

U.S. Customs and Border Protection



REPORT OF DIVERSION

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

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

SUMMARY: U.S. Customs and Border Protection, the Department of Homeland Security, 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 February 15, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0025 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

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

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

Overview of This Information Collection

Title: Report of Diversion.

OMB Number: 1651-0025.

Form Number: CBP Form 26.

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

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: CBP Form 26, *Report of Diversion*, is used to track vessels traveling coastwise from U.S. ports to other U.S. ports when a change occurs in scheduled itineraries. This form is initiated by the vessel owner or agent to notify and request approval by CBP for a vessel to divert while traveling coastwise from a U.S. port to another U.S. port, or a vessel traveling to a foreign port having to divert to a U.S. port when a change occurs in the vessel itinerary. CBP Form 26 collects information such as the name and nationality of the vessel, the expected port and date of arrival, and information about any related penalty cases, if applicable. This information collection is authorized by 46 U.S.C. 60105 and is provided for in 19 CFR 4.91. CBP Form 26 is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=26>.

Proposed Change: This form is anticipated to be submitted electronically as part of the maritime forms automation project through the Vessel Entrance and Clearance System (VECS), which will elimi-

nate the need for any paper submission of any vessel entrance or clearance requirements under the above referenced statutes and regulations. VECS will still collect and maintain the same data, but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

Type of Information Collection: CBP Form 26.

Estimated Number of Respondents: 1,400.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 2,800.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 233.

Dated: December 14, 2021.

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

[Published in the Federal Register, December 17, 2021 (85 FR 71652)]

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**AUTOMATED COMMERCIAL ENVIRONMENT (ACE)
EXPORT MANIFEST FOR AIR CARGO TEST:
EXTENSION OF TEST**

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

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is extending its Automated Commercial Environment (ACE) Export Manifest for Air Cargo Test, a National Customs Automation Program (NCAP) test concerning ACE export manifest capability.

DATES: The voluntary pilot initially began on July 10, 2015, and it was modified and extended on August 14, 2017. The extended test will run for an additional two years from the date of publication of this notice in the **Federal Register**.

ADDRESSES: Applications to participate in the ACE Export Manifest for Air Cargo Test must be submitted via email to CBP Export Manifest at cbpexportmanifest@cbp.dhs.gov. In the subject line of the email, please write "ACE Export Manifest for Air Cargo Test Application". Applications will be accepted at any time during the test period. Written comments concerning program, policy, and technical issues may also be submitted via email to CBP Export

Manifest at *cbpexportmanifest@cbp.dhs.gov*. In the subject line of the email, please write “Comment on ACE Export Manifest for Air Cargo Test”. Comments may be submitted at any time during the test period.

FOR FURTHER INFORMATION CONTACT: Brian Semeraro, Branch Chief, or David Garcia, Program Manager, Outbound Enforcement and Policy Branch, Office of Field Operations, CBP, via email at *cbpexportmanifest@cbp.dhs.gov*, or by telephone, 202–325–4221.

SUPPLEMENTARY INFORMATION:

I. Background

The Automated Commercial Environment (ACE) Export Manifest for Air Cargo Test is a voluntary test in which participants agree to submit export manifest data to U.S. Customs and Border Protection (CBP) electronically at least four hours prior to loading of the cargo onto the aircraft in preparation for departure from the United States. The ACE Export Manifest for Air Cargo Test is authorized under § 101.9(b) of title 19 of the Code of Federal Regulations (19 CFR 101.9(b)), which provides for the testing of National Customs Automation Program (NCAP) programs or procedures.

The ACE Export Manifest for Air Cargo Test examines the functionality of filing export manifest data for air cargo electronically in ACE. The ACE system creates a single automated export processing platform for certain export manifest, commodity, licensing, export control, and export targeting transactions. This will reduce costs for CBP, partner government agencies, and the trade community, as well as improve facilitation of export shipments through the supply chain.

The ACE Export Manifest for Air Cargo Test will also assess the feasibility of requiring the manifest information to be filed electronically in ACE within a specified time before the cargo is loaded on the aircraft. This capability will enable CBP to calculate the risk and effectively identify and inspect shipments prior to the loading of cargo in order to comply with all U.S. export laws.

CBP announced the procedures and criteria related to participation in the ACE Export Manifest for Air Cargo Test in a notice published in the **Federal Register** on July 10, 2015 (80 FR 39790). This test was originally scheduled to run for approximately two years. On August 14, 2017, CBP extended the test period for one additional year (82 FR 37888). At that time, CBP also modified the original notice to make certain data elements optional and opened the test to accept additional applications for all parties who met the eligibility requirements.

The data elements, unless noted otherwise, are mandatory. Data elements which are mandatory must be provided to CBP for every shipment. Data elements which are marked “conditional” must be provided to CBP only if the particular information pertains to the cargo. Data elements which are marked “optional” may be provided to CBP but are not required to be completed. The data elements are set forth below:

- (1) Exporting Carrier
- (2) Marks of nationality and registration
- (3) Flight number
- (4) Port of lading
- (5) Port of unloading
- (6) Scheduled date of departure
- (7) Consolidator (conditional)
- (8) De-consolidator (conditional)
- (9) Air waybill type (Master, House, Simple or Sub)
- (10) Air waybill number
- (11) Number of pieces and unit of measure (optional)
- (12) Weight (kg./lb.)
- (13) Number of house air waybills (optional)
- (14) Shipper name and address
- (15) Consignee name and address
- (16) Cargo description
- (17) AES Internal Transaction Number (ITN) or AES Exemption Statement/ Exception Classification (per shipment)
- (18) Split air waybill indicator (optional)
- (19) Hazmat indicator (Yes/No)
- (20) UN Number (conditional) (If the hazmat indicator is yes, the four digit UN (United Nations) Number assigned to the hazardous material must be provided.)
- (21) In-bond number (optional)
- (22) Mode of transportation (containerized air cargo or noncontainerized air cargo) (optional).

For further details on the background and procedures regarding this test, please refer to the July 10, 2015 notice and August 14, 2017 extension and modification.

II. Extension of the ACE Export Manifest for Air Cargo Test Period

CBP will extend the test for another two years to continue evaluating the ACE Export Manifest for Air Cargo Test. This will assist CBP in determining whether electronic submission of manifests will allow for improvements in capabilities at the departure level. The extended test will run for two additional years from the date of publication.

III. Applicability of Initial Test Notice

All provisions in the July 2015 notice and the modifications in the August 2017 extension remain applicable, subject to the time period extension provided herein.

Dated: December 10, 2021.

WILLIAM FERRARA,
*Executive Assistant Commissioner,
Office of Field Operations,
U.S. Customs and Border Protection.*

[Published in the Federal Register, December 22, 2021 (85 FR 72610)]



VISA WAIVER PROGRAM CARRIER AGREEMENT (FORM I-775)

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

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

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

DATES: Comments are encouraged and must be submitted no later than February 22, 2022 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control

Number 1651–0110 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

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

Overview of This Information Collection

Title: Visa Waiver Program Carrier Agreement.

OMB Number: 1651–0110.

Form Number: Form I–775.

Current Actions: Extension with change.

Type of Review: Extension (with change).

Affected Public: Businesses.

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

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

Proposed Change

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

Type of Information Collection: Form I-775.

Estimated Number of Respondents: 98.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 98.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 49.

Dated: December 17, 2021.

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

REQUEST FOR INFORMATION

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

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

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

DATES: Comments are encouraged and must be submitted (no later than February 22, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0023 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Request for Information.

OMB Number: 1651-0023.

Form Number: CBP Form 28.

Current Actions: Extension with a decrease in burden previously reported.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: U.S. Customs and Border Protection (CBP) is authorized to collect the information requested on this form pursuant to 19 CFR 151.11, 19 CFR 142.3, and 19 CFR 181.72.

Under 19 U.S.C. 1500, and 1401a, Customs and Border Protection (CBP) is responsible for appraising merchandise by ascertaining or estimating its value; fixing the final classification of such merchandise under the tariff schedule; and fixing a rate of duty and final amount of duty to be paid on such merchandise. On occasions when the invoice or other documentation does not provide sufficient information for appraisal or classification, including for import compliance with trade agreements, preference treatment, or special provisions, CBP may request additional information using CBP Form 28, *Request for Information*. This form is sent by CBP personnel to importers, exporters, producers, or their agents, as applicable, requesting additional information. Additional authority to collect this information provided under 19 U.S.C. 1509. CBP Form 28 is provided for by 19 CFR 151.11.

Type of Information Collection: Request for Information (CBP Form 28).

Estimated Number of Respondents: 13,415.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 13,415.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 26,830.

Dated: December 17, 2021.

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

[Published in the Federal Register, December 22, 2021 (85 FR 72612)]



19 CFR CHAPTER I

NOTIFICATION OF THE LIFTING OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA FOR CERTAIN INDIVIDUALS WHO ARE FULLY VACCINATED AGAINST COVID-19 AND CAN PRESENT PROOF OF COVID-19 VACCINATION STATUS

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of the lifting of temporary travel restrictions for certain travelers.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to lift the temporary restrictions that apply to non-essential travel by certain individuals. Specifically, the Secretary has lifted such restrictions for individuals who have been fully vaccinated against COVID-19, can present proof of COVID-19 vaccination status, and are seeking to enter the United States via land ports of entry (POEs) and ferry terminals along the U.S.-Canada border. The lifting of restrictions for such fully vaccinated individuals does not affect U.S. citizens and lawful permanent residents returning to the United States, regardless of whether the individual is fully vaccinated, because such travel is currently defined as essential travel.

DATES: The lifting of these restrictions began at 12 a.m. Eastern Standard Time (EST) on November 8, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Notice of Action

On October 21, 2021, the Secretary announced his decision to continue to temporarily restrict the non-essential travel of individuals from Canada into the United States via land POEs and ferry terminals along the United States-Canada border.¹ The Secretary further announced that he intended to lift these restrictions for individuals who are fully vaccinated against COVID-19 and have appropriate proof of vaccination to align with changes to international travel by air.² The Secretary stated that any such modifications to the restrictions would be accomplished via a posting to the DHS website (<https://www.dhs.gov>) and followed by a publication in the **Federal Register**.³

On October 29, 2021, DHS posted to its website an announcement that beginning November 8, 2021, non-essential travel would be permitted through land POEs and ferry terminals, provided that the traveler is fully vaccinated against COVID-19 and can present proof of COVID-19 vaccination status. DHS stated that unvaccinated travelers may continue to cross the U.S.-Canada border at land POEs and ferry terminals for essential travel, including lawful trade, emergency response, and public health purposes.⁴ Thus, starting November 8, 2021, when arriving at a U.S. land POE or ferry terminal, travelers who are traveling for a non-essential reason should be prepared to: (1) Present proof of COVID-19 vaccination as outlined on the CDC website;⁵ and (2) verbally attest to the reason for their travel and COVID-19 vaccination status. The lifting of restrictions for fully vaccinated individuals does not affect U.S. citizens and lawful permanent residents returning to the United States, regardless of whether the individual is fully vaccinated, because such travel is currently defined as essential travel.

¹ 86 FR 58218.

² *Id.*

³ *Id.* at 58220.

⁴ See DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (released Oct. 29, 2021; last updated Nov. 23, 2021); see also DHS, *Frequently Asked Questions: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals*, <https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us-land-ports-entry-and-ferry> (released Oct. 29, 2021; last updated Nov. 23, 2021).

⁵ See CDC, Requirement for Proof of COVID-19 Vaccination for Air Passengers <https://www.cdc.gov/coronavirus/2019-ncov/travelers/proof-of-vaccination.html> (updated Nov. 24, 2021).

Consistent with the October 21, 2021 **Federal Register** notice and the October 29, 2021 web posting, DHS is publishing this notice of the lifting of the non-essential travel restrictions for certain individuals as described above.

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, December 23, 2021 (85 FR 72842)]



19 CFR CHAPTER I

NOTIFICATION OF THE LIFTING OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO FOR CERTAIN INDIVIDUALS WHO ARE FULLY VACCINATED AGAINST COVID-19 AND CAN PRESENT PROOF OF COVID-19 VACCINATION STATUS

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of the lifting of temporary travel restrictions for certain travelers.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to lift the temporary restrictions that apply to non-essential travel by certain individuals. Specifically, the Secretary has lifted such restrictions for individuals who have been fully vaccinated against COVID-19, can present proof of COVID-19 vaccination status, and are seeking to enter the United States via land ports of entry (POEs) and ferry terminals along the U.S.-Mexico border. The lifting of restrictions for such fully vaccinated individuals does not affect U.S. citizens and lawful permanent residents returning to the United States, regardless of whether the individual is fully vaccinated, because such travel is currently defined as essential travel.

DATES: The lifting of these restrictions began at 12 a.m. Eastern Standard Time (EST) on November 8, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Notice of Action

On October 21, 2021, the Secretary announced his decision to continue to temporarily restrict the non-essential travel of individuals from Mexico into the United States via land POEs and ferry terminals along the United States-Mexico border.¹ The Secretary further announced that he intended to lift these restrictions for individuals who are fully vaccinated against COVID-19 and have appropriate proof of vaccination to align with changes to international travel by air.² The Secretary stated that any such modifications to the restrictions would be accomplished via a posting to the DHS website (<https://www.dhs.gov>) and followed by a publication in the **Federal Register**.³

On October 29, 2021, DHS posted to its website an announcement that beginning November 8, 2021, non-essential travel would be permitted through land POEs and ferry terminals, provided that the traveler is fully vaccinated against COVID-19 and can present proof of COVID-19 vaccination status. DHS stated that unvaccinated travelers may continue to cross the U.S.-Mexico border at land POEs and ferry terminals for essential travel, including lawful trade, emergency response, and public health purposes.⁴ Thus, starting November 8, 2021, when arriving at a U.S. land POE or ferry terminal, travelers who are traveling for a non-essential reason should be prepared to: (1) Present proof of COVID-19 vaccination as outlined on the CDC website;⁵ and (2) verbally attest to the reason for their travel and COVID-19 vaccination status. The lifting of restrictions for fully vaccinated individuals does not affect U.S. citizens and lawful permanent residents returning to the United States, regardless of whether the individual is fully vaccinated, because such travel is currently defined as essential travel.

¹ 86 FR 58216.

² *Id.*

³ *Id.* at 58218.

⁴ See DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, <https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals> (released Oct. 29, 2021; last updated Nov. 23, 2021); see also DHS, *Frequently Asked Questions: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals*, <https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us-land-ports-entry-and-ferry> (released Oct. 29, 2021; last updated Nov. 23, 2021).

⁵ See CDC, Requirement for Proof of COVID-19 Vaccination for Air Passengers <https://www.cdc.gov/coronavirus/2019-ncov/travelers/proof-of-vaccination.html> (updated Nov. 24, 2021).

Consistent with the October 21, 2021 **Federal Register** notice and the October 29, 2021 web posting, DHS is publishing this notice of the lifting of the non-essential travel restrictions for certain individuals as described above.

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, December 23, 2021 (85 FR 72843)]

U.S. Court of International Trade

Slip Op. 21–168

OPTIMA STEEL INTERNATIONAL, LLC and TOKYO STEEL MANUFACTURING Co., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00327

[Sustaining Commerce’s remand redetermination.]

Dated: December 17, 2021

Daniel L. Porter, Ana Maria Amador-Gil, and James C. Beaty, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. Of counsel was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Barnett, Chief Judge:

Before the court is a consent motion to sustain the U.S. Department of Commerce’s (“Commerce” or “the agency”) remand results and enter judgment. Consent Mot. to Sustain the Remand Results and Enter J. (“Consent Mot.”), ECF No. 31. Commerce issued its remand results on October 15, 2021. Confidential Final Results of Redetermination Pursuant to Court Remand (“Remand Results”), ECF No. 26–1. The court hereby sustains Commerce’s Remand Results.

Plaintiffs Optima Steel International, LLC (“Optima”) and Tokyo Steel Manufacturing Co., Ltd. (“Tokyo Steel”) commenced this case challenging Commerce’s liquidation instructions issued pursuant to an administrative review of the antidumping duty order covering hot-rolled steel from Japan. *See Certain Hot-Rolled Steel Flat Products From Japan*, 84 Fed. Reg. 31,025 (Dep’t Commerce June 28, 2019) (final results of antidumping duty admin. review) (“*Final Results*”). Tokyo Steel, a mandatory respondent in the administrative review, received a calculated rate in the *Final Results*. *See* Compl. ¶¶ 22, 25, ECF No. 2; *Final Results*, 84 Fed. Reg. at 31,027. Following the review, Commerce issued liquidation instructions providing that merchandise produced by Tokyo Steel during the relevant period should be liquidated at the rate calculated for Tokyo Steel. *See* Compl. ¶¶ 26–28. In December 2019, however, U.S. Customs and Border

Protection (“CBP”) liquidated several entries of subject merchandise imported by Optima and produced by Tokyo Steel, but exported by an unaffiliated Japanese trading company, at a higher rate, allegedly because of an error in Commerce’s liquidation instructions concerning the trading company’s name. *Id.* ¶¶ 29, 46, 49–50.

On October 1, 2021, Defendant United States (“the Government”), filed a consent motion for a voluntary remand to reconsider the liquidation instructions. Def.’s Mot. for Voluntary Remand, ECF No. 21. The court granted this motion, Order (Oct. 1, 2021), ECF No. 22, and Commerce’s Remand Results followed.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B), (D). The court reviews an action commenced pursuant to 28 U.S.C. § 1581(i) in accordance with the standard of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706, as amended. *See* 28 U.S.C. § 2640(e).

DISCUSSION

In the Remand Results, Commerce revised the liquidation instructions to reflect the full name of the trading company consistent with the record developed during the administrative review and indicated that it intends to issue the revised instructions to CBP. Remand Results at 1, 3. Plaintiffs assert that judgment is merited because “the Remand Results accurately reflect the record before the [agency] in the underlying administrative proceeding and provide for accurate liquidation of the entries identified in this appeal.” Consent Mot. at 1. Both parties request that the court sustain the Remand Results. *Id.* at 1–2.

CONCLUSION

There being no challenges to the Remand Results, which are otherwise in accordance with the law, the court will sustain Commerce’s Remand Results. Judgment will enter accordingly.

Dated: December 17, 2021

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21–169

XIPING OPECK FOOD CO., LTD., et al., Plaintiffs, and YANCHENG HI-KING AGRICULTURE DEVELOPING CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 19–00202

[U.S. Department of Commerce’s final results are sustained.]

Dated: December 17, 2021

Yingchao Xiao, Lee & Xiao, of San Marino, CA, argued for Plaintiffs Xiping Opeck Food Co., Ltd., et al.

Adams C. Lee, Harris Bricken McVay Sliwoski, LLP, of Seattle, WA, argued for Consolidated Plaintiff Yancheng Hi-King Agriculture Developing Co., Ltd.

