U.S. Court of International Trade

Slip Op. 23–97

CATFISH FARMERS OF AMERICA and eight of its individual members, Plaintiffs, v. UNITED STATES, Defendant, and QMC FOODS, INC.; COLORADO BOXED BEEF COMPANY; VINH HOAN CORPORATION; and NAM VIET CORPORATION, Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 21–00380
PUBLIC VERSION

[The court partially grants and partially denies Plaintiffs' motion for judgment on the agency record. The court grants judgment to Plaintiffs as to the issue of surrogate country selection and remands that issue to the Department of Commerce. The court grants judgment to Defendant-Intervenors QMC Foods and Colorado Boxed Beef as to their standing to request administrative reviews and to Defendant and Defendant-Intervenors Vinh Hoan and Nam Viet as to separate rate issues.]

Dated: July 7, 2023

Nazak Nikakhtar, Wiley Rein LLP of Washington, DC, argued for Plaintiffs. With her on Plaintiffs' reply brief were *Maureen E. Thorson* and *Stephanie M. Bell*. On the opening brief for Plaintiffs were *Jonathan M. Zielinski*, *James R. Cannon, Jr.*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP of Washington, DC.

Kara M. Westercamp, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Matthew McConkey, Mayer Brown LLP of Washington, DC, argued for Defendant-Intervenors Vinh Hoan Corporation and Nam Viet Corporation.

Robert L. LaFrankie, Crowell & Moring LLP of Washington, DC, on the brief for Defendant-Intervenors QMC Foods, Inc., and Colorado Boxed Beef Company.

OPINION

***Baker*, Judge:**

In this latest battle of what might be called the Twenty Years' Catfish War, domestic producers challenge the Department of Commerce's final determination in an administrative review of its antidumping order as to fish imported from Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019*, 86 Fed. Reg. 36,102 (Dep't Commerce July 8, 2021); Appx1088–1091. For the reasons explained below, the court sustains that determination in part and remands in part.

I

The genesis of this case is Commerce's 2003 antidumping order as to imported Vietnamese fish that compete with home-grown catfish. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003). In its investigation leading to that order, the Department found that importers were selling frozen fish at less than normal value and imposed antidumping duties to make up the difference. Because Vietnam has a non-market economy, Commerce's order imposed specific rates on certain exporters and applied a Vietnam-wide single rate to all other exporters. *Id.* at 47,909–10.

The catfish antidumping order has undergone repeated administrative reviews in the ensuing years. The Department began the 16th such review in 2019 following requests from various domestic producers. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 53,411, 53,415–16 (Dep't Commerce Oct. 7, 2019); Appx1012. The period of review was August 1, 2018, to July 31, 2019. *See* 84 Fed. Reg. at 53,415.

In brief, a non-market economy antidumping administrative review involves Commerce (1) selecting one or more surrogate countries for valuing factors of production, (2) selecting mandatory respondents and issuing questionnaires to them about their factors of production, (3) receiving "separate rate applications" from other exporters not selected as mandatory respondents who wish not to receive the single country-wide rate, (4) issuing a preliminary determination, (5) receiving case briefs from the parties, and (6) issuing a final determination.[1]

A

In its preliminary determination, Commerce explained its general policy is to

> select[ ] a surrogate country that is *at the same level* of economic development as the [non-market economy] country unless it is determined that none of the countries are viable options . . . . Surrogate countries that are *not at the same level* of economic development as the [non-market economy] country, but still at a level of economic development *comparable to* the [non-market economy] country, *are selected only to the extent that data considerations outweigh the difference in levels of economic devel-*

[1] For a primer on the relevant statutory and regulatory background, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334–41 (CIT 2020) (14th administrative review).

> *opment*. To determine which countries are *at the same level* of economic development, Commerce generally relies on per capita gross national income (GNI) data from the World Bank's World Development Report.

Appx1022 (emphasis added).

The Department then noted that earlier in the proceeding, it had identified Angola, Bolivia, Egypt, Honduras, Nicaragua, and India as surrogate country candidates because they were "at *the same level* of economic development as Vietnam based on per capita 2018 GNI data." *Id.* (emphasis added). Commerce did not elaborate on why it chose those six countries over other countries within the same overall band of GNI per capita or what criteria it employs in determining what GNI level is "the same."

In response to the Department's identification of its six surrogate country candidates, Catfish Farmers of America and several of its constituent members (collectively, Catfish Farmers) urged the Department to instead select Indonesia as the primary surrogate. Nevertheless, Commerce preliminarily selected India "because it is: (1) at the same level of economic development as Vietnam; (2) a significant producer of merchandise comparable to the subject merchandise; and (3) provides the best useable data and information with which to value" factors of production. *Id.*

After Commerce issued its preliminary determination, Catfish Farmers continued to urge the Department to use Indonesia as the primary surrogate country. They argued that Indonesia's economic development is comparable to Vietnam's and that Indonesia was closer to Vietnam in terms of GNI per capita than it was during seven prior administrative periods of review for which Commerce selected Indonesia as the primary surrogate country.

The final determination upheld the selection of India as the primary surrogate country. In so doing, the Department acknowledged that it had indeed selected Indonesia as the primary surrogate in previous administrative reviews, "even when it was not on the non-exhaustive list of countries," when the other countries on the list either were not significant producers of comparable merchandise or lacked suitable data. Appx1057. But in this review, India was on the list, was a significant producer of comparable merchandise, and had "useable data for the primary material inputs (*i.e.*, fingerlings, fish feed, and whole fish)" that accounted for "the majority" of the necessary calculations. *Id.*

B

Several companies sought separate rates, including, as relevant here, Seafood Joint Stock Company No. 4 Branch Dongtam Fisheries Processing Company (referred to by the parties as Dotaseafood), Vinh Hoan Corporation, and Nam Viet Corporation. Appx1012–1013.

There are two methods by which a respondent can seek a separate rate. When a company has applied for, and received, a separate rate in a prior segment of the proceeding, Commerce requires it to submit a "certification" establishing continued eligibility for a separate rate. Appx1019 (citing 84 Fed. Reg. at 53,412–13). Vinh Hoan and Dotaseafood, both of whom had received separate rate status in prior segments, submitted such certifications.

A company that has not previously received a separate rate instead submits an "application." *Id.* Nam Viet used this method and responded to a supplemental questionnaire Commerce issued to the company. Appx1019.

Under Commerce's policies, "[e]xporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents . . . will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents." 84 Fed. Reg. at 53,413. Because Commerce selected both Vinh Hoan and Dotaseafood as mandatory respondents, they had to respond to the Department's questionnaire to renew their separate rate status.

1

Nam Viet and Vinh Hoan both timely responded to Commerce's supplemental questionnaires. Dotaseafood, however, did not, and accordingly the Department concluded that it "has not demonstrated the absence of *de jure* and *de facto* government control and is not eligible for separate rate status." Appx1019. Commerce preliminarily assigned Dotaseafood the Vietnam-wide rate of $2.39/kg. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2018–2019*, 85 Fed. Reg. 84,300, 84,300–01 & n.12 (Dep't Commerce Dec. 28, 2020) (noting that Dotaseafood was one of 27 companies considered part of the Vietnam-wide entity because of failure to establish eligibility for a separate rate); *id.* at 84,302 ("[F]or all Vietnam exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the Vietnam-wide entity (*i.e.*, $2.39 per kilogram) . . . .").

Commerce also preliminarily determined that Vinh Hoan and Nam Viet showed both de *jure* and *de facto* independence from Vietnamese government control and thus presumptively qualified for separate-rate status. Appx1020–1021. Because Nam Viet was not a mandatory respondent and thus was not subject to individual examination, Commerce had to decide how to calculate the applicable rate.[2] The Department noted that in making such a calculation, the Tariff Act prohibits Commerce from using any rates that are zero, *de minimis*, or based entirely on the use of facts available. Appx1021 (citing 19 U.S.C. § 1673d(c)(5)(A)). But the Department also noted that the statute directs that if the rates for all individually investigated companies fall within those categories, Commerce may use "any reasonable method" for determining an "all-others rate," including "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.*; *see also* 19 U.S.C. § 1673d(c)(5)(B). Commerce preliminarily determined that because it had calculated a non-zero, non–*de minimis* rate for Vinh Hoan (9¢/kg, *see* Appx1004) without using facts available, the Department would apply that rate to Nam Viet. Appx1021.

2

Once Commerce issued its preliminary determination, no party disputed Vinh Hoan's entitlement to a separate rate. Appx1045. The Department's final determination assigned Vinh Hoan a dumping margin of zero, *see* Appx1087, Appx1089, which no party challenges.

Catfish Farmers disputed whether Nam Viet was entitled to a separate rate, arguing that the company failed to report its affiliated companies and to demonstrate that none of those affiliates were subject to government influence. Commerce rejected that argument and determined that "the information [Catfish Farmers] point to largely pre-dates the [period of review] and/or is otherwise not dispositive regarding affiliation." Appx1082–1083. Commerce assigned

[2] "For investigations involving a nonmarket-economy country," the Tariff Act gives no direction on how Commerce should determine the "separate rate" applied to non-individually investigated respondents that "have established their independence from that country's government. But Commerce generally uses the same methodology to determine a separate rate for non-individually investigated firms in nonmarket-economy countries that it employs to determine the all-others rate in market-economy cases, and we have found that approach acceptable." *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 788 (Fed. Cir. 2020) (cleaned up). The methodology for determining the "all-others" rate in a market economy case is "either weight-averaging the non–*de minimis* margins for the individually investigated firms—excluding margins determined under [19 U.S.C.] § 1677e (addressing cases of certain information or process deficiencies—or by 'any reasonable method' (with the 'expected method' being weight-averaging) where all such firms have zero or de minimis margins." *Id.* (citing, *inter alia*, 19 U.S.C. § 1673d(c)(5)).

Nam Viet the same rate—zero—Vinh Hoan received and cited 19 U.S.C. § 1673d(c)(5)(A) as the basis for that decision. Appx1089.

Catfish Farmers also argued that Commerce had been too lenient in preliminarily assigning Dotaseafood the Vietnam-wide rate of $2.39/kg. They argued that Dotaseafood's rate should be $3.87/kg based on the use of facts otherwise available with an adverse inference because the company failed to respond to the Department's supplemental questionnaire. Appx1080. The Department rejected these arguments because "[i]t is Commerce's practice that, once a company fails to demonstrate the absence of *de jure* and *de facto* government control, the company is not eligible for a separate rate. In the absence of a separate rate, the company must be treated as part of the country-wide entity and is assigned the country-wide rate." Appx1081.

C

After Commerce issued its final determination, Catfish Farmers filed a "ministerial error allegation" challenging Nam Viet's dumping margin. They argued that "by citing [subparagraph (A) of § 1673d(c)(5)],[3] Commerce intended in the *Final Results* to assign [Nam Viet] the weighted average of the rates determined for individually examined companies, without taking into account any zero or *de minimis* rates." Appx21955. They contended that Commerce "committed a ministerial error when it overlooked the rate determined" for Dotaseafood because that company received the Vietnam-wide rate, which was "not based entirely on adverse facts available, is not zero, and is not *de minimis*, and therefore must be included in the rate determined for non-examined companies under" § 1673d(c)(5)(A). *Id.* Catfish Farmers also asserted that it was erroneous to include Vinh Hoan's zero margin: "[C]onsistent with [§ 1673d(c)(5)(A),] Commerce intended to assign [Nam Viet] the final dumping margin of $2.39/kg established for" Dotaseafood. Appx21956.

In response, Commerce acknowledged that it made an error, but not the one Catfish Farmers alleged—rather, the Department found the statutory citation was a typo meant to reference subparagraph (B) of

[3] The Federal Register notice of the determination stated that Commerce assigned Nam Viet the same zero margin calculated for Vinh Hoan based on 19 U.S.C. § 1673d(c)(5)(A). Appx1089 (referring to "section 735(c)(5)(A) of the Tariff Act of 1930"). "[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 investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A).

