U.S. Customs and Border Protection

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection to The Protector & Gamble Company in regard to SK-II Facial Treatment Essence products intended for sale in Japan and China that bear the federally registered and recorded "SK-II" trademark (U.S. Trademark Registration No. 2,902,277/CBP Recordation No. TMK 05–00314). Notice of the receipt of an application for "Lever-Rule" protection was published in the October 11, 2023, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Rebecca Powell, Intellectual Property Rights Branch, Regulations & Rulings, (202) 325–1995.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection for SK-II Facial Treatment Essence that are intended for sale in Japan and China and that bear the "SK-II" trademark, U.S. Trademark Registration No. 2,902,277/CBP Recordation No. TMK 05–00314.

In accordance with *Lever Bros. Co. v. United States,* 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market SK-II Facial Treatment Essence differ physically and materially from the SK-II Facial Treatment Essence intended for sale in the United States with respect to at least the following characteristics: the packaging and labeling do not conform to U.S. legal and regulatory requirements, the packaging does not provide product information in English, and the packaging displays different product information.

ENFORCEMENT

Importation of the above-referenced subject gray market SK-II Facial Treatment Essence is restricted, unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied.

Dated: January 25, 2024

ALAINA L VAN HORN

U.S. Court of International Trade

Slip Op. 24–4

THE MOSAIC COMPANY, Plaintiff, PHOSAGRO PJSC, JSC APATIT, Consolidated Plaintiffs, INDUSTRIAL GROUP PHOSPHORITE, LLC, Consolidated Plaintiff and Consolidated Plaintiff-Intervenor, v. UNITED STATES, Defendant, THE MOSAIC COMPANY, Consolidated Defendant-Intervenor, PHOSAGRO PSJC, JSC APATIT, INDUSTRIAL GROUP PHOSPHORITE, LLC, Defendant-Intervenors

Before: Jane A. Restani, Judge
Consol. Court No. 21–00117

[Commerce's Final Results of Redetermination Pursuant to Court Remand in the countervailing duty investigation of phosphate fertilizers from the Russian Federation are sustained.]

Dated: January 19, 2024

David J. Ross, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for plaintiff The Mosaic Company. With him on the brief were *Stephanie E. Hartmann, Alexandra S. Maurer*, and *Natan P.L. Tubman*.

Ebonie I. Branch, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for the defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Jared M. Cynamon*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan T. Stoel, Hogan Lovells US LLP, of Washington, DC, for Defendant-Intervenors PhosAgro PJSC and JSC Apatit. With him on the brief were *Cayla D. Ebert, H. Deen Kaplan*, *Jared Wessel*, and *Maria A. Arboleda*.

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, DC, for Defendant-Intervenor Industrial Group Phosphorite, LLC. With him on the brief was *Peter J. Koenig*.

OPINION

Restani, Judge:

Before the court are the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, ECF No. 128 (Oct. 11, 2023) ("*Redetermination Results*"), in the countervailing duty ("CVD") investigation of phosphate fertilizers from the Russian Federation ("Russia") covering the period from January 1, 2019, through December 31, 2019. The court most recently remanded in part to Commerce for further explanation of the record. *See Mosaic Co. v. United States*, 647 F. Supp. 3d 1358 (CIT 2023)

("*Mosaic II*").[1] Consolidated Plaintiff PhosAgro PJSC and JSC Apatit, cross-owned, (collectively, "PhosAgro") partially challenge the *Redetermination Results* as unsupported by substantial evidence or otherwise not in accordance with law. Plaintiff and Consolidated Defendant-Intervenor The Mosaic Company ("Mosaic"), as well as the United States ("Government"), ask that the court sustain Commerce's *Redetermination Results*. For the reasons below, Commerce's *Redetermination Results* are sustained.

BACKGROUND

The court presumes familiarity with the facts as set out in *Mosaic II*, but briefly summarizes the relevant record evidence here for ease of reference. After Mosaic filed a CVD petition on June 26, 2020, concerning imports of phosphate fertilizers from Russia, Commerce initiated the investigation on July 23, 2020. *Petitions for the Imposition of Countervailing Duties: Phosphate Fertilizers from Morocco and Russia*, P.R. 1–8, C.R. 1–8 (June 26, 2020); *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations*, 85 Fed. Reg. 44,505 (Dep't Commerce July 23, 2020). PhosAgro and Industrial Group Phosphorite, LLC ("EuroChem") were selected as mandatory respondents. *See Countervailing Duty Investigation of Phosphate Fertilizers from Russia: Respondent Selection*, P.R. 55, C.R. 23 (Aug. 4, 2020).

Commerce published its preliminary results on November 30, 2020, *see Phosphate Fertilizers From the Russian Federation: Preliminary Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 76,524 (Dep't Commerce Nov. 30, 2020), along with the accompanying *Decision Memorandum for the Affirmative Preliminary Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation*, C-821–825, POR 1/1/2019–12/31/2019 (Dep't Commerce Nov. 23, 2020).

Commerce published its final determination on February 16, 2021. *See Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Dep't Commerce Apr. 7, 2021); *see also Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federa-*

[1] *See also Mosaic Co. v. United States*, 589 F. Supp. 3d 1298 (CIT 2022) ("*Mosaic I*") (wherein the court sustained in part and remanded in part on separate grounds). In short, mining rights themselves could not be valued so as to determine whether a subsidy occurred. Commerce, therefore, substituted a cost-build up methodology to measure the value received to compare to a benchmark for adequate remuneration. Accordingly, at this stage, only the cost-methodology is at issue.

tion, C-821–825, POR 1/1/2019–12/31/2019 (Dep't Commerce Feb. 8, 2021) ("*IDM*").

In *Mosaic II*, the court sustained aspects of Commerce's analysis but ordered that on remand Commerce may: (1) explain why reconciling to PhosAgro's financial statements, as opposed to those of its subsidiary JSC Apatit, was sufficient and respond to Mosaic's objection or seek further information from the respondent; (2) explain why it found EuroChem's submission supported and respond to Mosaic's specific objections; and (3) consider PhosAgro's arguments and explain why it selected Profit Before Tax rather than Gross Profit for the profit ratio. *Mosaic II*, at 1369–71.

Pursuant to the court's order, Commerce issued supplemental questionnaires to the mandatory respondents. *See Commerce Letter to PhosAgro PJSC Supp. Questionnaire*, R.P.R. 1 (July 26, 2023); *Commerce Letter to EuroChem Supplemental Questionnaire*, R.P.R. 2 (July 26, 2023). In its response, JSC Apatit reconciled its financial statements to those of its parent company PhosAgro. *Response from Hogan Lovells US LLP to Sec of Commerce Pertaining to JSC Apatit Second Supplemental Questionnaire Response*, R.P.R. 6, R.C.R. 3 (Aug. 9, 2023). Similarly, EuroChem provided a fully translated version of its reported cost data. *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Supplemental Questionnaire Response*, R.P.R. 4, R.C.R. 1 (Aug. 1, 2023). Commerce found the figures provided in each respective response to be reliable. *Redetermination Results* at 7, 9. No party challenges Commerce's findings here; the court therefore affirms Commerce's *Redetermination Results* on these grounds.

The only remaining issue in this case is the methodology used by Commerce to calculate PhosAgro's phosphate mining rights benefit. The court remanded to Commerce to further explain why it chose profit before tax, rather than gross profit, in its profit ratio calculation.[2] *Mosaic II*, at 1371 ("Commerce did not proffer why Profit Before Tax was used in previous proceedings or explain why it produced an accurate result now."). Because Commerce has done so now, the court sustains Commerce's *Redetermination Results*.

[2] As explained in *Mosaic II*, "Commerce calculated the phosphate rock cost of production by dividing JSC Apatit's reported 'Cost of Production' of phosphate rock by the total amount of phosphate rock produced, resulting in a per unit cost amount." *Mosaic II*, at 1370. "Commerce then multiplied the per unit cost amount by a 'profit ratio,' which Commerce calculated by dividing 'Profit Before Tax' by the total cost of sales in the financial statements." *Id.* A gross profit calculation, by contrast, includes additional expenses such as administrative and selling expenses.

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction continues pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(a)(2)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *U.S. Steel Corp. v. United States*, 219 F. Supp. 3d 1300, 1307 (CIT 2017) (internal quotations and citations omitted).

DISCUSSION

According to PhosAgro, Commerce again erred by declining to use the company's gross profit figure in its profit ratio calculation, which it argues "more accurately reflects the commercial reality of [its] pricing process." Consol. Pls. PhosAgro PJSC and JSC Apatit Comments on the U.S. Department of Commerce's Second Final Results of Redetermination Pursuant to Court Remand at 2, ECF No. 133 (Nov. 13, 2023). It argues Commerce's chosen profit before tax calculation "leaves out important expenses and business considerations (e.g., administrative and selling expenses) from the profit comparison . . . ." *Id.* at 3. Alternatively, if Commerce persists in its chosen methodology, PhosAgro argues for the inclusion of additional expenses that "are necessary in order to ensure a reasonable comparison of the alleged benefit [it received]." *Id.* at 12. The Government supports Commerce's use of profit before tax and decision not to adjust for any additional expenses that "would compromise the profit ratio calculation and incorporate expenses unrelated to mining and beneficiation activities." Def.'s Resp. in Supp. of Remand Results at 19, ECF No. 142 (Dec. 13, 2023) ("Def. Resp.").

Commerce "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). On remand, Commerce further explained its decision to use profit before tax here. As Commerce explains, profit before tax is narrower and helps to isolate costs for phosphate ore mining and beneficiation activities. *Redetermination Results* at 19–25. Conversely, using a gross profit calculation would include costs unrelated to the mining of phosphate ore such as selling and administrative expenses, taxes other than income taxes, and "other" expenses. *Id.* at 17.

PhosAgro has failed to demonstrate that including expenses broader than those involved in the mining and beneficiation of phosphate ore would bolster Commerce's goal to render an accurate profit ratio. The court concludes Commerce has adequately explained its action, and its determination is supported by substantial evidence. It therefore complied with the court's order in *Mosaic II*.

CONCLUSION

For the foregoing reasons, Commerce's *Redetermination Results* are SUSTAINED. Judgment will enter accordingly.

Dated: January 19, 2024
New York, New York

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

Slip Op. 24–5

SGS SPORTS INC., Plaintiff, v. UNITED STATES, Defendant.

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

[Granting the Parties' stipulation of facts and joint motion for the entry of a judgment.]

Dated: January 19, 2024

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., argued for Plaintiff SGS Sports Inc.

Justin R. Miller, attorney-in-charge, and *Monica P. Triana*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the motion were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the Stipulation of Facts and Joint Motion for the Entry of a Judgment filed by Plaintiff SGS Sports, Inc. ("Plaintiff" or "SGS") and Defendant United States. Stipulation Facts Joint Mot. Entry J., ECF No. 119. At the request of the Parties, the Court bifurcated this case into two phases. Order (Jan. 13, 2021), ECF No. 63. In Phase I, the Court determined that the warehousing agreement between SGS and 147483 Canada, Inc. is a lease or similar use agreement. *SGS Sports Inc. v. United States*, 47 CIT __, __, 620 F. Supp. 3d 1365, 1380 (2023). Remaining for Phase II is the question of whether the subject entries were eligible for duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See id.* at 1380–81.

The Parties filed their Stipulation of Facts and Joint Motion for the Entry of a Judgment informing the Court that the Parties have agreed to the following facts:

1. The imported merchandise that is the subject of this action was previously imported into the United States.
2. Plaintiff paid all applicable duties upon such previous importation.
3. The imported merchandise was not advanced in value or improved in condition by any process of manufacture or other means while abroad.
4. The imported merchandise was reimported by or for the account of the person who imported it into, and exported it from, the United States.

