Slip Op. 20–82

SHANGHAI WELLS HANGER CO., LTD., HONG KONG WELLS LTD., HONG KONG WELLS LTD. (USA), FABRICLEAN SUPPLY, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00103

JUDGMENT

This action having been submitted for decision, and the court, after due deliberation, having rendered opinions; now in conformity with those opinions, it is hereby

ORDERED that the Final Results of Redetermination Pursuant to Court Remand, ECF No. 95–1 (Second Remand Results), regarding the final results of the fifth administrative review of the antidumping duty order covering steel wire garment hangers from the People's Republic of China, *Steel Wire Garment Hangers from the PRC*, 80 Fed. Reg. 13,332 (Dep't of Commerce Mar. 13, 2015) (final results admin. rev.) and the accompanying Issues and Decision Memorandum for Steel Wire Garments from the PRC, A–570–918, (Dep't of Commerce Mar. 6, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–05828–1.pdf (last visited this date), are sustained; and it is further

ORDERED that the subject entries enjoined in this action, *see* ECF No. 12 (order granting motion for preliminary injunction), must be liquidated in accordance with the final court decision, as provided in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012).

Dated: June 11, 2020
New York, New York

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

Slip Op. 20–83

CANADIAN SOLAR INTERNATIONAL LIMITED et al., Plaintiffs and Consolidated Plaintiffs, and SHANGHAI BYD CO., LTD. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00173

[Sustaining the U.S. Department of Commerce's second remand redetermination in the third administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: June 15, 2020

Craig A. Lewis, *Jonathan T. Stoel*, and *Michael G. Jacobson*, Hogan Lovells US LLP, of Washington, DC, for Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Solar Power (China) Inc.; CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd.; CSI Cells Co., Ltd.; Canadian Solar (USA), Inc.; and Shanghai BYD Co., Ltd.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Meen Geu Oh*, Trial Attorney. Of counsel on the brief was *Ian McInerney*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein LLP, of Washington, DC, for SolarWorld Americas, Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") second remand redetermination filed pursuant to the court's order in *Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1326, 1335 (2019) ("*Canadian Solar II*"). *See* Redetermination Pursuant to Ct's Second Remand Order in [*Canadian Solar II*], Feb. 11, 2020, ECF No. 147 ("*Second Remand Results*").

In *Canadian Solar II*, the court sustained in part and remanded in part Commerce's first remand determination in the third administrative review of the antidumping duty ("ADD") order on crystalline silicon photovoltaic products, whether or not assembled into modules, from the People's Republic of China ("PRC"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 82 Fed. Reg. 29,033 (Dep't Commerce June 27, 2017) (final results of [ADD] admin. review and final determination of no ship-

ments; 2014–2015) ("*Final Results*") and accompanying Issues and Decision Memo. for the [Final Results], A-570–979, (June 20, 2017), ECF No. 44–5 ("Final Decision Memo"). Specifically, the court ordered Commerce to further explain or reconsider its application of partial adverse facts available ("AFA")[1] to base the unreported consumption rates of Canadian Solar's[2] unaffiliated suppliers. *Canadian Solar II*, 43 CIT at __, 415 F. Supp. 3d at 1329, 1332–35. On second remand, Commerce, under respectful protest,[3] reversed its decision to apply an adverse inference. *Second Remand Results* at 7. Defendant-Intervenor SolarWorld Americas, Inc. ("SolarWorld") argues that Commerce's determination is unreasonable and unlawful, when record evidence supports the application of an adverse inference and Commerce reasonably explained its reliance on partial AFA in the first remand redetermination. *See* [SolarWorld's] Cmts. Results Second Remand Redetermination at 3–4, Mar. 19, 2020, ECF No. 151 ("Def.-Intervenor's Br."); *see also* Remand Redetermination Pursuant to Ct. Remand Order in Canadian Solar Int'l Ltd. v. United States Consol. Ct. No. 17–00173, July 15, 2019, ECF No. 110 ("*First Remand Results*"). Defendant as well as Canadian Solar and Shanghai BYD Co., Ltd. ("Shanghai BYD") (collectively, "Plaintiffs") request the court to sustain the *Second Remand Results*. *See* Def.'s Request Sustain Results Commerce's Second Remand Redetermination at 1, Mar. 31, 2020, ECF No. 152 ("Def.'s Br."); [Canadian Solar's] Reply Cmts. Second Remand Redetermination at 1– 2, Apr. 3, 2020, ECF No. 153 ("Pls.' Br."); [Shanghai BYD's] Reply Cmts. Remand Results, Apr. 3, 2020, ECF No. 154 ("Shanghai BYD's Br.").[4] For the reasons that follow, the court sustains Commerce's *Second Remand Results*.

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[1] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available and, second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b).

[2] Plaintiffs Canadian Solar International Limited; Canadian Solar (USA), Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Cells Co., Ltd.; CSI-GCL Solar Manufacturing (Yancheng) Co., Ltd.; and CSI Solar Power (China) Inc. are referred to, collectively, as "Canadian Solar."

[3] By adopting a position forced upon it by the Court "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

[4] Consolidated Plaintiff Shanghai BYD incorporates Canadian Solar's arguments by reference and does not present arguments that differ from those made by Plaintiffs. *See* Shanghai BYD's Br. at 1; *compare id. with* Pls.' Br. at 5–9.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous two opinions ordering remand to Commerce, and now recounts those facts relevant to the court's review of the *Second Remand Results*. *See Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, __, 378 F. Supp. 3d 1292, 1298–1300 (2019) ("*Canadian Solar I*"); *Canadian Solar II*, 43 CIT at __, 415 F. Supp. 3d at 1329–31. Relevant here, in the *Final Results* of the third administrative review, Commerce determined that a number of Canadian Solar's unaffiliated suppliers of solar cells and solar modules were interested parties that failed to provide sufficient information regarding their factors of production ("FOPs").[5] *See* Final Decision Memo. at 15–18. Commerce found that the suppliers did not comply with Commerce's request for information and that Canadian Solar had the ability to induce cooperation from its suppliers.[6] *Id.* at 15–16. As a result, Commerce selected among facts otherwise available with an adverse inference and valued the unreported solar cell and solar cell module FOPs by using Canadian Solar's highest reported consumption rates for those solar cells and modules sold in the United States. *Id.* at 18. Canadian Solar commenced an action pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), challenging this determination, among other aspects of the *Final Results*.[7] Summons, July 7, 2017, ECF No. 1; Compl., July 7, 2017, ECF No. 8.[8]

In *Canadian Solar I*, the court held that Commerce's decision to apply partial AFA against Canadian Solar was contrary to law. 43 CIT

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[5] In an antidumping proceeding, if Commerce considers an exporting country to be a non-market economy ("NME"), like the PRC, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value. *See* 19 U.S.C. § 1677b(c)(1), (4). Normal value is determined on the basis of FOPs from the surrogate country or countries used to produce subject merchandise. *See id.* at § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." *See id.* at § 1677b(c)(3). This analysis is designed to determine a producer's costs of production in an NME as if that producer operated in a hypothetical market economy. *See, e.g.*, *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999); *see also* 19 U.S.C. § 1677b(c)(1).

[6] Commerce determined that Canadian Solar was "in a position to exercise leverage to induce cooperation" from its suppliers, given Canadian Solar's "industry position, rapid growth, significant purchases of solar cells and modules[.]" *See* Final Decision Memo. at 16.

[7] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[8] This action was consolidated with actions brought by Qixin, Shanghai BYD Co., Ltd., Changzhou Trina Solar Energy Co., Ltd. et al., SolarWorld, and Sunpreme Inc. *See* Order, Sept. 26, 2017, ECF No. 41.

at __, 378 F. Supp. 3d at 1318–20. The court explained that where information is necessary to calculate a respondent's dumping margin is not available on the record, *see id.*, Commerce applies "facts otherwise available" in place of the missing information. *See id.*, 43 CIT at __, 378 F. Supp. 3d at 1316; *see also* 19 U.S.C. § 1677e(a). If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available." 19 U.S.C. § 1677e(b); *see also Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1316. However, under certain circumstances, Commerce may incorporate an adverse inference under 19 U.S.C. § 1677e(a) in calculating a cooperative respondent's margin, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. *Mueller Comercial de Mexico S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014); *see also Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1316–18 (summarizing *Mueller*). Given that Commerce relied upon 19 U.S.C. § 1677e(b) to impose an adverse inference, the court held Commerce's determination to be contrary to law. *Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1318–20. The court also held that, to the extent Commerce purported to rely on 19 U.S.C. § 1677e(a) to apply partial AFA, Commerce's finding that Canadian Solar could potentially have induced its suppliers to cooperate was unsupported by substantial evidence. *Id.*, 43 CIT at __, 378 F. Supp. 3d at 1320–22. As a result, the court ordered Commerce to further explain or reconsider its determination. *Id.*, 43 CIT at __, 378 F. Supp. 3d at 1322.

Commerce, on remand,[9] offered further explanation to justify its continued imposition of partial AFA. *See First Remand Results* at 15–29. Specifically, Commerce elaborated that it may consider an adverse inference against a noncooperative party when choosing facts otherwise available for a cooperative respondent under 19 U.S.C. § 1677e(a) and that its use of an adverse inference against Canadian Solar fulfills policy objectives of deterring non-cooperation and duty evasion. *Id.* at 16–23. Commerce also explained that if Commerce did not apply partial AFA, Canadian Solar would be incentivized to conduct business with parties that did not cooperate with Commerce's investigation. *Id.* at 20–21. The court, however, held that Commerce failed to demonstrate, as required by *Mueller*, that applying an adverse inference would lead to the calculation of an accurate dumping

[9] Commerce issued the *First Remand Results* under respectful protest. *See First Remand Results* at 2 n.5.

margin and, further, that the record did not support Commerce's view that applying an adverse inference would promote the policy considerations of avoiding non-cooperation[10] and duty evasion.[11] *See Canadian Solar II*, 43 CIT at __, 415 F. 3d at 1332–35. The court noted that Commerce did not address the accuracy concerns identified by *Mueller*. *Id.*, 43 CIT at __, 415 F.3d at 1334 (citing *Mueller*, 753 F.3d at 1232–34). In addition, the court noted that Commerce's cited policy objectives were unsupported by substantial evidence. *See id.*, 43 CIT at __, 415 F.3d at 1334–35. The court again remanded Commerce's determination. *Id.*, 43 CIT at __, 415 F. 3d at 1335.

