U.S. Customs and Border Protection

VISA WAIVER PROGRAM CARRIER AGREEMENT (FORM I–775)

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

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

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

DATES: Comments are encouraged and must be submitted no later than May 16, 2022 to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (86 FR 72611) on December 22, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Visa Waiver Program Carrier Agreement.

OMB Number: 1651–0110.

Form Number: Form I–775.

Current Actions: Extension with change of an existing collection of information.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: Section 233(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1223(a)) provides for the necessity of a transportation contract. The statute provides that the Attorney General may enter into contracts with transportation lines for the inspection and admission of noncitizens coming into the United States from a foreign territory or from adjacent islands. No such transportation line shall be allowed to land any such noncitizen in the United States until and unless it has entered into any such contracts which may be required by the Attorney General. Pursuant to the Homeland Security Act of 2002, this authority was transferred to the Secretary of Homeland Security.

The Visa Waiver Program Carrier Agreement (CBP Form I–775) is used by carriers to request acceptance by CBP into the Visa Waiver

Program (VWP). This form is an agreement whereby carriers agree to the terms of the VWP as delineated in Section 217(e) of the INA (8 U.S.C. 1187(e)). Once participation is granted, CBP Form I–775 serves to hold carriers liable for certain transportation costs, to ensure the completion of required forms, and to require sharing passenger data, among other requirements. Regulations are promulgated at 8 CFR 217.6, Carrier Agreements. A fillable copy of CBP Form I–775 is accessible at: *https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/CBP%20Form%20I-775.pdf.*

Proposed Change: The requirement of submitting original documents bearing original signatures of company representatives, has been modified to include electronic wire transfer of CBP Form I–775. This temporary transfer of information will be lifted upon notification from the CDC that COVID–19 restrictions have changed.

Type of Information Collection: Form I–775.

Estimated Number of Respondents: 98.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 98.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 49.

Dated: April 12, 2022.

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

[Published in the Federal Register, April 15, 2022 (85 FR 22542)]

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

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

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

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP)

intends to revoke a ruling letter concerning tariff classification of a chafer set, Dura-Ware model 7800, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 3, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Cammy Canedo, Regulations and Disclosure Law Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

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), this notice advises interested parties that CBP is proposing to revoke a ruling letter pertaining to the tariff classification of chafer set. Although in this notice, CBP is specifically referring to revoking NY C88591, dated July 1, 1998 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for

rulings in addition to the ruling identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY C88591, CBP classified a chafer set, Dura-Ware model 7800, in heading 8419, HTSUS, specifically in subheading 8491.81.90, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof: Other machinery, plant or equipment: For making hot drinks or for cooking or heating food: Other..." CBP has reviewed NY C88591 and has determined the ruling letter to be in error. It is now CBP's position that the subject chafer set is properly classified in heading 7321, HTSUS, specifically in subheading 7321.89.00, HTSUS, which provides for "Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Other appliances: Other, including appliances for solid fuel..."

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

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

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

NY C88591

July 1, 1998
CLA-2–84:RR:NC:MM:106 C88591
CATEGORY: Classification
TARIFF NO.: 8419.81.9040

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

RE: The tariff classification of a chafer set from Korea

DEAR MR. SIEGAL:

In your letter dated April 17, 1998 and in subsequent follow-ups, on behalf of Dura-Ware Co. of America Inc., you requested a tariff classification ruling. You included descriptive literature with your request.

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

The applicable subheading for the Dura-Ware model 7800 chafer set will be 8419.81.9040, Harmonized Tariff Schedule of the United States (HTS), which provides for machinery, plant or equipment for making hot drinks or for cooking or heating food, of a type used in restaurants, hotels or similar locations. The rate of duty will be 0.8 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Patrick J. Wholey at 212–466–5668.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

ATTACHMENT B

HQ H324203
CLA-2 OT:RR:CTF:EMAIN H324203 ALS
CATEGORY: Classification
TARIFF NO.: 7321.89.00

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

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

DEAR MR. SIEGAL:

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

FACTS:

The following are the facts as stated in NY C88591:

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

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

ISSUE:

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

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation ("GRI") and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation ("ARI"). GRI 1 provides that the classification of goods shall be "determined according to the terms of the headings and any relative section or chapter notes." In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order.

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

The HTSUS provisions under consideration are as follows:

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

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

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

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

> This heading covers a group of appliances which meet all of the following requirements:
>
> (i) be designed for the production and utilisation of heat for space heating, cooking or boiling purposes;
>
> (ii) use solid, liquid or gaseous fuel, or other source of energy (e.g., solar energy);
>
> (iii) be normally used in the household or for camping.

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

As noted above, the Dura-Ware 7800 has a bottom shelf upon which heat sources such as Sterno® candles can be placed to heat food contained in the chafer. This is clearly a design for heating food, if not cooking or boiling. It is also evidence of being designed for use with a source of energy. While the facts

of NY C88591 indicate that the importer intends to sell the instant merchandise to distributors who in turn sell to restaurants and hotels, the dimensions of the Dura-Ware 7800 are indicative of its use in a household setting as well. Given the foregoing, we find that the Dura-Ware 7800 is a steel nonelectric domestic appliance similar to the goods named in heading 7321, HTSUS, (e.g., cookers, plate warmers, etc.). Therefore, it is properly classified under heading 7321, HTSUS, and thereby excluded from classification under heading 8419, HTSUS, by operation of Note 1(d) to Chapter 84, *supra*. Specifically, it is properly classified under subheading 7321.89.00, HTSUS. This conclusion is consistent with NY N199500 (January 24, 2012), wherein CBP classified four similarly designed chafer sets, which respectively featured five-quart, ten-quart, five-liter, and ten-liter containers, under heading 7321, HTSUS.

HOLDING:

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

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

EFFECT ON OTHER RULINGS:

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

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

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

MID CONTINENT STEEL & WIRE, INC., Plaintiff-Appellee v. UNITED STATES, Defendant-Appellee PT ENTERPRISE INC., PRO-TEAM COIL NAIL ENTERPRISE INC., UNICATCH INDUSTRIAL CO., LTD., WTA INTERNTIONAL CO., LTD., ZON MON CO., LTD., HOR LIANG INDUSTRIAL CORPORATION, PRESIDENT INDUSTRIAL INC., LIANG CHYUAN INDUSTRIAL CO., LTD., Defendants-Appellants

Appeal No. 2021–1747

Appeal from the United States Court of International Trade in Nos. 1:15-cv-00213-CRK, 1:15-cv-00220-CRK, Judge Claire R. Kelly.

Decided: April 21, 2022

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, argued for plaintiff-appellee. Also represented by PING GONG.

MIKKI COTTET, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, PATRICIA M. MCCARTHY; VANIA WANG, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

NED H. MARSHAK, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, New York, NY, argued for defendants-appellants. Also represented by MAX F. SCHUTZMAN; DHARMENDRA NARAIN CHOUDHARY, ANDREW THOMAS SCHUTZ, Washington, DC.

Before NEWMAN, LOURIE, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

In 2015, the United States Department of Commerce issued an antidumping duty order covering steel nails from Taiwan. In 2019, we ordered a remand to Commerce for further explanation of one aspect of the methodology it had adopted to determine whether there was "a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time" under 19 U.S.C. § 1677f-1(d)(1)(B)(i). *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 675 (Fed. Cir. 2019) (*CAFC 2019 Op*.). The present appeal involves Commerce's redetermination on remand from our 2019 decision.

In this proceeding, as in others, Commerce, in order to assess the significance of the difference between the prices of two groups of sales, stated that it was using a widely known statistical measure called the Cohen's *d* coefficient. As applied to groups of sales, that coefficient is a ratio whose numerator is the difference between means of the prices of the two groups and whose denominator is a figure, reflecting the

general dispersion of the pricing data, that serves as a benchmark against which to judge the significance of the difference stated in the numerator. Commerce used, for that benchmark, a figure based on the standard deviations of the prices in the two groups; it squared the standard deviations of the prices of each group (yielding the variances), added them together and divided by two, then took the square root. The middle step—adding together and dividing by two—is "simple averaging," which gives equal weight in the average to each group, even if they are very different in size (*e.g.*, if the first group reflects sales of 5 units and the second group reflects sales of 95 units). A "weighted average" approach, in contrast, would, at the middle step, assign weights proportionate to each group's share of the total (*e.g.*, multiplying the first group's variance by 5 and the second by 95, then dividing the sum by 100, thus giving 5/100 weight to the first group and 95/100 weight to the second group). In 2019, we held that Commerce did not adequately explain why it was reasonable to use simple averaging. *Id.* at 673–75. On remand from our decision, Commerce again chose to use simple averaging for its version of a Cohen's *d* denominator.

The Court of International Trade (Trade Court) upheld Commerce's decision. *Mid Continent Steel & Wire, Inc. v. United States*, 495 F. Supp. 3d 1298, 1308 (Ct. Int'l Trade 2021) (*CIT 2021 Op.*). The Taiwanese producers and exporters of the steel nails at issue appeal. We conclude that the relevant statistical literature cited by Commerce uniformly uses weighted averaging in the Cohen's *d* denominator calculation and that Commerce has not offered a reasonable justification for its departure from the cited literature. We therefore vacate the Trade Court's decision and require a remand to Commerce for further consideration of its methodology for applying § 1677f-1(d)(1)(B)(i) here.

I

A

In an antidumping duty investigation, when Commerce seeks to determine whether the foreign-originated merchandise of a foreign producer or exporter is being sold in the United States at less than fair value, *see* 19 U.S.C. § 1673, it must compare the home-country "normal value" (often the sale price in the home country) with the actual or constructed "export price" reflecting the price at which the merchandise is sold into the United States. *CAFC 2019 Op.*, 940 F.3d at 665. That comparison usually calls for use of an "average-to-average" method. When the normal value is based on home-country sales prices of a foreign producer or exporter who is a respondent in

the proceeding, the average-to-average method compares "the weighted average of the respondent's sales prices in its home country during the investigation period to the weighted average of the respondent's sales prices in the United States during the same period." *Stupp Corp. v. United States*, 5 F.4th 1341, 1345 (Fed. Cir. 2021); *CAFC 2019 Op.*, 940 F.3d at 666; *see also* 19 U.S.C. § 1677f-1(d)(1); 19 C.F.R. § 351.414(b)(1), (c)(1). But that average-to-average comparison is not the only authorized method: two other methods are authorized, of which one is at issue here.

The statute permits comparisons on a "transaction-to-transaction" basis in unusual circumstances, 19 U.S.C. § 1677f-1(d)(1)(A)(ii); 19 C.F.R. § 351.414(c)(2), but that method is not at issue here. What is at issue is a third method authorized by Congress under certain circumstances—an "average-to-transaction" method. This method calls for the "weighted average of normal values" in the home country to be compared to the "export values (or constructed export values) of individual transactions" in the United States. 19 U.S.C. § 1677f-1(d)(1)(B); 19 C.F.R. § 351.414(b)(3). The object is to uncover "targeted" dumping, a label for an exporter's unduly low pricing in portions (less than all) of its overall U.S. sales, which would be "masked" (offset) by the exporter's other, higher-priced sales if only overall averages are considered. *See Stupp*, 5 F.4th at 1345. Congress directed that Commerce may use the "average-to-transaction" method only if

> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) [average-to-average] or (ii) [transaction-to-transaction].

19 U.S.C. § 1677f-1(d)(1)(B).

The statute does not specify how Commerce should determine whether those conditions are met. *Stupp*, 5 F.4th at 1346. Starting in 2014, Commerce has used a two-stage "differential pricing" analysis. *See* Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722, (May 9, 2014) (*Differential Pricing RFC*); *see also Stupp*, 5 F.4th at 1346–48. The first stage of that process corresponds to the inquiry in paragraph (i)—whether "there is a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time"—and itself has two parts: the "Cohen's *d* test," fol-

lowed by the "ratio test." *Differential Pricing RFC* at 26,722–23. The second (final) stage involves a "meaningful difference" assessment to make the determination required in paragraph (ii). *Id*. The present case involves the Cohen's *d* test—the first part of the first stage of Commerce's overall differential pricing analysis.

Under the method as described in 2014, Commerce, considering all sales in the United States by an exporter, is to select a specific purchaser, region, or period of time, form a "test group" consisting of all the exporter's sales meeting that criterion, and put all the exporter's remaining U.S. sales in the "comparison group." *Id*. at 26,722. That is, Commerce is to compare sales to one purchaser to sales to all others, sales in one region to sales in all others, and sales in one period to sales in all others—in fact, to do so for each purchaser, each region, and each period. For each such test group, Commerce is to compute the Cohen's *d* coefficient by comparing the average price of sales within the test group to the average price of sales within the corresponding comparison group. *Id*.[1] How Commerce did that comparison to calculate the Cohen's *d* in this matter—which appears to be representative of its general approach—is the subject of the dispute before us.

Commerce explained that it started with the following formula from Cohen's textbook to calculate *d*:

$$d = \frac{m_A - m_B}{\sigma}$$

J.A. 1079 (quoting, with font changes, Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* 20 (2d ed. 1988) (*Cohen*)).[2] In that formula, m_A is the mean of the test group (here, the weighted average of the prices of sales in the group), m_B is the mean of the comparison group (here, the weighted average of the prices of sales in that group), and σ is "the standard deviation of either population [the test group or the comparison group] (since they are assumed equal)." *Cohen* at 20. Where, as here, the groups consist of sales at known prices, $m_A - m_B$ is in price units (*e.g*., dollars per kilogram), and so is σ, so the ratio *d* is a pure (unitless) number.

[1] "The Department calculates the Cohen's d coefficient with respect to comparable merchandise if the test and comparison groups of data each have at least two observations, and if the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise." *Id*.

[2] It appears that Commerce may have used the "two-tailed" version of the test to account for differences in either direction ($m_A > m_B$ or $m_A < m_B$), taking the absolute value of the coefficient, which is not shown in the formula in the text. *See Stupp*, 5 F.4th at 1346; *Cohen* at 20. That choice is not in dispute here, and the issue before us is unaffected by the presence or absence of absolute value signs in the formula.

Commerce then changed the denominator to a figure, also drawn from *Cohen*, designed to be applied when the two groups, though of the same size, have different standard deviations. Specifically, for this new denominator σ', Commerce used the following formula:

$$\sigma' = \sqrt{\frac{\sigma_A^2 + \sigma_B^2}{2}}$$

J.A. 1080 (quoting *Cohen* at 44). In this formula, σ_A^2 and σ_B^2 are the squared standard deviations (variances) of the prices in the test and comparison groups, respectively. The simple average is used under the square-root sign (with no weighting by the sizes of groups A and B), reflecting the fact that, in the situation addressed in the section of *Cohen* containing this formula, groups A and B are of the same size: "$n_A = n_B$." *Cohen* at 43. This formula involves "pooling" the data from the two groups, and the name "pooled standard deviation" is used for both the above formula and also the variation where a weighted average is used instead of a simple average. *E.g., CIT 2021 Op*., 495 F. Supp. 3d at 1300; *see also CAFC 2019 Op*., 940 F.3d at 673 (referring to the expression as the "pooled variance" because σ_A^2 and σ_B^2 are the variances of the prices in the two groups).

The disputed feature of the formula is that it does not use the size of the groups to weight the two figures (squared standard deviations, *i.e*., variances) being averaged. It is undisputed that, when the groups are of the same size, simple averaging equals weighted averaging. But Commerce used the formula without group-size weighting even when, unlike in the situation described in the *Cohen* section from which the formula is borrowed, the groups are of different sizes. In that circumstance, it is undisputed, simple averaging does not equal weighted averaging. Commerce noted: "To be sure, the use of a simple versus weight[ed] average yields very different results." J.A. 667.

The steps following the calculation of Cohen's *d* in Commerce's analysis are not in dispute. Nor, we note, has Commerce relied on those steps to help justify the simple-averaging choice it has made for the denominator at the first step. We briefly summarize the remaining steps.

Upon calculating *d* for a test group of sales, Commerce described the test group as having "passed" the Cohen's *d* test if *d* for that group exceeded 0.8, *i.e*., if the difference in means was at least 80% of the pooled standard deviation. *See Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326, 1338–39 (Ct. Int'l Trade 2017)

(*CIT 2017 Op.*).[3] Commerce then computed, for the sales of the subject merchandise of a given respondent, the ratio of (a) the total value of those sales which were part of any group that passed the Cohen's *d* test (whether by a purchaser, region, or period comparison) to (b) the total value of all the respondent's sales being studied by Commerce. *Id.* at 1343 n.24. Because that "ratio test" produced a ratio between 33 and 66 percent in this matter, Commerce tentatively decided to use average-to-transaction comparisons in part. *See CAFC 2019 Op.*, 940 F.3d at 671–72.

To make its final determination whether to use an average-to-transaction method, Commerce asked, pursuant to § 1677f-1(d)(1)(B)(ii), whether the pricing differences found "cannot be taken into account using" average-to-average or transaction-to-transaction comparisons. For that determination, Commerce asked whether using a comparison other than average-to-transaction would make a "meaningful difference" in the result. Commerce found that there would be such a difference and so adopted the average-to-transaction method. *See CAFC 2019 Op.*, 940 F.3d at 672.

B

1

In response to a petition by Mid Continent Steel & Wire, Inc., Commerce initiated an antidumping duty investigation of certain steel nails from Taiwan and certain other countries. *See CAFC 2019 Op.*, 940 F.3d at 665. The investigation of nails from Taiwan—for the period April 1, 2013, to March 31, 2014—was broken out separately, and Commerce selected PT Enterprises, Inc. and its affiliated producer Pro-Team Coil Nail Enterprise Inc. as mandatory respondents. In May 2015, Commerce issued an affirmative final determination of less-than-fair-value sales in the United States and determined that the appropriate weighted-average dumping margin for those respondents was 2.24%. *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28,959, 28,961 (Dep't of Commerce May 20, 2015) (Final Determination). Following the International Trade Commission's affirmative determination of material injury to a domestic injury, Commerce issued an antidumping duty order. In 2017, following an appeal to the Trade Court, Commerce revised the dumping margin for the respondents to 2.16%. The all-others rate was also set at 2.16%.

[3] A "pass" thus indicates that the test group's prices are sufficiently different from the comparison group's prices to contribute to a finding of targeted dumping. In this way, the label means the opposite of the word's usual connotation of success in avoiding trouble.

Those respondents and other Taiwanese producers and exporters (collectively, PT) and Mid Continent brought actions in the Trade Court to challenge Commerce's determination. The Trade Court sustained Commerce's application of the Cohen's *d* test in determining whether "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time," 19 U.S.C. § 1677f-1(d)(1)(B)(i), and in particular approved Commerce's decision "to use a simple average to calculate the pooled standard deviation in the Cohen's d test of the differential pricing analysis." *CIT 2017 Op*., 219 F. Supp. 3d at 1330. In 2019, we mostly affirmed the Trade Court's decision, but we vacated it in part, holding that Commerce's explanation of its use of "a simple average, rather than a weighted average, to calculate the pooled variance used in the Cohen's *d* calculation" was insufficient, requiring a remand to Commerce "for further explanation." *CAFC 2019 Op*., 940 F.3d at 673, 675.

