

U.S. Customs and Border Protection



19 CFR PART 177

REVOCAION OF TWO RULING LETTERS, MODIFICATION OF A RULING LETTER, AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DIGITAL BLOOD PRESSURE MONITORS

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

ACTION: Notice of revocation of two ruling letters, modification of a ruling letter, and revocation of treatment relating to the tariff classification of digital blood pressure monitors.

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 two ruling letters and modifying a ruling letter concerning tariff classification of digital blood pressure monitors 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. 54, No. 38, on September 30, 2020. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 17, 2021.

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. 54, No. 38, on September 30, 2020, proposing to revoke two ruling letters and modify a ruling letter pertaining to the tariff classification of digital blood pressure monitors. 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 HQ 952720 and NY 884125, CBP classified digital blood pressure monitors in subheading 9018.90, HTSUS, specifically in subheading 9018.90.50, HTSUS, which provides for "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Optical instruments and appliances and parts and accessories thereof". CBP has reviewed HQ 952720 and NY 884125 and has determined the ruling letters to be in error. It is now CBP's position that digital blood pressure monitors are properly classified in subheading 9018.19, HT-

SUS, specifically in subheading 9018.19.95, HTSUS, which provides for “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other”. CBP has also reviewed HQ 961998 and has determined that it is in error with respect to specific language regarding the classification of merchandise under subheading 9018.19.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ 952720 and NY 884125, modifying HQ 961998, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H304293, 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 H304293

November 3, 2020

CLA-2 OT:RR:TCM: EMAIL H304293 ALS

CATEGORY: Classification

TARIFF NO.: 9018.19.95

PORT DIRECTOR

U.S. CUSTOMS AND BORDER PROTECTION

555 BATTERY STREET

P.O. BOX 2450

SAN FRANCISCO, CALIFORNIA 94126

RE: Revocation of HQ 952720 (December 2, 1992); Revocation of NY 884125 (April 19, 1993); Modification of HQ 961998 (May 7, 1999); Modification of HQ H271911 (June 23, 2017); Tariff classification of Digital Blood Pressure Monitors

DEAR SIR:

This letter is to inform you that we have reconsidered and revoked or modified the above-referenced rulings. HQ 952720 was in response to a request for internal advice that you submitted at the request of A&D Engineering, Inc. The ruling and this reconsideration addresses the legal tariff classification of Digital Blood Pressure Monitors (also referred to herein as "BPMs"). In the course of our review we found it necessary to also revoke another ruling and modify another ruling, as discussed 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 952720 and NY 884125, and to modify HQ H271911 was published on September 30, 2020, in Volume 54, Number 38 of the Customs Bulletin. One comment was received in response to this notice, which we will address below.

FACTS:

The facts as stated in HQ 952720 are as follows:

The merchandise in question are digital blood pressure machines, A&D Engineering Inc.'s Medical Division model numbers UA-731, UA-701, and UA-711. The machines which perform like sphygmomanometers, are electronic blood pressure measuring instruments which allow blood pressure readings to be taken without the use of a stethoscope. The machines contain a microphone which picks up the arterial pulsating sound and transforms it into an electrical impulse that controls the operation of the electronic devices in the manometer unit. All three models submitted operate on batteries.

Additionally, we note that the BPMs consist of a sleeve made of fabric and an electrical cord leading from the sleeve to a control unit of plastic housing. The sleeve is meant to fit around the user's arm and the control unit consists of two buttons for the power and start functions, a switch for various settings, and an LCD display screen that displays the measurements in numbers. Upon initiation of the measuring function, the sleeve inflates to tighten around the user's arm until measurements are detected, at which point the electrical impulse is sent to the control unit. Once the electrical impulse is sent, the sleeve deflates to loosen enough to be removed from the arm. Based

9018.90	Other instruments and appliances and parts and accessories thereof:
	Other:
9018.90.50	Sphygmomanometers, tensimeters and oscillometers; all the foregoing and parts and accessories thereof...

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 Explanatory Notes to heading 9018 states the following:

This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. Instruments and appliances for anatomical or autoptic work, dissection, etc., are also included, as are, under certain conditions, instruments and appliances for dental laboratories (see Part (II) below). The instruments of the heading may be made of any material (including precious metals).

There is no dispute that the subject BPMs are medical instruments of heading 9018, HTSUS. The threshold question here is whether or not they are other electro-diagnostic apparatus of subheading 9018.19, HTSUS.

As described above, the BPMs measure the blood pressure of the user and uses that measurement to create an electrical pulse that is transmitted to an electronic device, in these cases a control unit with an LCD screen that displays the measurement in numbers. The measurement of blood pressure is a type of diagnosis. It is clear from the description of the BPMs that they utilize electrical components in the performance of the diagnosis. Given such, we conclude that the subject BPMs are in fact electrical diagnostic medical instruments of subheading 9018.19, HTSUS. Our ruling in HQ 952720 is incorrect.

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter contends that because the word “sphygmomanometer”, which is referenced in the text of subheading 9018.90.50, HTSUS, is defined in Wikipedia as a “[d]igital instrument [that] uses a cuff that may be placed, according to the instrument, around the upper arm, wrist, or finger, in all cases elevated to the same height as the heart”, the subject BPMs should be classified as such because they meet the definition of a sphygmomanometer. The commenter also argues that the analysis of NY 952720, in which CBP stated “an *eo nomine* designation of an article, absent legislative intent or other contrary limitations, includes all forms of an article”, should apply in this instance.

Indeed, “[a]n *eo nomine* designation with no terms of limitation, will ordinarily include all forms of the named article.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (quoting *Hayes-Sammons Chem. Co. v. United States*, 55 C.C.P.A. 69, 75 (1968)). However, as stated above and in the proposed ruling the threshold question before us is whether the instant digital blood pressure monitors are *prima facie* classifiable under the provi-

sion for “electro-diagnostic apparatus”, which would result in classification under subheading 9018.19, HTSUS. This is the case because GRI 6, *supra*, specifies that “only subheadings at the same level are comparable”. Therefore, leaving aside that the definition of “sphygmomanometer” proffered by the commenter is not comprehensive*, comparing subheading 9018.90.50, HTSUS, with the provision for “electro-diagnostic appliances” (two levels of indentation superior) is incorrect.

Given the foregoing, we conclude that A&D Engineering Inc.’s Blood Pressure Monitors, model numbers UA-731, UA-701, and UA-711, are properly classified under subheading 9018.19, HTSUS. Specifically, they are properly classified under subheading 9018.19.95, HTSUS, as other electro-diagnostic apparatus.

Regarding NY 884125 (April 19, 1993), CBP ruled that the “Press Mate BP 8800P” blood pressure monitor is classified under subheading 9018.90.50, HTSUS, citing HQ 952720. Upon review of NY 884125, we find that the Press Mate BP 8800P is similar to the subject articles in that it is a machine meant to measure blood pressure, with a sleeve attached to a control unit via an electrical cord, and the control unit having a display screen and control buttons. As such, given our conclusion above, we conclude that NY 884125 is also incorrect. Incidentally, we note that the Press Mate BP 8800P appears to be intended for professional/commercial use, in contrast to the BPMs discussed above.

Regarding HQ 961998 (May 7, 1999), CBP ruled that the “Dinamap Compact Monitor”, which measured and displayed “a patient’s blood pressure, pulse, body temperature and pulse oximetry (SpO2)”, is classified under subheading 9018.19.55, HTSUS. In doing so, CBP concluded the following:

Since the [Dinamap Compact Monitor] is used in a professional setting to monitor various vital signs, not just blood pressure, it is Customs view that the DCM is not a sphygmomanometer as the instruments classified in HQ 952720 and HQ 082973.

Upon review, we find that the statement “used in a professional setting” is irrelevant to whether or not an article is classifiable under subheading 9018.19. We also find that the relative simplicity of an article, such as the subject articles, to the Dinamap Compact Monitor is irrelevant to whether or not an article is classifiable under subheading 9018.19. Therefore, we conclude that the quoted statement above from HQ 961998 should not be followed henceforth. This conclusion does not otherwise affect our ruling in HQ 961998; the remaining analysis and holding in HQ 961998 remain in effect.

HOLDING:

By application of GRI 1 and 6, A&D Engineering Inc.’s Blood Pressure Monitors, model numbers UA-731, UA-701, and UA-711, are properly classified under subheading 9018.19, HTSUS. Specifically, they are properly classified under subheading 9018.19.95, HTSUS, which provides for “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electro-diagnostic

* The Merriam-Webster dictionary defines “sphygmomanometer” as “an instrument for measuring blood pressure and especially arterial blood pressure”. *Merriam-Webster Online*, retrieved on November 3, 2020, from <https://www.merriam-webster.com/dictionary/sphygmomanometer>.

apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other: Other: Other...” The general column one 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 HQ 952720 (December 2, 1992) is hereby REVOKED.

CBP Ruling NY 884125 (April 19, 1993) is hereby REVOKED.

CBP Ruling HQ 961998 (May 7, 1999) is hereby MODIFIED as discussed in the LAW AND ANALYSIS section above.

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

Pursuant to U.S. Note 20(b) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9018.19.95, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, an importer must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 9018.19.95, HTSUS, noted above, for products of China.

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

Sincerely,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

AGENCY INFORMATION COLLECTION ACTIVITIES:

Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 30, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 50830) on August 18, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and af-

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: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release.

OMB Number: 1651-0013.

Form Number: CBP Form 7523

Current Actions: CBP proposes to extend the expiration date of this information collection. There is no change to the burden hours or the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 7523, *Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release*, is used by carriers and importers as a manifest for the entry of merchandise free of duty under certain conditions, such as when a shipment is valued at \$2,500 or less. CBP Form 7523 is also used by carriers to show that articles being imported are to be released to the importer or consignee, and as an inward foreign manifest for vehicles or vessels, weighing less than five tons, arriving from Canada or Mexico, otherwise than by sea, with merchandise conditionally free of duty. CBP uses this form to authorize the entry of such merchandise. CBP Form 7523 is authorized by 19 U.S.C. 1433, 1484 and 1498. It is provided for by 19 CFR 123.4 and 19 CFR 143.23. This form is accessible at <http://www.cbp.gov/newsroom/publications/forms?title=7523&=Apply>.

Estimated Number of Respondents: 4,950.

Estimated Number of Annual Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 99,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 8,250.

Dated: October 26, 2020.

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

[Published in the Federal Register, October 30, 2020 (85 FR 68906)]

AGENCY INFORMATION COLLECTION ACTIVITIES:**Drawback Process Regulations**

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. Comments are encouraged and must be submitted no later than December 29, 2020 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 1651-0075 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

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

(2) *Mail.* Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229-1177.

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: Drawback Process Regulations.

OMB Number: 1651-0075.

Form Number: CBP Form 7553.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The collections of information related to the drawback process are required as per 19 CFR part 190 (Modernized Drawback), which provides for refunds of duties, taxes, and fees for certain merchandise that is imported into the United States where there is a subsequent related exportation or destruction. All claims for drawback, sometimes referred to as TFTEA-Drawback, must be filed electronically in the Automated Commercial Environment (ACE), in accordance with the Trade Facilitation Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114-125, 130 Stat. 122), and in compliance with the regulations in part 190, 181 (NAFTA Drawback) and 182 (USMCA Drawback). Specific information on completing a claim is available in the drawback CBP and Trade Automated Interface Requirement (CATAIR) document at: <https://www.cbp.gov/document/guidance/ace-drawback-catair-guidelines>.

CBP Form 7553, Notice of Intent to Export, Destroy or Return Merchandise for Purposes of Drawback (NOI), documents both the exportation and destruction of merchandise eligible for drawback. The NOI is the official notification to CBP that an exportation or

destruction will occur for drawback eligible merchandise. The CBP Form 7553 has been updated to comply with TFTEA-Drawback requirements and is accessible at <http://www.cbp.gov/newsroom/publications/forms>.

Relevant Regulations and Statutes

Title 19, part 190—<https://ecfr.io/Title-19/Part-190>

19 U.S.C. 1313—<https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap4-subtitleII-partI-sec1313.pdf>

19 U.S.C. 1313 authorizes the information collected on the CBP form 7553 as well as in the ACE system for the electronic drawback claim.

The New Data Elements in ACE for Drawback include the following:

1. Substituted Value per Unit
2. Entry Summary Line Item Number
3. Bill of Materials/Formula
4. Certificate of Delivery/Drawback Eligibility Indicator
5. Import Tracing Identification Number (ITIN)
6. Manufacture Tracing Identification Number (MTIN)
7. Certification for Valuation of Destroyed Merchandise
8. Substituted Unused Wine Certification
9. Certification of Eligibility for AP and/ or WPN Privilege(s)
10. Identification of Accounting Methodology
11. Indicator for Notice of Intent to Export or Destroy
12. Indicator for Waiver of Drawback Claim Rights

New data elements added to the CBP Form 7553:

1. Continuation sheet (#15–19)
2. Line item number added (#15)
3. Rejected merchandise box added (#20)
4. Instructions were edited to comply with TFTEA-Drawback requirements

This collection of information applies to the individuals and companies in the trade community who are and are not familiar with drawback, importing and exporting procedures, and with the CBP regulations.

Please note that CBP Forms 7551 and 7552 are both abolished. From February 24, 2019, onward, TFTEA-Drawback, as provided for in part 190, is the only legal framework for filing drawback claims. No new drawback claims may be filed under the paper-based processes previously provided for in part 191 (Drawback). Sections 190.51, 190.52, and 190.53 provide the requirements to submit a drawback claim electronically. The provisions of part 190 are similar to the provisions in part 191, except where necessary to outline all the data elements for a complete claim (previously contained in CBP form 7551) and modify those requirements to comply with TFTEA-Drawback. CBP form 7552, Certificates of Delivery and Certificates of Manufacturing & Delivery will no longer be requested or accepted to demonstrate the transfer of merchandise. Sections 190.10 and 190.24 require that any transfers of merchandise must be evidenced by business records, as defined in section 190.2.

Type of Information Collection: CBP Form 7553 Notice of Intent to Export/ Destroy Merchandise.

Estimated Number of Respondents: 3,066.

Estimated Number of Annual Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 66,772.

Estimated Time per Response: 33 minutes (.55 hours).

Estimated Total Annual Burden Hours: 38,582.

Dated: October 27, 2020.

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

[Published in the Federal Register, October 30, 2020 (85 FR 68905)]

AGENCY INFORMATION COLLECTION ACTIVITIES:**Customs Regulations Pertaining to Customhouse Brokers**

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 30, 2020) to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 53013) on August 27, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four

points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of this Information Collection

Title: Customs Regulations Pertaining to Customhouse Brokers.

OMB Number: 1651-0034.

Form Number: 3124 and 3124E.

Current Actions: CBP proposes to extend the expiration date of this collection of information. There is no change to the burden hours or the information collected.

Type of Review: Extension (without change).

Affected Public: Customhouse Brokers.

Abstract: The information contained in Part 111 of the CBP regulations (19 CFR) governs the licensing and conduct of customs brokers. An individual who wishes to take the broker exam must complete the electronic application CBP Form 3124E, "Application for Customs Broker License Exam," or to apply for a broker license, CBP Form 3124, "Application for Customs Broker License." The procedures to request a local or national broker permit can be found in 19 CFR 111.19, and a triennial report is required under 19 CFR 111.30. This information collected from customs brokers is provided for by 19 U.S.C. 1641. CBP Forms 3124 and 3124E may be found at <http://www.cbp.gov/xp/cgov/toolbox/forms/>. Further information about the customs broker exam and how to apply for it may be found at <https://www.cbp.gov/trade/programs-administration/customs-brokers>.

Application for Broker License (Form 3124)

Estimated Number of Respondents: 750.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 750.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 750.

