U.S. Court of International Trade

Slip Op. 21–47

HYUNDAI STEEL CO., Plaintiff, and UNITED STATES STEEL CORP., Consolidated Plaintiff, and NUCOR CORP., Consolidated Plaintiff-Intervenor, UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor, and HYUNDAI STEEL CO., Consolidated Defendant-Intervenor.

PUBLIC VERSION

Before: Richard K. Eaton, Judge
Consol. Court No. 19–00099

[Final Results sustained in part and remanded to Commerce.]

Dated: April 27, 2021

J. David Park, Arnold & Porter Kaye Scholer LLP, of Washington DC, argued for Plaintiff and Consolidated Defendant-Intervenor Hyundai Steel Co. With him on the brief were *Henry D. Almond* and *Daniel R. Wilson*.

Elizabeth Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. 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 *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington DC, argued for Consolidated Plaintiff and Defendant-Intervenor United States Steel Corporation. With them on the brief was *Jack A. Levy*.

OPINION and ORDER

Eaton, Judge:

Before the court, in this consolidated action,[1] are the motions for judgment on the agency record of Plaintiff and Consolidated Defendant-Intervenor Hyundai Steel Company ("Hyundai"), and Consolidated Plaintiff and Defendant-Intervenor United States Steel Corporation ("U.S. Steel"). By their respective motions, Hyundai and U.S. Steel challenge aspects of the final results of the United States Department of Commerce's ("Commerce" or the "Department") first

[1] On August 22, 2019, the court granted the parties' consent motion to consolidate *United States Steel Corporation v. United States*, Court No. 19–00103, under the lead case, *Hyundai Steel Company v. United States*, Consol. Court No. 19–00099. *See* Order dated Aug. 22, 2019, ECF No. 21.

administrative review of the antidumping duty order ("Order")[2] on cold-rolled steel flat products from the Republic of Korea ("Korea"). *See Certain Cold Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 24,083 (Dep't Commerce May 24, 2019) ("Final Results") and accompanying Issues and Decision Mem. (May 17, 2019), P.R. 202 ("Final IDM"). Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018).

Hyundai, a Korean producer and exporter of subject merchandise, and a mandatory respondent in the review, contends that Commerce's use of adverse facts available in the Final Results cannot be sustained. *See* Hyundai's Mem. Supp. Mot. J. Agency R., ECF No. 31–2 ("Hyundai's Br."); Hyundai's Reply Br., ECF No. 42; *see also* 19 U.S.C. § 1677e(a)-(b). Hyundai maintains that, contrary to Commerce's findings, it fully and accurately complied with Commerce's requests for information and, to the extent Commerce found a deficiency in the company's reporting (*i.e.*, inconsistencies in reported specification information for U.S. and home market sales), the agency failed to provide Hyundai with notice of the nature of the deficiency and an opportunity to remedy it, prior to resorting to facts otherwise available, as required by the statute.[3] *See* Hyundai's Br. 16; *see also* 19 U.S.C. § 1677m(d). Hyundai further maintains that, even if the use of adverse facts available were justified, Commerce's use was overbroad and arbitrary because the agency disregarded sales for which it found no inconsistencies in reported specification information. *See* Hyundai's Br. 1–2. Hyundai thus asks the court to "remand the agency's determination with instructions to Commerce to correct its errors." Hyundai's Br. 31.

For its part, U.S. Steel, a domestic steel producer, and one of the petitioners below,[4] challenges Commerce's denial of its request to

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[2] On September 20, 2016, Commerce issued an antidumping duty order on cold-rolled steel flat products from Korea following its investigation and final affirmative dumping determination. *See Certain Cold-Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom*, 81 Fed. Reg. 64,432 (Dep't Commerce Sept. 20, 2016) (amended antidumping duty order).

[3] Commerce must make two separate findings before it may use adverse facts available. *First*, Commerce must find that use of "facts available" is needed because "necessary information is not available on the record," or "an interested party or any other person . . . withholds information that has been requested by [Commerce] . . . [or] significantly impedes a proceeding." 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). *Second*, Commerce must find "that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b)(1). Only at that point may Commerce use an adverse inference "in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A).