§ 1673d(c)(5), rather than subparagraph (A).[4] Commerce further found that "the methodology used and rate assignment itself were not made in error" and explained that it "intentionally relied on the only margin calculated during this review, which was zero, to assign [Nam Viet's] separate rate" under § 1673d(c)(5)(B). Appx21963. "This rate assignment represents a methodological decision by Commerce and, thus, is not a ministerial error as defined in the Act or regulation." *Id.* In short, Commerce corrected the typo in the citation, found that it made no error in its choice of methodology and rate assignment, and concluded that in any event those choices were not properly the subject of a ministerial error allegation.

II

Dissatisfied with the final determination, Catfish Farmers timely brought this action under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). *See* ECF 1 (summons); ECF 12 (complaint). The court has subject-matter jurisdiction over such actions under 28 U.S.C. § 1581(c).

QMC Foods and Colorado Boxed Beef intervened as defendants (ECF 21), as did Vinh Hoan and Nam Viet (ECF 30). Catfish Farmers moved for judgment on the agency record. ECF 48 (confidential); ECF 49 (public). The government (ECF 54, confidential; ECF 53, public) and the intervenors (ECF 47, Vinh Hoan/Nam Viet; ECF 52, QMC Foods/Colorado Boxed Beef) opposed. Catfish Farmers replied. ECF 50 (confidential); ECF 51 (public). The court then heard oral argument.

In actions such as this brought under 19 U.S.C. § 1516a(a)(2), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole,

[4] "If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, [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." 19 U.S.C. § 1673d(c)(5)(B).

> including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

III

In their motion for judgment on the agency record, Catfish Farmers challenge the selection of India as the primary surrogate country and the rates assigned to Dotaseafood and Nam Viet.[5] The court considers these issues in turn.

A

In selecting a surrogate country in antidumping cases involving goods imported from a country with a nonmarket economy, Commerce must use, "to the extent possible," one or more market economy countries that are "at a level of economic development *comparable to* that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4) (emphasis added).

Catfish Farmers argue that Indonesia is economically comparable to Vietnam and that Commerce failed to explain why it did not include Indonesia on its list of potential surrogate countries: "Without explanation, and despite Indonesia's GNI being closer to Vietnam's than it had been in previous years where Commerce included Indonesia, Commerce did not include Indonesia on its list, *i.e.*, it determined that Indonesia was not economically comparable to Vietnam." ECF 49, at 14. They assert that the Department failed to explain both why it did not consider Indonesia's GNI "comparable" to Vietnam's and "the reasonableness of limiting its definition of economic comparability to a six-country, exclusively GNI-based list. It simply said circularly that Indonesia was not comparable to Vietnam because Commerce did not include it on its comparability list." *Id.* at 15.

The Department's analysis included more detail than Catfish Farmers claim. In responding to their arguments below, Commerce stated that Indonesia's GNI per capita was $3,840, Vietnam's was $2,400, and the highest GNI per capita on the six-country list was Angola's $3,370. "Therefore, we determine that Indonesia *is not at the same level* of economic development as Vietnam." Appx1058 (empha-

[5] Catfish Farmers' complaint also challenged whether Colorado Boxed Beef and QMC Foods had standing to request reviews of Vietnamese suppliers. ECF 12, at 6 ¶ 22. Catfish Farmers' opening brief does not address this issue, and their reply admits that they therefore abandoned it. ECF 51, at 1 n.1. As that is the only issue addressed by Colorado Boxed Beef and QMC Foods, the court grants judgment on the agency record to them as unopposed.

sis added; footnote references omitted). This phrasing indicates that Commerce regarded the six countries on its list of potential surrogates as being at "the same level of economic development" as Vietnam.

The statute, however, directs the Department to use "the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development *comparable to* that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4)(A) (emphasis added). Something that is "the same" is inherently "comparable," but the converse is not necessarily true—something may be "comparable" yet not be "the same."

The administrative record shows that Commerce (correctly) understands "the same" and "comparable" levels of economic development to represent different concepts. A Department memorandum notes the statutory requirement to use a surrogate country "at a level of economic development comparable to that of Vietnam." Appx14103. The memo explains that

> [c]ountries on the case record that are at the same level of economic development as Vietnam should be given equal consideration for the purposes of selecting a surrogate country. Countries that are not at the *same level* of economic development as Vietnam's, but still at a level of economic development *comparable to* Vietnam, *should be selected only to the extent that data considerations outweigh the difference in levels of economic development.*

Appx14104 (emphasis added). It offers no information, however, on what constitutes "the same" or "comparable" levels of economic development other than implying that any country whose GNI per capita falls within the two extremes of the six-country list should be considered to be at "the same" level.

The passage quoted above shows that the Department seeks to avoid selecting a surrogate country that is at "a comparable level" of economic development. It also shows that here Commerce did not simply conflate "the same" and "comparable" as though those terms are always interchangeable—rather, it shows a conscious choice to disregard the statutory standard.

Thus, Catfish Farmers are correct that Commerce misapplied the statutory standard by presumptively excluding countries that fall within the "comparable" category. And the Department has given no indication as to what criteria it employs (other than looking to a range of GNI chosen via unspecified means) to determine what constitutes either "the same" or "a comparable" level of economic development.

The government, however, contends that "Commerce explained why it rejected [Catfish Farmers'] argument that Indonesia was nonetheless economically comparable to Vietnam" and cites the Department's findings that " 'Indonesia's per-capita GNI of $3,840 is not at the same level of economic development as Vietnam,' which is '$2,400, and the highest GNI reflected on the Surrogate Country List is Angola's GNI of $3,370.' Indonesia's GNI is thus 60 percent greater than that of Vietnam's." ECF 53, at 26 (quoting Appx1058). But the government's argument conflates "the same" and "comparable" and is belied by the very language the government quotes. Commerce did not reject Catfish Farmers' argument that Indonesia is at a "comparable" level of economic development. Rather, it rejected a hypothetical argument—one not made by Catfish Farmers—that Indonesia is "at the same level" of economic development. But, as explained above, not being "at the same level" is not disqualifying under the statute if the country is at a "comparable" level.

Furthermore, the government's argument that Indonesia is not economically comparable because its GNI per capita is "60 percent greater" than Vietnam's does not withstand scrutiny. Commerce nowhere cited such percentages, so it is improper for the government to try to backfill the Department's analysis by using them. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [administrative] action solely by the grounds invoked by the agency" and "is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). Although the Federal Circuit has explained that *Chenery* is not to be applied "inflexibly," the situations in which a reviewing court may sustain agency action on a different ground are where "the new ground is not one that calls for a determination or judgment which an administrative agency alone is authorized to make" and where "it is clear that the agency would have reached the same ultimate result had it considered the new ground." *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (cleaned up). Neither of those situations applies here.

Because the administrative record shows that Commerce applied the wrong legal standard in its surrogate country selection, and because there is nothing in the administrative record showing what GNI level Commerce considered "economically comparable," Commerce's surrogate country selection is both contrary to law and not

supported by substantial evidence. The court therefore remands that issue for the Department to conduct a new analysis using the correct standard.

B

1

Catfish Farmers argued before Commerce, and argue now, that Dotaseafood failed to cooperate to the best of its ability and therefore should have received a higher rate via application of "adverse facts available." Appx1080; ECF 49, at 42–54. In its final determination, the Department disagreed: "It is Commerce's practice that, once a company fails to demonstrate the absence of *de jure* and *de facto* government control, the company is not eligible for a separate rate. In the absence of a separate rate, the company must be treated as part of the country-wide entity and is assigned the country-wide rate." Appx1081.

In a somewhat related argument, Catfish Farmers also contend that because Dotaseafood failed to demonstrate its entitlement to a separate rate *and* failed to cooperate in its questionnaire responses, the company was part of the Vietnam-wide entity such that *both* Dotaseafood *and* the Vietnam-wide entity should be assigned an "adverse facts available" rate. Appx1054.

Commerce disagreed. First, no party asked the Department to review the Vietnam-wide rate, so it was not subject to change. Appx1055. Second, Dotaseafood had a separate rate during the period of review and was not part of the Vietnam-wide entity during either that period or the administrative review. "While Dotaseafood will lose its separate rate status in the final results of this review, Dotaseafood could not have been considered a constituent part of the Vietnam-wide entity at the time the request was submitted." *Id.*

Catfish Farmers acknowledge that in a non-market economy proceeding all entities receive the country-wide single rate unless they apply for, and receive, a separate rate. ECF 49, at 42. They note, however, that "[u]nder a separate provision of the statute, Commerce may apply adverse inferences to companies that fail to cooperate to the best of their ability during a proceeding." *Id.* They contend that the Department had to explain why it did not impose an adverse inference when Dotaseafood stopped cooperating, arguing that Commerce's lack of explanation "ignores its statutory obligation to enforce its antidumping duty laws." *Id.* at 43–44.

Catfish Farmers' argument misconstrues the relevant statute, which does not permit Commerce simply to apply adverse inferences

to companies that fail to cooperate. Instead, it prescribes a two-step process. *See Hung Vuong*, 483 F. Supp. 3d 1336–39.

In the first step, if Commerce identifies a hole in the administrative record, it must fill that hole by using "facts otherwise available." 19 U.S.C. § 1677e(a). In the second, if the Department finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "*may* use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*." *Id.* § 1677e(b)(1)(A) (emphasis added).

The final part of the latter clause is significant: "The statute . . . allows the use of an adverse inference only for purposes of 'selecting from among the facts otherwise available.' This means that Commerce's use of an adverse inference in any matter is limited by how Commerce employs facts otherwise available." *Dalian Meisen Woodworking Co. v. United States*, 571 F. Supp. 3d 1364, 1370 (CIT 2021) (citation to § 1677e(b)(1)(A) omitted). "Once Commerce finds it necessary to resort to facts otherwise available[,] the Department *may (but need not)* take the second step of determining whether the respondent 'failed to cooperate by not acting to the best of its ability to comply' with Commerce's 'request for information.' " *Id.* (emphasis added) (quoting 19 U.S.C. § 1677e(b)).

Thus, the statute precludes the Department from applying an adverse inference unless it first finds one of the prerequisite conditions. Commerce did not find that any of those conditions existed here, and Catfish Farmers have nowhere argued otherwise—instead, they simply jump ahead to the adverse inference stage. Because they have not attempted to show that Commerce erred in not finding that any of the "facts otherwise available" conditions applied, the court finds that the Department's decision on Dotaseafood's rate was supported by substantial evidence.[6]

Even if Catfish Farmers had demonstrated that Commerce was required to apply facts otherwise available, the Federal Circuit has affirmed the Department's use of facts otherwise available to apply a country-wide single rate to a non-market economy respondent that withdrew from the proceeding and removed its confidential information from the record. *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1378–79 (Fed. Cir. 2013). In that case, the Department cited 19 U.S.C. § 1677e(a)(2)(C) and (D)—two subparagraphs in the "facts otherwise available" statute—and determined the respondent had significantly impeded the proceeding and prevented verification of

[6] Catfish Farmers also overlook that the statute's adverse inference provision is permissive—as noted above, it provides that Commerce "may" apply an adverse inference.

information. "Commerce concluded that Aifudi's withdrawal from participation and removal of its confidential information meant that Commerce did 'not have any record evidence upon which to determine whether Zibo Aifudi [was] eligible for a separate rate for this review period,' so Aifudi would be subjected to the country-wide rate." *Id.* (brackets in original) (quoting *Laminated Woven Sacks from the People's Republic of China*, 76 Fed. Reg. 14,906, 14,909 (Dep't Commerce Mar. 18, 2010)). The Federal Circuit held that "the absence of verifiable information that would be necessary for Aifudi to carry its burden" of affirmatively demonstrating its independence from the Chinese government made it appropriate for Commerce to apply the country-wide rate. *Id.* at 1380–81. The same principle applies here, and the court therefore finds no error in Commerce's application of the Vietnam-wide rate to Dotaseafood.