Application for Broker License Exam (Form 3124E)

Estimated Number of Respondents: 2,300.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,300.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,300.

Triennial Report

Estimated Number of Respondents: 4,550.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 4,550.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 2,275.

National Broker's Permit Application

Estimated Number of Respondents: 200.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 200.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 200.

Dated: October 27, 2020.

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

[Published in the Federal Register, October 30, 2020 (85 FR 68902)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing

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. Comments are encouraged and must be submitted (no later than December 29, 2020) 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 1651-0001 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

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

(2) *Mail.* Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229-1177.

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 Reduc-

tion 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: Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing.

OMB Number: 1651-0001.

Form Number: CBP FORM 1302, CBP FORM 1302A, CBP FORM 7509, CBP FORM 7533.

Current Actions: This submission is being made to extend the expiration date with a change to the burden hours.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: *CBP Form 1302:* The master or commander of a vessel arriving in the United States from abroad with cargo on board must file CBP Form 1302, *Inward Cargo Declaration*, or submit the information on this form using a CBP-approved electronic equivalent. CBP Form 1302 is part of the manifest requirements for vessels entering the United States and was agreed upon by treaty at the United Nations Inter-government Maritime Consultative Organization (IMCO). This form and/or electronic equivalent, is provided for by 19 CFR 4.5, 4.7, 4.7a, 4.8, 4.33, 4.34, 4.38, 4.84, 4.85, 4.86, 4.91, 4.93 and 4.99 and is accessible at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CBP%20Form%201302_0.pdf. Although the form has been mostly automated through the Automated Commercial Environment (ACE), there are still circumstances where a paper CBP Form 1302 is required due to not being captured in ACE.

CBP is working to automate the remaining use cases of the CBP for the CBP Form 1302 through the Vessel Entrance and Clearance System (VECS).

CBP Form 1302A: The master or commander of a vessel departing from the United States must file CBP Form 1302A, *Cargo Declaration Outward With Commercial Forms*, or CBP-approved electronic equivalent, with copies of bills of lading or equivalent commercial documents relating to all cargo encompassed by the manifest. This form and/or electronic equivalent, is provided for by 19 CFR 4.62, 4.63, 4.75, 4.82, and 4.87–4.89, and is accessible at: https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/CBP%20Form%201302A_0.pdf. Certain functions of the paper CBP Form 1302A that are not part of the automated export manifest process will also be automated through VECS.

Electronic Ocean Export Manifest: CBP began a pilot in 2015 to electronically collect the ocean export manifest information. This information is transmitted to CBP in advance via the Export Information System within the Automated Commercial Environment (ACE).

CBP Form 7509: The aircraft commander or agent must file Form 7509, *Air Cargo Manifest*, with CBP at the departure airport, or respondents may submit the information on this form using a CBP-approved electronic equivalent. CBP Form 7509 contains information about the cargo onboard the aircraft. This form, and/or electronic equivalent, is provided for by 19 CFR 122.35, 122.48, 122.48a, 122.52, 122.54, 122.73, 122.113, and 122.118 and is accessible at: http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207509_0.pdf.

Air Cargo Advance Screening (ACAS): As provided by 19 CFR 122.48b, for any inbound aircraft required to make entry that will have commercial cargo aboard, the inbound air carrier or other eligible party must transmit, via a CBP-approved electronic interchange system, specified advance data concerning the inbound cargo to CBP as early as practicable, but no later than prior to loading of the cargo onto the aircraft.

Electronic Air Export Manifest: CBP began a pilot in 2015 to electronically collect the air export manifest information. This information is transmitted to CBP in advance via the ACE's Export Information System.

CBP Form 7533: The master or person in charge of a conveyance files CBP Form 7533, *INWARD CARGO MANIFEST FOR VESSEL UNDER FIVE TONS, FERRY, TRAIN, CAR, VEHICLE, ETC*, which is required for a vehicle or a vessel of less than 5 net tons arriving in the United States from Canada or Mexico, otherwise than by sea,

with baggage or merchandise. Respondents may also submit the information on this form using a CBP-approved electronic equivalent. CBP Form 7533, and/or electronic equivalent, is provided for by 19 CFR 123.4, 123.7, 123.61, 123.91, and 123.92, and is accessible at: http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207533_0.pdf.

Electronic Rail Export Manifest: CBP began a pilot in 2015 to electronically collect the rail export manifest information. This information is transmitted to CBP in advance via the ACE's Export Information System.

Manifest Confidentiality: An importer or consignee (inward) or a shipper (outward) may request confidential treatment of its name and address contained in manifests by following the procedure set forth in 19 CFR 103.31.

Vessel Stow Plan: For all vessels transporting goods to the US, except for any vessel exclusively carrying bulk cargo, the incoming carrier is required to electronically submit a vessel stow plan no later than 48 hours after the vessel departs from the last foreign port that includes information about the vessel and cargo. For voyages less than 48 hours in duration, CBP must receive the vessel stow plan prior to arrival at the first port in the United States. The vessel stow plan is provided for by 19 CFR 4.7c.

Container Status Messages (CSMs): For all containers destined to arrive within the limits of a U.S. port from a foreign port by vessel, the incoming carrier must submit messages regarding the status of events if the carrier creates or collects a container status message (CSM) in its equipment tracking system reporting that event. CSMs must be transmitted to CBP via a CBP-approved electronic data interchange system. These messages transmit information regarding events such as the status of a container (full or empty); booking a container destined to arrive in the United States; loading or unloading a container from a vessel; and a container arriving or departing the United States. CSMs are provided for by 19 CFR 4.7d.

Importer Security Filing (ISF): For most cargo arriving in the United States by vessel, the importer, or its authorized agent, must submit the data elements listed in 19 CFR 149.3 via a CBP-approved electronic interchange system within prescribed time frames outlined in 19 CFR 149.2. Transmission of these data elements provide CBP with advance information about the shipment.

Type of Collection: Air Cargo Manifest (CBP Form 7509) Air Cargo Advanced Screening (ACAS).

Estimated Number of Respondents: 215.

Estimated Number of Annual Responses per Respondent: 6820,4651.

Estimated Number of Total Annual Responses: 1,466,400.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 366,600.

Type of Collection: Inward Cargo Manifest for Truck, Rail, Vehicles, Vessels, etc. (CBP Form 7533).

Estimated Number of Respondents: 33,000.

Estimated Numbers of Annual Responses per Respondent: 291.8.

Estimated Number of Total Annual Responses: 9,629,400.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 962,940.

Type of Collection: Cargo Declaration (CBP Form 1302).

Estimated Number of Respondents: 10,000.

Estimated Number of Annual Responses per Respondent: 300.

Estimated Number of Total Annual Responses: 3,000,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 1,500,000.

Type of Collection: Export Cargo Declaration (CBP Form 1302A).

Estimated Number of Respondents: 500.

Estimated Number of Annual Responses per Respondent: 400.

Estimated Number of Total Annual Responses: 200,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 10,000.

Type of Collection: Importer Security Filing.

Estimated Number of Respondents: 240,000.

Estimated Number of Annual Responses per Respondent: 33.75.

Estimated Number of Total Annual Responses: 8,100,000.

Estimated Time per Response: 2.19 hours.

Estimated Total Annual Burden Hours: 17,739,000.

Type of Collection: Vessel Stow Plan.

Estimated Number of Respondents: 163.

Estimated Number of Annual Responses per Respondent: 109.

Estimated Number of Total Annual Responses: 17,767.

Estimated Time per Response: 1.79 hours.

Estimated Total Annual Burden Hours: 31,803.

Type of Collection: Container Status Messages.

Estimated Number of Respondents: 60.

Estimated Number of Annual Responses per Respondent: 4,285,000.

Estimated Number of Total Annual Responses: 257,100,000.

Estimated Time per Response: .0056 minutes.

Estimated Total Annual Burden Hours: 23,996.

Type of Collection: Request for Manifest Confidentiality.

Estimated Number of Respondents: 5,040.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 5,040.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 1,260.

Type of Collection: Electronic Air Export Manifest.

Estimated Number of Respondents: 260.

Estimated Number of Annual Responses per Respondent: 5,640.

Estimated Number of Total Annual Responses: 1,466,400.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 121,711.

Type of Collection: Electronic Ocean Export Manifest.

Estimated Number of Respondents: 500.

Estimated Number of Annual Responses per Respondent: 400.

Estimated Number of Total Annual Responses: 200,000.

Estimated Time per Response: 1.5 minutes.

Estimated Total Annual Burden Hours: 5,000.

Type of Collection: Electronic Rail Export Manifest.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 300.

Estimated Number of Total Annual Responses: 15,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 2,490.

Dated: October 27, 2020.

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

[Published in the Federal Register, October 30, 2020 (85 FR 68903)]

U.S. Court of International Trade

Slip Op. 20–151

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant,
AND CALIFORNIA STEEL INDUSTRIES INC., AND STEEL DYNAMICS, INC.,
Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Court No. 19–00044

[Commerce’s *Remand Results* sustained in part and remanded in part.]

Dated: October 29, 2020

John M. Gurley and *Aman Kakar*, Arent Fox LLP, of Washington, DC, for Plaintiff Uttam Galva Steels Limited.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Roger B. Schagrin and *Christopher T. Cloutier*, Schagrin Associates of Washington, DC, for Defendant-Intervenors California Steel Industries, Inc. and Steel Dynamics, Inc.

OPINION and ORDER

Gordon, Judge:

This action involves the final results of the 2016 administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the countervailing duty (“CVD”) order of certain corrosion-resistant steel products from India. *See Certain Corrosion-Resistant Steel Products from India*, 84 Fed. Reg. 11,053 (Dep’t of Commerce Mar. 25, 2019) (final results admin. review) (“*Final Results*”); *see also* accompanying Issues and Decision Memorandum, C-533–864, PD¹ 193 (Dep’t of Commerce Mar. 18, 2019), *available at* <https://enforcement.trade.gov/frn/summary/india/2019–05647–1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court are Commerce’s Final Results of Redetermination Pursuant to Court Remand, ECF No. 34² (“*Remand Results*”), filed

¹ “PD” refers to a document in the public administrative record, which is found in ECF No. 20–3, unless otherwise noted. “CD” refers to a document in the confidential administrative record, which is found in ECF No. 20–2, unless otherwise noted.

² All citations to the *Remand Results*, the agency record, and the parties’ briefs are to their confidential versions unless otherwise noted.

pursuant to the court's remand order in *Uttam Galva Steels Ltd. v. United States*, 44 CIT ___, 358 F. Supp. 3d 1366 (2020) (“*Uttam Galva I*”). See Plaintiff's Comments on Remand Redetermination, ECF No. 39 (“Pl.’s Br.”); see also Defendant's Response to Comments on Remand Redetermination, ECF No. 41 (“Def.’s Resp.”); Defendant-Intervenors’ Responsive Comments in Support of the Remand Redetermination, ECF No. 40 (“Def.-Int.’s Resp.”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)³, and 28 U.S.C. § 1581(c) (2018). For the reasons follow, the court sustains in part and remands in part the *Remand Results*.

I. Background

Although the court assumes familiarity with the procedural history and its prior decision in this matter, some additional background will aid the reader. Commerce assigned adverse facts available (“AFA”) rates totaling 588.42% to Uttam Galva Steels Limited (“Uttam Galva” or “Plaintiff”) due to Uttam Galva’s failure to provide information about its affiliation with Lloyds Steel Industry Limited (“LSIL”). See *Final Results*, 84 Fed. Reg. at 11,054. Uttam Galva challenged, administratively and here, Commerce’s application of AFA with respect to the issues of affiliation and cross-ownership between Uttam Galva and LSIL, and Commerce’s calculation of AFA rates. See *Decision Memorandum* at 22–28; Compl., ECF No. 4.

Recognizing the merit of some of Uttam Galva’s claims, Commerce requested and received a voluntary remand to reconsider its determination of AFA rates with respect to the Market Access Initiative Program and the other four programs specially identified by Uttam Galva, but not for any other programs included in the *Final Results*. See *Uttam Galva I*, 44 CIT at ___, 358 F. Supp. 3d at 1373. In addition to granting the voluntary remand, the court sustained Commerce’s determination that Uttam Galva’s failure to disclose its affiliation with LSIL merited the application of AFA pursuant to 19 U.S.C. § 1677e. *Id.* at ___, 358 F. Supp. 3d at 1371 (“Plaintiff has failed to demonstrate that Commerce’s finding of cross-ownership was unreasonable.”). In remanding the calculation of AFA rates, the court declined to limit the scope of the remand to only those programs for which Commerce sought a voluntary remand. *Id.* at ___, 358 F. Supp. 3d at 1373–74.

Pursuant to the remand, Commerce revised Uttam Galva’s Market Access Initiative program rate downward from 16.63% to 6.06% and

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

excluded previously assigned rates for “(1) the Provision of Hot-Rolled Steel for LTAR, (2) SGUP Exemption for the Iron and Steel Industry, (3) SGUP Long-Term Interest Free Loans Equivalent to the Amount of VAT and CST Paid, and (4) SGUP’s Interest Free Loans.” *Remand Results* at 5–6. However, Commerce determined that it would continue to apply the same AFA rates to all the other remaining programs identified in the *Final Results* based on the adverse inference that Uttam Galva benefitted from all initiated programs. *Id.* at 6–7.

Uttam Galva now challenges Commerce’s continued assignment of AFA rates to the other remaining programs in the *Final Results*. Pl.’s Br. at 2. In particular, Uttam Galva contends that Commerce’s failed to explain the differences in its application of AFA under substantially similar factual circumstances to Uttam Galva as compared with mandatory respondent JSW Steel Limited (“JSW”) during the investigation segment of the underlying proceeding. *Id.* at 4–7. Plaintiff also argues that Commerce unreasonably attributed, as AFA, 20 subsidy programs (“20 disputed programs”) to LSIL, and by extension to Uttam Galva, despite information set forth in LSIL’s financial statement that indicates that LSIL could not have benefitted from these programs. *Id.* at 7–10. Specifically, Uttam Galva contends that LSIL (1) did not maintain facilities within the Indian States of Andhra Pradesh and Karnataka and could not have been in receipt of the 16 initiated programs specific to those territories (“geographically specific programs”), and (2) was not engaged in mining activities and could not have received four subsidies specific to that sector (“industry specific programs”). *Id.*

II. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being sup-

ported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2020). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2020).

III. Discussion

A. Application of Adverse Facts Available to All Programs Initiated

In the investigation segment of the underlying proceeding, Commerce selected two mandatory respondents: Uttam Galva and JSW. *See Certain Corrosion-Resistant Steel Products From India*, 81 Fed. Reg. 35,323 (Dep’t of Commerce June 2, 2016) (final affirm. determ.), and accompanying Issues and Decision Memorandum at 1, *available at* <https://enforcement.trade.gov/frn/summary/india/2016-12967-1.pdf> (last visited on this date). Commerce found that JSW failed to submit a response for a cross-owned input supplier (“Affiliate X”) and determined that the application of AFA was appropriate. *See id.* at 8–9. In applying AFA in calculating JSW’s subsidy rate, Commerce did not apply adverse inferences to all programs initiated upon during the investigation. *See id.* at 9. (“[W]e made an adverse inference that Affiliate X benefitted from all of the programs used by the other entities within the JSW group of companies that did properly submit questionnaire responses.”); *see also Remand Results* at 18 (“we acknowledge that we did not countervail all programs initiated upon when determining the subsidy rate for JSW”). In the administrative review at issue here, Commerce similarly found that Uttam Galva had failed to report the existence of an affiliate, LSIL, and determined that the application of AFA was appropriate. *See Decision Memorandum* at 24. In calculating Uttam Galva’s subsidy rate, however, Commerce did apply adverse inferences for *all* programs initiated upon with respect to LSIL. *Remand Results* at 18 (“while we acknowledge that we did not countervail all programs initiated upon when determining the subsidy rate for JSW in the investigation, as we explain below, this does not require us to deviate from our standard practice where companies fail to report all of their cross-owned entities in this segment of the proceeding...”).