Commerce filed its *Second Remand Results* under respectful protest as it disagrees with the court's holding in *Canadian Solar I* that Commerce failed to comply with *Mueller* and that record evidence did not support Commerce's interpretation of facts concerning duty evasion and deterrence of non-cooperation. *See Second Remand Results* at 8. Commerce, on second remand, did not apply an adverse inference in selecting among facts otherwise available. *Id.* Instead, Commerce used the average consumption rates reported by Canadian Solar in employing partial facts available. *Id.* Commerce revised Canadian Solar's dumping margin to 3.19 percent. *Id.* at 10.[12]

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will

[10] The court explained that although *Mueller* speaks of "potentially refusing to do business" in order to "potentially induce" cooperation, the Court of Appeals also states that it would be potentially unfair to incorporate an adverse inference where a cooperating party had no control over a non-cooperating party. *Canadian Solar II*, 43 CIT at __, 415 F. Supp. 3d at 1334 (citing *Mueller*, 753 F.3d at 1235). Even though Commerce relied on Canadian Solar's market presence, continued growth, and supplier-specific accounts to support its finding that Canadian Solar could have induced its suppliers' cooperation, the court found that such facts "'do not reasonably indicate the presence of a long-term relationship creating leverage.'" *Id.* (citing *Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1320).

[11] Specifically, the court explained that even though the Court of Appeals in *Mueller* did not opine on the reasonableness of a finding of duty evasion, a threat of duty evasion arguably existed in *Mueller* because the uncooperative supplier was a mandatory respondent in the proceeding and had an incentive to evade its AFA rate by exporting through another party. *Canadian Solar II*, 43 CIT at __, 415 F. Supp.3d at 1334 (citing *Mueller*, 753 F.3d at 1229, 1235). However, the court noted that Commerce's reference to Canadian Solar's payment of lower antidumping duties so that its products are more attractive to U.S. importers did not support the existence of such an incentive to evade duties. *Id.* To the court, this argument "prove[d] too much," because "[i] f all that is required is an interest in selling, it is unclear when Commerce would find an uncooperative supplier as not incentivized to evade duties." *Id.*

[12] Commerce also revised the rate applicable to separate rate respondents to 3.19 percent. *See Second Remand Results* at 10–12.

uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

SolarWorld argues that Commerce unreasonably and unlawfully declined to apply an adverse inference in the *Second Remand Results*, when Commerce's explanation in the *First Remand Results* adequately supported the application of partial AFA. *See* Def.-Intervenor's Br. at 3–6. Plaintiffs counter that SolarWorld failed to exhaust administrative remedies, because SolarWorld did not submit any comments on Commerce's draft remand redetermination. *See* Pls.' Br. at 5–7. Notwithstanding the failure to exhaust, Plaintiffs and Defendant contend that Commerce's second remand redetermination complies with the court's remand order. *See id.* at 7–10; Def.'s Br. at 3. For the reasons that follow, SolarWorld failed to exhaust its challenge to Commerce's *Second Remand Results*.

Parties are required to exhaust administrative remedies before the agency by raising all issues in their initial case briefs before Commerce. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing 19 C.F.R. § 351.309(c)(2), (d)(2); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)); *see also ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019). However, the court has discretion not to require exhaustion of administrative remedies. 28 U.S.C. § 2637(d); *see also Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).[13]

Here, SolarWorld failed to exhaust its administrative remedies, because it did not file any comments on Commerce's draft remand redetermination. *See Second Remand Results* at 8–9 (noting that only Canadian Solar and Shanghai BYD filed comments and that "[n]o party has contested [Commerce's] decision in the Draft Remand"). SolarWorld does not address the fact that it did not file comments in

[13] In addition, the Court has recognized several limited exceptions to the doctrine of exhaustion of administrative remedies such as: "where exhaustion would be 'a useless formality,' intervening legal authority 'might have materially affected the agency's actions,' the issue involves 'a pure question of law not requiring further factual development,' where 'clearly applicable precedent' should have bound the agency, or where the party 'had no opportunity' to raise the issue before the agency." *SeAH Steel Corp. v. United States*, 35 CIT 326, 329, 764 F. Supp. 2d 1322, 1325–26 (2011)(citing *Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1465–66, 751 F. Supp. 2d 1355–56 (2010)).

its case brief. *See generally* Def.-Intervenor's Br. Given that Commerce did not have the opportunity to hear the challenge in the first instance, the court declines to hear SolarWorld's challenge regarding Commerce's decision not to apply an adverse inference.[14]

CONCLUSION

For the foregoing reasons, the *Second Remand Results* comply with the court's order in *Canadian Solar II* and, therefore, are sustained. Judgment will enter accordingly.

Dated: June 15, 2020
New York, New York

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

[14] In maintaining that Commerce appropriately applied partial AFA in the *First Remand Results*, SolarWorld appears to take issue with the court's holding in *Canadian Solar II*. *See* Def.-Intervenor's Br. at 3–6. Specifically, SolarWorld contends that in the *First Remand Results* Commerce proffered an adequate explanation that the application of Canadian Solar's highest reported per-unit consumption rates for the FOPs promotes accuracy, as required by *Mueller*. *Id.* at 4. In addition, SolarWorld alleges that there is record evidence indicating that the threat of duty evasion exists and that the application of Canadian Solar's FOPs would promote the policy objective of deterring non-cooperation. *Id.* at 5–6. However, as the court explained in *Canadian Solar II*, Commerce did not address the accuracy concerns identified by *Mueller* at all, namely whether the data Commerce selected promotes accuracy and why the alternative of using reported usage rates would not better promote accuracy. *Canadian Solar II*, 43 CIT at __, 415 F. Supp. 3d at 1334.The court also found that Commerce failed to point to any record evidence that would substantiate its concerns of a threat of duty evasion exists and that Canadian Solar could have induced its suppliers to cooperate. *Id.*, 43 CIT at __, 415 F. Supp. 3d at 1334–35.

Slip Op. 20–84

COALITION OF AMERICAN FLANGE PRODUCERS, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00225
PUBLIC VERSION

[The court remands Commerce's AD determination for further explanation.]

Dated: June 17, 2020

Stephanie M. Bell and *Daniel B. Pickard*, Wiley Rein LLP, of Washington, DC, argued for plaintiff.

Geoffrey M. Long, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Kirrin Ashley Hough*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. Of counsel on the brief was *Daniel J. Calhoun*, Assistant Chief Counsel.

OPINION

Katzmann, Judge:

This case presents questions about the operation of the substantial evidence standard as applied to the U.S. Department of Commerce's ("Commerce") treatment of a foreign producer's home market sales database in an antidumping ("AD") investigation and determination. It involves a challenge to Commerce's calculation of normal value ("NV") in determining appropriate AD duty margins for a foreign producer and exporter, Chandan Steel Limited ("Chandan"), in the importation of stainless steel flanges from India into the United States. Plaintiff Coalition of American Flange Producers ("Coalition") is an ad hoc association whose members manufacture stainless steel flanges in the United States. Compl. at 2, Dec. 6, 2018, ECF No. 9. Coalition brings this action against the United States ("the Government"), to challenge certain aspects of Commerce's *Stainless Steel Flanges from India: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstances Determination*, 83 Fed. Reg. 40,745 (Dep't Commerce Aug. 16 2018), P.R. 411 ("*Final Determination*") and accompanying issues and decision memorandum (Dep't Commerce Aug. 10, 2018), P.R. 406 ("IDM"), in which Commerce determined that certain reported sales should not be included in Chandan's home market sales database and that, therefore, Chandan's home market of India was not viable as a basis

for determining NV. Commerce accordingly used Chandan's reported third-country market sales to determine the appropriate AD margins. *Id.*

Coalition asserts that Commerce's determination to exclude certain sales from Chandan's home market database was unsupported by substantial evidence and otherwise not in accordance with law because Commerce failed to provide an adequately reasoned explanation. Compl. at 4. Accordingly, Coalition asks that the court "remand Commerce's determination with respect to its decision that Chandan's home market was not viable for additional consideration." Pl.'s Mot. for J. on Agency R. at 18, June 17, 2019, ECF No. 23 ("Pl.'s Br."). The Government responds that the court should uphold the *Final Determination*, asserting that Coalition's argument is not meritorious and that "Commerce's determination was supported by substantial evidence and in accordance with law." Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on Agency R. at 11, Sept. 10, 2019, ECF No. 27 ("Def.'s Br."). The court concludes that Commerce failed to provide a sufficient explanation of its findings on the record to permit judicial review. Therefore, the court remands this matter to Commerce for a more reasoned explanation of its classification of a challenged sale as an export sale and its 19 U.S.C. § 1677b(a)(1)(C) finding of home market non-viability.

