74 to 76 or 78 to 81)...”

The HTSUS provisions under consideration are as follows:

7321	Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel:
	Other appliances:
7321.89.00	Other, including appliances for solid fuel...
	* * *
8419	Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric; parts thereof:
	Other machinery, plant or equipment:
8419.81	For making hot drinks or for cooking or heating food:
8419.81.90	Other...
	* * * * *

Prior to addressing whether the subject chafer set properly falls under the scope of heading 8419, HTSUS, as machinery, plant or laboratory equipment for the treatment of materials by a process involving a change of temperature, we must first consider whether it is *prima facie* classifiable under heading 7321, HTSUS, and therefore excluded from classification in Chapter 84 by operation of Note 1(d), *supra*.

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

The EN for heading 7321, HTSUS, provides the following:

This heading covers a group of appliances which meet all of the following requirements:

- (i) be designed for the production and utilisation of heat for space heating, cooking or boiling purposes;
- (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g., solar energy);
- (iii) be normally used in the household or for camping.

The EN for heading 7321 also notes that the “yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.”

As noted above, the Dura-Ware 7800 has a bottom shelf upon which heat sources such as Sterno® candles can be placed to heat food contained in the chafer. This is clearly a design for heating food, if not cooking or boiling. It is also evidence of being designed for use with a source of energy. While the facts of NY C88591 indicate that the importer intends to sell the instant merchandise to distributors who in turn sell to restaurants and hotels, the dimensions of the Dura-Ware 7800 are indicative of its use in a household setting as well. Given the foregoing, we find that the Dura-Ware 7800 is a steel nonelectric domestic appliance similar to the goods named in heading 7321, HTSUS, (e.g., cookers, plate warmers, etc.). Therefore, it is properly classified under heading 7321, HTSUS, and thereby excluded from classification under heading 8419, HTSUS, by operation of Note 1(d) to Chapter 84, *supra*. Specifically, it is properly classified under subheading 7321.89.00, HTSUS. This conclusion is consistent with NY N199500 (January 24, 2012), wherein CBP classified four similarly designed chafer sets, which respectively featured five-quart, ten-quart, five-liter, and ten-liter containers, under heading 7321, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the Dura-Ware 7800 chafer set is properly classified under heading 7321, HTSUS, and specifically provided for under subheading 7321.89.00, HTSUS, which provides for “Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Other appliances: Other, including appliances for solid fuel....” The HTSUS column one, general rate of duty for merchandise classified in this subheading is Free.

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

EFFECT ON OTHER RULINGS:

CBP Ruling NY C88591 (July 1, 1998) is hereby REVOKED.

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

Sincerely,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177**REVOCAION OF ONE RULING LETTER AND
REVOCAION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF DOG WHEELCHAIRS**

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of dog wheelchairs.

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) is revoking one ruling letter concerning tariff classification of dog wheelchairs under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 18, on May 11, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 28, 2022.

FOR FURTHER INFORMATION CONTACT: Emily K. Rick, Electronic, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0369.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 18, on May 11, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of dog wheelchairs. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N067952, dated July 24, 2009, CBP classified a dog wheelchair in heading 7615, HTSUS, specifically in subheading 7615.19.90, HTSUS, which provided for "Table, kitchen or other household articles and parts thereof, of aluminum; pot scourers and scouring or polishing pads, gloves and the like, of aluminum; sanitary ware and parts thereof, of aluminum: Table, kitchen or other household articles and parts thereof; pot scourers and scouring or polishing pads, gloves and the like: Other: Other." CBP has reviewed NY N067952 and has determined the ruling letter to be in error. It is now CBP's position that the instant dog wheelchair is properly classified, in heading 9021, HTSUS, specifically in subheading 9021.10.00, HTSUS, which provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Orthopedic or fracture appliances, and parts and accessories thereof."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N067952 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H311415, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H311415

June 13, 2022

CLA-2 OT:RR:CTF:EMAIN H311415 EKR

CATEGORY: Classification

TARIFF NO.: 9021.10.00

MS. DEBORAH SMITH
MARISOL INTERNATIONAL
871 RIDGEWAY LOOP, SUITE 203
MEMPHIS, TN 38120

RE: Revocation of NY N067952; Tariff classification of a “dog wheelchair”

DEAR MS. SMITH:

This ruling is in reference to New York Ruling Letter (NY) N067952, dated July 24, 2009, regarding the classification of a dog wheelchair under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N067952, U.S. Customs and Border Protection (CBP) classified the subject article in subheading 7615.19.90, HTSUS, which provided for “Table, kitchen or other household articles and parts thereof, of aluminum; pot scourers and scouring or polishing pads, gloves and the like, of aluminum; sanitary ware and parts thereof, of aluminum: Table, kitchen or other household articles and parts thereof; pot scourers and scouring or polishing pads, gloves and the like: Other: Other.” Upon reconsideration, CBP has determined that NY N067952 is in error. CBP is revoking NY N067952 according to the analysis set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N067952 was published on May 11, 2022, in Volume 56, Number 18 of the Customs Bulletin. No comments were received in response to the notice.

FACTS:

In NY N067952, the subject merchandise is described as a dog wheelchair, “a device designed to provide mobility to dogs with injured or amputated hind legs. It is composed of an aluminum rod frame with two wheels on the back end, a textile harness and straps to secure the dog. The Dog Wheel Chair comes with three sizes of wheels and four sizes of harnesses.”

ISSUE:

Whether a wheelchair intended for dogs is classified in the heading appropriate to its constituent material (heading 7615, HTSUS as “household articles... of aluminum”) or heading 9021, as an “[o]rthopedic appliance.”

LAW AND ANALYSIS:

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

The following provisions of the HTSUS are under consideration:

7615 Table, kitchen or other household articles and parts thereof, of aluminum; pot scourers and scouring or polishing pads, gloves and the like, of aluminum; sanitary ware and parts thereof, of aluminum:

* * *

9021 Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof:

Note 1(h) to Section XV, which includes Chapter 76, states that articles of Section XVIII, which includes Chapter 90, cannot be classified in Section XV. Note 6 to Chapter 90 states:

6.- For the purposes of heading 90.21, the expression “orthopaedic appliances” means appliances for:

- Preventing or correcting bodily deformities; or
- Supporting or holding parts of the body following an illness, operation or injury.

* * *

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

EN 90.21 explains that heading 9021, HTSUS, covers “walking aids known as ‘walker-rollators’, which provide support for the users as they push them. EN 90.21 further states, in relevant part:

This group also covers **orthopaedic appliances for animals**, for example, hernia trusses or straps; leg or foot fixation apparatus; special straps and tubes to prevent animals from crib-biting, etc.; prolapsus bands (to retain an organ, rectum, uterus, etc.); horn supports, etc. But it **excludes** protective devices having the character of articles of ordinary saddlery and harness for animals (e.g., shin pads for horses) (**heading 42.01**).

If the dog wheelchairs are properly classified in heading 9021, HTSUS, they are precluded from classification in heading 7615, by operation of Note 1(h) to Section XV. Therefore, we first consider whether the instant dog wheelchairs rain gauges can be classified as orthopedic appliances of heading 9021, HTSUS.

The purpose of the dog wheelchair at issue here is to provide mobility to dogs with injured or amputated hind legs. To do this, the wheelchair supports the injured part of the dog’s body, so that the dog can move around using its uninjured limbs to roll the wheelchair. As provided in Note 6 to Chapter 90, it is designed to “support[] or hold[] parts of the body following an illness, operation, or injury.” Moreover, the EN for heading 9021, HTSUS, supports classification of orthopedic appliances for animals in this provision. Classification in heading 9021, HTSUS, is consistent with CBP’s classification of

similar walker-rollators intended for human use. (*See, e.g.*, Headquarters Ruling Letter (HQ) H280343, dated April 5, 2017; NY N243278, dated July 18, 2013; and NY N235453, dated Dec. 12, 2012). The instant dog wheelchairs are properly classified in heading 9021, HTSUS, and are therefore precluded from classification in heading 7615, HTSUS, by operation of Note 1(h) to Section XV.

HOLDING:

By application of GRIs 1 (Note 6 to Chapter 90) and 6, the dog wheelchairs at issue in NY N067952 are classified in heading 9021, HTSUS, and specifically provided for under subheading 9021.10.00 HTSUS, which provides for “Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Orthopedic or fracture appliances, and parts and accessories thereof.” The general, column one rate of duty for merchandise of subheading 9021.10.00 is free.

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

EFFECT ON OTHER RULINGS:

NY N067952, dated July 24, 2009, is hereby REVOKED in accordance with the above analysis.

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

Sincerely,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 22–57

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and BLUESCOPE STEEL LTD., BLUESCOPE STEEL (AIS) PTY LTD., and BLUESCOPE STEEL AMERICAS, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Judge

Court No. 20–03815

PUBLIC VERSION

[Final Results are sustained.]

Dated: May 31, 2022

Sarah E. Shulman, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Plaintiff United States Steel Corp. With her on the brief were *Thomas M. Beline* and *Yohai Baisburd*. Also on the brief were *Alan H. Price*, *Christopher B. Weld*, and *Cynthia C. Galvez*, Wiley Rein LLP, of Washington, D.C., for Plaintiff-Intervenor Nucor Corp.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Porter and *Christopher A. Dunn*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Defendant-Intervenors BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Americas, Inc. With them on the brief was *James C. Beaty*.

OPINION

Eaton, Judge:

This case involves the final results of the U.S. Department of Commerce’s (“Commerce” or the “Department”) second administrative review of the antidumping duty order covering hot-rolled steel from Australia. *See Certain Hot-Rolled Steel Flat Prods. From Austl.*, 85 Fed. Reg. 63,249 (Dep’t Commerce Oct. 7, 2020) (“Final Results”) and accompanying Issues and Decision Mem. (Sept. 30, 2020), PR 147 (“Final IDM”). Domestic steel producers Plaintiff United States Steel Corporation and Plaintiff-Intervenor Nucor Corporation (“Plaintiffs”) dispute certain aspects of the Final Results.

Before the court is Plaintiffs’ motion for judgment upon the agency record. *See* Pls.’ Mem. Supp. Mot. J. Agency R., ECF No. 32 (“Pls.’ Br.”); Pls.’ Reply, ECF No. 39. By their motion, Plaintiffs challenge as unsupported by substantial evidence and otherwise not in accordance

with law, the dumping margin that Commerce determined for the sole mandatory respondent in the review—a collapsed entity of affiliated steel companies in Australia owned by Defendant-Intervenor BlueScope Steel Ltd. In particular, Plaintiffs dispute Commerce’s finding that the Department’s “reimbursement regulation,” in 19 C.F.R. § 351.402(f), did not apply. The regulation authorizes Commerce to deduct from U.S. price “the amount of any antidumping duty . . . which the exporter or producer . . . [r]eimbursed to the importer.” 19 C.F.R. § 351.402(f)(1)(i)(B) (2019). Here, Plaintiffs fault Commerce’s finding that there was no evidence that the respondent exporter had reimbursed its affiliated U.S. importer.

The United States (“Defendant”), on behalf of Commerce, and Defendant-Intervenors BlueScope Steel Ltd.; BlueScope Steel (AIS) Pty Ltd.; and BlueScope Steel Americas, Inc. ask the court to sustain Commerce’s non-reimbursement finding and deny Plaintiffs’ motion. *See* Def.’s Resp. Pls.’ Mot. J. Agency R., ECF No. 36 (“Def.’s Br.”); Def.-Ints.’ Resp., ECF No. 37.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018).

Because Commerce’s non-reimbursement finding is supported by substantial evidence and otherwise in accordance with law, Plaintiffs’ motion is denied, and the Final Results are sustained.

BACKGROUND

On December 11, 2018, Commerce initiated its second administrative review of the antidumping duty order on hot-rolled steel flat products from Australia. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 83 Fed. Reg. 63,615 (Dep’t Commerce Dec. 11, 2018). The period of review was October 1, 2017, to September 30, 2018.

Commerce reviewed one mandatory respondent—a collapsed entity comprised of affiliated companies owned by Defendant-Intervenor BlueScope Steel Ltd. (“BlueScope”).¹ *See* Final IDM at 1. BlueScope is the parent company, not only of the Australian exporter of the subject steel, Defendant-Intervenor BlueScope Steel (AIS) Pty Ltd. (“Exporter”), but also of the U.S. importer of that steel, Defendant-Intervenor BlueScope Steel Americas, Inc. (“Importer”), and the Importer’s U.S. customer, Steelscape LLC. *See* BlueScope Steel Ltd.’s Resp. Sec. A Quest. (Feb. 11, 2019) at 12, PR 29–33, CR 1–10 (“BlueScope’s Resp. Sec. A Quest.”).

¹ The collapsed entity included three companies: the parent company BlueScope; Defendant-Intervenor BlueScope Steel (AIS) Pty Ltd.; and BlueScope Steel Distribution. BlueScope Steel Distribution is not a party in this action.

Relevant to this dispute is a series of back-to-back transactions made pursuant to the terms of a supply agreement among the affiliated companies: BlueScope, the Importer, and Steelscape. *See* BlueScope Steel Ltd.’s Resp. First Suppl. Sec. A Quest. (Apr. 8, 2019) Ex. SA-11, PR 61–62, CR 105–134 (“Supply Agreement”). Under the back-to-back scheme, the parent company BlueScope (through the Exporter) sold subject steel to the Importer, which in turn resold the steel to Steelscape. Steelscape then further manufactured the subject steel into non-subject merchandise and sold its products to an unaffiliated U.S. customer. *See* BlueScope’s Resp. Sec. A Quest. at 17; *see also* Final IDM at 5–6.

In response to Commerce’s questionnaires, BlueScope placed on the record a copy of the Supply Agreement, and explained the method by which it calculated transfer prices among its affiliates, *i.e.*, the price at which the Exporter sold the subject steel to the Importer, and the price at which the Importer sold the subject steel to Steelscape.² *See* Final IDM at 8. Commerce summarized the transfer price calculation method in a confidential memorandum.³

In accordance with the Supply Agreement, the price that the Exporter charged to the Importer was determined by deducting the estimated antidumping duties and freight from the price charged to Steelscape. *See* Final Analysis Mem. (Sept. 30, 2020) at 4, CR 310. To arrive at the Importer’s transfer price, the Exporter started with the price paid by Steelscape, then the “[Exporter] calculate[d] [Importer’s] transfer price by, among other things, deducting an amount for estimated antidumping duties” from the Steelscape price in order to estimate entry value. *See* Def.’s Br. at 5. The sales price to Steelscape thus included the antidumping duties that were paid by the Importer at the time the merchandise was entered.

² The Supply Agreement identifies the price that the Importer charged Steelscape as a [[]], as this term is defined in the International Chamber of Commerce’s 2010 Incoterms, *i.e.*, “[t]he seller [Importer] bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.” International Chamber of Commerce, <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (last visited May 19, 2022); *see also* Supply Agreement at 4. The [[]] thus, a duty-inclusive price determined based on a proprietary formula using data from published hot-rolled price indices. *See* Supply Agreement § 5.1 (stating the formula for the [[]]).

³ BlueScope’s transfer price method is as follows:

[[]]. In other words, [the Importer] paid the requisite dumping duties (an amount calculated using the [[]] price), and Steelscape was charged a duty-inclusive price. Final Analysis Mem. (Sept. 30, 2020) at 4, CR 310.

Prior to liquidation of the subject steel entries, the Importer placed a certificate of non-reimbursement on the record, pursuant to 19 C.F.R. § 351.402(f)(2).⁴ Commerce’s regulations provide that if the importer fails to file a non-reimbursement certificate, Commerce “may presume from [such] failure . . . that the exporter or producer paid or reimbursed the antidumping duties.” *Id.* § 351.402(f)(3).

Notwithstanding the Importer’s non-reimbursement certificate, Plaintiffs claimed before Commerce,⁵ and now argue before the court, that by “decreas[ing] the invoice price to the related U.S. importer by the amount of the antidumping duties otherwise due,” the Exporter reimbursed the Importer for antidumping duties. *See* Pls.’ Br. at 1. Thus, for Plaintiffs, Commerce was required by the reimbursement regulation to lower U.S. price by the amount of estimated antidumping duties. *See* 19 C.F.R. § 351.402(f)(1)(i) (“In calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty . . . which the exporter or producer . . . [r]eimbursed to the importer.”).

On December 17, 2019, Commerce published its Preliminary Results, in which it determined that the mandatory respondent—the collapsed entity BlueScope—dumped subject steel during the period of review. *See Certain Hot-Rolled Steel Flat Prods. From Austl.*, 84 Fed. Reg. 68,876 (Dep’t Commerce Dec. 17, 2019) (“Preliminary Results”) and accompanying Issues and Decision Mem. (Dec. 11, 2019), PR 114 (“PDM”); *see also* Prelim. Analysis Mem. (Dec. 10, 2019), PR 115, CR 258. In making its dumping calculation, Commerce declined to deduct from U.S. price any amount for the allegedly reimbursed antidumping duties under 19 C.F.R. § 351.402(f) because it preliminarily determined that there was no evidence on the record that the Exporter had reimbursed the Importer for such duties. *See* PDM at 12; *see also* Prelim. Analysis Mem. at 7.

In the Final Results, Commerce continued to determine that the evidence did not support a finding of reimbursement. *See* Final IDM at 7. Commerce based its determination on record documents, includ-

⁴ The Importer’s certificate stated that the company had “not entered into any agreement or understanding for the payment or for the refunding to [it], by the manufacturer, producer, seller or exporter of all or any part of the antidumping duties assessed upon all shipments of” the subject steel during the period of review. *See* BlueScope’s Resp. Sec. A Quest. Ex. A-8b.

⁵ U.S. Steel alleged:

BlueScope is reimbursing its affiliated importer the amount of the antidumping duty that would be assessed on the subject merchandise by improperly deducting the antidumping duty from the transfer price. As such, BlueScope’s reported entered value is understated by the amount of the applicable duties on subject hot-rolled coils. In so far as BlueScope lowers the price of its hot-rolled steel by the amount of the duty, it is essentially paying the duty as a foreign producer.

U.S. Steel’s Pre-Preliminary Cmts. Concerning BlueScope (Nov. 19, 2019) at 14, CR 256.

ing the non-reimbursement certificate filed by the Importer, pursuant to 19 C.F.R. § 351.402(f)(2); the Supply Agreement demonstrating the manner in which transfer prices among the BlueScope affiliates were determined; and evidence that the Importer had paid to U.S. Customs and Border Protection the antidumping duties that were owed on the subject imports. *See* Final IDM at 7–8.

In the Final IDM, Commerce addressed Plaintiffs’ argument that reimbursement occurred when the Exporter lowered its transfer price to the Importer by the amount of estimated antidumping duties, stating, by way of explanation, that pricing alone is not probative of reimbursement in the context of transfers between affiliated companies, because the antidumping law treats affiliates as a single entity:

The antidumping statute and regulations make no distinction in the calculation of [U.S. price] between costs incurred by a foreign parent company and those incurred by its U.S. subsidiary. Therefore, [Commerce] does not make adjustments to U.S. price based upon intracompany transfers of any kind.

Final IDM at 8 (citation omitted). In other words, to show reimbursement, more evidence is required than the lowering of the invoice price among affiliates—*i.e.*, some “evidence showing a link between intracorporate transfers and the reimbursement of antidumping duties.” *Torrington Co. v. United States*, 19 CIT 403, 410, 881 F. Supp. 622, 632 (1995), *aff’d*, 127 F.3d 1077 (Fed. Cir. 1997). Here, Commerce found no such evidence on the record.

Moreover, Commerce did not find persuasive the evidence cited by Plaintiffs in support of their reimbursement claim, *i.e.*, invoice(s) that showed the Exporter, when calculating the transfer price charged to its related Importer, deducted the estimated antidumping duties that the Importer charged Steelscape. For Commerce, it would have been unreasonable for the Exporter to include antidumping duties in the price charged to the Importer because the Exporter itself was not responsible for those duties:

In essence, the petitioners’ argument appears to be that [the Exporter] should have charged [the Importer] the same price that [the Importer] itself charged Steelscape. However, that argument fails because [the Exporter] was not the importer of record (and thus, it would be unreasonable to require it to charge [the Importer] a price which is inclusive of [antidumping] duties which [the Exporter] did not incur).

Final IDM at 9 n.44. Here, Commerce found that the record showed the Importer “paid the [antidumping] duty deposits on each importation of subject merchandise during the [period of review], and it

included those duties in the downstream price to its U.S. customer.” Final IDM at 9. Commerce found that the record did not establish reimbursement and that, thus, its reimbursement regulation did not apply.

Commerce calculated an antidumping duty rate of 2.72 percent for the respondent BlueScope. *See* Final Results, 85 Fed. Reg. at 63,250.

Plaintiffs brought their objections to this Court, maintaining that Commerce misconstrued its reimbursement regulation by failing to recognize that “indirect” reimbursement (*i.e.*, the lowering of invoice price) had occurred here, and failed to support with substantial evidence its finding that the Exporter had not reimbursed the Importer for antidumping duties owed on the subject imports.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

Commerce’s determination of whether subject merchandise is being sold at less-than-fair value rests on a comparison of U.S. price (export⁶ or constructed export price⁷) and the price at which the foreign like product is sold in the exporting country (normal value). *See* 19 U.S.C. §§ 1677a, 1677b. If subject merchandise is being sold at less-than-fair value, Commerce determines how much less, and then assesses antidumping duties to make up the difference. *Id.* § 1673; *see also id.* § 1677(35)(A) (defining dumping margin as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise”).

When determining U.S. price, the antidumping statute requires Commerce to make adjustments to the price under certain circumstances. *See id.* § 1677a(c), (d). Commerce has promulgated regula-

⁶ The “export price” is “the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [§ 1677a(c)].” 19 U.S.C. § 1677a(a).

⁷ The “constructed export price” is “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under [§ 1677a(c) and (d)].” 19 U.S.C. § 1677a(b). Here, all of BlueScope’s U.S. sales were reported on a constructed export price basis, based on its U.S. affiliate Steelscape’s sales to unaffiliated customers in the United States. *See* PDM at 10 (“BlueScope reported that its sales to the United States were all made on a [constructed export price] basis.”).

tions that clarify how it makes these adjustments. *See* 19 C.F.R. § 351.402(a). Commerce’s reimbursement regulation is one of them.

The reimbursement regulation provides that “[i]n calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer: (A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer.” 19 C.F.R. § 351.402(f)(1)(i)(A)-(B). The regulation requires that the importer file a non-reimbursement certificate prior to liquidation, failing which, Commerce may presume that the exporter reimbursed the importer for antidumping or countervailing duties:

(2) *Certificate*. The importer must file prior to liquidation a certificate in the following form with the appropriate District Director of Customs:

I hereby certify that I (have) (have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or exporter, of all or any part of the antidumping duties or countervailing duties assessed upon the following importations of (commodity) from (country): (List entry numbers) which have been purchased on or after (date of publication of antidumping notice suspending liquidation in the Federal Register) or purchased before (same date) but exported on or after (date of final determination of sales at less than fair value).

(3) *Presumption*. The Secretary may presume from an importer’s failure to file the certificate required in paragraph (f)(2) of this section that the exporter or producer paid or reimbursed the antidumping duties or countervailing duties.

Id. § 351.402(f)(2)-(3).

This Court has stated that the rationale for the reimbursement regulation is to preserve the remedy provided under the antidumping and countervailing duty laws. As explained in *Hoogovens Staal BV v. United States*, in the antidumping context:

If the exporter assumes the cost of antidumping duties, an importer could continue to import at the lower, dumped price. U.S. producers would remain at a competitive disadvantage without the benefit of a viable remedy for the injury caused by the dumped imports. The regulation preserves the statutory remedy by accounting for the amount of duties reimbursed or paid by the exporter so that the final assessed duty will remedy the injury. Presumably, an exporter will be reluctant to continue paying the cost of antidumping duties because the margin will

increase accordingly each time Commerce reviews it. Thus, the effect of the [antidumping duty] order on import prices will be preserved.

22 CIT 139, 141, 4 F. Supp. 2d 1213, 1217 (1998); *see also APEX Exps. v. United States*, 777 F.3d 1373, 1381 (Fed. Cir. 2015) (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 1166, 1176, 925 F. Supp. 2d 1367, 1375 (2013)) (“The reimbursement regulation at § 351.402(f) is designed to ‘ensure that the . . . incentive for importers to buy at non-dumped prices is not negated by exporters who . . . remov[e] the importer’s exposure to antidumping liability.’”).

As to the application of the reimbursement regulation in the context of transactions among affiliated companies, it is not enough to show that intracorporate transfers occurred. There must be “evidence showing a link between intracorporate transfers and the reimbursement of antidumping duties.” *See Torrington*, 19 CIT at 410, 881 F. Supp. at 632.

DISCUSSION

The reimbursement regulation offers two scenarios for when Commerce will deduct the amount of any antidumping duty from U.S. price, *i.e.*, where an “exporter or producer” either (1) “Paid [the antidumping duties] directly on behalf of the importer,” or (2) “Reimbursed [those duties] to the importer.” 19 C.F.R. § 351.402(f)(1)(i)(A) & (B). Plaintiffs do not claim that reimbursement occurred under the first scenario. Indeed, Plaintiffs do not dispute Commerce’s finding that the Importer itself paid the antidumping duties owed on its imports of subject steel directly, and included the antidumping duties in its downstream price to Steelscape. Rather, Plaintiffs claim that reimbursement occurred here under the second scenario, *i.e.*, they claim that the Exporter reimbursed the Importer for antidumping duties indirectly by “decreas[ing] the invoice price to the related U.S. importer by the amount of the antidumping duties otherwise due.” Pls.’ Br. at 1.

In support of their claim, Plaintiffs argue that Commerce’s failure to deduct an amount for antidumping duties from U.S. price was inconsistent with its “practice” of considering the lowering of an invoice price to be “indirect reimbursement”:

Commerce concluded reimbursement had not taken place because duties were ultimately paid and [thus] declined to adjust [constructed export price] for reimbursement. Commerce ignored its long-standing interpretation of its regulation to find indirect reimbursement by lowering of the invoice price. Insofar as Commerce failed to follow its unambiguous regulation and

practice, Commerce's decision is not entitled to deference. Commerce thus erred as a matter of law by failing to correct for reimbursement in its antidumping calculation.

Pls.' Br. at 11. As evidence of Commerce's practice, Plaintiffs cite the final results of a 1997 administrative review on antifriction bearings. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Fr., Ger., It., Japan, Rom., Sing., Swed. and the U.K.; Final Results of Antidumping Duty Admin. Revs.*, 62 Fed. Reg. 54,043 (Dep't Commerce Oct. 17, 1997) ("AFBs"). Specifically, Plaintiffs rely on the following statement from AFBs: "Although we agree [with petitioners] that the reimbursement regulation is applicable in [constructed export price] situations, there must be evidence that the parent has reimbursed (e.g., the exporter directly paid the duties for the importer or the exporter lowered the amount invoiced to the importer) its subsidiary for antidumping duties to be assessed." AFBs, 62 Fed. Reg. at 54,077 (emphasis added). Thus, for Plaintiffs, AFBs supports their claim that Commerce acted unlawfully.

Moreover, Plaintiffs maintain that Commerce has failed to explain adequately the reasons for its non-reimbursement finding. Specifically, Plaintiffs maintain that Commerce avoided squarely addressing their reimbursement allegation and focused its analysis instead on the Importer's payment of antidumping duties and the inclusion of those duties in the price to Steelscape. *See* Pls.' Br. at 24 ("Instead of addressing the deduction of antidumping duties from the price [Exporter] invoiced [Importer], Commerce repeatedly leapfrogged U.S. Steel's argument, focusing instead on subsequent parts of Blue-Scope's Channel 2 sales."). Thus, Plaintiffs question whether "Commerce [had] an evidentiary basis to support its conclusion that Blue-Scope was not reimbursing its importer for antidumping duties." Pls.' Br. at 3. Plaintiffs ask the court to remand Commerce's reimbursement finding and direct the agency to adjust its dumping calculation.