In its comments on the draft remand redetermination, Uttam Galva argued that Commerce’s application of partial adverse facts available to JSW represented the agency’s consistent administrative practice. *See Remand Results* at 18. Further, Uttam Galva contended that Commerce unreasonably deviated from this practice when applying AFA to Uttam Galva. *See id.* at 17–18 (“Commerce’s calculation of Uttam Galva’s AFA rate in the *Final Results* constituted a change in agency policy because Commerce announced a new method of calculating a duty.”).

Commerce disagreed that its partial AFA application to JSW in the investigation segment demonstrated an established practice, and instead explained that application of AFA to Uttam Galva was in fact the agency’s consistent practice. *See Remand Results* at 18–19 (“Uttam Galva misstates agency practice... Commerce has applied AFA rates for all programs initiated upon in constructing a total AFA rate.”). Commerce identified “numerous CVD proceedings” where the agency “applied AFA rates for all programs initiated upon in constructing a total AFA rate.” *Id.* at 18. Commerce further explained why its different calculation of JSW’s AFA subsidy rate did not constitute agency practice, noting that an action only “becomes an ‘agency practice’ when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the [particular action] or procedure.” *Remand Results* at 20 (citing *SeAH Steel Vina Corp. v. United States*, 35 CIT ___, 182 F. Supp. 3d 1316 (2011) and *Huvis Corp. v. United States*, 31 CIT ___, 525 F. Supp. 2d 1370 (2007) (internal quotation marks omitted)). Given this explanation and analysis of prior determinations, Commerce concluded that its “treatment of Uttam Galva is entirely consistent with past practice.” *Remand Results* at 21.

After reviewing Commerce’s analysis in the *Remand Results*, Uttam Galva appears to have accepted this position. *See* Pl.’s Br. at 4 (“Commerce’s practice is to calculate an AFA rate for all programs when companies fail to report all their cross-owned entities.”). However, Uttam Galva now focuses its argument on Commerce’s failure to provide a reasoned explanation for the decision to calculate the AFA subsidy rates of JSW and Uttam Galva differently. *See id.* at 4–6. In rejecting Uttam Galva’s “practice” argument regarding its treatment of JSW, Commerce emphasized that the agency is “not bound by its determination in the investigation segment of this proceeding because the records of each segment are distinct.” *See Remand Results* at 18. Commerce stated that it is not required to “deviate from [its] standard practice where companies fail to report all of their cross-

owned affiliates in this segment of the proceeding.” *Id.*

Commerce’s analysis in the *Remand Results*, while clarifying the agency’s practice in the application of AFA, fails to explain why the agency found it appropriate to apply AFA differently for JSW than it did for Uttam Galva. Defendant-Intervenors, California Steel Industries and Steel Dynamics, Inc., attempt to provide a rationale for that differing treatment, arguing that “[JSW’s] circumstances are... easily distinguished from Uttam Galva’s.” See Def.-Int.’s Resp. at 2 (“The affiliate in the investigation was acquired through a broader transaction and operated as an affiliate during only the final two months of the period of investigation and was then closed down.”). Whatever the merits of Defendant-Intervenors’ argument, the court may not sustain Commerce’s determination on a rationale not provided by the agency. See *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”). While there may have been factual distinctions between the application of AFA to JSW in the investigation and the application of AFA to Uttam Galva in this review, Commerce failed to identify them and explain what distinguished Uttam Galva’s situation from that of JSW. See *Remand Results* at 18–21. The court therefore remands this issue so Commerce may provide a reasoned explanation for the differences in its application of AFA to JSW and Uttam Galva, and, if appropriate, reconsider its application of AFA to Uttam Galva. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (“[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.”), *aff’d*, 332 F.3d 1370 (Fed. Cir. 2003).

B. Commerce’s Examination of LSIL’s Financial Statement

Uttam Galva contends that Commerce’s inclusion of the “20 disputed programs” within its rate calculation was unreasonable. See Pl.’s Br. at 7–10. Uttam Galva argues that Commerce improperly ignored and dismissed LSIL’s financial statement as an “incomplete and unreliable source.” *Id.* at 10. Uttam Galva maintains that the LSIL financial statement comprises conclusive proof that LSIL does not have facilities outside of Maharashtra. *Id.* at 8–9 (arguing against Commerce’s inclusion of geographically specific programs in AFA rate

calculation). Uttam Galva also argues that the statement demonstrates that LSIL does not manufacture goods whose production could utilize mining subsidies related to the “purchase of high-grade iron ore, captive mining rights for iron ore and coal and mine allotments for less than adequate remuneration.” *Id.* at 8, 10 (challenging Commerce’s inclusion of industry specific programs in AFA rate calculation). Accordingly, Uttam Galva maintains that LSIL could not have benefitted from the 20 disputed programs. *Id.* at 9–10.

Commerce rejected Plaintiff’s argument that the LSIL financial statement demonstrated that LSIL (and thus Uttam Galva) could not have benefitted from the 20 disputed programs. *See Remand Results* at 23. Commerce explained that it did not find the LSIL financial statement to provide a sufficiently reliable basis to conclude that LSIL could not have benefitted from the 20 disputed programs, stating that the LSIL financial statement did not “provide a definitive listing of LSIL’s business activities or where LSIL conducted those business activities.” *Id.* at 25. Moreover, Commerce noted that the provision of such a statement “does not substitute for a respondent’s obligation to respond to Commerce’s questions on business activities/location...” and that “Commerce... had no opportunity to pursue these lines of inquiry due to Uttam Galva’s failure to fully cooperate.” *Id.*

Given this record, the court does not agree with Uttam Galva that Commerce acted unreasonably by including the 20 disputed programs in Uttam Galva’s AFA rate calculation. The court has already sustained Commerce’s decision to apply AFA to Uttam Galva for its failure to provide complete and accurate information regarding its affiliation with LSIL. *See Uttam Galva I*, 44 CIT at ___, 358 F. Supp. 3d at 1372. Commerce reasonably explained why it found that the LSIL financial statement did not conclusively provide a full account of LSIL’s geographic presence and sectoral activities. *Remand Results* at 25. Plaintiff’s arguments fail to demonstrate that the LSIL financial statement could lead Commerce to reach “one and only one reasonable outcome” on this administrative record, namely that LSIL could not have benefitted from the 20 disputed programs. *See Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1062, 1071 (2016) (noting that plaintiff must demonstrate that its preferred evidentiary finding is “the one and only one reasonable” outcome on the administrative record, “not simply that [its preferred finding] may have constituted another possible reasonable choice”). Accordingly, the court sustains as reasonable Commerce’s determination to include the 20 disputed programs in Uttam Galva’s AFA rate calculation.

IV. Conclusion

Accordingly, for the foregoing reasons it is hereby

ORDERED that Commerce's decision to include the 20 disputed programs within the AFA rate calculation for Uttam Galva is sustained; it is further

ORDERED that this matter is remanded for Commerce to further explain, and if appropriate, reconsider its application of AFA to Uttam Galva as compared to JSW; it is further

ORDERED that Commerce shall file its remand results on or before December 22, 2020; and it is further

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

Dated: October 29, 2020

New York, New York

/s/ Leo M. Gordon

JUDGE LEO M. GORDON

Slip Op. 20–154

UNITED STATES, Plaintiff, v. NYWL ENTERPRISES INC., Defendant.

Before: Mark A. Barnett, Judge
Court No. 16–00257

[Plaintiff's motion for the entry of default judgment is denied.]

Dated: October 30, 2020

Jason M. Kenner, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for Plaintiff United States. With him on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Steven J. Holtkamp*, Staff Attorney, Office of Chief Counsel, U.S. Customs and Border Protection, of Chicago, IL.

OPINION AND ORDER**Barnett, Judge:**

This matter is before the court following Plaintiff United States' ("Plaintiff" or "the Government") motion for the entry of default judgment. *See* Pl.'s Mot. for Entry of Default J. ("Pl.'s Mot."), ECF No. 35. Plaintiff alleges that Defendant, NYWL Enterprises Inc. ("NYWL"), fraudulently misclassified 107 entries of imported Siamese coaxial cable in violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012).¹ *See* Compl. ¶¶ 1–23, 34–35, Ex. A, ECF No. 2. The Government seeks to recover unpaid duties and post-judgment interest and enforce a monetary penalty. *See id.* ¶¶ 19–23, 34–35; Pl.'s Mot. at 16. For the following reasons, the court denies Plaintiff's motion.

BACKGROUND**I. Plaintiff's Allegations**

NYWL is a New York corporation. Compl. ¶ 4. During the events relevant to this action, Mr. Dian He was NYWL's Chief Executive Officer. *Id.*² Between March 4, 2011, and February 16, 2012, NYWL and Mr. He made 107 entries of merchandise consisting of Siamese

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, which was in effect when most of the subject entries were made, and which is the same in all relevant respects to the 2012 edition.

² Plaintiff initially named Mr. He as a defendant in this case. *See generally* Summons, ECF No. 1; Compl. The Government subsequently dismissed Mr. He as a defendant in the action after it was unable to serve process upon him in the United States. *See, e.g.*, [Tenth] Mot. to Extend Time for Domestic Service Pursuant to USCIT Rule 4(l), ECF No. 26; Notice of Dismissal as Against Dian He ("He Dismissal"), ECF No. 29.

coaxial cable through the Port of Chicago, Illinois. *Id.* ¶ 5, Ex. A. Entry documentation listed the cable as either: (1) cored wire of base metal for electric arc welding pursuant to subheading 8311.20.00 of the Harmonized Tariff System of the United States (“HTSUS”) dutiable at zero percent; (2) winding wire pursuant to 8544.11.0050, HTSUS, dutiable at 3.5 percent *ad valorem*; or (3) insulated wire of a kind used for telecommunications pursuant to 8544.49.10, HTSUS, dutiable at zero percent. *Id.* ¶¶ 6–7. However, “[t]he subject Siamese coaxial cable was properly classifiable . . . under subheading 8544.20.00, HTSUS, as coaxial cable and other coaxial electric conductors,” *id.* ¶ 6, dutiable at the rate of 5.3 percent *ad valorem*, *id.* ¶ 7. NYWL and Mr. He “knew the merchandise consisted of Siamese coaxial cable” that NYWL’s customer “was purchasing . . . for use in closed-circuit television systems.” *Id.* ¶ 6.

On December 5, 2011, U.S. Customs and Border Protection’s (“CBP” or “Customs”) computer system identified an NYWL entry for “a routine inquiry.” *Id.* ¶ 8. On December 8, 2011, “in response to a request from CBP, NYWL’s customs broker provided an entry with attached commercial invoice describing the merchandise as [closed circuit television] cable and not as cored wire of base metal for electric arc welding.” *Id.* This information resulted in CBP’s discovery of the extent of NYWL’s classification violations. *See id.*

On February 22 and 23 of 2016, “CBP issued pre-penalty notices to NYWL and Mr. He.” *Id.* ¶ 13. These notices “identified a total loss of revenue of \$470,008.75 and an actual loss of revenue of \$379,665.83 relating to the misclassification of the Siamese [coaxial] cable.” *Id.* Relevant here, the notices further “proposed a culpability level of fraud and a corresponding penalty, jointly and severally against NYWL and Mr. He in the amount of \$3,760,070.00[,] equal to eight times the loss of revenue.” *Id.* “Neither Mr. He nor NYWL responded to the pre-penalty notice[s].” *Id.* ¶ 14. On March 4, 2016, CBP issued a duty demand for \$379,665.83 and a penalty notice in the amount of \$3,760,070.00 for fraudulent misclassification. *Id.* ¶ 15. “Neither Mr. He nor NYWL responded.” *Id.* ¶ 16.

II. Procedural History

On December 7, 2016, Plaintiff commenced this action through the concurrent filing of the Summons and Complaint. *See* Summons; Compl. Plaintiff seeks, *inter alia*, \$379,665.83 in unpaid duties, Compl. ¶ 35, and a penalty in the amount of \$3,760,070.00 (equal to eight times the total lost revenue) plus interest, *id.* ¶ 21.

The Government effected service upon NYWL through the New York Secretary of State on March 7, 2017. Certificate of Service, ECF No. 4. As noted, on May 18, 2020, the Government dismissed its claims against Mr. He. *See* He Dismissal. On June 23, 2020, the Government requested, and the clerk entered, an entry of default against NYWL for its failure to respond to the Complaint. Request for Entry of Default, ECF No. 31; Entry of Default, ECF No. 32. On August 5, 2020, the Government filed the pending motion for the entry of default judgment. *See* Pl.’s Mot.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 28 U.S.C. § 1582. A case arising pursuant to 28 U.S.C. § 1582 is reviewed *de novo*. 28 U.S.C. § 2640(a)(6).

U.S. Court of International Trade (“USCIT”) Rule 55 “provides a two-step process for obtaining judgment when a party fails to plead or otherwise defend—(1) entry of default followed by (2) entry of a default judgment.” *United States v. Six Star Wholesale, Inc.*, 43 CIT ___, ___, 359 F. Supp. 3d 1314, 1318 (2019); *see also* USCIT Rule 55(a)–(b).

When, as here, the defendant has defaulted pursuant to USCIT Rule 55(a), “it admits all well-[pleaded] factual allegations contained in the complaint,” *Six Star*, 359 F. Supp. 3d at 1318, “but it does not admit legal claims,” *United States v. Santos*, 36 CIT 1690, 1693, 883 F. Supp. 2d 1322, 1326 (2012); *see also United States v. Scotia Pharms. Ltd.*, 33 CIT 638, 642 (2009) (“[A] party in default does not admit mere conclusions of law.”) (citation omitted). Thus, before entering judgment by default, the court must first ensure that the factual allegations in the Government’s Complaint “establish [NYWL’s] liability as a matter of law.” *Six Star*, 359 F. Supp. 3d at 1319; *see also Santos*, 36 CIT at 1693 n.4, 883 F. Supp. 2d at 1326 n.4 (“[T]he court will not grant default judgment on the basis of a complaint that is insufficiently [pleaded].”). Moreover, “a default does not concede the amount demanded,” and the court must “ensure that there is an adequate evidentiary basis for any relief awarded.” *United States v. Puentes*, 41 CIT ___, ___, 219 F. Supp. 3d 1352, 1358 (2017) (citation omitted).

The Government seeks judgment by default in connection with its fraudulent importation claim. Pl.’s Mot. at 16. Thus, the court’s review of Plaintiff’s complaint implicates USCIT Rule 9(b), which requires a party alleging fraud to state the circumstances constituting the fraud with particularity, while intent or knowledge “may be al-

leged generally.” See USCIT Rule 9(b); *United States v. Greenlight Organic, Inc.*, Slip Op. 20–100, 2020 WL 3970176, at *2 (CIT July 14, 2020) (applying USCIT Rule 9(b) to a penalty enforcement action based on fraud). These circumstances include “the who, what, when, where, and how of the alleged fraud.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009) (citation omitted) (examining the analogous Federal Rule of Civil Procedure (“FRCP”) 9(b)); see also *United States v. Univar USA, Inc.*, 40 CIT ___, ___, 195 F. Supp. 3d 1312, 1317 (2016) (noting that the court may refer to cases interpreting the analogous FRCP for guidance).³

DISCUSSION

In examining a penalty enforcement action, “the court must consider both whether the penalty imposed has a sufficient basis in law and fact, and whether Customs accorded the [importer] all the process to which [it] is entitled by statute and regulation.” *Puentes*, 219 F. Supp. 3d at 1357.