[4] The petitioners are domestic steel producers: Consolidated Plaintiff and Defendant-Intervenor U.S. Steel; Consolidated Plaintiff-Intervenor Nucor Corporation; and non-parties to this action ArcelorMittal USA LLC; AK Steel Corporation; and Steel Dynamics, Inc.

rescind the review with respect to Hyundai's affiliated freight company, Company A,[5] and the assignment of the all-others rate to Company A, as contrary to law, because Company A is neither a producer nor an exporter of subject merchandise. *See* U.S. Steel's Mem. Supp. Mot. J. Agency R., ECF No. 29 ("U.S. Steel's Br."); U.S. Steel's Reply Br., ECF No. 40. In the alternative, U.S. Steel argues that, notwithstanding Company A being neither a producer nor exporter of subject merchandise, Company A should have been collapsed with Hyundai, and assigned Hyundai's adverse facts available rate. Thus, U.S. Steel asks the court to "remand for Commerce to come into compliance with the antidumping statute." U.S. Steel's Br. 21.

Defendant the United States ("Defendant"), on behalf of Commerce, maintains that the Final Results are supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Resp. Opp'n, ECF No. 36 ("Def.'s Br."). U.S. Steel, as Defendant-Intervenor, urges the court to sustain the Final Results with respect to the issues raised in Hyundai's motion. *See* Def.-Int. U.S. Steel's Resp., ECF No. 35. Hyundai, as Consolidated Defendant-Intervenor, urges the court to sustain the Final Results with respect to the issues raised in U.S. Steel's motion. *See* Consol. Def.-Int. Hyundai's Resp., ECF No. 38.

The court finds that Department's use of facts available, under 19 U.S.C. § 1677e(a)[6] based on Hyundai's alleged "withholding" of requested information, cannot be sustained because Commerce failed to comply with its obligation, under 19 U.S.C. § 1677m(d),[7] to notify Hyundai of the nature of the alleged deficiency(ies) in Hyundai's questionnaire responses and provide the company an opportunity to remediate. Thus, on remand, Commerce shall reconsider whether the

[5] Company A is [[ ]], an affiliated freight company. *See* Hyundai's Sec. A Quest. Resp. (Mar. 8, 2018), C.R. 8, at A-12 to A-13.

[6] "If . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]," Commerce "shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (emphasis added).

[7] Subsection 1677m(d) provides:

> If [Commerce] . . . determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—
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> (1) [Commerce] . . . finds that such response is not satisfactory, or
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> (2) such response is not submitted within the applicable time limits,
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> then [Commerce] . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).

use of facts otherwise available is warranted with respect to any of Hyundai's sales, and adequately explain and support its remand redetermination with substantial evidence. If Commerce determines that the use of facts otherwise available is warranted, and it makes the additional, distinct finding that Hyundai failed to cooperate to the best of its ability, it must adequately explain and support this finding with substantial evidence.

Because the Department found that Company A was neither a producer nor an exporter of subject merchandise during the period of review, and thus did not meet the requirements of 19 U.S.C. §§ 1673b(d) and 1673d(c)(1) for the determination of an antidumping duty rate, the court remands for Commerce to rescind the assignment of the all-others rate to Company A.

The court sustains Commerce's finding that U.S. Steel's request to rescind the review with respect to Company A was untimely, and its decision not to collapse Company A.

BACKGROUND

On September 1, 2017, Commerce published notice of an opportunity to request an administrative review of the Order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Admin. Review*, 82 Fed. Reg. 41,595 (Dep't Commerce Sept. 1, 2017). Hyundai submitted its request for review on September 29, 2017. *See* Hyundai's Request for Admin. Rev. (Sept. 27, 2017), P.R. 2.

On October 2, 2017, the petitioners, including U.S. Steel, requested review of several companies, including Hyundai's affiliate, Company A.[8] *See* Pet'rs' Request for Admin. Rev. (Oct. 2, 2017), P.R. 4.

On November 13, 2017, Commerce published notice of the initiation of the first administrative review of the Order. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 52,268 (Dep't Commerce Nov. 13, 2017). The period of review was March 7, 2016, through August 31, 2017.

On February 14, 2018, the petitioners timely withdrew their request with respect to all of the companies they had asked Commerce to review, except Company A and POSCO/POSCO Daewoo Corp.