Specifically, we noted that (1) "Commerce said that it was simply using a widely accepted statistical test; yet it did not acknowledge that the only cited literature source for the relevant aspect of the test itself calls for the use of weighted averages"; (2) Commerce's statement that weighted averaging produces "skewing" was a "mere conclusion" without independent explanation of what the statute calls for; (3) Commerce's rebuttal of PT's argument against the simple average was unsupported and also was not itself an affirmative argument for simple averaging; and (4) Commerce's "predictability" concern seemed tied to the manipulability of reporting sales by number of transactions and Commerce did not indicate why the concern would be present if the average used weighting by quantities or weight of nails sold (nails seemingly being priced per kilogram). *Id*. at 674 (cleaned up). We did not preclude Commerce from making the same decision on remand if it supplied adequate reasoning in support. *Id*. at 675.

2

In December 2019, the Trade Court remanded the matter to Commerce in accordance with our decision. In early March 2020, Commerce issued a draft redetermination decision, again opting to use the simple average to calculate the pooled standard deviation, J.A. 660–76, and attaching portions of three statistics references: *Cohen*, J.A. 723–61; Paul D. Ellis, *The Essential Guide to Effect Sizes* (2010) (*Ellis*), J.A. 678–721; and Robert Coe, *It's the Effect Size Stupid: What Effect Size Is and Why It Is Important*, Paper presented at the Annual

Conf. of British Educational Research Ass'n (Sept. 2002) (*Coe*), J.A. 763–73.

In response, PT submitted comments in mid-March 2020, J.A. 780–1004, arguing that "use of simple averaging is both mathematically and statistically inaccurate," J.A. 781. PT pointed to sections of *Cohen* (at 67), of *Coe* (at 6), and of *Ellis* (at 10, 26, 27), all of which set forth formulas that clearly use weighted averages when comparing groups that have both different sizes and different standard deviations (and hence variances). J.A. 790–98.[4] PT proposed a modification, under which the variances of the two groups (test group, comparison group) are weighted by the total weight, in kilograms, of the goods in each group, so the denominator would be

$$\sqrt{\frac{W_a}{W_a + W_b}\sigma_a^2 + \frac{W_b}{W_a + W_b}\sigma_b^2}$$

J.A. 791–92. In that formula, W_a and W_b are the kilogram weights of the test-group goods and comparison-group goods, respectively (and σ_a^2 and σ_b^2 again refer to the variances of the sale prices in the test and comparison groups, respectively). This formula differs in minor ways from the specific formulas in *Cohen, Coe*, and *Ellis*, which involve details of weighted averaging appropriate for sampling when not all population data is known. Commerce did not object to PT's formula on the ground that it departed from those models, but rather on the ground that it used weighted averages rather than simple averages.

In May 2020, Mid Continent submitted comments arguing for the simple-average approach. J.A. 1005–70. It included in its comments a discussion of a portion of *Cohen* to which Commerce, in its draft redetermination, had not pointed. J.A. 1022–24 (citing *Cohen* at 360–61). Mid Continent pointed to a statement in *Cohen*—discussing an example involving a researcher's creating equal-size samples of the groups under study, even though some of the groups are a much smaller share of the overall population than the others—about treating a group's characteristic as an "abstract effect quite apart from the relative frequency with which that effect . . . occurs in the population." *Id*.

In June 2020, Commerce published its final redetermination. J.A. 1073–1121. Commerce continued to use a simple average, and it "provid[ed] further explanation of [its] methodology as requested."

[4] The *Coe* reference, at 6 (question 7), is the reference discussed in our 2019 opinion. *CAFC 2019 Op*., 940 F.3d at 673–74.

J.A. 1073. Commerce explained that to determine whether there was a pattern of export prices that "differ significantly" among purchasers, regions, or periods, it used the widely accepted Cohen's *d* test to measure the "effect size" on price associated with sales to certain purchasers, in certain regions, or during certain periods of time, and it relied on *Ellis, Cohen*, and *Coe* for elaboration. *See* J.A. 1077–80. It noted that the denominator of the Cohen's *d* coefficient was a "yardstick to gauge the significance of the difference of the means," J.A. 1079, and it stated that the statistical literature presented different methods for computing the denominator, "including the square root of the simple average of the variances within each group," J.A. 1080 (citing *Cohen* at 44).

To justify its decision to use the simple average to calculate the denominator, Commerce wrote:

> [T]he purpose of Commerce's Cohen's *d* test is to determine whether U.S. prices differ significantly among purchasers, regions, or time periods – *i.e.*, do prices to each purchaser, region, or time period differ significantly from all other prices of the comparable merchandise. Although these are all prices in the U.S. market made by the respondent, this analysis requires that these prices be subdivided into separate distinct groups to consider separately whether the respondent's pricing behavior for sales to one specific group differs from its pricing behavior for all other sales. In other words, these prices, all of which are used to evaluate: 1) a respondent's pricing behavior in the U.S. market; and 2) whether the respondent is dumping, are now considered to represent two distinct pricing behaviors which may differ significantly. For the purpose of this particular analysis, Commerce finds that these two distinct pricing behaviors are separate and equally rational, and each is manifested in the individual prices within each group. Therefore, each warrants an equal weighting when determining the "standard deviation" used to gauge the significance of the difference in the means of the prices of comparable merchandise between these two groups. Because Commerce finds that each of these pricing behaviors are equally genuine when considering the distinct pricing behaviors between a given purchaser, region, or time period and all other sales, an equal weighting is justified when calculating the "standard deviation" of the Cohen's *d* coefficient. To do otherwise and use an average weighted by sales volume, sales value, or number of transactions would give preference to one pricing behavior over the other, and therefore would bias the

> "yardstick" by which Commerce measures the observed difference in prices between the test and comparison groups.

J.A. 1080–81.

In responding to comments, Commerce referred to the "abstract effect" idea invoked by Mid Continent. J.A. 1112, 1116–17. It also pointed to the difference between this context, in which Commerce has the complete population data pool (and each pairwise comparison involves the entire population), and the context of the cited literature involving sampling from a population. J.A. 1109. Commerce further said that PT's challenge of the simple average relied on conclusory allegations of "skewed" results, J.A. 1081, incorrect assumptions about the relationship between standard deviation and group size, J.A. 1083–84, and "cherry-picked" data, J.A. 1084–85. It added that the simple average provides "predictability" because "the importance given to each pricing behavior will be the same for all products," and it concluded that the use of a simple average was "not only a reasonable approach but a more accurate and consistent measurement." J.A. 1087.

3

The matter returned to the Trade Court. PT submitted comments that included extensive attachments containing the sales information before Commerce and figures that, according to PT, showed why weighted averaging is substantially better than simple averaging at capturing those instances in which a test group's prices are noticeably outside the dispersion of prices generally. J.A. 1122–1373. The government responded, arguing, among other things, that PT failed to exhaust administrative remedies as to some of what PT presented. J.A. 1397–1428.

In January 2021, the Trade Court sustained Commerce's determination. *CIT 2021 Op.*, 495 F. Supp. 3d at 1300. It accepted Commerce's explanation that a weighted average would "inappropriately move the pooled standard deviation toward the pricing behavior of either the test or comparison group," *id.* at 1304, and agreed that an equal weighting was justified because the prices in each test and comparison group "separately and equally represent the respondent's pricing behavior," *id.* at 1308 (quoting J.A. 1108). The Trade Court did not refer to the "abstract effect" idea invoked by Mid Continent and Commerce.[5]

[5] The Trade Court reached its conclusion without having to determine which if any submissions by PT were objectionable under the exhaustion requirement, because the court concluded that all of the submissions were, in any event, answered by the just-noted rationale. *Id.* at 1306–08. Our decision does not rely on the materials that were the subject of the exhaustion dispute, which we therefore need not address.

PT timely appealed to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

A

We review Commerce's decisions using the same standard of review applied by the Trade Court, while carefully considering the Trade Court's analysis. *CAFC 2019 Op*., 940 F.3d at 667. Commerce's selection of a methodology for implementing the statutory directive of § 1677f-1(d)(1)(B) is "an interpretation of that statutory language" that we review for reasonableness. *Stupp*, 5 F.4th at 1352–53; *see Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1256 (Fed. Cir. 2009) ("It is well established that statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." (cleaned up)).

"Commerce has discretion to make reasonable choices within statutory constraints." *CAFC 2019 Op*., 940 F.3d at 667; *see also Stupp*, 5 F.4th at 1353, 1354. Commerce's "special expertise in administering antidumping duty law" is one recognized basis for the "significant deference" embodied in the reasonableness standard. *Ningbo Dafa*, 580 F.3d at 1256; *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007). Expertise enables an agency to identify a reasonable interpretation and to set forth an adequate justification for choosing it over others, but it remains a judicial obligation to ensure that the agency has done so, while avoiding judicial usurpation of agency authority to make pertinent factual and policy determinations. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016). For us to fulfill that obligation, we must ensure that Commerce provides "an explanation that is adequate to enable the court to determine whether the choices are in fact reasonable, including as to calculation methodologies." *CAFC 2019 Op*., 940 F.3d at 667; *Stupp*, 5 F.4th at 1357.

Last year, in *Stupp*, we held that Commerce had provided an inadequate explanation of the reasonableness of its use of Cohen's *d* in its differential-pricing analysis in circumstances where that use seemingly departed from what the statistical literature taught. *Stupp*, 5 F.4th at 1357–60. What was unjustified there was Commerce's use of Cohen's *d* "in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances." *Id*. at 1357. We remanded for further consideration.

On the record presented to us here, we do the same, focusing on a different feature of Commerce's use of Cohen's *d*. We hold that Commerce has not adequately justified its adoption of simple averaging for the Cohen's *d* denominator. Commerce has departed from the methodology described in all the cited statistical literature governing Cohen's *d*, but it has not justified that departure as reasonable. We again remand for further consideration.

B

1

Commerce recognized that the function of the denominator in the Cohen's *d* coefficient is to be a "yardstick to gauge the significance of the difference of the means" of the sales prices of the test and comparison groups. J.A. 1079. The numerator of Cohen's *d* is the difference in weighted average sales prices between the test and comparison groups. Without further context, *i.e.*, without a basis for comparison, it is impossible to say whether that difference is "significant," under 19 U.S.C. § 1677f-1(d)(1)(B)(i) or otherwise. The central purpose of using the Cohen's *d* ratio is to provide the missing basis of comparison—the "yardstick." Cohen's *d* relates, by division, the difference in mean prices of the two particular groups to a figure representing the magnitude of differences in (dispersion of) the prices in the data pool more generally. *See CAFC 2019 Op.*, 940 F.3d at 671. If the mean-price difference is large enough compared to the more general dispersion measure (*i.e.*, the ratio of the two is at least 0.8), "Commerce deems the sales prices in the test group to be significantly different from the sales prices in the comparison group." *Stupp*, 5 F.4th at 1347; *see Differential Pricing RFC* at 26,722 ("The Department finds that the difference is significant, and that the sales of the test group pass the Cohen's d test, if the calculated Cohen's d coefficient is equal to or exceeds the large threshold.").

The cited literature makes clear that one way to form the more general data-pool dispersion figure for the denominator—seemingly the preferred way if the full set of population data is available—is to use the standard deviation for the entire population. But the references recognize that entire population data may be unavailable, in which case an alternative is needed, and the alternative is chosen with the object of estimating (approximating) the unavailable population standard deviation. Thus, *Ellis* states:

> To calculate the difference between two groups we subtract the mean of one group from the other ($M_1 - M_2$) and divide the result

> by the standard deviation (SD) *of the population from which the groups were sampled*. The only tricky part in this calculation is figuring out the population standard deviation. If this number is unknown, some approximate value must be used instead.

Ellis at 10 (emphasis added). *Coe* presents the formula for measuring effect size as

$$\frac{[\textit{Mean of experimental group}] - [\textit{Mean of control group}]}{\textit{Standard Deviation}}$$

and then states:

> The "standard deviation" is a measure of the spread of a set of values. Here it refers to the standard deviation *of the population from which the different treatment groups were taken*. In practice, however, this is almost never known, so it must be estimated either from the standard deviation of the control group, or from a "pooled" value from both groups . . . .

Coe at 2 (emphasis added). And *Cohen* similarly indicates that the ideal denominator is the full population's standard deviation, which may be approximated by a pooled estimate. *See Cohen* at 27 (dividing by "the common within-population standard deviation"); *Cohen* at 67 (noting that the denominator is "the usual pooled within sample estimate of the population standard deviation"—indicating that the pooling method, based on the standard deviations of each of the two groups, aims to estimate the standard deviation of the overall population). When the full population data set is unavailable, all of the cited literature points to use of a "pooled standard deviation" of the two particular groups at issue to form the denominator. *Cohen* at 67; *Ellis* at 10, 26–27; *Coe* at 6.

In this matter, Commerce did not use the standard deviation of all the data for its denominator. It made that choice even while recognizing that it had the full set of data for U.S. sales for the period Commerce was reviewing. J.A. 1109 ("Commerce's analysis is based on all of the U.S. sales data for the respondent . . . . Commerce does not sample the respondent's U.S. sales data used in the Cohen's *d* test, and the calculated means and variances of the U.S. prices are the actual values of the entire population of U.S. sales and are not estimates of those values."). Indeed, in each test-group/comparison-group pair, the test and comparison groups together make up "the entire universe, *i.e.*, population, of the available data," J.A. 1115, because for each test group, the comparison group is all other sales data.

Rather than use the population standard deviation in the denominator, Commerce used a "pooled standard deviation," pooling the standard deviations for each pair of test and comparison groups. As discussed above, it used simple averaging to do the pooling—even where the test and comparison groups have different sizes. In making that choice to use simple averaging, however, Commerce departed from, rather than followed, the cited statistical literature. As we have described above, Commerce's formula for the denominator,

$$\sqrt{\frac{\sigma_A^2 + \sigma_B^2}{2}}$$

comes from a section of *Cohen* that addresses a situation in which the two groups at issue are of the same size. *Cohen* at 43–44; *id*. at 43 ("CASE 2: $\sigma_A \neq \sigma_B$, $n_A = n_B$"). By contrast, when the sampled groups have unequal sizes, the cited literature uniformly teaches use of a pooled standard deviation estimate that involves weighted averaging. *See Cohen* at 67; *Ellis* at 26–27; *Coe* at 6.

The section of *Cohen* (at 359–61) cited by Mid Continent and Commerce for its "abstract effect" language is no exception. It nowhere recites use of a simple average for calculating a pooled standard deviation from groups of unequal size. The discussion in that section involves *f*, an effect size index that is related to, but not the same as, the Cohen's *d* coefficient, applicable when there are arbitrarily many groups to compare, rather than just two. *See Cohen* at 274–80. It expressly sets forth a simple average formula for when the groups are equal in size but a weighted average formula for when the groups are of different size. *Id*. at 359–60. The language of "abstract effect" is used in a discussion of forming certain equal-size groups for the comparative analysis: in the example given, if the object was to identify differences in viewpoint on a topic (attitudes toward the United Nations) among three groups (Jews, Protestants, Catholics), the researcher could form equal groups even though random sampling from a population would produce different-size groups. *Id*. at 360–61. Nothing in the section applies simple averaging to pooled standard deviation estimates for different-size groups.

2

Commerce offered one principal reason for departing from the teaching of all the cited statistical literature. It said that the data in each group (the test and comparison groups) represent "equally rational" and "equally genuine" pricing choices and that, therefore, each

group "warrants an equal weighting" for calculating the pooled standard deviation. J.A. 1080–81. We see no basis for questioning, here or generally, the premise of equal rationality of the pricing behavior (and equal genuineness, if that is different, which is not clear). But Commerce has not offered an adequate explanation of why that premise supports the particular step Commerce must justify: a choice of how to form the denominator in the Cohen's *d* formula.

The fact that the seller is acting rationally and genuinely in its pricing choices in both the test and comparison groups provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation. The rationality and genuineness of the seller's pricing choices have no evident connection to the undisputed purpose of the denominator figure—to provide a dispersion figure for the more general pool that serves as a yardstick for deciding on the significance of the difference in mean prices of the two groups. Both the numerator and denominator take the behavior as a given and form certain statistical measures from the objective data that are then related in the ratio that is Cohen's *d*. Commerce has not identified anything in the statistical measure at issue that depends on considerations of rationality and genuineness of the conduct that gave rise to the objective data. Indeed, Commerce has not shown that the numerous real-world examples used in *Cohen* to illustrate the methods taught are different in the respect Commerce now features, *i.e.*, Commerce has not shown that the *Cohen* examples (generally or, perhaps, ever) involve sampled groups of data that reflect behavior that is *not* "rational" and "genuine." Thus, Commerce has not adequately justified, through its central rationale, its departure from the statistical literature's description of the Cohen's *d* coefficient.

Commerce also asserted that a simple average provides "predictab[ility]" in that "the importance given to each pricing behavior will be the same for all products." J.A. 1087. But Commerce did not suggest that this basis would suffice for its denominator choice without the principal basis we have just discussed and found inadequate. And in any event, Commerce has not provided a reasonable explanation for this predictability assertion. It is not clear from Commerce's language, including its "importance given to each pricing behavior" language, what meaning Commerce was ascribing to "predictability" independent of its equality (of rationality and genuineness) basis. If Commerce was referring, as "predictability" would suggest, to the ability to predict the consequences for the dumping analysis based on the ability to predict the weighting of a sale (the "importance"

component of the analysis), Commerce did not explain why simple averaging has greater predictability than weighted averaging (let alone than using the full population's standard deviation for every *d* calculation). The mathematical formulas have no identified elements of discretion, or other components, that distinguish them with respect to prediction. Specifically, Commerce provided no basis for an assertion of lesser "predictability" if weighted averaging is done on the basis of weight (or dollars or units), not transactions, as we discussed in our 2019 opinion. *See CAFC 2019 Op*. at 674. Not having provided an adequate explanation of "predictability," Commerce also did not provide an adequate explanation of what significance this consideration should have in the overall choice of denominator for Cohen's *d*.

In its final redetermination, Commerce invoked the "abstract effect" idea mentioned in the section of *Cohen* discussed above. J.A. 1112, 1116–17. As we have noted, that section does not call for simple averaging for unequal size groups in the denominator of Cohen's *d* or in the formula for the related *f* figure. And Commerce has not explained how such simple averaging could be derived from the "abstract effect" idea itself. We do not understand Commerce, in invoking this idea, to be saying anything other than that the statutory "differ significantly" analysis focuses on the difference between the test and comparison groups for its own sake, rather than for what it indicates about the overall population. One difficulty with this observation is that Commerce has not explained how it affects comparisons, such as those Commerce makes in its differential-pricing analysis, where the groups together make up the entire population (which was not the case in the section of *Cohen* at issue). More broadly and fundamentally, Commerce has not explained why the fact that the focus is being placed on the difference between the groups distinguishes the teaching of the cited literature—which, as discussed, uses the Cohen's *d* coefficient precisely to provide a yardstick for determining the significance of the difference in group means. Thus, Commerce has not explained why that focus calls for a simple-averaging yardstick figure for determining the significance of the difference when calculating Cohen's *d* (or, even, the *f* statistical measure) for different-size groups.