2

Catfish Farmers also argue that Commerce should have denied Nam Viet a separate rate, contending that the company did not report all of its affiliated companies and prove that none of them is subject to government influence. "If any affiliated entity is subject to government influence, then Commerce does not assign the respondent a separate rate." ECF 49, at 54–55 (citing, *inter alia*, *Zhaoqing New Zhongya Aluminum Co. v. United States*, 70 F. Supp. 3d 1298, 1308 (CIT 2015)).

Catfish Farmers contend that the administrative record showed that Nam Viet was affiliated with [[

]],

because both Nam Viet "and related entities" were owned and operated by [[

]]. ECF 48, at 55 (citing Appx6870–6871). Furthermore, [[

]]. *Id.* at 56 (citing Appx3139–3605).[7] Catfish Farmers argue that one Nam Viet shareholder was listed as [[

]], ECF 48, at 56–57 (citing Appx12973–13015, Appx13078–13079, Appx13066), and that Nam

[7] Catfish Farmers argue that while the [[

]] refers to [[

]]. ECF 48, at 56. It is unclear to the court [[

]].

Viet [[

]], *id.* at 57 (citing Appx1122–1128, Appx13023–13025, Appx13078–13079).

Catfish Farmers also contend that the record shows that Nam Viet was affiliated with its own U.S. customer but failed to disclose it. They assert that the record establishes that Nam Viet's U.S. customer was owned and operated by a person who also owned and managed a company that Commerce had previously found to be [[

]]. ECF 48, at 58. "The record indicates that these entities continue to be related during the review period." *Id.* at 59.

Commerce disagreed with Catfish Farmers, finding that the information about the shareholder was from before the period of review. Appx1083. The Department acknowledged Catfish Farmers' argument that the alleged affiliation extended into the period of review but found the information in the record inconclusive—"[a]lthough it appears that a person with a name similar to the name of a [Nam Viet] shareholder was involved with Exporter X, it is not clear, from the (third party) company profile web page, what the effective date of that information is. Therefore, the only reliable evidence concerning the dates of the alleged affiliation are more than a decade before the" period of review. *Id.* Commerce found that merely sharing an address "does not automatically confer affiliation" and that the information in the administrative record was insufficient to verify whether the shared address was still current during the period of review. *Id.* "Commerce considers a range of factors in determining whether two companies are affiliated; the information on the record does not demonstrate that the traditional indicia of affiliation are necessarily met here." *Id.*

In responding to Catfish Farmers' arguments before this court, the government invokes 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.102. The statute defines seven categories of "persons [who] shall be considered to be 'affiliated' or 'affiliated persons,' " and the government describes it as providing that "a claim that two entities are affiliated turns on whether one entity 'controls' another." ECF 53, at 62 (quoting 19 U.S.C. § 1677(33)). Similarly, the government characterizes the regulation as providing "further guidance on factors considered in evaluating affiliation, such as whether control over another exists in 'corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships.'" *Id.* (quoting 19 C.F.R. § 351.102(b)(3)). The government notes, however, that the regulation also states that the Department " 'will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or

cost of the subject merchandise or foreign like product,' considering such things as the 'temporal aspect of a relationship in determining whether control exists . . . .' " *Id.* (quoting 19 C.F.R. § 351.102(b)(3)).

Applying those statutory and regulatory provisions, the government argues that substantial evidence supports Commerce's findings that (1) the information indicating that a Nam Viet shareholder was [[ ]] predated the period of review because it was dated [[ ]], ECF 54, at 63 (citing Appx1083 and ECF 48, at 55–56); (2) the web page Catfish Farmers cited as further support for its arguments expressly disclaimed accuracy, *id.* at 63–64 (citing Appx13031–13192); (3) while the cited web page gave an [[ ]] during the period of review, it was unclear what information was [[ ]] at that time, *id.* at 64; and (4) perhaps most significantly, Catfish Farmers acknowledge that Nam Viet [[ ]] the current period of review, *id.* (citing ECF 48, at 56, and Appx1247–1367). The government also notes that the particular Nam Viet shareholder who was [[ ]] owned only [[ ]] of Nam Viet's shares. *Id.* (citing Appx12973–13015). Finally, as to the issues about Nam Viet's U.S. customer, the government notes that the entire chain depends on there being an affiliation between Nam Viet and [[ ]] because all the other alleged affiliations were with an [[ ]] affiliate. *Id.* at 65 (citing ECF 48, at 58–59, and Appx1083).

For their part, Nam Viet and Vinh Hoan simply argue that "the lack of contemporaneous data demonstrating a control relationship between [Nam Viet] and the alleged affiliated company during the period of review shows that Commerce did not err . . . ." ECF 47, at 14.

On reply, Catfish Farmers assert that the evidence in the administrative record shows that Nam Viet and [[ ]] did indeed operate out of the same address during the review period. ECF 50, at 32 (citing Appx13832 and Appx4000–4001). But that fails to respond to Commerce's eminently reasonable finding that a shared address, without more, does not automatically demonstrate affiliation.

Catfish Farmers' reply further contends that the government's argument about the chain of affiliations fails for two reasons—(1) "Commerce's conclusion regarding [[ ]] is inadequately explained and supported," *id.*, and (2) "Commerce[ ] failed to address [Catfish Farmers'] argument that [Nam Viet's] U.S. customer and [[ ]] were [[ ]]," *id.* (citing, *inter alia*, Appx13832–13833). These contentions, however, do not address in any meaningful way the basis for Commerce's

findings. Instead, they ask the court to reweigh the evidence. "It is not for this court . . . to reweigh the evidence or to consider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992); *see also Carbon Activated Tianjin Co. v. United States*, 586 F. Supp. 3d 1360, 1370 (CIT 2022) ("Plaintiffs fail to identify any error in the agency's analysis. Instead, they largely reassert the arguments they made to the agency. However, the court does not reweigh evidence.") (citing, *inter alia*, *Trent Tube*, 975 F.2d at 815).

Accordingly, the court sustains Commerce's finding that Nam Viet was entitled to a separate rate. That does not end the analysis for Nam Viet, however, because Catfish Farmers also dispute how Commerce calculated the company's rate. The court therefore turns to that issue.

3

After Commerce issued its final determination, Catfish Farmers submitted a ministerial error allegation contending that even if the Department properly granted Nam Viet a separate rate, Commerce miscalculated that rate by ignoring the rate assigned to Dotaseafood. In response, the Department acknowledged that its statutory citation contained a typographical error, but it also found that its determination was otherwise correct and that Catfish Farmers' arguments related to a "methodological" issue that was not properly the subject of a ministerial error allegation. Appx21963.

In this court, the government contends that Catfish Farmers failed to exhaust their administrative remedies as to how Commerce calculated Nam Viet's rate because their arguments before the Department focused on *whether* Nam Viet should receive a separate rate. The government asserts that Catfish Farmers never raised what should happen if Commerce disagreed and granted Nam Viet a separate rate. ECF 53, at 69–70 (citing Appx13831, Appx13834). Only after the Department granted the separate rate did Catfish Farmers change course by filing a ministerial error allegation. *Id.* at 70 (citing Appx21953–21960). The government contends it was improper for Catfish Farmers to omit the issue from their case brief and then try to resurrect it via a ministerial error allegation. *Id.* at 71.

Catfish Farmers respond that they did exhaust their administrative remedies:

> The purpose of the exhaustion doctrine is to ensure that Commerce has the opportunity to consider parties' arguments administratively. [Catfish Farmers] made its arguments at the administrative level, and Commerce responded to them. [Cat-

> fish Farmers'] Ministerial Error Comments . . . , Appx21954–21957; Commerce's Ministerial Error Allegation Memorandum . . . , Appx21961–21964. Therefore, the exhaustion doctrine has been satisfied.

ECF 51, at 34. In other words, Catfish Farmers readily admit that they did not raise the issue in their case brief, but they contend that fact is irrelevant.

Catfish Farmers are mistaken for three reasons. First, Nam Viet received a separate rate—the same one assigned to Vinh Hoan—in the *preliminary* determination. Appx1021. There, Commerce found Dotaseafood ineligible for a separate rate, assigned it the Vietnam-wide rate, and did not include that in calculating Nam Viet's rate. Appx1019, Appx1021. Thus, Catfish Farmers were on notice, at the time of the preliminary determination, that the Department did not intend to use Dotaseafood's rate in calculating Nam Viet's rate, yet Catfish Farmers did not address the issue in their case brief.

Second, a preliminary determination is, by definition, just that. Vinh Hoan's rate of 9¢/kg was subject to being increased or decreased in Commerce's final determination. If Catfish Farmers had concerns about that rate, or a revised version of that rate, being applied to Nam Viet, they had the opportunity to address it in their case brief but did not do so. Vinh Hoan's case brief, in contrast, raised several issues relating to how Commerce should calculate its rate, and Commerce accepted three of those four points and adjusted the calculations, resulting in Vinh Hoan receiving a zero rate. The Department stated that no other party (i.e., including Catfish Farmers) commented on any of the Vinh Hoan calculation issues. Appx1086–1087.

Third, Commerce's regulations require parties to use their case briefs to call the Department's attention to issues they consider significant—the case brief "must present all arguments that continue in the submitter's view to be relevant to the Secretary's determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2). "Both Commerce and reviewing courts normally find an argument not presented in a party's case brief to be waived unless the argument could not have been raised in the case brief." *NTSF Seafoods Joint Stock Co. v. United States*, Ct. Nos. 20–00104 and 20–00105, Slip Op. 22–38, at 24, 2022 WL 1375140, at *8 (CIT Apr. 25, 2022). But "[t]he Department's regulations do recognize that in some cases, a mistake might first appear in the final determination, when it would be too late for a party to address the issue via the (already-filed) case brief," in which case a party may

submit comments about a "ministerial error" within five days. *Id.* (citing 19 C.F.R. § 351.224(c)(1)–(2)).

Here, two issues relate to whether it was proper for Catfish Farmers to raise the calculation issue for the first time via a ministerial error allegation. The first is that, as noted above, the alleged error to which Catfish Farmers object appeared in the preliminary determination; the final determination then carried it over without change. "Comments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief." 19 C.F.R. § 351.224(c)(1).[8] The second is that, as Commerce stated in rejecting Catfish Farmers' allegation, the alleged error is not a "ministerial error" at all: "*[M]inisterial error* means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of *unintentional* error which the Secretary considers ministerial." *Id.* § 351.224(f) (second italicization added).

The word "unintentional" is critical here because Commerce explained that the method it used to assign a rate to Nam Viet was a "methodological decision," not an "unintentional error." Appx21963. Therefore, while the Department's citation to the wrong statutory subparagraph is precisely the sort of matter encompassed by the "ministerial error" regulation (a typo), the substantive question of how to calculate a respondent's rate is not. The Department's finding is consistent with its regulation.

As a result, the court agrees with the government: Catfish Farmers could and should have objected to Commerce's chosen methodology for calculating Nam Viet's rate in their case brief. The court recognizes that Catfish Farmers believe that Nam Viet should not have received a separate rate at all. But the Department's decision to award the company Vinh Hoan's rate in the preliminary determination was enough to put Catfish Farmers on notice that they needed to address the issue in their case brief if they thought it merited attention. Instead, they put all their eggs in the "no separate rate" basket. That was their intentional, considered choice, and the consequence is that they failed to exhaust their administrative remedies as to the separate-rate methodology.

* * *

For the foregoing reasons, the court grants partial judgment on the agency record to Catfish Farmers as to Commerce's surrogate country selection and remands that issue, but otherwise denies their motion.

[8] Despite the regulation's use of "should," its provisions are mandatory. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011) ("[I]nterested parties must point out any ministerial errors in their case briefs.").

The court grants partial judgment on the agency record to Defendant-Intervenors Colorado Boxed Beef and QMC Foods as to their standing to request administrative review of Vietnamese suppliers. The court also grants partial judgment on the agency record to the government and Defendant-Intervenors Vinh Hoan and Nam Viet as to the rate assigned to Dotaseafood, whether Nam Viet was entitled to a separate rate, and the method Commerce used to determine Nam Viet's rate. *See* USCIT R. 56.2(b). A separate remand order will issue.