Defendant maintains that Commerce's decision not to adjust U.S. price is supported by the record, the law, and its prior practice. First, Commerce notes that the Importer "actually paid antidumping duties and passed the price of those duties onto Steelscape. Therefore, Steelscape's United States customers bore the impact of the antidumping duties, fulfilling the intent of those duties." Def.'s Br. at 17–18. For Defendant, the Exporter's lowering of the transfer price to the Importer did not circumvent the remedial purpose of the antidumping law: "[t]he fact that [the Exporter] lowered its transfer price to [the Importer] by the amount of estimated antidumping duties offers no relief to [the Importer] because the lowered transfer price will be accurately reflected in [the Exporter's] dumping margin." Def.'s Br. at

18. In other words, the lowered transfer price reflected the amount the Importer would pay at entry but does not lower the cost of the merchandise to reimburse the Importer for the duties.

Here, the transfers at issue are among affiliated parties. BlueScope is the parent of the affiliated companies that were involved in the back-to-back transactions that resulted in the importation and sale of subject steel into the United States. The record shows that the parent company BlueScope determined the price that the Exporter charged to the Importer by reference to the downstream, duty-inclusive transfer price charged to the Importer's U.S. customer Steelscape, pursuant to the terms of the Supply Agreement.⁸

The Exporter's deduction of estimated antidumping duties from the Importer's invoice price, on its own, is unremarkable when viewed in the context of the record. Together with the non-reimbursement evidence in the form of the certificate filed by the Importer, and evidence that the Importer paid duties owed on the subject steel, the court concludes it was not unreasonable for Commerce to find that the reimbursement regulation did not apply here.

First, it is important to understand just what happened here. Shorn of references to transfer pricing, tri-partite agreements, and Commerce's regulations, the facts show: a single entity took the final price paid by its last-in-line affiliate, deducted from that price an amount equal to the duties paid at the time of entry, and used the result as the basis for the price charged to the Importer. Thus, the entered price, as is universally the case, did not contain duties which were paid at entry by the Importer. The Importer (as an affiliate) paid the duties and added them to the price charged to the last-in-line affiliate purchaser. Plaintiffs have presented no evidence that the Exporter adjusted the price charged to the Importer in two ways: first, to make the price free of the duties that the Importer would pay at entry, and second, in an amount sufficient to reimburse the duties paid by the Importer at entry. Thus, Plaintiffs have failed to demonstrate that the actual payments and prices charged were anything other than those

⁸ As summarized by Commerce:

Using invoice [[]] as an example, BlueScope first calculated Steelscape's transfer price using the formula price of [two] steel indices (\$[[]]/MT) and then it adjusted that base price according to product characteristics to arrive at \$[[]]/MT. This base price, plus adjustments, is the price that [the Importer] charged Steelscape. Then, BlueScope [[]]

[[]]/MT. Finally, BlueScope [[]]/MT, to arrive at the \$[[]]/MT entered value, upon which [the Importer] paid its cash deposit of antidumping duties. Finally, BlueScope calculated its transfer price to [the Importer] by [[]], resulting in a \$[[]] transfer price to [the Importer].

Final Analysis Mem. at 4 (footnotes omitted).

in a garden variety transaction among an exporter, an importer, and an unaffiliated purchaser. That the price paid was arrived at by means of a formula found in the Supply Agreement simply does not matter so long as the price paid for the merchandise by the Importer was not discounted to account for the duties.

Plaintiffs' claim that reimbursement occurred here rests on the alleged deduction of antidumping duties from invoices issued by Exporter to its affiliated Importer for the subject steel. In the Final Results, Commerce disagreed with Plaintiffs' interpretation of the evidence:

We disagree . . . that record evidence establishes that [the Exporter] deducted [antidumping] duties when setting the price to [the Importer]. Rather, the information provided by Blue-Scope demonstrates that [the Importer] paid [antidumping] duties on its imports of subject merchandise, and it passed these duties on to Steelscape as part of the transfer price changed [sic] to it. Despite the petitioners' claim, this information does *not* show that [the Exporter] deducted [antidumping] duties from the price that it charged to [the Importer]; to the contrary, it simply shows the calculation of the transfer price to the U.S. customer, albeit an affiliated one.

Final IDM at 8 (footnote omitted). In other words, for Commerce, all the record evidence shows is the manner in which the transfer price between the affiliated Exporter and Importer was calculated. Plaintiffs failed to establish, with evidence, any link between that price and the alleged reimbursement of duties.

Plaintiffs' other arguments do not convince the court of any error of law or fact that would require remand. Plaintiffs' argument that Commerce unlawfully ignored its "practice" of considering the lowering of an invoice price to be "indirect reimbursement" under its regulations is meritless. Without citation to any authority, Plaintiffs argue that the intent of the 1980 version of the regulation, which covered antidumping duties that "are, or will be, refunded to the importer by the . . . exporter, either *directly or indirectly*" persists to this day. See 19 C.F.R. § 353.55(a) (1980) (emphasis added); see also Pls.' Br. at 14 ("Correcting for the reimbursement of 'any antidumping duties' that are '*either directly or indirectly*' paid by the manufacturer is a foundational principle of Commerce's trade remedy administration."). Plaintiffs appear to make this argument in an attempt to buttress their "legal" contention that "indirect" reimbursement, which is what they allege happened here, is covered by the current regulation.

As Plaintiffs know, however, since at least 1997, the language of the reimbursement regulation has changed. Unlike in 1980, today the regulation covers countervailing, as well as antidumping duties; the word “reimbursed” has replaced “refunded”; and “directly or indirectly,” which modified “refunded,” has been omitted altogether. *Compare* 19 C.F.R. § 353.55(a) (1980) *with* 19 C.F.R. § 351.402(f)(1)(i) (2019). In any event, here, it does not appear that Commerce interpreted the regulation in a way that would necessarily exclude what Plaintiffs have called “indirect reimbursement,” *i.e.*, the lowering of an invoice price. Rather, Commerce based its determination on its finding that, in the context of transactions among affiliated companies, merely lowering the transfer price to account for the duties to be paid by the Importer, without more, does not amount to “reimbursement” under the regulation.

Regarding Plaintiffs’ reliance on the 1997 decisional memorandum in *AFBs* as support for their contention that Commerce has a practice that it has ignored, the court is unconvinced. Plaintiffs apparently have cited *AFBs* for a single sentence, quoted in their brief, in which Commerce stated that “indirect” reimbursement was when “the exporter lowered the amount invoiced to the importer’ by the antidumping duties.” *See* Pls.’ Br. at 27 (quoting *AFBs*, 62 Fed. Reg. at 54,077). When read in context, however, the language Plaintiffs quote is less the announcement of agency practice than the citation of one example of circumstances that could lead to a finding of reimbursement, provided additional evidence of reimbursement was present on the record:

Although we agree that the reimbursement regulation is applicable in [constructed export price] situations, there must be evidence that the parent has reimbursed (e.g., the exporter directly paid the duties for the importer or the exporter lowered the amount invoiced to the importer) its subsidiary for antidumping duties to be assessed. In [*Korean TVs*], we reaffirmed our original view that reimbursement, within the meaning of the regulation, takes place between affiliated parties if the evidence demonstrates that the exporter directly pays antidumping duties for the affiliated importer or reimburses the importer for such duties. In this case, there is no evidence that any of the named respondents engaged in reimbursement activity with their respective affiliated U.S. subsidiary. Furthermore, Torrington has presented no evidence of inappropriate financial intermingling, an agreement to reimburse, or reimbursement in general. FAG, Koyo, and Nachi are correct in that the presence of both below-cost transfer prices and actual dumping margins

do not, in and of themselves, constitute evidence that reimbursement is taking place. Therefore, consistent with our position in previous reviews of these orders, we reject Torrington's contention that below-cost transfer prices are tantamount to an indirect transfer of funds for reimbursement of antidumping duties and that we should make a deduction therefore in [constructed export price] transactions.

AFBs, 62 Fed. Reg. at 54,077 (citations omitted). Here, there is no evidence that the Importer was reimbursed for the duties it paid. Commerce's finding that the Exporter's deduction of estimated antidumping duties from its invoice to the Importer, without evidence that the price charged to the Importer was further lowered to reimburse the duties, fails to demonstrate reimbursement of the kind described in *AFBs*. Thus, the court is unconvinced by Plaintiffs' argument that Commerce has departed from an established practice that would require remand to permit the agency to explain or justify.

CONCLUSION

For the foregoing reasons, the Final Results are sustained. Judgment shall be entered accordingly.

Dated: May 31, 2022
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 22–65

POSCO, Plaintiff, and NUCOR CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., AK STEEL CORPORATION, ARCELORMITTAL USA LLC, NUCOR CORPORATION, UNITED STATES STEEL CORPORATION, POSCO, HYUNDAI STEEL COMPANY, and GOVERNMENT OF KOREA, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 16–00227

[Sustaining the U.S. Department of Commerce's second remand determination following a countervailing duty investigation of certain hot-rolled steel flat products from the Republic of Korea.]

Dated: June 13, 2022

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

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Stephen A. Jones and Daniel L. Schneiderman, King & Spalding LLP, of Washington, D.C., for Defendant-Intervenor AK Steel Corporation.

Thomas M. Beline and Sarah E. Shulman, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION

Choe-Groves, Judge:

Plaintiff POSCO (“POSCO”) and Consolidated Plaintiff Nucor Corporation (“Nucor”) initiated this action contesting various aspects of the final determination in a countervailing duty investigation, in which the U.S. Department of Commerce (“Commerce”) determined that countervailable subsidies are being provided to producers and exporters of certain hot-rolled steel flat products from the Republic of Korea (“Korea”). See *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t of Commerce Aug. 12, 2016) (final affirmative determination), *as amended, Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea*, 81 Fed. Reg. 67,960 (Dep’t of Commerce Oct. 3, 2016) (am. final affirmative countervailing duty determination and countervailing duty order); see also Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (Aug. 4, 2016) (“Final IDM”), PR 444. Before the Court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 125–1 (“*Second Remand Determination*”), which the Court ordered following the U.S. Court of Appeals for the Federal Circuit’s opinion in a related appeal, *POSCO v. United States* (“*CAFC POSCO*”), 977 F.3d 1369 (Fed. Cir. 2020), and the order in the appeal of this case vacating this Court’s decision and remanding, Order (Mar. 4, 2021) (“*CAFC Remand Order*”), ECF No. 123. Only Nucor and Defendant United States (“Defendant”) filed comments to the *Second Remand Determination*. Nucor Corporation’s Comments Opp’n Final Results Redetermination Pursuant Court Remand (“Nucor’s Cmts.”), ECF Nos. 127, 128; Def.’s Resp. Comments Second Remand Redetermination (“Def.’s Resp.”), ECF No. 130. For the reasons discussed below, the Court sustains the *Second Remand Determination*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case and recounts the facts relevant to the Court's review of the *Second Remand Determination*. See *POSCO v. United States*, 42 CIT __, __, 337 F. Supp. 3d 1265, 1270–72 (2018); *POSCO v. United States*, 43 CIT __, __, 378 F. Supp. 3d 1348, 1351–52 (2019).

Nucor, AK Steel Corporation, ArcelorMittal USA LLC, Steel Dynamics Inc., and United States Steel Corporation filed a petition (“Petition”) with Commerce concerning imports of hot-rolled steel flat products from Korea. See Decision Mem. for the Prelim. Negative Determination: Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (Jan. 8, 2015) (“Prelim. IDM”) at 1, PR 298. Commerce initiated a countervailing duty investigation into certain hot-rolled steel flat products from Korea, with a period of investigation covering calendar year 2014. See *id.* at 1, 3; see also *Certain Hot-Rolled Steel Flat Products from Brazil, the Republic of Korea, and Turkey*, 80 Fed. Reg. 54,267 (Dep’t of Commerce Sept. 9, 2015) (initiation of countervailing duty investigations). The investigation named POSCO and Hyundai Steel Co., Ltd. (“Hyundai Steel”) as the two mandatory respondents. See Prelim. IDM at 2. Commerce issued an initial questionnaire to the Government of Korea, seeking information about how electricity prices in Korea are set and how the Korean Electric Power Corporation’s (“KEPCO”) costs are reflected in its electricity rates. See *Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Countervailing Duty Questionnaire* (Sept. 24, 2015) (“Govt. of Korea Initial Questionnaire”), PR 46–47. The Government of Korea responded. *Countervailing Duty Investigation: Certain Hot-Rolled Steel Flat Products (Hot-Rolled Steel) from the Republic of Korea: Resp.* (Nov. 4, 2015) (“Govt. of Korea’s Initial Questionnaire Response”), PR 112–172, 175–201. Commerce conducted verifications of the questionnaire responses submitted by the Government of Korea, POSCO, and Hyundai Steel. See *Final IDM* at 2. In the *Final Determination*, Commerce determined that the Government of Korea’s provision of electricity did not benefit POSCO or Hyundai Steel, was not for less than adequate remuneration, and was not countervailable. See *id.* at 25, 44–50.

In a related appeal, the U.S. Court of Appeals for the Federal Circuit vacated and remanded “[b]ecause Commerce improperly based its benefit-conferred analysis on a ‘preferential price’ standard” contrary to the law and Commerce’s failure to investigate the Korean Power Exchange (the “KPX”) and include “[the] KPX’s generation costs in its analysis render[ed] its final determination unsupported by

substantial evidence.” *CAFC POSCO*, 977 F.3d at 1378 (discussing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,943 (Dep’t of Commerce July 29, 2016) (final affirmative determination), *as amended*, *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea* (“*CAFC POSCO Final Determination*”), 81 Fed. Reg. 64,436 (Dep’t of Commerce Sept. 20, 2016) (am. final affirmative countervailing duty determination and countervailing duty order). In the appeal of this case, the U.S. Court of Appeals for the Federal Circuit vacated and remanded consistent with its decision in *CAFC POSCO*. CAFC Remand Order at 2. This Court remanded to Commerce for further proceedings. Order (Mar. 8, 2021), ECF No. 124.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

The U.S. Court of Appeals for the Federal Circuit remanded two issues: (1) reliance on a preferential-rate standard as contrary to the law and (2) failure to address the KPX’s impact on the Korean electricity market as rendering Commerce’s cost-recovery analysis unsupported by substantial evidence. CAFC Remand Order; *see also CAFC POSCO*, 977 F.3d at 1376, 1378.

Section 1677(5) defines a countervailable subsidy as a financial contribution provided by an authority (a foreign government or public entity) to a specific industry when a recipient within the industry receives a benefit as a result of that contribution. *See* 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014). Before the statute was revised by the Uruguay Round Agreements Act (“URAA”), Pub. L. No. 103–465, § 101, 108 Stat. 4809, 4814 (codified as 19 U.S.C. § 3511 (1994)), Commerce applied the preferentiality standard, under which Commerce determined that a benefit was conferred if goods or services were provided “at preferential rates.” *See CAFC POSCO*, 977 F.3d at

1371 (citing 19 U.S.C. § 1677(5)(A)(ii)(II) (1988)). The URAA “replaced” the preferentiality standard with the less-than-adequate-remuneration standard. *Id.* at 1376 (citing URAA, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 927 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4209). Under the current law, “a benefit shall normally be treated as conferred . . . if [] goods or services are provided for less than adequate remuneration.” 19 U.S.C. § 1677(5)(E), (E)(iv); see *CAFC POSCO*, 977 F.3d at 1371. “For purposes of clause (iv), adequacy of remuneration [is] determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” 19 U.S.C. § 1677(5)(E).

Commerce codified its three-tiered, hierarchical approach for determining the adequacy of remuneration of an investigated good or service. See 19 C.F.R. § 351.511. The relevant tier in this case, the third tier, provides that when no world market price is available, “[Commerce] will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.” *Id.* at § 351.511(a)(2)(iii). Commerce makes this determination based on “information from the foreign government about how it sets its price.” *Fine Furniture*, 748 F.3d at 1370. “[I]f Commerce determines that government pricing is not consistent with market principles, then ‘a benefit shall normally be treated as conferred.’” *CAFC POSCO*, 977 F.3d at 1372 (quoting 19 U.S.C. § 1677(5)(E)(iv)).

I. Adequate Remuneration

The U.S. Court of Appeals for the Federal Circuit held in *CAFC POSCO* that Commerce’s application of the pre-URAA preferential-rate standard was contrary to the law. 977 F.3d at 1376. The *CAFC POSCO* court concluded that “Commerce’s analysis [] turned on whether respondents were given preferential treatment” based on the following in Commerce’s issues and decision memorandum in that case: “If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity, then there is no benefit.” *Id.* at 1374 (quoting Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea,

C-580–882 (July 20, 2016) (“*CAFC POSCO Final IDM*”) at 46. The court explained that “Commerce cannot rely on price discrimination to the exclusion of a thorough evaluation of fair-market principles to determine whether a recipient is receiving an unlawful benefit.” *Id.* at 1376 (citing *Nucor Corp. v. United States*, 927 F.3d 1243, 1251 (Fed. Cir. 2019)).

Commerce used the same standard in the *Final Determination* in this case as in the final determination reviewed in *CAFC POSCO Compare Final IDM* at 44–49, 45 (“If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity, then there is no benefit.”), with *CAFC POSCO Final IDM* at 45–50.

In the *Second Remand Determination*, Commerce defended its standard from the *Final Determination*.

Even after determining that the industrial tariffs charged by KEPCO are set at rates that cover cost and provide a rate of return, a rate could nevertheless represent [less than fair value] if a respondent company consumed electricity with a contract demand of between 4kW and 300kW and at a voltage of 220V–380V but was charged the lower tariff applicable to industrial companies that had a contract demand of over 300kW and consumed electricity at a voltage of 345,000V or higher. This is the meaning of the phrase in the *Final Determination*, “essentially treated no differently than other companies which purchase comparable amounts of electricity.”

Second Remand Determination at 16–17.

[T]he statement in the *Final Determination* referenced by both Nucor and the CAFC indicates that when the rate charged is consistent with the standard pricing mechanism (in this case, the electricity tariffs charged to the respondent covers cost plus a return) and the respondent is treated no differently than other companies that purchase comparable amounts of electricity (in this case, the rate charged to the respondent is from the correct tariff classification based on its contract demand for electricity and voltage for that electricity consumption, as this is a market condition for the provision of electricity in Korea), there is no benefit

Id. at 31. Because the Court of Appeals held unlawful Commerce’s standard in the *Final Determination, CAFC POSCO*, 977 F.3d at 1376, the Court does not consider Commerce’s argument as properly before the Court in the instant case.

The Court focuses instead on Commerce’s analysis as re-articulated on second remand:

[I]f the tariff charged to the respondent does not cover “cost of production” plus “a profitable return on the investment” . . . , then the respondent has received a countervailable benefit under section [1677(5)(E)] of the Act. Moreover, even in the event that the tariff charged to the respondent covers “costs of production” plus “a profitable return on the investment,” there is still a countervailable benefit conferred under the statute if KEPCO charges the respondent less than what it should be charged under its designated tariff classification.

Second Remand Determination at 31; *see also id.* at 15–16; Def.’s Resp. at 5–8. Nucor agrees that Commerce’s re-stated methodology, “[a] government price that covers the cost of production and supply, plus an appropriate amount for profit, and that is not otherwise less than the respondent should be charged,” is consistent with the statutory adequate-remuneration standard and *CAFC POSCO*. Nucor’s Cmts. at 4–5 (quoting *Second Remand Determination* at 31).

Adequate remuneration is tied to fair value, *Nucor*, 927 F.3d at 1252–53, as are “market principles of cost or pricing structures,” *id.* at 1253 (emphasis omitted) (quoting 19 U.S.C. § 1677(18) (defining nonmarket economy country)). The Court of Appeals has upheld an adequate-remuneration determination based on “familiar standards of cost recovery.” *Nucor*, 927 F.3d at 1254. Commerce’s methodology of determining whether KEPCO’s tariff schedule covers costs and whether the respondents were charged the appropriate rate according to the tariff schedule is a reasonable measure of the adequacy of remuneration under the regulatory third tier in assessing whether the rate that KEPCO charged the respondents is consistent with market principles, *see* 19 C.F.R. § 351.511(a)(2)(iii), because it is based on cost recovery, *see Nucor*, 927 F.3d at 1254. As in *Nucor*, no argument was raised about any conceptual difference between market value and cost recovery. *See id.* at 1255.

The *Second Remand Determination* standard is also consistent with *CAFC POSCO*. The *CAFC POSCO* court faulted Commerce for relying on price discrimination, namely “that [a] producer is being discriminatorily favored compared to others in the exporting country.” *CAFC POSCO*, 977 F.3d at 1376 (quoting *Nucor*, 927 F.3d at 1251).

Excluding its defense of the *Final Determination* standard, which is not before the Court, Commerce re-articulated its standard without the language “treated no differently than other companies,” which the *CAFC POSCO* court held was an unlawful preferential-rate standard. *See id.* at 1374–76. The Court notes Commerce’s assertion that “in assessing the price charged for electricity by KEPCO to the respondents, [it] did not compare the price charged to other customers in Korea.” *Second Remand Determination* at 14; *see also* Def.’s Resp. at 8. Commerce removed the offending preferential-rate language and did not conduct a price-discrimination analysis.

The Court concludes that Commerce’s re-articulated standard is in accordance with the law.

II. Cost Recovery

The U.S. Court of Appeals for the Federal Circuit concluded in *CAFC POSCO* that “Commerce’s determination that [the] KPX was not relevant to its analysis leaves unresolved whether a benefit was conferred by way of the price charged by [the] KPX to KEPCO.” *CAFC POSCO*, 977 F.3d at 1377 (citations omitted). The *CAFC POSCO* court held that Commerce failed to discharge its “affirmative duty to investigate any appearance of subsidies related to the investigation that are discovered during an investigation,” *id.* at 1378 (citing 19 U.S.C. § 1677d and *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 112 F. Supp. 2d 1141 (2000)), by not considering the KPX in its cost-recovery analysis when the “KPX is an authority” and the record showed that all electricity generated in Korea must be sold to KEPCO by the KPX; KEPCO and its six subsidiaries wholly own the KPX; and KEPCO sets its prices based on the cost of purchasing electricity from the KPX, which accounts for up to 90% of KEPCO’s total costs, *id.* at 1377–78 (citing *Nucor*, 927 F.3d at 1259 (Reyna, J., dissenting)). In the *CAFC POSCO* court’s words, “[t]hat [the] KPX’s pricing constitutes a significant portion of KEPCO’s total cost makes it implausible that Commerce adequately investigated Korea’s prevailing market condition for electricity without a thorough understanding of the costs associated with generating and acquiring that electricity.” *Id.* at 1377. The *CAFC POSCO* court held that “Commerce’s failure to investigate and include [the] KPX’s generation costs in its analysis renders its final determination unsupported by substantial evidence.” *Id.* at 1378.

As in the *CAFC POSCO Final Determination*, Commerce excluded the KPX’s costs from its analysis in reaching the *Final Determination* in this case, explaining:

[W]ith respect to the costs of the generators, including the nuclear generators, the Department did not request these costs because the costs of electricity to KEPCO are determined by the KPX. Electricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX. Thus, the costs for electricity are based upon the purchase price of electricity from the KPX, and this is the cost that is relevant for KEPCO's industrial tariff schedule.

Final IDM at 49.

The statute provides in relevant part:

If, in the course of a proceeding under this subtitle, [Commerce] discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition, . . . then [Commerce]

(1) shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding

19 U.S.C. § 1677d; *see also* 19 C.F.R. § 351.311.

In addition to the statute, the *CAFC POSCO* court cited *Allegheny Ludlum Corp. v. United States* (“*Allegheny I*”), 24 CIT 452, 112 F. Supp. 2d 1141 (2000), for the proposition that “Commerce has an affirmative duty to investigate any appearance of subsidies related to the investigation that are discovered during an investigation.” 977 F.3d at 1378 (citing *Allegheny I*, 24 CIT at 461, 112 F. Supp. 2d at 1150). On remand in that case, the court in *Allegheny Ludlum Corp. v. United States* (“*Allegheny II*”), 25 CIT 816 (2001), upheld Commerce’s determination that “while a financial contribution occurred, that contribution did not appear to be a countervailable subsidy when the record evidence was analyzed, revealing the absence of a benefit.” 25 CIT at 825. The court explained that “the plain language of the statute . . . only require[s] Commerce to investigate where there is a practice that ‘appears to be’ or ‘appears to provide’ a countervailable subsidy.” *Id.* at 821. The statute requires Commerce to “review the record, weighing and analyzing both negative evidence and positive evidence, to determine whether the business practice appears to be a countervailable subsidy,” but “does not force Commerce to fully investigate any subsidy.” *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1342 (2019) (internal quotation marks and brackets omitted) (quoting *Allegheny II*, 25 CIT at 824).

Nucor argues also that the *Second Remand Determination* is unlawful because it “treat[s] the ‘prevailing market conditions’ in Korea as coextensive with ‘the tariff classifications established by KEPCO’ and do[es] not properly expand the analysis to include additional information regarding the KPX or actual generation costs.” Nucor’s Cmts. at 11–12. Nucor contends that Commerce relied only on the Government of Korea’s responses to two questions in the Govt. of Korea Initial Questionnaire¹ that addressed KEPCO’s cost of purchasing electricity through the KPX but not the cost of generating electricity. *Id.* at 12 (citing *Second Remand Determination* at 17); see also Govt. of Korea Initial Questionnaire, Section II, Questions 40–41. Nucor asserts that the deficiency identified in *CAFC POSCO* remains because the *Second Remand Determination* “include[s] no additional information or analysis regarding the actual costs of generating and supplying electricity.” Nucor’s Cmts. at 13.

Nucor’s assertions are inaccurate. As Defendant asserts, Commerce did not rely only on the Government of Korea’s responses to two questions in the Govt. of Korea Initial Questionnaire. See Def.’s Resp. at 9. In the *Second Remand Determination*, the Court observes that Commerce also cited information from KEPCO’s 2015 Form 20-F covering calendar year 2014, which was filed with the U.S. Securities and Exchange Commission and was submitted with the Govt. of Korea’s Initial Questionnaire Response.² *Second Remand Determination* at 39 & nn.139–41, 40 & nn.142 & 144, 41 & n.147 (citing Govt.

¹ The two questions posed by Commerce were:

KEPCO pays its subsidiaries the generating cost when it purchases electricity at the [KPX] and that the capital and generating costs are included in the purchase price. If the price paid is not sufficient to cover all the costs including the amount of investment return, please explain the costs that are not covered and provide the additional amount that would need to be paid to cover all costs including an appropriate amount of investment return. Please make sure to also provide this additional amount in percentage terms.

Govt. of Korea Initial Questionnaire, Section II, Question 40.

The price of electricity from the KPX reflects an adjusted coefficient that is determined by the Cost Evaluation Committee. Please explain how the adjusted coefficient was determined; how often the adjusted coefficient is changed; and provide the adjusted coefficients that were in effect during the [period of investigation].

Govt. of Korea Initial Questionnaire, Section II, Question 41.

² Commerce also referenced *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2017* (“2017 Administrative Review of Hot-Rolled Steel”), 85 Fed. Reg. 64,122 (Dep’t of Commerce Oct. 9, 2020), in which Commerce investigated the selling of electricity to KEPCO through the KPX, “in the event that the Court wanted additional information with respect to [the] KPX’s generation costs.” *Second Remand Determination* at 40; see also Def.’s Resp. at 12–13. Nucor argues that no upstream subsidy allegation was made during this investigation and Commerce’s upstream subsidy determinations in subsequent administrative reviews are irrelevant here. Nucor’s Cmts. at 14–15. Because the Court concludes that evidence on this record supports Commerce’s determination, the Court does not consider the *2017 Administrative Review of Hot-Rolled Steel*.

of Korea's Initial Questionnaire Resp. Ex. E-3 ("KEPCO's 2015 Form 20-F"). The additional information from KEPCO's 2015 Form 20-F went beyond KEPCO's rate-setting methodology and included the subsidiaries' costs of generating electricity and the KPX's costs in administering sales of electricity to KEPCO, as required by *CAFC POSCO*.