BACKGROUND

I. Legal Framework

Dumping occurs when a foreign company sells goods in the United States at a lower price than the company charges for the same product in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). This practice constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below reasonable fair market value. *Id.* at 1046–47. To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. *Id.* When Commerce concludes that duties are appropriate, the agency is required to determine margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Pursuant to 19 U.S.C. § 1673, Commerce imposes AD duties on foreign goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and the International Trade Commission concludes that the sale of the merchandise below fair value materially injures, threatens, or impedes the establishment of an

industry in the United States. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when the price the producer charges in its home market, the NV, is greater than the price charged for the product in the United States, the export price. *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013) (quotation omitted). The AD duty is calculated by determining the difference between the NV and the export price for the merchandise. 19 U.S.C. § 1673.

NV is ordinarily computed by looking to the sales price of the subject merchandise in the exporting country, the home market. 19 U.S.C. § 1677b(a)(1)(B)(i). However, when the volume of subject merchandise the producer sells in its home market is less than five percent of the quantity of the merchandise the producer sells in the United States, Commerce may look to third-country sales to calculate the appropriate NV. *See* 19 U.S.C. § 1677b(a)(1)(C); 19 C.F.R. § 351.404(b). "To determine whether a sale is a home market sale, Commerce objectively assesses whether, given the particular facts and circumstances, a producer would have known that the merchandise will be sold domestically or for export." *Stupp Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1293, 1310 (2019) (citing *INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 123– 25, 957 F. Supp. 251, 263–64 (1997)). If Commerce concludes that a producer knew or had reason to know, at the time of the sale, that the merchandise was destined for export, Commerce may exclude the sale from the home market database. *INA Walzlager Schaeffler*, 957 F. Supp. at 264–65. In making this determination, Commerce must "diligently inquire into allegations of knowledge and render its conclusion based on all relevant facts and circumstances" in the record. *Stupp*, 359 F. Supp. 3d at 1310. Further, Commerce's responsibility to conduct a diligent inquiry requires the agency to examine evidence presented by interested parties "which a reasonable mind would accept as calling into question whether respondents were able to distinguish home market sales destined for consumption in the home market from home market sales destined [for export]." *Fed.-Mogul Corp. v. United States*, 17 CIT 1015, 1020–21, 15 ITRD 2233 (1993).

II. Factual and Procedural History

On August 16, 2017, Coalition filed a petition with Commerce regarding the importation of certain stainless steel flanges from India and the People's Republic of China. *Stainless Steel Flanges from India and the People's Republic of China: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 42,469 (Dep't Commerce Sept.

11, 2017), P.R. 18. On September 11, 2017, Commerce initiated an AD investigation into the importation of stainless steel flanges from India from the period of July 1, 2016 to June 30, 2017. *Id.* Commerce selected Chandan as one of three mandatory investigation respondents[1] and issued a questionnaire to Chandan seeking information on its sales of stainless steel flanges. *See* Mem. from C. Canales to E. Yang re: Investigation of Stainless Steel Flanges from India: Respondent Selection at 1 (Dep't Commerce Oct. 3, 2017), P.R. 29; Letter from P. Walker to Chandan Steel Ltd., re: Stainless Steel Flanges from India: Comments on Volume of Home Market Sales Destined for Consumption in Home Market at 1 (Dep't Commerce Oct. 20, 2017), P.R. 46.

Shortly thereafter, Chandan submitted a letter to Commerce regarding its home market sales. Letter from Chandan Steel Ltd. to Sec'y of Commerce re: Certain Stainless Steel Flanges from India, Comments on Volume of Home Market Sales Destined for Consumption at 1 (Oct. 18, 2017), P.R. 40, C.R. 13 ("Chandan's Initial Letter"). Chandan noted that it was aware that its home market sales of merchandise under investigation totaled [[ ]] kilograms, equivalent to [[ ]] of its aggregate sales of subject merchandise in the United States, which would make its home market viable for calculating NV. *See id.* Chandan expressed, however, that it had reason to believe that its sale to [[ ]] of [[ ]] kilograms of subject merchandise should be treated as an export sale. *Id.* at 1–3. Accordingly, Chandan asserted that its home market sales should be reduced by [[ ]], bringing the total home market sales to [[ ]] of its aggregate sales of subject merchandise in the United States. *Id.* at 1, 3. As such, Chandan posited that its home market was not a viable basis for calculating NV. *Id.* at 4; *see* 19 U.S.C. § 1677b(a)(1)(C); 19 C.F.R. § 351.404(b).

In that initial letter, Chandan articulated three reasons for its position. Chandan's Initial Letter at 2. First, the company stated that its initial offer to the customer, [[ ]], was quoted in U.S. dollars and marked for delivery in [[ ]],

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[1] In AD duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to-
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

and that it was only upon the customer's later insistence that the final purchase order was received from [[ ]] and quoted in Indian Rupees for delivery in [[ ]]. *Id.* Second, the purchase order specified that the goods would carry mill testing reports compliant with [[ ]], a certification that is widely accepted for goods bound for export to [[ ]] states. *Id.* Finally, Chandan notes that [[ ]]'s financial statements did not reflect any domestic sales for the years ending March 31, 2015 or March 31, 2016. *Id.*

Commerce replied to Chandan's October 18, 2017 letter and requested that Chandan provide further specific information in response to the previously issued questionnaire regarding its sales of stainless steel flanges in both the home market and third country markets. Letter from P. Walker to Chandan Steel Ltd., re: Stainless Steel Flanges from India: Comments on Volume of Home Market Sales Destined for Consumption in Home Market at 1 (Dep't Commerce Oct. 20, 2017), P.R. 46. Chandan responded by reaffirming its position regarding its home market sales and provided information on its third-country market sales. Letter from Chandan Steel Ltd. to Sec'y Commerce, re: Certain Stainless Steel Flanges from India, Chandan Steel Ltd.'s Submission of Resp. to Sec. A of Questionnaire at 1–6 (Oct. 31, 2017), P.R. 58–60.

Subsequently, Coalition wrote to Commerce commenting on Chandan's Section A Questionnaire Response. Letter from Wiley Rein LLP to Sec'y Commerce, re: Stainless Steel Flanges from India: Petitioners' Comments on Chandan's Sec. A Questionnaire Resp. (Nov. 20, 2017), P.R. 86, C.R. 45 ("Petitioners' Initial Comments"). Coalition challenged Chandan's assertion that the [[ ]] order should be treated as an export sale, noting that it was ultimately made in Indian Rupees and delivered in [[ ]].[2] *Id.* at 2. Chandan thereafter submitted further information to Commerce in response to Sec. B, C, and D of Commerce's questionnaire. Letter from Chandan Steel Ltd. to Sec'y Commerce, re: Stainless Steel Flanges from India, Chandan Steel Ltd.'s Submission of Resp. to Sec. B, C, and D of Questionnaire (Nov. 30, 2017), P.R 102–106.

In response to Coalition's comments, Chandan wrote to Commerce asserting that Chandan's Initial Letter "contain[ed] all relevant facts and evidences [sic] establishing the quantum of home market sales for consumption in India." Letter from Chandan Steel Ltd. to Sec'y Commerce, re: Certain Stainless Steel Flanges from India (A-

[2] Further mentions of the "challenged sale" refer to Chandan's sale to [[ ]], which Coalition, in the underlying investigation and in this litigation, contests was improperly classified as a sale that Chandan knew was intended for export.

533–877), Rebuttal on Comments Filed by Petitioners on Questionnaire Response by Chandan at 5 (Dec. 8, 2017), P.R. 119, C.R. 128 ("Chandan's Questionnaire Rebuttal"). Chandan also pointed out that [[ ]] is a subsidiary and under the control of [[ ]], a member of Coalition. *See id.* Chandan asked Commerce to request "details outlined in the letter dated October 18, 2017 by Chandan from [Coalition]." *Id.* The company asserted that this requested evidence "would conclusively establish the assertions made by Chandan and provide evidences [sic] to support the treatment of such sales by Chandan in its questionnaire responses." *Id.* at 5–6. Commerce did not request information or evidence from Coalition or its constituent members. *See* Def.'s Resp. to Ct.'s Questions in Advance of Oral Arg. at 13, Apr. 6, 2020, ECF No. 43 ("Def.'s Suppl. Resp.").

In comments submitted regarding Chandan's Section B response, Coalition again challenged Chandan's characterization of the [[ ]] sale as an export sale. Letter from Wiley Rein LLP to Sec'y Commerce, re: Stainless Steel Flanges from India: Petitioners' Comments on Chandan's Sec. B Questionnaire Resp. at 2–3 (Dec. 14, 2017), P.R. 136, C.R. 147. Moreover, Coalition argued that even if the challenged sale was not included in Chandan's home market sales database, Chandan's home market sales [[ ]]. *Id.* at 3. Accordingly, Coalition urged Commerce to require Chandan to report its home market sales to "allow the Department to consider the evidence on the record . . . and, regardless of its ultimate determination, have the proper information to calculate the dumping margin." *Id.* Coalition expressed concern that if Commerce failed to do so, "but subsequently determin[ed] that Chandan should have reported home market sales, any such determination may effectively be rendered moot if there is not sufficient time to collect and analyze such data." *Id.*

Commerce subsequently concluded in a preliminary determination that stainless steel flanges from India were being, or were likely to be sold, in the United States at less than fair value and that AD duties were appropriate. *Stainless Steel Flanges from India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstance, Postponement of Final Determination and Extension of Provisional Measures*, 83 Fed. Reg. 13,246, 13,246–47 (Dep't Commerce Mar. 28, 2018), P.R. 339 ("*Preliminary Determination*"). Regarding the appropriate NV market for Chandan, Commerce simply stated: "we determined that the aggregate volume of home market sales of the foreign like product for Chandan was less than five percent of the aggregate volume of its

U.S. sales of subject merchandise. Therefore, we used third-country market sales as the basis for NV for Chandan." Preliminary Decision Mem. accompanying Stainless Steel Flanges from India at 29 (Dep't Commerce Mar. 19, 2018), P.R. 327.