[8] In addition to Company A, the petitioners requested review of Ameri-Source Korea; Dongbu Steel Co., Ltd.; Dongkuk Steel Mill Co., Ltd.; Dongkuk Industries Co., Ltd.; GS Global Corp.; Hanawell Co., Ltd.; Hankum Co., Ltd.; Hyuk San Profile Co., Ltd.; Kindus Inc.; POSCO; Daewoo International Corp. (which is known as POSCO Daewoo Corp.); Samsung C&T Corp.; Steel N Future; Taihan Electric Wire Co., Ltd.; and Uin Global Co. *See* Pet'rs' Request for Admin. Rev. (Oct. 2, 2017), P.R. 4.

("POSCO/PDW"), a Korean producer and exporter.[9] *See* Letter from Pet'rs to Sec'y Wilber Ross, Jr. (Feb. 14, 2018), P.R. 32.

Thereafter, the Department selected Hyundai and POSCO/PDW as mandatory respondents, stating they were the two largest producers and exporters of subject merchandise by volume during the period of review.[10] Commerce sent its initial and supplemental questionnaires to each of the mandatory respondents. Both timely filed responses. *See* Commerce's Initial Quest. Secs. A-E (Feb. 8, 2018), P.R. 25 ("Initial Questionnaire"); Commerce's First Suppl. Quest. Secs. A-E (June 18, 2018), P.R. 130 ("Supplemental Questionnaire").

I. Commerce's Initial Questionnaire

A. Product Codes

In Sections B (home market sales) and C (U.S. sales) of its Initial Questionnaire, Commerce asked for information regarding, *inter alia*, Hyundai's "product codes" for products sold in Korea and the United States during the period of review. A product code is the internal code a company assigns to a product in the ordinary course of its business. *See, e.g.*, Hyundai's Sec. B Quest. Resp. (Mar. 30, 2018), P.R. 82–84 at B-8. Product codes were to be reported in the computer field "PRODCODU/H."[11] These codes were then to be correlated to a

[9] Because of common ownership, among other factors, Commerce treated POSCO and POSCO Daewoo as a collapsed entity (*i.e.*, POSCO/PDW). *See* Preliminary Decision Mem. (Oct. 3, 2018), P.R. 159 at 7–8. POSCO/PDW is not a party to this action.

[10] *See* Respondent Selection Mem. (Feb. 8, 2018), C.R. 3, P.R. 24 at 5 ("Based on the [Customs and Border Protection data for entries of cold-rolled steel flat products from Korea during the period of review], we identified the two publicly identifiable exporters/producers with the largest volume of subject imports, which are, in alphabetical order: Hyundai and POSCO."). [[

]] Respondent Selection Mem. at 6.

[11] The "U" and "H" at the end of a field name, *e.g.*, "PRODCOD" mean, respectively, the United States market and the home market (here, Korea).

matching control number, or CONNUM,[12] that the Department used in the calculation of a dumping margin. Product codes were not, however, used to construct the CONNUMs themselves.

Commerce's instructions did not require Hyundai to use any particular method to report its product codes. Regarding products sold in the home market, the Section B instructions stated: "Report the commercial product code assigned by your company in the normal course of business to the specific product sold." Hyundai's Sec. B Quest. Resp. at B-8. Similarly, regarding products sold in the U.S. market, the Section C instructions stated: "Report the commercial product code assigned by your company in the normal course of business to the specific product sold in the United States." Initial Questionnaire at B-38.

For products that were *further manufactured* in the United States, however, Commerce's Section C instructions provided some additional detail. The instructions stated that if, as in Hyundai's case,[13] "the product sold is further manufactured in the United States, report the product code of the product *sold* not the product *imported*." Initial Questionnaire at B-38 (emphasis added). In its brief before the court, Hyundai indicates that it interpreted this instruction to mean that Commerce was asking for "as sold" product codes in the PRODCOD2U sub-field.[14] *See* Hyundai's Br. 3–4.