The KPX does not generate electricity. *Id.* at 32 n.115 (citing Govt. of Korea's Initial Questionnaire Response at 9). As the *CAFC POSCO* court noted, electricity in Korea is "generated by 'independent power generators, community energy systems, and KEPCO's six subsidiaries.'" 977 F.3d at 1373. "Commerce found [that] KEPCO, through its six subsidiaries, generates the 'substantial majority of the electricity produced in Korea.'" *Id.* Therefore, it was reasonable for Commerce to use the average fuel costs of KEPCO's electricity-generating subsidiaries as reflected in KEPCO's 2015 Form 20-F for the costs of generating electricity. *See Second Remand Determination* at 39. The Court concludes that Commerce complied with *CAFC POSCO* in considering additional information from the record regarding the costs of generating electricity.

Commerce also complied with *CAFC POSCO* in reviewing the record on second remand and determining, as in *Allegheny II*, that there was no appearance of a subsidy provided by the KPX. Commerce explained that for the purpose of determining whether a practice appears to be a countervailable subsidy that triggers its obligation under Section 1677d, Commerce considered whether the practice appeared to have the three elements of a countervailable subsidy: "(1) a financial contribution that (2) confers a benefit which (3) is specific." *Second Remand Determination* at 7–8. Commerce acknowledged that the KPX is an authority that provided a financial contribution and that the Petition alleged possible specificity, but Commerce determined that there was no evidence of a benefit conferred in the pricing between the KPX and KEPCO, and therefore no appearance of a countervailable subsidy provided by the KPX that Commerce was required to include in the proceeding. *Id.* at 8. Commerce determined that the KPX's prices paid by KEPCO exceeded the KPX's full cost, including the cost paid by the KPX to the generators to cover the cost of generating electricity, and therefore did not constitute a benefit under 19 U.S.C. § 1677(5)(B). *Id.* at 18–19; *see also* Def.'s Resp. at 10. The Court concludes that Commerce complied with *CAFC POSCO* in analyzing the KPX's costs and answering, in the negative, the *CAFC POSCO* court's question of "whether a benefit was conferred by way of the price charged by [the] KPX to KEPCO." *See CAFC POSCO*, 977 F.3d at 1377.

Nucor argues that Commerce’s determination fails because it considered the profitability of KEPCO and KEPCO’s generation subsidiaries only “in the aggregate,” in other words, based on “all sales to all users” and not specifically with respect to sales to the respondents. Nucor’s Cmts. at 15–16. As Defendant argues, however, Commerce did not base its determination solely on KEPCO’s overall profitability as Nucor asserts. *See* Def.’s Resp. at 9–10. As discussed above, Commerce determined that KEPCO based the rates *for each electricity classification* on its overall costs as calculated and distributed to customers based on contract demand, voltage, hours of use, time of day (off-peak, mid-peak, on-peak), season, and number of consumers for each classification of electricity. *See supra* pp. 17–18. Commerce’s consideration of KEPCO’s cost recovery in the context of these factors is consistent with the statute’s instruction for Commerce to determine the adequacy of remuneration “in relation to prevailing market conditions,” including “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *See* 19 U.S.C. § 1677(5)(E).

Nucor contends that “KEPCO’s pricing structure creates *de facto* cross-subsidization, through which the majority of society . . . pays the highest government-assigned prices in order to cover the fixed costs that are excluded from the [low] government-assigned prices paid to generators supplying electricity to off-peak, industrial consumers like the mandatory respondents.” Nucor’s Cmts. at 16–17 (citation and internal quotation marks omitted). But on the contrary, the mandatory respondents purchased electricity at all three rates, “Off-Peak,” “Mid-Peak,” and “On-Peak,” not only, or even overwhelmingly, at the lowest off-peak rates. *See* Certain Hot-Rolled Steel Flat Products from Korea, Case No. C-580–884: [POSCO’s] Initial Questionnaire Resp. (Nov. 2, 2015), CR 41–84, Ex. A-2 (“POSCO’s Electricity Template”); Certain Hot-Rolled Steel Flat Products from Korea, Case No. C-580–884: [Hyundai Steel’s] Section III Initial Questionnaire Resp. (Nov. 6, 2015), CR 193–237, Ex. A-1 (“Hyundai Steel’s Electricity Template”). As Commerce noted in the Final IDM, “[t]he fact [that] [the] respondents operate their production facilities 24 hours a day and consume large amounts of electricity during the evening hours is more evidence of supply and demand than any [benefit].” Final IDM at 44. And it would seem that setting lower rates for lower demand during off-peak hours is consistent with market principles rather than being a hallmark of “*de facto* cross-subsidization” as asserted by Nucor. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (“Market prices of commodities and most services are determined by supply and demand.”).

Comparing the lowest monthly off-peak rate paid by a mandatory respondent to the annual average cost for the lowest cost generator, Nucor asserts that the record shows that the off-peak rates paid by the respondents do not cover costs. *See* Nucor’s Cmts. at 17 (citing POSCO’s Electricity Template; Hyundai Steel’s Electricity Template; *Second Remand Determination* at 39 n.140). Nucor’s mismatched comparison of the lowest variable *monthly* off-peak rate paid by a mandatory respondent to the *annual average* cost for the lowest cost generator does not undermine the record evidence that supports Commerce’s determination. That the lowest monthly rate was lower than the annual average cost provides no information to confirm or discredit the generator’s cost recovery that month or that year.

Commerce also complied with *CAFC POSCO* in considering the costs of acquiring electricity through the electricity supply chain. By Korean law, “[a]ll electricity generated in Korea, including that of the private generators, must be sold to KEPCO,” through the KPX. *CAFC POSCO*, 977 F.3d at 1373; *Second Remand Determination* at 32 n.115 (citing Govt. of Korea’s Initial Questionnaire Response at 9). The KPX, “a wholesale market,” “which is wholly owned by KEPCO and its six subsidiaries,” administers “all sales of electricity in Korea.” *CAFC POSCO*, 977 F.3d at 1373. “[E]lectricity generators ‘sell’ electricity to [the] KPX and then KEPCO ‘purchases’ that electricity from [the] KPX” *Second Remand Determination* at 38 n.136 (citing Final IDM at 49). “KEPCO is a state-owned entity and the sole provider of electricity in Korea.” *CAFC POSCO*, 977 F.3d at 1378. “KEPCO purchases electricity from the KPX and transmits and distributes to the customers.” *Second Remand Determination* at 32 n.115 (citing Govt. of Korea’s Initial Questionnaire Response at 9).

For KEPCO’s subsidiaries, Commerce compared each subsidiary’s average price per kilowatt hour (the price paid to the subsidiary by the KPX) to its average fuel cost per kilowatt hour, as disclosed in KEPCO’s 2015 Form 20-F, and determined that “it is readily apparent that the KPX unit price more than covered the fuel costs for each of these generators.” *See id.* at 39 & n.140. Commerce also noted that all six subsidiaries were profitable in 2014 and five subsidiaries distributed cash dividends. *Id.* at 40.

For the KPX, Commerce explained that “the only revenue permitted is membership fees, commission on electricity utility transactions and other revenue proscribed by [the Ministry of Trade, Industry and Energy] and its financial statements establish revenue from commissions more than covered its operating expenses.” *Id.* Commerce determined, based on KEPCO’s 2015 Form 20-F, that the KPX recovered costs during the period of investigation. *Id.*

For KEPCO, the *CAFC POSCO* court noted that “[w]hile KEPCO and other government entities establish the ultimate prices to end users, the basis of these prices is the cost of KEPCO’s purchases from the KPX,” *CAFC POSCO*, 977 F.3d at 1373, “and [the] KPX’s pricing accounts for upwards of 90% of KEPCO’s total cost,” *id.* at 1377 (citations omitted). Commerce reviewed KEPCO’s industrial tariff electricity schedule, which designated rates based on contract demand, voltage, hours of use, time of day (off-peak, mid-peak, on-peak), and season. *Second Remand Determination* at 12–13 (citing *Final Determination* at 44–50; Govt. of Korea’s Initial Questionnaire Response Ex. E-13 (“KEPCO’s Electricity Schedule”). Commerce explained that it calculated the “cost for each electricity classification” by: “(1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution and sales); (2) dividing each cost into fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level, peak level, and the patterns of consuming electricity.” *Id.* at 13. Commerce reviewed the Govt. of Korea’s Initial Questionnaire Response, which explained that the industrial tariff classifications were segregated by contract demand, either 4–300kW or more than 300kW, and by voltage, Low Voltage (220–380V), High Voltage (A) (3,300–66,000V), High Voltage (B) (154,000V), or High Voltage (C) (345,000V or higher). *Id.* at 12–13 (citing KEPCO’s Electricity Schedule). The higher the contract demand and the higher the voltage, the lower the industrial rate. *Id.* at 13. Commerce determined that, in addition to “the electricity load level, the usage pattern of electricity, and the volume of electricity consumed,” KEPCO distributed costs “according to the number of consumers for each classification of electricity.” *Id.* (citing *Final IDM* at 49). Commerce repeated its determination and explanation from the *Final Determination* that KEPCO developed its electricity schedule based on its costs. *Id.* Commerce determined that the method used to set KEPCO’s industrial tariff schedule was based on price, marketability, transportation, and other conditions of purchase or sale, which constituted prevailing market conditions within the meaning of Section 1677(5)(E)(iv). *Id.* at 12.

Commerce then considered whether the tariff classification rate charged to the respondents covered KEPCO’s costs and whether the respondents were assigned to the appropriate tariff classification. *Id.* at 12, 15–17. Commerce concluded again that for the period of investigation, KEPCO more than fully covered its cost for the industrial tariff applicable to the respondents. *Id.* at 13–14 (citing *Final IDM* at 49). Commerce determined based on KEPCO’s 2015 Form 20-F that

“KEPCO, as a consolidated entity, was profitable and its revenue was positive in transmission, distribution and power generation (nuclear and non-nuclear).” *Id.* at 39. Commerce determined that KEPCO “not only [recovered] the cost of production, but also [secured] a return on investment.” *Id.* at 40.

Commerce’s determinations that the subsidiaries, the KPX, and KEPCO recovered their costs and secured returns on investment was supported by KEPCO’s 2015 Form 20-F. *See Second Remand Determination* at 12–13 (citing KEPCO’s Electricity Schedule), 39 & n.140 (citing KEPCO’s 2015 Form 20-F), 40. The Court concludes that Commerce’s determination that the provision of electricity to the respondents was not for less than adequate remuneration is supported by substantial evidence and complies with *CAFC POSCO*.

CONCLUSION

For the aforementioned reasons, the Court sustains Commerce’s *Second Remand Determination*.

Judgment will be entered accordingly.

Dated: June 13, 2022

New York, New York

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

Slip Op. 22–66

ELLWOOD CITY FORGE COMPANY, ELLWOOD NATIONAL STEEL COMPANY, ELLWOOD QUALITY STEELS COMPANY, and A. FINKL & SONS Plaintiffs,
v. UNITED STATES, Defendant, METALCAM S.P.A., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21–00073

[Denying Plaintiffs’ Motion for Judgment on the Agency Record and sustaining Commerce’s determination.]

Dated: June 14, 2022

Thomas M. Beline, Cassidy Levy Kent LLP, of Washington, D.C., for Plaintiffs. With him on the brief were *Jack A. Levy*, *Myles S. Getlan*, *Jeffery B. Denning*, *James E. Ransdell*, and *Nicole Brunda*.

Sarah E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, and *Hendricks Valenzuela*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Douglas J. Heffner, Faegre Drinker Biddle & Reath, LLP, of Washington, D.C., for Defendant-Intervenor. With him on the brief was *Richard P. Ferrin*.

OPINION

Vaden, Judge:

Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl and Sons (collectively Ellwood City and Plaintiffs) filed this case under Section 516A of the Tariff Act of 1930, as amended. Plaintiffs challenge certain aspects of the final determination in the less-than-fair-value investigation of forged steel fluid end blocks from Italy issued by the U.S. Department of Commerce (Commerce). Specifically, Plaintiffs challenge Commerce's decision to issue verification questionnaires in lieu of conducting on-site verification and Commerce's subsequent determination of a 7.33% dumping margin for Lucchini and a *de minimis* dumping margin for Metalcam S.p.A., both Italian producers of FEBs and mandatory respondents in this investigation. See Compl., ECF No. 6. Before the Court is the Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Pls.' Mot. J. Agency R. (Pls.' Mot.), ECF No. 21. For the reasons set forth below, the Court finds that Ellwood City failed to exhaust its administrative remedies with regard to its verification claim and that substantial evidence otherwise supports the agency's determination. Plaintiffs' Motion is **DENIED**.

FACTUAL BACKGROUND

The products at issue in this case are forged steel fluid end blocks (FEBs) produced in Italy for import into the United States. The International Trade Commission described the types of FEBs included in the scope of its corresponding material injury investigation:

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term "forged" is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788. . . .

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2

mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm). . . .

A fluid end block may be imported in finished condition (i.e., ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (i.e., forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Forged Steel Fluid End Blocks from Italy: Final Affirmative Determination of Sales at Less Than Fair Value, 85 Fed. Reg. 79,998, Appendix I (Dec. 11, 2020) (Final Determination), J.A. at 83,315, ECF No. 29 (describing the particular characteristics of FEBs included in this investigation).

I. The Antidumping Investigation

The investigation at issue began on December 19, 2019, when Plaintiffs filed a petition alleging that FEBs from Italy were being sold at less than fair market value in the United States. *Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, and Italy: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 2,394 (Jan. 15, 2020). Commerce initiated an investigation on January 15, 2020, and published its Respondent Selection Memorandum that identified Lucchini Mamé Forge S.p.A. (Lucchini) and Metalcam S.p.A. (Metalcam) as mandatory respondents on February 4, 2020. Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from Italy (PDM) at 2, J.A. at 82,838, ECF No. 29. Commerce sent Lucchini and Metalcam a standard initial questionnaire on February 6, 2020, requesting information about the Italian producers' sales in the United States and costs of production. J.A. at 80,012, 80,165, ECF No. 29. Between March 3, 2020, and April 6, 2020, Metalcam and Lucchini submitted responses to each section of

the initial questionnaire. J.A. at 80,318, 81,180, 81,838, 81,873, 82,081, 82,215, 82,377, ECF No. 29.

During the period that Metalcam and Lucchini submitted their questionnaire responses, the World Health Organization officially classified COVID-19 as a pandemic. *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. On March 15, 2020, the Department of Commerce issued an agency-wide memo prohibiting all travel not "mission-critical and pre-approved by senior bureau leadership." DEPT OF COMMERCE, *All Hands: Coronavirus Update (3-16-20)* <https://bit.ly/commercecoronavirus>. The CDC issued a Level 4 travel advisory, urging all U.S. citizens to avoid international travel on March 31, 2020. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Global Level 4 Health Advisory: Do Not Travel* (Mar. 31, 2020).

On March 26, 2020, Commerce postponed the preliminary determination in the investigation by fifty days to July 16, 2020. *Forged Steel Fluid End Blocks from the Federal Republic of Germany, India and Italy: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 17,042 (March 26, 2020). Commerce continued its investigation of Italian FEBs during that period, issuing supplemental questionnaires to Metalcam and Lucchini between April 9, 2020, and June 17, 2020. PDM at 4, J.A. at 82,840, ECF No. 29. Metalcam and Lucchini responded to those questionnaires between April 29, 2020, and June 29, 2020. *Id.* Based on the initial information gathered from Metalcam and Lucchini, Commerce issued a Preliminary Affirmative Determination of Sales at Less Than Fair Value (SLTFV), with preliminary results of a zero percent dumping margin for Metalcam and 4.84% for Lucchini. *Forged Steel Fluid End Blocks from Italy: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* (Prelim. Determination), 85 Fed. Reg. 44,500-01 (July 23, 2020), J.A. at 82,872, ECF No. 29.

The parties submitted multiple comments after Commerce issued its Preliminary Determination and before Commerce explained its intended verification method. In Ellwood City's August 4, 2020 comments, it directly addressed concerns about the verification procedures Commerce would undertake and gave specific suggestions. Ellwood City argued: "Insofar as Commerce conducts verification or issues a verification outline for prompt response from the respondents, Commerce should instruct that the respondents must provide

source accounting records and not Excel worksheets as part of an answer and, in so doing, must not change any reported data . . .” J.A. at 82,911, ECF No. 29. Ellwood City continued:

As discussed, the reported costs are incomplete, distorted, and unreliable. And with Commerce’s ability to conduct a traditional verification in doubt, the integrity of these proceedings is in jeopardy . . . [I]f Commerce determines that further verification is warranted, we urge Commerce not to give respondents authorization to once again correct erroneous sales and cost submissions. To that end, Commerce should ask respondents to finally support the record that they have provided. To date, gaps exist and reported costs have not been supported with anything other than respondents’ say so. A decision to do otherwise would only invite further abuse of process by the respondents, particularly when they know that COVID-19 will likely prevent Commerce from conducting a robust on-site verification, as contemplated under the statute.

J.A. at 82,917–18, ECF No. 29.

On September 2, 2020, Commerce determined that “the global COVID-19 pandemic had made conducting on-site verification impossible” and thus issued questionnaires “in lieu of performing an on-site verification.” Def.’s Resp. Opp’n Mot. J. Agency R. (Def.’s Resp.) at 5, ECF No. 23; Letter to Metalcam, J.A. at 3,027, ECF No. 30. Commerce explained that the purpose of the questionnaire was “to probe information . . . already submitted – not to obtain new information.” Commerce Questionnaire in Lieu of Verification to Lucchini, J.A. at 82,922, ECF No. 29; Commerce Questionnaire in Lieu of Verification to Metalcam, J.A. at 82,927, ECF No. 29. As such, “the questions are similar to those that [Commerce] would normally ask during an on-site verification.” *Id.* Metalcam and Lucchini requested extensions of ten and eight days, respectively, beyond the one-week time period Commerce allowed for their responses. Case A-475–840: Antidumping Duty Investigation of Forged Steel Fluid End Blocks from Italy: Lucchini Mamé Forge S.p.A. Extension Req. for Post-Prelim Questionnaire Resp. (Sept. 8, 2020), bar code 4023491–01, PR 338; Antidumping Duty Investigation of Forged Steel Fluid End Blocks from Italy: Extension Req. of Metalcam S.p.A. for Post-Prelim Questionnaire Resp. (Sept. 8, 2020), bar code 4023284–01, PR 337. Commerce explained, however, that granting such an extension would be inconsistent with Commerce’s general verification procedures:

Normally, Commerce provides respondents a verification outline one week in advance and expects the respondent to have pre-

pared the documentation for each section of the verification outline during this time. Here, Metalcam has already been provided the equivalent of one week to prepare and submit information that amounts to a subset of what is typically requested in a verification outline. Further, unlike the impromptu questions that Commerce verifiers ask during the course of verification, Metalcam had one week to prepare answers to Commerce's specific requests for information. Moreover, Commerce's requests for information pertain to information Metalcam already provided on the record.

Commerce Response Partially Granting Extension, Doc. No. 4024158-01 (Sept. 9, 2020). Commerce ultimately granted the respondents a one-day extension, and Metalcam and Lucchini submitted responses on September 11, 2020. J.A. at 82,932, ECF No. 29.

Commerce issued the administrative briefing schedule on October 2, 2020; Metalcam and Ellwood City submitted administrative case briefs on October 20, 2020. Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from Italy at 2, J.A. at 83,283, ECF No. 29 (IDM). Ellwood City's submission repeatedly evinced acceptance of Commerce's verification questionnaires and indicated that the questionnaires fulfilled the purposes of verification. It observed that "[t]he factual record is meaningfully and substantively different than the factual record that existed at the time the U.S. Department of Commerce issued its *Preliminary Determination*, primarily as a result of Commerce's remote verification." Ellwood City Admin. Case Br. at 1, J.A. at 83,111, ECF No. 35. It elaborated:

Given that the COVID-19 global pandemic occurred in parallel with the conduct of this investigation, we firmly believe that respondents made a calculated judgment that verification would not occur in this investigation as required by law. Accordingly, respondents hid facts, obfuscated in responding to questionnaires, and withheld requested information that would shine light on their dumping. But they did not count on Commerce issuing the Verification Questionnaires in lieu of on-site, in-person verification. Insofar as they could not wiggle out of the requests within the Verification Questionnaires to support their reported costs by a specific and un-extended deadline, the Preliminary Determination, as is, can no longer stand and continue to be supported by substantial evidence.

Id. Positive references to “verification” abound throughout Ellwood City’s brief. *See, e.g., id.* at 2 (“But for Commerce’s verification questionnaire, these issues may have gone undetected. . . . Commerce’s verification has now revealed that”); *id.* at 3 (“Commerce’s Verification Questionnaire instruct[ed] Lucchini to reconcile”); *id.* at 6 (“Th[e] verification exercise has definitively established that Metalcam’s reported costs do not reconcile”); *id.* at 7 (“[V]erification has established that Metalcam supplied unexplained, unsupported, untranslated, and previously undisclosed [information] verification also undermined Metalcam’s previously reported individual cost elements These failures, which only came to light in verifying Metalcam’s responses, are substantial.”); *id.* at 48 (“As a result of the information obtained in the Verification Questionnaire, Commerce should apply partial adverse facts available”); *id.* at 66–67 (“Commerce obtained additional information for these commissions in the Verification Response”); *id.* at 85 (“We are grateful for Commerce’s Verification Questionnaires.”). Metalcam and Lucchini returned rebuttal case briefs on November 2, 2020, and Ellwood City submitted its rebuttal case brief on November 10, 2020. J.A. at 83,283, ECF No. 29.

On November 13, Commerce held a virtual public hearing at the parties’ request. At this hearing, counsel for Ellwood City repeatedly referred to “verification” and “verification questionnaires” without expressing any opposition to Commerce’s chosen verification procedures. *See* Tr. Hearing, J.A. at 83,204, ECF No. 29. Instead, Ellwood City only questioned whether Metalcam and Lucchini had submitted verifiable information and argued that discrepancies in their responses prevented Commerce from being able to rely on the submitted information. *See id.* at 36:4–12. Ellwood City even went so far as to compliment Commerce for taking an “extraordinary step in these times of the coronavirus to issue a verification questionnaire,” and Ellwood City was “glad [Commerce] did.” *Id.* at 36:5–7.

On December 8, 2020, Commerce issued its Final Issues and Decision Memorandum (IDM), explaining in detail its decision to assign a dumping margin of zero to Metalcam and 7.33% to Lucchini. *See* IDM, J.A. at 83,282, ECF No. 29. Lucchini’s rate was an increase from Commerce’s preliminary determination of 4.84%. *Cf.* Prelim. Determination, 85 Fed. Reg. at 44,501, J.A. at 82,872, ECF No. 29. Commerce published the Final Affirmative Determination of Sales at Less than Fair Value on December 11, 2020. Final Determination, 85 Fed. Reg. 79,996, J.A. at 83,315, ECF No. 29.

II. The Present Dispute

In February 2021, Plaintiffs sued Commerce, challenging its final determination with regard to Metalcam and Lucchini. Compl., ECF No. 6. Metalcam moved to intervene as Defendant-Intervenor on March 19, 2021. Consent Mot. Intervene, ECF No. 10. Plaintiffs ask this Court to reverse Commerce's final determination on the bases that (1) Commerce's failure to conduct on-site verification was contrary to law; (2) its overall determination is unsupported by substantial evidence; and (3) Commerce acted arbitrarily by failing to apply facts available with an adverse inference. Pls.' Mot. at 14–16, ECF No. 21.

Commerce filed its response on October 8, 2021, asserting that (1) Plaintiffs waived their verification argument by failing to raise it during the administrative proceeding; (2) Commerce's verification procedures were consistent with statutory requirements and necessary given the worldwide pandemic; (3) Metalcam and Lucchini's responses were consistent; and (4) Commerce's reliance on them was supported by substantial evidence. Def.'s Resp. at 7, ECF No. 23. Defendant-Intervenor Metalcam's¹ October 8, 2021, response similarly argued that (1) Commerce's verification procedures were within its discretion and fulfilled the statutory requirements and (2) Commerce's verification questionnaire elicited sufficient information such that Commerce's reliance on Metalcam's data was supported by substantial evidence. Def.-Intervenor's Resp. Pls.' Mot. at 1–2, ECF No. 22. Plaintiffs filed a reply brief on November 5, 2021. Pls.' Reply, ECF No. 26.

The Court held oral argument on February 17, 2022. Oral Argument Transcript (Tr.), ECF No. 41. Despite multiple invitations, Plaintiffs' counsel could not direct the Court to any specific page in the administrative record where Plaintiffs raised the statutory on-site verification arguments they now vigorously propound. Tr. 7:2 (“[W]hat I’m looking for is a page number[.]”); Tr. 12:21–25 (Judge Vaden: “Give me the page number where you told them you wanted it in person.” Plaintiffs: “So, Your Honor, we said at the July 2nd pre-preliminary comments, the need for rigorous verifications.”); Tr. 110:16–17 (inviting parties to tell the Court “[h]ere’s the page number you should go look at to prove I preserved this[.]”). Rather, Plaintiffs returned to the theme that Commerce did not treat the information it gathered in the way that Plaintiffs expected. Tr. 21:8–10 (“We didn’t know their procedures were inadequate until they issued a decision memo when Commerce did not engage.”). Commerce confirmed that,

¹ Lucchini did not move to intervene in these proceedings.

if Plaintiffs had raised the issue in the administrative case brief, it would have addressed the issue in the record. Tr. 46:24–25, 47:6–13.²

To give Plaintiffs a final chance to cite to the Court an instance in which they preserved their statutory verification argument, the Court allowed the parties to file an optional ten-page supplemental brief citing any additional evidence the Court should consider in its opinion. *See* Minute Order, ECF No. 37. Plaintiffs and Metalcam took advantage of the opportunity and filed their supplemental briefs on February 28, 2022. Pls.’ Br. Summarizing Arguments, ECF No. 42; Letter Br. Def.-Intervenors, ECF No. 40. In their submission, Plaintiffs cited the three-paragraph “Conclusion” section of their post-preliminary determination comments. They worried about “the integrity of the proceedings” and therefore requested that:

Commerce should ask respondents to finally support the record that they have provided. To date, gaps exist and reported costs have not been supported with anything other than respondents’ say so. A decision to do otherwise would only invite further abuse of process by the respondents, particularly when they know that COVID-19 will likely prevent Commerce from conducting a robust on-site verification, as contemplated under the statute.

J.A. at 82,918, ECF No. 29 (selectively quoted by Plaintiffs in Pls.’ Suppl. Br. at 2, ECF No. 42). *Cf.* Pls.’ Suppl. Br. at 2 (asserting that Plaintiffs “consistently and repeatedly stressed” their argument that on-site verification is legally mandatory). Even then, Plaintiffs did not object or suggest an alternative procedure for Commerce to employ. Plaintiffs instead confirmed their understanding that Commerce would not engage in its traditional “on-site verification.”

JURISDICTION AND STANDARD OF REVIEW

This Court has exclusive jurisdiction over Ellwood City’s challenge to Commerce’s Final Determination under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final affirmative determinations, including any negative part of such determinations, in an antidumping order. The Court must sustain Commerce’s “determination, finding, or conclusion” unless it is “unsupported by substantial

² When asked by the Court, “[I]f they had raised the objection at that point, you could have done something, couldn’t you?,” Commerce responded: “Absolutely, Your Honor. At the very least, it would have created a record for judicial review. It would have promoted administrative regularity. In terms of the verification report, it would have been possible perhaps to issue a verification report in that amount of time . . . [S]o it is possible that Commerce could have done things, or at the very least address the concerns to create a record for judicial review.” Tr. 46:24–25, 47:6–13.

evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). If the determinations are either unsupported by substantial evidence or not in accordance with the law, the Court must “hold unlawful any determination, finding, or conclusion found.” *Id.* This standard requires that Commerce thoroughly examine the record and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); accord *Tianjin Magnesium Int’l Co. v. United States*, 722 F.Supp.2d 1322, 1328 (CIT 2010). “[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce’s conclusion.” See *New Am. Keg v. United States*, No. 20–0008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021). “It is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew.” *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). The Federal Circuit has described “substantial evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Summary

The “major issue” presented by Plaintiffs’ Motion for Judgment on the Agency Record is whether Commerce’s verification methodology in the underlying investigation was consistent with statutory mandates. Pls.’ Mot. at 14, ECF No. 21. Commerce argues that Plaintiffs waived the verification argument by failing to address it during the administrative proceeding. Def.’s Resp. at 11, ECF No. 23. After reviewing the administrative record and the arguments in this case, the Court finds that Plaintiffs failed to exhaust their administrative remedies. Ellwood City did not challenge Commerce’s failure to perform an on-site verification during the pendency of the administrative proceeding, much less include the argument in its final brief before

the agency as required by regulation. Instead, it complimented the agency for its verification procedures — until those procedures resulted in a final determination not to Ellwood City’s liking.

