U.S. Customs and Border Protection

AGENCY INFORMATION COLLECTION ACTIVITIES

Extension; Prior Disclosure

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

ACTION: 30-Day notice and request for comments.

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

DATES: Comments are encouraged and must be submitted (no later than April 29, 2024) to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 792) on January 05, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Prior Disclosure.

OMB Number: 1651–0074.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with a decrease in annual burden hours.

Type of Review: Extension (w/ change).

Affected Public: Businesses.

Abstract: The Prior Disclosure program establishes a method for a potential violator to disclose to CBP that they have committed an error or a violation with respect to the legal requirements of entering merchandise into the United States, such as underpaid tariffs or duties, or misclassified merchandise, or regarding the payment or credit of any drawback claim. The procedure for making a prior disclosure is set forth in 19 CFR 162.74. This provision requires that respondents submit information about the merchandise involved, a specification of the false statements or omissions, and what the true and accurate information should be.

A valid prior disclosure will entitle the disclosing party to the reduced penalties pursuant to 19 U.S.C. 1592(c)(4) or 19 U.S.C. 1593a(c)(3).

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

The information is to be used by CBP officers to verify and validate the commission of a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a by the disclosing party. A valid prior disclosure will entitle the disclosing party to reduced penalties pursuant to 19 U.S.C. 1592(c)(4) or 19 U.S.C. 1593a(c)(3). A prior disclosure may be submitted orally or in writing to CBP. In the case of an oral disclosure, the disclosing party shall confirm the disclosure in writing within 10 days of the date of the oral disclosure. A written prior disclosure must be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words "prior disclosure," and be presented to a Customs officer at the Customs port of entry or a Center of the disclosed violation.

Type of Information Collection: Prior Disclosure.

Estimated Number of Respondents: 762.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 762.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 2,286.

Dated: March 26, 2024.

EMILY K. RICK,
Branch Chief,
Trade and Commercial Regulations Branch,
U.S. Customs and Border Protection.

INCREASE IN THE NEXUS APPLICATION FEE AND CHANGE IN THE NEXUS APPLICATION FEE FOR CERTAIN MINORS

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

ACTION: General notice.

SUMMARY: In this document, CBP is announcing an increase in the application fee for the NEXUS program and a change in the NEXUS application fee for certain minors. This change to the NEXUS program is being made simultaneously with changes to the Global Entry and Secure Electronic Network for Travelers Rapid Inspection (SEN-

TRI) programs in order to harmonize the fees, application procedures and standard for exempting minors from payment of the application fee. CBP is simultaneously issuing a separate final rule updating the Global Entry and SENTRI regulations to be consistent with the changes herein.

DATES: New applicants and participants applying for renewal, including specified minors under the age of 18, who submit applications to the NEXUS program on or after October 1, 2024, must pay a $120 non-refundable application fee at the time of the application submission.

FOR FURTHER INFORMATION CONTACT: Rafael E. Henry, Branch Chief, Office of Field Operations, (202) 344–3251, *Rafael.E.Henry@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

U.S. Customs and Border Protection (CBP) operates several trusted traveler programs at land, sea, and air ports of entry that allow dedicated processing for entry into the United States for certain pre-approved, low-risk travelers. Three of those programs are the Secure Electronic Network for Travelers Rapid Inspection (SENTRI) program, the Global Entry program, and the NEXUS program.[1] Each of these three programs originally had different application fees and a different policy as to whether minors[2] were charged an application fee. CBP is now harmonizing the application fees and establishing a uniform standard for exempting minors from payment of the application fee. In this document, CBP is announcing that, to harmonize the NEXUS application fee with the Global Entry and SENTRI application fees, the NEXUS application fee will be raised to $120 and certain minors, who are currently exempt from the payment of the application fee, will be required to pay the application fee. CBP is

[1] The Free and Secure Trade (FAST) program is another CBP trusted traveler program that allows pre-approved commercial truck drivers dedicated processing at select commercial ports of entry at the northern and southern land borders. This program has different vetting standards, is offered to a different type of traveler, and does not have the same benefits as the Global Entry, SENTRI, and NEXUS programs. TSA PreCheck is a Department of Homeland Security (DHS) trusted traveler program administered by the Transportation Security Administration (TSA).

[2] For the purposes of this notice, we use the term "minor" to mean a person who is under the age of 18. The choice of this age range for a minor is based on the standard age of adulthood in the United States (18) as well as the age previously used and currently agreed to by Canada concerning exemption of minors from payment of the NEXUS fee.

simultaneously issuing a separate final rule updating the Global Entry and SENTRI regulations to make those provisions consistent with the changes herein.[3]

Overview of the NEXUS Program

The NEXUS program is a joint trusted traveler program between U.S. Customs and Border Protection (CBP) and the Canada Border Services Agency (CBSA) that allows certain pre-approved, low-risk travelers dedicated processing by both U.S. and Canadian officials at designated lanes at certain northern land border ports of entry, at automated kiosks at Canadian preclearance airports, and at NEXUS marine reporting locations.

An individual is eligible to apply for the NEXUS program if he or she is a citizen or lawful permanent resident of the United States or Canada or is a qualified Mexican national.[4] Reasons why an applicant may not qualify for participation include, but are not limited to:

- The applicant is inadmissible to the United States or Canada under applicable immigration laws;
- The applicant provides false or incomplete information on their application;
- The applicant has been convicted of a criminal offense in any country;
- The applicant has been found in violation of customs, agriculture, or immigration law; or
- The applicant fails to meet other requirements of the NEXUS program.

All applicants must undergo a thorough background check against criminal, law enforcement, customs, immigration, and terrorist databases by U.S. and Canadian authorities, a 10-fingerprint law enforcement check, and a personal interview with both a CBP officer and a CBSA officer. Minors are eligible to apply to the NEXUS program with the consent of a parent or legal guardian. Such minors are subject to the same background checks and interview process as all other applicants. Additionally, for minors, a parent or legal guardian

[3] CBP published a notice of proposed rulemaking in the **Federal Register** on September 9, 2020, proposing the changes to harmonize the Global Entry and SENTRI application fees and fees for minors consistent with the changes herein. See 85 FR 55597. After review of comments received on that NPRM, CBP is publishing a final rule implementing those proposed changes concurrent with this notice.

[4] Pursuant to a Memorandum of Understanding between the Department of Public Safety of Canada, the Secretariat of Governance of the United Mexican States, and the U.S. Department of Homeland Security, Mexican nationals who are members of the Mexican Trusted Traveler Program "Viajero Confiable" are eligible to apply for NEXUS membership. CBP and CBSA will continue to make all eligibility and membership determinations.

must be present at the time of the interview with CBP and CBSA. To be accepted into the NEXUS program, both the United States and Canada must approve the person's application.

Individuals can apply to the NEXUS program via the Trusted Traveler Program Systems (TTP System) website at *https://ttp.cbp.dhs.gov* (formerly Global Online Enrollment System (GOES): website, *https://goes-app.cbp.dhs.gov*).

Prior to the effective date of this notice, a non-refundable $50 application fee was required with the submission of the application and minors were exempt from payment of an application fee. Pursuant to this notice and as described in further detail below, the fee for NEXUS will be raised to $120 for adult applicants and certain minors. A minor applying concurrently with a parent or legal guardian or whose parent or legal guardian is already a NEXUS member will be exempt from payment of the fee. If applicable, the applicant must pay the non-refundable fee through the TTP System at the time he or she submits the application.

After the applicant completes the application and submits the application fee, the TTP System will send an automatic notification to the applicant regarding whether they are conditionally approved or denied acceptance into the NEXUS program. If the applicant is conditionally accepted into the program, CBP will notify them via the TTP System that they are to schedule a personal interview with both CBP and CBSA. The information regarding the interview process and locations will be included with the notification to schedule an interview and is provided on: *https://www.cbp.gov/travel/trusted-traveler-programs/nexus/nexus-enrollment-centers.*

If either the United States or Canada denies an application, the applicant cannot be accepted into the NEXUS program, as membership requires approval by both countries. If CBP denies an application or terminates a participant's membership, there are two methods of redress available. These two methods of redress are: initiating the redress process through the DHS Traveler Redress Inquiry Program (DHS TRIP) at *www.dhs.gov/trip* or contacting the CBP Trusted Traveler Ombudsman via a reconsideration request filed through the TTP System at *https://ttp.cbp.dhs.gov.* If CBSA denies an application or terminates a participant's membership, the applicant or member will be directed to contact CBSA regarding the denial or termination.

Once an individual is accepted into the NEXUS program, CBP will issue a NEXUS Western Hemisphere Travel Initiative (WHTI)-approved[5] Radio Frequency Identification (RFID) card. CBP will charge a $25 fee for any replacement RFID card, for example if the card is lost or stolen or the member needs to update their name. When a replacement card is requested, CBP will deactivate the original RFID card and the original card will no longer function. This NEXUS RFID card allows a participant to receive dedicated processing at NEXUS designated lanes at certain northern border land ports of entry, at automated kiosks at Canadian preclearance airports, and at NEXUS marine reporting locations in the United States and Canada. As a benefit of NEXUS membership, a NEXUS participant may also utilize Global Entry processes for dedicated CBP processing at participating airports, as well as SENTRI lanes subject to certain limitations as described further below.

NEXUS membership is valid for five years. During this five-year membership period, CBP continually vets NEXUS participants through law enforcement databases to ensure that they comply with the program requirements. At the end of the five-year membership period, NEXUS members may apply to renew their memberships by submitting a new application and non-refundable application fee.

Additional information regarding the NEXUS program may be found at *https://www.cbp.gov/travel/trusted-traveler-programs/nexus.*

Harmonizing the CBP Trusted Traveler Program Fees

The NEXUS program is just one of several voluntary trusted traveler programs that provide dedicated processing for pre-approved, low-risk travelers. The Global Entry program allows pre-approved, low-risk travelers dedicated CBP processing at designated airports. The SENTRI program allows dedicated processing at specified land border ports along the United States-Mexico border for pre-approved, low-risk travelers. When the NEXUS, Global Entry and SENTRI programs were established, each had a separate application process. The information about participants of each program were contained in separate databases, and each program provided its participants with different benefits. Each program was intended to be used in

[5] WHTI implements a statutory mandate to require all travelers to present a passport or other document that denotes identity and citizenship when entering the United States. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, section 7209, 118 Stat. 3638, 3823, as amended. The goal of WHTI is to facilitate entry for U.S. citizens and legitimate foreign visitors while strengthening U.S. border security by providing standardized documentation that enables CBP to identify a traveler quickly and reliably. WHTI-compliant documents include valid U.S. passports, passport cards, trusted traveler program cards, and others.

different geographic regions for different modes of transportation. The SENTRI program was created for travelers at the U.S.-Mexico border traveling by vehicle. The NEXUS program was established for travelers frequently traveling between the United States and Canada. The Global Entry program was intended to provide dedicated CBP processing into the United States for frequent international air travelers. Due to these differences, there were specific reasons for the programs to have different costs, procedures, and fees. However, with the expansion of the Global Entry program, the success of all three programs, and advances in technology, CBP has since created a uniform application, a centralized database, and has allowed certain shared benefits across the Global Entry, SENTRI and NEXUS programs.

The Global Entry, SENTRI, and NEXUS programs now use the same application on the TTP System website located at *https://ttp.cbp.dhs.gov.* An applicant to any of the programs can indicate the trusted traveler programs to which they wish to apply. CBP officers perform the same application review and vetting process on all NEXUS, SENTRI and Global Entry applicants. All of these applicants must undergo a personal interview and must submit fingerprints and/or photographic biometrics before acceptance into any of the programs and are notified of their acceptance or denial via the TTP System. Applicants or participants can contest their denial or removal from the NEXUS, Global Entry or SENTRI programs through the same redress methods, *i.e.,* via DHS TRIP or submitting a reconsideration request to the CBP Trusted Traveler Ombudsman. Membership in all three CBP trusted traveler programs is valid for a five-year membership period. During this five-year membership period and any subsequent renewal period, CBP performs the same continuous vetting on all the participants.

In recent years, certain benefits of the programs have been extended to participants of the other programs. For example, participants in the NEXUS program and certain participants in the SENTRI program are permitted to use the Global Entry processing as part of their membership in those CBP trusted traveler programs.[6] Global Entry participants with Global Entry RFID cards may utilize the

[6] *See* Utilization of Global Entry processing by NEXUS and SENTRI Participants **Federal Register** notice, for further information (75 FR 82202, December 29, 2010). As a benefit of SENTRI membership, a SENTRI participant who is a U.S. citizen or a U.S. lawful permanent resident may utilize the Global Entry processing. Mexican nationals who are SENTRI participants may only utilize the Global Entry processing upon successful completion of a thorough risk assessment by the Mexican Government.

SENTRI lanes[7] and enter the United States via NEXUS lanes, and NEXUS marine reporting locations. SENTRI participants may enter the United States via NEXUS lanes, and NEXUS marine reporting locations. NEXUS participants may utilize the SENTRI lanes.[8] Despite these commonalities, each program has retained its own fees and has different policies regarding whether a minor must pay the application fee. CBP is now harmonizing the application fees and establishing a uniform standard for when minors are exempt from payment of the application fee.

Increasing the NEXUS Application Fee

CBP has performed a fee study entitled "CBP Trusted Traveler Programs Fee Study" to determine the amount of the fee that is necessary to recover the costs associated with membership in the Global Entry, SENTRI and NEXUS programs. CBP determined that a uniform fee of $120 is appropriate and necessary to recover a reasonable portion of these costs.[9] After an examination of CBP's fee study and a series of joint discussions, CBP and CBSA have mutually agreed to increase the NEXUS application fee to $120. The $120 application fee will apply to new applicants and to those members renewing their membership in the NEXUS program. This non-refundable application fee will continue to be paid to CBP at the time of the application submission via the TTP System.

Changing the NEXUS Application Fee for Certain Minors

Prior to the effective date of this notice, the Global Entry, SENTRI and NEXUS programs were not aligned with respect to whether minors were charged an application fee. The SENTRI program had a complex family option plan and the Global Entry program charged

[7] A Global Entry participant with an RFID card may travel as a passenger in a vehicle using the SENTRI lanes. However, a Global Entry participant may not drive a vehicle into the United States using the SENTRI lanes unless that vehicle has been approved by CBP for use in the SENTRI lanes. *See https://www.cbp.gov/global-entry/faqs* for more information.

[8] A NEXUS participant may travel as a passenger in a vehicle utilizing the SENTRI lanes. However, a NEXUS participant may not drive a vehicle into the United States using the SENTRI lanes unless that vehicle has been approved by CBP for use in the SENTRI lanes. *See https://help.cbp.gov/s/article/Article-227?language=en>_US#:~:text=They%20can%20also%20use%20their,not%20for%20the%20NEXUS%20lanes* for more information.