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[12] A CONNUM is a number composed of a series of digits each of which corresponds to a physical characteristic, as defined by Commerce in a questionnaire. For example, here, the components of a CONNUM include eight digits representing: paint, carbon content, quality, yield strength, thickness, width, form, and heat treatment, *e.g.*, 40_1_35_1_22_4_1_1. Each CONNUM is assigned to a unique product and is "designed to reflect the 'hierarchy of certain characteristics used to sort subject merchandise into groups' and allow Commerce to match identical and similar products across markets." *Manchester Tank & Equip. Co. v. United States*, 44 CIT __, __ n.3, 483 F. Supp. 3d 1309, 1312 n.3 (2020) (quoting *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1344, 1347 (2018)). Commerce has described how it uses CONNUMs to ensure an apples-to-apples comparison of sales made in the home market (or "comparison" market) and those made in the U.S. market:

> [T]he subject merchandise has different CONNUMs to identify the individual models of products for matching purposes. . . . The CONNUMs are assigned to each unique product reported in the sales response. . . . Identical products are assigned the same CONNUM in both the comparison market sales database and U.S. sales database. . . . The matching criteria are used to establish the most similar comparison market product to a given U.S. product.

1 JOSEPH E. PATTISON, ANTIDUMPING & COUNTERVAILING DUTY LAWS 837 (2017).

[13] Hyundai's U.S. affiliate, Hyundai Steel America, Inc. "is a wholly-owned U.S. subsidiary of [Hyundai] and is located in Greenville, Alabama. . . . [D]uring the [period of review], [Hyundai] sold subject merchandise to [Hyundai Steel America], which, in turn, either resold the subject merchandise in its imported condition, or further processed or consumed the merchandise in producing non-subject merchandise prior to reselling the resulting products." Hyundai's Sec. A Quest. Resp. at A-12.

[14] Hyundai reported within field 1.0 the "Complete Product Code," which included five sub-fields: Product Type (PRODCOD1U), Specification (PRODCOD2U), Thickness

B. Specification Data

In addition to product codes, Commerce also asked for "specification" data in Sections B and C of its Initial Questionnaire. In this case, specification referred to the type or grade of steel in a product, according to international standards such as those set by ASTM International, a testing and standards organization (*e.g.*, ASTM A653 designation CS Type A). *See, e.g.*, Hyundai's Sec. B Quest. Resp. at B-11. Commerce's instructions for reporting specification in Sections B and C, which were identical, asked Hyundai to "[r]eport the specification/designation/type/grade of the product." *See* Hyundai's Sec. B Quest. Resp. at B-11; Initial Questionnaire at B-39 (same). Specification data was to be reported in the computer field SPECGRADEU/H.

C. Hyundai's Reporting of Specification Data for Its U.S. Sales

In its Section C responses, Hyundai reported specification data not only in the SPECGRADEU field (found in Section C, field 2.3), but also as a component of its product code, in the computer sub-field "PRODCOD2U" (found in Section C, field 1.0). Unlike specification data reported in the SPECGRADEU field, however, which Hyundai reported on an "as produced" basis, the specification data in the PROCOD2U sub-field was reported on an "as sold" basis. In other words, in the SPECGRADEU field, Hyundai reported the specification of the product that was produced in Korea by Hyundai and imported into the United States by Hyundai Steel America. In the PRODCOD2U sub-field, Hyundai reported the specification of the product that, in some instances, had been further manufactured by its U.S. affiliate, Hyundai Steel America, and then sold to unaffiliated U.S. customers.

As a result of this difference in reporting method ("as produced" / "as sold"), in some instances the specification data reported in the PRODCOD2U sub-field was not identical to specification data reported in the SPECGRADEU/H and PRODCOD2H fields.[15] In its Section C responses, Hyundai explained its method, stating that it was relying on Hyundai Steel America's U.S. *sales* (*i.e.*, sales made in the United States) invoices as the basis for the specification data

(PRODCOD3U), Width (PRODCOD4U), and Form (PRODCOD5U). *See* Hyundai's Sec. C Quest. Resp. (Mar. 30, 2018), C.R. 130–32, P.R. 82–84 at C-10.