Furthermore, neither of the potentially relevant exhaustion exceptions allow the verification claim to proceed. The Court finds that submitting Plaintiffs’ verification argument would not have been futile. Indeed, the agency could have modified its procedures or addressed Plaintiffs’ concerns on the record had Plaintiffs raised their objection first before the agency. Plaintiffs’ own explanation of their legal claim relies on past agency practice, indicating that the inquiry is one that will require, in part, a factual record. It therefore cannot qualify for the pure-question-of-law exception.

In addition to the “major issue” of verification procedure, Plaintiffs make a number of secondary claims that they *did* address to the agency during the underlying investigation. Plaintiffs dispute Commerce’s evaluation of Metalcam’s records reconciliation, its perceived data discrepancies, its costs and sales data, and Lucchini’s steel ingot yield losses. Pls.’ Mot. at 28–38, ECF No. 21. However, after examining the record, the Court finds that these objections lack merit. They ask the Court to “reweigh the evidence,” which is impermissible under the substantial evidence standard. That standard applied to the record evidence supports Commerce’s final determination with respect to Plaintiffs’ preserved objections. *Trent Tube Div.*, 975 F.2d at 815. Because Ellwood City failed to properly raise its verification argument during the administrative proceedings and because substantial evidence supports Commerce’s remaining findings, Ellwood City’s Motion is **DENIED**.

II. Administrative Exhaustion

Ellwood City waived its verification argument when it failed to object to Commerce’s verification methodology during the antidumping investigation. The CIT requires the exhaustion of administrative remedies “where appropriate,” a requirement it interprets strictly. 28 U.S.C. § 2637(d); *Corus Staal BV v. U.S.*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). In evaluating this requirement, the determinative question is whether Commerce was “put on notice” of the argument, not whether the argument was raised in exactly the same words before the agency. *Trust Chem Co. v. U.S.*, 791 F.Supp.2d 1257, 1268 n.27 (CIT 2011). Here, Commerce was not put on notice of Ellwood City’s argument because Ellwood City never objected to Commerce’s “questionnaire in lieu of on-site verification” during the investigation. Though Ellwood City claims two exhaustion exceptions save it from its failure to raise the issue, its argument was neither futile nor a pure question of law.

The Supreme Court has long “acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. . . . Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992). “[D]eference to Congress’ delegation of authority” means that “agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.” *Id.* This is especially the case when “the action under review involves exercise of the agency’s discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.” *Id.*

Consequently, the doctrine of administrative exhaustion recognizes that “an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.” *Id.* Exhaustion thereby promotes judicial efficiency because it requires parties to make arguments first before the agency that the agency may then moot before they reach court. When administrative exhaustion does not resolve an issue before it reaches a courtroom, exhaustion still “produce[s] a useful record for subsequent judicial consideration, especially in a complex or technical factual context.” *Id.*

Statutory law mandates that “the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies” in an antidumping order review. 28 U.S.C. § 2637(d). Department of Commerce regulations are even more explicit. In an antidumping investigation, parties must submit a case brief that presents “all arguments that continue in the submitter’s view to be relevant to the Secretary’s final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results.” 19 C.F.R. § 351.309(c)(2). In other words, Commerce’s regulation provides that parties must state all relevant arguments in their final brief to the agency or forever hold their peace. *See id.* Although “applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade” because the “statutory injunction is not absolute,” Commerce’s regulation gives the exhaustion requirement extra weight. *Corus Staal*, 502 F.3d at 1379 (noting that the presence of the regulation means that exhaustion is not merely “a creature of court decision”); *see generally Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (explaining the importance of exhausting arguments before administrative agencies). Consequently, “the

Court of International Trade generally takes a ‘strict view’ of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases.” *Corus Staal*, 502 F.3d at 1379. “[A] party’s failure to raise an argument before Commerce constitutes a failure to exhaust its administrative remedies.” *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1388 (Fed. Cir. 2014).

In determining whether a party has exhausted its administrative remedies, “[t]he determinative question is whether Commerce was put on notice of the issue, not whether Plaintiff’s exact wording below is used in the subsequent litigation.” *Trust Chem Co.*, 791 F.Supp.2d at 1268 n.27. The Court strikes a balance here. Although a plaintiff “cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument,” the Court will also find “plaintiff’s brief statement of the argument is sufficient *if* it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it.” *Luoyang Bearing Corp. v. United States*, 347 F.Supp.2d 1326, 1352 (CIT 2004) (emphasis added).

The Court agrees with Commerce that Plaintiffs failed to exhaust their administrative remedies with regard to the verification argument because Ellwood City “did not raise any of the arguments it now makes regarding Commerce’s verification procedures to the agency” Def.’s Resp. at 11–12, ECF No. 23. Absent from the entire investigation — let alone from the case brief — are any arguments about the validity of Commerce’s verification procedures. Ellwood City’s voluminous, 106-page post-preliminary administrative case brief of October 20, 2020, is devoid of any assertion of illegality regarding Commerce’s use of a verification questionnaire. Rather, Ellwood City repeatedly indicates its approval of and confidence in Commerce’s questionnaires “in lieu of performing on-site verification.” Questionnaire, J.A. at 3,027, ECF No. 30. Ellwood City refers to Commerce’s “remote verification” and regularly lauds the effectiveness of the verification procedure in highlighting purported discrepancies in Metalcam and Lucchini’s data: “But for Commerce’s verification questionnaire, these issues may have gone undetected Commerce’s verification has now revealed that” Ellwood City Admin. Case Br. at 2, J.A. at 83,112, ECF No. 29. Ellwood City’s approval is further underscored by comments it made during the virtual hearing that took place after the administrative briefing, during which Ellwood City complimented Commerce for taking the “extraordinary step” of requiring a mid-pandemic “verification ques-

tionnaire” in the first place, a measure that “glad[dened]” Plaintiffs at the time. Hearing Tr. at 36:5–7, J.A. at 83,204, ECF No. 29.

Commerce’s regulations require that, in antidumping investigation proceedings before the issuance of a final determination, parties must submit a case brief that presents “all arguments that continue in the submitter’s view to be relevant to the Secretary’s final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results.” 19 C.F.R. § 351.309(c)(2) (2018). Even if parties have referenced certain arguments in earlier comments, they must present the arguments again in the post-preliminary case brief to exhaust their administrative remedies and avoid waiving those arguments. *See id.* Plaintiffs rightly acknowledge that Section 351.309 applies to the administrative review at the heart of Ellwood City’s case. Tr. 62:25, 63:1–2 (“You are in [an] antidumping case, so (b)(1) applies to you, correct?” Answer: “Yes, Your Honor.”).

Although Ellwood City noted in the concluding paragraphs of its post-preliminary comments that “COVID-19 will likely prevent Commerce from conducting a robust on-site verification, as contemplated under the statute” and that Commerce would not be able to conduct a “traditional verification,” Ellwood City did not object to Commerce’s questionnaire, suggest an alternative procedure, or express the strong position it now embraces that nothing short of an on-site verification is legal. *See* J.A. at 82,917–18. ECF No. 29. Indeed, following the conclusion of verification, when multiple further opportunities to challenge the questionnaire method arose, Ellwood City instead declared it was “grateful for Commerce’s Verification Questionnaires.” Ellwood City Admin. Case Br. at 85, J.A. at 83,195, ECF No. 29.

Compliments and observations are not objections, and parties to a proceeding generally are not “glad” if they believe an agency is acting illegally. Although Ellwood City’s brief to this Court accuses Commerce of “ignor[ing] the law completely” and suggests that Commerce could have conducted verification “via videoconference,” its submissions to Commerce do not hint at such arguments or alternatives. *Compare* Pls.’ Mot. at 24 (containing the prior quoted language), *with* Ellwood City Admin. Case Br. at 85, J.A. at 83,195, ECF No. 29 (“Here, in-person verification was impossible given the COVID-19 global pandemic, but Commerce developed an alternative tool of a verification questionnaire to obtain the type of information it would during an on-site verification. We are grateful for Commerce’s Verification Questionnaires.”). Commerce was thus not on notice of a

challenge to its use of a verification questionnaire. *Trust Chem Co.*, 791 F.Supp.2d at 1268 n.27 (noting that a party's burden is merely to put Commerce "on notice" of its objection). Because Ellwood City failed to raise its now strident objections to Commerce's use of a verification questionnaire during the pendency of the proceeding before the agency, it has failed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d).

The Court may still reach the substance of Ellwood City's argument if Ellwood City satisfies the requirements of an exception to the administrative exhaustion doctrine. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) ("In the Court of International Trade, a plaintiff must . . . show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine."). In response to its failure to exhaust, Ellwood City invokes two exceptions — futility and pure question of law. Pls.' Reply at 8–12, ECF No. 26. The Court considers each in turn.

1. Futility

The Federal Circuit has explained, "a party often is permitted to bypass an available avenue of administrative challenge if pursuing that route would clearly be futile, *i.e.*, where it is clear that additional filings with the agency would be ineffectual." *Itochu Bldg. Prod. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013) (internal quotation marks omitted). Two Federal Circuit precedents guide the Court's analysis of the narrow futility exception.

In *Corus Staal*, a Dutch manufacturer of hot-rolled steel challenged Commerce's finding that "Corus absorbed the antidumping duties on its U.S. sales rather than passing them on to its customers," arguing that Commerce "was not authorized to address the duty absorption issue." 502 F.3d at 1378. Corus Staal set forth its position on the duty absorption issue briefly in a pre-preliminary response to Commerce's request for information, which Commerce rejected in its preliminary results. *Id.* Thereafter, Corus Staal submitted an administrative case brief but omitted the duty absorption argument. *Id.* The manufacturer acknowledged that it failed to raise the duty absorption issue in its case brief but argued that its failure should be excused because raising the issue again would have been futile. *Id.* Corus Staal asserted that Commerce was already on notice of its position from its pre-preliminary submission and noted that Commerce rejected that position in the preliminary results. Commerce had further consistently taken a position contrary to Corus Staal's absorption argument in previous cases and "was therefore unlikely to accept those arguments if Corus pressed them in its case brief." *Id.*

The Federal Circuit was unpersuaded by Corus Staal's futility claim. Instead, it found that Corus Staal's "failure to raise its objections to the treatment of the duty absorption issue in the preliminary results . . . 'essentially precluded Commerce from the opportunity to make a final determination on the issue.'" *Id.* at 1380. The Federal Circuit explained that the futility exception "is a narrow one" and "[t]he mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Id.* at 1379. Moreover, it was "not obvious that the presentation of [Corus Staal's] arguments to the agency would have been pointless," adding "even if it is likely that Commerce would have rejected Corus's legal and factual showings, it would still have been preferable, for purposes of administrative regularity and judicial efficiency, for Corus to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results." *Id.* at 1380. Commerce's initial response in the preliminary results was brief and expressly designated as preliminary. It was "not designed to be Commerce's last word on the matter"; and on further consideration, the agency could have taken a different position in the final results. *Id.* Corus Staal's failure to raise the issue in its case brief to the agency, as required by Commerce's regulation, could not be excused by futility. *Id.* at 1379 (citing 19 C.F.R. § 351.309(b)(1)).

Itochu represents the flip side of the coin. There, a Chinese respondent was party to an administrative review of its American sales of steel nails that were subject to an antidumping-duty order. 733 F.3d at 1142. While the review was underway, one of the domestic manufacturers withdrew its petition with regard to "four types of steel nails" and asked Commerce to revoke the order as to those products. *Id.* Itochu submitted comments in support of the domestic manufacturer's withdrawal and also urged that the partial revocation extend back to the beginning of the administrative review period. Itochu "put its argument on the record before Commerce issued its preliminary results: it set forth its position in comments, met with eight department officials to discuss the issue, and submitted legal support for its position." *Id.* at 1146. However, when Commerce issued its preliminary determination, it rejected Itochu's position about the scope of the partial revocation of the order because it did "not find this to be consistent with [Commerce's] recent practice." *Id.* at 1143–44 (alteration in original) (quoting *Certain Steel Nails from the People's Republic of China, Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 22,369, 22,371 (Apr. 21, 2011)). Itochu did not submit comments after the preliminary deter-

mination; and in the final determination, Commerce once again rejected Itochu's position and selected a date after the period of administrative review as the effective date for the revocation.

The Federal Circuit held that futility excused Itochu from presenting its argument one more time before the agency. *Id.* at 1148. Exhaustion applies when it serves a "practical purpose" — that of giving notice to the agency so that it may be the initial decision maker and create a record for subsequent judicial review. *Id.* at 1145. None of those purposes would have been served by requiring Itochu to submit the same argument an additional time. Commerce was on notice of Itochu's argument and indeed addressed it in Commerce's final decision. *Id.* at 1146 ("Commerce [did not] reject Itochu's effective-date position for a failure to exhaust or indicate that it thought Itochu had abandoned its position. To the contrary, Commerce referred to Itochu's position and again ruled on the effective-date issue on the merits."). Thus, Commerce had made the initial decision and created a record reflecting the agency's full reasoning to allow for judicial review. *Id.* Where a party had eight meetings with Commerce Department officials on the topic and submitted two separate written versions of its argument, it belied reason to believe that yet another submission to the agency would have made a difference or convinced the agency to change its mind. *Id.* Itochu was also "under no specific requirement to file a case brief" because Commerce's exhaustion regulation requiring parties to state "all arguments that continue in the submitter's view to be relevant to the Secretary's final determination" did not apply. *See* 19 C.F.R. § 351.309(b)(1) (excluding changed-circumstance reviews from the proceedings where written briefs are required); *Itochu*, 733 F.3d at 1145 n.1 (noting the regulation's inapplicability). Futility thus excused Itochu's failure to make the same argument to the agency for the eleventh time, and the courts could address the merits of its case. *Id.* at 1148.

Ellwood City repeatedly referenced *Itochu* at oral argument and in its briefs, erroneously claiming that its facts are analogous. *Itochu* stands for the proposition that, where a party has repeatedly informed Commerce of its objections, it may be excused from omitting the same objection in an optional brief to the agency, particularly if the agency actually responds to the objection in question. *Itochu* does not permit a party to omit *any* clear mention of its objection and then blindsides the agency with a new argument once the matter reaches court. The issue is one of fundamental fairness; the Commerce Department in *Itochu* was repeatedly informed of the party's objection and responded to it both in the preliminary and final results. Here,

Commerce had no warning that Ellwood City would object and had no opportunity to respond before these proceedings.

Seeking to come within *Itochu*'s framework, Ellwood City asserts that "Commerce was aware of Plaintiffs' desire for on-site verification" because of comments it submitted after the preliminary determination. Pls.' Supp. Br. at 2, ECF No. 42. However, when given an opportunity by the Court to submit a supplemental brief listing each instance where it objected to Commerce's failure to conduct an on-site verification, Plaintiffs could only muster one citation. That citation, to the conclusion section of its brief to the agency, merely requested that Commerce "ask respondents to finally support the record that they have provided" because "COVID-19 will likely prevent Commerce from conducting a robust on-site verification, as contemplated under the statute." See J.A. at 82,917–18, ECF No. 29 (post-preliminary determination comments cited in Pls.' Supp. Br. at 2, ECF No. 42). Far from objecting to Commerce's actions, Plaintiffs endorsed them. See, e.g., Admin. Case Br. at 2, J.A. at 83,112, ECF No. 29 ("But for Commerce's verification questionnaire, these issues may have gone undetected Commerce's verification has now revealed that"); see also *id.* at 3 ("Commerce's Verification Questionnaire instruct[ed] Lucchini to reconcile"); *id.* at 6 ("Th[e] verification exercise has definitively established that Metalcam's reported costs do not reconcile"); *id.* at 7 ("verification has established that Metalcam supplied unexplained [items] verification also undermined Metalcam's previously reported individual cost elements These failures, which only came to light in verifying Metalcam's responses, are substantial."); *id.* at 48 ("As a result of the information obtained in the Verification Questionnaire, Commerce should apply partial adverse facts available"); *id.* at 66–67 ("Commerce obtained additional information for these commissions in the Verification Response"); *id.* at 85 ("We are grateful for Commerce's Verification Questionnaires."). Plaintiffs' actions — literally complimenting Commerce on its chosen course of action and then excoriating them in court after an adverse determination — has the feeling of a strategic litigation decision that did not go as planned. Plaintiffs may well have decided to work with the agency's chosen verification procedures in the hope that the new process would yield a positive result. Whatever Plaintiffs' reasoning for withholding its objection, Commerce cannot be expected to respond to an argument never made. And because Plaintiffs never objected, *Itochu* offers them no safe harbor. See 733 F.3d at 1146–48 (finding futility where a party raised an issue at least ten times before the agency and the agency responded to the argument in its final determination).

In a final effort to come within the exception, Ellwood City asserts futility because “[a]t the briefing and hearing stage, reverification was a temporal impossibility.” Pls.’ Reply at 9, ECF No. 26. It cites the Supreme Court’s recent admonition that it “makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.” *Id.* (citing *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021)). However, *Carr* is readily distinguishable. There, the Supreme Court addressed whether applicants for Social Security benefits should be required to raise constitutional objections before the agency’s administrative law judges, who had no power to rule on constitutional claims. The Justices explained, “agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators’ areas of technical expertise.” *Id.* at 1360. Therefore, “it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings.” *Id.*

But Plaintiffs’ claims here do not invoke the Constitution; they are instead about the proper agency procedures for verifying information submitted by the foreign exporters under investigation. Responding to procedural issues or methodological disputes in antidumping investigations is *precisely* Commerce’s area of expertise. *Cf. McCarthy*, 503 U.S. at 145 (holding that exhaustion principles are at their strongest when the question requires the agency to apply “its special expertise”). Even if Commerce could not have further tolled the deadline for the final determination or established new verification procedures in the remaining time, “it would still have been preferable, for purposes of administrative regularity and judicial efficiency,” for Ellwood City “to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results.” *Corus Staal*, 502 F.3d at 1380. Commerce could then have acknowledged and responded to Ellwood City’s objections on the record. And this is to say nothing of what procedural modifications Commerce could have made had Plaintiffs not remained silent but instead stated their objections early and often. *Cf. Itochu*, 733 F.3d at 1146 (noting that appellant stated its objections before eight separate departmental officials and submitted its legal rationale in writing *before* the optional final briefing stage).

Commerce could reasonably have concluded that it resolved Ellwood City’s concerns by its use of questionnaires to test information, and Ellwood City never said otherwise despite having ample opportunity to do so. *See* Hearing Tr. at 36:5–7, J.A. at 83,204, ECF No. 29 (praising Commerce for taking the “extraordinary step in these times

of the coronavirus to issue a verification questionnaire. We're glad you did."). The futility exception "is a narrow one," and Ellwood City has not satisfied it. *Corus Staal*, 502 F.3d at 1380. By failing to object to Commerce's decision to issue a questionnaire in lieu of a traditional on-site verification, Ellwood City "essentially precluded Commerce from the opportunity to make a final determination on the issue" and place its reasons for its actions in the administrative record. *Id.* Because it is far from "obvious that the presentation of [Ellwood City's] arguments to the agency would have been pointless," Plaintiff has failed to demonstrate that its failure to raise the issue before the agency may be excused by futility. *Id.*

2. Pure Question of Law

Although Ellwood City's appeal to futility proved futile, it advances one further exception to preserve its argument: pure questions of law. "Requiring exhaustion may also be inappropriate where the issue for the court is a 'pure question of law' that can be addressed without further factual development or further agency exercise of discretion." *Itochu*, 733 F.3d at 1146. Even when it is undisputed that a respondent did not raise an argument in proceedings before Commerce, if the argument "implicates a pure question of law, it may be addressed" on appeal. *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007). That is only the case, however, where "[s]tatutory construction alone is sufficient to resolve the merits of the argument," and where no evidentiary issues remain. *Id.* Because Ellwood City's argument implicates questions of past practice and Commerce's ability to comply with any statutory mandate — factual matters that would require the development of a record — the pure question of law exception does not apply.

The Federal Circuit has emphasized the exception's limited scope by holding it only applicable to cases where further factual development would be unnecessary. In *Consolidated Bearings*, an importer challenged Commerce's liquidation instructions. Because the importer did not participate in the underlying administrative review, it did not raise its challenge before the agency. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). When the agency asserted that Consolidated Bearings had failed to exhaust its administrative remedies and was barred from bringing the matter before the court, Consolidated argued that the case presented a "pure legal issue" that would only require examination of the statute governing liquidation of entries to determine who was correct. *Id.* The Federal Circuit did not find the inquiry to be so limited. Consolidated had "alleged that Commerce arbitrarily changed its well-established prac-

tice and contravened the reasonable expectations of importers” regarding the liquidation instructions Commerce gave to Customs at the conclusion of the administrative review. *Id.* Because those allegations “require[d] a factual record of Commerce’s past practice and an assessment of Commerce’s justifications for any departure from that past practice,” the Federal Circuit held that “[s]tatutory construction alone” was not sufficient to resolve the case and the “pure question of law” exception did not apply. *Id.*

Ellwood City’s argument falls into the same difficulties. Pointing to Commerce’s acknowledgement that it was “unable to conduct onsite verification of the information relied upon in making its final determination in this investigation as provided for in section 782(i),” Pls.’ Reply at 10–11, ECF No. 26; 85 Fed. Reg. 79,996–97, J.A. at 83,316, ECF No. 29, Plaintiffs claim Commerce admitted it violated the statute and that no further factual record is necessary. Pls.’ Reply at 10–11, ECF No. 26. But Ellwood City’s argument is not nearly so concise. To prove its case that past obstacles have not prevented a more fulsome verification, Ellwood City cites Commerce’s previous actions verifying information from a Pakistani respondent in a Washington, D.C. hotel; tolling deadlines after 9/11 to allow for security concerns to pass; and conducting what Ellwood City admits was an “off-site verification at a Beijing hotel rather than on-site verification at the respondent’s production facilities.” Pls.’ Mot. at 22–23, ECF No. 21. Ellwood City further suggests that “Commerce could have arranged a virtual ‘on site’ verification visit with Lucchini and Metalcam, given Commerce’s extensive use of videoconferencing during the pandemic.” *Id.* at 24. It also complains that Commerce failed to fully document in the record why it “believed the alternative procedures it undertook were adequate.” *Id.* at 27. And finally it asserts in a bolded heading that **“Commerce Unreasonably Departed from Past Practice.”** *Id.*

Ellwood City’s argument therefore appears to be perfectly analogous to that in *Consolidated Bearings*. Like Ellwood City, Consolidated Bearings first alleged that all a court need do is examine specific statutory provisions to rule on its claim. *Compare* Pls.’ Mot. at 22 (citing 19 U.S.C. § 1677m(i); 19 C.F.R. § 351.307), *with Consol. Bearings Co.*, 348 F.3d at 1003 (citing 19 U.S.C. § 1675). However, this seemingly simple statutory claim quickly morphs into allegations that Commerce had deviated from “past practices.” *Compare* Pls.’ Mot. at 22–23 (citing past examples from Pakistan, Germany, France, the United Kingdom, Korea, and China), *with Consol. Bearings Co.*, 348 F.3d at 1003 (noting that Consolidated alleged Commerce violated its “well-established prior practice of applying the final results of administrative reviews to importers who did not participate in the

review, but import the same merchandise from resellers”). Indeed, Ellwood City’s acceptance of these past “off-site” practices as “verification” and suggestion of virtual alternatives confirm the factual rather than purely legal nature of the inquiry. *See* Pls.’ Mot. at 22–23 (citing with approval these “alternative mechanisms of the type previously employed”). These are exactly the type of allegations that “require a factual record of Commerce’s past practice and an assessment of Commerce’s justifications for any departure from that past practice.” *Consol. Bearings Co.*, 348 F.3d at 1003. No such record exists because Plaintiffs failed to raise their claim before the agency. As “[s]tatutory construction alone” is not sufficient to resolve Plaintiffs’ claim, the pure question of law exception does not apply.³ *Id.*

3. Failure to Exhaust

There could be few more “appropriate” cases to apply the administrative exhaustion requirement than this one. *Cf.* 28 U.S.C. § 2637(d) (“requir[ing] the exhaustion of administrative remedies” wherever “appropriate”). Plaintiffs initially complimented the agency’s verification questionnaire only to blindsides the agency in court when they disagreed with the agency’s final determination. Exhaustion does not require that Ellwood City submit a dissertation on its legal arguments; it merely requires that the agency receive fair notice of them. Although *Itochu* suggests that the Federal Circuit may allow a party to omit raising the same argument in every agency submission, it does not permit a party to fail to provide *any* notice of its objection. *Cf. Itochu*, 733 F.3d at 1146 (holding that, because Commerce addressed the earlier-raised argument in its final decision, there was no unfairness to the agency in considering the argument on appeal). Plaintiffs’

³ To the extent Plaintiffs’ argument regarding the lack of a verification report is separate from their larger verification questionnaire argument, the Court will accept their premise *arguendo* that Commerce failed to include the required materials in the record and that the pure question of law exception applies. Plaintiffs’ claim still fails because they have not demonstrated substantial prejudice. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating the “general principle” that it is always within the discretion of “an administrative agency to relax or modify its procedural rules . . . when in a given case the ends of justice require it. The action . . . is not reviewable except upon a showing of substantial prejudice to the complaining party.”); *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1330 (Fed. Cir. 2013) (“the suspension in this case could be invalidated only if Great American showed that the agency’s procedural error caused it substantial prejudice”); *PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006) (“[A]gencies may relax or modify their procedural rules and . . . a subsequent agency action is only rescindable ‘upon a showing of substantial prejudice.’”) Plaintiffs point to no argument they would have raised had Commerce earlier placed additional information on the record, *see* Pls.’ Mot. at 21, ECF No. 21, and Plaintiffs had plenty of notice Commerce did not intend to conduct a traditional on-site verification. Letter to Metalcam, J.A. at 3,027, ECF No. 30 (informing all parties of the “questionnaire in lieu of on-site verification” method Commerce planned to pursue). Plaintiffs just chose not to object. Indeed, the remaining substantive arguments Plaintiffs advance are the same ones they made — and preserved — before the agency.

haste in seeking an outcome, which may have influenced their strategy, does not excuse their failure to comply with Commerce's regulation and to create an appealable record. *See* Tr. 24: 17–23 (“To be perfectly blunt with you . . . We need[ed] to get a final determination as soon as possible.”).

The Federal Circuit has held that Congress intended that, “absent a strong contrary reason, the [trade] court should insist that parties exhaust their remedies before the pertinent administrative agencies.” *Corus Staal*, 502 F.2d at 1379. Had Plaintiffs done so here, this Court would have had the benefit of the agency's reasoned judgment about both its interpretation of its legal authorities as well as its past practices. Because Ellwood City chose not to assert the alleged illegality of Commerce's verification questionnaire, the administrative record is devoid of Commerce's explanation of both the law and the facts supporting its chosen methodology. The Court may not now consider extra-record evidence about past practices to resolve Plaintiffs' claim. 19 U.S.C. § 1516a(b)(1)(B)(i) (limiting the Court to reviewing conclusions and evidence found “on the record”). Ellwood City has failed to identify a “strong contrary reason” not to apply the general rule that claims may not be raised for the first time in court. *Corus Staal*, 502 F.3d at 1379. The Court therefore may not consider the merits of Plaintiffs' claims because of their failure to exhaust their administrative remedies. *See* 28 U.S.C. § 2637(d).