Stipulation Facts Joint Mot. Entry J. at 3. The Parties contend that these stipulated facts resolve all factual issues remaining before the Court and request that judgment be entered for Plaintiff. *Id.* at 3–5. Defendant United States asserts that its agreement for the entry of a judgment is not intended to waive its ability to appeal the Court's determinations in Phase I of this proceeding. *Id.* at 1.

In an action brought challenging the denial of a protest to the assessment of duties by U.S. Customs and Border Protection, Parties may file a stipulation for judgment on agreed upon facts at any time. USCIT R. 58.1. The Court reviews classification cases based on a de novo review of the record. 28 U.S.C. § 2640(a). This is a two-step process. First, the Court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthSci., Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the Court determines whether the subject merchandise falls within the parameters of the tariff provision. *See id.* (citing *Sigma-Tau HealthSci., Inc.*, 838 F.3d at 1276). The former is a question of law and the latter is a question of fact. *See id.* The Court resolved the first step of this analysis during Phase I of the proceedings, leaving only questions of fact for Phase II. *SGS Sports Inc.*, 47 CIT at __, 620 F. Supp. 3d at 1375–81.

Importers must normally pay duties on goods that were imported into the United States, exported to another country, and reimported back into the United States. 19 C.F.R. § 141.2. HTSUS subheading 9801.00.20 provides an exception to this rule for merchandise imported into the United States, exported outside of the United States under a lease or similar use agreement, and then reimported into the United States. HTSUS 9801.00.20. Customs grants the HTSUS 9801.00.20 exception when:

> the article for which free entry is claimed was duty paid on a previous importation . . ., is being reimported without having been advanced in value or improved in condition by any process of manufacture or other means, was exported from the United States under a lease or similar use agreement, and is being reimported by or for the account of the person who imported it into, and exported it from, the United States.

19 C.F.R. § 10.108. The Court previously determined that the subject entries were "exported from the United States under a lease or similar use agreement." *SGS Sports Inc.*, 47 CIT at __, 620 F. Supp. 3d at 1381. The Parties have stipulated to the remaining requirements of

HTSUS 9801.00.20. The Court determines, therefore, that Plaintiff's subject entries were entitled to duty-free treatment under HTSUS 9801.00.20.

Upon consideration of the Parties' Stipulation of Facts and Joint Motion for the Entry of a Judgment, and all other papers and proceedings in this action, it is hereby,

ORDERED that the Parties' Stipulation of Facts and Joint Motion for the Entry of a Judgment, ECF No. 119, is granted; and it is further

ORDERED that all pending motions *in limine* are deemed withdrawn; and it is further

ORDERED that the subject entries are classifiable under subheading 9801.00.20 of the Harmonized Trade Schedule of the United States and are entitled to duty-free treatment; and it is further

ORDERED that U.S. Customs and Border Protection shall reliquidate the subject entries and pay any appropriate refunds, with any interest as provided by law, in accordance with this opinion.

Judgment shall issue for Plaintiff accordingly.

Dated: January 19, 2024
New York, New York

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

Slip Op. 24–6

HLDS (B) STEEL SDN BHD and HLD CLARK STEEL PIPE CO., INC., Plaintiffs, v. UNITED STATES, Defendant, and WELDED TUBE USA, INC., WHEATLAND TUBE COMPANY, and VALLOUREC STAR L.P., Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 21–00638

[The court denies Plaintiffs' motion for judgment on the agency record and sustains the Commerce Department's final determination.]

Dated: January 23, 2024

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiffs. With him on the briefs were *Alexandra H. Salzman* and *Vivien J. Wang*.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Benjamin J. Bay, Schagrin Associates of Washington, DC, argued for Defendant-Intervenors. With him on the brief were *Roger B. Schagrin* and *Luke A. Meisner*.

OPINION

***Baker*, Judge:**

In this case, two foreign manufacturers challenge the Department of Commerce's finding that the production of certain oil piping[1] in Brunei and the Philippines for export to the United States circumvented antidumping and countervailing duty orders covering such piping from China.[2] For the reasons explained below, the court sustains the Department's determination.

I

To "combat circumvention of antidumping duty or countervailing duty orders, a domestic interested party may allege that changes to an imported product constitute[ ] circumvention under 19 U.S.C. § 1677j." *Tai-Ao Aluminium (Taishan) Co. v. United States*, 983 F.3d 487, 489 (Fed. Cir. 2020) (cleaned up) (quoting 19 C.F.R. § 351.225(a) (2020)). "When such issues arise, Commerce may initiate an anti-

[1] The technical name is "welded oil country tubular goods."

[2] *See Certain Oil Country Tubular Goods from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 Fed. Reg. 28,551 (Dep't Commerce May 21, 2010); *Certain Oil Country Tubular Goods from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 3203 (Dep't Commerce Jan. 20, 2010).

circumvention inquiry and issue 'scope rulings' that 'clarify the scope of an order or suspended investigation with respect to particular products.' " *Id.* at 489–90 (citing 19 C.F.R. § 351.225(a), (g)–(j)). "Commerce may then 'determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope.' " *Id*. at 490 (quoting *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1337 (Fed. Cir. 2016), and citing 19 U.S.C. § 1677j).

One way that clever producers and importers may seek to circumvent duty orders is to first ship a product's components to a third country for completion or assembly before export to the United States. Congress anticipated this possibility in 19 U.S.C. § 1677j(b), which authorizes Commerce to extend the scope of such orders to those products when, *inter alia*, "the process of assembly or completion" in the third country is "minor or insignificant," *id*. § 1677j(b)(1)(C),[3] and the value created in the home country "is a significant portion of the total value" of the product as finally exported to this nation, *id*. § 1677j(b)(1)(D). Assuming that those threshold requirements are satisfied, the statute mandates that the Department consider certain additional factors before expanding the scope of a duty order. *See id.* §§ 1677j(b)(1)(E), 1677j(b)(3).

II

A

In 2020, Commerce on its own initiative opened "country-wide anti-circumvention inquiries to determine whether imports of certain [oil piping] completed in Brunei and the Philippines using inputs manufactured in . . . China are circumventing the antidumping duty and countervailing duty orders" on such piping from China. Appx03952.[4] The Department selected four mandatory respondents, including Bruneian producer HLDS (B) Steel Sdn Bhd and Filipino producer HLD Clark Steel Pipe Co., Ltd. (collectively HLD). Appx01026.

Commerce's final determination concluded that imports of oil piping assembled or completed in Brunei and the Philippines using steel inputs from China circumvented duty orders on such piping from the latter. Appx01000–01001. The Department accordingly included

[3] In considering whether the process of assembly or completion is "minor or insignificant," the statute directs the Department to consider five criteria. *See id.* § 1677j(b)(2).

[4] Information available to the Department "indicate[d] that third countries are likely processing Chinese-origin [steel] or other significant inputs into [oil piping] before exportation to the United States." Appx03839 n.7.

products from the former countries within the scope of the orders applicable to China. *Id*.

B

HLD brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(ii) and (B)(vi) to challenge Commerce's final determination. *See* ECF 8. The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c).

Three members of the domestic industry intervened as defendants. ECF 20. HLD then moved for judgment on the agency record. ECF 33; *see also* USCIT R. 56.2. The government (ECF 34) and the intervenors (ECF 35) opposed, HLD replied (ECF 38), and the court then heard oral argument.

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

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

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

In addition, Commerce's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in cases reviewed under 28 U.S.C. § 2640(b), "section 706 review applies since no law provides otherwise").

III

A

In assessing whether the "process of assembly or completion" in a third country is "minor or insignificant," 19 U.S.C. § 1677j(b)(1)(C), Commerce explained that it considers, "among other things, the level of investment in the third country, the nature of the production process in the third country, and the extent of production facilities in the third country." Appx01007 (citing 19 U.S.C. § 1677j(b)(2)). For purposes of these factors, the Department compared HLD's production of oil piping in Brunei and the Philippines to "integrated steel production mills in China." Appx01012. It reasoned that "[a]lthough hot-rolled steel is not in the same class or kind of merchandise as [oil piping]," Appx01007, HLD produced its piping from steel "and the production of hot-rolled steel is [included in] the production of [oil piping]." *Id*.

HLD takes aim at this comparison, arguing that Commerce should have compared it to an oil pipe producer, not an integrated Chinese steel producer. The company asserts that "Commerce's conclusory remark that the production of primary steel forms is more complex than the production of [oil piping] is debatable." ECF 33–1, at 18. That may be, but when the factual record is debatable, the Department gets the benefit of the doubt.

Setting that aside, the Federal Circuit's recent decision in *Al Ghurair Iron & Steel LLC v. United States*, 65 F.4th 1351 (Fed. Cir. 2023), resolves this issue. Like HLD, the *Al Ghurair* plaintiff argued that "Commerce legally erred by comparing [that company's] investment to make [corrosion-resistant steel] with Chinese manufacturers' investment to make hot-rolled or cold-rolled steel" and contended that the Department should have compared its cost of producing corrosion-resistant steel to Chinese corrosion-resistant producers' cost. *Id.* at 1360. The court rejected that theory, finding that "Commerce reasonably explained that its comparison indicated what portion of the total value of the merchandise subject to these inquiries is accounted for by the last step of processing." *Id.* (cleaned up). So too here—the Department reasonably explained why it compared the production of oil piping in Brunei and the Philippines to the Chinese production of the steel components of that piping: "[T]he level of investment and production facilities is much larger and the production processes are more complex for the production of hot-rolled steel than for the production of [oil piping]." Appx01007.

HLD further argues that "[o]nly recently has Commerce developed a practice of finding that third country producers of articles of steel

not under an AD/CVD order are circumventing an AD/CVD order on the steel article from a different subject country because they use hot-rolled steel from the subject country." ECF 33–1, at 25–26. The company contends that use of the circumvention statute in this way "is not Commerce's 'standard practice,' " *id.* at 27, and that the Department "created this theory and practice of using the circumvention statute against companies sourcing hot-rolled steel from a subject country out of whole cloth," *id.* Again, *Al Ghurair* resolves this issue because the Federal Circuit found that the Department's analysis, and its use of the entire manufacturing process instead of "just the final steps," was consistent with the latter's prior determinations. 65 F.4th at 1360. While HLD objects that "Commerce has never justified the change in its comparison analysis" and then says that the Department's current practice is unreasonable, ECF 33–1, at 35, *Al Ghurair* forecloses that argument.[5]

B

HLD next contests Commerce's finding that the "process of assembly or completion in Brunei or the Philippines was minor compared to that of integrated steel mills in China." Appx01014. The company argues that the statute requires the Department to determine whether a respondent's manufacturing processes in a third country "are *mere* assembly or completion operations." ECF 33–1, at 44 (emphasis added). It further contends that "[o]nly if the answer is 'yes' " to that question should Commerce decide "whether the assembly or completion is minor or insignificant." *Id*. (citing 19 U.S.C. § 1677j(b)(1)(B), (C)).

Relatedly, HLD asserts that its operations in Brunei and the Philippines are "manufacturing," which it maintains is different from "assembly or completion." *Id.* at 48. According to the company, its "manufacturing process turns a sheet of steel into . . . finished [oil piping] that is ready to be put into service . . . ," *id*. at 52, a much more extensive process than mere "screwdriver assembly operations," *id*. at 45 (quoting Statement of Administrative Action Accompanying the

[5] HLD also challenges Commerce's statement that the cost of the production of steel "is relevant to whether a producer would reasonably move its further processing across borders to avoid an order." Appx01007. The company contends that the Department previously disclaimed the relevance of intent for purposes of anti-circumvention. *See* ECF 33–1, at 17 (citing *Certain Corrosion-Resistant Steel Products from Taiwan*, Issues and Decision Memorandum at 20 (Dep't Commerce June 1, 2021)). Because Commerce provided several reasons for comparing the production of oil piping in Brunei and the Philippines to steel production in China, any inconsistency by the Department in this passing remark is harmless error. *Cf. SolarWorld Americas*, 962 F.3d at 1359 (Commerce's alleged error was harmless when it "had essentially no impact on [a respondent's] antidumping duty rate").