Commerce observes that the cited literature discusses "sampling" from a population, whereas Commerce has the entire population data and each of its test-comparison group pairs involves the entire population. J.A. 1109. In *Stupp*, we stated that Commerce had not explained how this difference bears on the reasonableness of Commerce's use of Cohen's *d* in certain respects not at issue in the present matter. 5 F.4th at 1360. Here, too, although it is undisputed that

sampling for estimation of an unknown overall population figure requires certain minor alterations of the formula for weighted averaging not needed in the present context, *compare, e.g., Cohen* at 67, *with* J.A. 792 (PT proposal), Commerce has not explained why the basic choice of weighted averaging of unequal-size groups fails to apply to the present context. The cited literature nowhere suggests simple averaging for unequal-size groups. Indeed, when the entire population is known, the cited literature points toward using the standard deviation of the entire population as the denominator in Cohen's *d*—which Commerce has not done.

3

Commerce's job is not to follow a statistical test as explained in published literature for its own sake, but to implement the statutory mandate to determine when prices of certain groups "differ significantly." 19 U.S.C. § 1677f-1(d)(1)(B)(i). In implementing a statutory mandate, an agency is not duty-bound to follow published literature when, *e.g.*, the literature is inapplicable to the specific problem before the agency or is not itself well grounded. But here Commerce embraced the Cohen's *d* statistics measure and relied on the literature for that measure in making its statutory significance assessment—and that embrace extends beyond the first step and is the foundation of the remaining steps. After the calculation of Cohen's *d*, the next step in Commerce's analysis is to declare what number is high enough to be significant (constituting "passing" the Cohen's *d* test), and the number it uses is 0.8, the threshold for a "large" effect size stated in *Cohen. See Cohen* at 26; J.A. 1080; *Differential Pricing RFC* at 26,722; *Stupp*, 5 F.4th at 1347. The "passing" sales then determine the results of the next "ratio test" step.

In this situation, Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen's *d*. It has departed from those teachings about how to calculate the denominator of Cohen's *d*, specifically in deciding to use simple averaging when the groups differ in size. And its explanations for doing so fail to meet the reasonableness threshold (a deferential one, in recognition of expertise) for the reasons we have set forth.

We must remand for further proceedings before Commerce in light of the identified deficiencies—as we did in this matter in 2019 regarding the simple-averaging choice and as we did in *Stupp* regarding other aspects of Commerce's use of Cohen's *d*. Commerce must either provide an adequate explanation for its choice of simple averaging or

make a different choice, such as use of weighted averaging or use of the standard deviation for the entire population.[6]

III

For the foregoing reasons, we vacate the decision of the Trade Court and remand for further proceedings consistent with this opinion.

No costs.

VACATED AND REMANDED

[6] Mid Continent argues that, if weighted averaging is to be done, the weighting should be based on the number of transactions, rather than on a measure of how much is sold (*e.g.*, number of nails, weight of nails, dollars paid). Mid Continent Br. 28–29. But Commerce rejected weighted averaging altogether, so we do not have before us for review a choice of one basis of weighting rather than another. We make two observations relevant to Commerce's consideration of that choice if it adopts weighted averaging on remand. First, when it uses the average-to-average method, Commerce computes average prices by quantity sold, not by transaction. *See* J.A. 1111. Second, in our earlier opinion, we recognized that Commerce had criticized weighting by the number of transactions as susceptible to manipulation, and we noted that weighting by quantity appears to address that issue. *CAFC 2019 Op.*, 940 F.3d at 674.

U.S. Court of International Trade

Slip Op. 22–34

DONGKUK STEEL MILL CO, LTD., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 22–00032

[Denying motion to intervene as of right.]

Dated: April 14, 2022

Roger B. Schagrin, *Jeffrey D. Gerrish*, and *Kelsey M. Rule*, Schagrin Associates of Washington, DC, on the papers for Movant/Proposed Defendant-Intervenor SSAB Enterprises, LLC.

Jeffrey M. Winton, Winton & Chapman PLLC of Washington, DC, on the papers for Plaintiff Dongkuk Steel Mill Co., Ltd.

OPINION

***Baker*, Judge:**

Stephen Hawking is famously reported to have remarked that "[s]howing up is half the battle." That may be, but in litigation *only* showing up risks losing the battle. Here, SSAB Enterprises, LLC, a domestic steel producer, requested that the Department of Commerce open an administrative review of a countervailing duty order but then sat on the sidelines for the ensuing review. At the review's conclusion, respondent Dongkuk Steel Mill Co., Ltd., a Korean steel producer, brought this action to challenge the countervailing duties imposed by Commerce. SSAB now seeks to intervene on the side of the government to defend those duties, arguing that it may do so as of right because it was a party to the administrative proceeding. Commerce's regulations, however, require that a would-be litigant do more than just show up. Because SSAB did not actively participate in the review, the court denies its motion to intervene.

I

Dongkuk sued under section 516A of the Tariff Act of 1930. *See generally* ECF 15.[1] SSAB now moves under USCIT R. 24(a) to intervene as of right in support of Defendant. ECF 25. The government consents, while Dongkuk opposes. ECF 31.

[1] Jurisdiction rests on 28 U.S.C. § 1581(c).

By statute, "in a civil action under section 516A of the Tariff Act of 1930, . . . an interested party *who was a party to the proceeding in connection with which the matter arose* may intervene . . . as a matter of right . . . ." 28 U.S.C. § 2631(j)(1)(B) (emphasis added).

SSAB asserts that it can intervene as of right for these reasons:

> The Applicant is a domestic producer of [steel plate] and *participated in the underlying administrative review*. Accordingly, the applicant is an interested party within the meaning of 19 U.S.C. § 1677(9)(C), and it has standing to appear and be heard as a party to the proceeding before this Court pursuant to 19 U.S.C. § 1516a(d) and may intervene as a matter of right pursuant to 28 U.S.C. § 2631(j)(1)(B).

ECF 25, ¶ 2 (emphasis added). Even though SSAB states that Dongkuk does not consent, *id*. ¶ 4, the former offers no further reasoning or argument in support of its opposed motion.

Dongkuk's response concedes SSAB's status as an "interested party" but disputes whether SSAB qualifies as a "party to the proceeding" before Commerce. Dongkuk argues that SSAB did not submit any "factual information or written argument" during the review and thus did not meaningfully participate. ECF 31, at 4–5. In support of that contention, Dongkuk attached all five of SSAB's administrative filings. *See id.* at 4 (describing exhibits).

II

The question presented is whether SSAB was a "party to the proceeding in connection with which [this] matter arose," as required by 28 U.S.C. § 2631(j)(1)(B). In the absence of any statutory definition, this court has looked to administrative definitions to determine that phrase's scope. *See, e.g.*, *Matsushita Elec. Indus. Co. v. United States*, 529 F. Supp. 664, 668 (CIT 1981) ("[T]he Court is not at liberty to give the term 'party' an expansive meaning, even if it were to deemphasize the I.T.C. rule . . . ."); *see also Nucor Corp. v. United States*, 516 F. Supp. 2d 1348, 1351 (CIT 2007) (citing Commerce's regulations absent any statutory definition).

The relevant Commerce regulation defines "[p]arty to the proceeding" as "any interested party that *actively participates*, through written submissions of *factual information* or *written argument*, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36) (emphasis added).[2] The definition therefore requires "active" participation and

[2] "Participation in a prior segment of a proceeding" does "not confer . . . 'party to the proceeding' status in a subsequent segment." *Id*. Thus, any participation by SSAB in previous reviews of the applicable countervailing duty order is irrelevant here.

allows a party to satisfy that requirement in either of two ways—submission of "factual information" *or* submission of "written argument." *See Sunpower Corp. v. United States*, 128 F. Supp. 3d 1333, 1339 (CIT 2015) ("There is no requirement that a party provide *both* factual information *and* legal argument.") (emphasis in original). "The addition of relevant information to an otherwise procedural filing changes the character of that filing to meaningful participation in the administrative proceeding." *Id.* Thus, "[t]hough the movant need not engage in extensive participation, the activity nevertheless 'must reasonably convey the separate status of a party' and 'be meaningful enough "to put Commerce on notice of a party's concerns." ' " *RHI Refractories Liaoning Co. v. United States*, 752 F. Supp. 2d 1377, 1380 (CIT 2011) (quoting *Laclede Steel Co. v. United States*, No. 961029, 1996 WL 384010, at *2 (Fed. Cir. July 8, 1996)).[3]

Dongkuk's response shows that SSAB's only filings before Commerce were its request for an administrative review, appearances of counsel, and requests to be placed on the service list. *See* ECF 31, Attachments 1–5.

The procedural filings related to counsel's appearances and the service list are not "meaningful enough to put Commerce on notice of [SSAB's] concerns." *Laclede*, 1996 WL 384010, at *2 (cleaned up). The sole question, then, is whether SSAB's request for a review amounted to "active[] participat[ion], through written submission[ ] of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36).

Commerce's regulations distinguish between "requests" for administrative reviews, "factual information," and "written argument." An interested party can "request" a review. *See* 19 C.F.R. § 351.221(b)(1) (describing how "[a]fter receipt of a timely *request* for a review . . . the [Department] will . . . publish in the Federal Register notice of initiation of the review") (emphasis added). "Before or after publication of notice of initiation of the review," Commerce will "send to appropriate interested parties or other persons . . . questionnaires

[3] *Nucor* explained this rule in terms of the need for consistency with the requirement of 28 U.S.C. § 2637(d) that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *See Nucor*, 516 F. Supp. 2d at 1353 ("Thus, in the normal instance, with only narrow exceptions, a party challenging any aspect of a final Commerce determination first must have presented its arguments to Commerce for decision during the administrative proceeding."). The court noted that treating procedural filings as equivalent to "participation" in the proceeding "would so weaken the 'party to the proceeding' requirement as to render it practically meaningless." *Id.*

requesting *factual information* for the review." *Id*. § 351.221(b)(2) (emphasis added).[4] After conducting any verification of such factual information, *id.* § 351.221(b)(3) (citing 19 C.F.R. § 351.307) (referring to verification of "relevant factual information"), and issuing a preliminary determination, *id.* § 351.221(4), the Department will "invit[e] . . . *argument* consistent with § 351.309." *Id*. § 351.221(b)(4)(ii) (emphasis added).

Section 351.309 in turn provides that "*[w]ritten argument* may be submitted during the course of an antidumping or countervailing duty proceeding." 19 C.F.R. § 351.309(a) (emphasis added). In determining "the final results of an administrative review," Commerce "will consider written arguments in case or rebuttal briefs filed within the time limits in this section." *Id.* § 351.309(b)(1). The Department may also "request written argument on any issue from any person or U.S. Government agency at any time during a proceeding." *Id.* § 351.309(b)(2). Thus, "written argument" consists of briefing submitted to Commerce in connection with determining the final results of an administrative review or in response to a request from the Department.

Per Commerce's regulations, SSAB filed a "request" for an administrative review. It provided as follows:

> On behalf of ArcelorMittal USA, LLC, Nucor Corporation, and SSAB Enterprises, LLC ("Petitioners"), we hereby request an administrative review of the above-captioned countervailing duty order, for the period January 1, 2019[,] through December 31, 2019. Petitioners are domestic producers of cut-to-length carbon-quality steel plate and are therefore a domestic interested party pursuant to 19 C.F.R. § 351.102(b)(17) and 19 U.S.C. § 1677(9)(C). We request this review pursuant to the Notice of Opportunity to Request Administrative Review published in the *Federal Register* on February 3, 2020.
>
> This request is for the review of the countervailing duty order on cut-to-length carbon-quality steel plate produced or exported by BDP International, Dongkuk Steel Mill Co., Ltd., Hyundai Steel Co., Ltd., Sung Jin Steel Co., Ltd., or any of their affiliates, whether directly to the United States or indirectly through third countries. Petitioners request review of these entities because

[4] *See also* 19 C.F.R. § 351.102(b)(21)(i), (ii), (iv), (v) (defining "factual information" as "[e]vidence, including statements of fact, documents, and data" submitted for specified reasons); *id.* § 351.102(b)(21)(iii) (defining "factual information" as "[p]ublicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of renumeration under § 351.511(a)(2), or, [sic] to rebut, clarify, or correct such publicly available information submitted by any other interested party").

> we believe that these producers and/or exporters received government subsidies during the period of review, and that any estimated cash deposits being collected on imports of subject merchandise from these manufacturers or exporters understate the degree of subsidization that occurred during the period of review.

ECF 31, Attachment 1, at 1–2 (footnotes omitted). The bare-bones request contained no further information or attachments.

SSAB's request did not include any "written argument" within the meaning of Commerce's regulations because it was not submitted in connection with the Department's determination of final results or in response to a request from Commerce. *See* 19 C.F.R. § 351.309(b).

Nor did SSAB's request include any "factual information" within the meaning of the Department's regulations. *See, e.g.*, 19 C.F.R. § 351.102(b)(21)(ii) (defining "factual information" as "[e]vidence, including statements of fact, documents, and data submitted either *in support of allegations*, or, [sic] to rebut, clarify, or correct such evidence submitted by any other interested party") (emphasis added). At most, the request contains an allegation that Dongkuk and others "received government subsidies during the period of review," ECF 31, Attachment 1, at 2, but the request contains no "factual information" to support that allegation.

As SSAB submitted neither "written argument" nor "factual information" in support of its "allegation," it did not "actively participate" in Commerce's review for purposes of 19 C.F.R. § 351.102(b)(36). Thus, the company was not a "party to the proceeding" for purposes of intervention as of right under 28 U.S.C. § 2631(j)(1)(B).

Conclusion

For the reasons set forth above, SSAB has no right to intervene here. A separate order denying its motion will issue. *See* USCIT R. 58(a).

Dated: April 14, 2022
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 22–35

OMAN FASTENERS, LLC, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.

Before: Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Timothy C. Stanceu, Judge
Consol. Court No. 20–00037

[Ordering measures to protect potential government revenue pending defendants' appeal of previous judgment in litigation contesting a Presidential proclamation]

Dated: April 15, 2022

Andrew Caridas, Perkins Coie, LLP, of Washington, D.C., for plaintiff Oman Fasteners, LLC. With him on the submissions were *Michael P. House*, *Shuaiqi Yuan*, *Jon B. Jacobs*, and *Brenna D. Duncan*.

Meen Geu Oh, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With him on the submissions were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Oman Fasteners, LLC ("Oman Fasteners") and defendants jointly inform the court of their inability to reach agreement on the form in which measures may be taken to protect the revenue of the United States pending defendants' appeal of our judgment in *Oman Fasteners, LLC v. United States*, 45 CIT __, 520 F. Supp. 3d 1332 (2021) ("*Oman Fasteners I*"). The court orders plaintiff Oman Fasteners to make cash deposits on future entries of merchandise affected by this litigation, unless or until Oman Fasteners and defendants agree upon and implement bonding to secure potential government revenue, during the remainder of the stay pending defendants' appeal of our prior judgment.

I. BACKGROUND

In *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 505 F. Supp. 3d 1352 (2021) ("*PrimeSource*"), we held that a proclamation issued by the President of the United States ("Proclamation 9980"), *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020), in which the President imposed duties of 25% *ad valorem* on various imported products made of steel, including nails and other fasteners, was issued contrary to time limitations in Section 232 of the Trade Expansion Act of 1962, 19 U.S.C.

§ 1862 ("Section 232")[1] and therefore beyond the authority to adjust tariffs that Section 232 delegated to the President.

In *Oman Fasteners I*, we granted summary judgment in favor of Oman Fasteners, who brought a claim essentially identical to that asserted in the *PrimeSource* litigation. In the judgment, we ordered defendants to liquidate the entries affected by this litigation without assessment of the 25% *ad valorem* Section 232 duties, discontinue the then-existing obligation of plaintiffs to post bonding for such duties, and refund with interest any deposits of Section 232 duties that may have been made. Judgment 2 (June 10, 2021), ECF No. 108. Defendants filed a notice of appeal of our judgment. Notice of Appeal 4–5 (Aug. 7, 2021), ECF No. 110.

In *Oman Fasteners, LLC v. United States*, 45 CIT __, 542 F. Supp. 3d 1399 (2021) ("*Oman Fasteners II*"), upon defendants' motion, we took several actions pending appeal. We stayed our order to liquidate the affected entries and refund with interest any deposits of Section 232 duties, enjoined the liquidation of the affected entries, and ordered defendants to confer with Oman Fasteners and co-plaintiffs Huttig Building Products, Inc. and Huttig, Inc. (collectively, "Huttig") "with the objective of reaching, and entering into, an agreement with Oman and an agreement with Huttig on monitoring and such bonding for entries of merchandise within the scope of Proclamation 9980 that have occurred, and will occur, on or after June 10, 2021 [the date of the entry of judgment], as is reasonably necessary to secure potential liability for duties and fees." *Oman Fasteners II*, 45 CIT at __, 542 F. Supp. 3d at 1409.

In taking the actions to allow defendants to protect potential revenue from Section 232 duties pending the appeal of our judgment in *Oman Fasteners I*, we stated that the opinion of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), "causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal." *Oman Fasteners II*, 45 CIT at __, 542 F. Supp. 3d at 1403. We concluded that defendants demonstrated, further, the likelihood of irreparable harm in the absence of the relief sought, explaining that the "harm is the loss of the authority, provided for by statute and routinely exercised by Customs [and Border Protection] in every import transaction, to require and maintain such bonding as it determines is reasonably necessary to protect the revenue of the United States." *Id.*, 45 CIT at __, 542 F. Supp. 3d at 1405–06. We also concluded that the remaining equitable factors,

[1] All citations to the United States Code herein are to the 2018 edition.

balancing of the hardships and the public interest, also favored allowing the government to exercise its authority to protect the revenue. *Id*., 45 CIT at __, 542 F. Supp. 3d at 1407–08.