Dated: July 7, 2023
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 23–101

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Timothy C. Stanceu, Judge
Court No. 20–00032

JUDGMENT

Further to the mandate of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *PrimeSource Building Products, Inc. v. United States*, CAFC Mandate in Appeal No. 21–2066 (July 5, 2023), ECF No. 133, it is hereby

ORDERED that Plaintiff PrimeSource Building Products, Inc.'s claims against the President of the United States be, and hereby are, dismissed without prejudice; it is further

ORDERED that Plaintiff PrimeSource Building Products, Inc.'s Rule 56 Motion for Summary Judgment (Apr. 14, 2020), ECF No. 73, be, and hereby is, denied; it is further

ORDERED that pursuant to USCIT Rule 56.1, judgment be, and hereby is, entered for Defendants United States, the Department of Commerce, Secretary of Commerce Gina Raimondo, U.S. Customs and Border Protection, and Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection Troy A. Miller; and it is further

ORDERED that entries affected by this litigation shall be liquidated in accordance with the decision of the Court of Appeals in *PrimeSource Building Products, Inc. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023).

Dated: July 13, 2023
New York, New York

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

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

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

Slip Op. 23–102

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

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

JUDGMENT

Further to the mandate of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Oman Fasteners, LLC, Huttig Building Products, Inc., Huttig, Inc. v. United States*, CAFC Mandate in Appeal No. 21–2252 (July 5, 2023), ECF No. 150, it is hereby

ORDERED that Plaintiff's claims against the President of the United States be, and hereby are, dismissed without prejudice; it is further

ORDERED that Plaintiff's Motion for Summary Judgment With Respect to Count 1 of Plaintiff's Complaint (Apr. 14, 2020), ECF No. 65, be, and hereby is, denied; it is further

ORDERED that pursuant to USCIT Rule 56.1, judgment be, and hereby is, entered for Defendants United States, the Department of Commerce, Secretary of Commerce Gina Raimondo, U.S. Customs and Border Protection, and Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection Troy A. Miller; and it is further

ORDERED that entries affected by this litigation shall be liquidated in accordance with the decision of the Court of Appeals in *Oman Fasteners, LLC, Huttig Building Products, Inc., Huttig, Inc. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023).

Dated: July 13, 2023
New York, New York

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

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

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

Slip Op. 23–103

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

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

[Sustaining the U.S. Department of Commerce's second remand redetermination in the 2017–2018 antidumping administrative review of welded line pipe from the Republic of Korea.]

Dated: July 14, 2023

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

Jarrod M. Goldfeder and *Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., for consolidated plaintiff and plaintiff-intervenor Hyundai Steel Company.

Robert R. Kiepura, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. On the brief were *Brian M. Boynton*, Principal Assistant Deputy Attorney General, *Patricia McCarthy*, Director, and *Franklin E. White Jr.*, Assistant Director. Of counsel was *Benjamin Juvelier*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington D.C.

OPINION AND ORDER

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") second redetermination on remand filed pursuant to the Court's order in *NEXTEEL Co. v. United States*, 601 F. Supp. 3d 1373 (Ct. Int'l Trade 2022) in connection with Commerce's 2017–2018 administrative review of the antidumping duty order covering welded line pipe from the Republic of Korea. On remand, Commerce offers further explanation for its decision to classify NEXTEEL's suspended production line costs as general and administrative expenses. *See* Final Results of Redetermination Pursuant to Ct. Remand, Mar. 6, 2023, ECF No. 116–1 ("Remand Results"). For the following reasons, the Court sustains Commerce's second remand redetermination.

BACKGROUND

The Court presumes familiarity with the facts of this case as set forth in its previous opinions remanding Commerce's determination, and recounts only the facts necessary to consider the Remand Results. On March 14, 2019, Commerce initiated an antidumping review of welded line pipe from the Republic of Korea, and selected

NEXTEEL as a mandatory respondent. *See* Initiation of Antidumping and Countervailing Duty Admin. Rev., 84 Fed. Reg. 9,297 (Dep't. of Commerce March 14, 2019). On May 22, 2019, NEXTEEL responded to Commerce's Section D questionnaire, stating that "NEXTEEL did suspend production on certain OCTG (non-subject) lines and one of the forming lines [ ] for the subject merchandise production for some periods during the POR. . . . The costs of suspended lines were transferred directly to [cost of goods sold] in accordance with NEXTEEL's normal accounting treatment." NEXTEEL's Sec. C & D Questionnaire Resp. at Ex. D-10, A-580–876, PR 80, bar code 3838281–01 (May 22, 2019). On August 8, 2019, Commerce requested additional information concerning NEXTEEL's Section C and D questionnaire responses, including specific details about how NEXTEEL accounted for its suspension losses. *See* Req. for Supp. Sec. C & D Info. at 6, A-580–876, PR 725, bar code 3876365–01 (Aug. 8, 2019). On September 5, 2019, NEXTEEL responded to Commerce's request for supplemental information concerning its suspension losses, explaining that these losses "were not included in reported costs" and were "unrelated to the cost of manufacturing the subject merchandise." NEXTEEL's Supp. Sec. C & D Questionnaire Resp. at S-16, A-580–876, PR 755, bar code 3887719–01 (Sept. 5, 2019).

On January 31, 2020, Commerce released the preliminary results of its administrative review, in which it "revised NEXTEEL's [general and administrative ("G&A")] and financial expense ratios to reclassify certain shutdown losses related to the company as a whole from the [cost of goods sold] denominators to G&A expenses" for the purposes of calculating constructed value ("CV"). *See* Decision Memo. for the Prelim. Results 2017–2018 Admin. Rev. of [ADD] Order on [WLP] from Korea at 20, A-580–876, PR 796, bar code 3937984–01 (Jan. 31, 2020). Specifically, Commerce removed certain costs which NEXTEEL had reported as cost of goods sold ("COGS"), and added these costs to NEXTEEL's G&A expenses. *See* Cost of Production and [CV] Calc. Adjustments for NEXTEEL at Attach. 2, A-580–876, PR 802, bar code 3938529–01 (Jan. 31, 2020). On November 20, 2020, Commerce published the final results of its administrative review. *See* Issues and Decision Memo. Final Results 2017–2018 Admin. Rev. of [ADD] Order on [WLP] from Korea, A-580–876, PR 854, bar code 4056558–01 (Nov. 20, 2020). In the final results, Commerce continued to treat NEXTEEL's suspension losses as G&A expenses. *See id.* at 47–49.

On December 11, 2020, NEXTEEL challenged Commerce's decision to reclassify its suspension losses, among other issues, and on April 19, 2022, the Court remanded this issue to Commerce for further

explanation or reconsideration. *See NEXTEEL Co. v. United States*, 569 F. Supp. 3d 1354 (Ct. Int'l Trade 2022) ("*NEXTEEL I*"). On remand, Commerce determined that it correctly classified NEXTEEL's suspension losses as G&A expenses, rather than COGS. *See* Final Results of Redetermination Pursuant to Ct. Remand, July 18, 2022, ECF No. 96–1. On December 6, 2022, the Court again remanded Commerce's determination for further explanation or reconsideration. *See NEXTEEL Co. v. United States*, 601 F. Supp. 3d 1373 (Ct. Int'l Trade 2022) ("*NEXTEEL II*"). Specifically, the Court requested that Commerce: (1) clarify which of NEXTEEL's production lines were suspended during what time periods, (2) explain whether Commerce treats suspension losses occurring at the beginning and end of the POR differently, and (3) explain why NEXTEEL's allocation of suspension losses to COGS is not reasonably reflective of costs. *See id.* at 1380–81. On remand, Commerce has provided additional explanation for its decision regarding NEXTEEL's suspension losses, and additional information regarding the suspended production lines. *See* Remand Results at 3–12. NEXTEEL and Consolidated Plaintiff / Plaintiff-Intervenor Hyundai Steel Company have submitted comments contesting the final results, *see* [NEXTEEL's] Cmts. on Remand, Apr. 5, 2023, ECF No. 118 ("Pl. Br."); [Hyundai Steel's] Cmts. on Commerce's Second Remand Results, Apr. 5, 2023, ECF No. 119, and Defendant has submitted comments urging the Court to sustain the final results, *see* Defendant's Resp. Cmts. on Remand Redetermination, May 5, 2023, ECF No. 120 ("Def. Br.").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018), which grants the Court authority to review actions initiated under 19 U.S.C. § 1516a(a)(2)(B)(iii)[1] contesting the final determination in an administrative review of an antidumping duty order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (citation omitted).

DISCUSSION

In its remand redetermination, Commerce again classifies NEXTEEL's suspension losses as G&A expenses, rather than COGS, and

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

provides further explanation for this determination. *See* Remand Results at 3–12. NEXTEEL argues that Commerce continues to treat suspension losses differently based on when they occur during the POR, and has not adequately explained why NEXTEEL's accounting does not reasonably reflect the cost of production for subject merchandise. *See* Pl. Br. at 3–6. Defendant counters that Commerce has clarified how it treats all significant suspensions the same, regardless of when they occur during the POR, and that Commerce has explained that NEXTEEL's accounting does not reflect the cost of merchandise because it results in unreasonably high per-unit costs. Def. Br. at 7–12. For the following reasons, Commerce's determination is sustained.

Commerce normally calculates costs based on the respondent's records if such records are kept in accordance with generally accepted accounting practices. *See* 19 U.S.C. § 1677b(f)(1)(A); *see also NEXTEEL I*, 569 F. Supp. 3d at 1371–72. However, § 1677b(f)(1)(A) requires that constructed value reasonably reflect a respondent's actual costs. *See Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321–23 (Fed. Cir. 2020). Thus, even if a respondent's normal books and records are compliant with generally accepted accounting practices, Commerce may deviate from the costs reflected in a respondent's books and records if it determines that such costs do not "reasonably reflect the costs associated with the production and sales of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

"Cost of goods sold" generally refers to the "price of buying or making an item," and in the context of manufacturing, "includes direct material, direct labor, and factory overhead associated with producing it." *Coalition for Fair Trade of Hardwood Plywood v. United States*, 180 F. Supp. 3d 1137, 1164 (Ct. Int'l Trade 2016) quoting Siegel, Joel G. & Shim, Jae K., *Dictionary of Accounting Terms 101* (2d ed. 1995). "General and administrative expenses" are "generally understood to mean expenses which relate to the activities of the company as a whole rather than to the production process." *Torrington Co. v. United States*, 146 F. Supp. 2d 845, 885 (Ct. Int'l Trade 2001). In order to calculate the per-unit amount of G&A expenses, Commerce multiplies the G&A expense ratio by the total cost of manufacture for each product. *See Mid Continent Steel & Wire, Inc. v. United States*, 273 F. Supp. 3d 1161, 1166 (Ct. Int'l Trade 2017). The G&A expense ratio is defined as a company's total G&A expenses divided by the company's total COGS. *See id.*

As an initial matter, Commerce answers the Court's question regarding which of NEXTEEL's production lines were suspended during which parts of the POR. Commerce explains that only one of the

four production lines in question produced subject merchandise, and this line was suspended during the last ten months of the POR. Remand Results at 4. It further explains that two of the lines producing non-subject merchandise were suspended during the last five months of the POR, and one non-subject line was suspended for the entirety of the POR. *Id.* NEXTEEL concedes that Commerce's timeline of line suspensions is accurate. *See* Pl. Br. at 2 ("Commerce did provide the details necessary to respond to the Court's question regarding the length of time during the POR in which these production lines were shut down"). Therefore, Commerce has satisfied the Court's instructions to specify when NEXTEEL suspended production on its product lines. *See NEXTEEL II*, 601 F. Supp. 3d at 1381.