Mollie L. Finnan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brendan Saslow*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Eaton, Judge:

This case involves the final results of the United States Department of Commerce’s (“Commerce” or the “Department”) administrative review of the antidumping duty order on freshwater crawfish tail meat from the People’s Republic of China (“China”) covering the period of September 1, 2017, through August 31, 2018. *See Freshwater Crawfish Tail Meat From the People’s Republic of China*, 84 Fed. Reg. 58,371 (Dep’t Commerce Oct. 31, 2019) (“Final Results”) and accompanying Issues and Decision Mem. (Oct. 25, 2019) (“Final IDM”), PR 106.

Xiping Opeck Food Co., Ltd. (“Xiping Opeck”), Nanjing Gemsen International Co., Ltd. (“Nanjing Gemsen”), Xuzhou Jinjiang Foodstuffs Co., Ltd. (“Xuzhou Jinjiang”) (collectively, “Plaintiffs”), and Yancheng Hi-King Agriculture Developing Co., Ltd. (“Consolidated Plaintiff” or “Hi-King”) are Chinese producers and exporters of freshwater crawfish tail meat that participated in the underlying review and commenced this action contesting certain aspects of the Final Results. Now before the court are motions for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2 filed by Plaintiffs and Hi-King. *See* USCIT R. 56.2; *see also* Pls.’ Mem. Supp. Mot. J. Agency R., ECF No. 27–2 (“Pls.’ Br.”); Pls.’ Reply, ECF No. 42; Consol. Pl.’s Mem. Supp. Mot. J. Agency R., ECF No. 26 (“Consol. Pl.’s Br.”); Consol. Pl.’s Reply, ECF No. 41. For the reasons set forth below, Commerce’s Final Results are sustained.

BACKGROUND

On September 11, 2018, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on freshwater crawfish tail meat from China. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Req. Admin. Rev.*, 83 Fed. Reg. 45,888 (Dep't Commerce Sept. 11, 2018). Plaintiffs requested a review of their sales during the period of review. *See Req. for Admin. Rev.* (Sept. 18, 2018), PR 2.

The Crawfish Processors Alliance also requested a review of Plaintiffs, as well as Hi-King and others. *See Crawfish Processors All.'s Req. Admin. Rev.* (Oct. 1, 2018), PR 6.

On November 15, 2018, Commerce published a notice of initiation of the administrative review. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 83 Fed. Reg. 57,411 (Dep't Commerce Nov. 15, 2018). Nanjing Gemsen together with Hubei Qianjiang Huashan Aquatic Food and Product Co., Ltd. ("Hubei Qianjiang") (collectively, "Mandatory Respondents") were selected for individual examination as mandatory respondents based on the volume of their exports during the period of review, pursuant to 19 U.S.C. § 1677f-1(c)(2)(B) (2018).¹ *See Respondent Selection for the 2017–2018 Antidumping Duty Admin. Rev.* (Feb. 13, 2019) at 2, 6, PR 45.

Commerce preliminarily determined that dumping of the subject freshwater crawfish tail meat occurred during the period of review and calculated an antidumping duty rate of 7.92 percent for Nanjing Gemsen. *See Freshwater Crawfish Tail Meat From the People's Republic of China*, 84 Fed. Reg. 34,339, 34,340 (Dep't Commerce July 18, 2019) ("Preliminary Results") and accompanying Decision Mem. (July 11, 2019) ("PDM"), PR 84. As for Hubei Qianjiang, which is not a party to this action, Commerce calculated a rate of zero percent. *See Preliminary Results*, 84 Fed. Reg. at 34,340. The rates for the Mandatory Respondents were calculated by determining the normal value of each company's respective exports using the nonmarket economy

¹ As shall be seen, this Court has frequently wondered how the primary purpose of determining accurate rates for unexamined respondents is advanced by selecting only two mandatory respondents, particularly when the rate for one of the two is undetermined or disregarded. *See, e.g., Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT ___, ___, 519 F. Supp. 3d 1224, 1236 (2021) (first citing *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); and then citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009)).

Judges of the Federal Circuit have expressed similar concerns. *See, e.g., Oral Argument, Y.C. Rubber Co. (North America) v. United States*, No. 21–1489 (Fed. Cir. argued Nov. 5, 2021), <https://cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments/>.

method under 19 U.S.C. § 1677b(c)(1).² In doing so, Commerce selected Malaysia as the surrogate country for valuing almost all of the Mandatory Respondents' factors of production.³ For the main factor of production, live freshwater crawfish, however, the Department relied on Spanish import data classified under Integrated Tariff of the European Communities⁴ ("TARIC") subheading 0306.39.10, which covers live, fresh or chilled freshwater crawfish.⁵ See Surrogate Value Mem. (July 11, 2019) at 2, PR 85. Commerce chose Spain because the record did not contain any data from Malaysia.⁶ See Surrogate Country Mem. (July 11, 2019) at 5, PR 86. No party disputes the decision to use Spanish information.

Commerce also preliminarily determined that certain companies rebutted the presumption of *de jure* and *de facto* control⁷ by the Chinese government and were therefore eligible for a separate, "all-

² The statute provides:

If—

- (A) the subject merchandise is exported from a nonmarket economy country, and
- (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a), the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1).

³ The factors of production are those used to produce the subject merchandise—which include, but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3)(A)-(D).

⁴ The Integrated Tariff of the European Communities or "TARIC" is a customs classification system akin to the Harmonized Tariff Schedule of the United States. The TARIC system is organized in a hierarchical structure by sections, chapters, headings, and subheadings, and is based upon the international Harmonized Commodity Description and Coding System administered by the World Customs Organization. It applies to all member states of the European Union ("EU") and is designed to provide for the classification of all products imported into the EU in accordance with a system of numerical codes through which each product is assigned its own TARIC number. A product's TARIC number determines, *inter alia*, the amount of customs duties owed on the imported good. See Gerd M. Schwendinger & Katka Göcke, *Duty Assessment – Tariff Classification (CN & TARIC)*, in 2 INTERNATIONAL CONTRACT MANUAL § 44:9 (West 2021).

⁵ For consistency purposes, the court has adopted the parties' use of the term "crawfish." The TARIC, however, uses the term "crayfish." No one disputes this difference in naming conventions, nor is it relevant to the outcome of this case.

⁶ Mandatory Respondents placed on the record contemporaneous Spanish import data for valuing the live freshwater crawfish input. See Surrogate Country Mem. at 5.

⁷ Commerce presumes that exporters and producers from nonmarket economy countries, such as China, are under government control with respect to export activities and thus should receive a single country-wide dumping rate. See *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)). This presumption is rebuttable, however, if a

others” rate. *See* PDM at 6; *see also* *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) (citations omitted) (“The separate rate for eligible non-mandatory respondents is generally calculated following the statutory method for determining the ‘all others rate’ under § 1673d(c)(5)(A).”). Relying on the general rule under the statute, Commerce excluded Hubei Qianjiang’s zero percent rate and used Nanjing Gemsen’s 7.92 percent rate as the all-others rate for the six other companies that qualified for a separate rate,⁸ but were not individually examined (the “Separate Rate Companies”).⁹ *See* PDM at 7; *see also* 19 U.S.C. § 1673d(c)(5)(A).

In October 2019, Commerce published its Final Results which remained unchanged from the Preliminary Results. *See* Final Results, 84 Fed. Reg. at 58,371. Commerce continued to use Spanish import data under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) for valuing the live freshwater crawfish factor of production. *See id.* Commerce also continued to use Nanjing Gemsen’s calculated 7.92 percent rate as the all-others rate assigned to the Separate Rate Companies. *See* Final IDM at 4–5.

On November 18, 2019, Commerce issued liquidation instructions for the subject entries of freshwater crawfish tail meat. On November 29, 2019, Hi-King’s period of review entries were liquidated. Hi-King timely filed its original complaint in this action on December 3, 2019. In its original complaint, Hi-King neither challenged Commerce’s issuance of liquidation instructions nor stated that its entries had been liquidated. In fact, Hi-King did not learn that its entries had been liquidated until after its original complaint had been filed. *See* Consol. Pl.’s Br. 19.

Upon learning that its entries had been liquidated, Hi-King sought two orders from the court: one permitting Hi-King to amend its original complaint to add a claim challenging the Department’s issuance of the liquidation instructions as premature and not in accordance with law; and another directing Commerce to instruct United States Customs and Border Protection (“CBP” or “Customs”) to reset company can demonstrate its independence from government control, both in law (*de jure*) and in fact (*de facto*). *See* *Sigma Corp.*, 117 F.3d at 1405. If a company successfully rebuts the presumption of government control, it may be eligible for a separate antidumping duty rate. If not, it will be considered part of the country-wide entity and will receive the country-wide rate. *See* 19 C.F.R. § 351.107(d) (2019); *see also* *Jilin*, 45 CIT at ___, 519 F. Supp. 3d at 1241.

⁸ A “separate rate” is a rate assigned to nonmarket economy exporters or producers that were not selected for individual examination but have rebutted the presumption of state control, and are therefore not covered by the single country-wide rate. *See* *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 784 (Fed. Cir. 2020).

⁹ The Separate Rate Companies are Deyan Aquatic Products and Food Co., Ltd., Hubei Nature Agriculture Industry Co., Ltd., Hubei Yuesheng Aquatic Products Co., Ltd., Xiping Opeck, Xuzhou Jinjiang, and Hi-King. *See* PDM at 8. Only Xiping Opeck, Xuzhou Jinjiang, and Hi-King are parties to this action.

its entries to unliquidated status. *See* Hi-King’s Mot. Leave Amend Compl., ECF No. 22; *see also* Hi-King’s Mot. for Order Directing Its Entries Be Reset to Unliquidated Status, ECF No. 35. The court granted these motions, accepting Hi-King’s amended complaint as filed and resetting its entries to unliquidated status. *See* Order dated Apr. 23, 2020, ECF No. 28; *see also* Order dated June 25, 2020, ECF No. 37.

Plaintiffs and Hi-King now challenge Commerce’s Final Results. For their part, Plaintiffs argue that (1) Commerce’s determination that TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is the best available information for calculating surrogate value is neither supported by substantial evidence nor in accordance with law; and (2) Commerce unlawfully used Nanjing Gemen’s rate as the all-others rate for the Separate Rate Companies. *See* Pls.’ Br. 5, 10.

Hi-King, too, contests Commerce’s calculation of surrogate value based on TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) and raises an additional claim challenging the Department’s 15-day liquidation policy¹⁰ as unlawful. *See* Consol. Pl.’s Br. 5, 27.

Together, Plaintiffs and Hi-King ask the court to remand the Final Results to Commerce with instructions to (1) recalculate the surrogate value for the live freshwater crawfish factor of production using Spanish import data under TARIC subheading 0306.19.10 (frozen freshwater crawfish), instead of TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish); (2) recalculate the all-others rate using an average of the Mandatory Respondents’ calculated rates; and (3) provide further guidance on the legality of Commerce’s 15-day liquidation policy. *See* Pls.’ Br. 5–13; Consol. Pl.’s Br. 36–37.

Defendant the United States (the “Government”), on behalf of Commerce, asks the court to sustain the Final Results and maintains that (1) valuing the Mandatory Respondents’ reported live freshwater crawfish factor of production using TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is supported by substantial evidence and in accordance with law; (2) assigning Nanjing Gemen’s rate as the all-others rate was consistent with the requirements of the statute; and (3) because the court has granted Hi-King’s consent motion directing Customs to reset its entries to unliquidated status, Hi-King’s claim challenging Commerce’s 15-day liquidation policy is

¹⁰ Commerce previously had a practice of issuing liquidation instructions to CBP fifteen days after publication of the final results of an administrative review in the Federal Register. This policy has since been discontinued. *See Notice of Discontinuation of Policy To Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings*, 86 Fed. Reg. 3,995 (Dep’t Commerce Jan. 15, 2021).

moot. *See* Def.’s Resp. Pls.’ Mots. J. Agency R., ECF No. 36 (“Def.’s Resp. Br.”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and will sustain a determination by Commerce unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). 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) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Surrogate Value Selections

“The United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value.” *Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT ___, ___, 353 F. Supp. 3d 1323, 1335 (2018) (quoting *Clearon Corp. v. United States*, 37 CIT 220, 222 (2013) (not reported in Federal Supplement)). If a domestic producer or other interested party believes that a product is being sold at less-than-fair value in the United States, it may petition Commerce to initiate an antidumping proceeding. *See* 19 U.S.C. § 1673a(b). During the initial antidumping investigation, and any subsequent administrative review, Commerce will determine whether dumping occurred by making “a fair comparison . . . between the export price^[11] or constructed export price^[12] and normal value.^[13]” 19 U.S.C. § 1677b(a). Where, as here, the exporting country is a nonmarket economy, Commerce relies on surrogate values from mar-

¹¹ “Export price” means

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

19 U.S.C. § 1677a(a).

¹² “Constructed export price” means

the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(b).

¹³ In general, “normal value” means “the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade” 19 U.S.C. § 1677b(a)(1)(B)(i).

ket economy countries to determine normal value. Thus, Commerce will calculate “the normal value of the subject merchandise [based on] the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1)(B).¹⁴

In the Final Results, the Department’s calculation of the dumping margins for Mandatory Respondents was driven primarily by the surrogate value used for the live freshwater crawfish factor of production. This is not surprising since both Mandatory Respondents Nanjing Gemsen and Hubei Qianjiang reported using “live freshwater crawfish” as the main input in the production of the subject merchandise. *See, e.g.*, Nanjing Gemsen’s Sec. D Quest. Resp. at D-8 to D-9, PR 69.

To value the live freshwater crawfish factor of production, Commerce concluded that there was no available data from Malaysia—the primary surrogate country—and instead turned to Spanish import data.¹⁵ *See* Final IDM at 3. Specifically, Commerce used data sourced from *Agencia Tributaria*¹⁶ under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish). *See* Surrogate Value Mem. at 2, 4.

All parties agree that live freshwater crawfish is the main factor of production, and no party challenges Commerce’s use of Spanish import data for valuing the live freshwater crawfish factor of production. Rather, the sole disputed aspect of Commerce’s live freshwater crawfish valuation is its decision to rely on Spanish import data under

¹⁴ Subsection 1677b(c)(1) provides for the calculation of normal value in nonmarket economy cases. It states that, in general, if

(A) the subject merchandise is exported from a nonmarket economy country, and
 (B) [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined under subsection [1677b](a),
 [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.

19 U.S.C. § 1677b(c)(1)(A)-(B).

¹⁵ Generally, Commerce will value all factors of production with surrogate data from a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2) (2019) (“Except for labor . . . the Secretary normally will value all factors in a single surrogate country.”). Nevertheless, Commerce may look to values from more than one surrogate country when “a non-primary country provides values that are more accurate” than the primary surrogate country. *See Ancientree Cabinet Co. v. United States*, 45 CIT ___, ___, 532 F. Supp. 3d 1241, 1249 (citing *Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1082, 810 F. Supp. 314, 317 (1992), *aff’d*, 43 F.3d 1442 (Fed. Cir. 1994)).

¹⁶ Part of the Ministry of Finance, the *Agencia Estatal de Administración Tributaria*, commonly referred to as “*Agencia Tributaria*,” is the revenue service of the Kingdom of Spain.

TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish), instead of TARIC subheading 0306.19.10 (frozen freshwater crawfish).

**A. Commerce’s Valuation of Mandatory Respondents’
Live Freshwater Crawfish Factor of Production
Under TARIC Subheading 0306.39.10 (Live, Fresh or
Chilled Freshwater Crawfish) Is Supported by
Substantial Evidence and in Accordance with Law**

According to Plaintiffs and Hi-King, Commerce should have selected TARIC subheading 0306.19.10 (frozen freshwater crawfish) instead of TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) to value the main factor of production, *i.e.*, live freshwater crawfish. Together, they argue that (1) the dataset selected by Commerce, TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish), is not the best available information because it also covers “other” products not comparable to live freshwater crawfish and is therefore less specific than their proposed alternative TARIC subheading 0306.19.10 (frozen freshwater crawfish); and (2) Commerce’s determination that TARIC subheading 0306.39.10 covers live freshwater crawfish is not supported by substantial evidence because the record lacks any evidence to support this determination. *See* Pls.’ Br. 10–13; *see also* Consol. Pl.’s Br. 29–36.¹⁷

The Government argues that Commerce was reasonable in selecting TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) as the best available information because the record shows that Mandatory Respondents reported using live freshwater crawfish as the main input in their production processes, and TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) covers that main input. *See* Def.’s Resp. Br. 14. The Government also contends that, because Commerce was plainly quoting the official TARIC subheading descriptions in explaining its method of calculating surrogate value for the live freshwater crawfish factor of production, such descriptions are necessarily incorporated by reference in the Final Results and are suitable for that use and for the court to take judicial notice of the subheading’s text. *See* Def.’s Resp. Br. 17.

Under the statute, Commerce is directed to value factors of production using the “best available information regarding the values of such factors in a market economy country or countries considered to

¹⁷ The relevant TARIC provisions in effect during the period of review are as follows:
SECTION I LIVE ANIMALS; ANIMAL PRODUCTS
CHAPTER 3 FISH AND CRUSTACEANS, MOLLUSCS AND OTHER AQUATIC IN-
VERTABRATES

be appropriate by the administering authority [*i.e.*, Commerce].”¹⁸ See 19 U.S.C. § 1677b(c)(1). Because the term “best available information” is left undefined by the governing statute, courts have read this provision to give Commerce some latitude in choosing what constitutes the best available information. See *Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182, 1197 (2007) (not reported in Fed-

...

0306		Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; smoked crustaceans, whether in shell or not, whether or not cooked before or during the smoking process; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine; flours, meals and pellets of crustaceans, fit for human consumption:
	-	<i>Frozen:</i>
0306 11	-	Rock lobster and other sea crawfish . . .
0306 12	-	Lobsters . . .
0306 14	-	Crabs
0306 15	-	Norway lobsters . . .
0306 16	-	Cold-water shrimps and prawns . . .
0306 17	-	Other shrimps and prawns
0306 19	-	Other, including flours, meals and pellets of crustaceans, fit for human consumption:
0306 19 10	-	Freshwater crayfish
0306 19 90	-	Other
	-	<i>Live, fresh or chilled:</i>
0306 31	-	Rock lobster and other sea crawfish . . .
0306 32	-	Lobsters . . .
0306 33	-	Crabs
0306 34	-	Norway lobsters . . .
0306 35	-	Cold-water shrimps and prawns . . .
0306 36	-	Other shrimps and prawns
0306 39	-	Other, including flours, meals and pellets of crustaceans, fit for human consumption:
0306 39 10	-	Freshwater crayfish
0306 39 90	-	Other

See *TARIC Consultation*, EUR. COMM’N: TAX’N & CUSTOMS UNION, https://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en (change reference date to September 1, 2017; then retrieve measures for goods code “0306”; then click “Frozen” and “Live, Fresh or Chilled” under the “0306” heading; and then click “0306 19” and “0306 39”) (“TARIC Database”).

¹⁸ Commerce selects a primary surrogate country using a process that tracks the requirements of 19 U.S.C. § 1677b(c)(1) and (4). The Department’s practice in identifying countries that are at the same level of economic development is described in the Department’s Policy Bulletin No. 04.1. See Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), available at <http://enforcement.trade.gov/policy/bull04-1.html> (last visited Dec. 2, 2021).

eral Supplement) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)).

