U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SYNTHETIC ICE PANELS FROM SWEDEN

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of synthetic ice panels from Sweden.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of synthetic ice panels under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 14, 2023.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of synthetic ice panels. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N278463, dated August 26, 2016, CBP classified synthetic ice panels in heading 3918, HTSUS, specifically in subheading 3918.90.1000, HTSUSA ("Annotated"), which provides for "Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ... Of other plastics: Floor coverings ..." CBP has reviewed NY N278463 and has determined the ruling letter to be in error. It is now CBP's position that synthetic ice panels are properly classified in heading 9506, HTSUS, specifically in subheading 9506.99.2580, HTSUSA, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports ... Other: Other: Ice-hockey ... articles and equipment, except balls and skates, and parts and accessories thereof ... Other, including parts and accessories."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N278463 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H313937, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H313937

January 19, 2023
OT:RR:CTF:CPMMA H313937 MAB
CATEGORY: Classification
TARRIFF NO.: 9506.99.2580

Ms. Hilary Doran
Royal Customs Brokers DBA Speed Global Services
2299 Kenmore Avenue
Buffalo, NY 14207

RE: Revocation of NY N278463; Classification of synthetic ice panels from Sweden

Dear Ms. Doran:

This letter is in reference to New York Ruling Letter ("NY") N278463, dated August 26, 2016, in which U.S. Customs and Border Protection ("CBP") classified synthetic ice panels in subheading 3918.90.1000, HTSUSA ("Annotated"), which provides for "[f]loor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles ... Of other plastics: Floor coverings ..." After reviewing this ruling in its entirety, CBP believes that it was issued in error. For the reasons set forth below, CBP hereby revokes NY N278463.

Pursuant to Section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on October 12, 2022, in Volume 56, Number 40, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

In NY N278463, CBP described the synthetic ice panels as follows:

> The merchandise at issue, identified as Scan-Ice® synthetic ice panels, consists of interlocking tiles manufactured from high density polyethylene (HDPE) plastic. The Scan-Ice® panels are designed to be mounted together to form an artificial ice skating surface, and can be used in any climate. The HDPE panels have been specially formulated to mimic the friction coefficient and glide properties of actual ice skating rinks. Per the information provided, the Scan-Ice® tiles measure 2.5' x 1.25,' and have a thickness of 5 mm. The tiles can be placed on any firm surface (indoor or outdoor) and interlocked to form a seamless uniform skating surface

In a letter dated September 11, 2020, counsel for Pace Enterprises, LLC, dba Skate Anytime ("Pace"), the entity to which NY N278463 was originally issued, submitted a request for reconsideration of NY N278463 concerning the proper classification of the synthetic ice panels, on behalf of Pace. As part of its reconsideration request, counsel for Pace argued that NY N278463 failed to consider the instant product's design and use as sports equipment to practice skills in the sport of ice hockey, thereby submitting evidence that the product is designed, marketed, and used as an ice hockey training aid.

ISSUE:

Whether the subject synthetic ice panels are classified in heading 9506, HTSUS, as articles and equipment for other sports, or in heading 3926, HTSUS, as floor coverings of plastics in the form of tiles.

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes..." If goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The following provisions of the HTSUS are under consideration:

3918	Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter:
3918.90	Of other plastics:
3918.90.1000	Floor coverings ...
9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Other:
9506.99	Other:
9506.99.25	Ice-hockey and field-hockey articles and equipment, except balls and skates, and parts and accessories thereof ...
9506.99.2580	Other, including parts and accessories ...

* * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is CBP's practice to consult, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 95.06 provides, in pertinent part, as follows:

(A) Articles and equipment for general physical exercise, gymnastics or athletics, e.g.:

Trapeze bars and rings; horizontal and parallel bars; balance beams, vaulting horses; pommel horses; spring boards; climbing ropes and ladders; wall bars; Indian clubs; dumb bells and bar bells; medicine balls; jump balls with one or more handles designed for physical exercises; rowing, cycling and other exercising apparatus; chest expanders; hand grips; starting blocks; hurdles; jumping stands and standards; vaulting poles; landing pit pads; javelins, discuses, throwing hammers and putting shots; punch balls (speed bags) and punch bags (punching bags); boxing or wrestling rings; assault course climbing walls; skipping ropes designed for sports activities and fitness classes.

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately, of heading 95.03), e.g.:

(1) Snow-skis and other snow-ski equipment, (e.g., ski-fastenings (ski-bindings), ski brakes, ski poles).

(2) Water-skis, surf-boards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

(3) Golf clubs and other golf equipment, such as golf balls, golf tees.

(4) Articles and equipment for table-tennis (ping-pong), such as tables (with or without legs), bats (paddles), balls and nets.

(5) Tennis, badminton or similar rackets (e.g., squash rackets), whether or not strung.

(6) Balls, other than golf balls and table-tennis balls, such as tennis balls, footballs, rugby balls and similar balls (including bladders and covers for such balls); water polo, basketball and similar valve type balls; cricket balls.

(7) Ice skates and roller skates, including skating boots with skates attached.

(8) Sticks and bats for hockey, cricket, lacrosse, etc.; chistera (jai alai scoops); pucks for ice hockey; curling stones.

(9) Nets for various games (tennis, badminton, volleyball, football, basketball, etc.).

(10) Fencing equipment: fencing foils, sabres and rapiers and their parts (e.g., blades, guards, hilts and buttons or stops), etc.

(11) Archery equipment, such as bows, arrows and targets.

(12) Equipment of a kind used in children's playgrounds (e.g., swings, slides, see-saws and giant strides).

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards, ice hockey pants with built-in guards and pads.

(14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; skate boards; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice.

As a preliminary matter, note 2(y) to chapter 39 states: "This chapter does not cover...Articles of chapter 95 (for example, toys, games, sports equipment) . . ." As such, the subject merchandise cannot be classified in heading 3918, HTSUS, if it is *prima facie* classifiable in heading 9506, HTSUS. Accordingly, we first consider classification in heading 9506, HTSUS, which provides, *inter alia*, for "articles and equipment for...other sports."

The term “sports equipment” is not defined in the HTSUS. Undefined tariff terms are construed in accordance with their common meanings, which may be ascertained by reference to “standard lexicographic and scientific authorities,” as well as the pertinent ENs. *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1357 (Fed. Cir. 2014). Relying on dictionary definitions of “sports equipment,” the Court of Appeals for the Federal Circuit (CAFC) has held that the term denotes items that are “necessary, useful, or appropriate” for a sport. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1318 (Fed. Cir. 2011) (citing *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250–51 (Fed. Cir. 2004)) (hereinafter “*LeMans*”). However, the term does not apply broadly to any article used in conjunction with a sport or physical activity and, as the court explained in *LeMans*, use of the exemplars listed in EN 95.06 to clarify the scope of the term is “entirely proper.” *See id.* at 1320. As the court found in *LeMans*, the exemplars of EN 95.06 include articles that are entirely separate from the user, held by the user in his or her hand, fastened to a user, or worn by a user for protection. *Id.* at 1322.

Of those articles that are “separate from a user,” all play integral roles in the particular sports or activities with which they are used, insofar as they enable the implementation of playing rules and/or the accrual of points in competitive matches or enable the sport or physical activity itself through direct interaction. For example, nets, enumerated in exemplar (7) of EN 95.06, are used to establish the required trajectory of the ball in games like tennis, badminton, and volleyball, and serve as the receptacle for the ball and scoring marker in soccer, basketball, and other contact sports. Likewise, the projectile shooting of archery targets and clay pigeons is the objective of, and scoring mechanism for, archery and clay target shooting, while swings, slides, see saws are directly swung, ridden, and tipped by their users.

The subject synthetic ice panels are also articles “separate from a user” and are designed to be mounted together to form an artificial ice skating surface of any size for use as a training aid in the sport of ice hockey. The product can be used either indoors or outdoors (e.g., basements, garages, driveways, decks, etc.) and plays an integral role in enabling users to practice specific ice hockey skills — including skating, shooting, passing, stickhandling, and goalie training — all while wearing ice hockey skates, similar to how an ice hockey player would on real ice. A review of Pace’s website and accompanying testimonials reveals that the product is marketed primarily to youth athletes and sold to purchasers and end-users associated with both professional and amateur ice hockey players, managers, trainers, and coaches. Other ice hockey training aids are also sold to enhance the use of the synthetic ice panels, including “puck stop curbing” that attach to the edges of the ice hockey skating surface and “goalie slide plates” to assist in goalie training.[1]

CBP has previously classified ice hockey training aids or equipment that are “separate from a user” in heading 9506, HTSUS. In NY 883968, dated April 13, 1993, Customs considered a “Sportslide” pro skating simulator, which is a device consisting of a plastic strip with two aluminum wedge end stops bolted to the plastic, and classified it in subheading 9506.99.2580, HTSUSA. As the Sportslide is designed for a user to slide in a lateral motion on the plastic surface, simulating the skating motion, Customs considered it to be training equipment for the sport of ice hockey. In NY N295624, dated April 19, 2018, CBP classified ice hockey training equipment aids consisting

[1] *See* https://www.skateanytime.com (last visited June 9, 2022).

of four separate products, in subheading 9506.99.2580, HTSUSA. One of the products included an item called the "My Puzzle Systems" ice hockey training aid, wherein the product is used while wearing athletic sneakers alone or with fabric "booties" covering them[2], to simulate the gliding motion of ice skating.[3] The ruling describes the item as follows:

> This item consists of interlocking floor tile pieces made of plastic. The tiles are designed to simulate the color and feel of playing hockey on the ice. This product can be used to create an ice hockey playing surface wherever desired. When used in conjunction with other hockey training products or equipment, the "My Puzzle Systems" ice hockey training aid is designed to provide a professional level "ice feeling" when training off ice. This item is packaged for retail sale and additional tiles may be purchased separately to increase the playing surface size.

As required by *LeMans*, the subject synthetic ice panels in NY N278463 create a playing surface that is "necessary, useful, or appropriate" for practicing the sport of ice hockey in that the product has been specially formulated to mimic the friction coefficient and glide properties of ice as found in ice hockey rinks. Like the ice hockey training aids in NY 883968 and NY N295624, the instant product is also designed for a user to slide in a lateral motion and practice ice hockey skills. Furthermore, since the instant product is engineered and designed for practicing the sport of ice hockey while wearing ice hockey skates, it is arguably an even more useful or appropriate training aid than the merchandise in NY 883968 and NY N295624. In sum, the subject synthetic ice panels are classified in subheading 9506.99.2580, HTSUSA, which provides for "[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports ... Other: Other: Ice-hockey ... articles and equipment, except balls and skates, and parts and accessories thereof ... Other, including parts and accessories."

Since the synthetic ice panels are *prima facie* classifiable in heading 9506, HTSUS, pursuant to Note 2(y) to Chapter 39, they cannot be classified in heading 3918, HTSUS.

HOLDING:

By operation of GRI 1, the subject synthetic ice panels are classified in heading 9506, HTSUS. They are specifically classified in subheading 9506.99.2580, HTSUSA, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports ... Other: Other: Ice-hockey ... articles and equipment, except balls and skates, and parts and accessories thereof ... Other, including parts and accessories." The 2023 column one rate of duty is *free*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at https://hts.usitc.gov/current.

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[2] *See* https://www.hockeyrevolution.us.com (last visited June 9, 2022).

[3] *Id.* The product is described as "interlocking flooring surface tiles," "training flooring tiles," or "dryland flooring tiles." They are sold either as a "Build Your Own Platform" or as part of a variety of sets, which may include items described as "passers," "symbols," "colors," and a "free training mobile app."

EFFECT ON OTHER RULINGS:

NY N278463, dated August 26, 2016, is hereby REVOKED as set forth above.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FINISHED WOOD SLATS AND WOOD BOTTOM RAILS WITH UV COATINGS USED FOR WINDOW BLINDS

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of finished wood slats and wood bottom rails with UV coatings used for window blinds.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of finished wood slats and wood bottom rails with UV coatings used for window blinds under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 14,2023.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022, proposing to modify one ruling letter pertaining to the tariff classification of finished wood slats and wood bottom rails with UV coatings used for window blinds. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N041645, dated October 30, 2008, CBP classified various wood components used for the manufacture of window blinds, including two styles of finished wood valances and wood slats that were primed and painted and three styles of finished wood slats and wood bottom rails that were either stained or painted and coated with UV coatings in heading 4409, HTSUS, specifically in subheading 4409.29.9000, HTSUSA ("Annotated")[1] , HTSUS, which provides for ""[w]ood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed: Nonconiferous: Other: Other: Other." CBP has reviewed NY N041645 and has determined the ruling letter to be in error. It is now CBP's position that finished wood slats and wood bottom rails with UV coatings used for window blinds are properly classified, in heading 4421, HTSUSA, specifically in subheading 4421.99.9880, HTSUSA, which provides for ""[o]ther articles of wood: Other: Other: Other: Other...Other."

[1] Please note that subheading 4409.29.9000, HTSUSA (2008), has been replaced by subheading 4409.29.9100, HTSUSA (2023).

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N041645 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H310648, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H310648
January 19, 2023
OT:RR:CTF:CPMMA H310648 MAB
CATEGORY: Classification
TARIFF NO.: 4421.99.9880

Mr. Lars-Erik A. Hjelm, Esq.
Akin, Gump, Strauss, Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036–1564

Re: Modification of NY N041645; Classification of wood slats, wood valances, and wood bottom rails for wood blinds imported from China, Vietnam, and Mexico

Dear Mr. Hjelm:

This letter is in reference to your New York Ruling Letter ("NY") N041645, dated October 30, 2008, involving the classification of wood components including slats, valances, and bottom rails, used in the construction of window blinds, including three styles with a UV coating, under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N041645, all of the aforementioned wood components were classified in subheading 4409.29.9000, HTSUSA ("Annotated")[1], as "[w]ood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed: Nonconiferous: Other: Other: Other."[2] After reviewing this ruling, CBP finds it to be partially in error. For the reasons set forth below, CBP is modifying NY N041645 with respect to the wood components with UV coatings only. The remaining analysis of NY N041645 remains unchanged.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on October 12, 2022, in Volume 56, Number 40, of the *Customs Bulletin*. One comment was received in response to this notice, which is addressed below.

FACTS:

In NY N041645, we described the merchandise as follows:

> The subject wood products are made of solid basswood (Tilia Americana), a Nonconiferous wood species. You state that in their imported condition, the wood products in question are not finished window blinds. After importation into the United States, [the importer] will cut the wood products to custom lengths, punch channel holes, and assemble them with cords and hardware.

[1] Please note that subheading 4409.29.9000, HTSUSA (2008), has been replaced by 4409.29.9100, HTSUSA (2022).

[2] Please note that NY N041645 inadvertently omits the last "Other" in subheading 4409.29.9000, HTSUSA (2008) and reads as follows: "[w]ood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed: Nonconiferous: Other: Other."

Five representative samples of the wood products in question were submitted. They are described as follows:

1. Wood valance – primed and painted white. The valences measure between 3/8 to 3/4 inch in thickness, 3 to 5 inches in width, and 3 to 10 feet in length. The face and the edges are continuously shaped to a pattern along the length. The valances will be imported either stained or painted.
2. Wood slat – with stain base and "stain coating" ("2 PASS SLAT TOPCOAT"), which is stated to be a slightly tinted paint. The wood slats measure 1/8 to 3/16 of an inch in thickness, range from 1 inch to 2–5/8 inches in width, and will be imported in lengths of 3 to 10 feet. The slats have rounded edges along the length. The slats will be imported either stained or painted.
3. Wood bottom rail – primed, painted white, and with a UV protective coat. The bottom rails measure 5/8 inch in thickness, 1 to 2.5 inches in width, and 3 to 10 feet in length. The rails are continuously shaped to a pattern along the length. The rails will be imported either stained or painted.
4. Wood slat - with stain base, stain coating, and with a UV protective coat. (See sample #2 for sizes and finishing options.) The slats have rounded edges along the length.
5. Wood bottom rail - with primer and white paint. (See sample #3 for sizes and finishing options.) The edges are continuously shaped to a pattern along the length.

We further note that your ruling request, dated September 16, 2008, leading to the issuance NY N041645, described sample #2 to include a clear UV coat.

ISSUE:

Whether the finished wood slats and wood bottom rails with UV coatings used in the manufacture of window blinds are classified in heading 4409, HTSUS, as "[w]ood ... continuously shaped ... [n]onconiferous ..." or in heading 4421, HTSUS, as "[o]ther articles of wood."

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States ("HTSUS") is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. If the goods cannot be classified solely based on GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2023 HTSUS provisions under consideration are as follows:

4409	Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed:
	Nonconiferous:

4409.29			Other:		
				Other:	
4909.29.9100				Other ...	
4421	Other articles of wood:				
		Other:			
4421.99			Other:		
				Other:	
4421.99.98					Other
4421.99.9880					Other ...

* * *

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 44.09 states the following, in relevant part:

> The heading also excludes :
>
> ...
>
> (e) Wood which has been surface worked beyond planing or sanding, other than painting, staining or varnishing (e.g., veneered, polished, bronzed, or faced with metal leaf) (generally heading 44.21).

* * *

The classification of samples #1 and #5 in heading 4409, HTSUS, is not in dispute, as primer and paint are permitted coatings in accordance with the ENs to heading 44.09; thus, their classification in subheading 4409.29.9100, HTSUSA, as “[w]ood ... continuously shaped ... [n]onconiferous ...”, remains unchanged.[3] Unlike samples #1 and #5, however, the remaining samples—in addition to painting or staining—are also coated with a UV protective coat (samples #2, #3, and #4). Accordingly, we examine whether this additional UV protective coat is a permissible coating for merchandise classifiable in heading 4409, HTSUS, or whether samples #2, #3, and #4 are classified elsewhere.

We note that a UV coating applied to wood products is essentially a liquid plastic layer, such as acrylic or polyurethane, that is cured with ultraviolet light. Pursuant to EN 44.09, wood that has been “surface worked beyond planing or sanding, other than painting, staining, or varnishing” is excluded from classification in heading 4409, HTSUS. Thus, the question before us is whether the application of UV coatings constitutes a finishing process whereby the subject wood blind parts are “surface worked beyond planing or sanding.”

It is CBP’s established practice that continuously shaped wood coated with UV coatings, lacquer, polyurethane, aluminum oxide (in polyurethane), acrylic, and the like, is precluded from classification in heading 4409, HT-

[3] Please note that subheading 4409.29.9000, HTSUSA (2008), has been replaced by subheading 4409.29.9100, HTSUSA (2022).

SUS, as these coatings fall under the exclusion described in EN 44.09 as wood that has been "surface worked beyond planing or sanding, other than painting, staining, or varnishing..." *See, e.g.*, NY 892737, dated February 9, 1994 (lacquered picture frame moldings classified in heading 4421, HTSUS); NY I83439, dated July 25, 2002 (wood flooring coated with clear polyurethane and acrylic classified in heading 4418 and 4412, HTSUS); NY K82706, dated February 20, 2004 (wood flooring coated with polyurethane classified in heading 4418, HTSUS); NY K88580, dated September 13, 2004 (wood floors with UV-cured aluminum oxide or polyurethane coating classified in heading 4412 or 4418, HTSUS, respectively); NY L82292, dated February 25, 2005 (wood floors with UV coating classified in heading 4418, HTSUS); NY L86986, dated September 1, 2005 (wood floors with UV coating classified in heading 4418, HTSUS); NY L88584, dated November 25, 2005 (wood floors with UV coating classified in heading 4418, HTSUS); NY M83957, dated June 16, 2006 (wood flooring coated with polyurethane classified in heading 4418, HTSUS); NY N006429, dated March 6, 2007 (wood flooring with nine coats of acrylic urethane featuring a sealer and a topcoat containing aluminum oxide classified in heading 4418, HTSUS); NY N007234, dated March 22, 2007 (wood flooring with five coats of UV-cured urethane classified in heading 4418, HTSUS); NY N027021, dated May 20, 2008 (wood flooring with UV coating classified in heading 4418, HTSUS), NY N067513, dated July 30, 2009 (wood floors sealed with polyurethane classified in heading 4418, HTSUS); NY N069658, dated August 20, 2009 (wood floors with UV coating and aluminum oxide classified in heading 4418, HTSUS); NY N199498, dated January 24, 2012 (wood floors with a 9-coat UV-cured prefinish with aluminum oxide classified in heading 4418, HTSUS); NY N270952, dated December 22, 2015 (wood floors with polyurethane, acrylic or UV coating classified in heading 4418, HTSUS), and NY N273588, dated March 25, 2016 (wood floors with UV-cured urethane finish classified in heading 4418, HTSUS).

Your client submitted a comment in response to the notice of proposed revocation of NY N041645. The comment states:

> The paint manufacturer's material safety data sheets indicate that all of the coatings that are applied to samples #2, #3, and #4 are "paint products" [citation omitted]. Application of these coatings does not affect the basic character of the products such that tariff classification under heading 4409 no longer applies.

Thus, your client argues that the subject UV coatings are "paint products" because the Material Safety Data Sheets ("MSDS") labels them as such, and therefore, should be classified in heading 4409, HTSUS.[4] In finding that the samples containing UV coatings were not paint products in NY N041645, we noted the following:

> We have analyzed the manufacturer's chemical composition data sheets and carefully considered your arguments that these finishing coating substances should be treated as paints, and thus, the subject parts for window blinds treated with them should be classified under heading 4409, HTSUS. However, the manufacturer's chemical composition data sheets for the three substances do not present the general understood composition of paints [citation omitted].

[4] We note that this argument is repetitive of those submitted by your client in connection with NY N041645.

In this regard, the underlying facts and our conclusion in NY N041645 that samples #2, #3, and #4 are not paints, have not changed. Additionally, we draw attention to the fact that the tariff language does not always correspond to industry language such as those used in the MSDS.

Furthermore, as noted previously, "UV coating" is a plastic-type coating that is cured to hardness with UV light. Paint, on the other hand, cures by evaporation of solvents. Even if a product were to be a mix of UV coating and paint designed for a single application, it would still yield a product that must be cured with UV light. While such a combined product would accomplish the function of painting, it does more than mere paint and therefore, is not simply "paint" as permitted by EN 44.09, HTSUS.

In sum, like the merchandise in the aforementioned rulings—many of which also involved wood with a UV coating—we find that samples #2, #3, and #4 of the finished wood slats and wood bottom rails with UV coatings in NY N041645 are excluded from classification in heading 4409, HTSUS, pursuant to EN 44.09, as the application of a UV coating to a wood slat or bottom rail constitutes wood that is surface worked beyond planing or sanding, other than painting, staining, or varnishing. Our conclusion is consistent with established CBP practice that classifies such merchandise outside of heading 4409, HTSUS. Under GRIs 1 and 6, samples #2, #3, and #4 are instead classified in heading 4421, HTSUS, and specifically in subheading 4421.99.9880, HTSUSA, which provides for "[o]ther articles of wood: Other: Other: Other: Other...Other."

HOLDING:

By application of GRIs 1 and 6, the subject finished wood slats and wood bottom rails with UV coatings used in the manufacture of window blinds (samples #2, #3, and #4) are classified in heading 4421, HTSUS, and specifically in subheading 4421.99.9880, HTSUSA, which provides for "[o]ther articles of wood: Other: Other: Other: Other...Other." The column one, general rate of duty is 3.3% *ad valorem*.

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 at https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY N041645, dated October 30, 2008, is hereby MODIFIED only with respect to the tariff classification of the finished wood slats and wood bottom rails with UV coatings.

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

Sincerely,

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

cc: Center Director
Industrial & Manufacturing Materials
Center of Excellence & Expertise
U.S. Customs and Border Protection
726 Exchange Street, Suite 400
Buffalo, NY 14201

FREE TRADE AGREEMENTS

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

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

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

DATES: Comments are encouraged and must be submitted (no later than March 31, 2023) 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** (87 FR 77131) on December 16, 2022, 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: Free Trade Agreements.

OMB Number: 1651–0117.

Form Number: N/A.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Free Trade Agreements (FTAs) are established to reduce and eliminate trade barriers, strengthen, and develop economic relations, and to lay the foundation for further cooperation to expand and enhance benefits of the agreement. These agreements establish free trade by reduced-duty treatment on imported goods.

The U.S. has entered into FTAs with the following countries: Chile (Pub. L. 108–77); the Republic of Singapore (Pub. L. 108–78, 117 Stat. 948,19 U.S.C. 3805 note); Australia (Pub. L. 108–286); Morocco (Pub. L. 108–302); Jordan (Pub. L. 107–43); Bahrain (Pub. L. 109–169); Oman (Pub. L. 109–283); Peru (Pub. L. 110–138, 121 Stat. 1455); Korea (Pub. L. 112–41); Colombia (Pub. L. 112–42, 125 Stat. 462); Panama (Pub. L. 112–43); and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (Pub. L. 109–53, 119 Stat. 462); Japan (Presidential Proclamation 9974, (**Federal Register** Notice (84 FR 72187)); Mexico and Canada (USMCA) (Pub. L. 116–113 section 101–195) and Consolidated Appropriations Act of 2021 (Pub. L. No: 116–260) (December 27, 2020).

These FTAs involve collection of data elements such as information about the importer and exporter of the goods, a description of the goods, tariff classification number, and the preference criterion in the Rules of Origin.

Respondents can obtain information on how to make claims under these FTAs at *http://www.cbp.gov/trade/free-trade-agreements,* and use a standard fillable format for the FTA submission by going to *http://www.cbp.gov/document/guides/certification-origin-template*.

Type of Information Collection: Free Trade Agreements.

Estimated Number of Respondents: 4,699,460.

Estimated Number of Total Annual Responses: 4,701,060.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 9,402,120.

Dated: February 23, 2023.

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

[Published in the Federal Register, March 1, 2023 (88 FR 12969)]

NAFTA REGULATIONS AND CERTIFICATE OF ORIGIN

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

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

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

DATES: Comments are encouraged and must be submitted (no later than March 31, 2023) 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** (87 FR 77626) on December 19, 2022, 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: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651–0098.

Form Number: 434, 446, and 447.

Current Actions: This submission is being made to extend the expiration dates for CBP Forms 434, 446, and 447 with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, the North American Free Trade Agreement (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103–182, 107 Stat. 2057).

CBP Form 434, *North American Free Trade Agreement Certificate of Origin,* is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP Form 434 is provided for by 19 CFR 181.11, 181.22, and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 446, *NAFTA Verification of Origin Questionnaire,* is used by CBP personnel to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election,* is used to gather information required by 19 CFR 181 Appendix, Section 11(2) "Information Required When Producer Chooses to Average for Motor Vehicles". This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference. CBP Form 447 is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

This information is collected from members of the trade community who are familiar with the CBP regulations.

Type of Information Collection: NAFTA Certificate of Origin (Form 434).

Estimated Number of Respondents: 13,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 13,000.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 26,000.

Type of Information Collection: NAFTA Questionnaire (Form 446).

Estimated Number of Respondents: 400.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 400.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 800.

Type of Information Collection: NAFTA Motor Vehicle Averaging Election.

Estimated Number of Respondents: 11.

Estimated Number of Annual Responses per Respondent: 1.28.

Estimated Number of Total Annual Responses: 14.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

Dated: February 23, 2023.

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

[Published in the Federal Register, March 1, 2023 (88 FR 12970)]]

PETROLEUM REFINERIES IN FOREIGN TRADE SUB-ZONES

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

ACTION: 60-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 (CBP) 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 1, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0063 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Petroleum Refineries in Foreign Trade Sub-zones.

OMB Number: 1651–0063.

Form Number: N/A.

Current Actions: Extension with a decrease in burden but no change to the information collected or method of collection.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The Foreign Trade Zones Act, 19 U.S.C. 81c(d) contains specific provisions for petroleum refinery sub-zones. It permits refiners and U.S. Customs and Border Protection (CBP) to assess the relative value of such multiple products at the end of the manufacturing period during which these products were produced, when the actual quantities of these products resulting from the refining process can be measured with certainty.

19 CFR 146.4(d) provides that the operator of the refinery sub-zone is required to retain all records relating to the above-mentioned activities for five years after the merchandise is removed from the sub-zone. Further, the records shall be readily available for CBP review at the sub-zone.

Instructions on compliance with these record keeping provisions are available in the Foreign Trade Zone Manual which is accessible at: *http://www.cbp.gov/document/guides/foreign-trade-zones-manual.*

Type of Information Collection: Recordkeeping for Petroleum Refineries.

Estimated Number of Respondents: 47.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 47.

Estimated Time per Response: 1,000 hours.

Estimated Total Annual Burden Hours: 47,000.

Dated: February 23, 2023.

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

[Published in the Federal Register, March 1, 2023 (88 FR 12971)]

U.S. Court of Appeals for the Federal Circuit

CHINA CUSTOM MANUFACTURING INC., GREENTEC ENGINEERING LLC, Plaintiffs-Appellants v. UNITED STATES, ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendants-Appellees

Appeal No. 2022–1345

Appeal from the United States Court of International Trade in No. 1:20-cv-00121-SAV, Judge Stephen A. Vaden.

Decided: March 2, 2023

GEORGE REID TUTTLE, III, Law Offices of George R. Tuttle, A Professional Corporation, San Rafael, CA, argued for plaintiffs-appellants. Also represented by GEORGE R. TUTTLE.

JAMIE SHOOKMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee United States. Also represented by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON, PATRICIA M. MCCARTHY; SAVANNAH MAXWELL, Office of the Assistant Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

ROBERT E. DEFRANCESCO, III, Wiley Rein, LLP, Washington, DC, argued for defendant-appellee Aluminum Extrusions Fair Trade Committee. Also represented by DERICK HOLT, ELIZABETH S. LEE, ALAN H. PRICE, JOHN ALLEN RIGGINS, ENBAR TOLEDANO.

Before NEWMAN, CHEN, and CUNNINGHAM, *Circuit Judges*.

CHEN, *Circuit Judge*.

China Custom Manufacturing, Inc. and Greentec Engineering, LLC (collectively, CCM) appeal a decision by the United States Court of International Trade (trial court) sustaining a final scope ruling by the Department of Commerce (Commerce) that found CCM's solar panel mounts are subject to antidumping and countervailing duty orders covering aluminum extrusions from the People's Republic of China. Commerce and the trial court concluded that the solar panel mounts are not eligible for the orders' "finished merchandise" exclusion because the mounts are just one component of a downstream product—i.e., a solar panel mounting system. Because the trial court's decision is supported by substantial evidence and is in accordance with law, we affirm.

BACKGROUND

I

In 2011, Commerce issued antidumping and countervailing duty orders covering aluminum extrusions from the People's Republic of China (Orders). Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011); Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order, 76 Fed. Reg. 30,653 (May 26, 2011). The Orders define as subject merchandise "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from" specified aluminum alloys. Antidumping Duty Order, 76 Fed. Reg. at 30,650.[1] The Orders further provide:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods "kit" defined further below.

Id. at 30,650–51. The Orders contain several exclusions from their scope, and two are pertinent here. The "finished merchandise" exclusion states:

> The scope . . . excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

Id. at 30,651. The "finished goods kit" exclusion states:

> The scope . . . excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation,

[1] The Orders recite the same scope, and the language of the Orders is materially the same for present purposes. *See Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 918 F.3d 1355, 1358 (Fed. Cir. 2019); Whirlpool Corp. v. United States, 890 F.3d 1302, 1305 n.1 (Fed. Cir. 2018) (citations omitted). Thus, for ease of reference, we cite to only the Antidumping Duty Order.

> all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product.

Id.

II

We have interpreted the Orders' scope on multiple occasions, and two of our prior opinions are relevant here. In the first case, we considered the Orders' scope as to the finished merchandise exclusion. There, the plaintiffs argued that their curtain wall units qualified for the finished merchandise exclusion because each unit was fully and permanently assembled and completed upon entry into the United States. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1358 (Fed. Cir. 2015) (*Shenyang I*). Commerce disagreed, finding that the curtain wall units were not a "complete product upon entry" and instead were "designed to be attached to other units to eventually form a completed curtain wall." *Id.* The trial court sustained Commerce's determination, explaining that "[c]urtain wall units are [] undeniably components that are fastened together to form a completed curtain wall. Thus, they are 'parts for,' and 'subassemblies' for, completed curtain walls." *Id.* (alterations in original) (citation omitted). We affirmed, holding that "[a] part or subassembly, here a curtain wall unit, cannot be a finished product." *Id.*

In the second case, which again involved curtain wall units, we considered the Orders' scope as to the finished goods kit exclusion. There, the "only remaining issue" was "whether [the curtain wall units] are excluded when viewed (correctly) as subassemblies." *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 918 F.3d 1355, 1367 (Fed. Cir. 2019) (*Shenyang II*). We first agreed with Commerce that the Orders only exclude subassemblies when imported as part of a finished goods kit. *Id.* We then agreed with Commerce that the curtain wall units at issue were ineligible for the finished goods kit exclusion because they were not a "packaged combination" of all the pieces needed to assemble the curtain wall (i.e., the final finished good) at the time of importation and were not ready for installation "as is." *Id.*

Together, these cases explain that (1) parts or subassemblies are not finished products and thus cannot qualify for the finished merchandise exclusion, (2) subassemblies may be excluded from the Orders' scope only if they are imported as part of a finished goods kit, and (3) merchandise qualifies for the finished goods kit exclusion only if it contains a packaged combination of all of the required components at the time of importation and is ready for installation as is.

III

On October 4, 2019, CCM requested Commerce determine whether its "Rock-it Mount 3.0" solar panel mounts are excluded from the Orders' scope. J.A. 227; J.A. 495. CCM explained that its solar panel mounts are used with other parts and components in a downstream structure, the "EcoFasten 3.0 Rock-it System,"[2] to mount solar panels on a roof. J.A. 231–35; J.A. 495–97. CCM asserted that its mounts qualify for the finished merchandise exclusion because the mounts are "fully and permanently assembled and complete at the time of entry [and] ready for installation as EcoFasten Rock-It 3.0 solar panel mounting system, a downstream structure." J.A. 228–31.

IV

On May 14, 2020, Commerce issued a final scope ruling that found CCM's solar panel mounts are composed of aluminum extrusions subject to the Orders' scope and that the mounts are ineligible for the finished merchandise and finished goods kit exclusions. J.A. 36, 50, 54–55. According to Commerce, the solar panel mounts "would not constitute finished merchandise because, at the time of entry into the United States, the solar mounts do not constitute a fully and permanently assembled and completed solar panel mounting system." J.A. 52. Instead, the solar mounts "are subassemblies comparable to the merchandise at issue in [*Shenyang I*]" because the mounts "are designed to be part of a downstream final product, just as curtain wall units were designed to be part of the final product, a curtain wall." J.A. 53–54. Thus, Commerce found CCM's solar panel mounts ineligible for the finished merchandise exclusion because "the solar mounts are not themselves finished merchandise which perform a function independent of the complete solar panel mounting system." J.A. 54. Separately, Commerce also determined that the solar panel mounts "do not constitute finished goods kits because, upon entry into the United States, they do not include all parts necessary to fully assemble a finished solar panel mounting system." J.A. 52.

[2] CCM's request also refers to the solar panel mounting system as, for example, the "EcoFasten Rock-it 3.0 solar panel mounting system," J.A. 228; the "EcoFasten Rock-It System 3.0," J.A. 230; the "Eco Fasten Rock-it System 3.0," J.A. 495–96; and the "Rock-It System 3.0," J.A. 496. We understand these terms to be interchangeable references to the same solar panel mounting system.

V

CCM sought review by the trial court, arguing that its mounts qualify only for the finished merchandise exclusion and not the finished goods kit exclusion. *China Custom Mfg., Inc. v. United States*, No. 20-cv-00121, 2021 WL 5822715, at *6 (Ct. Int'l Trade Dec. 6, 2021). The trial court affirmed Commerce's final scope ruling, explaining that "Commerce correctly applied the litany of Federal Circuit precedents interpreting the Orders to the solar mounts presented to it for review." *Id.* at *10. Citing CCM's explanation that its solar panel mounts require other components to form the solar panel mounting system, the court concluded that the "solar mounts themselves are not finished merchandise but rather [are] a part or subassembly of the finished merchandise — the solar panel mounting system — and as such do not qualify as finished merchandise excluded from the scope of the Orders." *Id.* (citing *Shenyang I*, 776 F.3d at 1358–59).

CCM timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the trial court's decisions de novo and apply anew the same standard it used. *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1308 (Fed. Cir. 2020) (en banc) (citations omitted). Under that standard, we "must uphold Commerce's determinations unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* (internal quotation marks and citation omitted). Although our review repeats much of the trial court's work, we do not ignore the trial court's informed judgment. *Id.* (citation omitted). We also give substantial deference to Commerce's interpretation of its own duty orders "because the meaning and scope of those orders are issues particularly within the expertise and special competence of Commerce." *Id.* (cleaned up) (citations omitted). A decision is supported by substantial evidence if "a reasonable mind might accept it as adequate to support a conclusion." *Id.* (cleaned up) (citation omitted).

This appeal is governed squarely by our holding in *Shenyang I* that "[a] part or subassembly . . . cannot be a finished product." 776 F.3d at 1358. CCM conceded to the trial court that its solar panel mounts are parts or subassemblies of its solar panel mounting system. *See* J.A. 1064 ("[T]he Eco Fasten mounts are installed with . . . other identified components and solar panels to function as the downstream solar panel mounting system. . . . The mounts are clearly 'parts' of this solar panel system . . . ."); J.A. 1090 ("[W]hen we refer to the Rocket 3 Solar mounts, we were referring to it as a subassembly, that is, as a part of a greater whole in which it's used."). CCM also conceded that the mounts have no use outside of the specific solar panel mounting system—i.e., the EcoFasten 3.0 Rock-it System. *See* J.A. 1092 ("THE COURT: Does this mount – is it solely for use in the Rocket 3.0 kit? . . . [COUNSEL]: I don't have an answer to that. But I believe that it's useful [in] only the Rocket 3 kit . . . ."). Thus, like the curtain wall units in *Shenyang I*, CCM's solar panel mounts are "undeniably components that are fastened together to form a completed [solar panel mounting system]." 776 F.3d at 1358 (citation omitted). CCM's solar panel mounts are parts or subassemblies and thus cannot be a finished product and cannot qualify for the finished merchandise exclusion.

CCM argues that our holding in *Shenyang I* was limited to the curtain wall units at issue there and cannot be applied to the solar panel mounts at issue here. Appellant's Br. 28; Appellant's Reply Br. 12–13. We disagree. Our holding in *Shenyang I* was based on the language of the Orders. Indeed, the statement that CCM's argument relies on—that a "part or subassembly, here a curtain wall unit, cannot be a finished product"—is divided into the legal conclusion ("a part or subassembly . . . cannot be a finished product") and the application of that legal conclusion to the facts ("here a curtain wall unit"). 776 F.3d at 1358.

CCM tries to reinforce its argument that *Shenyang I* is not precedential by pointing to a statement by the trial court in an unrelated proceeding that *Shenyang I* did not control the outcome in that specific proceeding. Appellant's Br. 26–28 (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 279 F. Supp. 3d 1209, 1212 n.3 (Ct. Int'l Trade 2017)). CCM misunderstands the trial court's statement. In that case, the plaintiffs argued that their curtain wall units qualified for the finished goods kit exclusion, and defendant-intervenors responded that *Shenyang I* controlled the outcome. *Shenyang*, 279 F. Supp. 3d at 1212 & n.3. The court disagreed with the defendant-intervenors because *Shenyang I* evaluated only the Orders' finished merchandise exclusion and did not address the finished goods kit exclusion. *Id.* at 1212 n.3. Thus, the trial court did not state that *Shenyang I* is not precedential. It stated that the holding of *Shenyang I*, which addressed only the finished merchandise exclusion, did not foreclose the finished goods kit exclusion arguments before it.

Unable to convince us that *Shenyang I* does not apply, CCM asks us to overturn its holding. CCM fails to convince us that we should. CCM initially contends that the holding of *Shenyang I* is "contrary to the plain language of the [finished merchandise] exclusion," which excludes from the Orders' scope "parts" that are "fully and permanently assembled and completed at the time of importation." Appellant's Br. 18–21, 29; Appellant's Reply Br. 5. Not only is this the same argument that the plaintiffs made and that we rejected in *Shenyang I*, 776 F.3d at 1358, it also misreads the exclusion, which states:

> The scope . . . excludes <u>finished merchandise containing</u> *aluminum extrusions as parts that are fully and permanently assembled* and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphases added). CCM focuses on the italicized portion and ignores the underlined portion. The Orders exclude finished merchandise *containing* aluminum extrusions as parts that are fully and permanently assembled, not the parts themselves.

CCM also asserts that Commerce rewrote the Orders' plain language when Commerce found that subassemblies cannot be excluded under the finished merchandise exclusion. Appellant's Br. 25; Appellant's Reply Br. 11. CCM again ignores our precedent and misreads the plain language. In *Shenyang I*, we held that subassemblies cannot qualify for the finished merchandise exclusion. 776 F.3d at 1358. We reiterated that holding in *Shenyang II*, where we agreed with "Commerce's straightforward reading" that subassemblies can be excluded only under the finished goods kit exclusion. 918 F.3d at 1367. Further, the Orders' plain language supports our prior decisions, as it states that "[t]he scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise *unless imported as part of the finish goods 'kit'* defined further below." Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphasis added). A straightforward reading of the plain language confirms, contrary to CCM's argument, that subassemblies are included in the Orders' scope and may be excluded only if imported as part of a finished goods kit.

CCM next avers that Commerce's final scope ruling merged the finished merchandise and finished goods kits exclusions by requiring all EcoFasten components to be fully and permanently assembled at the time of entry, thus requiring a complete "final finished product" for the finished merchandise exclusion rather than a "part." Appellant's Br. 23–24; Appellant's Reply Br. 5–9. First, we fail to see how Commerce merged the two exclusions. Commerce explained that CCM's solar panel mounts (1) were not eligible for the finished merchandise exclusion because the mounts do not constitute a fully and permanently assembled and completed solar panel mounting system, and (2) were not eligible for the finished goods kit exclusion because the mounts do not include, upon entry into the United States, all the parts necessary to fully assemble a finished solar panel mounting system. J.A. 52–53. Thus, Commerce kept the two exclusions separate. Second, Commerce did not err in using the phrase "final finished product" to describe finished merchandise. The Orders use that same phrase to explain that "parts for *final finished products*" are included in the Orders' scope, Antidumping Duty Order, 76 Fed. Reg. at 30,650–51 (emphasis added), and we used a similar term in *Shenyang I* when we explained that a "part or assembly . . . cannot be a *finished product*," 776 F.3d at 1358 (emphasis added). Thus, Commerce did not impermissibly change the word "part" to "final finished product" in the finished merchandise exclusion.

Finally, CCM notes that solar panels are explicitly excluded from the Orders' scope and asserts that Commerce, contrary to the facts of record, erred in finding that solar panels are added after the mounting system was assembled rather than added in an intermediate step in the assembly of the EcoFasten 3.0 Rock-it System. Appellant's Br. 21–23. First, solar panel mounts are undisputedly not solar panels, and thus whatever the Orders may say about solar panels is not material to whether solar panel mounts are excluded. Second, the sequence in which solar panels are added to the mounting system does not affect our analysis. The solar panel mounts at issue are parts or subassemblies for a downstream product—the EcoFasten solar panel mounting system—and thus are not a finished product that qualifies for the finished merchandise exclusion.

CONCLUSION

We have considered CCM's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm.[3]

AFFIRMED

[3] Defendant-Appellee Aluminum Extrusions Fair Trade Committee (AEFTC) moved to strike portions of CCM's corrected opening brief that AEFTC alleged were substantive corrections made without leave of the court. AEFTC's Br. 44–47. At oral argument, AEFTC's counsel stated that the court need not reach the motion to strike if it affirms on the merits. Oral Arg. 32:53–33:22. In light of our decision, AEFTC's motion to strike is denied as moot.

U.S. Court of International Trade

Slip Op. 23–17

OMAN FASTENERS, LLC, Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 22–00348

[Consolidating Plaintiff's motion for a preliminary injunction with trial on the merits, granting judgment on the agency record in favor of Plaintiff, remanding for further proceedings, and enjoining Defendant from requiring Plaintiff to post 154.33 percent cash deposits on subject merchandise pending further order of the court.]

Dated: February 15, 2023
Amended: February 22, 2023

Michael R. Huston, Perkins Coie LLP of Washington, DC, argued for Plaintiff. With him on the briefs were *Michael P. House* and *Andrew Caridas*. *John M. Devaney* examined Plaintiff's witness.

Kelly M. Geddes, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant and cross-examined Plaintiff's witness. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Ian A. McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Adam H. Gordon, The Bristol Law Group PLLC of Washington, DC, argued for Defendant-Intervenor and cross-examined Plaintiff's witness. With him on the brief were *Jennifer M. Smith* and *Lauren Fraid*.

OPINION

Baker, Judge:

"[T]he power to tax [is] the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (Marshall, C.J.). Wielding that power, the Commerce Department imposed a duty rate of 154.33 percent on Oman Fasteners, LLC (Oman), an importer of steel nails, solely for missing a filing deadline by 16 minutes. *See Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2020–2021*, 87 Fed. Reg. 78,639 (Dep't Commerce Dec. 22, 2022).[1] The rate previously applicable to such imports was 1.65 percent, see *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review;*

[1] For background on administrative reviews in antidumping proceedings and the role of mandatory respondents such as Oman, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334–35 (CIT 2020).

2019–2020, 86 Fed. Reg. 67,690, 67,691 (Dep't Commerce Nov. 29, 2021), meaning that Commerce raised Oman's duty rate by more than *ninety-three-fold*.

Oman brings this suit challenging Commerce's decision. In the ordinary course, Oman would move for judgment on the agency record and, if successful, the court would remand to the Department for a recalculation of the challenged antidumping duties. In the meantime, however, Oman would still be required to pay estimated cash deposits[2] set at 154.33 percent until the court entered a final judgment affirming a new rate recalculated by Commerce. The Department then would issue new cash deposit instructions and revoke the 154.33 percent rate. *See Guizhou Tyre Co. v. United States*, 557 F. Supp. 3d 1302, 1313–14 (CIT 2022) (discussing 19 U.S.C. § 1516a(c)(3) and holding that remand redeterminations do not become effective until sustained by a "final disposition of the court").

Claiming that it can't afford to pay such exorbitant cash deposits or (alternatively) shut down most of its business while this litigation and administrative proceedings play out, Oman moves for a preliminary injunction requiring the government to collect such deposits at the preexisting 1.65 percent rate set in the preceding administrative review. Exercising its discretion, the court consolidates Oman's motion with trial on the merits—in this context, a motion for judgment on the agency record.

Because Commerce's challenged actions here are the very definition of abuse of discretion, the court grants judgment on the agency record in favor of Oman and remands for further proceedings consistent with this opinion. And because the company has demonstrated the requirements for obtaining injunctive relief, including showing irreparable injury, the court enjoins the government to collect cash deposits at the previous rate of 1.65 percent pending further order of the court. *Cf. Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits.").