Commerce also clarifies that it does not differentiate between suspension periods based on whether they occur at the beginning or the end of the POR. In *NEXTEEL I*, it was unclear to the Court whether Commerce treated suspension losses differently based on their timing relative to the POR. *See NEXTEEL II*, 601 F. Supp. 3d at 1380. On remand, Commerce has explained that:

> [I]n situations where there is no production during the whole POR, or only production prior to or after the production lines are suspended during the POR, it is reasonable for Commerce to treat such costs in the same way. The costs related to these suspensions are a company-wide burden and, thus, correctly associated with the company's general operations, regardless of when within the POR the shutdown occurs.

Remand Results at 10. Previously, Commerce had stated that "[r]evenues from products produced prior to the shutdown should not be associated with the suspended losses incurred during the shutdown periods," creating ambiguity as to whether only products produced "prior to" a shutdown could carry subsequent suspension losses. *See* Final Results of Redetermination Pursuant to Ct. Remand at 11, July 18, 2022, ECF No. 96–1. However, it is evident from Commerce's explanation on remand, and in light of the clarified timeline, that Commerce's use of "prior to" did not imply that timing relative to the POR affected Commerce's determination. Rather, for each of the three production lines which were partially suspended, the suspension period occurred at the end of the POR, and in this case Commerce could only refer to products that had been produced prior to shutdowns. *See* Remand Results at 4. NEXTEEL thus misinterprets Commerce's narrow reference to its production lines, which all happen to have been suspended at the end of the POR, as a broad statement of

practice. *See* Pl. Br. at 3–4. Commerce has adequately explained on remand that the only factor relevant to its classification of suspension costs is the length of suspension. *See* Remand Results at 10; *see also* Def. Br. at 9. Therefore, Commerce's explanation complies with the Court's order in *NEXTEEL II*. *See Xinjiamei*, 968 F. Supp. 2d at 1259.

Finally, Commerce explains that NEXTEEL's allocation of suspension losses to COGS is unreasonable because these costs are more appropriately classified as G&A expenses carried by the entire company. Although Commerce ordinarily calculates costs based on a respondent's records, *see* 19 U.S.C. § 1677b(f)(1)(A), it may reject a respondent's accounting if that respondent's costs do not reasonably reflect the costs associated with the production and sales of the merchandise. *See id.* Here, Commerce explains that under NEXTEEL's current accounting method, products produced on suspended production lines are not only assigned normal operating costs, but then must also carry the full expenses associated with an idled production line. *See* Remand Results at 6; Def. Br. at 8. Specifically, Commerce states that under NEXTEEL's accounting, "the per-unit production costs for such merchandise would be unreasonably high because the cost of the suspended lines would be added on top of the normal operating cost for those lines." Remand Results at 6. Commerce further explains that "it is not reasonable to treat the cost of the suspended loss as part of COGS, because it would double count the costs of the products that already carry the full operating costs." *Id.* at 11. It is reasonably discernable from these explanations that Commerce believes that a product bearing both direct costs of manufacturing and separate costs associated with suspension losses will no longer reasonably represent the true cost of production.

Moreover, Commerce adequately explains that the depreciation and other costs associated with idled production lines are more akin to a company-wide cost, than a cost of manufacturing to be borne by specific products. As the Court has previously recognized, at a certain point the costs flowing from an extended shutdown are more akin to general expenses than costs associated with any specific product. *See* Remand Results at 11; *see also Husteel Co. Ltd. v. United States*, 520 F. Supp. 3d 1296, 1307–08 (Ct. Int'l Trade 2021). Indeed, as Commerce discusses, NEXTEEL does not attribute these costs to specific products, instead including them only in COGS and as a result removing those costs from the antidumping duty calculations. *See* Remand Results at 7–8 ("the costs of suspended lines, although recorded as COGS, were not included as part of the actual product costing"). As NEXTEEL itself asserts in its supplemental questionnaire response, "NEXTEEL believes that these costs were unrelated to the COM of

the subject merchandise." NEXTEEL's Supp. Sec. C & D Questionnaire Resp. at S-16, A-580–876, PR 755, bar code 3887719–01 (Sept. 5, 2019). In its remand results, Commerce acknowledges NEXTEEL's position that its suspension losses should not be associated with individual products, and supports its determination that these costs would be more appropriately considered as G&A expenses with NEXTEEL's own reasoning. *See* Remand Results at 8 ("Commerce agrees with NEXTEEL that the suspended loss was not directly attributable to a specific product; for that reason, consistent with Commerce's practice, we included these costs in G&A expenses.") From this explanation, it is reasonably discernable that Commerce found NEXTEEL's cost allocations to be unreasonable because, in addition to being too high, the appropriateness of the allocation was contradicted by NEXTEEL's own explanation of its costs.

CONCLUSION

Commerce explains which of NEXTEEL's production lines were suspended during what time periods, and why NEXTEEL's allocation of suspension losses to COGS is not reasonably reflective of costs. Commerce further adequately explains why its allocation of suspension costs is reasonable. For the foregoing reasons, the Court sustains Commerce's second remand redetermination. A separate judgment will issue.

Dated: July 14, 2023
New York, New York

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

Slip Op. 23–104

NUCOR TUBULAR PRODUCTS INC., Plaintiff, v. UNITED STATES, Defendant, and PRODUCTOS LAMINADOS DE MONTERREY S.A. DE C.V., PROLAMSA, INC., and MAQUILACERO S.A. DE C.V., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00543

[Sustaining the remand determination of the administrative review by the U.S. Department of Commerce in the antidumping duty investigation of heavy walled rectangular welded carbon steel pipes and tubes from Mexico.]

Dated: July 19, 2023

Alan H. Price, *Robert E. DeFrancesco, III*, and *Jake R. Frischknecht*, Wiley Rein LLP, of Washington, D.C., for Plaintiff Nucor Tubular Products, Inc.

Claudia Burke, Assistant Director, and *Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel on the brief was *Ayat Mujais*, Attorney, International Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David E. Bond, *Allison J.G. Kepkay*, and *C. Alex Dilley*, White & Case, LLP, of Washington, D.C., for Defendant-Intervenors Productos Laminados de Monterrey S.A. de C.V. and Prolamsa, Inc.

Diana Dimitriuc Quaia, *John M. Gurley*, and *Yun Gao*, ArentFox Schiff LLP, of Washington, D.C., for Defendant-Intervenor Maquilacero S.A. de C.V.

OPINION AND ORDER

Choe-Groves, Judge:

This action concerns the import of heavy walled rectangular welded carbon steel pipes and tubes from Mexico, subject to the final affirmative determination in an antidumping duty investigation by the U.S. Department of Commerce ("Commerce"). *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* ("*Final Results*"), 86 Fed. Reg. 41,448 (Dep't of Commerce Aug. 2, 2021) (final results of antidumping duty administrative review; 2018–2019), and accompanying Issues and Decision Mem. ("Final IDM"), ECF No. 26–2.

Before the Court are the Final Results of Redetermination Pursuant to Court Order ("*Remand Redetermination*"), ECF No. 52–1, which the Court ordered in *Nucor Tubular Products Inc. v. United States* ("*Nucor I*"), 47 CIT __, 619 F. Supp. 3d 1279, 1287 (2023). Defendant-Intervenor Maquilacero S.A. de C.V. ("Maquilacero") filed Defendant-Intervenor Maquilacero S.A. de C.V.'s Comments in Opposition to Remand Redetermination. Def.-Interv.'s Cmts. Opp'n Remand Redetermination ("Maquilacero's Cmts. Opp'n"), ECF No. 54. Defendant United States ("Defendant") filed Defendant's Response to

Comments on Remand Redetermination. Def.'s Resp. Cmts. Remand Redetermination ("Def.'s Resp. Cmts."), ECF No. 55. Plaintiff Nucor Tubular Products Inc. ("Nucor") filed Plaintiff Nucor Tubular Product Inc.'s Comments in Support of Remand Redetermination. Pl.'s Cmts. Supp. Remand Redetermination ("Nucor's Cmts. Supp."), ECF No. 56. Defendant-Intervenors Productos Laminados de Monterrey S.A. de C.V. and Prolamsa, Inc. (collectively, "Prolamsa") did not file comments in response to the *Remand Redetermination*. For the reasons discussed below, the Court sustains the *Remand Redetermination*.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Remand Redetermination*. *See Nucor I*, 47 CIT at __, 619 F. Supp. 3d at 1282–83.

Commerce published its final determination in the antidumping duty investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Mexico*, 81 Fed. Reg. 47,352 (Dep't of Commerce July 21, 2016) (final determination of sales at less than fair value). Commerce published its antidumping duty order in the Federal Register. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Mexico, and the Republic of Turkey*, 81 Fed. Reg. 62,865 (Dep't of Commerce Sept. 13, 2016) (antidumping duty orders).

After receiving requests to conduct administrative reviews of the antidumping duty order, Commerce initiated an administrative review of the antidumping duty order covering heavy walled rectangular welded carbon steel pipes and tubes from Mexico. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 61,011 (Dep't of Commerce Nov. 12, 2019). Commerce selected Maquilacero and Prolamsa as mandatory respondents. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* ("*Preliminary Results*"), 86 Fed. Reg. 7067, 7067 (Dep't of Commerce Jan. 26, 2021) (preliminary results of antidumping duty administrative review; 2018–2019) and accompanying Prelim. Decision Mem. ("Prelim. DM"), PR 191; *see also* Commerce's Mem. Re: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: 2018–2019 Antidumping Duty Administrative Review: Resp. Selection Mem. (Dec. 19, 2019) at 1, PR 21.[1] Commerce published the preliminary results and supporting calculations. *Prelimi-*

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") document numbers filed in this case, ECF Nos. 45, 58.

nary Results, 86 Fed. Reg. 7067; *see also* Commerce's Mem. Re: Preliminary Results Margin Calculation for Maquilacero S.A. de. C.V. (Jan. 15, 2021), PR 192. Commerce published its *Final Results* and supporting calculations. *Final Results*, 86 Fed. Reg. 41,448; Final IDM.

Nucor submitted ministerial error comments addressing the margin calculations for both Prolamsa and Maquilacero. Pl.'s Ministerial Error Cmts. (Aug. 2, 2021) ("Ministerial Error Comments"), PR 253. Commerce issued its ministerial error determination. *See* Commerce's Mem. Re: Ministerial Error Allegations in the Final Results of the 2018–2019 Antidumping Duty Administrative Review on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico ("Ministerial Error Mem.") (Aug. 20, 2021), PR 259. Nucor challenged Commerce's determinations in the *Final Results* regarding Prolamsa and Maquilacero. Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 32, 33, 34.

In *Nucor I*, the Court concluded that Commerce's use of zeros in its cost calculation regarding Maquilacero was ministerial in nature and that Nucor's comments challenging Commerce's ministerial error were timely. *Nucor I*, 47 CIT at __, 619 F. Supp. 3d at 1286. The Court granted Defendant's request for remand regarding the alleged double-conversion error for Prolamsa. *Id.* at 1286–87.

In the *Remand Redetermination*, Commerce determined that the Ministerial Error Comments submitted by Nucor were timely. *Remand Redetermination* at 1–2. Commerce reviewed its calculations with respect to both Maquilacero and Prolamsa and adjusted each company's dumping margins. *Id.* at 2–3. On remand, Commerce determined that the revised weighted-average dumping margin for Prolamsa is 2.11% and the weighted-average dumping margin for Maquilacero is 3.48%. *Id.* at 3. Commerce determined that the revised rate for the non-selected companies is 2.51%. *Id.* For the reasons set forth in this Opinion, the Court sustains Commerce's Remand Determination.