Plaintiffs and defendants reached agreement on bonding following our decision in *Oman Fasteners II*, and the special bonding arrangement for Section 232 duties continues to be in place for entries by Huttig. But as to entries by Oman Fasteners, the parties are no longer in agreement, and, according to defendants, the government's interest in potential Section 232 duties on Oman Fasteners's entries occurring after the end of February 2022 is not currently being protected by special bonding. Defs.' Suppl. Notice Concerning the Parties' Inability to Reach Agreement on Continuous Bonding, and Request for Continuous Bonding 1–2 (Mar. 18, 2022), ECF No. 129 ("Defs.' Request"); *see also* Joint Notice Regarding Court's Order Concerning Monitoring and Continuous Bonding 1–3 (Jan. 5, 2022), ECF Nos. 127 (public), 128 (conf.) ("Joint Notice").[2]

Opposing renewed bonding or the deposit of cash deposits on its entries, Oman Fasteners has responded to defendants' latest submission by proposing that the government's interest in potential Section 232 duties be protected by the deposit of estimated potential Section 232 duties into an escrow account, a proposal defendants oppose. Oman Fasteners' Resp. to Defs.' Suppl. Notice Regarding Bonding (Apr. 1, 2022), ECF Nos. 131 (conf.), 132 (public) ("Oman Fasteners's Resp."). The court issues this Opinion and Order to resolve the current dispute between Oman Fasteners and defendants and also to provide for protection of the revenue for Section 232 duties potentially owed on entries of merchandise by Oman Fasteners that are subject to Proclamation 9980.

II. DISCUSSION

The current dispute between Oman Fasteners and defendants is not over whether, but how, the government's interest in potential Section 232 duties should be protected. Oman Fasteners is opposed to the resumption of bonding for these potential duties, arguing that "liquidation of all of Oman Fasteners' entries at issue in this case likely will not occur until years after Defendants' appeal has concluded," Oman Fasteners's Resp. 3; *see* Joint Notice 4–5. Referring to lengthy suspensions of liquidation, Oman Fasteners explains that "the entries subject to the stay will coincide with the as-yet uninitiated seventh administrative review (covering entries between July 1, 2021 and June 30, 2022) and very likely eighth administrative review (covering entries between July 1, 2022 and June 30, 2023)" in *Certain*

[2] All citations in this Opinion and Order are to public documents.

Steel Nails from the Sultanate of Oman, Inv. No. A-523–808 ("*Oman Nails*"). Oman Fasteners's Resp. 3.

Oman Fasteners also is opposed to the deposit of estimated Section 232 duties on its current and future entries, maintaining that "there is no guarantee that Oman Fasteners would be able to recoup these funds prior to liquidation of the entries," which delay, according to Oman Fasteners, would cause it unnecessary hardship. Joint Notice 5. It argues, further, that depositing estimated Section 232 duties, "even payment of *contingent* duties, may affect the dumping margin calculations in subsequent reviews" in that "this Court has held that Section 232 duties are deductible from export price in antidumping cases." Oman Fasteners's Resp. 4 (citing *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 45 CIT __, __, 494 F. Supp. 3d. 1365, 1372–76 (2021)).

Oman Fasteners "proposes securing the Government's revenue interest by establishing an escrow account, into which Oman Fasteners would deposit funds sufficient to cover all Section 232 duties that would be assessed on its entries of merchandise in the event that Defendants ultimately prevail on the merits of their appeal." Joint Notice 3. It adds that "[u]nlike a customs bond, an escrow account can be interest bearing, with the interest proceeds paid out to the prevailing party in this litigation." *Id.* at 4. Also, as Oman Fasteners points out, duties could be escrowed for entries that already have occurred. Oman Fasteners's Resp. 2.

The court is not convinced that Oman Fasteners's proposed establishment of an escrow account would be superior to the deposit of estimated Section 232 duties for entries affected by this litigation. Any such account would have to be administered by, or under the supervision of, the court. Should the parties come into dispute as to whether the proper amounts of potential Section 232 duties were deposited, or deposited timely, the court would be called upon to resolve the matter. In comparison, U.S. Customs and Border Protection already has well-established procedures in place to receive and administer estimated duties of any character. While an extra burden on the court would not be a disqualifying reason for establishing an escrow account in a case in which doing so is necessary to ensure fairness to the parties, this is not such a case. Here, the escrow account procedure essentially would perform the function that deposits of estimated duties perform under existing statutory and regulatory procedures, which Congress established for the administration of the Tariff Act of 1930, and, specifically, for the protection of the

revenue. *See* 19 U.S.C. § 1505. Because other, non-Section 232-related amounts would need to be deposited on those entries as they occur, the escrow account procedure essentially would be duplicative as well as unnecessary.

Regarding administrative burden, Oman Fasteners argues that "providing security for entries during the interim period would likely require using an escrow account like the one Oman Fasteners proposes as a global solution." Oman Fasteners's Resp. 5. The court does not agree. Cash deposits of potential Section 232 duties and bonding are available as alternatives to an escrow account during the pendency of defendants' appeal. And with respect to the proposal that an escrow account be interest-bearing, the existing procedures already provide for interest assessment on underpaid duty deposits and the payment of interest to importers of record for excess duties deposited.

Nor is the court convinced by the argument that Oman Fasteners, if ultimately prevailing in this litigation, might be unable to recoup its deposited Section 232 duties prior to liquidation of the entries. The court does not foresee a situation in which this would occur. Should our judgment in *Oman Fasteners I* ultimately be affirmed after all appeals are concluded, this Court would have the power to order the refund, with interest, of deposits made to secure potential Section 232 duty liability on entries of Oman Fasteners that remain in unliquidated status.

Finally, the court considers Oman Fasteners's argument that deposit of estimated Section 232 duties could increase its dumping margin in future reviews of the applicable antidumping duty order. As Oman Fasteners itself recognizes, Oman Fasteners's Resp. 3–4, administrative reviews involving entries made in the coming months would not be conducted and completed anytime in the near future. Oman Fasteners presumes that using an escrow account for potential estimated Section 232 duties rather than duty deposits on individual entries might be advantageous to it in those future reviews, but this is a matter of speculation. The court's responsibility is to resolve the current dispute regarding security according to the present circumstances of this litigation rather than upon speculation concerning the issues that may be addressed in a future administrative proceeding conducted under the antidumping duty laws.

III. CONCLUSION AND ORDER

Based on the foregoing, we conclude that plaintiff Oman Fasteners has not presented a convincing argument why the court should es-

tablish and administer an escrow procedure to provide for security on its potential Section 232 duty liability during the remainder of the stay pending appeal.

Therefore, upon the court's consideration of the papers filed herein, and upon due deliberation, it is hereby

ORDERED that plaintiff Oman Fasteners shall make duty deposits for potential Section 232 duty liability on all consumption entries affected by this litigation that are made after the date of this Opinion and Order and during the remainder of the stay pending defendants' appeal of this Court's judgment in this litigation; it is further

ORDERED that Oman Fasteners, should it so choose, may discontinue the duty deposits ordered herein after reaching agreement with defendants on the resumption of bonding to secure the protection of the revenue for potential Section 232 duty liability and putting such bonding into place; and it is further

ORDERED that should defendants believe that any entries by Oman Fasteners of merchandise affected by this litigation that were made during the period from February 28, 2022 to and including the date of this Opinion and Order are not covered by a continuous bond sufficient to avoid a significant risk to the revenue, defendants shall confer with Oman Fasteners to discuss an appropriate resolution of this issue and shall file a status report on the outcome of any such resolution or discussions.

Dated: April 15, 2022
New York, New York

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

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

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–36

Z.A. SEA FOODS PRIVATE LIMITED, B-ONE BUSINESS HOUSE PVT. LTD., HARI MARINE PRIVATE LIMITED, MAGNUM EXPORT, MEGAA MODA PVT. LTD., MILSHA AGRO EXPORTS PRIVATE LTD., SEA FOODS PRIVATE LIMITED, SHIMPO EXPORTS PRIVATE LIMITED, FIVE STAR MARINE EXPORTS PVT. LTD., HN INDIGOS PRIVATE LIMITED, RSA MARINES, and ZEAL AQUA LTD., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00031

[The court grants Plaintiffs' motion for judgment upon the agency record and remands for further action.]

Dated: April 19, 2022

Robert G. Gosselink, Trade Pacific PLLC, of Washington, D.C., argued for Plaintiffs Z.A. Sea Foods Private Limited, B-One Business House Pvt. Ltd., Hari Marine Private Limited, Magnum Export, Megaa Moda Pvt. Ltd., Milsha Agro Exports Private Limited, Sea Foods Private Limited, Shimpo Exports Private Limited, Five Star Marine Exports Private Limited, HN Indigos Private Limited, RSA Marines, and Zeal Aqua Limited. With him on the joint briefs was *Jonathan M. Freed*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

Zachary J. Walker, Picard, Kentz & Rowe, LLP, of Washington, D.C., argued for Defendant- Intervenor Ad Hoc Shrimp Trade Action Committee. With him on the briefs was *Nathaniel Maandig Rickard*.

Katzmann, Judge:

The question presented by this case is whether the U.S. Department of Commerce ("Commerce") was permitted to employ constructed value as the basis for normal value in its administrative review of the antidumping duty ("AD") order covering certain frozen warmwater shrimp from India that had been imported into the United States at less than fair value in derogation of fair competition with domestic producers.[1] Plaintiffs, all foreign producers and exporters in India of the subject merchandise, argue that Commerce's use of constructed value was in error because the facts do not support

[1] The AD order on frozen warmwater shrimp from India was issued in February 2005 and includes within its scope "warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form." *Notice of Am. Final Determ. of Sales at Less Than Fair Value and AD Order: Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5,147, 5,148 (Dep't Commerce Feb. 1, 2005).

Commerce's rejection of Vietnam as a third country market through which normal value might have been ascertained.[2] Defendant, the United States ("the Government"), and domestic producers, Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), contend that Commerce correctly found that the Vietnamese sales data provided by Plaintiffs was not representative (as required by 19 U.S.C. § 1677b(a)(1)(B)(ii)(I)) and therefore unsuitable for purposes of calculating normal value. The court concludes that Commerce's use of constructed value was unsupported by substantial evidence. Accordingly, the court remands the administrative review determination to Commerce for further proceedings consistent with this opinion.

BACKGROUND

I. Legal & Regulatory Framework

The Tariff Act of 1930 authorizes Commerce to investigate alleged dumping and, if dumping is found, levy duties on the implicated goods. *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Dumping occurs when a foreign company sells a product in the United States for less than its fair value. 19 U.S.C. § 1673. When investigating whether goods are being dumped, Commerce must therefore first determine whether a good is being sold at less than its fair value. *Id.*; 19 U.S.C. § 1677b(a). To do so, Commerce compares the export price or constructed export price (export price adjusted for various additional expenses pursuant to 19 U.S.C. § 1677a(c)–(d)) of the merchandise with its normal value. 19 U.S.C. § 1677b(a). Ultimately, if dumping is found, the duty imposed will be equal to the difference between these two prices (also known as the "dumping margin"). *Id.*

The statute provides three methods for the calculation of normal value. By default, Commerce calculates normal value by averaging the price at which the exported good (or a like good) is sold for consumption in its home market. 19 U.S.C. § 1677b(a)(1)(B)(i). If the good (or a like good) is not offered for sale in its home market, or if the home market sales are equal to less than five percent of the aggregate U.S. sales, Commerce may instead average the good's prices in a third

[2] Plaintiffs Z.A. Sea Foods Private Limited, B-One Business House Private Limited, Hari Marine Private Limited, Magnum Export, Megaa Moda Private Limited, Milsha Agro Exports Private Limited, Sea Foods Private Limited, Shimpo Exports Private Limited, Five Star Marine Exports Private Limited, HN Indigos Private Limited, RSA Marines and Zeal Aqua Limited will be referred to as "Plaintiffs" or "ZASF" throughout for ease of reference.

country. 19 U.S.C. § 1677b(a)(1)(C). Specifically, a third country sales price may be considered for purposes of normal value calculation when:

> (i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country [...],
>
> (ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or
>
> (iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

Id. The third country price must further be (1) representative; (2) reflective of third country sales in excess of five percent of the aggregate U.S. sales; and (3) not unavailable for proper comparison due to a particular market situation in the third country. 19 U.S.C. § 1677b(a)(1)(B)(ii). Finally, if the home market cannot be used to calculate normal value, and notwithstanding the availability of third country sales data, Commerce may determine the product's normal value by calculating its constructed value. 19 U.S.C. § 1677b(a)(4). Constructed value is calculated by summing the costs of production and processing of the product, and the costs incurred by the exporter under investigation (or other representative exporters under investigation) in the course of the export and sale of the product. 19 U.S.C. § 1677b(e).

Commerce's regulations further specify the process for calculation of normal value. In relevant part, they provide:

> (b) **Determination of viable market** -
>
> (1) **In general**. [Commerce] will consider the exporting country or a third country as constituting a viable market if [Commerce] is satisfied that sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value.
>
> (2) **Sufficient quantity**. "Sufficient quantity" normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise in the United States.

> (c) **Calculation of price-based normal value in viable market** -
>
> (1) **In general**. Subject to paragraph (c)(2) of this section:
>
> (i) If the exporting country constitutes a viable market, [Commerce] will calculate normal value on the basis of price in the exporting country (see [19 U.S.C. § 1677b(a)(1)(B)(i)] (price used for determining normal value)); or
>
> (ii) If the exporting country does not constitute a viable market, but a third country does constitute a viable market, [Commerce] may calculate normal value on the basis of price to a third country (see [19 U.S.C. § 1677b(a)(1)(B)(ii)] (use of third country prices in determining normal value)).
>
> (2) **Exception**. [Commerce] may decline to calculate normal value in a particular market under paragraph (c)(1) of this section if it is established to the satisfaction of the Secretary that:
>
> (i) In the case of the exporting country or a third country, a particular market situation exists that does not permit a proper comparison with the export price or constructed export price (see [19 U.S.C. § 1677b (a)(1)(B)(ii)(III) or (a)(1)(C)(iii)]); or
>
> (ii) In the case of a third country, the price is not representative (see [19 U.S.C. § 1677b(a)(1)(B)(ii)(I)]).

19 C.F.R. § 351.404(c). Finally, 19 C.F.R. § 351.404(f) provides that Commerce "normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable."

Representativeness, as required by 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) and 19 C.F.R. § 351.404(c)(2)(ii), is not defined by statute or regulation. *Alloy Piping Prod., Inc. v. United States*, 26 CIT 330, 334; 201 F. Supp. 2d 1267, 1272 (2002), *aff'd sub nom. Alloy Piping Prod., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284 (Fed. Cir. 2003). Nevertheless, it is well-established that "where the aggregate quantity of third country sales are at a sufficient level, those sales are presumptively representative unless demonstrated otherwise." *Husteel Co. v. United States*, 45 CIT __, __, 520 F. Supp. 3d 1296, 1304 (2021) (citing 19 C.F.R. § 351.404(b)–(c)). A party seeking to establish that sales are not representative bears the burden of making such a showing. *Antidumping Duties, Countervailing Duties: Final Rule*, 62 Fed. Reg.

27,296, 27,357 (Dep't Commerce May 19, 1997) ("*Preamble*"). Any determination that the proposed third country sales are not representative must be supported by substantial evidence on the record. *Husteel*, 520 F. Supp. 3d at 1305 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983)).

II. Factual & Procedural Background

The administrative review at issue in these proceedings was initiated on May 2, 2019 for the period of review beginning February 1, 2018 and ending January 31, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 18,777, 18,778 (Dep't Commerce May 2, 2019) (P.R. 16) ("*Initiation*"). ZASF was selected as a mandatory respondent.[3] IDM at 1. In its response to Commerce's Section A questionnaire, ZASF acknowledged that its home market sales constitute less than five percent of the volume of its U.S. sales, and therefore cannot provide a viable basis for normal value. Letter from ZASF to Sec'y Commerce re: ZASF's Section A Questionnaire Resp. in the AD Order on Certain Frozen Warmwater Shrimp from India at A-3–A-4, Sept. 16, 2019 (P.R. 114–121, C.R. 28–31). ZASF further identified Vietnam as its largest third country market, and noted the similarity between its U.S- and Vietnam-bound merchandise. *Id.* at A-4.

Following the submission of ZASF's Section A questionnaire response, then-petitioner and now-Defendant-Intervenor AHSTAC, submitted additional publicly-available information to Commerce in an attempt to "rebut, clarify, or correct factual information" provided by ZASF. Letter from AHSTAC to Wilbur L. Ross, Jr. re: Certain Frozen Warmwater Shrimp from India: Comments on Z.A. Sea Foods Private Limited's Section A Response and Request for Verification at 2–3 (Sept. 26, 2019) (P.R. 94) ("AHSTAC Comments"). In its submission, AHSTAC noted that (1) "the overwhelming majority" (101 out of 152) of ZASF's shipments to Vietnam were to Vietnamese shrimp exporters who were at various points subject to an AD order on certain frozen warmwater shrimp from Vietnam, and (2) "[r]oughly 60

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

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to-
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

percent of ZASF's shipments to Vietnam (91 of 152) were to three companies that, in part, comprise the Minh Phu Group: (1) Minh Phat Seafood Co., Ltd.; (2) Minh Phu Hao Giang Seafood Corp.; and (3) Minh Phu Seafood Corp." *Id.* at 3–4 (citations omitted). AHSTAC went on to explain that the Minh Phu Group was previously subject to the AD order on certain frozen warmwater shrimp from Vietnam,[4] and in the course of its participation in that investigation, reported to Commerce that it "imported shrimp from other countries and used this shrimp as a raw material input in its exports to the United States." *Id.* at 5. In light of these facts, AHSTAC concluded it was "likely that not only are ZASF's shrimp shipments to Vietnam consumed in other markets, but that ZASF's merchandise sold through Vietnam was resold or shipped to the United States," and argued that Commerce was thus owed a "more fulsome and comprehensive explanation" of why ZASF's submitted invoice, bill of lading, and shipping documents were sufficient to prove the ultimate market for its shrimp, and why ZASF claimed to be unaware of any resale or re-shipment of its shrimp from Vietnam to the United States. *Id.* at 7.

On March 6, 2020, Commerce issued the preliminary results of its administrative review. *Certain Frozen Warmwater Shrimp From India: Prelim. Results of AD Admin. Rev.; 2018–2019*, 85 Fed. Reg. 13,131 (Dep't Commerce Mar. 6, 2020) (P.R. 169) ("*Preliminary Results*"). In the accompanying memorandum, Commerce agreed with ZASF that its home market sales did not provide a viable basis for the calculation of normal value. Mem. from J. Maeder to J. Kessler re: Decision Mem. for the Prelim. Results of the 2018–2019 Admin. Rev. of the AD Order on Certain Frozen Warmwater Shrimp from India at 9 (Dep't Commerce Feb. 27, 2020) (P.R. 166) ("PDM"). Commerce went on to preliminarily find that, while Vietnam "satisf[ied] the regulatory criteria for third country market selection under 19 C.F.R. 351.404(e)(1) and (2)," ZASF's "sales to Vietnam [were] not appropriate for consideration as comparison sales to establish [normal value] in this review." *Id.* In support of its finding, Commerce relied upon "the trade patterns evidenced by [ZASF's] customers in Vietnam" — namely, the fact that ZASF's "customers are also known processors

[4] The AD order on certain frozen warmwater shrimp from Vietnam was revoked with respect to the Minh Phu Group prior to the period of review in the instant case. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order*, 81 Fed. Reg. 47,756 (Dep't of Commerce July 22, 2016).

and exporters of shrimp to the United States." *Id.* (citing AHSTAC Comments). Accordingly, Commerce preliminarily employed constructed value to calculate the normal value of the subject merchandise. *Id.* at 11. The constructed value of the merchandise was based on the financial statements of Indian producers and exporters involved in the immediately preceding (i.e., 2016–2017) administrative review. *Id.* at 11–12.