Relevant here, section 1592 bars the fraudulent entry or introduction of merchandise into the commerce of the United States by means of a materially false statement or material omission. See 19 U.S.C. § 1592(a)(1)(A). A statement is considered material if it has the tendency to influence agency action including determination of the classification of merchandise. 19 C.F.R. pt. 171, app. B(B). Thus, the asserted classification of merchandise in entry paperwork “constitutes a material statement under the statute.” *United States v. Optrex Am., Inc.*, 32 CIT 620, 631, 560 F. Supp. 2d 1326, 1336 (2008). A violation is fraudulent when the “material false statement . . . was

³ The *Scotia Pharmaceuticals* court queried, but ultimately did not need to resolve, whether the heightened pleading standard stated in USCIT Rule 9(b) applies to a motion for default judgment. 33 CIT at 643–44 (noting disagreement among certain courts as to whether a defendant waives the requirement by its failure to file a responsive pleading). USCIT Rule 9(b) states the heightened requirement for pleading a fraud-based claim, as compared to the general pleading rule set forth in USCIT Rule 8(a)(2) requiring “a short and plain statement of the claim showing that the pleader is entitled to relief.” See *Ashcroft v. Iqbal*, 556 U.S. 662, 686–67 (2009) (explaining that allegations of scienter must comply with the requirements of FRCP 8(a)(2) if not those of FRCP Rule 9(b)). Challenges to the sufficiency of allegations sounding in fraud are properly framed as challenges to the plaintiff’s statement of a claim entitling the plaintiff to relief. See, e.g., *Greenlight*, 2020 WL 3970176, at *2. Because the defense of “failure to state a claim upon which relief can be granted” is not waived if not raised in a Rule 12 motion or a responsive pleading, see USCIT Rule 12(h)(1)–(2), the court does not consider USCIT Rule 9(b) effectively waived or otherwise inapplicable for purposes of resolving a motion for default judgment. See *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (reversing entry of default judgment on fraud claim when the complaint’s allegations did not meet the requirements of FRCP 9(b)); cf. *Larson Mfg. Co. of S.D. v. Am. Modular Housing Group, LLC*, 2018 WL 627185, at 3–*5 (D.S.D. Jan. 30, 2018) (finding that the defendants did not waive the opportunity to challenge the adequacy of the plaintiffs’ fraud-based allegations in a motion for judgment on the pleadings even though the objections were not raised in the defendants’ answers to the first and second amended complaints).

committed . . . knowingly, i.e., was done voluntarily and intentionally.” 19 C.F.R. pt. 171, app. B(C)(3). Section 1592 further requires CBP to issue a pre-penalty notice and penalty notice before commencing any enforcement action. 19 U.S.C. § 1592(b); *see also United States v. Int’l Trading Servs., LLC*, 40 CIT ___, ___, 190 F. Supp. 3d 1263, 1269 (2016) (discussing the procedures required for CBP to perfect its penalty claim at the administrative level).

While the Government’s Complaint states with particularity the facts regarding NYWL’s materially false statements and adequately alleges compliance with administrative procedural requirements, the Complaint lacks sufficient factual allegations demonstrating NYWL’s culpability for fraud.

With respect to the materially false statements, Plaintiff alleges that, from March 4, 2011, through February 16, 2012, NYWL made 107 entries of Siamese coaxial cable through the Port of Chicago, Illinois, that were accompanied by entry documentation reflecting incorrect HTSUS tariff provisions. Compl. ¶¶ 5–6. Exhibit A, attached to the Complaint and incorporated by reference, details, for each of the 107 entries at issue, the entry number and date, the classification declared by NYWL, and the correct classification. *See id.* ¶ 5, Ex. A; *cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (directing courts to consider “documents incorporated into the complaint by reference” when considering whether the complaint contains sufficient factual allegations to state a claim for relief). Plaintiff further specifies the difference between the duty rate reflected in each incorrect HTSUS provision and the higher duty rate provided for by the correct HTSUS provision, which resulted in the underassessment of duties by CBP. Compl. ¶¶ 7, 12. Taken together, Plaintiff’s factual allegations and the information contained in Exhibit A to the Complaint adequately specify both the falsity and the materiality of each of NYWL’s alleged misclassifications.

Plaintiff also adequately alleges the steps CBP took to perfect its claim administratively. Plaintiff alleges the dates on which it issued to NYWL and Mr. He pre-penalty notices and the contents of the notices respecting the actual and potential loss of revenue and levels of culpability and NYWL’s and Mr. He’s right to respond to the pre-penalty notice. *Id.* ¶ 13. Plaintiff further alleges the provision of a duty demand and a written penalty notice to Mr. He and NYWL. *Id.* ¶ 15.

Nevertheless, with respect to the culpability level of fraud, Plaintiff merely alleges that “[NYWL] knew the merchandise consisted of Siamese coaxial cable” to be used “in closed-circuit television sys-

tems,” *id.* ¶ 6, and, “[u]pon information and belief, the material false statements described . . . in paragraph 6 were committed, submitted, made, or caused by NYWL . . . voluntarily and intentionally,” *id.* ¶ 11. While knowledge may be alleged generally, *see* USCIT Rule 9(b), “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to meet even the more forgiving pleading standard of USCIT Rule 8, *Iqbal*, 556 U.S. at 678. Rather, Plaintiff must “include sufficient allegations of underlying facts from which a court may reasonably infer” NYWL’s knowledge of the falsity of the declared classification. *Exergen*, 575 F.3d at 1328; *see also In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1312 (Fed. Cir. 2011) (complaint did not meet the requirements of FRCP 9(b) when it contained “only generalized allegations rather than specific underlying facts from which [the court] can reasonably infer the requisite intent”).

Plaintiff’s Complaint lacks the factual allegations that would permit the court reasonably to infer that NYWL knowingly misclassified the 107 entries. At most, Plaintiff alleges that NYWL knew that the imported product would be “use[d] in closed-circuit television systems.” Compl. ¶ 6. Knowledge of the product’s use does not support the plausible inference that NYWL knew that the Siamese coaxial cable was *not* “cored wire of base metal for electric arc welding,” or “winding wire,” or “insulated wire of a kind used for telecommunications” and had been incorrectly classified as such. *See Iqbal*, 556 U.S. at 678 (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.”) (citation omitted). Thus, Plaintiff is not entitled to judgment by default.⁴

Plaintiff has not requested leave to amend its Complaint in the event the court finds its allegations insufficient to support the entry of default judgment inclusive of a penalty based on fraud. Further,

⁴ The Government submitted additional evidence along with its motion for default judgment that it sought to rely on to establish NYWL’s fraudulent violation. *See* Pl.’s Mot. at 12–15; *id.*, Exs. 1–4, ECF Nos. 35–1 to 35–26, 36, 37. “In determining whether to grant a motion for default judgment, the court may look outside the complaint whenever it needs to ‘determine the amount of damages or other relief; . . . establish the truth of an allegation by evidence; or . . . investigate any other matter.’” *United States v. Freight Forwarder Int’l, Inc.*, 39 CIT ___, ___, 44 F. Supp. 3d 1359, 1362 (2015) (alterations in original) (quoting USCIT Rule 55(b)). That Plaintiff may submit extrinsic evidence for the court’s assessment of whether it is ultimately entitled to judgment and to determine the amount of damages, however, does not obviate Plaintiff’s obligation to comply with the rules-based pleading requirements. “A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true.” *Nishimatsu Const. Co. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Marshall v. Baggett*, 616 F.3d 849, 852–55 (8th Cir. 2010) (reversing entry of default judgment when the complaint lacked well-pleaded facts supporting personal liability).

while Plaintiff alleged negligent and grossly negligent violations in the alternative, Compl. ¶¶ 25, 30, Plaintiff did not seek default judgment based on either of those theories of culpability, *see* Pl.'s Mot. at 16.

Rule 1 of the rules of this court encourage “the just, speedy, and inexpensive determination of every action.” USCIT Rule 1. Rule 15(a)(2) further permits the court to grant Plaintiff leave to amend its Complaint. *See* USCIT Rule 15(a)(2) (explaining that when, as here, more than 21 days have passed following Plaintiff’s service of the Complaint on NYWL, Plaintiff “may amend its pleading only with the opposing party’s written consent or the court’s leave” and “[t]he court should freely give leave when justice so requires”). In view of these rules, the court will deny Plaintiff’s motion for default judgment without prejudice to Plaintiff’s ability to seek default judgment on an alternative theory of liability if Plaintiff considers that the Complaint’s factual allegations are sufficient to support that theory. Alternatively, in the absence of any apparent reason to deny leave to amend, the court will allow Plaintiff one opportunity to do so. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that absent circumstances such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment,” the court should freely give leave to amend a complaint).

CONCLUSION AND ORDER

For the reasons discussed herein, it is hereby

ORDERED that Plaintiff’s motion for the entry of default judgment (ECF No. 35) is **DENIED** without prejudice; and it is further

ORDERED that Plaintiff shall have until January 15, 2021, to file an amended complaint pursuant to USCIT Rule 15(a)(2) *or* file a motion for default judgment based on an alternative theory of liability.

Dated: October 30, 2020
New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

Slip Op. 20–155

BUILDING SYSTEMS DE MEXICO, S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, AND FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC AND COREY S.A. DE C.V., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00069

[Denying Defendant’s motion to dismiss.]

Dated: November 3, 2020

Matthew R. Nicely, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for plaintiff Building Systems de Mexico, S.A. de C.V. Also on the brief was *Daniel M. Witkowski*.

In K. Cho, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. Also on the briefs were *Michael D. Granston*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Full-Member Subgroup of the American Institute of Steel Construction, LLC. Also on the brief was *Christopher B. Weld*, *Stephanie M. Bell*, and *Adam M. Teslik*.

Diana D. Quaia, Arent Fox LLP, of Washington, DC, for defendant-intervenor Corey S.A. de C.V. Also on the brief was *John M. Gurley* and *Jessica R. DiPietro*.

Matthew P. McCullough, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for amicus curiae the Government of Canada. Also on the brief was *Tung Nguyen*.

OPINION AND ORDER**Kelly, Judge:**

Defendant moves to dismiss Plaintiff’s complaint for lack of subject-matter jurisdiction. *See* Def.’s Memo. Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction & Opp’n to Mot. to Stay, July 9, 2020, ECF No. 31 (“Def.’s Br.”). Defendant and Defendant-Intervenors, joined by the Government of Canada as amicus curiae (“Canada” or “amicus”), submit that section 516A(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g) (2018)¹ precludes the Court from exercising jurisdiction over Building Systems de Mexico, S.A. de C.V.’s

¹ On July 1, 2020, United States-Mexico-Canada Agreement (“USMCA”) entered into force. *See United States-Mexico-Canada Agreement*, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/unitedstates-mexico-canada-agreement> (last visited Nov. 1, 2020); *see also* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116–113, 134 Stat. 11 (2020) (“Implementation Act”). Pursuant to section 432 of the Implementation Act, the USMCA’s entry into force does not affect the disposition of this action, which involves a final determination that was published before the relevant amendments to the Tariff Act of 1930 became effective. As such, further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

(“BSM”) challenge to the U.S. Department of Commerce’s (“Commerce”) final affirmative determination in its less-than-fair-value (“LTFV”) investigation of fabricated structural steel (“FSS”) from Mexico because Corey S.A. de C.V. (“Corey”) timely filed a request for binational panel review of the final determination pursuant to Article 1904 of the North American Free Trade Agreement (“NAFTA”).² See Def.’s Br. at 6–13; Def.-Intervenor [Corey’s Revised] Resp. Supp. Def.’s Mot. to Dismiss at 1–4, Aug. 13, 2020, ECF No. 43 (“Corey’s Resp. Br.”); Def.-Intervenor [Full Member Subgroup of the American Institute of Steel Construction, LLC’s] Resp. to Mot. to Dismiss at 1–2, Aug. 13, 2020, ECF No. 40 (“AISC’s Br.”); see also Gov’t of Canada’s Amicus Curiae Br. Supp. Def.’s Mot. to Dismiss at 1–17, July 10, 2020, ECF No. 36–1 (“Canada’s Amicus Br.”).³ BSM counters that the Court retains jurisdiction over the dispute by operation of the § 1516a(g)(3) exception because Corey’s NAFTA binational panel request cannot be deemed to have been made by an FTA country, and that the threshold question of whether the § 1516a(g)(3) exception applies belongs to the Court. See Pl.’s Resp. Opp’n Mot. to Dismiss at 1–15, Aug. 13, 2020, ECF No. 42 (“Pl.’s Br.”). For the following reasons, Defendant’s motion to dismiss is denied.

BACKGROUND

On February 25, 2019, in response to a petition filed by a subgroup of the American Institute of Steel Construction, LLC (specifically, “Full Member Subgroup of the American Institute of Steel Construction, LLC” or “AISC”),⁴ a trade association representing domestic producers of FSS, Commerce initiated an antidumping investigation

² The U.S. Court of International Trade has exclusive jurisdiction over matters arising under the Sections 516A of the Tariff Act, which governs appeals of determinations arising from antidumping and countervailing duty proceedings. See 28 U.S.C. § 1581(c) (2018); see also 19 U.S.C. § 1516a. However, if an FTA country, otherwise entitled to sue in the United States prefers, it may request to have a NAFTA binational panel preside over the appeal instead of a U.S. court. See 19 U.S.C. § 1516a(g). The binational panel replaces U.S. courts where a NAFTA party opts for a panel, and Congress intended that the binational panel’s decision have the same effect as a U.S. court judgment. See *Ontario Forest Indus. Ass’n v. United States*, 30 CIT 1117, 1120, 444 F. Supp. 2d 1309, 1313 (2006) (citing S. REP. NO. 100509, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2395, 2425).

³ Canada appears as amicus curiae in this action and filed a brief in support of Defendant’s motion to dismiss. See generally Canada’s Amicus Br.; see also Order, July 10, 2020, ECF No. 35 (granting consent motion for Canada to appear as amicus curiae).

⁴ On April 20, 2020, the court granted AISC’s unopposed motion to intervene as a matter of right. See Order, April 20, 2020, ECF No. 14. Shortly thereafter, AISC moved to stay the proceedings pending the outcome of the NAFTA binational panel’s review of the U.S. International Trade Commission’s final negative determination in its investigation into whether imports of FSS cause (or represent a threat of) material injury to the domestic industry, which the court denied. See [AISC’s] Mot. to Stay, May 28, 2020, ECF No. 22; see also *Bldg. Sys. de Mexico, S.A. de C.V. v. United States*, 44 CIT __, Slip Op. 20–104 (July 23, 2020).

of FSS from Canada, Mexico, and the People’s Republic of China. *See Certain [FSS] From Canada, Mexico, and the People’s Republic of China*, 84 Fed. Reg. 7,330 (Dep’t Commerce Mar. 4, 2019) (initiation of [LTFV] investigations). Commerce affirmatively determined that imports of certain FSS from Mexico were being, or were likely to be, sold in the United States at LTFV, and its investigation yielded weighted-average dumping margins of 8.47 and 0.00 percent for BSM and Corey, respectively. *See Certain [FSS] from Mexico*, 85 Fed. Reg. 5,390, 5,392 (Dep’t Commerce Jan. 30, 2020) (final determination of sales at [LTFV]) (“*Final Results*”) and accompanying Issues and Decision Memo. for [*Final Results*], A-201–850, (Jan. 23, 2020), ECF No. 21–6 (“*Final Decision Memo*”).