Despite the latitude afforded Commerce in selecting the best available information from among the available surrogate data for valuing the factors of production, it must still act in a manner consistent with the underlying objective of the antidumping statute—“to obtain the most accurate dumping margins possible.” See *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 719 (2001) (citation omitted). “This objective is achieved only when Commerce’s choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents.” *Id.* at 838, 159 F. Supp. 2d at 719 (citations omitted).

Here, the court finds reasonable Commerce’s use of TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) for valuing Mandatory Respondents’ reported live freshwater crawfish factor of production. Plaintiffs’ and Hi-King’s arguments to the contrary are unconvincing.

To begin, both Commerce’s preferred TARIC subheading and that of Plaintiffs and Hi-King are *eo nomine* provisions. That is, the subheading itself “describes a commodity by a specific name, usually one well known to commerce.” See *Myers v. United States*, 21 CIT 654, 659, 969 F. Supp. 66, 71 (1997) (cleaned up).

Since it is undisputed that live freshwater crawfish is the main input in the production of the subject merchandise, and Commerce’s preferred TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) covers live freshwater crawfish by name, TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is specific to the main input. Plaintiffs’ and Hi-King’s proposed alternative TARIC subheading 0306.19.10 (frozen freshwater crawfish), on the other hand, describes frozen freshwater crawfish by name. Frozen freshwater crawfish is not an input used in the production of the subject merchandise. Thus, Commerce’s chosen TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is specific to Mandatory Respondents’ reported input and Plaintiffs’ and Hi-King’s proposed alternative TARIC subheading 0306.19.10 (frozen freshwater crawfish) is not.

Plaintiffs and Hi-King make no real argument in favor of TARIC subheading 0306.19.10 (frozen freshwater crawfish). Rather, they dispute the appropriateness of Commerce’s chosen subheading. First, Plaintiffs insist that TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is a basket category that covers “other”

products than live crawfish such as “flours, meals and pellets of crustaceans, fit for human consumption,” and therefore is too broad to be used to value the main input. *See* Pls.’ Br. 13. Plaintiffs’ argument betrays a basic misunderstanding of the workings of the TARIC and indeed all tariff classification schemes based on the World Customs Organization’s Harmonized Commodity Description and Coding System.

Each of these schemes is hierarchical in nature. The six-digit 0306.39 heading,¹⁹ under which the eight-digit subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) is found, is indeed a basket category covering many things other than live freshwater crawfish. This heading, however, sets the outer limits of what can be classified by the subheadings that follow. For instance, the 0306.39 heading limits its subheadings to products “fit for human consumption.” Therefore, live freshwater crawfish (or indeed anything else) “unfit for human consumption” could not be classified under any subheading below the 0306.39 heading.

The subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) employed by Commerce, despite falling under the six-digit 0306.39 basket heading, is not itself a basket provision. Rather, it is, as noted above, an *eo nomine* provision that is limited to the products described—live, fresh or chilled freshwater crawfish.

Thus, the entries into Spain that Commerce examined to determine the value of the Mandatory Respondents’ main input did not contain “flours, meals and pellets of crustaceans, fit for human consumption.” Rather, these entries into Spain were all entered under the eight-digit subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) and were thus all of live, fresh or chilled freshwater crawfish and nothing else.²⁰

¹⁹ During the period of review, the six-digit 0306.39 heading, under which the eight-digit 0306.39.10 subheading falls, was described in the TARIC as follows:

	-	<i>Live, fresh or chilled:</i>
. . .		
0306 39	- -	Other, including flours, meals and pellets of crustaceans, fit for human consumption:
0306 39 10	- - -	Freshwater crayfish

See TARIC Database.

²⁰ The European Union’s tariff classification system contains general rules of interpretation nearly identical to the general rules of interpretation for the Harmonized Tariff Schedule of the United States. Rules 1 and 6 of the European Union’s general rules of interpretation provide:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions. . . .

Next, Plaintiffs and Hi-King make a remarkable argument. They assert that Commerce's determination that TARIC subheading 0306.39.10 covers live freshwater crawfish is not supported by substantial evidence because the record lacks a "description of the particular products that are covered by [TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish)]." *See* Consol. Pl.'s Br. 31; *see also* Pls.' Br. 11. In other words, because in the Final Results Commerce provided only a narrative description²¹ of the products TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) covers, the determination was unsupported by substantial evidence. Apparently, Plaintiffs and Hi-King believe that Commerce could only satisfy the substantial evidence requirement by reproducing a direct quote, printout, or photocopy of the product description from the TARIC database itself.

This claim is puzzling, however, since the subheading itself describes the input in question. That is, reference to the TARIC itself makes it clear that subheading 0306.39.10 covers live, fresh or chilled freshwater crawfish. Anyone reading the Final Results could easily find the subheading itself, read it in context, and confirm that its provisions covered the product that Commerce represented it covered.²²

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of the rule, the relative section and chapter notes also apply, unless the context requires otherwise.

Council Regulation 2658/87 of July 23, 1987, On the Tariff and Statistical Nomenclature and on the Common Customs Tariff, annex, 1987 O.J. (L 361) 1, 15–16.

²¹ Commerce accurately identified on the record that TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) covers live freshwater crawfish, and Plaintiffs' and Hi-King's proposed alternative, TARIC subheading 0306.19.10 (frozen freshwater crawfish), covers frozen freshwater crawfish. *See, e.g.*, Surrogate Value Mem. at 4 ("[W]e preliminarily find it is appropriate to use contemporaneous Spanish import data on the record under TARIC number, 0306.39.10, which represents live crawfish."); *see also, e.g.*, Final IDM at 7 ("TARIC number 0306.39.10 covers live crawfish, and TARIC number 0306.19.10 covers frozen crawfish.").

²² Commerce made clear from the start its intention to value the live freshwater crawfish factor of production using contemporaneous Spanish import data under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish). *See* Surrogate Value Mem. at 4. In fact, the Mandatory Respondents themselves stated that "[i]f Commerce finds [TARIC subheading 0306.19.10 (frozen freshwater crawfish)] data unusable, Commerce shall use the inflated Spanish import data [under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish)]." *See* Mandatory Respondents' Comments on Surrogate Value (Apr. 26, 2019) at 2, PR 75.

Thus, Plaintiffs and Hi-King were aware of Commerce's understanding of the TARIC code at the preliminary stages of the underlying review. *See, e.g.*, Hi-King Case Br. (Aug. 26, 2019) at 1, PR 101 (quoting Surrogate Value Mem. at 4) ("The Department also specifically stated that it found it appropriate to use the contemporaneous Spanish import data on the record under TARIC number 0306.39.10 [(live, fresh or chilled freshwater crawfish)], because this tariff heading 'represents live crawfish.'). Despite such notice, they have not provided any authority to support their arguments to the contrary, notwithstanding their

It is well established that courts may take judicial notice of the texts of statutes both domestic and foreign. *See, e.g., Micron Tech., Inc. v. United States*, 31 CIT 2031, 2038 n.9, 535 F. Supp. 2d 1336, 1343 n.9 (2007) (taking judicial notice of Korean law). The court, having done so, finds that Commerce’s claims of the contents of the products described by TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) are supported by substantial evidence.

B. Hi-King’s Claim Challenging Commerce’s Assertions Regarding Amendments to the TARIC Classification System Are Barred by the Doctrine of Exhaustion of Administrative Remedies and Would Be Unavailing Nonetheless

In past reviews, Commerce reported using TARIC subheading 0306.29.10,²³ which covered “not frozen freshwater crawfish,” to value Spanish imports of freshwater crawfish. *See* Surrogate Value Mem. at 4. Prior to Commerce’s initiation of this administrative review, however, it found that TARIC subheading 0306.29.10 (not frozen freshwater crawfish) had been discontinued, and the products previously covered by TARIC subheading 0306.29.10 (*i.e.*, not frozen freshwater crawfish) were reclassified under either TARIC subheading 0306.39.10, which covers live, fresh or chilled freshwater crawfish, or 0306.99.10, covering “other” types of freshwater crawfish, *i.e.*, those that are not frozen, live, fresh or chilled (*e.g.*, cooked freshwater crawfish). *See* Surrogate Value Mem. at 4.

In both the Surrogate Value Memorandum and the Final IDM, Commerce stated that using the current TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) for valuing Mandatory Respondents’ live freshwater crawfish factor of production was appropriate because it was now the most specific to the main input. In other words, Commerce identified changes in the TARIC classification system to explain why it relied on TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) in the current administrative review, whereas, in past reviews, it had relied on TARIC subheading 0306.29.10 (not frozen freshwater crawfish).

burden to do so. *See, e.g., United Steel & Fasteners, Inc. v. United States*, 44 CIT ___, ___, 469 F. Supp. 3d 1390, 1400 (2020) (alteration in original) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)) (“[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.”).

²³ In an attempt to prevent any confusion between the discontinued TARIC subheading 0306.29.10 (not frozen freshwater crawfish), which Commerce had relied upon in past reviews to value Spanish imports of live freshwater crawfish, and the current TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) used by Commerce to value Spanish imports of live freshwater crawfish in this review, the court has underlined the fifth and sixth digits (*i.e.*, .29 & .39) of each subheading.

Hi-King argues that it was “inappropriate [for Commerce] to assume anything about the asserted changes [to the TARIC] given the utter lack of supporting record evidence,” and, as a result, Commerce unlawfully selected TARIC 0306.39.10 (live, fresh or chilled freshwater crawfish) based on unsubstantiated assertions. *See* Consol. Pl.’s Br. 29–30 (“There is no evidence to establish what is the specific connection between the prior TARIC [subheading] 0306.29.10 [(not frozen freshwater crawfish)] and the . . . new TARIC [subheadings] that supposedly correspond to the old TARIC [subheading].”). Hi-King makes this argument without giving any reason as to why Commerce should trace the new subheadings to the old ones.

According to the Government, Hi-King failed to make this argument at the agency level and, therefore, the doctrine of exhaustion prevents Hi-King from raising this argument for the first time before the court.

“The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency’s consideration before raising these claims to the Court.” *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006) (quoting *Ingman v. U.S. Sec’y of Agric.*, 29 CIT 1123, 1126 (2005) (not reported in Federal Supplement)). “This court has discretion to determine when it will require the exhaustion of administrative remedies” and “shall, where appropriate, require the exhaustion of [such] remedies.” 28 U.S.C. § 2637(d); *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT 1619, 1627, 949 F. Supp. 2d 1311, 1321 (2013) (citation omitted). “Requiring exhaustion is appropriate where doing so ‘can protect administrative agency authority and promote judicial efficiency.’” *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1265 (2014) (quoting *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013)). “Exhaustion can ‘serve judicial efficiency . . . by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution.’” *Id.* (alteration in original) (quoting *Itochu*, 733 F.3d at 1145).

The record shows that Hi-King merely mentioned, in passing, that Commerce had noted TARIC subheading 0306.29.10 (not frozen freshwater crawfish) was discontinued, and that the main input for products covered by this review were reclassified under, *inter alia*, TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish). *See* Hi-King Case Br. at 2. That is, at the agency level, Hi-King did not challenge the evidentiary support for Commerce’s assertions regarding whether products previously classified under TARIC subheading 0306.29.10 (not frozen freshwater crawfish) should be clas-

sified under the amended TARIC provisions. Hi-King instead claimed that Commerce's selection of TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) was unlawful because it was not the best available information on the record.

"Respondents do not meet exhaustion requirements 'by merely mentioning a broad issue without raising a particular argument.'" See *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 44 CIT ___, ___, 471 F. Supp. 3d 1313, 1338 (2020) (quoting *Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340–41 (2002)). Thus, Hi-King's passing mention of Commerce's observations concerning amendments to the TARIC classification system, without more, is insufficient to support a claim before the court that Commerce failed to substantiate its assertion that subheading 0306.29.10 (not frozen freshwater crawfish) was discontinued and replaced with, *inter alia*, subheading 0306.39.10 (live, fresh or chilled freshwater crawfish), or that tracing these changes was somehow necessary for Commerce's reliance on the plain language of subheading 0306.39.10 (live, fresh or chilled freshwater crawfish)—*i.e.*, the TARIC subheading in effect during the underlying review.

It is clear from the record that Hi-King failed to exhaust its administrative remedy by failing to make its arguments before the Department when it had the opportunity to do so—despite having notice of Commerce's conclusions concerning the relevant changes to the TARIC classification system, and the agency's intention to rely on the revised TARIC schedule. Thus, Hi-King failed to take advantage of its opportunity to make its case before Commerce and deprived Commerce of its chance to consider Hi-King's claim and make a decision. Accordingly, the doctrine of exhaustion precludes Hi-King from raising this claim for the first time before this court.

Even if Hi-King had not failed to exhaust its administrative remedy, its claim would fail. Notably, Hi-King does not dispute that changes were made to the TARIC classification system. Rather, Hi-King's claim is that the record lacks any evidence to support Commerce's statements that the products previously classified under the now discontinued TARIC subheading 0306.29.10 (not frozen freshwater crawfish) were recast under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) or subheading 0306.99.10 (other types of freshwater crawfish that are not frozen, live, fresh or chilled). See Consol. Pl.'s Br. 30. Hi-King makes this claim without revealing why tracing the products previously classified under the old subheading to the revised subheading was important in the Final Results or is necessary to a just outcome in this case.

There is no dispute that Commerce used Spanish import data for merchandise entered under subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) to value the Mandatory Respondents' main input without reference to any subheading from a previous iteration of the TARIC. TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) was in effect during the period of review. In other words, Commerce's observation that the law has changed from past reviews, while helpful to those following the freshwater crawfish line of cases, was not dispositive of any issue in this case because Commerce used the current TARIC provisions in reaching its findings.

As the foregoing portions of this opinion hold, Commerce has supported with substantial evidence its finding that live freshwater crawfish was included under TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish).

Although Commerce is required to support its selection of TARIC subheading 0306.39.10 (live, fresh or chilled freshwater crawfish) with substantial evidence—which the court finds that it has done—it does not have to do the same with respect to its statements noting previous changes to the law. Thus, the court finds that Hi-King's argument would be unavailing even if not barred by the doctrine of exhaustion of administrative remedies.

II. Commerce's Calculation of the Separate Rate Companies' "All-Others" Rate Is in Accordance with Law

In the underlying administrative review, Commerce limited the number of individually examined exporters to two mandatory respondents and calculated entity-specific rates for Hubei Qianjiang and Nanjing Gensen. *See* 19 U.S.C. § 1677f-1(c)(2)(B).²⁴ Commerce also determined that certain respondents, not selected for individual examination, had rebutted the presumption of *de jure* and *de facto* control by the Chinese government and were therefore eligible for a separate rate.

To calculate the separate rate for non-individually examined respondents, Commerce has adopted the statutory method for calculating the "all-others" rate under 19 U.S.C. § 1673d(c)(5). While § 1673d(c)(5), by its terms, applies to investigations, this method has

²⁴ When it is not practicable for Commerce to calculate individual weighted average dumping margins for each exporter and producer involved in the underlying review, the statute authorizes Commerce to limit the number of individually examined exporters in a manner that contemplates a "reasonable number of exporters and producers" that either (A) constitute a statistically representative sample of all known exporters and producers of the subject merchandise; or (B) includes "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." *See* 19 U.S.C. § 1677f-1(c)(2)(A), (B).

been approved by courts for use in administrative reviews. *See, e.g., Navneet Publ'ns (India) Ltd. v. United States*, 38 CIT ___, ___, 999 F. Supp. 2d 1354, 1359 (2014) (“Though § 1673d(c)(5) explicitly references investigations, nothing in that statute or in any other statute expressly or impliedly precludes application to administrative reviews.”).

Subsection 1673d(c)(5) governs Commerce’s calculation of the all-others rate. Paragraph (A) provides:

(A) General rule

For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title [*i.e.*, based on facts available or AFA].

19 U.S.C § 1673d(c)(5)(A).

In other words, the statute provides that to calculate the all-others rate, Commerce will use the weighted average of all mandatory respondents’ rates, excluding any rates that are zero, *de minimis*, or based entirely on facts available or adverse facts available.

Here, Commerce applied the all-others method to its separate rate calculations. Pursuant to the statute, Commerce excluded Hubei Qianjiang’s zero percent rate from its separate rate calculations, and assigned the Separate Rate Companies a rate of 7.92 percent—a rate equal to the calculated rate for Nanjing Gemen, the sole remaining mandatory respondent with a rate that was not zero, *de minimis*, or based entirely on facts available or adverse facts available. *See* Final Results, 84 Fed. Reg. at 58,372 (“[I]n accordance with [19 U.S.C. § 1673d(c)(5)(A)] and its prior practice, Commerce has assigned Nanjing Gemen’s calculated rate (*i.e.*, 7.92 percent) as the separate rate for the non-examined separate rate exporters for these final results.”).

First, Plaintiffs take the position that, by refusing to include Hubei Qianjiang’s zero percent rate in its all-others rate calculation, Commerce failed in its obligation to determine an accurate rate for the Separate Rate Companies. Next, they argue that Commerce’s decision to apply the general rule under § 1673d(c)(5)(A), and to exclude Hubei Qianjiang’s zero percent rate from its separate rate calculations, was unlawful because the statute requires an *average* of the Mandatory Respondents’ rates. Finally, Plaintiffs contend that estab-

lished Commerce policy requires it to include zero percent rates in its separate rate calculations when only two mandatory respondents were selected for individual examination. *See* Pls.' Br. 5–9.

To make their case, Plaintiffs assert that “Congress intended that Commerce calculate dumping margins as accurately as possible and use the best available information,” and the “fundamental requirement of accuracy requires, in this case, the averaging of the margins of both mandatory respondents.” Pls.' Br. 8. Thus, according to Plaintiffs, only by averaging the margins applied to both Mandatory Respondents could Commerce calculate the dumping margins as Congress intended—that is, “as accurately as possible.” *See* Pls.' Br. 8. Therefore, Plaintiffs ask the court to remand with instructions that Commerce calculate the all-others rate as a simple average of the rates received by Hubei Qianjiang (0.00 percent) and Nanjing Gemsen (7.92 percent). *See* Pls.' Br. 7–8.

This Court has expressed a certain sympathy with Plaintiffs' first argument. *See, e.g., Jilin*, 45 CIT at ___, 519 F. Supp. 3d at 1236 (citations omitted) (footnote omitted) (“Commerce’s practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be ‘representative’ of unexamined respondents for the purpose of calculating the all-others rate in a review, a devolution that this Court has regarded with some skepticism.”).²⁵ There can be little question that, if Commerce were to

²⁵ What this Court in *Jilin* called the statute’s “Mandatory Respondent Exception” has had a tortured path:

The Mandatory Respondent Exception is used when the number of respondents in a proceeding is so “large” that it is “not practicable to make individual weighted average dumping margin determinations.” 19 U.S.C. § 1677f-1(c)(2). When that occurs, Commerce may determine the weighted-average dumping margins for a “reasonable” number of exporters or producers by limiting its examination to (1) “a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection,” or (2) “exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.” *Id.* § 1677f-1(c)(2)(A), (B). The weighted average of the rates for each mandatory respondent forms the basis of the all-others rate for respondents not individually examined. *See id.* § 1673d(c)(1)(B)(i). Here, noting the “large” number of respondents in the underlying proceeding, Commerce chose to employ this Mandatory Respondent Exception and base the determination of the all-others rate on the rate determined for two mandatory respondents, which were the two largest exporters of subject merchandise by volume during the period of review. *Jilin* was one of these. The other was Jiangsu.