JURISDICTION AND STANDARD OF REVIEW

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

Ad Hoc Shrimp Trade Action Comm. v. United States, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Maquilacero's Quarterly Cost Methodology

Maquilacero challenges Commerce's *Remand Redetermination*, arguing: (1) the error that Nucor alleged regarding Commerce's determination of normal value in Maquilacero's dumping margin calculation was not ministerial in nature; (2) the error that Nucor alleged regarding Commerce's determination of normal value in Maquilacero's dumping margin calculation was discoverable after publication of the *Preliminary Results*; and (3) Commerce was not required to correct the error that Nucor alleged regarding Commerce's normal value determination in Maquilacero's dumping margin calculation. Maquilacero's Cmts. Opp'n at 1. Maquilacero contends that Commerce departed from its established practice and applied a relaxed standard, contrary to 19 C.F.R. § 351.224(c)(1), when Commerce "correct[ed] a ministerial error that existed in the *Preliminary Results* but was only raised by Nucor for the first time after the *Final Results* were issued." *Id.* at 2. Maquilacero asserts that Commerce was not required to recalculate the dumping margin with respect to Maquilacero, but only needed to "provide adequate consideration to Nucor's allegation." *Id.*

Defendant disagrees with Maquilacero that Commerce's recalculation of Maquilacero's dumping margin was inappropriate, and argues that Nucor's ministerial error allegation was timely and in line with the Court's remand order. Def.'s Resp. Cmts. at 8.

The Court notes that Maquilacero reiterates arguments that the Court resolved in *Nucor I*. *See generally* Maquilacero's Cmts. Opp'n; *see also Nucor I*, 47 CIT __, 619 F. Supp. 3d 1279. First, regarding Maquilacero's contention that the errors were not ministerial in nature, this Court in *Nucor I* addressed ministerial errors and held that the errors alleged by Nucor were ministerial in nature. *Nucor I*, 47 CIT at __, 619 F. Supp. 3d at 1285–86. Second, regarding Maquilacero's contention that the errors were discoverable after the *Preliminary Results*, this Court held that the errors alleged by Nucor were not discoverable until after the publication of the *Final Results*. *Id.* at 1286. This Court held that "[b]ecause the unintentional errors became apparent only in the *Final Results*, the Court concludes that . . . Nucor was permitted to address new ministerial errors that arose after Commerce completed its constructed cost calculations for nor-

mal value in the *Final Results*." *Id.* Because Maquilacero has not convinced the Court that Commerce violated an established practice, and the Court previously held that Nucor's Ministerial Error Comments were timely submitted, the Court is not persuaded by Maquilacero's contention that Commerce applied a "relaxed standard that conflicts with . . . [an established practice under] 19 C.F.R. § 351.224(c)(1)." Maquilacero's Cmts. Opp'n at 2. Third, Maquilacero contends that Commerce was not required to correct the ministerial errors because "the Court's remand order did not expressly direct Commerce to recalculate Maquilacero's margin." *Id.* at 6. This Court remanded the *Final Results* and instructed Commerce to reconsider its calculations consistent with the Court's opinion. *Nucor I*, 47 CIT at __, 619 F. Supp. 3d at 1287. On remand, Commerce determined that the errors alleged by Nucor were ministerial in nature and that Nucor's ministerial error allegations were timely submitted. *Remand Redetermination* at 1–2, 8–10, 13–17. Commerce reconsidered the substance of Nucor's ministerial error allegations and recalculated Maquilacero's margin. *Id.* at 13–17. Based on the foregoing, the Court concludes that Commerce's *Remand Redetermination* is in accordance with the law.

Maquilacero challenges Commerce's *Remand Redetermination* as not supported by substantial evidence. *See* Maquilacero's Cmts. Opp'n at 4–5. In calculating Maquilacero's dumping margin, Commerce relied on Maquilacero's cost of production database submitted on September 10, 2020, in which Maquilacero reported its hot-rolled coil cost for each quarter of the period of review. Final IDM at 10; *see also* Commerce's Mem. Re: Prelim. Results Margin Calc. Maquilacero ("Maquilacero's Prelim. Margin Calc. Mem.") (Jan. 15, 2021) at 1, PR 7; Commerce's Mem. Re: Cost Prod. Constructed Value Calc. Adjustments Prelim. Results Maquilacero ("Macuilacero's Prelim. Cost Calc. Mem.") (Jan. 15, 2021) at 1–2, PR 9. However, Commerce initially used sequential values (i.e., .1, .2, .3 . . .) rather than Maquilacero's reported quarterly hot-rolled coil price data. Final IDM at 10–11. Nucor contested the use of sequential values, and Commerce subsequently removed the sequential values, inadvertently replacing them with zeros for the quarter immediately before the period of review (i.e., Q0). *See Nucor I*, 47 CIT __, 619 F. Supp. 3d at 1284; *see also* Pl.'s Ministerial Error Cmts.; Ministerial Error Mem. On remand, Commerce conceded that it "did not intend to include pre-[period of review] window period sales in [Commerce's] full [period of review] averaging calculation." *Remand Redetermination* at 9. Commerce thus adjusted the cost recovery benchmark (an average of all period of review quarterly costs, designed to evaluate whether sales deter-

mined to be "below cost" in a particular quarter were "above cost" when compared to the period of review average) by revising the programming language that the Court previously held was responsible for the ministerial error, and instead limited the quarters under consideration to only those within the period of review (i.e., Q1–Q4). *Id.* at 10. On remand, Commerce eliminated the ministerial error that was present in the *Final Results*, analyzing only the relevant cost data from the period of review.

Pursuant to the Court's remand order in *Nucor I*, Commerce was instructed to reconsider the substance of Nucor's timely submitted Ministerial Error Comments. Commerce made certain adjustments to address the deficiencies that Nucor highlighted in its timely submitted Ministerial Error Comments. *Id.* at 10, 13–17. Commerce recalculated Maquilacero's dumping margin and arrived at a more accurate determination, based upon record evidence including Maquilacero's cost of production database during the relevant period of review. *Id.* at 10, 17. The Court observes that the record evidence from Maquilacero's cost of production database and Commerce's established quarterly cost methodology support Commerce's determination that corrections needed to be made to the formulas that Commerce used in calculating Maquilacero's dumping margin. *Id.* at 10, 13–17. Commerce revised Maquilacero's dumping margin from 0.00% to the new rate of 3.48%. *Id.* at 17.

Because Commerce corrected the ministerial errors present in the *Final Results* by removing the inadvertent zeros within the calculation programming and disregarding data from the period prior to the relevant period of review, the Court concludes that Commerce's *Remand Redetermination* with regard to Maquilacero is supported by substantial evidence, in accordance with the law, and in compliance with this Court's remand order.

II. Prolamsa's Currency Conversion

The Court granted Commerce's request for remand regarding Commerce's calculation of Prolamsa's dumping margin in the *Final Results*. *Nucor I*, 47 CIT at __, 619 F. Supp. 3d at 1286–87. On remand, Commerce determined that several currency conversion mistakes occurred in Commerce's calculation of the *Final Results*. *Remand Redetermination* at 4–8. Commerce addressed each currency conversion error by: (1) converting home market packing expenses and home market inventory carrying costs to U.S. Dollars before calculating home market net price; and (2) correcting the foreign unit dollar price equation to only convert the level of trade adjustment and difference in merchandise adjustment variables into U.S. Dollars. *Id.* at 7.

Commerce addressed the comments provided by interested parties and revised its calculation formula to account for any remaining double conversion errors. *Id.* at 8. Commerce agreed with Prolamsa that Commerce made certain errors in Prolamsa's margin calculation in the Draft Results of Redetermination. *Id.* at 12; *see also* Prolamsa's Cmts. Draft Results Redetermination Pursuant Court Order ("Prolamsa's Comments on Draft Remand Redetermination") (Mar. 8, 2023), PRR 6. Commerce changed the formulas that it used to calculate Prolamsa's home market net price and foreign unit dollar price to eliminate the double conversion errors. *Remand Redetermination* at 12–13. Commerce revised Prolamsa's dumping margin from 0.00% to the new rate of 2.11%. *Id.* at 17. Prolamsa did not submit comments in opposition to Commerce's *Remand Redetermination*.

Because Commerce addressed the double conversion errors first highlighted by Nucor's Ministerial Error Comments, and subsequently corrected the remaining errors highlighted by Prolamsa's Comments on Draft Remand Redetermination, the Court concludes that the results of Commerce's *Remand Redetermination* with regard to Prolamsa are supported by substantial evidence, in accordance with the law, and comply with this Court's remand order.

CONCLUSION

For the foregoing reasons, the Court sustains the *Final Results*, 86 Fed. Reg. 41,448, *as amended* by the *Remand Redetermination*, ECF No. 52–1. Judgment will issue accordingly.

Dated: July 19, 2023
New York, New York

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

Slip Op. 23–105

CHINA MANUFACTURERS ALLIANCE, LLC AND DOUBLE COIN HOLDINGS LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 15–00124

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand (June 14, 2023), ECF No. 272 (the "Remand Redetermination") submitted to the court by the International Trade Administration, U.S. Department of Commerce ("the Department") in response to the court's Opinion and Order in *China Manufacturers Alliance, LLC v. United States*, No. 23–75, 2023 WL 3479423 (Ct. Int'l Trade May 16, 2023) (*"CMA V"*).

The court determines that the Remand Redetermination complies with the court's decisions in *CMA V* that plaintiffs China Manufacturers Alliance, LLC and Double Coin Holdings Ltd. (collectively, "Double Coin") did not rebut the Department's presumption of control by the Government of China over export activities and that Double Coin, consequently, must be assigned the PRC-wide rate of 105.31%.

No party filed comments in opposition to the Remand Redetermination within the 30-day period provided for in USCIT Rule 56.2(h).

Upon consideration of the Remand Redetermination and all other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Department's finding in the Remand Redetermination that Double Coin did not rebut the presumption of government control be, and hereby is, sustained; it is further

ORDERED that the Department's assignment of the PRC-wide rate of 105.31% to Double Coin be, and hereby is, sustained; and it is further

ORDERED that entries affected by this litigation shall be liquidated in accordance with the final judicial decision in this action.

Dated: July 19, 2023
NewYork, NewYork

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

Slip Op. 23–106

TARGET CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 21–00162

[Defendant's USCIT Rule 12(b)(6) motion to dismiss for failure to state a claim granted.]

Dated: July 20, 2023

Patrick D. Gill, Sandler, Travis & Rosenberg, P.A. of New York, N.Y., for Plaintiff Target Corporation.

Alexander Vanderweide, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, N.Y., for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Justin R. Miller*, Attorney-in-Charge. Of counsel was *Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, U.S. Customs & Border Protection, of New York, N.Y.

OPINION

Gordon, Judge:

This action involves a challenge by Plaintiff Target Corporation ("Plaintiff" or "Target") of the denial of its protest of the reliquidation by U.S. Customs and Border Protection ("Customs") of 40 entries that Customs originally liquidated at the incorrect antidumping duty rate. *See* Compl., ECF No. 6; *see also* Court No. 07–00123, ECF No. 168 (Dec. 8, 2016) ("Judgment"); Court No. 07–00123, ECF No. 172 (Oct. 27, 2017) ("Initial Order of Reliquidation"); *Home Prods. Int'l, Inc. v. United States*, 43 CIT ___, 405 F. Supp. 3d 1368 (2019) ("*Home Products I*"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a), as compared to 28 U.S.C. § 1581(c) for Court No. 07–00123, the precursor of this action. Before the court is Defendant's USCIT Rule 12(b)(6) motion to dismiss for failure to state a claim. *See* Def.'s Mot. to Dismiss for Failure to State a Claim, ECF No. 8 ("Def.'s Mot."); Pl.'s Resp. to Mot. to Dismiss, ECF No. 10 ("Pl.'s Resp."); Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 11 ("Def.'s Reply"); *see also* USCIT R. 12(b)(6).

I. Background

This action follows Target's unsuccessful attempt to challenge the reliquidation of the subject entries that was ordered in Court No. 07–00123. *See* Court No. 07–00123, Initial Order of Reliquidation; *Home Products I*. In that matter, the court entered judgment pursuant to a stipulation of settlement that established an antidumping duty margin of 72.29% for the first administrative review of imports

of metal-top iron tables from China ("subject merchandise") and manufactured/exported by Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware"). *See* Court No. 07–00123, Judgment, ECF No. 168 (Dec. 8, 2016) ("Judgment").