[9] Although the $120 fee is the amount necessary to recover a reasonable portion of the costs associated with the programs, CBP will not recover all of its costs for the NEXUS program. The NEXUS fee is split between the United States and Canada. As a result, the United States will only receive part of the revenue necessary to recover its costs for the NEXUS program. Please see the fee study entitled "CBP Trusted Traveler Programs Fee Study" for details. The fee study can be accessed at *https://www.regulations.assumgov/document/USCBP-2020–0035–0038.*

minors the full application fee. Meanwhile, the NEXUS program exempted all minors from payment of the application fee. This disparity resulted in families choosing a program based on financial considerations instead of choosing a program based on the features and benefits of the program. To eliminate this disparity and to reflect the costs to CBP to operate these programs, CBP is now harmonizing the fees, including ensuring that minors applying to the various programs are treated in the same manner and pay the same fee regardless of the program to which they apply.

In this document, CBP is announcing that minors who apply to the NEXUS program or apply for renewal will be exempt from payment of the application fee if the minor's parent or legal guardian applies concurrently with the minor, or if the parent or legal guardian is an existing member of the NEXUS program. If the minor's parent or legal guardian is already a member, the minor will be required to enter the parent or legal guardian's name and trusted traveler number to allow CBP to verify this information. If a minor applies to the NEXUS program without a concurrent parent or legal guardian application, and if the applicant's parent or legal guardian is not already a NEXUS participant, the minor will be charged the full application fee of $120. This is a change from the previous policy, as all minors were exempt from the payment of the NEXUS application fee regardless of their parent or legal guardian's status prior to the effective date of this notice. After joint discussions and an examination of CBP's fee study, CBP and CBSA have mutually concurred with the change in the NEXUS application fee for the specified minors.

All minors applying to the NEXUS program must have the consent of a parent or legal guardian to be eligible to participate, must complete the application, and are subject to the requisite vetting, including the collection of fingerprints. For minors, a parent or legal guardian must be present at the time of the interview with a CBP and CBSA officer.[10]

All other aspects of the NEXUS program remain in effect.

Authority for Announcing Changes to the NEXUS Program Through a Federal Register Notice

To harmonize the Global Entry and SENTRI fees with the NEXUS fee, CBP is simultaneously publishing a separate final rule that

[10] CBSA requires that all custodial parents or legal guardians be present at the time of the interview. For minors with more than one custodial parent or legal guardian, if only one parent or legal guardian is present at the interview, any other custodial parents or guardians must provide a signed letter of consent. *See https://www.cbsa-asfc.gc.ca/services/travel-voyage/prog/nexus/nexus-5-eng.html#a1.* CBP requires one custodial parent or legal guardian to be present at the time of the interview.

changes the application fee for the Global Entry and SENTRI programs to $120 and creates a unified application fee for minors.

CBP is announcing the changes to the NEXUS fee through this **Federal Register**notice, rather than through rulemaking, pursuant to its statutory authority. As provided in 8 U.S.C. 1753, U.S. border inspection agencies acting jointly and in cooperation with Canada, may conduct joint U.S.-Canada inspection projects on the border. The NEXUS program is a joint U.S.-Canada trusted traveler program established in 2002 as part of the U.S.-Canada Shared Border Accord. Pursuant to 8 U.S.C. 1753(c), fees for services and forms relating to such joint U.S.-Canadian projects shall be published as a notice in the **Federal Register**. The statute further provides that the Administrative Procedure Act (5 U.S.C. 553) and the Paperwork Reduction Act (44 U.S.C. 3501–3520) shall not apply to the fee setting for services and other administrative requirements of such joint U.S.-Canadian projects.

Signing Authority

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING OMEGA-3-ACID ETHYL ESTERS CAPSULES

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of Omega-3-Acid Ethyl Esters Capsules. Based upon the facts presented, CBP has concluded that the Norwegian-origin Omega-3-Acid Ethyl Esters do not undergo a substantial transformation in China when combined with certain inactive ingredients and encapsulated into dosage form.

DATES: The final determination was issued on March 28, 2024. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than May 3, 2024.

FOR FURTHER INFORMATION CONTACT: Mitchell Emery, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0321.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on March 28, 2024, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of Omega-3-Acid Ethyl Esters Capsules for purposes of title III of the Trade Agreements Act of 1979. This final determination, Headquarters Ruling (HQ) H331488, was issued at the request of Epic Pharma LLC, under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the Omega-3-Acid Ethyl Esters are not substantially transformed in China when combined with certain inactive ingredients and encapsulated into dosage form.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register**within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H331488
OT:RR:CTF: VS H331488 MLE
CATEGORY: Origin

MR. PEI ZHANG, PH.D., ASSOCIATE
DIRECTOR, REGULATORY AFFAIRS, EPIC PHARMA, LLC,
227–15 N CONDUIT AVENUE,
LAURELTON, NY 11413

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of Omega-3-Acid Ethyl Esters Capsules.

DEAR MR. ZHANG:

This is in response to your March 29, 2023 request, on behalf of Epic Pharma, LLC, for a final determination concerning the country of origin of certain Omega-3-Acid Ethyl Esters capsules pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Epic Pharma, LLC, is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

FACTS

Epic Pharma is a New York-based company specializing in the production of generic pharmaceuticals. At issue in this case are Omega-3-Acid Ethyl Esters capsules, which you describe are intended as an "adjunct to diet to reduce triglyceride ('TG') levels in adult patients with severe (≥500 mg/dL) hypertriglyceridemia." You state that Omega-3-Acid Ethyl Esters, which are the sole Active Pharmaceutical Ingredient ("API") in the final product, are produced in Norway. You state that in China the API is combined with inactive ingredients of various origins to produce the finished capsules.

The manufacturing processes in China include the following: first, inactive ingredients including gelatin glycerin, and purified water are combined to create an encapsulating gel. Second, the API is encapsulated into dosage form. Third, imprinting ink is applied for any trademark or content information.

You state that "[n]o change in name occurs in China because the product is referred to as 'Omega-3-Acid Ethyl Esters' both before and after encapsulation." You also state that the processes performed to produce the final product do not result in any changes to the chemical characteristics of the Omega 3-Acid Ethyl Esters, or to any other ingredients. Finally, you claim that no change in use occurs, as the product retains the same predetermined medicinal use. In short, you characterize the operations in China as purely mechanical, intended to process the Omega-3-Acid Ethyl Esters into dosage form.

ISSUE

What is the country of origin of the Omega-3-Acid Ethyl Esters capsules for the purposes of U.S. Government procurement?

LAW AND ANALYSIS

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title. Emphasis added.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR Part 0—Treasury Department Order No. 100–16, 68 Fed. Reg. 28, 322 (May 23, 2003).

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "designated country end product" as: a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

As indicated above, the Omega-3-Acid Ethyl Esters are produced in Norway, which is a WTO GPA country. *See* FAR, 48 CFR 25.003. The encapsulation process takes place in China, which is not a designated country for the purpose of government procurement.

In order to determine whether a substantial transformation occurs, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, CBP considers factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process when determining whether a substantial transformation has occurred. No one factor is determinative.

In deciding whether a substantial transformation occurs in the manufacture of chemical products such as pharmaceuticals, CBP has consistently examined the complexity of the processing and whether the final article retains the essential identity and character of the raw material. To that end, CBP has held that the processing of pharmaceutical products from bulk form into measured doses does not result in a substantial transformation of the product, even when the API is combined with other inactive ingredients. *See, e.g.,* Headquarters Ruling ("HQ") 561975, dated April 3, 2002; HQ 561544, dated May 1, 2000; HQ 735146, dated November 15, 1993; HQ H267177, dated November 5, 2016; HQ H233356, dated December 26, 2012; HQ H284694, dated August 22, 2017, and New York Ruling ("NY") C85112, dated March 27, 1998.

For instance, in HQ 561975, CBP held that the processing of imported bulk Japanese-origin anesthetic drugs into dosage form in the United States did not constitute a substantial transformation. Although the bulk form of the drug underwent testing operations, filtering, and packaging in the United States, these processes did not change the chemical or physical properties of the drug. Furthermore, there was no change in the product's name, which was referred to as sevoflurane in both its bulk and processed form. Additionally, because the imported bulk drug had a predetermined medicinal use as an anesthetic drug, the processing in the United States did not result in a change in the product's use. The country of origin of the finished product was therefore Japan.

More recently, in HQ H284694, CBP reviewed the country of origin of quinine sulfate capsules. In that case, the German-manufactured API quinine sulfate was exported to India in bulk form, where it was combined with several inactive ingredients, granulated, sieved and placed into gelatin capsules. No change in its name occurred because the product was referred to as "quinine sulfate" both before and after processing. Additionally, no change in character occurred because the product maintained the same chemical and physical properties in its processed form. Finally, because the product had a predetermined medical use as an antimalarial drug, no change in use occurred after processing. Therefore, the county of origin of the final product remained Germany.

Similar to the encapsulation here, in NY C85112, CBP reviewed the country of origin of leuprolide acetate, sold under the trade name Lupron Depot 7.5 mg. In that case, U.S.-manufactured leuprolide acetate powder was exported to Japan where it was combined with certain excipients and encap-

sulated into sterile microspheres. The purpose of microencapsulating the leuprolide acetate was to modify its delivery rate from daily into a form that would be released in the human body over a period of one to four months. CBP determined that the fundamental character of the leuprolide acetate was unchanged by the encapsulation processing and that the foreign processing did not result in a substantial transformation of the U.S.-manufactured leuprolide acetate.

The facts here closely follow the cases cited above, as does our decision. The processing of bulk imported pharmaceuticals into dosage form, even with the addition of inactive ingredients, will not result in a substantial transformation. In this case, the processing begins with the Norwegian-origin bulk Omega-3-Acid Ethyl Esters, and after the product is processed and combined with inactive ingredients in China, it results in Omega-3-Acid Ethyl Esters capsules. There is no change in name after processing. Furthermore, no change in character occurs in China, as the Omega-3-Acid Ethyl Esters maintain the same chemical and physical properties both before and after processing. Finally, because the Omega-3-Acid Ethyl Esters have a predetermined medical use to "reduce TG levels in adult patients with severe (≥500 mg/dL) hypertriglyceridemia," no change in use occurs after it is processed in China. Under these circumstances, and consistent with previous CBP rulings, we find that the county of origin of the final product is Norway, where the active pharmaceutical ingredient was produced.

HOLDING

Based on the information outlined above, we determine that the Omega-3-Acid Ethyl Esters made in Norway, do not undergo a substantial transformation when encapsulated into individual doses and combined with inactive ingredients in China. Therefore, the country of origin of the Omega-3-Acid Ethyl Esters capsules for purposes of U.S. Government procurement is Norway.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning April 1, 2024, the interest rates for underpayments will be 8 percent for both corporations and non-corporations. The interest rate for overpayments will be 8 percent for non-corporations and 7 percent for corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of April 1, 2024.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2024–6, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2024, and ending on June 30, 2024. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (5%) plus three percentage points

(3%) for a total of eight percent (8%) for both corporations and non-corporations. For overpayments made by non-corporations, the rate is the Federal short-term rate (5%) plus three percentage points (3%) for a total of eight percent (8%). For corporate overpayments, the rate is the Federal short-term rate (5%) plus two percentage points (2%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remain the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning July 1, 2024, and ending on September 30, 2024.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	070175	6	6	
063075	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	093023	7	7	6
100123	063024	8	8	7

Dated: March 28, 2024.

CRINLEY S. HOOVER,
Acting Chief Financial Officer,
U.S. Customs and Border Protection.

U.S. Court of Appeals for the Federal Circuit

UNITED STATES STEEL CORPORATION, Plaintiff-Appellant NUCOR CORPORATION, Plaintiff v. UNITED STATES, BLUESCOPE STEEL (AIS) PTY LTD., BLUESCOPE STEEL LTD, BLUESCOPE STEEL AMERICAS, INC., Defendants-Appellees

Appeal No. 2022–2078

Appeal from the United States Court of International Trade in No. 1:20-cv-03815-RKE, Senior Judge Richard K.Eaton.

Decided: April 4, 2024

SARAH E. SHULMAN, Cassidy Levy Kent (USA) LLP, Washington, DC, argued for plaintiff-appellant. Also represented by YOHAI BAISBURD, THOMAS M. BELINE, CHASE DUNN, JAMES EDWARD RANSDELL, IV.

EMMA EATON BOND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY; SPENCER NEFF, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

DANIEL L. PORTER, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, argued for defendants-appellees BlueScope Steel (AIS) Pty Ltd., BlueScope Steel Ltd, BlueScope Steel Americas, Inc. Also represented by JAMES BEATY, CHRISTOPHER A. DUNN, JAMES P. DURLING.

Before MOORE, *Chief Judge*, HUGHES and STARK, *Circuit Judges*.

HUGHES, *Circuit Judge*.

United States Steel Corp. appeals a decision from the United States Court of International Trade sustaining the Department of Commerce's determination that Australian producer and exporter of hot-rolled steel, BlueScope Steel (AIS) Pty Ltd., did not reimburse its affiliated U.S. importer, BlueScope Steel Americas, Inc., for antidumping duties. Because we agree with the trial court that the agency's determination is supported by substantial evidence and is otherwise in accordance with law, we affirm.

I

A

Under the Tariff Act of 1930, as amended, the Department of Commerce is authorized to administer the antidumping statute. *See* 19 U.S.C. §§ 1673, 1677(1). The purpose of the antidumping statute is to

protect domestic industries from injury caused by foreign manufactured goods that are sold in the United States at prices below the fair market value of those goods. *See U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed. Cir. 2010). In administering the statute, the agency will conduct investigations and assess antidumping duties where it determines that foreign goods are being sold in the United States at less-than-fair value. 19 U.S.C. § 1673. If requested by an interested party, the agency must also conduct an annual review of a previously issued antidumping duty order to determine the amount of dumping and the duties owed for the period of review. *Id.* § 1675(a)(1)(B),(2)(A). During the review, the agency calculates a "dumping margin" by comparing the price at which the merchandise is sold in the United States (export price) to a "normal value" benchmark. *See id.* §§ 1675(a)(2)(A)(ii),1677(35)(A). Where a domestic importer is affiliated with the foreign exporter, the agency will use "constructed export price," defined as the price at which the merchandise is first sold to a non-affiliated purchaser, with adjustments made to account for expenses incurred by the affiliated seller. *Id.* § 1677a(b), (d)(1).

When calculating export price or constructed export price, the agency must also account for additional factors, including whether the exporter has reimbursed the importer for antidumping duties owed on the merchandise. *See* 19 C.F.R. § 351.402(a), (f). If the agency finds that the importer has been reimbursed for antidumping duties, it will subtract the amount of reimbursement from the calculated export price, ultimately leading to a higher dumping margin and a larger duty owed. *Id.* § 351.402(f)(1)(i) ("In calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer . . . [p]aid directly on behalf of the importer; or . . . [r]eimbursed to the importer."). The agency requires importers to file a certification with United States Customs and Border Protection stating whether the importer has been reimbursed or refunded by the manufacturer, producer, seller, or exporter for all or part of the antidumping duties assessed. *Id.* § 351.402(f)(2)(i).