Coalition, in response to the *Preliminary Determination*, filed a brief again arguing that Chandan failed to demonstrate that it knew or should have known, at the time of the sale, that the merchandise at issue was bound for export to countries other than India. Letter from Wiley Rein LLP to Sec'y Commerce, re: Stainless Steel Flanges from India: Case Brief Regarding Chandan Steel at 4 (June 19, 2018), P.R. 401, C.R. 443 ("Petitioner Case Brief"). Specifically, Coalition observed that while the challenged purchase order called for a mill testing certification compliant with [[ ]], "Chandan provided no indication that these certifications would not be used for sale in India" and that [[ ]] provided by Chandan included the same [[ ]] mill testing requirement. *Id.* at 5. Moreover, Coalition argued that [[ ]] financial report, provided by Chandan, was not relevant to the issue because the report covered a period that predated the AD period of investigation. *Id.* Finally, Coalition asserted that Commerce had previously found that Indian law both required a buyer to inform a seller when merchandise was purchased for export and required the seller to report the transaction as an export sale. *Id.* at 6. Accordingly, Coalition asserted, "Chandan would have definitively known at the time of the sale whether the sales [[ ]]." *Id.*

In its rebuttal brief, Chandan highlighted additional evidence in the record that it had not previously cited as indicative of its knowledge that the challenged sale was for export. Letter from Chandan Steel Ltd. to Sec'y Commerce re: Certain Stainless Steel Flanges from India, Rebuttal Comments to Case Brief on Chandan filed by Petitioners dated June 19, 2018 at 2–3 (June 25, 2018), P.R. 402, C.R. 444 ("Chandan's Case Rebuttal"). Specifically, Chandan emphasized that its sales contract with [[ ]] reflected an agreement that the packaging of the merchandise would be of export quality and that the goods would be stamped with the logo of [[ ]]. *Id.* at 3.

On August 16, 2018, Commerce issued its *Final Determination*, in which it continued to find that stainless steel flanges from India were being, or were likely to be, sold in the United States at less than fair value. *Final Determination* at 40,475. Commerce also continued to find that Chandan's home market was not viable for calculating NV. IDM at 37. Specifically, Commerce wrote: "[Coalition's] argument that

Chandan's home market is viable, and therefore NV should be based on home market sales prices, is unsubstantiated. As a result, Commerce finds the comparison market viable . . . ." *See id.* For this conclusion, Commerce relied on the two provisions in Chandan's sales contract with [[ ]], which called for packaging of export quality and for the merchandise to be stamped with the logo of [[ ]]. *Id.* As a result, Commerce calculated an AD margin of 19.16 percent for Chandan. *Final Determination* at 40,476.

Coalition then filed a complaint, on December 6, 2018, challenging the portions of Commerce's *Final Determination* pertaining to Chandan's home market. Compl. at 3–5. On June 17, 2019, Coalition filed a revised Rule 56.2 motion for judgment on the agency record, arguing that Commerce's findings on Chandan's home market sales were unsupported by substantial evidence and otherwise not in accordance with the law. Pl.'s Br. at 10, 15. The Government responded to Coalition's motion on September 10, 2019. Def.'s Br. Coalition filed a reply brief to the Government's opposition on October 9, 2019. Pl.'s Reply Br. Oct. 9, 2019, ECF No. 29 ("Pl.'s Reply"). Prior to hearing oral argument, the court issued questions to the parties on March 25, 2020, ECF No. 38, to which the parties responded in writing, Pl.'s Resp. to Ct.'s Questions for Oral Arg., Apr. 6, 2020, ECF No. 42 ("Pl.'s Suppl. Resp."); Def.'s Suppl. Resp. The court held oral argument on April 9, 2020. ECF No. 44, available at https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings ("Oral Arg.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review is governed by 19 U.S.C. § 1516(a)(b)(1)(B)(i), which provides that "[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). 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.'" *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantiality of evidence must account for anything in the record that reasonably detracts from its weight. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (citing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)); *SeAH Steel Corp. v. United States*, 34 CIT 605, 607, 704 F. Supp. 2d 1353, 1355 (2010) (noting that Commerce

must examine the record and provide a reasoned analysis "if [its determination] is to be characterized as supported by substantial evidence and otherwise in accordance with law"). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

Commerce must also examine the record and provide an adequate explanation for its findings such that the record demonstrates a rational connection between the facts accepted and the determination made. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Jindal Poly Films, Ltd. of India v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1379, 1383 (2019). Commerce's findings may be supported by substantial evidence despite the possibility that two inconsistent conclusions may be drawn from the record. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373, 34 ITRD 2119 (2012). Moreover, the agency is not required to address every piece of evidence submitted by the parties, and Commerce is presumed to have considered all the evidence in the record absent a showing to the contrary. *Id.* (quoting *USEC Inc. v. United States*, 34 F. App'x 725, 731 (Fed. Cir. 2002)). Nonetheless, Commerce is obligated to respond to those arguments made by interested parties that bear on issues material to Commerce's determination. *Itochu Bldg. Prods., Co. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1330, 1337 (2016).

DISCUSSION

Coalition argues that (1) Commerce's determination that the challenged sale was for export is unsupported by substantial evidence because Commerce failed to provide an adequate explanation for its findings and failed to demonstrate a rational connection between the facts found and the determination made; and (2) Commerce did not act in accordance with law because it failed to undertake a diligent inquiry in response to Coalition's comments. Pl.'s Br. 10–18. For the reasons stated below, the court (1) remands Commerce's determination that the challenged sale was for export because that determination was not adequately reasoned and thus not supported by substantial evidence, but (2) concludes that Commerce did meet its obligation to conduct a diligent inquiry. The court takes no position, however, on the correctness of Commerce's determination. Rather, the court finds only that Commerce failed to meet its obligation to provide a reasoned explanation for its decision and, therefore, cannot sustain its *Final Determination* here.

I. Commerce's Determination Was Not Adequately Reasoned Because Commerce Failed to Discuss Material Issues.

In its *Final Determination*, Commerce concluded that Chandan's home market was not viable for calculating NV because its home market sales were less than five percent of its sales of subject merchandise to the United States. IDM at 37. In support of this conclusion, Commerce wrote:

> Specifically, we find that the sales contract contains the packing terms that Chandan agreed to with the buyer, which shows an agreement to make the packaging of export quality. Thus, Chandan provided documentary evidence demonstrating that it knew, at the time of the sale, that the ultimate destination was outside of India. Specifically, the sales contract stated that the flanges were to be marked with an affiliate's logo that was outside of India. Therefore, in accordance with section 773(a)(1)(C) of the Act, we find that Chandan's home market sales are not viable.

Id. (footnote omitted).

Coalition argues that Commerce's determination cannot be sustained because Commerce failed to address evidence and arguments raised by Coalition during the investigation that were material to its determination, and that Commerce failed to provide an adequate explanation of its reasoning. Pl.'s Br. at 10–18; Pl.'s Reply at 6–9. Specifically, Coalition asserts that Commerce was required to discuss: (1) the three factors that Chandan initially relied on to support its argument that it had knowledge the sale was made for export — the terms of the sale offer and counteroffer, the mill testing certification, and the [[ ]] financial statements; (2) the [[ ]], which contained a provision calling for export quality packaging; (3) Chandan's choice not to record the challenged sale it in its [[ ]] sales database despite the contract provision calling for merchandise to be marked with a [[ ]] affiliate logo; and (4) Coalition's assertion that Commerce "has previously found that Indian law requires that buyers tell a seller that merchandise is being purchased for export." Pl.'s Suppl. Resp. at 8. *See also* Pl.'s Br. at 12–14.

The Government replies that Commerce "must take the record as a whole into account, but it is not required to explicitly address all evidence in the record." Def.'s Suppl. Resp. at 4 (citing *Nucor Corp. v. United States*, 28 CIT 118, 233–34, 318 F. Supp. 2d 1207, 1247 (2004), *aff'd*, 414 F.3d 1331 (Fed Cir. 2005)). The Government argues that, contrary to Coalition's assertions, it did address all material issues.

Id. at 8. Specifically, the Government emphasizes that the key issue in determining how to classify the challenged sale was whether Chandan had knowledge that the goods at issue were not for home market consumption and that Commerce fully addressed this issue. *Id.* at 9. Moreover, the Government posits that Coalition has failed to demonstrate that the evidence it identified as detracting did indeed detract from Commerce's determination and that Coalition has therefore also failed to show that Commerce was required to discuss that evidence on the record. Def.'s Br. at 9–10.

In every case, Commerce must "examine the record and articulate a satisfactory explanation for its action." *CS Wind Vietnam*, 832 F.3d at 1376 (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)). Commerce is not required to make an explicit response to every piece of evidence or argument raised by interested parties. *Nucor Corp.*, 318 F. Supp. 2d at 1247 (quoting *USEC*, 34 F. App'x at 731). However, Commerce must discuss issues of law and fact that are material to its determination, including any evidence that reasonably detracts from its determination. *See CS Wind Vietnam*, 832 F.3dat 1373; *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355–56 (Fed. Cir. 2005); *Itochu Building Prods. Co.*, 163 F. Supp. 3d at 1337. Further, Commerce has "an 'obligation' to address important factors raised by comments from petitioners and respondents." *SKF USA, Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011). Finally, Commerce's explanation must be adequately detailed to permit judicial review. *See Timken U.S.*, 421 F.3d at 1355 ("[I]t is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973))); *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

Commerce's *Final Determination* did not meet these standards. The court agrees with Coalition that Commerce failed to adequately explain its decision to treat the challenged sale as an export, rather than home market, sale and that Commerce was required to address some of Coalition's arguments on the record. The court finds that Commerce did not address several issues raised by Coalition that were material to the agency's determination and thus did not "articulate a satisfactory explanation" for its decision. *See CS Wind Vietnam*, 832 F.3d at 1376 (quoting *Yangzhou Bestpak Gifts*, 716 F.3d at 1378). For the reasons discussed below, evidence pertaining to Chandan's sales agreements and the challenged sale raised material issues that

Commerce was obligated to discuss on the record, including (1) the export quality packaging provision in Chandan's [[ ]], (2) Chandan's treatment of the agreement's logo provision, and (3) the final payment and delivery terms of the sale.