The aim of the Mandatory Respondent Exception is to determine an *accurate* all-others rate, based on a weighted average of rates determined for mandatory respondents by statistical sampling or the use of a statistically sufficient volume of exports. The statute directs Commerce to (1) “determine the estimated weighted average dumping margin for each exporter and producer individually investigated” and (2) “determine” in accordance with the statute’s method “the estimated all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. § 1673d(c)(1)(B)(i), (c)(5)(B). Use of the Mandatory Respondent Exception is intended to fulfill the prime purpose of the antidumping duty statute to calculate accurate rates. *Compare* 19 U.S.C. § 1677f-1(c)(2),

change its method and name more than two mandatory respondents, separate rate companies would receive more accurate rates, and a great deal of litigation would be avoided. Judges of the Federal Cir-

with 19 U.S.C. § 1673d(c)(1)(B)(i). The role of the mandatory respondents is therefore broader than that of the usual individually-examined respondent, because the mandatory respondents serve as surrogates for what can be (and is, in this case) a much larger group.

Commerce now employs the Mandatory Respondent Exception often, and reviews only a limited number of selected respondents. *See, e.g., Certain Fresh Cut Flowers From Colombia: Preliminary Results & Partial Rescission of Antidumping Duty Admin. Rev.*, 62 Fed. Reg. 16,772 (Dep't Commerce Apr. 8, 1997). Indeed, Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be "representative" of unexamined respondents for the purpose of calculating the all-others rate in a review, a devolution that this Court has regarded with some skepticism. *See, e.g., Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009).

Even when Commerce does choose two mandatory respondents (and despite having replaced or substituted mandatory respondents in the past), it has more recently declined to name a mandatory respondent replacement when it became clear that a chosen mandatory entity would not participate or is otherwise excluded from examination. *See, e.g., Bestpak*, 716 F.3d at 1374. When one of two chosen mandatory respondents does not participate or is excluded from participation, a failure to name a replacement can result (as it did here) in an all-others rate being determined based on the margin of a sole respondent whose percentage of export volume is quite small in relation to the total volume of exports. *See, e.g., Stainless Steel Sheet & Strip From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value & Preliminary Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 64,135 (Dep't Commerce Sept. 19, 2016), and accompanying decision memorandum.

In November 2013, Commerce announced changes in its method of selecting mandatory respondents. *See Antidumping Procs.: Announcement of Change in Dep't Practice for Respondent Selection in Antidumping Duty Procs. & Conditional Review of the Non-market Econ. Entity in NME Antidumping Duty Procs.*, 78 Fed. Reg. 65,963 (Dep't Commerce Nov. 4, 2013) ("Practice Change").

As originally enacted, a 1984 change in the statute permitted Commerce to use "statistical sampling" of products "whenever a significant volume of sales is involved or a significant number of adjustments to prices is required." *See* Pub. L. No. 98-573, § 620(a), 98 Stat. 2948, 3039 (1984). With passage of the Uruguay Round Agreements Act in 1994, Commerce's mandatory respondent selection practice came to rely generally upon the then-new provision of 19 U.S.C. § 1677f-1(c)(2) for "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined" ("subsection (B)"), and it resorted to using the "statistically valid" sampling provision ("subsection (A)") only rarely. *See Proposed Methodology for Respondent Selection in Antidumping Procs.; Req. for Cmt.*, 75 Fed. Reg. 78,673, 78,678 (Dep't Commerce Dec. 16, 2010) ("Proposed Methodology") (emphasis added) (the Department has used subsection (B) in "virtually every one of its proceedings"). The 2013 Practice Change announced that Commerce would

consider sampling when it can select a *minimum of three respondents* to examine individually and when the three largest respondents (or more if the Department intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume. *The Department considers 50 percent [of import volume] to be a reasonable threshold* because in these circumstances the agency would be able to calculate specific dumping margins for the majority of imports during a period of review.

Practice Change, 78 Fed. Reg. at 65,968 (emphasis added).

cuit have expressed similar views. *See, e.g.*, Oral Argument, Y.C. Rubber Co. (North America) v. United States, No. 21–1489 (Fed. Cir. argued Nov. 5, 2021), <https://cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments/>.

Although Plaintiffs’ proposed method of averaging in the zero percent rate might well result in a more accurate all-others rate, it is not required by the law. Commerce’s exclusion of Hubei Qianjiang’s zero percent rate from its separate rate calculation comports with the language of the statute. *See* 19 U.S.C. § 1673d(c)(5)(A) (emphasis added) (“[T]he estimated all-others rate *shall* be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually [examined], *excluding* any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title.”).

By claiming that Commerce must average Hubei Qianjiang’s zero percent rate with Nanjing Gemsen’s rate of 7.92 percent, Plaintiffs ignore the statute’s express direction that Commerce exclude “any zero and *de minimis* margins, and any margins determined entirely [based on facts available or adverse facts available].” *See id.* Nonetheless, Plaintiffs maintain that Commerce has recently established a policy of *including zero or de minimis* rates in the calculation of the all-others rate when there are only two mandatory respondents. *See* Pls.’ Br. 9 & n.4. Plaintiffs misread the authorities.

Pursuant to the statute, if the estimated weighted average dumping margins established for *all* mandatory respondents are zero, *de minimis*, or determined entirely based on facts available or adverse

Thus, the *Practice Change* announced that Commerce would use the statistical sampling found in subsection (A) only if certain conditions were met. Otherwise, subsection (B) (volume) would be used. Specifically, Commerce would use the sampling of subsection (A) “where possible” on a case-by-case basis for the selection of mandatory respondents, if interested parties made a specific request to use that method. *See Proposed Methodology*, 75 Fed. Reg. at 78,678. Commerce, however, would forgo the subsection (A) option (and rely on the (B) option): (1) if it is unable to examine at least three companies “due to resource constraints”; or (2) *when the largest companies by import volume account for at least 50 percent of total imports*; or (3) when the “characteristics” of the underlying population make it highly likely that results obtained from the largest possible sample would be unreasonable to represent the population (*i.e.*, when “information obtained by or provided to the Department provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters”). *Practice Change*, 78 Fed. Reg. at 65,964–65.

There can be little doubt that relying almost exclusively on subsection (B) made Commerce’s work easier, while still, at least arguably, using a sufficiently large sample of imports to calculate an accurate rate for the unexamined respondents receiving the all-others rate. *Cf. Practice Change*, 78 Fed. Reg. at 65,968. The Department, however, does not appear to always follow the guidance of the *Practice Change*. *See, e.g., id.* (“The Department considers 50 percent [of import volume] to be a reasonable threshold because in these circumstances the agency would be able to calculate specific dumping margins for the majority of imports during a period of review.”).

Jilin, 45 CIT at ___, 519 F. Supp. 3d at 1235–38 (cleaned up).

facts available, then Commerce “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” See 19 U.S.C. § 1673d(c)(5)(B). In other words, the statute provides that Commerce is permitted to average zero or *de minimis* rates under the “any reasonable method” exception *when all of the individually examined respondents’ rates are zero or de minimis*. See *id.*

For example, in *Bestpak*, a case with only two mandatory respondents, one respondent was individually examined and received a *de minimis* rate, while the other was assigned an adverse facts available rate because it failed to cooperate. See *Bestpak*, 716 F.3d at 1375 (“In this case . . . the only two dumping margins on the administrative record were Yama’s *de minimis* rate and Jintian’s AFA China-wide rate [which it was assigned because of its refusal to cooperate in the investigation].”). Thus, both respondents received rates that were zero, *de minimis*, or determined entirely based on facts available or adverse facts available. See *id.* Therefore, the conditions for applying the exception found in § 1673d(c)(5)(B) were met, and Commerce took a simple average of the two rates. See *id.*

Unlike in *Bestpak*, use of the exception in § 1673d(c)(5)(B) (and thus averaging the Mandatory Respondents’ rates) is not statutorily directed here, because the conditions for its application—*i.e.*, when the dumping margins for *all* individually investigated mandatory respondents are zero, *de minimis*, or determined entirely based on facts available or adverse facts available—were not satisfied. That is, mandatory respondent Nanjing Gemen’s calculated rate of 7.92 percent was not zero, *de minimis*, or determined entirely based on facts available or adverse facts available.

Plaintiffs have cited no case approving the exception found in § 1673d(c)(5)(B) when Commerce has available to it a calculated margin that is greater than zero and not *de minimis*. One day a court may find that record evidence supports a finding that, in a case similar to that presented here, the assigned rate is so far from the mark that it is unlawful. That day has not yet arrived. Accordingly, the court finds that Commerce’s reliance on the general rule found in 19 U.S.C. § 1673d(c)(5)(A) in applying Nanjing Gemen’s rate to the Separate Rate Companies as the all-others rate is reasonable and in accordance with law.

III. Hi-King’s Claim Challenging the Lawfulness of Commerce’s 15-Day Liquidation Policy Is Moot

Commerce published its Final Results on October 31, 2019 and stated therein that it “intend[ed] to issue assessment instructions to CBP 15 days after the date of publication of the[] final results of review.” Final Results, 84 Fed. Reg. at 58,372. The liquidation instructions were issued on November 18, 2019, and eleven days later, on November 29, 2019, Hi-King’s entries were liquidated.

On November 26, 2019, three days before its entries were liquidated, Hi-King timely filed a summons with this Court initiating its appeal challenging certain aspects of the Department’s Final Results. On December 3, 2019, Hi-King timely filed its initial complaint. On December 4, 2019, it submitted its Form 24 request for a statutory injunction preventing the liquidation of its entries. The following day, on December 5, 2019, the court granted Hi-King’s request enjoining Customs’ liquidation of its entries.

It was not until after the filing of its initial complaint, however, that Hi-King’s counsel realized its entries had been liquidated prior to the issuance of the statutory injunction. Hi-King filed two motions in response to learning that its entries had been liquidated. The first, on March 19, 2020, was for leave to file an amended complaint to add a claim challenging the lawfulness of Commerce’s 15-day liquidation policy. The second, on May 21, 2020, was for an order directing Customs to reset its entries to unliquidated status. By orders dated April 23, 2020 and June 25, 2020, respectively, Hi-King’s amended complaint was deemed filed and its entries reset to unliquidated status. *See supra* Background.

Hi-King claims that, notwithstanding the June 25, 2020 order directing Customs to reset its entries to unliquidated status—with which Customs has complied—its case has not been mooted, and the court retains jurisdiction over its claim alleging that Commerce’s 15-day liquidation policy is unlawful. Hi-King acknowledges that the particular harm it suffered was remedied by the court’s June 25, 2020 order. It maintains, however, that Commerce’s alleged unlawful application of the 15-day liquidation policy is not limited to this review. *See* Consol. Pl.’s Reply 15. For that reason, Hi-King argues that the issue is “capable of repetition yet evading review,” and therefore falls within the narrow exception to the mootness doctrine. *See* Consol. Pl.’s Reply 15. Thus, Hi-King asks the court to “provide further guidance [regarding] the legality of the Department’s 15-day liquidation policy.” Consol. Pl.’s Reply 18.

For its part, the Government argues that Hi-King’s claim is moot because the court’s order restored its entries to unliquidated status,

and the “capable of repetition, yet evading review” exception to the mootness doctrine does not apply here.

Following the court’s order, and following the entry of similar orders in other cases before this Court,²⁶ Commerce issued a notice effectively discontinuing the use of its 15-day liquidation policy. Counsel for Commerce did not inform the court of the notice. Commerce published the notice in the Federal Register on January 15, 2021, announcing that:

effective immediately upon publication of this notice, [Commerce] is discontinuing its policy to issue liquidation instructions in certain segments of antidumping duty (AD) and countervailing duty (CVD) administrative proceedings to [Customs] 15 days after publication or mailing, whichever applies, of final administrative determinations where no statutory injunction was requested

Notice of Discontinuation of Policy To Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings, 86 Fed. Reg. 3995, 3995 (Dep’t Commerce Jan. 15, 2021).

Accordingly, because Commerce’s 15-day liquidation policy has been discontinued, the “capable of repetition, yet evading review” exception to the mootness doctrine does not apply. That is, Hi-King’s claim that Commerce will continue to unlawfully employ its 15-day liquidation policy in future administrative reviews has been rendered moot by the Department’s discontinuation of the policy. For that reason, the court does not address this issue.

CONCLUSION

For the foregoing reasons, the court sustains Commerce’s Final Results. Judgment shall be entered accordingly.

Dated: December 17, 2021

New York, New York

/s/ Richard K. Eaton

JUDGE

²⁶ See, e.g., *Order, Jinxiang Infang Fruit & Vegetable Co., v. United States*, 44 CIT ___, ___, 476 F. Supp. 3d 1415 (2020) (Gordon, J.) (No. 19–211), ECF No. 24; *NTSF Seafoods Joint Stock Co. v. United States*, 44 CIT ___, ___, 487 F. Supp. 3d 1310, 1315 (2020) (Choe-Groves, J.) (“The court issued a letter on August 26, 2020 requesting that Defendant consider restoring NTSF’s subject entries to unliquidated status. Defendant consented. The court ordered that NTSF’s subject entries be restored to unliquidated status.”).

Slip Op. 21–170

PRODUCTOS LAMINADOS DE MONTERREY S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC. and ATLAS TUBE AND SEARING INDUSTRIES, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 20–00166

[Remanding for reconsideration an agency decision concluding an administrative review of an antidumping duty order.]

Dated: December 17, 2021

David E. Bond, White and Case LLP, of Washington, D.C., for plaintiffs Productos Laminados de Monterrey S.A. de C.V. With him on the brief was *Allison J.G. Kepkay*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant the United States of America. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistance Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Nucor Tubular Products Inc. With him on the brief were *Robert E. DeFrancesco, III* and *Jake R. Frischknecht*.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., for defendant-intervenors Atlas Tube and Searing Industries. With him on the brief were *Roger B. Schagrin*, *Luke A. Meisner*, and *Kelsey M. Rule*.

OPINION AND ORDER

Stanceu, Judge:

In this action brought under Section 516A of the Tariff Act of 1930, *as amended* (the “Tariff Act”), 19 U.S.C. § 1516a,¹ plaintiff Productos Laminados de Monterrey S.A. de C.V. (“Prolamsa”) contests a final determination of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) that concluded the second administrative review of an antidumping duty order on certain heavy walled rectangular carbon welded steel pipes and tubes from Mexico (“HWR,” “HWRT,” or the “subject merchandise”).

Before the court is Prolamsa’s motion for judgment on the agency record, brought under USCIT Rule 56.2, in which it claims that Commerce erred in denying its request for a level-of-trade adjustment related to the subject merchandise that it sold in its home market of Mexico. Opposing the motion are defendant United States and defendant-intervenors Nucor Tubular Products Inc. (“Nucor”) and Atlas Tube and Searing Industries. Ruling that the Department’s

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

decision to deny Prolamsa's request for a level-of-trade adjustment in the Final Results relied upon a factual finding that is not supported by substantial evidence on the record of the administrative review and a second finding that is vague and conclusory, the court grants plaintiff's motion and remands the contested decision to Commerce for reconsideration.

I. BACKGROUND

A. The Contested Agency Determination

The contested administrative determination (the "Final Results") was published as *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 41,962 (Int'l Trade Admin. July 13, 2020) ("*Final Results*"). The Final Results incorporate by reference a "Final Issues and Decision Memorandum" containing explanatory discussion. *Issues and Decision Memorandum for the Antidumping Duty Administrative Review: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico; 2017–2018* (Int'l Trade Admin. July 6, 2020) (P.R. 173, J. App. at 530) ("*Final I&D Mem.*").²

B. The Parties

Plaintiff is a Mexican producer and exporter of the subject merchandise that participated in the Department's second administrative review. Compl. ¶ 3 (Sept. 28, 2020), ECF No. 12. Defendant is the United States. Defendant-intervenors Nucor and Atlas Tube and Searing Industries are domestic producers of HWR pipes and tubes. Consent Mot. to Intervene as a Matter of Right 2 (Oct. 7, 2020), ECF No. 13; Consent Mot. to Intervene as Def.-Intervenor 1–2 (Oct. 23, 2020), ECF No. 18.

C. Proceedings Before Commerce

Commerce issued the antidumping duty order (the "Order") in 2016. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Mexico, and the Republic of Turkey: Antidumping Duty Orders*, 81 Fed. Reg. 62,865 (Int'l Trade Admin.

² The information disclosed in this Opinion and Order is included in public versions of record documents, public versions of the parties' submissions, and other information subsequently made public in issuances by Commerce. All citations to record documents are to the public versions of those documents. All citations to "J. App." are to the public version of the Joint Appendix (June 25, 2021), ECF No. 47–1 (public).

Sept. 13, 2016) (“*Order*”). In the *Order*, Commerce described the subject merchandise as “certain heavy walled rectangular welded steel pipes and tubes of rectangular (including square) cross section, having a nominal wall thickness of not less than 4 mm.” *Id.* at 62,865. These products, which typically are supplied in lengths, commonly from 20 to 42 feet, to manufacturers who further process them, “are used in construction for support and for load-bearing purposes, as well as in transportation, farm, and material handling equipment.” *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea, Mexico, and Turkey*, Inv. Nos. 701-TA-539, 731-TA-1280–1282, USITC Pub. 4633, at I-12 (Sept. 2016) (Final).

On November 15, 2018, Commerce initiated the second administrative review of the *Order*, which covered entries made during the period of September 1, 2017 to August 31, 2018 (the “period of review” or “POR”). *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 57,411, 57,413 (Int’l Trade Admin.). Commerce chose Prolamsa and a second exporter/producer, Maquilacero S.A. de C.V., as “mandatory” respondents, i.e., respondents for which Commerce intended to conduct an individual examination of sales and determine individual dumping margins, for the review. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico; Selection of Respondents for Individual Review* (Feb. 7, 2019) (P.R. 21, at 1, J. App. at 16).

Commerce published preliminary results for the second review on November 18, 2019 (the “Preliminary Results”), in which Commerce preliminarily calculated a dumping margin of 0.8% for entries of subject merchandise produced and exported by Prolamsa. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018*, 84 Fed. Reg. 63,610 (Int’l Trade Admin.) (“*Preliminary Results*”). Incorporated by reference in the Preliminary Results is an explanatory document, the “Preliminary Decision Memorandum.” *Decision Memorandum for the Preliminary Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* (Int’l Trade Admin. Nov. 6, 2019) (P.R. 147, J. App. at 479) (“*Prelim. Decision Mem.*”). Commerce preliminarily found that Prolamsa had made sales at two levels of trade (“LOTs”) in its home market of Mexico during the period of review and, on that basis, made a level-of-trade adjustment in calculating the 0.8% preliminary dumping margin. *Id.* at 15, J. App. at 483.