On October 13, 2020, U.S. Customs and Border Protection ("CBP") issued an Enforce and Protect Act ("EAPA") determination finding that merchandise subject to the AD order on frozen warmwater shrimp from India was being illegally transshipped into the U.S. through Vietnam. Notice of Determ. as to Evasion (Customs and Border Protection Oct. 13, 2020) (P.R. 187 Att. 1) ("EAPA Determination"). In its determination, CBP noted that the Minh Phu Group "purchased Indian-origin shrimp for processing and supplemented orders to the United States with Indian-origin shrimp." *Id.* at 4. It explained that, because Indian-origin shrimp are subject to AD duties while Vietnamese-origin shrimp are not, the Minh Phu Group thus "has sufficient reason to disguise the true country of origin of its shrimp or to comingle Indian-origin shrimp with Vietnamese-origin shrimp and claim only Vietnam as the country of origin." *Id.* Although CBP acknowledged that the Minh Phu Group claims to maintain a "tracing system [which] ensures that imported shrimp never loses its identity as such," it also noted the Minh Phu Group's "inability to trace specific imports of Indian-origin shrimp through the production facility to specific sales," as well as its inadvertent one-time export of "commingled Indian-origin and Vietnamese-origin shrimp into the customs territory of the United States." *Id.* at 6–7. Ultimately, because specific orders of imported shrimp could not be traced to specific orders of exported shrimp, CBP concluded that the Minh Phu Group had failed to cooperate to the best of its abilities with the EAPA investigation, and applied adverse inferences to reach a finding of evasion. *Id.* at 9–10. On October 27, 2020, the public version of CBP's EAPA determination was placed on the record in Commerce's administrative review. Mem. from B. Bauer to File re: U.S. Customs and Border Protection Dec. (Dep't Commerce Oct. 27, 2020) (P.R. 187).

Commerce issued its final results of AD administrative review on December 29, 2020. *Certain Frozen Warmwater Shrimp From India: Final Results of AD Admin. Rev. and Final Determ. of No Shipments*; 2018–2019, 85 Fed. Reg. 85,580 (Dep't Commerce Dec. 29, 2020) (P.R. 199) ("*Final Results*"); *see also* Mem. from J. Maeder to J. Kessler re: Issues and Decision Mem. for the Final Results of the 2018–2019 AD Admin. Rev. of Certain Frozen Warmwater Shrimp from India (Dept'

Commerce Dec. 21, 2020) (P.R. 194) ("IDM"). In the *Final Results*, Commerce continued to use constructed value to calculate the normal value of the subject merchandise. IDM at 15–21. Commerce reiterated that there was "sufficient cause to use [constructed value]" for the reasons given in the PDM, but noted that there was "now additional information available on the record supporting the unsuitability of using sales to Vietnam to establish a comparison price for U.S. sales." *Id.* at 15. The additional information in question was the CPB EAPA determination. *Id.* at 16. Commerce acknowledged that ZASF might well have had no knowledge of the Minh Phu Group's transshipment, but found that would nevertheless be "unreasonable to use [ZASF's] Vietnamese sales, which include sales to the Minh Phu Group, as the comparison market." *Id.* at 19. In particular, Commerce noted that such a comparison would ultimately "compare U.S. sales to U.S. sales" and that any "worthwhile, profitable, and price competitive" transshipment scheme would necessitate a price advantage for the Vietnamese sales over the U.S. sales. *Id.* Finally, Commerce clarified that even if Vietnam were a viable third country market for the subject merchandise, neither 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) nor 19 C.F.R. § 351.404 specify a preference for relying upon third country sales over constructed value where the sales are otherwise not representative. *Id.* at 19–20.

Plaintiffs ZASF initiated these proceedings on January 29, 2021 to challenge Commerce's *Final Results*. *Summons*, Jan. 28, 2021, ECF No. 1. On June 18, 2021, ZASF filed a Rule 56.2 motion for judgment upon the agency record, arguing that Commerce's decision to employ constructed value and not the Vietnamese third country market prices as the basis for the subject merchandise's normal value was unsupported by substantial evidence and not accordance with law. Mem. in Supp. of the Rule 56.2 Mot. of Pls.' for J. Upon the Agency R. at 7–8, June 18, 2021, ECF No. 26 ("Pls.' Br."). The Government and AHSTAC filed their response briefs to ZASF's motion on September 2, 2021. Def.'s Resp. to Pls.' Mot. for J. Upon the Agency R., Sept. 9, 2021, ECF No. 31 ("Def.'s Br"); Def.-Inter. AHSTAC's Resp. to Pls.' Mot. for J. on the Agency R., Sept. 2, 2021, ECF. No. 30 ("Def.-Inter.'s Br."). Plaintiffs replied on October 5, 2021. Pls.' Reply to Def. and Def.-Inter.'s Resps. to Pls.' Mot. For J. on Agency R., ECF No. 34 ("Pls.' Reply"). The court subsequently issued and the parties responded to questions for oral argument. Letter re: Questions for Oral Arg., Jan. 6, 2022, ECF No. 49; Pls.' Resp. to Ct.'s Questions for Oral Arg., Jan. 19, 2022, ECF No. 50 ("Pls.' Suppl. Br."); Def.'s Resp. to Ct.'s Questions for Oral Arg., Jan. 19, 2022, ECF No. 52 ("Def.'s Suppl. Br."); Def.-Inter.'s Resp. to Ct.'s Questions for Oral Arg., Jan. 19 2022, ECF

No. 51 ("Def.-Inter.'s Suppl. Br."). Oral argument was held on January 25, 2022. Oral Arg., ECF No. 54. Following oral argument, the parties submitted additional briefing on the issues. Pls.' Suppl. Post-Arg. Submission, Feb. 1, 2022, ECF No. 57 ("Pls.' Post-Arg. Br."); Def.'s Suppl. Post-Arg. Submission, Feb. 1, 2022, ECF No. 55 ("Def.'s Post-Arg. Br."); Def.-Inter.'s Post-Arg. Submission, Feb. 1, 2022, ECF No. 56 ("Def.-Inter.'s Post-Arg. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c), 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review is provided by 19 U.S.C. § 1516a(b)(1)(B)(i), which states that "[t]he court shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[5] For an agency's determination to be supported by substantial evidence, the agency must "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

DISCUSSION

ZASF now disputes Commerce's reliance on constructed value in its calculation of the normal value of frozen warmwater shrimp from India. Arguing that Commerce should instead have based normal value on the Vietnamese third country sale price, ZASF alleges (1) that Commerce's rejection of Vietnam was unsupported by substantial evidence; (2) that Commerce's failure to comply with the regulatory preference for third country sales data was contrary to law; and (3) that Commerce's failure to apply a "knowledge test" in its consideration of Vietnamese sales was contrary to Commerce practice. The Government and AHSTAC contend that Commerce's decision to reject Vietnam as a potential third country market was supported by substantial evidence, and that Commerce's reliance on constructed value was in accordance with law. The court concludes that Commerce's decision to reject the Vietnamese third country sales data was not adequately supported by record evidence, but that Commerce's inter-

[5] Substantial evidence is "more than a mere scintilla" and amounts to what a "reasonable mind might accept as adequate to support a conclusion." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1374 (Fed. Cir. 2015) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantiality of the evidence must also "take into account whatever in the record fairly detracts from its weight." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)).

pretation of the regulatory preference order and rejection of the proposed knowledge test were each in accordance with law. Accordingly, Commerce's *Final Results* are remanded for further explanation.

I. Commerce's Rejection of the Vietnamese Third Country Sales Data and Reliance on Constructed Value was Unsupported by Substantial Evidence

ZASF first argues that Commerce erred by rejecting the Vietnamese third country market data because substantial evidence does not support a determination that ZASF's Vietnamese sales were unrepresentative. Pls.' Br. at 15–18, 22–26. Contending that Vietnam was a viable third country market under 19 C.F.R. § 351.404(b), ZASF argues that its "third-country sales to Vietnam were presumptively representative" and Commerce failed to bear its burden of establishing "that ZASF's Vietnamese selling prices were not representative." Pls.' Br. at 15. ZASF specifically contests (1) Commerce's determination that ZASF's Vietnamese sales were part of an evasion scheme as set out in CBP's EAPA determination; and (2) Commerce's reliance on the trade patterns of ZASF's customers; and argues that neither provides sufficient basis to conclude that the Vietnamese sales were unrepresentative.[6] *Id.* at 15–18; 22–26.

A. The Evasion Scheme Evidence

In its IDM, Commerce primarily relied upon CBP'S EAPA determination of evasion to conclude that ZASF's Vietnamese sales were unrepresentative. Commerce specifically stated that "[g]iven that CBP found sales made by the Minh Phu Group during the [period of review] were ultimately sold in the United States, it would be unreasonable to use [ZASF's] Vietnamese sales, which include sales to the Minh Phu Group, as the comparison market. Some of these sales ultimately entered the United States and are an unsuitable comparison for [ZASF's] own sales to the United States. Such a comparison would compare U.S. sales to U.S. sales rather than U.S. sales to a third-country market." IDM at 19. In support of this conclusion, Commerce further noted that "[t]he prices to Vietnam are not truly prices for consumption in Vietnam as the shrimp is exported for further processing." *Id.* Accordingly, Commerce found that ZASF's Vietnamese sales to the Minh Phu Group were unrepresentative, and that the Vietnamese third country market data could not serve as the basis for calculation of normal value.

[6] ZASF also argues that "Commerce failed to consider contradictory evidence that ZASF's sales to Vietnam *were* representative." Pls.' Br. at 24. As the court has concluded that Commerce inadequately supported its determination as to the Vietnamese sales, it need not address this further argument regarding Commerce's analysis.

ZASF now challenges Commerce's rejection of the Vietnamese data, arguing that "CBP's EAPA [d]etermination did not find that the Minh Phu Group channeled ZASF merchandise to the United States . . . [a]nd no other information collected by Commerce established that any ZASF merchandise sold to Vietnam ended up in the United States." Pls.' Br. at 19. ZASF also notes that "Commerce's claim that the Indian-origin shrimp that the Minh Phu Group shipped to the United States was 'exported without further processing' is contradicted throughout the EAPA [d]etermination" *id.* at 23 (quoting IDM at 19), and that no record evidence supports Commerce's conclusion that "'the prices to Vietnam are in fact prices for sales that eventually become U.S. sales' and 'do not represent prices of sales made for consumption in Vietnam'" *id.* at 24 (quoting IDM at 19).

The court concludes that, with respect to the EAPA determination, Commerce failed to support its conclusion that ZASF's Vietnamese sales were unrepresentative with substantial evidence. First, as ZASF notes, ZASF itself is not mentioned in the EAPA determination. Indeed, the text of the determination indicates that multiple Indian suppliers export shrimp to the Minh Phu Group. EAPA Determination at 4–5; Pls.' Reply at 10. It is therefore not apparent from what evidence Commerce reached its conclusion that "some of [ZASF's] sales ultimately entered the United States." IDM at 19. Second, it is not clear on what basis Commerce determined that "sales made by the Minh Phu Group during the [period of review] were ultimately sold in the United States." *Id.* While the EAPA determination did find that the Minh Phu Group participated in an evasion scheme, that finding corresponded to the period of investigation October 8, 2018 through October 13, 2020, and identified only one undated instance of the commingling of Vietnamese- and Indian-origin shrimp. EAPA Determination at 4–7. In contrast, Commerce's review of the AD order on frozen warmwater shrimp from India spanned the period from February 1, 2018 through January 31, 2019. *Initiation*, 84 Fed. Reg. at 18,778. Commerce identifies no support for its conclusion that, despite only a three-month overlap with the EAPA investigation, transshipment must have occurred during the administrative review period. Finally, Commerce fails to acknowledge or address the fact that the EAPA determination was ultimately predicated on an adverse inference resulting from the Minh Phu Group's failure to cooperate to the best of its ability with CBP's request for information. EAPA Determination at 9. Indeed, CBP acknowledged that it relied on the *absence* of evidence (1) that transshipment did *not* occur, and (2) of "how many imports to the United States contained comingled

Indian-origin and Vietnamese-origin shrimp." *Id.* (emphasis added). Commerce thus fails to articulate a reasoned connection between the underlying facts and its conclusion that ZASF's shrimp exports were comingled and re-exported to the U.S. by the Minh Phu Group during the period of review. *See, e.g.*, *Burlington Truck Lines,* 371 U.S. at 168.

Nor does the EAPA determination clearly support Commerce's determination that the Minh Phu Group performed "no such further processing" on Indian-origin shrimp exported to the U.S. IDM at 19. The Government contends in its brief that "such . . . processing" refers only to processing which "would take Minh Phu Group's shrimp exports outside of the scope of the antidumping order on shrimp," and concludes that "Commerce reasonably determined that [ZASF's] sales to Vietnam were subsumed in Minh Phu Group's transshipment scheme." Def.'s Br. at 13–14. While CBP did identify one exported shipment of comingled Indian- and Vietnamese-origin shrimp which was *not* further processed, and thus illegally evaded Commerce's AD order on warmwater shrimp from India, it is not clear how Commerce concluded from this finding that the Minh Phu Group performed "no" further processing on its Indian-origin shrimp. EAPA Determination at 7; *see generally* IDM at 17–19. Indeed, the EAPA determination explicitly states that "[e]vidence on the record shows that [the Minh Phu Group] has a history of importing Indian-origin shrimp into Vietnam *for processing*," EAPA Determination at 4 (citation omitted). Given Commerce's failure to address this apparently conflicting information, and to adequately explain how the cited record evidence supports its conclusion with respect to the processing of ZASF's shrimp exports, the court cannot determine that Commerce's findings are supported by substantial evidence. *See CS Wind Viet. Co*., 832 F.3d at 1373 (requiring Commerce's determinations to be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and to "take into account whatever in the record fairly detracts from its weight" (first quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951), and then quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997))).

B. The Trade Pattern Evidence

Although Commerce did not elaborate on the trade pattern data challenged by ZASF in the IDM accompanying its *Final Results*, it reiterated that because of its "concerns regarding the nature of the Vietnamese sales," it found "sufficient cause" to disregard those third

country sales and employ constructed value in the *Preliminary Results*. IDM at 15. The concerns in question were those raised by AHSTAC in its comments on ZASF's Section A questionnaire response "about the nature and the ultimate destination of sales ZA Sea Foods made to Vietnam, given that ZA Sea Foods' customers are also known processors and exporters of shrimp to the United States." PDM at 9 (citing AHSTAC Comments). Deeming ZASF's customers' U.S. dealings "such other factors as [it] considers appropriate" for the assessment of a third country market, 19 C.F.R. § 351.404(e)(3), Commerce concluded that ZASF's Vietnamese sales were "not appropriate for consideration as comparison sales to establish [normal value]." PDM at 9.

ZASF now disputes Commerce's determination that the trade patterns of ZASF's customers constituted substantial evidence that ZASF's sales could not be used to calculate normal value. In pertinent part, ZASF alleges that "[e]ven if the trade patterns were relevant . . . Commerce's conclusions were not supported by substantial evidence" because "[n]othing on the administrative record establishes that the shrimp sold to Vietnam by ZASF" were not resold in Vietnam or processed into merchandise outside the scope of the AD order on frozen warmwater shrimp from India.[7] Pls.' Br. at 17.

The court concludes that, with respect to the trade pattern information deemed "sufficient" in the IDM, Commerce again failed to support its rejection of ZASF's proffered third country sales data with substantial evidence. As ZASF correctly notes, Commerce identified no record evidence (beyond the EAPA determination, which is insufficient for the reasons set out above) establishing "that the shrimp sold to Vietnam by ZASF was *not* resold in Vietnam . . . [or] processed into merchandise outside the scope of the antidumping duty order." Pls.' Br. at 17. The sum total of Commerce's explanation for rejecting the Vietnamese market prices on the basis of ZASF's customers' trade patterns is that "[ZASF] stated that its customers in Vietnam were processors or traders, and [AHSTAC] raised concerns about the nature and the ultimate destination of sales [ZASF] made to Vietnam, given that ZA Sea Foods' customers are also known processors and exporters of shrimp to the United States." PDM at 9. Without any evidence as to the reasonableness of AHSTAC's concerns, or indeed of the transshipment of subject merchandise sold to Vietnamese purchasers by ZASF during the period of review, the court concludes that

[7] ZASF also argues that "[b]ecause ZASF did not know the ultimate disposition of the shrimp products at the time of sale, it was unreasonable and irrelevant for Commerce to base any decision on the representativeness of ZASF's sales on the alleged trade patterns of ZASF's customers." Pls.' Br. at 17. This contention is addressed in detail in Section III below.

Commerce's determination of "sufficient cause" to reject the Vietnamese sales data was unsupported by substantial evidence. IDM at 15.

As neither the EAPA determination nor the trade patterns of ZASF's customers provide adequate basis for Commerce's conclusion that the ZASF's Vietnamese sales were not representative, Commerce has failed to articulate a rational basis for its determination, and thus to support its representativeness determination with substantial evidence. *See Husteel*, 520 F. Supp. 3d at 1304; *Burlington Truck Lines*, 371 U.S. at 168. Accordingly, Commerce's representativeness determination cannot be sustained.

II. Commerce's Interpretation of 19 C.F.R. § 351.404's Regulatory Preference Was in Accordance With Law

In the interest of judicial economy, the court now proceeds to address ZASF's arguments regarding Commerce's methodology, beginning with Commerce's interpretation of 19 C.F.R. § 351.404. ZASF contends that Commerce erred by finding "that its regulations not only do not state a preference for establishing normal value if home market sales are not available, but in fact support the use of CV over third country sales" when in reality, "19 C.F.R.§ 404(f) clearly establishes a preference for third country sales as the basis for normal value." Pls.' Br. at 27. Commerce's departure from this regulatory order of preference, ZASF concludes, was contrary to law.

The Government responds by arguing that "Commerce's determination to use constructed value is not, as [ZASF] claims, tantamount to a finding that the regulations state no preference for the use of third country prices over constructed value, which would contravene 19 C.F.R. § 351.404(f)." Def.'s Br. at 21. Instead, "Commerce explained that the statute and regulations permit the calculation of normal value based on constructed value as an alternative to third-country prices," which was necessary in the present case because ZASF's proposed third-country prices could not "be used as a basis for normal value *at all* due to the EAPA decision." *Id.* (emphasis added).