A. Sales Agreement Packaging Provision

Coalition argues now, and previously as a petitioner before Commerce, that Commerce's reliance on the packaging term in the challenged sales agreement needed to be explained on the record because the same provision also appears in Chandan's [[ ]]. *See* Pl.'s Br. at 12. According to Coalition, the [[ ]] contained evidence that detracted from a conclusion that Chandan knew the challenged sale was for export and therefore Commerce was required to provide a reasoned analysis for its decision to rely on the provision in the [[ ]] sales agreement nonetheless. *Id.* The Government does not specifically address this argument but refers to the packaging provision in arguing that the facts of the case, taken together and considered holistically, demonstrate Chandan's knowledge. Def.'s Br. at 8.

The facts here are analogous to those in *Stupp Corp.*, 359 F. Supp. 3d 1293, on which Coalition relies. *See, e.g.*, Pl.'s Br. at 16–18. There, the plaintiff-intervenor challenged Commerce's decision to include certain sales in the respondent's home market database. *Stupp Corp.*, 359 F. Supp. 3d at 1309. Plaintiff-intervenor argued that Commerce failed to address record evidence that suggested the respondent should have known the merchandise at issue would be exported for consumption without further processing. *Id.* at 1310. While Commerce noted that the challenged sales included sales made to one customer that may have further consumed the merchandise in the home market prior to export, the court found that Commerce "fail[ed] to confront the remaining evidence tending to detract from its determination." *Id.* at 1310–11. The court reasoned that Commerce had not explained why the existence of one customer that consumed the merchandise before exporting it "implies a lack of knowledge," where the record also contained evidence that merchandise sold to another customer was "exported without being further manufactured." *Id.* at 1311.

As in *Stupp Corp.*, Commerce here concluded that the packaging provision in the challenged sales agreement constituted documentary evidence of Chandan's knowledge without providing any discussion of the existence of the same provision in the [[ ]], which tends to detract from its determination. *See* IDM at 37. Because the evidence in the record suggested that an export

quality packaging provision may be indicative of either a home market or an export sale, Commerce needed to explain the logic supporting its decision to rely on the provision in its *Final Determination*. *See Stupp Corp.*, 359 F. Supp. 3d at 1311; *Fed.-Mogul Corp.*, 17 CIT at 1020–21 (observing that Commerce must discuss "evidence which a reasonable mind would accept as calling into question whether respondents were able to distinguish home market sales destined for consumption in the home market from home market sales destined for [export]").

The court concludes that Commerce should have addressed this detracting evidence and Coalition's comments on this point. The existence of the export quality packaging provision in both the challenged sales agreement and the [[ ]] raised a meaningful question about Chandan's ability to identify an export sale based on such a provision.

B. Sales Agreement Logo Provision

Coalition further contends that Commerce failed to sufficiently explain its conclusion regarding the logo provision of the challenged sales contract. Pl.'s Br. at 13–14. The Government counters that Chandan's agreement to stamp the merchandise with the logo of a [[ ]] affiliate is evidence that Chandan knew the merchandise would be exported outside its home market. Def.'s Br. at 7. The Government also observes that "it was not incumbent upon Chandan" to know the specific country in which the merchandise would ultimately be sold. Def.'s Br. at 8 (citing *INA Walzlager Schaeffler KG*, 957 F. Supp. at 263–64). Coalition points out, however, that Chandan asserted it did not know the final destination of the merchandise. Pl.'s Br at 14. Chandan classified the transaction as a third-country market sale but chose not to include it in the company's [[ ]] sales database. *Id.* at 14 n.2. Accordingly, Coalition argues that "it is not reasonable to conclude on the one hand that the use of a logo for a [[ ]] company necessarily means the merchandise is not being sold in India and on the other hand that the logo does not provide any indication of where the merchandise is being sold outside of India." Pl.'s Reply at 4–5. Finally, Coalition asserts that there is no evidence showing that a [[ ]] affiliate logo could not be used on merchandise sold in the home market. Pl.'s Br. at 16.

The Government is correct that, under *INA Walzlager*, a producer need not know the final destination of merchandise sold so long as the producer has actual or constructive knowledge it will be exported outside the home market. *See* 957 F. Supp. at 263–64. Therefore, based on its experience and expertise, Commerce might have inferred

that the logo provision was evidence that Chandan knew the merchandise would be exported, even if Chandan did not consider the logo indicative of the specific final sales market. On the other hand, it also would have been reasonable for Commerce to conclude that the logo provision did not demonstrate that Chandan knew the sale was made for export. The court must accord significant deference to Commerce's experience and expertise when reviewing AD determinations because they "involve complex economic and accounting decisions of a technical nature." *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). That said, "[t]he requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter." *CS Wind Vietnam*, 832 F.3d at 1377.

The court concludes that Commerce was required to explain its choice between these two reasonable inferences regarding the significance of the logo provision. Commerce has discretion to "make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Me. Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). Moreover, the Government correctly posits that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Def.'s Suppl. Resp. at 4 (quoting *Downhole Pipe & Equip., LP v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1310, 1315 (2014)). However, in order to sustain its decision, the court requires that "reasons for the choices made among various potentially acceptable alternatives usually need to be explained." *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988). *Cf, Trust Chem Co. v. United States*, 36 CIT 310, 318, 819 F. Supp. 2d 1373, 1381 (2012) ("As long as Commerce reasonably explains its choice between imperfect alternatives, the court will not reject the agency's determination."). Because the logo provision contained in the challenged sale agreement could indicate either that Chandan knew the sale was destined for export or that Chandan would not have been able to indicate its final destination, whether in its home market or abroad, Commerce was required to explain its choice between reasonable alternatives.

In *INA Walzlager*, Commerce identified verified, uncontroverted evidence strongly supporting an inference that the manufacturer-respondent knew its customers would resell the subject merchandise abroad. 957 F. Supp. at 265. In contrast, here, Chandan's own treatment of the sale raised unanswered questions about its interpretation of the logo provision in the sales agreement. Specifically, Chandan

stated that it did not treat the [[ ]] logo as evidence that the merchandise would be sold in [[ ]]. Letter from Chandan Steel Ltd. to Sec'y Commerce, re: Chandan Steel Ltd.'s Submission of Resp. to Suppl. Questionnaire of Sec. A, B and C at 3 (Jan. 25, 2018), P.R. 198. Therefore, it also would have been rational for Commerce to infer that, absent evidence to the contrary, Chandan did not have reason to believe that merchandise stamped with a [[ ]] affiliate logo could not be sold in the Indian market.

Further, the Government argued that "[u]nder Commerce's practice, a company need not know the final destination of its exported merchandise, only that it be intended for export." Def.'s Br. at 8. However, this argument does not overcome Commerce's failure to fully discuss the logo provision. "The courts may not accept . . . counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). An agency's determination must be "upheld . . . on the same basis articulated in the order by the agency itself." *Id.* Commerce itself did not invoke its prior practice when explaining its conclusion regarding the logo provision. Moreover, even if Commerce had done so, an agency's "statement of what it 'normally' does or has done before . . . is not, by itself, an explanation of 'why its methodology comports with the statute.'" *CP Kelco US, Inc. v. United States*, 949 F.3d 1348, 1356 (Fed. Cir. 2020) (quoting *CS Wind Vietnam*, 832 F.3d at 1377). Therefore, the Government's explanation of Commerce's past practice, provided only in briefing to the court, may not fill the explanatory gap left by Commerce's statements on the record.

In sum, Commerce's conclusory treatment of this issue does not permit the court to review whether the agency met its obligation to make its decision based on the entire record. Commerce did not address information raised that may "cast doubt on the reasonableness of a position taken by the agency." *Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 549 (D.C. Cir. 1997). Therefore, the agency's explanation does not illustrate whether Commerce accounted for and rejected the questions raised by the logo provision or "entirely failed to consider an important aspect of the problem." *SKF USA Inc.*, 630 F.3d at 1374 (quoting *State Farm*, 463 U.S. at 43).

C. Final Payment and Delivery Terms of the Challenged Sale

Finally, in its analysis, Commerce should have discussed the final payment and delivery terms of the challenged sale. In its initial letter to Commerce, Chandan emphasized that the original offer the company made to [[ ]], was quoted in United States dollars, and

provided for delivery in [[ ]]. Chandan's Initial Letter at 2. However, Chandan explained that after the offer was received, [[ ]] submitted a counteroffer, quoted in Indian Rupees and calling for delivery in [[ ]]. *Id.* This counteroffer was accepted, and the transaction was completed on the terms it contained. *Id.* Coalition argues now, and previously raised to Commerce, that these circumstances "would have indicated to Chandan that the sale was for the home market." Pl.'s Reply at 7; Petitioners' Initial Comments at 3. Commerce did not discuss or rely on this evidence in either its *Preliminary Determination*or its *Final Determination* and continued to treat the challenged sale as one for which Chandan would have known was for export. The Government contends that "[i]t is reasonable to infer that a price initially quoted in U.S. dollars was intended for export, even where the sale ultimately was consummated in rupees." Def.'s Br. at 9.

