U.S. Customs and Border Protection

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ANCHOVY OIL

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

ACTION: Notice of proposed modification of one ruling letter and proposed modification of treatment relating to the tariff classification of anchovy oil.

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

DATE: Comments must be received on or before June 2, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Brent Keller, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0358.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of anchovy oil. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N311042, dated April 8, 2020 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N311042, CBP classified anchovy oil, as well as oils derived from microalgae (*Schizochytrium Iimacinum*) in heading 1516, HTSUS, specifically in subheading 1516.20.9000, HTSUS Annotated (HTSUSA), which provides for "Animal or vegetable fats and oil and

their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinized, whether or not refined, but not further prepared: Other." CBP has reviewed NY N311042 and has determined the ruling letter to be in error. It is now CBP's position that anchovy oil is properly classified in subheading 1516.10.0000, HTSUSA, which provides for "Animal, vegetable or microbial fats and oil and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinized, whether or not refined, but not further prepared: Animal fats and oils and their fractions."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N311042 with respect to the tariff classification of anchovy oil and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H329655, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N311042

April 8, 2020
CLA-2–15:OT:RR:NC:N2:231
CATEGORY: Classification
TARIFF NO.: 1516.20.9000; 9903.88.15

MR. MICHAEL DAHM
COLE INTERNATIONAL USA INC.
1775 BASELINE ROAD
GRAND ISLAND, NY 14072

RE: The tariff classification of Omega-3 Food Grade Oils from China. Correction to Ruling Number N310209

DEAR MR. DAHM:

This replaces Ruling Number N310209, dated March 25, 2020, which contained a clerical error. Skuny Bioscience requested to be listed as an importer of record for this merchandise. A complete corrected ruling follows.

In your letter dated February 27, 2020, you requested a tariff classification ruling on behalf of NovasPure Nutrition Inc. (British Columbia, Canada) and Skuny Bioscience Co., Ltd (Sichuan, China).

The subject merchandise under review is oils derived from anchovy and a marine microalgae (Schizochytrium limacinum), respectively. According to the flowchart submitted upon request each article will be undergo refining, deacidification, esterification, washing, molecular distillation, re-esterification, winterization, deodorization, decoloration and the addition of an antioxidant (tocopherols). The Anchovy Oil and Algae Oil will be imported in steel drums with a net weight of 190 kilogram.

The applicable subheading for the above-described products will be 1516.20.9000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for: "Animal or vegetable fats and oil and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinized, whether or not refined, but not further prepared: Other".

The rate of duty will be 8.8 cents per kilogram.

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

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 1516.20.9000, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 1516.20.9000, HTSUS, listed above.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is

regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301–575–0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H329655
March 31, 2023
RR:CTF:FTM H329655 BJK
CATEGORY: Classification
TARIFF NO.: 1516.10.0000

MR. MICHAEL DAHM
COLE INTERNATIONAL USA INC.
1775 BASELINE ROAD
GRAND ISLAND, NY 14072

RE: Modification of NY N311042; Classification of Anchovy Oil

DEAR MR. HU:

This is in reference to New York Ruling Letter (NY) N311042, dated April 8, 2020, concerning the tariff classification of Omega-3 Food Grade Oils imported from China, specifically oils derived from anchovies (anchovy oil) and a marine microalgae (*Schizochytrium limacinum*) (algae oil), respectively. In that ruling, U.S. Customs and Border Protection ("CBP") classified the oils under subheading 1516.20.9000, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), which provides for "Animal or vegetable fats and oil and their fractions, partly or wholly hydrogenated, interesterified, re-esterified or elaidinized, whether or not refined, but not further prepared: Vegetable fats and oils and their fractions: Other." We have reviewed NY N025677 and find it to be in error regarding the tariff classification of anchovy oil under subheading 1516.20.9000, HTSUSA.[1] This ruling only concerns the classification of anchovy oil. For the reasons set forth below, we hereby modify NY N311042.

FACTS:

NY N311042 described the product at issue as follows:

> The subject merchandise under review is oils derived from anchovy and a marine microalgae (Schizochytrium limacinum), respectively. According to the flowchart submitted upon request each article will be undergo refining, deacidification, esterification, washing, molecular distillation, re-esterification, winterization, deodorization, decoloration and the addition of an antioxidant (tocopherols). The Anchovy Oil and Algae Oil will be imported in steel drums with a net weight of 190 kilogram.

ISSUE:

Whether anchovy oil is classified under subheading 1516.10, HTSUS, as "Animal fats and oils and their fractions" or under subheading 1516.20, HTSUS, as "Vegetable fats and oils and their fractions"?

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

[1] NY N311042, dated April 8, 2020, used the 2020 subheading 1516.20.9000, HTSUSA, for its ruling. As of 2023, subheading 1516.20.9000, HTSUSA, has been renumbered to subheading 1516.20.9100, HTSUSA.

section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied in order.

The 2023 HTSUS provisions under consideration are as follows:

1516	Animal, vegetable or microbial fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinized, whether or not refined, but not further prepared:
1516.10	Animal fats and oils and their fractions
1516.20	Vegetable fats and oils and their fractions

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The EN for Chapter 15, HTSUS, provides in pertinent part that:

(A) This Chapter covers:

(1) Animal, vegetable or microbial fats and oils, whether crude, purified or refined or treated in certain ways (e.g., boiled, sulphurised or hydrogenated).

* * *

The EN for heading 15.16, HTSUS, provides in pertinent part that:

This heading covers animal, vegetable or microbial fats and oils, which have undergone a specific chemical transformation of a kind mentioned below, but have not been further prepared.

In NY N311042, anchovy oil is classified under subheading 1516.20, HTSUS, which provides for "Animal, vegetable or microbial fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinized, whether or not refined, but not further prepared: Vegetable fats and oils and their fractions." At the outset, we note the error of classifying oil derived from anchovies under subheading 1516.20, HTSUS, as "vegetable fats and oils and their fractions."

Based on its description, composition, and definition, the subject anchovy oil is derived from anchovies. The Court of International Trade has found that anchovies are a small fish belonging to the order Clupeiformes and the family Engraulidae. *See* Alexandria Int'l, Inc., v. United States, 13 C.I.T. 689, 693 (August 31, 1989). As a fish, anchovies belong to a group of animals considered aquatic vertebrates. Oil derived from anchovies, therefore, are considered "animal fats and oils," and not "vegetable fats and oils." Consequently, anchovy oil is classified under subheading 1516.10.00, HTSUS, which provides for animal fats and oils and their fractions.

HOLDING:

By application of GRI 1, the anchovy oil is classified under subheading 1516.10.00, HTSUS, which provides for: "Animal, vegetable or microbial fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified,

re-esterified or elaidinized, whether or not refined, but not further prepared: Animal fats and oils and their fractions." The 2023 column one, general duty rate for this subheading is 7 cents per kilogram.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 1516.10.00, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent *ad valorem* rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, HTSUS, in addition to subheading 1516.10.00, HTSUS, listed above.

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

EFFECT ON OTHER RULINGS:

NY N311042, dated April 4, 2020, is hereby MODIFIED.

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: Mr. Harry Hu
Skuny BioScience Co., Ltd.
No. 81 Industry Rd.
Pujiang Industry Park
Chengdu, Sichuan 611639, P.R. China.

NovasPure Nutrition Inc.
3728 North Fraser Way
Burnaby, BC, V5J 5G1, Canada

ENTRY SUMMARY (FORM 7501)

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (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 June 20, 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 1651–0022 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.*

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: Entry Summary.

OMB Number: 1651–0022.

Form Number: CBP Form 7501.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Importer, importer's agent for each import transaction.

Abstract: CBP Form 7501, *Entry Summary,* is used to identify merchandise entering the commerce of the United States, and to document the amount of duty and/or tax paid. CBP Form 7501 is submitted by the importer, or the importer's agent, for each import transaction. The data on this form is used by CBP as a record of the import transaction; to collect the proper duty, taxes, certifications, and enforcement information; and to provide data to the U.S. Census Bureau for statistical purposes. CBP Form 7501 must be filed within 10 working days from the time of entry of merchandise into the United States. Collection of the data on this form is authorized by 19 U.S.C. 1484 and provided for by 19 CFR 141.61 and 19 CFR 142.11. CBP Form 7501 and accompanying instructions can be found at: *https://www.cbp.gov/newsroom/publications/forms?title_1=7501.*
New Change:

CBP is proposing to add the following required data fields to Form 7501:

■ For certain Harmonized Tariff Schedule (HTS) classifications of steel imports, the country where the steel used in the manufacture of the product was melted and poured; the country where the steel used in the manufacture of the product was melted and poured applies to the original location where the raw steel is first produced in a steel-making furnace in a liquid state; and then poured into its first solid shape.

■ For certain HTS classifications of aluminum imports, the countries where the largest and second largest volume of primary aluminum used in the manufacture of the imported aluminum product was smelted; and the country where the aluminum used in the imported aluminum product was most recently cast. The fields requiring identification of the countries where the largest volume of primary aluminum used in the manufacture of the product was smelted applies to the country where the largest volume of new aluminum metal is produced from alumina (or aluminum oxide) by the electrolytic Hall-Héroult process. Importers may be required to report if primary aluminum from specific countries is used in the imported aluminum product, if required by law and/or Presidential Proclamation.[1]

■ Importers will be required to report on the Form 7501 the steel country of melt and pour and aluminum countries of smelt and cast for imports under those steel and aluminum HTS classifications subject to the Commerce Department's steel and aluminum import license applications, and where applicable, the Section 232 steel and aluminum measures.

These data fields will substantially align the Form 7501 reporting requirements with the Commerce Department's existing reporting requirements for steel melt and pour and aluminum smelt and cast countries for steel and aluminum import license applications under 19 CFR 360.103(c)(1) and 19 CFR 361.103(c)(1). The aluminum and steel license application information is used by the Commerce Department for monitoring of anticipated imports of certain aluminum and steel products into the United States. The Form 7501 data is used by CBP to determine, when imports are entered for consumption, the proper amount of duties, applicable fees, taxes, and imports subject to quota.

These data fields are also required to enforce the tariff rate quotas for imported steel and aluminum established by the following Presidential Proclamations under section 232 of the Trade Expansion Act of 1962, as amended: for products of the European Union, Proclamation 10327 of December 27, 2021 (87 FR 1, January 3, 2022) and Proclamation 10328 of December 27, 2021 (87 FR 11, January 3, 2022); for products of Japan (steel-only), Proclamation 10356 of March 31, 2022 (87 FR 19351, April 1, 2022); and for products of the

[1] The January 24, 2023 Presidential Proclamation on Adjusting Imports of Aluminum Into the United States requires importers to provide to CBP information necessary to identify the countries where the primary aluminum used in the manufacture of certain imports of aluminum articles are smelted and information necessary to identify the countries where such aluminum articles imports are cast. This notice proposes to add the aluminum smelt and cast data field to Form 7501 independently from the January 24, 2023 Proclamation.

United Kingdom, Proclamation 10405 of May 31, 2022 (87 FR 33583, June 3, 2022) and Proclamation 10406 of May 31, 2022 (87 FR 33591, June 3, 2022).

Type of Information Collection: 7501 Formal Entry (Electronic submission).

Estimated Number of Respondents: 2,336.

Estimated Number of Annual Responses per Respondent: 9,903.

Estimated Number of Total Annual Responses: 23,133,408.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1,920,073.

Type of Information Collection: 7501 Formal Entry (Paper Submission).

Estimated Number of Respondents: 28.

Estimated Number of Annual Responses per Respondent: 9,903.

Estimated Number of Total Annual Responses: 277,284.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 92,336.

Type of Information Collection: 7501 Formal Entry w/Softwood Lumber Act of 2008 (Paper Only).

Estimated Number of Respondents: 210.

Estimated Number of Annual Responses per Respondent: 1,905.

Estimated Number of Total Annual Responses: 400,050.

Estimated Time per Response: 40 minutes.

Estimated Total Annual Burden Hours: 266,433.

Type of Information Collection: 7501 Informal Entry (Electronic Submission).

Estimated Number of Respondents: 1,883.

Estimated Number of Annual Responses per Respondent: 2,582.

Estimated Number of Total Annual Responses: 4,861,906.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 403,538.

Type of Information Collection: 7501 Informal Entry (Paper Submission).

Estimated Number of Respondents: 19.

Estimated Number of Annual Responses per Respondent: 2,582.

Estimated Number of Total Annual Responses: 49,058.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 12,265.

Type of Information Collection: 7501A Document/Payment Transmittal (Paper Only).

Estimated Number of Respondents: 20.

Estimated Number of Annual Responses per Respondent: 60.

Estimated Number of Total Annual Responses: 1,200.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 300.

Type of Information Collection: Exclusion Approval Information Letter.

Estimated Number of Respondents: 5,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 5,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 250.

Dated: April 14, 2023.

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

[Published in the Federal Register, April 19, 2023 (88 FR 24203)]]

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Procter & Gamble Company ("Procter & Gamble") seeking "Lever-Rule" protection for the federally registered and recorded "OLAY" trademark.

FOR FURTHER INFORMATION CONTACT: Beth Jenior, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–0347.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Procter & Gamble Company seeking "Lever-Rule" protection. Protection is sought against importations of certain skincare products with sunscreen made in Poland and Thailand, which are intended for sale outside the United States and bear the "OLAY" (U.S. Trademark Registration No. 3,251,815/ CBP Recordation No. TMK 07–00758) trademark. In the event that CBP determines that the skincare products with sunscreen under consideration are physically and materially different from the skincare products with sunscreen authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different skincare products with sunscreen.

Dated: April 18, 2023

LAUREN O'STRICKER
Acting Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

U.S. Court of Appeals for the Federal Circuit

ZHEJIANG MACHINERY IMPORT & EXPORT CORP., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2021–2257

Appeal from the United States Court of International Trade in No. 1:19-cv-00039-GSK, Judge Gary S. Katzmann.

Decided: April 14, 2023

ADAMS LEE, Harris Bricken McVay Sliwoski, LLP, Seattle, WA, argued for plaintiff-appellant.

KELLY A. KRYSTYNIAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM; NIKKI KALBING, JESUS NIEVES SAENZ, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

Before PROST, REYNA, and HUGHES, *Circuit Judges*.

REYNA, *Circuit Judge*.

Appellant Zhejiang Machinery Import & Export Corp. appeals the judgment of the U.S. Court of International Trade that affirms the U.S. Department of Commerce's final determination in the 2016–2017 administrative review of tapered roller bearings from China. Zhejiang challenges Commerce's decision that Zhejiang did not qualify for a separate antidumping duty rate because it failed to successfully rebut the presumption of de facto control by the government of China. Commerce's determination that Zhejiang was not entitled to a separate rate was reasonable and supported by substantial evidence because a labor union is the majority shareholder with significant rights over Zhejiang and has overlapping membership with the employee stock-ownership committee. Accordingly, we affirm.

I.

In June 2017, the U.S. Department of Commerce ("Commerce") initiated an antidumping duty investigation on certain tapered roller bearings ("TRBs") from the People's Republic of China ("PRC"). *See* 82 Fed. Reg. 26,443 (Dep't of Commerce June 1, 2017); 82 Fed. Reg. 35,749–51 (Dep't of Commerce Aug. 1, 2017). Antidumping duties may be imposed on U.S. imports of goods that have been determined

are sold in the United States at less than fair value, i.e., dumped or dumping, and that a domestic industry is "materially injured" or "threatened with material injury," by virtue of the dumped imports. 19 U.S.C. § 1673; *see, e.g., Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017).[1]

An antidumping duty investigation may involve a non-market economy ("NME"). A non-market economy country, such as the PRC, is "any country that the administering authority determines does 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." 19 U.S.C. §1677(18)(A); *see, e.g.*, J.A. 526–722.

Investigated goods from a non-market economy country are subject to a single country-wide antidumping duty rate. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). An individual producer from that country can seek to receive an individual rate (as opposed to the country-wide rate) if it demonstrates that the NME country's government lacks both de jure and de facto control over its activities. *Id*. at 1405. Only de facto control is at issue in this appeal. Oral Arg. at 4:55–5:04.

To show an absence of de facto government control, the foreign producer can demonstrate that it sets its prices independently, negotiates its own contracts, selects its management autonomously, and keeps its sales proceeds. *Silicon Carbide from the People's Republic of China,* 59 Fed. Reg. 22,585 (Dep't of Commerce May 2, 1994); *see also Sigma Corp*., 117 F.3d at 1405–06. If the exporter fails to meet its burden in demonstrating the absence of government control, Commerce can decline to issue a separate company-specific rate and instead apply to that exporter the country-wide antidumping duty rate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1315, 1320 (Ct. Int'l Trade 2013).

On October 26, 2017, Commerce published a memorandum, "China's Status as a Non-Market Economy" (the"NME Status Memorandum"), which discussed various factors that the agency examines in making its determination on de facto government control, including the Chinese economy as a whole. J.A. 526. A key factor is the legal and institutional framework of trade unions of the Government of China ("GOC"). J.A. 545–548. The NME Status Memorandum explains that Chinese labor laws permit employees to join and organize trade unions and negotiate contracts, but the unions must be approved by the state. J.A. 545. In actuality, labor and management do not "carry

[1] Generally, in an antidumping investigation, Commerce determines the extent of dumping, and the U.S. International Trade Commission investigates whether a domestic industry that produces a like product (here, TRBs) under investigation is materially injured or threatened with material injury by virtue of dumped imports. 19 U.S.C. § 1673(2).

out real bargaining" and "management does not even meet with the trade unions, and "just sends them a collective contract for 'approval.'" J.A. 551 (internal citations omitted). In other words, "[f]ormal indicia of trade union membership in China do not necessarily support a conclusion [of] free bargaining." *Id*.

The NME Status Memorandum outlines that the All-China Federation of Trade Unions ("ACTFU") has been China's official trade union since the founding of the PRC in 1949. J.A. 546. The ACTFU has a "legal monopoly on all trade union activities" and the ACTFU is subject to the control of the Chinese Communist Party (the "CCP") such that trade or labor union leaders concurrently hold office at a corresponding rank of the CCP or government. *Id*. Indeed, "[t]rade union officials are officially employees of the Chinese government" and are considered, by Commerce, to be "government actors under CCP control." *Id*. Additionally, State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC") is the managing entity of state-owned assets that has the power to appoint managers and board members of state-owned enterprises but is influenced by the CCP. J.A. 608–09.

II.

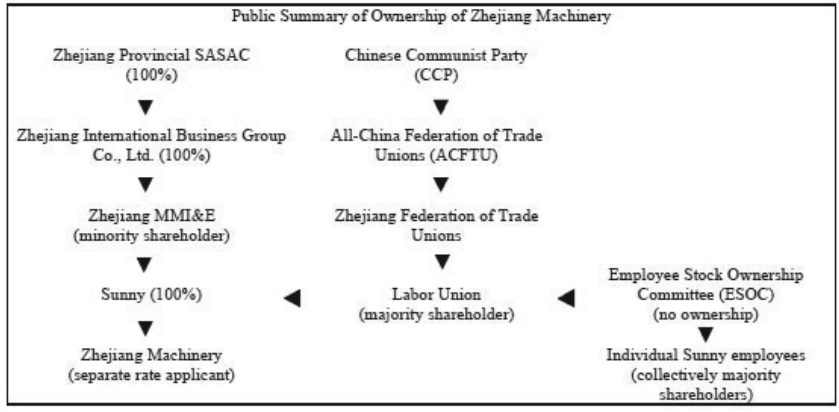
In 1987, in the underlying antidumping duty investigation, Commerce established a country-wide anti-dumping duty for TRBs from the PRC. *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667, 22,667 (Dep't of Commerce June 15, 1987). In 2009, Commerce revised the rate to 92.84%. *Zhejiang Machinery Import & Export Corp. v. United States*, 471 F. Supp. 3d 1313, 1326 (Ct. Int'l Trade 2020) (*Decision I*) (citing 74 Fed. Reg. 3,987, 3,989 (Dep't of Commerce Jan. 22, 2009)). Since 2017, Zhejiang Machinery Import & Export Corp. ("ZMC") had previously been granted separate rate status in prior reviews of TRBs from China. Appellant's Br. 4, 32. An interested domestic party requested review of ZMC's entries for a period of review of June 1, 2016, to May 31, 2017, and submitted data indicating de facto control of ZMC by the GOC. *Decision I*, at 1326–27; *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 35,749, 35,749 (Dep't of Commerce Aug. 1, 2017).

At the request of an interested party, Commerce can conduct an administrative review of an outstanding antidumping duty order and, to the extent necessary, recalculate antidumping duties for the period of review. 19 U.S.C. § 1675(a)(1)–(2). In 2017, Commerce pub-

lished a notice of opportunity to request review of the 2009 rate ("the 2009 Administrative Review"). ZMC filed an application seeking a separate review.

CORPORATE STRUCTURE

In its response to a questionnaire issued by Commerce, ZMC provided details about its corporate structure.



Appellant's Br. 6. According to that data, ZMC (or "Zhejiang Machinery" in the chart above) is wholly owned by Zhejiang Sunny I/E Corporation ("Sunny") which is, in turn, owned in minority part by Zhejiang Province Metal & Minerals Import and Export Co., Ltd. ("Zhejiang MMI&E"). Appellant's Br. 5. Zhejiang MMI&E is ultimately owned by the Zhejiang Provincial SASAC. *Id*. at 7. Sunny's majority shareholder, a labor union, was registered in accordance with the Labor Union Law of the PRC and Civil Law of the PRC and is registered before the Zhejiang Federation of Trade Unions, a provincial level branch of the ACTFU. *Id*. at 9–10. ZMC characterized Sunny's labor union as the "nominal owner" of the majority shares because the ultimate owners were the members of Sunny's employee stock ownership company ("ESOC"), which cannot have legal personhood under Chinese law or be assigned shares. *Decision I*, at 1327.

CIT ACTIONS

In July 2018, Commerce issued its preliminary determination in the 2009 Administrative Review. *Decision I*, at 1326–27. After assessing ZMC's corporate structure provided in ZMC's separate rate application, Commerce preliminarily found that ZMC failed to rebut the presumption of de facto government control over its export activities.

Appellee's Br. 5; *Decision I*, at 1327. In particular, Commerce found that Sunny's labor union and the GOC-controlled SASAC together own 100% of Sunny and that Sunny, in turn, owns 100% of ZMC. *Decision I*, at 1327. According to Commerce, all labor unions are under the control and direction of the ACTFU, which is a government affiliated "organ" of the CCP, and therefore, the GOC has actual or potential control over ZMC's export activities. *Id.* at 1327–28.