Uruguay Round Agreements Act (SAA), H.R. Doc. 103–316, vol. 1, 1994 U.S.C.C.A.N. 4040, 4216).[6]

The statute, however, does not "contemplate a distinction between manufacturing and completion or assembly." *Macao Com. & Indus. Spring Mattress Mfr. v. United States*, 437 F. Supp. 3d 1324, 1329 (CIT 2020). We know this because the statute equates "completion or assembly" with "production process." *See* 19 U.S.C. § 1677j(b)(2)(C) (directing Commerce, "[i]n determining whether the process of assembly or completion is minor or insignificant," to "take into account" various considerations, including "the nature of the *production process* in the [third] country") (emphasis added). A dictionary defines "manufacturing" as "[t]he action or process of manufacturing something; *production*, fabrication." Oxford English Dictionary (online edition) (emphasis added). Because the statute treats "completion or assembly" as synonymous with "production process,"[7] the Department was not required to first make a specific finding as to the former terms as HLD contends.

Instead, Commerce's duty was to determine whether HLD's "completion or assembly" of oil piping in Brunei and the Philippines was "minor or insignificant" given the criteria outlined in § 1677j(b)(2). The Department did exactly that, explaining at length that "[t]he vast majority of the production process necessary to produce [oil piping] occurs in China." Appx01013. As the company fails to challenge that determination—instead placing all its argument eggs in its statutory interpretation basket—the court sustains Commerce's "minor or insignificant" finding as supported by substantial evidence.

C

Finally, HLD contests Commerce's determination that anti-circumvention measures were "appropriate." Appx01016; *see also* 19 U.S.C. § 1677j(b)(1)(E) (requiring the Department to "determine[ ] that action is appropriate under this paragraph to prevent evasion" of a duty order). The company contends that such a finding was not appropriate here because oil piping from Brunei and the Philippines has "only a minimal presence on the U.S. market." ECF 33–1, at 55. It also complains that Commerce has not given an adequate explanation for self-initiating the investigation. *Id*. at 55–59. As the gov-

[6] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 66 F.4th 968, 972 (Fed. Cir. 2023) (quoting 19 U.S.C. § 3512(d)).

[7] Thus, the SAA's reference to "screwdriver assembly operations" plainly alludes to production operations in a third country that are "minor or insignificant." 19 U.S.C. § 1677j(b)(1)(C).

ernment responds, *see* ECF 34, at 42–44, however, the statute does not require the Department to either explain why it initiates an anti-circumvention investigation or consider the extent to which a product under investigation has penetrated the U.S. market.

What the statute instead directs Commerce to consider before taking anti-circumvention action are patterns of trade, whether the manufacturer of the inputs is affiliated with the producer in the third country who assembles or completes the product, and whether shipments of the inputs to the third country have increased since the original duty order was imposed. *See* 19 U.S.C. § 1677j(b)(3). As the government argues, *see* ECF 34, at 40–41, that's what the Department did. *See* Appx01039–01040. Because the agency considered those criteria before acting, it necessarily considered whether such action was "appropriate" for purposes of § 1677j(b)(1)(E).[8]

* * *

The court denies HLD's motion for judgment on the agency record and instead grants judgment to the government and Defendant-Intervenors. *See* USCIT R. 56.2(b). A separate judgment will issue. *See* USCIT R. 58(a).

Dated: January 23, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

[8] HLD also asserts—without laying any foundation for the argument—that "Commerce must justify why it overturned the ITC's well-reasoned exclusion of [Brunei and the Philippines] from its affirmative injury determinations." ECF 33–1, at 60. The Commission's material injury determination in an antidumping or countervailing duty proceeding, however, has no bearing on Commerce's obligations under the statute's anti-circumvention provisions.

Slip Op. 24–7

PHOENIX METAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and CAST IRON SOIL PIPE INSTITUTE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 23–00048

[The Government's Motion for Voluntary Remand is Denied.]

Dated: January 23, 2024

Gregory S. Menegaz, *Alexandra H. Salzman*, *J. Kevin Horgan*, and *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Phoenix Metal Co., Ltd.

Liridona Sinani, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Nicholas A. Morales*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, D.C.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cast Iron Soil Pipe Institute.

OPINION AND ORDER

Katzmann, Judge:

Defendant the United States ("the Government") moves for a voluntary limited remand of this case to allow United States Customs and Border Protection ("Customs") to perform certain actions that the Government states will account for the recent decision by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Royal Brush Manufacturing, Inc. v. United States*, 75 F.4th 1250, 1254 (Fed. Cir. 2023). Plaintiff Phoenix Metal, Inc. ("Phoenix") opposes the motion. The court denies the Government's motion for the reasons explained below. In so doing, the court intimates no view as to the ultimate outcome of the underlying litigation.

BACKGROUND

This case involves a challenge by Phoenix, a foreign importer of cast iron soil pipe, to three actions undertaken by Customs in relation to an evasion investigation under the Enforce and Protect Act ("EAPA"): Customs's initiation of the investigation and imposition of interim measures against Phoenix, Customs's affirmative determination of evasion, and Customs's subsequent administrative review affirming that determination. *See* 19 U.S.C. § 1517; Letter from Customs to Phoenix, re: Notice of Initiation of Investigation and Interim Measures – EAPA Consol. Case 7621 (Mar. 28, 2022), P.R. 73; Letter from Customs, re: Notice of Determination as to Evasion (Sept. 6, 2022),

P.R. 155[1]; Letter from Customs to Phoenix and Cast Iron Soil Pipe Inst., re: Administrative Review of Determination of Evasion (Jan. 18, 2023), P.R. 165.

On August 9, 2023, Phoenix moved for judgment on the agency record. *See* Pl.'s Br. in Support of Mot. For J. on the Agency R., Aug. 9, 2023, ECF No. 30 ("Pl.'s MJAR"); USCIT R. 56. That motion is now pending before the court. In it, Phoenix argues (*inter alia*) that Customs unlawfully withheld confidential information from Phoenix during the preliminary and investigative stages of the underlying proceeding. Pl.'s MJAR at 23–25. Phoenix also argues that Customs unlawfully deprived it of the right to rebut information contained in Customs's on-site verification report. *Id.* at 26–37. Phoenix seeks a remand to Customs "with instructions to lift all current enforcement measures and, if necessary, re-commence its EAPA investigation." *Id.* at 45–46.

Relevant to these arguments is the Federal Circuit's July 27, 2023 decision in *Royal Brush*, 75 F.4th 1250. Addressing a constitutional due process challenge to Customs's conduct of an EAPA evasion investigation, the Federal Circuit held that "[t]here is no legitimate government interest here in refusing to provide confidential business information to Royal Brush when all government concerns about the necessity of secrecy can be alleviated by issuing a protective order." *Id.* at 1259. *Royal Brush* postdated the evasion determinations underlying this case but predated Phoenix's pending Motion for Judgment on the Agency Record.

The Government filed the instant motion for voluntary remand on October 31, 2023. *See* Def.'s Partial Consent Mot. for Voluntary Remand, Oct. 31, 2023, ECF No. 32 ("Gov't Mot.").[2] Phoenix filed a response in opposition to that motion on November 21, 2023. *See* Pl.'s Resp. to Def.'s Mot. for Voluntary Remand, Nov. 21, 2023, ECF No. 35 ("Pl.'s Resp.").

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[1] Customs determined as follows:

> [S]ubstantial evidence exists demonstrating that, by means of material false statements or material omissions, Phoenix Metal entered Chinese-origin soil pipe subject to the [Antidumping/Countervailing Duty] Orders and failed to pay the requisite duties. While evidence on the record suggests that Phoenix Metal comingled Cambodian-origin and Chinese-origin soil pipe in its entries of soil pipe into the United States, because no reliable evidence exists to differentiate between Phoenix Metal's Cambodian-origin and Chinese-origin soil pipe, [Customs] determines that all of Phoenix Metal's entries of soil pipe into the United States during the POI are Chinese-origin based on adverse inferences and Phoenix Metal's aforementioned relationships with Chinese suppliers of soil pipe.

Id. at 32.

[2] Defendant-Intervenor, the Cast Iron Soil Pipe Institute, consents to the motion. Gov't Mot. at 1.

DISCUSSION

The Government initially frames its motion as a request "that the Court enter a limited voluntary remand in this case for up to 90 days so that [Customs] may reconsider or further explain its evasion determination in light of [*Royal Brush*, 75 F.4th 1250]." Gov't Mot. at 1. But the Government proceeds to clarify that the scope of its remand request is limited to allowing Customs to perform two actions: "to provide the parties access to business confidential information," and to "further explain its decision to reject any information that Customs deemed to be 'new factual information' during the investigation." Gov't Mot. at 5. The court holds that neither proposed action warrants remand at this time.

The Government may request a so-called "voluntary remand" to allow an agency to reconsider its own determination while a challenge to that determination is pending before the court. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). The standard the court applies in determining whether to grant such a request depends on the underlying circumstances: the Federal Circuit has outlined a "taxonomy" of potential scenarios (and their accompanying standards), two of which are relevant to this case. *Id.* at 1028. First is where the request is based on "intervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation." *Id.* Here, "a remand is generally required if the intervening event may affect the validity of the agency action. *Id.* The second relevant scenario is where the Government, in the absence of any intervening event, seeks remand to allow the agency to "reconsider its previous position":

> [The agency] might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies.

Id. at 1029. In this type of situation, remand is subject to the reviewing court's discretion and "usually appropriate" if the request is based on a "substantial and legitimate" concern. *Id.* The phrase "substantial and legitimate," in turn, refers to situations where "1) [the agency] provide[s] a compelling justification for its remand request, 2) the need for finality—although an important consideration—does not outweigh the justification for voluntary remand presented by [the agency], and 3) the scope of [the] remand request is appropriate." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 67, 71, 882 F. Supp. 2d 1377, 1381 (2013) (internal quotation marks and citation

omitted) (quoting *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005)).

The court concludes that the Government's arguments for remand, in view of these principles, are unpersuasive.

I. Supplementing the Record with Business Confidential Information Is Not an Appropriate Ground for Remand

As noted, the Government asserts that a "limited voluntary remand" is necessary to allow Customs, in light of *Royal Brush*, 75 F.4th 1250, to "reconsider the actions it took with respect to procedural steps leading up to the final decision; specifically, to provide the parties access to confidential business information." Gov't Mot. at 1, 3. The Government does not establish that voluntary remand is warranted on either of the relevant grounds identified by the Federal Circuit in *SKF USA*.

First, while the Government's remand request might appear to be based on "intervening events outside of the agency's control, for example, a new legal decision," the Government's motion does not ultimately contemplate Customs's potential reconsideration of the final evasion decision's ultimate validity or argue that the "intervening event" of *Royal Brush* "may affect the validity of the agency action." *SKF USA*, 254 F.3d at 1028. It proposes instead that Customs reconsider "the actions it took with respect to procedural steps leading up to" the decision. Gov't Mot. at 3. That is too attenuated a link between the remand's stated purpose and the validity of the final agency action. It is further attenuated by the specification that Customs's reconsideration would merely comprise the act of "provid[ing] the parties access to confidential business information." Gov't Mot. at 3. Without further explanation, such a narrowly tailored proposal does not justify granting an "intervening events"–based remand request as outlined in *SKF USA*.

Nor does the Government's request satisfy the Federal Circuit's "substantial and legitimate concern" standard for remand requests lodged "in the absence of any intervening event." *SKF USA*, 254 F.3d at 1029.[3] The Government's sole justification for remand is that "Customs now intends to provide access to the confidential business information on the administrative record of this proceeding to Phoenix's authorized representatives under a protective order." Gov't Mot.