III. Substantial Evidence

Although Ellwood City did not preserve what it now describes as its “major issue” on appeal, it did preserve five arguments regarding how Commerce analyzed the evidence before it and responded to Ellwood City's comments regarding its calculations. In reviewing antidumping determinations, this Court is bound to adhere to the substantial evidence standard. The Court will sustain Commerce's determination if it “articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. When reviewing a determination for substantial evidence, the Court's role is not to “reweigh the evidence” or “reconsider questions of fact anew.” *Crucible Materials Corp.*, 975 F.2d at 815. Rather, in “antidumping cases, we accord substantial deference to Commerce's statutory interpretation . . .” *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). An examination of the record demonstrates that Commerce has met its burden in each of Plaintiffs' preserved arguments, which are summarized below.

1. Metalcam's Records Failed to Reconcile

In its briefing before the Court, Ellwood City asserts that “Metalcam failed to reconcile its product-specific costs of raw materials, internal machining, and external machining, as reported in its cost database, to its audited financial statements.” Pls.’ Reply at 18, ECF No. 26. Ellwood City adequately preserved this argument at length. It asserted in its administrative case brief before the agency that “Metalcam’s reported direct material costs do not reconcile to the Income Statement,” J.A. at 83,121, ECF No. 29; that “Metalcam’s [e]xternal [m]achining [c]osts” also do not reconcile to Metalcam’s financial reports or its financial statements, J.A. at 83,125, ECF No. 29; and that “Metalcam’s [r]eported [i]nternal [c]osts” do not reconcile to its financial statements, J.A. at 83,133, ECF No. 29.

Commerce responded to this argument on the record in detail. Commerce described its usual method for calculating costs and the statute from which its methodology is derived. Commerce also thoroughly described Metalcam’s cost accounting system, which “accounts for the total cost of manufacturing at the job order level.” IDM at 7, J.A. at 83,288, ECF No. 29. The job order level is the basis for the manufacturing costs that Metalcam reports to Commerce, and Metalcam then calculates a variance based on the steel plant and forging mill where the products are manufactured to derive the actual costs. *Id.* Commerce acknowledged the specific arguments raised by Ellwood City: “The petitioners allege that costs as reported in Metalcam’s trial balance, the *Conto Economico* (internal operating report) and the product family level standard costs do not reconcile.” IDM at 8, J.A. at 83,289, ECF No. 29. “We disagree. . . . While the trial balance and internal operating report may not reconcile to the product family level standard costs by constituent cost elements . . . they do reconcile in total.” *Id.* Commerce explained that the discrepancy Ellwood City noted occurred because the “product family level standard costs, at the constituent cost level, cannot be reconciled to the trial balance or to the internal operating report as it is a characteristically different report compared to the other two documents from Metalcam’s accounting systems.” *Id.* Commerce concluded that “in total, the costs recorded in Metalcam’s trial balance, internal operating report, and product family level standard costs, adjusted by the variance, reconcile.” *Id.* Thus, Commerce evaluated the same documents on the record cited by Plaintiffs, explained its methodology, and its conclusions. Evaluating Ellwood City’s arguments and reviewing the record, the Court declines to reweigh the evidence, and finds that substantial evidence supports Commerce’s conclusions regarding Metalcam’s cost reconciliation.

2. Metalcam's Verification Response Did Not Support Its Previously Reported Data, Rendering These Data Unreliable.

Ellwood City also argued that “Commerce additionally erred in relying on Metalcam’s cost reconciliation because source documentation it submitted in response to Commerce’s ‘questionnaire in lieu of verification’ did not support Metalcam’s prior questionnaire responses.” Pls.’ Reply at 21, ECF No. 26. One of the specific errors Ellwood City identified was a formula error. Pls.’ Mot. at 31, ECF No. 21. Ellwood City stated this objection in numerous ways in its administrative brief, arguing that “[t]here are many differences between Exhibit CVE-3 and the documents it purports to verify” and “[i]nsofar as Metalcam was asked to provide a verification of its submitted data and the verification submission does not match its revised submission in its supplemental questionnaire response, Metalcam has not passed verification.” J.A. at 83,124, ECF No. 29.

Commerce acknowledged Ellwood City’s argument and explained its rationale for disagreeing: “We agree with petitioners that the cost reconciliation worksheet contained a formula error in one of the reconciling items However, after fully examining the record, as noted by Metalcam, we found the same formula error in the corresponding reconciling item.” IDM at 7, J.A. at 83,288, ECF No. 29. Commerce explained that “[b]ecause one of these reconciling items is a subtraction and the other error is an addition, the net result of the two errors continues to show that Metalcam’s reported cost file reconciled to its financial statement costs.” *Id.* Once again, Commerce acknowledged Plaintiffs’ concern, evaluated the document at issue, and came to a different conclusion on the record regarding these two minor errors. Ellwood City’s continued dissatisfaction with Commerce’s response and alternate interpretation of the formula error’s impact on the overall reliability of Metalcam’s data does not change the fact that a reasonable mind evaluating the record could find that substantial evidence supports Commerce’s conclusion. The Court finds that Commerce has adequately answered this challenge on the record, and substantial evidence supports Commerce’s evaluation of the reliability of Metalcam’s data.

3. By Not Rebutting the Use of Flawed Raw and Steel Ingot Costs, Commerce Admits Error

Ellwood City alleges that Commerce erred in its treatment of its concerns about Metalcam’s steel ingot costs. Pls.’ Mot. at 33, ECF No. 21. Ellwood City preserved this argument in its administrative brief. *See* J.A. at 83,142, ECF No. 29. Commerce responded to this argument on the record, summarizing the issue: “The petitioners also

allege that Metalcam lowered its actual POI⁴ costs for forged ingots that are held in semi-finished inventory waiting for a fluid end blocks order.” IDM at 9, J.A. at 83,290, ECF No. 29.

Commerce then explained that “[r]ecord evidence does not support a claim that there is an understatement of the reported costs due to ingot costs being held in semi-finished inventory.” *Id.* Commerce ultimately concluded that “review of the cost of sales in the trial balance for the POI shows that the inventory changes in the value of semi-finished goods are appropriately included in the cost of sales, and likewise appropriately included in the reported cost of manufacture as demonstrated in the overall cost reconciliation.” *Id.* Admittedly, Commerce is more conclusory and less detailed in its response to this argument than it is to many of the others. But all that Commerce needed to do was “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. Commerce, reviewing Plaintiffs’ complaint and investigating the matter at issue, applied its expertise and decided that Metalcam’s allocation of steel ingot costs to semi-finished inventory was appropriate given the circumstances. Both the evidence and the explanation of the record are sufficient to support Commerce’s conclusion, and the Court therefore finds that substantial evidence supports Commerce’s findings regarding steel ingot costs.

4. Commerce’s Reliance on Metalcam’s Sales Data Was Unreasonable

Plaintiffs object to Commerce’s reliance on Metalcam’s sales data: “Commerce recognized that Metalcam manually moved certain revenue items in its books and records, which was not disclosed until Metalcam’s response to Commerce’s questionnaire in lieu of verification.” Pls.’ Mot. at 34–35, ECF No. 21. Ellwood City asserts that “these types of belated disclosures and failures to verify without new factual information have been the basis for Commerce to apply adverse inferences [in the past].” *Id.* Plaintiffs preserved that argument during the administrative briefing, asserting that “Metalcam made undisclosed and unsupported adjustments to specific General Ledger accounts.” J.A. at 83,149, ECF No. 29.

On the record, Commerce explained in detail what led to the adjustments to the ledger accounts and how they could be resolved: For certain general sales ledgers, when finalizing the books at the end of the 2018 and 2019 fiscal years, “a certain limited number of invoices

⁴ “POI” means “period of investigation.”

was (*sic*) either reclassified from one sales revenue general ledger account to the other, or the total invoice value for certain invoices booked at year end was appropriated to those fiscal quarters in which the respective revenue should have been recognized.” IDM at 10, J.A. at 83,291, ECF No. 29. According to Commerce, in each instance of an adjustment, Metalcam identified how the affected invoices were recorded in its accounting system, provided the invoices to Commerce, and reconciled the values for the general ledger accounts. *Id.* This evidence led Commerce to conclude that “the petitioners’ assertion is misleading when arguing that Metalcam’s manual movement of certain revenue items finds no basis in Metalcam’s books and records” because “the nature of revenue activity described in affected invoices taken together with the names and structure of sales revenue general ledger accounts, support the narrative Metalcam provided on the record justifying certain anticipated divergences between financial accounting and trial balance information, affecting certain general ledger accounts.” *Id.* Commerce evaluated the books and records and did not find any conflict between the narrative Metalcam provided and the records on which the narrative was based, despite Plaintiffs’ beliefs to the contrary. The Court is satisfied that Commerce has provided evidence on the record to support its reliance on Metalcam’s sales data and finds that substantial evidence exists for Commerce’s findings.

5. Lucchini Failed to Timely Report Its Yield Losses

Finally, Plaintiffs also argue that “Lucchini’s response to the ‘questionnaire in lieu of verification’ disclosed for the first time that Lucchini buried yield losses within its ‘purchased price’ for steel ingot and in so doing, prevented Commerce from examining the reasonableness of these yield losses.” Pls.’ Mot. at 36, ECF No. 21. Ellwood City believes that further examination might have revealed that the impact of this issue was more widespread. *Id.* Ellwood City raised this issue thoroughly in its administrative case brief: “Lucchini’s Verification Response finally sheds light on Lucchini’s steel ingot costs: Lucchini buried yield loss within its reported ‘purchased price’ for steel ingot and in so doing precluded Commerce from examining the reasonableness of the yield losses.” J.A. at 83,158, ECF No. 29.

Commerce responded fulsomely on the record, explaining its methodology: “[W]e adjusted Lucchini’s reported costs to account for the cost of completed MUC⁵ which was scrapped for quality reasons. . . . Commerce’s practice is to ensure a fully yielded cost by allocating total input cost over the total of finished goods production.” IDM at

⁵ “MUC” is “merchandise under consideration.”

25, J.A. at 83,306, ECF No. 29. “[B]ecause Lucchini provided information concerning the total POI cost of non-conforming products on a product-group specific basis, we have allocated the cost of non-conforming products in the product group which contains MUC, over the production quantity of conforming finished goods.” *Id.* On the record, Commerce explained its decision to adjust Lucchini’s costs and further explained why, in its view, Lucchini’s responses did not lead to any loss of credibility in those responses. In so doing, Commerce referred to its past practice and articulated a rational connection between the facts of the case and its choice to accept Lucchini’s steel ingot costs with Commerce’s adjustments. Commerce was specific in its explanation, and substantial evidence supports its conclusion.

6. Substantial Evidence Exists to Support Commerce’s Determination

In each of Plaintiffs’ preceding arguments, the evidence appears to demonstrate good faith disagreement. Although Plaintiffs may dispute Commerce’s conclusions and the weight given to various pieces of evidence, Commerce clearly acknowledged Plaintiffs’ arguments and explained how it reached its ultimate determination on each issue. Commerce relied on information on the record and reconciled it to its satisfaction in calculating the dumping margins for Metalcam and Lucchini. The Court must not “reweigh the evidence” and will not second-guess Commerce on individual line-item decisions that pertain to its particular area of expertise. *Crucible Materials Corp.*, 975 F.2d at 815. Because Commerce responded to each of Plaintiffs’ arguments on the record, articulated a rational explanation for each decision, and the evidence on the record adequately supports Commerce’s conclusions, the Court finds that substantial evidence supports each of Commerce’s decisions in the remaining preserved arguments Plaintiffs raise.⁶

CONCLUSION

The “major issue” in this case concerns the validity of the verification questionnaire Commerce employed in the underlying investigation. Pls.’ Mot. at 14, ECF No. 21. Ellwood City had multiple opportunities to object to the verification methodology Commerce employed. Plaintiffs knew that Commerce’s analysts would not be boarding planes to Italy to conduct an on-site verification in the

⁶ Because the Court finds substantial evidence supports Commerce’s rejection of Plaintiffs’ arguments, it necessarily finds that substantial evidence also supports Commerce’s refusal to use facts available with an adverse inference in light of the alleged deficiencies Plaintiffs identified. *See* Pls.’ Mot. at 28–36, ECF No. 21.

summer of 2020. Yet, Plaintiffs were silent on that issue, including in their 106-page administrative case brief otherwise full of arguments and objections. Commerce had no opportunity to respond on the record to Plaintiffs' objection that its questionnaires did not satisfy the statutory requirements for verification. Nor did Commerce have a chance to evaluate the possibility of conducting a "virtual on-site verification" or any other of Plaintiffs' now-proposed alternatives. Pls.' Mot. at 24, ECF No. 21. Exhaustion would have served to "protect administrative agency authority and promote judicial efficiency." *Itochu*, 733 F.3d at 1145. Because Ellwood City failed to exhaust its administrative remedies, the Court cannot reach the merits of its verification challenge.

Plaintiffs' remaining arguments would require the Court to reweigh the evidence or substitute its judgment for that of Commerce. The substantial evidence standard prohibits the Court from taking that course. Plaintiffs' Motion for Judgment on the Agency Record is therefore **DENIED**; and Commerce's determination is **SUSTAINED**. Judgment will be entered accordingly.

Dated: June 14, 2022

New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 22-67

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

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

[Sustaining in part and remanding in part the U.S. Department of Commerce's third remand results of the 2015-2016 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: June 15, 2022

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

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

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

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

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company (“Hyundai Steel”) and Consolidated Plaintiff and Plaintiff-Intervenor SeAH Steel Corporation (“SeAH”) (collectively, “Plaintiffs”) challenge the final determination in the 2015–2016 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (“Final Results”)*, 83 Fed. Reg. 27,541 (Dep’t of Commerce June 13, 2018) (final results of antidumping duty administrative review; 2015–2016); *see also* Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; 2015–2016 (“Final IDM”), PR 314.¹

Before the Court are the Final Results of Redetermination Pursuant to Court Remand (“*Third Remand Results*”), ECF No. 94–1, ordered in *Hyundai Steel Co. v. United States (“Hyundai Steel III”)*, 45 CIT __, __, 531 F. Supp. 3d 1344, 1353–54 (2021). Hyundai Steel requests that the Court sustain Commerce’s *Third Remand Results*, noting that although Commerce continues to find that a particular market situation existed in Korea during the period of review, Commerce under protest recalculated Hyundai Steel’s weighted-average dumping margin by eliminating the particular market situation adjustment of the *Final Results* with respect to Hyundai Steel. Pl. Hyundai Steel’s Comments Commerce’s Third Remand Results (“Hyundai Steel’s Cmts.”) at 1–5, ECF No. 99. SeAH, a non-examined respondent, argues that remand is again required because the margin rate that Commerce recalculated is a simple average of the margins for the two mandatory respondents, Hyundai Steel and Husteel Co., Ltd. (“Husteel”). *See* Comments SeAH Opp’n Commerce’s Sept. 8, 2021 Redetermination (“SeAH’s Cmts.”) at 1–6, ECF No. 96. According to SeAH, Commerce eliminated the particular market situation adjustment for Hyundai Steel and also eliminated the particular market situation adjustment to the sales-below-cost test for Husteel during the third remand, but Commerce continued to make an improper particular market situation adjustment to Husteel’s normal value for transactions determined to be based on constructed value when recalculating SeAH’s rate, and therefore this non-examined

¹ Citations to the administrative record reflect the public record (“PR”) and confidential record (“CR”) document numbers filed in this case, ECF Nos. 50, 51.

respondent rate continues to be tainted. *See id.* at 3–5; *see also Third Remand Results* at 6–7.

Defendant United States (“Defendant”) argues that Commerce complied with the Court’s remand order when it removed the particular market situation adjustment for Hyundai Steel under protest. Def.’s Resp. Comments Regarding Third Remand Redetermination (“Def.’s Resp.”) at 6–7, ECF No. 104. Defendant also argues that Commerce calculated the dumping margin for SeAH by permissibly averaging the rates of the two mandatory respondents. *Id.* at 7–8. Defendant-Intervenor Wheatland Tube Company (“Wheatland”) filed comments in partial opposition, noting its support of Commerce’s remand determination filed under protest. Def.-Interv.’s Comments Partial Opp’n Remand Redetermination (“Def.-Interv.’s Cmts.”) at 1, ECF No. 100.

For the following reasons, the Court sustains in part and remands in part the *Third Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

- 1 Whether Commerce’s removal of the particular market situation adjustment when calculating Hyundai Steel’s dumping margin is in accordance with the law; and
- 2 Whether Commerce’s calculation of SeAH’s dumping margin is in accordance with the law.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the Court’s review of the *Third Remand Results*. *See Hyundai Steel III*, 45 CIT at __, 531 F. Supp. 3d at 1347–48; *see also Hyundai Steel Co. v. United States (“Hyundai Steel II”)*, 44 CIT __, __, 483 F. Supp. 3d 1273, 1275–76 (2020); *Hyundai Steel Co. v. United States (“Hyundai Steel I”)*, 43 CIT __, __, 415 F. Supp. 3d 1293, 1295–1301 (2019).

In the *Final Results*, Commerce determined that a particular market situation in Korea distorted the cost of production of CWP. Final IDM at 3. Commerce also determined that it could quantify the amount of the distortion, and it made an upward adjustment to the cost of production of CWP based on the subsidy rate of hot-rolled steel coil. *Id.* (citing *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t of Commerce Aug. 12, 2016) (final affirmative determination), *as amended*, *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea*, 81 Fed. Reg. 67,960 (Dep’t of

Commerce Oct. 3, 2016) (amended final affirmative countervailing duty determinations and countervailing duty orders)). Commerce then conducted a sales-below-cost test and disregarded certain sales made at prices below the cost of production, as adjusted. *See* Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2015–2016 (“Prelim. DM”) at 19–20, PR 275; Final IDM at 3 (noting that Commerce used the same calculation methodology for the respondents not selected for individual examination for the *Final Results* as explained in the Prelim. DM). Commerce calculated normal value from the remaining above-cost home market sales for mandatory respondents Hyundai Steel and Husteel. Prelim. DM at 20; Final IDM at 3.

In *Hyundai Steel I*, 43 CIT at ___, 415 F. Supp. 3d at 1301, the Court concluded that Commerce’s particular market situation determination was unsupported by substantial evidence. In the Final Results of Redetermination Pursuant to Remand (“*Remand Results*”), ECF No. 73–1, subsequent to *Hyundai Steel I*, Commerce conducted a new review of the record and again determined that a particular market situation distorted the cost of hot-rolled steel coil in the Korean market. *Remand Results* at 4. Commerce again made an upward adjustment to the cost of hot-rolled steel coil, performed the sales-below-cost test, and calculated normal value from the remaining above-cost home market sales. *See id.*

In *Hyundai Steel II*, 44 CIT at ___, 483 F. Supp. 3d at 1279, 1281, the Court remanded for Commerce to explain the statutory authority to conduct a cost-based particular market situation analysis when normal value is based on home market sales and to adjust the cost of production for purposes of the sales-below-cost test of 19 U.S.C. § 1677b(b), specifically within the context of relevant caselaw from this Court. Commerce’s second remand results explained its view that Section 504 of the Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 114–27, § 504, 129 Stat. 362, 385, authorizes it to make such determinations and to adjust the cost of production for the sales-below-cost test when calculating normal value based on home market sales. Final Results of Redetermination Pursuant Court Remand (“*Second Remand Results*”) at 3–4, ECF No. 85–1.

In *Hyundai Steel III*, 45 CIT at ___, 531 F. Supp. 3d at 1353, the Court concluded that Commerce’s cost-based particular market situation determination and subsequent adjustment were not in accordance with the law. The Court held that when normal value is based on home market sales, 19 U.S.C. § 1677b does not permit Commerce

to make a particular market situation adjustment to the costs of production for purposes of the sales-below-cost test of 19 U.S.C. § 1677b(b). *Id.* Under protest, Commerce eliminated the particular market situation adjustment in its recalculation of the weighted-average dumping margin of Hyundai Steel. *See Third Remand Results* at 6; *see also* 19 C.F.R. § 351.405. Commerce recalculated the dumping margin rate for SeAH by recalculating the rate for the second mandatory respondent, Husteel, using a particular market situation adjustment for Husteel and then relying on a simple average of the recalculated rates for Hyundai Steel and Husteel. *Third Remand Results* at 6–7.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Recalculation of Hyundai Steel’s Dumping Margin

In the *Third Remand Results*, Commerce stated that it continues to find that a particular market situation existed in Korea during the period of review. *Third Remand Results* at 5; *cf.* Final IDM at 11–19. Under protest, Commerce recalculated Hyundai Steel’s weighted-average dumping margin without a particular market situation adjustment. *Third Remand Results* at 6, 9, 10.

Hyundai Steel requests that the Court sustain Commerce’s calculation of its dumping margin without a particular market situation adjustment. Hyundai Steel’s Cmts. at 1–2. Wheatland agrees with Commerce’s assertion that a particular market situation existed in Korea during the period of review and supports Commerce’s decision to submit the *Third Remand Results* under protest. Def.-Interv.’s Cmts. at 1. SeAH’s comments as to its own issue (the rate for non-examined respondents) indicate tacit support of Hyundai Steel’s recalculated dumping margin. *Cf.* SeAH’s Cmts. at 4–5 (highlighting Hyundai Steel’s “extensive comments to the Court following Commerce’s first remand determination”).

Commerce's recalculation of Hyundai Steel's weighted-average dumping margin without a particular market situation adjustment is consistent with the Court's prior opinions and orders in *Hyundai Steel I*, *Hyundai Steel II*, and *Hyundai Steel III*. In addition, after Defendant filed the *Third Remand Results* with this Court, in the appeal of this Court's decision concerning the 2015–2016 administrative review of the antidumping duty order on welded line pipe from Korea, the U.S. Court of Appeals for the Federal Circuit confirmed that Congress intended a particular market situation adjustment only for constructed value but not for calculations of the cost of production, which impacts the sales-below-cost test of 19 U.S.C. § 1677b(b). *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352 (Fed. Cir. 2021); see *Husteel Co. v. United States*, 44 CIT ___, 426 F. Supp. 3d 1376 (2020).

On remand of this case, Commerce reasserted its determination that a particular market situation in Korea distorted manufacturers' cost of production. *Third Remand Results* at 5. Commerce eliminated its particular market situation adjustment of Hyundai Steel's costs of production and recalculated. Cf. *Second Remand Results*. Hyundai Steel's recalculated rate in the *Third Remand Results* is 12.92% as compared to 30.85% in the *Final Results*. *Third Remand Results* at 10; see also *Final Results*, 83 Fed. Reg. at 27,542.

In the third remand, Hyundai Steel obtains the relief it sought. In light of the U.S. Court of Appeals for the Federal Circuit's decision in *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352 (Fed. Cir. 2021), the Court sustains Commerce's removal of the particular market situation adjustment of Hyundai Steel's costs of production in the recalculation of Hyundai Steel's weighted-average dumping margin for the *Third Remand Results*. The U.S. Court of Appeals for the Federal Circuit's opinion moots Hyundai Steel's further arguments on the particular market situation determination. *Hyundai Steel Co.*, 19 F.4th at 1348. The Court sustains Commerce's recalculation of Hyundai Steel's dumping margin without the particular market situation adjustment in the *Third Remand Results* and does not consider Hyundai Steel's further arguments on Commerce's reiterated particular market situation determination.

II. Recalculation of SeAH's Dumping Margin

When calculating the dumping margin rate for SeAH, Commerce recalculated the rate for the second mandatory respondent, Husteel, who is not a party to this litigation. *Third Remand Results* at 6. Commerce stated that, in calculating Husteel's revised dumping margin, it applied a particular market situation adjustment for normal

value when normal value is based on constructed value. *Id.* at 6–7. The *Third Remand Results* explain that Commerce based its particular market situation adjustment for Husteel on the reasons enunciated in the *Final Results* and the *Remand Results*. *Id.* at 9. Commerce applied a simple average of the recalculated rates for Hyundai Steel and Husteel to determine SeAH’s new dumping margin. *Id.* at 6–7. Hyundai Steel’s dumping margin rate changed from 30.85% to 12.92%, and the rate applicable to SeAH changed from 19.28% to 9.99%. *Id.* at 10. Commerce stated that it was “not revising the cash deposit or assessment rates for Husteel because Husteel is not a party to this litigation and is therefore not entitled to the benefit of the recalculation.” *Id.* at 6. Commerce disagreed with SeAH “that no particular market adjustment is warranted,” and argued that “[b]ecause Husteel, unlike Hyundai, had comparisons to constructed value after we applied the sales-below-cost test, we made a particular market situation adjustment with respect to our calculation of constructed value for Husteel.” *Id.* at 10.

SeAH requests that the Court remand Commerce’s *Third Remand Results*, arguing that Commerce’s calculation of SeAH’s dumping margin improperly relied on a particular market situation determination that was not supported by substantial evidence. SeAH’s Cmts. at 1–5. Defendant responds that Commerce’s particular market situation determination is supported by substantial evidence of the cumulative effect of five factors: (1) subsidization by the Government of Korea of hot-rolled coil; (2) Chinese steel products that flooded the Korean market; (3) strategic alliances between certain Korean hot-rolled coil suppliers and CWP producers; (4) distortions in the Korean electricity market; and (5) the Government of Korea’s role in restructuring the private steel industry. Def.’s Resp. at 10–11. Despite this assertion, Defendant admits that the evidence relied upon by Commerce here is “the same as or similar to the evidence” that this Court has previously held to be defective in supporting a particular market situation in Korea:

Although the Court’s decision in [*NEXTEEL Co. v. United States* (“*NEXTEEL II*”), 44 CIT __, 450 F. Supp. 3d 1333 (2020),] involves a separate antidumping duty order and a different determination by Commerce, we recognize that [the] facts are similar and that much of the evidence that Commerce considered in [*NEXTEEL II*] is the same as or similar to the evidence at issue in this case. We respectfully disagree with the Court’s opinion in [*NEXTEEL II*]. . . .

Id. at 11. Commerce explained in the *Third Remand Results* that it made a particular market situation adjustment to Husteel’s rate “for

the sole purpose of calculating SeAH's rate." *Third Remand Results* at 9. Commerce stated that it based its particular market situation determination for Husteel "on the reasons enunciated" in the Final IDM and the *Remand Results*. *Id.* Accordingly, the Court examines the evidence cited in the Final IDM and the *Remand Results* to determine whether Commerce's particular market situation determination is supported by substantial evidence.

The Court observes, generally, that the evidence cited by Commerce in support of its particular market situation determination with respect to SeAH's dumping margin calculation focused on periods of time before or after the relevant 2015–2016 timeframe, did not show price distortions specific to the Korean steel market, was missing or incomplete in some instances, contained speculative and conclusory statements, provided no evidence that Korean steel producers received countervailable subsidies as to electricity, and speculated on effects outside the timeframe of the period of review. Other observations are discussed in more detail in the following section.

"It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Regarding the first factor, Commerce determined that subsidies of hot-rolled coil production by the Government of Korea contributed to a particular market situation in Korea. Final IDM at 11–12; *Remand Results* at 7. In support of this conclusion, the Final IDM cites the following three record documents from the October 16, 2017 particular market situation allegation filed with Commerce by Wheatland: (1) "[Particular Market Situation] Allegation at Attachment 13, Exhibit 12 (containing Letter from Maverick [Tube Corporation ("Maverick")], 'Oil Country Tubular Goods from South Korea: Particular Market Situation Case Brief,' dated March 1, 2017;]" (2) "[Particular Market Situation] Allegation at Attachment 13, Exhibit 4 (containing Letter from Maverick, 'Certain Oil Country Tubular Goods from the Republic of Korea: Information and Comments Requiring Immediate Attention,' dated November 25, 2015);" and (3) "at Attachment 11" (which, presumably, is also from Wheatland's Particular Market Situation Allegation document). Final IDM at 11–12, nn.20 & 22; *see also* Def.-Interv.'s Particular Market Situation Allegation ("Wheatland's Allegation"), PR 137–248, CR 170–255. The administrative record filed with the Court in this case does not include Attachment 11 to Wheatland's Allegation. The public record includes a page reading "Exhibit Not Susceptible to Public Summarization." *See* Wheatland's Allegation, Attachment 11. The confidential version of Attachment 11

indicates only “Exhibit Filed Separately as Spreadsheet” but gives no further indication of whether such separate filing is included anywhere in the record before the Court. *Id.* In addition, the Court is unable to locate “Exhibit 12” to “Attachment 13” that purportedly supports Commerce’s assertions that “the record evidence demonstrates that the Korean government has subsidized [hot-rolled coil] and that the mandatory respondents have purchased [hot-rolled coil] from entities receiving these subsidies, including POSCO.” *See* Final IDM at 11 (citing “[Wheatland’s] Allegation at Attachment 13, Exhibit 12 (containing Letter from Maverick, ‘Oil Country Tubular Goods from South Korea: Particular Market Situation Case Brief,’ dated March 1, 2017, at 6 and footnote 18, and sources cited therein”).² Because these two documents are missing from the record filed in this case, the Court is unable to ascertain whether Commerce’s determination of subsidization by the Government of Korea is supported by substantial evidence based on these documents.