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[2] The Tariff Act of 1930 provides that when Commerce makes an affirmative determination that merchandise is being dumped, the Department "shall order the posting of a cash deposit, bond, or other security, as [Commerce] deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin"—here, 154.33 percent. 19 U.S.C.§ 1673d(c)(1)(B)(ii). This requirement is intended as security for the eventual payment of antidumping duties.

Later, U.S. Customs and Border Protection "liquidates" the entry to make a "final computation or ascertainment of duties owed." *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1347 (CIT 2021) (citing 19 C.F.R. § 159.1; 19 U.S.C. § 1500), *aff'd*, 47 F.4th 1370 (Fed. Cir. 2022). Following liquidation, if the importer's deposit was lower than the final duty assessed, Customs collects any additional amounts due, with interest; if the deposit exceeded the final assessment, Customs refunds the difference, with interest. *Id.* (citing 19 U.S.C. § 1505(b)).

I

A

The memorandum accompanying Commerce's decision explains that Oman had until 5:00 p.m. Eastern Time on February 14, 2022, to upload its supplemental section C questionnaire response to the Department's ACCESS electronic filing system, but Commerce received the response "between 4:41 p.m. ET and 5:16 p.m. ET." ECF 38–3, at 17.[3] The Department "received no notification from Oman . . . of filing difficulties or an additional request for extension of the deadline prior to 5:00 p.m." and cited a regulation providing that "[a]n electronically filed document must be received successfully *in its entirety* by . . . ACCESS, by 5 p.m. [ET] on the due date." *Id.* (emphasis and brackets in original) (quoting 19 C.F.R. § 351.303(b)(1)).

Oman explains[4] that ACCESS offers a "check file" feature that pre-screens a submission to ensure there are no technical issues that will cause it to be rejected. Counsel used that feature and it found no problems, so he began uploading material 50 minutes prior to the 5:00 p.m. deadline, which he believed—based on past experience—would be sufficient time. ECF 38–1, at 7–8. Unexpectedly, and notwithstanding the "check file" feature's approval of the submission, ACCESS rejected the first submission twice due to technical defects, and it took a total of 17 minutes for the system to issue the two error messages. *Id.* at 8. Counsel reformatted the problem materials and filed them at 4:41 p.m. and 4:46 p.m. He then began uploading additional files, "all but one of which were Excel-format copies of the PDF exhibits that counsel had already uploaded." *Id.* at 9. But the system ran slowly and did not accept the "U.S. sales SAS database" piece of the submission until 5:16 p.m. *Id.* at 9.

Counsel decided not to contact Commerce about the matter for two reasons. First, the Department had said there would be no further extensions. *Id.* at 9–10; *see also* ECF 38–3, at 63 (Commerce letter to counsel stating, in relevant part, "Commerce does not anticipate providing any additional extension for Oman Fasteners' response . . .

[3] ECF 38–3 contains exhibits to the public version of Oman's motion. ECF 36–3 contains sealed versions of the same material. In this opinion, citations to exhibits refer to the page numbers stated in the ECF header.

[4] Oman did not provide a declaration from counsel substantiating its account of the events surrounding its 16-minute delay in completing its filing. The record contains counsel's statements offered before Commerce that were not under oath but were subject to false statement liability under 18 U.S.C. § 1001. *See* 19 C.F.R. § 351.303(g). As the parties have not addressed whether representations encompassed by § 1001 suffice to support injunctive relief in lieu of sworn testimony, the court recounts counsel's explanation solely for purposes of providing context. No party disputes that Oman completed its filing 16 minutes late, so the court accepts that fact as true.

."). Second, the February 14 submissions were "bracketing not final" versions, and the next day counsel timely filed the final versions under Commerce's "one-day lag rule."[5] ECF 38–1, at 10.

Just over five weeks later, the Department rejected Oman's entire supplemental section C questionnaire response (including the portions submitted prior to 5:00) as untimely and struck it from the record. ECF 38–3, at 17. In response, Oman made several requests that Commerce reconsider and grant a retroactive extension of time, but the Department refused, finding that "Oman . . . failed to demonstrate that a qualifying extraordinary circumstance existed to warrant an untimely extension of the deadline." *Id.* (citing 19 C.F.R. § 351.302(c)(2)).[6] Commerce faulted counsel for not seeking an extension before the deadline and instead "wait[ing] until 38 days after the untimely submission of the [response] to bring any filing issues to Commerce's attention . . . ." *Id.* The Department said counsel did not allow enough time to file because, as is often said on Wall Street, past performance is no guarantee of future results: Oman's "assertion that certain prior filings took a particular amount of time is not relevant. Prior filing times do not guarantee a given submission will require a specific length of time to file, and simply because filing on ACCESS had taken less time in previous cases does not constitute an extraordinary circumstance." *Id.* at 225.

The Department cited its "broad discretion" in establishing and enforcing deadlines and said past cases "demonstrate that Commerce establishes deadlines and maintains those deadlines throughout the

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[5] The "one-day lag rule" allows a party to submit only a business proprietary version of a document by the deadline with a notice that "bracketing of business proprietary information is not final for one business day after date of filing." 19 C.F.R. § 351.303(d)(2)(v) (title case removed). The party then has one extra business day to double-check its designations of confidential information and then to file a final confidential submission together with a redacted public version. *Id.* § 351.303(c), (c)(2)(iii). The party may make no changes to the final submission other than adjusting bracketing and removing the notice about bracketing not being final. *Id.* § 351.303(c)(2)(ii).

[6] The regulation the Department cited provides as follows:

> (c) *Requests for extension of specific time limit.* Before the applicable time limit established under this part expires, a party may request an extension pursuant to paragraph (b) of this section. An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists. The request must be in writing, in a separate, stand-alone submission, filed consistent with § 351.303, and state the reasons for the request. An extension granted to a party must be approved in writing.
>
> (1) An extension request will be considered untimely if it is received after the applicable time limit expires or as otherwise specified by the Secretary.
>
> (2) An extraordinary circumstance is an unexpected event that:
>
> (i) Could not have been prevented if reasonable measures had been taken, and
>
> (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means.

19 C.F.R. § 351.302(c).

proceeding and *occasionally accepts late filings depending on the facts of the particular case before it*." *Id.* at 18 (emphasis added).

Commerce then found that "the record lacks necessary information because Oman Fasteners did not timely file its SCQR. Oman Fasteners failed to act to the best of its ability and provide requested information by the deadline for submission of that information. . . . Therefore, in accordance with [19 U.S.C. § 1677e(a)], we are relying on facts available." *Id.* at 25 (emphasis added).

In selecting from facts otherwise available, Commerce also applied an adverse inference. In considering what rate to assign Oman, the Department noted that "the record of this proceeding includes certain calculated margins, ranging from 0.63 percent to 9.10 percent, as well as the Petition rate of 154.33 percent from the initiation of the underlying investigation," *id.* at 29, and decided, "[I]t is appropriate to assign Oman Fasteners the Petition rate of 154.33 percent based on its failure to cooperate, because it is a rate on the record which would confer an adverse inference and induce cooperation." *Id.* at 30. Oman thus suffered what trade cases commonly refer to as "adverse facts available," or "AFA," a fate statutorily reserved to respondents that do not "cooperate . . . to the best of [their] ability" with an antidumping or countervailing duty investigation. 19 U.S.C. § 1677e(b).[7]

B

Oman timely sued on December 23, 2022, the day after Commerce issued its decision. *See* ECF 1 (summons); ECF 10 (complaint). Three days later, Oman filed public (ECF 38) and confidential (ECF 36) versions of its motion for a preliminary injunction. At that time the court set an expedited briefing schedule and advised the parties that it was considering consolidating Oman's preliminary injunction motion with trial on the merits—in this context, treating Oman's motion as a motion for judgment on the agency record. *See* USCIT R. 56.2 (providing for judgment on the agency record); *see also* USCIT R. 65(a)(2) (allowing consolidation of a preliminary injunction motion with trial on the merits).

Mid Continent Steel & Wire, Inc., then intervened as a defendant as of right. ECF 37. After the completion of briefing and limited discovery, the court conducted an evidentiary hearing with live witness testimony and heard legal argument on February 1, 2023. At the outset of the hearing, the court advised the parties that it would

[7] For background on Commerce's use of adverse facts available in antidumping proceedings, see *Hung Vuong*, 483 F. Supp. 3d at 1336–39.

likely consolidate the preliminary injunction motion with trial on the merits by treating the motion as one for judgment on the agency record. *See* ECF 83, at 4:12–5:19.

II

Oman sues under § 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii), challenging Commerce's final determination in an administrative review of an antidumping order under 19 U.S.C. § 1675. ECF 10, at 2. The court has jurisdiction per 28 U.S.C. § 1581(c).

In cases brought under § 516A of the Tariff Act, the Court of International Trade "shall review the matter as specified in subsection (b) of such section." 28 U.S.C. § 2640(b). In relevant part, subsection (b) provides that "the Court of International Trade must sustain 'any determination, finding[,] or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). In addition, Commerce's exercise of discretion in § 516A cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in cases reviewed under 28 U.S.C. § 2640(b), "section 706 review applies since no law provides otherwise").

III

A

Under Rule 65, the court has discretion to consolidate a hearing on a preliminary injunction with the trial on the merits. *See* USCIT R. 65(a)(2). In this administrative law context, that means treating Oman's motion as one for judgment on the agency record. *See* USCIT R. 56.2. Here, the court so consolidates Oman's motion with the trial on the merits. The court finds that so doing promotes judicial economy, reduces expense to the parties, and furthers speedy resolution of this dispute. *See* USCIT R. 1 (stating that the court's rules are to be "construed, administered, and employed by the court . . . to secure the just, speedy, and inexpensive determination of every action and proceeding").

B

On the merits, Oman asserts three separate and independent theories challenging Commerce's decision to apply facts otherwise available with an adverse inference. *First*, the Department abused its discretion in denying Oman a retroactive extension of time in these circumstances. *Second*, even if the Department properly refused to grant Oman a retroactive extension, the Department abused its discretion in applying an adverse inference. *Finally*, even if the Department properly applied an adverse inference, the Department abused its discretion in selecting such a high rate (154.33 percent). The court easily agrees with Oman as to each of its theories; this is not a close case.

1

Oman argues that in denying it a retroactive extension, the Department abused its discretion for two reasons. The court considers each in turn.

a

Almost ten years ago, buried in a response to a party's comment made during rulemaking, Commerce casually revealed that it grants virtually automatic 15½-hour[8] extensions for completion of filings:

> Parties should be aware that the likelihood of the Department granting an extension will decrease the closer the extension request is filed to the applicable time limit because the Department must have time to consider the extension request and decide on its disposition. Parties should not assume that they will receive an extension of a time limit if they have not received a response from the Department. *For submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day.*

Extension of Time Limits, 78 Fed. Reg. 57,790, 57,792 (Dep't Commerce Sept. 20, 2013) (emphasis added). This offhand comment response—which has never been codified through a regulation or otherwise reasonably communicated to the bar—means that a party in Oman's situation could (and unquestionably should) have a boil-

[8] As a technical matter, the automatic extension is actually a *minimum* 15½-hour extension due to the Department's reference to "the next work day." A party with a deadline of 5:00 p.m. on an ordinary Friday, for example, would receive an extension to 8:30 a.m. the following Monday, and a party whose deadline falls on the Friday before a holiday weekend would receive an extension to Tuesday. Here, however, the deadline was on a Monday.

erplate request for an extension ready to file at 4:55 p.m. if a required filing encounters technical difficulties of the type that Oman claims to have suffered here. In the real world, such a last-minute extension request is virtually certain to obtain at least a 15½-hour extension for completing a filing.[9]

The court finds that because the Department has not codified its practice or otherwise provided clear notice to the bar that this virtually automatic 15½-hour extension is available, it is an abuse of discretion for Commerce to require a showing of "extraordinary circumstances" to support a retroactive extension request in the narrow circumstance where, as here, the filing is completed after 5:00 p.m. but prior to 8:30 a.m. the following work day—that is, when the filing is completed within the automatic window that Commerce's rulemaking comment response authorizes.[10]

[9] Counsel for the government argued at the hearing that the extension is not automatic because Commerce could deny it, but when pressed by the court she conceded that it would be very unlikely that Commerce would be able to deny such a last-minute extension request prior to the 5:00 p.m. cutoff. ECF 83, at 275:7–276:8. The Department's rulemaking comment response unambiguously states that if Commerce does not rule on the extension request by 5:00 p.m., the deadline bumps to 8:30 a.m. the next work day—thus making the extension essentially automatic in practice because a ruling at 5:01 p.m. would be too late to prevent the extension from taking effect.

[10] The court emphasizes that Oman's completion of its filing within the 15½-hour window is essential to Part III.B.1.a of this decision and distinguishes this case from matters such as *Tau-Ken Temir LLP v. United States*, 587 F. Supp. 3d 1346 (CIT 2022), *appeal filed*, No. 22–2024 (Fed. Cir. Sept. 14, 2022), where counsel filed an extension request in time to get the "automatic extension" but then failed to complete the substantive filing by 8:30 a.m., and *Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015), in which the Federal Circuit found that Commerce was justified in excluding responses filed *ten days* after the deadline when the submitting party submitted an untimely request for extension and provided no explanation for why the party had not timely filed a request. The court expresses no view on whether the Department's failure to grant an extension in these circumstances would be an abuse of discretion if Commerce had clearly put the bar on notice of its last-minute extension policy through codification in a regulation or some other method reasonably calculated to provide notice to the bar. *See Celik Halat ve Tel Sanayi A.S. v. United States*, 557 F. Supp. 3d 1348, 1361 (CIT 2022) ("[I]t is not reasonable for the court to expect a filer to be on notice of, or to allow a litigant to be prejudiced by, a substantive regulatory provision buried within preamble language, especially a provision that was published in the Federal Register [approximately eight and a half] years before the due date of a filing and never issued as a regulation or rule."). *Celik Halat* issued on February 15, 2022—the day after the missed deadline in this case. At argument, counsel represented that Oman was unaware of Commerce's automatic extension policy until the court "unearthed it" in *Celik Halat*. ECF 83, at 248–51.

b

Oman also argues that the Department has a "policy of leniency" for filing errors, ECF 38–1, at 30, and erred by failing to explain its departure from past practice in this proceeding. Oman points to this statement by Commerce in another proceeding:

> . . . Commerce's *practice* is to allow a law firm that misses a filing deadline one opportunity to submit the untimely information where [the] law firm failed to: 1) file a complete submission before the specified hour on the date of the deadline; 2) timely file the public version of the response; or 3) respond on the date of the deadline, but promptly contacted Commerce. We also note that Commerce allows a law firm a second opportunity to submit the untimely information only if that law firm has: 1) not previously been afforded such an opportunity in a past segment of any proceeding; and 2) identified the steps it has taken to avoid untimely filings in the future. This practice is grounded in 19 CFR 351.301(a) . . . .
>
> . . . . Pursuant to the practice described above, we previously accepted Hyundai Steel's narrative response because we determined that the law firm representing Hyundai Steel was eligible to receive a second opportunity. [Commerce then discovered it had accepted untimely information from that firm in a different matter two and a half years earlier.] It is inconsistent with Commerce's practice to allow the law firm another opportunity to file untimely information in this administrative review. . . .
>
> . . . . As a result, pursuant to our regulations and practice, [the Department rejected the untimely filing and removed it from the record].

Certain Corrosion-Resistant Steel Products from the Republic of Korea, Dep't No. A-580–878, Commerce Letter to Respondent's Counsel at 2–3 (Aug. 3, 2018) (emphasis added and footnote references omitted).

There is no dispute that Oman's counsel is eligible for leniency under the "practice" quoted above. The record shows that Oman brought the language to Commerce's attention and asked it to apply that "practice" here. *See* ECF 38–3, at 234–41; *see also id.* at 261. The Department, astonishingly, responded that it "does not have an 'established' practice of leniency for first-time offenders for late submissions." *Id.* at 269.

Commerce's response disregards its own prior statements and therefore constitutes an abuse of discretion (at best) or arbitrary and capricious action (at worst). The Department said, *five times*, that it has a "practice" of allowing a law firm one tardy filing—a "one-bite rule," as it were.[11] This court will hold Commerce to its stated practice. *Cf. NLRB v. Wash. Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984) (per curiam) ("The present sometimes-yes, sometimes-no, sometimes-maybe policy of [enforcing] due dates cannot, however, be squared with our obligation to preclude arbitrary and capricious management of the [agency]'s mandate."); *see also Cappadora v. Celebrezze*, 356 F.2d 1, 6 (2d Cir. 1966) (Friendly, J.) ("[O]nce appropriate rules have been established, the discretion conferred in day to day administration cannot have been assumed to extend to unreasonable deviation from such rules on an *ad hoc* basis at the whim of the [agency].").

* * *

Under these circumstances, Commerce abused its discretion by not granting Oman a retroactive extension. That, in turn, means the Department's invocation of facts otherwise available here was unlawful—necessary information was *not* missing from the record, 19 U.S.C. § 1677e(a)(1), nor did Oman "fail[ ] to provide such information by the deadline[ ] for submission," *id.* § 1677e(a)(2)(B).

Because the court finds Commerce's resort to facts otherwise available unlawful, the court necessarily finds the same as to the use of an adverse inference. Proper invocation of facts otherwise available is a statutory prerequisite to use of an adverse inference. *See id.* § 1677e(b)(1)(A) (permitting the Department to "use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*") (emphasis added).

2

Even if Commerce did not abuse its discretion in denying an extension of time to Oman and therefore properly applied facts otherwise available because of the company's late filing, *see id.* § 1677e(a)(2)(B), the court finds that Commerce abused its discretion in applying an adverse inference.

When the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," *id.* § 1677e(b)(1), the Tariff Act permits (but does not require) Commerce to "use an inference that is adverse to the

[11] At common law, a plaintiff seeking damages for a dog bite "must prove that the defendant knew about the dog's vicious propensities, a scienter requirement commonly referred to as the 'one-bite rule.' " *Carreiro v. Tobin*, 66 A.3d 820, 822–23 (R.I. 2013) (quoting *DuBois v. Quilitzsch*, 21 A.3d 375, 380 (R.I. 2011)); *cf. McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1045 (7th Cir. 1989) (Posner, J.) ("There is no 'one explosion' rule in OSHA cases comparable to the fabled 'one bite' rule of tort liability for injury inflicted by a house pet.").

interests of that party in selecting from the facts otherwise available," *id.* § 1677e(b)(1)(A). On the one hand, "the standard does not require perfection and recognizes that mistakes sometimes occur," but on the other, "it does not condone inattentiveness [or] carelessness . . . ." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.* at 1383. "Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information." *Id.* at 1382. Where "Commerce made no such examination," the Federal Circuit found invocation of an adverse inference to be unsupported by substantial evidence on the record. *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1386 (Fed. Cir. 2022).

Here, the extent of the Department's justification for applying an adverse inference consisted of a single clause within a single sentence: "Additionally, pursuant to section 776(b) of the Act [i.e., 19 U.S.C. § 1677e(b)], because Oman Fasteners failed to cooperate by not acting to the best of its ability when it failed to provide information to Commerce within established deadlines, we are applying an adverse inference when selecting from the facts available." ECF 38–3, at 25. That sentence tells the court nothing about *why* the Department concluded that Oman failed to cooperate to the best of its ability by missing a filing deadline by 16 minutes.

Agency action is improper where the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 423 U.S. 29, 43 (1983). Here, Oman told Commerce that the ACCESS system initially notified counsel that his filings *met* the system's requirements, yet after some delay the system then unexpectedly rejected them. The Department did not address Oman's assertion that the ACCESS system's performance contributed to the late filing.

Beyond failing to address Oman's contention that the company was not wholly at fault, Commerce's application of an adverse inference is an abuse of discretion for the additional reason that the Department provided no explanation justifying its conclusion that a 16-minute filing delay is a failure to cooperate. Commerce's *ipse dixit* here is not enough. *See City of Miami, Okla. v. Fed. Energy Regulatory Comm'n*, 22 F.4th 1039, 1042, 1043 (D.C. Cir. 2022) (chiding agency for *ipse dixit* explanation and failure to analyze evidence and finding "[t]hat is hardly acceptable evaluation of the evidence"); *State Farm*, 463

U.S. at 48 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . .").

3

Finally, even if Commerce did not abuse its discretion by refusing to grant a retroactive extension to Oman, and even if the Department did not abuse its discretion by applying an adverse inference in selecting from facts otherwise available, the court finds that Commerce abused its discretion by selecting the punitive 154.33 percent rate. "That the facts merited the use of an adverse inference does not necessarily mean that those same facts merited selection of the highest rate." *POSCO v. United States*, 296 F. Supp. 3d 1320, 1349 (CIT 2018). Section "1677e(d)(2) contemplates the selection of the highest rate when the situation merits the highest rate." *Id.* at 1350. If Commerce fails to reasonably explain why its chosen rate was appropriate, the court must find it inappropriate. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019).

Here, the Department simply stated that 154.33 percent "is a rate on the record *which would confer an adverse inference* and induce cooperation." ECF 38–3, at 30 (emphasis added). That is not an explanation. It amounts to, "We choose this as the adverse rate because it's crushing." But the Federal Circuit has noted that while "Commerce is at liberty to exercise its judgment and select a rate it finds appropriate to deter non-compliance, there is an extremely large range of rates between 1.43% and 126.44%." *BMW*, 926 F.3d at 1302. The same is true here, except the relevant range is even greater. In past administrative reviews, the highest rate that Oman received was 1.65 percent, *see Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2019–2020*, 86 Fed. Reg. 67,690, 67,691 (Dep't Commerce Nov. 29, 2021),[12] yet Commerce inexplicably opted for a 154.33 percent rate

[12] *See also Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2014–2016*, 83 Fed. Reg. 4030, 4031 (Dep't Commerce Jan. 29, 2018) (0.63 percent); *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 83 Fed. Reg. 58,231, 58,232 (Dep't Commerce Nov. 19, 2018) (0.00 percent); *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 84 Fed. Reg. 71,372, 71,372 (Dep't Commerce Dec. 27, 2019) (also 0.00 percent); and *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2018–2019*, 86 Fed. Reg. 14,309, 14,310 (Dep't Commerce Mar. 15, 2021) (also 0.00 percent). The highest margin Oman received was in the original antidumping order, *see Certain Steel Nails from the Republic of Korea, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994, 39,996 (Dep't Commerce July 13, 2015) (9.10 percent), although Commerce reduced that rate to 4.22 percent after multiple remands from this court, *see Mid Continent Steel & Wire, Inc. v. United States*, 586 F. Supp. 3d 1349, 1353 (CIT 2022), *appeal filed*, No. 23–1039 (Fed. Cir. Oct. 14, 2022).

this time. As the Federal Circuit has repeatedly admonished the Department, an adverse inference rate cannot be punitive or aberrational and must "reflect[ ] the seriousness of the non-cooperating party's misconduct." *BMW*, 926 F.3d at 1301. Commerce made no effort to justify the draconian sanction it imposed here.

* * *

For the reasons outlined above, the court concludes that Oman is entitled to judgment on the agency record. *See* USCIT R. 56.2.

IV

After a grant of judgment on the agency record, relief as of right is limited to a remand for further proceedings. *See* 19 U.S.C. § 1516a(c)(3) (authorizing the court to remand to Commerce "for disposition consistent with the" court's final decision). Oman, however, also seeks extraordinary relief in the form of an injunction enjoining the government from collecting cash deposits at a 154.33 percent rate pending further order of the court.

After prevailing on the merits of a cause of action created by Congress, and absent statutory direction to the contrary, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (stating that "Congress may intervene and guide or control the exercise of the courts' [equitable] discretion, but we do not lightly assume that Congress has intended to depart from established principles") (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)), a plaintiff seeking permanent injunctive relief must demonstrate

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).[13] As nothing in the Tariff Act otherwise suggests an intent by Congress to depart from ordinary equitable principles in this context of a request

[13] In the administrative law context, where a court must remand a successful challenge to agency action for further proceedings, "permanent" injunctive relief is something of a misnomer. Here, where the court has granted judgment on the agency record to Oman, the entry of injunctive relief is permanent only in the sense that it would remain in effect until the court sustains a final determination by Commerce.

to enjoin the collection of cash deposits, the court considers whether Oman has satisfied the three *eBay* requirements in dispute.[14]

A

When a plaintiff demonstrates "a viable threat of serious harm which cannot be undone," *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (emphasis removed), such harm, economic or otherwise, can constitute irreparable injury for purposes of injunctive relief. For example, judicial relief "may come too late to save the plaintiff's business. He may go broke while waiting, or may have to shut down his business but without declaring bankruptcy." *J. Conrad LTD v. United States*, 457 F. Supp. 3d 1365, 1377 (CIT 2020) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.)).

Oman's president and CEO, Steve Karaga, submitted a declaration in support of the company's motion and elaborated on that declaration in testimony in open court. In his testimony, he explained that Commerce's staggering increase in the duty rate requires the company to pick its poison: either shut down most of the business (to avoid paying cash deposits), fire most of the workforce, ruin customer relationships, and risk insolvency due to fixed costs exceeding revenue and/or [[ ]], or blithely continue business as usual for a few months (while paying the cash deposits that cannot be passed along to customers) until insolvency is reached. *Cf.* Ernest Hemingway, *The Sun Also Rises* 136 (1926) (" 'How did you go bankrupt?' Bill asked. 'Two ways,' Mike said. 'Gradually, then suddenly.' ").

1

As to shutting down most of the company's business to escape liability for cash deposits, the court finds that Mr. Karaga credibly identified at least four distinct kinds of ensuing irreparable injury, any one of which independently supports injunctive relief.

a. *Insolvency from running out of cash*

Mr. Karaga explained that more than [[ ]] of the company's revenue comes from U.S. market sales, ECF 83, at 61:15–22,[15] and more than [[ ]] of the company's revenue comes from U.S. sales of subject merchandise (steel nails subject to the antidumping duty

[14] There is no dispute here that Oman has no other remedy at law against the government. Therefore, the company satisfies the second *eBay* requirement.

[15] Citations to ECF 83 refer to the sealed hearing transcript.

order),[16] *id.* at 58:22–59:5. The [[ ]] figure represents between [[ ]] of Oman's 2022 revenue. *Id.* at 62:15–22. After nails, the company's second-largest product consists of steel staples that represent [[ ]] of its 2022 sales, or approximately [[ ]]. *Id.* at 62:23–63:8. In his testimony, Mr. Karaga referred to an exhibit (ECF 36–2, at 17) that showed Oman's projected 2022 revenue through December 19 as [[ ]]. ECF 83, at 63:9–64:4.

Mr. Karaga stated that because Oman cannot afford (as discussed further below) to pay cash deposits for the 154.33 percent antidumping duties, *id.* at 65:23–66:9, the company has discontinued shipments of nails to the United States,[17] which he said would cause the company's sales revenue to drop to approximately [[ ]] of the company's 2022 revenue, *id.* at 64:5–65:19. He noted that the company's [[ ]] dropped from [[ ]] to [[ ]] in November 2023, that [[ ]] increased in the following month, and that he expected January 2023 forward figures to show [[ ]]. *Id.* at 83:3–23.

Asked about the government and Mid Continent's assertions that Oman can make up lost revenue from not shipping nails by selling other products, Mr. Karaga noted that the company's profit and loss statement shows that there was "[[ ]]," i.e., at the same time the company stopped shipping nails. *Id.* at 83:24–84:17. He explained that a major reason for the [[ ]] is that [[ ]]. *Id.* at 84:22–86:7. He also explained that "[[ ]]," such that it would be implausible to suggest Oman could make up for lost sales of nails by selling other products. *Id.* at 86:8–21.[18]

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[16] The remainder of this opinion uses the word "nails" instead of the statutory term "subject merchandise."

[17] Oman has continued shipments of staples not subject to the antidumping duty order. *Id.* at 76:9–16.

[18] Asked whether the company can make up for the lost U.S. sales by selling to some other market, Mr. Karaga testified that other markets make up [[ ]]. *Id.* at 125:14–126:7. He testified about the company's efforts to develop business in other countries but stated that Oman has never been able to develop a single market representing more than [[ ]], in part because of [[ ]] and in part because of heavy competition from other companies subject to U.S. antidumping orders. *Id.* at 126:11–129:9.

Mr. Karaga testified extensively about the company's assets and the significance of lines of credit the company has with three Omani banks, including whether [[ ]]. *Id.* at 112:16–116:25. [[ ]] *Id.* at 111:2–13. He explained that regardless of whether [[ ]],[19] the company faces imminent insolvency. *Id.* at 160:19–163:7. He stated that the company had [[ ]] of accessible cash in bank accounts as of January 2023, but that it is obligated to pay [[ ]] in the first quarter to [[ ]],[20] [[ ]] for a tax payment due no later than March 31, and $22 million in Section 232 steel duties owed to the U.S. government. *Id.* at 211:25–214:9; *see also* ECF 79 (sealed demonstrative exhibit outlining those figures). Simple mathematics shows that these liabilities will exhaust the accessible cash by the end of March if [[ ]]. Mr. Karaga testified that he is certain that [[ ]], the company will not be able to generate enough profits to cover expenses and existing obligations, such as land leases and salaries, ECF 83, at 160:19–163:7, and he also testified that the company cannot pay its fixed costs based on the minimal revenue left after halting imports of nails, *id.* at 106:22–108:14.

The court finds that Oman will be insolvent by the end of March 2023 [[ ]] because the company will run out of cash due to the dramatic loss of revenue from sales of nails.[21] This looming insolvency constitutes irreparable injury. *J. Conrad*, 457 F. Supp. 3d at 1377.

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[19] Mr. Karaga acknowledged that [[ ]], but he also testified that the company must [[ ]]. *Id.* at 170:21–171:13.

[20] Mr. Karaga said this figure represents amounts [[ ]] and does not [[ ]]. *Id.* at 222:8–223:9.

[21] Mr. Karaga also explained that the company has [[ ]]. *Id.* at 111:14–112:15.

b. *Insolvency through default with lenders*

Mr. Karaga testified that he has been advised by the company's finance manager that the company is [[ ]]. *Id.* at 112:16–115:25. The court finds that Oman is [[ ]]. For example, the [[ ]]" ECF 36–2, at 47.[22] That is exactly what Oman has done—it has suspended most of its business because it can't pay the cash deposits.

Mr. Karaga testified that if the banks do invoke the default provisions, "[w]e would become immediately insolvent. We wouldn't be able to meet any of our obligations." *Id.* at 116:6–12.[23] The court finds that Oman is at immediate risk of insolvency because it is [[ ]]. Such injury is irreparable. *See J. Conrad*, 457 F. Supp. 3d at 1377.

c. *Damage to customer relationships*

Mr. Karaga explained that Oman faces the imminent loss of its customer base if it cannot resume shipments of nails to the United States. More than [[ ]] of the company's business comes from [[ ]] [[ ]]. ECF 83, at 89:9–19. Mr. Karaga testified that the customers whose letters and declarations the company submitted as part of the evidentiary record represent [[ ]] of the company's business, and that they have advised him that [[ ]] in view of Oman's ceasing shipments. *Id.* at 94:10–96:20. "[[

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[22] Oman's two other credit facilities have similar [[ ]] provisions. *See* ECF 36–2, at 69 ([[ ]]); *id.* at 82 ([[ ]]).

[23] Asked whether the company has attempted to obtain additional credit from other banks, he replied that it would be ridiculous to try because any bank would ask for the company's financial records; he further explained that [[ ]]. *Id.* at 117:7–119:23. The court finds Mr. Karaga's answer convincing.

]]” *Id.* at 98:23–99:7. He also explained that while Oman [[

]], *id.* at 104:15–105:17, competing companies [[ ]] that would pose a significant obstacle to Oman being able to win back lost business. *Id.* at 178:2–22.

The court finds that the injury to Oman’s customer relationships from having to cease importing nails is irreparable. *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (“[L]oss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.”) (citing *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008), and *Sanofi–Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1382–83 (Fed. Cir. 2006)).

d. *Termination of employees*

Mr. Karaga testified that his company has terminated [[ ]] to date and is preparing to terminate more. ECF 83, at 71:4–73:15. While the [[

]], he does not know whether [[

]] *Id.* Hiring new employees is not a straightforward matter because it requires visa applications, which typically takes a minimum of 30 days because the Omani government awards visas in batches. *Id.* at 207:6–208:6.

Moreover, Mr. Karaga testified that if the company doesn’t receive relief from the court, it will certainly terminate [[ ]] more employees. *Id.* at 73:7–17. If Oman proceeds to a round of layoffs involving [[ ]], Mr. Karaga estimates that it would take one or two years to replace them. *Id.* at 205:16–206:5.

The court finds that the disruption to Oman’s business resulting from the previous layoffs and the risk of further such layoffs constitutes irreparable injury. *See Std. Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 515–16 (Fed. Cir. 1990) (employee layoffs are irreparable injury); *Altana Pharma AG v. Teva Pharms. USA, Inc.*, 566 F.3d 999, 1010–11 (Fed. Cir. 2009) (same).

2

Instead of halting most of the company’s imports (and thus most of the company’s business), in theory Oman has another option: Mr. Karaga testified about a hypothetical in which his company continues to import nails into the United States, which would require paying the 154.33 percent cash deposits. He explained that Oman is the importer of record for its own products, which makes the company directly responsible for paying cash deposits at whatever dumping margin Commerce assigns. ECF 83, at 66:10–17. Asked whether Oman has the financial resources to pay the deposits, he replied, "The Company does not." *Id.* at 66:7–9. Mr. Karaga testified that the company has not determined what the precise annual cost of the cash deposits would be based on historical sales of nails, but he estimated it to be "[[ ]]" based on the 2022 entry value of nails multiplied by 154 percent. *Id.* at 66:18–67:6. The financial data Mr. Karaga used were provided by the company's finance manager, "[[ ]]." *Id.* at 67:7–17.

Mr. Karaga asked the financial manager to project the amount of time for which Oman could afford to pay the 154.33 percent duty if the company continued importing nails. He testified that "we would run out of cash in [[ ]]. At this point in time, after looking at it again that would be in [[ ]] we would run out of cash." *Id.* at 68:10–22. The reason he gave was that "[o]ur cash would be completely consumed by cash deposits for the 154 percent dumping margin." *Id.* at 68:23–69:3. Mr. Karaga testified about a cash flow projection submitted as Exhibit D in support of his declaration (ECF 362, at 24–25), which he explained was "[[ ]]." ECF 83, at 137:23–139:8. He later reiterated that the document "is a simulation created for the purpose of demonstrating the cash burn rate if we continued to sell subject merchandise and posted deposits." *Id.* at 159:4–14. The exhibit shows Oman's opening cash balance on [[ ]] and projects that the amount, again in the hypothetical scenario in which the company continues to import nails, will decline to [[ ]]. ECF 36–2, at 24–25. Mr.

Karaga testified that those figures reflect [[

]].[24] ECF 83, at 140:2–141:25.

Asked what effect the deposits would have on the company's sales if it just raised prices to compensate for the duties, Mr. Karaga referred to Oman's previous price adjustments in response to antidumping duties. The company's antidumping duty increased between 2015 and 2017 and, in response, Oman raised prices for nails and [[

]] *Id.* at 119:24–120:21. In 2018, the duty decreased substantially; in response the company lowered prices by about [[

]]. *Id.* at 120:22–121:21. Mr. Karaga said the company's takeaway from these experiences is that "nails are a commodity business" and "price is . . . a critical factor." *Id.* at 121:22–122:4. The company provided multiple declarations from customers stating that if Oman [[

]]. *See* ECF 63–1, at 137–60. Mr. Karaga stated that he felt foolish having to ask the customers for these declarations because they state the obvious to anyone familiar with the industry. *See* ECF 83, at 95:9–12 ([[

]]).

The court finds that simply paying cash deposits at the 154.33 percent rate set by Commerce is not a viable option for Oman. If the company pays the cash deposits without raising its prices, it will run out of money no later than April. If the company raises its prices to compensate for the cash deposit payments, it will lose its customers for these price-sensitive commodity products, and the company will go insolvent even sooner because of lost revenue. These harms are

[24] Mr. Karaga testified that the only asset the company can access to fund its ongoing operations is [[ ]]; he specifically said that the company cannot use [[

]], nor can the company use [[

]]. ECF 83, at 215:16–219:13.

irreparable. *See J. Conrad*, 457 F. Supp. 3d at 1377.

B

To grant permanent injunctive relief, the court must consider "the balance of hardships" between Oman and the government. *eBay*, 547 U.S. at 391. That balance is lopsidedly in Oman's favor. Absent injunctive relief, the company faces catastrophe. The harm to the government from granting such relief, in contrast, is minimal to nonexistent, because it will receive no revenue from Oman if the company goes bankrupt.

C

The final *eBay* factor in dispute is whether Oman has shown "that the public interest would not be disserved by a permanent injunction." 547 U.S. at 391. Oman argues that the public interest is served by ensuring that Commerce "compl[ies] with the law, and interpret[s] and appl[ies] trade statutes uniformly and fairly." ECF 38–1, at 63 (quoting *Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010)).

The government responds that the public interest is reflected in the balance struck in the antidumping statute, which authorizes injunctive relief against liquidation of entries covered by a challenged determination. *See* ECF 48, at 23–25 (citing 19 U.S.C. § 1516a(c)(2)). The statute, however, makes no provision for such relief against cash deposit requirements. *Id*. The government contends that this balance protects an importer's interest in ultimately recouping cash deposit overpayments while also protecting the government's interest in "collecting the money it is owed for any entries made during that period." *Id.* at 25. The government further contends the statute's remedial purposes will be undermined if it cannot collect cash deposits on an interim basis because the importer might be unable to pay its ultimate liability. *Id*.

The court, however, has determined on the merits that the 154.33 percent duty rate set by Commerce is unlawful. Therefore, the government has no legitimate interest in collecting cash deposits at that rate. Enjoining such collection cannot possibly undermine the statute's remedial purposes, because Oman has no liability to pay 154.33 percent duties. Injunctive relief here will not disserve the public interest.

* * *

In sum, Oman has demonstrated that it will suffer irreparable injury in the absence of injunctive relief, that the balance of the hardships is in its favor, and that the public interest will not be disserved by such relief. As there is no dispute that Oman lacks any remedy at law, the company satisfies the *eBay* requirements for permanent injunctive relief.

Conclusion

For the reasons provided above, the court grants judgment on the agency record in favor of Oman and enjoins Defendant from collecting cash deposits at the punitive rate set by Commerce. A separate order will enter. *See* USCIT R. 58(a).

Dated: February 15, 2023
New York, New York

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

Slip Op. 23–19

Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited, Plaintiffs and Consolidated Defendant-Intervenors, v. United States, Defendant, and Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; The International Brotherhood Of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, Defendant-Intervenors and Consolidated Plaintiffs.

Before: Gary S. Katzmann, Judge
Consol. Court No. 21–00281
PUBLIC VERSION

[Plaintiffs' Motion for Judgment on the Agency Record is granted in part and denied in part. Defendant-Intervenors' Motion for Judgment on the Agency Record is granted. The U.S. Department of Commerce's Partial Motion to Dismiss is granted. Commerce's Final Determination is remanded for reconsideration or further explanation.]

Dated: February 17, 2023

Jeffrey S. Grimson, *Jacob Reiskin*, *Kristin H. Mowry*, *Sarah M. Wyss*, and *Wenhui (Flora) Ji*, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiffs and Consolidated Defendant-Intervenors Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Yohai Baisburd, *Jack A. Levy*, and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant Intervenors and Consolidated Plaintiffs Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett &Platt, Incorporated; the International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO.

OPINION AND ORDER

Katzmann, Judge:

Important issues relating to agency discretion, surrogate value methodology, and the treatment of NME-based affiliated suppliers in market economy proceedings spring forth from the facts of this case. Plaintiffs Best Mattresses International Company Limited ("Best Mattresses") and Rose Lion Furniture International Company Limited ("Rose Lion") challenge certain aspects of the final affirmative antidumping duty determination regarding mattresses from Cambodia by Defendant U.S. Department of Commerce ("Commerce" or "the

Government"). *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia*, 86 Fed. Reg. 26,460 (Dep't Com. May 14, 2021) ("*Final Determination*"), P.R. 325.[1] Defendant-Intervenors Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, the International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO challenge additional aspects of Commerce's Final Determination.[2] Plaintiffs and Defendant-Intervenors each move for judgment on the agency record pursuant to USCIT Rule 56.2 and argue that parts of the Final Determination were "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

The Final Determination is the result of Commerce's first antidumping duty investigation involving mattresses from Cambodia. *See* Mem. from J. Maeder to C. Marsh, re: Issues and Decisions Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Mattresses from Cambodia at 3 (Dep't Com. Mar. 18, 2021), P.R. 301 ("IDM"). In this market economy investigation, Commerce confronted an issue of first impression: how to calculate constructed value for respondents who, while formally based in market economies, sourced a substantial percentage of their minor and major inputs from affiliated suppliers located in a non-market economy ("NME"). Plaintiffs assert five challenges to the Final Determination: (1) Commerce's use of surrogate country data to value input cost of production ("COP") under the Major Input Rule, 19 U.S.C. § 1677b(f)(3), in a market economy proceeding was unauthorized and unreasonable; (2) Commerce's inclusion and exclusion of certain country data were unreasonable; (3) Commerce's use of the Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2), to adjust Plaintiffs' fixed asset depreciation expenses was unauthorized and

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[1] Commerce had initially noticed its final antidumping duty determination on March 25, 2021. *See Mattresses from Cambodia: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 86 Fed. Reg. 15,894 (Dep't Com. Mar. 25, 2021), P.R. 309 ("*Unamended Final Determination*"). Commerce later amended that determination to correct two ministerial errors. *See Final Determination*, 86 Fed. Reg. at 26,461. The court will refer to the amended final determination, *see id.*, as the Final Determination.

[2] Defendant-Intervenors' challenge, *see* Compl., *Brooklyn Bedding, LLC v. United States*, No. 21cv-00282 (CIT July 12, 2021), ECF No. 13, was consolidated with Plaintiffs' case under case number 21-cv-00281 on September 21, 2021, *see* Order, Sept. 21, 2021, ECF No. 30.

unreasonable; (4) Commerce's selection of the financial statement for calculating Plaintiffs' profit and selling expense ratios was unreasonable; and (5) Commerce's application of the Cohen's *d* test in calculating weighted average dumping margins was unauthorized. Defendant-Intervenors submit three more: (1) Commerce's construction of the Transactions Disregarded Rule, which interpreted "market under consideration" to mean the country under investigation, was not in accordance with law and unreasonable; (2) Commerce's use of distortive and unreliable Trademap surrogate data to value market price under the Transactions Disregarded Rule was unreasonable; and (3) Commerce's inclusion of NME and export-subsidizing countries in the surrogate data was unauthorized and unreasonable. Additionally, the Government moves to dismiss Count VI of Plaintiffs' Complaint for lack of standing to challenge Commerce's application of the Cohen's *d* test. *See* USCIT R. 12(b)(2). As with Commerce's investigation, many of these arguments are matters of first impression before the Court of International Trade.

First, the court grants the Government's motion to dismiss Count VI of Plaintiffs' Complaint. Plaintiffs fail to establish standing to challenge Commerce's application of the Cohen's *d* test because any difference in Commerce's methodology would not have materially impacted the result of the dumping margin. Second, the court grants in part and denies in part Plaintiffs' Motion for Judgment on the Agency Record. Almost all of Plaintiffs' challenges yield to the broad legal and factfinding discretion enjoyed by Commerce, which is master of the antidumping statutes. Notably, the court holds that Commerce's interpretation of the Major Inputs Rule, 19 U.S.C. § 1677b(f)(3); *see infra* pp. 7–8, to allow use of third-country surrogate data as "information available" for determining the COP of a major input purchased from an affiliated NME-based supplier is reasonable and warrants deference. But Plaintiffs prevail on two claims; Commerce's determinations that the financial statement it had selected was publicly available and sufficiently complete were unreasonable. Third, the court grants the Defendant-Intervenors' Motion for Judgment on the Agency Record. The court concludes that Commerce's interpretation of "market under consideration" in the Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2); *see infra* pp. 6–7, to strictly mean the country under investigation is unreasonably inflexible and inconsistent with prior practice. Because Commerce's selection of Trademap data is premised on that interpretation, the court does not reach the other issues concerning the Trademap data's reliability. Moreover, Commerce's continued inclusion of NME and export-subsidizing countries in the surrogate data was inconsistent with other reasoning in its Final Determination. The court, therefore, remands to Commerce for reconsideration or further explanation consistent with this opinion.

BACKGROUND

I. Legal Framework for Antidumping Duty Determinations

"Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). This practice constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below reasonable fair market value. *Id.* To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. *Id.* at 1047. When Commerce concludes that duties are appropriate, the agency is required to determine "margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Commerce imposes antidumping ("AD") duties on foreign goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and the International Trade Commission ("ITC") concludes that the sale of the merchandise below fair value materially injures, threatens, or impedes the establishment of an industry in the United States. *See* 19 U.S.C. § 1673; *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when the normal value ("NV") is greater than the price charged for the product in the United States. *See* 19 U.S.C. § 1673. Commerce traditionally determines NV by reference to market prices in the exporting country, *id.* § 1677b(a)(1)(B)(i), or a third country, *id.* § 1677b(a)(1)(B)(ii). If there does not exist a viable home market or third country market to serve as the basis for NV, Commerce uses constructed value ("CV") as the basis for NV. *See id.* § 1677b(a)(4). CV is calculated by adding the exporter's COP, selling expenses and profits, and costs of containers and other shipping expenses. *See id.* § 1677b(e); *HiSteel Co., Ltd v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1233, 1238 (2021).

A. Special Rules for Calculating of COP and CV

19 U.S.C. § 1677b(f) codifies special rules for the calculation of COP and CV. When Commerce considers price data reflecting transactions between an exporter and its affiliated supplier, the agency must apply the Transactions Disregarded Rule, *id.* § 1677b(f)(2), and Major Input

Rule, *id.* § 1677b(f)(3), in order to ensure that the price used in the CV calculation most accurately reflects the value of the input. The underlying concern is that simply relying on the transaction purchase price for an input from an affiliated supplier ("transfer price"), without testing it against external measures of value, could be reflective of exporters' cost-sharing arrangements with affiliates or like distortions.

The Transactions Disregarded Rule states:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2). In other words, Commerce determines the market price of the input to test whether the transfer price "does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." *Id.* Commerce's calculation of the market price "shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated." *Id.* If testing the market price against the transfer price reveals that the former is the more reliable indicator, Commerce uses it in determining constructed value. *Id.*

The Major Input Rule, operating somewhat similarly, is codified in the next subsection:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(f)(3). Commerce has codified its formal interpretation of the Major Input Rule. *See* 19 C.F.R. § 351.407(b) (2022); *see also NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1375 (Fed. Cir. 2004) (affirming the validity of 19 C.F.R. § 351.407(b) under *Chevron*). Per that rule, Commerce "normally" will determine the value of a major input purchased from an affiliated entity by selecting the higher of:

> (1) The price paid by the exporter or producer to the affiliated person for the major input [("transfer price")];
>
> (2) The amount usually reflected in sales of the major input in the market under consideration [("market price")]; or
>
> (3) The cost to the affiliated person of producing the major input [("input COP")].