Setting aside for the moment the issues already identified with respect to Commerce's determination of evasion, the Government is correct that Commerce's reliance on constructed value did not violate any regulatory preference. As Commerce explained, it did not make any determination as to the viability of Vietnam as a third country market under 19 C.F.R. § 351.404(b). IDM at 18–19. Even if it had, such a finding would not obligate Commerce to rely on third country sales to calculate normal value where the third country prices were otherwise unrepresentative. IDM at 19. If substantial evidence had supported Commerce's conclusion that the Vietnamese sales were not representative, 19 C.F.R. § 351.404(c)(2)(ii) clearly permits Commerce

to "decline to calculate normal value in a particular market if . . . in the case of a third country, the price is not representative." This exception does not conflict with 19 C.F.R. § 351.404(f)'s provision that Commerce "normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable" because, where the third country sales are demonstrably unrepresentative, they cannot constitute adequate information for the calculation of normal value. Accordingly, the court concludes that Commerce's interpretation of its regulations was in accordance with law.

III. Commerce's Decision Not to Apply a Knowledge Test Was in Accordance With Law

Finally, the court addresses ZASF's argument that Commerce's failure to apply a knowledge test in its treatment of ZASF's Vietnamese sales "contradicts long-standing practice." Pls.' Br. at 18. ZASF contends that "under longstanding and well-established Commerce practice: (1) the seller's knowledge at the time of sale determines whether sales are U.S. sales transactions; and (2) merchandise that is destined for a third country without any evidence establishing an actual U.S. destination cannot be considered U.S. sales under the U.S. antidumping laws." *Id.* at 19. As ZASF was not aware of any downstream transactions wherein its merchandise was exported to the U.S., ZASF argues that its third country sales should not be considered sales to the U.S. (and thus unrepresentative) for purposes of normal value calculation. Pls.' Br. at 20–21. In support of its contention, ZASF cites Commerce's determinations in *Certain Circular Welded Non-Alloy Steel Pipe from Mexico*, 76 Fed. Reg. 36,086 (Dep't Commerce June 21, 2011) ("*Mexican Standard Pipe*") and *Welded Line Pipe From the Republic of Korea*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) ("*Korean Line Pipe*") that because respondents had no knowledge of specific downstream sales to the U.S. the sales in question were properly considered home market sales, as well as the court's application of a knowledge test in *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 215 F. Supp. 2d 1322 (2000). Pls.' Br. at 20; Pls.' Reply at 14–15. By failing to apply a knowledge test in the present case, ZASF contends, Commerce unlawfully disregarded sales which its past practice would not have been rejected based on the actions of ZASF's downstream purchasers. Pls.' Reply at 14.

Both the Government and AHSTAC argue that ZASF's proposed knowledge test applies only where Commerce is "determining whether to treat certain sales as U.S. sales" for purposes of calculat-

ing a dumping margin. Def.'s Br. at 18–19; *see also* Def.-Inter.'s Br. at 19. Where, as here, the relevant issue is the representativeness of third country sales, ZASF's "lack of knowledge regarding the transshipment scheme, or basically what the customer does with the product or pattern of trade, does not mitigate the fact that those sales were ultimately transshipped to the United States and by statute are inappropriate for use as a basis for normal value." Def.'s Br. at 17; *see also* Def.-Inter.'s Br. at 19. Accordingly, both the Government and AHSTAC argue that Commerce properly declined to apply a knowledge test in its analysis of the effect of downstream U.S. exports on the representativeness of ZASF's third country sales. Def.'s Br. at 19–20; Def. Inter.'s Br. at 19–20.

The Government and AHSTAC are correct. As the court explained in *Allegheny Ludlum*, Commerce employs a knowledge test under 19 U.S.C. § 1677b to determine whether a producer "knew or should have known that the merchandise was . . . for home consumption" such that the sales should be included in the home market database, and under 19 U.S.C. § 1677a to determine whether a producer "knew or should have known, at the time of a sale, whether or not the subject merchandise will be exported" such that the sale price should be considered the U.S. purchase price. 24 CIT at 1433 (quoting *INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 123–24, 957 F. Supp. 251, 264 (1997), aff'd 108 F.3d 301 (Fed.Cir.1997)). Put simply, the knowledge test described by ZASF is used to (1) exclude from Commerce's calculation of foreign market value and (2) include in Commerce's calculation of U.S. export price any sales a producer knew or should have known were for exportation to the U.S. *See id.*; *INA Walzlager Schaeffler*, 21 CIT at 123, 957 F. Supp. at 263 (discussing application of the knowledge test to determine whether sales may be included in the home market database); *LG Semicon Co., Ltd. v. United States*, 23 CIT 1074, 1999 WL 1458844 at *3 (1999) (discussing application of the knowledge test to determine inclusion of a product's sale price in the U.S. purchase price).

Neither knowledge test is applicable here. While Commerce did reject ZASF's proffered third country sales data because it determined that the Minh Phu Group's sales were ultimately U.S. sales, it did not treat ZASF's Vietnamese sales as U.S. sales for purposes of export price calculation under 19 U.S.C. § 1677a. *See* PDM at 8 (describing Commerce's export price calculations). Nor, clearly, did Commerce exclude any specific sales from its calculation of foreign market value, as it ultimately relied upon constructed value alone. Rather, Commerce concluded that because the Minh Phu Group exported subject merchandise purchased from ZASF into the U.S., that

merchandise was neither "sold (or offered for sale) for consumption in a [third country]" nor representative of such third country sales. 19 U.S.C. § 1677b(a)(1)(B)(ii); *see also* IDM at 19 (finding that ZASF's Vietnamese sales "are an unsuitable comparison for ZA Sea Foods' own sales to the United States" because "[s]uch a comparison would compare U.S. sales to U.S. sales rather than U.S. sales to a third-country market.") ZASF provides no evidence that Commerce has previously applied a knowledge test in similar circumstances: in fact, both *Mexican Standard Pipe* and *Korean Line Pipe* address the inclusion of sales in a home market database, not a determination of unrepresentative sales. *See* 76 Fed. Reg. at 36,088; 80 Fed. Reg. at 61,367. As Commerce did not depart from any longstanding practice by declining to apply a knowledge test in the present case, the court concludes that its decision not to apply such a test was in accordance with law.

CONCLUSION

For the foregoing reasons, while Commerce acted in accordance with law in interpreting 19 C.F.R. § 351.404 and declining to apply a knowledge test to its assessment of potential third country markets, it nevertheless failed to support its rejection of ZASF's Vietnamese sales data and use of constructed value with substantial evidence. Neither Commerce's initial assessment of the record evidence nor its subsequent analysis of CBP's EAPA determination of evasion by ZASF's primary Vietnamese purchaser provide a rational basis for its conclusion that ZASF's Vietnamese sales were unrepresentative and thus unsuitable as a third country benchmark. Accordingly, the court grants ZASF's motion for judgment on the agency record, and remands Commerce's calculation of normal value for further proceedings consistent with this opinion. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised remand determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: April 19, 2022
New York, New York

/s/ Gary S. Katzmann
JUDGE

Slip Op. 22–37

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

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

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the 2017–2018 antidumping administrative review of welded line pipe from the Republic of Korea.]

Dated: April 19, 2022

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

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

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

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Eugene Degnan*, Morris, Manning, & Martin, LLP, of Washington, D.C. for plaintiff-intervenor Husteel Co., Ltd.

Robert R. Kiepura, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C. argued for defendant United States. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Franklin E. White Jr.*, Assistant Director. Of counsel was *Reza Karamloo*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington D.C.

Elizabeth J. Drake, Schagrin Associates, of Washington, D.C. argued on behalf of defendant-intervenors California Steel Industries, Inc. and Welspun Tubular LLC USA. Also on the brief was *Roger R. Schagrin*.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, D.C. argued on behalf of defendant-intervenors American Cast Iron Pipe Company and Stupp Corporation, a Division of Stupp Bros., Inc. Also on the brief was *Laura El-Sabaawi*.

Gregory J. Spak, *Frank J. Schweitzer*, *Kristina Zissis*, and *Matthew W. Solomon,* White & Case LLP, of Washington, D.C. for defendant-intervenors Maverick Tube Corporation and IPSCO Tubulars Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court are four Rule 56.2 motions for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Commerce") final determination in its 2017–2018 administrative review of the antidumping duty ("ADD") order covering welded line pipe ("WLP") from the Republic of Korea ("Korea") ("WLP

from Korea"). Pl. Husteel Co., Ltd.'s Mot. J. Agency R., May 24, 2021, ECF No. 58 ("Husteel's Rule 56.2 Mot.") and accompanying Pl.-Intervenor Husteel Co., Ltd.'s Br. in Supp. Mot. for J. Agency R., May 24, 2021, ECF No. 58–2 ("Husteel's Br."); R. 56.2. Mot. J. Agency R. of Pl. and Consol. Pl. NEXTEEL Co., Ltd., May 24, 2021, ECF Nos. 59, 60 ("NEXTEEL's R. 56.2 Mot.") and accompanying Memo. in Supp. of [NEXTEEL's R. 56.2 Mot.], May 24, 2021, ECF Nos. 59–2, 60–2 ("NEXTEEL's Br."); Mot. of Pl. SeAH Steel Corporation for J. Agency R., May 24, 2021, ECF Nos. 61, 62 ("SeAH's R. 56.2 Mot.") and accompanying Br. of SeAH Steel Corporation in Supp. of R. 56.2 Mot. for J. Agency R., May 24, 2021, ECF Nos. 61–1, 62–1 ("SeAH's Br."); Consol. Pl. and Pl.-Intervenor Hyundai Steel Company's R. 56.2 Mot. J. Agency R., May 24, 2021, ECF No. 63 ("Hyundai's R. 56.2 Mot.") and accompanying Memo. in Supp. of [Hyundai's R. 56.2 Mot.], May 24, 2021, ECF No. 63–1 ("Hyundai's Br."); *see generally* [*WLP from Korea]* 85 Fed. Reg. 76,517 (Dep't Commerce Nov. 30, 2020) (final results of [ADD] admin. review; 2017–2018) ("*Final Results*") and accompanying Issues and Decision Memo., A-580–876, Nov. 20, 2020, ECF No. 52–4 ("Final Decision Memo."); Order on Consent Mot. to Consol. Cases, Jan. 21, 2021, ECF No. 50 (consolidating Ct. Nos. 20–03898, 20–03935, and 20–03940).

Plaintiff, consolidated plaintiffs and plaintiff-intervenors (collectively, "Plaintiffs") challenge Commerce's determination of a particular market situation ("PMS"), SeAH's Br. at 8–21; NEXTEEL's Br. at 21–31; Hyundai's Br. at 6–9;[1] Husteel's Br. at 7–13, Commerce's application of a PMS adjustment to the sales-below-cost test, SeAH's Br. at 8–11; NEXTEEL's Br. at 18–21; Hyundai's Br. at 7–8; Husteel's Br. at 15–18,[2] and Commerce's PMS adjustment methodology, SeAH's Br. at 21–28; NEXTEEL's Br. at 34–42; Hyundai's Br. at 8–9, as unsupported by substantial evidence and contrary to law. Additionally, NEXTEEL Co., Ltd. ("NEXTEEL") challenges Commerce's non-prime cost calculation and Commerce's classification of NEXTEEL's suspension loss costs as unsupported by substantial evidence and contrary to law. NEXTEEL's Br. at 42–48. SeAH Steel Corporation ("SeAH") challenges two additional aspects of the *Final Results*; Commerce's denial of a constructed export price ("CEP") offset for SeAH's U.S. sales and its decision to cap adjustments for freight revenue when calculating SeAH's constructed export price. SeAH's Br. at 29–35. Hyundai and Husteel challenge Commerce's separate rate

[1] Joining in the arguments set forth in SeAH's, NEXTEEL's and Husteel's briefs. Hyundai's Br. at 6.

[2] Adopting and incorporating by reference the arguments set forth in SeAH's and NEXTEEL's briefs related to other issues impacting SeAH's and NEXTEEL's dumping margins. Husteel's Br. at 18.

calculation as unsupported by substantial evidence, reasoning that any errors made when calculating NEXTEEL's and SeAH's dumping margins impact the separate rate because the separate rate is calculated by averaging the final weighted-average dumping margins of the mandatory respondents. Hyundai's Br. at 9–11; Husteel's Br. at 18. For the following reasons, the *Final Results* are remanded for reconsideration or additional explanation consistent with this opinion.

BACKGROUND

In March 2019, Commerce initiated an administrative review of its ADD order for WLP from Korea covering the period of December 1, 2017, to November 30, 2018. *Initiation of [ADD] and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9,297 (Dep't Commerce Mar. 14, 2019). Commerce selected NEXTEEL and SeAH as mandatory respondents. Resp't Selection Memo. at 4–5, PD 20 bar code 3812218–01 (Mar. 28, 2019).[3] On June 24, 2019, California Steel Industries ("California Steel"), TMK IPSCO, and Welspun Tubular LLC USA ("Welspun") (collectively, "Domestic Interested Parties") alleged that a PMS existed in the Korean hot-rolled coil steel ("HRC") market, distorting the price of HRC. Ltr. Re: [PMS] Allegation and Supporting Factual Information, PD 95–690 CD 110–339 (June 24, 2019) ("PMS Allegation"). The Domestic Interested Parties provided a regression model for Commerce to use to quantify any adjustment to the price of HRC, should Commerce determine that a PMS in Korea distorted the price of HRC during the period of review. PMS Allegation at Ex. 62. On July 8, 2020, Commerce supplemented the record with steel reports and information from a statistical analysis textbook and invited interested parties to submit comments and rebuttal evidence in response. Memo. Re: New Factual Information, PDs 841–842 bar codes 3998238–01, -02 (July 8, 2020); *see also* Final Decision Memo. at 2–3, 35.

Commerce published the *Final Results* on November 30, 2020, determining that a PMS existed in the Korean HRC market based on the cumulative effects of subsidies provided to the HRC market by the Government of Korea ("GOK"), imports of low-priced HRC from the People's Republic of China ("China"), strategic alliances between Korean HRC suppliers and WLP producers, and GOK intervention in

[3] On January 22, 2021, Commerce filed indices to the public and confidential administrative records underlying Commerce's *Final Results*. These indices are located on the docket at ECF Nos. 52–1 and 52–2. All references to documents from the public and confidential record are identified by the numbers assigned by Commerce in the indices, *see* ECF Nos. 52–1 & 52–2, and preceded by "PD" or "CD" to denote public or confidential documents, respectively.

the electricity market. Final Decision Memo. at 17; *Final Results*. Finding sufficient record evidence existed to quantify the impact of the PMS on production costs, Commerce calculated the amount of the upward adjustment using the beta coefficient for uneconomic capacity from an ordinary least squares fixed-effects regression model originally submitted by the Domestic Interested Parties as part of the PMS Allegation with certain modifications by Commerce. Final Decision Memo. at 32–44; PMS Allegation at Exs. 56, 62.

Commerce determined the normal value of NEXTEEL's subject merchandise using constructed value, based on data submitted by NEXTEEL, with adjustments to NEXTEEL's reported costs for HRC to account for the PMS, non-prime WLP products, costs of goods sold ("COGS"), and general and administrative expenses. [*WLP from Korea*] 85 Fed. Reg. 7,269 (Dep't Commerce Feb. 7, 2020) (prelim. admin. review) and accompanying Issues and Decision Memo. at 19–20. Issues and Decision Memo. at 19–20, A-580–876, Jan. 31, 2020 ("Prelim. Decision Memo."); Final Decision Memo. at 3; NEXTEEL's Prelim. Calculation Memo., CD 459 bar code 3938526–01 (Jan. 31, 2020); NEXTEEL's Final Calculation Memo., CD 480 bar code 4056576–01 (Nov. 20, 2020). Commerce determined the normal value of SeAH's subject merchandise using SeAH's home market sales, with adjustments to SeAH's reported HRC cost to account for the PMS for the purpose of the sales-below-cost test; and constructed value where there were no identical home market sales in the ordinary course of trade, with an adjustment to SeAH's reported cost for HRC to account for the PMS. Prelim. Decision Memo. at 21–22; Final Decision Memo. at 3; SeAH's Prelim. Calculation Memo., CD 461 bar code 3938891–01 (Jan. 31, 2020) ("SeAH's Prelim. Calc."); SeAH's Final Calculation Memo., CD 484 bar code 4056688–01 (Nov. 20, 2020).

Between September 22, 2021, and October 20, 2021, parties fully briefed the issues. Def.'s Resp. Pls.' Mots. J. Agency R., Sept. 22, 2021, ECF No. 69 ("Def. Br."); Resp. Br. Def.-Intervenors Maverick Tube Corporation and IPSCO Tubulars Inc., Sept. 22, 2021, ECF No. 70 ("Maverick's and IPSCO's Br."); Def.-Intervenors' Resp. Br., Sept. 22, 2021, ECF No. 71 ("Def.-Intervenors' Br."); Pl.-Intervenor [Husteel]'s Reply Br. Supp. Mot. J. Agency R., Oct. 20, 2021, ECF No. 74; Reply Br. [SeAH], Oct. 20, 2021, ECF No. 75; Reply Br. Supp. [NEXTEEL]'s Mot. for J. Agency R., Oct. 20, 2021, ECF No. 76; Reply Br. of Consol. Pl. and Pl.-Intervenor [Hyundai], Oct. 20, 2021, ECF No. 77. On January 21, 2022, the court denied California Steel's and Welspun's motion to stay. Opinion and Order, Jan. 21, 2022, ECF No. 86; Partial Consent Mot. to Stay Proceedings, Jan. 13, 2022, ECF No. 84; Pls.' Joint Opp. To Def.-Intervenors' Mot. to Stay Proceedings, Jan. 20,

2022, ECF No. 85. On February 4, 2022, the court held oral argument. Order, Nov. 19, 2021, ECF No. 83; Order, Jan. 26, 2022, ECF No. 88; Remote Oral Arg., Feb. 4, 2022, ECF No. 89.

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)[4] and 28 U.S.C. 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Particular Market Situation and the Sales-Below-Cost Test

The court remands Commerce's application of the PMS adjustment to SeAH's direct material costs when conducting the sales-below-cost test because such application is contrary to law. When determining the normal value of a respondent's subject merchandise, Commerce generally bases the normal value on the price at which the foreign like product is sold in either the respondent's home market, or a third country market. *See id.* § 1677b(a)(1). In selecting the home market sales on which to base normal value, Commerce may disregard home market sales made at less than the cost of production if the sales (1) have "been made within an extended period of time in substantial quantities" and (2) "were not made at prices which permit recovery of all costs within a reasonable period of time." *Id.* § 1677b(b). After disregarding sales, Commerce bases normal value on the remaining home market sales made in the ordinary course of trade. *Id.* § 1677b(b)(1). If there are no remaining sales, Commerce bases normal value "on the constructed value of the merchandise." *Id.* The Trade Preferences Extension Act of 2015 ("TPEA") amended section 1677b(e), allowing Commerce to make adjustments to "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise" for the purpose of calculating the subject merchandise's constructed value if "a particular market situation exists such that" the cost does "not accurately reflect the cost of production in the ordinary course of trade." *Id.* § 1677b(e). Congress has not enacted any amendments to the framework of section

[4] 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.