Furthermore, the Final IDM’s citation to “[Wheatland’s] Allegation at Attachment 13, Exhibit 4 (containing Letter from Maverick, ‘Certain Oil Country Tubular Goods from the Republic of Korea: Information and Comments Requiring Immediate Action,’ dated November 25, 2015, at 3) and at Attachment 11” is deficient not only as to the missing “Attachment 11” on the record before the Court but also because Exhibit 4 to Attachment 13 consists only of particular market situation *allegations* by Maverick (relating to a different proceeding), not actual factual findings or evidence. *See* Wheatland’s Allegation, Attachment 13, Ex. 4. (“A finding that the alleged programs are countervailable *would confirm* the existence of a particular market situation for the single largest cost component in [Oil Country Tubular Goods] production . . .” (emphasis added)). Because two documents are missing from the record and one document consists of mere allegations by a domestic producer, the Court concludes that none of the three documents cited by Commerce in the Final IDM demonstrate that the evidence addresses or even confirms the extent, if any, of subsidization of hot-rolled coil production by the Government of Korea during the period of review. The Court concludes that Com-

² In the public version of the administrative record before the Court, Attachment 13 is a letter from Maverick dated May 4, 2017. *See* Wheatland’s Allegation, Attachment 13. Within that Attachment 13, the only apparent mention of a “March 1, 2017” letter from Maverick is a reference to that letter as “Exhibit 12” on page 5 of the May 4, 2017 letter. *Id.* at 5. Exhibit 12 to Attachment 13 contains “Electricity in Korea – Paper,” dated May 16, 2011, which was published for an Asia-Pacific Economic Cooperation symposium. *See* Wheatland’s Allegation, Attachment 13, Ex. 12. Exhibit 11 to Attachment 13 contains a “Letter from Maverick” pertaining to comments on the Government of Korea’s supplemental questionnaire response regarding the investigation of welded line pipe from the Republic of Korea. *See* Wheatland’s Allegation, Attachment 13, Ex. 11. Further, it is dated June 2, 2015 and the comments pertain to electricity in Korea, not HRC. *See id.*

merce's determination that subsidization contributed to a particular market situation in Korea is unreasonable and not supported by substantial evidence, due to inaccurate, insufficient, or missing record evidence filed with the Court.

As to the second factor, Commerce determined that significant overcapacity in Chinese steel production caused flooding of the Korean steel market with imports of low-priced Chinese steel products, which placed downward pressure on Korean domestic steel prices. Final IDM at 12; *Remand Results* at 7–8. In support of this determination, Commerce cited Wheatland's Allegation "at Attachment 13, Exhibit 6 (containing Letter from Maverick, 'Certain Oil Country Tubular Goods from the Republic of Korea: Particular Market Situations and Other Factual Information Submission,' dated September 6, 2016, at Exhibit 4)." Final IDM at 12 n.23. Exhibit 4 consists of a Bloomberg article dated January 28, 2016, entitled "POSCO Posts Smallest Ever Profit Amid Chinese Steel Deluge," which notes that POSCO's prices plummeted due to demand in China contracting, creating a surplus "overseas" and quoting a POSCO executive as stating that China is flooding "the market" with extremely cheap products while also noting that "the worst of the Chinese deluge may be over." Wheatland's Allegation, Attachment 13, Ex. 4 at 2. The Court observes that the article refers generally to flooding "the market," but does not specify that the influx of Chinese products had an effect that was unique or particular to Korea. *See id.* at 1–2. In fact, the same article opens with a statement that "a deluge of Chinese exports pushed *global prices* to their lowest in at least a decade." *Id.* at 1 (emphasis added). At best, the article suggests that Korea experienced price pressures similar to other countries in the global market due to Chinese flooding of cheap products, but the article does not clearly support Commerce's determination in the *Final Results* that Korea's market experienced a particular or unique situation that differed from the global impact on other countries. The Court notes that the same Bloomberg article dated January 28, 2016 also states that "[t]here are signs that the worst of the Chinese deluge may be over." *Id.* at 2. The January 2016 article was published two months into the relevant period of review (November 2015 to October 2016) and suggests that the Chinese deluge may have been over near the beginning of the period of review, which the Court observes may contradict Commerce's determination that Chinese steel overproduction placed downward pressure on Korean domestic steel prices during the period of review. Although it is clear that the oversupply of

low-priced Chinese products affected many countries in the global market, the Court concludes that the evidence cited by Commerce fails to demonstrate that the oversupply of Chinese products was *particular* to the Korean market during the period of review, especially in light of potentially contrary evidence on the record.

As to the third factor, Commerce determined that attempted strategic alliances between certain Korean hot-rolled coil suppliers and Korean CWP producers may have affected prices in 2012–2013 and subsequent periods, including the period of review in this case. Final IDM at 12; *Remand Results* at 8–9. In support of this determination, Commerce cited Wheatland’s Allegation “at Attachment 13, Exhibit 4 (containing Letter from Maverick, ‘Certain Oil Country Tubular Goods from the Republic of Korea: Information and Comments Requiring Immediate Action,’ dated November 25, 2015, at Attachment 4).” Final IDM at 12 n.24. The information in “Attachment 4” to that Maverick letter is completely redacted. Wheatland’s Allegation, Attachment 13, Ex. 4. The Court is thereby precluded from evaluating whether substantial evidence supports Commerce’s determination on this third factor.

As to the fourth factor, Commerce determined that a particular market situation may exist when there is government control over prices to such an extent that home-market prices are not competitive. Final IDM at 12; *Remand Results* at 9–10. With respect to Korea specifically, Commerce first determined that electricity in Korea functions as a tool of the government’s industrial policy. Final IDM at 12; *Remand Results* at 9, 35. To support this point, the Final IDM refers to Wheatland’s Allegation³ “at Attachment 12, Exhibit 1 (containing Letter from Maverick, ‘Certain Oil Country Tubular Goods from the Republic of Korea: Submission of Factual Information Relating to Particular Market Situation Allegations,’ dated August 7, 2017, at Exhibits 6 and 7).” Final IDM at 12 n.26. Exhibit 1 referenced by Commerce is a one-page spreadsheet entitled “Korea Electric Power Company” showing a breakdown of “Industrial (B) * General (B): contract demand of 300KW or more” into classifications of “High Voltage (A),” “High Voltage (B),” and “High Voltage (C)” categories, with three “Options” pertinent to each classification, and a series of numbers listed in various columns denoting demand charge (KRW/kW) and energy charge (KRW/kW). Wheatland’s Allegation, Attachment 12, Ex. 1 at 1. The document’s relevance is not explained further. Absent any further explanation, the Court observes that it is

³ The Court presumes that the use of “*Id.*” in note 26 refers to Wheatland’s Allegation and not to note 25’s reference to the “Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, Vol. 1, at 822, reprinted at 1994 U.S.C.C.A.N. 4040, 4162 (1994).” See Final IDM at 12 nn.25 & 26.

unable to draw any conclusions from this document as to whether the record evidence supports Commerce's determinations that Korean steel manufacturers received subsidies as to electricity, or that the Government of Korea's regulation of the electricity market contributed to a particular market situation.

The Final IDM next states that the largest electricity supplier, the Korean Electric Power Corporation ("KEPCO"), is a "government-controlled entity." Final IDM at 12. For support, the Final IDM refers to Wheatland's Allegation at "Attachment 13, Exhibit 5 (containing Letter from Maverick, 'Certain Oil Country Tubular Goods from the Republic of Korea: Particular Market Situation Allegation on Electricity,' dated February 3, 2016, at 13–14 and Exhibit 2, p. 50)." *Id.* at 12 n.27. Maverick's particular market situation narrative is a mere allegation and the Court does not consider Maverick's letter to be proper evidence that supports Commerce's determinations. *See* Wheatland's Allegation, Attachment 13, Ex. 5 at 13–14. Exhibit 2 is a Form 20-F filed for KEPCO with the U.S. Securities and Exchange Commission ("SEC") on April 30, 2014. Wheatland's Allegation, Attachment 13, Ex. 5 at Ex. 2. The disclosures in the SEC filing pertain mostly to fiscal year 2013, not to the period of review of 2015–2016, and describe general information related to a utility regulated by the SEC.⁴ To the extent that Commerce could reasonably determine from

⁴ For example, page 50 of Exhibit 2 of the relevant Maverick Particular Market Situation Allegation states in pertinent part:

For the period since 2006, our actual rates of return have been lower than the fair rate of return largely due to a general increase in fuel costs and additional facility investment costs incurred, the effects of which were not offset by timely increases in our tariff rates. Partly in response to the variance between our actual rates of return and the fair rates of return, the Government from time to time increases the electricity tariff rates, but there typically is a significant time lag for the tariff increases as such increases requires a series of deliberative processes and administrative procedures and the Government also has to consider other policy considerations, such as the inflationary effect of overall tariff increases and the efficiency of energy use from sector-specific tariff increases.

Recent increases to the electricity tariff rates by the Government involve the following, which were made principally in response to the rising fuel prices which hurt our profitability as well as to encourage a more efficient use of electricity by the different sectors:

- effective August 1, 2011, a 4.9% overall increase in our average tariff rate, consisting of increases in the industrial, commercial, residential, educational, street lighting and overnight power usage tariff rates by 6.1%, 4.4%, 2.0%, 6.3%, 6.3% and 8.0%, while making no changes to the agricultural tariff.
- effective December 5, 2011, a 4.5% overall increase in our average tariff rate, consisting of increases in the industrial, commercial, educational and street lighting tariff rates by 6.5%, 4.5%, 4.5% and 6.5%, while making no changes to the residential, agricultural and overnight power usage tariff.
- effective August 6, 2012, a 4.9% overall increase in our average tariff rate, consisting of increases in the residential, commercial, educational, industrial, street lighting, agricultural and overnight power usage tariff rates by 2.7%, 4.4%, 3.0%, 6.0%, 4.9%, 3.0% and 4.9%, respectively.

Wheatland's Allegation, Attachment 13, Ex. 5 at Ex. 2 at 50.

the Form 20-F document that the conditions of the Korean electricity market remained unchanged throughout 2014 and the period of review, its page 50 might provide a modicum of support for that inference, but the Court concludes that the cited evidence does not address whether Korean steel manufacturers received subsidies as to electricity or whether the Government of Korea’s regulation of the electricity market contributed to a particular market situation during the period of review.

As to the fifth factor addressed in the *Remand Results*, Commerce determined that the Government of Korea’s plan to restructure the private steel industry in Korea “is indicative of a [particular market situation].” *Remand Results* at 11–12. In support of this determination, Commerce cited as record evidence “Wheatland’s [] Allegation at Attachment 14, Exhibit 12 (containing ‘Korean Ministry of Strategy and Finance, Press Release: Government Unveils 2017 Action Plan to for Industrial Restructuring’ (January 25, 2017))” and “Wheatland’s [] Allegation, Attachment 12, Exhibit 3 [*sic*] (containing ‘Severe Excess Supply in Steel Pipe, Cold Rolled and Plate Sectors . . . Concerns Loom over Dongkook Steel and SeAH Group,’ Invest Chosun, dated May 20, 2016).” *See Remand Results* at 11 nn.45 & 46. Those documents were submitted as part of Maverick’s and U.S. Steel Corporation’s particular market situation allegations in an administrative review of *Oil Country Tubular Goods from Korea*, 82 Fed. Reg. 18,105 (Dep’t of Commerce Apr. 17, 2017). *See* Wheatland’s Allegation, Attachment 12, Ex. 2;⁵ *id.*, Attachment 14, Ex. 12. Commerce stated in its *Remand Results*:

This type of active government involvement in the steel industry’s response to market overcapacity is indicative of a [Particular Market Situation]. This is precisely the type of interference that meets the definition of a [Particular Market Situation]. As stated in the TPEA, a [Particular Market Situation] “exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade.” The Korean government’s assistance to accelerate the steel industry’s response and restructuring interferes with the normal functioning of the free market and *alters the ordinary course of trade*. Outside government interference in the steel industry in response to particular market conditions that affected such industry to the point that the industry may need to undergo restructuring is highly unusual and does not represent the ordinary course of trade. When the investment industry expressed the view that the Korean steel

⁵ The *Remand Results* incorrectly cite to Exhibit 3, rather than Exhibit 2.

industry needed additional restructuring, as shown in Invest Chosun, the Korean government quickly intervened to assist the steel industry to restructure, as expressed in the press release from the Korean Ministry of Strategy and Finance. We recognize that the government’s announcement of additional restructuring of [the] steel industry occurred within months of the end of the [period of review]. Nonetheless, we conclude that the conditions that led to the government’s announcement existed during the [period of review].

Remand Results at 11–12 (footnote omitted; emphasis added).

The Court observes that the referenced documents in support of this statement do not support any particular market situation determinations as to the Government of Korea’s actions vis-a-vis “the market” during the period of review. *See also NEXTEEL II*, 44 CIT at ___, 450 F. Supp. 3d at 1343 (discussing the same press release from the Korean Ministry of Strategy and Finance announcing the Government of Korea’s “2017 Action Plan for Industrial Restructuring,” dated January 25, 2017). The *Remand Results* are also unclear as to whether a particular market situation *caused* the Government of Korea to become involved in industry restructuring, or that a particular market situation would arise *as a result of* the Government of Korea’s involvement—which would concern matters beyond the confines of the period of review. The Court notes that the evidence cited by Defendant does not support the fifth factor of its particular market situation analysis.

CONCLUSION

The Court concludes that Commerce’s calculation of Hyundai Steel’s dumping margin rate without a particular market situation adjustment is in accordance with the law and sustains Commerce’s determination on the issue of Hyundai Steel’s dumping margin rate.

The Court concludes that Commerce calculated SeAH’s dumping margin improperly using an average of dumping rates based in part on a particular market situation determination that is unsupported by substantial evidence, and remands for Commerce to recalculate SeAH’s dumping margin in accordance with this opinion.

Accordingly, it is hereby

ORDERED that the *Third Remand Results* are sustained with respect to Commerce’s recalculation of the dumping margin for Hyundai Steel; and it is further

ORDERED that the *Third Remand Results* are remanded for Commerce to recalculate the dumping margin for SeAH in light of this opinion; and it is further

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

- (1) Commerce shall file the fourth remand results on or before August 15, 2022;
- (2) Commerce shall file the administrative record on or before August 29, 2022;
- (3) Comments in opposition to the fourth remand results shall be filed on or before September 19, 2022;
- (4) Comments in support of the fourth remand results shall be filed on or before October 3, 2022; and
- (5) The joint appendix shall be filed on or before October 11, 2022.

Dated: June 15, 2022
New York, New York

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

Slip Op. 22–68

COALITION OF AMERICAN MILLWORK PRODUCERS, Plaintiff, v. UNITED STATES, Defendant, and ARAUPEL S.A., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00047

[Sustaining the U.S. Department of Commerce’s final negative determination in the 2019 antidumping investigation of wood mouldings and millwork products from Brazil.]

Dated: June 15, 2022

Timothy C. Brightbill, Laura El-Sabaawi, Elizabeth S. Lee, and Theodore P. Brackemyre, Wiley Rein LLP, of Washington, D.C., for Plaintiff Coalition of American Millwork Producers.

Ioana Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of counsel on the brief was Saad Y. Chalchal, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Craig A. Lewis, H. Deen Kaplan, Maria A. Arboleda, and Gregory M.A. Hawkins, Hogan Lovells US LLP, of Washington, D.C., for Defendant-Intervenor Araupel S.A.

OPINION

Choe-Groves, Judge:

Plaintiff Coalition of American Millwork Producers (“Coalition” or “CAMP”) challenges the final negative determination by the U.S. Department of Commerce (“Commerce”) on its antidumping duty petition alleging that wood mouldings and millwork products (“WMMP”) imported from Brazil were being sold in the United States at less than fair value. *See Wood Mouldings and Millwork Products from Brazil (“Final Determination”),* 86 Fed. Reg. 70 (Dep’t of Commerce Jan. 4, 2021) (final negative determination of sales at less than fair value; 2019), ECF No. 14–1; *see also* Issues and Decision Mem. for the Final Negative Determination in the Less-Than-Fair-Value Investigation of Wood Mouldings and Millwork Products from Brazil (Dec. 28, 2020) (“Final IDM”), ECF No. 14–2. Before the Court is the Coalition’s Rule 56.2 Motion for Judgment on the Agency Record. *See* Pl.’s Rule 56.2 Mot. J. Agency R., ECF No. 19; *see also* Mem. Supp. Pl.’s Rule 56.2 Mot. J. Agency R. (“Pl.’s Br.”), ECF Nos. 20, 21; Pl.’s Reply Br. (“Pl.’s Reply”), ECF Nos. 34, 35. Defendant United States (“Defendant”) and Defendant-Intervenor Araupel S.A. (“Araupel”) oppose the Coalition’s Rule 56.2 Motion for Judgment on the Agency Record. *See* Def.’s Opp’n Pl.’s Rule 56.2 Mot. J. Agency R. (“Def.’s Resp.”), ECF Nos. 28, 29; Def.-Interv. Araupel’s Mem. Opp’n Pl.’s Rule 56.2 Mot. J. Agency R. (“Araupel’s Resp.”), ECF Nos. 26, 27. For the following reasons, the Court sustains the *Final Determination*.

ISSUES PRESENTED

The Court reviews the following issues:

- 1 Whether Commerce’s decision to collapse Araupel and Braslumber Industria de Molduras Ltda./BrasPine Madeiras Ltda. into a single entity is supported by substantial evidence;
- 2 Whether Commerce’s decision not to apply the major input rule to certain log purchases is supported by substantial evidence;
- 3 Whether Commerce’s decision to revise Araupel’s reported general and administrative expenses to account for fair value adjustments associated with the annual revaluation of standing trees in Araupel’s unharvested forests is in accordance with the law and supported by substantial evidence; and

- 4 Whether Commerce’s application of the Federal Reserve Bank of New York’s short-term interest rate to calculate imputed credit expenses and inventory carrying costs is in accordance with the law.

BACKGROUND

An antidumping duty investigation requires Commerce to determine whether imports of the subject merchandise are, or are likely to be, sold in the United States at less than fair value. *See* 19 U.S.C. § 1673d(a)(1).¹ Commerce makes the less-than-fair-value determination by comparing the U.S. price of the subject merchandise, typically the export price, with its normal value counterpart in the foreign market. *See id.* §§ 1677a(a)–(b), 1677b(a)(1). The margin of dumping, if any, is the amount by which the normal value exceeds the U.S. price. *See id.* § 1677(35)(A).

In January 2020, Commerce initiated a less-than-fair-value investigation into WMMP from Brazil for the period covering January 1, 2019 through December 31, 2019. *Wood Mouldings and Millwork Products from Brazil and the People’s Republic of China*, 85 Fed. Reg. 6502, 6502–03 (Dep’t of Commerce Feb. 5, 2020) (initiation of less-than-fair-value investigations), PR 46.² Commerce selected Araupel, Braslumber Industria de Molduras Ltda. (“Braslumber”), and BrasPine Madeiras Ltda. (“BrasPine”), the three entities with the largest volume of subject merchandise entries into the United States during the period of investigation, as the mandatory respondents. WMMP from Brazil: Respondent Selection Mem. (Feb. 25, 2020) at 6, PR 73.

Commerce considered comments from interested parties, including comments submitted jointly by Braslumber and BrasPine stating that both companies operate their own production facilities, but they would likely be considered affiliated based on common ownership and collapsed under administrative practice due to extensive overlap of management and sales operations. *Id.* at 5; *see also* 19 U.S.C. § 1677(33) (definition of “affiliated”); 19 C.F.R. § 351.401(f) (collapsing regulation). Under Commerce’s collapsing practice, when certain conditions are met, affiliated companies are collapsed (i.e., treated as a single entity), and assigned a single weighted-average dumping margin. *See Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 158, 90 F. Supp. 2d 1284, 1286 (2000) (citations omitted); *see also Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007).

¹ All statutory citations are to the 2018 edition of the United States Code and all citations to regulations are to the 2020 edition of the Code of Federal Regulations.

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

Between April 2020 and July 2020, the three mandatory respondents submitted responses to the antidumping duty questionnaires³ and to the supplemental questionnaires.⁴ Decision Mem. for Prelim. Negative Determination in the Less-Than-Fair-Value Investigation of Wood Mouldings and Millwork Products from Brazil (Aug. 5, 2020) (“Prelim. DM”) at 3, PR 313. The Coalition, Araupel, Braslumber, and BrasPine submitted pre-preliminary determination comments to Commerce. See CAMP’s Pre-Preliminary Determination Comments (July 15, 2020), PR 298; Araupel’s Pre-Preliminary Determination Comments (July 20, 2020), PR 309; Braslumber/BrasPine’s Pre-Preliminary Determination Comments (July 21, 2020), PR 310. Commerce published its preliminary determination on August 12, 2020. *Wood Mouldings and Millwork Products from Brazil* (“*Prelim. Determination*”), 85 Fed. Reg. 48,667 (Dep’t of Commerce Aug. 12, 2020), PR 325. As part of its preliminary consideration, Commerce collapsed all three mandatory respondents and considered them as a single entity. See Prelim. Affiliation & Collapsing Determination Mem. (Aug. 5, 2020), PR 314.

In reaching its preliminary collapsing determination, Commerce determined that Braslumber, BrasPine, Araupel, and a certain company (“Company X”) holding a controlling stake in Araupel were all under one family’s common control and thus were affiliated as a matter of law. Prelim. DM at 5; Prelim. Affiliation & Collapsing Determination Mem. at 5–6; see 19 U.S.C. § 1677(33)(A). Based on its analysis of the regulatory criteria for collapsing producers under 19 C.F.R. § 351.401(f) and the “totality of the circumstances,” Commerce collapsed Araupel, Braslumber, and BrasPine and treated them as a single entity. Prelim. DM at 5; Prelim. Affiliation & Collapsing Determination Mem. at 6–11. Commerce calculated preliminary antidumping duty rates of zero percent for the collapsed mandatory respondents, resulting in a negative preliminary determination. See *Prelim. Determination*, 85 Fed. Reg. at 48,667.

³ *E.g.*, Araupel’s Section A Questionnaire Resp. (Apr. 8, 2020), PR 161–63; Braslumber/BrasPine’s Section A Questionnaire Resp. (Apr. 8, 2020), PR 164–67; Araupel’s Sections B and C Questionnaire Resp. (May 6, 2020), PR 192; Braslumber/BrasPine’s Sections C and D Questionnaire Resp. (May 6, 2020), PR 195; Araupel’s Section D Questionnaire Resp. (May 14, 2020), PR 201.

⁴ *E.g.*, Araupel’s Suppl. Section D Questionnaire Resp. (Mar. 31, 2020), PR 146; Araupel’s Suppl. Section A Questionnaire Resp. (May 22, 2020), PR 209; Braslumber/BrasPine’s Suppl. Section A Questionnaire Resp. (June 5, 2020), PR 240–41; Araupel’s Suppl. Section D Questionnaire Resp.: Questions 1 Through 25 and 31 Through 43 (July 1, 2020), PR 274–75; Araupel’s Second Suppl. Section A Questionnaire Resp. (July 6, 2020), PR 279; Araupel’s Suppl. Sections A and C Questionnaire Resp. (July 6, 2020), PR 280–84; Araupel’s Third Suppl. Section A Questionnaire Resp. (July 16, 2020), PR 300; Braslumber/BrasPine’s Second Suppl. Section A Questionnaire Resp. (July 16, 2020), PR 305.

For purposes of the preliminary dumping calculations, Commerce based normal value on “constructed value”⁵ because the collapsed entity did not have viable sales of the foreign like product in Brazil or in a third-country market. Prelim. DM at 12. In calculating constructed value, Commerce relied on the cost data reported by each of the mandatory respondents, with a few exceptions. *Id.* at 12–13. One exception involved certain annual revaluations of Araupel’s biological assets, i.e., its unharvested forests and the logs harvested from its forests. Cost of Production & Constructed Value Calculation Adjustments for the Prelim. Determination Mem. (Aug. 5, 2020) (“Prelim. Cost Mem.”) at 1–2, PR 322–23. These annual revaluations were not included in Araupel’s costs reported to Commerce but were present in its books and records kept in the normal course of business. *Id.* Araupel’s audited financial statements recognized the fair value adjustments for biological assets in accordance with Brazilian Generally Accepted Accounting Principles (“GAAP”). *Id.* Commerce adjusted Araupel’s reported total cost of manufacturing preliminarily as well as Araupel’s reported general and administrative (“G&A”) expenses to account for the fair value adjustment related to harvested logs. *Id.*

Due to the COVID-19 pandemic, Commerce was unable to conduct on-site verification and instead issued verification questionnaires to Araupel and to Braslumber/BrasPine. *See, e.g.*, Letter to Braslumber/BrasPine in Lieu of On-Site Verification (Oct. 14, 2020), PR 361. After the verification questionnaires and the preliminary determination were issued, interested parties submitted case and rebuttal briefs on the preliminary determination. Final IDM at 2–3; *see, e.g.*, Braslumber/BrasPine’s Case Br. (Nov. 13, 2020), PR 384; CAMP’s Case Br. (Nov. 13, 2020), PR 385–86; Araupel’s Rebuttal Br. (Nov. 23, 2020), PR 389.

The Coalition argued that: (1) Commerce should not collapse Araupel with Braslumber and BrasPine; (2) Commerce should apply the major input rule under 19 U.S.C. § 1677b(f)(3) to certain log purchases by Araupel because it is affiliated with its log supplier and logs are critical in the production of WMMP; (3) Commerce should use Araupel’s reported G&A expenses and not decrease them by the annual fair value adjustment of Araupel’s unharvested forests; and (4) in order to impute Araupel’s credit expenses, Commerce should use the U.S. dollar short-term interest rate from the Federal Reserve’s Small Business Lending Survey and not use the short-term

⁵ Constructed value is “the sum of the costs of materials and fabrications or other processing of any kind employed to produce the merchandise, plus an amount for selling expenses, [general and administrative] expenses, and for profits, plus the cost of packing and shipping to the United States.” *Husteel Co. v. United States*, 44 CIT __, __, 471 F. Supp. 3d 1349, 1362 (2020) (citing 19 U.S.C. § 1677b(e)).

interest rate from the Federal Reserve Bank of New York reported by Araupel. CAMP's Case Br. at 4–33, 42–44, 45–47, 51–55.

In the *Final Determination*, Commerce: (1) determined that, despite the absence of intertwined operations between Araupel and Braslumber/BrasPine weighing against collapsing, Commerce continued to collapse the three mandatory respondents because the totality of the evidence on the record showed that the regulatory criteria under 19 C.F.R. § 351.401(f) had been satisfied, in particular that other evidence established a significant potential for the manipulation of price or production among the entities, *see* Final IDM at 4–17; (2) did not apply the major input rule to Araupel's log purchases from its supplier because it determined that Araupel and its supplier were not affiliated, *see id.* at 38–41; (3) continued to adjust Araupel's reported G&A expenses to account for the annual fair value adjustments pertaining to Araupel's unharvested forests, *see id.* at 36–38; and (4) continued to impute Araupel's credit expenses applying the short-term interest rate from the Federal Reserve Bank of New York, *see id.* at 48–51. Commerce calculated a final estimated weighted-average dumping margin of zero percent for the collapsed entity, *see Final Determination*, 86 Fed. Reg. at 70, and because Commerce reached a negative determination, the investigation terminated pursuant to 19 U.S.C. § 1673d(c)(2) and did not result in the issuance of an antidumping duty order, *see id.* at 71.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(ii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting a final negative determination in an antidumping duty investigation. The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Determination to Collapse Araupel with Braslumber/BrasPine

When appropriate, Commerce collapses related entities and treats them as one entity, resulting in the calculation of a single weighted-average dumping margin for the collapsed entity as a whole. *See, e.g., Carpenter Tech. Corp.*, 510 F.3d at 1373; *Koenig & Bauer-Albert AG*, 24 CIT at 158–59, 90 F. Supp. 2d at 1286. The collapsing practice is meant to ensure that Commerce reviews the entire producer or reseller, not merely part of it, *Queen's Flowers de Colombia v. United States*, 21 CIT 968, 971, 981 F. Supp. 617, 622 (1997), and prevents

affiliated entities from circumventing antidumping duties by channeling production of subject merchandise through the affiliate with the lowest potential dumping margin, *Slater Steels Corp. v. United States*, 27 CIT 1255, 1261, 279 F. Supp. 2d 1370, 1376 (2003).