19 C.F.R. § 351.407(b) (2022).

B. Calculation of Profit and Selling Expense Ratios

As part of its constructed value calculation, Commerce must also determine the value of a respondent's profit and selling expenses. *See* 19 U.S.C. § 1677b(e)(2). Commerce's preferred methods of calculating profit and selling expenses is to rely on the respondent's own home market or third-country sales. *See id.* § 1677b(e)(2)(A). But if neither is available, then Commerce may choose one of three alternative methods:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or

> producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . .

IDM at 15–16 (quoting 19 U.S.C. § 1677b(e)(2)(B)). There is no preference among the three methods, so long as Commerce's choice is reasonable. *See also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 840 (1994) ("At the outset, it should be emphasized that, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases."). In NME investigations, "Commerce values certain factors of production, such as selling, general, and administrative expenses . . . and profit, by using financial ratios derived from financial statements of producers of comparable merchandise in the surrogate country." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319 (Fed. Cir. 2010).

C. Calculation of Dumping Margin

After calculating CV as the basis for NV, Commerce will then determine the weighted average dumping margin. In general, the agency "compar[es] . . . the weighted average of the normal values with the weighted average of the exported prices (and constructed export prices) for comparable merchandise," termed the average-to-average ("A-to-A") method, "unless the Secretary determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(b)(1), (c)(1); *see also* 19 U.S.C. § 1677f–1(d)(1)(A)(i).

"The average-to-average method, however, sometimes fails to detect 'targeted' or 'masked' dumping, because a respondent's sales of low-priced 'dumped' merchandise would be averaged with (and offset by) sales of higher-priced 'masking' merchandise, giving the impression that no dumping was taking place." *Stupp Corp. v. United States*, 5 F.4th 1341, 1345 (Fed. Cir. 2021) (internal quotation marks and citation omitted); *see also Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720, 26,721 (Dep't Com. May 9, 2014). Congress therefore authorized Commerce to use two alternative methods to address the kind of targeted dumping that the A-to-A method sometimes fails to detect. *Stupp*, 5 F.4th at 1345. First, Commerce may compare the NVs of individual transactions to the export prices of individual transactions, a method known as the transaction-to-transaction ("T-to-T") method. *Id.* § 1677f–1(d)(1)(A)(ii). Commerce employs the T-to-T method only in "unusual" situations, such as "when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2). Second, Commerce may use the average-to-transaction ("A-to-T") method, which "involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." *Id.* § 351.414(b)(3). Commerce is authorized to use the A-to-T method only if "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 if Commerce "explains why such differences cannot be taken into account" using alternative methods. 19 U.S.C. § 1677f-1(d)(1)(B).

To determine whether to apply the A-to-T or T-to-T methods instead of the A-to-A method, Commerce conducts a differential pricing analysis. *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1342 & n.2 (Fed. Cir. 2017); *see also Stupp*, 5 F.4th at 1346–47. In the first step of the differential pricing analysis, Commerce segments export sales into subsets based on region, purchasers, and time periods. See Differential Pricing Analysis, 79 Fed. Reg. at 26,722. Commerce then applies the Cohen's *d* test, a statistical test determining effect size, to each subset to evaluate the extent to which prices differ significantly among purchasers, regions, or time periods. *See id.* If the Cohen's *d* coefficient is 0.8 or greater, the sales in the group "pass" the Cohen's *d* test. *See id.* Commerce next applies the "ratio test" on the aggregated results of the Cohen's *d* test on each subset to assess the extent of the significant price differences for all sales. *See id.* If less than 33 percent of the value of total sales passes the Cohen's *d* test, Commerce will use the A-to-A method to calculate the weighted-average dumping margin. *See id.* at 26,723. If more than 33 percent but less than 66 percent of the value of total sales pass the Cohen's *d* test, Commerce has the discretion to apply a hybrid method, wherein it applies the A-to-A method to sales which do not pass the Cohen's *d* test, and the A-to-T method to sales which pass the Cohen's *d* test. *See id.* And if more than 66 percent of the value of total sales pass the Cohen's *d* test, Commerce tentatively applies the A-to-T method to all sales. *See id.* at 26,722–23.

Finally, Commerce applies the "meaningful difference" test, which compares the AD margins resulting from different methodologies, to examine whether using only the A-to-A method can appropriately account for price differences. *See* 19 U.S.C. § 1677f–1(d)(1)(B)(ii);

Stupp, 5 F.4th at 1347; *Differential Pricing Analysis*, 79 Fed. Reg. at 26,723. Under this test, Commerce compares the dumping margin that results from applying only the A-to-A method with the dumping margin that results from applying the alternative method that is tentatively selected based on the Cohen's *d* and ratio tests. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26,723. A difference in the weighted average dumping margins is considered meaningful if (1) there is a 25 percent relative change and both rates are above the de minimis threshold of two percent, or (2) the A-to-A weighted average dumping margin is below the de minimis threshold and the alternative margin is above. *See id.* Commerce uses the alternative approach to calculate AD margin if it concludes there is a meaningful difference; absent a meaningful difference, Commerce will apply the A-to-A method. *See id.*

II. Factual Background

On March 31, 2020, Defendant-Intervenors filed antidumping petitions with Commerce alleging the importation of mattresses from Cambodia, among other countries, at less than fair value. *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 23,002, 23,003 (Dep't Com. Apr. 24, 2020), P.R. 45. Commerce published an initiation notice on April 24, 2020, for the less-than-fair value investigation of mattresses from Cambodia with a period of investigation ("POI") from January 1, 2019, to December 31, 2019. *See id.* On May 8, 2020, Commerce selected Best Mattresses and Rose Lion as mandatory respondents. *See* Mem. from J. McGowan to J. Maeder, re: Respondent Selection at 1 (Dep't Com. May 8, 2020), P.R. 52. On May 21, 2020, the ITC preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of mattresses from Cambodia. *See* Mem. from J. Maeder to J.I. Kessler, re: Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Mattresses from Cambodia at 2 (Dep't Com. Oct. 27, 2020), P.R. 232 ("PDM").

In June and July 2020, Plaintiffs submitted responses to Section A of Commerce's antidumping questionnaire relating to general information, and to Sections C and D relating to U.S. sales, COP, and CV. *See* Letter from Best Mattresses to W. Ross, Sec'y of Com., re: Sections C and D Questionnaire Response at D-8 to -9 & Exs. D-4 to -5 (July 6, 2020), P.R. 107, C.R. 47–55 ("Best Mattresses C-DQR"); Letter from Rose Lion to W. Ross, Sec'y of Com., re: Sections C and D Questionnaire Response at D-8 to -9 & Exs. D-4 to -5 (July 9, 2020), P.R. 108, C.R. 56–67 ("Rose Lion C-DQR"). In the questionnaire response, Best Mattresses reported that no less than [[ ]] percent of its total cost of manufacture ("TOTCOM") was based on transfer prices from affiliated parties in [[ ]], Best Mattresses C-DQR at Exs. D-4 to -5, and Rose Lion reported that no less than [[ ]] percent of its TOTCOM was based on transfer prices from affiliated parties in [[ ]], Rose Lion C-DQR at Exs. D-4 and D-5.

From June 2020 to August 2020, Defendant-Intervenors submitted comments on Plaintiffs' questionnaire responses related to the determination of CV profit and selling expenses. PDM at 3. From July 2020 to September 2020, Plaintiffs submitted responses to Commerce's supplemental questionnaires. *Id.* at 3. For the calculation of the profit and selling expense ratio, Plaintiffs submitted the financial statements of Grand Twins International (Cambodia) Plc ("GTI"). *See* Letter from Rose Lion & Best Mattresses to W. Ross, Sec'y of Com., re: CV Profit and Selling Expenses Comments and Information at Ex. CV-1 (Aug 17, 2020), P.R. 143–144. Defendant-Intervenors submitted the financial statements of Emirates Sleep Systems Private Limited ("Emirates"). *See* Letter from Mattress Pet'rs to W. Ross, Sec'y of Com., re: Mattress Petitioners' Submission Concerning CV Profit and Selling Expenses at attach. 2 (Aug. 17, 2020), P.R. 142 ("Emirates Fin. Stmts.").

In September 2020, Commerce issued a supplemental questionnaire requesting a schedule reporting all of Best Mattresses' POI affiliated material purchases and comparable unaffiliated purchases, including (1) data on affiliated suppliers' sales of the same input to unaffiliated customers and (2) the "POI per-unit average input value" of each input into Cambodia, as well as for Romania, Russia, Malaysia, Turkey, Mexico, and Brazil. Letter from M. Martin to Best Mattresses Int'l Co., re: Antidumping Duty Investigation of Mattresses from Cambodia at 4 (Dep't Com. Sept. 1, 2020), P.R. 156, C.R. 137; Letter from M. Martin to Rose Lion Furniture Int'l Co., re: Antidumping Duty Investigation of Mattresses from Cambodia at 4 (Dep't Com. Sept. 1, 2020), P.R. 157, C.R. 138 (together, "Sec. D Supp. Qs."). Notably, Commerce did not ask Plaintiffs to submit the affiliated suppliers' actual COP data.

Plaintiffs responded that Commerce's first request was inapplicable because Plaintiffs' "affiliated suppliers . . . did not have sales of the same input to unaffiliated customers in the market under consideration during the POI." Letter from Best Mattresses to W. Ross, Sec'y of Com., re: Third Supplemental Questionnaire Response at SD-3 (Sept. 22, 2020), P.R. 169–188, C.R. 139– 179; Letter from Rose Lion to W. Ross, Sec'y of Com., re: Third Supplemental Questionnaire Response at SD-3 (Sept. 22, 2020), P.R. 189–208, C.R. 180–223 (together, "Third Supp. Q. Resps."). To satisfy the second request, Plaintiffs submitted data, published by Global Trade Atlas ("GTA"),[3] of all POI per-unit average import values for Romania, Russia, Malaysia, Turkey, Mexico, and Brazil; but because Cambodia does not report data to the GTA, Plaintiffs provided "mirror data" sourced from Trademap, another trade database.[4] *See* Third Supp. Q. Resps. at SD 3 to -4. In response, Defendant-Intervenors submitted mirror data from GTA, not Trademap, to show that the two datasets, both of which ostensibly constructed the same value of imports into Cambodia, were different and therefore unreliable. *See* Third Supp. Q. Rebuttal at attach. 4.

In November 2020, Commerce published its affirmative preliminary determination. *See Mattresses from Cambodia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 69,694 (Dep't Com. Nov. 3, 2020), P.R. 244 ("*Preliminary Determination*"). Commerce calculated a preliminary dumping margin of 252.74 percent for Best Mattresses. *See* PDM at 6. Because Best Mattresses presented no viable home market or third-country market, Commerce used constructed value as the basis for calculating normal value. *Id.* at 13.

In the PDM, Commerce "relied on the COP and CV data submitted" by Plaintiffs in the questionnaires but adjusted the data pursuant to the Transactions Disregarded and Major Input Rule. PDM at 13. As Plaintiffs purchased certain major inputs from affiliated parties located in an NME country, Commerce determined the COP for the affiliates pursuant to the Major Input Rule in 19 U.S.C. § 1677b(f)(3). *See* Mem. from S. Medillo to N. Halper, re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination at 2 (Dep't Com. Oct. 27, 2020), P.R. 242 ("Prelim. Cost

[3] Global Trade Atlas "is an online trade data system" that advertises that it "allows users to view world trade flows for products of interest using the latest import/export data from the official sources of more than 70 Countries." *Global Trade Atlas*, Glob. Trade Info. Servs., www.gtis.com/English/GTIS_GTA.html (last visited Feb. 17, 2023).

[4] Trademap data, maintained by the International Trade Centre of the World Trade Organization and United Nations Conference on Trade and Development, is "mainly based" on trade data reported to UN Comtrade; the trade data of "countries that do not report their national trade statistics to UN Comtrade" is "reconstructed on the basis of data reported by partner countries." Letter from Mattress Pet'rs to W. Ross, Sec'y of Com., re: Mattress Petitioners' Submission of Rebuttal Factual Information Concerning Respondents' Third Supplemental Questionnaire Responses at attach. 1 (Oct. 2, 2020), P.R. 219–220 ("Third Supp. Q. Rebuttal"). The resulting data is called "mirror data," which "is better than no data at all but . . . has a number of shortcomings." *Id.* at attach. 2.

Mem."). Specifically, in the absence of affiliates' COP, Commerce derived surrogate COP amounts by the Harmonized Tariff Schedule ("HTS") number of specific inputs using GTA import data into Brazil, excluding imports from NMEs and subsidized countries. Prelim. Cost Mem. at 2. Commerce explained that it chose Brazil as the surrogate country "because Brazil provides coverage for all of the relevant HTS classifications, Brazil is the fourth largest mattress market in the world, and the Brazilian market is supplied almost entirely by domestic raw materials producers." *Id.*[5]

Commerce also compared affiliated party purchase prices for minor inputs to a market price pursuant to the Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2). *See* Prelim. Cost Mem. at 2. Where a market price based on unaffiliated party purchases was unavailable, Commerce determined a market price using the average of GTA data for six countries (i.e., Brazil, Malaysia, Mexico, Romania, Russia, and Turkey), excluding imports from NMEs and subsidized countries. *Id.* Commerce explained that it used the GTA average instead of the Trademap data submitted by Plaintiffs because there was little import data left for calculation purposes after excluding NME countries in the Trademap data. *Id.*

For depreciation costs associated with the purchase of various fixed assets from NME affiliated parties for which a market price was unavailable, Commerce adjusted the costs based on the adjustment it determined for the minor input purchases from the same affiliate. *See id.* To construct Plaintiffs' profit and selling expense ratios, Commerce used financial statements from Emirates, the Indian mattress company whose statements were submitted by Defendant-Intervenors. *See* PDM at 14; Prelim. Cost Mem. at 3.

In its Preliminary Determination, Commerce conducted a differential pricing analysis and found that 62.51 percent of the value of Plaintiffs' sales passed the Cohen's *d* test. PDM at 10; *see also* Mem. from P.N. Cox, re: Amended Final Determination Analysis Memorandum at 3 (Dep't Com. Apr. 19, 2021), P.R. 316 ("Am. Final Determination Mem."). In applying the "ratio test," Commerce found that the value of sales to purchasers, regions, and time periods that passed the Cohen's *d* test accounted for more than 33 percent and less than 66 percent of the value of total sales, which supported its application of the hybrid A-to-A and A-to-T approach to calculate the dumping

[5] While it is not at issue in the current proceeding, Commerce also determined that there was insufficient evidence to warrant investigation for a "particular market situation." *See* PDM at 16; *see also* 19 U.S.C. § 1677(15)(C) (allowing Commerce to consider sales and transactions to be "outside the ordinary course of trade" when a "particular market situation prevents a proper comparison with the export price or constructed export price").

margin. PDM at 10. But Commerce determined that there was no meaningful difference between using the A-to-A method and a hybrid method, *see supra* pp. 11–12, and therefore used the default A-to-A method to calculate the dumping margin. PDM at 10.

On January 19, 2021, Plaintiffs filed a case brief challenging Commerce's Preliminary Determination on various grounds, and on February 1, 2021, Defendant-Intervenors filed a rebuttal brief. *See* Case Brief (Jan. 19, 2021), P.R. 288, C.R. 271 ("Pls.' Case Br."); Rebuttal Brief (Feb. 1, 2021), P.R. 292, C.R. 272. Plaintiffs challenged Commerce's application of the Transactions Disregarded and Major Input Rules, calculation of fixed asset depreciation, and use of Emirates' financial statements instead of the GTI statements submitted by Plaintiffs. *See generally* Pls.' Case Br.

On March 25, 2021, Commerce issued its affirmative final decision with a final estimated dumping margin of 45.34 percent. *See Unamended Final Determination*, 86 Fed. Reg. at 15,895– 96. Commerce continued to use the financial statements of Emirates to determine constructed value profit, citing its prior determination in *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 Fed. Reg. 49,349 (Dep't Com. Sept. 27, 2001), for the relevant criteria informing its choice of surrogate data. *See* IDM at 15–22. But Commerce revised other decisions from the Preliminary Determination. *See id.* at 8–13. These revisions included adjustments to the application of the Major Input and Transaction Disregarded Rules for transactions with affiliated suppliers located in NME countries. In the Final Determination, to determine the COP when applying the Major Input Rule, Commerce relied on the six-country GTA data average rather than the Brazilian GTA data alone as it did in the Preliminary Determination. *See id.* at 10–11. In addition, unlike the Preliminary Determination, Commerce did not exclude imports from NMEs or subsidized countries. *Id.* at 11. Commerce also explained that it was unable to rely on affiliated suppliers' reported COP because the suppliers were based in NMEs, and thus "sought to obtain surrogate information." *Id.* at 9. Commerce further considered it reasonable to rely on imports into countries that are economically comparable to the country of the affiliated NME suppliers but caveated that it was not employing an NME factors of production methodology.[6] *Id.* at 10–11. Commerce also decided to include Romanian GTA data, determining that it was not aberrational, and

[6] 19 U.S.C. § 1677b(c) provides the methodology for investigations on subject merchandise exported from NME countries and requires Commerce to "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise."

exclude Mexican GTA data, determining that no universal conversion factor existed to convert the data from kilograms to the required unit of measurement. *See id.* at 11; Mem. from S. Medillo to N. Halper, re: Cost of Production and Constructed Value Calculation Adjustments for the Final Determination at attachs. 1E, 1F4 (Dep't Com. Mar. 18, 2021), P.R. 307, C.R. 276 ("Final Cost Mem.").

Commerce also noted that to determine a market price for purchases of minor inputs from affiliated suppliers pursuant to the Transactions Disregarded Rule, it relied on Cambodian Trademap data rather than the six-country average of GTA data as it did in its Preliminary Determination. *See id.* at 10. Commerce explained that "the statute indicates that the item being tested should reflect a market price in the country under consideration, which is Cambodia in this case. Accordingly, we have reevaluated our preliminary determination . . . and now find that the Cambodian Trademap data best reflect fair market prices for the market under consideration." IDM at 10. It further observed that "the Trademap data for Cambodia is robust, includes prices for all the necessary affiliated inputs and, while it is aggregated differently from GTA, there is no evidence that it is faulty or inaccurate." *Id.* Commerce also applied a transactions disregarded adjustment to account for expenses associated with the depreciation of fixed assets purchased from affiliated suppliers but modified the adjustment in the Final Determination. *See id.* at 12. Specifically, Commerce calculated the percentage difference between the transfer price and constructed market price for minor inputs from affiliated suppliers, then applied the percentage difference to depreciation costs of fixed assets purchased from that same affiliate supplier. *See id.*

Plaintiffs did not challenge the differential pricing analysis findings in its case brief after the PDM, and Commerce continued to use the A-to-A method in its Final Determination and Amended Final Determination. *See* Pls.' Case Br.; Mem. from P. Cox & J. McGowan, re: Final Determination Analysis Memorandum at 2 (Dep't Com. Mar. 18, 2021), P.R. 304; Am. Final Determination Mem. at 2. In the Amended Final Determination Memorandum, Commerce found that, as reported in the Preliminary Determination, 62.51 percent of the value of U.S. sales pass the Cohen's *d* test, "confirm[ing] the existence of a pattern of prices that differ significantly among purchases, regions, or time periods." Am. Final Determination Mem. at 3. It then found that the weighted-average dumping margin produced by the three methodologies were 52.41 percent using the A-to-A method, 52.42 percent using the hybrid method that incorporates both the A-to-A and A-to-T methods, and 52.50 percent using the A-to-T method. *See id.* at 2. Commerce concluded there was no meaningful difference between the weighted average dumping margins calculated using the A-to-A method and alternative methods and applied the A-to-A method for all of Plaintiffs' U.S. sales, *see supra* pp. 11–12, resulting in a final amended dumping margin of 52.41 percent, *see* Am. Final Determination Mem. at 3.

Following the correction of certain ministerial errors, *see* Am. Final Determination Mem. at 2, Commerce published the antidumping duty order and the final amended estimated dumping margin of 52.41 percent. *See Final Determination*, 86 Fed. Reg. at 26,460.

III. Procedural History

Plaintiffs and Defendant-Intervenors timely filed complaints challenging Commerce's Final Determination on July 9, 2021, and July 12, 2021, respectively. *See* Compl., July. 9, 2021, ECF No. 9; Compl., *Brooklyn Bedding, LLC v. United States*, No. 21-cv-00282 (CIT July 12, 2021), ECF No. 13. The cases were consolidated under case number 21-cv-00281 on September 21, 2021. *See* Order, Sept. 21, 2021, ECF No. 30. On December 9, 2021, Plaintiffs filed the instant Motion for Judgment on the Agency Record pursuant to USCIT Rule 56.2. *See* Pls.' Mem. in Supp. of Mot. for J. upon Agency R., Dec. 9, 2021, ECF No. 43 ("Pls.' Br."). Defendant-Intervenors filed their Motion for Judgment on the Agency Record pursuant to USCIT Rule 56.2 on the same day. *See* Def.-Inters.' Mem. in Supp. of Mot. for J. on Agency R., Dec. 9, 2021, ECF No. 45 ("Def.-Inters.' Br."). On March 11, 2022, Defendant filed its response to Plaintiffs' and Defendant-Intervenors' motions and moved to dismiss part of Plaintiffs' Complaint for lack of standing. *See* Def.'s Mot. to Partially Dismiss and Resp. to Pls.' Mot. for J. on Agency R., Mar. 11, 2022, ECF No. 54 ("Def.'s Br."). Plaintiffs and Defendant-Intervenors filed response briefs to one another's Rule 56.2 motions, *see* Pls.' Resp. to Def.-Inters.' Rule 56.2 Mot. for J. on Agency R., Mar. 11, 2022, ECF No. 57 ("Pls.' Resp. Br."); Def.-Inters.' Resp. Br. in Opp. to Pls.' Rule 56.2 Mot. for J. on Agency R., Mar 14, 2022, ECF No. 59, and replies in support of their motions for judgment on the agency record, *see* Pls.' Reply, Apr. 22, 2022, ECF No. 65; Def.-Inters.' Reply, Apr. 22, 2022, ECF No. 63.

The court scheduled oral argument for July 19, 2022, *see* Order, May 13, 2022, ECF No. 68. The court issued questions in advance of argument, *see* Ct.'s Qs. for Oral Arg., July 5, 2022, ECF No. 72, to which the parties filed responses, *see* Pls.' Resp. to Ct.'s Oral Arg. Qs. ("Pls.' OAQ Resp."), July 15, 2022, ECF No. 75; Def.'s Resp. to Ct.'s Oral Arg. Qs., July 15, 2022, ECF No. 73 ("Def.'s OAQ Resp."); Def.-

Inters.' Resp. to Ct.'s Oral Arg. Qs., July 15, 2022, ECF No. 77. The court invited parties to file submissions after oral argument on July 19, 2022, *see* Oral Arg., July 19, 2022, ECF No. 80, and on July 26, 2022, all parties made such submissions, *see* Pls.' Post-Arg. Subm., July 26, 2022, ECF No. 84; Def.'s Post-Arg. Subm., July 26, 2022, ECF No. 85; Def.-Inters.' Post-Arg. Subm., July 26, 2022, ECF No. 82. The court issued additional questions for the parties, *see* Ct.'s Supp. Qs., Oct. 14, 2022, ECF No. 89, to which all parties filed responses, *see* Pls.' Resp. to Ct.'s Supp. Qs., Oct. 28, 2022, ECF No. 93; Def.'s Resp. to Ct.'s Supp. Qs., Oct. 28, 2022, ECF No. 90; Def.-Inters.' Resp. to Ct.'s Supp. Qs., Oct. 28, 2022, ECF No. 92.

JURISDICTION

Plaintiffs bear the burden of establishing jurisdiction. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). The complaint alleges subject matter jurisdiction under 28 U.S.C. § 1581(c), which grants to the Court of International Trade "exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." 28 U.S.C. § 1581(c); *see also* 19 U.S.C. § 1516a(a)(2). But the outer bounds of federal jurisdiction are defined in Article III of the U.S. Constitution, which limits the judicial power to "actual cases or controversies" and similarly must be satisfied by the party invoking the court's authority. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (internal quotation marks omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

The Government challenges Plaintiffs' standing to bring Count VI of the Complaint, which alleges that "Commerce's finding that Plaintiffs' U.S. sales exhibited an existence of a pattern of prices that differed significantly among purchasers, regions, or time periods, using the Cohen's *d* test, was unreasonable, not supported by substantial evidence, and otherwise not in accordance with law." Compl. ¶ 40. A plaintiff seeking to establish standing must meet three elements: (1) an "injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Furthermore, it is a founding principle that federal courts issue dispositive, not advisory, opinions. *See Camreta v. Greene*, 563 U.S. 692, 717 (2011).

Plaintiffs have failed to establish injury-in-fact. The Government argues that Plaintiffs lack standing because any difference in Commerce's methodology would not have materially impacted the result of the dumping margin. Def.'s Br. at 46–47. Indeed, Commerce explained that although "62.51 percent of the value of Best Mattresses[] U.S. sales pass the Cohen's *d* test and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods," "there is *no meaningful difference* between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative comparison method . . . ." PDM at 10 (emphasis added). Plaintiffs also concede that "the application of the Cohen's *d* test did not result in a change in Best Mattresses' margin," Pls.' OAQ Resp. at 23, and they do not request a method different from the average-to-average calculation method that Commerce ultimately applied, *id.* at 24. "[A]n injury in fact must be both concrete *and* particularized," and importantly for this case, "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo*, 578 U.S. at 341 (emphasis in original). Because Commerce ultimately applied the method of calculation that Plaintiffs requested, and Commerce's use of the Cohen's *d* test is not dispositive to the final dumping margin, the alleged harm of a potentially misapplied Cohen's *d* test amounts to a "bare procedural violation" and does not "entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 341, 343; *see also, e.g.*, *Royal Thai Gov't v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1330, 1333 (2014) (reasoning that typically, "when a respondent challenges an administrative proceeding in which it has prevailed there is no case or controversy, and thus no jurisdiction lies."). Put simply, Plaintiffs' injury is too "divorced from any concrete harm" to establish Article III standing. *Spokeo*, 578 U.S. at 341.

Plaintiffs nonetheless urge the court to find error in Commerce's application of the Cohen's *d* test in "the interests of judicial economy . . . to avoid unnecessary repetition and duplicative efforts" when this court reviews Commerce's redetermination after remand. Pls.' Reply at 26. Relying on *Stupp Corp. v. United States*, where the Federal Circuit remanded Commerce's application of the Cohen's *d* test "to explain whether the limits on the use of the Cohen's *d* test . . . were satisfied in this case," 5 F.4th at 1360, Plaintiffs allege that "Commerce failed to explain whether the sales data conformed with the underlying assumptions necessary for the Cohen's *d* test," including in particular, "whether the test and comparison groups were normally distributed, equally variable, and equally numerous." Pls.' Br. at 55. Plaintiffs also suggest that Commerce did not sufficiently explain its usage of a simple-average standard deviation, rather than weighted-average or population standard deviation, in the Cohen's *d* calculation. *See Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1381 (Fed. Cir. 2022) (concluding that Commerce failed to sufficiently justify its use of a simple-average standard deviation).

But Plaintiffs' prudential concerns about repetitive briefing at a later stage cannot justify an extension of judicial power beyond Article III's mandatory limits. "[A] federal court does not have the 'power to render an advisory opinion on a question simply because [it] may have to face the same question in the future.'" *Verson v. United States*, 22 CIT 151, 153–54, 5 F. Supp. 2d 963, 966 (1998) (quoting *NLRB v. Globe Sec. Servs., Inc.*, 548 F.2d 1115, 1118 (3rd Cir. 1977)). If the court were to rule for Plaintiffs now, and if the Cohen's *d* test is once again immaterial to the final dumping margin on remand, then the court will have opined on a hypothetical legal matter outside the live controversy of this case. And while it may be that "there are possible remand recalculations in which Commerce would otherwise use the average-to-transaction methodology overturned in *Stupp*, resulting in an unlawful dumping margin calculation," Pls.' OAQ Resp. at 23, Plaintiffs "will still have a right to challenge that redetermination . . . during the course of any remand" if Commerce does not apply the A-to-A method to calculate dumping margins in its redetermination. *Royal Thai*, 38 CIT at __, 978 F. Supp. 2d at 1334. Ultimately, the relief that Plaintiffs seek exceeds what the Constitution permits. This court dismisses Count VI of the Complaint as nonjusticiable.

DISCUSSION

The court turns now to Plaintiffs' and Defendant-Intervenors' surviving claims. The Court of International Trade sustains Commerce's antidumping determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Support from substantial evidence is satisfied by "less than the weight of evidence but more than a mere scintilla of evidence." *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1355 (Fed. Cir. 2018) (internal quotation marks omitted) (quoting *In re Nuvasive, Inc.*, 842 F.3d 1376, 1379 (Fed. Cir. 2016)). Substantial evidence must account for "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985

(Fed. Cir. 1994) (internal quotation marks omitted) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Commerce "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The agency is not required to address every piece of evidence submitted by the parties, and Commerce is presumed to have considered all the evidence in the record absent a showing to the contrary. *See Nucor Corp. v. United States*, 28 CIT 188, 233, 318 F. Supp. 3d 1207, 1247 (2004), *aff'd,* 414 F.3d 1331 (Fed. Cir. 2005). But Commerce must respond to arguments made by interested parties that bear on issues material to its determinations. *See Itochu Bldg. Prods., Co. v. United States*, 40 CIT __, __, 163 F. Supp 3d 1330, 1337 (2016).

To determine whether Commerce's interpretation of a statute "is in accordance with the law," 19 U.S.C. § 1516a(b)(1)(B)(i), the court applies the two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court first inquires "whether Congress has directly spoken to the precise question at issue. [I]f the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43 (footnote omitted). The court uses "traditional tools of statutory construction," beginning with the plain meaning of the text, to determine the intent of Congress with respect to a particular statutory provision. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (internal quotation marks omitted) (quoting *Chevron*, 467 U.S. at 843 n.9). The court may also consider "the statute's structure, canons of statutory construction, and legislative history" if the text itself does not clearly indicate Congress's aim. *Id.* But if Congressional intent is ultimately unclear, the second question for the court is "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "Commerce is the 'master of antidumping law' and has technical expertise in the 'complex economic and accounting decisions' required in administering the statutory scheme." *Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1361 (Fed. Cir. 2022) (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 764 (Fed. Cir. 2012)). The court "therefore defers to its interpretation of the statute when implementing its antidumping duty methodology unless it is 'arbitrary, capricious, or manifestly contrary to statute,'" *id.* (quoting *PSC VSMPO-Avisma Corp.*, 688 F.3d at 764).

I. Commerce's Determination of the Cost of Production in its Application of the Major Input Rule Is Supported by Substantial Evidence and in Accordance with Law

Plaintiffs first allege that "use of surrogate country data from six countries to value the COP of Plaintiffs' major inputs in this market economy investigation rather than Plaintiffs' own reported prices or, alternatively, market price data from Cambodia is unsupported by substantial evidence and otherwise not in accordance with law." Compl. ¶ 30. As has been noted, the Major Input Rule, codified in the U.S. Code, provides:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(f)(3). Under the Major Input Rule, Commerce "normally" will determine the value of a major input purchased from an affiliated person based on the higher of:

> (1) The price paid by the exporter or producer to the affiliated person for the major input;
>
> (2) The amount usually reflected in sales of the major input in the market under consideration; or
>
> (3) The cost to the affiliated person of producing the major input.

19 C.F.R. § 351.407(b); *see also NTN Bearing Corp.*, 368 F.3d at 1375 (affirming Commerce's authority to administer this statutory scheme pursuant to 19 U.S.C. § 1677(1)).

Plaintiffs challenge two aspects of Commerce's administration of the Major Input Rule, both of which include subordinate arguments questioning the authority and reasonableness of agency action. Plaintiffs first argue that Commerce's use of surrogate data of third-party countries to calculate input COP was an unauthorized and unreasonable exercise of its authority under the Major Input Rule. *See* Pls.' Br. at 13–28. In the alternative, Plaintiffs argue that Commerce's decisions to include and exclude subsets of data from the input COP calculations were unreasonable. *See* Pls.' Br. at 28–35. The court, addressing each objection in turn, sustains Commerce's use and calculation of surrogate data pursuant to the Major Input Rule.

A. Commerce's Use of Surrogate Data Is in Accordance with Law and Supported by Substantial Evidence

Specifically, Plaintiffs argue that Commerce exceeded its statutory authority conferred by 19 U.S.C. § 1677b(f)(3). Per Plaintiffs, the statute only "allows Commerce to determine the major input value based on information available" and "does not allow Commerce to determine the COP based on information available." Pls.' Reply at 5. Nothing in the Tariff Act or Commerce's implementing regulation, they maintain, gives Commerce the authority to use third-country surrogate value data to construct the input COP as it did in the Final Determination. Pls.' Br. at 14. Plaintiffs further argue that neither 19 U.S.C. § 1677b(f)(3) nor 19 C.F.R. § 351.407(b) expressly require Commerce to use COP in determining the value of a major input, and that its gap-filling authority is limited to where necessary information is not available on the record. Pls.' Br. at 15; Pls.' Reply at 7. They moreover allege that Commerce failed to meet the statutory requirement that it have "reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of product of such input." 19 U.S.C. § 1677b(f)(3); Pls.' Reply at 3. To be clear, Plaintiffs do not contest Commerce's decision not to request actual COP data from its suppliers. *See supra* pp. 13–14. They instead challenge the agency's use of third-country surrogate data to estimate the suppliers' COP in light of the fact that there was no actual COP data on the record. Pls.' Br. at 17.

Plaintiffs also argue that even if the statute is ambiguous with respect to Commerce's authority to use surrogate values, Commerce acted unreasonably by choosing data that do not accurately reflect of inputs' fair values. Pls.' Br. at 17–18 (citing *Chevron*, 467 U.S. 837). Plaintiffs specifically contend that the data chosen does not have a reasonable connection to the inputs used by Plaintiffs and are distortive due to their inclusion of sellers' profits. *Id.* (citing *SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1359 (Fed. Cir. 2020); *NTN Bearing Corp. v.* United States, 14 CIT 623, 642, 747 F. Supp 726, 743 (1990)). Plaintiffs argue further that Commerce's use of GTA import data constituted unauthorized reliance on 19 U.S.C. § 1677b(c), which only applies to NME proceedings and is thus inapplicable to Cambodia as a market economy. Pls.' Br. at 20. Finally, Plaintiffs assert that Commerce violated the Administrative Procedure Act by engaging in rulemaking with respect to the use of the NME surrogate value methodology within the Major Input Rule without proper notice and comment procedures. *Id.* at 26.

The first issue before the court is whether Commerce was permitted by statute and supported by substantial evidence in using the GTA average data to determine the value of the major inputs by constructing the COP as provided in 19 U.S.C. § 1677b(f)(3) and 19 C.F.R. § 351.407(b)(3). This issue has three component questions, which the following subsections address in turn: (1) whether Commerce met the condition precedent to apply the Major Input Rule; (2) whether Commerce's usage of GTA average data to construct COP is in accordance with law and supported by substantial evidence; and (3) whether Commerce used and was statutorily bound by the NME methodology in 19 U.S.C. § 1677b(c).

1. Commerce's Use of GTA Information to Establish the Condition Precedent Is in Accordance with Law and Supported by Substantial Evidence

As a threshold matter, the court must determine whether Commerce complied with the condition precedent in 19 U.S.C. § 1677b(f)(3). Commerce may rely on constructed COP to value major inputs only if it has "reasonable grounds to believe or suspect that an amount represented as the value of [an] input is less than the cost of production of such input." 19 U.S.C. § 1677b(f)(3); *see also, e.g.*, *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 835–36, 77 F. Supp. 2d 1302, 1310–11 (1999) ("By its plain language, the requirement that Commerce have 'reasonable grounds to believe or suspect' a below-cost sale serves as a condition precedent to Commerce's use of an affiliated party's cost-of-production."). Commerce argues that it had reasonable grounds because the "the Global Trade Atlas (GTA) information on the record that Commerce used to determine the cost of production showed that the value of the affiliate-supplied input was below the cost of production." Def.'s OAQ Resp. at 4. Plaintiffs insist that "[t]here is no information from which Commerce can reasonably assess if the value of the input is less than the input COP," Pls.' Reply at 3,[7] and challenge Commerce's reliance on the GTA information, which was "third-party data" that Commerce requested instead of requesting COP input data from Best Mattresses

[7] Plaintiffs' challenge to Commerce's satisfaction of the condition precedent appears to be first squarely raised in their Reply. *See* Pls.' Reply at 2–3. While the court is not obligated to consider arguments not raised in Plaintiffs' opening brief, *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002), the Government did not argue that the argument was waived and addressed it in subsequent briefing. Def.'s OAQ Resp. at 3–4. The court "exercise[s] [its] discretion to nonetheless consider the issue." *Veterans4You LLC v. United States*, 985 F.3d 850, 857–58 (Fed. Cir. 2021).

and "was completely unrelated to 'information available regarding such cost of production.'" Pls.' Resp. to Ct.'s Supp. Qs. at 3 (quoting 19 U.S.C. § 1677b(f)(3)).

Commerce's approach is in accordance with law. The condition precedent is precedent only to Commerce's determination of the major input's value, not to Commerce's ability to solicit or consider information regarding COP. *See* 19 U.S.C. § 1677b(f)(3) ("If . . . [Commerce] has reasonable grounds . . . , then the administering authority may *determine* the value of the major input . . . ." (emphasis added)); *see also* 19 C.F.R. § 351.301(a) ("[Commerce] may request any person to submit factual information at any time during a proceeding . . . ."); *id.* § 351.301(c)(4) ("[C]ommerce may place factual information on the record of the proceeding at any time."). Insofar as Plaintiffs suggest that Commerce may not use third-party information to establish reasonable grounds, *see* Pls.' Resp. to Ct.'s Supp. Qs. at 3, the statute contains no such restriction. *See also infra* pp. 33–34. There is similarly no restriction against Commerce's use of the GTA information on the record both to satisfy the condition precedent and to constitute the "information available regarding such cost of production" under 19 U.S.C. § 1677b(f)(3). In fact, the statute requires Commerce to "request information necessary to calculate the constructed value and cost of production under subsections (e) and (f)," 19 U.S.C. § 1677b(b)(2)(A)(ii), which is a requirement to test affiliated transactions, "both minor and major, . . . to insure they were at arm'[s] length prices, which for major inputs requires they are above the cost of the affiliated supplier." IDM at 12. Of course, Commerce's use of the GTA data must still be reasonable under the substantial evidence standard. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). But to hold for Plaintiffs as a matter of law would constitute judicial line-drawing among the information available on Commerce's record that is unmoored in either the statutory language or agency interpretation.

Substantial evidence also supported Commerce's use of GTA data to establish "reasonable grounds" under 19 U.S.C. § 1677b(f)(3). Plaintiffs allege that Commerce's finding of "reasonable grounds" was unreasonable because the GTA data "was completely unrelated to 'information available regarding such cost of production,'" Pls.' Resp. to Ct.'s Supp. Qs. at 3 (quoting 19 U.S.C. § 1677b(f)(3)), which is Plaintiffs' same argument to challenge Commerce's use of the GTA data to calculate the input COP. For the same reasons below that justified Commerce's use of GTA data, *see infra* pp. 37–40, and because Commerce's use of GTA data is in accordance with law, the court affirms Commerce's finding of "reasonable grounds."

2. Commerce's Construction of the Input COP Using Third-Country Surrogate Data Is in Accordance with Law and Supported by Substantial Evidence

The court must next determine whether Commerce's interpretation of 19 U.S.C. § 1677b(f)(3) to permit construction of Best Mattresses' suppliers' COP using third-country data is in accordance with law and supported by substantial evidence. Plaintiffs first argue that "Congress acted outside of the bounds of the Act . . . . Congress conferred authority on Commerce to calculate normal value under 19 U.S.C. § 1677b in a very specific manner, including detailed provisions for how Commerce may use CV for *market economy* determinations under 19 U.S.C. § 1677b(e) and how Commerce may determine normal value in *NME* determinations under 19 U.S.C. § 1677b(c) by using surrogate value data." Pls.' Br. at 12 (emphasis in original). This statutory scheme, Plaintiffs maintain, does not allow Commerce to "alter its normal value calculation methodology in a market economy case when the mandatory respondent purchases inputs from affiliates located in NME countries." *Id.*

Under *Chevron* step one, the Major Input Rule leaves open the question of whether Commerce may determine the COP using third-party data despite the lack of actual COP data from an NME-affiliated supplier. Plaintiffs argue that because the plain text "allows Commerce to determine the major input value based on information available," Congress "drew a line in the sand as to how many layers of construction Commerce may use in determining normal value," and the statute "does not allow Commerce to determine the COP based on information available." Pls.' Reply at 5; *see also* 19 U.S.C. § 1677b(f)(3) ("[Commerce] may determine the value of the major input on the basis of the information available regarding such cost of production . . . ."). Put differently, Plaintiffs stress that the object of "determine" is "the value of the major input," not "cost of production." But such a restrictive read of the Major Input Rule is in tension with the statute's reference to "the information available," which leaves the reasonable selection of relevant information to Commerce's discretion. Moreover, the force of negative inferences by reading one statutory provision to the exclusion of another is "especially feeble . . . in the administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Waterkeeper All. v. Env't Prot. Agency*, 853 F.3d 527, 534 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting *Cheney*

R. Co. v. I.C.C., 902 F.2d 66, 69 (D.C. Cir. 1990)); *see also Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1353 n.9 (Fed. Cir. 2021) (noting the appellant's argument that "courts have been hesitant to rely on that canon in the administrative law context" and citing *Cheney Railroad Co.*, but not applying the rule because the negative implication was based on the fact that Congress had amended one provision and not another). Nothing in the plain text prevents Commerce from constructing the COP from third-party data, so long as its use of the third-party data is reasonable.

Legislative history reveals Congressional intent to leave COP calculations to Commerce's broad discretion. In the absence of text that "directly resolve[s]" the question, the court looks to the legislative history of the Major Input Rule. The conference report for the Major Input Rule states:

> Commerce may base the value of [an] input on the *best evidence available as to its costs of production* when such costs are greater than the [market price]. . . . If the related party seller does not provide reliable data on its costs of production, and Commerce has reasonable grounds to believe or suspect that the transfer price and also the arms-length price would be less than the costs of production, then Commerce should use *best information* to establish a *reasonable estimate of the related party's costs of production* for such input.

H.R. Rep. No. 100–576, at 595 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1628 (emphasis added). Congress's statement that Commerce may use "best information" to determine a "*reasonable estimate*" not only grants the agency wide discretion in determining the "best evidence available as to . . . costs of production," but also suggests —; in its use of the word "estimate" — that Commerce may look beyond the affiliated supplier's COP as reported by the respondent, but only if reasonable to do so. *See also Viraj Grp. v. United States*, 476 F.3d 1349, 1356 (Fed. Cir. 2007) ("[The] Major Input Rule . . . provides Commerce discretion in valuing one company's production input, when the company receives that input from an affiliated company."). From this field of discretion, however, Plaintiffs attempt to carve out an exception; they argue that recently introduced Senate Bill S. 1187, which will "amend[] the law to specify that Commerce is authorized to disregard costs for inputs obtained from non-market economics," Eliminating Global Market Distortions to Protect Americans Jobs Act 2, https://www.brown.senate.gov/imo/media/doc/eliminating_global_market_distortions_to_protect_americans_jobs_act_section-by-section.pdf (last visited Feb. 17,

2023) ("S. 1187 Summary"), suggests that "the current law governing this investigation does not authorize Commerce to treat NME-sourced inputs differently." Pls.' Br. at 20 (citing Eliminating Global Market Distortions to Protect American Jobs Act of 2021, S. 1187, 117th Cong. § 205(a)(2) (1st Sess. 2021)). S. 1187 is not instructive here. As an initial matter, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (internal quotation marks omitted) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)), and "arguments predicated upon subsequent Congressional actions must be weighed with extreme care," *id.*, particularly when the post-enactment evidence is not a subsequent law but a subsequent legislative report that has not benefitted from the full legislative process. *See South Carolina v. Regan*, 465 U.S. 367, 380 n.17 (1984). Yet even with the Senate Bill's diminished persuasive force, it is still consistent with the Government and Defendant-Intervenors' position: it signals a Congressional intent to "disregard[] inputs produced by or acquired from non-market economies as being outside the ordinary course of trade" where the law currently commits that matter entirely to Commerce's discretion. S. 1187 § 205(a)(2); *see also* S. 1187 Summary at 3 ("[T]he [current] statute gives little guidance as to what types of costs should be considered not reasonably reflective of market costs of production."). Congress has not clearly spoken on the issue of whether Commerce may determine the COP using third-party data instead of actual data from the NME-based affiliated suppliers, leaving the question to Commerce's reasonable discretion.

Under *Chevron* step two, Commerce's construction of the Major Input Rule to allow the determination of input COP using surrogate data despite the lack of actual data from an NME-affiliated supplier was reasonable. "Deference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993)). Plaintiffs argue that Commerce, lacking input COP information, could have alternatively compared only two of the three benchmark prices under 19 C.F.R. § 351.407(b): transfer price and market price. *See* Pls.' Br. at 17; *see also U.S. Steel Corp. v. United States*, 36 CIT 613, 616, 844 F. Supp. 2d 1334, 1337 (2012) (affirming an uncontested remand redetermination that acknowledged Commerce's practice of not requiring COP data for an input when the respondent is unable to compel an affiliate and when no other information is available). But Plaintiffs' alternative begs the very question. It presumes that there was no information available regarding COP for Commerce to use, whereas Commerce's interpretation is that the GTA data *did* constitute information available. The agency's formal interpretation of the Major Input Rule, 19 C.F.R. § 351.407(b), is to compare all three values of transfer price, market price, and input COP on the basis of the information available. *See NTN Bearing Corp.*, 368 F.3d at 1376 (affirming Commerce's interpretation in 19 C.F.R. § 351.407(b)); *Huvis Corp. v. U.S.*, 32 CIT 845, 849 (2008), 2008 WL 2977890, *aff'd*, 570 F.3d 1347 (Fed. Cir. 2009) ("Commerce will compare *all three* values . . . ."). Commerce, therefore, "sought to obtain surrogate information that would allow it to fulfill the requirements of sections 773(f)(2) and (3) of the Act" and selected the GTA data as the "most readily available information to the parties for this purpose." IDM at 9. Commerce's interpretation is reasonable because it was consistent with, and acted in furtherance of, its obligations under 19 U.S.C. § 1677b(f)(3) and 19 C.F.R. § 351.407(b). *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) ("Because the agency employed a methodology similarly derived from the relevant statutory language, this court affords the appropriate deference due to Commerce."). And because Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous," *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009), its determination of the COP using third-party data warrants *Chevron* deference. Put simply, Commerce's decision to use surrogate data was reasonably sourced in its authority to determine the "information available regarding such cost of production." 19 U.S.C. § 1677b(f)(3).