B

This appeal arises out of the Department of Commerce's second administrative review of the existing antidumping duty order on hot-rolled steel flat products from Australia, covering a period of review from October 1, 2017 to September 30, 2018. Defendants-Appellees BlueScope Steel (AIS) Pty Ltd., BlueScope Steel Ltd, and BlueScope Steel Americas, Inc. (collectively, BlueScope) are all affili-

ated parties that comprise the only hot-rolled steel producer and exporter in Australia. BlueScope Steel Ltd (hereinafter, BSL) is the ultimate corporate parent company. BlueScope Steel (AIS) Pty Ltd. (hereinafter, AIS) is a wholly owned subsidiary of BSL and is the actual producer and exporter of BlueScope hot-rolled steel. BlueScope Steel Americas, Inc. (hereinafter, BSA) is the affiliated United States importer. BSL also owns a 50% controlling interest in Steelscape LLC, an affiliated downstream U.S. customer that receives the majority of the imported steel.

For exports of AIS steel that are destined for Steelscape, AIS first invoices BSA, and in a "back-to-back transaction," BSA then invoices the ultimate customer, Steelscape. BlueScope Br. 4. The shipment of the physical merchandise goes directly from AIS to Steelscape.

Prior to the agency's release of its preliminary findings in the 2017–2018 administrative review, Plaintiff-Appellant United States Steel Corp. (hereinafter, U.S. Steel) alleged that BlueScope had reimbursed BSA for the antidumping duties it incurred when importing AIS steel. U.S. Steel argued to the agency—and now argues to us on appeal—that BlueScope engaged in antidumping duty reimbursement by failing to charge BSA a predetermined "formula price" and instead charged a price that accounted for estimated antidumping duties owed by BSA. The "formula price" at issue in this case is housed in a supply agreement between BlueScope entities. Because the parties offer incompatible interpretations of the Supply Agreement and the entities to which it applies, we present each party's recitation of the underlying facts in turn.

1

BlueScope explains that the Supply Agreement at issue is a "Substrate Supply Agreement" among BSL, BSA, and Steelscape. BlueScope Br. 6. BlueScope states:

> The Agreement sets the price that *BSA charges Steelscape* for the merchandise, according to a formula using two published hot-rolled price indices. Article 5.1 of the Supply Agreement uses this formula to determine the price of the purchase order ("PO") that Steelscape submits to BSA. Article 3.5 of the Supply Agreement states that "Steelscape will submit two POs {purchase orders} to BSA for the total amount of HRC {hot-rolled coil} in the Steelscape Order for each supply month . . . [.]" Article 6.1 of the Agreement further sets forth invoice the price [sic] that "BSA will provide to Steelscape." That price is a delivered, duty-paid price—a price that includes both the duties and the cost of delivering the merchandise to Steelscape.

BlueScope Br. 6–7 (internal citations omitted). In sum, BlueScope asserts that while the Supply Agreement controls the invoice price between BSA and Steelscape, it does not set forth the "transfer price" for the transaction between AIS and BSA. Instead, BlueScope reports that it calculates the transfer price between AIS and BSA by starting with the formula price to Steelscape and subtracting the estimated antidumping duties that BSA will owe. To support its explanation of the pricing methodology, BlueScope submitted evidence into the agency record during review, including a questionnaire response discussing the methodology, a copy of the Supply Agreement, and a series of sales traces showing the actual amounts paid by AIS to BSA and then BSA to Steelscape in previous transactions. BlueScope also submitted evidence showing that BSA actually paid the antidumping duty amounts owed and filed the certifications of nonreimbursement that are required under 19 C.F.R. § 351.402(f)(2)(i). J.A. 25.

2

Notwithstanding BlueScope's proffered explanation of its own Supply Agreement, U.S. Steel has adopted the position that BSA—not Steelscape—is required to pay the Supply Agreement's formula price for hot-rolled steel. U.S. Steel points to several record documents as support for this contention. The first is the Supply Agreement itself, which BlueScope submitted in response to the agency's request that BlueScope "[e]xplain how you determined the net unit transfer price." J.A. 114. In responding to that question, BlueScope provided the Supply Agreement and stated that the agreement governed "[t]he price of material sold by BlueScope to BSA and subsequently to Steelscape." J.A. 114. The second document is another questionnaire response that provides a worksheet "demonstrat[ing] the application of the transfer price formula" for a sale "made by AIS on invoice to BSA and destined for Steelscape." J.A. 1458. U.S. Steel also references a third questionnaire response where BlueScope reported that "BlueScope issues an invoice to BSA for the merchandise according to the amount shipped and the formula price," and further that "there is no negotiation of sales prices or terms of sale between Steelscape and BSA or BSA and BlueScope." J.A. 97.

Because U.S. Steel argues that BSA was required to pay the formula price and because "the pricing formula does not establish a basis to deduct antidumping duties," U.S. Steel concludes that BlueScope's practice of calculating the transfer price between AIS and BSA by subtracting estimated duties from the formula price is impermissible reimbursement of antidumping duties. Appellant's Br. 8–9, 12 ("That BlueScope lowered the price of the [hot-rolled steel] by

antidumping duties outside of its pricing formula is evidence of reimbursement."). In response, BlueScope argues that "nothing in the Substrate Supply Agreement sets forth the invoice price that foreign producer AIS is to charge its related party importer BSA for the merchandise," and therefore, "AIS cannot have 'lowered' an invoice price when that invoice price is nowhere set forth in the relevant agreements between the parties." BlueScope Br. 9.

C

In its preliminary findings, the agency rejected U.S.Steel's allegations of reimbursement, stating that its preliminary analysis of the record "[did] not demonstrate that BlueScope reimbursed its U.S. affiliate." J.A. 48. Because the agency did not find evidence of reimbursement, it did not adjust BlueScope's U.S. gross unit price to account for such reimbursement. In its final results, the agency again determined that BSA was not reimbursed for antidumping duties deposited during the period of review. The agency focused on record evidence showing that BSA filed the requisite certifications of nonreimbursement when it imported subject merchandise and stated that "there [was] no record evidence to contradict BSA's statements in these certifications." J.A. 25. In fact, the agency found that BlueScope submitted record evidence to support the statements of nonreimbursement and further that the information demonstrated that BSA actually paid the requisite cash deposit of antidumping duties. The agency determined that BlueScope's explanation of the Supply Agreement "showed that these parties have a long-standing supply agreement which set the transfer prices of subject merchandise *to Steelscape* according to a formula." J.A. 26 (emphasis added). Turning to BlueScope's method of calculating the transfer price between AIS and BSA, the agency stated:

> We disagree with the petitioners that record evidence establishes that AIS deducted [antidumping] duties when setting the price to BSA. Rather, the information provided by BlueScope demonstrates that BSA paid [antidumping] duties on its imports of subject merchandise, and it passed these duties on to Steelscape as part of the transfer price [charged] to it. Despite the petitioners' claim, this information does not show that AIS deducted [antidumping] duties from the price that it charged to BSA; to the contrary, it simply shows the calculation of the transfer price to the U.S. customer, albeit an affiliated one.

J.A. 26 (footnote omitted). The agency also addressed U.S. Steel's contention that a finding of no reimbursement was inconsistent with

previous agency decisions. The agency explained that because there was "no evidence that AIS deducted the [antidumping] duties paid by BSA from the transfer price charged to BSA or otherwise reimbursed BSA for those duties," its determination that the reimbursement regulation did not apply was consistent with previous cases and past practice. J.A. 27 (citing cases where the agency clarified that "reimbursement, within the meaning of the regulation, takes place between affiliated parties if the evidence demonstrates that the exporter directly pays antidumping duties for the affiliated importer or reimburses the importer for such duties").

Following the agency's final decision, U.S. Steel filed a complaint in the United States Court of International Trade challenging the decision. *U.S. Steel Corp. v. United States*, 578 F. Supp. 3d 1323 (Ct. Int'l Trade 2022). The trial court sustained the agency's decision, finding that it was supported by substantial evidence and was otherwise in accordance with the law. *Id.* at 1325. The trial court noted that "[t]he Exporter's deduction of estimated antidumping duties from the Importer's invoice price, on its own, is unremarkable when viewed in the context of the record." *Id.* at 1331. The court further explained that "[t]ogether with the non-reimbursement evidence in the form of the certificate filed by the Importer, and evidence that the Importer paid duties owed on the subject steel, the court concludes it was not unreasonable for Commerce to find that the reimbursement regulation did not apply here." *Id.* The trial court also rejected U.S. Steel's argument that the agency erred as a matter of law by failing to apply its reimbursement regulation, stating, "Plaintiffs' argument that Commerce unlawfully ignored its 'practice' of considering the lowering of an invoice price to be 'indirect reimbursement' under its regulations is meritless." *Id.* at 1331–32. Like the agency, the trial court reasoned that in previous cases concerning allegations of antidumping duty reimbursement between affiliated parties, the agency has required a showing of something more than a transfer of funds between parties: there must be evidence that the exporter directly paid the duties or reimbursed the importer for such duties. *Id.* at 1332–33. The trial court then concluded that because there was no evidence of such reimbursement—direct or indirect—it was "unconvinced by Plaintiff's argument that Commerce has departed from an established practice." *Id.* at 1333.

U.S. Steel now appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

We review the decisions of the Court of International Trade de novo, applying the same standard of review used by the trial court in reviewing the administrative record before the agency. *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017). This court will uphold the agency'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); *Union Steel v. United States*, 713 F.3d 1101, 1106 (Fed. Cir. 2013).

A decision is supported by substantial evidence if the evidence amounts to "more than a mere scintilla" and "a reasonable mind might accept [it] as adequate to support a conclusion.'" *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1348 (Fed. Cir. 2015) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 217 (1938)). Our review "is limited to the record before Commerce in the particular proceeding at issue and includes all evidence that supports and detracts from Commerce's conclusion." *Id.* Further, the Department of Commerce's findings "may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence." *Id.*

III

On appeal, U.S. Steel argues that the trial court erred in sustaining the agency's finding that BlueScope did not engage in antidumping duty reimbursement because such a decision is not supported by substantial evidence. U.S. Steel further argues that the agency erred as a matter of law when it declined to apply its antidumping duty regulation to the facts of the case. We disagree and hold that the agency's determination was supported by substantial evidence and was otherwise in accordance with law.

During the review, the agency based its determination on a number of record documents, including the nonreimbursement certificate filed by BSA, the Supply Agreement, the sales trace of previous transactions amongst the parties, and documents showing that BSA had paid the owed duties to United States Customs and Border Protection. The agency's Final Decision Memorandum and the Final Results Analysis Memorandum both demonstrate that the agency had a clear understanding of BlueScope's transfer price methodology, including the ways that BlueScope factored estimated antidumping duties into its calculation. *See* J.A. 26, 4103. Even after weighing this evidence, the agency found that the transfer pricing methodology did not constitute reimbursement. As the trial court explained, the agency determined

that "it would have been unreasonable for the Exporter to include antidumping duties in the price charged to the Importer because the Exporter itself was not responsible for those duties." *U.S. Steel*, 578 F. Supp. 3d at 1327. The record indicates that the evidence before the agency was adequate to support the agency's finding of nonreimbursement. Furthermore, the fact that U.S. Steel may be able to point to several instances in the record where BlueScope submitted questionnaire responses that could fairly be read to contradict its overall narrative regarding the Supply Agreement, *see* Reply Br. 2–3, is not sufficient to render the agency's decision unreasonable or not based on substantial evidence.

Because we find that substantial evidence supports the agency's determination that BlueScope did not engage in reimbursement, we are also not persuaded by U.S. Steel's argument that the agency erred as a matter of law in failing to apply its reimbursement regulation. Like the trial court, in the absence of evidence demonstrating that BSA was reimbursed for the duties it paid, we find no departure from an established practice by the agency that would constitute reversible error. *See U.S. Steel*, 578 F. Supp. 3d at 1333.

IV

We have considered the remainder of U.S. Steel's arguments and find them unpersuasive. Accordingly, we affirm the Court of International Trade's decision sustaining the Department of Commerce's determination that BlueScope did not engage in antidumping duty reimbursement within the meaning of the statute.

AFFIRMED

U.S. Court of International Trade

Slip Op. 24–37

SEA SHEPHERD NEW ZEALAND and SEA SHEPHERD CONSERVATION SOCIETY, Plaintiffs, v. UNITED STATES; GINA M. RAIMONDO, in her official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; JANET COIT, in her official capacity as Assistant Administrator of the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; JANET YELLEN, in her official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants, and NEW ZEALAND GOVERNMENT, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 20–00112

[In light of NOAA's new comparability findings, Defendant-Intervenor's Unopposed Motion to Dissolve the Preliminary Injunction is granted. The court intimates no view as to those new comparability findings.]

Dated: April 1, 2024

Lia Comerford, Earthrise Law Center at Lewis & Clark Law, of Portland, OR, for Plaintiffs Sea Shepherd New Zealand and Sea Shepherd Conservation Society.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants United States, Gina M. Raimondo, in her official capacity as Secretary of United States Department of Commerce; Janet Coit, in her official capacity as Assistant Administrator of her the National Marine Fisheries Service; National Marine Fisheries Service; Janet Yellen, in her official capacity as Secretary of Treasury United States Department of the Treasury; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; and United States Department of Homeland Security. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Jason S. Forman*, Office of the General Counsel, National Oceanic and Atmospheric Administration, of Silver Spring, MD.

Warren E. Connelly, *Robert G. Gosselink* and *Kenneth N. Hammer* of Trade Pacific PLLC, of Washington, D.C., for Defendant-Intervenor New Zealand Government.

OPINION

Katzmann, Judge:

The court returns once more to the case of the critically endangered Māui dolphin—one of the world's smallest dolphins—that is endemic to New Zealand. *See Sea Shepherd N.Z. v. United States* ("*Sea Shepherd I*"), 44 CIT __, 469 F. Supp. 3d 1330 (2020), ECF No. 38; *Sea*

Shepherd N.Z. v. United States ("*Sea Shepherd II*"), 46 CIT __, 606 F. Supp. 3d 1286 (2022), ECF No. 108; *Sea Shepherd N.Z. v. United States* ("*Sea Shepherd III*"), 47 CIT __, 611 F. Supp. 3d 1406 (2023), ECF No. 131; *Sea Shepherd N.Z. v. United States* ("*Sea Shepherd IV*"), 47 CIT __, 639 F. Supp. 3d 1367 (2023), ECF No. 136. Sea Shepherd New Zealand and Sea Shepherd Conservation Society ("Plaintiffs") initiated this lawsuit with the fundamental claim that as a result of incidental capture—also referred to as "bycatch"—in gillnet and trawl fisheries within their range, the Māui dolphin population is declining such that a U.S. ban on importing certain fish and fish products from New Zealand is required by the Marine Mammal Protection Act ("MMPA"). *See* First Supp. Compl. ¶¶ 1–4, Nov. 24, 2020, ECF No. 46. On November 28, 2022, the court entered a preliminary injunction ordering several United States agencies and officials ("Defendants") to "immediately ban the importation from New Zealand" of nine types of seafood deriving from New Zealand's West Coast North Island inshore trawl and set net fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. Order at 2, Nov. 28, 2022, ECF No. 109; *see also Sea Shepherd II*, 606 F. Supp. 3d at 1286. Defendant-Intervenor New Zealand now moves to dissolve that preliminary injunction.