[3] Although this case evidently involves the "intervening event" of *Royal Brush*, the Government rests its argument for remand on the "substantial and legitimate" framework that the Federal Circuit identified as applying to circumstances that do not involve an intervening event. Gov't Mot. at 2 (quoting *SeAH Steel Corp. v. United States*, 34 CIT 605, 637, 704 F. Supp. 2d 1353, 1378 (2010)); *SKF USA*, 254 F.3d at 1029.

at 3.[4] But the practical impact of this disclosure is unclear: as Phoenix notes, Pl.'s Resp. at 3, all parties to this litigation have had access to the information at issue since the court's Protective Order on March 31, 2023. *See* Protective Order, Mar. 31, 2023, ECF No. 18. Even supposing, moreover, that providing this access on the administrative record would somehow meaningfully impact this litigation, the Government does not explain why this action must take place now. If the court orders a remand upon considering Phoenix's pending Motion for Judgment on the Agency Record, Customs will have an opportunity to perform the actions that the Government specifies in the instant motion. *See* Pl.'s MJAR.

II. Further Explanation of Customs's Rejection of Phoenix's Submissions as "New Factual Information" Is Not an Appropriate Ground for Remand

The Government also asserts that remand is necessary to allow Customs to further explain why it rejected certain of Phoenix's rebuttal submissions as "New Factual Information"—an action that Phoenix argues was unlawful in its separate Motion for Judgment on the Agency Record. *See* Gov't Mot. at 3; Pl.'s MJAR at 36 (citing 19 C.F.R. § 165.23(c)(1)). This request is unsupported by any independent justification—it appears to trail behind the Government's primary request for remand on the confidential information issue. Because the court denies that primary request for the reasons explained above, the court denies this ancillary request as well.

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[4] The Government cites the court's recent order in the separate case of *Newtrend USA Co. v. United States*, No. 22–347, as an instance where the court has granted a "similar request for a limited remand to allow Customs the opportunity to reconsider or further explain its evasion determination in light of . . . *Royal Brush*." Gov't Mot. at 3–4 n.1 (citing Order, *Newtrend USA Co. v. United States*, No. 22–347 (Oct. 20, 2023), ECF No. 68 ("*Newtrend* Order")). That order is not meaningfully analogous for the simple reason that all parties in that case agreed that a voluntary remand, in principle, was appropriate—the "only dispute" was over the remand order's scope. *Newtrend* Order at 6.

Also non-supportive of the Government's position is the court's opinion and order in *Far East American, Inc. v. United States*, 47 CIT __, Slip Op. 23–176 (Dec. 14, 2023). In that case, the court granted the Government's motion for voluntary remand on *Royal Brush*' confidential-information issue over the objection of all plaintiffs. *Id.* at 2. But the court conditioned remand on that issue on the non-dispositive nature of a separate, primary issue whose expeditious resolution was a "substantial and legitimate concern" justifying remand in its own right. *Id.* at 10–11 ("The court will also grant the Government's motion for [Customs] to *reconsider its determination* consistent with the requirement to share confidential information in light of [*Royal Brush*]. However, compliance with [*Royal Brush*] is necessary only to the extent that Commerce's negative covered merchandise determination is not determinative based on the record before [Customs]." (emphasis added)).

CONCLUSION

The Government asks the court to pause briefing on the merits of this case with a remand order of carefully circumscribed scope. But this request, as currently framed, is supported neither by a "compelling justification" nor any showing that the proposed scope is "appropriate." *Ad Hoc Shrimp*, 37 CIT at 71, 882 F. Supp. 2d at 1381. Of course, Customs will later have a chance to perform the actions outlined in the Government's motion if the court issues a remand order upon consideration of Plaintiff's pending Motion for Judgment on the Agency Record. The court is accordingly unpersuaded by the Government's argument that a preemptive limited remand is appropriate or necessary at this stage.

In its motion for remand, the Government also requested "that the Court stay briefing on Phoenix's motion for judgment on the agency record." Gov't Mot. at 5. In consideration of this request, the court will set a new deadline of two weeks from the issuance of this order for Defendant and Defendant-Intervenor to submit their response briefs. *See* USCIT R. 56.2(a)(1).

For the foregoing reasons, the court denies Defendant's motion for a voluntary remand. Defendant and Defendant-Intervenor are ordered to file their responses to Plaintiff's Motion for Judgment on the Agency Record within 14 days of this order.

SO ORDERED.

Dated: January 23, 2024
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 24–8

FRASERVIEW REMANUFACTURING INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Timothy M. Reif, Judge
Court No. 22–00244

[Denying defendant's motion to dismiss.]

Dated: January 25, 2024

Heather Jacobson, Nakachi, Eckhardt & Jacobson, P.C., of Seattle, WA, argued for plaintiff Fraserview Remanufacturing Inc.

Mathias Rabinovitch, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for defendant United States. With him on brief were *Elisa S. Solomon*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*. Director, *Aimee Lee*, Assistant Director and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel on the brief was *Sabahat Chaudhary*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Reif, Judge:

Fraserview Remanufacturing Inc. ("plaintiff") brings the instant case to challenge the designation by U.S. Customs and Border Protection ("Customs") of 80 entries of plaintiff's softwood lumber imports from Canada (the "entries") as "deemed liquidated" while the entries were subject to suspension of liquidation instructions from the U.S. Department of Commerce ("Commerce"). Compl. ¶ 1, ECF No. 2; *see* Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl. Resp. Br."), ECF No. 11.

Plaintiff's entries were subject to the first administrative reviews by Commerce of the antidumping duty ("AD") and countervailing duty ("CVD") orders on certain softwood lumber products from Canada. *See* Compl. ¶¶ 29–30; *Certain Softwood Lumber Products from Canada: Initiation of Antidumping and Countervailing Duty Administrative Reviews*("*Initiation of Administrative Review*"), 84 Fed. Reg. 12,209 (Dep't of Commerce Apr. 1, 2019); *see also Antidumping Duty Order and Partial Amended Final Determination* ("*Softwood Lumber AD Order*"), 83 Fed. Reg. 350 (Dep't of Commerce Jan. 3, 2018); *Certain Softwood Lumber Products from Canada: Amended Final Countervailing Duty Determination and Countervailing Duty Order* ("*Softwood Lumber CVD Order*"), 83 Fed. Reg. 347 (Dep't of Commerce Jan. 3, 2018); *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 Fed. Reg. 76,519 (Dep't of Commerce Nov. 30, 2020);

Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review; 2017–2018, 85 Fed. Reg. 77,163 (Dep't of Commerce Dec. 1, 2020).

Plaintiff observes that Customs acted unlawfully in designating the 80 entries as "deemed liquidated" and argues that the U.S. Court of International Trade ("USCIT" or the "Court") has subject matter jurisdiction to hear the instant case pursuant to 28 U.S.C. § 1581(i). *See* Compl. ¶¶ 1–3. Plaintiff requests that the Court "issue a declaratory judgment that the entries in question remain suspended" and, further, order Customs to "correct [the] liquidation status designation" of these entries in the ACE system. *Id.* ¶ 4. Alternatively, plaintiff requests that the Court "set aside liquidation of the entries as in error, and . . . direct [Customs] to place the entries back in suspended liquidation status or to reliquidate the subject entries in accordance with the final liquidation instructions to be issued by Commerce." *Id.*

Defendant, the United States ("defendant"), maintains that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) and moves to dismiss the instant case pursuant to USCIT Rule 12(b)(1). *See* Def.'s Mot. to Dismiss the Compl. ("Def. Mot. to Dismiss") at 1, ECF No. 10; Def.'s Reply in Supp. of its Mot. to Dismiss ("Def. Reply Br.") at 1–2, ECF No. 14; USCIT R. 12(b)(1).

Defendant asserts that although Customs acknowledged that its designation in the ACE system of plaintiff's 80 entries as "deemed liquidated" was erroneous, *see* Def. Mot. to Dismiss, Decl. of Kathy Brenske ("Brenske Decl."), Attach. 2 at 4, ECF No. 10–6, plaintiff failed to timely protest this designation in accordance with section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514(a).[1] *See* Def. Mot. to Dismiss at 12–13 (quoting 19 U.S.C. § 1514(a)); Def. Reply Br. at 3, 7, 13. Defendant argues that "if plaintiff had filed a timely protest pursuant to 19 U.S.C. § 1514(a), plaintiff could have challenged" before this Court "any adverse decision" by Customs pursuant to 28 U.S.C. § 1581(a). Def. Mot. to Dismiss at 12. Defendant contends, however, that the failure of plaintiff to timely protest Customs' decision forecloses plaintiff from now invoking the Court's jurisdiction under 28 U.S.C. § 1581(i). *See id.* at 11.

For the reasons discussed below, the court denies defendant's motion to dismiss. In addition, the court declares that Customs' designation of plaintiff's entries as deemed liquidated is null and void and that, as a result, such designation is set aside. The court orders Customs to correct the liquidation status of plaintiff's entries in ac-

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

cordance with Commerce's original set of instructions, pending the result of any administrative proceedings or binational panel review under the United States Mexico Canada Agreement. The court directs Customs further to file with the court the corrected liquidation status of plaintiff's entries within 90 days of the date of this opinion and order.

BACKGROUND

Plaintiff is a Canadian exporter of softwood lumber that, together with the related entity 0752615 B.C. Ltd., does business under the commercial name Fraserview Cedar Products.[2] Compl. ¶ 5.

On April 28, 2017, and June 30, 2017, Commerce ordered the suspension of liquidation and collection of CVD and AD duty cash deposits on entries of softwood lumber from Canada after affirmative preliminary CVD and AD determinations. *Id.* ¶¶ 23–24. On August 26, 2017, Commerce instructed Customs to lift the suspension of liquidation of softwood lumber entries in the CVD investigation and stop collecting CVD duties. Def. Mot. to Dismiss at 4; Compl. ¶ 26. In accordance with Commerce's directions, plaintiff paid the relevant AD cash deposits. Def. Mot. to Dismiss at 5 n.2; Compl. ¶ 25.

On January 3, 2018, Commerce published its final AD and CVD Orders with respect to imports of softwood lumber from Canada. *See Softwood Lumber AD Order*, 83 Fed. Reg. 350; *Softwood Lumber CVD Order*, 83 Fed. Reg. 347. On January 21, 2019, Fraserview timely requested an AD administrative review. Compl. ¶¶ 29–30.

On April 1, 2019, Commerce initiated the first administrative reviews of the Softwood Lumber AD and CVD Orders. *Id.* The first period of review ("POR 1") with respect to the Softwood Lumber AD Order was from June 30, 2017, through December 31, 2018, and the POR 1 with respect to the Softwood Lumber CVD Order was from April 28, 2017, through December 31, 2018. *See Initiation of Administrative Review*, 84 Fed. Reg. 12,209. The 80 entries at issue in the instant case were entered in November and December 2017, during the POR 1 for the Softwood Lumber AD Order. *See* Mot. to Dismiss at 2, 5; Compl. ¶¶ 1, 42.

On March 19, 2020, Commerce transmitted Message No. 0079405 to Customs, in which Commerce instructed Customs not to liquidate any of plaintiff's entries. *See* Mot. to Dismiss, Ex. 2, Commerce Message No. 0079405 ("Message No. 0079405"), ECF No. 10–2; Def. Reply

[2] Customs' records indicate that the importer of record was "0752615BC LTD. FRASERVIEW REMANU," Def. Mot. to Dismiss at 1 n.1, a party related to plaintiff, which asserts that it was "adversely affected or aggrieved" by Customs' designation of plaintiff's entries as deemed liquidated. Compl. ¶¶ 5, 17 (citing 28 U.S.C. § 2631(i)).