On February 19, 2020, BSM filed a notice of intent to seek judicial review of Commerce’s final determination. *See* Compl. ¶ 15, Mar. 30, 2020, ECF No. 6. On February 28, 2020, the United States Section of the NAFTA Secretariat received a request for binational review of Commerce’s final determination filed on behalf of Defendant-Intervenor Corey. *See [NAFTA], Article 1904 Binational Panel Review*, 85 Fed. Reg. 14,462 (Dep’t Commerce Mar. 12, 2020) (notice of request for panel review; USA-MEX-2020–1904–01) (“*NAFTA Req.*”).⁵

On March 30, 2020, Plaintiff BSM commenced this action pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and § 1516a(d), challenging certain aspects of Commerce’s final determination in its LTFV investigation of certain FSS from Mexico. *See* Summons, Mar. 30, 2020, ECF No. 1; Compl. at ¶¶ 1–2, 3–7; *see also Final Results* ; *Final Decision Memo*. Defendant’s motion to dismiss for lack of subject matter jurisdiction ensued.

DISCUSSION

The issue before the court is whether Corey fulfilled certain constitutional and statutory requirements for obtaining review of a final determination before a NAFTA binational panel, therefore precluding this court from exercising jurisdiction over this proceeding. The court holds that it has authority to determine whether it has jurisdiction over this proceeding. Moreover, the court holds that it has jurisdiction over this proceeding because the requirements to request a binational panel, and divest this court of jurisdiction, have not been met.

⁵ On March 20, 2020, the U.S. International Trade Commission published its final negative determination in its part of the investigation into whether imports of FSS cause (or represent a threat of) material injury to the domestic industry. *See [FSS] from Canada, China & Mexico*, 85 Fed. Reg. 16,129 (Int’l Trade Comm’n Mar. 20, 2020).

I. Court's Authority to Decide the Court's Jurisdiction

As a threshold matter, Defendant, Defendant-Intervenor Corey and amicus challenge the court's authority to reach the jurisdictional question that Defendant raises in this appeal. *See* Def.'s Br. at 6–13; Corey's Resp. Br. at 3; Canada's Amicus Br. at 5–7. Defendant, Defendant-Intervenor Corey and amicus submit that the issue of whether Corey has standing to request binational review of the final determination—and thus, whether Corey's request can be deemed filed by an FTA country such that the court would be precluded from exercising jurisdiction—belongs exclusively to the NAFTA binational panel. *See* Def.'s Br. at 6–13; Corey's Resp. Br. at 3; Canada's Amicus Br. at 5–7. For the following reasons, the court holds that it has authority to determine whether it has jurisdiction over this case.

The statutory framework and the separation of powers doctrine both envision that this Court will resolve jurisdictional questions. Congress provided, as an exception to NAFTA binational panel review, that this Court may review “a determination as to which neither the United States nor the relevant [free trade area (“FTA”)] country requested review[.]” 19 U.S.C. § 1516a(g)(3)(A)(i). Pursuant to 19 U.S.C. § 3434(c) and NAFTA art. 1904(5),⁶ taken together, a person, as opposed to one of the NAFTA countries, can request a panel so long as that person would otherwise be permitted to sue under the law of the importing party. *See* 19 U.S.C. § 3434(c). Given that the law of the importing party is U.S. law, in order for a person to request binational review of Commerce's final determination, that person must be one with standing to challenge the determination. *Id.* (“[A] person, within the meaning of paragraph 5 of article 1904, may request a binational panel review of such determination. . . [and] [t]he receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of article 1904.”); [NAFTA] art. 1904(5), U.S.-Can.-Mex., Dec. 17 1992, 32 I.L.M. 289, 683 (1993) (“An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.”).

Section 1516a(g) reveals that this Court retains authority to determine its own jurisdiction. Here, § 1516a(g)(2) precludes the Court from exercising jurisdiction over an appeal from a final determination “[i]f binational panel review of [that] determination is requested

⁶ The NAFTA provision is part of the statutory scheme as Congress explicitly incorporates it by reference, e.g., in 19 U.S.C. § 3434(c) as discussed in greater detail below, and in 19 U.S.C. § 1516a(g)(2) (concerning the scope of the binational review provision).

pursuant to article 1904 of the NAFTA[.]” 19 U.S.C. § 1516a(g)(2). However, § 1516a(g)’s preclusion is subject to various exceptions.⁷ Congress, when enumerating exceptions to § 1516a(g)’s preclusion on the exercise of jurisdiction, allowed the Court to exercise jurisdiction where a determination sought to be reviewed was one “(i) . . . which neither the United States nor the relevant FTA country requested review by a binational panel” or “(iv) . . . which a binational panel has determined is not reviewable by the binational panel[.]” 19 U.S.C. § 1516a(g)(3)(A). If only the NAFTA binational panel could determine whether an exception to the statute has been met, exception (iv) would be superfluous, as every instance an exception applies would be one “which a binational panel has [so] determined[.]” See 19 U.S.C. § 1516a(g)(3)(A)(iv); see also, e.g., *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]”).⁸

⁷ 19 U.S.C. § 1516a(g)(3). Exception to exclusive binational panel review.

(A) In general. A determination is reviewable under subsection (a) if the determination sought to be reviewed is—

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA or of the Agreement,

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to subsection (a), if neither the United States nor the relevant FTA country requested review of the original determination,

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to subsection (a) prior to the entry into force of the NAFTA or of the Agreement,

(iv) a determination which a binational panel has determined is not reviewable by the binational panel,

(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.

⁸ Defendant, Defendant-Intervenor and amicus fail to persuade that the applicability of the 19 U.S.C. § 1516a(g)(3)(A) exception should be decided by a NAFTA binational panel. Amicus argues that the exception allowing for a binational panel to dismiss a suit supports its position that the Court cannot decide matters relating to its own jurisdiction. See Canada’s Amicus Br. at 5–6. In particular, amicus reasons that the statutory provision allowing a plaintiff to file a summons and complaint in the U.S. Court of International Trade within 30 days of a binational panel dismissal suggests that Congress intended that only a binational panel could decide whether a party had standing under U.S. law to commence a suit. *Id.* at 6. However, as amicus itself points out, the exceptions to jurisdiction originated in the U.S.-Canada Free-Trade Agreement (“CFTA”), the predecessor to NAFTA. See Canada’s Amicus Br. at 5–7. Yet, the CFTA’s implementing legislation had no provision allowing a party to commence an action in the U.S. Court of International Trade within 30 days following a binational panel’s dismissal. See [CFTA] Implementation Act of 1988, Pub. L. 100449, 102 Stat. 1851 (1988); cf. 19 U.S.C. § 1516a(a)(5)(C)(i). If Canada’s position were correct, it would follow that, under the CFTA, Congress intended to leave the parties without a remedy if the CFTA panel decided it lacked jurisdiction. The court cannot accept

Moreover, even assuming the separation of powers doctrine allows Congress to divert jurisdiction over an appeal from an administrative determination away from an Article III court,⁹ separation of powers does not permit this Court to abdicate its duty to determine whether Congress indeed meant to do so. Separation of powers prevents not only the encroachment of one branch on the other, but also the abandonment by one branch of its obligations. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496–98 (2010) (“[T]he separation of powers does not depend on . . . whether ‘the encroached-upon branch approves the encroachment.’”) (citations omitted). A federal statute that restricts this Court’s jurisdiction implicates the “institutional integrity of the Judicial Branch” see *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–53 (1986) and the rights of individual litigants. *Id.* at 850, 855. This Court has a responsibility to answer the constitutional inquiry embedded in the statute.

Indeed, Congress acknowledges the Court’s separation of powers responsibilities with respect to constitutional issues in particular. Section 1516a(g)(4) provides for challenges to the constitutionality of NAFTA binational panels themselves to be heard by the United States Court of Appeals for the District of Columbia Circuit. 19 U.S.C. § 1516a(g)(4)(A). Further, constitutional issues, other than challenges to the constitutionality of binational panels themselves, that may arise under any law, must be heard by the U.S. Court of International Trade. Specifically, the statute provides: “Review is available under subsection (a) with respect to a determination solely concerning a constitutional issue (other than an issue to which subparagraph (A) applies) arising under any law of the United States as enacted or applied.” 19 U.S.C. § 1516a(g)(4)(B). The legislative history of this provision indicates that Congress intended this subsection to allow for constitutional challenges to antidumping or countervailing duty laws. See S. REP. NO. 100–509, at 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2395, 2428.¹⁰

In this case, there is no constitutional challenge to an antidumping or countervailing duty law. However, the jurisdictional dispute re-

that Congress would have intended litigants dismissed from a binational panel to be deprived access to the U.S. Court of International Trade.

⁹ There is no challenge in this case that the Constitution prohibits Congress from diverting jurisdiction over appeals from countervailing and antidumping duty determinations to NAFTA binational panels, nor would this Court be the court where such a claim would be heard. Section 1516a(g)(4) provides that an action challenging the constitutionality of binational panels “may be brought only in the United States Court of Appeals for the District of Columbia Circuit[.]” 19 U.S.C. § 1516a(g)(4)(A).

¹⁰ Such a challenge would be heard by a three-judge panel of this Court. 19 U.S.C. § 1516a(g)(4)(B).

quires a threshold analysis of constitutional standing for challenging a determination under the antidumping and countervailing duty laws. The same separation of powers concerns that resulted in provisions for constitutional review under 19 U.S.C. § 1516a(g)(4) arise in considering whether a party would have standing to bring a challenge under U.S. law so as to deprive this Court of jurisdiction. This Court cannot abdicate its role to determine that threshold issue.

II. Jurisdiction

Defendant, Defendant-Intervenor Corey and amicus argue that 19 U.S.C. § 1516a(g) precludes this court from exercising jurisdiction. *See* Def.'s Br. at 6–13; Corey's Resp. Br. at 2–3; Canada's Amicus Br. at 9–15. BSM counters that because Corey lacks standing under U.S. law to challenge Commerce's final determination, its request cannot be deemed filed by an FTA country, and thus the statutory exception to preclusion under 19 U.S.C. § 1516a(g)(3) applies. *See* Pl.'s Br. at 3–11. For the following reasons, the court holds that it has jurisdiction over BSM's appeal.

In relevant part, 28 U.S.C. § 1581(c) (2018) vests the U.S. Court of International Trade with exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a. Under 19 U.S.C. § 1516a(a)(2)(B)(i) the Court may review “[f]inal affirmative determinations by the administering authority and by the Commission under [19 U.S.C. §§ 1671d or 1673d], including any negative part of such a determination (other than a part referred to in clause (ii)).”¹¹

However, 19 U.S.C. § 1516a(g) provides that if a party seeks binational review of “a determination described in—[19 U.S.C. § 1516a(a)(2)(B)(i)–(iii), (vi)–(vii)] . . . the determination is not reviewable under [19 U.S.C. § 1516a(a).]” 19 U.S.C. § 1516a(g)(1)(B), (2)(A). Nonetheless, 19 U.S.C. § 1516a(g)(3) enumerates certain exceptions, and permits judicial review of “a determination as to which neither the United States nor the relevant FTA country requested review[.]” *Id.* at § 1516a(g)(3)(A)(i).¹²

¹¹ 19 U.S.C. § 1516a(a)(2)(B)(ii) provides for review of

[a] final negative determination by the administering authority or the Commission under section [19 U.S.C. §§ 1671d or 1673d], including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

¹² The phrase “relevant FTA country” is statutorily defined as “the free trade area country to which an antidumping or countervailing duty proceeding pertains.” 19 U.S.C. § 1516a(f)(9).

The statute also establishes a mechanism for private parties to seek binational review of Commerce’s final determination in cases involving NAFTA merchandise. Namely, 19 U.S.C. § 3434(c) provides, in pertinent part, that

a person, within the meaning of paragraph 5 of article 1904, may request a binational panel review of such determination by filing such a request with the United States Secretary . . . [and] [t]he receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of article 1904.

19 U.S.C. § 3434(c). Under article 1904(5) of the NAFTA

[a]n involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

NAFTA art. 1904(5), 32 I.L.M. at 683.

In the United States, a private person who would “otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review” is a person who has standing. Standing is a threshold matter in which the court ensures that the plaintiff’s complaint meets the requirements of Article III of the Constitution. *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1549 (Fed. Cir. 1986); *see also Warth v. Seldin*, 422 U.S. 490, 517–18 (1975) (“[t]he rules of standing, . . . are threshold determinants of the propriety of judicial intervention.”). The Constitution constrains the federal courts’ jurisdiction to cases which involve “actual cases or controversies,” and standing constitutes part of this limitation. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”); *see* U.S. Const. art. III, § 2, cl. 1. “[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must satisfy three elements. First, it must have suffered an “injury in fact,” that is, “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical[.]’” *Id.* at 560 (citations omitted). Second, a causal connection must exist between the injury and

the conduct complained of. *Id.* Third, the plaintiff must show a likelihood that the injury can be redressed by a favorable court decision. *Id.* at 561.

Corey does not have standing, as required in order for it to properly request review of Commerce’s final determination before a NAFTA binational panel, and therefore its request for binational review of Commerce’s final determination cannot be deemed filed by an FTA country. NAFTA art. 1904(5) requires a private party to have standing, as determined by the laws of the importing country, in order to request a binational panel. *See* NAFTA art. 1904(5), 32 I.L.M. at 683. In Commerce’s final determination, it assigned Corey a weighted-average dumping margin of 0.00 percent. *See Final Results*, 85 Fed. Reg. at 5,392. Under U.S. law, Corey’s 0.00 percent margin, without more, is insufficient to demonstrate an injury in fact—the first of three requirements for standing. *See, e.g., PAO Severstal v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1411, 1414 (2017) (“PAO”) (holding a prevailing party lacks standing to sue); *Zhanjiang Guolian Aquatic Prods. Co. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1339, 1342 (2014) (citing *Royal Thai Gov’t v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1330, 1333 (2014)); *Jubail Energy Servs. Co. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1352, 1356 (2015) (respondent receiving favorable outcome in antidumping determination lacks standing); *Rose Bearings Ltd. v. United States*, 14 CIT 801, 802–03, 751 F. Supp. 1545, 1546–47 (1990) (where, inter alia, the complaining party did not have to pay an antidumping duty, there is no case or controversy); *but see Oman Fasteners, LLC v. United States*, 43 CIT __, Slip Op. 19–108 at 14–21 (2019) (“*Oman*”) (finding a plaintiff had standing to challenge a final determination, despite being assigned a zero rate, where the plaintiff alleges that the outcome of a separate, pending appeal of that same determination, in which it was a defendant-intervenor thus unable to raise its own claim, could result in it being assigned a rate on remand).¹³ As all three criteria must be satisfied for a party to have standing, the court does not need to consider the other two requirements. Moreover, since Corey is the only party to this dispute that requested a binational panel, *see generally NAFTA Req.*, and since it did not have standing to do so, no party who would “otherwise be entitled under the law of

¹³ In this case, as in *Oman*, the petitioners in the investigation have challenged Commerce’s determination in a related proceeding and Corey is a defendant-intervenor in that case. *See Full Member Subgroup of the American Institute of Steel Construction, LLC v. United States*, Ct. No. 20–00089. Defendant-intervenor in that case, BSM, has argued that petitioners’ filing in that proceeding was beyond the time allowed by statute to commence an action. *See* Def.-Intervenor [BSM]’s Resp. to Mot. to Dismiss, Aug. 13, 2020, ECF No. 36 (from Dkt. Ct. No. 20–00089).

the importing Party to commence domestic procedures for judicial review” requested a binational panel.¹⁴

Although it may seem unfair to deny a party the ability to defend a favorable determination before a NAFTA binational panel, the court must abide by the statutory framework as written— it cannot refashion it to suit the court’s notions of fairness. Moreover, Congress intended to divert jurisdiction from U.S. courts to a binational panel where a NAFTA party opts for a panel, and for the binational panel’s decision to have the same effect as a U.S. court’s judgment. *See Ontario Forest Indus. Ass’n v. United States*, 30 CIT 1117, 1120, 444 F. Supp. 2d 1309, 1313 (2006) (citing S. REP. NO. 100–509 at 30, reprinted in 1988 U.S.C.C.A.N. at 2425). Thus, the binational panel process replaces the forum—not the remedies—available to the parties. A prevailing party can defend a favorable outcome as a defendant-intervenor before the U.S. Court of International Trade where another plaintiff challenges that determination. Although a defendant-intervenor may not expand the issues before the court, if, upon review, the administrative determination is changed in such a way as to cause injury to the defendant-intervenor, that party may then commence an action challenging the determination causing the injury. 19 U.S.C. § 1516a(a)(2); *see also PAO*, 41 CIT at __, 219 F. Supp. 3d at 1416. To allow Corey to request the formation of a binational panel would expand the rights and remedies available to it rather than simply provide a change of forum. Where, as here, no party with standing requested the binational panel, there are no statutory grounds to divest this Court of jurisdiction over the dispute.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant’s motion to dismiss for lack of subject matter jurisdiction is denied.