Having established that Commerce's process is in accordance with law, the court now evaluates whether substantial evidence supported Commerce's decision to select six countries' GTA import data. Plaintiffs argue that Commerce's selected GTA import data from Brazil, Malaysia, Mexico, Romania, Russia, and Turkey bears "no relation to Best Mattresses's suppliers' production or actual mattress input production anywhere in the world," and that Commerce failed to explain how the selected data was adequate to estimate the COP of major inputs in the production of mattresses in Cambodia. Pls.' Br. at 17–18. Commerce explained:

> We determined that the most reasonably available information to the parties . . . is the Global Trade Atlas (GTA) data, as these data are readily available and reasonably specific to the voluminous number of affiliated NME inputs. Further, to narrow the request and given that the affiliated suppliers are from an NME

> country, Commerce determined that it was appropriate to solicit GTA data from countries economically similar to the affiliated suppliers' country. Thus, Commerce requested and obtained from the parties GTA data for the countries that are currently used by Commerce as potential surrogate sources for the particular NME country . . . .
>
> [Commerce] considers it reasonable in this case to rely on the imports into countries that are economically comparable to the country of the affiliated NME suppliers as the COP for those suppliers, as information reasonably available.

IDM at 9, 11. Plaintiffs nonetheless maintain that because the surrogate values for the COP of two major inputs — [[ ]] — were higher than the transfer price and market value, those surrogate values were plugged into the margin calculation and resulted in "calculating Best Mattresses' COP, in part, as if it were located in [[ ]]." Pls.' Br. at 18. They also contend that Commerce failed to find that the imports into the six selected countries under the same "broad HTS codes" as [[ ]] "had any reasonable connection to the inputs actually used by Best Mattresses in its production of mattresses in Cambodia" or to "mattress input production anywhere in the world." *Id.* at 16, 18. Plaintiffs further object to the use of GTA import data, arguing that import price data is higher than COP because it necessarily includes the profit to the seller. *See* Pls.' Br. at 18–19.

Substantial evidence supports Commerce's decision to use the GTA data from six countries to estimate affiliated suppliers' COP. First, because nearly [[ ]] percent of Best Mattresses's affiliated suppliers are based in [[ ]], Commerce reasonably decided to assign a surrogate value instead of relying on nonexistent COP data from an NME. *See* IDM at 9. The court is not aware of a case or administrative decision where Commerce has relied on NME-based affiliated suppliers' actual COP in applying the Major Input Rule, nor do Plaintiffs contest Commerce's decision not to request actual COP data from its suppliers. *See* Pls.' Br. at 17. Commerce has also noted that it "would generally not rely on cost of production information for a non-market economy producer, even if unaffiliated," because NMEs do "'not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.'" Def.'s OAQ Resp. at 3 (quoting 19 U.S.C. § 1677(18)(A)). And as established above, nothing in the Major Input Rule obligates Commerce to proceed with an empty input COP value — considering the high percentage of affiliated suppliers based in an

NME country, Commerce decision to calculate an estimate based on surrogate values was justified. Second, Plaintiffs' contention that using the surrogate values leads to an unsatisfactory result, as if Best Mattresses's was located in [[ ]], is little more than an observation about the statutory scheme — not a defect, but by design. As Commerce made clear, the six countries selected are the countries "currently used by Commerce as potential surrogate sources for" [[ ]]. IDM at 9. Had nearly [[ ]] percent of Best Mattresses's affiliated suppliers of its major inputs not been based in [[ ]], then use of the GTA data substantiating the input COP may not have been appropriate. Third, Best Mattresses's objections about "broad HTS codes" are similarly without merit, considering that Best Mattresses itself provided the HTS codes corresponding to its inputs. *See* Best Mattresses Supplemental Section D Response at Exhibit SD1–1.1 (Sept. 22, 2020), C.R. 141; Rose Lion Supplemental Section D Response at Exhibit SD1–1.1 (Sept. 22, 2020), C.R. 181; *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) ("QVD is in an awkward position to argue that Commerce abused its discretion by not relying on evidence that QVD itself failed to introduce into the record."). And finally, while Plaintiffs are correct that import price data would necessarily include profit, this court's inquiry is not whether Commerce correctly estimated the input COP, but whether Commerce's use of the "information available" was a reasonable estimate of input COP. *See* H.R. Conf. Rep. No. 100–576, at 595. Given the lack of other suitable information on the record, and considering the agency's "preference for the GTA database as a source of reliable data," *Heze Huayi Chemical Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1326 (2021), Commerce's use of import pricing to estimate input COP was reasonable. Commerce's construction of the input COP using the GTA trade data was, therefore, in accordance with law and supported by substantial evidence.

3. Commerce's Decision Not to Follow the Procedures for Employing an NME Surrogate Value Methodology Is in Accordance with Law

While the Tariff Act makes clear that the calculation of normal value pursuant to 19 U.S.C. § 1677b(c) applies only if "the subject merchandise is exported from a nonmarket economy country," 19 U.S.C. § 1677b(c)(1)(A), Best Mattresses reads that provision to mean that the Act "only allows [Commerce] to apply surrogate value methodology in an NME proceeding." Pls.' Br. at 20. Commerce, Plaintiffs argue, acted outside its authority in applying a surrogate value methodology to a market economy proceeding.

Commerce acted within its authority granted by the Major Input Rule, 19 U.S.C. § 1677b(f)(3). The agency neither formally invoked, nor functionally replicated, its NME surrogate value methodology in this case. Commerce was clear that it "decided not to apply an NME factors of production methodology analysis to inputs the respondent obtained from NME-based affiliated suppliers, because section 773(c) of the Act specifically applies to the issue of determining normal value for NME-based respondents," which Plaintiffs are not. IDM at 9. And in using an average of GTA data from six countries, Commerce significantly diverged from its codified preference to rely on only one surrogate country to value all inputs in NME proceedings. *See* 19 C.F.R. § 351.408(c)(2). Moreover, to the extent Plaintiffs argue that 19 U.S.C. § 1677b(c) impliedly limits the use of surrogate data to NME proceedings simply because those provisions reference surrogate data, that reading is overbroad. The better read of the statute is that the lack of indication in the plain text commits the matter to Commerce's discretion. *See Waterkeeper All.*, 853 F.3d at 534 (negative inferences derived from a statutory provision are "especially feeble . . . in the administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved" (internal quotation marks omitted) (quoting *Cheney R. Co.*, 902 F.2d at 69)). The source of that discretion, as discussed above, is Commerce's authorization to administer the Major Input Rule and to "value the major input on the basis of the information available regarding such cost of production," which may include reasonably selected surrogate data. 19 U.S.C. § 1677b(f)(3).

Because Commerce's use of surrogate data was an authorized and reasonable exercise of its authority pursuant to the Major Input Rule, Plaintiffs' alternative arguments — that Commerce failed to follow the proper surrogate value selection procedure under 19 C.F.R. § 351.408, and that Commerce violated the Administrative Procedure Act by engaging in improper rulemaking — are dismissed. *See also Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1320 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017) ("[T]he APA's notice and comment requirement applies to legislative rules and does not apply to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'" (quoting 5 U.S.C. § 553(b)(A)). Plaintiffs more broadly object that Commerce's "failure to provide parties with a full opportunity to submit factual information related to input COP was unsupported by substantial evidence because it restricted parties' opportunity to be heard and lead to an inaccurate dumping margin" and "it never once explained its surrogate selection framework nor requested information to build the record that would allow the agency to calculate a margin as accurately as possible." Pls.' Br. at 25–26. But all parties were afforded the opportunity to respond to data provided by, and comments made by, other parties; all parties were also "able to provide pre-preliminary comments" on the use of collected data and to comment on the Preliminary Determination throughout the briefing for the Final Determination. IDM at 10. These procedural guarantees satisfy Commerce's obligation to calculate input COP under the Major Input Rule "on a fair and equitable basis," *Koyo Seiko Co.*, 36 F.3d at 1573, and Plaintiffs do not identify any statute, rule, or case that would obligate Commerce to solicit even more information to properly administer the Major Input Rule. Because Commerce is not subject to the requirements for employing a surrogate value methodology in NME proceedings, and because Commerce's construction of the input COP is consistent with the Major Input Rule and justified on the record, Commerce's use of surrogate data is in accordance with law and supported by substantial evidence.

B. Commerce's Calculation of COP Is Supported by Substantial Evidence

The second issue before the court relating to Commerce's determination of input COP is whether Commerce's decisions to include or exclude GTA data in its calculations were supported by substantial evidence. Plaintiffs challenge two aspects of Commerce's final analysis. First, Plaintiffs argue that Commerce unreasonably included aberrational and distortive GTA data from Romania. *See* Pls.' Br. at 29–32. Second, Plaintiffs contend that Commerce's decision to exclude GTA data from Mexico due to different measurement units was unreasonable because the agency did not use the conversion factor on the record that Plaintiffs had themselves supplied. *See* Pls.' Br. at 32–35. Each calculation decision is reviewed for substantial evidence, including whether Commerce has adequately considered information from Plaintiffs that "fairly detracts from [the] weight" of the agency's decision. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). The court sustains Commerce's calculation method.

1. Commerce's Inclusion of Romanian Data Is Supported by Substantial Evidence

"Commerce has acknowledged that aberrational values should not be used." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1286, 1291 (2017). Data is aberrantly high when it is "many times higher than the import values from other countries." *SolarWorld Ams., Inc. v. United States*, 42 CIT __, __, 320 F. Supp. 3d 1341, 1351 (2018) (internal quotation marks and citation omitted). While there is no bright-line rule for what multiple of other price values would qualify as "aberrational," the court has previously affirmed the exclusion of "aberrational values" that were nearly 30 times higher than other values, *Calgon Carbon Corp. v. United States*, 44 CIT __, __, 443 F. Supp. 3d 1334, 1350 (2020), and 30 and 79 times higher than the average unit value, *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1260, 641 F. Supp. 2d 1362, 1367 (2009); *see also* Final Results of Redetermination at 5–6, *Catfish Farmers of Am.*, No. 08–00111 (CIT Dec. 10, 2009), ECF No. 100–1. Plaintiffs argue that Commerce's inclusion of Romanian GTA data when valuing the COP of [[ ]] was unsupported by substantial evidence because the Romanian GTA data was aberrational and "many times higher" than the rest of the data. Pls.' Br. at 29.

The record supports Commerce's determination that Romanian GTA data is not sufficiently aberrant to be excluded. The Romanian [[ ]] value is [[ ]] USD/kg, which is [[ ]] higher than the next highest value and [[ ]] higher than the lowest value. *See* Final Cost Mem. at attach. 1E. These multiples are a far cry from the values that courts have affirmed to be "aberrationally high." *See, e.g.*, *SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1361 (Fed. Cir. 2020) (inclusion of multiple of 191 times was remanded for reconsideration); *Jacobi Carbons AB v. United States*, 619 F. App'x 992, 1000 (Fed. Cir. 2015) (suggesting that multiples of 30 and 15 times are aberrational); *Calgon Carbon Corp.*, 443 F. Supp. 3d at 1350 (multiple of 30 times was aberrational); *Catfish Farmers of Am.*, 33 CIT at 1260, 641 F. Supp. 2d at 1367 (multiples of 30 and 79 were aberrational). Commerce explained that the fact that "some [price values] are higher than the average and some are lower" on the spectrum of price values "is no reason, in and of itself, to exclude any of the data" as aberrational. IDM at 11. The court agrees and affirms Commerce's reliance on the Romanian GTA data.[8]

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[8] Commerce's exclusion of Malaysian price data in calculating the [[ ]] COP is consistent with the court's holding. The Malaysian data was [[ ]] higher than the next highest value and [[ ]] higher than the lowest value, *see* Preliminary Cost Memorandum at Attachment 2C, C.R. 241, but both multiples appear sufficiently higher from the exclusion of the Romanian data so as not to be arbitrary. Although Commerce did not explain its conclusion that the Malaysian data was aberrational, "[a]n explicit explanation is not necessary . . . where the agency's decisional path is reasonably discernible," as it is here. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998).

2. Commerce's Exclusion of Mexican Data Is Supported by Substantial Evidence

Plaintiffs also argue that Commerce's decision to exclude Mexican GTA data in valuing Best Mattresses's [[ ]] input COP was unreasonable. Commerce stated that "[n]o data was submitted by both the Respondents and the Petitioners for Mexico that were expressed in kilograms. Therefore, we did not include its per unit cost in the average calculation." Final Cost Mem. at attach. 1E, n.1, C.R. 276. Plaintiffs contend that because they reported their own [[ ]] purchases quantities in both [[ ]] in their supplemental section D questionnaire response submission, Commerce could have constructed a [[ ]] ratio to convert the Mexican data into kilograms. *Id.* at 33.

The record justifies Commerce's exclusion of the Mexican GTA data. Data on the record supports the calculation of at least five different [[ ]] densities, which vary greatly. First, the densities of the [[ ]] purchased by Best Mattresses and Rose Lion are different between the two companies. *Id.*; *see also* Pls.' Br. at 33 (representing the two densities to be [[ ]]). Furthermore, Defendant-Intervenors demonstrated that the [[ ]] data, all three of which report units of measure of both [[ ]] and kilograms, result in varying densities. *See* Letter from Mattress Pet'rs to G. Raimondo, Sec'y of Com., re: Mattress Petitioners' Rebuttal to Respondents' Ministerial Error Allegation at 3 (Apr. 5, 2021), C.R. 284 (determining the range of densities to be [[ ]]). Commerce, reviewing the record, explained that because "[t]he density relied on by Best Mattresses/Rose Lion is different from that inherent in the data of other countries" and "there is no universal conversion factor to covert [[ ]] to kg," "[t]he conversion factor used by Best Mattresses/Rose Lion, which is based on their own records, cannot be applied to all other countries' GTA data." Mem. from J. McGowan to J. Maeder, re: Allegations of Ministerial Errors in Final Determination at 4 (Dep't Com. Apr. 19, 2021), P.R. 315, C.R. 285. Commerce's finding of no universal conversion value was not a result of "ignor[ing] convertor information on the record," Pls.' Br. at 35, but of evidence that demonstrated varying density values.

Commerce also sufficiently explained its deviation from prior investigations where it has relied on respondent-reported data to construct conversion facts. Plaintiffs insist that the "only reasonable method" is for Commerce to have used Best Mattresses's own conversion rate, as it did in *Ceramic Tile from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Prelimi-*

nary Negative Critical Circumstances Determination, and Postponement of Final Determination, 84 Fed. Reg. 61,877 (Dep't Com. Nov. 14, 2019), and accompanying Prelim. Results Analysis Mem. at 9 ("*Ceramic Tile* Mem."). In that investigation, Commerce converted a dataset from a USD/m ^{2} basis to a USD/kg basis by calculating a conversion rate of m ^{2}/kg from the respondent's reported data. *See id.* Here, Commerce sufficiently explained why the situations are distinguishable. *See Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1377 n.5 (Fed. Cir. 2007) ("When an agency decides to change course . . . , it must adequately explain the reason for a reversal of policy."). Commerce calculated a sufficiently accurate conversion factor in *Ceramic Tile* because the investigation involved an NME respondent and only one country's import statistics were used. *See Ceramic Tile* Mem. at 9. Not so here. Commerce had on the record not one, but six, country data sets, three of which — as Commerce explains and this court affirms — support a competing finding that there is no universal density for [[ ]]. *See also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020*, 87 Fed. Reg. 38,379 (Dep't Com. June 28, 2022), and accompanying IDM at 18–19 (declining to use the respondent's reported conversion factor, "even if the respondents' conversion factors accurately reflect the weight of their solar glass per square meter," because "[t]here is no evidence that the thickness of the glass imported into Malaysia is the same as that of the respondents' glass"). And the court's inquiry is not whether the agency's approach was the best calculation method, but whether a reasonable mind could conclude that the agency's approach was the best calculation method. Substantial evidence supported Commerce's exclusion of Mexican GTA data and, more broadly, its calculation of input COP from the GTA data.

II. Commerce's Application of the Transactions Disregarded Rule Is in Not Accordance with Law and Not Supported by Substantial Evidence

Before proceeding to Plaintiffs' other challenges to the Final Determination, the court considers Defendant-Intervenors' challenges to Commerce's application of the Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2). Among other arguments, Defendant-Intervenors contend that Commerce's "unreasonable construction and interpretation of the transactions disregarded rule" and "its refusal to follow its longstanding practice of excluding from surrogate value data those data that are from NMEs or from countries with broadly available export subsidies" both render Commerce's Final Determination not in accordance with law and unsupported by substantial evidence. Def.-Inters.' Br. at 2. The court agrees. Commerce's interpretation of the Transactions Disregarded Rule is not in accordance with law, and the record did not justify why Commerce included imports from NMEs or countries with broadly available export subsidies in its surrogate value calculations. The court remands to Commerce for reconsideration or further explanation consistent with this opinion.

A. Commerce's Determination of the Market Price Pursuant to the Transactions Disregarded Rule Is Not in Accordance with Law

At the heart of Defendant-Intervenors' challenge to Commerce's calculation of market price, and Commerce's and Plaintiffs' related defense, is whether Commerce's interpretation of "market under consideration" merits deference. Under the Transactions Disregarded Rule, Commerce may disregard the transfer price of an input between the respondent and an affiliated supplier and instead use the input's market price in its normal value calculation. As has been noted, the codified rule states:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2).

Commerce's shift from the six-country GTA average in the Preliminary Determination to the Cambodian Trademap data, *see supra* note 4, in the Final Determination was due, according to Commerce, to its interpretation of "market under consideration" under the Transaction Disregarded Rule. Commerce stated that "the statute indicates that the item being tested should reflect a market price in the country under consideration, which is Cambodia in this case. Accordingly, we have reevaluated our preliminary determination . . . and now find that the Cambodian Trademap data best reflect fair market prices for the market under consideration." IDM at 10. Put simply, Commerce reasoned: Because "market under consideration" means Cambodia, Cambodian Trademap data is the best choice. Whereas Commerce and Plaintiffs argue that "market under consideration" is best read to refer to the country subject to the antidumping investigation, Def.'s Br. at 28–29; Pls.' Resp. Br. at 9–15, Defendant-Intervenors contend that the phrase unambiguously refers to the market of the affiliated supplier, Def.-Inters.' Br. at 24–26. The issue is whether Commerce's interpretation of the Transactions Disregarded Rule "is in accordance with the law," 19 U.S.C. § 1516a(b)(1)(B)(i), thereby warranting deference under *Chevron*'s two-step framework. The court determines that it does not and remands for reconsideration or further explanation.

Under *Chevron* step one, the meaning of "market under consideration" is ambiguous. The text of the Transactions Disregarded Rule is silent on whether to look to the market of the affiliated supplier or the respondent. Looking instead to context, Defendant-Intervenors stress that because the Transactions Disregarded Rule focuses on inputs into the merchandise subject to investigation by Commerce, *see* 19 U.S.C. § 1677b(f)(2) (limiting the rule to "the case of any *element of value* required to be considered"), the subsequent phrasing — "the amount usually reflected in sales of merchandise under consideration" — refers to the input being purchased, not the merchandise subject to investigation by Commerce. *See* Def.-Inters.' Br. at 24–25 (quoting 19 U.S.C. § 1677b(f)(2)). They argue that the next phrase, "market under consideration," must also refer to the market where the supplier of that input is located. *See id.* But that leap from "merchandise under consideration" to "market under consideration" leaves the court right back where it started, because it is still consistent with the provision's broader context that Commerce must consider the input prices within the respondent's home market. Furthermore, the broad phrasing in the statute's second sentence, which authorizes Commerce to determine the amount "based on the *information available* as to what the amount would have been if the transaction had occurred between persons who are not affiliated," is once again a grant of reasonable discretion to the agency in determining the source information for market price.[9] 19 U.S.C. § 1677b(f)(2); *see also Unicatch Indus. Co. v. United States,* 45 CIT __, __, 539 F. Supp. 3d 1229, 1248 (2021) ("The statute vests Commerce with discretion to determine how best to apply the transactions disregarded rule . . . .").

But under *Chevron* step two, Commerce's interpretation of "market under consideration" to mean the country subject to investigation as opposed to the country of the affiliated supplier was unreasonable. Commerce's prior decisions do not reveal a unified interpretation of "market under consideration" to mean either the country of the affiliated supplier or the country subject to investigation — in fact, choosing one or the other forces a false dichotomy. This court has explained Commerce's practice in applying the Transactions Disregarded Rule as follows:

> Commerce has expressed a preference for how to establish market value. . . . First, it looks at whether respondent purchased the input from an unaffiliated supplier; if unavailable, it looks to sales of the input between an affiliate supplier and an unaffiliated party, and as a final resort, to a reasonable source for market value available on the record.

Rebar Trade Action Coal. v. United States, 43 CIT __, __, 398 F. Supp. 3d 1359, 1372 (2019); *see also Diamond Sawblades Mfrs. Coal. v. United States*, 38 CIT __, __, 2014 WL 5463307, at *2 n.2 (2014), *aff'd sub nom. Diamond Sawblades Mfrs. Coal. v. Hyosung D & P Co.*, 809 F.3d 626 (Fed. Cir. 2015) (Commerce may, as last resort, "rely on . . . 'any reasonable method' to confirm that the affiliated prices reflect

[9] Nor is the legislative history helpful in illuminating Congressional intent. Commerce may ignore sales made outside the ordinary course of trade, when "such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." H.R. Rep. No. 103–826, at 76 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3773, 3848. Congressional reports do not conclusively clarify whether "market under consideration" unambiguously refers to the country under investigation or the country of the affiliate supplier. In H. R. Rep. 103–826, Congress did explain — in the context of subsection 773(b)(1) of the Tariff Act — that "[o]nly if there are no above-cost sales in the ordinary course of trade in the *foreign* market under consideration will Commerce resort to constructed value." *Id.* at 90 (emphasis added). The only use of the phrase "market under consideration" in section 773 of the Tariff Act is in the Transactions Disregarded Rule.

Importing Congress's use of the word "foreign" into the Transactions Disregarded Rule would possibly suggest that "market under consideration" cannot refer to the country of the affiliate supplier because a "market" would not be "foreign" if the affiliate supplier were located in the United States. But Congress did not include the word "foreign" in the statute, nor did it explain the concept further in the Committee report. The evidence from legislative history is ultimately too tenuous to support a finding of unambiguous intent.

arm's length transactions").[10] And when resorting to a "reasonable source for market value," if "a market price is not available, Commerce has developed a consistent and predictable approach whereby it may use an affiliate's total cost of providing the [good or service] as information available for a market price." *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2018–2019*, 86 Fed. Reg. 35,060 (Dep't Com. July 1, 2021), and accompanying IDM cmt. 24 ("*Carbon Steel Pipes* IDM"). And any reasonable interpretation of "market under consideration" must "derive[] from [this] relevant statutory language." *Yangzhou*, 716 F.3d at 1378. The phrase "market under consideration," therefore, is purposefully broad to ensure that, whatever the choice, Commerce may select a market that allows for a "reasonable source for market value," *Rebar*, 398 F. Supp. 3d at 1372, to "confirm that the affiliated prices reflect arm's length transactions," *Diamond Sawblades*, 2014 WL 5463307, at *2 n.2. Commerce itself has affirmed that it has the flexibility to choose the appropriate market. *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,437 (Dep't Com. Dec. 12, 2005), and accompanying IDM cmt. 32 ("The Department's general practice is to define the market under consideration as the entire home market *or* third country." (emphasis added)). Commerce's decision to interpret "market under consideration" to mean only the "country under consideration," IDM at 10, is therefore not only be an arbitrary and unexplained departure from prior practice, but also an unreasonably restrictive reading of the provision.

To be clear, today's holding does not prevent Commerce from selecting Cambodia as the "market under consideration" for purposes of the Transactions Disregarded Rule on remand. Where Commerce erred is that it hinged its reasoning on a faulty reading of the statute that presumed that "market under consideration" referred to the country subject to investigation, *see* IDM at 10 ("[T]he statute indicates that the item being tested should reflect a market price in the country under consideration, which is Cambodia in this case."), when it should have explained why the selection of Cambodia constituted a "'reasonable method' to confirm that the affiliated prices reflect arm's length transactions" between respondent and [[ ]] suppliers. *Dia-*

[10] Other Court of International Trade decisions are persuasive but not binding. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). The court exercises its discretion to consider and address such cases, particularly where the litigants cite them as evidence of Commerce's established practices and preferences, which facilitates the analysis of the case now before the court.

mond Sawblades, 2014 WL 5463307, at *2 n.2; *see also Carbon Steel Pipes* IDM at cmt. 24 (noting that usual practice is to rely on the affiliated supplier's COP, which necessarily involves prices from the affiliated supplier's country). Whether Commerce selects Cambodia or [[ ]] on remand, "Commerce's final determination cannot be sustained" when "the court cannot discern Commerce's analytical pathway," and it must adequately justify its choice.[11] *Garg Tube Exp. LLP v. United States*, 45 CIT __, __, 527 F. Supp. 3d 1362, 1372 (2021) (citing *SEC v. Chenery Corp.* 332 U.S. 194, 196–97 (1947)).

B. Commerce's Inclusion of Imports from NME Countries and Countries with Broadly Available Export Subsidies in the GTA and Trademap Data Is Not Supported by Substantial Evidence

When calculating constructed value, Commerce must normally calculate "costs . . . based on the records of the exporter or producer of the merchandise, if such records . . . reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). If substantial evidence supports the agency's finding that the records are not reasonably reflective of production and sale, then § 1677b(f)(1)(A) "does not require Commerce to accept [a respondent's] records." *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014). Defendant-Intervenors argue that Commerce erred because it had already determined that it would not rely on Plaintiffs' records in the Transactions Disregarded Rule and Major Input Rule contexts, *see* Def.-Inters.' Br. 29–30, and that Commerce's longstanding practice in NME investigations to exclude data from NMEs and countries with broadly available export subsidies should apply here, *see* Def.-Inters.' Br. at 31–32.

Commerce has taken the position that, in the context of affiliated suppliers, it "cannot rely on the affiliated suppliers' actual cost of production because the affiliates are based in an NME country." IDM at 10; *see also id.* at 9 ("[B]ecause these transactions were between Best Mattresses/Rose Lion and NME-based affiliated suppliers, Commerce was unable to rely on the affiliated suppliers' cost of production . . . ."). The NME distinction was dispositive because Commerce usually relies on the reported input COP values if the affiliated

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[11] Because Commerce's interpretation of "market under transaction" is not in accordance with law, Commerce's decision to use Cambodian Trademap data is unjustified. For that reason, the court does not reach Defendant-Intervenor's other challenges to Commerce's use of Cambodian Trademap data, including whether the Trademap export data is "distorted, misrepresentative, and incorrect," *see* Def.-Inters.' Br. at 17, and whether Commerce departed from a longstanding practice of relying exclusively on official import data, not export data, to establish surrogate values, *id.* at 26–27.

supplier is from a market economy. And as discussed, *supra* pp. 36–37, Commerce's decision to not consider the respondent data and to use surrogate data was sourced in its authority to determine the "information available regarding such cost of production." 19 U.S.C. § 1677b(f)(3). But now, Commerce states:

> In market economy cases, Commerce is required under section 773(f)(1)(A) of the Act to calculate costs based on the records of the exporter or producer of the merchandise which are kept in accordance with generally accepted accounting principles and reasonably reflect costs associated with production. In market economy cases, Commerce relies on the purchase prices paid to unaffiliated suppliers based in these countries. It would be inconsistent with the law and our practice to exclude imports from these countries when using GTA data as a proxy for market prices and COP.

IDM at 11.

Commerce fails to justify why its presumption of NME unreliability applies in the affiliated supplier context, but not in the unaffiliated supplier context. Put simply, when Commerce must determine whether surrogate data that includes NME and countries with broadly available export subsidies may "reasonably reflect the costs associated with the production and sale of the merchandise," 19 U.S.C. § 1677b(f)(1)(A), Commerce does not apply the same presumption of NME data unreliability and instead argues that it must rely on purchase prices paid to unaffiliated NME-based suppliers. *See* IDM at 11. And while it is true that Commerce was not subject to the methodological obligations of 19 U.S.C. § 1677b(c) because Plaintiffs are not NME-based respondents, *see* IDM at 9, the lack of § 1677b(c)'s formal application does not exempt Commerce's obligation to address the unreliability of NME data, which is derived from the Tariff Act as a whole and affirmed by Commerce's prior practice. *See* 19 U.S.C. § 1677(18)(A); *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29,310 (Dep't Com. May 22, 2006), and accompanying IDM cmt. 12 ("[T]he Act *generally assumes* that prices for goods produced in NMEs cannot be relied upon for purposes of a price-based analysis." (emphasis added)); *see also Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 Fed. Reg. 12,651 (Dep't Com. Mar. 15, 2005), and accompanying IDM cmt. 3 ("Consistent with our practice, we do not use export prices from a market economy for the valuation of surrogate values when we have a reasonable basis to believe or suspect that the product benefits from broadly available export subsidies."). If the presumption does not apply with equal force in the unaffiliated supplier versus affiliated supplier contexts, then the agency must provide affirmative reasons to explain why that is so. The court remands to Commerce for reconsideration or further explanation.

III. Commerce's Application of the Transactions Disregarded Rule to Best Mattresses's Fixed Asset Depreciation Is Supported by Substantial Evidence and in Accordance with Law

Having reviewed Defendant-Intervenors' challenge to Commerce's application of the Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2), the court now considers Plaintiffs' challenge to Commerce's application of the same rule to the depreciation expenses of fixed assets purchased from Best Mattresses' affiliated suppliers. As part of its calculation of Best Mattresses's constructed value, Commerce must include depreciation expenses of fixed asset purchases in its calculation of respondents' cost of manufacturing and general and administrative expenses. *See* Prelim. Cost Mem. at 2; Final Cost Mem. at 3. Because Best Mattresses had purchased fixed assets from affiliated suppliers, Commerce was required to test those purchases against market price pursuant to the Transactions Disregarded Rule. *See* 19 U.S.C. § 1677b(f)(2); IDM at 12. Best Mattresses submitted market price data on [[

]]. *See* Pls.' Br. at 36. Commerce declined to use [[

]] and explained:

> The respondent did not identify any specific fixed assets that have a market price. The purported market prices appear to relate to the general category of "construction materials," not to specific assets, which makes impossible a proper comparison between similar fixed assets. Because we are not able to directly test the affiliated asset purchases because no reasonable market price information is available, ... Commerce compared the overall difference between the transfer price and market price, for each affiliated supplier, on minor input transactions, and applied, if applicable, the resulting adjustment percentage to the depreciation expense of the fixed assets supplied by that same affiliated supplier.

IDM at 12. Commerce's method ultimately relied on the same Cambodian Trademap data, which provided the market prices for raw material inputs, to determine the adjustment percentage for fixed asset depreciation expenses provided by affiliated supplier.

Commerce's application of the Transactions Disregarded Rule to fixed asset depreciation from affiliated suppliers is in accordance with law and supported by substantial evidence. Plaintiffs submit three challenges to Commerce's methodology. First, Plaintiffs argue that by rejecting Plaintiffs' reported data on [[ ]] in calculating the fixed asset depreciation cost related to assets from affiliated suppliers, Commerce invented a specificity requirement not grounded in law and failed to use "the information available" as required by the plain text of 19 U.S.C. § 1677b(f)(2). *See* Pls.' Br. at 36–39. Second, Plaintiffs contend that Commerce did not give interested parties the opportunity to provide market data specific to fixed asset depreciation, rendering Commerce's decision unsupported by substantial evidence. Pls.' Br. at 39. Third, Plaintiffs claim that Commerce erred in applying the Transactions Disregarded Rule because it adjusted the [[ ]]. *See* Pls.' Br. at 39–40. The court addresses each in turn.

First, Commerce exercised reasonable discretion when it chose not to use Plaintiffs' reported data on [[ ]] in calculating the fixed asset depreciation cost. When applying the Transactions Disregarded Rule, Commerce prefers a respondent's reported data on its own purchases from unaffiliated suppliers; if unavailable, then it considers the affiliated supplier's sales to unaffiliated purchasers. *Certain Cold-Rolled Steel Flat Products from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 49,946 (Dep't Com. July 29, 2016), and accompanying IDM cmt. 10; *see also Rebar*, 398 F. Supp. 3d at 1372 (finding that Commerce "first looks at whether respondent purchased *the input* from an unaffiliated supplier; if unavailable, it looks to sales of *the input* between an affiliate supplier and an unaffiliated party" (emphasis added)). "[A]s a final resort," Commerce looks "to a reasonable source for market value available on the record." *Rebar*, 398 F. Supp. 3d at 1372. Here, Plaintiffs reported [[ ]]. *See* Pls.' Br. at 35, 38. Plaintiffs then paired each fixed asset price with a range of categories of market data, such as [[ ]]. *Id.* at 38. But only [[ ]] of Rose Lion's [[ ]] reported fixed asset purchases, and only [[ ]] of Best Mattresses' [[ ]], were from [[ ]]. Def.'s Br. at 34. And the purchases from [[ ]] were limited to [[ ]]. In requiring specificity, *see* IDM at 12, Commerce reasonably decided that Plaintiffs' price data would distort specific input depreciation costs by using poorly representative categories of fixed asset depreciation costs. For example, to compare [[

]], Commerce must have either [[

]]. Neither method would properly compare like inputs; both would distort depreciation cost.

Commerce's decision to use percentage adjustments based on minor input price differences was otherwise a reasonable alternative and consistent with 19 U.S.C. § 1677b(f)(2). "If a transaction is disregarded . . . , the determination of the amount shall be based on the *information available* as to what the amount would have been." 19 U.S.C. § 1677b(f)(2). Because Plaintiffs did not report market prices for the specific inputs at issue, Commerce instead calculated the percentage difference between the transfer price and constructed market price for minor inputs from affiliated suppliers, which was the "information available" under the Transactions Disregarded Rule. *See* IDM at 12. Commerce then applied the percentage difference, derived from the minor input price difference of an affiliated supplier, to depreciation costs of fixed assets purchased from that same affiliate supplier. *Id.*"The statute vests Commerce with discretion to determine how best to apply the transactions disregarded rule," *Unicatch*, 539 F. Supp. 3d at 1248, and nothing in the text of "information available" forbids Commerce from applying the affiliate-specific adjustment for minor input purchases to the fixed asset purchases. Plaintiffs' argument that Commerce could have paired fixed asset prices "with a range of categories of market data," Pls.' Reply at 16, only further underscores that the range does not reflect identical inputs. Commerce also "applied the adjustment only to the current year's depreciation expense, not to the entire fixed assets" because, unlike minor inputs, fixed assets are purchased for use in more than one year. *See* IDM at 12. Commerce, therefore, articulated a rational connection between the facts and application of the percentage difference to fixed asset depreciation expenses. *State Farm*, 463 U.S. 29, 43.

Today's holding is also consistent with *Rebar* and Commerce's expressed preferences for calculating market value. In *Rebar*, Commerce solicited and relied on actual costs of inputs from affiliated providers of services in order to determine the market price for those same inputs pursuant to the Transactions Disregarded Rule. *Rebar*, 398 F. Supp. 3d at 1359. The *Rebar* court reasoned that "Commerce has expressed a preference for how to establish market value," where it first "looks at whether respondent purchased the input from an affiliated supplier." *Id.* From this language, Plaintiffs propose a rule that Commerce must use data reported by the respondent "as opposed to fictious, market values when possible." Pls.' Br. at 37. But in *Rebar*, Commerce relied on the actual costs to the affiliated providers for the *same* inputs; here, Commerce chose not to rely on actual costs to the respondent for *different* inputs. Commerce's decision is consistent with its preference "to use the price paid by the respondent itself in transactions with unaffiliated suppliers involving *identical* products *when such information is available* because this price best represents the respondent's own experience in the market under consideration." *Unicatch*, 539 F. Supp. 3d at 1249 (emphasis added) (citation and internal quotation marks omitted). After finding the conditions for use of Plaintiffs' reported data to be deficient, Commerce turned "to a reasonable source for market value available on the record." *Rebar*, 398 F. Supp. 3d at 1372. To hold otherwise would compel Commerce to draw inferences or use methodologies in Plaintiffs' favor, particularly from generalized market price data when data on specific input prices was unavailable. *See Rebar*, 398 F. Supp. 3d at 1372 ("whether respondent purchased *the* input" (emphasis added)); *see also Shanxi Hairui Trade Co.*, 39 F.4th at 1361 (deferring "to [Commerce's] interpretation of the statute when implementing its antidumping duty methodology unless it is 'arbitrary, capricious, or manifestly contrary to statute'" (quoting *PSC VSMPO-Avisma Corp.*, 688 F.3d at 764)). Commerce's explanation was, therefore, in accordance with law and justified by substantial evidence.

Plaintiffs' alternative argument that Commerce should have solicited market data specific to fixed asset depreciation, instead of resorting to percentage adjustments based on minor input data, also fails. As an initial matter, Commerce requested sufficient information to substantiate its determinations. The Section D questionnaire requested that Best Mattresses "provide a worksheet that identifies those inputs and other items (e.g., fixed assets, services, etc.) that your company receives from affiliated parties" and to include "the POI total quantity and transfer price of the transactions" and the "percentage the item represents of the total [merchandise under consideration's cost of manufacture]." Best Mattresses C-DQR at D-9; Rose Lion C-DQR at D9. And in the supplemental Section D questionnaires, Commerce expressly requested "for each [affiliated] supplier," "a schedule of the individual fixed assets . . . purchased with . . .

[d]epreciation expense for the POI." *See* Sec. D Supp. Qs. at 4–5. That Commerce did not request additional market data specific to fixed asset depreciation is consistent with its practice; Commerce's preferred method is "to use the price paid by the respondent itself in transactions with unaffiliated suppliers involving identical products when such information is available," *Unicatch*, 539 F. Supp. 3d at 1249, and because that information was unavailable, Commerce reasonably turned to other "information available" on the record. 19 U.S.C. § 1677b(f)(2). Plaintiffs could have attempted to introduce market data under 19 C.F.R. § 351.301(a) and (c)(5), which enumerate categories of information for submitting factual information and include a catch-all provision subject to Commerce's approval (and subsequent judicial review). But because Plaintiffs did not do so, nor have Plaintiffs alleged how the analysis would have been more accurate had Commerce requested such information, Plaintiffs' argument — which borders on the hypothetical — does not hold water.

Finally, Commerce acted in accordance with law in invoking the Transactions Disregarded Rule where transfer prices to Best Mattresses were higher than the original purchase price to affiliated suppliers. Plaintiffs argue that Commerce violated the plain text of 19 U.S.C. § 1677b(f)(2) because Best Mattresses's [[

]], and therefore the transfer prices "fairly reflect[ed]" the market price. Pls.' Br. at 39–40. But as Commerce explained, "the original purchase price or the book value of the affiliated supplier are [not] relevant, because it is the *market value on the date of sale* for the asset that is relevant for testing the arm's length nature of the transaction." IDM at 12 (emphasis added). Book value and market value are distinct. *Compare Book Value*, *Black's Law Dictionary* (11th ed. 2019) ("The value at which an asset is carried on a balance sheet."), *with* 19 C.F.R. § 351.407(b)(2) (referring to market value as "the amount usually reflected in sales of the major input in the market under consideration"). The original purchase price may represent book value for fixed assets whose market value was higher at the time; and even so, it is reasonable for Commerce to test transfer prices against contemporaneous, as opposed to dated, market prices. Because "no reasonable market price information was available," IDM at 12, Commerce acted in accordance with law.[12]

[12] The court expresses no view on the Government's alternative argument that Commerce had no obligation to use original acquired price data because they do not represent a "market under consideration" under 19 U.S.C. § 1677b(f)(2). *See* Def.'s Br. at 35.

IV. Commerce's Reliance on Emirates's Financial Statements to Calculate Profit Ratios Is Only Partly Supported by Substantial Evidence

Plaintiffs' final challenge contests Commerce's use of the Emirates financial statements. This issue is, at its heart, a question of standard of review. Without a viable home or third-country market during the POI for Best Mattresses and Rose Lion, Commerce had to calculate CV profit using "any other reasonable method." 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce solicited comments from the parties regarding the calculation of CV profit, and the parties submitted two separate financial statements as potential surrogates. *See* Prelim. Cost Mem. at 3; *cf. Ad Hoc Shrimp*, 618 F.3d at 1319 ("Commerce values certain factors of production, such as selling, general, and administrative expenses . . . and profit, by using financial ratios derived from financial statements of producers of comparable merchandise in the surrogate country."). The parties agree that Commerce weighs four criteria for choosing among surrogate data under § 1677b(e)(2)(B)(iii):

> (1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; (2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; . . . (3) the contemporaneity of the data to the POI. . . . [and (4)] the extent to which the customer base of the surrogate company and the respondent is similar (*e.g.*, original equipment manufacturers versus retailers).

IDM at 16 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 Fed. Reg. 49,349 (Dep't Com. Sept. 27, 2001), and accompanying IDM cmt. 8; *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 Fed. Reg. 20,592 (Dep't Com. Apr. 16, 2004), and accompanying IDM cmt. 26); *see also Mid Continent Steel & Wire, Inc. v. United States*, 45 CIT __, __, 551 F. Supp. 3d 1360, 1364 n.6 (2021). Moreover, Commerce prefers financial statements that are publicly available and complete. *See, e.g.*, *CP Kelco U.S., Inc. v. United States*, 949 F.3d 1348, 1359 (Fed. Cir. 2020); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT 803, 805, 911 F. Supp. 2d 1362, 1366 (2013). "Accordingly, 'when presented with multiple imperfect potential' financial statements, Commerce is required to 'faithfully compare the strengths and weaknesses of each before deciding which to use.'" *Ashley Furniture Indus., LLC v. United States*, 46 CIT __, __, __ F. Supp. 3d __, __, 2022 WL 17489243, at *5 (Nov. 28, 2022) (quoting *CP Kelco US, Inc. v. United States*, 39 CIT __, __, 2015 WL 1544714, at *7 (Mar. 31, 2015)).

Plaintiffs argue that Commerce's decision to use the Emirates statements over those of GTI was unsupported by substantial evidence for four reasons: (1) Emirates's financial statements were not entirely contemporaneous with the POI, *see* Pls.' Br. at 42–43; (2) Emirates's business model is different from that of Best Mattresses, *see id.* at 44–47; (3) Emirates's financial statements are not publicly available, *see id.* at 47–49; and (4) Emirates's financial statements are incomplete and not entirely legible, *see id.* at 49–51. The GTI data, Plaintiffs conclude, was the only reasonable option of the two. *See id.* at 51–52. But all parties also acknowledge that Commerce was limited to choosing between two surrogates that had obvious deviations from the respondent companies. And "[w]here Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009). "The Court's role . . . is not to evaluate whether the information Commerce used was the best available" or to reweigh the evidence, "but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006).

Despite Commerce's substantial discretion to choose between two imperfect financial statements, the court concludes that its choice of Emirates was only partly supported by substantial evidence. The record supported Commerce's conclusions that the Emirates statements were representative of Best Mattresses's business operations, sufficiently contemporaneous with the POI, and sufficiently legible. But Commerce did not adequately explain its finding that the Emirates statements were publicly available, and the record did not support Commerce's finding that the Emirates statements were complete. The court remands to Commerce for reconsideration or further explanation.

A. The Record Supports Commerce's Determination that Emirates's Business Operations Are Sufficiently Similar to Those of Best Mattresses

Plaintiffs' first challenge is that "Commerce overlooked significant discrepancies between Emirates and Best Mattresses that did not exist between GTI and Best Mattresses." Pls.' Br. at 44. Although it "is not a producer of mattresses," Plaintiffs advocated the use of GTI, a "Cambodian producer of apparel and garment products" that are "similar to the inputs used to produce mattresses." *Id.* Alternatively, Defendant-Intervenors preferred Emirates, which "is an India-based manufacturing company" that produces "all types and kinds of mattresses, bases and other sleep related products and systems." *Id.* Commerce reasoned that "both the preferred and alternative methods [of calculating profit and selling expenses] show a preference [for] . . . (1) production and sales in the foreign country; and (2) the foreign like product," but the agency "may not be able to find a source that reflects both factors. . . . Consequently, [Commerce] must weigh the quality of the data against these factors." *Id.* Commerce concluded that "[w]hile GTI is a Cambodian producer which would expose it to similar business conditions as those of Cambodian mattress producers, it is not a mattress producer; Emirates Sleep is a mattress producer which would expose it to similar production and industry-specific conditions as those of Cambodian mattress producers." *Id.*

Substantial evidence supports Commerce's conclusion. "The goal in calculating [constructed value] profit is to approximate the home market profit experience of the respondents." *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530 (Fed. Cir. 2019) (internal quotation marks and citation omitted). Confronted with two imperfect options, Commerce's tradeoff was choosing financial statements that reflected either the country under investigation, Cambodia, or the merchandise under consideration, mattresses. *See* IDM at 17. The fact that Emirates was a mattress manufacturer, whereas GTI was not, is surely "more than a mere scintilla of evidence" and was "relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that Emirates' financial statements best reflect the production experience of a respondent that manufactures mattresses. *Nippon Steel*, 337 F.3d at 1379.

Plaintiffs raise two factual arguments in opposition, but neither establishes that Commerce's conclusion was unreasonable. First, they insist that Emirates appears to be a minor player in the mattress industry and the magnitude of GTI's revenues are more comparable to those of Best Mattresses. *See* Pls.' Br. at 45–46. But Commerce's explanation that the size of a company is not instructive without relative data about the entire industry is consistent with prior investigations. *See* IDM at 17 ("Commerce does not typically use relative production quantities or sales as a criterion because the information to judge relative data to the overall industries is not available."); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1374 (Fed. Cir. 2010) ("Commerce can rely on certain financial surrogate companies' financial statements even where distortions based on economies of scale exist . . . ."); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep't Com. Aug. 17, 2009), and accompanying IDM cmt. 14 ("[T]he Department's practice is to disregard company size as a basis upon which to determine the representative nature of a company's financial statements . . . ."). Next, Plaintiffs argue that Emirates is an unsuitable comparison because it derived 23.29 percent of its revenues from marketing, as opposed to manufacturing, activities. *See* Pls.' Br. at 46. But Commerce considered this adverse fact and ultimately concluded that "the marketing, promotion, and trading activities related to mattresses and sleep systems are completely appropriate activities for a company engaged in the manufacturing and sale of mattresses." IDM at 18. In addition, Commerce did not include the retail, marketing, and advertising service or commission costs in calculating selling expenses. *See id.* The decision to compare the financial statements of Emirates's business operations to those of Best Mattresses was, therefore, supported by substantial evidence.

B. The Record Supports Commerce's Determination that Emirates's Financial Statements Are Sufficiently Contemporaneous with the POI

Next, Plaintiffs argue that the GTI statement better represent Best Mattresses because the GTI statement represents company performance during the entire POI, whereas the Emirates statement overlaps the POI for only three months. The POI is January 1, 2019, through December 31, 2019. IDM at 2. Indeed, the dates of GTI's 2019 statements are entirely coextensive with the POI, whereas the Emirates 2019 statements report the fiscal year ended March 31, 2019 and overlap only three months with the POI. *See* Pls.' Br. at 42. Commerce acknowledged the difference in overlap and reasoned that "[b]ecause our periods of investigation and review do not normally coincide with the calendar year or other fiscal years typically adopted by companies, Commerce regularly accepts as contemporaneous a financial statement that overlaps the POI by some amount." IDM at 18–19.