Br., Decl. of Nicholas Bishop ("Bishop Decl.") ¶ 5, ECF No. 14–1. However, Customs erroneously marked plaintiff's entries for liquidation when implementing Commerce's instructions.[3] *See* Bishop Decl. ¶ 6.

Next, Customs made yet another mistake. Customs failed to process some of plaintiff's entries that CBP had (erroneously) marked for liquidation. *Id.* ¶ 9. Customs attributed this failure to "system errors." *Id.* Thereafter, on September 2–3, 2020, Customs committed a third error: Customs determined that these entries — which Customs had erroneously marked for liquidation and then had failed actually to process — had nonetheless "liquidated by operation of law" on August 7, 2020, pursuant to 19 U.S.C. § 1504(d). *Id.* Section 1504(d) provides that entries are liquidated by operation of law if Customs fails to liquidate the entries within six months after CBP receives notice that Commerce has removed the suspension of liquidation. 19 U.S.C. § 1504(d); Bishop Decl. ¶ 9. Consequently, on September 2–3, 2020, Customs concluded that the entries had liquidated by operation of law on August 7, 2020, because Customs assumed incorrectly — based on its own erroneous actions — that Commerce had removed the suspension of liquidation on February 7, 2020. Bishop Decl. ¶ 9; Brenske Decl., Attach. 2 at 4. Based on this conclusion, on September 2–3, 2020, Customs published bulletin notices of deemed liquidation with respect to these entries. *See* Brenske Decl., Attach. 1, ECF 10–5. The notices provide two dates — a "liquidation date" and a "posted date." *Id.* The deemed liquidation date is August 7, 2020, and the posting date is either September 2, 2020, or September 3, 2020, depending on the entry. *Id.*

In May 2021, plaintiff discovered that Customs had updated the ACE system to indicate that the 80 entries were "deemed liquidated" by operation of law pursuant to 19 U.S.C. § 1504(d). *See* Compl. ¶ 43. On June 3, 2021, counsel for plaintiff contacted Customs to rectify the erroneous "deemed liquidation" designations of the 80 entries. *Id.* ¶ 44.

Import Specialist Kathy Brenske ("Brenske") of Customs responded and indicated her agreement with the position of plaintiff that Customs had erroneously liquidated the 80 entries. *See* Brenske Decl., Attach. 2 at 4. Brenske stated, however, that these entries were deemed liquidated on August 7, 2020, and, consequently, that the

[3] Commerce's Message stated that it was effective as of February 7, 2020. Message No. 0079405. February 7, 2020, is the date on which Commerce published in the Federal Register the "notice of recission in part" of the administrative review. *Id.* This notice served as the notice to Customs that Commerce had removed the suspension of liquidation for certain entries — notably *not* including the entries at issue in this case. *Id.*; 19 U.S.C. § 1504(d); *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1237 (Fed. Cir. 2007).

statutory timeline of 180 days for plaintiff to file a protest with respect to Customs' decision had passed by the point at which plaintiff contacted Customs. *See id.* Accordingly, Brenske informed plaintiff that "nothing [could] be done legally" with respect to the deemed liquidation of the 80 entries, as the deadline to file a "timely protest" had passed. *Id.* at 2–5.

For this reason, Customs declined plaintiff's request to rectify the liquidation status of these entries in the ACE system.[4] *Id.* On August 23, 2022, plaintiff filed its complaint with the USCIT, asserting subject matter jurisdiction under 28 U.S.C. § 1581(i). *See* Compl.; Def. Mot. to Dismiss at 7. On October 26, 2023, the court heard oral argument. *See* Oral Arg. Tr., Oct. 26, 2023, ECF No. 27.

JURISDICTION AND STANDARD OF REVIEW

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Plaintiff files its action under 28 U.S.C. § 1581(i)(1)(B) and (D), which provide:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (A) . . .
>
> (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; [or]
>
> (C) . . .
>
> (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)-(h) of this section.

[4] In the same email exchange, counsel for Fraserview contested the deemed liquidation of a later batch of 830 entries. Brenske Decl., Attach. 2. Customs initially stated that protest was unavailable as to these entries as well, as more than 180 days had passed since the date of deemed liquidation as stated in the bulletin notices. *Id.* at 4. However, in a subsequent message Customs reversed its position and permitted protest of the deemed liquidation of the 830 entries because 180 days had not yet elapsed since the posting of the bulletin notices of deemed liquidation. *Id.* at 2. Because Customs' reversal allowed a protest within 180 days of the posting of the bulletin notices, and not within 180 days of the date of the actual deemed liquidation, plaintiff — at Customs' encouragement — protested the deemed liquidation of those entries within 180 days of the date of the notice of deemed liquidation. *Id.* Notwithstanding Customs' position, plaintiff maintains that protest was unavailable by law as to *both* sets of entries. Compl. ¶ 4, *Fraserview Remanufacturing Inc. v. United States*, Court No. 23–00063, ECF No. 2.

Section 1581(i) is the Court's "residual" jurisdictional provision, *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citing *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994)), which allows the Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted).

However, the "scope" of § 1581(i) is "strictly limited," *id.*, and jurisdiction under this provision "may not be invoked when jurisdiction under another [sub]section of § 1581 *is or could have been available*, unless the relief provided under that other subsection would be manifestly inadequate." *Consol. Bearings Co. v. United States*, 25 CIT 546, 549, 166 F. Supp. 2d 580, 583 (2001) (alterations in original) (internal quotation marks omitted) (quoting *Ad Hoc Comm. Of Fla. Producers of Gray Portland Cement v. United States*, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998)); *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983) (citation omitted) ("[T]he legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service.").

"An inquiry into § 1581(i) jurisdiction is thus a two-step process." *ARP Materials, Inc. v. United States*, 47 F.4th 1370, 1377 (Fed. Cir. 2022). First, the court considers whether jurisdiction under a subsection other than § 1581(i) was available. *Erwin Hymber Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019). Second, "if jurisdiction was available under a different subsection of § 1581," the court then examines "whether the remedy provided under that subsection is 'manifestly inadequate.'" *Id.* (citing 28 U.S.C. § 1581(i)).

The party that seeks to invoke the Court's jurisdiction "bears the burden of demonstrating manifest inadequacy." *Intercontinental Chems., LLC v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1232, 1241 (2020) (citing *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987)).

LEGAL FRAMEWORK

Section 1581(a) grants the Court exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930" (the "Tariff Act"). 28 U.S.C. § 1581(a).

19 U.S.C. § 1515 provides for the administrative review of protests filed under § 1514. 19 U.S.C. § 1514(a) in turn states:[5]

> [A]ny clerical error, mistake of fact, or other inadvertence . . . adverse to an importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to —
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry . . . including the liquidation of an entry pursuant to . . . section 1504 of this title . . .
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . . .

19 U.S.C. § 1514(c)(3) provides the protest window and states that a "protest of a decision, order, or finding described in subsection (a) shall be filed with the Customs Service within 180 days after but not before . . . (A) [the] date of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made."

Whether an entry has been deemed liquidated by operation of law is governed by 19 U.S.C. § 1504. When Commerce lifts the suspension of liquidation, § 1504(d) requires Customs to liquidate the entries within six months after receiving notice of the removal of suspension from Commerce. If an entry is not liquidated within six months of Customs receiving notice, the entry "shall be treated as having been liquidated at the rate of duty . . . asserted by the importer of record

[5] The court sets forth § 1514(a) in its entirety here because the ensuing discussion of § 1514(a)(5) and § 1514(c)(3) implicate the remaining subsections of § 1514(a).

[upon entry]." *Id.*; *see also Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1236 (Fed. Cir. 2007) ("Under our precedent, the rate of duty that applies to a deemed liquidation under 19 U.S.C. § 1504(d) is the duty rate claimed on the importer's entry papers.") (citations omitted).

DISCUSSION

I. Whether subject matter jurisdiction to hear the instant case "is or could have been available" under 28 U.S.C. § 1581(a)

A. Positions of the parties

This case arises out of a challenge to Customs' erroneous determination that certain of plaintiff's entries were deemed liquidated by operation of law while the entries were subject to suspension of liquidation instructions issued by Commerce. Compl. ¶ 1. Defendant has filed a motion to dismiss, arguing that, because jurisdiction "could have been available" under § 1581(a) had plaintiff filed a timely protest to the bulletin notices of deemed liquidation, plaintiff cannot establish subject matter jurisdiction pursuant to § 1581(i). Def. Mot. to Dismiss at 7. Plaintiff, by contrast, urges the court to deny defendant's motion to dismiss because, plaintiff argues, the entries remain unliquidated. Pl. Resp. Br. at 2. According to plaintiff, because the entries remain unliquidated, Customs' actions were not protestable under § 1514(a). *Id.* at 3. Further, plaintiff alleges that, because Customs' actions were not subject to protest under § 1514(a), jurisdiction under § 1581(a) is not and was not ever available. *Id.* at 2.

B. Analysis

Customs' posting of the bulletin notices of deemed liquidation while liquidation of the subject entries remained suspended was not a protestable decision under 19 U.S.C. § 1514(a). As such, jurisdiction under 28 U.S.C. § 1581(a) was not, nor could it have been, available. Therefore, plaintiff has properly invoked this Court's residual jurisdiction under 28 U.S.C. § 1581(i). *LG Elecs. U.S.A., Inc. v. United States*, 21 CIT 1421, 1429–30, 991 F. Supp. 668, 676–77 (1997).

1. Whether decisions under 19 U.S.C. § 1514(a)(5) are protestable only after liquidation

To understand most clearly the legal issue before the court, the court begins with a brief description of the process by which entries previously subject to suspension of liquidation are liquidated, as well

as the purpose of liquidation by operation of law under § 1504(d). The court then addresses whether 19 U.S.C. § 1514(a)(5) allows protest only after the liquidation of the entries.

When Commerce issues an antidumping duty order, Commerce is required to direct Customs to suspend the liquidation of all entries of the subject merchandise.[6] *See* 19 U.S.C. § 1673b(d)(2). An importer whose entries are subject to the order is required to make cash deposits of the estimated duties. *See id.* § 1673e(a)(3). Interested parties may request an administrative review of the final antidumping order. *Id.* § 1675. During the administrative review, the liquidation of the importer's entries will remain suspended. *See, e.g.*, *Am. Power Pull Corp. v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1296, 1297 (2015); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1000 (Fed. Cir. 2003).

In general, Customs liquidates entries when Customs receives notice from "[Commerce], other agency, or a court with jurisdiction over the entr[ies]" that the suspension of liquidation that was in place has been "removed." 19 U.S.C. § 1504(d). Occasionally, however, Customs fails to liquidate entries promptly following the receipt of such notice. *See, e.g.*, *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1309–10 (Fed. Cir. 2005). Consequently, to provide finality to importers, the statute requires that Customs liquidate entries within six months after Customs receives notice of the removal of the suspension of liquidation. *Id.*; 19 U.S.C. § 1504(d). If Customs fails to do so, the merchandise is liquidated by operation of law "at the rate of duty . . . asserted by the importer of record" upon entry. 19 U.S.C. § 1504(d).

In the instant case, Commerce had not removed the suspension of liquidation on September 2–3, 2020, when Customs posted bulletin notices that the entries had liquidated by operation of law under § 1504(d). Brenske Decl., Attach. 2 at 5–6; Bishop Decl. ¶ 9; Message No. 0079405; Mot. to Dismiss at 2–5. Instead, Commerce had instructed Customs specifically that suspension of liquidation of the instant entries was to remain in place. Message No. 0079405; Mot. to Dismiss at 5. The court considers first whether a decision is protestable under § 1514(a)(5) only after an entry has been liquidated. Then, the court turns to whether the instant entries were liquidated.