On July 13, 2020, Commerce published the Final Results, in which it assigned Prolamsa a weighted average dumping margin of 7.47%. *Final Results*, 85 Fed. Reg. at 41,963. In the Final Results, Commerce, changing its prior position, denied Prolamsa's request for a level-of-trade adjustment upon deciding that Prolamsa sold the foreign like product at a single LOT in its home market. Commerce made two other changes affecting Prolamsa's margin, neither of which Prolamsa contests before the court. *See Final I&D Mem.* at 3, J. App. at 533. Therefore, the Department's decision not to allow a level-of-trade adjustment for Prolamsa is at issue in this litigation.

D. Proceedings Before the Court

Plaintiff brought this action in September 2020. Summons (Sept. 1, 2020), ECF No. 1; Compl. (Sept. 28, 2020), ECF No. 12. On March 5, 2021, plaintiff filed the instant motion for judgment on the agency record and accompanying brief. Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 31 (conf.), 32 (public); Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R., ECF Nos. 31–1 (conf.), 32–1 (public) ("Pl.'s Br."). On May 4, 2021, Atlas Tube and Searing Industries filed a response in opposition to plaintiff's motion. Def.-Intervenors Atlas Tube and Searing Industries' Resp. in Opp'n to Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 37 (conf.), 38 (public) ("Atlas Tube's Resp."). Nucor and the government each submitted their respective responses on May 7, 2021. Def.-Intervenor Nucor Tubular Products Inc.'s Resp. Br., ECF Nos. 40 (conf.), 41 (public) ("Nucor's Resp."); Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 42 ("Def.'s Resp."). On June 11, 2021, Prolamsa filed its reply brief. Reply Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 45.

On July 2, 2021, plaintiff filed an unopposed motion for oral argument on its Rule 56.2 motion. Pl.'s Unopposed Mot. for Oral Arg., ECF No. 49.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of an antidumping duty order.

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported

by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Levels of Trade in Calculations of Dumping Margins

Section 751(a)(1) of the Tariff Act requires Commerce, upon a proper request, to conduct a periodic administrative review at least once during each 12-month period beginning on the anniversary of the date of publication of an antidumping duty order. 19 U.S.C. § 1675(a)(1). In a review, Commerce is directed to make comparisons between the normal value of the subject merchandise and the “U.S. price” (i.e., the “export price” (“EP”) or “constructed export price” (“CEP”)) and determine the dumping margin for “each entry” of the subject merchandise. *Id.* § 1675(a)(2)(A)(i), (ii).

The Tariff Act directs that Commerce, in the ordinary instance in which normal value is based on the price of the foreign like product in the home market, determine normal value beginning with the price (often referred to as the “starting price”) “at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.” *Id.* § 1677b(a)(1)(B)(i) (emphasis added). The statute provides for various types of adjustments to the starting price in the determination of normal value.

One of the types of adjustments to the starting price is known as a “level-of-trade” adjustment, which Commerce must make according to 19 U.S.C. § 1677b(a)(7) under certain conditions. When calculating normal value, Commerce is required to make an upward or downward adjustment to the starting price “to make due allowance for any difference (or lack thereof) between the export price or constructed export price” and the starting price “(other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value” if both of two conditions are met. *Id.* § 1677b(a)(7)(A).

The first condition is met if the difference in the level of trade between the export price or constructed export price and normal value “involves the performance of different selling activities.” *Id.* § 1677b(a)(7)(A)(i). The second condition is met if the difference in the level of trade between the EP or the CEP and normal value “is

demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.” *Id.* § 1677b(a)(7)(A)(ii). The statute provides that “[i]n a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.” *Id.* § 1677b(a)(7)(A).

The Department’s regulations explain that “[i]n comparing United States sales with foreign market sales [i.e., sales in the comparison market, which typically is the home market of the exporting country], the Secretary may determine that sales in the two markets were not made at the same level of trade, and that the difference has an effect on comparability of the prices,” adding that “[t]he Secretary is authorized to adjust normal value to account for such a difference.” 19 C.F.R. § 351.412(a). The regulations provide that “[t]he Secretary will determine that sales are made at different levels of trade if they are made at *different marketing stages (or their equivalent)*.” *Id.* § 351.412(c)(2) (emphasis added). The Commerce regulations do not include a definition for the term “marketing stages” or the term “equivalent of marketing stages” in the “definitions” section of the regulations, 19 C.F.R. § 351.102(b). The preamble to the Department’s 1997 promulgation of the regulations explains that “Section 351.412(c) states that an LOT is a marketing stage ‘or the equivalent’ (which means that the merchandise does not necessarily have to change hands more than twice in order to reach the more remote LOT).” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,371 (Int’l Trade Admin. May 19, 1997). While addressing level-of-trade issues involving a remote LOT, the preamble instructs that “[s]ubstantial differences in the amount of selling expenses associated with two groups of sales also may indicate that the two groups are at different levels of trade,” *id.*, but the regulations further provide, in § 351.412(c)(2), that “[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.” *Id.* It also explains that “[s]ome overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.” *Id.*

C. The Department’s Preliminary Determination of Two Levels of Trade in Prolamsa’s Home Market Sales and its Level-of-Trade Adjustment to Normal Value

In questionnaire responses it submitted during the review, Prolamsa informed Commerce that its home market sales occurred in four channels of distribution, identifying its sales in what it termed “HM

[home market] Channel 4” as sales of custom-designed parts that were made from HWR pipes and tubes and that were produced for, and sold to, original equipment manufacturers (“OEMs”). *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Response to Section A of the Questionnaire* (Mar. 15, 2019) (P.R. 46–56, at A-18, J. App. at 34) (“*Section A Resp.*”). Prolamsa contrasted its HM Channel 4 sales, to which it referred as its “industrial” sales, with those sold through its other three channels of distribution, to which it referred as its “commercial” sales of HWR pipes and tubes, and which it described as follows: direct sales to unaffiliated customers from inventory stored at its plants (“HM Channel 1”); direct sales to unaffiliated customers from inventory stored at its warehouses (“HM Channel 2”); and sales to affiliated resellers, which products subsequently were resold to unaffiliated home market customers (“HM Channel 3”). Pl.’s Br. 7–9.

Prolamsa points to record evidence in arguing that “sales through HM Channel 4 required substantially more selling activities” than did its sales through the other three channels. Pl.’s Br. 8.

On the issue of price comparability, Prolamsa informed Commerce that its “[h]ome market sales prices did not vary based on whether the HWRT was sold through HM Channel 1, HM Channel 2, or HM Channel 3,” that “[h]ome-market sales prices in HM Channel 4 were significantly higher than sales through HM Channel 1, HM Channel 2, and HM Channel 3” and that “[t]he higher prices reflected the significant, additional selling activities performed in relation to sales through HM Channel 4, as well as the additional production costs incurred to manufacture the parts.” *Section A Resp.* at A-22, J. App. at 38.

With respect to its U.S. sales of subject merchandise, Prolamsa explained to Commerce during the review that it sold HWR pipes and tubes through three channels of distribution.³ Prolamsa argued that all of its U.S. sales were more similar, in terms of characteristics and

³ Prolamsa had both export price (“EP”) and constructed export price (“CEP”) sales in the United States during the period of review for the second review. As stated in the Preliminary Decision Memorandum:

With respect to the U.S. market, Prolamsa reported that it made sales through three channels of distribution: (1) direct EP sales of HWR pipe and tube to unaffiliated U.S. customers for which Prolamsa knew the final destination was the United States (*i.e.*, U.S. channel 1); (2) direct CEP sales of HWR pipe and tube to unaffiliated U.S. customers from Prolamsa’s inventory sold through its U.S. affiliate, Prolamsa, Inc. (*i.e.*, U.S. channel 2); and (3) direct CEP sales of HWR pipe and tube to unaffiliated U.S. customers sold from Prolamsa Inc.’s warehouse through Prolamsa, Inc. (*i.e.*, U.S. channel 3).

Decision Memorandum for the Preliminary Results of the 2017-2018 Administrative Review of the Antidumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico (Int’l Trade Admin. Nov. 6, 2019) (P.R. 147, at 15, J. App. at 485).

selling functions, to its HM Channels 1, 2, and 3 sales, i.e., its “commercial” sales, than they were to its “industrial” sales of HM Channel 4. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Response to Sections B and C of the Questionnaire* (Apr. 8, 2019) (P.R. 69–71, at B-35, J. App. at 202). Prolamsa contended that its U.S. sales should be compared to HM Channels 1–3, and that HM Channel 4 sales should not be used for comparison purposes unless sales in HM Channels 1–3 are unavailable, and that in such an instance Commerce should make a level-of-trade adjustment. *Id.*

For purposes of calculating the 0.8% preliminary dumping margin for Prolamsa in the Preliminary Results, Commerce agreed. Commerce preliminarily determined, first, that all of Prolamsa’s U.S. sales occurred at a single LOT. *Prelim. Decision Mem.* at 15, J. App. at 483. It preliminarily determined, next, “that sales to the home market non-OEM customers (*i.e.*, in HM channels 1 through 3) during the POR were not made at a different LOT than sales to the United States.” *Id.* at 16, J. App. at 484. Regarding the requested level-of-trade adjustment, Commerce stated that “[i]n instances where we were unable to make price-to-price comparisons at the same LOT (*i.e.*, comparisons involving OEM sales in HM channel 4) we made an LOT adjustment.” *Id.* In summary, for the Preliminary Results Commerce used Prolamsa’s HM Channel 4 sales for price comparisons with U.S. sales only when no HM Channel 1, 2, or 3 sales were available for comparison with U.S. sales, and when it used an HM Channel 4 sale for that purpose, it made an adjustment, i.e., a reduction, in normal value to account for the difference in level of trade.

D. The Department’s Decision in the Final Results to Deny Prolamsa’s Request for a Level-of-Trade Adjustment

Following the Department’s issuance of the Preliminary Results, Petitioners Independence Tube Corporation, a Nucor company, and Southland Tube, Inc., a Nucor company, (the corporate predecessors to defendant-intervenor Nucor) filed a case brief with Commerce in which they opposed the decision in the Preliminary Results that would allow Prolamsa a level-of-trade adjustment. *See Final I&D Mem.* at 16–20, J. App. at 546–50. They characterized the difference between HM Channel 4 sales and the sales in HM Channels 1 through 3 as demonstrating only “minor differences” in the customer bases and merchandise that they argued did not amount to a different stage of marketing. Overall, they argued that Prolamsa provided insufficient, and inadequately documented, proof for its request that Commerce recognize a second level of trade in its home market. In its

case brief, Prolamsa made arguments in rebuttal. *Id.* at 20–23, J. App. at 550–53.

Commerce, reversing its preliminary decision in the Final Results, stated that “[b]ased upon the parties’ comments and our reexamination of the evidence on the record, we find that Prolamsa has not demonstrated that it sold HWR pipe and tube at two different LOTS in the home market.” *Id.* at 23, J. App. at 553. “Accordingly, for these final results we have treated all sales made in the home market at a single LOT during the POR.” *Id.*

E. The Department’s Denial of the Requested Level-of-Trade Adjustment Is Not Supported by Substantial Evidence

In the Final Issues and Decisions Memorandum, Commerce stated as background that “reliance on qualitative evidence, such as narrative descriptions of differences in selling functions, customer correspondence, sample sales records, meeting presentations and the like, without supporting quantitative evidence frequently does not present a complete understanding of a respondent’s selling activities.” *Final I&D Mem.* at 25, J. App. at 555. Commerce cited a change of practice under which “[s]ince 2018, Commerce has required respondents to provide quantitative evidence in support of their LOT claims.” *Id.* at 26, J. App. at 556. It further explained that “[s]ignificantly, Commerce’s requirement that respondents support LOT claims with quantitative evidence in all proceedings was implemented in 2018 to enhance Commerce’s ability to determine whether reported differences in selling functions are substantial enough to warrant a finding that sales were made at different LOTS.” *Id.* at 25, J. App. at 555 (footnote omitted). Commerce added that “[a]lthough qualitative information is helpful and relevant to the LOT analysis, reliance on this information alone limits Commerce’s ability to analyze selling functions to determine if LOTS identified by a party are meaningful and to evaluate whether a respondent’s LOT claims are reasonable and accurate.” *Id.*

After discussing its general requirement for “quantitative information,” Commerce based its decision denying Prolamsa’s request for a level-of-trade adjustment on a finding that “[w]hile Prolamsa asserts that it fully demonstrated that there were significant differences in the selling activities performed between home market channels during the POR, none of the documents provided demonstrate direct quantitative support for such claims.” *Id.* at 27, J. App. at 557. “Therefore, for these final results, Commerce finds that Prolamsa has not shown that it made sales in the home market at more than one LOT because it has not supported its LOT claims with quantitative evidence.” *Id.*

Before the court, Prolamsa argues that Commerce “completely overlooked the quantitative information submitted by Prolamsa.” Pl.’s Br. 14. The court agrees. Evidence on the record contradicts the Department’s finding that none of the documents Prolamsa provided “demonstrate direct quantitative support” for Prolamsa’s assertion “that there were significant differences in the selling activities performed between home market channels during the POR.” *Final I&D Mem.* at 27, J. App. at 557.

With its response to the Department’s supplemental Section A questionnaire, Prolamsa provided quantitative data illustrating differences between the staffing and expenses it incurred in making its home market “industrial” sales, i.e., its OEM sales of parts made from HWR pipe and tube in HM Channel 4, and its sales of standard HWR pipe and tube in the other three channels, to which it referred in the response as its “commercial” sales. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Response to the First Section A Supplemental Questionnaire* (Oct. 21, 2019) (P.R. 135–37, at 7–8, J. App. at 307–08) (“*Supp. Section A Resp.*”). In columns in Supplemental Exhibit A-4, Prolamsa presented data for the “Commercial” and “Industrial” sales activities, broken down by “Total Sales Personnel (Directors, Managers, Staff) (Headcount),” “Total Selling Expenses (MXN [apparently, ‘Mexican’]),” and “Sales Team’s Salaries & Benefits (MXN).” *Id.* at Ex. Supp. A-4, J. App. at 325. Prolamsa summarized this confidential business data on page 8 of the response. *Id.* at 8, J. App. at 308. The data show generally that the industrial sales accounted for staffing and staffing expenses (salary and benefits) and total selling expenses that, when related to total home market (“MXN”) sales in each of these two categories, were proportionally higher by a substantial amount than those of the commercial sales. *Id.* Describing these quantitative data to the court, Prolamsa describes this supplemental questionnaire response as presenting “comparisons of selling expenses, salaries/benefits, and headcount, all demonstrating the substantially higher expenses incurred for sales made through HM Channel 4 due to the higher intensity of selling activities, such as those required to qualify as a supplier and to coordinate customer-specific inventory and just-in-time delivery.” Pl.’s Br. 10 (citing *Supp. Section A Resp.* at 7–8 & Ex. Supp. A-4, J. App. at 307–08 & 325).

Prolamsa provided a second set of quantitative data on inventory turnover to illustrate that the industrial sales involved substantially longer average inventory turnover periods than the commercial sales. Prolamsa argues that these data “support the conclusion that the sales through HM Channel 4 had a slower inventory turnover, which

resulted in higher inventory costs, as compared to sales through HM channels 1 through 3” and that “[t]he slower inventory turnover was because of additional inventory requirements for just-in-time delivery requirements of OEMs and to compensate for specific customer needs.” Pl.’s Br. 15 (citing *Supp. Section A Resp.* at 17 & Ex. Supp. A-8, J. App. at 317 & 360).

The Final Issues and Decision Memorandum does not specifically address the quantitative data on selling expenses and inventory turnover. Instead, the Department’s analysis proceeds directly from its invalid finding that Prolamsa failed to provide documents that “demonstrate direct quantitative support” for Prolamsa’s assertion “that there were significant differences in the selling activities performed between home market channels during the POR.” *Final I&D Mem.* at 27, J. App. at 557. In addition to that specific finding, Commerce offered only one other finding in support of its ultimate conclusion. Referring to its “analytical framework” since the 2018 change of practice, Commerce concluded that “[i]n applying this analytical framework to the record evidence, Commerce has reached a different conclusion in the final results of this review than it reached in the *Preliminary Results* because it has found that the totality of the record evidence contains inadequate support for Prolamsa’s LOT claims.” *Id.* at 27-28, J. App. at 557–58. This second finding is unsatisfactory in two respects. First, it is entirely conclusory, hiding behind a vague and unexplained “totality of the record evidence.” Second, the actual “totality of the record evidence” would appear to include circumstances Commerce described in a number of specific factual findings that Commerce stated, and grounded in record evidence, in the *Preliminary Results* but did not identify in the *Final Results* as findings that it was reversing or abandoning.

For example, regarding “intensity” of selling activities, Commerce stated in the *Preliminary Results* that Prolamsa had “provided certain additional documentation adequately demonstrating that it performed 9 out of 14 selling activities for its HM channel 4 sales at a high level of intensity (*i.e.*, personal training/exchange, engineering services, qualification requirements, order input/processing, inventory maintenance, freight and delivery, just-in-time delivery, technical assistance, and after-sales services).” *Prelim. Decision Mem.* at 14, J. App. at 482 (footnote omitted). For the *Preliminary Results*, Commerce also found that Prolamsa performed certain selling activities for its “industrial” sales of HM Channel 4, which were sales of custom “HWR pipe and tube parts,” that it did not perform for its other, *i.e.*, “commercial” sales of HM Channels 1–3, which were of “standard

HWR pipe and tube.” *Id.* Commerce devoted detailed discussion in the Preliminary Decision Memorandum to these “OEM-specific selling activities not performed for the rest of Prolamsa’s home market sales.” *See id.* In the Preliminary Decision Memorandum, Commerce stated that “Prolamsa undertakes significant selling activities when selling HWR pipe and tube parts to OEMs and that “[b]ecause certain of these OEM-specific selling activities are not performed for the rest of Prolamsa’s home market sales, it is clear that substantial differences inherently exist between home market sales of standard HWR pipe and tube and HWR pipe and tube parts.” *Id.* Commerce found, specifically, that “[c]ritical to these sales is the successful completion of the Production Parts Approval Process (PPAP), an industry-specific qualification process that ensures quality and established processes for OEM customers to certify manufacturers on a custom-‘part’ basis.” *Id.* (footnote omitted). Commerce also stated that “Prolamsa provided contemporaneous PPAP documentation supporting certain activities performed in HM channel 4 that are not performed with respect to other home market sales.” *Id.* “For example, with respect to engineering services, we find that the PPAP documentation provided is representative” and that “with respect to technical assistance, Prolamsa provided documentation detailing ways to re-engineer products or production processes in order to reduce production process costs as required by an OEM customers [*sic*].” *Id.* (footnote omitted).