Dated: November 3, 2020

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

¹⁴ No party to this dispute alleges that anyone other than Corey has filed a request for a NAFTA binational panel.

Slip Op. 20–156

FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC, Plaintiff, v. UNITED STATES, Defendant, LES CONSTRUCTIONS BEAUCEATLAS, INC. et al., Defendant-Intervenors

Before: Claire R. Kelly, Judge
Court No. 20–00088

[Granting Defendant’s motion to dismiss.]

Dated: November 3, 2020

Alan H. Price, Wiley Rein LLP, of Washington, DC, for plaintiff Full Member Subgroup of the American Institute of Steel Construction, LLC. Also on the brief was *Christopher B. Weld*, *Stephanie M. Bell*, and *Adam M. Teslik*.

In K. Cho, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for defendant United States. Also on the briefs were *Michael D. Granston*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Reza Karamloo*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Matthew P. McCullough, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for defendant-intervenor the Government of Canada. Also on the brief was *Tung Nguyen*.

OPINION AND ORDER

Kelly, Judge:

Defendant moves to dismiss Plaintiff’s complaint for lack of subject-matter jurisdiction. *See* Def.’s Memo. Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction & Opp’n to Mot. to Stay, July 9, 2020, ECF No. 31 (“Def.’s Br.”). Defendant and Defendant-Intervenor, the Government of Canada, submit that section 516A(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g) (2018)¹ precludes the court from exercising jurisdiction over Full Member Subgroup of the American Institute of Steel Construction, LLC’s (“AISC”) challenge to the U.S. Department of Commerce’s (“Commerce”) final affirmative determination in its less than fair value (“LTFV”) investigation of fabricated structural steel (“FSS”) from Canada because Industries Canatal Inc.’s (“Canatal”) and Les Constructions Beauce-Atlas, Inc.’s

¹ On July 1, 2020, the United States-Mexico-Canada Agreement (“USMCA”) entered into force, replacing the NAFTA. *See United States-Mexico-Canada Agreement*, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-tradeagreements/united-states-mexico-canada-agreement> (last visited Nov. 1, 2020); *see also* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116113, 134 Stat. 11 (2020) (“Implementation Act”). Pursuant to section 432 of the Implementation Act, the USMCA’s entry into force does not affect the disposition of this action, which involves a final determination that was published before the relevant amendments to the Tariff Act of 1930 became effective. As such, further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

("CBA") timely requests for binational panel review of the final determination pursuant to Article 1904 of the North American Free Trade Agreement ("NAFTA") are deemed to have been filed by an FTA country. *See* Def.'s Br. at 5–12; Government of Canada's Resp. Br. Supp. Def.'s Mot. to Dismiss at 3–10, Aug. 13, 2020, ECF No. 35. AISC agrees that this court does not have jurisdiction, but nonetheless requests that the court issue its decision in accordance with the pending motion to dismiss in *Building Systems de Mexico, S.A. de C.V. v. United States*, Ct. No. 20–00069 ("Building Systems"). *See* Pl.'s Resp. to Mot. to Dismiss at 1–4, Aug. 13, 2020, ECF No. 36 ("Pl.'s Resp."). For the following reasons, Defendant's motion to dismiss is granted.

BACKGROUND

On February 25, 2019, in response to a petition filed by AISC, a trade association representing domestic producers of FSS, Commerce initiated an antidumping investigation into FSS from Canada, Mexico, and the People's Republic of China. *See Certain [FSS] From Canada, Mexico, and the People's Republic of China*, 84 Fed. Reg. 7,330 (Dep't Commerce Mar. 4, 2019) (initiation of [LTFV] investigations). Commerce affirmatively determined that sales of FSS from Canada into the United States were being, or were likely to be, sold at LTFV, and its investigation yielded weighted-average dumping margins of 6.70 and 0.00 percent for CBA and Canatal, respectively. *See Certain [FSS] From Canada*, 85 Fed. Reg. 5,373, 5,374 (Dep't Commerce Jan. 30, 2020) (final determination of sales at [LTFV]) ("*Final Results*") and accompanying Issues and Decision Memo. for [*Final Results*], A-122864, (Jan. 23, 2020), ECF No. 30–5 ("Final Decision Memo").

On February 28, 2020, the United States Section of the NAFTA Secretariat received requests for binational review of Commerce's final determination filed on behalf of Defendant-Intervenors Canatal and CBA. *See [NAFTA], Article 1904 Binational Panel Review*, 85 Fed. Reg. 14,465 (Dep't Commerce Mar. 12, 2020) (notice of request for panel review; USA-CDA-2020–1904–02). On March 20, 2020, the U.S. International Trade Commission published its final negative determination in its contemporaneous investigation into whether imports of FSS cause (or represent a threat of) material injury to the domestic industry. *See [FSS] from Canada, China, & Mexico*, 85 Fed. Reg. 16,129 (Int'l Trade Comm'n Mar. 20, 2020).

Plaintiff AISC commenced this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(i), contesting portions

of Commerce’s final affirmative determination. *See* Summons, Apr. 17, 2020, ECF No. 1; Compl., May 13, 2020, ECF No. 9. In its complaint, AISC asserts that the court lacks jurisdiction over its action because a party requested review before a NAFTA binational panel. *See* Compl. at ¶¶ 2–5. Nonetheless, Plaintiff explains that it commences this action in light of arguments raised in a related case, *Building Systems*, Ct. No. 20–00069. *Id.* Specifically, the plaintiff in *Building Systems* asserts that this Court has jurisdiction despite the fact that an interested party requested review before a NAFTA binational panel. *See* Compl. ¶¶ 3–7, Mar. 30, 2020, ECF No. 6 (from Dkt. Ct. No. 20–00069). Plaintiff AISC therefore commences this action because it speculates that if the Court concludes that it has jurisdiction in *Building Systems* despite the request for binational panel review, it may do the same in this case. *See* Pl.’s Resp. at 1–4. Defendant’s motion argues that the court lacks jurisdiction,² and as explained above, Plaintiff does not disagree.

DISCUSSION

In relevant part, 28 U.S.C. § 1581(c) (2018) vests exclusive jurisdiction with the Court over any civil action commenced under section 516A of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a. Under 19 U.S.C. § 1516a(a)(2)(B)(i) the Court may review “[f]inal affirmative determinations by the administering authority and by the Commission under [19 U.S.C. §§ 1671d or 1673d], including any negative part of such a determination (other than a part referred to in clause (ii)).”³

However, 19 U.S.C. § 1516a(g) provides, in relevant part, that if a party seeks binational review of “a determination described in [19 U.S.C. § 1516a(a)(2)(B)(i)–(iii), (vi)–(vii)] . . . the determination is not reviewable under [19 U.S.C. § 1516a(a).]” 19 U.S.C. § 1516a(g)(1)(B), (2)(A). Nonetheless, 19 U.S.C. § 1516a(g)(3) enumerates certain

² Despite its invocation of *Building Systems*, none of the parties in this case raise the threshold issue raised in *Building Systems*, specifically whether this Court has the power to determine its own jurisdiction. *See generally* *Bldg. Sys. de Mexico, S.A. de C.V. v. United States*, 44 CIT __, Slip Op. 20–155 (Nov. 3, 2020) (“*Building Systems*”). *Building Systems* concluded that the Court had the power to determine its own jurisdiction. *See Building Systems*, 44 CIT at __, Slip Op. 20–155 at 6–11.

³ 19 U.S.C. § 1516a(a)(2)(B)(ii) provides for review of

[a] final negative determination by the administering authority or the Commission under section [19 U.S.C. §§ 1671d or 1673d], including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

exceptions,⁴ and permits judicial review of “a determination as to which neither the United States nor the relevant [free trade area (“FTA”)] country requested review[.]” *Id.* at § 1516a(g)(3)(A)(i).

The statute also establishes a mechanism for private parties to seek binational review of Commerce’s final determination in NAFTA cases. Namely, 19 U.S.C. § 3434(c) provides, in pertinent part, that

a person, within the meaning of paragraph 5 of article 1904, may request a binational panel review of such determination by filing such a request with the United States Secretary . . . [and] [t]he receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of article 1904.

19 U.S.C. § 3434(c). Under article 1904(5) of the NAFTA

[a]n involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

NAFTA art. 1904(5), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 683 (1993).

The court cannot exercise jurisdiction over AISC’s complaint because no exception to the preclusion of judicial review under § 1516a(g) applies. There is no dispute as to whether the timely request for binational panel review of Commerce’s final determination in this

⁴ 19 U.S.C. § 1516a(g)(3) Exception to exclusive binational panel review.

(A) In general. A determination is reviewable under subsection (a) if the determination sought to be reviewed is—

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA or of the Agreement,

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to subsection (a), if neither the United States nor the relevant FTA country requested review of the original determination,

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to subsection (a) prior to the entry into force of the NAFTA or of the Agreement,

(iv) a determination which a binational panel has determined is not reviewable by the binational panel,

(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.

case is deemed filed by an FTA country under NAFTA art. 1904(5).⁵ Section 1516a(g) thus precludes the court from exercising jurisdiction over the complaint.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant's motion to dismiss for lack of subject-matter jurisdiction is granted; and it is further

ORDERED that the case is dismissed. Judgment will enter accordingly.

Dated: November 3, 2020

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

⁵ AISC's claim that the jurisdictional issues in this case and in *Building Systems*, Ct.No. 20-00069 are identical is mistaken. See Pl.'s Resp. at 3-4. Namely, the court is not confronted with the same question of whether the request for binational panel review of Commerce's final determination is deemed to have been made by an FTA country pursuant to NAFTA art. 1904(5). See Pl.'s Resp. Opp'n Mot. to Dismiss, Aug. 13, 2020, ECF No. 42 (from Dkt. Ct. No. 20-00069). In *Building Systems*, by contrast, the Court found that a party given a zero margin, without more, lacked an injury in fact as required for standing and consequently its request for NAFTA binational panel review could not be deemed to have been made by an FTA country. See *Building Systems*, 44 CIT at __, Slip Op. 20-155 at 14-15; but see *Final Results*, 85 Fed. Reg. at 5,374 (assigning CBA a dumping margin of 6.70 percent).

Slip Op. 20–157

FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC, Plaintiff, v. UNITED STATES, Defendant AND BUILDING SYSTEMS DE MEXICO, S.A. DE C.V. AND COREY S.A. DE C.V., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00089

[Denying Defendant's motion to dismiss.]

Dated: November 3, 2020

Alan H. Price, Wiley Rein LLP, of Washington, DC, for plaintiff Full Member Subgroup of the American Institute of Steel Construction, LLC. Also on the brief was *Christopher B. Weld*, *Stephanie M. Bell*, and *Adam M. Teslik*.

In K. Cho, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. Also on the briefs were *Michael D. Granston*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Diana D. Quايا, Arent Fox LLP, of Washington, DC, for defendant-intervenor Corey S.A. de C.V. Also on the brief was *John M. Gurley* and *Jessica R. DiPietro*.

Matthew R. Nicely, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for defendant-intervenor Building Systems de Mexico, S.A. de C.V. Also on the brief was *Daniel M. Witkowski*.

OPINION AND ORDER

Kelly, Judge:

Defendant moves to dismiss Plaintiff's complaint for lack of subject-matter jurisdiction. *See* Def.'s Memo. Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction & Opp'n to Mot. to Stay, July 9, 2020, ECF No. 28 ("Def.'s Br."). Defendant and Defendant-Intervenor Corey S.A. de C.V. ("Corey") submit that section 516A(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g) (2018)¹ precludes the Court from exercising jurisdiction over Full Member Subgroup of the American Institute of Steel Construction's ("AISC") challenge to the U.S. Department of Commerce's ("Commerce") final affirmative determination in its less than fair value ("LTFV") investigation of fabricated

¹ On July 1, 2020, the United States-Mexico-Canada Agreement ("USMCA") entered into force, replacing the NAFTA. *See United States-Mexico-Canada Agreement*, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-tradeagreements/united-states-mexico-canada-agreement> (last visited Nov. 1, 2020); *see also* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116113, 134 Stat. 11 (2020) ("Implementation Act"). Pursuant to section 432 of the Implementation Act, the USMCA's entry into force does not affect the disposition of this action, which involves a final determination that was published before the relevant amendments to the Tariff Act of 1930 became effective. As such, further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

structural steel (“FSS”) from Mexico because Corey timely filed a request for binational panel review of the final determination pursuant to Article 1904 of the North American Free Trade Agreement (“NAFTA”). *See* Def.’s Br. at 5–13; Def.-Intervenor [Corey’s Revised] Resp. Supp. Def.’s Mot. to Dismiss, Aug. 13, 2020, ECF No. 37 (“Corey’s Resp. Br.”). Defendant-Intervenor Building Systems de Mexico, S.A. de C.V. (“BSM”) agrees that the case should be dismissed, but for different reasons. *See* Def.-Intervenor [BSM]’s Resp. to Mot. to Dismiss, Aug. 13, 2020, ECF No. 36 (“BSM’s Resp. Br.”). AISC requests the court to issue its decision in accordance with the pending motion to dismiss in Building Systems de Mexico, S.A. de C.V. v. United States, Ct. No. 20–00069 (“Building Systems”). *See* Pl.’s Resp. to Mot. to Dismiss, Aug. 13, 2020, ECF No. 34 (“Pl.’s Resp.”). For the reasons that follow, Defendant’s motion to dismiss is denied.

BACKGROUND

On February 25, 2019, in response to a petition filed by AISC, a trade association representing domestic producers of FSS, Commerce initiated an antidumping investigation into FSS from Canada, Mexico, and the People’s Republic of China. *See Certain [FSS] From Canada, Mexico, and the People’s Republic of China*, 84 Fed. Reg. 7,330 (Dep’t Commerce Mar. 4, 2019) (initiation of [LTFV] investigations). Commerce selected Defendant-Intervenors BSM and Corey as mandatory respondents. *See* Compl. ¶¶ 3–4, May 13, 2020, ECF No. 9. Commerce affirmatively determined that imports of certain FSS from Mexico into the United States were being, or were likely to be, sold at LTFV, and its investigation yielded weighted-average dumping margins of 8.47 and 0.00 percent for BSM and Corey, respectively. *See Certain [FSS] from Mexico*, 85 Fed. Reg. 5,390, 5,392 (Dep’t Commerce Jan. 30, 2020) (final determination of sales at [LTFV]) (“*Final Results*”) and accompanying Issues and Decision Memo. for [*Final Results*], A-201–850, (Jan. 23, 2020), ECF No. 25–6 (“Final Decision Memo”).