Plaintiff asserts that a protestable "decision[] . . . as to . . . the liquidation or reliquidation" of entries under § 1514(a)(5), including liquidation by operation of law under 19 U.S.C. § 1504(d), occurs only after the actual liquidation of the pertinent entries. Pl. Resp. Br. at 3

[6] Liquidation is "the final computation or ascertainment of duties" on entries. 19 C.F.R. § 159.1.

(citing 19 U.S.C. § 1514(c)(3)(A)). Plaintiff states that in this case no such liquidation ever occurred. *Id.*

Defendant argues that two decisions of the Federal Circuit support defendant's position that a decision by Customs to post a bulletin notice of liquidation, even when the decision is erroneous or premature, is a protestable decision. Def. Reply Br. at 3–4 (citing *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995) (holding that "all liquidations, whether legal or not, are subject to the timely protest requirement"); *Cemex, S.A. v. United States*, 384 F.3d 1314, 1325 n.14 (Fed. Cir. 2004) (stating that the posting of bulletin notices of liquidation is a protestable decision)).[7] According to defendant in its briefs, because the bulletin notices were protestable, the court need not examine whether the entries were actually liquidated. Def. Reply Br. at 12–13.

The cases that defendant cites — *Cemex* and *Juice Farms* — are inapposite. Def. Reply Br. at 12. In *Juice Farms*, it is true that the Federal Circuit determined that the decision to liquidate the entries in question while suspension of liquidation was in place was a protestable decision. 68 F.3d at 1346. However, the entries in that case were *in fact* liquidated in accordance with 19 U.S.C. § 1500. *Id.* Section 1500 concerns *manual* liquidation. *Aspects Furniture Int'l, Inc. v. United States*, 45 CIT __, __, 510 F. Supp. 3d 1353, 1361 (2021). Unlike 19 U.S.C. § 1504, which covers the purported *deemed* liquidation at issue in this case, § 1500 imposes no requirement that suspension be removed or that Customs receive notice of such removal for liquidation to occur. *Compare* 19 U.S.C. § 1500, *with* 19 U.S.C. § 1504. In the instant case, the suspension of liquidation remained in place and, therefore, none of the statutory requirements for deemed liquidation was satisfied. *See* 19 U.S.C. § 1504(d). For this reason, *Juice Farms* is inapposite to the instant case.

In *Cemex*, the Federal Circuit held that bulletin notices of deemed liquidation were protestable even though the notice to Customs that suspension of liquidation was removed was premature and nonpublic. 384 F.3d at 1320–21. However, there, the suspension of liquidation was in fact removed, and Customs did in fact receive notice of such removal. *Id.* at 1320. By contrast, in the instant case, none of the prerequisites for § 1504(d) was satisfied. Accordingly, the holding in *Cemex* is not apposite to this case.

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[7] Defendant also relies on a more recent, unpublished opinion from the Federal Circuit, *Alden Leeds Inc. v. United States*, 476 F. App'x 393 (Fed. Cir. 2012) (nonprecedential opinion). The court addresses defendant's argument pertaining to *Alden Leeds infra* Section I.B.2.

Moreover, it is notable that the version of § 1514(c)(3)(A) and accompanying regulations that the Federal Circuit applied in *Cemex* required protest within 90 days after the *notice* of liquidation. 19 U.S.C. § 1514(c)(3)(A) (2000); 19 C.F.R. § 159.9(c)(2)(iii) (2003) (requiring protest within 90 days of the posting of notice of deemed liquidation); Miscellaneous Trade and Technical Corrections Act of 2004 ("MTTCA"), sec. 2103, § 1514(a), 118 Stat. 2434.[8] The current version of § 1514(c)(3)(A) requires that protest be filed within 180 days after but not before the *date* of liquidation (rather than the *notice* of liquidation). *See United States v. Great Am. Ins. Co. of N.Y.*, 41 CIT __, __, 229 F. Supp. 3d 1306, 1325 (2017) (stating that an amendment to the reliquidation statute that required reliquidation within 90 days of the original liquidation — and not notice of such liquidation — was "significant because those two dates do not necessarily (or even likely) coincide").

This distinction is critical also in the instant case because the suspension of liquidation was still in place; therefore, deemed liquidation never actually occurred. As such, whether there may have been an actual *notice* of liquidation, there never was a *date* of liquidation as the current statute requires.[9] It follows that the 180-day requirement under § 1514(c)(3)(A) does not apply in this case. Consequently, *Cemex* is inapposite also because the current version of § 1514 requires protest only after an entry has actually deemed liquidated.[10]

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[8] The MTTCA is the amending statute that updated the language to current law and contains an explanation of the prior codification of the law that the *Cemex* court applied. The MTTCA explains that Congress amended § 1514(c)(3)(A) to replace "notice of" liquidation with "date of" liquidation.

[9] Customs has acknowledged that in the context of deemed liquidation, the date of liquidation and the date of notice do not coincide because "in many situations, CBP is unaware of the liquidation by operation of law for some time after it has occurred." *Electronic Notice of Liquidation*, 81 Fed. Reg. 89375–01, 89377 (Dec. 12, 2016). For that reason, Customs may post a bulletin notice of deemed liquidation after the date of deemed liquidation. *Id.*; Brenske Decl., Attach. 1–2. Importers are required to file a protest within 180 days of liquidation, regardless of whether the liquidation is deemed or manual. 19 U.S.C. § 1514(c)(3)(A); 19 C.F.R. § 174.12(e)(1); 19 C.F.R. § 159.9(c)(2)(iii). Therefore, the effect of the 2004 amendment to § 1514(c)(3)(A) was to shorten an importer's time to protest if the importer is unaware that its entries were deemed liquidated prior to Customs posting notice. *See* 19 U.S.C. § 159.9(c)(2)(iii).

[10] The court observes that it is possible that Customs' regulations as currently drafted could permit Customs to post the notice of deemed liquidation more than 180 days after the date on which the deemed liquidation occurred, depriving an importer of the knowledge that deemed liquidation had occurred and, thereby, depriving an importer also of the opportunity to file a protest within the statutorily prescribed period. Notably, the version of 19 C.F.R. § 159.9(c)(2) in place prior to 2017 contained a requirement that Customs post notice of deemed liquidation "within a reasonable period after each liquidation by operation of law." 19 C.F.R. § 159.9(c)(2)(ii) (2016); *Consolidated Fibers, Inc. v. United States*, Slip Op. 17–157, 2017 WL 5665031, at *4 (CIT Nov. 27, 2017) (stating that plaintiff "could have

Moreover, decisions of the Federal Circuit and this Court demonstrate that decisions under § 1514(a)(5) are protestable only after liquidation has actually occurred. For example, in *Chemsol, LLC v. United States*, the Federal Circuit held that a Customs decision to extend the period to liquidate an entry pursuant to § 1504(b) was not protestable under § 1514(a)(5) because such decisions "may only first be challenged before Customs in an administrative protest *after* liquidation." 755 F.3d 1345, 1353 (Fed. Cir. 2014) (emphasis supplied) (citing 19 U.S.C. § 1514(c)(3)); *see also Acquisition 362, LLC v. United States*, 59 F.4th 1247, 1249 (Fed. Cir. 2023) ("Importers that wish to challenge the liquidation of their entries [under § 1514(a)(5)] can do so by filing a protest within 180 days of the liquidation."); *Thyssenkrupp Steel N. Am., Inc. v. United States*, 886 F.3d 1215, 1222 (Fed. Cir. 2018) ("A protest regarding a liquidation under § 1514(a) must be filed within 180 days of the date of liquidation.") (citing 19 U.S.C. § 1514(c)(3)(A)); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 46 CIT __, __, 578 F. Supp. 3d 1333, 1344 (2022) ("[A]s the subject merchandise remains unliquidated[,] the administrative process is incomplete."); *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1273, 1286 (2015) ("[P]rotests may only be filed after liquidation of the entries at issue.") (citing 19 U.S.C. § 1514(c)(3)(A)). Accordingly, defendant's contention that the court need not inquire into the liquidation status of the entries is unsupported by recent decisions of this Court and the Federal Circuit.

In sum, the court concludes that a decision as to the liquidation of an entry under § 1514(a)(5) is protestable only after the entry is liquidated.

2. Whether plaintiff's entries were liquidated

Under § 1514(a)(5), decisions are protestable only after the liquidation of the subject entries. Accordingly, the court considers next whether plaintiff's entries were liquidated.

Plaintiff cites decisions of this Court and the Federal Circuit for the proposition that, under § 1504(d), liquidation by operation of law — termed "deemed liquidation" — can occur only when each of the statutory prerequisites for it has been satisfied. Pl. Resp. Br. at 4–5 (citing *Fujitsu*, 283 F.3d at 1376; *LG Elecs.*, 21 CIT at 1429–30, 991 F.

raised a protest ground that was at least plausible by arguing that the bulletin notice [of deemed liquidation] was not issued within a 'reasonable period' as required by 19 C.F.R. § 159.9(c)(2)(ii)"). However, in 2017 Customs amended its regulations to eliminate the "reasonable period" requirement; in its current form, § 159.9(c)(2)(i) requires Customs to post the notice "when [Customs] determines that each entry has liquidated by operation of law." 19 C.F.R. § 159.9(c)(2)(i). Consequently, if Customs does not "determine[]" that an entry deemed liquidated — and therefore does not post notice — until more than 180 days after the deemed liquidation, Customs' regulations do not provide an opportunity for the importer to protest the deemed liquidation.

Supp. at 676–77; *United States v. Am. Home Assurance Co.*, 35 CIT 585, 591 (2011)). Specifically, the Federal Circuit has held that entries are deemed liquidated when: (1) Commerce removes the suspension of liquidation; (2) Customs receives notice of the removal; and (3) Customs fails to liquidate the entries within six months of receiving such notice. *Fujitsu*, 283 F.3d at 1376 (citing 19 U.S.C. § 1504(d)). Plaintiff maintains that those conditions have not been satisfied here, and that, therefore, liquidation by operation of law has not occurred. Pl. Resp. Br. at 5. Consequently, plaintiff asserts that there has been no protestable decision under 19 U.S.C. § 1514(a). *Id.* at 6–8.

Defendant takes two positions before the court. First, in its briefing, defendant asserted that the bulletin notices were protestable regardless of whether the entries had been liquidated. Def. Reply Br. at 12–16, 19. However, defendant added that, if liquidation by operation of law did occur, it took place on August 7, 2020, the date of deemed liquidation identified in the bulletin notice. *Id.* at 19–20. Then, at oral argument, defendant asserted that the September 2–3, 2020, bulletin notices of deemed liquidation actually liquidated the subject entries, asserting that "nothing happened on August 7." Oral Arg. Tr. at 5:3–10, 46:1–2.

The court concludes that plaintiff's entries were never liquidated because the statutory requirements for deemed liquidation under § 1504(d) were not met. *See Fujitsu*, 283 F.3d at 1376; *Koyo*, 497 F.3d at 1235–36. To the contrary, Commerce instructed Customs specifically that liquidation of plaintiff's entries was to remain suspended. Message No. 0079405. By statute and regulation, liquidation by operation of law cannot occur while the suspension of liquidation is still in place — which it was in this case — and unless Commerce has notified Customs that the suspension of liquidation has been lifted — which Commerce did not do in this case.

This conclusion is consistent with the holdings of this Court. In *LG Electronics U.S.A. v. United States*, for example, the court held that, where liquidation was suspended, bulletin notices of deemed liquidation are "invalid and legally inconsequential, as deemed liquidation can occur only by operation of law." 21 CIT at 1429, 991 F. Supp. at 676. Because "[t]he liquidation did not in fact occur," and "erroneous notice cannot create a deemed liquidation[,]" the statutory period for

protest never began to run.[11] *Id.* at 1429–30, 991 F. Supp. at 676–77; *see also Am. Home Assurance Co.*, 35 CIT at 591 ("[A] deemed liquidation cannot occur while a suspension of liquidation is in place, and . . . Customs has no authority to effect a deemed liquidation."). As these cases make clear, there can be no "decision[] . . . as to" a deemed liquidation while the suspension of liquidation remains in place.[12] [13] 19 U.S.C. § 1514(a)(5).