In March 2017, several months after the entry of the Judgment, the Government learned that Customs had erroneously liquidated 242 entries of the subject merchandise, including Target's 40 entries, at the original cash deposit antidumping duty rate of 9.47% instead of the 72.29% rate set forth in the Judgment.[1] The Government then sought an order directing Customs to reliquidate the 242 entries, since the 90-day window for voluntarily reliquidation by Customs under 19 U.S.C. § 1501 had expired. *See* Court No. 07–00123, Status Report, ECF No. 171 (Oct. 20, 2017). Home Products International, Inc. ("Home Products"), Plaintiff in Court No. 07–00123, joined in the Government's motion. As an "affected domestic producer" under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), 19 U.S.C. § 1675,[2] Home Products stood to lose considerable compensation from the antidumping duties to be collected and distributed to it under the CDSOA unless the erroneous liquidations were corrected.

In the absence of any objection at the time, and consistent with its inherent power as an Article III court and the obligation to enforce its own judgments, the court entered an order directing reliquidation at the 72.29% rate reflected in the Judgment. *See* Initial Order of Reliquidation; *see also* Def.'s Mot. at 3. Shortly thereafter, Target became aware of the court-ordered reliquidation and contested its lawfulness. Target then filed motions to intervene under USCIT Rule 24(a) (intervention as of right) and Rule 24(b) (permissive intervention), to reconsider, and to vacate the Initial Order of Reliquidation. *See* Court No. 07–00123, ECF Nos. 173 (intervention), 176 (reconsideration), 177 (vacation).

Subsequently, the court stayed implementation of the Initial Order of Reliquidation and re-postured the post-judgment relief sought by the Government and Home Products as a supplemental proceeding to enforce the Judgment under USCIT Rule 71. *See* Court No. 07–00123, Order Issuing Stay Pending Disposition of Target's Motions, ECF No. 188 (Dec. 22, 2017). In disposing of Target's multiple requests for relief, this Court addressed the unusual circumstances before it by

[1] The Judgment had ordered "that the injunction enjoining liquidation of the subject merchandise in this action, *see Home Products International, Inc. v. United States*, Court No. 07–00123 (CIT Apr. 18, 2007), ECF No. 11 (prelim. inj. order) shall be dissolved, and the covered entries liquidated in accordance with this entry of judgment." Judgment. The Judgment directed that the covered entries "produced or exported by Since Hardware" were to be liquidated at a rate of 72.29 percent. *Id.*

[2] Also known as the Byrd Amendment, the CDSOA was enacted in October 2000 and repealed in February 2006.

providing a comprehensive overview of the matter's procedural posture, the erroneous liquidations by Customs, the powers of the U.S. Court of International Trade, how the finality of liquidation operates in traditional customs duty cases, and how finality operates in the international trade context (*i.e.*, antidumping and countervailing duties), focusing on the court's power and authority to correct liquidations not in accordance with a court order or judgment. *See generally Home Products I*.

The following provides context for understanding the unique facts that gave rise to this action. Though it was a purchaser/importer of the subject merchandise from Since Hardware, Target chose not to participate in the underlying administrative review and subsequent § 1581(c) litigation, Court No. 07–00123. As Target was not a party to the administrative proceeding below, it had not perfected a right to intervene in Court No. 07–00123. Target, therefore, could not challenge the merits of the litigation that led to the Judgment. *See* 28 U.S.C. § 2631(j)(1)(B) ("in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right"); USCIT Rule 24(a)(1). Additionally, while USCIT Rule 24(b)(1) provides for permissive intervention by any person who is "given a conditional right to intervene by a federal statute" or "has a claim or defense that shares with the main action a common question of law or fact," that form of intervention is not available in § 1581(c) litigation. *See, e.g.*, *Ontario Forest Indus. Assoc. v. United States*, 30 CIT 1117, 1130 n.12, 444 F. Supp. 2d 1309, 1322 n.12 (2006) ("The court notes that here jurisdiction is founded under 28 U.S.C. § 1581(i). Section 2631(j) of Title 28 allows permissive intervention in such suits. In contrast, under 28 U.S.C. § 1581(c), intervention may only be sought as a matter of right. *See* 28 U.S.C. § 2631(j)(B)."); *see also Dofasco Inc. v. United States*, 31 CIT 1592, 1594–95, 519 F. Supp. 2d 1284, 1286–87 (2007) (collecting cases explaining unavailability of permissive intervention under 28 U.S.C. § 1581(c)).

Whether Target could have earlier sought interested party status and participated throughout the lengthy and expensive administrative process before the U.S. Department of Commerce ("Commerce") is a moot point. *Cf. U.S. Magnesium LLC v. United States*, 31 CIT 792, 793 (2007) ("While it may be true that TMI could have sought intervention of right earlier in this matter or initiated its own action to contest the Final Results, given the statutory scheme and this Court's rules and jurisprudence, the court cannot now see how TMI may, pursuant to USCIT Rule 24(b), permissively intervene in this

matter." (internal citations omitted)). In the final analysis, Target, as the importer of 40 of the entries of the subject merchandise, was fundamentally and fully protected by the advocacy of its supplier—the foreign manufacturer/exporter, Since Hardware—throughout the administrative process as well as in the follow-on litigation, Court No. 07–00123.

Regarding Target's post-judgment attempt to intervene in Court No. 07–00123, the court explained that USCIT Rule 24 and 28 U.S.C. § 2631(j) were inapplicable in these circumstances because these provisions appertain to intervention by a litigant who was a party to the administrative proceeding below, which Target was not. Again, as Target's rights were fully protected by the foreign manufacturer/exporter in the matter before Commerce and the court, Target had no reason or incentive to intervene in the case-in-chief in Court No. 07–00123.[3] Target's "rights" arose only upon the issuance of the Initial Order of Reliquidation.

As neither Target nor Customs were parties to Court No. 17–00123, and due to the potential impact on Target's entries of the post-judgment relief sought by the Government and Home Products, the court addressed Target's opposition to the Initial Order of Reliquidation and its various motions through the vehicle of USCIT Rule 71. *See* USCIT R. 71 ("When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party."). The objections raised by Target were thus considered in the context of that separate, supplemental, post-judgment proceeding—a proceeding that was grounded in equity, specifically focused on the power and authority of the U.S. Court of International Trade to enforce its own judgment.

In considering Target's objections, the court balanced the various factors involved, including the timeline relating to the discovery in August 2017 of the erroneous liquidations that occurred in March 2017, and the relative alacrity with which the Government and Home Products sought reliquidation once they discovered the problem. *Home Products I*, 43 CIT at ___, 405 F. Supp. 3d at 1375–77; *cf. Cemex, S.A. v. United States*, 384 F.3d 1314, 1325 (Fed. Cir. 2004) ("*Cemex*") ("Ad Hoc should have moved the Court of International Trade to enforce the judgment in 1998, rather than in 2003"). As a result, the court determined that it had the authority to order reliquidation and issued an affirmative injunction ("Final Order of Reliquidation") that, *inter alia*, vacated and superseded the Initial Order of

[3] As the U.S. Court of Appeals for the Federal Circuit ("CAFC" or "Court of Appeals") observed, the net effect of granting Target relief would be to preserve a "windfall from Customs' failure to properly implement a court order." *Home Products Int'l, Inc. v. United States*, 846 F. App'x 890, 895 n.1 (Fed. Cir. 2021) ("*Home Products II*").

Reliquidation. *Home Products I*, 43 CIT at ___, 405 F. Supp. 3d at 1378. It also directed Customs to promptly reliquidate the subject entries in conformity with the Judgment, and denied as moot Target's motions to intervene and to stay implementation of, and to reconsider and vacate, the Initial Order of Reliquidation. *Id.*

Target then appealed *Home Products I*. *See* Court No. 07–00123, Docketing of CAFC Appeal No. 2020–1202, ECF No. 206 ("Appeal"). In the period between the issuance of *Home Products I* and the filing of the Appeal, Customs reliquidated all 242 entries, including Target's 40 entries, consistent with this Court's December 8, 2016 Judgment. *See* Def.'s Mot at 5. Target paid the reliquidated amounts and filed Protest No. 1401–20–102470 ("Protest") against the reliquidations. *See* Compl. ¶¶ 1, 7. In view of the Appeal, Customs suspended consideration of the Protest. *See id.* ¶ 26.

On appeal, both Target and the Government agreed that Target had not satisfied the requirements for intervention as of right pursuant to 28 U.S.C. § 2631(j)(1)(B). However, they urged the Court of Appeals to consider that Target should fall into the "unique interest" exception to the rule against non-party appeals, so the court could reach Target's arguments regarding the Final Order of Reliquidation. *See Home Products II*, 846 F. App'x at 893–94. The Court of Appeals did not agree. *Id.* at 894. After examining the various formulations of the unique interest exception, the Court of Appeals applied the following test: (1) whether the non-party participated in the proceedings below; (2) whether the non-party has a personal stake in the outcome; (3) whether the equities favor hearing the appeal; and (4) whether the non-party has an alternative path to appellate review of the decision. *Id.* The court found that Target satisfied the first two factors but not the last two:

> Target's nonparty appeal is in tension with the *ordinary process of intervention*. . . . Target effectively asks that we ignore that it sought intervention and skip directly to considering this case as a nonparty appeal. We decline to do so. To ensure that the exceptions to the rule against nonparty appeals remain narrow, we conclude that *equity required Target, whose motion to intervene was denied, to appeal and contest the denial of intervention*. As Target failed to follow that procedure and does not meaningfully defend that choice, we conclude that the equities do not favor allowing Target's nonparty appeal.[ ]
>
> Finally, it is undisputed that Target has another, statutorily prescribed, path to redress its grievance without resort to a nonparty appeal. Target has, in fact, followed that path. Upon reliquidation of the subject entries, Target protested Customs'

> actions pursuant to 19 U.S.C. § 1514. Target's Opening Br. 20. If Customs denies Target's protest, Target will be able to commence an action in the CIT challenging that decision. *See* 28 U.S.C. §§ 1581(a), 2637(a). And, if the CIT resolves that case adversely to Target, Target, as a party to the CIT action, will be able to seek review in this court. *See* 28 U.S.C. § 1295(a)(5).
>
> Target contends that requiring it to continue down that path will be a waste of resources, given the amount of time the proceeding will take and the fact that it "is inevitable a new case will land right back with this Court." Target's Suppl. Br. 8. While we recognize some inefficiency in that process, it is a problem of Target's own creation. Target, although a nonparty, chose to involve itself at the tail-end of this CIT proceeding. Its involvement resulted in an additional two years of litigation before the CIT and over a year pending appeal in this court. Had Target chosen to follow the procedure prescribed by statute, such that reliquidation would have occurred in November 2017, Target may well have reached the point of appeal in its own case. Target's choice to risk a dead-end road, rather than follow the clear path laid out by statute, does not create an exceptional circumstance warranting nonparty appeal.

Id. at 895 (footnote omitted, emphasis added). As a consequence, the Court of Appeals dismissed Target's appeal in its entirety, thereby concluding the *Home Products* litigation. Customs then proceeded to consider, and ultimately deny, Target's protest. Compl. ¶ 27; Protest. Target then commenced this action seeking judicial review of the denial of its protest.

II. Standard of Review

A Rule 12(b)(6) motion to dismiss for failure to state a claim is appropriate when a plaintiff's allegations do not entitle it to a remedy. *See United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006) (citation omitted). The motion "tests the legal sufficiency of a complaint," *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), which must be dismissed if it fails to present a legally cognizable right of action. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff's factual allegations must be "enough to raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* Dismissal is required when a complaint fails to "contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its

face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "In deciding a motion to dismiss, the court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant," *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013), but it need not accept legal conclusions contained in the same allegations. *Twombly*, 550 U.S. at 555.