1677b(b), enabling Commerce to make a PMS adjustment to a respondent's reported costs for the purpose of determining whether those sales were made below cost. *Hyundai Steel Co. v. United States*, 19 F.4th 1346 (Fed. Cir. 2021).

Here, Commerce applies an upward adjustment of 25.62% to SeAH's HRC cost to account for a PMS in the Korean HRC market before conducting the sales-below-cost test. Final Decision Memo. at 41. Such adjustment is not permitted by the statute; thus, Commerce's adjustment to SeAH's HRC cost for the purpose of conducting the sales-below-cost test is remanded for reconsideration consistent with this opinion.

II. Particular Market Situation Determination

Plaintiffs argue that Commerce's PMS determination is not supported by substantial evidence. Specifically, Plaintiffs argue that the market phenomena on which Commerce relies do not give rise to a PMS, SeAH's Br. at 11–17; NEXTEEL's Br. at 21–31; Hyundai Br. at 6–8; Husteel's Br. at 7–15, Commerce may not base its determination on the totality of the circumstances without additional explanation, SeAH's Br. at 18, and Commerce has failed to show that HRC costs are outside of the course of ordinary trade. SeAH's Br. at 19–21. Defendant and Defendant-Intervenors argue that Commerce's PMS determination is supported by substantial evidence. Def.-Intervenors' Br. at 8–23; Def. Br. at 14–20. The court remands Commerce's PMS determination for reconsideration or additional explanation consistent with this opinion.

The TPEA allows Commerce to adjust a respondent's cost of materials and fabrication or other processing when Commerce calculates constructed value "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade." 19 U.S.C. § 1677b(e). Although "particular market situation" is not defined in either the statute or the legislative history to the TPEA, the phrase predates the TPEA in sections § 1677b(a)(1)(B) and (C). *NEXTEEL Co., Ltd. v. United States*, 28 F.4th 1226, 1234 (Fed. Cir. 2022) ("*NEXTEEL I*"). The Statement of Administrative Action to the Uruguay Round Agreements Act (the "SAA") provides examples of situations that "distort[] costs so that they are not set based on normal market forces or do not move with the rest of the market." *Id.*; *see* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 822 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4162 ("SAA"). The language of section 1677b(e) "adopts both a comparative requirement and a

causal requirement" requiring Commerce to find the existence of one or more unique market phenomena and demonstrate how those market phenomena render the cost of materials and fabrication inaccurate in the ordinary course of trade. *See* 19 U.S.C. § 1677b(e); *Garg Tube Export LLC v. United States*, Ct. No. 20–00026, 2022 WL 836402 *1, 4–5 (Ct. Int'l Trade Mar. 11, 2022).

Commerce may choose the methodology it employs to identify the unique market phenomena that render the cost of materials and fabrication an inaccurate reflection of the cost of production, so long as the methodology comports with its statutory mandate and provides a reasoned explanation supported by substantial evidence. *See Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Universal Camera Corp. v. N.R.L.B.*, 340 U.S. 474, 488 (1951). The evidence must be sufficient such that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Commerce bases its PMS determination on the cumulative impact of subsidies for HRC products by the GOK, unfairly traded Chinese HRC, "strategic alliances between Korean HRC suppliers and Korean WLP producers," and government control over electricity prices in Korea. Final Decision Memo. at 17. Although Commerce identifies each of the market phenomena it believes contribute to a PMS in the Korean HRC market, the court cannot discern how Commerce combined these phenomena to reach its determination that a PMS exists in the Korean HRC market. Commerce also fails to demonstrate that the market phenomena identified distort the price of HRC such that the cost does not accurately reflect the price of HRC in the ordinary course of trade. Commerce can support its PMS determination with evidence of subsidies, but in doing so, Commerce must show that the subsidies "affect the price of the input so that it does 'not accurately reflect the cost of production in the ordinary course of trade.'" *NEXTEEL I*, 28 F.4th at 1235–36. Commerce must also show that the effect of the subsidies is "'particular' to producers of the subject merchandise." *Id.* Here, Commerce has only shown that HRC subsidies were in place during the period of review and that NEXTEEL and SeAH purchased HRC from entities receiving subsidies. Final Decision Memo. at 18. On remand, if Commerce wishes to continue relying on the provision of subsidies as a market phenomenon con-

tributing to a PMS in the Korean HRC market, it should explain how the subsidies distort the price of HRC preventing an accurate reflection of the cost of production in the ordinary course of trade and demonstrate that the effect of the subsidies is particular to producers of the subject merchandise. *NEXTEEL I*, 28 F.4th at 1235–36.

Commerce asserts that strategic alliances contribute to the PMS in the Korean HRC market. In support of its assertion, Commerce points to record evidence that in December 2017 the Korea Fair Trade Commission ("KFTC") fined six Korean steel producers, including Hyundai "for rigging bids for pipe sold to a Korean gas company over a period of ten years," and that the KFTC has not found that Hyundai or SeAH have discontinued their anticompetitive practices. Final Decision Memo. at 20. Commerce argues that the KFTC's findings are consistent with Commerce's conclusion that strategic alliances have previously created distortions in the past and may continue to do so now. *Id.* Commerce fails to demonstrate that the alleged strategic alliances created distortions during the period of review. Instead, it speculates that distortions are occurring due to the alleged alliances. *Id.* However, Commerce's PMS determination must be supported by substantial evidence, not speculation. *See NEXTEEL I*, 28 F.4th at 1236. Commerce concedes that the existence of strategic alliances alone is not dispositive of a PMS but is part of Commerce's consideration of the totality of the circumstances in the Korean HRC market. Final Decision Memo. at 20. The court cannot discern from Commerce's explanation how Commerce combined and weighed each market phenomenon it identified to reach its determination of a PMS and must remand. On remand, in addition to demonstrating that strategic alliances have distorted HRC prices in the Korean HRC market, such that the cost of HRC is no longer an accurate reflection of the cost in the ordinary course of trade, Commerce should explain how it combined each of the market phenomena it identifies to reach its PMS determination.

Commerce also relies on the GOK's control over electricity prices as a contributing factor to its PMS determination, arguing that the GOK's control results in a distortion in the Korean electricity market. *Id.* Although the SAA contemplates that government control over prices may constitute a PMS, government control must be so pervasive "that home market prices cannot be considered to be competitively set." SAA at 822. Commerce fails to establish that level of government control here. Commerce's countervailing duty determinations have found that electricity is not countervailable; therefore, Commerce has determined that the GOK is not conferring a benefit

on Korean steel producers. *See, e.g., NEXTEEL I*, 28 F.4th at 1237–38 (collecting cases). Furthermore, Commerce fails to explain how a distortion in the Korean electricity market distorts the price of HRC. On remand, if Commerce wishes to continue relying on electricity prices, it should explain why the facts of this case warrant a departure from its previous determinations and how distortions in the electricity market result in distorted HRC prices. *See id.*

Finally, Commerce relies on China's overproduction of steel as a market phenomenon supporting its PMS determination arguing that Chinese steel production exerts "downward pressure" on the price of HRC. Final Decision Memo. at 18. Commerce explains record evidence shows "that Korea is one of the top two destinations of Chinese exports of hot-rolled steel," *id.*, and "the average unit value (AUV) for HRC imported from China into Korea was lower than the AUV of China's exports to other countries." *Id.* at 19. Yet, Commerce also acknowledges that China exported steel to 160 destinations in 2017 and 2018, and the AUV of steel imports was lower in some other countries. *See id.* Thus, low-priced steel imports from China cannot be considered unique to the Korean market. Commerce is not precluded from relying on steel overcapacity as a market phenomenon contributing to a PMS in Korea, *see NEXTEEL I*, 28 F.4th at 1237, but it must explain how overcapacity combines with the other market phenomena it relies on to create a unique distortion in the Korean market and demonstrate that the price of HRC is impacted by the distortion. Commerce does neither here. On remand, if Commerce wishes to continue relying on global steel overcapacity, Commerce should explain how it combines with the other market phenomena Commerce relies on to give rise to a PMS and demonstrate that Korean HRC costs are distorted.

III. Particular Market Situation Adjustment

Plaintiffs challenge Commerce's PMS adjustment calculation methodology as arbitrary and unsupported by substantial evidence. NEXTEEL argues that "Commerce's reliance on a 'regression-based' methodology" is arbitrary because it is "a complete departure from its prior PMS determinations." NEXTEEL's Br. at 34–35. Plaintiffs argue that the regression-based methodology is unsupported by substantial evidence because unrebutted expert testimony demonstrates that the regression model is invalid, SeAH's Br. at 22–24, the relationship between uneconomic capacity and steel prices is not stable over time, SeAH's Br. at 23–27; NEXTEEL's Br. at 40, Commerce did not use product-specific data, NEXTEEL's Br. at 40–41, and Commerce's use of 2017 HRC prices is improper because most of the

period of review is in 2018. SeAH's Br. at 27–28; NEXTEEL's Br. at 37–40. Defendant and Defendant-Intervenors counter that the regression-based methodology employed by Commerce to calculate the PMS adjustment is supported by substantial evidence and in accordance with law. Def. Br. at 27–32; Def.-Intervenors' Br. at 29–35. For the following reasons, Commerce's PMS adjustment methodology is remanded for reconsideration or further explanation consistent with this opinion.

Where Commerce identifies a PMS such that the cost of materials and fabrication are not accurate, section 1677b(e) permits Commerce to use any other calculation methodology to quantify the impact of the PMS on the costs of materials and fabrication. 19 U.S.C. § 1677b(e). The chosen methodology must be reasonable, and the determination must be supported by substantial evidence. *See Garg*, 2022 WL 836402 at 5. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477 (quoting *Consol. Edison Co.*, 305 U.S. at 229). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. In providing its explanation Commerce must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). "A court may 'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (quoting *Bowman Transportation v. Ark.-Best Freight Sys.*, 419 U.S. 281, 286 (1974)); *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 595, (1945). Moreover, the court will remand Commerce's determination if it is arbitrary. The court will find Commerce's determination arbitrary where the "agency offer[s] insufficient reasons for treating similar situations differently." *SKF USA v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

Here, Commerce calculates the PMS adjustment using the beta coefficient for uneconomic capacity[5] derived from an ordinary least

[5] The beta coefficient for uneconomic capacity measures the relationship between the import AUV for HRC and uneconomic capacity when all other explanatory variables are held constant. *See* Final Decision Memo. at 40. Commerce explains that relying on the beta coefficient for uneconomic capacity allows Commerce to "to isolate the factors contributing to a cost-based PMS in the Korean HRC market [and] capture the effect of global uneconomic capacity in the steel industry on the cost of imported HRC in Korea." *Id.* at 39. The Domestic Interested Parties define "uneconomic capacity" as "the amount of steel capacity in a given year in excess of the largest possible quantity of steel that may be demanded in that year (i.e., global capacity minus the highest global production ever experienced prior to that year)." PMS Allegation at 46.

squares ("OLS") regression model provided in the Domestic Interested Parties' PMS Allegation (the "OLS Regression Model").[6] Final Decision Memo. at 32; *see generally* PMS Allegation at Ex. 62. Commerce adjusts SeAH's and NEXTEEL's reported HRC costs by a rate of 25.62%, which it finds is the amount that the import AUV for HRC would increase "if uneconomic capacity were eliminated." Prelim. Results Regression Analysis for [PMS] Adjustment at 2, PD 798 bar code 3938102–01 (Jan. 31, 2020); Final Decision Memo. at 41. Commerce arrives at the upward adjustment using the following equation:

Change in AUV =

$$\left(\frac{(Global\ Prod._{5\ yr\ avg.} \div Capacity\ Utilization\ Rate) - GlobalProd._{Max}}{Global\ Capacity_{2017} - Global\ prod._{Max}}\right) \beta Uneconomic\ Capacity - 1.^{7}$$

Id. at 40–41.

Commerce's has discretion to choose "any reasonable methodology" to quantify a PMS adjustment. Here, Commerce explains its formula captures the distortion created by the PMS phenomena because quantifies the relationship the actual AUV of HRC and a counterfactual AUV of HRC. Commerce's PMS adjustment methodology is reasonable.[8] 19 U.S.C. § 1677b(e); *Fujitsu*, 88 F.3d at 1039.

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[6] Multiple regression models estimate relationships between explanatory variables and a dependent variable, showing the estimated impact that a particular independent variable has on the dependent variable. Jeffrey M. Wooldridge, Introductory Econometrics A Modern Approach 68 (South-Western Cengage Learning 5th ed.) (2013) ("Wooldridge, Econometrics"); *see* PMS Allegation at 40. The OLS regression model submitted by the Domestic Interested Parties uses panel data from 2008–2017 for several countries and attempts "to estimate the effect of global excess capacity on prices of HRC at the national level." Final Decision Memo. at 39–40; PMS Allegation at 44–45, Ex. 62.

[7] Where "Global $Prod._{5\ year\ avg.}$" is the average of global steel production from 2013–2017, "Capacity Utilization Rate" is the level of global capacity desired, "βUneconomicCapacity" is the beta coefficient for uneconomic capacity derived from the OLS Regression Model, *id.* at 40–41, citing PMS Allegation at Ex. 56a, regression model 3, "Global $Capacity_{2017}$" is the global production capacity in 2017 and "Global $Production_{max}$" "is the maximum level of Global Production during the years before the current year." *See id.*

[8] In its brief before the court, NEXTEEL argues that Commerce's reliance on a regression-based methodology is arbitrary because in prior reviews Commerce based its PMS determination on the same four market phenomena it identifies in the current review and based the PMS adjustment on subsidy rates for the input. NEXTEEL Br. at 34–35; *see, e.g., Certain Oil Country Tubular Goods from [Korea],* 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of [ADD] admin. review; 2014–2015), as amended, 82 Fed. Reg. 31,750 (Dep't Commerce July 10, 2017) (amended final results of [ADD] admin. review; 2014–2015) and accompanying Issues and Decision Memo. at 40–44, A-580–870 bar code 3562289–01, Apr. 11, 2017 ("For HRC purchased from Korean producers, [Commerce] bases this adjustment on the subsidy rates found for . . . producers of HRC in the final determination in Hot-Rolled Steel Flat Products from Korea. [Commerce] has quantified this adjustment as the net domestic subsidization rate"). NEXTEEL does not raise this issue in

Plaintiffs challenge the application of Commerce's methodology. In applying its methodology Commerce relies upon the beta coefficient for uneconomic capacity supplied in the Domestic Parties' OLS Regression Model. Final Decision Memo at 41. *See also* PMS Allegation at Ex. 56a, Regression Model 3; SeAH's Br. at 21–28; NEXTEEL's Br. at 37–42. Because in Commerce's application of it PMS methodology it relies in part on the beta coefficient for uneconomic capacity, and the court finds that the OLS Regression Model that supplies the coefficient is not supported by substantial evidence, Commerce's PMS adjustment is not supported by substantial evidence.

Although Commerce explains why it included data from 2008 and 2009 in the OLS Regression Model, it fails to address record evidence demonstrating that the inclusion of the data renders the OLS Regression Model unstable. SeAH placed an expert report on the record examining the validity of the OLS Regression Model. Submission of Factual Information Rebutting, Clarifying, or Correcting Pets.' Allegation of a [PMS] at App. 11, PDs 726–728 CD 356 bar codes 3877486–01– -03, 3877426–01– -03 (Aug. 12, 2019) (the "Northeim Report"). The Northeim Report found that the OLS Regression Model "does not represent an appropriate statistical analysis and cannot be expected to provide reliable estimates concerning the pricing behavior that it was designed to predict . . . [b]ecause many of the key assumptions for an OLS model are not met."[9] Northeim Report at 5; *see generally*, Wooldridge, Econometrics at 509 (listing assumptions for fixed-effects OLS regression models). The Northeim Report tested "the sensitivity of the [OLS Regression Model] over time" by comparing OLS regression models "constructed using a rolling 5-year window" to measure the impact that the inclusion or exclusion of annual data had on the beta coefficients and the import AUV

its agency brief, *see generally* NEXTEEL's Case Brief, bar code 3953030–01 (Mar. 11, 2020), and although the government does not argue NEXTEEL has failed to exhaust its administrative remedies, Commerce nonetheless provides a reasonable explanation for its decision to rely on a regression-based methodology. Prelim. Decision Memo. at 14–16. (explaining that Commerce finds a regression-based methodology "sufficiently quantifies the impact of the PMS on the material cost of HRC, and derives a corresponding adjustment factor that, when applied to the costs of HRC, accounts for the distortions induced by the observed PMS.")

[9] The Northeim Report identifies additional problems with the variance of the error terms, autocorrelation, and the validity of the panel data used. Northeim Report at 12–18. Commerce addresses these problems, explaining that although the OLS Regression Model may include some level of abnormality in the error terms, some level of abnormality is expected when using time series data and the record evidence does not suggest that the level of abnormality in the error terms is high enough to render the model invalid. Final Decision Memo. at 38–39. With respect to the presence of autocorrelation, Commerce rejects the evidence explaining that it does not consider in the Durbin Watson test used in the Northeim Report to be appropriate for the data. *Id.*

prediction.[10] Northeim Report at 7–10. In comparing the various models, the Northeim Report states that "the time period used significantly affects the [beta] coefficients of the model" showing that depending on the time period used, the uneconomic capacity beta coefficient ranges from -0.6112–18.6713. *Id.* at 10–11. The OLS regression models in the Northeim Report demonstrate that depending on the time period examined, uneconomic capacity may have a variable positive or negative impact on the import AUV of HRC. *Id.* Implicit in the Northeim Report's finding is that the OLS Regression Model does not accurately estimate the relationship between uneconomic capacity and import AUV for HRC when data from 2008 and 2009 is used because the data are outliers. *Id.* In response, Commerce explains that it includes the data from 2008 and 2009 because its prior regression models have been based on ten years of data and the financial crisis of 2008–2009 "is the main event of interest in the analysis," but does not explain why such inclusion is supported by substantial evidence in light of the Northeim Report's finding that the model is unstable. *See* Final Decision Memo. at 37; *see* Northeim Report at 10–11.[11] On remand, Commerce should explain why its inclusion of the 2008 and 2009 data is supported by substantial evidence in light of evidence detracting from its inclusion.[12]

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[10] Wooldridge explains that OLS regression models are sensitive to outlier data, also known as influential observations. Wooldridge, Econometrics at 326. Wooldridge further explains that generally "an observation is an influential observation if dropping it from the analysis changes the key OLS estimates[, *i.e.*, the beta coefficients,] by a practically 'large' amount." *Id.* at 326–327.