In summary, the Department’s analysis rests on one finding that is contradicted by the record evidence and another that is vague and conclusory in invoking the “totality of the record evidence.” The court, therefore, must remand for reconsideration the Department’s decision that all home market sales occurred at a single LOT and to reject Prolamsa’s request for a level-of-trade adjustment.

Defendant argues that the court should sustain the Department’s decision on the ground that “in reaching its conclusion that the record evidence was insufficient to support Prolamsa’s level of trade claim, Commerce explained in the final results that there was no quantitative evidence that would allow Commerce to determine if Prolamsa’s claimed levels of trade were *meaningful*.” Def.’s Resp. 12 (citing *Final I&D Mem.* at 23, 25, J. App. at 553, 555) (emphasis in original). This is not an accurate paraphrase of the discussion in the Final Issues and Decision Memorandum. Commerce ruled as it did upon a finding that Prolamsa failed to provide documents that demonstrated direct quantitative support for Prolamsa’s assertion that there were significant differences in the selling activities performed between the in-

dustrial and the commercial home market sales and upon a conclusion that the totality of the record evidence was insufficient to support a level-of-trade adjustment.

Even were defendant's characterization of the Department's decision correct, the court would not agree with defendant's argument. The record evidence defendant implies is not "meaningful" includes, *inter alia*, quantitative and qualitative evidence concerning a number of selling activities that, according to findings in the Preliminary Results that Commerce did not abandon, uniquely characterized the home market industrial sales and distinguished them from the other home market sales and the U.S. sales. In summary, there is record evidence that sales in HM Channel 4 involved different and more intense selling activities, a different type of customer (OEMs), and different products (what Commerce in the Preliminary Results termed custom "HWR pipe and tube parts") than did the "commercial" sales of HM Channels 1–3 (which were of "standard HWR pipe and tube").

Defendant-intervenors' arguments parallel defendant's in some respects but also rest upon certain other findings and conclusions upon which Commerce did not base its decision. *See Nucor's Resp.* 11–24; *see also Atlas Tube's Resp.* 9–10. The court cannot sustain an agency determination upon *post hoc* reasoning. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . ."). Instead, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that [agency] action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

III. CONCLUSION AND ORDER

Commerce, on remand, must reconsider its decision finding a single home market level of trade and declining to make a level-of-trade adjustment. That decision rests solely upon a factual finding that is not supported by substantial evidence and a vague and conclusory statement directed to the "totality of the record evidence."

Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's Rule 56.2 Motion for Judgment on the Agency Record, ECF Nos. 30 (initial conf.) (Mar. 5, 2021), 31 (conf.) (Mar. 8, 2021), 32 (public) (Mar. 8, 2021), be, and hereby is, granted; it is further

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenors shall have 30 days from the filing of the Remand Redetermination in which to submit comments to the court; it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response; and it is further

ORDERED that plaintiff's Unopposed Motion for Oral Argument (July 2, 2021), ECF No. 49, be, and hereby is, denied.

Dated: December 17, 2021

New York, New York

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

Slip Op. 21–171

DEACERO S.A.P.I DE C.V. AND DEACERO USA, INC., v. UNITED STATES,
Defendant, and REBAR TRADE ACTION COALITION, Defendant-
Intervenor.

Before: Jane A. Restani, Judge
Court No. 20–03924

[Antidumping Duty Determination in Review of Order on Steel Concrete Reinforcing Bar from Mexico Sustained]

Dated: December 20, 2021

Rosa S. Jeong and *Sonali Dohale*, Greenberg Traurig LLP, of Washington, D.C., argued for Plaintiffs Deacero S.A.P.I. de C.V. and Deacero USA, Inc. With them on brief was *Friederike S. Görgens*.

Ann C. Motto, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the Defendant. Of counsel on the brief was *Ian A. McInerney*, Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen E. Thorson, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenors Rebar Trade Action Coalition. With her on brief were *Alan H. Price* and *John R. Shane*.

OPINION

Restani, Judge:

Before the court is a motion for judgment on the agency record pursuant to United States Court of International Trade (“USCIT”) Rule 56.2, in an action challenging a final determination of the United States Department of Commerce (“Commerce”). The final determination at issue resulted from Commerce’s findings during an administrative review of the antidumping (“AD”) order covering steel

concrete reinforcing bar (“rebar”) products from Mexico. Plaintiffs Deacero S.A.P.I. DE C.V. and Deacero USA, Inc. (collectively, “Deacero”) challenge the calculation.

BACKGROUND

a. Antidumping Administrative Review and Determination

On February 6, 2019, Commerce initiated an antidumping duty administrative review of rebar products from Mexico for the period of November 1, 2017, through October 31, 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 2,159, 2,161 (Dep’t Commerce Feb. 6, 2019). On March 1, 2019, Commerce selected Deacero as a mandatory respondent to be individually examined. *Commerce Respondent Selection Memorandum*, P.R. 10 (Mar. 1, 2019). Commerce issued its Preliminary Results and accompanying Preliminary Decision Memorandum on January 9, 2020, and published the results in the Federal Register. *Decision Memorandum for the Preliminary Results on Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from Mexico; 2017–2018*, A-201844, POR 11/1/2017–10/31/2018 (Dep’t Commerce Jan. 9, 2020) (“PDM”); *Steel Concrete Reinforcing Bar from Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 85 Fed. Reg. 2,702 (“Preliminary Results”) (Dep’t Commerce Jan. 16, 2020). Commerce issued the *Final Results* on November 6, 2020, resulting in a 7.12% margin for Deacero. *Steel Concrete Reinforcing Bar from Mexico: Final Results on Antidumping Duty Administrative Review; 2017–2018*, 85 Fed. Reg. 71,053 (Dep’t Commerce Nov. 6, 2020).

b. Treatment of Section 232 Duties

On March 8, 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1962, as amended, and mandated the imposition of a global tariff of 25 percent on imports of steel articles from all countries, except Canada and Mexico. *Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) (“*Proclamation 9705*”). The Section 232 duties went into effect on March 23, 2018, and applied “in addition to any other dut[y].” *Id.* at 11,627–28. By its terms, Proclamation 9705 was issued in order to “enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production” and to “ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.” *Id.* at

11,625–26; *see also* 19 U.S.C. § 1862(d). Proclamation 9705 excluded Canada and Mexico in order “to continue ongoing discussion” regarding steel articles imports. *Proclamation 9705* at 11,626.

On March 22, 2018, the President issued another proclamation, declaring that the Section 232 duties would be effective for steel articles from Mexico, Canada, and other designated countries beginning May 1, 2018. *Proclamation No. 9711 of March 22, 2018*, 83 Fed. Reg. 13,361, 13,362–64 (Mar. 28, 2018) (“*Proclamation 9711*”). The President noted, however, that the United States was “continuing discussions with Canada and Mexico,” as well as the other countries, to identify “satisfactory alternative means to address the threatened impairment to national security by imports of steel articles.” *Id.* at 13,361. On April 30, 2018, the President extended the temporary exemption for Mexico and other countries until June 1, 2018. *Proclamation No. 9740 of April 30, 2018*, 83 Fed. Reg. 20,683 (May 7, 2018). On May 19, 2019, after the Section 232 duties went into effect for Mexico and Canada, the President exempted Mexico and Canada from the Section 232 tariffs on a long-term basis after adopting alternative measures that were stated to ensure imports would “no longer threaten to impair the national security.” *Proclamation No. 9894 of May 19, 2019*, 84 Fed. Reg. 23,987, 23,987–88 (May 23, 2019) (“*Proclamation 9894*”). The President stated that the United States reached an agreement with Mexico and Canada “to prevent the importation of steel articles that are unfairly subsidized or sold at dumped prices,” while also “permitting the domestic industry’s capacity utilization to continue at approximately the target level recommended.” *Id.*

In the Preliminary Results, Commerce treated the Section 232 duties paid by Deacero as “United States import duties” under 19 U.S.C. § 1677a(c)(2)(A) and therefore deducted the Section 232 duties on the United States price side of the dumping comparison from Deacero’s export price (“EP”) and constructed export price (“CEP”). *PDM* at 12–14. Deacero argued that Commerce should not deduct Section 232 duties because the duties were special duties, not “United States import duties.” *Deacero Submission of Case Br.* at 5–15, P.R. 173 (June 17, 2020). Deacero also argued that Commerce must submit its proposed methodology for Section 232 duties for notice-and-comment proceedings. *Id.* at 15–19. In its final Decision Memorandum, Commerce determined that Section 232 duties were more akin to normal customs duties than to antidumping or countervailing (“AD/CV”) duties, codified in 19 U.S.C. §§ 1671, 1673, or Section 201 duties, codified in 18 U.S.C. § 2251, which are not deducted. Steel Concrete Reinforcing Bar from Mexico: Issues and Decision Memo-

randum for the Final Results of Antidumping Duty Administrative Review; 2017–2018, A-201–844, POR 11/1/2017–10/31/2018 at 11–13 (Dep’t Commerce Nov. 2, 2020) (“Final I&D Memo”). Commerce explained that there was no risk of imposing an impermissible double remedy by deducting Section 232 duties because *Proclamation 9705* stated that the duties were to be imposed in addition to other duties and the Section 232 duties were an import duty. *Id.* at 13; *Proclamation 9705* at 11,627–28.

c. Challenge to AD Review Determination

On December 21, 2020, Deacero commenced the instant action against the United States pursuant to 19 U.S.C. § 1516a(a)(1). Compl., ECF No. 2 (Dec. 21, 2020). Deacero claims the AD determination is unsupported by substantial evidence or is otherwise contrary to law because Commerce incorrectly treated Section 232 duties as normal U.S. customs duties and did not use notice-and-comment proceedings before that treatment. Compl. ¶¶ 15–16; Pls. Deacero Mem. in Supp. of their R. 56.2 Mot. For J. on the Agency R. at 21–36, ECF No. 23–1 (May 10, 2021) (“Deacero Br.”).¹

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce’s results of an administrative review of an AD duty order unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Section 232 Duties May Be Deducted From United States Price

The adjustments of EP and CEP are set forth in section 772(c) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677a(c). EP and CEP are to be reduced by “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . .” 19 U.S.C. § 1677a(c)(2)(A) (emphasis added).

¹ In its original brief, Deacero also argued that the implementation of Section 232 tariffs on steel imports from Mexico was unlawful, and thus, the tariffs were invalid. Deacero Br. at 10–21. Deacero later withdrew the argument. Letter regarding withdrawal of legal argument at 1, ECF No. 34 (Sep. 7, 2021).

When Congress has directly spoken to the precise question at issue, it ends the matter—“the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). When the statute is silent or ambiguous with respect to the specific issue, then the court must evaluate whether Commerce’s interpretation “is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. The inquiry is into “the reasonableness of Commerce’s interpretation.” *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1296 (2002).

Because the operable statute does not define “United States import duties,” in *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153 (Dep’t Commerce Apr. 12, 2004). Commerce issued an interpretation of the phrase “United States import duties” with regard to the deductibility of Section 201 safeguard duties, 19 U.S.C. § 2251, utilizing formal notice and comment procedures. *Id.* at 19,157–61. Commerce concluded Section 201 duties should not be deducted as “import duties.” *Id.* at 19,159–61. There, Commerce relied on the legislative history of the Antidumping Act of 1921 to conclude there is a distinction between certain “special dumping duties” and “normal-customs duties” (also referred to as “United States import duties”). *Id.* at 19,159 (citing S. Rep. No. 67–16, at 4 (1921)) (emphasis added). In upholding as reasonable Commerce’s interpretation that Section 201 safeguard duties are not “United States import duties,” the Federal Circuit clearly stated that “United States import duties” is an ambiguous phrase in the statute. *Wheatland Tube*, 495 F.3d at 1359–60.

Recently, the court held that Commerce did not err in treating Section 232 duties, unlike Section 201 duties, as “United States import duties.” *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, 45 CIT __, __, 494 F. Supp. 3d 1365, 1376 (2021). The court stated that Commerce’s differing treatment was a reasonable decision because “Section 201 duties [were] more akin to antidumping duties and that there [was] an interplay between antidumping duties and Section 201 duties, which [was] not present with Section 232 duties.” *Id.* The court reasoned that antidumping duties continue after the President imposes Section 232 duties while prior to imposition of Section 201 duties consideration must be given to “internationally accepted remedies for unfair trade practices,” including antidumping duties. *Id.* at 1375. Thus, the court held that there was no “impermissible double counting” when it came to Section 232 duties because the statutory term “import duties” was broad enough to include “all import duties

except antidumping duties.” *Id.* at 1375–76. In particular, the deduction of antidumping duties presents a circularity problem. *Id.* at 1373. In contrast, deducting Section 232 duties merely take EP and CEP back to a level for better comparison to normal value. *Id.* at 1371, 1375–76.

Here, Deacero has not shown no reason to reject the court’s prior decision in *Borusan*. The presidential proclamations detailing Section 232’s applicability to Mexico do not undermine *Borusan*’s holding that Commerce can consider Section 232 duties “import duties.” *See id.* at 1376. Deacero argues that the language of the presidential proclamations reveals that the purpose of the Section 232 duties as applied to Mexico was the same as antidumping duties, and thus, the duties were impermissibly double counted. Deacero Br. at 29–31. This argument misses the point. There would only be impermissible double counting if there was clear statutory interplay between Section 232 duties and antidumping duties. *See Borusan*, 494 F. Supp. at 1375. Here, there is no such interplay. *See id.*

In Proclamation 9711, the President applied the Section 232 duties to Mexico for the same stated reasons that any Section 232 duties were implemented, primarily for national defense reasons based on the status of domestic steel production. *Compare Proclamation 9711* at 13,361 (stating that the tariff would apply until there was “a satisfactory alternative means to address the threat to the national security” from steel imports), *with Proclamation 9705* at 11,625–26 (explaining that the tariff was to “ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.”).² While the President’s justifications for lifting the Section 232 duties on Mexico involved some discussion of ending the sale of steel sold at “dumped prices,” there remained no interplay with the Section 232 statute and antidumping duties. *See Proclamation 9894* at 23,987–88; 19 U.S.C. § 1862. Antidumping duties continue after the President imposes Section 232 duties, and the duties are separate and distinct. *See Proclamation 9705* at 11,627 (stating that “all steel articles imports specified . . . shall be subject to an

² The court looks to the statutory purpose of the Section 232 duties, national security, and not the particular ways that national security was addressed by the duties. *See* 19 U.S.C. § 1862. The particular ways national security is accomplished has nothing to do with the statutory purpose, whether it is the protection of a vital domestic industry or stopping funds being used to support terrorism. *Compare Proclamation 9705* at 11,625–26 (explaining that the tariff was to “ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.”), *with Proclamation 4907 of March 10, 1982*, 47 Fed Reg. 10,507 (Mar. 10, 1982) (stating “Libyan policy and action supported by revenues from the sale of oil imported into the United States are inimical to the United States national security.”).

additional 25 percent *ad valorem* rate of duty . . . in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles”); *see also Borusan*, 494 F. Supp. at 1375–76. Thus, the reasoning of *Borusan* applies in equal force here. Finally, while Deacero argues that Commerce did not provide a reasoned basis for its decision based on impermissible double counting, Commerce sufficiently explained its reasoning. *See Final I & D Memo* at 12–13. Commerce compared Section 232 duties to antidumping duties to conclude that there was no overlap. *Id.* Accordingly, the court sustains Commerce’s decision that the CEP and EP may be reduced by Section 232 duties paid.

II. There Was No Violation of the Administrative Procedure Act

The final issue before the court is whether Commerce’s decision to deduct Section 232 duties from EP and CEP was without proper notice to Deacero and thus violated principles of administrative law. Section 553 of the Administrative Procedure Act (“APA”) requires agencies, including Commerce, to give interested parties notice and an opportunity to comment on proposed rulemaking. 5 U.S.C. § 553. A rule is defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). This court has repeatedly held that notice and comment procedures “do not apply to antidumping administrative procedures, which mostly involve fact-based, investigative activities.” *See Jiaxing Brother Fastener Co. v. United States*, 36 CIT __, __, 961 F. Supp. 2d 1323, 1331 (2014) (internal citation omitted); *JTEKT Corp. v. United States*, 35 CIT 510, 523, 768 F. Supp. 2d 1333, 1347–48 (2011); *see also Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (noting that “Even where Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw *Chevron* deference.”).

Here, Commerce was not required to engage in notice-and-comment rulemaking to deduct Section 232 duties from Deacero’s U.S. price. Notice-and-comment procedures do not apply in antidumping administrative procedures because they are fact-based, investigative activities. *See Jiaxing Brother Fastener Co.*, 916 F. Supp. 2d at 1331. The decision to deduct Section 232 duties as import duties is not a new policy because the antidumping statute requires Commerce to deduct import duties. *See* 19 U.S.C. § 1677a(c)(2)(A). There was no agency statement or rule necessary to announce because Commerce was only

complying with its statutory duty, the language of Proclamation 9705, and its interpretative rule that Section 232 duties were import duties. *See* 5 U.S.C. § 553. Accordingly, Commerce did not fail to comply with the APA.


CONCLUSION

The court sustains Commerce’s determination regarding the AD order for rebar products from Mexico.

Dated: December 20, 2021

New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE



Slip Op. 21–172

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

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 15–00214

[Remanding the second remand results in this antidumping duty investigation of certain steel nails from the Sultanate of Oman.]

Dated: December 22, 2021

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for Plaintiff/Consolidated Defendant-Intervenor Mid Continent Steel & Wire, Inc.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Ian McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael P. House, *Andrew Cardias*, and *Shuaiqi Yuan*, Perkins Coie LLP, of Washington, DC, for Defendant-Intervenor/Consolidated Plaintiff Oman Fasteners, LLC.

OPINION AND ORDER

Barnett, Chief Judge:

This matter arises out of a challenge to the U.S. Department of Commerce’s (“Commerce” or “the agency”) second remand results in its antidumping duty investigation of certain steel nails from the Sultanate of Oman. *See* Final Results of Redetermination Pursuant to [Second] Court Order (“Second Remand Results”), ECF No. 135–1. The Second Remand Results were issued in response to an opinion by the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”),

wherein the Federal Circuit held that Commerce had not adequately explained its reliance on a financial statement from Hitech Fastener Manufacturer (Thailand) Co., Ltd. (“Hitech”), a third-country company, to determine constructed-value profit because the agency had not sufficiently considered whether Hitech had received countervailable subsidies. *Mid Continent Steel & Wire, Inc. v. United States* (“*Mid Continent III*”), 941 F.3d 530, 542–45 (Fed. Cir. 2019).

The court again remands the determination to Commerce for reconsideration and further explanation of its reliance on Hitech’s financial statement. The Second Remand Results are largely conclusory and fail to provide the explanations and analysis required to comply with the findings of the Federal Circuit.