Creating with certain exceptions a "moratorium on the taking and importation of marine mammals and marine mammal products," the MMPA aims to protect marine mammals by setting forth U.S. standards applicable both to domestic commercial fisheries and to foreign fisheries that wish to export their products to the United States, like those in New Zealand. 16 U.S.C. § 1371(a). If such U.S. standards are not met, the MMPA calls for a mandatory ban. *See id.* § 1371(a)(2). Administering that statute, the National Oceanic and Atmospheric Administration's ("NOAA") Imports Regulation requires foreign harvesting nations to secure "comparability findings" for their fisheries importing fish and fish products into the United States and establishes that any fish or fish product harvested in a fishery for which a valid comparability finding is not in effect is in excess of U.S. standards and thereby prohibited from import. *See* 50 C.F.R. § 216.24(h)(1)(i).

The November 28, 2022 preliminary injunction was premised on Plaintiffs' challenge, as pleaded in their First Supplemental Complaint, to NOAA's decision on November 9, 2020, which did not impose an import ban as requested by Plaintiffs' supplemental petition and instead issued positive comparability findings for New Zealand's West Coast North Island inshore trawl and set net fisheries. *See* First

Suppl. Compl.; *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act—Notification of Rejection of Petition and Issuance of Comparability Findings*, 85 Fed. Reg. 71297, 71298 (NOAA Nov. 9, 2020); *see also Sea Shepherd I*, 469 F. Supp. 3d 1330; *Sea Shepherd II*, 606 F. Supp. 3d 1286; *Sea Shepherd III*, 611 F. Supp. 3d 1406; *Sea Shepherd IV*, 639 F. Supp. 3d 1367. On January 24, 2024, NOAA published notice of its issuance of new positive comparability findings for New Zealand's West Coast North Island inshore trawl and set net fisheries, based on supplemental information provided by Plaintiffs and New Zealand. *See Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act—Notification of Issuance of Comparability Findings*, 89 Fed. Reg. 4595, 4596 (NOAA Jan. 24, 2024). NOAA found that, effective for the period from February 21, 2024, through December 31, 2025, New Zealand had established that its fisheries' measures for reducing the bycatch of Māui dolphins satisfy the provisions of the MMPA. *See id.*[1]

New Zealand now moves to dissolve the preliminary injunction. *See* Unopposed Mot. of the Gov't of N.Z. to Dissolve the Prelim. Inj., Mar. 19, 2024, ECF No. 152. Plaintiffs do not oppose, and Defendants consent to, the dissolution of the preliminary injunction. *See id.* at 2. The court concludes that NOAA's issuance of the new comparability findings, which supersede the administrative actions underlying the preliminary injunction, constitutes a "significant change in factual conditions and law." *Sea Shepherd III*, 611 F. Supp. 3d at 1409–10 (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2961 (3d ed. 2022)). New Zealand's motion is granted.

To be clear, this opinion does not preclude future legal challenges to NOAA's new comparability findings. Nor does the court suggest any view on those new comparability findings. All this opinion means is that the particular administrative decision underlying the November 28, 2022 preliminary injunction is no longer operative. The Māui dolphin remains critically endangered, and current estimates indicate that approximately forty-three dolphins remain. *See* R. Constantine, Int'l Union for Conservation of Nature and Nat. Res., *The IUCN Red List of Threatened Species: Cephalorhynchus hectori ssp. maui* 1 (2023), https://www.iucnredlist.org/species/39427/50380174; Mem.

[1] NOAA's notice stated:

> As a result of these findings, [the National Marine Fisheries Service] announces the issuance of positive comparability findings that will allow the importation into the United States of fish and fish products harvested by New Zealand's set-net and trawl fisheries operating off the West Coast North Island within the Māui dolphins range.

Id. at 4597.

from A. Cole to J. Coit, re: Issuance of Comparability Findings for the Government of New Zealand's Set-Net and Trawl Fisheries—Decision Memorandum at 2 (NOAA Jan. 2, 2024), ECF No. 144–2 ("Decision Mem.").

Furthermore, this litigation is not yet concluded. In response to the parties' Joint Motion to Govern Further Proceedings, Feb. 28, 2024, ECF No. 150, the court issued an order that (1) adopted the parties' proposal to submit, within sixty days, a joint filing or separate filings with an update on the parties' negotiations for this case's stipulated dismissal, which may include issues of terms of dismissal, attorneys' fees, and costs, and (2) required the parties to include a statement on their views of the status of the claims asserted in Plaintiffs' First Supplemental Complaint. *See* Order, Mar. 13, 2024, ECF No. 151.

It is hereby **ORDERED** that the preliminary injunction against Defendants, their agents and their employees, and those in active concert and participation with them, *see* Order at 2, ECF No. 109, is **DISSOLVED**.

SO ORDERED.

Dated: April 1, 2024
New York, New York

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

Slip Op. 24–38

KG DONGBU STEEL CO., LTD., DONGBU STEEL CO., LTD., and DONGBU INCHEON STEEL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION and STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00047

[Remanding the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Order in the countervailing duty review of certain corrosion-resistant steel products from the Republic of Korea.]

Dated: April 3, 2024

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffey*, and *Stephen Morrison*, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiffs KG Dongbu Steel Co., Ltd., Dongbu Steel Co., Ltd., and Dongbu Incheon Steel Co., Ltd.

Claudia Burke, Assistant Director, and *Elizabeth Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*,

Director. Of Counsel was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, *Christopher B. Weld*, *Tessa V. Capeloto*, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation. *Derick G. Holt*, *Enbar Toledano*, *Maureen Elizabeth Thorson*, *Paul A. Devamithran*, *Robert Edward DeFrancesco, III*, and *Theodore P. Brackemyre* also appeared.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth Jackson Drake*, *Jeffrey D. Gerrish*, *Luke A. Meisner*, *Michelle R. Avrutin*, *Nicholas J. Birch*, *Saad Y. Chalchal*, and *William A. Fennell*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Steel Dynamics, Inc.

OPINION

Choe-Groves, Judge:

Plaintiffs KG Dongbu Steel Co., Ltd., Dongbu Steel Co., Ltd., and Dongbu Incheon Steel Co., Ltd. (collectively "KG Dongbu" or "Plaintiffs") filed this action challenging the U.S. Department of Commerce's ("Commerce") fourth administrative review of *Certain Corrosion-Resistant Steel Products from the Republic of Korea* ("*Final Results*"), 87 Fed. Reg. 2759 (Dep't of Commerce Jan. 19, 2022) (final results and partial rescission of countervailing duty administrative review; 2019), and the accompanying Issues and Decision Memorandum for the Final Results and Partial Rescission of the 2019 Administrative Review of the Countervailing Duty Order on Certain Corrosion-Resistant Steel Products from the Republic of Korea ("IDM"), PR 213.[1] The Court remanded the case to Commerce for reconsideration. *KG Dongbu Steel Co., Ltd. v. United States* ("*KG Dongbu I*"), 47 CIT __, 648 F. Supp. 3d 1353 (2023). Now before the Court are Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Redetermination*"), ECF Nos. 57–1, 58–1. For the following reasons, the Court remands the *Remand Redetermination*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination on remand that the first three debt-to-equity restructurings provided a countervailable subsidy to KG Dongbu was supported by substantial evidence and in accordance with law;
2. Whether Commerce's remand determination that the benefits from the first three debt-to-equity restructurings passed through to KG Dongbu despite the change in ownership was supported by substantial evidence and in accordance with law;

[1] Citations to the administrative record reflect the public record ("PR") and public remand record (PRR) numbers filed in this case, ECF Nos. 44, 71.

3. Whether Commerce's calculation of the uncreditworthiness benchmark for purposes of measuring the benefit from KG Dongbu's debt-to-equity restructuring was supported by substantial evidence; and
4. Whether Commerce's calculation of the uncreditworthy discount rate for purposes of measuring the benefits from the debt-to-equity restructurings was supported by substantial evidence.

BACKGROUND

The Court presumes familiarity with the underlying procedural history of this case as set forth in *KG Dongbu Steel Co., Ltd. v. United States* ("*KG Dongbu I*"), 47 CIT __, __, 648 F. Supp. 3d 1353, 1356 (2023).

Commerce published its countervailing duty order on July 25, 2016. *Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea, and the People's Republic of China*, 81 Fed. Reg. 48,387 (Dep't of Commerce July 25, 2016) (countervailing duty order). Commerce initiated an administrative review of the countervailing duty order on certain corrosion-resistant steel products from the Republic of Korea ("Korea") for the period of January 1, 2019 to December 31, 2019, and selected KG Dongbu and Hyundai Steel Company as mandatory respondents. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 54,983, 54,990–91 (Dep't of Commerce Sep. 3, 2020); *Final Results*, 87 Fed. Reg. at 2760.

Commerce issued the preliminary results of the administrative review, in which Commerce calculated a 10.52% subsidy rate for KG Dongbu. *Certain Corrosion-Resistant Steel Products from the Republic of Korea* ("*Preliminary Results*"), 86 Fed. Reg. 37,740 (Dep't of Commerce July 15, 2021) (preliminary results of countervailing duty administrative review; 2019); Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review; 2019: Certain Corrosion-Resistant Steel Products from the Republic of Korea ("PDM"), PR 173. Commerce issued the *Final Results* of the administrative review, in which Commerce calculated a 10.51% subsidy rate for KG Dongbu and assigned the same rate to non-selected companies. *Final Results*, 87 Fed. Reg. at 2760.

On appeal, Plaintiffs challenged: (1) Commerce's determination that the first through third debt-to-equity restructurings provided a countervailable subsidy; (2) Commerce's determination that the sale of Dongbu Steel Co., Ltd. ("Dongbu Steel") was not arm's length for fair market value; (3) Commerce's calculation of the uncreditworthiness benchmark for purposes of measuring the benefit from KG Dong-

bu's restructured long term loans and bonds; and (4) Commerce's calculation of the unequityworthy discount rate for purposes of measuring the benefits from the equity infusions from government-controlled creditors. Pls.' Mot. J. Agency R., ECF Nos. 33, 34; Pls.' Opening Br., ECF Nos. 33–2, 34–2; Reply Br. Pls.' Supp. Mot. J. Agency R., ECF Nos. 40, 41. Defendant United States ("Defendant") and Defendant-Intervenor Nucor Corporation ("Defendant-Intervenor" or "Nucor") argued that the Court should sustain the *Final Results*. Def.'s Resp. Pls.' Mot. J. Agency R., ECF Nos. 35, 36; Def.-Interv.'s Resp. Mot. J. Agency R., ECF Nos. 37, 38, 39.

The Court observed that Commerce had considered the first through third debt-to-equity restructurings in each of the first three administrative reviews of the countervailing duty order. *KG Dongbu I*, 47 CIT at __, 648 F. Supp. 3d at 1358. In each of the three prior administrative reviews, Commerce had determined that the debt-to-equity restructurings did not provide a countervailable benefit to KG Dongbu because private creditors had participated in those debt-to-equity restructurings and had agreed to swap debt for equity on the same terms as the government creditors. *See Certain Corrosion-Resistant Steel Products from the Republic of Korea*, 84 Fed. Reg. 11,749 (Dep't of Commerce Mar. 28, 2019) (final results and partial rescission of countervailing duty administrative review; 20152016) and accompanying Issues and Decision Memorandum; *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, 85 Fed. Reg. 15,112 (Dep't of Commerce Mar. 17, 2020) (final results of countervailing duty administrative review; 2017) and accompanying Issues and Decision Memorandum; *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, 86 Fed. Reg. 29,237 (Dep't of Commerce June 1, 2021) (final results and partial rescission of countervailing duty administrative review; 2018) and accompanying Issues and Decision Memorandum. Commerce did not conduct an unequityworthiness analysis in any of those first three administrative reviews.

The fourth administrative review also involved a fourth debt-to-equity restructuring. *See* IDM at 15. Commerce determined that the evidence showed that private banks had (1) participated in the three debt-to-equity restructurings at issue, (2) paid the same per share price as the government-controlled policy banks, and (3) purchased a significant percentage of the shares of debt that were converted to equity. *See generally* Countervailing Duty Administrative Review of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Analysis Memorandum—Equity Infusions ("Equity Infusions Analysis Memorandum" or "Equity Infusions Analysis

Mem."), P.R. 176; *see also* PDM at 11–12. Commerce thus determined that, pursuant to 19 C.F.R. § 351.507(a)(2)(i), the equity infusions in the fourth debt-to-equity restructuring were inconsistent with usual investment practices of private investors. Equity Infusions Analysis Mem. at 13.

During the fourth administrative review, Commerce also reexamined the first three debt-to-equity restructurings, found that KG Dongbu was unequityworthy at their respective placements, and determined that the restructurings had in fact provided a benefit each time to KG Dongbu, as detailed in the Equity Infusions Analysis Memorandum. *Id.* at 10–13. Commerce determined that the benefits of the first through third debt-to-equity restructurings were countervailable because Commerce had previously determined that those debt restructurings satisfied the specificity requirement of countervailability. IDM at 46–47; *see* 19 U.S.C. § 1677(5A).

Upon consideration of Plaintiffs' appeal, this Court concluded that Commerce had a standard practice of not reexamining the countervailability of a respondent's equity infusions absent new information and had not provided a reasonable explanation for departing from that practice, and the Court remanded the *Final Results* for reconsideration or further explanation. *KG Dongbu I*, 47 CIT at __, 648 F. Supp. 3d at 1357–59. This Court reasoned that all the information cited by Commerce regarding the first through third debt-to-equity restructurings were based on existing record evidence that had been thoroughly considered in the previous reviews, and that no new information impacted the facts surrounding the fourth debt-to-equity restructuring. Specifically, "the record evidence cited by Commerce as justification for its deviation from its past practice does not deal directly with the first through third debt-to-equity restructurings and is not a sufficient explanation to justify departing from its standard practice." *Id.* at __, 648 F. Supp. 3d at 1359. The fourth administrative review was based on the same record as the first through third reviews, and thus Commerce did not provide a sufficient explanation or cite new substantial evidence to justify departing from the prior three reviews in the fourth administrative review.

The Court remanded for Commerce to reconsider or further explain: (1) its determination that the first through third debt-to-equity restructurings provided a countervailable benefit; (2) its determination that the benefits from the debt-to-equity restructurings "passed through" to Plaintiffs despite the change in ownership; (3) whether Commerce's calculations of the uncreditworthy benchmark rate are supported by substantial evidence; and (4) whether Commerce's

calculations of the unequityworthy discount rate are supported by substantial evidence. *Id.* at __, 648 F. Supp. 3d at 1357–61.