[11] Defendant's brief provides several reasons why reliance on the OLS Regression Model is still appropriate in light of the instability identified by SeAH. Def. Br. at 29–30. Those reasons are not included in the Final Decision Memo. and the court will not consider them at this time.

[12] NEXTEEL also challenges the product specifications Commerce used for the regression model, arguing that Commerce should have relied on the 6-digit HTS classification rather than the 4-digit HTS classification. NEXTEEL's Br. at 40–42. Commerce explains that although the 4-digit HTS classification may be over inclusive, "OECD data on steel capacity and WSA data on steel production are only provided at the broader four-digit HTS level" and using data in the regression analysis at the four- and six- digit level would "prevent[] an accurate quantification of the PMS." Final Decision Memo. at 32. Commerce adequately explains its decision to rely on the six-digit HTS classification.

Furthermore, although Commerce's explanation could be clearer, it is discernible that Commerce reasonably excluded the 2018 data for global steel production and capacity. Commerce explains that despite eleven months of the period of review occurring in 2018, it declines to include the data from 2018 because some production in 2018 likely relates to sales occurring outside of the period of review and further, a portion of production in 2018 falls outside of the period of review. *Id.* at 36–37. Implicit in Commerce's explanation is that it believes there is a lag between the time production costs are incurred and recuperated through sale of the product. *See id.*; *see also* Def. Br. at 31–32; Oral Arg. at 37:15–38:11. Therefore, data from 2017 is more representative of the costs incurred to produce products sold in 2018 than data from 2018. *See* Final Decision Memo. at 36–37; *see also* Def. Br. at 31–32; Oral Argument at 37:15–38:11. In light of this explanation, the court cannot say Commerce's choice to exclude the 2018 data was unreasonable.

IV. NEXTEEL's Non-Prime Costs

NEXTEEL argues that Commerce erred in calculating the cost of NEXTEEL's non-prime WLP by valuing it at its sale price rather than its reported cost of production, a valuation inconsistent with 19 U.S.C. § 1677b(f)(1)(A) and the U.S. Court of Appeals for the Federal Circuit's ("Court of Appeals") decision in *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1322 (Fed. Cir. 2020). NEXTEEL's Br. at 42–45. Defendant argues that assigning the full cost of production does not reasonably reflect the costs associated with the production and sale of the merchandise because the non-prime products cannot be used for the same general application as prime products; therefore, Commerce's valuation is correct. Def. Br. at 34–35. Defendant further argues that Commerce's calculation is reasonable and consistent with the Court of Appeals' decision in *Dillinger*. Def. Br. at 34–35. For the reasons that follow, Commerce's determination is remanded.

When determining the constructed value of subject merchandise, Commerce normally calculates cost "based on the records of the exporter or producer of the merchandise" if the records "are kept in accordance with the generally accepted accounting principles [("GAAP")] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Sometimes, Commerce finds that a portion of a respondent's reported costs relate to the production of "non-prime" products. *See, e.g.*, *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1381 (Fed. Cir. 2008). Commerce classifies a product as non-prime on a case-by-case basis after examining "how the products are treated in the respondent's normal books and records, whether [the products] remain in scope, and whether [the products] can be used in the same applications as the prime product." Final Decision Memo. at 45. When a product is no longer capable of being used in the same applications as the prime product, Commerce typically considers the product's market value to be "significantly impaired, often to a point where its full cost cannot be recovered," and believes it would be unreasonable to assign full costs to the product. *Id*. In those cases, Commerce applies an adjustment to the reported cost of production of the non-prime product, valuing it at its sale price, and allocates the difference between the production cost and sales price to the production cost of prime products. *Id.* at 47. In *Dillinger*, the Court of Appeals held that Commerce's constructed value calculation must reasonably reflect a respondent's actual costs, whether or not the respondent's books and records reasonably reflect such costs. 981 F.3d at 1321–23. Specifi-

cally, the *Dillinger* court held that Commerce was not permitted to use a respondent's costs as reflected in its books and records because those reported costs did not reasonably reflect the respondent's actual costs, even though the respondent kept its books and records in accordance with GAAP. *Id.* at 1324.

Although Commerce explains how its evaluation of NEXTEEL's non-prime products is consistent with its practice, Final Decision Memo. at 46–47; *contra Husteel Co., Ltd. v. United States*, 471 F. Supp. 3d 1349, 1366–1368 (Ct. Int'l Trade 2020) ("*Husteel I*"), it does not explain how adjusting the price of non-prime products accords with the Court of Appeals' instruction in *Dillinger* to use actual costs when calculating constructed value. *See Dillinger*, 981 F.3d at 1321–24. Here, NEXTEEL's books and records allocate the costs of prime and non-prime products based on the cost of production for each. Final Decision Memo. at 45. Commerce explains that NEXTEEL's non-prime WLP was downgraded at the end of the production process and never certified as WLP for oil and gas pipe. *Id.* at 46. Commerce continues, explaining that because the non-prime WLP does not meet the same certifications as prime WLP, it cannot be used in the same applications as prime WLP and the market value of the non-prime products is significantly impaired such that it "may not be sufficient to recover production costs."[13] *Id.* at 46–47. However, the legislative history to section 1677b(f) demonstrates Congress' clear intent that costs used to construct the subject merchandise's value "accurately reflect the resources actually used in the production of the merchandise in question," not costs based on a product's market value. *See Dillinger*, 981 F.3d at 1322 (quoting *S. REP. NO. 103–412* at 75 (1994)); *see also id.* at 1321 n.1. Commerce's methodology uses the likely market value of the non-prime product rather than the actual cost of production reported by NEXTEEL and its explanation is inadequate in light of the Court of Appeals' precedent. Therefore, the court remands for further explanation or reconsideration consistent with this opinion.

V. NEXTEEL's Suspension Loss Costs

NEXTEEL argues that Commerce's decision to reallocate costs related to the suspended production of certain non-subject production lines and one subject merchandise forming line, from cost of goods sold to general and administrative expenses, contravenes section

[13] Prime WLP is "used in pipeline transportation systems in the petroleum and natural gas industries as permitted by API 5L usage." Final Decision Memo. at 46–47. Customers do not use non-prime WLP in pipeline transportation systems because of the potential costs and liabilities associated with pipe failure and instead use it for structural purposes such as piling. *Id.* at 47.

1677b(f)(1)(A). NEXTEEL's Br. at 45–46. Defendant argues that the reallocation is reasonable because although NEXTEEL's accounting records are kept in accordance with Korean International Financial Reporting Standards ("K-IFRS"), the records do not reasonably reflect the cost of production and Commerce's reallocation is consistent with its established practice. *See* Def. Br. at 36–37. Defendant also counters that NEXTEEL's argument is a disagreement with Commerce's evidentiary conclusion which is an insufficient basis for a legal challenge. *See id.* at 36. For the reasons that follow, Commerce's determination is remanded.

Commerce normally calculates costs based on the respondent's records if such records are kept in accordance with GAAP and reasonably reflective of the cost of production. *See* 19 U.S.C. § 1677b(f)(1)(A). As discussed, *Dillinger* requires that constructed value reasonably reflect a respondent's actual costs, whether or not the respondent's books and records reasonably reflect such costs. 981 F.3d at 1321–23. However, even if a respondent's normal books and records are GAAP-compliant, Commerce may deviate from the costs reflected in a respondent's books and records if it determines that such costs do not "reasonably reflect the costs associated with the production and sales of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). When confronted with the shutdown of a production line, Commerce's practice is to include routine shutdown expenses in reported costs, "associat[ing] them to products produced on [the] line," and include losses related to extended shutdowns in the general expenses of the company because "products are not produced on those production lines to recover the costs associated with them." Final Decision Memo. at 48–49.

Here, NEXTEEL reported losses associated with suspended production lines related to subject and non-subject merchandise. *Id.* at 48; *see also* NEXTEEL's Br. at 45–46. NEXTEEL allocated losses related to suspended production to the cost of goods sold ("COGS") in its books and records, consistent with K-IFRS. *See* Final Decision Memo. at 49. However, Commerce reclassified those losses "as [general and administrative] expenses and deducted them from the COGS denominator in the general and administrative and financial expense ratios." *Id.* at 48. Commerce reasons that because NEXTEEL "suspended the production lines for an extended period of time" it considers "the associated costs to be related to the general operations of the company as a whole, and not specific to products associated with that production line." *Id.* at 49. Commerce believes that its reclassification and adjustment results in a reasonable reflection of the cost of production. *Id.* at 48–49.

It is unclear from Commerce's explanation whether NEXTEEL suspended production on the lines in question for a portion of the period of review or the entirety of the period of review. If NEXTEEL suspended production for only a portion of the period of review, then merchandise may have been produced on those lines during the period of review, allowing Commerce to associate the suspended production losses with the revenue generated from that merchandise. *Contra Husteel Co., Ltd. v. United States*, 520 F. Supp. 3d 1296, 1307–1308, 1307 n.5 (Ct. Int'l Trade 2021) ("*Husteel II*") (Commerce determined that "'[n]o revenue from any products normally produced on [the suspended] lines was generated for the period'" (quoting Final Results of Redetermination Pursuant to Ct. Remand in Consol. Court No. 19–00112 at 30, Jan. 8, 2021, ECF No. 84)). Furthermore, Commerce's analysis does not address the extent to which losses associated with the suspension of non-subject merchandise production lines relate to the general and administrative expenses incurred in the production of subject merchandise, such that NEXTEEL's K-IFRS compliant books and records do not reasonably reflect costs. On remand, Commerce should clarify whether any merchandise was produced on the suspended production lines at issue during the period of review and explain why NEXTEEL's books and records do not reasonably reflect costs.

VI. SeAH's Freight Revenue

SeAH alleges that Commerce impermissibly capped SeAH's freight revenue in its calculation of SeAH's constructed export price and only included the separately invoiced freight in the constructed export price "to the extent that doing so increased the dumping margin." SeAH's Br. at 35. SeAH further argues that Commerce's methodology is contrary to the statute because section 1677a(c) only allows Commerce to deduct freight expense if it is included in the starting price. *Id.* at 34. Defendant and Defendant-Intervenors argue that Commerce capped SeAH's freight revenue consistent with the statute, case law, and Commerce's practice. Def. Br. at 37–39; Maverick's and IPSCO's Br. at 16–20. For the following reasons, Commerce's determination is sustained.

To determine "whether subject merchandise is being, or is likely to be, sold at less than fair value" Commerce makes a "fair comparison . . . between the export price or the constructed export price and normal value" of the subject merchandise. 19 U.S.C. § 1677b(a). Commerce arrives at the export price or constructed export price, as appropriate, by making certain adjustments to the starting price of the subject merchandise enumerated in 19 U.S.C. § 1677a(c)–(d). 19

U.S.C. § 1677a(c)–(d); 19 C.F.R. § 351.402(a). Pursuant to section 1677a, Commerce increases the price used for constructed export price by:

> (A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and
>
> (C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy, and

Commerce decreases the price by

> (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and
>
> (B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

Commerce further provides in its regulations

> Use of price net of price adjustments. In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). The Secretary will not accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of the Secretary, its entitlement to such an adjustment.[14]

[14] "'Price adjustment' means a change in the price charged for subject merchandise or the foreign like product . . . reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38).

19 C.F.R. § 351.402.

Recently, in *NEXTEEL I* the Court of Appeals affirmed as reasonable Commerce's use of a freight cap on nearly identical facts. 28 F.4th at 1239–40. The Court explained that it gave deference to Commerce's methodology for its treatment of freight. *Id.* Although SeAH's correctly asserts that the statute only allows a freight deduction for "the amount, if any, included in such price," 19 U.S.C. § 1677a(c)(2)(A); SeAH's Br. at 34, it is reasonably discernable that Commerce's adjustment for freight expense, net of freight revenue subject to the freight expense cap, is the means by which Commerce determines the extent to which freight is "included in such price." *See* Final Decision Memo. at 51–52. The Court of Appeals has found Commerce's methodology reasonable and that determination controls this case. *NEXTEEL I* 28 F.4th at 1239–40.

VII. Denial of SeAH's Constructed Export Price Offset

SeAH argues that unrebutted record evidence indicates that SeAH's constructed U.S. sales were less advanced than its home-market sales, with SeAH performing "additional activities . . . at a much greater intensity to unaffiliated customers in Korea;" therefore, Commerce's refusal to include a constructed export price offset when calculating the normal value of SeAH's subject merchandise is unsupported by substantial evidence. SeAH's Br. at 29–33. Defendant argues that Commerce reasonably determined that no constructed export price offset was warranted because SeAH's selling functions in the U.S. and home markets were at the same or similar level of trade and supported its determination with substantial evidence. Def. Br. at 41–44. For the following reasons Commerce's determination is remanded.

Commerce compares the export price or constructed export price to "the price the subject merchandise is first sold for consumption in the home market," and "to the extent practicable, at the same level of trade." 19 U.S.C. § 1677b(a)(1)(A)–(B). Where the home market sales and the U.S. sales are not at the same level of trade, Commerce adjusts the home market sale to bring the sale to the same level of trade "if the difference in level of trade—(i) involves the performance of different selling activities; and (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined." *Id.* § 1677b(a)(7)(A). Commerce grants a CEP offset if the normal value is at a level of trade constituting "a more

advanced stage of distribution than the level of trade of the constructed export price" and data on the record does not provide an appropriate basis to determine the adjustment under 19 U.S.C. § 1677b(a)(7)(A). *Id*. § 1677b(a)(7)(B); 19 C.F.R. § 351.412(f)(1). The amount of the offset is equal to "the amount of indirect selling expenses included in normal value, up to the amount of indirect selling expenses[15] deducted in determining constructed export price." 19 C.F.R. § 351.412(f)(2); 19 U.S.C. § 1677b(a)(7)(B).

Commerce must support its determinations with substantial evidence. "Substantial evidence is more than a mere scintilla." *Consol. Edison Co.*, 305 U.S. at 229. The evidence must be sufficient such that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See id.*; *Universal Camera*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight").

Commerce determines the level of trade for SeAH's home and U.S. market sales by identifying the chain of distribution, "including selling functions and class of customer . . . and the level of selling expenses for each type of sale." Prelim. Decision Memo. at 17. Commerce classifies SeAH's selling functions into five categories: (1) provision of sales support; (2) provision of training services; (3) provision of technical support; (4) provision of logistical services; and (5) performance of sales-related administrative activities. Prelim. Decision Memo. at 18. Commerce compares the selling functions for each channel of distribution of SeAH's home market sales to determine if multiple levels of trade exist in the home market. *Id.* Commerce compares the selling functions for each channel of distribution of SeAH's U.S. sales to determine if multiple levels of trade exist in the U.S. market. *Id.* Finally, Commerce compares the level of trade in SeAH's home market to the level of trade in the U.S. market to determine whether a CEP offset is appropriate. *Id.*

The court cannot discern how Commerce arrived at its determination that SeAH's home and U.S. markets were at the same level of trade in light of record evidence showing that SeAH performed the same selling activities at different levels of intensity in each market. Commerce asked SeAH to identify both the selling functions SeAH performed in its home and U.S. markets and the level of intensity with which SeAH performed them. Request for Information [ADD] Admin. Review for SeAH Steel Corporation at A-15, PD 21 bar code

[15] "'[I]ndirect selling expenses means selling expenses, other than direct selling expenses or assumed selling expenses . . . that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales." 19 C.F.R. § 351.412(f)(2).

38313088–1 (Apr. 1, 2019) ("Request for Information") ("Report level of intensity information using a scale of zero to ten"). SeAH reported making sales in its home market through two channels of distribution, performing the same selling functions for all its home market customers. Prelim. Decision Memo. at 17–18. In the U.S. market, SeAH reported making sales through four channels of distribution and performed the same selling functions for all its U.S. market customers. *Id.* at 18. SeAH reported that it performed several selling functions at a "high level of activity" in its home market and a "low level of activity" in the U.S. market.[16] SeAH's Resp. to [Request for Information] at App. A-5-A, CD 7 bar code 3836300–04 (Apr. 29, 2019) ("SeAH's Sales Activities"). Commerce does not address this difference when comparing the two markets, rather, Commerce summarily concludes that the evidence SeAH provided in support of a CEP offset "does not demonstrate that there were significant differences in the selling functions performed for its home market and U.S. sales." Final Decision Memo. 58; *see also* Prelim. Decision Memo. at 19.

On remand, if Commerce continues to determine that a CEP offset is not warranted, it should explain how it compared SeAH's home and U.S. sales and arrived at its conclusion that the markets were at the same level of trade. Specifically, Commerce should address the differences in the level of intensity of SeAH's selling functions in its home and U.S. markets and explain why those differences combined with the additional selling functions SeAH performed in its home market are not significant enough to conclude that the sales in each market are at different levels of trade. Commerce should also explain how the facts of this case differ such that a CEP offset is not warranted in this case but was warranted in *Large Diameter Welded Pipe from the Republic of Korea* 83 Fed. Reg. 43,651 (Dep't Commerce Aug. 27, 2018) (prelim. deter. of sales at less than fair value and postponement of final deter.) ("*LDWP from Korea*") and explain the impact that selling function categories have on Commerce's level of trade determination. *See* Final Decision Memo. at 58–59, 59 n.318 (explaining that a CEP offset determination "is a fact-intensive and case-specific inquiry" and comparing the selling function categories used in *LDWP from Korea* to the selling function categories used in this determination).

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[16] SeAH largely performed the same selling functions in both of its markets however, SeAH performed the provision of cash discounts, distributor/dealer training, warehouse operations, provision of post-sale warehousing, and technical assistance in its home market only. *See* Prelim. Decision Memo. at 18 (listing the selling functions SeAH performed in each market). Commerce acknowledges that SeAH performed additional selling functions in its home market but explains that it does not believe that these additional activities were significant enough to constitute a different level of trade. Final Decision Memo. at 58.

VIII. Commerce's Separate Rate Calculation

Commerce's determination in the *Final Results* to apply the weighted-average dumping margins calculated for NEXTEEL and SeAH to the separate rate respondents is not supported by substantial evidence. The separate rate is "the weighted average of the estimated weighed average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(a). Thus, because the separate rate is based on the rate calculated for NEXTEEL and SeAH, and the court has found that those rates are not supported by substantial evidence, Commerce's separate rate calculation is also not supported by substantial evidence and is remanded for reconsideration consistent with this opinion.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination to cap SeAH's freight revenue. Commerce's PMS determination and adjustment methodology, application of a PMS adjustment to SeAH's home market sales for the purpose of the sales-below-cost test, denial of a constructed export price offset for SeAH, reallocation of NEXTEEL's suspended loss and non-prime product costs, and separate rate calculation are remanded. In accordance with the foregoing, it is

ORDERED that Commerce's Final Results are remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the Joint Appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

Dated: April 19, 2022
New York, New York

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

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