III. Discussion

A. Dispositional Path

As an initial matter, the court addresses the issue of the proper procedural vehicle for disposing of this action. Defendant argues that Target's claims reappear under the jurisdictional guise of 28 U.S.C. § 1581(a) without altering any of Target's arguments raised in the supplemental post-judgment proceeding in Court No. 07–00123. Def.'s Mot. at 1. Defendant further contends that Plaintiff's complaint "consists of legal arguments, all of which have been considered and rejected by the [c]ourt in *Home Products[I]*." *Id.* Therefore, in Defendant's view, "Target's complaint should be dismissed for failure to state a claim upon which relief can be granted." *Id.* Target disagrees, contending that it is entitled to relief, and that the merits can be resolved by treating Defendant's Rule 12(b)(6) motion as a motion for summary judgment or a motion for judgment on the pleadings. *See* Pl.'s Resp. at 2 n.1 ("While a motion for judgment on the pleadings or a motion for summary judgment should be filed after answer, an answer to the factual allegations of the complaint in this case would be unnecessary. ... [Plaintiff] submit[s] that the Court should treat the instant motion as a motion for judgment on the pleadings or for summary judgment, proceed to decide the case on the merits, and waive the defects in the filing of the dispositive motion *nunc pro tunc*. Under Rule 1 of the Rules of the Court, the 'rules should be construed, administered and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.'"). Target also maintains that filing of an answer is unnecessary because Defendant's motion does not contest the factual allegations of the complaint. *Id.*

For the court to convert a motion to dismiss for failure to state a claim into a summary judgment motion, certain circumstances must exist—namely whether a party presented matters outside the pleading that were not excluded by the court. USCIT R. 12(b)(6); *see also* Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1366 (3d ed. 2023). When those circumstances are present, the court is to convert the Rule

12(b)(6) motion to a motion for summary judgment. *Id.* As neither party refers to matters outside of the complaint, those circumstances are not present. Similarly, the pleadings are not closed as Defendant has yet to file an answer. Accordingly, circumstances are not present that call for the conversion of Defendant's motion to a motion for judgment on the pleadings. USCIT R. 12(c); 5C Fed. Prac. & Proc. Civ. § 1366.

As the parties acknowledge, this action presents a unique set of facts and circumstances. The parties further agree that the complaint presents no dispute about the material facts of this action, but merely a pure question of law, *i.e.*, the legal conclusions to be drawn from the governing legal authorities. These questions of law—the authority of the Court of International Trade to order reliquidation considered in conjunction with certain statutory provisions, including 19 U.S.C. § 1501 (reliquidation), as well as finality and the applicability of *Cemex*—are resolvable under Rule 12(b)(6). *See Yanko v. United States*, 869 F.3d 1328, 1331 (Fed. Cir. 2017) (treating as "pure legal issue of statutory interpretation" claim based on interpretation of statutory provision and related executive order). Thus, "the sufficiency of the complaint is the question on the merits, and there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Accordingly, the court agrees with Defendant that Rule 12(b)(6) is the proper procedural vehicle for resolving this action.

B. Merits Analysis

Target claims the Final Order of Reliquidation is *ultra vires*, illegal, null and void, as well as contrary to the guidance of the Court of Appeals in *Cemex*. Compl. ¶¶ 29, 30. It argues that the Court of International Trade "cannot use its equitable powers to ignore a statutory prohibition" or "ignore the binding precedent of the CAFC in *Cemex*." *Id.* ¶¶ 37, 38. Target maintains that "[a]s in this action, there was no question in *Cemex* that the entries were deemed liquidated improperly under 19 U.S.C. § 1504(d), and there was no reliquidation of the deemed liquidation within the 90-day period permitted under 19 U.S.C. § 1501." *Id.* ¶ 35. "In *Cemex*, the CAFC unanimously affirmed the decision of this [c]ourt denying the domestic producers' motion to reliquidate and holding that the liquidation became 'final and conclusive upon all persons' under 19 U.S.C. § 1514. 384 F.3d at 1315–316." *Id.* ¶ 36.

Target argues that *Cemex* controls the result here, going so far as to declare that "*Cemex* is on all fours with this case." Pl.'s Resp. at 16. Target's argument is unavailing as the court has already made clear its view of *Cemex* regarding the facts that gave rise to the supplemental post-judgment proceedings in Court No. 07–00123, and why *Cemex* was distinguishable in that context. *See Home Products I*, 43 CIT at ___, 405 F. Supp. 3d at 1376–77. Beyond this general reliance on *Cemex*, Target appears to acknowledge that its arguments here amount to little more than the "unenviable task of requesting a judge to reverse his own decision." Pl.'s Resp. at 2. For the reasons set forth in *Home Products I* as well as this opinion, the court remains unpersuaded by Target's arguments.

As the court previously observed, when considering "what most likely tips the balance in one direction or the other is how quickly the party with an interest in a judgment moved to assert their rights once they *knew* or *should have known* about the error." *Home Products I*, 43 CIT at ___, 405 F. Supp. 3d at 1374. The belated actions of the domestic industry in *Cemex* are simply not comparable to those of the domestic industry plaintiff in *Home Products I*. In *Cemex*, Customs did not liquidate pursuant to Commerce's instructions, which were issued in March 1998. Those instructions were premature, and issued prior to the expiration of the 90-day certiorari period for appeal to the U.S. Supreme Court, which had the effect of lifting the court-ordered suspension of liquidation. But that was immaterial, as the entries were "deemed liquidated" in September 1998, a discovery the domestic industry did not pursue or learn of until 2002, some four years later. Critically, unlike the circumstances here, *Cemex* did not involve a violation of an affirmative injunction or a judgment. There was "merely" a failure by Customs to follow instructions from Commerce that went undiscovered for years, rather than the passage of a few months addressed by the supplemental post-judgment proceedings in Court No. 07–00123.

The court notes that Target often refers to the erroneous liquidations at issue here as "deemed" liquidations under 19 U.S.C. § 1504(d). However, *Home Products I* only involved *actual* liquidations, not *deemed* liquidations as in *Cemex*. *See* Court No. 07–00123, Status Report, ECF No. 171 (explaining that "Customs recently realized that ... it misapplied the liquidation instructions. ... [Specifically, Customs had liquidated several entries in violation of this Court's judgment], at the lower cash deposit rate," and further noting that "[u]nsurprisingly, no importers have filed protests against the erroneous liquidations at a lower rate"). Therefore, Plaintiff's arguments regarding deemed liquidations under § 1504(d) are without merit.

In the end, Plaintiff's reliance on *Cemex* is simply misplaced. Reading *Cemex* as broadly as Plaintiff suggests would elevate the principle of finality found in § 1514 over the inherent power of the Court of International Trade under Article III of the United States Constitution. To do so would render this Court powerless to enforce its orders and judgments. *Home Products I*, 43 CIT at ___, 403 F. Supp. 3d at 1377; *see also Allegheny Bradford Corp. v. United States*, 28 CIT 603, 608 n.4, 342 F. Supp. 2d 1162, 1166 n.4 (2004) ("Section 1514(b), in relevant part, prevents certain determinations of Customs from becoming final when an action is commenced with this Court. Section 1514(b) was enacted in 1979, before the Court had power to enjoin liquidation pursuant to § 1516a(c). Because the injunction power allows the Court to protect an importer from liquidations that might otherwise become final and unreviewable, '§ 1514(b) seems somewhat redundant.' The court finds it unreasonable to construe § 1514(b)–a statutory provision with an ambiguous purpose–to preclude review of the improper liquidations and thereby frustrate the intent of an injunction order granted pursuant to § 1516a(c), a provision with the clear purpose of providing temporary protection to parties who contest agency determinations." (internal citations omitted)).

Target also contends that 19 U.S.C. § 1501,[4] the 90-day voluntary reliquidation provision, "foreclosed" reliquidation by order of the court. The court again disagrees. That provision merely limits the time within which Customs may act *to voluntarily correct its own mistake*. Plaintiff points to no language in the statute or its legislative history to support its argument. The statute on its face does not govern the authority of the Court of International Trade to grant relief from an unlawful liquidation derived from its jurisdiction over the entries underlying an action, as well as its inherent powers as an Article III court. *See Home Products I*, 43 CIT at ___, 405 F. Supp. 3d 1373–74, 1376–77; *see also* 28 U.S.C. § 1585; 28 U.S.C. § 2643; *Allegheny Bradford Corp.*, 28 CIT at 614–15, 342 F. Supp. 2d at 1171 ("To remedy liquidations that violate a valid court order, the Court 'possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.' This includes the power to grant 'any other form of relief that is appropriate in a civil action.'" (internal citations omitted)); *AK Steel Corp v. United States*, 27 CIT 1382, 1388, 281 F. Supp. 2d 1318, 1323 (2003) ("Where liquidation occurs through an illegal act of Customs and in the absence of

[4] "A liquidation made in accordance with section 1500 or 1504 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by U.S. Customs and Border Protection, notwithstanding the filing of a protest, within ninety days from the date of the original liquidation." 19 U.S.C. § 1501.

a protestable event, the doctrine of finality cannot be said to attach. To reach any other result would be absurd.").

As the court stated in *Home Products I*, it was facing "a simple and straightforward issue ... whether to enforce its judgment through an affirmative injunction, which the court decides by balancing the proper assessment of antidumping duties with the finality of liquidation." *Home Products I*, 43 CIT at ___, 403 F. Supp. 3d at 1373 (citing *SSAB v. United States*, 32 CIT 795, 803, 571 F. Supp. 2d 1347, 1354 (2008)). Given the facts, the court concluded that "justice require[d] correction of the erroneously liquidated subject entries." *Id.*, 43 CIT at ___, 403 F. Supp. 3d at 1378. Once again, the court reaches the same conclusion. It is a matter of basic logic and common sense that Court of International Trade (and the Court of Appeals), *not* Customs, has the "final" say about entries in a trade action. *See* 19 U.S.C. § 1516a(e); *Home Products I*, 43 CIT at ___, 403 F. Supp. 3d at 1373 ("When Customs liquidates an entry, the finality considerations of § 1514 always lurk in the background *except* when the Court of International Trade takes jurisdiction over the entries in an action under § 1516a. *See* 19 U.S.C. § 1514(b). This is a logical and necessary carve-out from § 1514 because such entries need to be liquidated in accordance with 'the final court decision' pursuant to § 1516a(e), meaning the court, not Customs, necessarily has the final say over the entries.").

Target also relies on certain language from the dissent in *In re Section 301 Cases*, 45 CIT ___, ___, 524 F. Supp. 3d 1355, 1374 (2021) for support. *See* Pl.'s Resp. at 19, 21. To the extent Target attempts to use that discussion as another attack on the court's prior decision in Court No. 07–00123, the discussion taken as a whole does not undermine, but rather supports, the analysis set forth in *Home Products I*. It is consistent with this Court's view of its duty and statutory authority when confronting enforcement of its own judgments. *See In re Section 301 Cases*, 45 CIT at ___, 524 F. Supp. 3d at 1382 ("In light of the CIT's broad remedial authority, the court asked the Parties to identify any cases in which 'the Federal Circuit found that the CIT erred in its exercise of discretion as to appropriate relief.' . . . None of the identified cases suggest that the court would overstep its authority to order reliquidation to prevailing Plaintiffs in this case.").

The statutory scheme states plainly and unequivocally that this Court has all powers in law and equity that are conferred on all Article III courts under the Constitution. *See* 28 U.S.C. § 1585; 28 U.S.C. § 2643. Were Target to prevail—namely, have this Court hold that it lacks the power to enforce its own judgment—such a conclusion would turn the clock back over 40 years to before the passage

of the Customs Courts Act of 1980, and again call into question whether a party before the Court could obtain full and complete relief. *See* H.R. Rep. No. 96–1235, at 19–20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3730–31 (explaining one purpose of Customs Courts Act of 1980 as providing U.S. Court of International Trade with "*all the necessary remedial powers* in law and equity possessed by other federal courts established under Article III of the Constitution." (emphasis added)). This the court cannot and will not do.

IV. Conclusion

For the foregoing reasons, the court will grant Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted.

Dated: July 20, 2023
New York, New York

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

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