ZMC submitted its case brief that included a revision of the original translation of the ESOC's Articles of Association, but Commerce rejected consideration of the new translation as untimely, and, instead, it considered ZMC's revised brief without the translation of the ESOC's Articles of Association. *Id.* at 1328.

In February 2019, Commerce published its final determination, which maintained the preliminary results that ZMC failed to rebut the presumption of de facto control. *Decision I*, at 1328–29. Commerce reasoned that Sunny's labor union (the majority shareholder) was ultimately controlled by the ACTFU—an extension of the CCP—and that Zhejiang MMI&E (the minority shareholder) was wholly owned by the Zhejiang SASAC. Appellee's Br. 9. Additionally, the ESOC and labor union are intertwined because all members of the ESOC are labor union members. *Id*. at 10.

ZMC appealed to the Court of International Trade ("CIT"), challenging Commerce's final determination, including the refusal to consider the revised translation of the ESOC Articles. *Decision I*, at 1329. The CIT held that Commerce erred in rejecting the revised translation of Sunny's Articles and remanded the case, directing Commerce to consider the translation and explain how Sunny's labor union had the potential to exercise majority shareholder rights in light of the presence of the ESOC. Appellee's Br. at 11–12; *Decision I*, at 1330.

On remand, Commerce reviewed the revised translation but maintained its determination that ZMC failed to rebut the presumption of de facto government control for several reasons. First, Commerce pointed to Article 20 of the ESOC Articles of Association, which states that "[t]he labor union members of [Sunny] may become members of the ESOC after approval of the ESOC, and may purchase and hold shares of the company according to their positions or achievements in the company." Appellee's Br. 12. Second, Commerce observed that ZMC's separate rate questionnaire response states that members of the ESOC are also members of the labor union:

> Sunny is majoritively (*sic*) *owned by its labor union*, which consists of [] private individuals. In Exhibit 1, please see the Articles of Association of Sunny *and the list of labor union members who own the shares of Sunny*. Based upon the Articles

> of Association, the majority shareholder, i.e., *Sunny's labor union*, takes majority members of the board of directors and majority voting rights over all important decisions of Sunny within the board of directors. The board of directors, which is controlled by *the majority shareholder*, also appointed the general manager who is in return responsible for all daily activities of Sunny.

Id. at 13 (citing J.A. 803) (emphases in original). Third, Commerce did not distinguish labor union membership from leadership, noting that the GOC "has the ability to control labor union members to the same extent as labor union leaders" and that collectively, these individuals, who are members of the labor union, direct the equity ownership of Sunny through the ESOC by selecting management and the directors. *Id*. at 9, 13–15, 48–49 (citing J.A. 782, 804–05).

ZMC challenged Commerce's determination, asserting that Commerce had changed its position to rely entirely on the premise that the CCP controlled Sunny because some owners of Sunny were also members of the labor union. *Zhejiang Machinery Import & Export Corp. v. United States*, 521 F. Supp. 3d 1345, 1350 (Ct. Int'l Trade 2021) (*Decision II*). The CIT reviewed Commerce's remand determination and affirmed Commerce's determination that ZMC had failed to rebut the presumption of government de facto control. *Id*. at 1351. ZMC appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review a judgment of the Court of International Trade de novo, reapplying the same standard of review applied by that court in its review of Commerce's antidumping duty determinations. *See NEXTEEL Co. v. United States*, 28 F.4th 1226, 1233 (Fed. Cir. 2022). As such, we review Commerce's findings for substantial evidence. *Id*. Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (citation omitted); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003).

On appeal, ZMC contends that the corporate structure here differs from other cases where Commerce has denied separate rate status to an exporter that was either directly or indirectly owned by a company with majority shareholding held by a SASAC entity. Appellant's Br. 19. ZMC asserts that the SASAC entity in this case only held an "indirect *minority* shareholding." *Id*. (emphasis in original). The record evidence, ZMC believes, shows that the union could not exercise any control—actual or potential—over the corporation because the

union could not make capital contributions and, consequently, had no voting rights. Oral Arg. at 3:43–4:03. ZMC argues that Commerce should have focused on the majority of the corporation's shares being held by the twenty individual employees who formed the ESOC because they had true voting rights while the labor union's possession of those shares were nominal. Appellant's Br. 20; Oral Arg. at 3:56–4:11. ZMC claims that mere passive membership of the ESOC in a labor union where they participate only in non-union activities is not enough to establish the GOC's control. Appellant's Br. 20.

The government argues that the NME Status Memorandum explains how the Chinese union structure shows government involvement and is evidence of a "top-down, state-led approach to collective bargaining in China [that] essentially produces government-managed outcomes." Appellee's Br. 26–27 (citing J.A. 551). While ZMC's questionnaire response and case brief assert that the union is a nominal majority shareholder, the government contends that the Articles of Association do not limit the labor union's power—let alone "carve out any rights for the ESOC." *Id*. at 37–38. The government explains that the union can still appoint board members who control operations and price setting, can still vote on shareholder resolutions, and can still determine the disposition of profits. *Id*. at 39. Additionally, the government asserts that Zhejiang MMI&E, the state-owned minority owner of ZMC, has significant control over Sunny because it can elect two out of five board members. *Id*. at 39–40. So, not only are Sunny's employees members of the union, but the union itself is the majority shareholder. *Id*. at 41. Therefore, the government argues, the GOC could exert influence over Sunny and ZMC if it wanted to. *Id*.

As the CIT has noted, "[w]here a majority shareholder has potential control[,] that control is, for all intents and purposes, actual control." *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350, 1359(Ct. Int'l Trade 2018). The mere presence of a government-owned *minority* shareholder may not be sufficient to establish de facto government control. *Id*. at 1359, 61–62. But where evidence of additional indicia of control shows that the minority shareholder could exercise its right to control—such as Articles of Association without restrictions on the minority shareholder's rights, or evidence that the minority shareholder stifled other shareholders' opportunity to put competing nominations to the board or indirectly appointed board members—a determination of de facto government control is reasonable. *Id*. at 1361–64.

There is no dispute that the labor union is the legal majority shareholder of ZMC. Oral Arg. at 8:42–8:48. The record demonstrates

that the labor union is a majority shareholder of and has influence over Sunny, which owns 100% of ZMC. Corporate documents show that the labor union is the majority shareholder; the union voted to appoint the corporation's general manager and board members; one of the twenty ESOC members is both a union member and a union official; and the remaining ESOC members are also union members. J.A. 785; Appellee's Br. 13, 24; Oral Arg. at 18:29–35. Commerce's NME Status Memorandum explains that (1) workers in China have "limited collective bargaining power because they lack the freedom to associate and assemble and the right to strike," J.A. 551, and (2) all labor unions are ultimately under the control of the ACTFU and—by extension—the CCP, J.A. 785. Even if ZMC were correct that the ESOC exercises majority shareholder rights, the common membership of the ESOC members with the labor union (and one union official) shows that the GOC has the potential to exercise control over the ESOC through its labor union members and, consequently, over Sunny and ZMC. J.A. 805–06; Oral Arg. at 15:49–16:34, 17:17. Even ZMC's minority shareholder, which is owned by a SASAC entity, has the power to appoint two board members, thereby having *at least* the potential to control ZMC—if not actual control over the corporation.

ZMC's corporate documents do not support its argument that the labor union *cannot* exercise any voting rights as the legal majority shareholder. Article 11 of Sunny's Articles of Association lists "Zhejiang Province Metals and Minerals Import and Export Co., Ltd." as Shareholder A and "Labor Union of Zhejiang Sunny I/E Co., Ltd." as Shareholder B. J.A. 149. Article 12(1) gives the shareholders the right to participate in meetings and "exercise voting rights . . . in proportion to their capital contribution." *Id*. at 149. While ZMC argues that this proportionality of rights hinges on capital contributions, and the union cannot legally make any capital contributions, ZMC has not shown whether all shareholder rights are tethered to capital contributions. For example, Article 12(3) gives "shareholders of the Company" the right to "elect and be elected as director or supervisor of the Company," and Article 12(5)permits shareholders to "exercise the priority purchase right." *Id*. Article 14 provides that the "board of shareholders of the Company shall be composed by both of its shareholders" as the "organ of authority of the Company." *Id*. Article 21 explains that the Board is accountable to the shareholders (including the labor union) and "shall" "decide on business plans and investment plans," formulate the annual budget, formulate the "profit distribution plans and plans for making up losses," and decide on the "internal management organization." *Id*. at 150; *see* Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's

Republic of China: Factual Information Regarding Zhejiang Machinery (Oct. 2, 2017), P.R. 109 ("ZMC October Submission"); Appellee's Br. 10. Article 27 provides that the company "shall have a board of supervisors, which shall have three members," and that board is to be "appointed by the board of shareholders." J.A. 151. These shareholder rights do not appear to be expressly tied to a shareholder's capital contributions from the Articles.

The record does *not* disclose an instance where Sunny was unable to exercise its rights as a majority shareholder due to GOC influence through the labor union. Appellant's Br. 22, 36–37; Appellee's Br. 16–17; Arg. at 15:25–50. The absence of such evidence, however, does not necessarily negate the potential for GOC control, particularly as the burden lies with ZMC to develop a full record and affirmatively rebut the presumption. *Sigma*, 117 F.3d at 1405–06; *see also Decision II*, at 1351–52.

Commerce found that Sunny's labor union had the inherent ability to appoint board members who "in turn control Zhejiang Machinery, including company operations and price setting," vote on shareholder resolutions, and "determine the disposition of profits." Appellee's Br. 10 (citing J.A. 783); ZMC October Submission. Sunny's "Resolution of Shareholders' Meeting" suggests that shareholders approve board appointments. Appellee's Br. 6. Board meeting minutes also suggest that only the board elected by the labor union voted on matters. Appellee's Br. 48. Article 20 of the ESOC's Articles of Association states that the labor union members can purchase shares of the company. Appellee's Br. 12. And yet, neither Sunny's Articles of Association nor its board meeting minutes mention the employees or "ESOC." J.A. 148–53; Appellee's Br. 37–38. Accordingly, ZMC's argument that the corporation is actually governed by the ESOC is unreasonable and unsupported by substantial evidence. *Contra* Appellant's Br. 50–51.

Commerce has previously found an exporter's labor union membership relevant to the de facto analysis. *See* Appellee's Br. 42 n. 3 (citing *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; 84 Fed. Reg. 38,002 (Dep't of Commerce Aug. 5, 2019), and accompanying IDM at 50 ("Thus, we continue to conclude that [the company's] government-owned entity, the Labor Union, which is under control of the ACTFU, exercises, or has the potential to exercise, control over [the company's] export operations.")). When "Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable

explanation" as to why it departs from it. *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004). Thus, Commerce's consideration of the labor union's role in ZMC's corporate structure was not error.

Together, ZMC's submissions demonstrate that the shareholders, including the labor union, have the power to select managers and keep the profit distribution—factors that Commerce has considered in establishing the presumption of de facto control. *See, e.g.*, *Sigma*, 117 F.3d at 1405–06 (considering independent pricing, contract negotiation, management selection, and profit management). Given the legal framework of unions in China, there is no absence of control over ZMC from the labor union or ACTFU because the ESOC cannot negotiate its own contracts or organize as a legal person, nor is there any measurement by the GOC to decentralize control of unions or the union in this case as majority shareholder. Even if this is the first case where an exporter is arguing that the voting shareholder is an employee stock ownership committee, Commerce's determination of de facto government control, based on ZMC's corporate structure comprising union membership and overlapping ownership with a union official, paired with an absence of support for ZMC's argument of restricted GOC control over the ESOC, is reasonable and supported by substantial evidence. The CIT properly affirmed Commerce's remand determination denying ZMC a separate rate due to de facto government control.

CONCLUSION

We hold that Commerce's determination of the presumption of de facto government control over ZMC was supported by substantial evidence and otherwise not contrary to law. We therefore affirm the CIT's decision sustaining Commerce's final results of redetermination pursuant to court remand that denied ZMC a separate antidumping rate. We have considered ZMC's remaining arguments and find them unpersuasive.

AFFIRMED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 23–51

SXP SCHULZ XTRUDED PRODUCTS LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00136

[Granting Defendant's motion to dismiss for lack of subject matter jurisdiction.]

Dated: April 19, 2023

Lawrence M. Friedman and *Meaghan Elizabeth Vander Schaaf*, Barnes, Richardson & Colburn, LLP of Chicago, IL, for Plaintiff SXP Schulz Xtruded Products LLC.

Aimee Lee, Assistant Director, *Guy Eddon*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y. 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, International Trade Field Office. Of counsel on the brief were *Kenneth Kessler*, Senior Counsel, Office of the Chief Counsel, U.S. Department of Commerce, and *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SXP Schulz Xtruded Products LLC ("Plaintiff" or "SXP") filed this action pursuant to the Court's residual jurisdiction under 28 U.S.C. § 1581(i), seeking a refund of duties imposed under Section 232 of the Trade Act of 1974 ("Section 232 duties"). SXP alleges that a refund of the Section 232 duties is warranted because U.S. Customs and Border Protection ("Customs") failed to apply a granted exclusion from Section 232 duties to its entries of the imported subject merchandise at liquidation. SXP contends that due to a series of errors by the U.S. Department of Commerce's ("Commerce") Bureau of Industry and Security ("BIS") that resulted in the delayed issuance of a correct exclusion order, SXP was unable to exercise its right to file protests with Customs. Notably, SXP filed a timely protest with respect to one entry and received a refund for Section 232 duties paid. As to the remaining four entries of subject merchandise, SXP could have filed timely protests with Customs. If Customs had denied the protests, SXP could have sought relief in this Court by invoking jurisdiction under 28 U.S.C. § 1581(a). SXP did not file timely protests with respect to the four entries.

Before the Court is Defendant United States' ("Defendant") Motion to Dismiss. Def.'s Mot. Dismiss ("Def.'s Mot."), ECF No. 17. Plaintiff filed this action pursuant to 28 U.S.C. § 1581(i) contesting the final agency action of Commerce with respect to an exclusion under Section 232 and seeking a refund of $343,193.50 paid in duties. *See* Compl. at 1, ECF No. 2. Defendant filed its Motion to Dismiss pursuant to USCIT Rules 12(b)(1) and 12(b)(6) for mootness, lack of subject matter jurisdiction, or failure to state a claim for which relief can be granted on October 6, 2022. Def.'s Mot.; Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mem."), ECF No. 17. Plaintiff filed Plaintiff's Response to Defendant's Motion to Dismiss on December 19, 2022. Pl.'s Resp. Def.'s Mot. Dismiss ("Pl.'s Resp."), ECF No. 20. Defendant filed Defendant's Reply Memorandum in Further Support of its Motion to Dismiss on January 27, 2023. Def.'s Reply Mem. Supp. Mot. Dismiss ("Def.'s Reply"), ECF No. 21.

Plaintiff filed its Motion for Leave to File a Sur-Reply to Clarify the Record on February 24, 2023. Pl.'s Mot. Sur-Reply Clarify Record ("Plaintiff's Motion" or "Pl.'s Mot."), ECF No. 22; Pl.'s Sur-Reply Clarify Record ("Plaintiff's Sur-Reply" or "Pl.'s Sur-Reply"), ECF No. 22–1. Defendant did not file a response to Plaintiff's Motion for Leave to File a Sur-Reply but advised that Defendant does not consent to the request and defers to the Court's discretion. *Id.* at 1–2.

For the following reasons, the Court grants Defendant's Motion to Dismiss for lack of subject matter jurisdiction, grants Plaintiff's Motion for Leave to File a Sur-Reply, and deems Plaintiff's Sur-Reply filed.

BACKGROUND

A. SXP's Entries

SXP requested an exclusion under request number 19456 for Super Duplex Stainless Steel UNS S32750 forged and turned bars suitable for use as raw material for producing billet for pipe extrusion for Entry Numbers, U51–3078786–9 ("Entry 1"), U51–3079083–0 ("Entry 2"), U51–3079254–7 ("Entry 3"), U51–3079442–8 ("Entry 4"), and U51–0000570–6 ("Entry 5").[1] Compl. at 2–3. The Parties agree that SXP did not file timely protests for Entries 1 to 4, but SXP filed a timely protest only for Entry 5. Order (Oct. 11, 2022), Court No. 21–00597, ECF No. 10. The following chart denotes the relevant dates with respect to each of the five entries:

[1] Plaintiff's Complaint incorrectly states 19556 as the exclusion number. Compl. at 2. Defendant correctly states 19456 as the exclusion number, which it indicates in its Administrative and Judicial Timeline. Def.'s Mem. at 5–6. Plaintiff does not contest Defendant's Administrative and Judicial Timeline. Pl.'s Resp. at 1; *see* Def.'s Mem. at 5–8.

Entry	Entry No.	Date of Entry	Date of Liquidation	End of 180-day Protest Period (Date of Final Liquidation)	Filing of Protest (11/4/2020) Number of Days After Liquidation
1	U51–3078786–9	4/30/2019	3/27/2020	9/23/2020	222
2	U51–3079083–0	5/6/2019	3/27/2020	9/23/2020	222
3	U51–3079254–7	5/12/2019	4/10/2020	10/7/2020	208
4	U51–3079442–8	5/21/2019	4/17/2020	10/14/2020	201
5	U51–0000570–6	6/15/2019	5/8/2020	11/4/2020	180

As noted on the chart above, SXP made five entries of subject merchandise between April 30, 2019, and June 15, 2019. SXP filed a request for Section 232 exclusions pertaining to the five entries on April 26, 2019, which Commerce denied. On September 4, 2019, SXP filed a second Section 232 exclusion request that was granted by Commerce on October 18, 2019. In the October 18, 2019 decision memorandum ("First Decision Memo") that granted the exclusion request, Commerce included an incorrect submission date of September 4, 2019 (the filing date of the second exclusion request), rather than the correct date of April 26, 2019 (the filing date of the first exclusion request). Def.'s Mem. at 5.

SXP sought a corrected exclusion decision memo from Commerce. *Id.* While the exclusion request was pending (and before a second, corrected decision memorandum was issued by Commerce), Customs liquidated SXP's five entries between March 27, 2020 and May 8, 2020. *Id.*

On May 8, 2020, Commerce issued a revised decision memorandum ("Second Decision Memo"), in which Commerce fixed the submission date by changing it to April 26, 2019, but made a new error by reversing the supplier countries denoted as Germany and Austria.[2] Def.'s Mem. at 5–6; Compl. at 2, Ex. 1, ECF No. 2–1. SXP sought a corrected decision memo from Commerce. Def.'s Mem. at 6.

On July 26, 2020, Commerce issued another revised decision memorandum ("Third Decision Memo"), in which Commerce fixed the prior mistake regarding the supplier countries, but again incorrectly listed the submission date of September 4, 2019, rather than the correct date of April 26, 2019. Compl. at 3, Ex. 2, ECF No. 2–2. While SXP sought another corrected decision memo from Commerce, the 180-day

[2] SXP's suppliers are "BGH GmbH" (a German company) and "Bohler" (an Austrian company). *See* Def.'s Mem. at 5 (citing public website link to SXP's Section 232 application). In the Second Decision Memo, BIS incorrectly stated that BGH GmbH is an Austrian company (rather than a German one) and Bohler is a German company (rather than an Austrian one).

protest period pertaining to SXP's liquidated entries ended between September 23, 2020 to November 4, 2020.

On November 4, 2020, SXP filed Protest No. 1703–20111127 to challenge Customs' imposition and collection of Section 232 duties on SXP's five entries.[3] Def.'s Mem. at 7. SXP concedes that only one of the five entries that its broker protested was within the 180-day statutory time limit set by 19 U.S.C. § 1514(c)(3) in its attempt to recover duties paid on merchandise. Pl.'s Resp. at 2. Customs denied the protest on June 3, 2021, determining that SXP's entries were outside the exclusion period. Compl. at 4; Def.'s Mem. at 7. Customs' denial of SXP's protest used the incorrect exclusion request date of September 4, 2019 (noted incorrectly in Commerce's Third Decision Memo) rather than the correct date of April 26, 2019 (the filing date of the first exclusion request, which pre-dated SXP's entries). Compl. at 4; Def.'s Mem. at 7.

SXP challenged the denial of its protest in two separate cases. The first challenge was filed in *SXP Schulz Xtruded Products LLC v. United States*, Court No. 21–00597, on November 24, 2021, pursuant to 28 U.S.C. § 1581(a). The second challenge was filed in the pending action before this Court, with SXP's Summons and Complaint filed on May 4, 2022, pursuant to 28 U.S.C. § 1581(i). Both cases covered the same five entries. On May 11, 2022, Commerce issued its fourth decision memorandum ("Fourth Decision Memo"), in which Commerce confirmed the granting of SXP's exclusion request and finally corrected all relevant information. Def.'s Mem. at 8.

B. Court No. 21–00597

In Court No. 21–00597, SXP challenged Customs' denial of its protest for the same five entries at issue in this case pursuant to 28 U.S.C. § 1581(a). Summons, Court No. 21–00597, ECF No. 1. On October 11, 2022, the court approved a Stipulated Judgment proposed by the Parties, which ordered Customs to reliquidate one entry (the fifth and last entry) that was subject to timely protest and to refund any Section 232 duties that were subject to the granted exclusion order. Order (Oct. 11, 2022), Court No. 21–00597; Pl.'s Resp. at 3. The Order also stated that, "[t]he [P]arties agree that the Court lacks jurisdiction pursuant to 28 U.S.C. § 1581(a) for the claims covering the non-stipulable entries [i.e., Entries 1 to 4] . . . and consequently plaintiff abandons all claims for these non-stipulable entries for purposes of this case." Order (Oct. 11, 2022), Court No. 21–00597.

[3] Defendant notes, and SXP acknowledges, that SXP incorrectly stated the date of submission of its protest as April 26, 2019 in SXP's Complaint in ¶ 19. *See* Compl. at 4; Def.'s Mem. at 7 n.3.

C. This Action

SXP challenges Customs' denial of its protest for five entries pursuant to 28 U.S.C. § 1581(i) in this action. In its Complaint, SXP alleges that Commerce's error in the Third Decision Memo, which included the incorrect exclusion filing date of September 4, 2019, violated the Administrative Procedure Act ("APA"). Compl. at 4. SXP also alleges that Commerce's use of the incorrect date resulted in a final decision that violated SXP's statutory rights. *Id.* at 4. SXP seeks declaratory relief and monetary relief with the refund of duties. *Id.* at 5.

DISCUSSION

I. Motion to Dismiss Pursuant to USCIT 12(b)(1)

To adjudicate a case, a court must have subject matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); USCIT R. 12(h)(3). "[I]f the facts reveal any reasonable basis upon which the non-movant may prevail, dismissal is inappropriate." *Airport Road Ass., Ltd. v. United States*, 866 F.3d 1346, 1351 (Fed. Cir. 2017) (quoting *Pixton v. B & B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002)).