BACKGROUND

This matter originated when Plaintiff Mid Continent Steel & Wire, Inc. (“Mid Continent”) and Defendant-Intervenor Oman Fasteners, LLC (“Oman Fasteners”) each challenged separate aspects of Commerce’s final determination that Oman Fasteners was selling goods at less than fair value, or “dumping,” in the United States. *See Certain Steel Nails From the Sultanate of Oman*, 80 Fed. Reg. 28,972 (Dep’t Commerce May 20, 2015) (“*Final Determination*”), ECF No. 16–1, and accompanying Issues and Decision Mem., A-523–808 (May 13, 2015) (“I&D Mem.”), ECF No. 16–2.

When determining whether a company is dumping, section 773(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(a) (2012),¹ directs Commerce to calculate the difference between the export price and the normal value, a value usually based on the price at which the merchandise is sold in the exporting country or in a third country other than the United States. *Id.* If, however, there are insufficient home-market and third-country sales, as was the case with Oman Fasteners, Commerce calculates the “constructed value” of the merchandise to use as the normal value. 19 U.S.C. § 1677b(a)(4). Constructed value consists of the sum of (1) the cost of producing the merchandise; (2) amounts for profit and selling, general, and administrative expenses; and (3) the cost of packaging for shipment to the United States. *See* 19 U.S.C. § 1677b(e).

Commerce may use one of four methods to calculate constructed value profit depending on what data is available: the “preferred method,” which is based on actual profits and expenses, or one of three alternative methods, among which there is no hierarchy or

¹ Further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2012 edition, unless stated otherwise.

preference.² See *SKF USA Inc. v. United States*, 263 F.3d 1369, 1374 (Fed. Cir. 2001). In this case, because “actual data” were not available as required for the preferred method, Commerce chose to apply the third of the alternative methods, which allows Commerce to utilize “any other reasonable method” to determine constructed value profit, subject to a profit cap provided in the statute.³ See *Mid Continent III*, 941 F.3d at 535–36 (citations omitted); 19 U.S.C. § 1677b(e)(2)(B)(iii). “[A]ny other reasonable method” may include, as Commerce chose in this case, the financial statements from a third-country company. See *Mid Continent III*, 941 F.3d at 542–545 (remanding for Commerce to reconsider its reliance on Hitech’s financial statement for calculating constructed value profit while leaving open the possibility that Commerce may continue to do so).

Oman Fasteners submitted financial data from several Omani companies along with partially translated financial statements from L.S. Industry Co., Ltd. (“LSI”), a Thai producer of steel nails, as proposed sources of constructed value profit. *Id.* at 535. *Mid Continent*, in turn, submitted other financial statements, including the statements of Hitech, a Thai producer of steel screws, and Sundram Fasteners Limited (“Sundram”), an Indian producer of auto parts and fasteners. *Id.* at 535–36; I&D Mem. at 14. For the *Final Determination*, Commerce chose Hitech as the source of constructed value profit, declined to consider the partially translated LSI statements, and found no profit cap available to apply to the constructed value profit determination. *Mid Continent III*, 941 F.3d at 536.

These findings were challenged, and the court remanded the case to Commerce on two issues. *Mid Continent Steel & Wire, Inc. v. United States* (“*Mid Continent I*”), 41 CIT ___, 203 F. Supp. 3d 1295 (2017).⁴ To address the court’s concerns, Commerce issued the First Remand

² If “actual amounts” of profits and sales, general, and administrative expenses of the company are available, the “preferred method” is used; if no actual data are available, one of the alternative methods is used. 19 U.S.C. § 1677b(e)(2)(A)-(B).

³ Commerce used the third alternative method for its preliminary determination, and then continued to rely thereon for the *Final Determination*. See *Mid Continent III*, 941 F.3d at 536 (citations omitted).

⁴ *Mid Continent I* remanded Commerce’s *Final Determination* with respect to two issues raised by Oman Fasteners: (1) Commerce’s reliance on third-country profit data from the production of comparable products instead of home-market profit data to calculate constructed value profit; and (2) Commerce’s refusal to apply a profit cap to the constructed value profit rate. See *Mid Continent I*, 203 F. Supp. 3d at 1308–10, 1314–16. The court found that Commerce did “not adequately explain why third-country data of comparable merchandise better represents Omani sales of steel nails than home-market sales data from Omani steel producers.” *Id.* at 1310. In addition, the court found that Commerce failed to adequately explain why it could “not make use of ‘facts otherwise available’ in order to” calculate a profit cap. *Id.* at 1316. The court sustained the remainder of the contested determination. See *id.*

Results. See Final Results of Redetermination Pursuant To [First] Court Order (“First Remand Results”) at 1, ECF No. 95–1. These First Remand Results were contested at the court, but the court affirmed the results. *Mid Continent Steel & Wire, Inc. v. United States* (“*Mid Continent II*”), 41 CIT ___, 273 F. Supp. 3d 1348 (2017).⁵ *Mid Continent II* was appealed to the Federal Circuit, which issued *Mid Continent III*.

Before the Federal Circuit, Oman Fasteners challenged several aspects of the First Remand Results. In particular, it challenged (1) Commerce’s choice of the third alternative method for calculating constructed value profit, (2) Commerce’s refusal to consider LSI’s partially translated financial statements and its rejection of LSI’s fully translated statements, (3) Commerce’s choice of Hitech’s financial statements despite potential evidence of a subsidy, and (4) Commerce’s conclusion that it could not calculate a profit cap. See *Mid Continent III*, 941 F.3d at 534, 537.

The Federal Circuit affirmed in part, vacated in part, and remanded. *Id.* at 546. The Federal Circuit affirmed the use of the third alternative method for calculating constructed value profit. *Id.* at 538–40. It also affirmed Commerce’s decision not to rely on the partial translation of LSI’s financial statements, along with the agency’s decision to reject the late-submitted full translation of LSI’s financial statements. *Id.* at 540–42. With respect to the choice of Hitech’s financial statements, while not directing a conclusion about which financial statements should be used, the Federal Circuit held that Commerce must address record information raising questions as to whether Hitech received subsidies. *Id.* at 544–45. In particular, the Federal Circuit rejected Commerce’s suggestion that the practice of disregarding financial statements based on suspicion of subsidies was limited to nonmarket-economy proceedings. *Id.* at 544. The Federal Circuit held that Commerce’s statement of practice in nonmarket-economy cases failed to substantiate the reasonableness of declining to consider the possible indications of a subsidy in market-economy proceedings generally or in this case specifically. *Id.* The Federal Circuit explained that subsidies could distort a substitute company’s financial statements, noting that “[a]s a logical matter, Hitech would be a weaker surrogate for constructed value [profit] if government subsidies heavily distort its profits.” *Id.* Consistent with the above, the Federal Circuit remanded to this court to remand to Commerce. *Id.* at 546.

⁵ *Mid Continent II* affirmed the First Remand Results, in which Commerce continued to use third-country data to calculate constructed value profit and continued to find that there was insufficient data with which to calculate a profit cap. See *Mid Continent II*, 273 F. Supp. 3d at 1350.

In the Second Remand Results, Commerce largely reiterates its prior conclusions regarding its reliance on third-country profit data and Hitech's financial statements for calculating constructed value profit. *See* Second Remand Results at 3–7.

First, Commerce explained that, of the eleven financial statements on the record, “[n]one of the six Omani companies produce steel nails or any . . . merchandise comparable . . . to steel nails.”⁶ *Id.* at 4. Second, after narrowing the comparable producers to two companies,⁷ Hitech and Sundram, Commerce found that, as compared to Oman Fastener's nails, Hitech's screws utilized “similar formation and collation machinery in their production processes,” Hitech “[sold] their product[] . . . for the same end use,” *id.* at 4, and Hitech's screws had “similar . . . terms of profitability,” *id.* at 5. Sundram, in contrast, “does produce some comparable merchandise, [but] a large portion of its production consists of various automobile parts that are not comparable to nails.” *Id.* at 4. Commerce therefore concluded that Hitech's statements better reflected the profit of a producer of nails. *See id.* at 5.

Regarding Hitech's possible receipt of a subsidy from the Thai government, Commerce explained that there was nothing on the record to support the conclusion that Hitech received a countervailable subsidy. *See id.* While Commerce acknowledged that Hitech's financial statements indicated that “[t]he company has been support for production screws (SCREW) Category 4.7 Manufacture of wire products, metal wire Promotion Number 1447/2538 on July 10, 1995,” *id.* at 5 n.19, a statement which refers to a program that Commerce has countervailed in other cases, Commerce noted that the financial statements do not report an amount associated with the potential subsidy and Oman Fastener does not point to any, *id.* at 5. Commerce

⁶ In order to calculate constructed value profit under the “any other reasonable method” provision, Commerce looks for a company that produces comparable merchandise. Second Remand Results at 3–4. To this end, Commerce explained that it used the factors from *Pure Magnesium From Israel*, 66 Fed. Reg. 49,349 (Dep't Commerce Sept. 27, 2001) (notice of final determination of sales at less than fair value), and *Certain Color Television Receivers From Malaysia*, 69 Fed. Reg. 20,592 (Dep't Commerce Apr. 16, 2004) (notice of final determination of sales at not less than fair value), to find a constructed value profit substitute under the third alternative. Second Remand Results at 8. These factors include: “(1) the similarity of the potential surrogate companies' business operations and products to the respondent's; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; and (3) the contemporaneity of the surrogate data to the POI.” *Pure Magnesium From Israel*, 66 Fed. Reg. 49,349, and accompanying Issues and Decision Mem., A-508–809 (Sept. 14, 2001); *see also Certain Color Television Receivers From Malaysia*, 69 Fed. Reg. 20,592, and accompanying Issues and Decision Mem., A-557–812 (Apr. 16, 2004).

⁷ Commerce re-asserted its refusal to consider the financial statements for two Taiwanese companies and LSI due to the lack of English translations for portions of those financial statements. *See* Second Remand Results at 4.

explained that the “ultimate choice of [constructed value] profit in any given proceeding must be sourced from the record,” *id.* at 6, which “will vary by the available choices,” *id.* at 7. Commerce notes that each case “stands on its own,” *id.* at 5, and, in this case, after weighing the quality of data against the criteria established under 19 U.S.C. § 1677b(e)(2)(B)(iii), record evidence supports its conclusion that Hitech’s data more closely reflects the production of nails than does Sundram’s, *id.* at 7.

Lastly, Commerce rejected the argument that it should have reconsidered LSI’s financial statements. *Id.* at 10–11. Commerce also rejected the argument that it must reopen the record to accept the fully translated version of LSI’s financial statements or other possible sources of constructed value profit. *Id.* at 13–14.

Before this court, Oman Fasteners opposes the Second Remand Results because, in its view, Commerce provided an insufficient explanation for its continued reliance on Hitech’s financial statements despite having rejected Hitech’s statements based on the inclusion of possible subsidies in another proceeding. Cmts. of Pl. Oman Fasteners, LLC in Opp’n to the Commerce Dept’s Remand Redetermination (“Pl.’s Opp’n Cmts.”) at 7, ECF No. 138 (citing *Steel Wire Garment Hangers From the People’s Republic of China*, 79 Fed. Reg. 65,616 (Dep’t Commerce Nov. 5, 2014) (prelim. results of antidumping duty admin. review; 2012–2013)). Oman Fasteners also argues that Commerce ignored alternative sources of constructed value profit data available to the agency, and that Commerce should compare all financial statements on the record—including LSI’s rejected statements—along with re-opening the record to obtain all readily available and relevant information. *See id.* at 17–24. Due to the deficiencies in the record, Oman Fasteners argues, the Second Remand Results are unlawful and unsupported by substantial evidence. *Id.* at 25. Mid Continent and Defendant United States (“the Government”) urge the court to sustain Commerce’s Second Remand Results in full. *See* Cmts. of Pl./Consol. Def-Intervenor Mid Continent Steel & Wire, Inc. on Final Remand Determination (“Mid Continent’s Resp. to Cmts.”), ECF No. 137; Def.’s Resp. to Cmts. on Remand Redetermination (“Def.’s Resp. to Cmts.”), ECF No. 142.

For the reasons discussed herein, the court remands Commerce’s Second Remand Results, finding that they insufficiently consider whether possible subsidies affect the appropriateness of using Hitech’s financial statements in calculating constructed value profit.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court will uphold an agency determina-

tion that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Parties' Contentions

Oman Fasteners contends that Commerce did not reconsider or explain its use of Hitech's financial data in calculating constructed value profit despite potential evidence of a subsidy. *See* Pl.'s Opp'n Cmts. at 7–17. Oman Fasteners argues that there is “undisputed” evidence of a subsidy in the record that impacts the usefulness of Hitech's profit data and that evidence precludes Commerce from using Hitech's financial data for constructed value profit. *Id.* at 7. Oman Fasteners relies primarily on *Steel Wire Garment Hangers From China*, a determination in which Commerce found that Hitech's financial statements “contain[] evidence of a subsidy [Commerce had] previously found to be countervailable.” *Id.* (citing *Steel Wire Garment Hangers From China*, 79 Fed. Reg. at 65,616) (first alteration in original). Oman Fasteners argues that, so too here, Commerce must also find evidence of a subsidy and exclude Hitech's financial statements. *See id.* Oman Fasteners additionally argues that Commerce should reconsider its refusal to rely on LSI's financial statements or reopen the record due to its many inadequacies. *See id.* at 17–24.

The Government contends that Commerce complied with the remand order.⁸ Def.'s Resp. to Cmts. at 7. The Government emphasizes that, in reconsidering Hitech's financial statements, Commerce reexamined the eleven companies' financial statements, *id.* at 5, with an eye to the “statutory preference for both home market and comparability in merchandise,” *id.* at 6. Based on these statutory preferences, the Government contends, Commerce found that Hitech's financial data best reflected the profit of a company like Oman Fasteners. *See id.* at 10. The Government further argues that while there is a suggestion of a subsidy in Hitech's financial statements, there is no amount reported, allowing Commerce to find that “Hitech's financial statements are the best source on the record to calculate the constructed value profit ratio.” *Id.* at 6. The Government also contends that Commerce properly enforced its regulations and deadlines when it declined to rely on LSI's partially translated financial statements and rejected LSI's untimely fully translated financial statements. *Id.* at 12–15. Lastly, the Government notes that the decision to reopen the record lies entirely within Commerce's discretion, and there is no

⁸ Mid Continent also supports Commerce's remand results. Mid Continent's Resp. to Cmts. at 1. Its arguments largely echo those of the government, emphasizing that there is not conclusive evidence of a subsidy received by Hitech and that the other financial statements are unusable. *See id.* at 1–4.

basis to require Commerce to reopen the record in this case. *See id.* at 15–16.

II. Commerce Failed to Justify its Reliance on Hitech's Financial Statements for Constructed Value Profit

In the Second Remand Results, Commerce failed to justify its reliance on Hitech's financial statements to determine constructed value profit. In particular, Commerce did not explain why this case is distinguishable from a case in which Hitech's financial statements were disregarded due to evidence of a countervailable subsidy. Commerce also did not explain why, given its finding that the potential subsidies could not be quantified, Hitech's financial statements were a better choice than Sundram's.

First, Commerce did not adequately distinguish this case from a case in which Hitech's financial statements were found to be unsuitable because they contained evidence of a subsidy. *See* Second Remand Results at 5–6 (merely noting that each determination stands on its own record). Hitech's financial statements were previously disregarded in a separate, non-market economy proceeding, *Steel Wire Garment Hangers From China*, due to potential evidence of subsidies. *See Pl.'s Opp'n Cmts.* at 12. As the Federal Circuit explained, Commerce's reliance on the distinction between market-economy and nonmarket-economy cases is inadequate, by itself, to support the agency's disparate treatment of Hitech's financial statements. *Mid Continent III*, 941 F.3d at 544. In the Second Remand Results, however, Commerce failed to explain why this case differs from *Steel Wire Garment Hangers From China*. *See* Second Remand Results at 5–6.

Commerce's sole justification for distinguishing this case from *Steel Wire Garment Hangers From China* is that "the record of each case stands on its own." *Id.* at 5. This assertion, however, does not explain or identify any difference between the two cases that would lead to such different treatment. In support of its assertion that it need not consider the subsidy, Commerce stated that, "in this case[,] . . . the financial statements of Hitech do not report an amount associated with the potential subsidy" and "the respondent [does not] cite to any in its remand comments." *Id.* Commerce did not find that any evidence of a subsidy was so insignificant as to permit the evidence to be completely ignored; instead, Commerce found only that the subsidy is not quantifiable. *See id.* at 5, 13. Thus, Commerce's decision to ignore the potential subsidy is unsupported by substantial evidence.

Second, the Federal Circuit acknowledged that Commerce may need to engage in a comparative analysis of the deficiencies of mul-

multiple financial statements. See *Mid Continent III*, 941 F.3d at 544 (“The size of any subsidies would obviously be relevant, as would the comparative deficiencies of the alternative sources.”). In fact, Commerce does appear to have engaged in a limited comparison between the Hitech and Sundram financial statements; however, even that comparative analysis is largely conclusory. See Second Remand Results at 4. Commerce found that Sundram produces “some comparable merchandise,” but “a large portion of its production consists of various automobile parts that are not comparable to nails.” *Id.* (citations omitted). Commerce went on to conclude that because Sundram produces mostly auto parts, Sundram’s financial statements are less appropriate as a substitute than Hitech’s financial statements, given that Hitech produces fasteners. See *id.*

While that comparison took account of the differing production foci of the two companies, and also identified a concern about the impact of the non-comparable production on the profit ratio, Commerce ignored the possible deficiencies in Hitech’s financial data—namely, the unknown impact of possible subsidies on Hitech’s profit ratio. See *id.* at 4–5. As the Federal Circuit noted, however, the quantity of the potential subsidy is an important consideration because “Hitech would be a weaker surrogate for constructed value if government subsidies heavily distort its profits.” *Mid Continent III*, 941 F.3d at 544. The Federal Circuit also suggested that “Commerce might determine the amount of subsidies and adjust its calculation of constructed value downward to eliminate the effect of the subsidies.” *Id.* Commerce, however, found that “there is no evidence on the record for the amount of the subsidy with which to adjust [constructed value] profit.” Second Remand Results at 13.

While the finding that Hitech’s subsidies are not quantifiable and therefore cannot be offset may be reasonable,⁹ this finding fails to address how Commerce could make a determination that Hitech’s

⁹ Commerce acknowledged its practice of making adjustments to general and administrative expenses to eliminate subsidy values from its calculations in market economy cases. Second Remand Results at 6–7, 13. Commerce went on to find that, because there is no evidence regarding the amount of any subsidy, it cannot make similar adjustments to Hitech’s financial statements. *Id.* at 13.