Commerce filed its *Remand Redetermination* maintaining that all of its original determinations were correct. In summary, Commerce reiterated on remand that Commerce was attempting to fix in the fourth administrative review a "mistake" that it had made in the three prior administrative reviews, but Commerce again failed to cite substantial record evidence or provide an adequate explanation for departing from its prior determinations that the first three debt-to-equity restructurings did not provide countervailable benefits. In addition, Commerce explained on remand that it would assess countervailable benefits as a pass through for the prior three years of review (despite its prior determinations that Commerce would not countervail benefits in the first three years of review), plus would assess countervailable benefits for the fourth year of review, without citing substantial record evidence or providing an adequate explanation for this change in practice.

Plaintiffs challenged Commerce's *Remand Redetermination* in Plaintiffs KG Dongbu Steel Co., Ltd., Dongbu Steel Co., Ltd., and Dongbu Incheon Steel Co., Ltd.'s Comments on Commerce's Redetermination Pursuant to Court Remand. Pls.' Cmts. Commerce's Redetermination Pursuant Court Remand ("KG Dongbu's Cmts."), ECF Nos. 60, 61. Defendant defended Commerce's *Remand Redetermination* in Defendant's Response to Plaintiffs' Comments on Commerce's Remand Redetermination. Def.'s Resp. Pls.' Cmts. Commerce's Remand Redetermination ("Def.'s Resp."), ECF Nos. 65, 66. Nucor filed Comments in Support of Remand Redetermination. Nucor's Cmts. Supp. Remand Redetermination ("Nucor's Cmts."), ECF Nos. 67–69.

JURISDICTION AND STANDARD OF REVIEW

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

A countervailable subsidy exists when a foreign government provides a financial contribution to a specific industry that confers a benefit upon a recipient within the industry. 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014). For equity infusions, a benefit is conferred if "the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made." 19 U.S.C. § 1677(5)(E)(i); *see also* 19 C.F.R. § 351.507(a)(1) (defining a benefit for equity infusions).

Commerce considers an equity infusion to be inconsistent with usual investment practice if the price paid by the foreign government for newly issued shares is greater than the price paid by private investors for the same (or similar form of) newly issued shares. 19 C.F.R. § 351.507(a)(2)(i). Commerce does not consider private sector investor prices if Commerce concludes that private investor purchases of newly issued shares are not significant. *Id.* § 351.507(a)(2)(iii). When significant private sector participation does not exist, Commerce determines whether the firm funded by the foreign government-provided equity is equityworthy or unequityworthy at the time of the equity infusion. *Id.* § 351.507(a)(3). A determination that the firm is unequityworthy constitutes a determination that the equity infusion is inconsistent with the usual investment practice of private investors, and therefore, that a benefit to the firm exists in the amount of the equity infusion. *Id.*; *see also id.* § 351.507(a)(6).

Commerce considers a firm to be equityworthy if Commerce determines that, from the perspective of a reasonable private investor examining the firm at the time the foreign government-provided equity infusion took place, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. *Id.* § 351.507(a)(4)(i). In making this determination, Commerce considers the following factors: (A) an objective analysis of the future financial prospects of the recipient firm; (B) current and past indicators of the recipient firm's financial health; (C) rates of return on equity in the three years prior to the foreign government equity infusion; and (D) private investor equity investment into the recipient firm. *Id.* § 351.507(a)(4)(i)(A)–(D). Commerce may focus on the equityworthyness of a specific project, in appropriate circumstances, rather than the company as a whole. *Id.* § 305.507(a)(4)(i).

II. First Through Third Debt-to-Equity Restructurings

Commerce's *Remand Redetermination* attempted to explain the rationale for departing from its previous findings that the first three debt-to-equity restructurings provided no countervailable subsidy.

Commerce explained that absent new information, Commerce does not usually re-evaluate prior determinations on countervailability—by which Commerce means it will not normally revisit prior financial contribution and specificity determinations absent new information. *Remand Redetermination* at 6–7 (citing *Magnola Metallurgy, Inc. v. United States*, 508 F.3d 1349 (Fed. Cir. 2007) and *PPG Industries, Inc. v. United States*, 978 F.2d 1232 (Fed. Cir. 1992)). Commerce had previously determined that KG Dongbu's first three debt-to-equity restructurings, including the debt-to-equity infusions, constituted financial contributions and were specific; therefore, Commerce was not revisiting those determinations consistent with its practice. *Id.* at 7. Because the "amount" of any benefit conferred to a company can vary between periods of review, Commerce claimed that it was necessary to examine the "amount" of such benefit in each period of review, consistent with 19 U.S.C. § 1675(a)(1)(A) and 19 U.S.C. § 1677(5)(E). *Id.*

The *Remand Redetermination* explained that during the fourth administrative review, the new fourth debt-to-equity infusion caused Commerce to reevaluate the "total benefit" conferred under the four debt-to-equity restructurings in order to calculate a single subsidy rate for the debt-to-equity infusion program. *Id.* at 22. Commerce claimed that when it re-examined the benefit conferred from the fourth equity infusion during the period of review, it realized that it "had made a mistake in the prior review," specifically that the "prior finding that no benefit was conferred by the first three debt-to-equity restructurings was inconsistent with" 19 C.F.R. § 351.507. *Id.* at 8. In addition, Commerce relied on *Nucor Corporation v. United States* ("*Nucor*"), 45 CIT __, 494 F. Supp. 3d 1377 (2021), which sustained Commerce's determination in the 2015–2016 administrative review not to use KG Dongbu's private bank loans as a loan benchmark because these loans had been provided as part of a government loan program. *Id.* at 9 (citing *Nucor*, 45 CIT at __, 494 F. Supp. 3d at 1381). Commerce determined that using KG Dongbu's private bank loans as a benchmark for the debt-to-equity infusions in this administrative review would be inconsistent with its regulations as well as *Nucor*. *Id.* Therefore, Commerce determined in the *Remand Redetermination* that Commerce had to reevaluate its "prior determination of the benefit under the debt-to-equity infusions." *Id.*

Regarding the Court's remand instruction to explain how Commerce's determination in this review is supported by substantial evidence, the *Remand Redetermination* stated that "Commerce considers an equity infusion to be inconsistent with usual investment practice if the price paid by the foreign government for newly issued shares is greater than the price paid by private investors for the same (or similar form of) newly issued shares," and it does not consider private sector investor prices if Commerce concludes that private investor purchases of newly issued shares are "not significant." *Id.* at 10 (citing 19 C.F.R. § 351.507(a)(2)(i), (iii)). The *Remand Redetermination* referred to the Equity Infusions Analysis Memorandum, which concluded that evidence such as the underlying agreements and the ownership of KG Dongbu indicated that the Korea Development Bank, as a government-controlled policy bank, exercised significant influence over the debt-to-equity restructurings. *Id.* (citing Equity Infusions Analysis Mem.).

According to Commerce, this meant that private creditors on the creditors councils were considering how best to limit their losses instead of evaluating the reasonableness of the rate of return on any equity they were considering investing in the company in each debt-to-equity restructuring. *Id.* Commerce claimed that its practice of analyzing the significance of private investor participation focused on the perspective of an outside investor, not an existing investor that was simply trying to minimize its losses. *Id.* at 11. Because of the percentage of shares owned by government-controlled creditors compared to private creditors, Commerce determined that the participation of KG Dongbu's private creditors in the first, second, and third equity infusions was not significant. *Id.* Accordingly, Commerce determined that it could not "rely on the prices paid by the private creditors on the creditors councils for the purpose of determining a benchmark." *Id.*

An administrative agency generally has authority to reconsider its decisions if there is no specific statutory limitation to do so. *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("[C]ourts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so." (citations omitted)). Commerce must still provide a reasonable explanation for treating similar situations differently, in this instance based on its own standard. *See SKF USA Inc. v. United States* ("*SKF USA*"), 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." (quoting

Transactive Corp. v. United States, 91 F.3d 232, 237 (D.C. Cir. 1996) (alteration in original))). Commerce's *Remand Redetermination* does not satisfy that standard.

The only reason for Commerce to re-examine the countervailability of the prior debt-to-equity restructurings is "new information," according to its own statements. *See, e.g.*, Administrative Review of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Countervailing Duty Questionnaire ("Initial Questionnaire"), Section III at III-1, PR 22–23 ("Absent new information warranting a program reexamination, we will not reevaluate prior determinations regarding the countervailability of programs. This includes determinations that previously examined programs are or are not countervailable."). Commerce on remand points to no new information on the record that it has not already considered in its prior final determinations that there were no countervailable benefits in KG Dongbu's first three debt-to-equity restructurings.

The Court observes that Commerce has failed twice, in the *Final Results* and the *Remand Redetermination*, to cite any new information or provide a reasonable explanation for its attempted reversal of its prior determinations in three completed administrative reviews in which Commerce determined before that the same debt-to-equity restructurings currently under review provided no countervailable benefits. Without citing any new record evidence or providing a reasonable explanation, Commerce simply states that it "made a mistake" and now determines that countervailable benefits were conferred during the past three administrative reviews. Commerce's determination is not supported by substantial evidence because it does not satisfy the standard in *SKF USA* (requiring Commerce to provide a reasonable explanation for treating similar situations differently). *SKF USA*, 263 F.3d at 1382. The Court holds that Commerce's determination that the same debt-to-equity restructurings in the prior three administrative reviews are now countervailable is arbitrary and not supported by substantial evidence.

In addition, Commerce determined here that the debt-to-equity restructurings in the first through fourth administrative reviews were countervailable and the financial benefits would be "passed through" and allocated across all four years of the administrative reviews. *See Remand Redetermination* at 22. The Equity Infusions Analysis Memorandum analyzed the first through third debt-to-equity restructurings as integral financial parts from the past that are tied to the fourth debt-to-equity swap, such that there is a single subsidy program. *See* Equity Infusions Analysis Mem. at 9 ("In this review, Commerce is analyzing four debt-to-equity conversions be-

cause the conversions are non-recurring and attributed to the average-useful-life (AUL) period."). Commerce has already determined, however, that the first three debt-to-equity restructurings of that "program" provided no benefit for KG Dongbu. There are therefore no benefits from those first three debt-to-equity restructurings to be included, or re-examined, in Commerce's calculations of the fourth debt-to-equity restructuring. The Court concludes that Commerce's determination to pass through or allocate financial benefits to years one through four of the administrative reviews is arbitrary and not supported by substantial evidence, given Commerce's prior completed administrative reviews determining that no countervailable benefits were conferred during years one through three.

The statute requires Commerce to "review and determine the amount of any net countervailable subsidy." 19 U.S.C. § 1675(a)(1)(A). If Commerce determines in a prior administrative review that there has been no benefit (*i.e.*, no "amount"), and no new information is presented in a subsequent administrative review, such as fraud or mistake of fact, that would call into question that prior determination, then the prior determination equates to a determination of no countervailable subsidy. Whether or not Commerce made a mistake in its prior analyses, the facts of the prior reviews remain the same in this administrative review. In other words, regardless of whether Commerce had to calculate "a single subsidy rate for the debt-to-equity infusion program," those prior final determinations of "no benefit" based on record evidence were carried over into Commerce's calculus for the fourth administrative review in the absence of new information relating to those prior determinations. KG Dongbu explains this more succinctly:

> The need to recalculate the amount of benefit in each review is only necessary in cases where Commerce has previously found the program to be countervailable. Only then is Commerce calculating a new benefit "amount" in each review. However, in cases such as this one where Commerce had consistently found that the first three [debt-to-equity restructurings] did not provide a countervailable subsidy there was no need to recalculate any benefit because there was none.

KG Dongbu's Cmts. at 4.

Defendant argues that Commerce had "good cause" to re-examine the first through third debt-to-equity restructurings because it "needed to correct a mistake that it had realized that it made in a prior review." Def.'s Resp. at 7. Commerce claimed that it did not

analyze the first through third debt-to-equity restructurings correctly from the perspective of what a private investor would pay for shares consistent with 19 C.F.R. § 351.507(a)(2)(i). *See Remand Redetermination* at 8–12. The Court concludes that Commerce did not adequately articulate the nature of its alleged mistake. Commerce simply and summarily determined (without citing substantial evidence) in this fourth administrative review that "[p]rivate creditors on the creditors councils did not evaluate the reasonableness of the rate of return on any equity they were considering investing in the company in each debt-to-equity conversion," but the private creditors were rather "considering how best to limit their losses." *Id.* at 10. Their participation in the first through third debt-to-equity restructurings, therefore, was "not significant," resulting in Commerce undertaking an equityworthiness analysis. *Id.* at 11. The Court concludes that Commerce failed to provide a reasonable explanation and failed to cite new information or a mistake of fact regarding the first three administrative reviews that would warrant reversing Commerce's prior final determinations that the first three debt-to-equity restructurings resulted in no countervailable benefits.

Any need to recalculate a benefit amount for each review is inapplicable for this particular program. Unlike determining the amount of a benefit under a subsidy program that changes year to year, the benefit determination to be calculated here for the fourth administrative review had nothing to do with the amounts of benefits from the first three debt-to-equity restructurings that had been calculated for past administrative reviews. Commerce usually allocates a nonrecurring benefit, such as the debt-to-equity restructurings in this case, over a number of years that correspond to the average useful life allocation period. 19 C.F.R. § 351.524(b).

Commerce's attempt to rely on the existence of the fourth debt-to-equity restructuring as the basis for why it had to reconsider the benefit element for the first three debt-to-equity restructurings is unpersuasive. More specifically, Commerce argues that it was required to calculate a benefit for the entire debt-to-equity restructuring program and that its "benefit calculation for [the 2019 administrative review] is a single rate which includes benefits conferred for all four of the equity infusions." *Remand Redetermination* at 23. The fact that Commerce added up the benefit amounts for each of the four debt-to-equity restructurings to arrive at a total benefit from the debt-to-equity restructuring program, however, did not change the fact that separate benefit amounts were calculated for each debt-to-equity restructuring, as detailed in Commerce's final calculations

data. *See* Final Results Calculation for KG Dongbu Steel Co., Ltd. and Dongbu Incheon Steel Co., Ltd. ("Final Calculations Mem."), PR 214. Commerce did not need to revisit its prior determinations that there were no benefits from the first three debt-to-equity restructurings just because Commerce found that there was a benefit from the fourth debt-to-equity restructuring.

Commerce's reliance on *Nucor* is also unpersuasive. *Nucor* concerned whether the loans by the private commercial banks on the creditors committee constituted "comparable commercial loans" for purposes of 19 C.F.R. § 351.505(a)(2). *Nucor*, 45 CIT __, 494 F. Supp. 3d at 1380. *Nucor*'s remand was not concerned with whether private investor participation was significant for purposes of equity infusions considered under 19 C.F.R. § 351.507(a)(2)(iii), which is a separate regulation and separate consideration. In the *Nucor* litigation, Commerce defended its determination that private investor participation was significant and thus there were no countervailable benefits from the first three debt-to-equity restructurings. *See Nucor Corp. v. United States,* Consol. Court No. 19–00042, Def.'s Mem. Opp'n Pl.'s Consol. Pls.' R. 56.2 Mot. J. Agency at 19–22, ECF Nos. 59, 60. The Court is not convinced that Commerce's prior determinations of no countervailable benefits in three administrative reviews were "mistakes." It appears that Commerce's purported "mistakes" are excuses for Commerce's abrupt change in agency practice here in the fourth administrative review.