A. Mootness

Defendant moves to dismiss this action pursuant to USCIT 12(b)(1) for mootness. *See* Def.'s Mot. at 1. Defendant argues that this action is moot because SXP has already received the only remedy to which it is entitled, which was Commerce's issuance of the Fourth Decision Memo (correcting all of the relevant information relating to Commerce's granting of SXP's Section 232 exclusion request). Def.'s Mem. at 10–11. A case becomes moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980), and must be dismissed when "it is impossible for a court to grant any effectual relief whatever to [the plaintiff assuming it prevails]." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

With respect to Entry 5, the Court concludes that this action is moot because SXP previously received the relief it was seeking when the court ordered Customs to reliquidate the fifth entry and to refund any Section 232 duties that were subject to the granted exclusion order. *See* Order (Oct. 11, 2022), Court No. 21–00597.

With respect to Entries 1 to 4, SXP seeks a refund of duties paid for the four remaining entries that it argues should have been covered by Commerce's approval granting SXP's Section 232 exclusion request, which has not yet been decided by this Court. Because a live controversy still exists and relief is not impossible for the Court to grant, the Court concludes that this action is not moot with respect to Entries 1 to 4.

B. Whether the Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1581(i)

SXP seeks to invoke the court's residual jurisdiction pursuant to 28 U.S.C. § 1581(i) on its four entries covered by its single protest. Compl. at 1. Defendant seeks dismissal of this action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. *See* Def.'s Mot. at 1. The party asserting a claim bears the burden of establishing subject matter jurisdiction, *see Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021), and must allege sufficient facts to establish jurisdiction, *see DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006). When jurisdiction is asserted under 28 U.S.C. § 1581(i), the party asserting the claim also "bears the burden of showing that another subsection is either unavailable or manifestly inadequate." *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citing *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018)). In deciding a motion to dismiss for lack of jurisdiction, the Court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). For purposes of establishing jurisdiction, "[s]ubstance, not form, is controlling." *Williams v. Sec'y of the Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986).

Section 515 of the Tariff Act provides for the administrative review of protests filed under Section 514 of the Tariff Act, which in turn provides for protests of Customs' decisions. 19 U.S.C. §§ 1514, 1515. Section 1514 provides that "decisions of the Customs Service, including the legality of all orders and findings entering into the same," including classification, rate of duty, charges or exactions, and other specified decisions of the Customs Service "shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade." 19 U.S.C. § 1514(a).

The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumer-

ated under 28 U.S.C. § 1581(a)–(i). In cases in which the specific jurisdictional grants of § 1581(a)–(h) do not apply, § 1581 contains a residual jurisdictional provision. See 28 U.S.C. § 1581(i). Pursuant to 28 U.S.C. § 1581(i), the Court possesses jurisdiction to hear "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Nevertheless, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . under Section 516A(a) of the Tariff Act of 1930[, as amended, 19 U.S.C. § 1516a(a)] . . . ." *Id.* § 1581(i). "Section 1581(i) embodies a 'residual' grant of jurisdiction, and may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme*, 892 F.3d at 1191. To be manifestly inadequate, an importer's protest must be an "exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual vain." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008) (citation and internal quotations omitted).

Defendant moves to dismiss this action for lack of subject matter jurisdiction pursuant to USCIT 12(b)(1). *See* Def.'s Mot. at 1. Defendant argues that 28 U.S.C. § 1581(i) does not apply because jurisdiction was available under 28 U.S.C. § 1581(a), and asserts that any remedy under 28 U.S.C. § 1581(a) would have been adequate. Def.'s Mem. at 15–17. SXP argues that it lacked the right to submit a valid protest, so judicial review under 28 U.S.C. § 1581(a) was not available and any remedy would have been manifestly inadequate. Pl.'s Resp. at 12.

1. Whether Relief Under 28 U.S.C. § 1581(a) Was Available

The Section 232 exclusion process involves both Commerce (BIS) and Customs. To obtain a Section 232 exclusion, the importer must first make a request for an exclusion from Commerce for a particular product, and Commerce must grant the exclusion request. *See* Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46,026, 46,043 (Dep't of Commerce Sept. 11, 2018); *see also* Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the

Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 Fed. Reg. 12,106, 12,110 (Dep't of Commerce Mar. 19, 2018).

After Commerce grants the exclusion, an importer may submit the granted exclusion request to Customs, requesting that Customs determine that the entries are "within the scope of an approved exclusion request" and that the importer is exempt from paying the Section 232 duties. *Id.* Customs assesses and collects the Section 232 duties. *See* 15 C.F.R. § Pt. 705, Supp. 1. The relevant regulations state that:

> [Commerce] will provide [Customs] with information that will identify each approved exclusion request pursuant to this supplement. Individuals or organizations whose exclusion requests are approved must report information concerning any applicable exclusion in such form as [Customs] may require. These exclusion identifiers will be used by importers in the data collected by [Customs] in order for [Customs] to determine whether an import is within the scope of an approved exclusion request.

Id. Here, Customs liquidated the entries and classified the imported merchandise as entered by SXP under subheading 7218.99.0045 of the Harmonized Tariff Schedule of the United States ("HTSUS") and assessed 25 percent *ad valorem* duties under Section 232. Compl. at Exs. 1–2; Def.'s Mem. at 4.

Relevant to this case, Customs issued a bulletin in the Cargo Systems Messaging Service ("CSMS") that provided guidance to importers for the specific situation in which an importer submitted an exclusion request and "a decision on the requested exclusion(s) has not yet been rendered": "Section 232 . . . exclusions granted by [Commerce] . . . may be retroactive for unliquidated entries and for entries that are liquidated but where the liquidation is not final and the protest period has not expired." Pl.'s Resp. at Att. 1, ECF No. 20–3 ("CSMS No. 42566154"). SXP, as an importer with a pending exclusion request wishing to seek a refund of Section 232 duties, had at least two possible courses of action.

First, Customs stated that an importer could request an extension of liquidation when there is a pending request for a Section 232 exclusion for unliquidated entries:

> Given the potential retroactive application of Section 232 . . . product exclusions, in situations where the importer has requested a product exclusion and the request is pending with [Commerce] . . . the importer or their licensed representative may submit a request to extend the liquidation of impacted

> unliquidated entry summaries to CBP. . . . Approved requests extend the liquidation of an entry summary for one year. When a product exclusion is granted, an importer may submit a [post summary correction] to request a refund on the entry summary(ies).

CSMS No. 42566154. While SXP's request for a corrected Section 232 exclusion was pending, SXP did not submit a request to extend the liquidation of impacted entries as outlined in Customs' bulletin at CSMS No. 42566154.

SXP argues that:

> SXP may have been able to request an extension of liquidation as part of Customs' administrative mechanism for handling claims for refunds of Section 232 duties. . . . But, the existence of that CBP administrative process and CSMS notice does not change this Court's exclusive jurisdiction over a claim against the United States relating to Section 232 actions of the Commerce Department nor does it change the scope of this Court's power to fashion an appropriate remedy.

Pl.'s Resp. at 17. The Court observes that "the existence of that CBP administrative process" is relevant in this situation: SXP could have filed for an extension of liquidation with Customs, which would have extended liquidation by one year (renewable up to three years) and would have allowed SXP to protect its rights by extending liquidation while SXP waited to obtain the corrected exclusion approval from Commerce. *See* CSMS No. 42566154. Upon receiving the corrected exclusion approval from Commerce, SXP could have provided that information to Customs in order to have the entries liquidated properly with a Section 232 exclusion applied. If SXP disagreed with the eventual liquidation at the end of the extended liquidation period, SXP could have filed a protest and challenged a protest denial in court under § 1581(a).

Second, Customs also provided relevant guidance for when there is a pending request for a Section 232 exclusion for liquidated entries:

> If an entry summary is set to liquidate in less than 15 days or has already liquidated, the entry summary is beyond the [post summary correction] filing period. However, the importer may file a protest so long as the protest is filed within the 180-day period following liquidation of the impacted entry summary(ies).

CSMS No. 42566154. While SXP's request for a corrected Section 232 exclusion was pending and after SXP's entries were liquidated, SXP

could have, but did not, submit a protest for Entries 1 to 4 within the 180-day period following liquidation as outlined in Customs' bulletin at CSMS No. 42566154.

SXP argues that:

> The corrected exclusion letter did not exist until after September 23, 2020, which is the earliest deadline on which SXP could file a timely protest. The last day on which a timely (yet substantively invalid) protest could have been filed one of four affected entries was October 14, 2020. At that time, the then-current version of the exclusion letter from BIS showed an incorrect effective date of September 4, 2019, making it facially inapplicable to the entries. . . . SXP was unable to file a protest to take advantage of the administrative mechanism Customs had established to permit claims within the protest period.

Pl.'s Resp. at 16–17. SXP asserts that it could not have filed a protest by September 23, 2020 because the information on the Third Decision Memo stated mistakenly that the granted exclusion applied to entries after September 4, 2019, which facially did not apply to the four entries made between April and May of 2019. *Id.*

The Court notes that by September 23, 2020, when the 180-day protest period expired for SXP's first and second entries, SXP had three exclusion decision memos from Commerce, which collectively indicated that Commerce had granted a Section 232 exclusion for SXP's subject merchandise, effective either on April 26, 2019 or September 4, 2019, with the supplier companies' locations reversed as Germany and Austria. *See* Def.'s Mem. at 5–6. While SXP did not yet have a correct exclusion decision memo from Commerce, SXP could have nonetheless filed a timely protest to contest the liquidation of its entries. Under 19 U.S.C. § 1514, SXP could have filed a protest within 180 days contesting the liquidation of its four entries, thereby preserving its right to contest the protest denial before this Court under § 1581(a). *See* 19 U.S.C. § 1514(a) ("decisions of the Customs Service, including . . . the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section"); *see* 19 U.S.C. § 1514(c)(3) ("A protest of a decision, order, or finding described in subsection (a) shall be filed with the Customs Service within 180 days after but not before (A) the date of liquidation or reliquidation . . . .").

The Court notes that Customs' bulletin CSMS No. 42566154 was issued on May 1, 2020, which was after all four entries had liquidated, but at least four months before the 180-day deadline to file a protest for the earliest entries (the first two entries' 180-day deadline

was September 23, 2020). SXP was on notice from at least May 1, 2020 when Customs issued bulletin CSMS No. 42566154 that SXP had four months in which to file a timely protest after its entries were liquidated. SXP did not do so. SXP's customs broker filed SXP's protest on November 4, 2020, which was 222 days after liquidation of the first two entries, 208 days after liquidation of the third entry, and 201 days after liquidation of the fourth entry.

Because Section 232 exclusions may only be applied to entries "with respect to which liquidation is not final," Pres. Proc. 9777 of Aug. 29, 2018, cl. 5, 83 Fed. Reg. 45,025, 45,028 (Dep't of Commerce Sept. 4, 2018), importers can only claim Section 232 exclusions for (1) unliquidated entries; (2) unliquidated entries due to a granted request for extension; or (3) liquidated entries that are not final because they are within the 180-day protest period. See 19 U.S.C. § 1514(c)(3); CSMS No. 42566154. SXP's four entries did not fall into any of these categories when it submitted its protest, due to SXP's own actions by failing to file either an extension of liquidation or a timely protest after liquidation.

The Court notes that SXP filed a timely protest 180 days after liquidation of the fifth entry, and Customs issued a refund of Section 232 duties for that entry. This fact alone demonstrates that SXP could have filed a timely protest as to Entries 1 to 4 and SXP could have obtained appropriate relief in the form of a refund of any Section 232 duties paid.

2. Whether Relief Under 28 U.S.C.§ 1581(a) Would Be Manifestly Inadequate

SXP argues that any remedy under 28 U.S.C. § 1581(a) would be manifestly inadequate because SXP lacked the legal right to submit a valid protest for Entries 1 to 4, "making the prospects for relief under § 1581(a) 'incapable of producing any result' and generally an exercise in futility." Pl.'s Resp. at 12. SXP contends that its protest did not fall within the scope of a valid protest set out in § 1514 because the "predicate for all protests is . . . a decision of Customs," and even if its Protest had been timely filed for the four entries, it would not have been a valid challenge to the liquidations of its entries. *Id.*

At the outset, the Court observes the contradiction in SXP's argument that for Entries 1 to 4, SXP lacked the legal right to submit a valid protest and relief under § 1581(a) was an exercise in futility, while at the same time for Entry 5, SXP was able to file a valid protest and obtain a refund of Section 232 duties paid under § 1581(a). The only apparent difference was that SXP filed a timely protest for Entry 5 and untimely protests for Entries 1 to 4.

SXP attempts to distinguish between Customs' and Commerce's roles in the Section 232 exclusion process to allege Commerce's exclusive decision-making role that ultimately led to the denial of a protest. *Id.* at 12–15. SXP contends that Customs' role was limited to merely executing the exclusion order because Customs did not determine what merchandise was covered by the exclusion and did not decide on the correct effective date. *Id.* at 15.

Defendant analogizes this case to *ARP Materials, Inc. v. United States*, 47 F.4th 1370 (Fed. Cir. 2022), in which the U.S. Court of Appeals for the Federal Circuit ("CAFC") held that the importers, seeking a refund of duties paid under Section 301, could not invoke the CIT's residual jurisdiction under 28 U.S.C. § 1581(i) because a remedy would have available under 28 U.S.C. § 1581(a) if the importers had filed a timely protest. *ARP Materials*, 47 F.4th at 1373. The Court finds the CAFC's decision in *ARP Materials* to be relevant, particularly in the CAFC's rejection of plaintiffs' argument that they were not required to file protests because the similar Section 301 exclusion process was the sole decision-making responsibility of the United States Trade Representative and Customs' involvement was purely ministerial. *Id.* at 1377; *see also Env't One Corp. v. United States,* 47 CIT __, __, Slip Op. 23–49 at 19 (Apr. 11, 2023) (finding *ARP Materials* to provide relevant guidance in determining whether judicial review pursuant to 28 U.S.C. § 1581(a) of Customs' exclusions determinations was "manifestly inadequate"). The CAFC explained that "the protest procedure cannot be [so] easily circumvented." *ARP Materials*, 47 F.4th at 1378. The CAFC found that "Customs made substantive legal determinations—interpreting the HTSUS subheadings—and factual determinations—determining whether the entries fell within those subheadings—that it had the authority to make." *Id.* The CAFC held that had plaintiffs timely protested Customs' classification decisions, jurisdiction would have been available pursuant to 28 U.S.C. § 1581(a), and because the relief provided by § 1581(a) was not manifestly inadequate, jurisdiction pursuant to § 1581(i) was not available. *Id.* at 1379–80.

The Court agrees with Defendant that this action is analogous to *ARP Materials*, in that the *ARP Materials* court recognized that "[t]he obligation to protest a Customs classification error does not turn on whether it was erroneous *ab initio* or became erroneous because of retroactive administrative action. It instead turns on whether Customs' classification of the importers' entries were protestable 'decisions' under 19 U.S.C. § 1514, and we hold that these classifications were such protestable 'decisions.'" *Id.* at 1379.

Similarly, here Customs liquidated the entries and classified the imported merchandise as entered by SXP under subheading 7218.99.0045 of the HTSUS and assessed 25 percent *ad valorem* duties under Section 232. The Court holds that Customs' classification was a protestable decision. SXP could have followed the guidance provided in Customs' bulletin CSMS No. 42566154 while SXP's exclusion request was pending, then either filed an extension to prevent liquidation of Entries 1 to 4, or filed a timely protest within 180 days after liquidation to prevent the liquidation of Entries 1 to 4 from becoming final, and SXP would then have been able to receive a refund pursuant to 28 U.S.C. § 1581(a) for Section 232 exclusion duties paid on those entries. Moreover, the Court holds that the remedy that SXP could have received pursuant to 28 U.S.C. § 1581(a) would not have been manifestly inadequate because SXP could have received a refund of any Section 232 duties paid, and such result would not have been "incapable of producing any result" or "failing utterly of the desired end." *Sunpreme*, 892 F.3d at 1193–94.

Because jurisdiction would have been available under 28 U.S.C. § 1581(a) if SXP had timely protested Customs' classification decisions and because failure to invoke an available remedy within the timeframe prescribed did not render the remedy manifestly inadequate, the Court dismisses SXP's Complaint pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction.

II. Motion to Dismiss Pursuant to USCIT 12(b)(6)

Defendant moves to dismiss SXP's Complaint for failure to state a claim upon which relief may be granted pursuant to USCIT Rule 12(b)(6). *See* Def.'s Mot. at 1. Because the Court is dismissing Defendant's Complaint pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, it will not address the Parties' substantive arguments pursuant to USCIT Rule 12(b)(6).

CONCLUSION

The Court grants Defendant's Motion to Dismiss, grants Plaintiff's Motion for Leave to File Sur-Reply to Clarify the Record, and deems Plaintiff's Sur-Reply filed. Judgment will issue accordingly.

Dated: April 19, 2023
New York, New York

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

Slip Op. 23–52

NEXTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, et al., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00083

[Sustaining in part and remanding in part the U.S. Department of Commerce's third remand redetermination following the 2015–2016 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: April 19, 2023

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

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

Claudia Burke, Assistant Director, and *Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Mykhaylo Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, *Myles S. Getlan*, and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Gregory J. Spak, *Frank J. Schweitzer*, *Kristina Zissis*, and *Matthew W. Solomon*, White & Case LLP, of Washington, D.C., for Defendant-Intervenors Maverick Tube Corporation and Tenaris Bay City, Inc.

OPINION

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") third remand redetermination in the administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from the Republic of Korea ("Korea") covering the period from September 1, 2015 to August 31, 2016. *See* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Third Remand Redetermination*"), ECF No. 119–1, pursuant to Order, ECF No. 114; *see also Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 17,146 (Dep't of Commerce Apr. 18, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the

2015–2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (Apr. 11, 2018) ("Final IDM"), PR 368.[1]

In *NEXTEEL Co. v. United States* ("*NEXTEEL IV*"), 28 F.4th 1226 (Fed. Cir. 2022), the U.S. Court of Appeals for the Federal Circuit ("CAFC") remanded for Commerce to further consider whether a particular market situation could be found based on any subset of the factors or other reasoning, and for proceedings consistent with the CAFC's decision in *Stupp Corp. v. United States* ("*Stupp*"), 5 F.4th 1341 (Fed. Cir. 2021). *NEXTEEL IV*, 28 F.4th at 1238–39, 41.

For the following reasons, the Court sustains in part and remands in part Commerce's *Third Remand Redetermination*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the Court's review of the *Third Remand Redetermination*. *See NEXTEEL Co. v. United States* ("*NEXTEEL I*"), 43 CIT __, __, 392 F. Supp. 3d 1276, 1283–84 (2019); *NEXTEEL Co. v. United States* ("*NEXTEEL II*"), 44 CIT __, __, 450 F. Supp. 3d 1333, 1337–38 (2020); *NEXTEEL Co. v. United States* ("*NEXTEEL III*"), 44 CIT __, __, 475 F. Supp. 3d 1378, 1380–81 (2020).

In this administrative review of OCTG from Korea, Commerce selected Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") and Consolidated Plaintiff SeAH Steel Corporation ("SeAH") as mandatory respondents for individual examination. *See NEXTEEL I*, 43 CIT at __, 392 F. Supp. 3d at 1283.

In *NEXTEEL Co. v. United States* ("*NEXTEEL I*"), 43 CIT __, 392 F. Supp. 3d 1276 (2019), the Court sustained in part and remanded in part the *Final Results*. *NEXTEEL I*, 43 CIT at __, 392 F. Supp. 3d at 1297. In *NEXTEEL Co. v. United States* ("*NEXTEEL II*"), 44 CIT __, 450 F. Supp. 3d 1333 (2020), the Court sustained in part and remanded in part the *Remand Redetermination*. *NEXTEEL II*, 44 CIT at __, 450 F. Supp. 3d at 1346–47; *see* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Redetermination*"), ECF No. 81–1, pursuant to Order, ECF No. 73. In *NEXTEEL Co. v. United States* ("*NEXTEEL III*"), 44 CIT __, 475 F. Supp. 3d 1378 (2020), the Court sustained the *Second Remand Redetermination*. *NEXTEEL III*, 44 CIT at __, 475 F. Supp. 3d at 1380; *see* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Second Remand Redetermination*"), ECF No. 96–1, pursuant to Order,

[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF Nos. 60, 94.

ECF No. 95. In *NEXTEEL IV*, the CAFC directed the Court to remand to Commerce to further consider whether a particular market situation could be found based on any subset of the factors or other reasoning, and for proceedings consistent with the CAFC's decision in *Stupp*. *NEXTEEL IV*, 28 F.4th at 1238–39, 41.

In the *Third Remand Redetermination*, Commerce reconsidered the record and determined that substantial evidence did not support the conclusion that a particular market situation existed in Korea during the period of review. *Third Remand Redetermination* at 11–12, 16. Commerce also reconsidered the differential pricing analysis and provided further explanation regarding Commerce's application of the Cohen's *d* test to SeAH's U.S. sales. *Id.* at 16–21, 57–73. Commerce determined that the weighted-average dumping margins calculated in the *Second Remand Redetermination* would remain the same. *Id.* at 74.

NEXTEEL filed Plaintiff NEXTEEL Co., Ltd.'s Comments on Remand Redetermination, in which Plaintiff raises concerns but argues that Commerce's *Third Remand Redetermination* should be sustained. Pl.'s Cmts. on Remand Redetermination ("Pl.'s Br."), ECF No. 122. SeAH filed two briefs, Comments of SeAH Steel Corporation in Partial Opposition to Commerce's October 21, 2022, Redetermination and Comments of SeAH Steel Corporation in Partial Support of Commerce's October 21, 2022, Redetermination, in which SeAH argues that Commerce's differential pricing analysis should be remanded and its particular market situation analysis should be sustained. Cmts. SeAH Part. Opp'n Commerce's Oct. 21, 2022 Redetermination ("Consol. Pl.'s Part. Opp'n Br."), ECF Nos. 123, 124; Cmts. SeAH Part. Supp. Commerce's October 21, 2022 Redetermination ("Consol. Pl.'s Part. Supp. Br."), ECF No. 126. Defendant-Intervenor United States Steel Corporation ("Defendant-Intervenor" or "U.S. Steel") filed United States Steel Corporation's Comments in Partial Opposition to Remand Results, arguing that Commerce's particular market situation analysis should be remanded. Def.-Interv.'s Cmts. Part. Opp'n Remand Results ("Def.-Interv.'s Br."), ECF No. 121. Defendant filed Defendant's Response to Comments Regarding the Remand Redetermination. Def.'s Resp. Cmts. Regarding Remand Redetermination ("Def.'s Br."), ECF No. 125. NEXTEEL filed Plaintiff Nexteel Co., Ltd.'s Reply Comments on Remand Redetermination. Pl.'s Reply Cmts. Remand Redetermination, ECF No. 127.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions

contesting 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

I. Particular Market Situation

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A).