The authority to collapse arises out of Commerce’s “responsibility to prevent circumvention of the antidumping law.” *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1323 (Fed. Cir. 2020) (quoting *Queen’s Flowers*, 21 CIT at 971, 981 F. Supp. at 622). The decision whether to collapse entities is a fact-specific inquiry and therefore a case-by-case determination. See *Antidumping Duties; Countervailing Duties* (“Preamble”), 62 Fed. Reg. 27,296, 27,345–46 (Dep’t of Commerce May 19, 1997). By regulation, there are three preconditions for collapsing: (1) entities must be “affiliated;” (2) they must have “production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;” and (3) there must exist “a significant potential for the manipulation of price or production.” 19 C.F.R. § 351.401(f)(1).

“Affiliated persons” and “affiliated parties” in the regulation have the same meanings as the statutory definition, which includes members of a family (siblings, spouses, ancestors, lineal descendants); any officer or director of an organization (and such organization); partners; employer-and-employee; and any person directly or indirectly owning, controlling, or holding with power to vote five percent or more of the outstanding voting stock or shares of any organization (and such organization). 19 U.S.C. § 1677(33). Also included is any controlling or controlled person, and “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” *Id.*

Commerce also defines by regulation any “person” to include “any interested party as well as any other individual, enterprise, or entity, as appropriate,” 19 C.F.R. § 351.102(b)(37), and the agency’s interpretation of “person” to encompass a “family grouping” for purposes of affiliation has been upheld. See *Echjay Forgings Priv. Ltd. v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1350, 1365–67 (2020); see also *Ferro Union, Inc. v. United States*, 23 CIT 178, 194–95, 44 F. Supp. 2d 1310, 1326 (1999). To determine whether “control over another person exists” within the meaning of 19 U.S.C. § 1677(33),

the Secretary will consider the following factors, among others: Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact deci-

sions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

19 C.F.R. § 351.102(b)(3).

Regarding the second precondition, affiliated entities must have “production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities.” *Id.* § 351.401(f)(1). This consideration “requires similarity in the products produced, not in the facilities that produce them.” *Viraj Grp. v. United States*, 476 F.3d 1349, 1356 (Fed. Cir. 2007).

The third precondition is “a significant potential for the manipulation of price or production,” and Commerce “may consider” the following: (1) the level of common ownership; (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (3) whether operations are intertwined, for example through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. 19 C.F.R. § 351.401(f)(2). This list for the manipulation of price or production, which is non-exhaustive, “focuses on what may transpire in the future.” *Preamble*, 62 Fed. Reg. at 27,346; *see also Jinko Solar Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1253, 1261 (2017) (“The emphasis in the regulation is on the potential for, not actual, manipulation.”). Commerce need not find all of the factors in the regulation present to find a significant potential for manipulation of price or production, *U.S. Steel Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1114, 1139 (2016), as the factors are considered by Commerce in light of the totality of the circumstances and no one factor is dispositive in determining whether to collapse the producers, *Zhaoqing New Zhongya Aluminum Co. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1298, 1304 (2015).

The Coalition challenges Commerce’s determination regarding the third “significant potential for manipulation” precondition.⁶ *See*

⁶ The Coalition “strongly” disagrees with Commerce’s finding that Araupel is affiliated with Braslumber/BrasPine but states that in the interest of limiting the issues here, it has not appealed this issue and assumes for the sake of argument that the affiliation requirement is satisfied. CAMP’s Case Br. at 21. The Coalition also does not contest Commerce’s finding that the “substantial retooling” requirement was met, but disagrees that this is meaningful because the companies at issue are both mandatory respondents and it is essentially a “given” that both companies would have production facilities for similar products, i.e., the subject merchandise. *Id.* at 21–22.

CAMP's Case Br. at 21–22. The Coalition argues that Commerce unreasonably collapsed Araupel with Braslumber/BrasPine because the only “shared” commonality between them is the ancestry of the lineal descendants of a certain ancestor among individuals in “decision making” positions at each company, and Araupel and Braslumber/BrasPine had provided voluminous evidence to demonstrate that they are competitive, independent of each other, and have had no commercial interaction except for one small-volume transaction in 2019. *See generally* Pl.'s Br. at 3–11, 20–30; Pl.'s Reply at 2–10. The Coalition argues that the collapsing regulation above all requires a “significant” potential for price manipulation because “any” potential for price manipulation “would lead to collapsing in almost all circumstances in which [Commerce] finds producers to be affiliated.” Pl.'s Br. at 19–20 (quoting *Preamble*, 62 Fed. Reg. at 27,345). Such an outcome was “neither [Commerce's] current nor intended practice,” *id.* at 20 (quoting *Preamble*, 62 Fed. Reg. at 27,345), and cases have upheld this “significant” standard, *see, e.g., Carpenter Tech. Corp.*, 510 F.3d at 1374. The U.S. Court of Appeals for the Federal Circuit recently reiterated the importance of this “significant” element in *Prosperity Tieh Enterprise Co. v. United States*, 965 F.3d 1320, 1323 (Fed. Cir. 2020) (Commerce “emphasized that collapsing requires a ‘significant’ potential for manipulation” in the *Preamble*), and the Coalition notes that Commerce has stated that while it may find two companies affiliated on the basis of equity interest, when deciding whether to collapse them, the existence of such equity interest “absent other factors may be insufficient to warrant collapsing,” summarizing that “affiliation alone is not a sufficient basis to collapse.” *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,582 (Dep't of Commerce Oct. 16, 1998); *see also Steel Threaded Rod from India*, 79 Fed. Reg. 40,714 (Dep't of Commerce July 14, 2014).

Defendant and Araupel contend that Commerce's collapsing determination is reasonable. Def.'s Resp. at 17–21; Araupel's Resp. at 11–12. Defendant argues that in considering whether entities are affiliated, it is Commerce's practice to consider the ownership interest of the individual members of a family grouping in the aggregate, and that the family aggregate in this case owns the majority of Braslumber's and BrasPine's equity and also has indirect majority control of Araupel through its ownership of certain holding companies, in addition to owning direct equity in BrasPine. Def.'s Resp. at 17–21.

Defendant and Araupel argue that Commerce properly considered each of the factors listed in the regulation for the collapsing test. *Id.*; Araupel's Resp. at 11–12. Commerce contends that it considered the

“level of common ownership,” 19 C.F.R. § 351.401(f)(2)(i), by stating the percentages of each company’s shares held by the family group and finding that “the family group’s aggregate direct and indirect shareholdings demonstrate[] a significant level of common ownership between Araupel and Braslumber/BrasPine.” Def.’s Resp. at 19 (quoting Final IDM at 13) (citations omitted); *see* Araupel’s Resp. at 18–20. As to “the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm,” 19 C.F.R. § 351.401(f)(2)(ii), Commerce examined the family group’s collective presence in the companies and found that “members of the family grouping hold senior management positions and board positions at Araupel and Braslumber/BrasPine.” Def.’s Resp. at 19–20 (quoting Final IDM at 12) (citations omitted); *see* Araupel’s Resp. at 20. Defendant contends that Commerce’s explanation that “decision-making positions held by the family group can significantly influence and manipulate the pricing or production at Araupel and Braslumber/BrasPine” is reasonable based on evidence on the record. *See* Def.’s Resp. at 20 (quoting Final IDM at 13). Lastly, considering “whether operations are intertwined,” 19 C.F.R. § 351.401(f)(2)(iii), Defendant and Araupel argue that Commerce acknowledged that Araupel did not appear to have intertwined operations with Braslumber and BrasPine, *see* Prelim. Affiliation & Collapsing Determination Mem. at 10, but contend that Commerce properly explained that no one factor alone is dispositive and that the “totality” of the evidence weighed in favor of finding a significant potential for manipulation of price or production. *See* Def.’s Resp. at 20–21 (quoting Final IDM at 12, 14–16); *see also* Araupel’s Resp. at 22–24. Defendant argues that because the analysis “focuses on what may transpire in the future,” and “Araupel and Braslumber/BrasPine have the capability to intertwine their operations in the future” considering the family group’s overall presence, “[t]he family group’s prominent role in the ownership, management, and boards in each of the three companies enable it to coordinate its actions to direct the companies to act in concert or out of common interest such that the family group could direct outcomes across the companies, thereby creating a significant potential for the manipulation of price or production.” Def.’s Resp. at 21 (citing Final IDM at 12–13).

The Court concludes that substantial evidence supports Commerce’s determination to collapse Araupel with Braslumber/BrasPine. Commerce determined that evidence showed that Braslumber and BrasPine had an almost identical ownership structure, an overlapping management structure, an intertwined production process, and that the lineal descendants of a common ancestor

(the “family”) held majority control of both Braslumber and BrasPine. Prelim. Affiliation & Collapsing Determination Mem. at 2–3. Record evidence demonstrated that Braslumber and BrasPine also had similar mills that produced almost the same products, including the subject merchandise WMMP that undergo similar production processes. *See id.* Commerce determined based on its review of the record evidence that Araupel, Braslumber, and BrasPine had manufacturing facilities for similar or identical products and no retooling would be required in order to restructure manufacturing priorities. *Id.*

With respect to the issue of whether there was “significant potential for manipulation of price or production” under 19 C.F.R. § 351.401(f)(2)(i), Commerce reviewed evidence relating to the level of common ownership, shared management or board membership, and intertwined operations, which 19 C.F.R. § 351.401(f)(2) sets forth as factors for consideration. *See id.* at 6–11. Commerce determined based on a review of record evidence that Braslumber and BrasPine were majority owned by the same family group, had the same board of directors, board and decision-making managerial positions held by family members, and had overlapping management and sales operations. *Id.* The two companies also frequently purchased semi-finished products from each other. *Id.* at 10.

As for Araupel, Commerce determined based on evidence on the record that because Company X held a controlling stake in Araupel and because family members owned most of the shares of Company X, the family therefore indirectly held a majority of the equity in Araupel. *See id.* at 3, 5, 9 (citing Araupel’s responses to supplemental questionnaires). Commerce also determined that some family members on the boards of Braslumber and/or BrasPine held shares in Company X as well as Braslumber and/or BrasPine. *Id.* at 2–3 (citing responses to supplemental questionnaires). Certain family members held decision-making positions at Company X, and other family members at Araupel. *See id.* at 3 (citing responses to supplemental questionnaires). Commerce determined that Araupel also had mills that produced WMMP but maintained that its operations were independent from Braslumber and BrasPine, with one small-volume transaction during the period of investigation of a certain processed product between Araupel and Braslumber and/or BrasPine. *Id.* at 8 (citing responses to supplemental questionnaires); *see generally* Final IDM at 9–17.

It may be true, as the Coalition argues, that in prior cases of collapsing there have been more prominent indicia of “shared” activity between the collapsed entities to justify their collapse than are

present in this instance. *See, e.g., Jinko Solar Co.*, 41 CIT at __, 279 F. Supp. 3d at 1261 (family grouping played a prominent role in the management of both entities concerned in addition to other evidence including substantial transactions between the two entities); *U.S. Steel Corp.*, 40 CIT at __, 179 F. Supp. 3d at 1139 (Commerce concluding that the family grouping's control in that case was "more active than that of other shareholders"). In this instance, based on a review of evidence on the record, the Court concludes that it was reasonable for Commerce to determine that a significant potential for the manipulation of price or production was posed by the family grouping's indirect majority control of all three companies when coupled with the presence of family individuals in decision making positions at each company during the period of investigation, regardless of the fact that the three respondent companies' operations were not actively "intertwined" during the period of investigation. The relevant metric in cases involving multiple members of the same family is the degree of aggregate involvement by the family group, not that of any single member of the family group. *See, e.g., Zhongya*, 39 CIT at __, 70 F. Supp. 3d at 1305. Commerce need not find all of the factors in the regulation present to find a significant potential for manipulation of price or production. *U.S. Steel Corp.*, 40 CIT at __, 179 F. Supp. 3d at 1139.

The Court concludes that Commerce reasonably supported its collapsing determination based on substantial evidence on the record. For the above reasons, the Court sustains Commerce's determination to collapse Araupel with Braslumber and BrasPine.

II. Decision to Find Araupel Not Affiliated with "Company A" For the Purpose of the Major Input Rule

One component in the calculation of constructed value is "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise." 19 U.S.C. § 1677b(e)(1). Such costs may include inputs (either self-produced or purchased from third parties) that are consumed in the production of subject merchandise. The statute provides special rules relating to the treatment of transactions between affiliated parties in the calculation of constructed value. *See id.* § 1677b(f)(2)–(3). Under 19 U.S.C. § 1677b(f)(3), commonly referred to as the "major input rule," Commerce evaluates whether the sale of a major input between affiliated parties is made at arm's length. *Huvis Corp. v. United States*, 32 CIT 845, 846 (2008). To be clear, the major input rule only applies in an instance of affiliation. *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, at 838

(1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175 (“SAA”); 19 C.F.R. § 351.407(b).

When the major input rule is applicable, Commerce compares the input’s transfer prices and its market price to the affiliated suppliers’ costs of production and values the major input based on the highest of transfer price, market value, or the affiliated supplier’s cost of production. 19 U.S.C. § 1677b(f)(3); *see* 19 C.F.R. § 351.407(b); *see also NTN Bearing Corp. v. United States*, 368 F.3d 1369, 1374–75 (Fed. Cir. 2004). An input is considered “major” based on the significance of the value of the purchases from an affiliate in relation to the total cost of manufacturing all products under investigation. 19 C.F.R. § 351.407(b)(2). Because the statute does not define what constitutes a “major input,” the Court defers to Commerce’s interpretation if it is reasonable. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT 541, 569, 15 F. Supp. 2d 807, 830 (1998).

The Coalition challenges Commerce’s determination that Araupel was not affiliated with its standing log supplier and argues that Commerce should have applied the major input rule. Pl.’s Br. at 32. Araupel reported that logs are the most significant input to Araupel in the production of wood mouldings. Araupel’s Suppl. Section D Questionnaire Resp.: Questions 1 Through 25 and 31 Through 43 (July 1, 2020) (“Araupel SDQR Questions”) at SD-4, CR 194–205, PR 274–75. During the period of investigation, Araupel bought standing logs from “Company A,”⁷ a wholly owned subsidiary of Company B, on land owned by Company C and Company D. Araupel’s Section D Initial Questionnaire Resp. (May 14, 2020) (“Araupel DQR”) at D-10 & n.5, PR 201; Araupel’s Section A Questionnaire Resp. (Apr. 8, 2020) (“Araupel AQR”) at A-11 n.5, PR 161–63. Because Araupel maintained a joint venture partnership with Company B during the period of investigation, the Coalition contends that Araupel and Company B “jointly owned” Company C and Company D. *See* Araupel AQR at A-11 n.4; Araupel DQR at D11 & n.6; Araupel SDQR Questions at SD-6.

The joint venture was intended to allow [Company B’s parent] to invest in standing timber in Brazil and to reduce the risk of its investment because Araupel would purchase the timber for its operations; and Araupel would have a reliable source of timber

⁷ Commerce used these letters to refer to business proprietary company names: Company A refers to the company that harvested and supplied logs to Araupel; Company B refers to the parent company of Company A and joint venture partner with Araupel; and Company C and Company D refer to the two companies that held partial ownership of the land on which Company A harvested the logs purchased by Araupel. Company E refers to the entity originally designated to hold title to the biological assets, which prior to the period of investigation merged with Company A. *See* Final IDM at 38–41; Business Proprietary Information Mem., CR 341 (Dec. 28, 2020).

supply in the region close to its plants. This would bring together [the parent's] expertise on forestry management and Araupel's operational management and knowledge of the region.

Araupel's Second Suppl. Section A Questionnaire Resp. (July 6, 2020) ("Araupel SSAQR") at S2A-2, PR 279.

The Coalition argued to Commerce that Araupel should be considered affiliated with its standing log supplier, Company A, and that it should apply the major input rule to the standing logs that Company A supplied to Araupel in the production of WMMP. *See* CAMP's Case Br. at 42–44. Araupel filed a rebuttal brief, arguing that the major input rule does not apply to logs that Araupel purchased from Company A. *See* Araupel's Rebuttal Br. at 37–43. In its *Final Determination*, Commerce determined that the record indicated that:

Araupel and Company B entered into a joint venture agreement prior to the [period of investigation] to invest in rural land for timber production.[] The joint venture agreement allowed Company B's foreign-owned parent company to maintain investments in timber in Brazil.[] Araupel and Company B held shares in Company E, the entity originally designated to hold title to the biological assets, which prior to the [period of investigation] merged with Company A.[] At that point, Araupel transferred any remaining shares it owned of Company E to Company A.[] Company A is wholly-owned by Company B.[] Under the joint venture agreement, Araupel was a minority shareholder in Companies C and D, while Company B held the remaining ownership shares.[] Companies C and D hold title to the land in which Company A harvests the logs that Araupel purchases for the production of subject merchandise.[] Araupel explained that, in Brazil, different entities can hold titles to the land and the biological assets held on that land.[] Araupel also stated that it did not share any board members, company directors, or employees with Companies A or B, nor did it exercise any control over the operations, production or pricing decisions of Companies A or B.[]

. . . Under 19 [C.F.R. §] 351.102(b)(3), Commerce determines whether control over another person exists, within the meaning of section 771(33) of the Act, by considering certain relationships, including joint venture agreements. However, Commerce will not find that control exists in these relationships unless the relationship has the potential to impact decisions concerning production, pricing, or cost of the subject merchandise or foreign like product. In this case, we find that Araupel has sufficiently

demonstrated that it does not have ownership over Companies A and B, nor that the joint venture has the potential to impact decisions concerning the production, pricing, or cost of subject merchandise. Therefore, in accordance with 19 [C.F.R. §] 351.102(b)(3) and consistent with Commerce’s practice, we find that neither affiliation nor control exists between Araupel and Companies A and B on the basis of the joint venture.[] As such, we have not applied the major input rule to Araupel’s log purchases from Company A for this final determination.

Final IDM at 40–41 (footnotes omitted).

The Coalition contends that Commerce’s determination that Araupel was not affiliated with its log supplier, Company A, despite its joint venture with the supplier’s parent company, Company B, is flawed. *See* Pl.’s Br. at 32–37. The Coalition argues that the elements for finding affiliation are satisfied here because Araupel is legally and operationally in a position to exercise restraint and discretion over the production and sales of logs by Company A. *See id.* at 34. The Coalition argues that Araupel maintains control over Company A through its joint venture partnership with Company B, which wholly owns Company A, and that control can also be discerned through Araupel’s close supplier relationship with Company A. *Id.* (citing Araupel AQR at A-11 n.4).

As to the first point, the Coalition asserts that Araupel’s joint venture arrangement is focused entirely on Company A’s production and supply of logs through the ownership of land held by Company C and Company D, and as a result, Araupel’s joint venture partner, Company B, is legally positioned to exercise control over Company A as its parent company. *Id.* (citing Araupel DQR at D-10). According to the Coalition, Araupel is positioned jointly to exercise operational control over Company A, particularly since the Coalition contends that the record shows a symbiotic relationship between Araupel and Company A. *Id.* (citing Araupel’s Suppl. Section A Questionnaire Resp. (May 22, 2020) (“Araupel SAQR”) at SA-4–SA-5, Ex. SA-2, PR 209). The Coalition contends that the whole purpose of the joint venture between Araupel and Company B was to own the land for harvesting the logs that Company A then sold to Araupel, so Araupel was necessarily positioned to exercise restraint and discretion over the production and sales of logs by Company A. *See id.* (citing Araupel SSAQR at S2A-2).

As to the second point, the Coalition contends that because log purchases are a key input for Araupel in manufacturing subject merchandise, the relationship between Araupel, Company A, Company B, and the joint venture partnership companies (Company C

and Company D) had an “obvious” potential to impact decisions concerning the production, pricing, or cost of the subject merchandise during period of investigation. *Id.* at 35 (citing Araupel SDQR Questions at SD-4). The Coalition asserts that any decisions concerning the supply of logs significantly and directly impact the production and sale of subject WMMP. *Id.* The Coalition contends that Araupel purchased standing logs only from Company A during the period of investigation and that Company A does not appear to have had other operations. *Id.* at 36 (citing Araupel SAQR at SA-5, Ex. SA-2). With such a relationship, both companies maintained the ability to impact the other’s production, pricing, and cost decisions, according to the Coalition. *Id.*

The Coalition highlights that the U.S. Court of International Trade has previously found the exclusivity of a supplier to a customer to be indicative of whether a close customer-supplier relationship exists. In *Itochu Building Products, Co. v. United States*, 41 CIT __, __, 163 F. Supp. 3d 1330, 1338–39 (2016), the court concluded that Commerce failed to adequately explain its affiliation determination related to a joint partnership. In its remand redetermination, Commerce continued to find affiliation by pointing to such facts as one partner being by far the largest customer of the other. Similarly, in *Mitsubishi Heavy Industries, Ltd. v. United States*, 23 CIT 326, 334, 54 F. Supp. 2d 1183, 1191 (1999), Commerce found that because a company made greater than fifty percent of its sales to another company, there was a reasonable indication of a close supplier relationship. The Coalition argues that, compared to *Itochu Building Products, Co.* and *Mitsubishi Heavy Industries, Ltd.*, the facts of this case weigh more strongly in favor of finding affiliation between Araupel and Company A. *See* Pl.’s Br. at 35–37. The Coalition contends that Company A is not merely Araupel’s largest log supplier, it is its only supplier, which is indicative of a close supplier relationship implicating control issues regarding the pricing, production, and cost decisions of the other company. *See id.* at 35–36. Additionally, the Coalition asserts that under agency practice, Commerce does not need to determine that Araupel and Company A actually exercised control over each other or actually impacted each other’s production, pricing, or cost decisions during the period of investigation; Commerce need only find that these companies had the potential of control. *See id.* at 36.

Defendant and Araupel argue that the Coalition’s view of the case is inaccurate. Defendant and Araupel contend that record evidence demonstrates that “the joint venture agreement [between Araupel and Company B] allowed Company B’s foreign-owned parent company to maintain investments in timber in Brazil.” Def.’s Resp. at 32

(quoting Final IDM at 40); see Araupel’s Resp. at 27–29. Defendant notes that record evidence shows that Company C and Company D “hold title to the land in which Company A harvests the logs that Araupel purchases for the production of subject merchandise” under the joint venture agreement. Def.’s Resp. at 32 (quoting Final IDM at 40). Defendant argues that record evidence supports Commerce’s determination that during the period of investigation, Araupel did not have any ownership interest in Company A or Company B, nor did Company A or Company B have any ownership interest in Araupel, and Araupel held only a minority interest in Company C and Company D. See *id.* at 32–33 (citing Araupel AQR at Ex. 4; Araupel SAQR at SA-4). Defendant asserts that there is no evidence that Araupel shared any board members, company directors, or employees with Company A or Company B, or exercised any control over the operations, production, or pricing decisions of Company A or Company B. *Id.* In addition, Defendant contends that the record shows that Araupel sourced “logs” (not just standing logs) from multiple sources (including its own production of logs) and that the logs supplied by Company A did not represent most of the total volume of logs that Araupel used to produce subject merchandise during the period of investigation. *Id.* at 33.

To support its determination that the joint venture agreement under which Araupel acquired logs from Company A did not show that affiliation or control existed between Araupel, Company A, and Company B, Commerce cited *Corrosion-Resistant Steel Products From the Republic of Korea*, 84 Fed. Reg. 48,118 (Dep’t of Commerce Sept. 12, 2019) (preliminary results), unchanged in *Corrosion-Resistant Steel Products From the Republic of Korea (“CORE from Korea”)*, 85 Fed. Reg. 15,114 (Dep’t of Commerce Mar. 17, 2020) (final results), in which Commerce made an administrative decision of no affiliation between companies that had entered into a joint venture agreement and had a similar buyer-supplier relationship. See Final IDM at 41 n.216. Defendant argues that *CORE from Korea* supports Commerce’s determination of no close supplier relationship on the facts of the WMMP investigation because Araupel and Company A do not have an exclusive supply agreement such that Araupel would not be free to purchase logs from, or Company A would not be free to sell logs to, third parties. Def.’s Resp. at 34 (citing Prelim. DM at 12). Defendant also contends that “the record shows that Araupel had multiple sources for its log supply.” *Id.*

As discussed previously, affiliation can imply a certain amount of control between affiliates, which the statute defines as “legally or operationally in a position to exercise restraint or direction over the

other person.” 19 U.S.C. § 1677(33). Commerce’s regulations specify that control occurs when “the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.” 19 C.F.R. § 351.102(b)(3). Among the types of arrangements that Commerce considers in making its determination are joint ventures or close supplier relationships in which the supplier or buyer becomes reliant upon the other. *See* SAA at 838; 19 C.F.R. § 351.102(b)(3). When analyzing whether a joint venture has control with respect to a third party, two elements must be met for affiliation to exist: (1) two parties must be legally or operationally in a position to exercise restraint or direction over the third party, and (2) the relationship must have the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. *E.g., Itochu Bldg. Prods., Co.*, 41 CIT at ___, 163 F. Supp. 3d at 1336–37.

In reply to Defendant’s contention that the Coalition “has not identified any record evidence to show that Company A exclusively sold its logs to Araupel during the [period of investigation],” Def.’s Resp. at 34, the Coalition argues that Araupel stated in its supplemental Section A questionnaire response that it “harvested logs for use in the production of WMMP that were owned by [Company A] on land owned by [Company C and Company D], and other Brazilian entities. Araupel is not aware of any other operations by [Company A],” Pl.’s Reply at 17 (citing Araupel SAQR at SA-4–SA-5). “[G]iven that Araupel and Company B have a [joint venture] established in order to permit Company A to supply logs, this statement reasonably serves as evidence that Company A exclusively sold its logs to its parent company’s [joint venture] partner—Araupel.” *Id.*

The Court agrees with Defendant and Araupel that Commerce’s determination to treat Araupel and Company A as unaffiliated was reasonable and supported by substantial evidence. As Defendant and Araupel point out, evidence on the record supports Commerce’s determination that Araupel was not Company A’s only customer. *See, e.g.,* Araupel Resp. at 31 & n.2 (citation omitted). Similarly, Araupel did not source logs only from Company A. *See, e.g., id.* at 31 (citation omitted). For example, evidence on the record established that, while Araupel was a joint venture partner with Company A, it was otherwise unaffiliated with Company A. Araupel AQR at A-11 n.4; Araupel SDQR Questions at SD-5 n.2, SD-12; Araupel SSAQR at S2A-4. Araupel does not participate in Company A’s negotiations with landowners in regard to potential lease payments. Araupel SDQR Questions at SD-6. Araupel does not hold any investments in Company B or any of its affiliated companies, and neither Company B nor any of its affili-

ated companies hold any ownership interest in Araupel, either directly or indirectly. Araupel SSAQR at S2A-3. Araupel did not exercise any control over the operations, production, or pricing decisions of Company A or Company B during the joint venture. *Id.* Araupel does not share any board members or company directors/employees with Company A or Company B. *Id.* Because substantial evidence on the record supports Commerce’s determination that Araupel was not affiliated with Company A, the Court sustains Commerce’s determination not to apply the major input rule.