The court concludes that the accepted payment and delivery terms in [[ ]] counteroffer constitutes material evidence that Commerce was required to discuss because it raises an inference that Chandan had reason to believe the merchandise would remain in the home market. A determination that fails to analyze or rebut material issues cannot be supported by substantial evidence. *Usinor v. United States*, 26 CIT 767, 773 (2002). Commerce did not address the payment or delivery terms at any point during the investigation, and the Government gives it sparse treatment, stating only that it does not undercut the evidence Commerce relied upon without explaining why it should not have been discussed by Commerce despite Coalition having raised this same argument to Commerce. *See* Def.'s Br. at 9. Therefore, Commerce has not indicated how or why the terms of the initial offer negate the terms on which the sale was ultimately consummated or why its inference was reasonable. *See SKF USA Inc.*, 630 F.3d at 1375 ("Commerce must explain why [the plaintiff's] concern is unwarranted or is outweighed by other considerations.").

In sum, the record in this case contained both evidence from which conflicting inferences concerning Chandan's knowledge may have been drawn and arguments from Coalition raising these issues. In light of such evidence and arguments, Commerce was obligated to provide a reasoned analysis of the choices made in support of its determination. *See Asociacion Colombiana de Exportadores de Flores*, 704 F. Supp. at 1071; *Trust Chem*, 36 CIT at 318. In the absence of this explanation, the court is unable to determine the path of Commerce's reasoning and thus concludes that it was not supported by substantial evidence.

II. Commerce Met its Obligation to Conduct a Diligent Inquiry.

Throughout its submissions to the court, Coalition has also alleged that Commerce was under a duty to undertake additional inquiry into Chandan's knowledge, that the agency failed to request additional information where it should have done so, and thus that the *Final Determination* was not in accordance with law.[3] *See* Pl.'s Br. at 17–18; Pl.'s Reply at 9–10. Coalition argues that, "despite Petitioner repeatedly identifying concerns with Chandan's claims, at no point during the investigation did the agency request any additional explanation or information from Chandan regarding its claims or the information upon which it relied." Pl.'s Reply at 9–10. In particular, Coalition points to the fact that it alerted Commerce that the agency had allegedly taken the position, in a prior investigation, that Indian law requires buyers to notify sellers when goods are being purchased for export. Pl.'s Suppl. Resp. at 18. According to Coalition, this issue is material because it goes directly to Chandan's knowledge and therefore, Commerce was required to investigate Coalition's argument and provide an explanation in response. *Id.* The Government, however, urges the court to recognize that Coalition never provided any legal authority to support this claim. Def.'s Br. at 10.

The court notes that, on the one hand, it is clear that Commerce is required to conduct a diligent inquiry into any allegations of knowledge when deciding how to classify home market sales potentially exported outside the home market. *See Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1432–36, 215 F. Supp. 2d 1322, 1330–33 (2000). On the other hand, it is also settled that interested parties bear the burden of developing an adequate record on contested issues. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). At oral argument, the Government argued that the two standards are not inconsistent, but rather that the burden on the parties to develop the record comes first in time. *See* Oral Arg. at 41:37–43:08. Specifically, the Government posits that Commerce must investigate allegations presented by interested parties that raise a reasonable doubt about a material issue; however, the agency has no independent duty to make a diligent inquiry into any and all information highlighted by interested parties. *Id.*

[3] During the investigation, Chandan also asked Commerce to request additional information from Coalition. Chandan's Questionnaire Rebuttal at 5. Chandan asserted that, as [[ ]] is an affiliate of [[ ]], Coalition should have had information establishing whether the merchandise at issue was exported for consumption. *Id.* Commerce did not request any information or evidence from Coalition. Def.'s Suppl. Resp. at 13. However, neither the Government nor Coalition argue that Commerce was required to request information from the Coalition or [[ ]] in order to meet the diligent inquiry standard. *See id.* ; Pl.'s Suppl. Resp. at 16–17.

The court agrees with the Government's exposition. "[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce." *QVD Food Co.*, 658 F.3d at 1324 (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936–37, 806 F. Supp. 1008, 1015 (1992)); *see also NTN Bearing Corp. of America v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (noting that the interested party had the "burden to supply the information in the first instance"). Therefore, if Coalition sought an inference that [[ ]] would have informed Chandan had the merchandise been purchased for export, "then it should have furnished some proof to that effect." *See RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1312 (2015). Moreover, while Coalition does identify several issues that Commerce did not adequately address on the record, it has not identified any specific information that Commerce should have solicited. The diligent inquiry obligation does not constitute a requirement that Commerce seek out additional information where an interested party has not made a showing that additional information is required. *See Tianjin Mach. Imp. & Exp. Corp.*, 806 F. Supp. at 1015 ("A requirement that Commerce must search out new information in the guise of 'verification,' as plaintiffs suggest, is really a mandate that Commerce must shoulder any burden that the plaintiffs choose not to meet."). The court thus concludes that Commerce fulfilled its duty of conducting a diligent inquiry and was not required to do more here.

CONCLUSION

In sum, Commerce's inadequate explanation on the record does not permit the court to discern the path of the agency's reasoning and fails to address detracting evidence that bears on issues material to Commerce's determination. As such, Commerce has not satisfied its burden to provide a sufficiently reasoned explanation, and therefore its *Final Determination* was not supported by substantial evidence. Accordingly, the court remands to Commerce for further proceedings consistent with this opinion. Specifically, the court remands to Commerce for an explanation of the significance to its determination of the following: (1) Chandan's [[ ]], containing a provision calling for export quality packaging; (2) Chandan's treatment of the challenged sale as a third-country market sale, rather than a [[ ]] one, despite its contention that the logo provision indicated to the company that the sale was for export; and (3) the final payment and delivery terms of the challenged sale. The court takes no position on the issue of whether, with more robust analysis and explanation, Commerce's determination may be

deemed supported by substantial evidence. Commerce shall file with the court and provide to the parties its remand results within 90 days of the date of this order; thereafter the parties shall have 30 days to submit briefs addressing the revised final determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: June 17, 2020
New York, New York

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

Slip Op. 20–85

NEXTEEL CO., LTD., Plaintiff, HYUNDAI STEEL COMPANY, HUSTEEL CO., LTD., AJU BESTEEL CO., LTD., MAVERICK TUBE CORP., and SEAH STEEL CORP., Consolidated Plaintiffs, and HUSTEEL CO., LTD., HYUNDAI STEEL CO., and ILJIN STEEL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and IPSCO TUBULARS INC., VALLOUREC STAR, L.P., WELDED TUBE USA INC., MAVERICK TUBE CORP., and UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Ct. No. 17–00091

[Sustaining the United States Department of Commerce's remand redetermination following an administrative review of the antidumping order on oil country tubular goods from the Republic of Korea. Denying Plaintiff's motion for entry of partial final judgment as moot.]

Dated: June 17, 2020

J. David Park, *Michael T. Shor*, *Henry D. Almond*, *Daniel R. Wilson*, *Leslie C. Bailey*, and *Kang Woo Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff NEXTEEL Co., Ltd. and Consolidated Plaintiff and Plaintiff-Intervenor Hyundai Steel Company.

Donald B. Cameron, *Eugene Degnan*, *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, and *Rudi W. Planert*, Morris, Manning, & Martin, LLP, of Washington, D.C., for Consolidated Plaintiff and Plaintiff-Intervenor Husteel Co., Ltd. *Jordan L. Fleischer* and *Edward J. Thomas III* also appeared.

Jarrod M. Goldfeder and *Robert G. Gosselink*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiff AJU Besteel Co., Ltd.

Gregory J. Spak, *Frank J. Schweitzer*, *Kristina Zissis*, and *Matthew W. Solomon*, White & Case LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Maverick Tube Corporation and Defendant-Intervenor IPSCO Tubulars Inc.[1] *Luca Bertazzo* also appeared.

Jeffrey M. Winton and *Amrietha Nellan*, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation.[2]

Roger B. Schagrin, *Elizabeth J. Drake*, and *Christopher T. Cloutier*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors Vallourec Star, L.P. and Welded Tube USA Inc. *Paul W. Jameson* also appeared.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Hardeep K. Josan, Attorney, United States Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, United States Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance, of Washington, D.C.

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[1] Counsel for IPSCO Tubulars Inc. advised that the entity formerly known as TMK IPSCO, which had been represented by Schagrin Associates, is now known as IPSCO Tubulars Inc. Letter Regarding Acquisition And Party Name, Feb. 7, 2020, ECF No. 202. IPSCO Tubulars Inc. is represented by White & Case LLP. Notice of Substitution of Attorney, Feb. 7, 2020, ECF No. 199. The caption is amended accordingly.

[2] The law firm formerly known as the Law Office of Jeffrey M. Winton PLLC is now known as Winton & Chapman PLLC. Amended Notice of Appearance, Jan. 14, 2020, ECF Nos. 193–94.

Joel D. Kaufman and *Richard O. Cunningham*, Steptoe & Johnson LLP, of Washington, D.C., for Plaintiff-Intervenor ILJIN Steel Corporation.