On February 19, 2020, BSM filed a notice of intent to seek judicial review of Commerce’s final determination. *See* Compl. ¶ 4, March 30, 2020, ECF No. 6 (from Dkt. Ct. No. 20–00069) (“Building Systems Compl.”). On February 28, 2020, the United States Section of the NAFTA Secretariat received a request for binational review of Commerce’s final determination filed on behalf of Defendant-Intervenor Corey. *See [NAFTA], Article 1904 Binational Panel Review*, 85 Fed.

Reg. 14,462 (Dep't Commerce Mar. 12, 2020) (notice of request for panel review; USA-MEX-20201904-01) ("*NAFTA Req.*").²

Plaintiff AISC commenced this action pursuant to 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(i), contesting portions of Commerce's final affirmative determination. *See* Summons, Apr. 17, 2020, ECF No. 1; Compl. ¶ 5. In its complaint, AISC asserts that the court lacks jurisdiction over this action because of the request for review before a NAFTA binational panel. *See* Compl. at ¶¶ 2-5. Nonetheless, Plaintiff explains that it commences this action in light of arguments raised in a related case, Building Systems, Ct. No. 20-00069. *Id.* at ¶¶ 4-5. Specifically, the plaintiff in Building Systems, Ct. No. 20-00069 asserts that this Court has jurisdiction over an action involving the same Commerce determination despite the fact that an interested party requested review of that determination before a NAFTA binational panel. *See* Pl.'s Resp. Opp'n to Mot. to Dismiss, Aug. 13, 2020, ECF No. 42 (from Dkt. Ct. No. 20-00069). Plaintiff AISC therefore commences this action, reasoning that if the Court concludes that it has jurisdiction in Building Systems despite the request for binational panel review, it may do the same in this case. *See* Pl.'s Resp. at 1-3. Defendant's motion argues that the court lacks jurisdiction, and as explained above, Plaintiff does not disagree. BSM, for its part, argues that the case should be dismissed, not because a binational panel has been requested,³ but because Plaintiff failed to timely invoke the jurisdiction of this court. *See* BSM's Resp. Br. at 2-3. In its reply brief, Defendant adds that not only does this Court lack jurisdiction over the Commerce determination at issue, but that it lacks the power to decide whether it has jurisdiction. *See* Def.'s Reply Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction at 3-10, Sept. 17, 2020, ECF No. 42 ("Def.'s Reply Br.").

² On March 20, 2020, the U.S. International Trade Commission published its final negative determination in its contemporaneous investigation into whether imports of FSS cause (or represent a threat of) material injury to the domestic industry. *See [FSS] from Canada, China & Mexico*, 85 Fed. Reg. 16,129 (Int'l Trade Comm'n Mar. 20, 2020).

³ BSM maintains its position in Building Systems, Ct. No. 20-00069, that the 19 U.S.C. § 1516a(g)(3)(A)(i) exception to preclusion from exercising jurisdiction, which applies where the request is not filed by a NAFTA party, would allow this Court to review the final determination. *See* BSM's Resp. Br. at 2-3. Because Corey received a margin of zero, BSM explains that Corey would not have standing to appeal Commerce's final determination under U.S. law, and thus its request could not be deemed a request for panel review by the United States. *See id.*

DISCUSSION

As a threshold matter the Defendant argues that the Court cannot decide the jurisdictional question at issue. *See* Def.’s Reply Br. at 5–6. Instead Defendant argues that this Court must await the NAFTA panel’s decision as to whether a party had standing under U.S. law to request a binational panel. *See id.*⁴ Defendant alternatively argues that even if this Court may decide whether it has jurisdiction, that 19 U.S.C § 1516a(g) precludes the Court from exercising jurisdiction. *See* Def.’s Reply Br. at 9–10. For the following reasons, both of Defendant’s arguments fail.

Defendant’s argument that this Court lacks the power to decide its own jurisdiction fails as: (i) the statute envisions that the Court will decide jurisdictional disputes; and (ii) separation of powers prevents the Court from abdicating its role to decide this jurisdictional issue. *See Bldg. Sys. de Mexico, S.A. de C.V. v. United States*, 44 CIT __, __, Slip Op. 20–155 at 6–11 (Nov. 3, 2020) (“*Building Systems*”). As discussed more fully in *Building Systems*, one exception to the Court’s jurisdiction explicitly references a scenario where a NAFTA binational panel might decide whether it lacked jurisdiction. *See id.* at 7–9. The existence of other exceptions implies that the Court would also be called upon to assess its own jurisdiction. *See id.* Moreover, the Court must be mindful of its constitutional role in our system of government. *See id.* at 9–10. The Court cannot abdicate its role to interpret the contours of Congressional action even where that action involves diverting the Court’s jurisdiction.⁵ *See id.*

⁴ In *Building Systems*, Ct. No. 20–00069, the defendant filed a motion to dismiss arguing that the statute precluded this Court from exercising jurisdiction and asking this Court to dismiss in light of the statutory provisions. *See generally* Def.’s Memo. Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction & Opp’n to Mot. to Stay, July 9, 2020, ECF No. 31 (from Dkt. Ct. No. 20–00069). Subsequently amicus curiae, the Government of Canada, argued that not only did this Court lack jurisdiction, it also lacked the power to address the jurisdictional question. *See* Gov’t of Canada’s Amicus Curiae Br. Supp. Def.’s Mot. to Dismiss at 1–17, July 10, 2020, ECF No. 36–1 (from Dkt. Ct. No. 20–00069). Plaintiff in that case argued that the Court, not a NAFTA binational panel, was the proper body to determine whether the party that requested the binational panel had standing to do so. *See* Pl.’s Resp. Opp’n Mot. to Dismiss at 1–15, Aug. 13, 2020, ECF No. 42 (from Dkt. Ct. No. 20–00069). The defendant in its reply then echoed the amicus’ argument that the Court could not consider its own jurisdiction. *See* Def.’s Reply Supp. Mot. to Dismiss for Lack of Subject-Matter Jurisdiction at 2–7, Sept. 17, 2020, ECF No. 48 (from Dkt. Ct. No. 20–00069). Here, the Defendant also moved to dismiss the case for lack of jurisdiction and subsequently added in its reply that the Court lacked the power to determine its own jurisdiction. *See* Def.’s Reply Br. at 3–10.

⁵ As discussed in *Building Systems*, this case does not involve a challenge to the constitutionality of a NAFTA binational panel. *See Building Systems*, 44 CIT at __, Slip Op. 20–155 at 9 n. 9. Section 1516a(g)(4) provides that an action challenging the constitutionality of binational panels “may be brought only in the United States Court of Appeals for the District of Columbia Circuit[.]” 19 U.S.C. § 1516a(g)(4)(A). Nor does this case involve a challenge that would be decided by a three-judge panel of this Court. Pursuant to 19 U.S.C. § 1516a(g)(4)(B) all constitutional issues that may arise under any law—apart from chal-

The statutory scheme indicates that this Court has jurisdiction to hear this dispute. Although Congress gives the U.S. Court of International Trade exclusive jurisdiction over antidumping determinations, it has excluded certain antidumping determinations involving merchandise from NAFTA countries. In relevant part, 28 U.S.C. § 1581(c) (2018) vests the court with exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a. Under 19 U.S.C. § 1516a(a)(2)(B)(i) the court may review “[f]inal affirmative determinations by the administering authority and by the Commission under [19 U.S.C. §§ 1671d or 1673d], including any negative part of such a determination (other than a part referred to in clause (ii)).”⁶ However, 19 U.S.C. § 1516a(g) provides that if a party seeks binational review of “a determination . . . described in [19 U.S.C. § 1516a(a)(2)(B)(i)–(iii), (vi)–(vii)] . . . the determination is not reviewable under [19 U.S.C. § 1516a(a).]” 19 U.S.C. § 1516a(g)(1)(B), (2)(A). Nonetheless, 19 U.S.C. § 1516a(g)(3) enumerates certain exceptions,⁷ and permits judicial review of “a determination as to which neither the United States nor the relevant [free trade area (“FTA”)] country requested review[.]” *Id.* at § 1516a(g)(3)(A)(i).

lenges to the constitutionality of binational panels themselves as covered by 19 U.S.C. § 1516a(g)(4)(A)—must be heard by a three-judge panel of the U.S. Court of International Trade.

⁶ 19 U.S.C. § 1516a(a)(2)(B)(ii) provides for review of

[a] final negative determination by the administering authority or the Commission under section [19 U.S.C. §§ 1671d or 1673d], including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

⁷ 19 U.S.C. § 1516a(g)(3) Exception to exclusive binational panel review.

(A) In general. A determination is reviewable under subsection (a) if the determination sought to be reviewed is—

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA or of the Agreement,

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to subsection (a), if neither the United States nor the relevant FTA country requested review of the original determination,

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to subsection (a) prior to the entry into force of the NAFTA or of the Agreement,

(iv) a determination which a binational panel has determined is not reviewable by the binational panel,

(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.

The statute also establishes a mechanism for private parties to seek binational review of Commerce's final determination in NAFTA cases. Namely, 19 U.S.C. § 3434(c) provides, in pertinent part, that

a person, within the meaning of paragraph 5 of article 1904, may request a binational panel review of such determination by filing such a request with the United States Secretary . . . [and] [t]he receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of article 1904.

19 U.S.C. § 3434(c). Under article 1904(5) of the NAFTA

[a]n involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

[NAFTA] art. 1904(5), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 683 (1993).

In the United States, a private person who would “otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review” is a person who has standing. Standing is a threshold matter in which the court ensures that the plaintiff's complaint meets the requirements of Article III of the Constitution. *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1549 (Fed. Cir. 1986); *see also Warth v. Seldin*, 422 U.S. 490, 517–18 (1975) (“[t]he rules of standing . . . are threshold determinants of the propriety of judicial intervention.”). The Constitution constrains the federal courts' jurisdiction to cases which involve “actual cases or controversies,” and standing constitutes part of this limitation. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (“No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”); *see* U.S. Const. art. III, § 2, cl. 1. “[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must satisfy three elements. First, it must have suffered an “injury in fact,” that is, “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical[.]’” *Id.* at 560 (citations omitted). Second, a causal connection must exist between the injury and

the conduct complained of. *Id.* Third, the plaintiff must show a likelihood that the injury can be redressed by a favorable court decision. *Id.* at 561.

Here, Corey’s request for NAFTA binational review of the Final Results cannot be deemed filed by the United States because, under U.S. law, Corey would not have standing to challenge the Final Results. Corey received a weighted-average dumping margin of 0.00 percent. See Final Results, 85 Fed. Reg. at 5,392. Under U.S. law, Corey’s 0.00 percent margin, without more, is insufficient to demonstrate an injury in fact—the first of three requirements for standing. See, e.g., *PAO Severstal v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1411, 1414 (2017) (“PAO”) (holding a prevailing party lacks standing to sue); *Zhanjiang Guolian Aquatic Prods. Co. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1339, 1342 (2014) (citing *Royal Thai Gov’t v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1330, 1333 (2014)); *Jubail Energy Servs. Co. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1352, 1356 (2015) (respondent receiving favorable outcome in antidumping determination lacks standing); *Rose Bearings Ltd. v. United States*, 14 CIT 801, 802–03, 751 F. Supp. 1545, 1546–47 (1990) (where, inter alia, the complaining party did not have to pay an antidumping duty, there is no case or controversy); *but see Oman Fasteners, LLC v. United States*, 43 CIT __, Slip Op. 19–108 at 14–21 (Aug. 8, 2019) (“*Oman*”) (finding a plaintiff had standing to challenge a final determination, despite being assigned a zero rate, where the plaintiff alleges that the outcome of a separate, pending appeal of that same determination, in which it was a defendant-intervenor thus unable to raise its own claim, could result in it being assigned a rate on remand).⁸ As all three criteria must be satisfied for a party to have standing, the court does not need to consider the other two requirements. Moreover, since Corey is the only party to this dispute that requested a binational panel, *see generally NAFTA Req.*, and since it did not have standing to do so, no party who would “otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review” requested a binational panel.⁹ As explained in *Building Systems*, Congress provided for the NAFTA binational panels to serve as an alternate forum and did not expand the rights of the litigants. *See Building Systems*, 44 CIT at __, Slip Op. 20–155 at 3 n. 2, 16 (noting a prevailing party could not invoke

⁸ In this case, as in *Oman*, the petitioners in the investigation have challenged Commerce’s determination and Corey (the prevailing party) is a defendant-intervenor. *See Corey’s Resp. Br.* BSM argues that petitioners’ filing is beyond the time allowed by statute to commence an action. *See BSM’s Resp. Br.* at 2–3.

⁹ No party to this dispute alleges that anyone other than Corey has filed a request for a NAFTA binational panel.

the Court’s jurisdiction but could act as a defendant-intervenor if another party challenged the Commerce determination). As such, 19 U.S.C. § 1516a(g) does not preclude the court from exercising jurisdiction over AISC’s complaint. *See Building Systems*, 44 CIT at __, Slip Op. 20–155 at 15–16.

Nonetheless, BSM argues that, pursuant to the timing requirements set forth in 19 U.S.C. § 1516a(a)(5) for cases involving free trade area merchandise, Plaintiff’s challenge is untimely.¹⁰ *See* BSM’s Resp. Br. at 3. However, “procedural rules, including time bars, cabin a court’s power only if Congress has ‘clearly stated’ as much.” *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (citations omitted) (“*Kwai Fun Wong*”). Under *Kwai Fun Wong*, the time requirements of 19 U.S.C. § 1516a(a) are not jurisdictional. *See Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1328, 1335–37 (2015) (citing, inter alia, *Kwai Fun Wong*, 575 U.S. at 406–20). As the time requirements of § 1516a(a) are not jurisdictional and because no party in this action moves to dismiss it as untimely, *see* Def.’s Reply Br. at 2 n.1, the court declines to consider timeliness as a basis for granting or denying Defendant’s motion to dismiss.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendant’s motion to dismiss for lack of subject matter jurisdiction is denied.

Dated: November 3, 2020

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

¹⁰ 19 U.S.C. § 1516a(a)(5). Time limits in cases involving merchandise from free trade area countries.

Notwithstanding any other provision of this subsection, in the case of a determination to which the provisions of subsection (g) apply, an action under this subsection may not be commenced, and the time limits for commencing an action under this subsection shall not begin to run, until the day specified in whichever of the following subparagraphs applies:

(A) For a determination described in paragraph (1)(B) or clause (i), (ii) or (iii) of paragraph (2)(B), the 31st day after the date on which notice of the determination is published in the Federal Register.

Slip Op. 20–158

CARPENTER TECHNOLOGY CORPORATION, et al., Plaintiffs, v. UNITED STATES, Defendant, AND VENUS WIRE INDUSTRIES PVT. LTD., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 19–00200

[Granting Defendant's request for remand of the U.S. Department of Commerce's final results in the administrative review of the antidumping duty order on stainless steel bar from India. Otherwise denying Plaintiffs' motions for judgment upon the agency record and for oral argument as moot.]