Commerce's decision to use the Emirates statement, notwithstanding the different fiscal year, was reasonable. "It is well-established that Commerce considers data that overlap any portion of the POR to be contemporaneous." *Golden Dragon Precise Copper Tube Grp., Inc. v. United States*, 38 CIT __, __, 2016 WL 4442163, at *5 (2016) (internal quotation marks and citation omitted) (using a financial statement with a ten-month overlap); *see also, e.g.*, *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 78 Fed. Reg. 79,662 (Dep't Com. Dec. 31, 2012), and accompanying IDM cmt. 3 (using a financial statement with an eight-month overlap); *Utility Scale Wind Towers From the Socialist Republic of Vietnam*, 80 Fed. Reg. 55,333 (Dep't Com. Sept. 15, 2015), and accompanying IDM cmt. 4.B (using a financial statement with one-half-month overlap). To the extent that Plaintiffs argue that the availability of a fully contemporaneous statement requires Commerce to preference that statement over its alternatives, citing *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 23,756 (Dep't Com. Apr. 29, 2020), and accompanying IDM cmt. 2, such a rule has no basis in law. Commerce was confronted with a different choice in *Certain Frozen Fish Fillets*, where not all statements were contemporaneous with the POI, *id.*, whereas here Commerce reasonably found both the Emirates and GTI statements to be contemporaneous. Holding otherwise would not only disrupt Commerce's practice, but also arbitrarily disadvantage the financial statements of companies whose fiscal years do not align with the periods of investigation. Furthermore, "[w]hile [one] statement may be more contemporaneous than [another], the selection of a financial statement requires balancing of several factors, of which more overlap with the [POI] is one." *Golden Dragon*, 2016 WL 4442163, at *5. Because Commerce reasonably considered Emirates's financial statements to be contemporaneous, and because the selection of Emirates's statements was otherwise justified by the balancing of other factors, Commerce's decision is supported by substantial evidence.

C. Commerce Did Not Adequately Explain Its Determination that Emirates's Financial Statements Were Publicly Available

Plaintiffs also contend that the Emirates statements were not publicly available and, in not choosing the publicly available GTI statements, Commerce deviated from a longstanding practice in NME investigations of preferring publicly available information. They argue that "publicly available information addresses the concern that a lack of transparency about the source of the data could lead to proposed data sources that lack integrity or reliability." *Since Hardware (Guangzhou) Co., Ltd. v. United States*, 37 CIT at 807, 911 F. Supp. 2d at 1367; *see also Home Prod. Int'l, Inc. v. United States*, 32 CIT 337, 341–42, 556 F. Supp. 2d 1338, 1343 (2008) ("Commerce's choice of a complete, publicly available financial statement consistent with its regulatory preference is . . . correct.”). Notably, the *Since Hardware* court remanded to Commerce for “a detailed step-by-step explanation” by the submitter “of how they obtained [the] . . . financial statements.” 37 CIT at 809, 911 F. Supp. 2d at 1369 (citation omitted). And while Plaintiffs acknowledge that Commerce’s regulatory preference for publicly available data is codified only with respect to NME proceedings, *see* 19 C.F.R. § 351.408(c)(1)–(4), and both *Since Hardware* and *Home Products International* cases involve NME investigations, they argue that Commerce should be held to the same standard here because “the benefits to using . . . publicly available information is both obvious and universally applicable across antidumping proceedings. . . . Put simply, public availability allows for public accountability.” Pls.’ Br. at 48–49.

The publicly available requirement has diminished force under this case’s unique circumstances. Because “Commerce is not performing an NME investigation in this case nor is it following a NME methodology,” IDM at 19, the policy considerations underpinning, as well as the cases relying on, 19 C.F.R. § 351.408(c) are less persuasive. *See Since Hardware*, 37 CIT at 805, 911 F. Supp. 2d at 1366 (deriving Commerce’s “general regulatory preference” from 19 C.F.R. § 351.408(c)); *Home Prod. Int’l*, 32 CIT at 341, 556 F. Supp. 2d at 1342 (same). Moreover, the circumstances of this investigation appear to satisfy the policy that motivates the publicly available requirement. Commerce’s “primary purpose for obtaining publicly available information for financial statements is to ensure that all interested parties have access to such information, and are able to comment on the reliability and relevance of such information in the particular case, and not as much for purposes of obtaining broader information that reflects numerous transactions as is the case for material inputs.” *Since Hardware (Guangzhou) Co. v. United States*, 977 F. Supp. 2d 1347, 1352 (2014), *order vacated in part on denial of reconsideration on alternative grounds*, 37 F. Supp. 3d 1354 (2014), *aff’d*, 636 F. App’x 800 (Fed. Cir. 2016) (internal quotation marks and citation omitted). Here, Commerce *requested* the financial statements from interested parties and placed them on its record, allowing Best Mattresses the opportunity to comment on the reliability and relevance of both the GTI and Emirates statements. *See* IDM at 20. And while statements that are easily accessible to the public bear a marker of reliability, Commerce found comparable markers here. *See id.* (finding that Emirates Sleep was a private company registered in India and that the accompanying audit was conducted “in accordance with the standards on auditing specified under section 143 (10) of the Companies Act, 2013”).

But despite the requirement's diminished force, Commerce did not adequately explain its finding that the financial statements were publicly available. Plaintiffs have insisted that the source of the statements is unclear despite its independent research: Emirates Sleep is not publicly listed and does not maintain a website, and the statements are unavailable on the Indian Ministry of Corporate Affairs website. *See* IDM at 19; Pls.' Br. at 49. Commerce reasonably rebutted each argument, noting that Commerce does not require financial statements to be from a corporate registry, government securities website, public website of the company in order to be considered publicly listed; nor does Commerce require that publicly available statements come only from publicly listed companies. *See* IDM at 19–20. It concluded that "[w]hile the respondent was unable to locate Emirates Sleep themselves there is no record evidence that the statements are not publicly available, as indicated by the petitioners." *Id.* at 20.[13] Where Commerce acted unreasonably, however, was premising its finding that Emirates's financial statement was publicly available on an inference that the statement was from a "fee-based subscription service." *Id.* at 20. Specifically, Commerce concluded:

> The petitioners argue that "a financial statement need not be free of charge for it to be publicly available" and their statement suggests that they obtained the financial statements from a public fee-based subscription service. We agree that a financial statement from a fee-based service would constitute a publicly available source.

IDM at 20. Defendant-Intervenors have represented to Commerce that the financial statements are publicly available, *see* Letter from J. Levy to W. Ross, Sec'y of Com., re: Mattress Petitioners' Submission Concerning CV Profit and Selling Expenses at 2 (Aug. 17, 2020), but have not introduced evidence on the record of how the statements were obtained, *see* Hr'g Tr. at 53 (J. Levy) (Mar. 5, 2021) (Prelim), P.R. 299 ("[T]o tell you where it came from I think would be new information on the factual record, but I will say this: We've represented it as a publicly available financial statement."). Commerce's inference that Emirates was obtained from a "public fee-based subscription service" derives solely, it appears, from Defendant-Intervenor's legal argu-

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[13] Defendant-Intervenors also argue, and the court agrees, that Plaintiffs did not exhaust all reasonable methods of testing public availability; Plaintiffs did not, for example, contact the email address on Emirates's statements to ask whether the financial statements would be made available to them. *See* Emirates Fin. Stmts. at 1; *cf. Since Hardware*, 37 CIT at 809–810, 911 F. Supp. 2d at 1369 (remanding Commerce's determination that statements were publicly available despite respondents' rebuffed attempt to obtain the statements by contacting the company).

ment that a financial statement need not be free of charge. That is no more than a "mere scintilla" of evidence, even under our deferential standard. For instance, Defendant-Intervenor's reasoning is also consistent with a hypothetical private payment to Emirates for use of its financial statements, which would not qualify as a subscription service and possibly render the financial statements not "publicly available." Because Commerce has not grounded the specific finding of using a *subscription service* in any part of the factual record before the court,[14] its determination that Emirates's financial statements were publicly available cannot be sustained.

D. The Record Supports Commerce's Determination that Emirates's Financial Statements Were Legible, but Not Commerce's Determination that the Statements Were Complete

Plaintiffs next argue that the last three pages of the Emirates financial statements are illegible at the highest zoom level and that other pages' text is hard to read. *See* Pls.' Br. at 49–50. Substantial evidence does not support Commerce's reliance on a financial statement when the "illegible portions . . . prevent a full and accurate analysis of the statements and prevent their use in calculating financial ratios for the final determination." *Welded Stainless Pressure Pipe from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value*, 79 Fed. Reg. 31,092 (Dep't Com. May 30, 2014), and accompanying IDM cmt. 1. But notwithstanding the fact that the three pages of the statement were shrunk down to fit onto individual pages, Commerce stated that it was still able to read them when calculating the financial ratios. *See* IDM at 19–20. Commerce's adequately explained its decision not to discard the Emirates statements for illegibility.

Plaintiffs more substantially argue that the Emirates statements were incomplete because they were missing five "annexures" that were expressly referenced in the independent auditor's report. Commerce is not compelled to reject incomplete financial statements unless the "missing information" is "vital . . . and of critical importance."

[14] During oral argument, Defendant-Intervenors referenced facts about the source of Emirates's financial statements that were available on the record of Commerce's investigation into mattress imports from Vietnam. *See Ashley Furniture Indus.*, 2022 WL 17489243, at *13–14. But because "[t]hat administrative record is not . . . before us," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971), neither the court nor Commerce may rely on it. "Each investigation has its own unique and separate administrative record," *Yama Ribbons & Bows Co., Ltd. v. United States*, 36 CIT 1250, 1256, 865 F. Supp. 2d 1294, 1300 (2012) (citing 19 C.F.R. § 351.306), and "[t]he task of the reviewing court is to apply the appropriate . . . standard of review to the agency decision based on the record the agency presents to the reviewing court," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (citation omitted) (citing *Citizens to Preserve Overton Park*, 401 U.S. 402)).

CP Kelco, 949 F.3d at 1359; *see also Ashley Furniture Indus.*, 2022 WL 17489243, at *10 ("Commerce does not invariably reject incomplete financial statements, but instead looks to whether the missing information is vitally important or key." (internal quotation marks and citation omitted)). Plaintiffs' main argument focuses on the omission of the fifth annexure.[15] One of the entries under the "Current Assets" listed on Emirates's balance sheet is titled "Short-term loans and advances." Emirates Fin. Stmts. at 41. Note 13 of the auditor's report organizes the component assets within "Short-term loans and advances" into three broad categories: "(a) Security deposits . . . [;] (b) Balances with government authorities (Refer Annexure - 5)[;] (c) Others: Advances to Sundry Creditors - Expenses." *Id.* at 50. Notably, category (b) accounted for approximately 56.6 percent of "Short-term loans and advances" and approximately 11.5 percent of all assets at fiscal year's end. *See id.* at 41. Plaintiffs argue that this large balance "provides Commerce with a reason to believe or suspect that Emirates received an amount of government support that would be significantly distortive," Pls.' Br. at 51, and the lack of Annexure 5 would deprive Commerce of key information. Commerce rejected this argument:

> To the contrary, Note 13 of the Emirates Sleep financial statements provides details on short-term loans and advances to other parties, not from other parties. These are assets, not liabilities. The annexure clearly refers to additional details that are supplementary to the significant details already shown in Note 13 on deposits or advances (*i.e.*, assets of Emirates Sleep) held by government authorities. Moreover, it provides no evidence for the respondent's theory that Emirates Sleep received "massive" subsidies associated with its advances to other parties.

[15] The five annexures, which Plaintiffs argue were "integrated parts of the audit report," were as follows:

> Note 6 — Trade Payables: "a) Sundry Creditors - Expenses (Refer Annexure - 1)"
>
> Note 8 — Short Term Provisions: "b) Other Provisions: Salaries Payable (Refer Annexure - 2)"
>
> Note 12 — Cash and Bank Balances: "Cash in Hand (Refer Annexure - 3)" [and] "Fixed Deposits (Refer Annexure - 4)"
>
> Note 13 — Short-term loans and advances: "(b) Balances with government authorities (Refer Annexure - 5)"

Pls.' Br. at 50 (quoting Emirates Fin. Stmts. at 48–50). Regarding the first four missing annexures, Commerce's reasoning that "[n]one of these appear to affect profit or selling expenses" is supported by the titles and contents of each note they append. IDM at 21. Because the missing information is irrelevant to the profit or selling expenses, remand to the agency would be unwarranted. *See CP Kelco*, 949 F.3d at 1359.

IDM at 21.

The record does not support Commerce's reasoning. As an initial matter, Commerce is correct in rebuffing a component of Plaintiffs' argument made before the agency, that the entry reflects "loan balances and payments *from the Government of India*," Pls.' Case Br. at 50 (emphasis added), because a loan owed by Emirates to the Indian Government would appear as a liability. But Commerce erred in summarily stating that any asset plausibly qualifying as a "[b]alance with government authorities" cannot be an indicator of government subsidies. For example, if Annexure 5 revealed that Emirates had an Indian tax credit receivable on its books, that would potentially be evidence of a "financial contribution" required to establish the existence of a countervailable subsidy. *See* 19 U.S.C. § 1677(5)(D) ("The term 'financial contribution' means . . . foregoing or not collecting revenue that is otherwise due, such as granting tax credits . . . ."). The missing annexure may have deprived Commerce of key information regarding the viability of Emirates's financial statements — specifically, the existence of government subsidies recorded as assets — and Commerce does not appear to dispute that such government subsidies would impact the profit and selling expense calculations. Commerce's conclusion that the Emirates statements are complete is, therefore, unsupported by substantial evidence.

Because Commerce did not "sufficiently explain[] its reason for choosing between two flawed financial statements," *CP Kelco*, 949 F.3d at 1359, the Final Determination is remanded. *See id.* (affirming Commerce's choice of an alternative financial statement where "missing information" in the other "was vital . . . and of critical importance"); *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 37 CIT 489, 497–98, 904 F. Supp. 2d 1359, 1367 (2013) (remanding for lack of a tax line item that "may affect a company's profit and thus, distort the resulting financial ratio"). In remanding the publicly available and completeness issues, "the court does not require Commerce to choose any particular financial statement . . . . Commerce must, however, fairly weigh the available options and explain its decision in light of its selection criteria, addressing any shortcomings." *Carbon Activated Tianjin Co. v. United States*, 46 CIT __, __, 586 F. Supp. 3d 1360, 1381 (2022).

CONCLUSION

The Final Determination is in accordance with law and supported by substantial evidence, with four exceptions: (1) Commerce's determination of the market price under the Transactions Disregarded Rule using Trademap data is not in accordance with law because it relies on an unreasonable interpretation of "market under consideration" to mean only the country under investigation; (2) Commerce's inclusion of imports from NME and export-subsidizing countries is unreasonable because Commerce did not justify why its presumption of NME unreliability applies in the affiliated supplier context but not in the unaffiliated supplier context; (3) Commerce did not adequately explain its determination that Emirates's financial statements are publicly available; and (4) Commerce's determination that Emirates's financial statements are sufficiently complete is unreasonable. For the foregoing reasons, the court remands to Commerce for reconsideration or further explanation 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. The parties shall have 30 days to submit briefs addressing Commerce's redetermination to the court, and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: February 17, 2023
New York, New York

/s/ Gary S. Katzmann
JUDGE

Slip Op. 23–20

SGS Sports Inc., Plaintiff, v. United States, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00128

[Granting Defendant's motion for rehearing. After a bench trial, holding that the Warehousing Agreement is a lease or similar use agreement and a Phase Two bench trial shall proceed to determine whether the subject merchandise is eligible for duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States. Amending the Court's prior opinion to address the additional issue of whether there is a valid agreement under applicable Canadian corporate law.]

Dated: February 17, 2023

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., argued for Plaintiff SGS Sports Inc. With them on the supplemental briefs was *Richard F. O'Neill*.

Monica P. Triana, Trial Attorney, International Trade Field Office, and *Edward F. Kenny*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the pretrial brief were *John V. Coghlan*, Deputy Assistant Attorney General of the Federal Programs Branch, *Jeanne E. Davidson*, Director, and *Justin R.* Miller, Attorney-in-Charge, International Trade Field Office, and with them on the supplemental brief were *Brian M. Boynton*, Acting Assistant Attorney General, Patricia M. McCarthy, Director, and Justin R. Miller, Attorney-in-Charge. Of counsel on the trial and supplemental briefs was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

AMENDED OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SGS Sports Inc. ("Plaintiff" or "SGS") brings this action to contest the denial of its administrative protests by U.S. Customs and Border Protection ("Customs") regarding swimwear and related accessories that Plaintiff entered into the United States in 2013 and 2014 ("subject merchandise"). The Court conducted a bench trial via video conference to determine whether the subject merchandise was entitled to duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which states:

> 9801.00.20.00 Articles, previously imported, with respect to which the duty was paid upon such previous importation . . . , if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

HTSUS subheading 9801.00.20.[1] The bench trial focused on the issue of whether the Warehousing Agreement between SGS and 147483 Canada Inc. ("Canada 147483") constituted a lease or similar use agreement under HTSUS subheading 9801.00.20. The Court issued an Opinion and Order on March 21, 2022 (Slip. Op. 22–26), in which the Court concluded after trial, based on findings of fact and conclusions of law, that the Warehousing Agreement is a lease or similar use agreement under HTSUS subheading 9801.00.20.

Before the Court is Defendant's Motion for a New Trial or Rehearing for Slip Op. 22–26, and for The Court to Amend its Findings of Fact and Conclusions of Law and Make Additional Ones ("Defendant's Motion"), ECF No. 100. The Court grants Defendant's Motion and sets aside Slip Opinion 22–26. This Amended Opinion and Order addresses the additional issue of whether there is a valid agreement under applicable Canadian corporate law.

PROCEDURAL HISTORY

Plaintiff attempted to enter the subject merchandise pursuant to HTSUS subheading 9801.00.20. Final Pretrial Order (Phase One of Remote Bench Trial), Schedule C (Phase One Uncontested Facts) ¶ 59, ECF No. 74. Customs denied Plaintiff's claim for duty-free treatment under HTSUS subheading 9801.00.20, reclassified the subject merchandise, and liquidated the entries. *See id.*, Schedule D-1 (SGS Sports, Inc. Claims and Defenses) ¶ 2, Schedule D-2 (Def.'s Claims and Defenses) ¶¶ 2–3. Thereafter, SGS filed three timely protests challenging Customs' classification determination. *See id.* Schedule B ¶ 1; Compl. ¶ 5, ECF No. 6. When denying SGS' protests, Customs stated its determination that the subject merchandise had not been properly exported under a lease or similar use agreement as required under the duty-free HTSUS subheading 9801.00.20 because "no bailment occurred." HQ H216475 (Jan. 16, 2015); HQ H276403 (Dec. 12, 2017). SGS filed suit challenging the denial of its protests. Summons, ECF No. 1; Compl.

The Parties filed cross-motions for summary judgment. Pl.'s Mot. Summ. J., ECF No. 26; Mem. P. & A. Supp. Pl.'s Mot. Summ. J. ("Pl.'s Summ. J. Br."), ECF No. 26–2; Def.'s Cross-Mot. Summ. J., ECF No. 30. The Court denied Plaintiff's motion for summary judgment and granted the cross-motion for summary judgment filed by Defendant. *SGS Sports[] Inc. v. United States*, 44 CIT __, 463 F. Supp. 3d 1356

[1] Plaintiff stopped entering merchandise under HTSUS subheading 9801.00.20 in 2015 and now enters merchandise under HTSUS subheading 9801.00.10,Trial Tr., Day 1, at 80, ECF No. 83, which was amended in 2016 to include "any other products when returned within 3 years after having been exported," HTSUS subheading 9801.00.10. HTSUS subheading 9801.00.10 was amended after the subject merchandise was entered in 2013 and 2014.

(2020). In an order granting Plaintiff's Motion for Rehearing, ECF No. 41, the Court set aside its previous opinion and judgment, and scheduled the matter for trial. *SGS Sports Inc. v. United States*, 44 CIT __, Slip Op. 20–150 (Oct. 22, 2020).

The Court granted a motion to bifurcate the trial into Phase One and Phase Two. Am. Order ("Am. Bifurcation Order") at 1, ECF No. 66. The Court ordered that the Phase One trial would resolve the sole issue of whether the Warehousing Agreement between SGS and Canada 147483, dated September 1, 2005, is a lease or similar use agreement. *Id.* If Phase One did not resolve the case in its entirety, Phase Two would encompass the remaining issues necessary to resolve the case. *Id.* The Court stayed the remaining issues reflected in Defendant's Motion in Limine, ECF No. 52; Plaintiff's Motion in Limine to Allow Introduction at Trial of an Evidence Summary Pursuant to FRE 1006 ("Plaintiff's Motion in Limine"), ECF No. 54; and the deadline for Defendant to respond to Plaintiff's Motion in Limine, pending the Court's decision in Phase One. Am. Bifurcation Order at 1–2. The Parties filed pretrial briefs and schedules. Def.'s Pretrial Br., ECF No. 67; Pl.'s Pretrial Mem. ("Pl.'s Pretrial Br."), ECF No. 68; [Proposed] Pretrial Order, ECF No. 71.

The Court conducted the Phase One trial on February 4 and 5, 2021. Docket Entries, ECF Nos. 81, 82. The Court heard testimony via videoconference from three fact witnesses: Anna Murdaca, Vice President of Finance and Chief Financial Officer of SGS since 1997 and part owner of SGS since 2007; Michael Couchman, Warehouse Manager of Canada 147483 for approximately ten years; and Steven Gellis, President of SGS since its incorporation in 1988 and President of Canada 147483 since its incorporation in 1985. Trial Tr., Day 1, at 59–298, ECF No. 83. The witnesses provided testimony that appeared to be truthful based on each witness' respective demeanor, inflection, length of employment in his or her position, and familiarity with the subject matter of the questions asked, and thus provided the Court with the necessary basis to conclude that they were credible witnesses.

In its pretrial brief, Plaintiff repeated its argument from its summary judgment response brief that Customs was bound by its previous rulings to treat the Warehousing Agreement as a similar use agreement under HTSUS subheading 9801.00.20 because Customs had not modified or revoked its previous rulings under the 19 U.S.C. § 1625(c) notice and comment procedure. Pl.'s Mem. P. & A. Opp'n Def.'s Cross-Mot. Summ. J. and Reply Supp. Pl.'s Mot. Summ. J. at 9–15, ECF No. 32; Pl.'s Pretrial Br. at 7–13. Defendant objected to the 19 U.S.C. § 1625(c) argument at the January 21, 2020 pretrial conference and renewed its objection at trial. Trial Tr., Day 1, at 6–8, 27; Trial Tr., Day 2, at 340; Docket Entry (Jan. 21, 2021 Pretrial Conference), ECF No. 72. The Court ordered supplemental briefing and held oral argument on the 19 U.S.C. § 1625(c) issue on January 12, 2022. Order (Oct. 8, 2021), ECF No. 85; Pl.'s Suppl. Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Suppl. Br."), ECF No. 86; Def.'s Suppl. Submission ("Def.'s Suppl. Br."), ECF No. 89; Pl.'s Reply Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Reply Br."), ECF No. 90; Docket Entry (Jan. 12, 2022 Oral Arg.), ECF No. 94; Oral Arg. (on file with the U.S. Court of International Trade).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court reviews classification cases based on the record made before the Court. 28 U.S.C. § 2640(a).

A two-step process guides the Court in determining the correct classification of merchandise. First, the Court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the Court determines whether the subject merchandise falls within the parameters of the tariff provision. *See id.* (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276). The former is a question of law and the latter is a question of fact. *See id.* "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The Court reviews classification cases de novo. *See* 28 U.S.C. § 2640(a)(1). The Court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citation omitted). The Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

FINDINGS OF FACT

The Court makes the following findings of fact based on a review of the documents admitted into evidence and the credible testimony of the witnesses during the bench trial:

1. SGS is and has always been an importer and distributor of swimwear, sports apparel, and related merchandise. Schedule C ¶ 7; Trial Tr., Day 1, at 63, 117.
2. SGS is a Canadian corporation that was incorporated under the Canada Business Corporations Act on January 19, 1988 by Mr. Gellis. Schedule C ¶ 5; Pl.'s Ex. 1; Def.'s Ex. 1; Trial Tr., Day 1, at 63–64, 116.
3. From incorporation of SGS in 1988 until 2007, Mr. Gellis was the sole owner and sole officer of SGS. Schedule C ¶¶ 8–9; Trial Tr., Day 1, at 117.
4. Mr. Gellis is and has always been the President of SGS. Schedule C ¶¶ 9, 101; Trial Tr., Day 1, at 102, 272, 287–88.
5. SGS modified its ownership structure and reorganized the shares of the company in 2007 and 2013, both of which occurred subsequent to the execution of the Warehousing Agreement. Schedule C ¶ 91; Trial Tr., Day 1, at 201–03.
6. Canada 147483 is a Canadian corporation that was incorporated under the Canada Business Corporations Act on October 22, 1985 at the direction of Mr. Gellis. Schedule C ¶¶ 1–2; Pl.'s Ex. 2; Def.'s Ex. 2; Trial Tr., Day 1, at 72, 114.
7. From incorporation of Canada 147483 in 1985, Mr. Gellis is and has always been the sole owner and officer of Canada 147483. Schedule C ¶¶ 3, 101; Trial Tr., Day 1, at 115.
8. Beginning in 2001, SGS leased real property located at 6400 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the address of SGS' office. Schedule C ¶ 25; Pl.'s Ex. 10; Def.'s Ex. 14; Trial Tr., Day 1, at 69, 118–20.
9. In 2005, SGS leased additional real property adjacent to 6400 Cote de Liesse Road, with an address of 6450 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the location of the warehouse since 2005. Schedule C ¶ 26; Pl.'s Ex. 10; Def.'s Exs. 14, 16; Trial Tr., Day 1, at 69–70, 98, 118–20.
10. Canada 147483 does not pay any rent to SGS or any other entity for use of the warehouse. Schedule C ¶ 67; Trial Tr., Day 1, at 175.
11. All of the property, inventory, and equipment in the warehouse are owned by SGS and were identified as assets of SGS on its financial statements. Schedule C ¶ 68; Trial Tr., Day 1, at 176; *see* Def.'s Exs. 6–10.
12. The utility bill for the real property located at 6450 Cote de Liesse Road, which is separate from the utility bill for the real property located at 6400 Cote de Liesse Road, is paid by SGS. Schedule C ¶ 70; Trial Tr., Day 1, at 177.

13. The insurance policy on all of the merchandise and equipment in the entirety of the real property located at 6400 and 6450 Cote de Liesse Road is held by SGS. Schedule C ¶ 71; Trial Tr., Day 1, at 176–77.
14. On September 1, 2005, Mr. Gellis reviewed, approved, and executed a document entitled "Warehousing Agreement" by signing on behalf of both SGS and Canada 147483 in his capacity as President and sole officer of both companies. Schedule C ¶¶ 40, 45, 57; Pl.'s Ex. 8 ("Warehousing Agreement"); Def.'s Ex. 12 ("Warehousing Agreement"); Trial Tr., Day 1, at 160, 295–96.
15. Mr. Gellis was not required, according to the bylaws of either company, to obtain approval from any other person in order to execute the Warehousing Agreement. Schedule C ¶ 44.
16. In the Warehousing Agreement, SGS and Canada 147483 mutually agreed that:

    (1) [SGS] may, from time to time request that [Canada 147483] take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise."

    (2) "[Canada 147483] agrees that in taking delivery of said merchandise it will perform the following functions:

    > (a) provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;
    > (b) assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;
    > (c) create and maintain inventory records of all merchandise delivered to [Canada 147483];
    > (d) maintain perpetual inventory records;
    > (e) assist [SGS] in the issuance of samples from the inventory on deposit;
    > (f) take periodic inventory of the merchandise deposited;
    > (g) provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services."

    Warehousing Agreement at 1–2; *see* Schedule C ¶ 41; Trial Tr., Day 1, at 254.
17. SGS does not manufacture the merchandise it sells; the merchandise is imported from foreign suppliers, who are primarily located in China. Schedule C ¶ 27; Trial Tr., Day 1, at 66.
18. Beginning in 2005, SGS' foreign suppliers shipped SGS' merchandise, by sea or by air, to Canada. When sent by combined

transport utilizing sea and rail, the goods were transported "through Montreal," and when sent by air, the airport of destination was Montreal. From Montreal, the merchandise was then transported by truck, in bond, to Champlain, New York. Order (Feb. 2, 2021) at 1, ECF No. 80 (granting the Parties' joint motion to amend Schedule C ¶ 33); Trial Tr., Day 1, at 67, 127, 130–36.

19. When the in-bond merchandise was brought into New York, SGS would file a consumption entry in the United States and duties were assessed on the price "paid or payable" to the foreign supplier. Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.
20. Beginning in 2005 and up until at least the date the subject merchandise entered the United States, containers that were imported into the United States by SGS from its foreign suppliers were immediately exported, unaltered, from the United States to SGS' warehouse at 6450 Cote de Liesse Road in Canada by truck. Schedule C ¶¶ 26, 34; Trial Tr., Day 1, at 63, 67, 128.
21. As to the transactions from the United States to Canada, SGS acts as both the exporter (from the United States) and importer (into Canada). Schedule C ¶ 34; Trial Tr., Day 1, at 137, 139.
22. The physical handling of the merchandise by Canada 147483 began when the merchandise arrived at the loading dock for the SGS warehouse. Legal title to that merchandise did not pass from SGS to Canada 147483. Order (Feb. 2, 2021) at 2 (granting the Parties' joint motion to amend Schedule C ¶ 62); Trial Tr., Day 1, at 63, 67, 140, 163–64, 252.
23. When merchandise reached the SGS warehouse, Canada 147483 employees confirmed the number of cartons in the shipment; documented any open or broken boxes and notified SGS; segregated the merchandise by style, color, and size; and placed the merchandise in appropriate areas. Trial Tr., Day 1, at 67, 74, 217, 252, 254–57.
24. When a customer placed an order, SGS entered the order into its system. The allocation system compared the order to the inventory on hand and automatically allocated inventory to the orders. The SGS allocation manager reviewed the allocation and an SGS employee printed a picking ticket and placed it in a basket in the SGS front office. Schedule C ¶¶ 64–65; Trial Tr., Day 1, at 91–92; *see* Pl.'s Ex. 14.

25. Two or three times per day, a Canada 147483 employee entered the SGS front office, retrieved the accumulated pick tickets, and took the pick tickets to Mr. Couchman. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.
26. Mr. Couchman placed the pick tickets in order of priority. Trial Tr., Day 1, at 258–60.
27. A Canada 147483 employee retrieved the inventory by style and color as indicated on the pick ticket, packed the merchandise, and arranged for the carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.
28. The Warehouse Manager for Canada 147483, Mr. Couchman, interacted with SGS' suppliers—both warehouse supply companies and transport companies, such as FedEx and UPS—on behalf of SGS, identifying himself as Warehouse Manager for SGS. Mr. Couchman was an authorized user on the SGS purchasing accounts for many such vendors. Schedule C ¶ 75; Trial Tr., Day 1, at 180–82, 246–48.
29. A Canada 147483 employee indicated by circling that all the inventory on a pick ticket had been picked and returned the fulfilled pick tickets back to the SGS front office. The fulfilled pick tickets were used to invoice SGS for Canada 147483's services. Schedule C ¶ 66; Trial Tr., Day 1, at 94–99, 109–10; *see* Pl.'s Ex. 12; Def.'s Exs. 16, 18, 39.
30. Canada 147483 on its own could not decide to direct any merchandise to leave the SGS warehouse. No merchandise left the SGS warehouse except according to a pick ticket from SGS. Trial Tr., Day 1, at 263.
31. Canada 147483 employees did not "use" merchandise for any purpose other than to provide "pick and pack" services. Trial Tr., Day 1, at 264–65.
32. In 2013 and 2014, SGS imported the subject merchandise into the United States under various consumption entries and paid duties on the price paid or payable to the foreign supplier. *See* Compl. ¶ 8; Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.
33. SGS exported the subject merchandise immediately to Canada. *See* Compl. ¶ 9; Schedule C ¶¶ 34–35; Trial Tr., Day 1, at 63, 67, 128.
34. SGS and Canada 147483 understood the terms of the Warehousing Agreement to apply to Canada 147483's handling of the subject merchandise. *See* Trial Tr., Day 1, at 79, 241.

35. Canada 147483 handled the subject merchandise at the warehouse in the same manner in which it generally handled all of SGS' merchandise. *See* Order (Feb. 2, 2021) at 2; Schedule C ¶¶ 64–66, 75; Trial Tr., Day 1, at 67, 74, 91–94, 217, 235, 252–60, 264–65; *see* Pl.'s Ex. 14; Def.'s Ex. 32.
36. SGS imported the subject merchandise into the United States, asserting that the merchandise was properly classified under HTSUS subheading 9801.00.20. Schedule C ¶ 59.
37. Customs denied SGS' claim for duty-free treatment under HTSUS subheading 9801.00.20, liquidated the subject entries, reclassified the merchandise under HTSUS Chapters 61 through 63, and assessed duties. Compl. ¶ 24; Trial Tr., Day 1, at 100; *see* Pl.'s Ex. 16.

CONCLUSIONS OF LAW

I. HTSUS Subheading 9801.00.20

The Court conducts de novo review of whether the subject merchandise qualifies for duty-free treatment under HTSUS subheading 9801.00.20. The Court specifically addresses only the Phase One bifurcated trial issue of whether the Warehouse Agreement is a lease or similar use agreement.

A. Legal Framework

In construing the terms of the HTSUS headings, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999)). Ordinarily, the Court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "are not legally binding or dispositive," *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but here the tool is unavailable because Chapter 98 does not have Explanatory Notes. Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

B. Analysis of the Terms of HTSUS Subheading 9801.00.20

The Court first ascertains the proper meaning and scope of HTSUS subheading 9801.00.20. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

HTSUS subheading 9801.00.20 covers reimported merchandise: (1) upon which duty was paid at the time of previous importation; (2) that has not been advanced in value or improved in condition by any process of manufacture or other means while abroad; (3) that was exported under a lease or similar use agreement; and (4) that is reimported by or for the account of the person who imported the merchandise into, and exported it from, the United States. *See* HTSUS subheading 9801.00.20; *Skaraborg Invest USA, Inc. v. United States*, 22 CIT 413, 417, 9 F. Supp. 2d 706, 709 (1998).

Generally, an importer must pay a duty on previously imported merchandise that was exported and then reimported into the United States. 19 C.F.R. § 141.2. HTSUS subheading 9801.00.20 provides an exception to this general rule by allowing duty-free treatment if the subject merchandise was originally imported into the United States and duties were paid, the merchandise was exported outside the United States under a lease or similar use agreement, and then reimported back into the United States. The purpose of this provision is to prevent the imposition of double duties for merchandise that meets the specific requirements of HTSUS subheading 9801.00.20. Customs determines whether to allow for duty-free treatment under HTSUS subheading 9801.00.20, as set forth in the relevant implementing regulation as follows:

> **Entry of reimported articles exported under lease.** Free entry shall be accorded under subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS), whenever it is established to the satisfaction of the Center director that the article for which free entry is claimed was duty paid on a previous importation . . . , is being reimported without having been advanced in value or improved in condition by any process of manufacture or other means, was exported from the United States under a lease or similar use agreement, and is being reimported by or for the account of the person who imported it into, and exported it from, the United States.

19 C.F.R. § 10.108.

C. Lease or Similar Use Agreement

Phase One of this bifurcated trial involves only the third element, whether the Warehousing Agreement constitutes a lease or similar use agreement. Am. Bifurcation Order at 1; *see* HTSUS subheading 9801.00.20. Plaintiff argues that its Warehousing Agreement is a bailment agreement, which Customs has previously recognized as a "lease or similar use agreement[]." *See* Pl.'s Pretrial Br. at 3; Trial Tr., Day 2, at 330, 338–39. The Court notes at the outset that Plaintiff's characterization of its arrangement with Canada 147483 as a "bailment agreement" presupposes a legal conclusion, and the Court does not entertain an analysis of whether there is a bailment agreement in this case. The Court confines its analysis to whether the facts ascertained at trial establish a lease or similar use agreement under a statutory analysis of HTSUS subheading 9801.00.20.

The Court looks to dictionary definitions to construe the tariff terms "lease or similar use agreement[]." "Lease" is defined as "[a] contract by which a rightful possessor of personal property conveys the right to use that property in exchange for consideration." *Lease* (5), *Black's Law Dictionary* (11th ed. 2019). "Similar" is defined as "alike in substance or essentials." *Similar*, *Merriam-Webster's Collegiate Dictionary* at 1161 (11th ed. 2020). "Use" as a noun is defined as "[t]he application or employment of something." *Use* (noun) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" as a verb is defined as "[t]o employ for the accomplishment of a purpose." *Use* (verb) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" is also defined as "to carry out a purpose or action." *Use*, *MerriamWebster's Collegiate Dictionary* at 1378. "Agreement" is defined as "[a] mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." *Agreement* (1), *Black's Law Dictionary* (11th ed. 2019).

Accordingly, the Court construes the terms "lease or similar use agreement[]" under HTSUS subheading 9801.00.20 in light of these relevant dictionary definitions as follows:

The Court construes the term "lease" to mean a contract by which a rightful possessor of the subject merchandise conveys the right to employ the subject merchandise for the accomplishment of a purpose or action in exchange for consideration.

The Court construes the terms "similar use agreement" and "use agreement similar to a lease" to be synonymous in the context of HTSUS subheading 9801.00.20, because "similar" compares the use agreement to a lease.

The Court construes the synonymous terms "similar use agreement" and "use agreement similar to a lease" to mean a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of a purpose or action that is alike in substance to a lease. Both a lease and a similar use agreement require that the subject merchandise be employed for the accomplishment of a purpose or action.

Few cases at the U.S. Court of International Trade have opined on a lease or similar use agreement. In *Werner & Pfleiderer Corp. v.*

United States ("*Werner*"), 17 CIT 916 (1993), the court held that consideration is not required for a valid similar use agreement. 17 CIT at 918. The Court of International Trade defined a "similar use agreement" under HTSUS subheading 9801.00.20 as a loan for temporary use. *Skaraborg*, 22 CIT at 418; *Werner*, 17 CIT at 918. In *Werner*, the subject merchandise machine was reimported to the United States after it was loaned by the plaintiff to Ogilvie Mills Limited and several test runs of the subject merchandise machine were performed at Ogilvie Mills Limited's facilities in Canada. 17 CIT at 916. The *Werner* court determined that the agreement to "loan" the machine "for testing purposes" was "either a lease or a similar use agreement." *Id.* at 918–19. This is consistent with the Court's definition of a similar use agreement because testing requires operating the subject merchandise for the accomplishment of a purpose or action.

Legislative history also supports the Court's statutory interpretation. In the 1963 version of the Tariff Schedule of the United States ("TSUS"), which followed the enactment of the Tariff Classification Act of 1962, Pub. L. No. 87–456, Item 801.00 of the TSUS appeared as follows:

> Articles, previously imported, with respect to which the duty was paid upon such previous importation, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under *lease to a foreign manufacturer*, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

Tariff Classification Act of 1962, Pub. L. No. 87–456, Schedule 8, Item 801.00, 77A Stat. 403, 406 (1962) (emphasis added). Item 801.00 of the TSUS was amended by the Trade and Tariff Act of 1984, Pub. L. No. 98–573, to language identical to the language of HTSUS subheading 9801.00.20, as follows:

> **SEC. 118. REIMPORTATION OF CERTAIN ARTICLES ORIGINALLY IMPORTED DUTY FREE.**
>
> Item 801.00 is amended —
>
> . . .
>
> (2) by striking out "lease to a foreign manufacturer" in clause (1) and inserting in lieu thereof "*lease or similar use agreements*."

Trade and Tariff Act of 1984, Pub. L. 98–573, § 118, 98 Stat. 2948, 2953–54 (1984) (emphasis added). The legislative intent is recorded in a Ways and Means Committee Report of stand-alone bill H.R. 5448, as the amendment was originally introduced, and later a House of Representatives Report of the amendment as combined with other bills in omnibus bill H.R. 6064:

> Section 1 of H.R. 5448, if enacted, would extend the duty-free treatment of item 801.00 of the Tariff Schedules of the United States (TSUS) to the reimportation of articles which were imported into the United States and then exported *under lease or similar use agreement* to an entity other than a foreign manufacturer. . . . The intent of this legislation is to extend the coverage of that provision to the reimportation of goods which were exported *under lease* to someone other than a foreign manufacturer; of particular concern are exportations *under lease* to a government or service industry. . . .
>
> Item 801.00 may be applied to any type of article. However, it appears to be primarily applied to the reimportation of injection molds for plastic or rubber products, such as combs, plastic houseware items, toys, or tires. The molds are manufactured of steel and generally range in price from $8,000 to $80,000. Other reimported articles entered under item 801.00 include dies of all kinds and general tooling equipment such as jigs, fixtures, and CNC machine lathes. . . .

Report on Miscellaneous Tariff and Customs Bills Before the Subcomm. on Trade of the H. Comm. on Ways and Means, 98th Cong. 34, 157–59 (1984) (emphasis added); *see also* H.R. Rep. No. 98–1015, at 1, 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4960, 4983. The word "lease" in Item 801.00 was replaced with the phrase "lease or similar use agreement," but the legislative history reflects a focus on lease with references to "goods which were exported under lease" and "exportations under lease." A reading of the entire report supports a conclusion that the expansion of the provision intended by the 1984 amendment does not apply to all goods that were imported and duty-paid, then exported and reimported, under any type of agreement that might be described as a use agreement, but rather a use agreement that is similar to a lease.

Based on credible testimony presented during a bench trial, the Court finds that under the Warehousing Agreement in this case, SGS and Canada 147483 expressed a mutual understanding for Canada 147483 to "take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise;" "provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;" "assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;" "create and maintain inventory records of all merchandise delivered to [Canada 147483]; "maintain perpetual inventory records;" "assist [SGS] in the issuance of samples from the inventory on deposit;" "take periodic inventory of the merchandise deposited;" and "provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services." Warehousing Agreement at 1–2. Evidence elicited at trial established that Canada 147483's handling of the subject merchandise involved confirming the number of cartons in the shipment; notifying SGS of any open or damaged boxes; segregating by style, color, and size; placing the merchandise in appropriate areas; retrieving the inventory by style and color as indicated on the pick ticket; packing the merchandise; and arranging for a carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 91–94, 217, 235, 252–55, 257–59; *see* Pl.'s Ex. 14. The Court finds that sufficient credible evidence was presented at trial to establish that Canada 147483 employees, pursuant to the Warehousing Agreement, used the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that satisfies the meaning of a similar use agreement under HTSUS subheading 9801.00.20.

Defendant argues that by its plain or common meaning, a "use agreement similar to a lease" conveys the right to use and possess the property, and that possession is characterized by dominion and control over the property. Def.'s Pretrial Br. at 21; Trial Tr., Day 2, at 345–47. Defendant contends that because the services covered by the Warehousing Agreement do not involve use of merchandise, and Canada 147483 did not have exclusive possession, control, or dominion over the subject merchandise and could not use the subject merchandise as it wished, the Warehousing Agreement is not a use agreement similar to a lease. Def.'s Pretrial Br. at 21–26; Trial Tr., Day 2, at 347–52.

The Court does not agree with Defendant that the "use" must be for the specific purpose for which the subject merchandise was designed (for example, Canada 147483 employees do not need to wear the bathing suits for swimming under the "use" requirement), but it is sufficient if some purpose or action, such as performing warehousing services or "pick and pack" services, or testing as in *Werner*, is the purpose or action under the agreement.

Defendant proposed including an element of possession by defining "lease" as "a contract by which one owning property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payments." Def.'s Pretrial Br. at 18–19 (quoting *Black's Law Dictionary* at 800 (5th ed. 1979)) (emphasis and internal punctation omitted). Defendant proposed defining "possession" as:

> 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. Civil law. The detention or use of a physical thing with the intent to hold it as one's own. La. Civ. Code art. 3421(a). 4. (usu. pl.) Something that a person owns or controls. . . .

Id. at 10 n.2 & 18–19 (quoting *Black's Law Dictionary* (11th ed. 2019)). The Court rejects Defendant's contention that use under HTSUS subheading 9801.00.20 must involve Canada 147483 possessing or having exclusive control over the subject merchandise, akin to temporary ownership of the goods. The Court declines to read "use" as narrowly as proposed by Defendant.

D. Valid Agreement

The Court amends the previous opinion to address the additional issue of whether a valid agreement exists under applicable Canadian corporate law. Defendant argues that the Warehousing Agreement is not a valid agreement because SGS and Canada 147483 are a single entity that operates at the direction and sole discretion of Mr. Gellis for the benefit of SGS. Def.'s Pre-Trial Br. at 1–2, 22–26. Because SGS and Canada 147483 are corporations, agreement with Defendant's argument that SGS and Canada 147483 are a single entity would require the Court to pierce the corporate veils of both SGS and Canada 147483.

The Court cannot "lightly cast aside" the corporate form. *3D Sys. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1380 (Fed. Cir. 1998). Canadian corporate law applies here because SGS and Canada 147483 were both incorporated in Canada under the Canada Business Corporations Act. Schedule C ¶¶ 1–2, 5; Pl.'s Exs. 1, 2; Def.'s Exs. 1, 2; Trial Tr., Day 1, at 63–64, 72, 114, 116. SGS and Canada 147483 are both located in Quebec. Schedule C ¶¶ 25, 26; Pl.'s Ex. 10; Def.'s Exs. 14, 16; Trial Tr., Day 1, at 69–70, 98, 118–20.

Article 317 of the Civil Code of Quebec provides that "[t]he juridical personality of a legal person may not be invoked against a person in good faith so as to dissemble fraud, abuse of right or contravention of a rule of public order." Civil Code of Quebec, C.Q.L.R. 1991, c 64, art.

317 (Can.); *see also Barer v. Knight Brothers LLC*, 2019 SCC 13, paras. 201, 209, 286 (Can.). "It is trite law that [a] corporation[] ha[s] a legal personality that is separate from its shareholders." *7914377 Canada Inc. v. Gauvreau*, 2019 QCCS 4344, para. 83 (Can.). To satisfy the fraud requirement of Article 317, "two essential elements of a fraud are dishonesty and loss." *Chisasibi (Cree Nation) v. Servitec Emergency Vehicle Corp.*, 2005 CarswellQue 13008, para. 21 (Can. C. Que.) (WL). Article 317 prohibits a company's shareholders and directors from hiding behind a corporation's juridical personality "to abuse of this right to defraud people doing business with the corporation. . . . [O]ne must prove that said shareholders or directors are the *alter ego* of the corporation; *Alter ego* means a corporation which is an instrument, a puppet in the hands of said shareholders who act through it." *Panorios v. 9200–8143 Quebec Inc.*, 2010 QCCQ 3264, paras. 45, 47–48 (Can. C. Que.).