III. Decision to Revise Araupel’s Reported G&A Expenses

In matters of costs of production and constructed value, 19 U.S.C. § 1677b(f)(1)(A) provides that “[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.” 19 U.S.C. § 1677b(f)(1)(A). Administrative deviation from the company’s normal books and records is authorized if any of those conditions are not met, if Commerce “consider[s] all available evidence on the proper allocation of costs[.]” *Id.*; see SAA at 834; see, e.g., *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321–24 (Fed. Cir. 2020). “Costs shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review.” SAA at 835. Also, Commerce “will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review and in the normal course of its business operation.” *Id.*

In calculating costs as part of constructed value, “Commerce must include selling, general, and administrative expenses.” *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1161, 1166 (2017) (citing 19 U.S.C. § 1677b(e)(2)(A)–(B)). G&A expenses are not defined in the statute, but “are generally understood to mean expenses which relate to the activities of the company as a whole rather than to the production process.” *Id.* (internal quotations and citation omitted). “[T]he numerator of the G&A expense ratio is the respondent’s expenses attributable to general operations of the company and the denominator is the respondent’s company-wide [cost of goods sold].” *Id.* Commerce is afforded “significant deference” in the calculation of G&A expenses because “it is a determination [involv]ing complex economic and accounting decisions of a technical

nature.” *Id.* (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996)).

Araupel reported that the value of its “biological assets” (forests) is carried at fair value less estimated selling costs at the time of harvest. Araupel’s Resp. at 8. Araupel added a field to its cost database, WOODFV, to report the fair value adjustment for wood assigned in its system and it reported that this adjustment is applicable to self-grown and harvested wood but is not part of its cost of manufacturing or cost of production for the “merchandise under consideration.” Araupel DQR at D-48. Commerce asked Araupel to describe how and when the fair values of wood are determined in its normal books and records. Araupel explained that when goods are sold, adjustments are recorded in a particular International Financial Reporting Standards account (i.e., “wood,” a/k/a “madeira”), that they are part of the inventoried cost of the finished goods, and that the amounts are ultimately recorded in Araupel’s earnings statement. Araupel SDQR Questions at SD-25–SD-26. Araupel explained that the wood fair value adjustments do not correspond with log inventory adjustments but are considered part of the inventoried cost of the finished goods, and that excluding the “fair value of wood” cost from the total cost of manufacturing and determining its raw materials costs on a historical cost basis would be consistent with Commerce’s normal practice of considering historical costs in its cost calculations. *Id.* at SD-26. When asked by Commerce to either revise its G&A expenses to include the fair value “variation” of its biological assets or explain why not, Araupel stated that it did not believe that it was appropriate to include this item in G&A expenses and that Araupel’s self-grown logs should be valued at historical cost. *Id.*

Commerce preliminarily adjusted Araupel’s reported costs to include the fair value adjustments. *See* Prelim. Cost Mem. at 1–2. In addition to adding the product-specific fair value adjustments for harvested logs that Araupel submitted under the WOODFV field to the total cost of manufacturing field, Commerce revised Araupel’s reported G&A expenses to include a fair value adjustment for unharvested forests for fiscal year 2019, in effect adding a biological assets gain from a particular account. *See id.* at 2, Attach. 1. Commerce reasoned that “[b]ecause Araupel recognizes the fair value adjustments in its normal books and records, we revised the company’s reported costs to include both fair value adjustments (the unharvested forest and the harvested log) in [cost of production].” *Id.* at 2.

In response, the Coalition argued in its case brief that Commerce should have used the G&A expenses reported by Araupel without an adjustment to include the fair value adjustment for unharvested

forests. *See* CAMP's Case Br. at 45–47. Araupel defended Commerce's adjustments in rebuttal. *See* Araupel's Rebuttal Br. at 46–50.

In the *Final Determination*, Commerce continued to include the fair value adjustments related to the unharvested forests as well as the fair value adjustments related to consumed logs (WOODFV) in the calculations of Araupel's G&A expenses and total cost of manufacturing, respectively. *See* Final IDM at 37–38. Commerce reasoned that this treatment “is consistent with both the statute and prior practice.” *Id.* at 37. Commerce stated that Araupel's two fair value adjustments reflected in its financial statements are in accord with Brazilian GAAP, which follows the International Financial Reporting Standards. *Id.* Based on International Accounting Standards 41, which requires biological assets (such as Araupel's standing forest trees) to be measured at each balance sheet date at their fair value less costs to sell, Commerce concluded that the fair value adjustments to the forests attached to the logs harvested from the forests as additional inventoried log costs. *Id.* at 37–38. This resulted in “additional” income and “additional” expense being recognized in Araupel's audited 2019 financial statements. *Id.* Including both sides of the fair value adjustments in the cost of production was consistent with Araupel's normal and Brazilian GAAP-compliant books and records, Commerce explained, while recognizing only one side of the fair value adjustments required by Brazilian GAAP, as the Coalition had argued, “would be unreasonable and result in a distortion of Araupel's total reported costs.” *Id.* Commerce noted that this result was consistent with “prior practice,” *see, e.g., Certain Uncoated Paper from Brazil*, 81 Fed. Reg. 3115 (Dep't of Commerce Jan. 20, 2016), and rejected the Coalition's argument that the two fair value adjustments are separate and unrelated because

including the [period of investigation] fair value adjustments that have been allocated to harvested logs, i.e., those that increase costs, but excluding the annual fair value adjustment to the unharvested forests, i.e., those that decrease costs but give rise to the additional costs that are ultimately allocated to harvested logs, is unreasonable and distortive.

Final IDM at 38. Commerce also rejected the Coalition's contention that the fair value adjustments for unharvested forests reflect future realizable values that are unrelated to current production costs because the value of the logs harvested from those forests have been increased in value in fact at year's end by the revaluations of the underlying biological assets. *See id.* Lastly, Commerce found “unpersuasive and irrelevant” the argument that Araupel itself had

classified the fair value adjustments as an element of gross profit rather than G&A expense items. *Id.*

The Coalition argues that Commerce's change to Araupel's reported G&A expenses to include the fair value adjustment for its unharvested forests is contrary to law because that adjustment does not reasonably reflect costs associated with the production and sale of subject merchandise, as required by the statute. Pl.'s Br. at 38. The Coalition contends that the two biological asset adjustments are with respect to different items and are separate: one adjustment affects the cost of logs consumed during the period of investigation (reported through the WOODFV field); the other is unrelated to the cost of wood consumed during the period of investigation and merely reflects an increase in the future realizable value that Araupel hopes to make on unharvested wood. *Id.* The Coalition emphasizes that Araupel itself did not classify fair value adjustments as G&A expense items and had argued against adjusting G&A expenses to reflect the adjustments. *Id.* at 39. The Coalition argues that the unharvested forests have no effect on the period of investigation production costs and therefore should not have been used in the cost calculations in this investigation. *Id.* The Coalition points out that Commerce has long held, as required by the statute, that it must deviate from a company's books and records when the resulting costs do not "reasonably reflect the costs associated with the production and sale of the merchandise." *Id.* (citing 19 U.S.C. § 1677b(f)(1)(A); *Certain Steel Concrete Reinforcing Bars from Turkey*, 73 Fed. Reg. 66,218 (Dep't of Commerce Nov. 7, 2008) (Commerce will not use GAAP-compliant records if they are not reasonable)). Because the fair value adjustment to Araupel's unharvested forests is unrelated to the cost of production for merchandise under consideration produced during the period of investigation, the Coalition maintains, Commerce erred in including this adjustment to Araupel's reported costs. *Id.* at 39–40.

Commerce has discretion over how the costs of production under 19 U.S.C. § 1677b(f)(1)(A) are to be calculated in an investigation or review. *See Dongbu Steel Co. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1377, 1385 (2015). Moreover, the U.S. Court of Appeals for the Federal Circuit has opined that "failure to account for inventory holding time during a period of rising costs is unreasonable," albeit under the particular facts of *Thai Pineapple Canning Industry Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001).

In this case, Commerce's G&A expense calculation was reasonable because the adjustment was included in Araupel's audited financial statements that were found to be compliant with Brazilian GAAP, and record evidence did not demonstrate that the financial state-

ments were distortive or did not reasonably reflect the cost of producing and selling the merchandise. Because substantial evidence supports Commerce's determination to adjust Araupel's reported G&A expenses, and the adjustment in compliance with Brazilian GAAP was in accordance with the law, the Court sustains Commerce's determination.

IV. Calculation of Imputed Credit Expenses and Inventory Carrying Costs

Commerce may make a "circumstance of sale" adjustment to normal value in antidumping calculations to account for differences in credit terms between sales made in the home and U.S. markets. *See* 19 U.S.C. § 1677b(a)(6)(C)(iii). To calculate U.S. credit expenses and inventory carrying costs for purposes of this adjustment, Commerce normally relies on the interest rate for the respondent's short-term borrowings in U.S. dollars. *See* Import Administration, Policy Bulletin 98.2 (Feb. 23, 1998), available at https://access.trade.gov/Resources/policy/bull98_2.htm. When the respondent does not have any such short-term borrowings, Commerce uses "the Federal Reserve's weighted-average data for commercial and industrial loans maturing between one month and one year from the time the loan is made." *Id.* Commerce has determined that such data meets three criteria applicable to the selection of a short-term borrowing rate: the data are (1) reasonable, (2) readily obtainable and predictable, and (3) reflect "a short-term interest rate actually realized by borrowers in the course of 'usual commercial behavior' in the United States." *Id.* Policy Bulletin 98.2 contains a link for such data to the Federal Reserve's Survey of Terms of Business Lending ("Survey of Terms of Business Lending"), indicating that this survey constitutes the appropriate source for such data. *See id.*

Araupel reported that it had no qualifying short-term U.S. dollar borrowings during the period of investigation from which Commerce could derive appropriate U.S. credit and inventory carrying cost expenses. *See* Final IDM at 49; *see also* Araupel's Sections B and C Questionnaire Resp. (May 6, 2020) ("Araupel BCQR") at C-53-C-55, PR 192. Araupel reported these expenses based on a 2.16 percent interest rate derived from rates published by the Federal Reserve Bank of New York for federal funds market transactions. Araupel BCQR at Ex. C-17.⁸ The Coalition argued that the rate utilized by Araupel was inappropriate, and that the company should use a 5.73

⁸ "The federal funds market consists of domestic unsecured borrowings in U.S. dollars by depository institutions from other depository institutions and certain other entities, primarily government-sponsored enterprises." *See* Effective Federal Funds Rate, Fed. Rsvv. Bank of N.Y., available at: <https://apps.newyorkfed.org/markets/autorates/fed%20funds>.

percent interest rate derived from the Federal Reserve's Small Business Lending Survey ("Small Business Lending Survey"). CAMP's Comments Araupel's Section C Questionnaire Resp. (May 20, 2020) at 21–23, PR 205–06. The Coalition explained that in Policy Bulletin 98.2, Commerce had indicated that appropriate short-term lending rates for calculating imputed credit expenses were those derived from the Survey of Terms of Business Lending and that the Federal Reserve had replaced the Survey of Terms of Business Lending with the Small Business Lending Survey in 2018. *Id.* at 22, Ex. 2. The Coalition argued that Araupel should revise its reporting based on the Small Business Lending Survey rate, and it provided Small Business Lending Survey data for each quarter of the period of investigation. *Id.* at 22, Ex. 1.

Commerce evidently agreed that Araupel's original reporting was not appropriate, issuing a supplemental questionnaire instructing Araupel to revise its reporting. Araupel's Suppl. Sections A and C Questionnaire Resp. (July 6, 2020) ("Araupel SACQR") at SAC-38, SAC-41, PR 280–84. In making this request, however, Commerce referred to the defunct Survey of Terms of Business Lending rather than the Small Business Lending Survey. *Id.* at SAC-38. Araupel did not revise its reporting, stating that the Survey of Terms of Business Lending had been discontinued. *Id.* Araupel also argued that the Small Business Lending Survey did not provide an appropriate rate because it related to loans to small businesses, and Araupel was not a small business. *Id.* at SAC-38–SAC-39, SAC-41.

In its preliminary determination, Commerce relied on the 2.16 percent interest rate reported by Araupel to derive credit expenses and inventory carrying costs. *See* Final IDM at 50. The Coalition argued in its case brief that this rate was inconsistent with Policy Bulletin 98.2, which specifically referred to the Small Business Lending Survey's predecessor survey as an appropriate source of rates. CAMP's Case Br. at 52–53. The Coalition also pointed out that the Small Business Lending Survey, like the Survey of Terms of Business Lending, was based on interest rates charged for "commercial and industrial loans made by all commercial banks." *Id.* at 53. Further, the Coalition argued that the 5.73 percent Small Business Lending Survey rate was consistent with the short-term borrowing rate reported by BrasPine (with which Araupel was ultimately collapsed). *Id.*; *see* Final IDM at 9–17. In its *Final Determination*, Commerce continued to rely on the 2.16 percent interest rate, characterizing it as a "published U.S. dollar short-term borrowing rate." Final IDM at 50.

The Coalition argues here that Commerce should not have used the Federal Reserve Bank of New York's 2.16 percent interest rate because the Small Business Lending Survey's 5.73 percent interest rate is "consistent with" and "very similar" to the 5.28 percent interest rate used for BrasPine. Pl.'s Br. at 44. The Federal Reserve Bank of New York short-term interest rate is unreasonable, the Coalition contends, because: (1) "the rate does not correspond to 'data for commercial and industrial loans,'" (2) the Federal Reserve Bank of New York data pertains to loans data collected from depository institutions and "the record does not indicate that Araupel is a 'depository institution,'" and (3) Commerce collapsed Araupel with BrasPine and "used different imputed credit interest rates for what Commerce itself has found to be a single company." *Id.* at 42–44. Commerce determined that the Small Business Lending Survey data meets the criteria of Policy Bulletin 98.2 in *Polyethylene Terephthalate Sheet from the Republic of Korea* ("PET Sheet"), 85 Fed. Reg. 44,276 (Dep't of Commerce July 22, 2020) and in *4th Tier Cigarettes from the Republic of Korea* ("Korean Cigarettes"), 85 Fed. Reg. 79,994 (Dep't of Commerce Dec. 11, 2020), and the Coalition argues that Commerce should similarly have used the Small Business Lending Survey data to impute Araupel's credit expenses in this instance. Pl.'s Br. at 43–44.

Defendant argues that the Small Business Lending Survey data was based on a survey of loans to small businesses and that these small businesses were defined as companies with \$5 million or less in annual gross revenue. Def.'s Resp. at 42–43. Defendant asserts that because Araupel's annual revenue exceeded the \$5 million threshold, Commerce concluded reasonably that applying the short-term interest rate from the Small Business Lending Survey data would be inappropriate. *Id.* Further, Defendant contends that Commerce is presumed to have adequately considered the issue and all the evidence in the record in making its decision. *Id.* (citing *Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 220, 237, 105 F. Supp. 2d 1363, 1378 (2000)). The absence of an explicit and comprehensive discussion does not satisfy the burden to rebut that presumption nor justify a remand on procedural grounds because Commerce's path to its decision is reasonably discernible. *Id.* at 43–44. Both options were publicly available information based on averages of rates for actual borrowers and reflective of usual commercial behavior, so the issue was simply which of the two options would be a reasonable reflection of Araupel's short-term borrowing. *Id.* at 44. Commerce decided that selection of the Small Business Lending Survey short-term interest rate was unreasonable (i.e., Policy Bulletin 98.2's first criterion) be-

cause the data pertained to loans issued to small businesses and Araupel did not fit the survey's description of a small business, according to Defendant. *Id.*

Defendant also argues that *PET Sheet* and *Korean Cigarettes* do not amount to an administrative "practice" of using the Small Business Lending Survey short-term interest rate to impute credit expenses denominated in U.S. dollars, nor do these administrative determinations indicate that Commerce has previously used the Small Business Lending Survey short-term interest rate to impute credit expenses for a respondent that is not the type of borrower that would be eligible to receive the rates compiled in the survey. Def.'s Resp. at 44–45. As to the Coalition's remaining arguments, Defendant contends that they are being raised for the first time and are not properly before the Court and that the arguments lack merit in any event because: (1) the Coalition has not demonstrated that the Federal Reserve Bank of New York short-term interest rate does not reflect what borrowers would receive in the course of "usual commercial behavior;" (2) the Federal Reserve Bank of New York data pertain to entities that would provide commercial loans and the Coalition offers no argument as to why the information collected from these depository institutions is not a reasonable surrogate for Araupel's U.S. dollar short-term borrowings; and (3) the argument that Commerce must use the same surrogate short-term interest rate to impute credit expenses for a collapsed entity does not favor the Coalition's position because Commerce did not use the Small Business Lending Survey short-term interest rate for BrasPine. *Id.* at 45.

The imputation of credit expenses "is based on the principle of the time value of money" and "must correspond to a dollar figure reasonably calculated to account for such value during the gap period between delivery and payment." *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460–61 (Fed. Cir. 1990). Commerce's policy guidance states that the seller "is effectively lending [the currency of the sale] to its purchaser between the time it ships the merchandise and the time it receives payment." Policy Bulletin 98.2. Commerce's policy is to calculate imputed credit expenses based on the weighted-average interest rate paid by the respondent for short-term loans in the currency of sale. *Id.* In cases when respondents have no U.S. short-term loans, Commerce uses the following criteria for determining a surrogate U.S. dollar short-term interest rate: (1) "the surrogate rate should be reasonable;" (2) "it should be readily obtainable and predictable;" and (3) "it should be a short-term rate actually realized by borrowers in the course of 'usual commercial behavior' in

the United States.” *Id.* The surrogate short-term interest rate is tied to the currency in which the sales are denominated and is based on publicly available information. *Id.* Policy Bulletin 98.2 announced that for U.S. dollar transactions, Commerce will generally use “the Federal Reserve’s weighted-average data for commercial and industrial loans maturing between one month and one year from the time the loan is made” because these rates meet the three criteria. *Id.*

In its *Final Determination*, Commerce stated that its selection between the two data sources of record was guided by the three criteria described above in Policy Bulletin 98.2, and Commerce concluded that the Small Business Lending Survey did not meet these criteria. Final IDM at 50. Specifically, Commerce determined that the Small Business Lending Survey’s data pertained to “loans *by* small businesses” and that Araupel was not a small business. *Id.* (emphasis added). The Coalition argues that Commerce’s statement regarding the Small Business Lending Survey data is incorrect, insisting that Commerce meant what it said, but at the same time, the Coalition admits that the Small Business Lending Survey data obviously pertained to loans *to* small businesses, not loans *by* small businesses. *See* Pl.’s Br. at 42; Pl.’s Reply at 20. The Court reads Commerce’s statement “loans *by* small businesses” as a harmless, typographical error because clearly the context here is that the Small Business Lending Survey data involves loans *to* small businesses rather than loans *from* small businesses. Commerce’s statement can also readily be interpreted to mean “loan proceeds taken by small businesses,” which would be consistent with the obvious intent of the *Final Determination*. The issue is whether Araupel is a small business or not, and whether the Small Business Lending Survey interest rate would thus apply to Araupel as a small business. Because Araupel’s annual revenue exceeded \$5 million, Araupel is ineligible to be considered a small business under the relevant definition, and the Court concludes that Commerce’s decisions not to use the Small Business Lending Survey interest rate and to use the 2.16 percent interest rate from the Federal Reserve Bank of New York were reasonable and in accordance with the law. The Court does not view the typographical error by Commerce to require a remand for clarification, given the context. The Court concludes that Commerce’s selection of the Federal Reserve Bank of New York’s interest rate was in accordance with the law.

CONCLUSION

In view of the foregoing, the Court sustains Commerce's *Final Determination* and denies Plaintiff's motion for judgment on the agency record. Judgment will be entered accordingly.

Dated: June 15, 2022

New York, New York

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

Slip Op. 22-69

NEXTEEL Co., LTD., Plaintiff, HYUNDAI STEEL COMPANY and SEAH STEEL CORPORATION, Consolidated Plaintiffs, and HYUNDAI STEEL COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 20-03868

[Sustaining the U.S. Department of Commerce's remand results in the 2017-2018 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: June 16, 2022

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OPINION

Choe-Groves, Judge:

Plaintiff NEXTEEL Co., Ltd. (“NEXTEEL”), Consolidated Plaintiff and Plaintiff-Intervenor Hyundai Steel Company (“Hyundai Steel”), and Consolidated Plaintiff SeAH Steel Corporation (“SeAH”), (collectively, “Plaintiffs”), challenged the final results in the 2017–2018 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (“Final Results”)*, 85 Fed. Reg. 71,055 (Dep’t of Commerce Nov. 6, 2020) (final results of antidumping duty administrative review; 2017–2018) and accompanying Issues & Decisions Mem. for the Final Results of the 2017–2018 Admin. Review of the Antidumping Duty Order on Circular Non-Alloy Steel Pipe from the Republic of Korea (“Final IDM”), PR 247.¹

Before the Court are the [Amended] Final Results of Redetermination Pursuant to Court Order (“*Remand Results*”), ECF No. 54–1, which the Court ordered in *NEXTEEL Co. v. United States (“NEXTEEL”)*, 45 CIT ___, 540 F. Supp. 3d 1320 (2021). Defendant-Intervenors Wheatland Tube Company and Nucor Tubular Products Inc. (collectively, “Defendant-Intervenors” or “Def.-Intervs.”) filed comments stating that the *Remand Results* comply with the Court’s order. Def.-Intervs.’ Comments Partial Opp’n Remand Redetermination (“Def.-Intervs.’ Cmts.”) at 1, ECF No. 56. NEXTEEL filed comments indicating partial opposition to the *Remand Results* because the Court’s prior decision held that the particular market situation determination made by the U.S. Department of Commerce (“Commerce”) was contrary to the law but Commerce continued to find on remand that a particular market situation existed in Korea during the period of review. NEXTEEL’s Remand Comments (“NEXTEEL’s Cmts.”) at 1–4, ECF No. 57.

Defendant United States (“Defendant”) filed its response in support of the *Remand Results*. Def.’s Resp. Comments Remand Redetermination (“Def.’s Cmts.”), ECF No. 59. Hyundai Steel filed comments expressing general support for the *Remand Results* and opposition in part. Hyundai Steel’s Comments Commerce’s Remand Redetermination (“Hyundai Steel’s Cmts.”) at 2, ECF No 60.

For the following reasons, the Court sustains the *Remand Results*.

¹ Citations to the remand administrative record reflect the public record (“PR”) document numbers filed in this case, ECF No. 46.

BACKGROUND

The Court assumes familiarity with its previous opinion and recites the facts relevant to review of the *Remand Results*. See generally *NEXTEEL*, 45 CIT __, 540 F. Supp. 3d 1320. Commerce interpreted Section 504 of the Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 114–27, § 504, 129 Stat. 362, 385, to confer discretion to adjust input purchase prices of producers for calculating cost of production as part of the sales-below costs test of 19 U.S.C. § 1677b(b)(1). In its *Final Results*, Commerce determined that a particular market situation existed that distorted the costs of Korean producers of subject merchandise based on the totality of four factors: (1) Korean subsidies of hot-rolled steel coil; (2) Korean imports of hot-rolled steel coil from the People’s Republic of China; (3) strategic alliances between Korean hot-rolled steel coil producers and CWP producers; and (4) distortions in the Korean electricity market. *NEXTEEL*, 45 CIT at __, 540 F. Supp. 3d at 1328 (citing Final IDM at 8; Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2017–2018 (Jan. 9, 2020) at 12, PR 203). After reviewing the language of Section 1677b (as amended) and other provisions and case law, the Court concluded that Congress did not authorize Commerce to adjust the cost of production as an alternative calculation methodology when using normal value based on home market sales under Section 1677b(e) because Section 504 of the TPEA did not amend Section 1677b(b), which sets out the calculation of the cost of production for the sales-below-cost test to determine whether and which sales should be disregarded as outside the ordinary course of trade when normal value is based on home market sales. *Id.* at __, 540 F. Supp. 3d at 1328–29. Commerce’s particular market situation adjustment to the cost of production was therefore not in accordance with the law, and the Court remanded the *Final Results* for reconsideration of Commerce’s particular market situation determination and adjustment. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court’s remand order. *Ad Hoc*

Shrimp Trade Action Comm. v. United States, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

NEXTEEL “fully supports Commerce’s determination to remove any element of a particular market situation adjustment to the calculation of NEXTEEL’s costs,” which NEXTEEL argues “is the only possible reasonable outcome under the statute and the only outcome that would accord with the remand order,” NEXTEEL’s Cmts. at 2 (citing *NEXTEEL*, 45 CIT at __, 540 F. Supp. 3d at 1328, 1329), but it objects to Commerce’s continued finding on remand that a particular market situation existed in Korea during the period of review, *id.* at 4. NEXTEEL contends that that determination is contrary to the Remand Order. *Id.* NEXTEEL contends further that Commerce’s particular market situation determination is unreasonable and unsupported by substantial record evidence in any event, but also recognizes that the issue of Commerce’s particular market situation determination is moot when the court concludes that the statute does not permit a particular market situation adjustment. *Id.* at 3–4 (quoting *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 45 CIT __, __, 494 F. Supp. 3d 1365, 1371 (2021) (“Because a [particular market situation] adjustment is not permitted for the purposes of the sales-below-cost test, any claims relating to . . . Commerce’s determination that a [particular market situation] existed are now mooted.”)).

Defendant requests that the Court sustain the *Remand Results* and enter judgment. Defendant contends that because the Court did not consider whether Commerce’s particular market situation determination is supported by substantial evidence on the record, “on remand Commerce continued to find that substantial evidence supported its particular market situation determination when calculating the cost of production where normal value is based on constructed value, in accordance with 19 U.S.C. § 1677b(e).” Def.’s Cmts. at 3 (citing, *inter alia*, *Remand Results* at 3). However, “[b]ecause all of Commerce’s normal value calculations were based on home market sales, Commerce complied with this Court’s order and recalculated the weighted-average dumping margins for the respondents without making a cost-based particular market situation adjustment.” *Id.* at 4 (citing *Remand Results* at 3).

Defendant-Intervenors disagree with the Court’s holding that the statute does not permit an adjustment to the cost of production to account for a particular market situation when normal value is based on home market sales, and they disagree with this aspect of Com-

merce's remand determination. Def.-Intervs.' Cmts. at 1. Defendant-Intervenors "recognize, however, that Commerce had no choice but to comply with this Court's order ... [and] support Commerce's decision to submit the remand determination under respectful protest." *Id.* (citing *Remand Results* at 5).

Regarding the comments in opposition to the *Remand Results*, Defendant argues that:

[a]lthough Commerce acknowledges the Court has held that Commerce's determination to apply a particular market situation adjustment for purposes of the sales-below-cost test is unlawful, because the Court did not reach the threshold issue of whether substantial evidence supports a particular market situation, Commerce has continued to find that its particular market situation finding is supported by substantial evidence.

Def.'s Cmts. at 5 (citing *Remand Results* at 6).

Commerce on remand may still claim to have had, as a matter of law, "discretion" to examine whether a particular market situation existed in Korea, but that is only relevant when normal value is based on constructed value—which, under the circumstances, was not this case. The U.S. Court of Appeals for the Federal Circuit recently affirmed that "the 2015 amendments to the antidumping statute do not authorize Commerce to use the existence of a [particular market situation] as a basis for adjusting a respondent's costs of production to determine whether a respondent has made home market sales below cost." *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1348 (Fed. Cir. 2021); *see id.* at 1356. In addition, the U.S. Court of Appeals for the Federal Circuit confirmed that Congress intended a particular market situation adjustment only for constructed value but not for calculations of the cost of production, which impacts the sales-below-cost test of 19 U.S.C. § 1677b(b). *Id.* at 1352–53; *see Husteel Co. v. United States*, 44 CIT __, 426 F. Supp. 3d 1376, 1387–88 (2020).

The Court need not waste its or the Parties' resources any further by delving into the question of whether Commerce's particular market situation determination on remand is supported by substantial evidence, as that point is moot in light of the U.S. Court of Appeals for the Federal Circuit's opinion in *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1348 (Fed. Cir. 2021).

CONCLUSION

Because the Court concludes that the *Remand Results* comply with the Court's remand order, the Court sustains the *Remand Results*. Judgment will be entered accordingly.

Dated: June 16, 2022
New York, New York

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

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