The statute dictates the steps by which Commerce may calculate normal value "to achieve a fair comparison" with export price or constructed export price. *Id.* § 1677b(a). When Commerce looks to determine normal value in accordance with 19 U.S.C. § 1677b, if Commerce concludes that it must resort to using constructed value under 19 U.S.C. § 1677b(e), and that a "particular market situation" exists "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade," the statute authorizes Commerce to use any other reasonable calculation methodology. *Id.* § 1677b(e). The origin in the statute of "particular market situation" is its inclusion in the framework of "normal value" when the Tariff Act of 1930 was amended by the Uruguay Round Agreements Act. *See* Pub. L. 103–465, § 224, 108 Stat. 4809, 4878 (1994);[2] *cf.* Trade Preferences Extension Act of 2015 ("TPEA"), Pub. L. No. 114–27, 129 Stat. 362 (2015) (adding the concept of a particular market situation in the definition of the term "ordinary course of trade" for purposes of constructed value and clarifying remedial action if Commerce finds the existence of a particular market situation). The Trade Preferences Extension Act of 2015 amended certain subsections of the Tariff Act of

[2] *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 2.2 ("[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[ ], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits") (footnote omitted).

1930. *See* TPEA, Pub. L. No. 114–27, 129 Stat. 362. Section 504 of the TPEA permits Commerce to consider certain sales and transactions "to be outside the ordinary course of trade" when "the particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15). When calculating constructed value under the revised statute, if Commerce finds an extant particular market situation, "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." *Id.* § 1677b(e). Congress did not define "particular market situation" in 1994 or 2015, but as observed in *NEXTEEL IV*, § 1677b(e) plainly "identifies the factual support Commerce must provide to invoke this provision." *NEXTEEL IV*, 28 F.4th at 1234. Congress also provided examples in adopting the Statement of Administrative Action:

> The [Antidumping] Agreement does not define "particular market situation," but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

Statement of Administrative Action, H.R. REP. No. 103–316, vol. 1, at 822 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4162. "These are all situations in which some circumstance distorts costs so that they are not set based on normal market forces or do not move with the rest of the market." *NEXTEEL IV*, 28 F.4th at 1234.

The CAFC found that three of the five particular market situation factors were not supported by substantial evidence: the Korean Government's subsidies to hot-rolled coil ("HRC") producers, strategic alliances, and steel industry restructuring. *Id.* at 1234–38. The CAFC noted that "Commerce has not taken a clear position on whether it believes the other two circumstances alone are sufficient" and that "it is far from a foregone conclusion that Commerce would have found a particular market situation based on these two factors alone." *Id.* at 1237. The CAFC stated:

> In summary, we agree with the Court of International Trade that substantial evidence does not support the existence of a particular market situation created by Commerce's five enumerated circumstances. Because we are limited to reviewing Commerce's reasoning, we do not decide whether a particular market situation could be found based on any subset of the factors or other reasoning.

Id. at 1241.

The Parties focus on whether the CAFC issued an open-ended remand and to what extent Commerce should have been bound to follow the CAFC's holdings in *NEXTEEL IV*. *See, e.g.*, Def.-Interv.'s Br.; Pl.'s Br.; Def.'s Br. On remand, Commerce acknowledged that, "the CAFC left open the possibility that a [particular market situation] could be found based on an analysis of any subset of the factors or other reasoning. Thus, the CAFC ruled that Commerce may seek to justify a [particular market situation] finding on remand." *Third Remand Redetermination* at 6–7. Commerce did not reopen the record on remand, but reexamined the existing record. *Id.* at 8, 36–37. Whether to reopen the record is a matter for Commerce's discretion, and the Court concludes that Commerce's determination to not reopen the record was reasonable. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) ("The decision to reopen the record is best left to the agency."); *Changshan Peer Bearing, Co. v. United States*, 38 CIT __, __, 953 F. Supp. 2d 1354, 1362 (2014) ("[T]he court views an order compelling an agency to reopen an administrative record on remand as the exception rather than the rule, consistent with the principle that courts, as a general matter, should allow agencies to exercise discretion as to whether to reopen an administrative record on remand.").

A. HRC Imports from China

Defendant-Intervenor alleges that Commerce presumed impermissibly in its *Third Remand Redetermination* that the CAFC "mandated Commerce to reach certain evidentiary conclusions." Def.-Interv.'s Br. at 2. Defendant-Intervenor focuses on Commerce's statement that:

> In [*NEXTEEL IV*], however, the CAFC held "[a]lthough low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own." While we respectfully disagree with the CAFC that the

> evidence does not show sufficient particularity for this factor to establish a [particular market situation] on its own, the CAFC's holding is binding in this case.

Third Remand Redetermination at 57 (internal citation omitted); Def.-Interv.'s Br. at 2. This statement appears in Commerce's *Third Remand Redetermination* and seemingly indicates that Commerce believes that the evidence of low-priced Chinese steel could support a particular market situation determination on its own, absent instructions from the CAFC to the contrary.

The CAFC's remand directions were open-ended, stating that, "we do not decide whether a particular market situation could be found based on any subset of the factors or other reasoning." *NEXTEEL IV*, 28 F.4th at 1241. The CAFC also stated, however, that, "[a]lthough low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own." *Id.* at 1237. The CAFC did not make specific evidentiary rulings with respect to the issues of low-price Chinese products and Korean electricity, but instead remanded for Commerce to conduct its analysis again without further parameters. *Id.* at 1241.

Commerce determined that evidence placed on the record by Maverick Tube Corporation and U.S. Steel demonstrated that imports of low-priced Chinese steel *could* contribute to the existence of a particular market situation. *Third Remand Redetermination* at 12. Commerce considered that evidence on the record demonstrated that the Chinese government highly subsidized steel products and that distortions in the Chinese economy resulted in significant overcapacity. *Id.* at 12–13. Commerce referenced the Official Journal of the European Union, which estimated that in 2015, China accounted for 50.3 percent of the world's actual crude steel production and that China's steel production overcapacity was estimated at 350 million metric tons. *Id.* at 13. Commerce considered the Government of Korea's estimate that China's steel production overcapacity was 450 million metric tons in 2015 and accounted for 60 percent of global steel production overcapacity. *Id.*

Commerce determined that data submitted on the record demonstrated that an increase in Chinese exports of steel products *may have* created downward pressure on steel prices in Korea. *Id.* at 14. Commerce referenced data from the Korean Iron & Steel Association showing that from 2011 to 2015, Korean imports of Chinese steel products rose from 10,200,000 metric tons (mt) to 13,740,000 mt,

representing a 35 percent increase. Over the same time period, Commerce noted that steel imports from China increased their Korean market share from 18 percent to 25 percent. *Id.* Commerce considered that in 2015, the price differential between Korean-produced hot-rolled steel and Chinese-produced hot-rolled steel was U.S. dollars (USD) 118 per mt; as a result, Korean producers of hot-rolled steel found it increasingly difficult to operate profitably. *Id.* Commerce considered further data from the Global Trade Atlas ("GTA") showing that Chinese exports of hot-rolled carbon and alloy steel products to Korea increased from 3,156,607,961 kilograms (kg) in 2012 to 3,820,686,369 kg in 2016, representing a 21 percent increase and that over the same time period, the average unit value of Chinese exports of hot-rolled carbon and alloy steel products to Korea fell from USD 544.34 per mt to USD 313.08 per mt, representing a 43 percent decrease. *Id.* Commerce determined that Chinese steel production overcapacity resulted in an increase in Chinese steel exports to Korea and a drastic decline in average unit values from China. *Id.*

Commerce determined that the record evidence demonstrated that "imports of low-priced Chinese steel *could potentially* contribute to a [particular market situation]." *Id.* (emphasis added). Notably, Commerce did not determine that the record evidence showed sufficient particularity to the Korean market to support a particular market situation. The Court observes that Commerce used tentative language such as "*could contribute* to the existence of a [particular market situation]," "*may have* created downward pressure," and "*could potentially* contribute to a [particular market situation]," without stating that the overcapacity of Chinese steel imports *definitively* created a particular market situation. *Id.* Commerce stated that, "[a]ccordingly, although we are concluding on remand that a [particular market situation] is not supported by substantial evidence for this particular [period of review] on this record, we also acknowledge that in a future determination Commerce may find a [particular market situation] based on this factor if the evidence demonstrates sufficient particularity." *Id.* at 16.

The Court agrees with Commerce's determination that the record evidence does not show that an increase in Chinese steel exports was particular to Korea and the drastic decline in average unit values from China was particular to Korea. Although the CAFC issued an open-ended remand, the Court concludes that it was reasonable for Commerce in its *Third Remand Redetermination* to follow the CAFC's direction that the evidence on the record regarding low-priced Chinese steel did not establish with sufficient particularity a particular market situation in Korea on its own, especially given Commerce's

decision to not reopen the record. Moreover, the Court is persuaded because Commerce conducted a full evaluation of the record evidence on remand and determined that substantial evidence on the record did not support a particular market situation in Korea. The Court sustains Commerce's determination that record evidence of low-priced Chinese steel did not support a particular market situation determination in Korea.

B. Korean Electricity Market

Commerce determined that there was insufficient evidence on the record to establish that the Government of Korea's involvement in the Korean electricity market contributed to a particular market situation in Korea during the period of review. *Third Remand Redetermination* at 6–16. Commerce did not reopen the record on remand but reexamined the record to perform its particular market situation analysis. *Id.* For example, Commerce examined several record documents that supported Commerce's determination that the Korean Government heavily monitored and regulated the electricity rates of the Korea Electric Power Corporation. *See* Maverick Tube Corporation's Letter, "Certain Oil Country Tubular Goods from the Republic of Korea: Other Factual Information Submission for Valuing the Particular Market Situation in Korea," (May 4, 2017) ("Particular Market Situation Allegation"), PR 95–113; *id.* at Ex. 3 (Maverick Tube Corporation's Letter, "Oil Country Tubular Goods from the Republic of Korea: Submission of Factual Information" (Nov. 13, 2015)) at Ex. X-13 (Government of Korea's Letter, "Response of the Government of Korea to the Department of Commerce's Questionnaire January 21, 2015 Welded Line Pipe From the Republic of Korea [Countervailing Duty] Original Investigation," (January 21, 2015)) at I– 34; *id.* at Ex. 5 (Electricity [Particular Market Situation] Allegation Letter) at Ex. 4. Commerce determined that this evidence demonstrated that government policy controlled Korean electricity prices and that the Government of Korea may have intervened in the electricity market and distorted electricity prices in order to achieve policy goals such as controlling inflation, but that there was insufficient evidence to demonstrate that Korean electricity prices were distorted during the period of review. *Third Remand Redetermination* at 9–10.

Commerce considered a report from the International Energy Agency ("IEA") showing that in 2016, the median industrial electricity price including taxes among IEA members was 6.97 British pence (pence) per kilowatt hour (kWh) and the Korean industrial electricity price including taxes was 6.965 pence per kWh, nearly identical to the

median IEA electricity rate. *Id.* at 10. Commerce determined that Korean industrial electricity prices (including taxes) were, on average, in line with the median of electricity rates in other countries in 2016. *Id.* Commerce determined that the same report showed that Korea's annual industrial electricity prices were approximately 43 percent lower than electricity prices in Japan. *Id.* Commerce determined that although Japan and Korea were the only two countries located in Asia included in the IEA study, there were variables other than geographic location that factored into identifying an appropriate comparison. *Id.* Commerce determined that the record evidence demonstrated that shortly before the relevant period, Japan changed its energy consumption make-up by transitioning from nuclear energy to liquid natural gas, which explained why Japan's prices were significantly higher than the median electricity prices of all countries in the IEA study. *Id.* at 10–11. Commerce determined that without sufficient evidence on the record of this review demonstrating that Japanese electricity rates were the most appropriate comparison for Korean electricity rates, the median industrial electricity rate among IEA members was a better comparison for Korea's electricity rates. *Id.* at 11. Commerce considered that this comparison, which used a median of the broader scope of electricity price data, was less likely to have results affected by market peculiarities or distortions in any single country. *Id.*

The Court concludes that Commerce was not required to compare Korea's electricity rates with Japan's electricity rates because Commerce's explanation was reasonable for why Japan's prices were significantly higher than the median electricity prices of all countries in the IEA study. The Court also concludes that Commerce's decision to use a comparison with the median industrial electricity rate among IEA members was reasonable given Commerce's explanation that the comparison provided the median of the broader scope of electricity price data and was less likely to have results affected by market peculiarities or distortions specific to a particular country.

Because Commerce's comparison of Korea's electricity rates with the median industrial electricity rate among IEA members was reasonable and Commerce's determination that Korean industrial electricity prices (including taxes) were, on average, in line with the median of electricity rates in other countries in 2016 was supported by substantial evidence, the Court sustains Commerce's determination that there was insufficient evidence on the record to establish that the Government of Korea's involvement in the Korean electricity market contributed to a particular market situation in Korea during the period of review.

II. Commerce's Differential Pricing Analysis

In *NEXTEEL IV*, the CAFC directed that the *Second Remand Redetermination* be remanded for Commerce to reconsider the use of the Cohen's *d* test in view of the *Stupp* opinion. *NEXTEEL IV*, 28 F.4th at 1239. On remand, Commerce continued to apply the Cohen's *d* test and determined that the statistical assumptions identified by the CAFC in *Stupp* were not pertinent to Commerce's analysis, which considered an entire population and did not rely on sampling. *Third Remand Redetermination* at 16–21, 57–73. SeAH opposes the *Third Remand Redetermination* in part, arguing that Commerce failed to support its use of a 0.8 threshold in its application of the Cohen's *d* test, abused its discretion in not considering academic literature relied on by the CAFC in *NEXTEEL IV*, and improperly relied on Commerce's analysis in the *Final Results of Redetermination Pursuant to Court Remand* ("*Stupp Remand Redetermination*") filed in *Stupp Corp. v. United States*, Court No. 15–00334. Consol. Pl.'s Part. Opp'n Br. at 2–13; *see Stupp Remand Redetermination*, Court No. 15–00334, ECF No. 208–1. Defendant contends that Commerce supported its use of the Cohen's *d* test and SeAH has not provided a basis for a fourth remand. Def.'s Br. at 16–31.

A. Commerce's Use of the 0.8 Threshold

Commerce utilizes the Cohen's *d* test to measure differences in prices between two groups relative to the variance in prices within those groups. *Third Remand Redetermination* at 18. When the differences in the means measured relative to the variances, the Cohen's *d* coefficient, is found to be 0.8 or greater, the difference is considered "large" and "significant." *Id.* SeAH contends that because the CAFC expressed concern regarding the use of the 0.8 threshold to interpret data that did not follow the statistical assumptions of normality, sufficient observation size, and roughly equal variances, Commerce was required to explain its use of the 0.8 threshold in the *Third Remand Redetermination*. Consol. Pl.'s Part. Opp'n Br. at 3–5. SeAH argues that Commerce did not provide an explanation for the reasonableness of the 0.8 threshold and, instead, based its determination on the inapplicable case *Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent*"), 940 F.3d 662 (Fed. Cir. 2019). *Id.* at 4–6. Defendant contends that Commerce provided a reasonable explanation for its use of the 0.8 threshold and addressed the concerns raised by the CAFC. Def.'s Br. at 19–23. Defendant asserts that Commerce's citation to *Mid Continent* was not dispositive, and that Commerce also relied on *Stupp* to support its use of the 0.8 threshold. *Id.* at 23.

In *Stupp*, the CAFC observed that the Cohen's *d* test was based on certain statistical assumptions, including the normality, sufficient size, and roughly equal variances of the considered populations. *Stupp*, 5 F.4th at 1357–58. The CAFC expressed concern that Commerce's methodology disregarded these statistical assumptions and remanded Commerce's determination with instructions for "Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's d test." *Id.* at 1357–60. The CAFC cited these concerns in its remand of this case. *NEXTEEL IV*, 28 F.4th at 1238–39.

In the *Third Remand Redetermination*, Commerce explained the purpose of the Cohen's *d* test:

> Section 777A(d)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act) requires that Commerce find that there exists a pattern of prices that differ significantly for comparable merchandise among purchasers, regions, and time periods. As part of Commerce's "differential pricing analysis," the "Cohen's *d* test" examines whether, for comparable merchandise, the prices to a particular purchaser, region, or time period differ significantly from all other prices. The Cohen's *d* test is based on the concept of "effect size" which measures the difference in the means of some measurement between two groups relative to the variance in that measurement within each of the two groups. In effect, the denominator of this ratio is the "yardstick" by which the difference in the means is measured. When this difference in the means relative to the variances within the underlying data, i.e., the effect size or the "Cohen's *d* coefficient," is found to be "large," i.e., 0.8 or larger, then the difference in the prices is found to be "significant."

Third Remand Redetermination at 18 (internal citations omitted).

In its analysis, Commerce relied on *Mid Continent* to support its determination that the CAFC had previously affirmed the reasonableness of the 0.8 threshold to determine whether price differences were significant. *Id.* at 19–20 (citing *Mid Continent*, 940 F.3d at 673). In *Mid Continent*, the CAFC held that Commerce was within "the wide discretion left to it under 19 U.S.C. § 1677f-1(d)(1)(B)" in adopting the 0.8 threshold because:

> Commerce reasoned that even a small absolute difference in the means of the two groups can be significant (for the present statutory purpose) if there is a small enough dispersion of prices within the overall pool as measured by a proper pooled variance

> or standard deviation; the 0.8 standard is "widely adopted" as part of a "commonly used measure" of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size.

Mid Continent, 940 F.3d at 673. In *Stupp*, the CAFC recognized that *Mid Continent* had resolved the issue of whether Commerce's adoption of the 0.8 threshold was reasonable but did not reach the question of whether the 0.8 threshold could be applied when the data did not satisfy the statistical assumptions of the Cohen's *d* test. *Stupp*, 5 F.4th at 1356–57.

On remand, Commerce determined that the statistical assumptions are not relevant to Commerce's application of the Cohen's *d* test to SeAH's price data. *Third Remand Redetermination* at 20. Specifically, Commerce explained that:

> Such criteria, i.e., the normality of the distribution, equal variances and the number of observations (i.e., the sample size), are relevant to determine whether the results of an analysis based on a sample are representative of the full population as a whole. The results of an analysis based on sampled data are estimates of the actual values of the parameters for the full population, and using statistical inference based on these statistical characteristics of the sampled data will determine, with predefined criteria, whether the estimates in the analysis results represent the actual values of the parameters for the full population of data.

Id. This explanation does not resolve the CAFC's concerns raised in *Stupp* pertaining to the use of the 0.8 threshold when the statistical assumptions are not observed. As the CAFC observed, "Professor Cohen derived his interpretive cutoffs under certain assumptions. Violating those assumptions can subvert the usefulness of the interpretive cutoffs, transforming what might be a conservative cutoff into a meaningless comparator." *Stupp*, 5 F.4th at 1360. The Court remands for reconsideration or further discussion the issue of Commerce's calculation and application of the 0.8 threshold in Cohen's *d* analysis.

B. Consideration of Academic Material

In *Stupp*, the CAFC cited academic literature discussing the statistical assumptions of the Cohen's *d* test. *See id.* at 1357–59. Commerce determined that it did not need to address this academic

literature in the *Third Remand Redetermination* because the academic literature was not on the administrative record for this case. *Third Remand Redetermination* at 60–63, 68. SeAH argues that "Commerce was, at a minimum, required to engage with the academic literature that the CAFC took judicial notice of and cited in the *Stupp* decision." Consol. Pl.'s Part. Opp'n Br. at 7. SeAH contends that because Commerce did not reject references to the academic literature in SeAH's administrative case brief and referenced the materials in the Final IDM, the texts are part of the administrative record. *Id.* at 7–9. SeAH also argues that Commerce abused its discretion by not reopening the administrative record on remand to permit the academic literature to be placed on the record. *Id.* at 9–11.

Defendant contends that the *Stupp* decision and the Court's remand did not require Commerce to address the academic literature cited by the CAFC. Def.'s Br. at 25–26. Defendant also argues that SeAH is precluded from challenging Commerce's decision to not reopen the administrative record because SeAH did not request that the administrative record be reopened on remand and failed to exhaust its administrative remedies. *Id.* at 24. If the arguments are not barred by exhaustion, Defendant argues, then SeAH has failed to demonstrate that Commerce abused its discretion in not reopening the administrative record and that SeAH did not carry its burden to build an adequate record. *Id.* at 24–25. Defendant asserts that Commerce's failure to reject citations to academic literature in SeAH's case brief and references to the academic literature in the Final IDM were in error and did not result in the academic literature being placed on the administrative record. *Id.* at 26–29.

The Court remanded this matter to Commerce for further proceedings in conformity with the CAFC's decision in *NEXTEEL IV*. In *NEXTEEL IV*, the CACF held that "[b]ecause Commerce's use of Cohen's *d* here presents identical concerns to those in *Stupp*, we vacate this portion of [*NEXTEEL III*] and remand to the Court of International Trade to reconsider in view of *Stupp*." *NEXTEEL IV*, 28 F.4th at 1239. In *Stupp*, the CAFC considered multiple academic sources addressing the statistical assumptions underlying the Cohen's *d* test. *Stupp*, 5 F.4th at 1357–59. The CAFC directed the Court to remand Commerce's determination:

> to give Commerce an opportunity to explain 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 less-than-fair-value adjudications. In that regard, we invite Commerce to clarify its argument that having

> the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test.

Id. at 1360.

Though the CAFC relied on academic literature in *Stupp*, the CAFC did not instruct Commerce to directly respond to the specific sources of information. Rather, the CAFC directed the remand in *Stupp* to allow Commerce an opportunity to discuss whether statistical limitations on the Cohen's *d* test were satisfied or relevant to Commerce's analysis when an entire universe of data was considered. *See id.* Though the statistical limitations were drawn from academic literature, Commerce was not required by the CAFC to incorporate the academic literature into its response. Commerce explained why statistical assumptions, such as normality, sufficient observation size, and roughly equal variances, are not relevant when the population considered consists of the total universe of data. *Third Remand Redetermination* at 20–21, 58–60.