At oral argument, defendant asserted that the bulletin notices of deemed liquidation operated to liquidate plaintiff's entries. Oral Arg. Tr. at 5:3–10. This assertion is contradicted by the statute and Customs' own regulations, which make clear that a bulletin notice may effectuate liquidation under § 1500 (often termed "manual liquidation"); however, a bulletin notice may *not* effectuate a *deemed liquidation* under § 1504 while liquidation of the subject entries remains suspended.

19 U.S.C. § 1500(e), which covers manual liquidation, requires that Customs "give or transmit . . . notice of such liquidation to the importer . . . in such form and manner as the Secretary shall by regulation prescribe."[14] 19 U.S.C. § 1504, which covers deemed liquidations, creates a specific and different set of prerequisites that de-

[11] Defendant argues that *LG Electronics* is inapposite to this case because the notices of deemed liquidation there were in the context of a court-ordered injunction. Def. Reply Br. at 9. The court does not find defendant's point persuasive. In *LG Electronics*, there were two entries for which deemed liquidation notices were posted, and only one of the two entries was under a court ordered injunction. 21 CIT at 1429 n.16, 991 F. Supp. at 676 n.16. The court noted in a footnote that the injunction provided an *additional* basis that the bulletin notice was ineffective as to that individual entry. *Id.* Defendant argues further that the court's reasoning relied heavily on the fact that the notices were generated automatically. *Id.* at 1429, 991 F. Supp. at 676. However, the court's concern with automatically generated liquidation notices applied only to its reasoning concerning a different set of liquidation notices, which the court labeled "automatic liquidations" and which are not relevant to the instant action. *Id.* As for the "deemed liquidation" notices, the court concluded that the deemed liquidation notices were not protestable because "liquidation was suspended." *Id.* Therefore, "as a matter of law, no deemed liquidation . . . occurred." *Id.*

[12] Defendant also relies on *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1240 (Fed. Cir. 2007), for the proposition — incontestable to be sure — that deemed liquidations are protestable. Def. Mot. to Dismiss at 13; 19 U.S.C. § 1514(a)(5). *Koyo*, however, is inapposite. In that case, the statutory conditions for deemed liquidation were satisfied; therefore, the entries had actually deemed liquidated. *See* Pl. Resp. Br. at 27–28; *Koyo*, 497 F.3d at 1242–43. As noted, neither was true in this case.

[13] Defendant asserts that an incorrect decision that an entry has deemed liquidated is a "decision *as to* liquidation" under § 1514(a)(5). Oral Arg. Tr. at 12:7–19, 25:6–12; 19 U.S.C. § 1514(a)(5) (emphasis supplied). In this case, deemed liquidation did not occur, as suspension of liquidation remained in place, *see Acquisition 362*, 59 F.4th at 1254 (stating that decisions under § 1514(a)(5) may be protested "within 180 days *of liquidation*") (emphasis supplied); accordingly, the erroneous bulletin notice of deemed liquidation is not a protestable decision "as to" or "with respect to" liquidation.

[14] By contrast, the deemed liquidation provision of the statute provides that "[n]otwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated." 19 U.S.C. § 1504(a)(1). Nevertheless, Customs has required by regulation that Customs post a notice of deemed liquidation. *See* 19 C.F.R. § 159.9(c)(2)(i).

termine whether and when liquidation occurs. Customs' regulations set out at 19 C.F.R. § 159.9(c) reflect the way in which the statute distinguishes the legal effect of notice under § 1500 for manual liquidation from the legal effect of notice under § 1504 for deemed liquidation:

> (1) Generally. The notice of liquidation will be dated with the date it is posted electronically on www.cbp.gov for the information of importers. This electronic posting will be deemed the legal evidence of liquidation
>
> . . . .
>
> (2) Exception: Entries liquidated by operation of law.
>
> (i) Entries liquidated by operation of law at the expiration of the time limitations prescribed in [19 U.S.C. § 1504] will be deemed liquidated as of the date of expiration of the appropriate statutory period and will be posted on www.cbp.gov when CBP determines that each entry has liquidated by operation of law and will be dated with the date of liquidation by operation of law.
>
> 19 C.F.R. § 159.9(c).

Accordingly, subsection (c)(1) establishes a general rule that when Customs posts a bulletin notice that Customs has manually liquidated an entry, the bulletin notice causes liquidation to occur and sets the date on which liquidation does occur. 19 C.F.R. § 159.9(c)(1). Subsection (c)(1) and § 174.12(e)(1) provide further that the importer is required to protest the liquidation within 180 days after the date of liquidation as listed in the bulletin notice, and that date of liquidation is always the same as the posted date. *Id.*; *see also id.* § 174.12(e)(1).

By contrast, subsection (c)(2)(i) expressly provides an *exception pertaining to deemed liquidation* to the general rule provided in subsection (c)(1). *Id.* § 159.9(c)(2)(i). Customs' regulations provide that deemed liquidation is to occur at the expiration of the "appropriate statutory period" under § 1504, *not* — as Customs came to maintain at oral argument before the court, *see* Oral Arg. Tr. at 5:3–16 — on the date that the bulletin notice of deemed liquidation is posted. *Id.*; *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1331 (Fed. Cir. 2008) (stating that deemed liquidation occurs "as of the expiration of the appropriate statutory period," not when notice is posted). Consistent with the regulations, the instant bulletin notices state that the entries were deemed liquidated and that the liquidation date was

August 7, 2020. Brenske Decl., Attach. 1.[15] However, and as described above, deemed liquidation did not occur in this case because Commerce stated explicitly that the suspension of liquidation as to these entries was to remain in place. Message No. 0079405. Therefore, the court concludes that the instant bulletin notices did not liquidate plaintiff's entries.

Even though the entries were not liquidated, defendant maintains that the bulletin notices of deemed liquidation were protestable because this case is governed by § 1514(c)(3)(B), not § 1514(c)(3)(A). Def. Reply Br. at 20–21 (citing *Alden Leeds Inc. v. United States*, 476 F. App'x 393, 397 (Fed. Cir. 2012) (nonprecedential opinion)).[16] Subparagraph (B) requires protest within 180 days after but not before "the date of the decision," regardless of whether liquidation has occurred. 19 U.S.C. § 1514(c)(3)(B). Defendant argues on this basis that Customs made a "decision[] . . . as to . . . liquidation" under § 1514(a)(5) and that subparagraph (B) requires protest within 180 days of that decision. Def. Reply Br. at 19–20.

Defendant's contention that subparagraph (B) applies to a "decision[] . . . as to . . . the liquidation of an entry" under § 1514(a)(5) is unpersuasive. The statute and Customs' regulations demonstrate that the date that triggers the protest window for a deemed liquidation under § 1514(a)(5) is the date of liquidation pursuant to subparagraph (A). 19 U.S.C. § 1514(c)(3)(A); 19 C.F.R. § 159.9(c)(2)(iii).

19 U.S.C. § 1514(c)(3) provides:

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[15] The court notes further that the government's position in this proceeding appears to contradict even Customs' initial reasoning for declining plaintiff's request to correct the liquidation status of the entries. In its motion to dismiss, the government asserts that Customs informed plaintiff's counsel in email correspondence that a protest could have been filed within 180 days of the date that the notice of deemed liquidation was posted. Def. Mot. to Dismiss at 7. That is not correct. Customs stated clearly in its emails to plaintiff's counsel that protest was required within 180 days of August 7, 2020, the date on which Customs thought that the entries were deemed liquidated. Brenske Decl., Attach. 2 at 4. Customs stated further that the error could not be corrected because plaintiff had failed to protest the purported deemed liquidation of August 7, 2020. *Id.* at 4–5. Customs was correct that the protestable event in the context of a deemed liquidation is *not* a notice of such liquidation but the deemed liquidation itself, which occurs by operation of law on the date that is six months after Commerce notifies Customs that Commerce has removed the suspension of liquidation. *See* 19 C.F.R. § 159.9(c)(2)(iii); *cf. SKF USA, Inc.*, 512 F.3d at 1331 (holding that deemed liquidation occurred despite Customs' failure to post notice of deemed liquidation). As the court has discussed, Customs was *not* correct that deemed liquidation had occurred in this case.

[16] The court may look to nonprecedential or unpublished opinions for guidance or persuasive reasoning, but such opinions do not have the effect of binding precedent. Fed. Cir. R. 32.1(d); *Irwin Industrial Tool Company v. United States*, 41 CIT __, __ n.34, 222 F. Supp. 3d 1210, 1227 n.34 (2017).

> A protest of a decision order or finding described in subsection (a) shall be filed with the Customs Service within 180 days after but not before—
>
> (A) [the] date of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is *inapplicable*, the date of the decision as to which protest is made.
>
> (emphasis supplied).

Customs' regulations state that subparagraph (B) requires protest within 180 days of a decision "involving *neither* a liquidation nor reliquidation." 19 C.F.R. § 174.12(e)(2) (emphasis supplied). In the same way, subparagraph (B) cannot apply to a "decision[] . . . *as to* . . . liquidation" under § 1514(a)(5) because such a decision necessarily "involv[es]" a liquidation.[17] 19 U.S.C. § 1514(a)(5) (emphasis supplied); 19 U.S.C. § 1514(c)(3)(B); 19 C.F.R. § 174.12(e)(2).

Moreover, § 174.12(e)(2) provides a list of the categories of decisions that can be protested "from the date of the decision as to which protest is made" under subparagraph (B). This list coincides with certain enumerated categories of decisions in § 1514(a) — none of which involves a liquidation — but excludes § 1514(a)(5), the category of protestable decisions on which defendant relies.[18] *See* 19 C.F.R. § 174.12(e)(2). The omission of § 1514(a)(5) from the list of categories of decisions that can be protested from the "date of the decision" demonstrates that Customs interprets § 1514(c)(3) to provide that a decision as to liquidation pursuant to § 1514(a)(5) may be protested only "after but not before" the date of liquidation. 19 U.S.C. § 1514(c)(3)(A).

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[17] 19 C.F.R. § 174.12(e) is Customs' regulation implementing § 1514(c)(3) and requires that protest be filed within 180 days of:

> (1) The date of notice of liquidation or reliquidation, or the date of liquidation or reliquidation, as determined under §§ 159.9 or 159.10 of this chapter; [or]
>
> (2) [t]he date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made . . . .

While § 174.12(e)(1) references "notice of liquidation," 19 C.F.R. § 159.9 specifies that protest of a "notice of liquidation" under § 174.12(e)(1) applies only to decisions relating to entries made prior to the MTTCA, which changed the statute to require protest within 180 days of the "date of liquidation" instead of the "notice of liquidation." 19 C.F.R. § 159.9(c)(2)(iii).

[18] The categories of decisions listed in § 174.12(e)(2) are decisions as to: an exaction; the exclusion of merchandise from entry; the denial of a claim for reliquidation under § 1520(d); or the denial of a petition for reliquidation pursuant to § 1520(c)(1). Each of these categories of decisions coincides with an enumerated category of decision in § 1514(a) that occurs in the absence of a liquidation. Specifically, the categories of decisions listed in § 174.12(e)(2) are provided in § 1514(a)(3), § 1514(a)(4) and § 1514(a)(7), including the now repealed § 1520(c)(1). The exclusion of decisions as to the liquidation of an entry under § 1514(a)(5) from this list demonstrates further that decisions under § 1514(a)(5) are not among the "circumstances where subparagraph (A) is inapplicable." 19 U.S.C. § 1514(c)(3)(B).