Defendant argues that because Customs did not seek to impose liability on Canada 147483 or Mr. Gellis, the test for piercing the corporate veil and determining that one entity is an alter ego of another entity need not be applied rigidly. Def.'s Pretrial Br. at 23. Defendant does not cite direct authority supporting its argument and the Court is not persuaded that a less rigid test exists under Quebec law by Defendant's references to the caselaw of various other Canadian and U.S. jurisdictions.

Defendant did not present evidence at trial that SGS committed fraud, abuse of right, or contravention of a rule of public order as required under Canadian law to pierce the corporate veil. The Court agrees with Plaintiff's assertion that Defendant never elicited evidence at trial regarding alleged fraud or wrongdoing by the principals of SGS and Canada 147483, even though Defendant crossexamined multiple witnesses from SGS and Canada 147483 during trial. Because Defendant failed to establish any evidence of fraud, alter ego, or other wrongdoing by SGS and Canada 147483 during trial, the Court views the companies as separate corporate entities and declines to pierce the corporate veils of SGS and Canada 147483. The Court concludes, therefore, that the Warehousing Agreement is a valid agreement between two corporations, SGS and Canada 147483.

In sum, the Court reiterates its conclusion based on the credible evidence presented at trial that the Warehousing Agreement is a lease or similar use agreement, specifically a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that is alike in substance to a lease. Therefore, the Court holds that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20. Because the third requirement of HTSUS subheading 9801.00.20 is satisfied, the Court concludes that a further trial on Phase Two of the Bifurcation Order shall proceed.[2]

CONCLUSION

For the foregoing reasons, the Court holds that the Warehousing Agreement is a lease or similar use agreement and a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20.

It is hereby

ORDERED that Defendant's Motion, ECF No. 100, is granted; and it is further

ORDERED that Slip Opinion 22–26, ECF No. 95, is set aside; and it is further

ORDERED that following a bench trial, the Court concludes that the Warehousing Agreement is a lease or similar use agreement under Phase One of the Bifurcation Order; and it is further

ORDERED that a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20; and it is further

ORDERED that a status conference will be scheduled accordingly to discuss trial under Phase Two of the Bifurcation Order.

Dated: February 17, 2023
New York, New York

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

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[2] The Court considered supplemental briefing and held oral argument on the issue of whether 19 U.S.C. § 1625(c) applies in this case. In light of the Court's holding that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20, the Court need not address the 19 U.S.C. § 1625(c) arguments presented by the Parties.

Slip Op. 23–21

SEAH STEEL CORPORATION, Plaintiff, HUSTEEL CO., LTD., NEXTEEL CO., LTD., AJU BESTEEL CO., LTD., AND ILJIN STEEL CORPORATION, Consolidated Plaintiffs, and HYUNDAI STEEL COMPANY AND ILJIN STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, TENARIS BAY CITY, INC., IPSCO TUBULARS INC., VALLOUREC STAR, L.P., AND WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00086

[Denying the motion for reconsideration.]

Dated: February 23, 2023

Jeffrey M. Winton, *Michael Chapman*, *Amrietha Nellan*, and *Vi N. Mai*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiff SeAH Steel Corporation.

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

Jarrod M. Goldfeder, Trade Pacific PLLC, of Washington, D.C., for Consolidated Plaintiff AJU Besteel Co., Ltd. and Consolidated Plaintiff and Plaintiff-Intervenor ILJIN Steel Corporation.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. Also on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

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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, Tenaris Bay City, Inc., and IPSCO Tubulars Inc.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *Kelsey M. Rule*, *Luke A. Meisner*, *Paul W. Jameson*, and *William A. Fennell*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors Vallourec Star, L.P. and Welded Tube USA Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SeAH Steel Corporation ("SeAH"), Consolidated Plaintiffs Husteel Co., Ltd., NEXTEEL Co., Ltd., AJU Besteel Co., Ltd., and ILJIN Steel Corporation, and Plaintiff-Intervenors Hyundai Steel Company and ILJIN brought this consolidated action challenging the final results published by the U.S. Department of Commerce ("Commerce") in the 2016–2017 administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from the Republic of Korea. *See Certain Oil Country Tubular Goods From the Republic of Korea* ("*Final Results*"), 84 Fed. Reg. 24,085 (Dep't of Commerce May 24, 2019) (final results of antidumping duty admin. review; 2016–2017); *see also* Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (May 17, 2019) ("Final IDM"), ECF No. 20–5. The Court sustained the *Final Results*, as amended by the Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), ECF No. 118–1, and entered judgment for Defendant United States ("Defendant"). J., ECF No. 148; *SeAH Steel Corp. v. United States* ("*SeAH I*"), 45 CIT __, 513 F. Supp. 3d 1367 (2021); *SeAH Steel Corp. v. United States* ("*SeAH II*"), 46 CIT __, 589 F. Supp. 3d 1267 (2022).

Before the Court is the Motion for Reconsideration, ECF No. 149, filed by SeAH. SeAH moves pursuant to USCIT Rule 59(e) for the Court to reconsider and rescind the prior Opinion and Judgment, in which this Court sustained Commerce's differential pricing analysis in *SeAH Steel Corp. v. United States*, 45 CIT __, 513 F. Supp. 3d 1367 (2021). Mot. Recons. at 1. SeAH asserts that the Court should remand the differential pricing analysis issue due to the issuance of *Stupp Corp. v. United States* ("*Stupp*"), 5 F.4th 1341 (Fed. Cir. 2021). *Id.* at 2–4. SeAH argues also that the Court erred in sustaining Commerce's flawed explanation of SeAH's account of how SeAH's cost of materials was reported. *Id.* at 4–8. Defendant opposes SeAH's Motion for Reconsideration. Def.'s Resp. Opp'n SeAH Steel Corporation's Mot. Recons. ("Def.'s Opp'n"), ECF No. 151.

For the reasons that follow, the Court denies the Motion for Reconsideration.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinion and recounts the facts relevant to the Court's review of the Motion for Reconsideration. *See SeAH I*, 45 CIT at __, 513 F. Supp. 3d at 1376– 77; *SeAH II*, 46 CIT at __, 589 F. Supp. 3d at 1272–73.

In the *Final Results*, Commerce applied a differential pricing analysis and calculated SeAH's weighted-average duty margin using the alternative average-to-transaction method. Final IDM at 60–71. Commerce included inventory valuation losses in SeAH's general and administrative ("G&A") expenses. *Id.* at 82–83.

The Court issued *SeAH I* on April 14, 2021. In *SeAH I*, the Court considered six Rule 56.2 motions for judgment on the agency record and nine issues presented by the Parties. *See SeAH I*, 45 CIT at __, 513 F. Supp. 3d at 1375–76. Relevant here, the Court held that: (1) Commerce's application of the Cohen's *d* test, the 0.8 threshold, and the 33% and 66% ratio test thresholds were in accordance with the law; Commerce's explanation for why the A-to-A method could not account for the pattern of price differences in SeAH's sales was in accordance with the law; and Commerce's use of the alternative A-to-T method to calculate SeAH's dumping margin was in accordance with the law, *id.* at __, 355 F. Supp. 3d at 1379–85; and (2) Commerce's decision to include SeAH's inventory valuation losses as G&A expenses was not supported by substantial evidence because Commerce did not cite relevant record evidence, *id.* at __, 355 F. Supp. 3d at 1405–06.

The U.S. Court of Appeals for the Federal Circuit issued *Stupp* on July 15, 2021, remanding Commerce's use of the Cohen's *d* test for further explanation as to "whether the limits on the use of the Cohen's *d* test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be observed when Commerce uses the Cohen's *d* test in . . . adjudications." *Stupp*, 5 F.4th at 1341, 1357–60.

In the *Remand Results*, Commerce continued to include inventory valuation losses in SeAH's G&A expenses. *Remand Results* at 24–27.

In *SeAH II*, the Court sustained Commerce's inclusion of SeAH's inventory valuation losses in SeAH's G&A expenses ratio because Commerce provided further explanation with additional details and citations to record evidence that sufficiently demonstrated that the inventory valuation losses were recognized as actual in SeAH's normal books and records. *SeAH II*, 46 CIT at __, 589 F. Supp. 3d at 1285–88. The Court entered judgment for Defendant.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

SeAH asks the Court to reconsider its decision affirming Commerce's differential pricing analysis and inclusion of SeAH's inventory valuation losses in SeAH's G&A expense ratio. Mot. Recons. at 2.

Defendant argues that there is no basis for the Court to reconsider its decision regarding the differential pricing analysis and inventory valuation losses. Def.'s Opp'n at 4–9.

USCIT Rule 59(e) provides that:

> A motion to alter or amend a judgment must be served no later than 30 days after the entry of the judgment.

USCIT R. 59(e). "The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Ford Motor Co. v. United Sates*, 30 CIT 1587, 1588 (2006) (citing *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

I. Commerce's Use of the Cohen's *d* Test

In *Stupp*, the U.S. Court of Appeals for the Federal Circuit ("CAFC") remanded Commerce's use of the Cohen's *d* test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. 5 F.4th at 1357–60. The CAFC addressed Commerce's argument that Commerce does not need to worry about normality because it is using a population instead of a sample, stating that Commerce's argument "does not address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality." *Id.*

Commerce applied its two-step differential pricing methodology in this case, the first step of which was the Cohen's *d* test. *See* Prelim. Decision Mem. ("Prelim. DM") at 11–13, PD 274 (Oct. 3, 2018); Final IDM at 5–6, 71 (applying the same methodology as in the Prelim. DM without change to its differential pricing methodology). The standard of review for considering Commerce's differential pricing analysis is reasonableness. *Stupp*, 5 F.4th at 1353. The CAFC and the U.S. Court of International Trade have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g.*, *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen's *d* test); *Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1314–35 (2016) (discussing application of the A-to-T method, the Cohen's *d* test, the meaningful difference analysis, zeroing, and the "mixed comparison methodology" of applying the A-to-A method and the A-to-T method when 33–66% of a respondent's sales pass the Cohen's *d* test), *aff'd*, 862 F.3d 1337 (Fed.

Cir. 2017); *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test). However, the CAFC has stated that "there are significant concerns relating to Commerce's application of the Cohen's *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances." *Stupp*, 5 F.4th at 1357.

The Cohen's *d* test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." *Apex Frozen Foods*, 862 F.3d at 1342 n.2. The Cohen's *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous. *See Stupp*, 5 F.4th at 1357. Applying the Cohen's *d* test to data that do not meet these assumptions can result in "serious flaws in interpreting the resulting parameter." *See id.* at 1358.

The Court concludes that SeAH has not raised a ground justifying a grant of its Motion for Reconsideration of the judgment. Commerce's use of a population, rather than a sample, in the application of the Cohen's *d* test sufficiently negates the questionable assumptions about thresholds that were raised in *Stupp*. As this Court considered in *SeAH I*, Commerce explained in the Final IDM that "application of the Cohen's *d* test was appropriate because 'the U.S. sales data . . . reported to Commerce constitute[] a *population*. As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to Commerce's analysis.'" 45 CIT at __, 513 F. Supp. 3d at 1382–83 (emphasis added) (quoting Final IDM at 66). Based on Commerce's explanation, this Court concluded in *SeAH I* that "Commerce's application of the Cohen's *d* test to determine whether there was a significant pattern of differences was reasonable. Commerce did not need to consider sample size, sample distribution, and the statistical significance of the sample." *Id.* The concerns described in *Stupp* that might be raised when the Cohen's *d* test is applied to samples are inapplicable because in this case, Commerce applied the Cohen's *d* test to a population.

SeAH has not presented a ground justifying reconsideration of the judgment pursuant to USCIT Rule 59(e) and the Court will not disturb its previous decision regarding Commerce's use of its differential pricing analysis, in particular its application of the Cohen's *d* test. The Court denies SeAH's Motion for Reconsideration as to the differential pricing analysis issue.

II. Inventory Valuation Losses

SeAH argues that Commerce's inclusion of inventory valuation losses in its G&A expense ratio is unsupported by substantial evidence and the Court should reconsider and reverse its conclusion sustaining Commerce's determination. Mot. Recons. at 7–8.

SeAH provides no new controlling law, evidence, or arguments but instead continues to dispute Commerce's determination. *See id.* at 4–8. SeAH repeats its arguments, which the Court considered already, that SeAH's cost calculations reflected the full historical cost of the raw-materials and work-in-process inventories used in production and including SeAH's inventory valuation losses in calculating SeAH's costs resulted in double counting of SeAH's actual cost of materials. *Id.* at 4–5. SeAH asserts that the Court erred in relying on Commerce's explanation of SeAH's account of how SeAH's cost of materials was reported. *Id.* Because the Court evaluated SeAH's arguments, Commerce's explanation, and the record evidence already in *SeAH I* and *SeAH II* and SeAH has not presented a ground justifying reconsideration of the judgment pursuant to USCIT Rule 59(e), the Court will not disturb its previous decision regarding Commerce's treatment of SeAH's inventory valuation losses. The Court denies SeAH's Motion for Reconsideration as to the inventory valuation losses issue.

CONCLUSION

For the foregoing reasons, the Court denies the Motion for Reconsideration as to the Cohen's *d* test and inventory valuation losses. Accordingly, it is hereby

ORDERED that the Motion for Reconsideration, ECF No. 149, is denied.

Dated: February 23, 2023
New York, New York

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

Slip Op. 23–22

Grupo Simec S.A.B. de C.V. et al., Plaintiffs, v. United States, Defendant, and Rebar Trade Action Coalition, Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 22-cv-00202

[Denying Plaintiffs' Motion for a Preliminary Injunction.]

Dated: February 24, 2023

James L. Rogers, Jr., Nelson Mullins Riley & Scarborough LLP of Greenville, SC, for Plaintiffs Grupo Simec S.A.B. de C.V., et. al.

Kara M. Westercamp, Trial Attorney, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the brief were *Brian M. Boynton,* Principal Deputy Assistant Attorney General, *Patricia M. McCarthy,* Director, *L. Misha Preheim,* Assistant Director, U.S. Department of Justice, Commercial Litigation Branch, and *Ian A. Mclnerney,* Of Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance.

John R. Shane, Wiley Rein LLP, of Washington, DC, for the Defendant-Intervenor. With him on the brief were *Alan H. Price, Maureen O. Thorson, Jeffrey O. Frank,* and *Paul J. Coyle.*

OPINION

Vaden, Judge:

On August 8, 2022, Grupo Simec S.A.B. de C.V. (including fourteen subsidiaries, collectively, Grupo Simec) filed a complaint challenging the Final Results of the Department of Commerce's (Commerce) Administrative Review in *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2019–2020* (Final Results), 87 Fed. Reg. 34,848 (June 8, 2022). Compl. ¶ 1, ECF. No 8. On the consent of all the parties, Chief Judge Barnett issued an order enjoining liquidation on August 19, 2022. ECF No. 10. Citing USCIT Rules 7 and 65(a), Grupo Simec now seeks a further injunction. It moves to enjoin U.S. Customs and Border Protection (Customs) from collecting cash deposits at the rate set forth in the contested Final Results. Pls.' Am. Mot. Prelim. Inj. (Pls.' Mot.), ECF No. 32. Commerce opposes this remedy, as does Defendant-Intervenor Rebar Trade Coalition (the Coalition). For the reasons that follow, the Motion to enjoin Customs from requiring Plaintiffs to pay cash deposits is **DENIED.**

BACKGROUND

I. Procedural History

On November 6, 2014, Commerce issued an antidumping duty order on concrete reinforcing bar (rebar) from Mexico. *Steel Concrete Reinforcing Bar from Mexico: Antidumping Duty Order,* 79 Fed. Reg. 65,925 (Nov. 6, 2014). Commerce began an annual review of the order on January 6, 2021. *See Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews,* 86 Fed. Reg. 511, 513 (Jan. 6, 2021). The agency selected Grupo Simec and Deacero S.A.P.I. de C.V. as mandatory respondents on February 8, 2021. *See Steel Concrete Reinforcing Bar from Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2019–2020* (Preliminary Results), 86 Fed Reg. 68,632, 68,633 (Dec. 3, 2021). Commerce chose Grupo Simec because it was one of "the two largest exporters and/or producers of subject merchandise by volume during the [period of review.]" Preliminary Decision Memorandum (PDM) at 2, Barcode: 4186374–02 A-201–844 REV. The agency then issued an initial antidumping questionnaire to Grupo Simec on February 8, 2021. *Id.* at 2.

Grupo Simec submitted multiple extension requests for the various sections of its questionnaire responses, citing challenges caused by COVID-19 restrictions, the amount of data requested, and electricity blackouts. *See, e.g.,* Section A Extension Request (Feb. 23, 2021) Barcode: 4090967–01 A-201–844 REV. Commerce granted a number of partial and full extensions in response to these requests. *See, e.g.,* Extension of Time Section A Response (Feb. 23, 2021), Barcode: 4091001–01 A-201–844 REV. Grupo Simec then filed its responses on March 8, March 31, and April 7, 2021, respectively. Section A Questionnaire Response, Barcode: 4095785–01 A-201–844 REV; Section B & C Questionnaire Response, Barcode: 4105401–01 A-201–844 REV; Section D Response, Barcode: 4107846–01 A-201–844 REV.

Because of deficiencies in Grupo Simec's initial questionnaire responses, Commerce issued a first supplemental questionnaire focusing on Sections A C of Grupo Simec's initial responses on July 27, 2021, and a second supplemental questionnaire focusing on Sections A and D on August 4, 2021. First Supplemental Questionnaire Barcode: 4146957–01 A-201–844 REV; Second Supplemental Questionnaire, Barcode: 4149597–01 A-201–844 REV. The first supplemental questionnaire had an initial deadline of August 17, 2021, and the second supplemental questionnaire had a deadline of August 11, 2021. *Id.* Shortly thereafter, Grupo Simec again requested a series of extensions for both questionnaires, citing the large amount of data Commerce requested as well as continued challenges from the pandemic such as loss of staff. *See, e.g.,* Extension Request (Aug. 9, 2021), Barcode: 4151182–01 A-201–844 REV. Again, Commerce granted a number of partial extensions. *See, e.g.,* Extension of Time for Grupo Simec's Supplemental Questionnaire Responses (Aug 10, 2021), Barcode: 4151379–01 A-201–844 REV.

With Commerce's extensions, Grupo Simec's Section A-C responses were due on September 7, 2021, and its Section A & D responses were due on September 9, 2021. Extension of Time for Section A-C Responses (Sept. 1, 2021), Barcode: 4157267–01 A-201–844 REV; Extension of Time for Section A & D Responses (Sept. 3, 2021), Barcode: 4157901–01 A-201–844 REV. Despite these extensions, on September 6, 2021, Grupo Simec filed another request for a two week extension to answer specific questions in its Section A-C questionnaire that were due the following day. Extension Request for Downstream Sales Data, Barcode: 4158024–01 A-201–844 REV. Commerce denied this request because Grupo Simec had already "been provided six weeks to prepare and submit their responses," and the request lacked any justification for why additional time was needed. Denial of Extension (Sept. 7, 2021), Barcode: 4158116–01 A-201–844 REV. In response to this denial, Grupo Simec filed another request and reiterated the same points from its previous letters, such as the difficulty of gathering the data given the geographic dispersion of the company and pandemic-related issues. Second Extension Request for Downstream Sales Data (Sept. 7, 2021), Barcode: 4158573–01 A-201–844 REV. The agency denied this request because it had already "provided three additional weeks for Grupo Simec . . . to respond to Commerce's supplemental questionnaire covering sections A-C[.]" Denial of Extension Request at 1 (Sept. 9, 2021), Barcode: 4159298–01 A-201–844 REV. Grupo Simec also requested a one day extension on September 9, 2021, for its Section A&D responses, which Commerce granted. *See* Section A&D Extension Request, Barcode: 4159299–01 A-201–844 REV; Granting Extension Request (Sept. 9, 2021), Barcode: 4159336–01 A-201–844 REV. Grupo Simec filed its Section A&D responses on September 10, 2021. Submission of Section A&D Supplemental Questionnaire Response, Barcode: 4160054–01 A-201–844 REV.

Over a month later, Grupo Simec attempted to submit what it labeled "Additional Factual Information" to Commerce, consisting of its downstream sales data as well as some translations "inadvertently stripped by computer operation from the documents in the Commerce ACCESS filing process." Submission of Additional Information at 2 (Oct. 18, 2021), Barcode: 4172584–01 A-201–844 REV. Because these submissions contained information originally requested in the supplemental questionnaires, Commerce rejected them as untimely filed. Rejection of Untimely Filed Information (Oct. 19, 2021), Barcode: 4173540–01 A-201–844 REV.

On December 3, 2021, Commerce issued its Preliminary Results and its accompanying explanation in the Preliminary Decision Memorandum. Preliminary Results, 86 Fed Reg. 68,632; PDM, Barcode: 4186374–02 A-201–844 REV. A review of Grupo Simec's initial questionnaire responses found "deficiencies [that] covered all aspects of Grupo Simec's responses[.]" PDM at 4, Barcode: 4186374–02 A-201–844 REV. Commerce determined that Grupo Simec's supplemental questionnaire responses "continued to fail to provide information Commerce requested," and pervasive errors remained in Grupo Simec's home market sales data, U.S. sales data, and downstream sales data. *Id.* at 5. Commerce concluded that "it d[id] not have any sales-related information that can be used for conducting a dumping analysis," prompting the application of facts available under 19 U.S.C. § 1677m(e)(3). *Id.* at 7. Commerce did not rest there; it also drew adverse inferences from facts otherwise available under 19 U.S.C. § 1677m(d). It explained that "Grupo Simec has failed to cooperate by not acting to the best of its ability in failing to remedy the errors identified by Commerce as well as failing to submit requested information within the established deadline." *Id.* at 8. Commerce then preliminarily assigned a 66.7% dumping margin to Grupo Simec, which was the rate given to it in the original 2014 antidumping investigation. *Id.* at 9.

In its Final Results, Commerce maintained substantially the same position. *See* Final Results, 87 Fed. Reg. at 38,849–50; Issues & Decision Memorandum (IDM), Barcode: 4247887–02 A-201–844 REV. The Final Results defended Commerce's (1) refusal to give Grupo Simec more time to cure its deficiencies and to issue an additional questionnaire, (2) rejection of Grupo Simec's late submission, (3) drawing of adverse inferences from facts otherwise available, and (4) assignment of a 66.7% dumping rate to Grupo Simec. IDM at 4–35.; Barcode: 4247887–02 A-201–844 REV.

First, Commerce explained that it issued two supplemental questionnaires to Grupo Simec and granted multiple extensions, giving Grupo Simec approximately six weeks to complete the supplemental questionnaires. *Id.* at 9. The agency also noted that it was aware from the beginning of Grupo Simec's difficulties in preparing its answers because of COVID-19 and that it had kept these difficulties in mind when considering Grupo Simec's extension requests. *Id.* at 9–10. The final due date of September 7 came in response to Grupo Simec's September 1, 2021 extension request, and was within the range of the date requested in prior extension requests. *Id.* at 10. It was only on September 6 that Grupo Simec filed an additional request for an extension. *Id.* at 10. Commerce explained that it rejected this request "because Grupo Simec failed to comply with the basic regulatory requirement of demonstrating good cause existed for the extension." *Id.* at 11. It also rejected Grupo Simec's revised extension request—filed on the due date at 4:29 pm—because it "had granted Grupo Simec sufficient time and concluded that no additional extensions were warranted." *Id.* Commerce asserted that it gave Grupo Simec an opportunity to remedy deficiencies with the two supplemental questionnaires and that the statute does not require it to give the company additional opportunities. *Id.* at 16.

Next, Commerce explained why it rejected Grupo Simec's submission of additional information on October 18, 2021. *Id.* at 17. It rejected this submission because the submission "not only failed to comply with basic regulatory requirements but was also an attempt to submit untimely questionnaire responses, described as 'additional information.'" *Id.* The information submitted as additional information was information missing from its supplemental questionnaire response for which the deadline had already passed. *Id.* at 19. Commerce asserted that it was legally entitled to enforce its deadlines and that considering the information — submitted six weeks after the deadline — would have imposed a significant burden on the agency. *Id.* at 19–20.

Commerce then addressed why it was proper to draw adverse inferences from fact otherwise available; namely, Grupo Simec's failure to submit complete responses to the supplemental questionnaires. *Id.* at 25. Given the widespread and pervasive deficiencies, it found that 'the data [Grupo Simec] placed on the record is incomplete and cannot easily be corrected or resolved by Commerce." *Id.* at 26. The agency also found that Grupo Simec had not cooperated to the best of its ability because its supplemental questionnaire responses had "many of the same deficiencies that were flagged in its initial questionnaire response[.]" *Id.* at 28. Finally, the selection of a 66.7% rate was appropriate because Grupo Simec failed to comply with the multiple requests for information and this rate was applied to Grupo Simec in the initial investigation based on a similar set of facts. *Id.* at 33–34. Grupo Simec's resulting lawsuit challenges all these findings. Complaint ¶ ¶ 35–52, ECF No. 8.

II. Legal Background

The Tariff Act of 1930 authorizes Commerce to investigate alleged dumping activity. If documented, the agency imposes antidumping duties on the unfairly priced goods. *Sioux Honey Ass'n v. Hartford Fire Ins.,* 672 F.3d 1041, 1046 (Fed. Cir. 2012). The statute defines dumping as the sale of products in the United States by a foreign company at prices below their fair value. 19 U.S.C. § 1677b(a).

To impose antidumping duties, Commerce assesses whether goods are being sold at less than their fair value. 19 U.S.C. § 1673. If dumping has occurred, the International Trade Commission (ITC) then evaluates whether American domestic industries producing like goods are materially injured or threatened with material injury. The ITC also determines whether the domestic growth of industries producing the same goods is threatened by the sale of the dumped product. *Id.* If dumping is documented to have "materially injured" or "threatened with material injury" a domestic industry, or "materially retarded" the establishment of a domestic industry, Commerce proceeds to impose antidumping duties. 19 U.S.C. § 1673(2)(A)-(B).

For individual companies under investigation, Commerce's action vis-a-vis duties begins when the Department preliminarily concludes that duties are appropriate. Its staff then publishes a detailed preliminary determination establishing the duty rates assessed for specific cases, providing baseline explanations for its findings. 19 U.S.C. § 1673b(d)(l). Afterward, Commerce orders exporters to post security for subject merchandise. Liquidation is suspended on "all entries of merchandise subject to the [preliminary] determination which are entered, or withdrawn from [a] warehouse, for consumption on or after" publication of the preliminary determination or sixty days from publication of notice of initiation of the investigation. 19 U.S.C. § 1673b(d)(2)(A)-(B). The duty rates provided in the preliminary determination and a halt on liquidation are imposed for a minimum of four and a maximum of six months. 19 U.S.C. § 1673b(d)(3). Commerce then provides a final determination of duty rates. If its initial determination is sustained, the suspension of liquidation applied to subject merchandise remains in place through the process of administrative review. *See* 19 U.S.C. § 1673d(c)(4).

Affected businesses may face hardships because of the United States' "'retrospective' assessment system." 19 C.F.R. § 351.213(a). This system requires that "final liability for antidumping ...duties is determined after merchandise is imported." *Id.* Final duty liability is decided following an administrative review. *Id.* An antidumping order may be reviewed following a request submitted after the first anniversary of its publication. 19 C.F.R. § 351.213(a)(b)(l). The first administrative review examines the period from the commencement of the suspension of liquidation to the month immediately prior to the anniversary month. In the case of subsequent reviews, the evaluation takes place one year immediately prior to the anniversary month. 19 C.F.R. § 351.213(e)(l). Once these administrative reviews are completed, Commerce publishes the final applicable duty rates. Customs then liquidates relevant entries within ninety days. 19 U.S.C. § 1675(a)(3)(B).

Distinct from preliminary injunctions to suspend liquidation, enjoining the collection of cash deposits is a separate and unusual remedy. The former seeks to preserve a party's litigation options and ensure a full and fair review of duty determinations before liquidation. The statute expressly contemplates these steps. *See* 19 U.S.C. § 1516a(c)(2) (providing that the CIT "may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission"). However, the latter remedy is rare and harder to obtain because the statutory and regulatory antidumping duty regime envisions a stricter application of the procedure. *See* 19 U.S.C. §§ 1671f, 1673f, 1677g; 19 C.F.R. § 351.205(d) (providing for importers to pay cash deposits higher than what is finally determined they owe relying on subsequent mechanisms to return excess collections). Congress chose this prepayment process to protect the public fisc and to ensure the Government receives the tariffs due. *See* 19 U.S.C. § 1673b(d)(l)(B). The deposit requirement remains even in instances where a party's potential liability remains uncertain. *Id.* (requiring collection of cash deposits on affirmative preliminary determination in antidumping duty investigation); 19 U.S.C. § 1673d(c)(l)(B)(ii) (making the continuation of cash deposits obligatory on the issuance of an affirmative final determination for antidumping duty investigations). The distinction between liquidation and the statutory deposit requirement — reflected in the likelihood of successfully enjoining each — is grounded in the text of relevant statutes as well as longstanding CIT jurisprudence.

III. Prior Injunctive Relief

The Court takes special notice in this case of the injunctive relief already provided to Plaintiffs. Eleven days after Grupo Simec filed its Complaint, Chief Judge Barnett enjoined liquidation on August 8, 2020. ECF No. 10. The basis for Plaintiffs' Motion is their insistence that this initial equitable remedy remains insufficient. To avoid permanent harm to its business interests, Grupo Simec now seeks a preliminary injunction preventing Customs from collecting cash deposits. Like the injunction obtained against liquidation, Grupo Simec seeks this additional equitable relief pending the completion of legal proceedings arising from its challenge to the Final Results.

JURISDICTION AND STANDARD OF REVIEW

The Court maintains adjudicatory authority over the underlying action. 28 U.S.C. § 1581(c). "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." *Id.* At this early stage in the case, Plaintiffs seek a second preliminary injunction, an extraordinary form of equitable relief. It shall issue only where the movant establishes that: (1) it will suffer irreparable harm absent the requested relief; (2) it is likely to succeed on the merits of its underlying claim; (3) the balance of the hardships favors the movant; and (4) an injunction would serve the public interest. *See Winter v. Natural Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citations omitted).

In the Federal Circuit, the fulfillment of the four factors bears a complex relationship to the resolution of the motion. "'[N]o one factor, taken individually, is necessarily dispositive.'" *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). However, "(irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits and irreparable harm[.]" *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994); *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (refusing to grant plaintiff preliminary relief "unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm.") (citation omitted). Because "the weakness of the showing regarding one factor may be overborne by the strength of the others," *FMC Corp.*, 3 F.3d at 427, "the more the balance of irreparable harm inclines in the plaintiffs favor the smaller the likelihood of prevailing on the merits [plaintiffs] need show in order to get the injunction." *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (quoting *Kowalski v. Chi. Trib. Co.*, 854 F.2d 168, 170 (7th Cir. 1988)).

Nonetheless, "an [adequate] showing on one preliminary injunction factor does not warrant injunctive relief in light of a weak showing on other factors." *Wind Tower Trade Coal. v. United States,* 741 F.3d 89, 100 (Fed. Cir. 2014) (citing *Winter,* 555 U.S. at 22). *Cf Winter,* 555 U.S. at 26 (denying injunctive relief because of public interest in national security); *Sumecht NA, Inc. v. United States,* 331 F. Supp. 3d 1408, 1412 (CIT 2018), *aff'd,* 923 F.3d 1340 (Fed. Cir. 2019) (lacking evidence of immediate irreparable harm compels denial of preliminary injunction); *Otter Prods., LLC v. United States,* 37 F. Supp. 3d 1306, 1316 (CIT 2014) (failing to establish irreparable harm sufficient to deny injunction).

USCIT Rule 65, governing motions for preliminary injunctions, is parallel to Federal Rule of Civil Procedure 65. The Federal Circuit has held that the latter does not require a hearing on a motion for a preliminary injunction. *See Murata Mach. USA u. Daifuku Co., Ltd.,* 830 F.3d 1357, 1364 (Fed. Cir. 2016) ("We do not ask, nor do the Federal Rules of Civil Procedure require, that the district court conduct a preliminary injunction hearing, or even request a responsive brief."). USCIT Rule 65 is nearly identical to Federal Rule 65: "It was obviously taken from the federal rule, and it therefore is appropriate to look to decisions under the latter in interpreting and applying the identical rule of the Court of International Trade." *Precision Specialty Metals, Inc. v. United States,* 315 F.3d 1346, 1353 (Fed. Cir. 2003). Thus, USCIT Rule 65, like the parallel federal rule, does not require a hearing before ruling on a motion for a preliminary injunction.[1]

DISCUSSION

Preliminary Injunction

A. Irreparable Harm

For Plaintiffs to prevail, they must establish that irreparable injury is likely to accrue to them immediately if the requested equitable relief does not issue. *Winter,* 555 U.S. at 22. Harm is irreparable if "no damages payment, however great," could redress it. *Celsis In Vitro, Inc. v. CellzDirect, Inc.,* 664 F.3d 922, 930 (Fed. Cir. 2012). Imminence of injury is also required, *Zenith Radio,* 710 F.2d at 809, yet this immediacy does not equate to a demonstration that the harm complained of has already occurred. *See United States v. WT. Grant Co.,* 345 U.S. 629, 633 (1953) (holding movant must show a "cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive"). A moving party must put forward more than mere "speculative" evidence to demonstrate an "immediate and viable" likelihood of injury. *Otter,* 37 F. Supp. 3d at 1315 (quoting *Kwo Lee, Inc. v. United States,* 24 F. Supp. 3d 1322, 1326 (CIT 2014)); *Sumecht,* 331 F. Supp. 3d at 1412 (citing *Zenith Radio,* 710 F.2d at 809). To analyze whether Plaintiffs have met this "extremely heavy burden," *Shandong Huarong Gen. Grp. v. United States,* 122 F. Supp. 2d 1367, 1369 (CIT 2000), the Court will assess "the magnitude of the injury, the immediacy of the injury, and the

[1] None of the parties has requested a hearing.

inadequacy of future corrective relief." *Sunpreme, Inc. v. United States,* 181 F. Supp. 3d 1322, 1331 (CIT 2016).

Bare financial losses neither constitute nor substantiate irreparable harm, even when they signal economic damage to an entity. This derives in part from the presumed effectiveness of corrective relief for monetary injury that a court may provide at a later date. *See, e.g., Sampson v. Murray,* 415 U.S. 61, 90 (1974) (noting that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"); *Corus Group PLC v. Bush,* 217 F. Supp. 2d 1347, 1355 (CIT 2002) (holding "economic injury" insufficient to establish irreparable harm). The *Corus* Court found, for example, that *plans* to close a plant to avoid "operat[ing] at a loss," did not establish irreparable harm because there was no "danger of imminent closure" of the plant. 217 F. Supp. 2d at 1355. On the other end of the spectrum, bankruptcy stemming from a substantial decline of business is grave enough to demonstrate the inadequacy of later corrective relief. *See Doran u. Salem Inn, Inc.,* 422 U.S. 922, 932 (1975) ("Certainly [bankruptcy] sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless."); *McAfee v. United States,* 3 CIT 20, 24 (1982) ("It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the very loss of the business itself."). Generally, a movant must show "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities" severe enough to represent an imminent threat to the continuation of the business. *Celsis In Vitro,* 664 F.3d at 930 (citing *Abbott Labs. v. Sandoz, Inc.,* 544 F.3d 1341, 1362 (Fed. Cir. 2008)).

Plaintiffs' Motion fails to meet this high standard because it lacks evidence of the alleged harm's immediacy and irreparability.[2] An authoritative dictionary instructs that "immediate" equates to "occurring, acting, or accomplished without loss of time," providing the synonym "instant," with the secondary definition of "near to or related to the present." *Immediate,* Webster's Third New Int'l Dictionary (1968). Precedent echoes the dictionary. In *Shandong Huarong,* an affidavit from an importer's "major [American] customer," attesting that it would be compelled to cancel all orders in the event that the court sustained cash deposits, was adjudged "'weak evidence, unlikely to justify a preliminary injunction,'" largely because it fell short of "indicating exactly how and when these lost sales would force

[2] Grupo Simec was offered the opportunity to file a reply brief responding to the Government's and the Coalition's arguments. It declined.

[plaintiff] out of business." 122 F. Supp. 2d at 1370 (quoting *Shree Rama Enterprises v. United States,* 983 F. Supp. 192, 195 (CIT 1995)).

Grupo Simec's affidavits similarly offer weak evidence and do not show immediate and irreparable harm. Grupo Simec offers an affidavit from its chief financial officer stating that it has stopped exporting rebar to the United States because of the 66.7% rate and that the company is "incur[ring] substantial loss of new and existing customers, business opportunities and goodwill." Pls.' Mot. at Ex. 1, ECF No. 32. Grupo Simec offers another affidavit from its foreign trade manager asserting that, without a preliminary injunction, the company will have to lay off employees and that the collection of deposits threatens one of Grupo Simec's fourteen subsidiaries with insolvency. *Id.* at Ex. 2. These statements are conclusory and insufficient to show immediate and irreparable harm. The affidavits offer no timeline for the alleged termination of employees or insolvency of the subsidiary in question. Plaintiffs have therefore failed to "indicat[e] exactly how and when these lost sales would force [them] out of business." *Shandong Huarong,* 122 F. Supp. 2d at 1371. Absent such information, Grupo Simec fails to show that the alleged harms are immediate.

At first glance, the statement that a subsidiary is threatened with insolvency seems like irreparable harm. But showing irreparable harm demands more than conclusory statements.[3] As in *Shandong Huarong,* "no financial statements have been proffered indicating that Plaintiff does not possess the capital reserves necessary to remain viable during this litigation." *Id.* at 1371; *accord Companhia Brasileira Carbureto de Calcio v. United States,* 18 CIT 215, 217 (1994) (refusing to find irreparable harm when "no hard evidence was submitted to the court indicating what specific effect loss of such sales would have upon [plaintiff]"); *Chilean Nitrate Corp. v. United States,* 11 CIT 538, 541 (1987) (refusing to find irreparable harm when "Plaintiffs witness did not testify that financing was sought and denied. No financial statement demonstrating lack of reserves was presented."). *Cf. Jiangsu Hilong Int'l Trading Co. v. United States,* No. 02–00311, Order Granting Prelim. Inj., ECF No. 15 (CIT June 4, 2002) (granting injunction where plaintiff produced financial records confirming insolvency claims). Grupo Simec has offered no evidence corroborating its affidavits; therefore, its purported harm is only "speculative." *Otter,* 37 F. Supp. 3d at 1315.

The letters from two of Grupo Simec's customers are unable to fill

[3] Even if Grupo Simec had properly shown irreparable harm and had a sufficient showing on all remaining factors, it would only be entitled to an injunction pertaining to that individual subsidiary — not a blanket injunction covering all subsidiaries as it requests. See Pls.' Mot. at 1 ECF No. 32.

the evidentiary gap. *See* Pls.' Mot. at Exs. 3–4. Both letters remark on the difficulties the customers face now that Grupo Simec has stopped exporting rebar to the United States. *Id.* Although both speak to the harm their companies experience, neither speaks to the harms Grupo Simec's officers allege in their affidavits. *Id.* At most, they provide corroboration of the claim that Grupo Simec stopped exporting rebar to the United States, but a foreseeable result of the operation of the antidumping statute cannot alone provide the basis for a finding of irreparable harm. *See Shandong Huarong,* 122 F. Supp. 2d at 1371–72 (refusing to find irreparable harm caused by ceasing to export when "Plaintiff has not produced any evidence establishing that it would go out of business during the year 2000, thereby negating the possibility of selling its excess inventory in the future."). If it was sufficient, an injunction could issue every time a party ceased exporting to the United Sates to avoid paying the assessed rate. This result would eviscerate the operation of the antidumping laws and obtaining an injunction would be automatic rather than the "extremely heavy burden" the law requires. *Id.* at 1369.

Grupo Simec has not met its burden of demonstrating irreparable and immediate harm. This failure is sufficient to deny the Motion; however, the Court briefly considers the other factors for completeness. *See Reebok,* 32 F.3d at 1556 ("While a district court must consider all four factors before granting a preliminary injunction to determine whether the moving party has carried its burden of establishing each of the four, we specifically decline today to require a district court to articulate findings on the third and fourth factors when the court denies a preliminary injunction because a party fails to establish either of the two critical factors."). Grupo Simec unfortunately fairs no better with those analyses.

B. Likelihood of Success on the Merits

In addition to demonstrating that irreparable harm would occur without an injunction, a movant must also establish a likelihood of success on the merits to obtain the extraordinary remedy of enjoining the collection of cash deposits. *Sunpreme,* 181 F. Supp. 3d at 1332. When the Court assesses Commerce's tariff determinations, the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(l)(B)(i). Grupo Simec raises six distinct arguments against the Final Results, alleging that they lack substantial evidentiary support or result from Commerce's abusing its discretion. Pls.' Mot. at 20–33, ECF No. 32.

Commerce counters that substantial evidence supports its decision to apply adverse inferences from facts otherwise available because of the pervasive errors in Grupo Simec's submissions. Def.'s Resp. at 19–20, ECF No. 37. This is all-the-more remarkable, Commerce observes, given Grupo Simec's status as a company with prior experience undergoing such reviews. *See* IDM at 9, Barcode: 4247887–02 A-201–844 REV; *see also* Def. Int's Resp. at 2 (explaining that "not only did Simec request a review of its 2019–2020 entries, but it was a seasoned respondent with significant experience in responding to Commerce's questionnaires"). Similarly, the contention that Commerce acted *ultra vires* in rejecting Grupo Simec's late submission of data and denying its extension requests fails because the filing was properly rejected as untimely, and Commerce granted many extensions to Grupo Simec. Def.'s Resp. at 20–21. Indeed, the attempted late submission was much later than the extended deadline that Grupo Simec originally requested. *See* IDM at 18; Barcode: 4247887–02 A-201–844 REV (noting that the company had requested a nine day extension but then attempted to submit the missing data six weeks later). Commerce also contests the company's claims that the rate selection was punitive and that it had cooperated to the best of its ability. Because the rate was based on a similar set of facts to when the rate was applied previously and Grupo Simec failed to submit the requested information despite opportunities to cure the deficiencies, Commerce asserts that substantial evidence supports its decisions. *Id.* at 21–22. Defendant-Intervenor the Coalition also filed a response brief arguing many of the same points as the Government. *See* Def.-Int.'s Resp. at 1, ECF No. 35. In addition, the Coalition asserts that Grupo Simec received notice and an opportunity to cure the deficiencies because Commerce provided it with supplemental questionnaires after Grupo Simec provided inadequate answers to the initial antidumping questionnaire. *Id.* at 27.

Although Grupo Simec's claims are colorable, it has not demonstrated a clear likelihood of success on the merits. The Government contests these claims, and there is no claim that is obviously meritorious at this stage of the case. At best, this factor is neutral for Grupo Simec. Even if one of the company's six claims were clearly meritorious, an injunction cannot issue without a finding of irreparable harm, which is absent here. *See Reebok,* 32 F.3d at 1556; *Amazon.com,* 239 F.3d at 1350.

C. Balance of the Equities

Plaintiffs misconstrue the balance of equities at this juncture in the case. The harms Grupo Simec claims it will suffer include ceasing exportation of rebar during the time it is subject to the current rate as well as potential job losses, loss of customer goodwill, and the possible insolvency of one subsidiary.[4] Pls.' Mot. at 34. America's retroactive system, financially inconvenient as it may be, is the course Congress chose and committed to Commerce and Customs to enforce. *Valeo N. Am., Inc. v. United States,* 277 F. Supp. 3d 1361, 1366 (CIT 2017) ("[P]aying deposits pending court review is an ordinary consequence of the statutory scheme.") (quoting *MacMillan Bloedel Ltd. v. United States,* 16 CIT 331, 333 (1992)). The statutory scheme's foreseeable result does not amount to a cause for equitable relief. *See Shandong Huarong,* 122 F. Supp. 2d at 1371–72 (noting that a plaintiff could always sell excess stock it did not export the following year). As noted earlier, these harms fail to meet the threshold of "irreparability" in the Court's analysis and ignore the countervailing evidence that at least one of Grupo Simec's customer affiants maintained its business relationship with Grupo Simec the last time it was subjected to a 66.7% tariff rate. *See* Pls.' Mot. at Ex. 4, ECF No. 32 (stating that the company "has been a long-standing customer of Groupo [*sic*] Simec for over 15 years").

Plaintiffs give short shrift to the harm potentially caused to the Government. They fail to consider that their assumption of a minimal impact on the United States contradicts "the determinations at the core of this matter that a tariff increase is necessary to counter-act serious injury or the threat of serious injury[.]" *Corus Group,* 217 F. Supp. 2d at 1356. Commerce's prior findings suggest that significant harm would result if the effective suspension of the underlying tariff would allow underpriced goods to "flood the market." *Id*. America's domestic industry — the statute's express beneficiary — would lose the remedy Commerce has found it due. Absent exceptional circumstances, a court should be reticent to unwind the entire remedy the Government has ordered, especially when it accords with a clear statutory scheme.

D. Serving the Public Interest

A review of the circumstances surrounding Grupo Simec's Motion demonstrates granting the relief it seeks does not serve the public interest. Grupo Simec cites its customers' letters attesting to business harms resulting from the deprivation of Grupo Simec's rebar and alleges that "U.S. construction and other projects involving Simec's rebar may be jeopardized." Pls.' Mot. at 34, ECF No. 32. Even accept-

[4] The Court notes that Grupo Simec's cash deposit rate will change by April 6, 2023, based on the projected conclusion of the next administrative review. *See* Def.-Int.'s Resp. at 11. This undercuts both the company's argument for irreparable harm and its equities-balancing argument.

ing these speculative and unsubstantiated claims in the two customer affidavits at face value, the public's greater interest lies in following Congress's legislative enactments and ensuring that Customs collects cash deposits sufficient to protect the public fisc. *See* 19 U.S.C. §§ 1673(c)(1)(B)(ii), 1675(a)(2)(C). The public interest thus favors the Government; and as Plaintiffs have not clearly prevailed in any of the four required analyses they are not entitled to the extraordinary remedy of a preliminary injunction. *Winter*, 555 U.S. at 20.

CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for a preliminary injunction. Plaintiffs have not met the criteria necessary for the extraordinary remedy of enjoining the normal operation of the tariff collection system. It is hereby:

ORDERED that the Motion is **DENIED;** and it is further

ORDERED that the briefing schedule established by the Court in its Order of January 27, 2023, shall continue unaffected. *See* ECF No. 40.

SO ORDERED.

Dated: February 24, 2023
New York, New York

/s/ Stephen Alexander Vaden
JUDGE STEPHEN ALEXANDER VADEN

Slip Op. 23–23

STUPP CORPORATION et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION, Plaintiff-Intervenor and Consolidated Plaintiff-Intervenor, v. UNITED STATES, Defendant, and SEAH STEEL CORPORATION AND HYUNDAI STEEL COMPANY, Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00334

[Sustaining the U.S. Department of Commerce's third remand redetermination in the less-than-fair-value investigation of welded line pipe from the Republic of Korea.]