As for Commerce's determination that the private investor participation was not "significant" in the first three debt-to-equity restructurings, Commerce claimed that its practice "is to conduct the analysis from the perspective of an outside investor, and not an existing investor that is simply trying to minimize its losses." *Remand Redetermination* at 11. Further:

> If [Commerce] determines that the firm was equityworthy, [Commerce] will apply paragraph (a)(5) of [19 C.F.R. § 351.507] to determine whether the equity infusion was inconsistent with the usual investment practice of private investors. A determination by [Commerce] that the firm was unequityworthy will constitute a determination that the equity infusion was inconsistent with usual investment practice of private investors . . . .

Id. (quoting 19 C.F.R. § 351.507(a)(3)).

Here, however, Commerce determined that the debt-to-equity infusion was inconsistent with the usual investment practice of private investors in order to determine that KG Dongbu was unequityworthy. Commerce's regulation provides that it "will not use private investor

prices . . . if [it] concludes that private investor purchases of newly issued shares are not significant." 19 C.F.R. § 351.507(a)(2)(iii). Commerce created this "significant investment" standard when promulgating 19 C.F.R. § 351.507(a)(2)(iii) by stating that it was keeping its practice of considering "the volume of a firm's traded shares to be so low as to preclude the use of [private investor] shares as a benchmark." *Countervailing Duties*, 62 Fed. Reg. 8818, 8832 (Dep't of Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments).

Substantial evidence does not support Commerce's remand determination that private investor participation in the first three debt-to-equity restructurings was not significant. Based on the same record evidence, Commerce determined in the prior administrative reviews that the private creditors in the debt-to-equity swaps were significant. Equity Infusions Analysis Mem. at 4–8. Commerce also reached the same conclusion in a separate proceeding that involved comparable private investor participation. *See Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60,639 (Dep't of Commerce Oct. 25, 2007) (notice of final affirmative countervailing duty determination) and accompanying Issues and Decision Memorandum at 47.

The Court notes that the first three administrative reviews are complete, and it is arbitrary for Commerce to revisit and attempt to reverse the determinations in those completed administrative reviews retroactively without citing new evidence. Commerce may address any relevant evidence in the fourth administrative review before the Court, and any determinations made with respect to the fourth administrative review must be supported by substantial evidence and in accordance with law. Commerce may not attempt to reverse the countervailability determinations on the first three administrative reviews in this case absent new information to address fraud or mistake of fact. In addition, Commerce may not pass through the purportedly countervailable benefits to the first three years without substantial new evidence to justify such calculations.

The Court holds that Commerce's remand redetermination with respect to the countervailability of the debt-to-equity restructurings is unsupported by substantial evidence and is remanded for further consideration in accordance with this Opinion.

III. Pass-Through of Benefits from First Three Debt Restructurings

The Court also remanded the issue of whether substantial evidence supports Commerce's determination that a change in ownership extinguished any alleged subsidies from the first through third debt-to-

equity restructurings to KG Dongbu. *KG Dongbu I*, 47 CIT at __, 648 F. Supp. 3d at 1360.

In its *Remand Redetermination*, Commerce repeated its position that KG Dongbu's failure to submit the Change-in-Ownership Appendix ("CIO Appendix") was fatal. *Remand Redetermination* at 12–13. Commerce cited to its instructions in the Initial Questionnaire requesting the submission of a CIO Appendix if the respondent wanted to challenge the baseline presumption that non-recurring subsidies continued to benefit the recipient even after a change in ownership. *Id.* at 12. Without a response to the questions in the CIO Appendix, Commerce purported to follow its "practice to presume that any benefits to the company will also pass through as a benefit to the new owners." *Id.* at 13. Further, Commerce argued that because KG Dongbu stated that it did not wish to challenge the baseline presumption and did not provide a response to the CIO Appendix, KG Dongbu's response relieved Commerce of the obligation to consider the record evidence showing that the alleged non-recurring subsidies from the first three debt to-equity restructurings were extinguished. *Id.* at 13–14. The Court concludes that Commerce's explanation is not reasonable and is not responsive to the prior remand Order.

KG Dongbu contends that, first, at the time that it responded to Commerce's Initial Questionnaire and subsequent supplemental questionnaires, all of the subsidies that Commerce had found in prior reviews with respect to KG Dongbu were from other programs that provided recurring subsidies. *See* KG Dongbu's Cmts. at 11. KG Dongbu argues that Commerce had not found benefits from any programs in which the benefit was calculated based on the allocation of a nonrecurring subsidy received in the average useful life period to current and future reviews. *Id.* KG Dongbu also asserts that this necessarily means that even though Dongbu Steel had been acquired by the KG Consortium, the question of whether there were any programs that provided non-recurring benefits that may have passed through to KG Dongbu was not an issue at the time of the questionnaire response process. *Id.* at 11–12. KG Dongbu asserts further that it was not required to predict that Commerce would change its mind in the 2019 administrative review and would determine retroactively that the first through third debt-to-equity restructurings conferred non-recurring benefits to KG Dongbu. *Id.* at 12. The Court agrees with KG Dongbu's argument that KG Dongbu had no reason to submit the CIO Appendix to challenge Commerce's baseline presumption regarding non-recurring subsidies based on unforeseeable actions that Commerce would take in the future to attempt to reverse prior concluded administrative reviews.

Second, KG Dongbu argues that for Commerce to claim that it "properly presumed that any non-recurring benefit would pass through to the new owners" because KG Dongbu did not initially challenge the baseline presumption by submitting a CIO Appendix is to elevate form over substance. KG Dongbu's Cmts. at 13. The fact that KG Dongbu did not submit a CIO Appendix does not necessarily mean that there was no other record evidence to challenge Commerce's baseline presumption. *Id.* If the record reflects that an arm's length transaction took place at fair market value, the baseline presumption is rebutted, regardless of the absence of a CIO Appendix. *Id.* at 13–14.

Pursuant to 19 U.S.C. § 1677(5)(F), Commerce presumes that a non-recurring subsidy will benefit a recipient over the average useful life of the relevant assets and Commerce thus allocates the subsidy over that allocation. 19 U.S.C. § 1677(5)(F); *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act* ("*Final Modification*"), 68 Fed. Reg. 37,125, 37,127 (Dep't of Commerce June 23, 2003). A respondent may rebut the presumption, however, by demonstrating that a change in ownership occurred in which the former owner sold all or substantially all of a company or its assets, and that the sale was an arm's length transaction for fair market value. *Final Modification*, 68 Fed. Reg. at 37,127. In such situations, the subsidy is reflected in the fair market price of the arm's length transaction and the pre-sale subsidy is extinguished (*i.e.*, does not pass through) as to the new owner. In the *Final Modification*, Commerce listed four factors that it would analyze when determining whether the transaction price in an acquisition was arm's length and for fair market value: (1) whether an objective analysis was performed in determining the appropriate sales price; (2) whether any artificial barriers to entry were imposed on potential purchasers that could artificially suppress demand for, or the purchase of, the company; (3) whether the highest bid was accepted; and (4) whether there were committed investment requirements that could serve as a barrier to entry or distort the value that bidders were willing to pay. *Id.*

KG Dongbu claims that record evidence demonstrates that all of these elements are met, and that Commerce failed to consider the record evidence. *Id.* at 15–17. First, regarding the objective analysis factor, KG Dongbu claims that: (1) PricewaterhouseCoopers independently analyzed the acquisition proposal from the KG Consortium, including the acquisition price in Scenario 3; (2) PricewaterhouseCoopers compared the proposal with alternative scenarios that assumed the creditors council either made no changes to Dongbu Steel's pre-

acquisition structure or liquidated Dongbu Steel; and (3) based on its analysis, PricewaterhouseCoopers concluded that the KG Consortium's proposal had the highest value to the creditors council of the available alternative scenarios and posed less risk than liquidating Dongbu Steel. *Id.* at 15 (citations omitted). KG Dongbu claims that this was an objective analysis.

Second, KG Dongbu claims that there were no artificial barriers to entry because: (1) there was a publication in a newspaper on January 7, 2019, publicizing an investment attraction announcement for an open bidding process that provided equal access and free competition for all interested parties; (2) the purpose of the transaction was the acquisition by a third party of newly issued common stock that would result in the transfer of corporate management rights; and (3) potential investors that submitted the confidentiality agreement form and revealed an intention to bid received a Preliminary Bidding Guide and a Teaser Memorandum containing private and confidential information of Dongbu Steel to assist the recipient in making a decision on whether to pursue a further analysis of Dongbu Steel and submit a preliminary bidding proposal. *Id.* at 14–15 (citations omitted).

Third, KG Dongbu also claims that (1) the highest bid was accepted in this bidding process; (2) potential investors showed interest by signing confidentiality agreements and were allowed access to Dongbu Steel's confidential information; (3) Dongbu Steel's financial and business information was provided for the valuation and to determine a reasonable investment amount to take over Dongbu Steel; and (4) because the financial information covered the period through September 2018, it fully reflected Dongbu Steel's financial condition after the first three debt-to-equity restructurings. *Id.* at 16–17. KG Dongbu explains the bidding and selection process that led to its assumption of Dongbu Steel, including the evaluation of proposed investment amounts, financial and business plans, and capacity to close the deal as well as the KG Consortium's appointment of an independent accounting firm to analyze Dongbu Steel's financial situation before the KG Consortium's preparation of its business restructuring plan and submission of its final bidding proposal on March 4, 2019. *Id.* KG Dongbu argues that the KG Consortium paid in full for the new shares before it assumed control of Dongbu Steel. *Id.* at 17.

Fourth, KG Dongbu argues that there were no committed investment requirements that could serve as a barrier to entry or distort the value that bidders were willing to pay. *Id.*

Commerce has not reviewed this record evidence and made any determinations. Commerce has yet to determine whether this amounts to substantial evidence of an arm's length transaction of

Dongbu Steel's assets sold to the KG Consortium. The Court remands this issue for further explanation or reconsideration in accordance with this Opinion.

IV. Calculation of the Uncreditworthiness Benchmark

KG Dongbu challenges Commerce's calculation of the uncreditworthy benchmark rate. KG Dongbu's Cmts. at 17–21; *see* 19 C.F.R. § 351.505(a)(3)(iii); 19 C.F.R. § 351.524(d). Familiarity with the formula, as transcribed in the prior Opinion,[2] is presumed. *See KG Dongbu I*, 47 CIT at __, 648 F. Supp. 3d at 1361. This Court previously noted that the extension of the repayment date on KG Dongbu's loans was to December 31, 2025, and that the fifteen-year average useful life of the equity infusions contradicted Commerce's *Final Results*. *Id.*

In its *Remand Redetermination*, Commerce continued to use three years for the term of the loan variable and the creditworthy and uncreditworthy default rates because there was allegedly no information on the record regarding a six-year interest rate for a comparable commercial loan and the loans that KG Dongbu received cannot constitute "comparable commercial loans" pursuant to 19 C.F.R. § 351.505(a)(2). *Remand Redetermination* at 17. Specifically, Commerce reiterated on remand that in its *Final Results*, it determined that while there were some private commercial banks involved in the debt restructuring of KG Dongbu, the restructuring of its debt was not overseen by those private banks. *Id.* at 15–16. Instead, the debt restructuring was controlled by the Creditor Bank Committee ("CBC"), which in turn was controlled by Korean government policy banks such as the Korea Development Bank. *Id.* at 16. Therefore, Commerce determined that the record of this case did not warrant any change from prior administrative reviews. *Id.*

More specifically, Commerce determined that the loans from private creditors on the CBC could not be construed as "comparable commercial loans" and used as a commercial benchmark under 19 U.S.C. § 1677(5)(E)(ii) and 19 C.F.R. § 351.505(a)(2), because the CBC

---

[2] " $i_b = \left[\frac{(1 - q_n)(1 + i_f)^n}{(1 - p_n)}\right]^{1/n} - 1$

where:

n = the term of the loan;
i_b = the benchmark interest rate for uncreditworthy companies;
i_f = the long-term interest rate that would be paid by a creditworthy company;
p_n = the probability of default by an uncreditworthy company within n years; and
q_n = the probability of default by a creditworthy company within n years."

See 19 C.F.R. § 351.505(a)(3)(iii). This uncreditworthy interest rate formula thus has four variables: (1) the term of the loan in question ("n"); (2) the long-term interest rate paid by a creditworthy company; (3) the probability of default of a creditworthy company in "n" years; and (4) the probability of default of an uncreditworthy company in "n" years.

was controlled by government policy and special purpose banks. *Id.* Commerce used a three-year AA-rated Korean Won interest rate, published by the Bank of Korea as the long-term interest rate paid by a creditworthy company because it was the only long-term interest rate available on the record. *Id.* Commerce alleged that no other long-term Korean Won interest rates were provided on the record by interested parties in this review. *Id.* Furthermore, Commerce explained that:

> [T]he plain language of the [Preamble to Commerce's regulation] dictates that Commerce use the term of the benchmark (in this case, [three] years, from the [three]-year [Korean Won] AA-Corporate Bond Rate from Bank of Korea) to identify both the probability of default by a creditworthy company, and the probability of default by an uncreditworthy company from the Moody's "Average Cumulative Issuer-Weighted Global Default Rates, 1920–2010" table. Otherwise, if Commerce used the probability of default by an uncreditworthy company within six years for variables p_n and q_n respectively, as the Plaintiffs suggests, the variables would not be on the same basis as the term of the baseline benchmark used for variable if (*i.e.*, [three] years). This would be contrary to Commerce's intention in providing a formula to calculate the benchmark interest rate for an uncreditworthy company, as set out in the Preamble.

Id. at 34 (citing *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,365 (Dep't of Commerce Nov. 25, 1998)).

The Court concludes that Commerce's explanation is arbitrary. Commerce's determination on remand to use three years for the term of the loan in variable "n" and the length of time within which creditworthy and uncreditworthy companies may default for variables "p_n" and "q_n" is contrary to the plain language of its regulations. *See* 19 C.F.R. § 351.505(a)(3)(iii). Commerce's explanation does not justify ignoring the plain language of its own regulations, and there is no rational basis for ignoring the actual evidence on the record regarding the term of the loan (*i.e.*, six years) and substituting a pretend term for the sake of consistency. *See, e.g., Ereğli Demir ve Çelik Fabrikalari T.A.Ş. v. United States* ("*Ereğli Demir*"), 43 CIT __, __, 415 F. Supp. 3d 1216, 1230 (2019) ("Commerce's determination in the remand proceeding is inconsistent with the plain language of the regulation and, thus, merits no deference."); *Guangzhou Jangho Curtain Wall Sys. Eng'g Co. v. United States*, 40 CIT __, __, 181 F. Supp. 3d 1265, 1280 (2016) ("Commerce's per se restriction of its scope ruling to a particular interested party rather than to a particular

product is contrary to the plain language of the regulation."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("The agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." (quotations omitted)).