While it may be reasonable for Commerce to find that it cannot adjust Hitech’s financial statements to address any potential subsidies, Oman Fasteners correctly distinguishes those market-economy cases from the present situation. See Pl.’s Opp’n Cmts. at 10. In each cited case, Commerce was adjusting the respondent’s own financial statements to take account of subsidies received by that respondent. See *id.* In such cases, Commerce had the benefit of being able to obtain substantially more information from the respondent than from a third-country substitute company. In substitute cases such as this one, Commerce must “make do with publicly available information regarding [substitutes] proffered by the parties,” as highlighted by Oman Fasteners. *Id.* at 10. Thus, Commerce should reconsider and further address the relevance of any potential adjustment to Hitech’s financial statements on remand.

financial statements are more suitable for use than Sundram's when the problems with Hitech's financial statements cannot be quantified. In other words, Commerce failed to explain why Sundram's non-comparable merchandise was a more significant issue than Hitech's unquantifiable evidence of subsidies. Accordingly, Commerce's reasoning regarding the superiority of Hitech's statements was not supported by substantial evidence.¹⁰

Because Commerce failed to explain the difference between this case and *Steel Wire Hangers From China*, where Hitech's financial statements were disregarded because of evidence of subsidies, and also failed to explain how Hitech's financial statements are more suitable than Sundram's given the unquantifiable nature of Hitech's potential subsidies, Commerce's findings are not supported by substantial evidence and are not in accordance with law.

CONCLUSION

On the basis of the above analysis, the court remands Commerce's Second Remand Results for reconsideration and further explanation of the choice of Hitech's financial statements for determining constructed value profit, consistent with this opinion and that of the Federal Circuit in *Mid Continent III*, 941 F.3d 530.

To the extent that Commerce wishes to rely on Hitech's financial statements, the agency must seriously engage with the possible inclusion of subsidies in those statements. Specifically, Commerce must address why the above quoted language in the financial statements is sufficient to be considered "evidence of a subsidy" in *Steel Wire Garment Hangers From China* yet may be ignored in this case. If Commerce accepts that the statement raises a suspicion of subsidization in this case, Commerce must explain why it is reasonable nevertheless to disregard that suspicion here and continue to rely on Hitech's financial statements. If Commerce reconsiders its comparative analysis between Hitech's and Sundram's financial statements, it must address whether and, if so, why, the financial statements with a potential subsidy is preferable to one with a limited percentage of comparable merchandise production, given that both would seem to be impacted by factors not related to the production and sale of

¹⁰ The court also notes that Commerce provided no reasoning as to why it limited its comparative analysis to Hitech and Sundram. While Commerce had rejected other potential financial statements earlier in its analysis, Commerce did not directly consider whether the deficiencies of those financial statements were more or less significant than the deficiencies of Hitech's financial statements. While there may be circumstances in which Commerce may conduct such an iterative analysis, Commerce has not acknowledged or justified such an approach in this case.

comparable merchandise. Commerce must also address whether a comparative analysis inclusive of the other financial statements on the record is appropriate.

To be clear, the court does not seek to impose a particular result on Commerce; however, a serious analysis of any deficiencies in the various data sources before the agency is required before Commerce's conclusions may be sustained. Should Commerce find that Hitech's financial statements contain deficiencies requiring the agency to engage in a more expansive comparative analysis of its potential data sources, the agency may reconsider any such data source on the record. Similarly, while the agency is not required to reopen the record, such a decision is within the agency's discretion if it determines that reopening would provide the most reasonable path forward.

ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Second Remand Results are remanded for further reconsideration and explanation consistent with this opinion and that of the Federal Circuit in *Mid Continent III*, 941 F.3d 530; it is further

ORDERED that Commerce shall file its remand redetermination on or before March 22, 2022; it is further

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

ORDERED that any comments or responsive comments must not exceed 4,000 words.

Dated: December 22, 2021

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21-173

POWER STEEL CO., LTD, Plaintiff, v. UNITED STATES, Defendant. REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 20-03771

[Antidumping Duty Determination in Review of Order on Steel Concrete Reinforcing Bar from Taiwan. Remanded.]

Dated: December 23, 2021

Adams C. Lee, Harris Bricken McVay Sliwoski LLP, of Seattle, WA, argued for Plaintiff Power Steel Co., Ltd.

Ann C. Motto, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the Defendant. Of counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen E. Thorson, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenors Rebar Trade Action Coalition. With her on brief were *Alan H. Price* and *John R. Shane*.

OPINION

Restani, Judge:

Before the court is a motion for judgment on the agency record pursuant to the United States Court of International Trade (“USCIT”) Rule 56.2, in an action challenging a final determination of the United States Department of Commerce (“Commerce”). The final determination at issue results from Commerce’s findings during an administrative review of the antidumping (“AD”) order covering steel concrete reinforcing bar (“rebar”) from Taiwan. *See Steel Concrete Reinforcing Bar from Taiwan*, 85 Fed. Reg. 63,505 (Dep’t Commerce Oct. 8, 2020) (“*Final Results*”); *see also Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Steel Concrete Reinforcing Bar from Taiwan*, A-583–859, POR 3/7/17–9/30/2018 (Dept’ of Commerce October 2, 2020) (“*Final I&D Memo*”). Plaintiff Power Steel Co. Ltd. (“Plaintiff” or “Power Steel”) argues that Commerce’s deduction of Section 232 duties from the United States export price (“EP”) was not supported by substantial evidence or in accordance with law. *See* Pl. Power Steel Br. In Supp. of its Mot. for J. on the Agency R. at 8–17, ECF. No. 24 (March 25, 2021) (“Pl. Br.”). Plaintiff also challenges Commerce’s determination that Power Steel paid Section 232 duties for all its United States sales. *See id.* at. 18–24.

BACKGROUND

a. Antidumping Administrative Review and Determination

In December 2019, Commerce initiated an administrative review of the antidumping duty order covering rebar from Taiwan for the period of review of March 7, 2017, through September 20, 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 63,615 (Dep’t Commerce Jul. 12, 2018). Commerce published the preliminary results of its review in December 2019. *Steel Concrete Reinforcing Bar from Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2017–2018*, 84 Fed. Reg. 68,884 (Dep’t Commerce Dec. 17, 2019) (“*Preliminary Results*”); *Decision Memorandum for the Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from Taiwan; 2017–2018*, A-583–859, POR 3/7/2017–9/30/2018 (Dep’t Commerce Dec. 10, 2019)

(“PDM”). Commerce issued the *Final Results* on October 8, 2020, resulting in a 3.27% dumping margin for Power Steel. *Final Results*, 85 Fed. Reg. at 63,505.

b. Treatment of Section 232 Duties

In March 2018, the President mandated the imposition of a global tariff of 25 percent on imports of steel articles from all countries, except Canada and Mexico, exercising his authority under Section 232 of the Trade Expansion Act of 1962, as amended. *Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) (“*Proclamation 9705*”). Section 232 empowers the President and Commerce to take action to ensure that the importation of an article “will not threaten to impair the national security.” See Trade Expansion Act of 1962, Pub. No. L. 87–794, § 232 (codified as amended at 19 U.S.C. § 1862); 19 U.S.C. § 1862(c)(1)(A). The statute authorizes the President to consider “domestic production needed for projected national defense requirements,” and to “determin[e] whether such weakening of our internal economy may impair national security.” 19 U.S.C. § 1862(d).

The Section 232 duties went into effect on March 23, 2018, and applied “in addition to any other dut[y].” *Id.* at 11,627–28. *Proclamation 9705* sought to “enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production” and to “ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.” See *id.* at 11,625–26; see also 19 U.S.C. § 1862(d).

In the December 2019 Preliminary Results, Commerce treated the Section 232 duties paid by Power Steel as “United States import duties” under 19 U.S.C. § 1677a(c)(2)(A) and therefore deducted the Section 232 duties on the United States price side of the dumping comparison from Power Steel’s EP. *Prelim Analysis Memo* at 3–4, C.R. 82, P.R. 87, (Dec. 13, 2019). Power Steel argued that Commerce should not deduct Section 232 duties because the duties were special duties, not “normal U.S. Customs Duties.” *Power Steel Submission of Case Br.* at 2–9, C.R. 92, P.R. 97 (Jan. 24, 2020). In its final *Decision Memorandum*, Commerce determined that Section 232 duties were more akin to normal customs duties than to antidumping or counter-vailing (“AD/CV”) duties, codified as 19 U.S.C. §§ 1671, 1673, or Section 201 duties, codified as 18 U.S.C. § 2251, which it does not deduct from EP. *Final I & D Memo* at 10–13. Commerce explained that the President implemented the Section 232 duties to address national security concerns and found that Section 232 duties differed

from antidumping or Section 201 duties because they did not focus on remedying injury to a domestic industry, were concerned with national security, and did not reduce the antidumping duties owed. *Id.*

c. Challenge to Review Determination

On October 19, 2020, Power Steel commenced the instant action against the United States pursuant to 19 U.S.C. § 1516a(a)(2). Compl., ECF No. 5 (Oct. 19, 2020). Power Steel claims the AD determination is unsupported by substantial evidence or is otherwise contrary to law because Commerce incorrectly treated Section 232 duties as normal U.S. customs duties. Compl. ¶¶ 18–19; Pls. Br. at 10–17. Power Steel further argues that Commerce’s decision to deduct Section 232 duties from the EP of all of Power Steel’s U.S. sales was not supported by substantial evidence and was otherwise not in accordance with law because Power Steel did not pay the Section 232 duties on certain sales. Compl. ¶¶ 20–21; Pls. Br. at 18–34.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce’s results of an administrative review of an AD duty order unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Section 232 Duty Duties May Be Deducted from United States Price

Under section 772(c) of the Tariff Act of 1930, EP and constructed export price (“CEP”) are to be reduced by “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . .” 19 U.S.C. § 1677a(c)(2)(A) (emphasis added).

When Congress has directly spoken to the precise question at issue, it ends the matter—“the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). Where, as here, the statute is silent or ambiguous with respect to the specific issue, then the court must evaluate whether Commerce’s interpretation “is based on a permissible construction of the statute” and inquire into the “the reasonableness of Commerce’s

interpretation.” *Chevron*, 467 U.S. at 843; *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1296 (2002).

Commerce previously issued an interpretation of the phrase “United States import duties” with regard to the deductibility of Section 201 safeguard duties, 19 U.S.C. § 2251, and concluded Section 201 duties should not be deducted as “import duties.” *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153, 19,159–61 (Dep’t Commerce Apr. 12, 2004). Commerce relied on the legislative history of the Antidumping Act of 1921 to conclude that there is a distinction between certain “special dumping duties” and “normal customs duties” (also referred to as “United States import duties”). *Id.* at 19,159 (citing S. Rep. No. 67–16, at 4 (1921)) (emphasis added). The Federal Circuit stated that the phrase “United States import duties” is an ambiguous phrase in the statute and upheld as reasonable Commerce’s interpretation that Section 201 safeguard duties are not “United States import duties.” *Wheatland Tube*, 495 F.3d at 1359–60.

This court recently held that Commerce did not err in treating Section 232 duties as “United States import duties” that are deducted from the EP under 19 U.S.C. § 1677a. *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, 45 CIT __, __, 494 F. Supp. 3d 1365, 1376 (2021). The court stated that it was reasonable for Commerce to treat Section 232 duties differently from Section 201 duties because Section 201 duties were more similar to antidumping duties and that there was “an interplay between antidumping duties and Section 201 duties, which [was] not present with Section 232 duties.” *Id.* The court reasoned that antidumping duties continue after the President imposes Section 232 duties while prior to imposition of Section 201 duties consideration must be given to “internationally accepted remedies for unfair trade practices,” including antidumping duties. *Id.* at 1375. Thus, the court held that there was no “impermissible double counting” when it came to Section 232 duties because the statutory term “import duties” was broad enough to include “all import duties except antidumping duties.” *Id.* at 1375–76. While the deduction of antidumping duties presents a circularity problem, deducting Section 232 duties merely takes EP and CEP back to a level for better comparison to normal value. *Id.* at 1372–73.

Here, Power Steel has not shown reason to reject the court’s prior decision in *Borusan*. Power Steel suggests that Section 232 duties are “special duties” because they are remedial and temporary in nature. *Pls. Br.* at 14–15. Power Steel acknowledges, however, that this court considered these issues in *Borusan*, and only argues that this court’s

decision “was in error.” *See id.* at 17; *Borusan*, 494 F. Supp. at 1374–75. Power Steel raises a unique argument that Section 232 duties are “special duties” because the President enacts the duties through “specific and limited” congressional authorization for national security purposes while only Congress can enact “normal custom duties” through Article I of the U.S. Constitution. *See Power Steel Br.* at 16–17; *Power Steel Reply Br.* at 1–7. This argument is in error. As recognized by the Federal Circuit, the phrase “United States import duty” is ambiguous, and Commerce’s reasonable interpretation of its meaning is entitled to deference. *See Wheatland Tube*, 495 F.3d at 1359–60. The statute contains no language and has no legislative history that limits “United States import duties” to only those duties enacted by Congress as opposed to import duties imposed by the President for national security reasons, pursuant to Congressional authorization, as is the case with Section 232 duties. *See* 19 U.S.C. § 1677a(c)(2)(A); 19 U.S.C. § 1862. Thus, nothing in the statute renders Commerce’s interpretation that Section 232 duties are “United States import duties” impermissible. *See* 19 U.S.C. § 1677a(c)(2)(A); *Chevron*, 467 U.S. at 843. Accordingly, the court sustains Commerce’s decision that the EP may be reduced by Section 232 duties paid.

II. The Court Remands to Commerce to Consider Record Evidence of Non-Payment of Section 232 Duties

The second issue before the court is whether Commerce’s determination that Power Steel paid Section 232 duties for all U.S. sales during the relevant period is supported by substantial evidence and in accordance with law.

Prior to the Preliminary Results, Power Steel consistently reported that it was the importer of record and paid Section 232 duties for its U.S. sales. *See e.g., Power Steel March 14, 2019 Section C Questionnaire Response* at 14, C.R. 13, P.R. 33 (March 14, 2019) (reporting in response to Commerce’s initial questionnaire that Power Steel was importer of record and paid “special Section 232 duties” ((for applicable sales))). In the December 13, 2019, Preliminary Results, Commerce found that Power Steel paid Section 232 duties on merchandise entered after March 23, 2018, and deducted Section 232 duties from all of Power Steel’s U.S. sales. *See Preliminary Analysis Memo* at 3, C.R. 82, P.R. 87, (Dec. 13, 2019); *see also* PDM at 8.

Following the Preliminary Results, Power Steel claimed that it did not pay Section 232 duties for certain transactions and that these duties were rather paid by United States parties. *See Power Steel 4th Supplemental Questionnaire Response* at 1–3, C.R. 86, P.R. 93 (Jan. 9, 2020). In support for this claim, Power Steel submitted a revised sales

agreement, email correspondence, accounting records, and other documentary evidence that it claimed demonstrated that other parties paid the Section 232 duties for the disputed transactions. *See 4th Supplemental Questionnaire Response* at Exs. 1–8. Commerce analyzed the email correspondence and revised sales agreement and found that Power Steel failed to demonstrate that it did not pay the disputed Section 232 duties. *Final I&D Memo* at 16; *Final Calculation Memo* at 8, C.R. 98, P.R. 131 (Oct. 2, 2020). Commerce thus continued to deduct Section 232 duties from all of Power Steel’s U.S. sales during the relevant period. *Final I&D Memo* at 15.

Power Steel initially argued before the court that Commerce’s finding that Power Steel paid Section 232 duties for all U.S. sales was not supported by substantial evidence because Commerce failed to consider properly the revised sales agreement and email correspondence, and the record does not demonstrate that Power Steel actually paid the duties in question. Pl. Br. at 18–34. Commerce argued in response that it reasonably determined that Power Steel paid Section 232 duties for all its U.S. sales. Def. Br. in Resp. to Mot. for J. on Agency R. at 21–28. Neither party in briefing or oral argument, however, explained by citation to the record what demonstrated the exclusion or inclusion of Section 232 duties in the base EP to which adjustments are made under 19 U.S.C. § 1677a. The court ordered the parties to provide additional information of record, including any sales invoices associated with U.S. Customs and Border Protection 7501 forms (“CBP 7501”) for the disputed transactions. *See Order for Further Information*, ECF No. 39 (Oct. 22, 2021).

Power Steel now argues, in response to the court’s order, that the sales invoices and CBP 7501 entry documents provide further support for the argument that Power Steel did not pay the Section 232 duties for the disputed transactions, because Section 232 duties were not included in the gross unit price that was the basis for Commerce’s EP. *See Pl. Public Response to Court’s Oct. 22 Questions* at 3, ECF No. 43 (Nov. 10, 2021). Power Steel submitted two sales invoices in support of this position; only one invoice, however, was submitted on the administrative record of this review. *See id.* at Ex. 1–2; *see also Power Steel’s February 21 Section A Response* at Ex. A-7(1). The second sales invoice was submitted contrary to the court’s instructions and is not considered to be of record here.

Power Steel had the burden of creating a complete and accurate record before Commerce. *Yama Ribbons & Bows Co. v. United States*, 36 C.I.T. 1250, 1253, 865 F. Supp. 2d 1294, 1298 (Ct. Int’l Trade 2012) (quoting *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012)) (stating that “[w]ith respect to data within their control,

the burden rests on the interested parties ‘to create an accurate record during Commerce’s investigation.’”) Here, Power Steel was on notice that Commerce was deducting Section 232 duties from all its U.S. sales. See *Preliminary Analysis Memo* at 3; see also PDM at 8. Power Steel had an opportunity to submit all relevant sales invoices and other documents in its response to Commerce’s questionnaire following the Preliminary Results but submitted other information that it claimed showed Power Steel did not pay the Section 232 duties for the disputed transactions. See *4th Supplemental Questionnaire Response* at Exs. 1–8. Power Steel did not argue before Commerce specifically that the sales invoices at issue demonstrated non-payment of Section 232 duties and Commerce does not seem to have considered whether the sales invoice in the record demonstrated nonpayment by Power Steel. See, e.g., *Final I&D Memo* at 13–16; *Final Calculation Memo* at 2–8; *Power Steel Case Brief*, C.R. 92, P.R. 97 (Jan. 24, 2020).

The documentary evidence that Power Steel initially argued was evidence of its nonpayment of Section 232 duties for certain transactions appears to be ambiguous if considered in a vacuum. See *4th Supplemental Questionnaire Response* at Exs. 1–8. It appears, however, that the sales invoices that Power Steel submitted in response to the court’s October 22 order may show that Power Steel did not pay the Section 232 duties for the disputed transactions and that therefore they were not part of the sales price used to establish base EP. See *Pl. Public Response to Court’s Oct. 22 Question* at 1–10, Ex. 1–2. As the administrative record contained one such sales invoice, the court remands to Commerce to consider whether the sales invoice of record and other record evidence sufficiently demonstrate Power Steel’s non-payment of Section 232 duties for this entry. See *id.* If, on remand, Commerce declines to remove the adjustment to the U.S. price for the relevant sale, it must explain its analysis of the record evidence as a whole, including the sales invoice. Commerce, in its discretion, may choose to reopen the record to consider on remand the non-record sales invoice and other documents not originally submitted in the administrative record. It may also conclude that the one sales invoice of record together with the other evidence of record informs its view of all of the disputed transactions.

CONCLUSION

The court sustains Commerce’s determination regarding the deduction of Section 232 duties. The matter is remanded for consideration of the sales invoice at issue that is on the record and for whatever other action Commerce considers appropriate. The remand determi-

nation shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter. SO ORDERED.

Dated: December 23, 2021
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

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