Dated: February 24, 2023

Jeffrey M. Winton and *Jooyoun Jeong*, Winton and Chapman PLLC, of Washington, D.C., argued for plaintiff SeAH Steel Corporation.

Robert R. Kiepura, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Claudia Burke*, Assistant Director, *Patricia M. McCarthy*, Director, and *Brian M. Boynton*, Principle Deputy Assistant Attorney General. Of Counsel was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Jeffrey D. Gerrish, Schagrin Associates, of Washington, D.C., argued for plaintiff Welspun Tubular LLC USA. With him on the brief were *Roger B. Schagrin* and *Saad Y. Chalchal*.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") third remand redetermination in its 2015 less-than-fair-value investigation of welded line pipe imported from the Republic of Korea ("Korea"). *See* Final Results of Redetermination Purs. Ct. Remand, April 4, 2022, ECF No. 208 ("Remand Results"); *see also Welded Line Pipe From [Korea]*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) (final determination of sales at less than fair value), as amended by *Welded Line Pipe From [Korea]*, 80 Fed. Reg. 69,637 (Dep't Commerce Nov. 10, 2015) ("*Amended Final Determination*") and accompanying Issues & Decisions Memo, A-580–876, (Oct. 5, 2015), ECF No. 30–3 ("Final Decision Memo"). In *Stupp Corporation v. United States*, the Court of Appeals for the Federal Circuit vacated this court's opinion, remanding to Commerce to further explain why it is reasonable to apply the Cohen's *d* test as part of its differential pricing analysis if certain statistical assumptions have not been met. *Stupp Corporation v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) ("*Stupp III*"). For the following reasons, the court sustains Commerce's third remand redetermination.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in this court's previous opinions, as well as the Court of Appeals' decision in *Stupp III*, and now recounts only the facts relevant to the court's review of the Remand Results. On November 14, 2014, Commerce initiated an antidumping duty investigation of welded line pipe from Korea. Welded Line Pipe From [Korea], 79 Fed. Reg. 68,213, 68,213 (Dep't Commerce Nov. 14, 2014) (initiation of less-than-fair-value investigation). Commerce published its final determination on October 5, 2015 and, finding that 39.72% of SeAH Steel Corporation's ("SeAH") U.S. sales passed the Cohen's *d* test, applied the average-to-transaction method to those sales. Final Decision Memo. at 4. Commerce accordingly calculated a 2.53% dumping margin for SeAH. *Amended Final Determination* at 69,638. SeAH appealed, arguing that Commerce's differential pricing analysis and application of the Cohen's *d* test were contrary to law and unsupported by substantial evidence. *See Stupp Corp. v. United States*, 359 F. Supp. 3d 1293, 1302 (Ct. Int'l Tr. 2019) ("*Stupp I*"), reconsideration denied, 365 F. Supp. 3d 1373 (Ct. Int'l Tr. 2019). SeAH also argued that Commerce improperly rejected its case brief, which contained citations to certain academic texts not part of the administrative record. *Id.* at 1300–03; Letter from Commerce Rejecting SeAH's Sept. 1, 2015 Case Br., 1–2, PD 384, bar code 3302027–01 (Sept. 3, 2015); [SeAH's] Case Br., PD 377–79, bar codes 3301610–01–03 (Sept. 1, 2015) ("SeAH's Rejected Brief").

This court sustained Commerce's determinations with respect to its use of differential pricing analysis and rejection of SeAH's case brief. *Stupp I*, 359 F. Supp. 3d at 1299–1306. Specifically, the court found that Commerce correctly rejected SeAH's brief because the academic authorities cited in the brief constituted new factual information intended to advance SeAH's arguments. *Id.* at 1301. The court also found that Commerce's differential pricing analysis was supported by substantial evidence because, among other reasons, Commerce was not required to apply the Cohen's *d* test in accordance with academic literature. *Id.* at 1302–06.

The Court of Appeals remanded, instructing Commerce to further explain why its use of the Cohen's *d* test was reasonable in light of "significant concerns" related to application of the test. *Stupp III*, 5 F. 4th at 1357. Specifically, the Court of Appeals questioned the reasonableness of Commerce's application of Cohen's *d* test to data failing to satisfy the statistical criteria of normality, equal variance, and sufficient observation size. *Id.* 1357–60. Citing to academic literature examining the use of Cohen's *d* test to measure effect size, the Court of Appeals expressed concern that Commerce's failure to satisfy the statistical criteria assumed by Cohen's test could "undermine the usefulness of the interpretive cutoffs," resulting in artificially inflated dumping margins. *Id.* at 1357. The Court of Appeals affirmed the remaining issues from *Stupp I,* including this court's decision to uphold Commerce's rejection of SeAH's case brief. Id. at 1344.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018), which grants the court authority to review actions initiated under 19 U.S.C. § 1516a(a)(2)(B)(i)[1] contesting the final determination in an antidumping duty 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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Tr. 2014).

DISCUSSION

On remand, SeAH challenges Commerce's application of the Cohen's *d* test on the grounds that (1) assumptions underlying the test have not been met, (2) the large cutoff prescribed by the test is arbitrary, and (3) random variables such as exchange rates can cause "false positives." *See* Cmts. of [SeAH] on Final Determ. on Remand, 5–36, June 14, 2022, ECF No. 216 ("SeAH's Cmts."). Defendant and Welspun Tubular LLC ("Welspun") counter that (1) the assumptions are inapplicable, (2) Commerce's application of Cohen's *d* test leads to reasonable results, (3) the cutoff is supported by statistical literature, (4) SeAH cannot introduce non-record documents for the first time on remand, and (5) SeAH failed to exhaust administrative remedies for its exchange rate-related arguments. *See* Def.'s Corr. Resp. to Cmts., 9–34, Sept. 22, 2022, ECF No. 230 ("Def.'s Reply"); [Welspun's] Reply [SeAH's] Cmts. on Remand Redeterm., 18–32, Aug. 15, 2022, ECF No. 218 ("Welspun's Reply"). For the following reasons, the court sustains the results of Commerce's remand redetermination.

I. SeAH's Non-Record Documents

SeAH's comments to the Remand Results reference several pieces of academic literature which were not included in the administrative

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

record. *See* SeAH's Cmts. at 6–36. Welspun and Defendant argue that the court should disregard these materials, as judicial review is limited to the agency record. Welspun's Reply at 19– 20; Def.'s Reply at 10–12. SeAH argues that the court may take judicial notice, or otherwise consider, these materials to better understand the statistical principles behind Cohen's *d* test. Reply of [SeAH] to Responses by Def. and [Welspun], 10–11, Sept. 28, 2022, ECF No. 236 ("SeAH's Reply"). For the following reasons, the court need not take judicial notice of SeAH's non-record documents to understand the statistical principles they illustrate.

Judicial review is generally limited to the administrative record before the agency at the time it rendered its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to 'convert the "arbitrary and capricious" standard into effectively de novo review.'" *Axiom Res. Mgmt, Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009) (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).

This court previously upheld Commerce's decision to reject SeAH's non-record documents, on the grounds that the submissions constituted new factual information not on the administrative record. *Stupp I*, 359 F. Supp. 3d at 1299–1306. SeAH's submissions primarily cited academic articles relating to application of the Cohen's *d* test under certain conditions. SeAH's Rejected Brief at 26–33. On appeal, the Court of Appeals affirmed this court's decision rejecting the non-record information, concluding that SeAH's materials were not introduced to correct inaccuracies in Commerce's reporting, but to support its argument challenging Commerce's use of Cohen's *d* test. *Stupp III*, 5 F.4th at 1350. In *Stupp III*, the Court of Appeals nevertheless referenced and quoted from several of the non-record texts introduced by SeAH.[2] *Id.* at 1357–59. On remand, Commerce asked SeAH to place the previously-rejected materials on the record, which SeAH

[2] The Federal Circuit cited the following five works: Grissom, Robert and Kim, John, *Effect Sizes for Research: Univariate and Multivariate Applications* (2nd ed. 2012), A580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Grissom & Kim"); Coe, Robert, *It's the Effect Size Stupid: What Effect Size Is and Why It Is Important*, paper presented at the Annual Conference of the British Educational Research Association (September 2002), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Coe"); Lane, David, et al., *Introduction to Statistics*, Online Edition, A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Lane"); Algina, James, Keselman, H.J., and Penfield, Randall, *An Alternative to Cohen's Standardized Mean Difference Effect Size: A Robust Parameter and Confidence Interval in the Two Independent Groups Case*, 10 Psychological Methods (2005), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Algina"); Li, Johnson Ching-Hong, *Effect Size Measures in a Two Independent-Samples Case With Nonnormal and Nonhomogenous Data*, Behavioral Research (2015), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Li").

did. *See* Letter from [Commerce] to Interested Parties, A-580–876, PRRD 1, bar code 4176823–01 (Oct. 29, 2021); SeAH Submission of Publications Requested, A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021). In its comments on the remand redetermination, SeAH again cites new academic sources not on the record, arguing that the court may consider the underlying statistical principles which the texts discuss.[3] *See* SeAH's Cmts. at 6–25. SeAH claims that the Court of Appeals considered SeAH's previous academic sources in *Stupp III*, despite upholding Commerce's rejection of SeAH's brief which contained these materials. SeAH's Reply at 10–11. Although SeAH states that the Court of Appeals took judicial notice of the texts, it later clarified that the court may consider the statistical principles regardless of whether the texts themselves are on the record. Response of [SeAH] to Def's Sur-Reply, 2–3, Nov. 14, 2022, ECF No. 247 ("SeAH's Sur-Reply").[4]

Consistent with the approach of the Court of Appeals, the court may recognize the basic statistical principles discussed in these texts. The idea, for example, that a skewed statistical sample may yield inaccurate results is inductive reasoning—not an assertion of fact. The Court of Appeals' references to academia do not render its reasoning dependent on academic sources. Thus, the court considers Commerce's Cohen's *d* methodology in the same way it would review any other methodology, and may make logical inferences without taking judicial notice of SeAH's literature.

II. Administrative Exhaustion

SeAH argues that random fluctuations of exchange rates can affect the Cohen's *d* test, and lead to inaccurate results. SeAH's Cmts. at 24–28. Welspun and Defendant argue SeAH failed to properly exhaust this argument. Welspun's Reply at 20–21; Def.'s Reply. at 27–28. For the following reasons, the court concludes that SeAH has exhausted this argument.

[3] SeAH cites to the following six non-record sources in its comments: Todd D. Little, *Oxford Handbook of Quantitative Methods in Psychology* (2013); Ricca and Blaine, *Notes on a Nonparametric Estimate of Effect Size*, 90:1 Journal of Experimental Education 249 (2022); Hedges and Olkin, *Overlap Between Treatment and Control Distributions as an Effect Size Measure in Experiments*, 21:1 Psychological Methods 61 (2016); Huberty and Lohman, *Group Overlap as a Basis for Effect Size*, 60:4 Educational and Psychological Measurement 543 (2000); J. Cohen, *A Power Primer*, 112:1 Psychological Bulletin 155 (1992); F. Alvarez, A. Atkeson, and P. Kehoe, *If Exchange Rates Are Random Walks, Then Almost Everything We Say about Monetary Policy is Wrong*, Federal Reserve Bank Of Minneapolis Research Department Staff Report 388 (2007).

[4] SeAH argues that the Court of Appeals' decision "stands for the proposition that, when an agency purports to be using a statistical test in accordance with widely-adopted statistical practice, the courts may consider non-record academic materials to evaluate that claim." SeAH's Sur-Reply at 2.

Pursuant to 28 U.S.C. § 2637(d), the court "shall, where appropriate, require the exhaustion of administrative remedies," including at the preliminary determination stage before the agency. 28 U.S.C. § 2637(d); 19 C.F.R § 351.309(c)(2). Section 2637(d) grants the court "discretion to identify circumstances where exhaustion of administrative remedies does not apply." *ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019) (quoting *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003)). The court may also excuse exhaustion in certain circumstances, such as when a party is raising a "pure question of law." *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).

In its comments on the draft redetermination, SeAH argued that random factors, such as exchange rates, could cause the standard deviation of test populations to vary significantly. SeAH's Cmts. on Draft Redetermination, 17–20, A-580–876, PRRD 30, bar code 4224356–02 (March 21, 2022). SeAH did not provide an exchange rate table, or assert that its actual sales during the period of review were affected by these factors. *See id.* Subsequently, in its comments on the final remand results, SeAH again argues that Cohen's *d* could be significantly affected by random factors where the population of data is not normally distributed. SeAH's Cmts. at 24–28. SeAH adds that its sales were, in fact, affected by fluctuations in the exchange rate between the U.S. dollar and Korean won, because its inland freight expenses were denominated in won. *Id.* at 24. Welspun counters that SeAH failed to raise its exchange rate argument and supporting factual information during the draft redetermination. Welspun's Reply at 26.

SeAH has exhausted its exchange rate argument. SeAH's exchange rate examples provide an illustration of how it believes random factors can render the Cohen's *d* test inaccurate when values are not normally distributed. Normal distributions is one of the three assumptions that the Court of Appeals remanded to Commerce to explain. *See Stupp III*, 5 F. 4th at 1360. Therefore, Welspun's argument that Commerce had no opportunity to address SeAH's exchange rate calculations misses the point; these calculations are not a new argument, but an illustration of the same scenario Commerce was directed to explain.

SeAH separately argues Commerce must "ignore" fluctuations in exchange rates pursuant to 19 U.S.C. 1677b-1(a). SeAH's Br. at 8. SeAH concedes that it did not raise this argument in its comments to the draft remand results; nevertheless, it argues that this argument may be considered as a "pure question of law." Oral Argument at 0:27:39–0:27:53. Defendant argues that Commerce had no opportunity to consider this argument on remand, and Welspun characterizes the argument as a mixed question of law and fact. Oral Argument at 0:24:15–0:26:33, 0:27:56–0:28:39. Whether § 1677b-1(a) is pertinent to Commerce's differential pricing analysis is a matter of statutory interpretation, not subject to exhaustion requirements. *See Agro Dutch Indus.*, 508 F.3d at 1029. However, SeAH's argument that § 1677b-1(a) directs Commerce to compensate for exchange rate variations is inapposite. In its full context the statute directs Commerce to use the exchange rate "in effect on the date of sale" for valuation of merchandise, and to ignore fluctuations on that particular date. 19 U.S.C. 1677b-1(a). The plain language does not mandate that Commerce compensate for a respondent's decision to report expenses in a foreign currency, as SeAH suggests.

III. Differential Pricing Analysis

In *Stupp III*, the Court of Appeals remanded for further explanation of Commerce's application of the Cohen's *d* test as part of its differential pricing analysis. *Stupp III*, 5 F.4th at 1360. On remand, SeAH renews its argument that Commerce's application of Cohen's *d* test is flawed because it fails to take into account assumptions of sample size, distribution, and variance underlying the test, and further argues Commerce's choice of Cohen's large cutoff is arbitrary. SeAH's Cmts. at 6–24. SeAH also claims random fluctuations in exchange rates can affect the *d* coefficient, causing even test groups with identical prices to pass. *Id.* at 24–28. Commerce counters that its Cohen's *d* analysis does not operate in a vacuum, and must be considered with the ratio test and meaningful difference test. *See* Remand Results at 26, 28, 30–31, 41–42, 54–60. Commerce also argues the cutoffs are tied to real-world criteria, that small fluctuations in price will not lead to "false positives" in Cohen's test, and that use of the 0.8 threshold results in reasonably infrequent application of alternative methodologies. Remand Results at 16–19, 32, 54–60. For the following reasons, Commerce has adequately addressed Court of Appeals' concerns.

When investigating whether subject merchandise is being sold at less than fair value, Commerce typically compares "the weighted average of the normal values to the weighted average of the export (and constructed export prices) for comparable merchandise" unless it determines another method is appropriate. 19 U.S.C. § 1677f1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). This average-to-average ("A-to-A") method compares the weighted average of a respondent's home country sales prices during the investigation period to the weighted average of the respondent's sales prices in the United States during the same period. *See* 19 C.F.R. § 351.414(b)(1). One concern with the A-to-A method is that it may allow a foreign producer or exporter to engage in "targeted dumping," which occurs when an exporter sells at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions. *See Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017) ("Apex II"). As a result, higher-priced products can mask dumped products when Commerce averages the sales using the A-to-A method.

Congress addressed concerns over targeted dumping with the passage of 19 U.S.C. § 1677f-1(d)(1)(B). *See Apex II*, 862 F.3d at 1342. Section 1677f-1(d)(1)(B) allows Commerce to compare "the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account using [the A-to-A method or transaction-to-transaction method[5]]." 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). Targeted dumping is more likely when export prices fit a pricing model that differs significantly across different market segments. *Apex II*, 862 F.3d at 1341–42. Congress has not provided a method for Commerce to use to determine whether a pattern of significantly different prices exists. However, the Statement of Administrative Action ("SAA") of the Uruguay Round Agreements Act explains that Commerce should proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.[6]

To determine whether the criteria set forth in § 1677f-1(d)(1)(B) are met, Commerce conducts a "differential pricing analysis" of a respondent's sales. *See* Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722 (Dep't of Commerce May 9, 2014). This analysis contains three tests. First, Commerce applies to respondent's sales what it refers to as the "Cohen's *d* test," described in more detail below, which measures the degree of price disparity between groups of sales. *Id.* Commerce then counts the percentage of sales by

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[5] Commerce's regulations provide that the transaction-to-transaction method, which compares prices of individual transactions, will be employed only in rare cases, "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

[6] The SAA is an "authoritative expression by the United States concerning the interpretation and application" of the Uruguay Rounds Agreement Act. 19 U.S.C. § 3512(d).

value which "pass" the Cohen's *d* test, and applies its "ratio test." *Id.* at 26,722–23. If 33% of respondent's sales or less pass, Commerce uses the A-to-A method, and if 66% or more pass, Commerce uses the A-to-T method. *Id.* If the total percentage of passing sales is between 33% and 66%, Commerce takes a hybrid approach, applying the A-to-T method to those sales passing the test, and the A-to-A method to the remainder. *Id.* Finally, if Commerce has not selected the A-to-A method for all sales, it applies the "meaningful difference" test to determine whether the A-to-A method could nevertheless account for the disparate pricing. *Id.* at 26,723. Commerce applies the test by comparing a respondent's dumping margin using both A-to-A and the selected method. *Id.* If the A-to-A margin is below the de minimis threshold and the margin from the selected method is not, or if both margins are above the threshold and differ by 25% or more, Commerce continues to use the selected method; otherwise, Commerce applies the A-to-A method for all sales. *Id.*

As applied by Commerce, the Cohen's *d* test involves comparing the product-specific prices of "test groups" of a respondent's sales to a "comparison group" by region, purchaser, and time period. *Stupp III*, 5 F.4th at 1346. For each category, Commerce segregates sales into subsets, with one subset becoming the test group, and the remaining subsets being combined as the comparison group. *Id.* Commerce then calculates the means and standard deviations of the test and comparison groups. *Id.* Commerce then calculates a Cohen's *d* coefficient by dividing the difference in the groups' means by the groups' standard deviation.[7] *Id.* Each subset is thus tested against the remaining subsets across each category, and assigned a *d* coefficient by solving Cohen's ratio. If the *d* value of a test group is equal to or greater than the "large threshold," or 0.8, the observations within that group are said to have "passed" the Cohen's *d* test. *Id.* at 1347.

In *Stupp III*, the Court of Appeals expressed concern that Commerce's application of Cohen's *d* under certain circumstances could undermine the usefulness of the test in less-than-fair-value determinations. Specifically, the Court of Appeals identified three potential scenarios in which use of Cohen's *d* could be problematic: first, when the distribution of a respondent's sales data is not normal, second, when the test groups have few data points, and third, when there is

[7] Thus, $d = |\text{mean of test group} - \text{mean of control group}| \div \text{standard deviation}$. Commerce uses a modified version of this formula, substituting the square root of the simple average of the groups' variances for standard deviation. The Cohen's *d* test solves for a coefficient representing "effect size." *See generally* Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, (2nd ed. 1988), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Cohen"). "Effect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference." Coe at 7.

minimal variance in a respondent's sales. *Stupp III*, 5 F.4th at 1357–59. The assumption of normality is satisfied when a fixed percentage of the population falls within each standard deviation from the mean—in other words, that a population density graph generally shows a symmetrical, bell-shaped curve. *See* Starnes, Yates, and Moore, *Statistics through Applications*, 116 (2005), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021). The assumption of size is satisfied when the population is sufficiently large. *See* Cohen at 21. The assumption of homogeneous variances is satisfied when the standard deviations of test and comparison groups are similar. *See* Grissom at 68–69. Commerce argued in *Stupp III*, as it does now, that the three assumptions are only relevant as a matter of statistical significance, and do not apply when analyzing a whole population; the Court of Appeals concluded that this explanation did not fully address its concerns. *Stupp III*, 5 F.4th at 1360.

The Court of Appeals illustrated the problems it identified with the Cohen's *d* test through two hypotheticals. First, the Court of Appeals considered a situation in which Commerce analyzed a group of only eight export sales across four groups, such that each test group would consist of only two sales. *Stupp III*, 5 F. 4th at 1358–59. With groups of such small numbers, the Court of Appeals pointed out that there would be some upward bias in effect size, such that the test would produce more "passing" results, and potentially exaggerate dumping margins. *Id.* at 1359. The Court of Appeals also observed that a group of only two sales would lack normality. *Id.* Second, the Court of Appeals described a test group of five sales of about $100 each, which differed from one-another by up to two cents. *Id.* Because the standard deviation of such a group would be so small, the Court of Appeals pointed out that the denominator in Cohen's ratio would be drastically reduced, again causing an increase in effect size, and inflating the resulting dumping margin. *Id.* The Court of Appeals noted that an objective examiner looking at these similar sales prices "would be unlikely to conclude that they embody a 'pattern' of prices which 'differ significantly.'" *Id.* (citing 19 U.S.C. § 1677f-1(d)(1)(B)(i)).

Commerce reasonably explains that Cohen's *d* test does not operate in a vacuum, but as part of the differential pricing analysis as a whole.[8] Turning first to the assumptions of population size and nor-

[8] The parties devote a significant part of their briefings to discussion of (1) the permissibility of using Cohen's *d* test on full populations, and (2) questions of statistical significance versus practical significance. *See* Remand Results at 11–16, 43–51; SeAH's Cmts. at 7–10; Def.'s Br. at 12–20; Welspun's Br. at 21–23; SeAH's Reply at 17–27; Def's Sur-Reply at 12–29, 34–35; SeAH's Sur-Reply at 16–24. Neither question is determinative of whether Commerce's methodology is reasonable. Both arguments have already been raised before the Court of Appeals, which concluded that they did not resolve its concern over whether the

malcy, the Court of Appeals questioned whether small sample sizes without normal distributions could "exaggerate" dumping margins by introducing an "upward bias" to effect size. *Stupp III*, 5 F.4th at 1359.[9] Addressing the Court of Appeals' concerns about population size, Commerce explains that its Cohen's *d* analysis does not stand alone, and operates together with the ratio test and meaningful difference test. *See* Remand Results at 26, 28, 30–31, 41–42, 54–60. Thus, even if the Cohen's *d* values of small test groups were less accurate than for large test groups, this difference does not by itself render Commerce's use of Cohen's test unreasonable, because the ratio test and meaningful difference test compensate for inaccuracies. *See id.* Commerce's differential pricing analysis looks at the frequency and impact of effect size to detect targeted dumping — not the effect size alone. *See* Cohen at 8; Remand Results at 26–28. As Commerce points out in its remand redetermination, the "sole purpose of the Cohen's *d* test" is to determine whether prices "differ significantly" across region, time period, or customer. Remand Results at 41. The "pattern" of export prices which Commerce must find under 19

absence of certain assumptions forecloses Commerce's use of Cohen's *d* test. *Stupp III*, 5 F.4th at 1360.

Commerce correctly asserts that a "t-test" for statistical significance is used with sampled data, and that Dr. Cohen considered normal distribution and equal variance as necessary assumptions in a t-test. *See* Cohen at 19; Remand Results at 12–16. However, Commerce improperly reasons that because there is no need for a t-test, there is no basis for the assumptions. Remand Results at 14. Commerce also asserts that SeAH's assumptions are only relevant as a matter of statistical significance, and that they do not apply because Cohen's *d* test determines practical significance. Remand Results at 14, 43–45. That these assumptions are required for questions of statistical significance does not answer the question of whether they are also needed to determine practical significance, as the Court of Appeals suggests. *See Stupp III*, 5 F.4th at 1360.

Although SeAH claims that academic sources do not support Commerce's use of Cohen's *d* in its differential pricing analysis, this argument is inapposite. SeAH's decision to substantially advance its arguments using labels taken from statistical literature does not alter the court's obligation on review. *See Soc Trang Seafood Joint Stock Co. v. United States*, 321 F. Supp. 3d 1329, 1339 n.13 (2018) ("the fact that Commerce has adopted a methodology based upon a statistical tool known as Cohen's *d*, and chooses to refer to this methodology as Cohen's *d*, does not diminish the discretion granted to Commerce"); *see also Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) ("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").

[9] Although the parties dispute whether such results are really "false positives," it is undisputed that in at least some instances, groups with as few as two sales have passed Cohen's test. *See Stupp III*, 5 F.4th at 1357; SeAH's Cmts. at 17–19; *see* Remand Results at 55, 58–59. Identifying results as "false" positives begs the question of what is a false positive. *See* Remand Results at 59 ("To label this result a 'false-positive' does not render the variances inaccurate or erroneous"). SeAH illustrates this situation using data from its own sales, showing how a group of only two sales to a single customer passed Cohen's test, despite SeAH's observation that a visual comparison of the groups on a graph showed those sales to be near the average price. SeAH's Cmts. at 18. Commerce counters that a visual inspection may be inadequate in situations involving complex calculations. Remand Results at 59.

U.S.C. § 1677f-1(d)(1)(B)(i) is then determined by the ratio test. *Id.* at 42. The ratio test has already been approved by the Court of Appeals, which found that Commerce's choice of the 33% and 66% thresholds was a "reasonable choice." *Stupp III*, 5 F.4th at 1355. SeAH's attacks on Cohen's *d* test presuppose that what SeAH claims are "false positives" automatically affect the accuracy of Commerce's differential pricing analysis, when in fact Commerce has allowed for 33% positives before there is any potential effect on a respondent's dumping margins.

Commerce also addresses the Court of Appeals' concern whether samples without normal distributions will produce an inappropriate number of passes. SeAH points to numerous academic sources which it claims confirm the usefulness of Cohen's test is compromised when comparing data sets with non-normal distributions. *See* SeAH's Cmts. at 7, n.19 (citing Cohen at 13); *Id.* at 12 (citing Ellis at 41); *Id.* at 13 (citing Starnes, Yates, and Moore at 135). The Court of Appeals has acknowledged some of these sources. *See Stupp III*, 5 F.4th at 1357–59 (citing Cohen at 21, Grissom & Kim at 66, Coe at 13, Lane at 645, Algina at 318, and Li at 1571). The court need not opine on the relevance of these academic observations;[10] however, it logically follows that a relatively large-tailed distribution (i.e., with large standard deviation) in a test group would tend to decrease Cohen's *d* coefficient, while the opposite would result in an increase. *See* Remand Results at 29 ("in other words, the fat-tailed distribution may *undervalue* the significance of effect") (emphasis in original). SeAH focuses on the second of these two scenarios, arguing that even inputting random data, such as exchange rates, can cause test groups to frequently pass Cohen's *d* test. SeAH's Cmts. at 25–28. SeAH further argues that the ratio test does not account for such random fluctuations.[11] Oral Argument at 0:42:57–0:43:43. Commerce addresses these arguments by explaining that even if Cohen's test can produce positive results under unusual circumstances, this possibility does not mean its use of Cohen's *d* is unreasonable when combined

[10] The task of the court is not to interpret the meaning of literature treating with correct application of Cohen's *d*. Rather, the court must determine whether Commerce's methodology is reasonable in light of considerations that run counter to its decision. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Tr. 1986), aff'd, 810 F.2d 1137, 1139 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology").

[11] Commerce explains that, even if exchange rate fluctuations do affect prices, this effect is not "random" because a respondent can control in which currency it denominates its prices. Remand Results at 45; Oral Argument at 0:49:11–0:50:05.

with the ratio test and meaningful difference test. *See* Remand Results at 26, 28, 30–31, 41–42, 54–60.

The Court of Appeals also specifically asked Commerce to explain why it can use the 0.8 threshold identified by Dr. Cohen as a measure of a significant price difference, when Commerce evaluates data which fails to meet statistical assumptions of normality, size and variance.[12] *Stupp III*, 5 F.4th at 1360. Although Commerce reiterates those assumptions are irrelevant, *see* Remand Results at 11–16, it also explains its choice of the 0.8 threshold as a function of its differential pricing analysis. First, Commerce explains that it employs the 0.8 threshold to identify where prices "differ significantly" pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i). Remand Results at 11. Second, Commerce states the 0.8 measurement "represents a difference which is 'grossly perceptible.'" Remand Results at 52. Reasonably discernible from this statement is that Commerce considers a significant difference to be grossly perceptible in the same way that Dr. Cohen identified a large threshold as one that is "grossly perceptible." *See* Cohen at 27. The SAA to the Uruguay Round Agreements Act directs Commerce to proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another," SAA at 842–43; thus, Commerce's choice of a measurement that is a function of standard deviation as a uniform approach to identify differences as significant is reasonable, even if the absolute difference in means is small. Commerce's approach tailors the question of what is a significant difference in price to the pricing parameters of different products. Third, Commerce adequately explains its adoption of Cohen's widely-recognized choice of 0.8 as a large threshold as significant. Remand Results at 18. It explains that it chose the 0.8 standard because it was "a conservative standard to determine that the observed price differences are significant." *Id.* Commerce summarizes its reasoning by explaining that "[u]sing Dr. Cohen's thresholds is a reasonable approach to interpret whether the difference in the prices is significant and the further interpretation of the difference in the prices in the context of the calculation of dumping margins ensures the reasonable and limited

[12] Although the Court of Appeals approved the 0.8 cutoff in *Mid Continent Steel & Wire, Inc. v. United States*, it explained in *Stupp III* that it had yet to consider the reasonableness of the 0.8 cutoff value when the assumptions in question have not been met. *Stupp III*, 5 F.4th at 1356–57 ("We held that . . . it is reasonable to adopt that [0.8] measure where there is no better objective measure of effect size. We did not, however, address SeAH's second argument [on assumptions] in *Mid Continent*") (citation omitted) discussing *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673 (Fed. Cir. 2019); see also Oral Argument at 1:39:45–1:40:30. More specifically, SeAH argues that it is unreasonable to compare its prices, which are not normally distributed, using a subjective benchmark that was derived from a normally-distributed population. SeAH's Cmts. at 10–12.

application of the alternative comparison methodology." *Id.* at 33. Thus, Commerce chose a threshold it predicted would result in limited application of the alternative methodology.

Although Commerce adopted this yardstick from Dr. Cohen, and did so because it was widely acknowledged in the statistical literature, Commerce does not rely on the prominence of this yardstick alone. Commerce elaborates that its "actual application of the Cohen's *d* test in the context of the differential pricing analysis resulted in the application of an alternative comparison methodology to a relatively small number of respondents." Remand Results at 32. Discernible from Commerce's explanation is that the 0.8 cutoff produces reasonable passing rates once the ratio and meaningful difference tests are applied. SeAH challenges Commerce's reliance on the 0.8 threshold as large, arguing that Commerce's only basis for using the threshold is that it is widely accepted. SeAH's Cmts. at 10–11. However, in addition to relying on a widely-accepted standard for "grossly perceptible" to determine what is significant, Commerce defines "significant" with reference to the impact a price difference has on a respondent's dumping margins. Remand Results at 32. Finding that the 0.8 threshold leads to relatively few determinations of targeted dumping, Commerce concludes that its choice is reasonable. *Id.*

Congress delegated to Commerce the authority to determine where a price difference is significant. 19 U.S.C. § 1677f-1(d)(1)(B)(i). Congress also made clear that the definition of a "significant price difference" would depend on the product at issue. *See* SAA at 842–43. Thus, Congress entrusted Commerce to use its expertise and knowledge of pricing to gauge price distinctions. *Cf. Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"). Commerce's decision to adopt Cohen's 0.8 ("large") threshold as a measure of significance because it is widely accepted in the statistical literature does not undermine the reasonableness of that choice, if it is based on Commerce's expertise and Commerce demonstrates the reasonableness of that choice with reference to the impact it has on the differential pricing analysis. Thus, Commerce's reference to Cohen's work does not circumscribe its discretion to choose the same values in a new context, because that choice is itself reasonable.

Commerce addresses the Court of Appeals' concern that prices with small variances, which hover around the same value, will produce inaccurate results on Cohen's test. As an initial matter, Commerce explains that results which pass Cohen's test under these circumstances are not "false positives," as small differences in average prices will mean that variances, too, will be small. Remand Results at 59; Oral Argument at 1:06:32–1:07:02. Thus, it is discernable that a small variance means a small difference in price will be more significant, and a passing result under these circumstances is not necessarily "erroneous." Remand Results at 59. Nevertheless, the Court of Appeals observed that an objective examiner considering a group of sales where prices differed by only a few cents would be unlikely to conclude that they show a "pattern" of prices that "differ significantly" under the statute. *Stupp III*, 5 F.4th at 1359. Commerce responds to this issue by pointing out that an examiner would indeed conclude that there was no pattern—because Commerce does not look for a pattern at this stage of its differential pricing analysis. Remand Results at 41. Again, Commerce explains that the ratio test determines whether a pattern exists, while Cohen's *d* test only shows whether there are significant price differences. *Id.* at 41–42. Thus, Cohen's test would need to generate enough "false positives" to overcome the 33% threshold, at minimum, and there is no evidence on the record suggesting that price patterns, such as that proposed by the Court of Appeals, occur with frequency in SeAH's sales.

Additionally, to specifically address the hypothetical proposed by the Court of Appeals, Commerce explains that, in addition to the ratio test, the meaningful difference test would prevent low-variance sales which pass Cohen's *d* test from impacting a respondent's dumping margins. *See* Remand Results at 30–31. Adopting the Court of Appeals' example in which all of a respondent's prices hovered around $100 and passed Cohen's test, Commerce explains that even in this extreme scenario, the respondent would still be assessed under the A-to-A method. *Id.* Choosing a normal value for comparison equal to the highest sales price, and thus maximizing the respondent's theoretical dumping margin, Commerce observes the margin would still be under the 2% de minimis threshold. *Id.*; *see* 19 U.S.C § 1673d(a)(4), 1673b(b)(3). SeAH argues that Commerce's reliance on the meaningful difference test is misplaced, because even changes of less than 2% in a respondent's dumping margin can cross the de minimis threshold and result in a "meaningful difference" finding. SeAH's Sur-Reply at 15. Specifically, SeAH argues that when the Cohen's *d* results from small-variance data sets of different products are cumulated, Commerce may find that a respondent's sales pass the thresholds for both ratio test and the meaningful difference test, even if price differences are negligible. Oral Argument at 1:13:37–1:16:06.[13] This argument

[13] SeAH does not argue that it received an alternative method because its own combined sales inappropriately passed the Cohen's *d* test. Rather it offers a hypothetical to challenge the reasonableness of Commerce's methodology more generally. SeAH's Cmts. at 8, 14–21.

overstates Commerce's position. It is reasonably discernable that Commerce does not rely on the meaningful difference test to prevent all "inappropriate" passes from affecting a respondent's dumping margins. Commerce has explained the meaningful difference test compensates for a specific concern with low-variance sales which the Court of Appeals identified. *See Stupp III*, 5 F.4th at 1359; Remand Results at 30–31. Moreover, SeAH's argument is misplaced, because the question before the court is not whether it is possible to construct an unusual scenario where Cohen's *d* test can result in an alternative comparison method. Rather, the question is whether Commerce's use of Cohen's test, when applied as a component of its differential pricing analysis, is reasonable. *See Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Tr. 1986). Thus, for the forgoing reasons, Commerce has adequately explained how its methodology is reasonable.

CONCLUSION

For the foregoing reasons, Commerce's remand results are supported by substantial evidence and comply with the court's Order, Oct. 8, 2021, ECF No. 192, in conformity with the Court of Appeals' Mandate, Oct. 8, 2021, ECF No. 191, and are therefore sustained. Judgment will enter accordingly.

Dated: February 24, 2023
New York, New York

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Slip Op. 23–24

Cyber Power Systems (USA) Inc., Plaintiff, v. United States, Defendant.

Before: Leo M. Gordon, Judge
Court No. 20–00124

[Following trial on the issue of substantial transformation for purposes of determining country of origin under 19 U.S.C. § 1304(a), judgment for Plaintiff as to the origin of one model of subject merchandise, and judgment for Defendant as to the remaining five.]

Dated: February 27, 2023

John M. Peterson, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson LLP, of New York, N.Y., for Plaintiff Cyber Power Systems (USA) Inc.

Luke Mathers, Trial Attorney, and *Beverly A. Farrell*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-in-Charge. Of counsel was *Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Gordon, Judge:

Plaintiff Cyber Power Systems (USA) Inc. ("Cyber Power") commenced this action contesting a denied protest regarding the country of origin marking of five models of uninterruptible power supplies ("UPS") and one model of surge voltage protectors ("SVP"). Upon entry of the subject merchandise, which Plaintiff had marked as "Made in the Philippines," U.S. Customs and Border Protection ("Customs") determined that the country of origin for the five UPSs and one SVP was China and excluded their entry when Cyber Power refused to change its markings. Cyber Power contended before Customs, and now before the court, that its operations in the Philippines, conducted by Cyber Power Systems Manufacturing, Inc. ("Cyber Power Philippines"), resulted in a "substantial transformation" of the merchandise into Philippine origin, having a name, character, and use different from each device's Chinese components.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018). The court presumes familiarity with its prior opinions in this action. *See Cyber Power Sys. (USA) Inc. v. United States*, 44 CIT ___, ___, 471 F. Supp. 3d 1371 (2020); *Cyber Power Sys. (USA) Inc. v. United States*, 46 CIT ___, ___, 560 F. Supp. 3d 1347 (2022). For the reasons that follow, the court enters judgment for Plaintiff as to the Philippine origin of one model of subject merchandise, UPS Model No. CP600LCDa, and judgment for Defendant as to the Chinese origin of the remaining five models.

I. Standard of Review and Legal Framework

A. Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1) (2018). For contested factual issues, a statutory presumption of correctness imposes the burden of proof on Plaintiff. *See id.* § 2639(a)(1); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997); *Chrysler Corp. v. United States*, 33 CIT 90, 97, 601 F. Supp. 2d 1347, 1353–54 (2009), *aff'd*, 592 F.3d 1330 (Fed. Cir. 2010). Despite its name, the statutory presumption of correctness is not a true evidentiary presumption governed by Federal Rule of Evidence 301, but rather an "assumption" that allocates to Plaintiff the burden of proof on contested factual issues that arise from the protest decision. *Universal Elecs.*, 112 F.3d at 492 n.2; 21B Charles A. Wright & Kenneth W. Graham, Jr., *Fed. Prac. & Proc. Evid.* § 5124 (2d ed. 2022) ("Rule 301 does not apply to 'assumptions'—rules for allocating the burden of proof that are often mislabeled as 'presumptions.' . . . [T]he best known include: . . . the 'assumption' that official duty has been regularly performed." (footnotes omitted)). Plaintiff's burden of proof carries an initial burden of production (to make an evidentiary proffer), and an ultimate burden of persuasion to establish the operative facts by a preponderance of the evidence. *Universal Elecs.*, 112 F.3d at 492.

B. The Marking Statute (19 U.S.C. § 1304(a))

Section 304(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a),[1] requires that all merchandise imported into the United States be marked permanently, legibly, indelibly, and in a conspicuous place, to indicate to the ultimate purchaser the English name of the product's country of origin. The implementing regulation, 19 C.F.R. § 134.1(b), defines the term "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States." Section 134.1(b) explains that "[f]urther work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the 'country of origin' within the meaning of this part." 19 C.F.R. § 134.1(b) (emphasis added). Simply stated, imported merchandise

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

originates for marking purposes in the last country in which it underwent a “substantial transformation” prior to importation into the United States. Merchandise not marked with the proper country of origin may be excluded by Customs from entry into the United States. *See* 19 U.S.C. § 1304(j); *see also* 19 C.F.R. § 134.3(a).[2]

C. Substantial Transformation

Plaintiff must establish by a preponderance of the evidence that its subject merchandise is substantially transformed in the country it wishes to represent as the merchandise’s country of origin. *See* 28 U.S.C. § 2639(a)(1); *Universal Elecs.*, 112 F.3d at 492 (plaintiff bears burden of proof on contested factual issues arising from underlying protest decision).

A substantial transformation occurs “when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process.” *Torrington, Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985) (citing *Tex. Instruments, Inc. v. United States*, 681 F.2d 778, 782 (C.C.P.A. 1982)); *see also United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267, 273 (1940) (clarifying that marking statute did not “require that an imported article, which is to be used in the United States as material in the manufacture of a new article having a new name, character, and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country”). Substantial transformation is fact-specific and determined on a case-by-case basis. *See Belcrest Linens v. United States*, 741 F.2d 1368, 1373 (Fed. Cir. 1984).

While the test is expressed in the disjunctive, courts consider all three factors, and have generally found a change in name to be “the

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[2] Additionally, effective July 6, 2018, the Office of the United States Trade Representative imposed an additional tariff—twenty-five percent *ad valorem*—on certain products from China, including those in issue in this action, that are classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), Harmonized Tariff Schedule of the United States.

In ruling on cross-motions for summary judgment, the court articulated the purpose of the Section 301 tariffs:

> [T]he purpose of the imposition of the Section 301 tariffs was to promote a change in the “government of China’s acts, policies and practices related to technology transfer, intellectual property and innovation.” . . . Additionally, the Section 301 tariffs were intended to encourage a partial de-coupling of China’s economy from that of the United States, by discouraging investment in, and trade with, China.

Cyber Power, 46 CIT at ___, 560 F. Supp. 3d at 1352 (citations omitted). It is evident to the court that Cyber Power was engaging in that decoupling process. However, the mere fact that Cyber Power was attempting to meet the policy objective does not overcome its inability to demonstrate that five of the six devices were substantially transformed in the Philippines.

weakest evidence of substantial transformation." *See, e.g.*, *Koru N. Am. v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 (1988) (quoting *Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 59, 628 F. Supp. 978, 989 (1986)). Indeed, a finding of substantial transformation frequently rests on multiple factors because a change in character often results in a change in use, and a change in character or use generally necessitates a change in name. *See id.* 12 CIT at 1127, 701 F. Supp. at 235 ("The fish's name has been changed as the result of the processing method which occurred in Korea. . . . The fish's character, after its journey through Korea, is also vastly different.'" (internal citations omitted)); *see also Belcrest Linens*, 741 F.2d at 1374 ("[T]he identity of the merchandise changed as did its character and use: embroidered fabric was transformed into pillowcases which are clearly distinguishable in character and use from the fabric of which they were made."); *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 478, 664 F. Supp. 535,541 (1987) ("Based on the totality of the evidence, showing that the continuous hot-dip galvanizing process effects changes in the name, character and use of the processed steel sheet, the Court holds that the changes constitute a substantial transformation and that hot-dipped galvanized steel sheet is a new and different article of commerce from full hard cold-rolled steel sheet."); *Uniden Am. Corp. v. United States*, 24 CIT 1191, 1194, 120 F. Supp. 2d 1091, 1095 (2000) ("Here, each cordless telephone has experienced a change in both name and use from its original materials.").

In applying the test, the U.S. Court of Appeals for the Federal Circuit has emphasized the requirement that there be a "new and different" article that emerges from the manufacturing process. *See, e.g., Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020); *Zuniga v. United States*, 996 F.2d 1203 (Fed. Cir. 1993); *Azteca Milling Co. v. United States*, 890 F.2d 1150 (Fed. Cir. 1989); *see also Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908) ("There must be transformation; a new and different article must emerge.").

II. Discussion

The dispositive question in this action, as noted over the course of the litigation, is whether the subject merchandise was substantially transformed at the Cyber Power Philippines factory. In denying cross-motions for summary judgment, the court found that, while the subject merchandise underwent a change in name in the Philippines, that "change . . . alone [did] not appear sufficient to constitute a 'substantial transformation,'" and "that a determination as to the resulting 'character' and 'use' of the subject merchandise after production at Plaintiff's Philippine facility require[d] analysis and adjudication." *Cyber Power*, 46 CIT at ___, 560 F. Supp. 3d at 1356–57 ("[T]he factual details as to the extent and nature of Cyber Power's operations regarding the subject merchandise in the Philippines also remain in dispute."); *see also* Pl.'s Mot. for Summ. J., ECF No. 48; Def.'s Cross-Mot. for Summ. J., ECF No. 60.

A. Findings of Fact

On August 8–11, 2022, the court held a bench trial to decide whether the subject merchandise was properly marked under 19 U.S.C. § 1304(a) as "Made in Philippines." Trial, ECF Nos. 144–47. Thereafter, the parties submitted proposed findings of fact and conclusions of law. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, ECF No. 157 ("Pl.'s FOF & COL"); Defendant's Proposed Findings of Fact and Conclusions of Law, ECF No. 158 ("Def.'s FOF & COL").

1. Uncontested Facts Regarding the Subject Merchandise

Before trial, the court delineated the uncontested facts in its Pretrial Order. *See* Pretrial Order, Schedule C, ECF No. 142 ("Jt. Uncontested Facts"). The UPS devices at issue are Model Nos. CP600LCDa, CBN50U48A-1, CST135XLU, OR500LCDRM1U, and SX650U, and the SVP device is Model No. HT1206UC2RC1. *See* Jt. Uncontested Facts ¶¶ 1–2.

The UPS devices essentially serve as backup batteries for a range of electronic devices and electrical appliances. *See, e.g.*, Jt. Uncontested Facts ¶ 14 (Model No. OR500LCDRM1U); *see, e.g.*, *id.* ¶ 17 ("If power to a connected device is lost, [this model] activates a lead acid battery, which provides emergency power to the connected device until power is restored[.]"). These devices assist in a "graceful shutdown" during a power failure so as "to protect against the loss of data and damage to valuable electronics." *Id.* ¶¶ 25, 33, 41, 48. To make the UPSs function as intended, all five subject models contain "firmware"—computer code—that is written in Taiwan and programmed on the main PCBAs of each device. *Id.* ¶¶ 19, 27, 35, 43 & 51; *see also* Trial Vol. III at 377–80 (Plaintiff's witness Thomas L. Fuehrer explaining general function of firmware).

The surge protector, SVP Model No. HT1206UC2RC1, provides "surge protection of up to 2880 joules to connected devices." Jt. Uncontested Facts ¶ 56. Unlike the UPS devices, it contains neither firmware nor a battery. Trial Vol. III at 436, ECF No. 151; Deposition Transcript of Chi-Ting (Tim) Huang at 149, ECF No. 153 ("Huang Dep.").