SeAH cited certain academic texts in its administrative case brief to Commerce. *See* SeAH's Admin. Case Br. (Nov. 30, 2017) at 30–34, PR 319. Commerce cited to some of these academic texts in the Final IDM. *See* Final IDM at 67–72. In the *Third Remand Redetermination*, Commerce determined that it could not consider the relevant academic literature because the documents were not included on the administrative record. *Id.* at 60–63. In the *Third Remand Redetermination*, Commerce claimed that it did not realize that the academic texts cited in SeAH's administrative case brief were not on the administrative record during the initial review and conceded that discussion of the academic literature in the Final IDM was an oversight that "may have resulted from the discussion and analysis of such texts in the final results of the preceding first administrative review of this [antidumping duty] order, where the academic texts were part of the record of the first review." *Third Remand Redetermination* at 62 & n.284. Commerce claimed that the discussion "had been simply copied from the final results of the first review" and that it was "clarifying this oversight" on remand. *Id.* Commerce determined that "[s]uch an oversight by Commerce does not negate either Commerce's need to maintain the boundaries of an administrative record or to enforce the time limits for the submission of [new factual information] consistent with 19 CFR § 351.301." *Id.* at 62.

SeAH contends that Commerce's reliance on the cited academic literature in the Final IDM effectively placed the academic literature on the administrative record. Consol. Pl.'s Part. Opp'n Br. at 7–9. In

support of its argument, SeAH cites to *Clearon Corp. v. United States*, 38 CIT 1122 (2014). *Id.* at 8. In *Clearon Corp.*, Commerce used the World Development Report in selecting a surrogate country, but a copy of the World Development Report was not included in the administrative record. *Clearon Corp.*, 38 CIT at 1147. The Court held that because Commerce relied upon the World Development Report as factual information in reaching its determination, the document was part of the record and directed Commerce to add the document to the record so that the Court could determine the reasonableness of Commerce's determination. *Id.* Defendant argues that the instant case is more analogous to another situation considered in *Clearon Corp.*, in which Commerce considered information from a 2010 financial statement but referenced a 2011 financial statement inadvertently. Def.'s Br. at 28; *Clearon Corp.*, 38 CIT at 1132.

Here, Commerce discussed SeAH's argument and the supporting academic literature in the context of whether the application of the Cohen's *d* coefficient and 0.8 threshold were reasonable. Final IDM at 67–72. Commerce's detailed response to the argument was more significant than a simple typographic error. Because Commerce relied on the academic literature cited in SeAH's administrative case brief in its analysis supporting the *Final Results*, the Court concludes that Commerce effectively made the academic literature part of the administrative record. Commerce's attempt to retroactively explain the consideration of the academic literature as an oversight does not excuse Commerce's failure to consider the evidence in the *Third Remand Results*. The Court remands this matter to Commerce for reconsideration of the academic literature cited in the Final IDM.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that this action is sustained in part and remanded in part to Commerce for reconsideration consistent with this opinion, and it is further

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

(1) SeAH shall place on the administrative record on or before April 26, 2023 copies of academic literature cited by Commerce in the Final IDM;

(2) Commerce shall file its fourth remand determination on or before June 20, 2023;

(3) Commerce shall file the administrative record on or before July 5, 2023;

(4) Comments in opposition to the fourth remand determination shall be filed on or before August 2, 2023;

(5) Comments in support of the fourth remand determination shall be filed on or before August 30, 2023; and

(6) The joint appendix shall be filed on or before September 27, 2023.

Dated: April 19, 2023
New York, New York

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

Slip Op. 23–53

MEIHUA GROUP INTERNATIONAL TRADING (HONG KONG) LIMITED AND XINJIANG MEIHUA AMINO ACID CO., LTD., Plaintiffs, and DEOSEN BIOCHEMICAL (ORDOS) LTD., DEOSEN BIOCHEMICAL LTD., AND JIANLONG BIOTECHNOLOGY COMPANY, LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00069

[Remanding the final results of the U.S. Department of Commerce, following the final determination in the antidumping duty investigation of xanthan gum from the People's Republic of China.]

Dated: April 19, 2023

Mark B. Lehnardt, Law Offices of David L. Simon, PLLC, of Washington, D.C., for Plaintiffs Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd.

Chunlian (Lian) Yang, and *Lucas Querioz Pires*, Alston & Bird LLP, of Washington, D.C., for Consolidated Plaintiffs Deosen Biochemical (Ordos) Ltd. and Deosen Biochemical Ltd.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific PLLC, of Washington, D.C., for Consolidated Plaintiff Jianlong Biotechnology Company, Ltd.

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

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the import of xanthan gum from the People's Republic of China ("China"), subject to the administrative determination by the U.S. Department of Commerce ("Commerce") in *Xanthan Gum From the People's Republic of China ("Final Results"), 87 Fed. Reg. 7104 (Dep't of Commerce Feb. 8, 2022) (final results of antidumping duty administrative review and final determination of no shipments; 2019–2021); see also Issues and Decision Memorandum for the Final Results of the 2019–2020 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China ("Final IDM"), ECF No. 23–3.*

Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd. (collectively, "Meihua") challenge Commerce's *Final Results* in its Motion of Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua

Amino Acid Co., Ltd., for Judgment on the Agency Record and the Memorandum of Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd., in Support of its Motion for Judgement upon the Agency Record. Pls.' Mot. J. Agency R., ECF No. 30–2; Mem. Pls.' Supp. Mot. J. Agency R. ("Pls.' Br."), ECF Nos. 30–4, 31. Consolidated Plaintiff Jianlong Biotechnology Co., Ltd. ("Jianlong") contests Commerce's *Final Results* in Consolidated Plaintiff's Rule 56.2 Motion for Judgement upon the Agency Record and Memorandum in Support of the Rule 56.2 Motion of Consolidated Plaintiff Jianlong Biotechnology Co. Ltd., for Judgment upon the Agency Record. Consol. Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 27, 28; and Mem. Supp. Consol. Pl.'s R. 56.2 Mot. J. Agency R. ("Jianlong's Br."), ECF Nos. 27–2, 28–2. Deosen Chemical (Ordos) Ltd. and Deosen Biochemical Ltd. (collectively, "Deosen") challenge Commerce's *Final Results* in Consolidated Plaintiff Deosen's Motion for Summary Judgment on the Agency Record and Consolidated Plaintiff Deosen's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment on the Agency Record. Consol. Pl.'s R. 56.2 Mot. J. Agency R. ("Deosen's Br."), ECF No. 32. Defendant United States ("Defendant") filed Defendant's Response to Plaintiffs' and Plaintiff-Intervenors' Motions for Judgment Upon the Agency Record.[1] Def.'s Resp. Br. Opp'n Pls.' R. 56.2 Mots. J. Agency R. ("Def.'s Resp. Br."), ECF Nos. 35, 36.[2] Meihua, Jianlong, and Deosen filed reply briefs. *See* Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Meihua's Reply"), ECF Nos. 41, 42; Consol. Pl.'s Reply Br. ("Jianlong's Reply"), ECF No. 39; Consol. Pl.'s Reply Supp. Mot. Summary J. Agency R. ("Deosen's Reply"), ECF No. 40.

For the reasons discussed below, the Court remands Commerce's *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's application of facts otherwise available to Meihua was in accordance with the law and supported by substantial evidence;
2. Whether failure to exhaust administrative remedies prevents Jianlong's arguments before the Court;

[1] Defendant incorrectly identified Consolidated Plaintiffs Deosen Biochemical (Ordos) Ltd., Deosen Biochemical Ltd., and Jianlong Biotechnology Company, Ltd. as Plaintiff-Intervenors.

[2] Plaintiffs Meihua Group International Trading (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd. submitted Plaintiffs' Unopposed Motion for Oral Argument, ECF No. 43, which was granted by the Court. *See* Order, ECF No. 46. Because some of the Parties were unavailable for a substantial period of time, the Court decides this case without oral argument.

3. Whether Commerce's application of the separate rate to Jianlong and Deosen was supported by substantial evidence and in accordance with the law; and
4. Whether Commerce's determination not to rescind Deosen's review was supported by substantial evidence.

PROCEDURAL HISTORY

On July 19, 2013, Commerce published an antidumping duty order on xanthan gum from China. *Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't of Commerce July 19, 2013) (amended final determination of sales at less than fair value and antidumping duty order). Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on xanthan gum from China for the period of July 1, 2019 through June 30, 2020. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 85 Fed. Reg. 39,531 (Dep't of Commerce July 1, 2020) (opportunity to request administrative review). Commerce initiated an administrative review of the antidumping duty order *Xanthan Gum From the People's Republic of China*. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* ("*Initiation Notice*"), 85 Fed. Reg. 54,983, 54,990 (Dep't of Commerce Sep. 3, 2020).

Commerce received requests for reviews of several companies and selected Neimenggu Fufeng Biotechnologies Co., Ltd., Xinjiang Fufeng Biotechnologies Co., Ltd., and Shandong Fufeng Fermentation Co., Ltd. (collectively, "Fufeng"), and Meihua Group International Trading (Hong Kong) Limited, Langfang Meihua BioTechnology Co., Ltd., and Xinjiang Meihua Amino Acid Co., Ltd. for review. Memo From USDOC to Office Director Pertaining to Interested Parties Respondent Selection, PR 39.[3] Commerce explained that because Commerce treated Deosen Chemical (Ordos), Ltd. and Deosen Biochemical Ltd. as a single entity during the investigation, it would continue to do so in the 2019–2020 administrative review. *Id.* at 2 n.5. Commerce published its Seventh Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Preliminary Application of Adverse Facts Available to Meihua on July 30, 2021. Seventh Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Preliminary Application of Adverse Facts Available to Meihua ("AFA Memo"), PR 285. Commerce published its preliminary results and accompanying issues and deci-

[3] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF No. 45.

sion memorandum on August 5, 2021. *Xanthan Gum From the People's Republic of China*, 86 Fed. Reg. 42,781 (Dep't of Commerce Aug. 5, 2021) (preliminary results of the antidumping duty administrative review, partial recission of the antidumping duty administrative review, and preliminary determination of no shipments; 2019–2020); *see also* Decision Memorandum for the Preliminary Results of the Seventh Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China, PR 278. Meihua and Deosen filed administrative case briefs. Brief From Craven Trade Law LLC to Sec of Commerce Pertaining to Meihua ("Meihua's Admin. Case Br."), PR 294; Brief from Alston & Bird, LLP to Sec of Commerce Pertaining to Deosen ("Deosen's Admin. Case Br."), PR 293. Jianlong did not file an administrative case brief. Commerce issued its *Final Results* and Final IDM on February 8, 2022. *Final Results*, 87 Fed. Reg. 7104; Final IDM. Commerce determined that Meihua provided inaccurate data and withheld information, and Commerce applied an adverse inference when selecting from facts otherwise available on the record to determine Meihua's dumping margin. Final IDM at 11–16. Commerce assigned a dumping margin to separate rate companies not individually investigated (collectively, "Separate Rate Respondents") (including Deosen and Jianlong) of 77.04%, based on the simple average of the alternative facts available rate of 154.07% assigned to Meihua and the 0% rate assigned to Fufeng. *Final Results*, 87 Fed. Reg. at 7105.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 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 a countervailing duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Application of Facts Otherwise Available to Meihua

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If Commerce determines that a response is

deficient, 19 U.S.C. § 1677e(a)(1) permits Commerce to select from facts otherwise available if necessary information is missing from the record. 19 U.S.C. § 1677e(a)(2) permits Commerce to select from facts otherwise available if an interested party (A) withholds information, (B) fails to provide such information by the deadlines for submission, or in the form and manner requested, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified. 19 U.S.C. § 1677e(a)(2).

The U.S. Court of Appeals for the Federal Circuit ("CAFC") has interpreted 19 U.S.C. § 1677e(a)(1) and (a)(2)(B) to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). Subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

When determining whether a respondent has complied to the "best of its ability," Commerce "assess[es] whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382. This determination requires both an objective and subjective showing. *Id.* at 1382–83. First, Commerce must determine objectively "that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). Next, Commerce must demonstrate subjectively that the respondent's "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382–83. Adverse inferences are not warranted "merely from a failure to respond," but rather in instances in which the Department reasonably expected that "more forthcoming responses should have been made." *Id.* at 1383. "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.*

Meihua argues that Commerce's use of facts otherwise available should be remanded because Commerce's determination is not sup-

ported by substantial evidence and is not in accordance with the law. Pls.' Br. at 19–20. Meihua contends that it did not withhold information requested by Commerce, that it timely submitted all information requested by Commerce, and that its submission of incorrect information did not call into question the reliability of the information reported by Meihua. *Id.* In the alternative, Meihua asserts that even if Commerce's determination that the application of an adverse inference to Meihua was justified, "its decision to apply total [alternative facts available] was not." *Id.* at 19. Meihua contends that it cooperated to the best of its ability and that Commerce failed to conduct the statutorily required evaluation of circumstances leading to its use of alternative facts available. *Id.*

Defendant argues that Commerce's determination that there is a "gap in the record based on Meihua's failure to report accurate information" regarding United States sales is supported by substantial evidence and in accordance with the law because Meihua knowingly reported inaccurate information that was vital to Commerce's calculation of a U.S. price, and thus Commerce's ultimate duty rate calculation. Def.'s Resp. Br. at 12–13. Defendant asserts that "by failing to provide Commerce with [necessary information], Meihua withheld information requested by Commerce, failed to provide that information for the deadline established by Commerce, and—by significantly impeding Commerce's proceeding—Meihua's [sic] created a gap in the record that Commerce needed to fill by reliance on facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(A)–(C)." *Id.* at 13 (citing Final IDM at 14).

Commerce's Section C Questionnaire requested information about amounts of duties paid: "Field Number 29.0: U.S. Customs Duty . . . Description: If terms of sale included this charge, report the unit amount of any customs duty paid on the merchandise under consideration. . . . Narrative: Describe how you calculated the unit cost of U.S. customs duties and customs fees, and include your worksheets as attachments to the narrative response." Letter from USDOC to Grunfeld, Desiderio Pertaining to Meihua Questionnaire; Appendix VIII, Appendix VII, Appendix X ("Section C Questionnaire") at C-19–C-20, PR 44–47. Meihua contends that it provided the information requested by Commerce when Meihua submitted calculations of the unit amounts of customs duty paid, including the amounts of Harbor Maintenance Tax, Merchandise Processing Fee, and ordinary duty due at the time of entry. Pls.' Br. at 8. Meihua asserts that it also provided Section 301 duties paid by Meihua and explained its methodology for reporting the Section 301 duties as follows:

> [B]ecause in the accounting system of Meihua Hong Kong, there is [not] any sub-account to catch these duties (the Section 301 duty, the normal duty, ocean freight and ocean insurance expense as well as [Merchandise Processing Fee/Harbor Maintenance Tax] expenses are deducted from the gross sales revenue to arrive at a net sales revenue). In other words, because of the terms of sale, Meihua began with the sale price and backed out customs duties, 301 duties, ocean freight and insurance, and [Merchandise Processing Fee/Harbor Maintenance Tax] to arrive at the net sales price. . . .
>
> Meihua reported the actual amounts paid to [Customs] upon entry of the merchandise for regular customs duties, [Harbor Maintenance Tax], and [Merchandise Processing Fee]—not any more or less. . . . Meihua had not paid, or been refunded, any amounts; and the amounts it would eventually need to pay or that it would be reimbursed were not final. There was no other number that Meihua could report.

Id. at 8–9 (citing Response from Craven Trade Law LLC to Sec of Commerce Pertaining to Meihua Sec C QR ("Meihua's Section C Questionnaire Response") at C-48, C-31, Exhibit C-5, PR 71–74; Letter from Craven Trade Law LLC to Sec of Commerce Pertaining to Meihua Rebuttal to Pre-Prelim Cmts, PR 274; Meihua's Admin. Case Br. at 9–13).

Approximately three months prior to filing Meihua's Section C Questionnaire Response, Meihua filed a document with the U.S. Department of Customs and Border Protection ("Customs") containing certain information that arguably differed from the information in Meihua's Section C Questionnaire Response (specific differences included the identity of the consignee provided to Customs as well as information related to Meihua's methodology for reporting to Customs entered values for certain sales). *Id.* at 5–6, 10. Meihua explained that it "reported to [Customs] all the errors it had found, but stated that it would perfect (or complete) the disclosure in near the future." *Id.* at 6. Meihua did not initially report the corrected information regarding entered values to Commerce, but in supplemental filings to Commerce, Meihua provided the documents that Meihua had submitted previously to Customs regarding these corrections to information about consignees and reported value for certain sales.

Meihua contends that the information initially provided to Commerce was accurate and answered Commerce's specific question about "duties paid" to Customs. Meihua argues that it accurately "reported the actual amounts paid" to Customs upon entry, and that

"the amounts it would eventually need to pay or that it would be reimbursed were not final" due to ongoing Section 301 exclusion requests. *Id.* at 9. Notably, Meihua asserts that "Commerce provided no indication that it believed Meihua's submissions were deficient in any way." *Id.* at 11. Meihua contends that it first learned of any purported deficiency when it received the AFA Memo on July 30, 2021:

> Meihua was flabbergasted. . . . Commerce hadn't seemed to disagree that the information was not relevant to the calculation of duties, and Commerce certainly hadn't pointed out a deficiency and provided Meihua an opportunity to remedy a deficiency.

Id. at 14.

Defendant does not dispute that Commerce failed to provide notice of a deficiency, instead blaming Meihua for Commerce's lack of knowledge:

> Meihua could have alerted Commerce to the fact that its reported sales were under revision, giving Commerce an opportunity to recognize the deficiency in Meihua's reporting, potentially issue further supplemental questionnaire(s), and adjust its calculations accordingly."

Def.'s Resp. Br. at 14. Commerce determined that:

> Meihua withheld relevant information about these adjustments and failed to disclose certain information concerning the documentation for these reported sales. Meihua was aware that the duties and entered values that it reported to Commerce were incorrect at the time it filed its Section C Questionnaire Response and should have informed Commerce about the inaccuracy of the sales adjustments and other relevant information about the sales at issue early in the proceeding. Meihua's actions call into question the reliability of its reported sales information and prevented Commerce (and interested parties) from fully analyzing and commenting on Meihua's sales data and calculating an accurate dumping margin.

Final IDM at 11. Commerce determined that Meihua's dumping margin should be based on facts otherwise available because:

> (1) Information necessary to calculate an accurate dumping margin for Meihua is not available on the record; (2) Meihua did not fully disclose information regarding the U.S. sales data that

> it reported and thus, in that sense, it withheld information that had been requested; (3) Meihua failed to provide information within the deadlines established, or in the form and manner requested by Commerce; and (4) Meihua significantly impeded this proceeding. We also used adverse inferences in selecting from the facts otherwise available because Meihua did not act to the best of its ability because it withheld information and knowingly failed to disclose that certain reported information was inaccurate.

Id. at 11–12.

With respect to Meihua's allegation that Commerce's determination to use facts otherwise available was not in accordance with the law, Meihua argues that it provided all of the information that Commerce requested, and that Meihua was not provided with sufficient notice or an opportunity to remedy any deficiencies in its filing pursuant to 19 U.S.C. § 1677m(d). This statutory provision states in relevant part:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—
>
> (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or
> (2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).

The Court concludes that Commerce failed to fulfill its statutory obligation under 19 U.S.C. § 1677m(d) because Commerce did not "promptly inform the person submitting the response of the nature of the deficiency and . . . to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." *See id.* Here, Commerce neither notified Meihua of any deficiencies in its provision of information, nor provided Meihua with an opportunity to correct such deficiencies before Commerce determined that Meihua failed to

cooperate to the best of its ability and drew adverse inferences against Meihua. To the extent that Defendant argues that Commerce could not have known about any deficiencies because the information was solely in Meihua's possession, the Court observes that Commerce was aware of potential discrepancies when Meihua provided copies of its prior filings to Customs in Meihua's supplemental responses to Commerce. *See* Def.'s Resp. Br. at 4–5 (acknowledging the timeline upon which Meihua submitted copies of its prior filings).

Because Commerce failed to satisfy its statutory obligation to provide notice and an opportunity to remedy any deficiency under 19 U.S.C. § 1677m(d), the Court concludes that Commerce has no authority to apply adverse facts and inferences under 19 U.S.C. § 1677e. *See Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007) ("Commerce . . . satisfied its obligations under section 1677m(d) when it issued a supplemental questionnaire specifically pointing out and requesting clarification of [the] deficient responses.") (internal quotation omitted); *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1384–85 (Fed. Cir. 2022) ("Commerce's denial of [movant's] request to provide any necessary information was contrary to the statute, which states . . . that Commerce 'shall promptly inform the person submitting the response of the nature of the deficiency and shall . . . provide that person with an opportunity to remedy or explain the deficiency.'"). The Court does not reach the substantive analysis of whether Commerce's determination to use an adverse inference was supported by substantial evidence. The Court remands Commerce's application of adverse facts available and the application of the highest rate in a prior proceeding to Meihua for further consideration in accordance with this Opinion.

II. Exhaustion of Administrative Remedies by Jianlong

Jianlong argues that Commerce's determination to assign Separate Rate Respondents the simple average of the alternative facts available rate of 154.07% assigned to Meihua and the 0% rate assigned to Fufeng is not supported by substantial evidence because the rate of 77.04% assigned to the cooperating Separate Rate Respondents is not reasonably reflective of the non-investigated respondents' potential dumping. Jianlong's Br. at 9–17.

Defendant argues that Jianlong failed to exhaust its administrative remedies because Jianlong did not file an administrative case brief addressing the issues it now seeks to argue before the Court. Def.'s Resp. Br. at 21–22.

Before commencing suit in the U.S. Court of International Trade, an aggrieved party must exhaust all administrative remedies available to it. "In any civil action . . . the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies[.]" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013).

19 C.F.R. § 351.309(c)(2) requires that, "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the . . . final determination or final results." 19 C.F.R. § 351.309(c)(2). There are limited exceptions to the exhaustion requirement. *See Pakfood Pub. Co. v. Unites States*, 34 CIT 1122, 1145, 1147, 724 F. Supp. 2d 1327, 1351, 1352 (2010) (listing "futil[ity] for the party to raise its argument at the administrative level" and issues "fully considered by Commerce" as two generally recognized exceptions to the exhaustion doctrine); *see also Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) ("[E]xhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it.").

The Court concludes that the limited exception to the exhaustion requirement applies here because even though Jianlong did not file an administrative case brief, Jianlong now seeks to raise an identical issue addressed in an administrative case brief filed by Consolidated Plaintiff Deosen, arguing that Commerce's determination did not reasonably reflect the dumping margin assigned to the Separate Rate Respondents. *See* Jianlong's Br. at 5–6. Incorporation by reference to another party's administrative argument is among the exceptions this court has recognized to the exhaustion requirement. *See Holmes Prod. Corp.*, 16 CIT at 1104. The Court will allow Jianlong to proceed with its arguments before this Court.