Commerce's regulation specifies that if it finds that a firm that received a government provided long-term loan was uncreditworthy, it will "normally" calculate the interest rate "where: n = the term of the loan." 19 C.F.R. § 351.505(a)(3)(iii). The final countervailing duty regulations specify the selection of the default rates used in calculating an uncreditworthy benchmark, explaining that Commerce:

> . . . will use the average cumulative default rate for the number of years corresponding to the length of the loan, as reported in Moody's study of historical corporate bond default rates. In other words, we would use a five-year default rate for a five-year loan, as a [fifteen]-year default rate for a [fifteen]-year loan, and so forth. We believe that *using a default rate that is directly linked to the term of the loan* is a better reflection of the risk associated with long- term lending to uncreditworthy borrowers.

Countervailing Duties, 63 Fed. Reg. at 65,365 (emphasis added). In other words, it is the rate that is to be linked to the term of the loan. It is not the other way around.

Commerce's rule addresses that the default rate is a measurement of risk and the level of risk for a company to default within "n" years, which can only be properly calculated using the actual term of the new loan at issue, in this case for KG Dongbu, six years. *See id.* However, Commerce introduced abnormality into the equation by imposing, through unnecessary substitution, a condition that was directly at odds with clear evidence of record. Commerce has not articulated a rational basis to ignore an actual data point in favor of a three-year term unrelated to the term of the actual loan. Its calculation thus contradicts the plain language of its own regulations as to the appropriate period for the applicable default rates.

In the absence of substantial evidence to the contrary, the term of the restructured long-term loans and bonds is six years, and the term of the loan (variable "n") and default rates ("p_n" and "q_n") used in the calculation must match the actual six-year term of KG Dongbu's loans and bonds. Commerce's decision to ignore the plain requirements of its regulation renders its decision not in accordance with law. *See Ereğli Demir*, 43 CIT at __, 415 F. Supp. 3d at 1230.

Apart from the rate (variable "i_f") that Commerce concluded is proper, on remand, if Commerce reaches this issue again, it must either revise the calculation of the uncreditworthy benchmark rate

(quotient "i_b") by using the six-year term and default rates on the record for variables "n," "p_n," and "q_n" as set out in the plain language of its regulations, or provide cogent reasoning for adopting any other alternative calculation.

V. Calculation of the Unequityworthy Discount Rate

KG Dongbu challenges Commerce's calculation of the uncreditworthy benchmark rate. KG Dongbu's Cmts. at 17–20.

After Commerce determines that a company receives a benefit through an equity infusion and that the firm is unequityworthy, it will calculate the amount of the benefit as equal to the amount of the equity infusion. 19 C.F.R. § 351.507(a)(4), (6). Commerce's regulation specifies that Commerce will then allocate the benefit amount conferred by an equity infusion (a non-recurring subsidy) over the same time period as the non-recurring subsidy, in accordance with 19 C.F.R. § 351.524(d). *See* 19 C.F.R. § 351.507(c) ("The benefit conferred by an equity infusion shall be allocated over the same time period as a nonrecurring subsidy.").

19 C.F.R. § 351.524(d)(1) sets out the formula to be used for allocating nonrecurring benefits over time:

$$A_k = \frac{\frac{y}{n} + \left[y - \left(\frac{y}{n}\right)(k-1)\right] d}{1+d}$$

Where:
A_k = the amount of the benefit allocated to year k,
y = the face value of the subsidy,
n = the [average useful life] . . . ,
d = the discount rate . . . , and
k = the year of allocation, where the year of receipt = 1 and $1 \leq k \leq n$.

19 C.F.R. § 351.524(d)(1).

19 C.F.R. § 351.524(d)(3)(ii) then sets out an exception for selecting the discount rate for uncreditworthy firms. For such firms, Commerce "will use as a discount rate the interest rate described in 19 C.F.R. § 351.505(a)(3)(iii)" (*i.e.*, it will use the same formula for the calculation of the uncreditworthy benchmark interest rate described above in section III of this Opinion). 19 C.F.R. § 351.524(d)(3)(ii). In other words, the regulations require that Commerce calculate the unequityworthy discount rate (listed as variable "d" in 19 C.F.R. § 351.524(d)(1)) using the formula from 19 C.F.R. § 351.505(a)(3)(iii),

but it must use the average useful life period as variable "*n*" as specified in 19 C.F.R. § 351.524(d).

When the creditor's committee met and approved the restructuring of KG Dongbu's loans, the maturity date of the loans was extended until 2025. *See* KG Dongbu's Cmts. at 19. The term of KG Dongbu's restructured loans is six years, from the 2019 extension until the loans mature in 2025. The term of average useful life allocation period for non-recurring subsidies is fifteen years. *Id.* The probabilities of default by creditworthy and uncreditworthy companies on six-year and fifteen-year loans are on the record. *Id.* The Court also agrees that the information necessary to calculate the uncreditworthy benchmark rate and unequityworthy discount rate pursuant to the plain language of 19 C.F.R. § 351.505(a)(3)(iii)—the six-year term of KG Dongbu's restructured loans, the fifteen-year average useful life of the equity infusions, and the probabilities of default by creditworthy and uncreditworthy companies for six- and fifteen-year periods—is on the record.

Because the average useful life period in this case is fifteen years, Commerce allocated the amounts of the 2015, 2016, 2018, and 2019 government equity infusions on that basis pursuant to 19 C.F.R. § 351.507(c) and 19 C.F.R. § 351.524(b) and (d)(1). Equity Infusions Analysis Mem. at 21. However, in determining the amount of the benefit in each year of the fifteen-year allocation period, Commerce calculated the discount rates (variable "*d*" in Commerce's equation) based on a three-year period, and in so doing it applied the formula from 19 C.F.R. § 351.505(a)(3)(iii) incorrectly, as discussed above for the uncreditworthy benchmark interest rate. *See* IDM at 41–42, 59. Commerce's regulation and preamble to Commerce's regulations are clear that the default rates should be tied to the term of the loan or, in the case of an equity benefit, to the same period as a non-recurring subsidy, *i.e.*, the fifteen-year average useful life period. *See* 19 C.F.R. § 351.524(d)(2); 19 C.F.R. § 351.507(c) ("The benefit conferred by an equity infusion shall be allocated over the same time period as a non-recurring subsidy.").

Thus, the "*n*" variable (number of years) in the formula for calculating the unequityworthy discount rates should match the fifteen-year allocation period, just as the "*n*" variable for calculating an uncreditworthy benchmark interest rate must match the term of the uncreditworthy loan. Because Commerce's *Remand Redetermination* contradicts the plain language of Commerce's regulations, Commerce's determination is not in accordance with law. *See Ereğli Demir*, 43 CIT at __, 415 F. Supp. 3d at 1230. On further remand,

Commerce must either revise the calculation of the unequityworthy discount rates by using the fifteen-year average useful life period and default rates for variables "n," "p_n," and "q_n" as set forth in the regulations, or provide cogent reasoning for adopting any alternative calculation.

CONCLUSION

Accordingly, it is hereby

ORDERED that Commerce's amended Final Results of Redetermination Pursuant to Court Remand, ECF Nos. 57, 58, are remanded to Commerce for reconsideration consistent with this Opinion; and it is further

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

(1) Commerce shall file the remand determination on or before July 3, 2024;

(2) Commerce shall file the administrative record on or before July 17, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before September 6, 2024;

(4) Comments in support of the remand determination shall be filed on or before October 7, 2024; and

(5) The joint appendix shall be filed on or before October 22, 2024.

Dated: April 3, 2024
New York, New York

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

Slip Op. 24–39

KAPTAN DEMIR CELIK ENDUSTRISI VE TICARET A.S., COLAKOGLU METALUJI A.S., and COLAKOGLU DIS TICARET A.S., Plaintiffs, ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff-Intervenor, v. UNITED STATES, Defendant, REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00059

[Commerce's Final Results in the Administrative Review of Commerce's antidumping duty order on steel concrete reinforcing bar from Turkey are sustained.]

Dated: April 4, 2024

Leah N. Scarpelli and *Jessica DiPietro*, ArentFox Schiff LLP, of Washington, DC, argued for plaintiffs Kaptan Demir Celik Endustrisi ve Ticaret A.S., Colakoglu Dis Ticaret A.S., Colakoglu Metalurji A.S., and plaintiff-intervenor ICDAS Celik Enerji Tersane Ve Ulasim Sanayi, A.S. With them on the brief was *Matthew M. Nolan*.

Sosun Bae, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for the defendant. With her on the brief was *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Maureen E. Thorson, Wiley Rein, LLP, of Washington, DC, argued for defendant-intervenor Rebar Trade Action Coalition. With her on the brief was *John R. Shane* and *Alan H. Price*.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final results made by the United States Department of Commerce ("Commerce") in the administrative review of the antidumping duty ("AD") order on steel concrete reinforcing bar ("rebar") from the Republic of Turkey covering the period from July 1, 2020, through June 30, 2021. Plaintiffs and Plaintiff-Intervenor[1] request the court hold that Commerce's decision to use the invoice date as the date of sale for sales of subject merchandise to the U.S. market is unsupported by substantial evidence.[2] The United States ("Government") and the Rebar Trade Action Coalition ("RTAC") ask that the court sustain Commerce's final results.

BACKGROUND

Commerce published an antidumping duty order on steel concrete reinforcing bar from the Republic of Turkey on May 22, 2017. *See Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Determination of Sales at Less than Fair Value*, 82 Fed. Reg. 23192

[1] Plaintiff Intervenor ICDAS Celik Enerji Tersane Ve Ulasim Sanayi, A.S. ("Icdas") was not a mandatory respondent in this review but was a foreign producer subject to the "all others" rate assigned by Commerce in the final results. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021*, 88 Fed. Reg. 7941 (Dep't Commerce Feb. 7, 2023). In its 56.2 motion, Icdas adopted and incorporated all arguments related to date of sale as filed by the plaintiffs to the extent they impact the determination of the all-others' rate. Plaintiff-Intervenor Icdas Celik Enerji Tersane Ve Ulasim Sanayi, A.S.'s Mem. of L. in Supp. of Mot. for J. on the Agency Record at 3, ECF No. 32 (Sept. 18, 2023). Icdas made no unique arguments relating to date of sale. *See generally*, *id.*

[2] In the complaint, plaintiffs also challenged Commerce's treatment of Section 232 tariffs. Compl. at ¶ 34, ECF No. 8 (Apr. 10, 2023). In their brief, plaintiffs notified the court that although they still argue Commerce's determination is not based on substantial evidence, they concede that their appeal is now foreclosed by the Federal Circuit's decision in *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*. 63 F.4th 25, 37 (Fed. Cir. 2023); Pls.' Br. in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 at 3, ECF Nos. 33–34 (Sept. 19, 2023).

(Dep't Commerce May 22, 2017). In September 2021, Commerce initiated an administrative review of this order, covering the period from July 1, 2020, through June 30, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 50034 (Dep't Commerce Sept. 7, 2021). Commerce selected Colakoglu Metalurji A.S. ("Colakoglu") and Kaptan Demir Celik Endustrisi ve Ticaret A.S. ("Kaptan") as mandatory respondents in this review. *Respondent Selection Memorandum* at 1, C.R. 3, P.R. 22 (Sept. 29, 2021).

Commerce published its preliminary results on August 5, 2022. *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 87 Fed. Reg. 47975 (Dep't Commerce Aug. 5, 2022), and accompanying Preliminary Decision Memorandum *Issues and Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2020–2021*, A-489–829, POR 07/01/2020–06/30/2021 (Dep't Commerce July 29, 2022) ("*PDM*"). For both Colakoglu's and Kaptan's U.S. market calculation, although Colakoglu and Kaptan reported their date of sale as the contract date, Commerce used the invoice date as the date of sale. *PDM* at 11–12. Kaptan and Colakoglu (collectively, "Respondents") submitted a joint case brief to Commerce challenging Commerce's use of the invoice date. *See generally Turkish Respondents' Case Brief*, C.R. 345, P.R. 190 (Sept. 13, 2022).

Commerce published its final results on February 7, 2023. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021*, 88 Fed. Reg. 7941 (Dep't Commerce Feb. 7, 2023), and accompanying *Issues and Decision Memorandum of the Final Results of the Administrative Review of the Antidumping Duty Order on Steel Concrete Reinforcing Bar from Turkey; 2020–2021*, A-489–829, POR 07/01/2020–06/30/2021 (Dep't Commerce Feb. 1, 2023) ("*IDM*"). In the results, Commerce continued to find that the invoice date should serve as the date of sale for Respondents despite the arguments in the case briefs. *See IDM* at 8–12.

Commerce primarily relied on three factors to make its determination. First, that no changes had occurred to Respondents' sales process since the previous review where the invoice date was selected as the date of sale. *IDM* at 9, 11. Second, that their contracts allowed for changes to be made to material terms after the contract date. *PDM* at

11; *IDM* at 9, 11. Third, that actual changes occurred and there were no mitigating factors to excuse such changes.[3] *IDM* at 9–10, 12.

On April 10, 2023, Respondents commenced the instant action against the United States pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i) and 1516a(a)(2)(B)(iii). Compl., ECF No. 8 (Apr. 10, 2023). Respondents claim that the final results are unsupported by substantial evidence or are otherwise contrary to law because Commerce used the invoice date as the date of sale for the U.S. market when no material changes were made after the contract date. *Id.* at ¶¶ 30–31. Respondents contend that each of the three prongs Commerce relied upon to make its determination were unsupported by substantial evidence and are contrary to Commerce's pattern and practice. *Id.*

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court sustains Commerce's determinations in antidumping proceedings unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. *Legal Standard*

The parties agree on the broad strokes of the law governing this case. In an antidumping review, Commerce must conduct a "fair comparison" of the prices for a good sold in the respondent companies' home market ("normal value") with the prices that they charge for the same or similar good in the U.S. market ("export price") to determine whether the good is being, or is likely to be, sold at less than fair value. *See* 19 U.S.C. § 1677b(a); *see also Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1577–78 (Fed. Cir. 1983). The normal value must be from "a time reasonably corresponding to the time of sale used to determine the export price," leading Commerce to identify a specific date on which the sale occurred. 19 U.S.C. § 1677b(a)(1)(A). Commerce's regulations on the matter provide that:

> In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, [Commerce] may use

[3] In the *IDM*, Commerce distinguishes other reviews where Commerce used the contract date despite changes to the material terms occurring after the contract date. *IDM* at 9. The two examples of factors referenced by Commerce include reviews where record evidence indicates that said changes were "usually immaterial, or if material, rarely occur" and when there is a "long lag time between the contract and invoice/shipment date." *Id.*

> a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i) (2020). Thus, under ordinary circumstances, the date of sale regulation "establishes a 'rebuttable presumption' in favor of the invoice date unless the proponent of a different date produces satisfactory evidence that the material terms of sale were established on that alternate date." *Eregli Demir ve Çelik Fabrikalari T.A.S. v. United States*, 308 F. Supp. 3d 1297, 1306 (CIT 2018) (citations omitted).