With respect to four of the UPS devices and the single SVP device, it is undisputed that the majority of their components, including the main printed circuit board assemblies ("PCBAs"), were manufactured in China. Jt. Uncontested Facts ¶¶ 18, 20–23, 26, 28–31, 34, 36–39, 50, 52–55, 58, 60–63. Throughout this litigation, Plaintiff contended, and Defendant disputed, that the main PCBA for UPS Model No. CP600LCDa was manufactured in the Philippines. *See* Huang Dep. at 40.[3]

The main PCBA controls all the functions of the device in which it is installed. *See* Huang Dep. at 40; Trial Vol. III at 417. In its presentation of the case, Plaintiff identified multiple other PCBAs within certain of the models of the subject merchandise, in addition to the main PCBAs. *See, e.g.*, Huang Dep. at 87–93. Plaintiff also presented testimony generally addressing the specifications and functions of PCBAs—namely, that "a printed circuit board assembly is the fiberglass board [inside a UPS, for example] with the copper traces attached to it that are embedded inside it. Those copper traces connect the components that are also located on the printed circuit board. . . . [T]he assembly is the board plus all the components." Trial Vol. III at 375–76.

2. Trial Witnesses and Admitted Evidence

Plaintiff's principal witness, Chi-Ting "Tim" Huang, is an employee of Cyber Power Systems Inc. ("Cyber Power Taiwan"), who is assigned to and serves as the general manager of Cyber Power Philippines.[4] Huang Dep. at 6–8, 13; Trial Vol. I at 46–48, ECF No. 149. Mr. Huang testified that he "manage[s] all the departments at the [Philippines] factory[,] execute[s] the short-term, medium-term, and long-term plans of the company[, and] appl[ies] for all the relevant documents for the company from the Philippines government." Trial Vol. I at 46. Mr. Huang's testimony primarily consisted of a review of Plaintiff's trial exhibits relating to each model of the subject merchandise. *See generally* Huang Dep.; Plaintiff's Trial Exhibits ("PTX") 6–63. During trial, Mr. Huang also guided the court through a demonstrative video depicting the operations in July 2020 at the Cyber Power Philippines

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[3] Mr. Huang's deposition was used as the majority of his direct testimony at trial.

[4] Cyber Power Taiwan is the parent company of Plaintiff, Cyber Power Philippines, and other entities. Jt. Uncontested Facts ¶ 64; Huang Dep. at 13; Trial Vol. III at 522, 527.

factory.[5] Trial Vol. I at 48–122; Trial Vol. II at 128–222, ECF No. 150; Jt. Trial Exhibit 1.

At trial, and as memorialized in its Proposed Findings of Fact and Conclusions of Law, Defendant challenged Mr. Huang's credibility on the basis of discrepancies in his signature used to sign various documents, inconsistencies in his testimony about the relationship between Cyber Power Philippines and a related entity, Phisonic, and errors in his explanation of the July 2020 demonstrative video. *See* Def.'s FOF & COL at 24–27 ("These examples of implausible testimony reveal a witness whose testimony should be seen as untrustworthy and, thus, not credited unless corroborated by other, unimpeachable evidence.").

As a threshold matter, the court notes the limited relevance of any testimony regarding Cyber Power's corporate structure and relationship with Phisonic to the substantial transformation issue. As explained below, the court finds that Mr. Huang's testimony contained evidentiary gaps regarding certain aspects of the assembly of the subject merchandise during the relevant time period. *See infra* pp. 18–24. Even though these gaps detract from his credibility, the court finds that Mr. Huang's demeanor on the stand, along with his direct answers regarding the technically complex subject merchandise, rendered him a credible witness overall.

Plaintiff's remaining witnesses were Thomas L. Fuehrer, the electrical project manager at Cyber Power, and Brent A. Lovett, the general manager and president of Cyber Power. Trial Vol. III at 360, 362, 478. The Government's witnesses were Linda Horacek, an import specialist on Customs' electronic enforcement team, and Karl Moosbrugger, a national import specialist at Customs, who were involved in the administrative investigation and protest determination. *Id.* at 596, 608, 611–17; Trial Vol. IV at 789, 825, ECF No. 152.

At trial, Cyber Power again raised its relevance objection to testimony by Defendant's witnesses "dealing with the administrative process by which the protest was decided." Trial Vol. III at 593. This objection was previously denied by the court. *See* ECF Nos. 135, 136. As the court explained at trial, and reiterates now, in presiding over a bench trial the court maintains the ability to ignore any testimony that it finds to be irrelevant. Here, every witness other than Mr. Huang lacked personal knowledge as to the operations at the Cyber Power Philippines factory. Accordingly, the probative value of their

[5] As a demonstrative exhibit, the video was not entered into evidence. *See, e.g.*, Trial Vol. II at 188, ECF No. 150; Pre-Trial Order, Schedule C-1, ¶ 69 (Plaintiff's Statement of Material Facts in Dispute) ("The video record does not purport to depict the manufacture of the specific goods which are the subject of this action, but is proffered as a demonstrative or pedagogical exhibit, in accordance with Rule 611 of the Federal Rules of Evidence.").

respective testimony is minimal because it does not assist the court in resolving the central question—whether those operations, occurring in early 2020, constituted a substantial transformation of the subject merchandise.

3. Operations in the Philippines

To determine whether substantial transformation of the subject merchandise occurred in the Philippines, the court has reviewed the admitted evidence and testimony pertaining to the manufacture of each model of subject merchandise during the relevant time period—early 2020 up to the date of entry, March 27, 2020. Jt. Uncontested Facts ¶ 1; ECF No. 20–1; *see also* Trial Vol. III at 452, 454 (establishing that UPS Model No. CBN50U48A-1 went into production and entered marketplace in March 2020). Although the parties do not identify exact dates, they appear to be in agreement that the subject merchandise was manufactured in early 2020. *See, e.g.*, Huang Dep. at 36, 65, 68, 84; Trial Vol. II at 153, 295 (questioning by Defendant making reference to early 2020 as relevant time period).

During direct examination, Mr. Huang identified and described the contents of various documentary exhibits associated with the production process of each model of UPS or SVP in issue. He also testified that Cyber Power Philippines began "manufacturing" UPSs and SVPs in October 2018, and that Phisonic, a related entity operating in the same building as Cyber Power Philippines, was incorporated in March 2019 and has been manufacturing PCBAs since September 2019. *Id.* at 26–29; *see* PTX 8.

For each of the six devices at issue, Plaintiff submitted the following information as separate exhibits: "Spec Sheets" for each device (PTX 9, 18, 20, 28, 37, 46, and 55); "User Manuals" (PTX 10, 19, 29, 38, 47, and 56); Bills of Materials for the components of each device (UPS or SVP) (PTX 11, 21, 30, 39, 48, and 57); and Bills of Materials for the components of each PCBA (main boards and other boards, if applicable) (PTX 12, 22, 31, 40, 49, and 58). Plaintiff also introduced exhibits purporting to show the manufacturing process for each device: "Production Timelines" (PTX 13, 23, 32, 41, 50, and 59); "Manufacturing Process Flowcharts" (PTX 14, 26, 35, 44, and 53, and 62); and "Standard Operating Procedures" for both the PCBA(s) and device assembly processes (PTX 15, 24, 25, 33, 34, 42, 43, 51, 52, 60, and 61). Finally, for each device, Plaintiff submitted schematics for each device's PCBA(s), dimension drawings, and "exploded" view diagrams of the finished UPS and SVP devices (PTX 17, 27, 36, 45, 54, and 63).

For five of the six models of subject merchandise, it is undisputed that the main PCBAs were manufactured in China. Before discussing the assembly process for all of the UPS and SVP devices, the court addresses the disputed origin of UPS Model No. CP600LCDa's main PCBA.

i. Origin of UPS Model No. CP600LCDa's Main PCBA

To support its position that the CP600LCDa was manufactured in the Philippines from the PCBA stage onward, Plaintiff submitted additional documentary evidence— specifically, "work orders" and "set issuing" records—that purport to show the production of PCBAs by Phisonic. *See* PTX 16. This additional evidence, together with the contents of the core documentary exhibits and Mr. Huang's testimony, permits the court to draw the necessary factual inferences to conclude that the main PCBAs for the subject CP600LCDa devices were manufactured in the Philippines.

For the CP600LCDa, the Spec Sheet and User Manual are consumer-facing documents that reveal nothing about the manufacture or country of origin for the subject devices or their main PCBAs.[6] *See* PTX 9 & 10. Mr. Huang testified, based on these exhibits and his personal knowledge, that the CP600LCDa was "manufactured" at Cyber Power Philippines as of early 2020 and is still in production there, and that the User Manual would be packed with each device before shipping. Huang Dep. at 35–36.

The CP600LCDa's Bills of Materials (*i.e.*, "component lists" for both the main PCBA and the UPS in its entirety) are undated, but provide references to the country of origin for each type of component. PTX 11 & 12. Notably, both Bills of Materials state that the device's firmware (Part No. 0PA-0000506–03) "is designed and coded in Taiwan; [and] *loaded in Philippines*." PTX 11 & 12 (emphasis added). Mr. Huang specifically testified that the Bill of Materials for the CP600LCDa's main PCBA showed 128 types of components that were combined by Phisonic employees in the Philippines to produce that main PCBA. Huang Dep. at 39–40, 45.

The Manufacturing Procedure Flowchart for the CP600LCDa corroborates the foregoing exhibits by listing the Philippines as the country where firmware is loaded. *See* PTX 14; *see also* PTX 15 at 01089 (Standard Operating Procedure) (showing, as general matter, that firmware burning for CP600LCDa is step of PCBA manufacturing process). Mr. Huang testified that he personally observed the processes shown in the Flowchart, and that "descriptions of the op-

[6] Both the Spec Sheet and User Manual refer to the device as "CP600LCD," which the parties appear to treat as an interchangeable name for the CP600LCDa. *See, e.g.*, Pl.'s FOF & COL ¶ 45; Def.'s FOF & COL ¶ 22. The same seems true for a different UPS device, Model No. OR500LCDRM1U. *Compare* PTX 37 (Spec Sheet for OR500LCDRM1U), *with* PTX 39 (Bill of Materials for OR500LCDRM1Ua).

erations that are performed" in the Philippines were accurate. Huang Dep. 46–47. While the component lists and the Flowchart lack dates, when these exhibits are read together with the remaining exhibits pertaining to the CP600LCDa's manufacture, the court can draw key inferences as to the origin of the subject model's main PCBA.

Turning next to the Production Timeline for the CP600LCDa, this exhibit lists the Philippines as the country location for both the PCBA operations (Surface Mount Device ("SMD" or "SMT" for "Surface Mount Technology"), Auto-Insertion ("AI"), and Dual in-line package ("DIP")) and the assembly and testing of that model of UPS. PTX 13. Mr. Huang testified that Phisonic employees conducted the SMD, AI, and DIP operations in the Philippines, while Cyber Power Philippines employees completed the UPS assembly, testing, and packaging. Huang Dep. at 45–46.

While the production timeline lacks dates, it includes a production quantity—1,440 units—that also appears in the additional documentation provided for the CP600LCDa: the "work orders" and "set lists." *See* PTX 13 & 16; Huang Dep. at 43 ("[Y]ou can see the quantity for the purchase order[,] which is 1,440."). These work orders and set lists reflect each stage of the PCBA manufacturing process—SMD, AI, and DIP assembly—for a total quantity of 1,440 PCBA boards.[7] PTX 16. Further, these work orders and set lists include a date range—September 2019 through February 2020—for the PCBA manufacturing process as a whole that is consistent with Plaintiff's claimed timeline for manufacture of the subject merchandise. *Id.*; *see also* Huang Dep. at 29 (testifying that Phisonic began manufacturing PCBAs in Philippines in September 2019). Finally, the work orders and set lists repeatedly reference "Phisonic," as the company conducting the listed operations, which again is consistent with Mr. Huang's testimony that the main PCBAs for the subject CP600LCDa UPSs were manufactured by Phisonic in the Philippines as of early 2020. Huang Dep. at 55 (testifying that PCBA manufacturing machines shown in PTX 16 were Phisonic's machines).

The remaining exhibits pertaining to the CP600LCDa—Standard Operating Procedures for main PCBA and UPS assembly, and diagrams showing PCBA circuitry and the UPS components—provide little additional support for the country of origin of the PCBAs, as they are generalized instructional and informational documents. *See* PTX 15 & PTX 17. Mr. Huang testified that the Standard Operating Procedures are posted at workstations at the Cyber Power Philippines factory and that "the operator or the worker of that workstation

[7] The CP600LCDa is the only model of subject merchandise for which a production quantity can be consistently traced across multiple documents.

would then perform the job according to the manual." Huang Dep. at 51–52. Although the Procedures are dated "First draft: 2018, Revised in 2019," Mr. Huang failed to confirm whether the workers who manufactured the subject merchandise in early 2020 acted in accordance with them. *See id.*; PTX 15. There is nothing contained in the Procedures, such as the identification of a specific order or quantity, to tie them to the subject merchandise. Likewise, the circuit diagrams for all of the PCBAs (dated 2018) and UPS assembly diagrams (undated) for the CP600LCDa do not provide information establishing the country of origin for its main PCBA. PTX 17.

For its part, Defendant argues that Plaintiff has failed to establish that the main PCBAs for the subject CP600LCDa devices were manufactured in the Philippines. According to Defendant, "Cyber Power's failure to provide sufficient documentation actually tied to the articles comprising the subject merchandise detained by [Customs] leaves the Court with no ability to evaluate this claim with confidence." Def.'s FOF & COL at 32. Specifically, the Government points to (1) an invoice purporting to show that a part of the main PCBA for the CP600LCDa was shipped to China rather than the Philippines (Defendant's Trial Exhibits ("DTX") 4 & 5), and (2) a report from an audit of the Cyber Power Philippines factory in February 2020 (DTX 9). *See* Def.'s FOF & COL at 32–34. The audit report states that, as of February 28, 2020, there were PCBA manufacturing operations taking place in the Philippines, but those operations appeared to be less than fully organized. *See, e.g.*, DTX 9 at 02055 ("Although responsibilities for the new processes were assigned, there were no records to demonstrate who are assigned to specific process . . . . Moreover, Job Descriptions for these processes were not available.").

The court finds that it is unable to draw Defendant's preferred factual inferences from the cited exhibits. The invoice, which appears to show a part of the main PCBA for the CP600LCDa, is dated June 27, 2019—prior to the dated work orders and set lists for the CP600LCDa on which Plaintiff relies. DTX 5. Without additional context, it is unclear what the invoice can prove about the manufacture of the CP600LCDa's main PCBA in later 2019 and early 2020. As to the audit report, the court's findings with respect to the country of origin of the CP600LCDa's main PCBA do not depend on a thorough understanding of Phisonic's corporate structure or the sophistication of its operations. Rather, the court merely concludes that Phisonic is indisputably located in the Philippines. *See, e.g.*, PTX 7 (showing Phisonic's factory layout in Philippines); Def.'s FOF & COL at 24 (arguing that Phisonic may be a mere "proxy" for Cyber Power Philippines). Thus, the watermark "Phisonic" on Plaintiff's admitted work orders and set lists from late 2019 to early 2020 tilts the scales in favor of a finding that the main PCBAs for the subject CP600LCDa devices were manufactured in the Philippines.

As a whole, Plaintiff's documentary evidence contains consistent references to the Philippine production of the main PCBA for the CP600LCDa, quantity-specific work orders and set lists showing dates corresponding with the approximate timeframe during which the subject merchandise was manufactured, and comports with Mr. Huang's testimony as to his personal knowledge of operations occurring at Phisonic and Cyber Power Philippines in early 2020. Based on the totality of this evidence, the court concludes that Plaintiff has proven that the main PCBAs for the subject CP600LCDa devices were manufactured in the Philippines.

The Philippine origin of the CP600LCDa from the main PCBA process onwards distinguishes it from the remaining UPS and SVP devices, for which it is undisputed that the main PCBAs originated in China. Before the court reaches its substantial transformation determination, however, it will address the evidence on the record that purports to establish the nature and extent of the assembly processes for each UPS and SVP device.

ii. Device Assembly and Testing of All Subject Models

Unlike the evidence establishing the origin of the CP600LCDa's main PCBA, Plaintiff's evidence of subsequent assembly and testing of the subject UPSs and SVPs does not permit the court to piece together a coherent and detailed manufacturing timeline for the subject merchandise in the Philippines as of the relevant time period (early 2020). The court now addresses the deficiency of each set of exhibits.

First, the Spec Sheets and User Manuals for each model contain no information about the manufacturing process for the subject merchandise. *See* PTX 9, 10, 18, 19, 20, 28, 29, 37, 38, 46, 47, 55 & 56. Mr. Huang's testimony based on these exhibits confirmed only that he recognized these devices and the general timeline of their manufacture. *See, e.g.*, Huang Dep. at 62–65 (UPS Model No. CBN50U48A-1 was being manufactured at Cyber Power Philippines in early 2020, but has since been "phased out").

The next exhibits—Bills of Materials for the devices and their respective PCBAs, including main PCBAs—do not describe the manufacture of the subject merchandise, but rather, list the types of components that are part of each device or PCBA. *See* PTX 11, 12, 21, 22, 30, 31, 39, 40, 48, 49, 57, & 58. While they provide the country of origin for each type of component *generally*, these Bills lack any information to link them to the subject merchandise *specifically*. They are undated, and do not indicate a total quantity or order of finished merchandise. Indeed, as the Government points out, there is non-specific country of origin information provided for certain components in some of the Bills. *See, e.g.*, PTX 30 at 00032 ln.123 (showing, for "electrolytic cap," that country of origin is "4% from Taiwan, 18% from Japan/Korean, 78% from CHINA); Def.'s FOF & COL at 29. Mr. Huang testified that the percentages represent the relative chance of a given part being from a particular country, and that to confirm the actual country of origin, one must review a "procurement order" to identify the part's supplier. Trial Vol. II at 324–25. From Mr. Huang's testimony, the court infers that the Bills provided are summary-type documents, further distancing them from the subject merchandise. On direct, Mr. Huang testified only as a general matter that these Bills of Materials show the parts used to make each PCBA—including the main PCBAs—and UPS or SVP device, and confirmed that (for the devices other than CP600LCDa) the PCBAs were assembled in China as of early 2020, while the assembly, testing, and packaging of each device occurred in the Philippines. *See* Huang Dep. at 66–68 (CBN50U48A-1); *id.* at 85, 89–90, 92–93 (CST135XLU); *id.* at 111–13, 116–18 (OR500LCDRM1U); 131–33 (SX650U); *id.* at 153–55 (HT1206UC2RC1); *see also id.* at 37–41 (discussing CP600LCDa's Bills of Materials and testifying that PCBA components are assembled in Philippines).

Turning next to the Production Timelines and Manufacturing Process Flowcharts that ostensibly show how the UPS and SVP devices are assembled, the court is faced with the conundrum of similarly weak "connective tissue" between generalized descriptions of the operations at the Cyber Power Philippines factory and the *actual* assembly of the subject merchandise as it occurred in early 2020. Both sets of exhibits are undated, and lack any additional documentation to confirm that these timelines specifically show the assembly process of the subject merchandise. *See* PTX 13, 14, 23, 26, 32, 35, 41, 44, 50, 53, 59 & 62. The production quantities and work hours in these exhibits also lack further context to tie them to the subject merchandise. *See* PTX 13, 23, 32, 41, 50 & 59.

The Standard Operating Procedures, circuit diagrams, dimension drawings, and "exploded" diagrams for each model suffer from similar issues: there is nothing to link these exhibits to specific quantities of merchandise, and no testimony to confirm whether or not these processes were being followed by the workers who assembled the subject merchandise at the Cyber Power Philippines factory in early 2020.

See PTX 15, 17, 24, 25, 27, 33, 34, 36, 42, 43, 45, 51, 52, 54, 60, 61 & 63.

Mr. Huang's testimony regarding these exhibits is noticeably lacking when compared to his testimony on the CP600LCDa. Mr. Huang repeatedly confirmed that he was "familiar" with the operations in each exhibit, that they occurred in China (as to the PCBAs) and the Philippines (as to the UPS and SVP devices), and that the exhibits themselves were "accurate." *See* Huang Dep. at 69–82 (CBN50U48A-1); *id.* at 95–107 (CST135XLU); *id.* at 114–28 (OR500LCDRM1Ua); *id.* at 137–44 (SX650U); *id.* at 150–65 (HT1206UC2RC1). He failed to testify, however, that he had personally observed the manufacture of the subject merchandise, or to point to any other evidence that could link its production to these summary, "guidelines"-type exhibits, especially with reference to the necessary timeframe: early 2020. *See generally id.* The need to tie the evidence to that timeframe is critical because Mr. Huang repeatedly acknowledged that Cyber Power's operations continued to shift from China to the Philippines. For instance, with respect to the CST135XLU, Mr. Huang testified that all of its PCBAs (main board, control board, USB charging board, COAX board, and NTVS board) were manufactured in China as of early 2020, but as of the time of the trial were manufactured by Phisonic in the Philippines. *Id.* at 87–93. Because many of the documentary exhibits are undated, however, it is difficult to discern which exhibits are concurrent with each other, and which describe operations occurring in different countries.

The questions raised by the lack of consistent dates and other links between the documentary evidence and Mr. Huang's testimony also confuses the operational timeline with respect to "firmware burning." These inconsistencies and gaps in the record are illustrative of Plaintiff's evidentiary failures. Importantly, Plaintiff argues that the "[f]irmware is applied to the PCBAs *in all the subject UPS models*. . . . at [the Cyber Power Philippines] plant *in the Philippines, using firmware code* which was created . . . in Taiwan by Taiwanese firmware engineers." Pl.'s FOF & COL ¶ 85 (emphasis added). Plaintiff goes on to argue that once firmware is burned into a particular Cyber Power device, it cannot be overridden by additional firmware. *See* Trial Vol. III at 463 ("Q. Once you burn firmware the door is shut? A. That's correct.").

The evidence, however, appears to present a less clear picture. For all of the subject UPS devices, at least some firmware burning occurs during the PCBA manufacturing process, a stage of production that—except for the CP600LCDa—undisputedly occurs in China. *See* PTX 23, 25, 32, 33, 41, 42, 50, & 51. This is borne out by the documentary evidence: the Bills of Materials for the CBN50U48A-1 list firmware as designed in Taiwan, with the same part number (#0HU-5048017–00) appearing in the Bills for the finished UPS device and the main PCBA. PTX 21, ln.157; PTX 22, ln.157. The Standard Operating Procedure for the CBN50U48A-1's main PCBA lists "Firmware Burn-In" as a step in the main board manufacture, and identifies the firmware by the same part number as the Bills: 0HU-504817–00. PTX 24 at 01032. As of 2020, Plaintiff concedes that these operations took place in China. *See* Huang Dep. at 68. CBN50U48A-1's Standard Operating Procedure for UPS assembly does not mention firmware. *See* PTX 25. Nevertheless, Plaintiff contends that the firmware for this device is loaded in the Philippines, where only UPS assembly, testing, and packaging occurred. Pl.'s FOF & COL ¶ 59 ("The assembled UPS Model No. CBN50U48A-1 is then programmed in the Philippines with firmware which is produced in Taiwan and which enables the electronic components of the UPS to function.").

As another example, the Bill of Materials for the main PCBA of the SX650U states that its firmware was "designed and coded in Taiwan, loaded in Philippines." PTX 49. The Standard Operating Procedures for both PCBA and UPS assembly show firmware burning as a step in the UPS assembly process. PTX 51 at 01210; PTX 52 at 01228. Mr. Huang testified, however, that the firmware burning for the SX650U "[i]nitially . . . was done in China." Huang Dep. at 140 ("Q. So when you made this main board in China, you did some firmware burning in China? A. Yes."). Plaintiff has failed to explain this seeming contradiction.

Based on the foregoing, the court concludes that Plaintiff has failed to carry its burden of producing evidence to show that five of the six models of subject merchandise—UPS Model Nos. CBN50U48A-1, CST135XLU, OR500LCDRM1U, SX650U, and SVP Model No. HT1206UC2RC1—were substantially transformed in the Philippines. Plaintiff's evidence does not establish what operations occurred in the Philippines to produce these subject devices to permit the court to conduct a substantial transformation analysis.

A distinction must be made, however, for the CP600LCDa. Having determined that its main PCBA originates in the Philippines, the court is able to infer that the majority of its manufacture—multiphase assembly of its main board, and assembly and testing of the ultimate UPS device—took place in the Philippines. Accordingly, the court proceeds to a substantial transformation analysis for the CP600LCDa.

B. Conclusions of Law

In a civil action, preponderance of the evidence means "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." *Bosun Tools Co. v. United States*, 43 CIT ___, ___, 405 F. Supp. 3d 1312, 1315 (2019) (quoting *Hale v. Dep't of Transp.*, 772 F.2d 882, 885 (Fed. Cir. 1985)). Here, Plaintiff Cyber Power bore the burden of proof that the assembly it alleged took place in the Philippines with respect to the six models of subject merchandise constituted "substantial transformation" under the "name, character, or use" test, such that "new and different" articles emerged.

1. UPS Model No. CP600LCDa Was Substantially Transformed in the Philippines

As the court articulated in its summary judgment opinion, the substantial transformation test is not straightforward to apply. *Cyber Power*, 46 CIT at ___, 560 F. Supp. 3d at 1351. Nevertheless, courts deciding issues of substantial transformation have established several guiding tenets and consistently emphasized the case-by-case nature of the test. *See, e.g.*, *Nat'l Hand Tool v. United States*, 16 CIT 308, 311 (1992), *aff'd* 989 F.2d 1201 (Fed. Cir. 1993) ("To determine whether a substantial transformation of an article has occurred . . . each case must be decided on its own particular facts." (quoting *Uniroyal, Inc. v. United States*, 3 CIT 220, 224, 542 F. Supp. 1026, 1029 (1982))).

The court reiterates its prior rejection of two potential alternatives to the substantial transformation test of name, character, or use: first, an "essence"-based approach that would look only to whether the essential or critical component of a product had been transformed; and second, an approach that would *per se* decide whether substantial transformation had occurred on a component-by-component basis. *See Cyber Power*, 46 CIT at ___, 560 F. Supp. 3d at 1354 ("The court agrees with Plaintiff that Defendant's proposed focus on the PCBA and the application of an 'essence' or 'critical component' test here is without merit. The Government's suggestion to focus solely on the PCBA components[8] of the subject merchandise may well undermine the objective of the 'substantial transformation' test, namely to focus on a change in name, character, or use."); *id.* ("While the intended use of components may provide some insight as to whether the assembly

[8] To be functional, the subject UPS devices require multiple components in addition to the main PCBA—including, but not limited to, firmware unique to each model, and a battery. Without these components, the main PCBA cannot individually perform the functions of a UPS. *See, e.g.*, Huang Dep. at 61, 82, 147; Trial Vol. III at 385–86; Trial Vol. IV at 911.

of those components into the finished merchandise accomplishes a change in use that indicates a 'substantial transformation,' such a consideration is but one of many for the court to consider as part of the 'totality of the evidence.'" (citation omitted)). The Government's approach does not promote uniformity, consistency, and predictability in the application of the substantial transformation test. Consequently, the court does not read the prior caselaw on that test as having altered the fundamental requirements of "name, character, or use" by narrowing it to an essence- or component-based interpretation.

Rather, a change in name, character, or use turns on the nature of the potentially transformative processing, considered in the context of the particular kind of merchandise being manufactured. *See Meyer Corp., U.S. v. United States*, 43 F.4th 1325, 1331 (Fed. Cir. 2022) (holding that "the trial court correctly focused its inquiry on manufacturing steps that changed the shape, form, chemical properties, and mechanical properties" of a product).

Because the court finds that the entirety of the CP600LCDa's manufacture occurred in the Philippines, the court need not make a determination as to whether its UPS assembly process *alone* constituted a substantial transformation. The CP600LCDa began its manufacturing journey in the Philippines as a set of components not yet functional as a power source of any kind. *See* Huang Dep. at 39–40, 45 (128 types of components were combined in Philippines to assemble CP600LCDa's main PCBA). After several stages of manufacturing, each involving numerous steps directed toward changing the electronic properties of the device as a whole, the CP600LCDa left the Philippines as a fully functioning UPS. It is undisputed that that the CP600LCDa is capable of providing "battery backup (using simulated sine wave output) and surge protection for desktop computers, workstations, networking devices, and home entertainment systems," and that, thanks to its programming, "is able to provide real time status and alerts of potential problems." Jt. Uncontested Facts ¶¶ 40, 42. Even without detailed evidence describing the assembly stage of UPS production, the change from all of its components to its ultimate finished product as a UPS device is a change so marked as to shift the burden of proof in Plaintiff's favor.

Thus, the court holds that Cyber Power's operations in the Philippines resulted in a "new and different article": the CP600LCDa. Indeed, the CP600LCDa's Philippine manufacture satisfies all three prongs of the substantial transformation test: a change in name (from a set of PCBA and UPS component parts to the finished, functioning UPS Model No. CP600LCDa), a change in character (from component parts not yet capable of being electronically programmed to a device capable of performing a number of intelligent functions), and a change in use (from component parts to a device geared towards a specifically identified purpose: protecting against power outages).

Accordingly, the subject UPS Model No. CP600LCDa devices should be marked as products originating from the Philippines under 19 U.S.C. § 1304(a).

2. Plaintiff Failed to Carry Its Burden of Proof as to UPS Model Nos. CBN50U48A-1, CST135XLU, OR500LCDRM1U, SX650U, and SVP Model No. HT1206UC2RC1

The court now turns to the country of origin of the remaining models of subject merchandise. As articulated in its Findings of Fact, the court determined that Plaintiff's evidence in this case is undercut by its lack of connection to the subject merchandise and the existence of unanswered questions and unresolved conflicts among the documentary evidence, Mr. Huang's testimony, and Plaintiff's contentions in its Proposed Findings of Fact and Conclusions of Law.

Before trial, the court was faced with many questions pertaining to the subject UPS and SVP devices: how the production process in the Philippines evolved as more of Cyber Power's operations shifted there; when and where discrete steps of the so-called "assembly" process, such as firmware burning, were taken; and whether Plaintiff could submit evidence of assembly procedures that depicted the manufacturing process of the subject merchandise.

Based on Mr. Huang's testimony and Plaintiff's admitted exhibits, the trial did not provide answers to these questions. The court thus holds that Plaintiff has failed to prove, by a preponderance of the evidence, that five of the six subject models are products of the Philippines. The court cannot reliably discern how the parts of the remaining four UPS devices, or the single SVP device at issue, were assembled into fully functioning products. Plaintiff failed to present the specific testimony describing the assembly process of the subject devices *for the relevant time period*, and instead focused on a general overview of its product types and manufacturing operations. *See, e.g.*, Huang Dep. at 74–75, 104–05, 123–25, 138, 161–65. Thus, no witness with personal knowledge confirmed that the assembly operations depicted in the documentary exhibits fully reflected the manufacture of the subject merchandise. Without such testimony, the documentary evidence alone does not establish what the assembly process for the subject UPS and SVP devices looked like in early 2020.

Furthermore, discrepancies between the exhibits and Mr. Huang's testimony with respect to where and at what stage certain steps were performed, along with the absence of dates, quantities, and other merchandise-specific information, leave the court unable to determine whether the devices were substantially transformed in the Philippines. That the devices left the Philippines with new names cannot suffice to prove that "new and different article[s] emerged" from the operations at Cyber Power Philippines factory. Simply put, with the exception of the CP600LCDa, this is a case in which Plaintiff has failed in its burden of proof from the outset.

III. Conclusion

For the foregoing reasons, the court finds that country of origin for UPS Model No. CP600LCDa is the Philippines, and the country of origin for the remaining five models of subject merchandise is China. Judgment will enter accordingly.

Dated: February 27, 2023
New York, New York

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

Slip Op. 23–25

United States, Plaintiff, v. Crown Cork & Seal USA, Inc., et ano., Defendants.

Before: M. Miller Baker, Judge
Court No. 21–00361

[Defendants' motion to dismiss Counts I and II of the amended complaint is denied.]

Dated: February 27, 2023

Jackson D. Toof, ArentFox Schiff LLP of Washington, DC, argued for Defendants. With him on the papers was *Leah N. Scarpelli*.

William Kanellis, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, argued for Plaintiff. With him on the papers were *Brian M. Boynton*, Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Franklin E. White, Jr.*, Assistant Director. Of counsel for Plaintiff was *Philip Hiscock*, Senior Attorney, Office of the Associate Chief Counsel, U.S. Customs and Border Protection of Chicago, Illinois.

OPINION AND ORDER

Baker, Judge:

Before the court is Defendants' motion to dismiss Counts I and II of the government's amended complaint in this action seeking civil penalties for misclassification of imports. For the reasons stated below, the court denies the motion.

I

A

Goods imported into the United States must be "classified." This means that U.S. Customs and Border Protection (Customs) must determine where such goods fit into the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. *See* 19 U.S.C. § 1500(b) (requiring Customs to "fix the final classification and rate of duty applicable to [imported] merchandise"). Customs's classification "is critical because the applicable duty, or tariff, can vary considerably depending on which HTSUS subheading applies." *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1346 (CIT 2021), *aff'd*, 47 F.4th 1370 (Fed. Cir. 2022).

Although Customs is responsible for classifying imports, it is "unable to inspect every import." *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 246 (3d Cir. 2016). Customs therefore relies "primarily on the importers themselves to self-report any duties owed," *id.*, much as the Internal Revenue Service relies upon self-reporting by taxpayers. The Tariff Act of 1930, as amended, provides that an

> importer of record . . . shall, using reasonable care . . . complete the entry . . . by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise, and . . . such other information as is necessary to enable [Customs] to . . . properly assess duties on the merchandise . . . .

19 U.S.C. § 1484(a)(1)(B); *see also* 19 C.F.R. § 141.90(b) (requiring an importer to report "the appropriate subheading under the provisions of the [HTSUS] and the rate of duty for the merchandise being entered").

To give teeth to this requirement, federal law provides that "no person, by fraud, gross negligence, or negligence," may import merchandise into the United States "by means of (i) any document or electronically transmitted data or information, written or oral statement, or act which is material or false, or (ii) any omission which is material." 19 U.S.C. § 1592(a)(1)(A). The United States may bring an action in this court to recover civil penalties for violations of this provision. *See id.* § 1592(e).[1]

In any such action, the burden of proof to establish liability varies according to the level of alleged culpability. When alleging fraud, the government's burden is to establish the violation by clear and convincing evidence. *Id.* § 1592(e)(2).[2] When alleging gross negligence, the government's burden is to "establish all the elements of the alleged violation." *Id.* § 1592(e)(3).[3] As the statute is silent as to the standard of proof for gross negligence, the default preponderance of the evidence standard applies. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (referring to the preponderance standard as "the default rule for civil cases"). And when the government alleges negligence, its only burden is to establish a violation; doing so shifts the burden to the defendant to prove that the infraction "did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4).

[1] Before the government can sue to recover civil penalties, Customs must complete an administrative process prescribed by statute. *See* 19 U.S.C. § 1592(b).

[2] Customs defines "fraud" as "a material false statement, omission, or act in connection with the transaction . . . committed (or omitted) knowingly, *i.e.*, . . . voluntarily and intentionally, as established by clear and convincing evidence." 19 C.F.R. Pt. 171 App. B(C)(3).

[3] Customs defines "gross negligence" as "an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171 App. B(C)(2).

The civil penalties the government may recover likewise turn on the degree of culpability. "A fraudulent violation of subsection (a) is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." *Id.* § 1592(c)(1). A grossly negligent violation is punishable by a civil penalty in an amount not to exceed either the lesser of the merchandise's domestic value or four times the lawful duties, taxes, and fees of which the United States is or may be deprived; alternatively, if the violation did not affect the assessment of duties, the penalty may not exceed 40 percent of the merchandise's dutiable value. *Id.* § 1592(c)(2). For cases involving simple negligence, the penalty structure is the same as it is for gross negligence, except the amounts are reduced—instead of four times the lawful duties, taxes, and fees, the maximum is two times those amounts, and the maximum is 20 percent of dutiable value if the violation did not affect the assessment of duties. *Id.* § 1592(c)(3).

B

This case arises out of imports of metal can lids, valued at approximately $51 million, into the United States between 2004 and 2009 by two Crown Cork & Seal entities (collectively, Crown Cork) from related entities in Europe. It is undisputed that Crown Cork misclassified these lids under the HTSUS and as a result underpaid approximately $1.3 million in import duties.[4] It is also undisputed that during the same 2004–09 period, the same Crown Cork entities imported comparable metal can lids from related entities in Canada and properly classified them. NAFTA, however, exempted those Canadian imports from duties. After the government detected the misclassification of the European imports, Crown Cork admitted the error and made the government whole.

Over a decade later,[5] the government brought this action seeking civil penalties for Crown Cork's errors in classifying the European can lid imports. The government's initial complaint alleged a conspiracy by various Crown Cork entities and other unidentified coconspirators to fraudulently classify the imported can lids. ECF 2, ¶¶ 6–7. The government further alleged alternative theories of culpability and sought a different penalty amount for each—approximately $18.1

[4] Crown Cork classified the European lids using HTSUS subheading 7326.90.1000, "Other articles of iron or steel: Other: Of tinplate," which avoided any liability for duties. ECF 23, ¶ 23. The parties agree that the correct classification was under HTSUS subheading 8309.90.0000, "Stoppers, caps and lids (including crown corks, screw caps, and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other [than Crown corks (including crown seals and caps), and parts thereof]." This classification carried a 2.6% *ad valorem* duty rate on the value of the merchandise imported from Europe. ECF 23, ¶ 17.

[5] The parties agreed to toll the limitations period in the run-up to this suit.

million under its fraud theory,[6] *id.* ¶¶ 25–26, approximately $5.2 million under a gross negligence theory, *id.* ¶ 29, and approximately $2.6 million under a negligence theory, *id.* ¶ 32.

Crown Cork moved to dismiss the original complaint's Counts I and II—the fraud and gross negligence counts. Following briefing, the court heard oral argument and granted the motion for reasons stated from the bench. *See* ECF 22. The court explained that in its view the government's complaint failed to surmount the "plausibility" threshold required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). ECF 25, at 39:19–40:14. The court granted the government leave to file an amended complaint within 21 days after the date of the order. ECF 22.

The government then filed an amended complaint. ECF 23, ¶¶ 33–40. The government again alleges that Crown Cork conspired with unnamed co-conspirators to import the can lids from Crown Cork entities in Europe using fraudulent statements to avoid paying import duties. *Id.* ¶¶ 10–11.

The most significant new material is a more fulsome description of the exact circumstances of the relevant import transactions. The amended complaint contains an exhibit identifying for each entry the entry number, the date and port of entry, the correct HTSUS subheading and applicable duty rate, the product value, the duty payable, and the revenue lost by the entry's incorrect classification. *Id.* ¶ 12 & Ex. A.[7]

The amended complaint alleges that Crown Cork "caused these 543 false statements to be made to the [g]overnment by submitting or causing to be submitted information containing HTSUS subheadings which falsely classified the metal lids they imported." *Id.* ¶ 13. The amended complaint further avers—in another change from the original complaint—that the licensed brokers used by Crown Cork to file the necessary paperwork for the entries "relied exclusively upon representations" from Crown Cork "for descriptions, entry information[,] and classifications related to these metal lids." *Id.* ¶ 15.

[6] If it sufficiently pled and then proved fraud, notionally the government could recover a civil penalty equivalent to the misclassified can lids' full value, or approximately $51 million. *See* 19 U.S.C. § 1592(c)(1). The reduced penalty sought by the government reflects a recognition of constitutional constraints. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 337 (1998) (holding that a forfeiture "grossly disproportional to the gravity of the defendant's offense . . . is unconstitutional" under the Eighth Amendment's Excessive Fines Clause).

[7] Exhibit A was also attached to the original complaint, in which the government simply said it listed 543 entries of metal lids that were "entered or introduced into the commerce of the United States by means of material false statements, acts, or omissions." ECF 2, ¶¶ 6, 7.

The amended complaint further alleges that Crown Cork knew the correct HTSUS subheadings and intentionally misclassified the European can lids under different subheadings subject to lower duties. *Id.* ¶¶ 17–18. The amended complaint notes that during the same period, Crown Cork imported identical or similar merchandise from Canada and classified those entries properly. *Id.* ¶¶ 20–22. These correctly classified Canadian imports were exempt from duties because of NAFTA. *Id.* ¶ 21.

Crown Cork moved to dismiss Counts I and II of the amended complaint. ECF 24. The government opposed, ECF 26, and Crown Cork replied, ECF 27. The court then heard oral argument and received supplemental briefing. *See* ECF 36; ECF 37.

C

The government brings this suit under 19 U.S.C. § 1592. The court has subject-matter jurisdiction over such actions under 28 U.S.C. § 1582.

At this "motion to dismiss stage, [the court] must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant." *Bioparques de Occidente, S.A. de C.V. v. United States*, 31 F.4th 1336, 1343 (Fed. Cir. 2022) (cleaned up).

II

A

Crown Cork first contends that the amended complaint's fraud and gross negligence counts fail to satisfy the particularity requirements of Rule 9(b), which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." USCIT R. 9(b). As an initial matter, Crown Cork's argument sweeps too broadly because Rule 9(b)'s requirements do not apply to the gross negligence claim. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 437 (S.D.N.Y. 2010) ("[C]laims for gross negligence, like claims of negligence, are governed by Rule 8(a), not Rule 9(b) . . . . Plaintiffs are not required to plead gross negligence with particularity . . . .").

Crown Cork argues that the fraud claim here violates Rule 9(b) because it is insufficiently specific despite the government having had ten years to investigate the matter.[8] The company asserts that "[d]espite having over a decade to investigate the inadvertent misclassification of can ends . . . the [g]overnment continues to put forward only speculative and unsubstantiated allegations." ECF 37, at 2. The company contends that Rule 9(b) requires the government to identify the specific Crown Cork employees and brokers involved in the relevant import transactions. ECF 24, at 15.

The government responds that Rule 9(b) requires that a complaint set forth "the who, what, when, where, and how: the first paragraph of a newspaper story." ECF 36, at 8 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). It further contends that the amended complaint achieves this through Exhibit A, a table listing the 543 entries of lids at issue. *Id.* at 9. While the table does not name individual employees involved in the activity, it identifies the two Crown Cork companies named as defendants here as the responsible parties. *See generally* ECF 23–1 (table); *see also* ECF 23, ¶ 12 (so explaining). The court agrees that the government has satisfied the "who, what, when, where, and how" pleading requirements.

That the government is, or may be, in possession of more detailed information is not by itself sufficient to demand that the government use that information in its amended complaint. "Assessment of the facial sufficiency of the complaint must ordinarily be undertaken without resort to matters outside the pleadings," for if the court expands the inquiry beyond the pleadings, it must treat the motion as one for summary judgment. *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1360 (Fed. Cir. 2019) (quoting *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016)).[9] Thus, the government is correct that issues relating to what was gleaned from its investigation are matters for discovery and possible summary judgment motions.

For these reasons, the court concludes that the government's amended complaint survives Crown Cork's Rule 9(b) challenge.

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[8] The parties' supplemental briefing disagrees on the duration of the government's "investigation" in this matter. *Compare* ECF 36, at 6 (government arguing that the investigation did not take ten years and that the bulk of the period involved "the administrative penalty process and negotiations"), *with* ECF 37, at 4–6 (Crown Cork arguing that the investigation ran from 2011 to 2021 and concluded with issuance of an administrative summons in 2021). As a practical matter, the parties are talking past each other. In the interest of simplicity, this opinion uses the term "the investigation" to refer to the entire process up to the government's filing suit.

[9] There is an exception whereby the court may consider "judicially noticeable matters outside the pleadings" without converting the motion into one for summary judgment, but the judicially noticeable facts "must not be subject to reasonable dispute." *Id.* (cleaned up). Here, no party has argued that the facts from the government's investigation are judicially noticeable.

B

Crown Cork's second line of attack is that the amended complaint's fraud and gross negligence counts fail the notice requirements of Rule 8 as construed in *Twombly* and *Iqbal*. *See* USCIT R. 8(a)(2) (requiring a complaint to assert "a short and plain statement of the claim showing that the pleader is entitled to relief").

Twombly and *Iqbal* represent something of a revolution in federal civil practice, as they "moved us away from a system of pure notice pleading." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013) (citing 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1216, at 71 (2012 supp.)). "In addition to providing fair notice," *id.*, a complaint "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Id.* (quoting *Iqbal*, 556 U.S. at 678). This "plausibility" standard

> is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Iqbal, 556 U.S. at 678 (cleaned up). "Something more is needed, such as facts tending to exclude the possibility that the [defendant's] alternative explanation is true . . . to render [a] plaintiff['s] allegations plausible within the meaning of *Iqbal* and *Twombly*." *Century Aluminum*, 729 F.3d at 1108.

Here, the amended complaint goes beyond alleging facts that are merely consistent with Crown Cork's intentional misclassification of its European imports—it alleges that at the same time the company also correctly classified identical products imported from Canada, which were conveniently duty free under NAFTA. That additional allegation tends to exclude the possibility that Crown Cork innocently misclassified its European imports and therefore nudges Count I over "the line between possibility and plausibility of entitlement to relief" for purposes of Rule 8. *Iqbal*, 556 U.S. at 678.[10]

That brings us to Count II, the government's gross negligence claim. Significantly for present purposes, the relevant regulation defines gross negligence as "an act or acts (of commission or omission)

[10] The bare fact that Crown Cork misclassified its European imports would not, standing alone, support a plausible inference that the company did so fraudulently.

done with *actual knowledge* of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171 App. B(C)(2) (emphasis added).

Given that definition's incorporation of "actual knowledge," the court concludes that the government's allegation regarding the Canadian imports also nudges Count II across the line between possible and plausible. Crown Cork obviously knew the correct classification of these products, as evidenced by its Canadian imports. That knowledge tends to exclude the company's alternative explanation of simple negligence. In effect, Crown Cork put itself on notice that it incorrectly classified its European imports, meaning that the amended complaint plausibly alleges that the company either knew of its ongoing error or turned a blind eye to that reality. *Cf. United States v. Great Neck Saw Mfrs., Inc.*, 311 F. Supp. 3d 1337, 1342 (CIT 2018) (government's complaint sufficiently alleged gross negligence as to entries made after Customs put the importer on notice as to irregularities). Like Count I, Count II also passes muster under Rule 8 as construed in *Twombly* and *Iqbal*.

* * *

For the foregoing reasons, the court **DENIES** Crown Cork's motion to dismiss (ECF 24) Counts I and II of the amended complaint. The court further **ORDERS** the parties to meet and confer and report within 10 days the parties' views on whether referral to mediation would be appropriate. *See* USCIT R. 16.1. In the meantime, the company's obligation to answer the amended complaint is **STAYED** pending further order of the court.

Dated: February 27, 2023
New York, New York

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

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