III. Commerce's Application of the Separate Rate

Jianlong and Deosen argue that the separate rate of 77.04% assigned to the cooperating Separate Rate Respondents, based on the simple average of the alternative facts available rate of 154.07% assigned to Meihua and the 0% rate assigned to Fufeng, is not reasonably reflective of the Separate Rate Respondents' potential dumping. Deosen's Br. at 5–15; Jianlong's Br. at 9–17. Defendant argues that the separate rate calculated by Commerce is reasonably reflective of potential dumping in light of the history of the administrative reviews and because Commerce assigned non-selected companies a rate equal to the simple average of the final rates assigned to Meihua

and Fufeng pursuant to the relevant statutory framework. Def.'s Resp. Br. at 22–23 (citing Final IDM at 5; the Uruguay Round Agreement Act, H.R. Doc. No. 103–316 at 873 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4201). Commerce applied the expected method and determined that the rate of 77.04%, based on the simple average of the alternative facts available rate of 154.07% assigned to Meihua and the 0% rate assigned to Fufeng, reasonably reflected the potential dumping margins. Final IDM at 4–7; *Final Results*, 87 Fed. Reg. at 7105.

The Court is remanding Commerce's application of adverse facts against Meihua due to Commerce's failure to provide notice and an opportunity to cure any deficiencies under 19 U.S.C. § 1677m(d), and therefore does not reach the issue of Commerce's calculation of the separate rate. The Court remands Commerce's *Final Results* for further consideration or explanation regarding the applicable rate for the Separate Rate Respondents based on any changes that Commerce may make to Meihua's rate on remand.

IV. Commerce's Determination Not to Rescind its Review of Deosen

Deosen alleges that, "[o]ne of the Deosen plaintiffs, Deosen Biochemical Ltd., made no shipments during the [period of review] and timely submitted a No Shipment Certification. Only Deosen Biochemical (Ordos) Ltd. exported subject merchandise during the [period of review]." Deosen's Br. at 15. Deosen argues that because Deosen Biochemical Ltd. made no shipments of xanthan gum during the period of review, Commerce's refusal to rescind its review of Deosen Biochemical Ltd. was an abuse of discretion and was inconsistent with Commerce's regulations. Deosen's Br. at 15–16.

Defendant argues that Commerce properly collapsed Deosen Biochemical (Ordos) Ltd. and Deosen Biochemical Ltd. into a single entity. Def.'s Resp. Br. at 26–27 (citing 19 C.F.R. § 351.401(f)). Pursuant to 19 C.F.R. § 351.401(f), Commerce collapsed Deosen Biochemical (Ordos) Ltd. and Deosen Biochemical Ltd. in its original investigation of xanthan gum from China. Memo From USDOC to Office Director Pertaining to Interested Parties Respondent Selection at 2 n.5, PR 39. Commerce continued to treat the individual companies as a collapsed entity in this review. Final IDM at 8.

19 C.F.R. § 351.401(f) governs the treatment of affiliated producers in antidumping proceedings and provides:

> (1) In general. In an antidumping proceeding under this part, [Commerce] will treat two or more affiliated producers as a single entity where those producers have production facili-

ties for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and [Commerce] concludes that there is a significant potential for the manipulation of price or production.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors [Commerce] may consider include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f).

19 C.F.R. § 351.213(d) provides in relevant part:

(3) No shipments. [Commerce] may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.

19 C.F.R. § 351.213(d)(3).

Commerce's regulations permit Commerce to treat two or more affiliated producers as a single entity under a "collapsing analysis" when those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to shift manufacturing priorities and Commerce concludes that there is a significant potential for manipulation of price or production. 19 C.F.R. § 351.401(f). In determining whether there is significant potential for manipulation, Commerce analyzes: (1) the level of common ownership, (2) the extent of managerial crossover between the affiliated firms, and (3) whether the affiliated firms' operations are intertwined through information sharing, facilities, employee crossover, and production and pricing decisions. *Id.* § 351.401(f)(2).

Deosen argues that Commerce failed to conduct a collapsing analysis pursuant to 19 C.F.R. § 351.401(f), improperly rejected Deosen's timely submitted No Shipment Certification, and should have re-

scinded its review of Deosen Biochemical Ltd. Deosen's Br. at 15–16. Deosen alleges that it offered to submit additional documentation to show Commerce that Deosen Biochemical Ltd. should not have been identified as an exporter. *Id.* The Court agrees with Deosen that there is no evidence on the record that Commerce conducted a collapsing analysis pursuant to 19 C.F.R. § 351.401(f) for the relevant period of review. The Court observes that apparently Commerce relied on the past collapsing of the two Deosen entities from the previous investigation, without considering whether any factors had changed during the relevant period of review.

The Court concludes that Commerce's failure to conduct a collapsing analysis for the period of review was an abuse of discretion, particularly because Commerce rejected Deosen Biochemical Ltd.'s No Shipment Certification and its offer to submit additional documents demonstrating no shipments of xanthan gum during the period of review. The Court observes that Commerce's error was further compounded by Commerce's apparent determination that Customs data may have attributed shipments of subject merchandise to Deosen Biochemical Ltd. rather than Deosen Biochemical (Ordos) Ltd. because the two companies were "registered under the same company-specific case number because Commerce has treated the two companies as a single, collapsed entity in prior reviews." Final IDM at 8. At the very least, the Court holds that Commerce should perform a collapsing analysis pursuant to 19 C.F.R. § 351.401(f) to reexamine the record evidence and determine whether Deosen Biochemical Ltd. was an exporter with any shipments during the period of review, whether Deosen Biochemical Ltd. should have been collapsed into a single entity with Deosen Biochemical (Ordos) Ltd., and whether Deosen Biochemical Ltd.'s review should have been rescinded.

The Court remands this issue for Commerce to reconsider its determinations with respect to Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd.

CONCLUSION

For the foregoing reasons, the Court remands the *Final Results*.

Accordingly, it is hereby

ORDERED that the *Final Results* are remanded to Commerce to reconsider the application of adverse facts available to Meihua, the calculation of the separate rate, and whether Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. should be collapsed into a single entity consistent with this opinion; and it is further

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

(1) Commerce shall file the remand determination on or before June 20, 2023;

(2) Commerce shall file the administrative record on or before July 5, 2023;

(3) Comments in opposition to the remand determination shall be filed on or before August 4, 2023;

(4) Comments in support of the remand determination shall be filed on or before September 5, 2023; and

(5) The joint appendix shall be filed on or before October 6, 2023.

Dated: April 19, 2023
New York, New York

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

Slip Op. 23–54

NUCOR CORPORATION, Plaintiff, and STEEL DYNAMICS, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and HYUNDAI STEEL COMPANY AND GOVERNMENT OF THE REPUBLIC OF KOREA, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00050

[Sustaining the final results of the administrative review by the U.S. Department of Commerce in the countervailing duty investigation of certain corrosion-resistant steel products from the Republic of Korea.]

Dated: April 19, 2023

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OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Nucor Corporation ("Nucor") challenges the U.S. Department of Commerce's ("Commerce") Certain Corrosion-Resistant Steel Products From the Republic of Korea ("Korea"): Final Results and Partial Recission of Countervailing Duty Administrative Review; 2019. Compl., ECF No. 10; *Certain Corrosion-Resistant Steel Products From the Republic of Korea* ("*Final Results*"), 87 Fed. Reg. 2759 (Dep't of Commerce Jan. 19, 2022) (final results and partial recission of countervailing duty administrative review; 2019); *see also* Issues and Decision Memorandum for the Final Results and Partial Recission of the 2019 Administrative Review of the Countervailing Duty

Order on Certain Corrosion-Resistant Steel Products from the Republic of Korea ("Final IDM"), PR 213.[1]

Nucor challenges Commerce's determination that the Government of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Pl.'s R. 56.2 Mot. J. Agency R. and Mem. Supp. ("Pl.'s Br."), ECF Nos. 34, 35; Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply Br."), ECF Nos. 45, 46. Defendant United States ("Defendant"), Defendant-Intervenor Hyundai Steel Company ("Hyundai Steel"), and the Government of the Republic of Korea ("Government of Korea") argue that the Court should sustain the *Final Results*. Def.'s Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp. Br."), ECF No. 38; Def.-Interv.'s Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 36, 37; Def.-Interv.'s Corrected Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R., ECF No. 42–2, 43–2. For the reasons discussed below, the Court sustains Commerce's *Final Results*.

BACKGROUND

Commerce published its countervailing duty order in the Federal Register. *Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea and the People's Republic of China*, 81 Fed. Reg. 48,387 (Dep't of Commerce July 25, 2016) (countervailing duty order). Commerce initiated an administrative review of the countervailing duty order on certain corrosion-resistant steel products from Korea for the period of review of January 1, 2019, to December 31, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 54,983, 54,990–91 (Dep't of Commerce Sept. 3, 2020). Petitioners U.S. Steel Corporation ("U.S. Steel") and Nucor filed new subsidy allegations. Letter from Cassidy Levy Kent (USA) LLP and Wiley Rein LLP to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea: Petitioners' New Subsidy Allegation (Jan. 4, 2021), PR 96. Nucor and U.S. Steel alleged that the Government of Korea provided countervailable subsidies to the steel industry in the form of electricity for less than adequate remuneration. *See id.* Commerce initiated a review of the alleged subsidy. Memorandum from Dennis McClure to Irene Darzenta Tzafolias, re: Countervailing Duty Administrative Review of Certain Corrosion-Resistant Steel Products from the Republic of Korea: New Subsidy Allegation (Feb. 1, 2021), PR 109. Commerce issued supplemental questionnaires regarding the subsidy allegation to the Government of Korea and to mandatory respondents Hyundai

[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF No. 48.

Steel and KG Dongbu Steel Co., Ltd. ("KG Dongbu") (collectively, "mandatory respondents"), each of whom provided responses. Letter from Yoon & Yang LLC to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580–879: Government of Korea's New Subsidy Allegations Questionnaire Response (Feb. 24, 2021) ("Government of Korea's NSAQR"), PR 130; Letter from Morris, Manning & Martin, LLP to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580–879: Hyundai Steel's New Subsidy Allegations Questionnaire Response (Feb. 24, 2021) ("Hyundai Steel's NSAQR"), PR 129; Letter from Morris, Manning & Martin, LLP to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580–879: Dongbu's New Subsidy Allegations Questionnaire Response (Feb. 10, 2021) ("KG Dongbu's NSAQR"), PR 123.

Commerce issued the *Preliminary Results* and the *Final Results* of the administrative review. *Certain Corrosion-Resistant Steel Products from the Republic of Korea* ("*Preliminary Results*"), 86 Fed. Reg. 37,740 (Dep't of Commerce July 16, 2021) (preliminary results of countervailing duty administrative review, 2019); Preliminary Decision Memorandum accompanying Certain Corrosion-Resistant Steel Products From the Republic of Korea 86 Fed. Reg. 37,740 (Dep't Commerce July 16, 2021 (prelim. results of countervailing duty admin. rev., 2019) ("Prelim. DM"), PR 173; *Final Results*, 87 Fed. Reg. 2759; Final IDM. In the Final IDM, Commerce explained that it applied a "Tier 3 analysis" pursuant to 19 C.F.R. § 351.511(a)(2)(iii) to assess whether the electricity prices charged by the Korea Electric Power Corporation ("KEPCO") were consistent with market principles by evaluating whether the electricity prices allowed for the recovery of costs plus a rate of recovery or profit. Final IDM at 15. Using this methodology, Commerce determined that some electricity prices were in line with market principles and some were not, with the difference between the price paid and the benchmark being the benefit conferred. *Id.* Commerce determined that no measurable benefit was conferred in this administrative review. *Id.*

Commerce calculated final subsidy rates of 0.47% or de minimis for Hyundai Steel and 10.51% for KG Dongbu. *Final Results*, 87 Fed. Reg. at 2760.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 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 a countervailing duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Countervailable Subsidy Overview

A countervailable subsidy exists when a foreign government provides a financial contribution to a specific industry that confers a benefit upon a recipient within the industry. 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014). A countervailable benefit shall normally be treated as conferred if goods or services are provided for less than adequate remuneration. 19 U.S.C. § 1677(5)(E)(iv); *see also POSCO v. United States*, 977 F.3d 1369, 1371 (Fed. Cir. 2020). "For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

Commerce's regulations provide a three-tiered approach for determining the adequacy of remuneration of an investigated good or service. *See* 19 C.F.R. § 351.511(a)(2). The Tier 1 and Tier 2 analyses compare the government price to a market-based price for the good or service in the country in question, or in a world market. *Id.* § 351.511(a)(2)(i), (ii). The Tier 3 analysis provides that when both an in-country market-based price and a world market price are unavailable, Commerce examines whether the government price is consistent with market principles. *Id.* § 351.511(a)(2)(iii). Commerce makes this determination based on "information from the foreign government about how it sets its price." *Fine Furniture (Shanghai) Ltd.*, 748 F.3d at 1370. "[I]f Commerce determines that government pricing is not consistent with market principles, then 'a benefit shall normally be treated as conferred.'" *POSCO*, 977 F.3d at 1372 (quoting 19 U.S.C. § 1677(5)(E)(iv)); *see also Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) (discussing Commerce's application of the three-tier methodology).

II. Nucor's Allegations and Commerce's Determination

Nucor challenges as unsupported by substantial evidence and not in accordance with the law Commerce's determination that the Gov-

ernment of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Compl. at 8.

A. Whether Commerce's Determination was in Accordance with the Law

Nucor argues that Commerce's determination was unlawful because Commerce disregarded the government price to respondents and purportedly should have determined whether a benefit was conferred to a specific respondent individually, not in the aggregate. *See* Pl.'s Br. at 12–24. Nucor asserts that 19 U.S.C. § 1677f–1(e) requires Commerce to determine whether a benefit was conferred to an *individual entity*. *Id.* at 12. 19 U.S.C. § 1677f-1(e)(1) states that:

> In determining countervailable subsidy rates . . . the administering authority shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.

19 U.S.C. § 1677f–1(e)(1). Nucor contends that 19 U.S.C. § 1677f–1(e) requires Commerce to focus on the "prices that the respondents actually paid KEPCO for electricity" rather than KEPCO's cost by classification data reflecting KEPCO's total cost of sales and total sales income. Pl.'s Br. at 15.

In the Final IDM, Commerce continued to determine that its Tier 3 analysis required Commerce to assess whether the electricity prices charged by KEPCO were consistent with market principles by evaluating whether the electricity prices allowed for the recovery of costs plus a rate of recovery or profit. Final IDM at 15. Commerce explained that Commerce's analysis focused not on KEPCO's total revenue, but on KEPCO's methodology for determining the adequacy of its pricing through cost and revenue data. *Id.* at 16–17.

Commerce determined that under the Tier 3 analysis: (1) KEPCO fully recovered costs and did not confer a benefit; or (2) the prices for electricity resulted in a non-measurable benefit during the period of review. Final IDM at 15. Commerce explained:

> [O]ur [Tier 3] analysis for electricity in Korea assesses whether the electricity prices charged by KEPCO are consistent with market principles by evaluating the electricity prices to see if they allow for the recovery of costs, plus a rate of recovery or profit. This well-established approach has been relied upon by Commerce in many cases and upheld by the [U.S. Court of Appeals for the Federal Circuit] in both Nucor and POSCO. To the extent that we determine that the electricity prices are in line with market principles, then we determine that no benefit is

> conferred. . . . In the instant review, we determined that some electricity prices were in line with market principles while others were not and, as such, for those categories that did not cover costs plus a rate of recovery, we calculated a benefit amount. Furthermore, KG Dongbu and Hyundai Steel reported paying electricity prices that are listed on KEPCO's electricity rate schedule, and supporting documentation indicated that KG Dongbu and Hyundai Steel's operations were classified under the correct electricity consumption categories.

Id.

Addressing Nucor's argument that Commerce should apply a standard that directly compares the electricity prices paid by a respondent to the cost plus profit rate of KEPCO to determine whether a benefit exists, Commerce determined that:

> [O]ur analysis is not based on KEPCO's total revenue but, instead, KEPCO's methodology for determining the adequacy of its pricing through cost and revenue data. As such, our analysis only relates to financial performance to the extent income from prices charged for each electricity consumption category covers KEPCO's costs, plus profit. Because, as stated above, KG Dongbu and Hyundai Steel paid electricity prices that are charged to all companies in the corresponding electricity consumption classifications, our analysis does, in fact, account for whether the prices KG Dongbu and Hyundai Steel paid were covering KEPCO's costs.

Id. at 17. Defendant asserts that Commerce's analysis was lawful and in conformity with the U.S. Court of Appeals for the Federal Circuit's ("CAFC") decisions in *Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) and *POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020). Def.'s Br. at 9–11.

The Court notes that 19 U.S.C. § 1677f-1(e)(1) refers to the requirement that Commerce determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise, which Commerce satisfied here when it determined individual countervailable subsidy rates of 0.47% for Hyundai Steel and 10.51% for KG Dongbu. *Final Results*, 87 Fed. Reg. at 2760. The language of 19 U.S.C. § 1677f–1(e)(1) does not require that Commerce focus on the prices that the respondents actually paid KEPCO for electricity, as alleged by Nucor. Commerce explained that notwithstanding Nucor's challenge, Commerce did contemplate the prices paid by mandatory respondents Hyundai Steel and KG Dongbu when Commerce consid-

ered the prices paid by all companies, because Hyundai Steel and KG Dongbu paid the same prices that other companies paid within the corresponding electricity consumption classifications. Final IDM at 16–17.

Nucor also contends that 19 C.F.R. § 351.503(b)(1) requires Commerce to analyze whether a benefit was conferred when an individual firm pays less for its inputs than it would otherwise pay. Pl.'s Br. at 12. 19 C.F.R. § 351.503(b)(1) states that:

> For other government programs, [Commerce] normally will consider a benefit to be conferred where a firm pays less for its inputs (e.g., money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

19 C.F.R. § 351.503(b)(1). Nucor argues that 19 C.F.R. § 351.503(b)(1) compels Commerce to consider the price paid by "the firm" or an individual respondent. Pl.'s Br. at 12.

Commerce explained that "[w]hile Nucor appears to argue that we should disregard a market analysis of KEPCO's pricing and simply focus on the price charged to the respondents, 19 [C.F.R. §] 351.511(a)(2)(iii) necessarily requires that we evaluate whether KEPCO's pricing is consistent with market principles, which the record demonstrates." Final IDM at 17. 19 C.F.R. § 351.511(a)(2)(iii) states in relevant part:

> If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

19 C.F.R. § 351.511(a)(2)(iii).

As discussed above, Commerce considered the prices paid by mandatory respondents KG Dongbu and Hyundai Steel when Commerce considered the prices paid by all companies, because KG Dongbu and Hyundai Steel paid the same prices that other companies paid within the corresponding electricity consumption classifications. Moreover, Commerce's determination regarding whether the prices paid by all companies, including KG Dongbu and Hyundai Steel, were consistent with market principles, was in conformity with the relevant statute's instruction for Commerce to determine the adequacy of remuneration in relation to prevailing market conditions, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale. 19 U.S.C. § 1677(5)(E). When conducting a Tier 3 analysis, the CAFC has held that Commerce has "considerable prima

facie leeway to make a reasonable choice within the permissible range" of calculation methodologies, so long as that choice is properly justified "based on the language and policies of the countervailing-duty statute . . . and other relevant considerations." *Nucor Corp.*, 927 F.3d at 1255. The Court concludes that Commerce's determination was reasonable and in accordance with the law.

B. Whether Commerce's Determination was Supported by Substantial Evidence

Nucor challenges as unsupported by substantial evidence Commerce's determination that the Government of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Compl. at 8. In order to analyze the structure of the Korean electricity market and the role that the Korean Power Exchange ("KPX") played in price setting, Commerce reviewed record documents, including questionnaire responses filed by the Government of Korea, KG Dongbu, and Hyundai Steel regarding the structure of the Korean electricity market and operations of KEPCO. Final IDM at 15–19; Government of Korea's NSAQR; Letter from Yoon & Yang LLC to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580–879: Government of Korea's New Subsidy Allegations Supplemental Questionnaire Response (Mar. 11, 2021) ("Government of Korea's Supplemental NSAQR"), PR 140; KG Dongbu's NSAQR; Hyundai Steel's NSAQR; Letter from Yoon & Yang LLC to Sec'y Commerce, re: Certain Corrosion-Resistant Steel Products from the Republic of Korea, Case No. C-580–879: Government of Korea's New Subsidy Allegations Second Supplemental Questionnaire Response (Apr. 13, 2021) ("Government of Korea's Second Supplemental NSAQR"), PR 146.

For example, Commerce reviewed the Government of Korea's NSAQR to support Commerce's determination that KG Dongbu and Hyundai Steel reported paying electricity prices that were listed on KEPCO's electricity rate schedule and that KG Dongbu and Hyundai Steel's operations were classified under the correct electricity consumption categories. Final IDM at 15. Exhibit E-9 to the Government of Korea's NSAQR cited by Commerce is a document entitled "Electricity Tariff Schedules" and provides applicable rate schedules for various classifications of electricity, including industrial electricity rates for different voltage levels with corresponding demand charge in won/kWh and energy charge in won/kWh. *Id.*; Government of Korea's NSAQR at Exhibit E-9. Commerce also cited KG Dongbu's NSAQR at Exhibits NSA-2 to NSA-3, which are documents entitled "Electricity Template" and "Electricity Bills for July 2019," and Hyundai Steel's NSAQR at Exhibits NSA-2 to NSA-3, which are documents

entitled "Electricity Template" and "Electricity Bills for July 2019." Final IDM at 15; KG Dongbu's NSAQR at Exhibits NSA-2, NSA-3. Commerce determined based on a review of these record documents that KG Dongbu and Hyundai Steel reported paying electricity prices that were listed on KEPCO's electricity rate schedule. Final IDM at 15.

Commerce also determined based on record evidence that KPX's standardized electricity pricing system included fixed and variable costs to ensure that the expected rate of return was suitably allocated between the independent generators along with KEPCO and the six wholly-owned subsidiary generators (GENCOs) in the KPX market. *See* Final IDM at 17–18. For example, Commerce cited the Government of Korea's NSAQR to support its determination that KEPCO was obligated to pay the GENCOs for the total cost of generating electricity, including interest on loans, even if KEPCO was not profitable. Final IDM at 17; Government of Korea's NSAQR at 27 (stating that "if KEPCO makes profit from the sales of electricity, such profit is shared with its generators, and vice versa. KEPCO and its subsidiaries enjoy the profits and share the risks because KEPCO wholly owns its six subsidiaries, and KEPCO needs to have its subsidiaries operate stably. Nevertheless, KEPCO is obligated to pay its subsidiaries the total cost . . . regardless of whether KEPCO has made profits or not").