OPINION

Choe-Groves, Judge:

This action arises from the administrative review of the antidumping order on oil country tubular goods ("OCTG") from the Republic of Korea ("Korea") by the United States Department of Commerce ("Commerce"). *See Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015), as amended, 82 Fed. Reg. 31,750 (Dep't Commerce July 10, 2017) (amended final results of antidumping duty administrative review; 2014–2015) ("*Final Results*"); *see also Certain Oil Country Tubular Goods from the Republic of Korea*, 81 Fed. Reg. 71,074 (Dep't Commerce Oct. 14, 2016) (preliminary results of the antidumping duty administrative review; 2014–2015) ("*Preliminary Results*"). Before the court are the second Final Results of Redetermination Pursuant to Court Remand, Nov. 20, 2019, ECF No. 190–1 ("*Second Remand Redetermination*"), pursuant to the court's decision in *NEXTEEL Co., Ltd. v. United States*, 43 CIT __, __, 399 F. Supp. 3d. 1353, 1355 (2019) ("*NEXTEEL III*"). For the reasons set forth in this opinion ("*NEXTEEL IV*"), the court sustains the *Second Remand Redetermination*.

PROCEDURAL HISTORY

The court presumes familiarity with the facts of this case. *See NEXTEEL Co. Ltd. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1336, 1344–52, 1357–58, 1360–61 (2019) ("*NEXTEEL I*"). In *NEXTEEL I*, the court considered seven Rule 56.2 motions for judgment on the agency record and fourteen issues presented by the Parties. *See id.* at 1343–44. The court sustained in part and remanded in part Commerce's *Final Results*. *Id.* at 1344, 1364. Consolidated Plaintiff SeAH Steel Corporation ("SeAH") and Defendant-Intervenors Maverick Tube Corporation ("Maverick"), IPSCO Tubulars Inc. (then known as TMK IPSCO), Vallourec Star, L.P., Welded Tube USA, and United States Steel Corporation filed motions for reconsideration of the court's decision in *NEXTEEL I* as to SeAH's ocean freight expenses, Commerce's application of differential pricing analysis, and the particular market situation adjustment. *See NEXTEEL Co. Ltd. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1343, 1346–47 (2019) ("*NEXTEEL II*"). The court denied both motions

for reconsideration. *Id.* at 1350. In *NEXTEEL III*, the court sustained in part and remanded in part Commerce's first remand redetermination ("*First Remand Redetermination*"). *NEXTEEL III*, 399 F. Supp. 3d at 1362.

Commerce filed its *Second Remand Redetermination* on November 20, 2019. SeAH filed comments. Comments of SeAH Steel Corp. on Commerce's Nov. 20, 2019 Redetermination, Dec. 20, 2019, ECF No. 192 ("SeAH's Comments"). Defendant United States and Defendant-Intervenor Maverick responded. Def.'s Resp. to Comments Regarding the Remand Redetermination, Jan. 21, 2020, ECF No. 195 ("Def.'s Resp."); Responsive Comments of Def.-Inter. Maverick Tube Corp. in Supp. of Commerce's Remand Redetermination, Jan. 21, 2020, ECF No. 196 ("Def.-Inter.'s Resp."). SeAH filed the Joint Appendix. Public Joint Appendix Second Remand Redetermination, Jan. 27, 2020, ECF No. 198.

Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") moved for entry of partial final judgment under CIT Rule 54(b). Mot. for Entry of Partial Final J. With Respect to NEXTEEL's Claims, Feb. 10, 2020, ECF No. 207 ("NEXTEEL's 54(b) Mot."). Defendant United States responded. Def.'s Resp. to NEXTEEL's Mot. For Entry of Partial Final J., Mar. 23, 2020, ECF No. 211. Defendant-Intervenors responded. Def.-Inters.' Resp. to NEXTEEL's Mot. For Entry of Partial J., Mar. 16, 2020, ECF No. 210. NEXTEEL replied. Reply to Def.'s and Def.-Inters.' Resps. to NEXTEEL's Mot. for Entry of Partial Final J., Apr. 13, 2020, ECF No. 215.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which provide the court with authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Treatment of Pusan Pipe America Inc.'s General and Administrative Expenses as Indirect Selling Expenses

In the *Final Results*, Commerce deducted general and administrative ("G&A") expenses from constructed export price for resold United States products for SeAH's United States affiliate, Pusan Pipe America Inc. ("PPA"). *See First Remand Redetermination* at 11–12; Final Issues & Decision Memorandum, P.R. 551 (Apr. 10, 2017) at 6,

87–88 ("Final IDM"). Commerce explained that "[b]ecause PPA's G&A activities support the general activities of the company as a whole, including its sales and further manufacturing functions of all products," Commerce applied the "G&A ratio to the total cost of further manufactured products . . . as well as to the cost of all resold products." Final IDM at 87–88. The court noted that Commerce's explanation failed to clarify why it deducted PPA's G&A expenses for resold products or how Commerce determined that it would apply all of PPA's G&A expenses to resold products. *NEXTEEL I*, 355 F. Supp. 3d. at 1360–61. The court concluded that Commerce's decision to deduct G&A expenses in the *Final Results* was unsupported by substantial record evidence and remanded this issue for clarification or reconsideration of Commerce's methodology. *Id.* at 1361.

In the *First Remand Redetermination*, Commerce explained that "Commerce did not apply 'all' of PPA G&A expenses to directly resold products" and "Commerce allocated PPA G&A expenses proportionally to all of the products PPA sold (*i.e.*, products which PPA directly resold and products PPA further processed and then resold)." *First Remand Redetermination* at 11–12. For further manufactured products, Commerce "applied PPA's G&A expense ratio to the total cost of further manufacturing, plus the cost of production . . . of imported OCTG pipe that was further manufactured, and [Commerce] included the amount as further manufacturing under 19 U.S.C. § 1677a(d)(2)." *Id.* at 14. Commerce also "applied PPA's G&A expense ratio to the [cost of production] of the imported OCTG for products not further manufactured and included the amount as indirect selling expenses under 19 U.S.C. § 1677a(d)(1)(D)." *Id.* The court noted that Commerce's *First Remand Redetermination* did not identify what record evidence supported the treatment of G&A expenses as selling expenses or explain why Commerce may treat G&A expenses as selling expenses. *NEXTEEL III*, 399 F. Supp. 3d at 1361. The court remanded this issue again for further explanation of why Commerce may treat G&A expenses as selling expenses as to PPA and for identification of record evidence supporting its position. *Id.* at 1361–62.

In the *Second Remand Redetermination*, Commerce explained that PPA is SeAH's United States affiliate established for the purpose of generating sales in North America. *Second Remand Redetermination* at 5. Commerce noted that PPA has no production capabilities of its own, meaning the extent of PPA's further manufacturing costs is the fee PPA pays to unaffiliated processors. *Id.* at 5–6. Commerce decided to allocate "PPA's G&A expenses proportionately to all of the products

PPA sold (*i.e.*, products which PPA directly resold and products which PPA further processed and then resold) as indirect selling expenses . . . ." *Id.* at 10.

An antidumping duty represents the amount by which the normal value of the merchandise exceeds its export price or constructed export price. 19 U.S.C. § 1673. Constructed export price is the price at which the subject merchandise is first sold in the United States by a seller affiliated with the producer or exporter to a non-affiliated purchaser. *Id.* § 1677a(b). When calculating constructed export price, Commerce must make adjustments for certain expenses. *Id.* § 1677a(b), (d). Under 19 U.S.C. § 1677a(d)(2), Commerce must reduce constructed export price by "the cost of any further manufacture or assembly (including additional material and labor) . . . ." *Id.* § 1677a(d)(2). Commerce also must reduce the constructed export price by:

> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> (A) commissions for selling the subject merchandise in the United States;
>
> (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
>
> (C) any selling expenses that the seller pays on behalf of the purchaser; and
>
> (D) any selling expenses not deducted under subparagraph (A), (B), or (C).

Id. § 1677a(d)(1)(A)–(D). "For purposes of calculating indirect selling expenses, Commerce generally will include G&A expenses incurred by the United States selling arm of a foreign producer." *Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101 (1995) ("*Aramide*"). "[I]ndirect selling expenses . . . implicitly contemplate[] the exclusion of all expenses that relate to sales of non-subject merchandise, as well as the exclusion of . . . all expenses that are entirely unrelated to sales." *United States Steel Corp. v. United States*, 34 CIT 252, 266 (2010) (internal punctuation omitted). When the record shows that an expense is "unrelated to the sale of subject merchandise, that expense may be removed from the indirect selling expense calculation." *Id.* (internal citation and punctuation omitted); *see also*

Uruguay Round Agreements Act: *Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1 at 154 (1994) ("SAA") (describing "indirect selling expenses" in largely similar terms).[3]

SeAH argues that certain of its G&A expenses are properly described as manufacturing expenses. SeAH's Comments at 2–4. Defendant and Maverick counter that PPA is the United States selling arm of a foreign producer (SeAH), PPA's involvement in further manufacturing activities is perfunctory, and Commerce treated PPA's G&A expenses appropriately as indirect selling expenses. Def.'s Resp. at 4; Def.-Inter.'s Resp. at 4–6.

i. Commerce's Conclusions That PPA is SeAH's United States Affiliate And Primarily Functions to Facilitate SeAH's Sales in North America Are Supported by Substantial Evidence

The court first examines whether Commerce's conclusions that PPA is SeAH's United States affiliate and primarily functions to facilitate SeAH's sales in North America are supported by substantial evidence.