Dated: November 4, 2020

Grace W. Kim and *Laurence J. Lasoff*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiffs.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Elio Gonzalez*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Eric C. Emerson and *St. Lutheran M. Tillman*, Steptoe & Johnson LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the administrative review of stainless steel bar (or "SS bar") from India for the period of review February 1, 2017 through January 31, 2018 ("the POR"). See *Stainless Steel Bar From India*, 84 Fed. Reg. 56,179 (Dep't Commerce Oct. 21, 2019) (final results of admin. review of the anti-dumping duty order; 2017–2018) ("*Final Results*"), ECF No. 20–4, and accompanying Issues and Decision Mem., A-533–810 (Oct. 15, 2019) ("I&D Mem."), ECF No. 20–5.¹

Plaintiffs² filed a motion for judgment on the agency record challenging Commerce's revised method of selecting partial adverse facts

¹ The administrative record for this case is divided into a Public Administrative Record, ECF No. 20–1, and a Confidential Administrative Record, ECF No. 20–2.

² Plaintiffs consist of Carpenter Technology Corporation; Crucible Industries LLC; Electralloy, a Division of G.O. Carlson, Inc.; North American Stainless; Valbruna Slater Stainless, Inc.; Universal Stainless Alloy Products, Inc.

available (or “partial AFA”)³ to use in determining Defendant-Intervenors’ (“Venus”)⁴ final antidumping duty margin. *See* Confidential Pls.’ Rule 56.2 Mot. for Judgment Upon the Agency R., and Confidential Mem. of Law in Supp. of Pls.’ Rule 56.2 Mot. for Judgment [upon] the Agency R. (“Pls.’ Mem.”), ECF No. 25. Specifically, Plaintiffs contend that: (1) Commerce did not adequately explain or provide notice of its decision to revise its methodology for determining partial AFA for the *Final Results*, *see id.* at 10–17; and (2) Commerce’s application of the revised methodology is not supported by substantial evidence or in accordance with the law, *see id.* at 17–35.

In response, Defendant United States (“the Government”) requests a remand to Commerce so that the agency may “reconsider or further explain its application of [the] revised partial [AFA] methodology, its change in methodology from the preliminary results to the final results, and if appropriate, the rates assigned to the respondents.”⁵ Def.’s Resp. to Pls.’ Mot. for Judgment Upon the Agency R. (“Gov’t’s Resp.”) at 6, ECF No. 27. Venus filed a reply to the Government’s remand request asserting that remand is not appropriate, but otherwise taking no position on the remand request. *See* Def.-Ints.’ Reply to [Pls.’] Mot. for Judgment on the Agency R. and [Def.’s] Request for Voluntary Remand (“Venus’s Resp.”), ECF No. 28. Plaintiffs filed a reply supporting the Government’s request for remand, *see* Confidential Pls.’ Reply in Supp. of Def.’s Request for Voluntary Remand, ECF No. 29, and a motion for oral argument, *see* Pls.’ Mot. for Oral Arg., ECF No. 32.

For the following reasons, the court finds that the Government has established that the agency’s concerns are substantial and legitimate

³ When “necessary information is not available on the record,” or an interested party “withholds information” requested by Commerce, “fails to provide” requested information by the submission deadline, “significantly impedes a proceeding,” or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall . . . use the facts otherwise available.” 19 U.S.C. § 1677e(a). If Commerce determines that the party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *Id.* § 1677e(b).

⁴ Defendant-Intervenors or Venus consist of Venus Wire Industries Pvt. Ltd.; Precision Metals; Sieves Manufacturers (India) Pvt. Ltd.; and Hindustan Inox Ltd.

⁵ Commerce determined the only other mandatory respondent’s (“JSHL”) dumping margin based on total AFA. *See* I&D Mem. at 34, 47; *see also* Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review, A-533–810, (Apr. 9, 2019) (“Prelim. Mem.”) at 2, *available at* https://enforcement.trade.gov/frn/summary/india/2019-07560_1.pdf (last visited Oct. 30, 2020) (stating that Venus and JSHL were the two mandatory respondents selected in this review). As AFA for JSHL, Commerce selected “the highest transaction-specific dumping margin that [the agency] calculated for [Venus] in this review.” I&D Mem. at 43 (citation omitted). Commerce relied on 19 U.S.C. § 1673d(c)(5)(A) to determine the rate for non-individually examined respondents. *See id.* at 46. Commerce therefore excluded JSHL’s rate—determined by total AFA—in averaging the rates of the mandatory respondents and, thus, assigned Venus’s margin to the non-individually examined respondents. *See id.*

and, thus, grants the Government's request for remand. Plaintiffs' motions for oral argument and for judgment on the agency record are otherwise denied as moot.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁶ and 28 U.S.C. § 1581(c) (2018).

BACKGROUND

Commerce published the antidumping duty order on SS bar from India on February 21, 1995. *See Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9,661 (Dep't Commerce Feb. 21, 1995) (antidumping duty orders). In 2011, Commerce conditionally revoked the antidumping duty order on SS bar with respect to subject merchandise produced or exported by Venus. *See Stainless Steel Bar from India*, 76 Fed. Reg. 56,401, 56,402–03 (Dep't Commerce Sept. 13, 2011) (final results of the antidumping duty admin. review, and revocation of the order, in part). Thereafter, Commerce initiated a changed circumstances review of Venus and, as a result of that review, determined that Venus had resumed selling SS bar in the United States at less than fair value. *See Stainless Steel Bar From India*, 83 Fed. Reg. 17,529 (Dep't Commerce Apr. 20, 2018) (final results of changed circumstances review and reinstatement of certain companies in the antidumping duty order).

In the changed circumstances review, Venus reported consuming inputs referred to as "SS rounds, straight rounds, or hot rolled bar" (referred to herein as "SS rounds") provided by an unaffiliated supplier, but Commerce found that these inputs were in fact subject merchandise. *See Venus Wire Indus. Pvt. Ltd. v. United States* ("Venus I"), 43 CIT ___, ___, 424 F. Supp. 3d 1369, 1371–73 (2019). Commerce requested, but Venus did not provide, the unaffiliated producers' cost of production for the SS rounds used to make SS bar. *See id.* at 1373. "[I]n the absence of cost information from Venus's suppliers, [Commerce] assigned Venus a margin based on total AFA." *Id.* The court has issued two opinions in the appeal of the changed circumstances review which provide additional background regarding Commerce's finding that the SS bar provided by Venus's unaffiliated producers and reported as inputs are subject merchandise and the agency's reliance on total AFA. *See generally Venus Wire Indus. Pvt. Ltd. v. United States* ("Venus II"), Slip Op. 20–118, 2020 WL 4933616 (CIT

⁶ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

Aug. 14, 2020); *Venus I*, 424 F. Supp. 3d 1369.

Commerce initiated this administrative review on April 16, 2018. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 16,298, 16,300 (Dep't Commerce Apr. 16, 2018). As Commerce did in the changed circumstances review, it sought to determine whether SS rounds reported as inputs and provided by Venus's unaffiliated suppliers were in fact subject merchandise. *See Prelim. Mem.* at 5, 7. Venus explained that "it purchased stainless steel wire rods (^[4] SSWR ^[7]) in coil form and hot-rolled stainless-steel bars . . . and [SS rounds] from unaffiliated suppliers during the POR." *Id.* at 7 (footnotes omitted). Venus stated that it "further processed these inputs into cold finished SS Bar." *Id.* (citation omitted). Commerce found that the inputs reported as SS rounds were subject merchandise and instructed Venus to provide the unaffiliated suppliers' cost of production information for the SS rounds. *See id.* at 8. Venus did not provide this information in its entirety. *Id.* at 8–9 (stating that one of Venus's unaffiliated suppliers provided its cost information, but that it was unusable "because it represents a small number of sales").

Absent the unaffiliated suppliers' cost of production information, the agency found that it could not calculate Venus's rate. *Id.* at 9. Commerce made the additional finding that Venus and its unaffiliated suppliers failed to act to the best of their ability to provide cost of production data, and thus, the agency preliminarily relied on partial AFA. *See id.* at 9–10. As partial AFA, Commerce preliminarily selected "one of the highest transaction-specific rate[s] calculated for the U.S. sales of subject merchandise produced using the SSWR input." *Id.* at 13 (citation omitted). As a result, Commerce preliminarily determined a rate of 77.49 percent for Venus. *See Stainless Steel Bar From India*, 84 Fed. Reg. 15,582, 15,583 (Dep't Commerce Apr. 16, 2019) (prelim. results of antidumping duty admin. review; 2017–2018).

For the *Final Results*, Commerce continued to find that Venus was not the producer of the subject merchandise produced from SS rounds purchased from unaffiliated suppliers, *see I&D Mem.* at 19, and that Venus did not act to the best of its ability to provide Commerce with its unaffiliated producers' cost of production data, *see id.* at 23–24. Commerce, however, revised its method of selecting partial AFA. *Id.* at 24. Rather than using the "highest (non-aberrational) transaction-specific margin" to determine the sales at issue, Commerce "calcu-

lated a ‘surrogate’ [cost of production] for these sales.”⁷ *Id.* As a result, Commerce determined a margin of 5.35 percent for Venus. *See Final Results*, 84 Fed. Reg. at 56,180.

DISCUSSION

I. Legal Framework

When an agency determination is challenged in the courts, the agency may “request a remand (without confessing error) in order to reconsider its previous position” and “the reviewing court has discretion over whether to remand.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Remand is appropriate “if the agency’s concern is substantial and legitimate,” but “may be refused if the agency’s request is frivolous or in bad faith.” *Id.* “A concern is substantial and legitimate when (1) Commerce has a compelling justification, (2) the need for finality does not outweigh that justification, and (3) the scope of the request is appropriate.” *Hyundai Heavy Indus. v. United States*, 43 CIT ___, ___, 393 F. Supp. 3d 1293, 1300 (2019) (quoting *Changzhou Hawd Flooring Co. v. United States*, 38 CIT ___, ___, 6 F. Supp. 3d 1358, 1361 (2014)).

II. The Government Has Demonstrated that the Agency’s Concerns are Substantial and Legitimate

The Government has established that its remand request is based on concerns that are substantial and legitimate, consistent with the three-pronged test referenced in *Hyundai Heavy Industries*.

First, the Government identifies a compelling justification for the remand request. The Government represents to the court that Commerce “acknowledges potential concerns with how it applied the new methodology in [the] review.”⁸ Gov’t’s Resp. at 6. “[A] remand request for Commerce to correct a potentially erroneous calculation of a

⁷ To determine the surrogate cost of production, Commerce examined:

the below-cost sales of SS bar produced using the SSWR input. For these sales, [Commerce] identified the highest difference (as a percentage of acquisition cost) between [Venus’s] acquisition cost, plus Selling, General & Administrative (SG&A) costs, and the sales price. [Commerce] then applied this percentage to the acquisition cost, plus SG&A, of the [SS rounds] or hot rolled bar inputs. [Commerce] conducted the sales-below cost [analysis] on the basis of this ‘surrogate’ [cost of production], and [] applied the margin program to the appropriate U.S. sales.

I&D Mem. at 24.

⁸ The court is not persuaded by Venus’s argument that the Government’s remand request is overly broad and vague. *See Venus’s Resp.* at 2–3 (discussing *NEXTEEL Co. v. United States*, 43 CIT ___, ___, 355 F. Supp. 3d 1336, 1348 (2019), *recons. denied*, 43 CIT ___, 389 F. Supp. 3d 1343 (2019)). The Government explained that Commerce seeks to consider the arguments raised by Plaintiffs regarding the agency’s method of selecting partial AFA that caused Commerce “substantial and legitimate concern.” Gov’t’s Resp. at 6. Although the

dumping margin is a compelling justification.” *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT ___, ___, 163 F. Supp. 3d 1255, 1312 (2016). Moreover, interested parties did not have the opportunity to comment to the agency on this methodology, and the court agrees that the agency will benefit from considering such arguments in the first instance.⁹ See Gov’t’s Resp. at 6–7.

Second, in this challenge to the *Final Results*, “the need to accurately calculate margins is not outweighed by the interest in finality.” *Baroque Timber*, 37 CIT at 1127, 925 F. Supp. 2d at 1339. The Government promptly requested the remand in its response brief and, absent a remand, would have limited ability to defend Commerce’s determination because, by adopting the new methodology in its *Final Results*, Commerce did not have an opportunity to address Plaintiffs’ arguments.¹⁰

Third, the court is persuaded that the scope of the requested remand is appropriate. The Government acknowledged that Plaintiffs raised new arguments in their motion for judgment on the agency record and that Commerce seeks an opportunity to address those arguments and, as appropriate, reconsider or further explain its reliance on and methodology for partial AFA. See Gov’t’s Resp. at 6–7. Further, because Venus’s margin calculations provided the basis for the margins determined for all other respondents in this review, it is appropriate that Commerce be permitted to reconsider those margins to the extent appropriate. See *supra* note 5. As a result, it is appropriate that the court remand this matter to allow Commerce to consider Plaintiffs’ arguments and further explain or modify its determination accordingly. Because granting the Government’s request for remand otherwise renders moot the arguments in Plaintiffs’ motion for judgment on the agency record, the court otherwise denies that motion and denies as moot Plaintiffs’ motion for oral argument.

Government did not list each relevant argument, the Government’s remand request to address Plaintiffs’ arguments regarding Commerce’s altered methodology is not overbroad or vague.

⁹ While Commerce acknowledges potential concerns with its methodology, the court does not require Commerce to adopt or refrain from a particular approach in its remand determination. See Gov’t’s Resp. at 8 (requesting that the court not direct a particular outcome). “In matters of method, the court defer[s] to the agency whose expertise, after all, consists of administering the statute.” *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 37 CIT 1123, 1127 n.8, 355 F. Supp. 3d 1336, 1339 n.8 (2013) (quoting *Gleason Indus. Prods., Inc. v. United States*, 31 CIT 393, 396 (2007)) (alteration in original).

¹⁰ By requesting a remand of this matter in its entirety, the Government explains that it does not waive any arguments on the merits of the issues presented in the *Final Results* that may arise on appeal of the remand results. See Gov’t’s Resp. at 7–8.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results* are remanded to the agency for further explanation or reconsideration of its selection of partial AFA in the *Final Results*; and it is further

ORDERED that Commerce shall file its remand results on or before February 2, 2021; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that Plaintiffs' motion for judgment upon the agency record (ECF No. 25) is otherwise denied as moot; and it is further

ORDERED that Plaintiffs' motion for oral argument (ECF No. 32) is denied as moot.

Dated: November 4, 2020

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

Index

Customs Bulletin and Decisions
Vol. 54, No. 45, November 18, 2020

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Revocation of Two Ruling Letters, Modification of a Ruling Letter, and Revocation of Treatment Relating to the Tariff Classification of Digital Blood Pressure Monitors	1
Agency Information Collection Activities:	
Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release	9
Drawback Process Regulations	12
Customs Regulations Pertaining to Customhouse Brokers	16
Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing	19

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
Uttam Galva Steels Limited, Plaintiff, v. United States, Defendant, and California Steel Industries Inc., and Steel Dynamics, Inc., Defendant-Intervenors.	20-151	29
United States, Plaintiff, v. NYWL Enterprises Inc., Defendant.	20-154	37
Building Systems de Mexico, S.A. de C.V., Plaintiff, v. United States, Defendant, and Full Member Subgroup of the American Institute of Steel Construction, LLC and Corey S.A. de C.V., Defendant-Intervenors.	20-155	44
Full Member Subgroup of the American Institute of Steel Construction, LLC, Plaintiff, v. United States, Defendant, Les Constructions Beauceatlas, Inc. et al., Defendant- Intervenors	20-156	54
Full Member Subgroup of The American Institute of Steel Construction, LLC, Plaintiff, v. United States, Defendant and Building Systems De Mexico, S.A. de C.V. and Corey S.A. de C.V., Defendant-Intervenors.	20-157	59
Carpenter Technology Corporation, et al., Plaintiffs, v. United States, Defendant, and Venus Wire Industries Pvt. Ltd., et al., Defendant-Intervenors.	20-158	67