Commerce determined based on record evidence such as the Government of Korea's Supplemental NSAQR that the Government of Korea provided a detailed explanation and supporting documentation of how KEPCO's profit rate was calculated and how it was based on KEPCO's operations. Final IDM at 18 (citing the Government of Korea's Second Supplemental NSAQR at 7–8) (providing answers to questions detailing how the rate of return was calculated)). Commerce also determined based on record evidence that the prices paid by KG Dongbu and Hyundai Steel were those set by KEPCO's electricity rate schedules. *Id.* at 19 (citing the Government of Korea's NSAQR at Exhibit E-9) (providing rate schedules for electricity)).

The Court notes that Nucor alleges that "overwhelming record evidence to the contrary" shows that Commerce's determination is not supported by substantial evidence, but Nucor fails to provide evidence substantiating this claim. Pl.'s Br. at 22. Mere allegations are insufficient to raise doubts as to the veracity of the evidence upon which Commerce relied in making its determination. *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 15, 704 F. Supp 1114, 1117 (1989) (holding that "[s]peculation is not support for a finding").

The Court concludes that Commerce's determination is supported by substantial evidence because Commerce cited record documents, including the questionnaire responses of the Government of Korea, KG Dongbu, and Hyundai Steel, showing that the respondents did not receive a measurable benefit and "KG Dongbu and Hyundai Steel paid electricity prices that are charged to all companies in the corresponding electricity consumption classifications[.]" Final IDM at 17; *see POSCO*, 977 F.3d at 1374 ("If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity, then there is no benefit.").

CONCLUSION

The Court holds that Commerce's determination that the Government of Korea does not subsidize the Korean steel industry through the provision of electricity for less than adequate remuneration is supported by substantial evidence and in accordance with the law. The Court sustains the *Final Results*. Judgment will issue accordingly.

Dated: April 19, 2023
New York, New York

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

Slip Op. 23–55

NUCOR CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and GOVERNMENT OF THE REPUBLIC OF KOREA, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00137

[Sustaining the final results of the administrative review by the U.S. Department of Commerce in the countervailing duty investigation of certain cold-rolled steel flat products from the Republic of Korea.]

Dated: April 19, 2023

Alan H. Price, *Christopher B. Weld*, *Tessa V. Capeloto*, and *Adam M. Teslik*, Wiley Rein, LLP, of Washington, D.C., for Plaintiff Nucor Corporation.

L. Misha Preheim, Assistant Director, and *Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Yujin K. McNamara, *Sarah S. Sprinkle*, *Daniel M. Witkowski*, *Devin S. Sikes*, *Sydney L. Stringer*, and *Sung Un K. Kim*, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., for Defendant-Intervenor Government of the Republic of Korea.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Nucor Corporation ("Nucor") challenges the U.S. Department of Commerce's ("Commerce") Certain Cold-Rolled Steel Flat Products From the Republic of Korea ("Korea"): Final Results of Countervailing Duty Administrative Review; 2019. Compl., ECF No. 9; *Certain Cold-Rolled Steel Flat Products From the Republic of Korea* ("*Final Results*"), 87 Fed. Reg. 20,821 (Dep't of Commerce Apr. 8, 2022) (final results of countervailing duty administrative review; 2019); *see also* Issues and Decision Mem. Accompanying Certain Cold-Rolled Steel Flat Products From the Republic of Korea ("Final IDM"), PR 198.[1]

Nucor challenges Commerce's determination that the Government of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Pl.'s R. 56.2 Mot. J. Agency R. and Mem. Supp. ("Pl.'s Br."), ECF Nos. 27, 28; Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("Pl.'s Reply Br."), ECF Nos. 32, 33. Defendant United States ("Defendant") and Defendant-Intervenor the Government of the Republic of Korea ("Government of Korea") argue that the Court

[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF No. 35.

should sustain the *Final Results*. Def.'s Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Def.'s Resp. Br."), ECF No. 29; Def.-Interv.'s Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 30, 31. For the reasons discussed below, the Court sustains Commerce's *Final Results*.

BACKGROUND

Commerce published its countervailing duty order in the Federal Register. *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea*, 81 Fed. Reg. 64,436 (Dep't of Commerce Sept. 20, 2016) (amended final affirmative countervailing duty determination and countervailing duty order (the Republic of Korea) and countervailing duty orders (Brazil and India). Commerce initiated an administrative review of the countervailing duty order on certain cold-rolled steel flat products from Korea for the period of review of January 1, 2019, to December 31, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 68,840, 68,846–47 (Dep't of Commerce Oct. 30, 2020). Petitioners U.S. Steel Corporation ("U.S. Steel") and Nucor filed new subsidy allegations. Letter from Cassidy Levy Kent (USA) LLP and Wiley Rein LLP to Sec'y of Commerce, re: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Petitioners' New Subsidy Allegations (Feb. 24, 2021), PR 83–84. Nucor and U.S. Steel alleged that the Government of Korea provided countervailable subsidies to the steel industry in the form of electricity for less than adequate remuneration. *See id.* Commerce initiated a review of the alleged subsidy. Memorandum from Moses Y. Song & Natasia Harrison, Int'l Trade Compliance Analysts, to Dana S. Mermelstein, Off. Director, re: Countervailing Duty Administrative Review of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: New Subsidy Allegation (Mar. 12, 2021), PR 107. Commerce issued supplemental questionnaires regarding the subsidy allegation to the Government of Korea and to mandatory respondents Hyundai Steel and POSCO (collectively, "mandatory respondents"), each of whom provided responses. Letter from Yoon & Yang LLC and Morris, Manning & Martin LLP to Sec'y of Commerce, re: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580–882: Government of Korea's New Subsidy Allegation Questionnaire Response (Mar. 25, 2021) ("Government of Korea's NSAQR") PR 121–122; Letter from Morris, Manning & Martin, LLP to Sec'y of Commerce, re: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C580–882: Hyundai Steel's New Subsidy Allegation Questionnaire Response (Mar. 22, 2021) ("Hyundai Steel's NSAQR"), PR 120; Letter from Morris, Manning & Martin, LLP to Sec'y of Com-

merce, re: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580–882: POSCO's New Subsidy Allegation Questionnaire Response (Mar. 29, 2021) ("POSCO'S NSAQR"), PR 123.

Commerce issued the *Preliminary Results* and the *Final Results* of the administrative review. *Certain Cold-Rolled Steel Flat Products from the Republic of Korea* ("*Preliminary Results*"), 86 Fed. Reg. 55,572 (Dep't of Commerce Oct. 6, 2021) (preliminary results of countervailing duty administrative review, 2019); Preliminary Decision Memorandum accompanying Certain Cold-Rolled Steel Flat Products from the Republic of Korea, 86 Fed. Reg. 55,572 (Dep't Commerce Oct. 6, 2021) (prelim. results of countervailing duty admin. rev., 2019) ("Prelim. DM"), PR 169; *Final Results*, 87 Fed. Reg. 20,821; Final IDM. In the Final IDM, Commerce explained that it applied a "Tier 3 analysis" pursuant to 19 C.F.R. § 351.511(a)(2)(iii) to assess whether the electricity prices charged by the Korea Electricity Power Corporation ("KEPCO") were consistent with market principles by evaluating whether the electricity prices allowed for the recovery of costs plus a rate of recovery or profit. Final IDM at 20–25. Using this methodology, Commerce determined that some electricity prices were in line with market principles and some were not, with the difference between the price paid and the benchmark being the benefit conferred. *Id.* at 21. Commerce determined that no measurable benefit was conferred in this administrative review. Id. at 20–25.

Commerce calculated de minimis final subsidy rates of 0.46% for Hyundai Steel and 0.22% for POSCO. *Final Results*, 87 Fed. Reg. at 20,821, 20,823.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 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 a countervailing duty order. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Countervailable Subsidy Overview

A countervailable subsidy exists when a foreign government provides a financial contribution to a specific industry that confers a benefit upon a recipient within the industry. 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365,

1369 (Fed. Cir. 2014). A countervailable benefit shall normally be treated as conferred if goods or services are provided for less than adequate remuneration. 19 U.S.C. § 1677(5)(E)(iv); *see also POSCO v. United States*, 977 F.3d 1369, 1371 (Fed. Cir. 2020). "For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

Commerce's regulations provide a three-tiered approach for determining the adequacy of remuneration of an investigated good or service. *See* 19 C.F.R. § 351.511(a)(2). The Tier 1 and Tier 2 analyses compare the government price to a market-based price for the good or service in the country in question, or in a world market. *Id.* § 351.511(a)(2)(i), (ii). The Tier 3 analysis provides that when both an in-country market-based price and a world market price are unavailable, Commerce examines whether the government price is consistent with market principles. *Id.* § 351.511(a)(2)(iii). Commerce makes this determination based on "information from the foreign government about how it sets its price." *Fine Furniture (Shanghai) Ltd.*, 748 F.3d at 1370. "[I]f Commerce determines that government pricing is not consistent with market principles, then 'a benefit shall normally be treated as conferred.'" *POSCO*, 977 F.3d at 1372 (quoting 19 U.S.C. § 1677(5)(E)(iv)); *see also Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) (discussing Commerce's application of the three-tier methodology).

II. Nucor's Allegations and Commerce's Determination

Nucor challenges as unsupported by substantial evidence and not in accordance with the law Commerce's determination that the Government of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Compl. at 9.

A. Whether Commerce's Determination was in Accordance with the Law

Nucor argues that Commerce's determination was unlawful because Commerce disregarded the government price to respondents and purportedly should have determined whether a benefit was conferred to a specific respondent individually, not in the aggregate. *See* Pl.'s Br. at 12–24. Nucor asserts that 19 U.S.C. § 1677f–1(e) requires Commerce to determine whether a benefit was conferred to an *individual entity*. *Id.* at 13. 19 U.S.C. § 1677f–1(e)(1) states that:

> In determining countervailable subsidy rates . . . the administering authority shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.

19 U.S.C. § 1677f–1(e)(1). Nucor contends that 19 U.S.C. § 1677f–1(e) requires Commerce to focus on the "prices that the respondents actually paid KEPCO for electricity" rather than KEPCO's cost by classification data reflecting KEPCO's total cost of sales and total sales income. Pl.'s Br. at 16.

In the Final IDM, Commerce continued to determine that its Tier 3 analysis required Commerce to assess whether the electricity prices charged by KEPCO were consistent with market principles by evaluating whether the electricity prices allowed for the recovery of costs plus a rate of recovery or profit. Final IDM at 20. Commerce explained that Commerce's analysis focused not on KEPCO's total revenue, but on KEPCO's methodology for determining the adequacy of its pricing through cost and revenue data. *Id.* at 21–22. Commerce determined that under the Tier 3 analysis: (1) KEPCO fully recovered costs and did not confer a benefit; or (2) the prices for electricity resulted in a non-measurable benefit during the period of review. Final IDM at 20. Commerce explained:

> [O]ur [Tier 3] analysis for electricity in Korea assesses whether the electricity prices charged by KEPCO are consistent with market principles by evaluating the electricity prices to see if they allow for the recovery of costs, plus a rate of return or profit. This well-established approach has been relied upon by Commerce in many cases and upheld by the [U.S. Court of Appeals for the Federal Circuit] in both Nucor and POSCO. To the extent that we determine that the electricity prices are in line with market principles, then we determine that no benefit is conferred. . . . In this review, we determined that some electricity prices were in line with market principles and, therefore did not confer a benefit. Other electricity price categories did not cover costs plus a rate of recovery; for electricity purchased at those prices, we determined a benchmark consistent with market principles and we calculated a benefit amount. Furthermore, Hyundai Steel and POSCO reported paying electricity prices that are listed on KEPCO's electricity rate schedule, and supporting documentation indicated that Hyundai Steel and POSCO's operations were classified under the correct electricity consumption categories.

Id. at 20–21. Defendant asserts that Commerce's analysis was lawful and in conformity with the U.S. Court of Appeals for the Federal Circuit's ("CAFC") decisions in Nucor and POSCO. Def.'s Br. at 19–26.

The Court notes that 19 U.S.C. § 1677f–1(e)(1) refers to the requirement that Commerce determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise, which Commerce satisfied here when it determined individual countervailable subsidy rates of 0.46% for Hyundai Steel and 0.22% for POSCO. *Final Results*, 87 Fed. Reg. at 20,823. The language of 19 U.S.C. § 1677f–1(e)(1) does not require that Commerce focus on the prices that the respondents actually paid KEPCO for electricity, as alleged by Nucor. Commerce explained that notwithstanding Nucor's challenge, Commerce did contemplate the prices paid by mandatory respondents Hyundai Steel and POSCO when Commerce considered the prices paid by all companies, because Hyundai Steel and POSCO paid the same prices that other companies paid within the corresponding electricity consumption classifications.

Nucor also contends that 19 C.F.R. § 351.503(b)(1) requires Commerce to analyze whether a benefit was conferred when an individual firm pays less for its inputs than it would otherwise pay. Pl.'s Br. at 12–15. 19 C.F.R. § 351.503(b)(1) states that:

> For other government programs, [Commerce] normally will consider a benefit to be conferred where a firm pays less for its inputs (e.g., money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

19 C.F.R. § 351.503(b)(1). Nucor argues that 19 C.F.R. § 351.503(b)(1) compels Commerce to consider the price paid by "the firm" or an individual respondent. Pl.'s Br. at 12–15.

Commerce explained that, "[w]hile Nucor appears to argue that we should disregard a market analysis of KEPCO's pricing and simply focus on the price charged to the respondents, 19 C.F.R. [§] 351.511(a)(2)(iii) necessarily requires that we evaluate whether KEPCO's pricing is consistent with market principles, which the record demonstrates." Final IDM at 22. 19 C.F.R. § 351.511(a)(2)(iii) states in relevant part:

> If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

19 C.F.R. § 351.511(a)(2)(iii).

As discussed above, Commerce considered the prices paid by mandatory respondents POSCO and Hyundai Steel when Commerce considered the prices paid by all companies, because POSCO and Hyundai Steel paid the same prices that other companies paid within the corresponding electricity consumption classifications. Moreover, Commerce's determination regarding whether the prices paid by all companies, including POSCO and Hyundai Steel, were consistent with market principles, was in conformity with the relevant statute's instruction for Commerce to determine the adequacy of remuneration in relation to prevailing market conditions, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale. 19 U.S.C. § 1677(5)(E). When conducting a Tier 3 analysis, the CAFC has held that Commerce has "considerable prima facie leeway to make a reasonable choice within the permissible range" of calculation methodologies, so long as that choice is properly justified "based on the language and policies of the countervailing-duty statutes . . . and other practical considerations." *Nucor Corp.*, 927 F.3d at 1255. The Court concludes that Commerce's determination was reasonable and in accordance with the law.

B. Whether Commerce's Determination was Supported by Substantial Evidence

Nucor challenges as unsupported by substantial evidence Commerce's determination that the Government of Korea's provision of electricity for less than adequate remuneration did not confer a benefit. Compl. at 9. In order to analyze the structure of the Korean electricity market and the role that the Korean Power Exchange ("KPX") played in price setting, Commerce reviewed record documents, including questionnaire responses filed by the Government of Korea, POSCO, and Hyundai Steel regarding the structure of the Korean electricity market and operations of KEPCO. Final IDM at 21–25; Government of Korea's NSAQR; POSCO's NSAQR; Hyundai Steel's NSAQR.

For example, Commerce reviewed the Government of Korea's NSAQR to support Commerce's determination that POSCO and Hyundai Steel reported paying electricity prices that were listed on KEPCO's electricity rate schedule and that POSCO and Hyundai Steel's operations were classified under the correct electricity consumption categories. Final IDM at 21. Exhibit E-9 to the Government of Korea's NSAQR cited by Commerce is a document entitled "Electricity Tariff Schedules" and provides applicable rate schedules for various classifications of electricity, including industrial electricity rates for different voltage levels with corresponding demand charge in won/kWh and energy charge in won/kWh. Final IDM at 21; Gov-

ernment of Korea's NSAQR at Exhibit E-9. Commerce also cited POSCO's NSAQR at Exhibits NSA-2 to NSA-3, which are documents entitled "Electricity Template" and "Electricity Bills for July 2019," and Hyundai Steel's NSAQR at Exhibits NSA-2 to NSA-3, which are documents entitled "Electricity Template" and "Electricity Bills for July 2019." Final IDM at 21; POSCO's NSAQR at Exhibits NSA-2, NSA-3; Hyundai Steel's NSAQR at Exhibits NSA-2, NSA-3. Commerce determined based on a review of these record documents that POSCO and Hyundai Steel reported paying electricity prices that were listed on KEPCO's electricity rate schedule. Final IDM at 25.

Commerce also determined based on record evidence that KPX's standardized electricity pricing system included fixed and variable costs to ensure that the expected rate of return was suitably allocated between the independent generators along with KEPCO and the six wholly-owned subsidiary generators (GENCOs) in the KPX market. *See Id.* at 23. For example, Commerce cited the Government of Korea's NSAQR to support its determination that KEPCO was obligated to pay the GENCOs for the total cost of generating electricity, including interest on loans, even if KEPCO was not profitable. *Id.*; Government of Korea's NSAQR at 31 (stating that "if KEPCO generates profit from the sale of electricity, such profit is shared with its generators, and vice versa. KEPCO and its subsidiaries enjoy the profits and share the risks because KEPCO wholly owns its six subsidiaries, and KEPCO needs to have its subsidiaries operate stably. Nevertheless, KEPCO is obligated to pay its subsidiaries the total cost . . . regardless of whether KEPCO has generated profit or not").

Commerce determined based on record evidence such as the Government of Korea's Supplemental NSAQR that the Government of Korea provided a detailed explanation and supporting documentation of how KEPCO's profit rate was calculated and how it was based on KEPCO's operations. Final IDM at 24 (citing Letter from Yoon & Yang LLC and Morris, Manning & Martin, LLP to Sec'y of Commerce, re: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580–882: Government of Korea's New Subsidy Allegation Supplemental Questionnaire Response (Apr. 8, 2021) ("Government of Korea's Supplemental NSAQR") at 4–5, PR 126) (providing answers to questions detailing how the rate of return was calculated)). Commerce also determined based on record evidence that the prices paid by POSCO and Hyundai Steel were those set by KEPCO's electricity rate schedules. *Id.* at 25 (citing the Government of Korea's NSAQR at Exhibit E-9) (providing rate schedules for electricity).

The Court notes that Nucor alleges that "overwhelming record evidence to the contrary" shows that Commerce's determination is

not supported by substantial evidence, but Nucor fails to provide evidence substantiating this claim. Pl.'s Br. at 23. Mere allegations are insufficient to raise doubts as to the veracity of the evidence upon which Commerce relied in making its determination. *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 15, 704 F. Supp. 1114, 1117 (1989) (holding that "[s]peculation is not support for a finding").

The Court concludes that Commerce's determination is supported by substantial evidence because Commerce cited record documents, including the questionnaire responses of the Government of Korea, POSCO, and Hyundai Steel, showing that the respondents did not receive a measurable benefit and "Hyundai Steel and POSCO paid electricity prices that are charged to all companies in the corresponding electricity consumption classifications[.]" Final IDM at 22; *see POSCO*, 977 F.3d at 1374 ("If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity, then there is no benefit.").

CONCLUSION

The Court holds that Commerce's determination that the Government of Korea does not subsidize the Korean steel industry through the provision of electricity for less than adequate remuneration is supported by substantial evidence and in accordance with the law. The Court sustains the *Final Results*. Judgment will issue accordingly.

Dated: April 19, 2023
New York, New York

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

Slip Op. 23–56

SUZANO S.A., (FORMERLY KNOWN AS SUZANO PAPEL E CELULOSE S.A.), Plaintiff, v. UNITED STATES, Defendant, and DOMTAR CORPORATION, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00069

[The court sustains in part and remands in part the Department of Commerce's *Remand Results*.]

Dated: April 20, 2023

Craig A. Lewis, *Nicholas W. Laneville*, and *Cayla D. Ebert*, Hogan Lovells US LLP, of Washington, D.C., for Plaintiff Suzano S.A.

Antonia R. Soares, Senior 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*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Benjamin Juvelier*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Schneiderman, and *Stephen J. Orava*, King & Spalding, LLP, of Washington, D.C., for Defendant-Intervenor Domtar Corporation.

OPINION AND ORDER

Katzmann, Judge:

The court is asked to revisit a challenge to Commerce's calculation of cost of production. Plaintiff Suzano S.A (formerly known as Suzano Papel e Celulose S.A.) ("Suzano"), brought this action against Defendant United States ("the Government") to challenge the Department of Commerce's ("Commerce") final determination in the 2018–2019 administrative review of the antidumping duty order on uncoated paper from Brazil. *See Certain Uncoated Paper From Brazil: Final Results of Antidumping Duty Administrative Review; 2018–2019*, 86 Fed. Reg. 7,254 (Dep't Com. Jan. 27, 2021) ("*Final Results*"). Suzano argued that Commerce erred by failing to exclude certain of its derivative trading expenses from the cost of production calculation as both (1) investment-related and (2) extraordinary. The court remanded, concluding that Commerce's decision to include the expenses in Suzano's cost of production was unsupported by substantial evidence on both counts. *Suzano S.A. v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1225, 1228 (2022) ("*Suzano I*").

On remand, Commerce continues to determine that the derivative trading expenses should be included in the cost of production, as the expenses were neither investment-related nor extraordinary. *See* Final Results of Redetermination Pursuant to Ct. Remand, Nov. 14,

2022, ECF No. 60–1 ("*Remand Results*"). Suzano challenges the *Remand Results* on the basis that (1) record evidence clearly demonstrates a tie between the derivative losses with the acquisition of Fibria, an "investment-related" activity; and (2) the record evidence shows that the derivate losses are extraordinary expenses. Pl.'s Cmts. in Opp. to U.S. Dep't of Com.'s Final Results of Redeter. Pursuant to Ct. Remand, Dec. 14, 2022, ECF No. 62 ("Pl.'s Br."). The Government requests the court sustain the remand results, Def.'s Reply in Supp. of Dep't of Com.'s Remand Redeter., Jan. 13, 2023, ECF No. 64 ("Def.'s Br."), as does Defendant-Intervenor Domtar Corporation ("Domtar"), Def.-Inter.'s Resp. in Supp. of Com.'s Remand Redeter., Jan 10, 2023, ECF No. 63 ("Def.-Inter.'s Br.").

For the reasons set forth below, the court concludes that Commerce's determinations on investment-related costs are supported by substantial evidence and further is in accordance with law and the court's remand instructions. The court concludes, however, that Commerce's determination on extraordinary expenses is unsupported by substantial evidence. The court therefore sustains the *Remand Results* in part and remands in part for further explanation.