Commerce found that PPA is SeAH's United States affiliate, PPA was established to generate sales in North America, and PPA's primary function is to facilitate SeAH's sales. *Second Remand Redetermination* at 5. Commerce found that PPA has no production capabilities of its own and PPA's further manufacturing costs are limited to the fee PPA pays to unaffiliated processors tasked with the further processing of the products PPA sells. *Id.* at 5–6. The parties do not dispute that PPA is SeAH's United States affiliate, SeAH's Comments at 6, and that PPA neither owns nor operates its own manufacturing facilities, *id.* at 3. The record evidence supports Commerce's conclusion that PPA primarily facilitates SeAH's sales in North America. *See Second Remand Redetermination* at 5 (noting that SeAH, in a questionnaire response, conceded that SeAH's two channels for sales of OCTG to United States customers are through its United States affiliate, PPA).[4] Based on the record evidence cited by Commerce, the

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

[4] *See* SeAH's Section A Supp. Questionnaire Resp. at Question 5, P.R. 225–227 (July 6, 2016). As SeAH explained, in pertinent part:

> [SeAH] sells OCTG to the United States to U.S. customers through two channels of distribution: (1) back-to-back sales through the head office of PPA, and (2) inventory sales through PPA's PMT division. A comparison of the reported sales and entry quantities for each of these distribution channels during the review period is provided in Appendix SA-1. For back-to-back sales, the OCTG is shipped directly by SeAH to the U.S. port of entry where PPA takes title to the merchandise. The OCTG is then shipped directly from the U.S. port to the U.S. destination designated by PPA's customer.

court accepts as reasonable Commerce's conclusion that PPA's primary function is the facilitation of SeAH's sales in North America.

The court concludes that Commerce's findings that PPA is SeAH's United States affiliate and primarily functions to facilitate SeAH's sales in North America are supported by substantial evidence.

ii. Commerce's Treatment of PPA's G&A Expenses as Indirect Selling Expenses is in Accordance With The Law

The court next examines whether Commerce's treatment of PPA's G&A expenses as indirect selling expenses is in accordance with the law.

When calculating indirect selling expenses, Commerce generally includes G&A expenses incurred by the United States selling arm of a foreign producer. *Aramide*, 19 CIT at 1101. SeAH's argument that PPA engages in administrative activities relating to manufacturing is inapposite. SeAH's Comments at 3. Commerce found that PPA is the United States selling arm of a foreign producer, and the parties do not dispute that PPA neither owns nor operates its own manufacturing facilities. *Id.*; *Second Remand Redetermination* at 5–6. To the extent that PPA purchases and supplies material inputs to contractors performing further manufacturing and tracks products through the manufacturing process, the associated G&A expenses are properly understood as expenses facilitating sales, not manufacturing. *See* SeAH's Comments at 3. Commerce accounted for G&A activities supporting further manufacturing in the fee PPA pays to the unaffiliated processors, whose further manufacturing activities can reasonably be expected to incur G&A expenses funded by PPA's fee. Commerce already treats that processing fee as a further manufacturing expense. *Second Remand Redetermination* at 8. Allocating a portion of PPA's G&A expenses to further manufacturing, as requested here by SeAH, would result in impermissible double counting.

The court concludes, therefore, that Commerce's treatment of PPA's G&A expenses as indirect selling expenses is in accordance with the law.

II. Exhaustion of SeAH's Administrative Remedies

The court next considers whether SeAH exhausted its administrative remedies.

The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "Absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube*

LLC v. United States, 856 F.3d 908, 912 (Fed. Cir. 2017) (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). Generally, exhaustion requires that a party submit an administrative case brief to Commerce presenting all arguments that continue to be relevant to Commerce's final determination or results. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); *see* 19 C.F.R. § 351.309(c)(2). If a party fails to put forth a relevant argument before Commerce in its case brief, then that argument is typically considered waived and will not be considered by a court on appeal. *DuPont Teijin Films China Ltd. v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1338, 1354 (2014) (citations omitted). Parties must raise their issues before Commerce at the time the agency addresses the issue because "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Dorbest Ltd.*, 604 F.3d at 1375 (citing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) and *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (internal punctuation omitted).

i. SeAH Did Not Exhaust Its Administrative Remedies And Waived Its Argument Concerning Inconsistent Questionnaire Instructions

SeAH argues that Commerce's *Second Remand Redetermination* is inconsistent with questionnaire instructions SeAH received in a different proceeding. SeAH's Comments at 4–6. The Government argues that SeAH did not exhaust its administrative remedies because SeAH did not raise this argument properly before the agency. Def.'s Resp. at 6.

The brief that SeAH submitted in the remand administrative proceeding does not address the argument it now raises for the first time before this court. *See* SeAH's Comments on Draft Remand Determination 1–7, R.P.R. 6 (Nov. 4, 2019) ("SeAH's Comments on Draft Remand Determination"). SeAH had an opportunity during the remand administrative proceeding below to raise its argument in its case brief concerning inconsistencies between Commerce's draft of the *Second Remand Redetermination* and prior questionnaire instructions. Here, where the court remanded Commerce's G&A allocation methodology, Commerce's past practice relating to Commerce's allocation methodology was well within the scope of issues that SeAH should have addressed during the administrative proceeding on remand if it wished to litigate them before this court. *Dorbest Ltd.*, 604

F.3d at 1375; *see* 19 C.F.R. § 351.309(c)(2); *see DuPont Teijin Films China Ltd.*, 7 F. Supp. 3d at 1354 (holding that where a party had failed to make a particular argument to Commerce, that party failed to exhaust its administrative remedies and so waived that argument). Neither the law nor the facts here describe a strong contrary reason for permitting SeAH to sidestep the requirement to exhaust its administrative remedies. *Boomerang Tube*, 856 F.3d at 912.

The court concludes that SeAH did not exhaust its administrative remedies as to SeAH's argument that Commerce's *Second Remand Redetermination* is inconsistent with questionnaire instructions SeAH received in a different proceeding because SeAH failed to address the issue during the remand administrative proceeding when it had an opportunity to express dissatisfaction with Commerce's actions. Because SeAH did not exhaust its administrative remedies, SeAH has waived this argument before the court. Accordingly, the court will not opine on this issue.

ii. SeAH Did Not Exhaust Its Administrative Remedies And Waived Its Argument as to Whether SeAH Should be Granted a Constructed Export Price Offset

The court next considers whether SeAH exhausted its administrative remedies and therefore waived its argument with respect to the issue of a constructed export price offset when SeAH did not raise the issue in its administrative case brief.

Although SeAH raised the constructed export price offset issue in the most recent remand administrative proceeding, the parties do not dispute that the case brief SeAH filed in the initial administrative proceeding did not raise the constructed export price offset issue. SeAH's Comments at 7; *Second Remand Redetermination* at 16; Def.-Inter.'s Resp. at 10–12. The question before the court is whether SeAH waived its argument when SeAH failed to address the constructed export price offset issue in its initial administrative case brief that would have served to express its dissatisfaction with Commerce's *Preliminary Results* before Commerce published the *Final Results* in 2017. The record demonstrates that SeAH was aware of the constructed export price offset issue in 2016, prior to Commerce's issuance of the *Preliminary Results* and prior to SeAH's filing of its initial administrative case brief. SeAH's Comments at 6; SeAH's Section A Response, P.R. 121–22 (Mar. 18, 2016) at 24 ("SeAH's Section A Resp.") (demonstrating that SeAH knew about the constructed export price offset issue in 2016). After Commerce issued the

Preliminary Results, SeAH failed to raise the constructed export price offset argument or otherwise express its dissatisfaction with this issue in SeAH's initial administrative case brief, and Commerce published its *Final Results* in 2017. SeAH's Comments at 7; *Second Remand Redetermination* at 16; Def.-Inter.'s Resp. at 10–12. SeAH raised the constructed export price offset issue in an administrative case brief for the first time in 2019, when SeAH asserted in its comments on the draft *Second Remand Redetermination* that Commerce's denial of a constructed export price offset was based on a faulty determination. SeAH's Comments on Draft Remand Determination at 5–7; *see* SeAH's Comments at 7. Maverick argues that SeAH did not exhaust its administrative remedies before Commerce as to the constructed export price offset issue, a constructed export price offset is inappropriate, and none of SeAH's expenses are equivalent to PPA's G&A expenses. Def.-Inter.'s Resp. at 10–15. Commerce has requested a voluntary remand for the purpose of reconsidering whether SeAH should be granted a constructed export price offset. Def.'s Resp. at 6, 8.

The court holds that SeAH failed to exhaust its administrative remedies and therefore waived its constructed export price offset argument before this court because (1) SeAH was aware of the constructed export price offset issue when it filed its questionnaire response in 2016, SeAH's Section A. Resp. at 24; (2) Commerce's Preliminary Analysis Memorandum did not include a level of trade adjustment or constructed export price offset for SeAH, *Second Remand Redetermination* at 16; (3) SeAH failed to raise the constructed export price offset argument in the initial administrative case brief to express its dissatisfaction with Commerce's *Preliminary Results* prior to the publication of Commerce's *Final Results* in 2017, *id.*; and (4) SeAH challenged Commerce's denial of a constructed export price offset for the first time when SeAH filed its comments on the *Second Remand Redetermination* in 2019. SeAH's Comments at 7; *Second Remand Redetermination* at 16; *see DuPont Teijin Films China Ltd.*, 7 F. Supp. 3d at 1354.

Because SeAH failed to address the constructed export price offset issue in its initial administrative case brief, the court concludes that SeAH did not exhaust its administrative remedies and, as a result, waived its argument before this court. Therefore, the court will not consider the constructed export price offset issue in this litigation. The court also denies Commerce's request for a voluntary remand

because the constructed export price offset issue was waived.[5] In addition, because the court has rendered a conclusive determination as to the *Second Remand Redetermination*, the court denies as moot NEXTEEL's motion for entry of partial final judgment under CIT Rule 54(b). NEXTEEL's 54(b) Mot.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Second Remand Redetermination* and denies NEXTEEL's Motion for Entry of Partial Final Judgment With Respect to NEXTEEL's Claims. Judgment will enter accordingly.

Dated: June 17, 2020
New York, New York

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

[5] The court notes that it has previously denied Commerce's impermissible request for a "doover" in this matter. *NEXTEEL I*, 355 F. Supp. 3d at 1348.