In addition, defendant's reliance on *Alden Leeds* is unavailing. Def. Reply Br. at 20 (citing *Alden Leeds*, 476 F. App'x at 397; 19 U.S.C. § 1514(c)(3)). In *Alden Leeds*, the suspension of liquidation had not been removed when Customs posted notices of deemed liquidation. 476 F. App'x at 395. Nevertheless, the Federal Circuit stated that "the mere fact that the entries were not actually deemed liquidated is not controlling, and does not excuse Alden Leeds' obligation to file a protest." *Id.* at 400. However, the *Alden Leeds* decision did not address the amendments to § 1514(c)(3)(A) and § 159.9(c)(2)(iii), which as amended permit protest of a deemed liquidation only after the expiration of the appropriate statutory period — that is, only "*after but not before*" the actual deemed liquidation of the subject entries. 19 U.S.C. § 1514(c)(3)(A) (emphasis supplied); 19 C.F.R. § 159.9(c)(2)(i)-(iii) (stating protest of a deemed liquidation must be filed with 180 days of the date of deemed liquidation). Moreover, more recent, binding decisions of the Federal Circuit establish that subparagraph (A) applies to "decisions . . . as to . . . liquidation" under § 1514(a)(5) and that subparagraph (A) mandates that protest be filed within 180 days of the date of liquidation. *See Acquisition 362*, 59 F.4th at 1253–54 ("In general, duties are finally determined by liquidation. The date of liquidation is the applicable date under § 1514(c)(3). . . . There is no other 'date of decision as to which protest is made.'"); *Chemsol, LLC*, 755 F.3d at 1349–50; *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250, 1256 (Fed. Cir. 2023); *see also George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021) (declining to follow a nonprecedential decision that was in conflict with the reasoning of binding decisions).

Accordingly, defendant's contention that § 1514(c)(3)(B) applies and requires protest irrespective of the liquidation status of the entries is contradicted by the terms of the statute, Customs' regulations and decisions of the Federal Circuit.

In sum, the court concludes that the posting of deemed liquidation notices did not liquidate the instant entries because the suspension of liquidation had not been removed. As such, the bulletin notices were not protestable under § 1514(a)(5). The court turns next to whether the bulletin notices were protestable "mistakes of fact" under § 1514(a).

3. Whether Customs made a protestable "clerical error, mistake off act, or other inadvertence" in an entry, liquidation, or reliquidation

Section 1514(a) provides that "any clerical error, mistake of fact, or other inadvertence . . . adverse to the importer, in any entry, liquidation, or reliquidation" is protestable. To assist in understanding the relevant language, the court describes the process by which "clerical

error[s], mistake[s] of fact, or other inadvertence[s]" came to be included in § 1514(a). Then, the court turns to whether defendant made a protestable "mistake of fact" under § 1514(a).

Prior to the MTTCA, 19 U.S.C. § 1520(c) permitted an importer to request from Customs reliquidation of an entry "within one year *after the date of liquidation*" if a "clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law" was made "in any entry [or] liquidation." 19 U.S.C. § 1520(c) (2000) (repealed 2004) (emphasis supplied). A claim under § 1520(c) was in addition to the protest procedures under § 1514(a). *See, e.g.*, *Black & White Vegetables Co. v. United States*, 24 CIT 1380, 1383, 125 F. Supp. 2d 531, 536 (2000). The exclusion of mistakes "amounting to an error in the construction of a law" from the purview § 1520(c) was designed to ensure that an importer could not bring a § 1520(c) claim to contest a Customs decision that should have been challenged within the relatively shorter protest period in § 1514, which at that time required protest within 90 days of the notice of liquidation. *Id.*; *Zojirushi Am. Corp. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1354, 1364 (2016).

The MTTCA repealed § 1520(c). *Zojirushi*, 40 CIT at __, 180 F. Suppl. 3d at 1364. The MTCCA also inserted the phrase "clerical error, mistake of fact, or other inadvertence . . . in any entry, liquidation, or reliquidation" into § 1514(a). *Id.* As a result, the amended § 1514(a) required all challenges to a Customs decision pertaining to a liquidation to be brought within 180 days of the date of the liquidation. *Id.*

Defendant argues that the posting of the erroneous bulletin notices was a protestable "mistake of fact" in the liquidation of the subject entries. Def. Reply Br. at 17. Specifically, defendant asserts that Customs "made a factual error" when Customs concluded incorrectly that Commerce had removed the suspension of liquidation of plaintiff's entries. *Id.* at 18.

Plaintiff asserts that a "mistake of fact" is not protestable unless the entries have liquidated. Pl. Resp. Br. at 15. Plaintiff contends that since its entries were not liquidated there was no "mistake of fact . . . in a[] . . . liquidation" to protest. *Id.* (citing 19 U.S.C. § 1514(a)).

The court applies "clerical error, mistake of fact, or other inadvertence" in § 1514(a) in view of the rule of statutory construction that when "'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation." *Armstrong v.*

Exceptional Child Ctr., Inc., 575 U.S. 320, 330 (2015) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). The Federal Circuit and this Court had long interpreted § 1520(c) to require liquidation of the subject merchandise before a party could bring a § 1520(c) claim. *See, e.g.*, *Omni U.S.A., Inc. v. United States*, 840 F.2d 912, 914 (Fed. Cir. 1988). There is no indication that the limitation in § 1520(c) requiring liquidation before a claim could be brought to correct a mistake of fact was not incorporated also into the amended § 1514(a). As such, a "mistake of fact" in any entry, liquidation or reliquidation may be protested only after the entry is liquidated. *See Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1352 (Fed. Cir. 2006) (stating that under the current version of § 1514(a), protest of a Customs liquidation decision must be filed within 180 days of liquidation, even if the decision "contains a 'clerical error, mistake of fact, or other inadvertence'").

Accordingly, the court concludes that the posting of the instant bulletin notices of deemed liquidation while liquidation of plaintiff's entries remained suspended did not involve a protestable mistake of fact. Defendant is correct that Customs made a factual error when Customs concluded incorrectly that Commerce had removed the suspension of liquidation. Def. Reply Br. at 18. However, by failing to liquidate plaintiff's entries, Customs did not take the requisite step to render that factual error protestable. *Norsk Hydro Canada, Inc.*, 472 F.3d at 1352.

In sum, the court concludes that jurisdiction could not have been available under 28 U.S.C. § 1581(a) because the posting of the bulletin notices of deemed liquidation while liquidation of the entries remained suspended was not protestable under § 1514(a). *See Ford Motor Co. v. United States*, 688 F.3d 1319, 1328 (Fed. Cir. 2012) ("With no administrative action to protest, none of the jurisdictional avenues enumerated in subsections (a) through (h) of § 1581 were available to [plaintiff]."); *see also LG Elecs.*, 21 CIT at 1430, 991 F. Supp. at 676–77 ("Without the expiration of the statutory period, there is no date to be noticed. As the statutory period for protest never began to run, plaintiff may bring suit under 28 U.S.C. § 1581(i) . . . .").

II. Whether this Court has jurisdiction to hear plaintiff's case under § 1581(i)

Jurisdiction under 28 U.S.C. § 1581(a) is not, nor could it have been, available in the instant action, as the bulletin notices of deemed liquidation were not protestable under § 1514(a). The court considers whether it can exercise its residual jurisdiction under § 1581(i).

Plaintiff invokes this Court's jurisdiction under 28 U.S.C. § 1581(i)(1)(B) and (D). Section 1581(i)(1)(B) and (D) grant the Court

exclusive jurisdiction over any civil action that arises out of any law of the United States providing for "tariffs, duties, fees, or other taxes on the importation of merchandise," as well as the "administration and enforcement with respect to" such tariffs, duties, fees or other taxes.

However, an importer cannot invoke this Court's jurisdiction under § 1581(i) when another subsection is or could have been available, unless the remedy provided under that section would be manifestly inadequate. *Consol. Bearings*, 25 CIT at 546, 166 F. Supp. 2d at 583. 28 U.S.C. § 1581(a) grants the Court exclusive jurisdiction over "any civil action commenced to contest the denial of a protest" filed pursuant to § 1514(a).

As already noted, the court concludes that jurisdiction could not have been available under § 1581(a) because under § 1514(a), no protest was required to contest the bulletin notices of deemed liquidation. *See supra* Section I.

Accordingly, the court has jurisdiction over counts one and two of plaintiff's complaint under § 1581(i). In count one, plaintiff seeks a declaratory judgment that Customs' designation of plaintiff's entries as deemed liquidated is void and that liquidation of plaintiff's entries remains suspended. Compl. ¶¶ 49–53 (citing 28 U.S.C. § 2201(a); 28 U.S.C. § 2643(c)(1)). In count two, plaintiff seeks also an order by this Court under the Administrative Procedure Act setting aside the designation of its entries as deemed liquidated and compelling defendant to correct the liquidation status of the 80 entries. *Id.* ¶¶ 55–59 (citing 5 U.S.C. § 706). As to these two requests for relief, plaintiff has stated valid claims upon which relief can be granted.

As for count three of plaintiff's complaint, plaintiff asserts that "[t]o the extent that [Customs'] designation . . . caused actual liquidation to occur," plaintiff is entitled to an order from this Court "setting aside the unlawful liquidation." Compl. ¶¶ 61–64. However, the court concludes that the posting of bulletin notices of deemed liquidation in the instant case did not liquidate plaintiff's entries. *See supra* Section I.B.2. Accordingly, count three of plaintiff's complaint is dismissed as moot.

In addition, the court notes that the question of jurisdiction is intertwined with the merits of plaintiff's claim. Defendant asserts that the court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) because jurisdiction "could have been available" under § 1581(a). Def. Mot. to Dismiss at 7–8. To determine whether jurisdiction "could have been available" under § 1581(a), the court was required to address plaintiff's position on the merits that the entries were not and have not been liquidated. As noted, the court concludes

that the entries were not and could not have been liquidated. Moreover, it is undisputed that Commerce had not removed the suspension of liquidation of plaintiff's entries at the time that Customs posted the bulletin notices of deemed liquidation. Def. Reply Br. at 10 (describing Customs' actions as "apparent error" because Commerce had instructed Customs that liquidation of plaintiff's entries remained suspended); Pl. Resp. Br. at 2. Defendant has submitted exhibits substantiating that fact. *See* Bishop Decl. ¶ 5; Message No. 0079405. As such, the court has examined all the materials necessary to reach a decision on the merits.

In sum, in reaching a determination as to the court's jurisdiction under § 1581(i), the court has concluded that plaintiff's entries were not liquidated, as the suspension of liquidation was still in place and the bulletin notices of deemed liquidation could not operate to liquidate plaintiff's entries. As a consequence, the court declares that the designation of plaintiff's entries as deemed liquidated is null and void and that, as a result, such designation is set aside. Further, the court directs Customs to correct the liquidation status of plaintiff's entries in accordance with Commerce's original set of instructions, pending the outcome of any further administrative proceedings or binational panel review under the United States Mexico Canada Agreement. The court directs Customs to file with the court the corrected liquidation status of plaintiff's entries within 90 days of the date of this opinion and order.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss is **DENIED**; it is further

ORDERED that count three of plaintiff's complaint is **DISMISSED** as moot; it is further

ORDERED that plaintiff's request for a declaratory judgment that the designation of plaintiff's entries as deemed liquidated is null and void is **GRANTED**; it is further

ORDERED that the designation of plaintiff's entries as deemed liquidated is set aside; it is further

ORDERED that Customs correct the liquidation status of plaintiff's entries in accordance with Commerce's original set of instructions, pending the outcome of any administrative proceedings or binational panel review per above; and it is further

ORDERED that Customs file with the court the corrected liquidation status of plaintiff's entries within 90 days of the date of this opinion and order.

Dated: January 25, 2024
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

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