BACKGROUND

The court described in detail the factual and legal background of this case in *Suzano I*. Only the details relevant to the current disposition are provided below.

I. Statutory Framework and Agency Practice

In calculating a product's normal value, Commerce may choose to disregard sales made at less than the cost of production ("COP"). 19 U.S.C. § 1677b(a)(1)(B)(i). COP is equal to the sum of (1) the cost of "materials and . . . fabrication or other processing," (2) "selling, general, and administrative expenses," and (3) "the cost of all containers and coverings" required for sale and shipment. 19 U.S.C. § 1677b(b)(3)(A)–(C). Costs, including COP, are normally calculated based on records kept in accordance with the generally accepted accounting principles of the exporting country. 19 U.S.C. § 1677b(f)(1)(A). Commerce "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, *if such allocations have been historically used* by the exporter or producer . . . ." *Id.* (emphasis added).

In administering the statute, Commerce has generally excluded both "investment-related" and "extraordinary" expenses from COP. *AG der Dillinger Hüttenwerke v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1338, 1344 (2021) (noting Commerce's "practice [is] to ex-

clude investment-related gains and losses from the calculation of the cost of production because it considers them a separate profit-making activity unrelated to a company's normal operations"); *see also Hornos Electricos de Venez. v. United States*, 27 CIT 1522, 1534, 285 F. Supp. 2d 1353, 1365 (2003) ("To be considered an 'extraordinary' event giving rise to extraordinary treatment . . . the event must be unusual in nature and infrequent in occurrence.") (quoting *Floral Trade Council v. United States*, 16 CIT 1014, 1016 (1992)).

Legislative history indicates that the purpose of enacting 19 U.S.C. § 1677b(f) was to "harmonize[] the methods of calculating cost for purposes of examining sales below cost and determining constructed value." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 840 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4171 ("*SAA*").[1] Thus, the statute intends that:

> Costs shall be allocated using a method that *reasonably reflects and accurately captures* all of the *actual costs incurred in producing and selling the product* under investigation or review. In determining whether to accept the cost allocation methods proposed by a specific producer, Commerce will consider the production cost information available to the producer and whether such information could *reasonably be used to compute a representative measure of the materials, labor and other costs, including financing costs, incurred to produce the subject merchandise*, or the foreign like product. Commerce also will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review *and in the normal course of its business operation.*

Id. at 4172 (emphasis added).

II. Procedural History

On February 24, 2021, Suzano initiated this appeal to contest Commerce's *Final Results*. Summons, ECF No. 1; Compl., Mar. 2, 2021, ECF No. 9. The central issue was whether Commerce's categorization of certain of Suzano's expenses as financial costs was supported by substantial evidence. *Suzano I*, 589 F. Supp. 3d at 1228. Following briefing and oral argument, the court remanded on August 16, 2022, for further explanation by Commerce regarding its inclusion

[1] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

of Suzano's derivative expenses in the COP calculation. *See generally id.*

On remand, Commerce released its draft results continuing to find that the expenses were neither investment-related nor extraordinary. *See* Draft Results of Redeter. Pursuant to Ct. Remand (Dep't Com. Oct. 13, 2022), P.R.R. 1 ("*Draft Remand Results*").[2] After receiving written comments from the parties, Commerce issued the *Remand Results* reiterating its reasoning that the expenses were neither investment-related nor extraordinary, and thus that the expenses would be included in the COP. *Remand Results* at 17. The matter is now before the court as the parties have filed their comments to the *Remand Results*. USCIT R. 56.2(h).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The court sustains Commerce's determinations, findings, and conclusions on remand unless they are unsupported by substantial evidence, or otherwise not in accordance with law. *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020); 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In conducting its review, the court's function is not to reweigh the evidence but rather to ascertain whether Commerce's determinations are supported by substantial evidence on the record. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984); *see also DAK Ams. LLC v. United States*, 45 CIT __, __, 517 F. Supp. 3d 1349, 1362 (2021).

DISCUSSION

Suzano challenges Commerce's continued treatment of the derivative expenses as neither investment-related nor extraordinary. Pl.'s Br. at 6–18. As noted, Suzano again raises two issues: (I) whether Commerce concluded by substantial evidence that the derivative expenses were not investment-related; and (II) whether Commerce concluded by substantial evidence that the derivative expenses were not

[2] Documents on the agency record are referred to by the number provided in the U.S. Department of Commerce's administrative record index filed with the Court, *see* J.A., Apr. 12, 2021, ECF No. 20. Confidential documents are referred to with the rubric "C.R." followed by the relevant number; public documents and public versions of confidential documents are referred to with the rubric "P.R." followed by the relevant number. Documents on the public agency record on remand, filed with the Court on November 17, 2022, ECF No. 61, are referred to by the rubric "P.R.R." No confidential agency record has been filed following remand.

"extraordinary." *See id.* Upon review, the court sustains the *Remand Results* in part and remands in part.

I. The Court Sustains Commerce's Determination That the Derivative Losses Were Not Investment Costs.

In its original opinion, the court concluded that "Commerce failed to adequately consider Suzano's unaudited quarterly reports," and thus its determination that the derivative losses were not investment-related "is unsupported by substantial evidence." *Suzano I*, 589 F. Supp. 3d at 1234. Specifically, the court pointed to the portion of the quarterly reports separating the expenses related to the Fibria acquisition, including derivative losses. *Id.* In response to the court's remand instructions, Commerce addressed the evidence and has offered a detailed explanation as to why the derivative losses are properly treated as operating expenses under Brazilian GAAP, and also points to other record evidence that the derivatives transactions were exclusively for hedging purposes in general cash flow management. *Remand Results* at 19–21; *see also Draft Remand Results* at 7–9.

The question raised by Suzano is ultimately one of fact, i.e., whether the losses incurred by Suzano through the derivatives trading is treated as an investment cost. Commerce has now addressed the record evidence that the court identified in the original opinion with an explanation, *see Remand Results* at 19–21, and additionally offers contrary evidence in the quarterly reports describing the policy of Suzano as "carr[ying] out derivatives transactions *exclusively* for hedging purposes," *id. at 19* (emphasis added); *see also* Letter from Steptoe & Johnson LLP to Sec'y Commerce, re: *Antidumping Duty Investigation of Certain Uncoated Paper from Brazil: Suzano's Resp. to Questionnaire for Section D* at D-31, D-38–39, & Exs. D-19, D-19a at 10 (Aug. 21, 2019), P.R. 79–80 ("Initial Section D Resp."). Commerce explains that the losses from derivatives trading is incurred as part of its hedging activities, rather than for the purposes of a specific investment activity. *Remand Results* at 20.

The record thus presents conflicting evidence on the treatment of the derivative losses, with a portion of the quarterly reports supporting the view that the losses were connected to the investment activity, and another portion of the quarterly reports and the Financial Statements supporting the opposite conclusion. Under such circumstances, the court gives deference to Commerce as the expert factfinder in determining the representativeness of the evidence and resolving the factual question. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006). "[E]ven if it is possible to draw two

inconsistent conclusions from evidence in the record, such a possibility does not prevent [Commerce's] determination from being supported by substantial evidence." *Id.* (first alteration in original) (internal quotation marks omitted) (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)); *see also SeAH Steel VINA*, 950 F.3d at 843 (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

Suzano argues that the existence of the policy merely suggests that derivatives may be used for hedging purposes. Pl.'s Br. at 6. Notwithstanding the fact that this argument is in tension with the use of the phrase "*exclusively* for hedging purposes," Initial Section D Resp. Ex. D-19a at 10 (emphasis added), entertaining this inquiry would require the court to re-weigh the evidence or draw a separate inference from the record. The court thus declines to disturb Commerce's findings, especially "[w]hen the totality of the evidence does not illuminate a black-and-white answer to a dispute." *Nippon Steel Corp.*, 458 F.3d at 1359. This deference is appropriate considering that the court "'has consistently upheld Commerce's reliance on a firm's expenses as recorded in the firm's financial statements, as long as those statements were prepared in accordance with the home country's GAAP and does not significantly distort the firm's actual costs,' with the burden of proving distortion falling on the company." *Solvay Solexis S.p.A. v. United States*, 33 CIT 687, 690, 628 F. Supp. 2d 1375, 1379 (2009) (quoting *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 345, 966 F. Supp. 1230, 1235 (1997)), *dismissed on consent motion*, 375 F. App'x 3 (Fed. Cir. 2009). In short, the court upholds Commerce's further explanation of its conclusion that the derivative losses were not investment costs as based on substantial evidence and otherwise in accordance with law.

II. The Court Remands Commerce's Determination That the Derivative Losses Were Not Extraordinary.

In examining the *Final Results*, the court concluded that Commerce had not supported its inclusion of the derivative losses in the COP by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Suzano I*, 589 F. Supp. 3d at 1236. The court explained that "Commerce's determination of whether certain costs must be excluded as extraordinary remains subject to its statutory obligation to employ 'a method that reasonably reflects and *accurately captures* all of the actual costs incurred in producing and selling the product under investigation or review.'" *Id.* (emphasis added) (quoting *Am. Silicon Techns.*, 261 F.3d at 1377).

The court finds that Commerce has again neglected to support its conclusion by "such relevant evidence as a reasonable mind might

accept as adequate." *Universal Camera*, 340 U.S. at 477. Commerce has failed to provide adequate explanation as to whether its conclusions on the derivative losses are based on a method that reasonably reflects and accurately captures all of the actual costs.

In its *Remand Results*, Commerce first explains that the definition of extraordinary relates not to the amount of gain or loss, but rather the underlying event which caused the gain or loss. *Remand Results* at 10. Commerce then asserts that Suzano's acquisition of Fibria was simply an expansion of normal operations. *Id.* at 21–23. Commerce further states that the derivative losses in question relate to Suzano's hedging activities and the financial derivatives (assets) used by Suzano as part of those activities and not to the acquisition of Fibria. *Id.* at 23. Finally, Commerce submits that because the statute does not quantify reasonableness, the determination of a reasonable and appropriate method is left to the discretion of Commerce. *Id.* at 24.

Commerce's reasoning is flawed with several inconsistencies. Commerce cites to *Floral Trade Council of Davis, Cal. v. United States*, 16 CIT 1014, 1014 (1992), *aff'd*, 74 F.3d 1200 (Fed. Cir. 1996), for its main proposition that the "underlying event" is what defines the extraordinary nature of the event. *Remand Results* at 10 & n.53, 24 & n.96. A close reading of the case, however, reveals no such formulation used by the *Floral Trade* court. In fact, *Floral Trade* concerned the adjustment of production expenses due to collapse of a water table and a viral attack. 16 CIT at 1014. The holding in *Floral Trade* was that the agency is "allowed to prefer substance over form" in not blindly following the financial statement's treatment of the costs, but rather considering the existence of extraordinary events such as virus attacks that led to the incurring of such costs. *Id.* at 1017. This holding is in tension with Commerce's approach in the instant case, where it continues to rely on the classifications in the financial statement and the quarterly reports, *see Remand Results* at 7, without considering the "underlying event" of a major acquisition that may have triggered the costs, *see id.* at 21–24. Based on this record, the *Floral Trade* case does not lend support to Commerce's reasoning on this point.

Commerce further points to some of its previous practice in trying to justify its approach. "[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004). "Thus, the question becomes: (1) whether Commerce has a standard practice . . . and, (2) if so, whether Commerce reasonably departed therefrom." *Id.* at 1284.

Turning to the first question, Commerce has not demonstrated a standard practice of treating the costs in question. Commerce insists that the decision in *Final Results of Antidumping Duty Administrative Review of Chlorinated Isocyanates from Spain*, 74 Fed. Reg. 50,774 (Dep't Com., Oct. 1, 2009), and accompanying Issues and Dec. Mem. (Sept. 24, 2009) ("*Chlorinated Isocyanates from Spain* IDM") is distinguishable from the current case. *See Remand Results* at 22. Yet Commerce also relies on the same for the key proposition that "costs related to mergers, un-mergers, and restructuring of a company's operations are not unusual in nature." *Remand Results* at 9 & n.49. Aside from the inherent tension in arguing that a case is distinguishable and also arguing that it is applicable, the *Chlorinated Isocyanates from Spain* IDM does not contain the word "merger" or "unmerger" in its text. Rather, the *Chlorinated Isocyanates from Spain* IDM only mentions restructuring costs, and Commerce's reasoning is based on the characteristics of restructuring as a streamlining of existing operations:

> Restructuring costs are commonly incurred by companies in the production and manufacturing sector as they try to streamline operations and reduce operating costs. Companies evaluate their overall operations and change them accordingly to meet the changing needs of the general organization. Thus, similar to impairment losses, restructuring costs are period costs that relate to the general operations of the company, rather than to the production of a specific product.

Chlorinated Isocyanates from Spain IDM at 7. It is unclear, however, whether the same logic applies to expansion of operations, as Commerce now argues, or in cases of mergers and acquisitions involving significant changes to the general organization.

Commerce and the Government equates its practice on restructuring costs with all costs arising from mergers, without further explanation. Commerce cites to *Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (Dep't Com. Apr. 2, 2002) and accompanying Issues and Dec. Mem. (Mar. 21, 2002) ("*Softwood Lumber from Canada 2002* IDM") at Cmt 16, to support its proposition that costs related to mergers are not included. *Remand Results* at 9 & n.49. While the *Softwood Lumber from Canada 2002* IDM did discuss costs related to mergers, the costs in question were "redemption of stock options" resulting from a merger. *Softwood Lumber from Canada 2002* IDM at Cmt 16.

Thus, the key question Commerce should address is whether the costs in question relate to the operations of the company. Not all costs arising from a merger necessarily relate to operations. As explained in *Final Results of the Antidumping Duty Administrative Review of Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 73, 437 (Dep't Com. Dec. 12, 2005) and accompanying Issues and Dec. Mem. (Dec. 5, 2005) ("*Softwood Lumber from Canada 2005* IDM"):

> Fundamentally, however, *we do not believe that these transactions should be treated identically* by the Department *just because they all arise from [respondent]'s acquisitions of new businesses*. Rather, the Department considers the nature of every income and expense item separately regardless of the event that caused it. *Closure expenses* are costs incurred to take facilities permanently out of production and, as stated in our position above, because the closed facility is no longer involved in production, the closure costs should not be assigned to the cost of manufacturing of products which are still produced. *Integration and restructuring expenses, on the other hand, are not related to the disposition of assets or closing of the facilities*, *but are costs incurred in the normal course of business* to incorporate the newly acquired businesses into the company and to streamline the company's continuing operations. Thus, integration and restructuring expenses are costs related to the company's general operations and, as such, should be included in the cost of production.

Softwood Lumber from Canada 2005 IDM at 29–30 (emphasis added). A close reading of this excerpt suggests that unlike the Government's argument, Commerce's practice is not to adopt a simple rule that all expenses related to the merger of two companies, or to the acquisition of a new business, are included in general and administrative ("G&A") costs. *Cf.* Def.'s Br. at 26. Rather, the practice Commerce adopted in *Softwood Lumber from Canada 2005* recognizes that different costs may be related to the acquisition of a new business, such as closure expenses and expenses related to integration and restructuring. It then analyzes the impact of the costs on the actual operations of the company to determine whether the costs should be included in the COP. Furthermore, Commerce notes in *Softwood Lumber from Canada 2005* that it "ha[s] changed [its previous] practice and excluded the gains and losses associated with plant closures and sales." *Softwood Lumber from Canada 2005* IDM at 35.

Likewise, Commerce falls short in its reference to *Granular Polytetrafluoroethylene Resin from India: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 87 Fed. Reg. 3,722 (Dep't Com. Jan. 25, 2022), and accompanying IDM (Jan. 18, 2022) ("*Resin from India* IDM") at Cmt 5. Commerce cites this case in a footnote to support its position that Commerce has an established practice of including costs related to a merger in the COP. *See Remand Results* at 23 & n.94. The Government further quotes a portion of the *Resin from India* IDM stating that "restructuring costs incurred as a result of a merger and classified as extraordinary expenses in a respondent's financial statements are includable in a respondent's G&A expense rate calculation." Def.'s Br. at 19–20 (internal quotation marks omitted and emphasis added). As seen in the quote, the *Resin from India* IDM only establishes that "restructuring costs" related to mergers and demergers are routinely included in G&A expenses. *Resin from India* IDM at Cmt. 5.

Thus, despite Commerce's citations of its previous decisions, the court has not been shown that there is an established practice treating all costs resulting from a merger as G&A expenses. If such a practice exists, that practice would only extend to "*restructuring costs* as a result of a merger," not to any cost or expense related to a merger, such as derivative trading expenses. Restructuring costs have specific meaning in accounting and reporting practices, as explained *supra* p. 10–11 (discussing *Chlorinated Isocyanates from Spain* IDM). While severance pay may be considered as a restructuring cost, *see Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part*, 70 Fed. Reg. 71,464 (Dep't of Com. Nov. 29, 2005) and accompanying IDM (Nov. 29, 2005) ("*Pasta from Italy* IDM") at Cmt. 11, nothing in the record suggests that financial costs from derivative trading and hedging in anticipation of an acquisition falls in the category of restructuring costs. Indeed, Commerce itself distinguishes "gains or losses associated with the sale of an entire plant or facility in the general and administrative expense rate calculation," i.e., restructuring gains or losses from non-routine sales, from "costs associated with acquiring a company or a new production facility." *Remand Results* at 22.

In short, the various previous decisions cited by Commerce do not lend support to its position that it is following established practice to include all costs related to merger transactions in the G&A expense ratio calculation, nor to the notion that placement on the financial statements is dispositive. Rather, Commerce's stated practice is that:

> [N]o matter how a particular item of income or expense is recorded on the company's financial statement, or how significant it is, the Department considers the nature of the item in determining whether it should be included or excluded from the costs. . . . Therefore, we believe that the placement of an income or expense item on the financial statements should not be the determining factor of whether the amount should be included or excluded from the reported cost.

Softwood Lumber from Canada 2005 IDM at 39. This is in line with Commerce's obligation to adopt methodology that "accurately captures" the costs, *Am. Silicon Techns.*, 261 F.3d at 1378 (quoting *SAA*, H.R. Doc. 103–316, at 834–35), and will "reasonably be used to compute a representative measure of the materials, labor and other costs, including financing costs, incurred to produce the subject merchandise," *SAA*, H.R. Doc. 103–316, at 873.

Having found no standard Commerce practice on point, the court need not reach the second prong articulated in *Save Domestic Oil*. *See* 357 F.3d at 1284. The inquiry on the remainder of Commerce's reasoning reverts to the standard question of whether Commerce has supported its conclusion by "such relevant evidence as a reasonable mind might accept as adequate." *Universal Camera*, 340 U.S. at 477.

Commerce stated that the amount of gain or loss is not relevant in determining extraordinary expenses, and that because the statute does not quantify reasonableness, it has discretion to determine the methods in calculating costs. *Remand Results* at 24. Commerce indeed has discretion, but that discretion must be exercised in a reasonable manner.[3] While numerical value may not be dispositive, Commerce regularly considers the nature and impact of the transaction to determine whether such transactions are routine and thus

[3] An opinion of the court is instructive in approaching the issue of discretion. *See Daewoo Elecs. Co. v. United States*, 13 CIT 253, 712 F. Supp. 931 (1989), *rev'd on other grounds by Daewoo Elecs. Co. v. Int'l Union of Elec. Elec., Tech., Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511 (Fed. Cir. 1993). In *Daewoo*, the issue was whether marketing and advertising expenses, if made in an unusual, one-time manner regarding a recent acquisition, may be excluded from the calculation of foreign market value as start-up costs. Commerce in that case refused to consider the acquisition-related expenses because the costs related to a "going concern," i.e., its operations, and further focused on the fact that marketing and advertising costs were "ordinary." 13 CIT at 261, 712 F. Supp. at 941. The *Daewoo* court found that under these circumstances, Commerce had abused its discretion when "Commerce acknowledge[d] the extraordinary *amount* of these expenses, which indicates that they were not made in the normal course of trade" and nevertheless "ignored the unusual acquisition-related nature and the *size* of this expense focusing instead on the classification of the type of the expense." 13 CIT at 261–62, 712 F. Supp. at 941–42. While *Daewoo* concerns the interpretation of other provisions under 19 U.S.C. § 1677b(b), it is nevertheless helpful in interpreting subsection 1677b(f), which is intended to expound upon 1677b(b) and 1677b(e). *See* 19 U.S.C. § 1677b(f). Further, considering that the legislative intent in enacting 19 U.S.C. § 1677b(f) was to "harmonize[] the methods of calculating cost for

part of the general operations as stated in the *Softwood Lumber from Canada 2005* IDM. It offered that:

> For example, the sale of an entire production facility, sale of a business unit, and sale of a business division, are considered non-routine. These sales differ from the sale of a piece of equipment, even large pieces of equipment. These non-routine sales encompass many pieces of production equipment, the buildings, land and fixtures. *These are transactions that change the organization and structure of the company and its operations*.

Softwood Lumber from Canada 2005 IDM at 95 n. 141 (emphasis added). An acquisition such as the acquisition of Fibria may also change the organization and structure of the company and its operations, and as argued by Suzano, has the nature of a "a unique, once-in-a-corporate lifetime event where Suzano acquired a larger company with a different scope and nature of operations." Pl.'s Br. at 17.

Commerce determined, without citing to agency practice or court precedent, or any accounting principles supporting its position, that all costs arising from a merger are for the purpose of "expand[ing] normal business operations" and thus not extraordinary. *Remand Results* at 8, 23. Considering the various tensions and conflicting positions in the *Remand Results* as discussed hereto, the court finds that the record does not contain "such relevant evidence as a reasonable mind might accept as adequate." *Universal Camera*, 340 U.S. at 477. Commerce should further explain why such transactions of such a nature are still routine as an "expansion" of its operations and not extraordinary items.

In light of the above, Commerce's determination that the derivative losses were not extraordinary must be remanded for further explanation and review.

CONCLUSION

For the reasons stated, the court sustains the *Remand Results* in part and remands in part for further explanation. It is hereby

ORDERED that Commerce's finding that Suzano's derivative expenses were not extraordinary for the purposes of cost of production calculation is remanded to Commerce for further explanation, and if

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purposes of examining sales below cost and determining constructed value," *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1322 (Fed Cir. 2020) (quoting *SAA*, H.R. Rep. No. 103–315, at 826), the statute requires a consistent approach offering predictable outcomes in the calculation of costs.

appropriate, reconsideration of the costs analysis pursuant to 19 U.S.C. § 1677b(f)(1)(A); and it is further

ORDERED that Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; and it is further

ORDERED that the deadlines provided by USCIT Rule 56.2(h) shall govern thereafter.

SO ORDERED.

Dated: April 20, 2023
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

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