The material terms generally include the terms of price, quantity, payment, and delivery. *Id.* at 1306–07 (citing *Sahaviriya Steel Industries Public Co. Ltd. v. United States*, 34 CIT 709, 727, 714 F. Supp. 2d 1263, 1280 (2010), *aff'd*, 649 F.3d 1371 (Fed. Cir. 2011)). The preamble to the regulation explicitly contemplates situations where quantity or price change, explaining that:

> as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established. In [Commerce's] experience, price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced. The existence of an enforceable sales agreement between the buyer and the seller does not alter the fact that, as a practical matter, customers frequently change their minds and sellers are responsive to those changes. [Commerce] also has found that in many industries even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not fully established until the sale is invoiced.
>
> . . .
>
> If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of the invoice, [Commerce] will use that alternative date as the date of sale. . . . However, [Commerce] emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly "established" in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

62 Fed. Reg. 27,296, 27,348–49 (Dep't Commerce May 19, 1997) ("*Preamble*"). Accordingly, a party proposing a date other than the invoice date must not only show that the administrative record as a whole demonstrates that the material terms were "finally" and "firmly" established on that date, but also that none of the scenarios explicitly labeled as insufficient by Commerce in the *Preamble* are applicable. *See Yieh Phui Enterprise Co. v. United States*, 35 CIT 1122, 1125–28, 791 F. Supp. 2d 1319, 1322–25 (2011). In the light of this, the question here is whether the evidence relied upon by Respondents supports using the contract date rather than the invoice date as the date of sale.

II. *Commerce's use of the invoice date as the date of sale is supported by substantial evidence*

Respondents reported in their initial questionnaires that the material terms of sale were established on the contract date. *Kaptan's Response to the Department's Section A Questionnaire* at A-19, C.R. 4–11, P.R. 38 (Oct. 29, 2021); *Colakoglu's Response to the Department's Section A Questionnaire* at A-22, C.R. 15–26, P.R. 39–44 (Oct. 29, 2021). Commerce, however, found that the administrative record as a whole did not rebut the presumption in favor of using the invoice date and that the material terms were not established until the invoice date. *See PDM* at 10–12; *see also IDM* at 8–12. To make this determination, Commerce relied on the fact that Respondents reported no changes to their sales processes since the prior review; that terms in the contracts allowed for changes in quantity after the contract date; and that actual changes occurred after the contract date. *IDM* at 8–12. The court addresses each of these considerations in turn.

a. Evidence from prior administrative reviews support the use of the invoice date as the date of sale

Respondents argue that Commerce's reliance on information from its previous review was inappropriate as Commerce must "evaluate the evidentiary record in each review . . . ." Pls.' Br. in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 at 27, ECF Nos. 33–34 (Sept. 19, 2023) ("Resp't Br.") (emphasis omitted). The Government asserts that by placing the Respondents' information on date of sale from the prior review on the record, that information is considered part of the evidentiary record of this review. Def.'s Resp. to Pls.' Mot. for J. on the Agency Record at 19, ECF Nos. 35–36 (Nov. 17, 2023) ("Gov. Br.").

The parties agree that Commerce's determination must be supported by substantial evidence contained in the administrative record unique to this review. Resp't Br. at 27–28; Gov. Br. at 19–20. Nevertheless, Respondents have not cited any statute, regulation, or binding court precedent that prevents Commerce from adding information from a prior review to the administrative record of a new review. *See generally* Resp't Br. at 28. Commerce may have legitimate reasons, such as to prevent double counting,[4] to consider information from prior reviews.[5]

Here, Commerce used the information, not to make an independent factual determination, but to provide context to Respondents' questionnaire responses stating that their sales process had not changed since the prior review. *See PDM* at 11; *see, e.g.*, *Colakoglu's Response to Second Supplemental Sections A-C Questionnaire* at S3–12, C.R. 282–289, P.R. 138 (June 6, 2022) ("There have not been changes to Colakoglu's sales process since the prior period of review."); *Kaptan's Response to the Department's Second Supplemental Sections A-C Questionnaire* at S3–4, S3–7, C.R. 253–268, P.R. 126 (May 20, 2022) (admitting that as in prior reviews here the "material terms of the sale may change between the contract date and the internal order date in the normal course of business"). With this context, Commerce understood the responses to mean that the sales processes which led to a finding that the invoice date was the appropriate date of sale were the same processes employed here. *IDM* at 8–9, 11–12. The *Preamble* refers to the importance of business practices in a particular industry and whether renegotiation is likely to happen. 62 Fed. Reg. at 27,348–49. Accordingly, it was reasonable for Commerce to use information from a prior review about the sales processes, and which Respondents confirmed had not changed, to determine the appropriate date of sale. Additionally, the fact that there had been no change to sales processes which had previously resulted in using the invoice date, although not determinative itself, supports the presumption of using the invoice date as the date of sale here.

b. The terms of the contract allowed for deviation in a material term

In their questionnaire responses, Respondents stated that the material terms of a sale may change between the contract date and

[4] *See, e.g.*, *IDM* at 8 (expressing concern that altering the date of sale between PORs could risk double counting).

[5] In its response brief, the RTAC argues that adding information from prior reviews to the administrative record is a common practice. Rebar Trade Action Coalition's Resp. Br. at 32–33, ECF Nos. 37–38 (Nov. 17, 2023).

invoice date. *Kaptan Response to the Department's Second Supplemental Sections A-C Questionnaire* at S3–7, C.R. 253–68, P.R. 126 (May 20, 2022) ("Kaptan 2nd SQR"); *Colakoglu's Response to Second Supplemental Sections A-C Questionnaire* at S3–10, C.R. 282–289, P.R. 138 (June 6, 2022). The Government argues that these concessions "preclude[] a finding that the material terms of the sale were fixed at the contract date." Gov. Br. at 16. Respondents assert, however, that the determinative factor is whether the material terms changed, not whether the terms could have changed. Resp't Br. at 22–32.

Prior caselaw is filled with examples of Commerce considering contracts that allow for minor changes between the contracting and invoicing stages. Commerce has decided cases both ways, sometimes finding the material terms were established despite an allowance for tolerances and sometimes determining the presence of tolerances meant the material terms were not established. *See, e.g.*, *Nakornthai Strip Mill Co. Ltd. v. United States*, 33 CIT 326, 614 F. Supp. 2d 1323 (2009); *Eregli Demir v. Celik Fabrikalari T.A.S*, 308 F. Supp. 3d 1297, 1312 (CIT 2018); *Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 Fed. Reg. 6522 (Dep't Commerce Feb. 12, 2007) and accompanning *Issues and Decision Memorandum for the Administrative Review of Certain Cut-to-Length Carbon Steel Plate from Romania: Final Results of Antidumping Duty Administrative Review and Final Partial Rescission*, A-485–908, POR 08/01/2004–07/31/2005 (Dep't Commerce Feb. 2, 2007). In *Eregli Demir*, the court considered two issues: first, whether a clause giving the buyer the option to receive a cash discount constituted a material change; and second, whether a clause allowing for quantity changes within a certain tolerance constituted a material change. *Eregli Demir*, 308 F. Supp. 3d at 1308–11. For the first, the court found there was no material change as the payment terms do not change between contract and invoice as the buyer can always exercise either option and those two options are not subject to change. *Id.* at 1309. For the second clause, however, the court found that the seller's "ability to ship items not in conformity with the quantity ordered or the tolerance limits" supported Commerce's finding that the material terms were not set on the contract date. *Id.* at 1312.

Here, the contracts are similar to the latter example from *Eregli Demir*. Although the price per unit is set, tolerances exist both for individual products, i.e., line-items, and for the aggregate product sent. *See IDM* at 10–12; *see, e.g., Kaptan's Response to Supplemental Sections A-D Questionnaire* at S1–5–6, C.R. 169–179, P.R. 88 (Mar. 11, 2022). Accordingly, a seller retains significant discretion to adjust

the line-item quantities, resulting in a wide variety of product mixes to be shipped under the same contract. Under these circumstances, the court is hard-pressed to consider the material term of quantity to be "firmly established" at this point regardless of whether the contract maintains a consistent aggregate quantity.

The existence of such tolerances, however, does not "preclude[] a finding that the material terms of the sale were fixed at the contract date" as the Government contends. Gov. Br. at 16. There are some scenarios, such as where an unutilized tolerance is included in boilerplate language of which the parties were unaware or where the tolerance is extremely small, where Commerce found the presence of the tolerance did not impact the material terms of the sale. *See, e.g.*, *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 CIT 695, 738–40, 625 F. Supp. 2d 1339, 1375–77 (2009) (finding that Commerce's decision that a proprietary clause was a routine boilerplate clause of no real significance was reasonable); *Yieh Phui Enterprise Co. v. United States*, 35 CIT 1122, 1128–29, 791 F. Supp. 2d 1319, 1325–26 (2011) (speculating that there could be an exception for changes that are so small as to be *de minimis*). Here Commerce did not find those scenarios to be present.

Respondents argue that such a scenario exists here as the parties do not consider line-item changes to be a material term. Resp't Br. at 20–21. As evidence, Respondents pointed to the lack of post-contract amendments, despite deviations from the line-item tolerances. Resp't Br. at 24; Kaptan 2nd SQR at S3–4–5. Although Commerce may consider this evidence as to whether there was a "meeting of the minds," what is or is not a material term in a date of sale inquiry is set by regulation and caselaw, not the parties. *See supra* DISCUSSION § I; *see also infra* DISCUSSION § II(c). There is neither information on the record indicating that the parties were unaware of the tolerances, nor information that the tolerances were *de minimis*. Parties may take actions for a number of reasons, and the acceptance of a good that does not meet contract parameters could be entirely unrelated to whether that parameter is a material term. Accordingly, it is reasonable for Commerce to presume here that the presence of a tolerance in contract language implies that changes to quantity regularly occur and that the material terms are not settled until the invoice date.

c. The quantities specified in the invoice were materially different from those in the contract

Respondents argue that the material terms of the contract did not change as the aggregate quantity remained stable. Resp't Br. at 23–24, 27–28. The Government contends that the material term of

"quantity" refers to more than the aggregate quantity of product, and that there were changes to line-item quantities that exceeded the tolerances specified in the contract. Gov. Br. at 16–19. Limiting the material term of quantity to only the aggregate number, the Government argues, would allow a seller to completely shift the makeup of a sale between the contract and invoice stage and therefore fail to achieve the statutory directive. *Id.*

Respondents cite no binding precedent for the proposition that the material term of quantity only refers to aggregate quantity. Resp't Br. at 18–19.[6] To the contrary, the court has previously found that Commerce was reasonable in treating a change in a line-item quantity within a tolerance as a change in a material term. *ArcelorMittal USA LLC v. United States*, 302 F. Supp. 3d 1366, 1376–77 (CIT 2018). Just as here, in *ArcelorMittal* the court examined a set of facts where the contract allowed for a tolerance, and then the invoice finalized the exact quantity. *Id.* at 1372–73. Commerce observed in *ArcelorMittal* that in one instance the quantity shipped was outside of the tolerance. *Id.* Commerce, relying on a clause in the contract that specified the importance of the quantity term, determined that the terms of the sale were not "firmly" and "finally" established until the date of the invoice. *Id.* at 1376–77. Considering the contract clause and the change outside of the tolerance level, the court affirmed Commerce's determination. *Id.*

Respondents attempt to distinguish *ArcelorMittal* on two counts. First, Respondents argue that the rebar at issue here is a different product from the cold-rolled steel at issue in *ArcelorMittal*. Resp't Br. at 30. Second, Respondents assert the contracts are different as the parties here "agree to quantity tolerances with respect to the total order quantity." *Id.* The court is unconvinced that these differences are material. First, there is no information on the record to establish that the rebar industry is significantly different from cold-rolled steel such that the line-item quantity amounts are immaterial. Second, although Respondents correctly point out that here there is no clause indicating the importance of quantity as in *ArcelorMittal*, neither the court nor Commerce indicated the clause was essential to that deter-

[6] To establish Commerce's practice, Respondents reference several determinations from Commerce and one CIT case, all of which are at least fifteen years old, where Commerce disregards line-item changes that are not significant "so long as the overall quantity is within the quantity tolerance level . . . ." Resp't Br. at 18–19 (quoting *Nakornthai*, 33 CIT 326, 334, 614 F. Supp. 2d 1323, 1332 (2009)). Yet, the issue considered in *Nakornthai* was whether Commerce had properly considered the significance of the line-item quantity tolerance level after Commerce found the change in the line-item quantity was significant. *Id.* at 335–36, 1332–33. Thus, even the nonbinding precedent cited by Respondents exhibits Commerce treating a change to a line-item quantity as material.

mination. Additionally, Commerce found that similar to *ArcelorMittal*, the size breakdowns of individual rebar products is "fundamental." *IDM* at 11. Thus, it would be reasonable for Commerce to conclude that the line-item quantity term here is important just as it was in *ArcelorMittal*.

Here, Commerce found multiple instances where the quantity changed beyond the line-item tolerances set by the contract. *IDM* at 9–10, 12. Considering Commerce's determination of the importance of the line-item tolerances, Commerce reasonably determined these changes were to a material term and that a change to a line-item quantity beyond the specified tolerance supports the presumption of using the invoice date as the date of sale.

III. *Commerce followed its established pattern and practice*

Finally, Respondents argue that Commerce failed to explain its decision to disregard its established practice of setting the date of sale as the time when there was a "meeting of the minds." Resp't Br. at 32. The Government asserts that Commerce acted within its established practice and found that there was not sufficient evidence to rebut the presumption of using the invoice date. Gov. Br. at 21.

As articulated in *ArcelorMittal*, to rebut Commerce's presumptive selection of the invoice date, the proposing party must demonstrate that the alternative date is the only reasonable one. *ArcelorMittal USA LLC*, 302 F. Supp. 3d at 1377–78 (citing *Toscelik Profil v. Sac Endustrisi A.S.*, 256 F. Supp. 3d 1260, 1263 (CIT 2017)). "An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from that evidence." *Viet I –Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016). Where reasonable minds could disagree, Commerce's presumptive selection of the invoice date stands. *ArcelorMittal USA LLC*, 302 F. Supp. 3d at 1377–78.

As described above, Respondents fail to meet their burden. Each of the grounds listed by Commerce reasonably support using the invoice date. Respondents reference no additional factors, instead choosing to double down on their argument that the material terms did not change between the contract date and invoice date. *See generally* Resp't Br. In the light of the court's determination that material term of quantity includes changes to line-item quantities, and in addition to Commerce's other stated reasons for using the invoice date, substantial evidence supports Commerce's determination that the meeting of the minds occurred at the invoice date.

Assuming *arguendo* that Respondents had additional evidence to support the use of the contract date, Commerce has not broken from

its established practice by using the invoice date as supported by its presumption and substantial evidence. Accordingly, Respondents' final argument fails.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's final results. Judgment will enter accordingly.

Dated: April 4, 2024
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 58, No. 15, April 17, 2024

U.S. Customs and Border Protection

General Notices

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2024—427-373/30071