[15] In the Final IDM, Commerce does not identify the CONNUMs or individual sales affected by the alleged deficiency(ies). According to U.S. Steel, however, the specification data that Hyundai provided in PRODCOD2U/H did not match the specification data reported in SPECGRADEU/H in seven of eighty-seven instances, impacting individual sales under ten CONNUMs. *See* U.S. Steel's Conf. Resp. Opp'n, ECF No. 34, 5; *see also* U.S. Steel's Pre-Preliminary Cmts. Concerning Hyundai (Sept. 10, 2018), C.R. 313, P.R., 151 at 12.

reported in PROCOD2U, and Hyundai Steel America's *purchasing* records for specification data reported in SPECGRADEU, *i.e.*, records detailing the company's purchases of product from producer Hyundai.[16] *See* Hyundai's Sec. C Quest Resp. at C-10 ("[Hyundai] reports the following [product code] information as reflected in the sales invoice."); C-13 (noting that it was reporting SPECGRADEU "based on [Hyundai Steel America]'s purchasing records."); *see also* Hyundai's Sec. B Quest Resp. at Ex. B-4 (setting out a table listing all of the reported specifications and grades, along with the matching QUALITYU code). As requested by Commerce, Hyundai also reconciled specification information for its reported U.S. sales with the total sales listed in its financial statements:

> Specifically, where [Hyundai Steel America]'s sales system record is inconsistent with the actual specification of the coil in [Hyundai Steel America]'s purchase records, Hyundai Steel reviewed the source documentation. If the actual specification of the input coil was Hyundai Steel Korea [cold rolled steel flat product], Hyundai Steel has added the transactions to the reported sales, and, conversely, if the actual specification was not Hyundai Steel Korea [cold rolled steel flat product], Hyundai Steel excluded the transactions from the reported sales.

Hyundai's Sec. C. Quest Resp. at C-7. In other words, the specification data for products "as purchased" and "as sold" did not always match because the specification in Hyundai Steel America's purchasing records did not always match the specification in its sales invoices, due to, for example, the further manufacturing of the steel in the United States. Hyundai reconciled its sales to exclude sales of non-subject merchandise from its reported sales.

It should be noted that, according to Commerce's instructions, neither "product code" nor "specification" data was used to construct CONNUMs. Put another way, no part of the string of numbers composing the CONNUM included a digit for the "product code" field or the "specification" field. But specification data was *related to* one of the eight physical characteristics that did compose the CONNUM,

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[16] According to Hyundai, it provided to Commerce "record evidence to explain the differing specification fields," *e.g.*, "Exhibit C-6-B of [its] initial Section C Questionnaire Response [provided] explanations for the differing specification fields for [[ ]] [metric tons] of sales (these instances related to sales where the [SPECGRADEU field] indicated that the product was subject merchandise, but the 'as sold' specification [*i.e.*, reported in PRODCOD2U] indicated the product was not subject merchandise)." Hyundai's Br. 28–29. Hyundai's administrative case brief provided a list of the total sales that had differing fields, which amounted to [[ ]] metric tons. *See* Hyundai's Case Br. (Nov. 20, 2018), C.R. 344, P.R. 180 at 22 & Attach. 2.

i.e., the "quality" element of the CONNUM.[17] *See, e.g.*, Initial Questionnaire at C-1-C-2 (description of QUALITY field identifying, *inter alia*, ASTM standards). That is, as Hyundai describes in its brief, "the SPECGRADEU field related to the specific product produced and exported to the United States, and [Hyundai] therefore used data from that field to identify the QUALITYU code used to construct CONNUMs that it reported in the C database." Hyundai's Br. 15.

Nonetheless, as will be seen, Commerce found that the differences in reported specification data in the product code and specification fields prevented the determination of normal value because, it found that, for some CONNUMs, Commerce could not "match the U.S. sales of these CONNUMs to the appropriate sales in Hyundai's home market database." Final IDM at 13.

II. Commerce's Supplemental Questionnaire

On June 18, 2018, Commerce issued a supplemental questionnaire to Hyundai:

> Please ensure that you have accurately reported all *product specifications* in your sales and cost reporting, including whether or not the merchandise is prime or non-prime.[18] Revise your response as necessary.

Supplemental Questionnaire at 6 (emphasis added). The questionnaire did not inquire about, or even mention, Hyundai's method for reporting product code (PRODCOD2U/H), specification (SPECGRADEU/H), or any perceived discrepancy in the reported data with respect to those fields. It simply asked Hyundai to make sure that the reported data was "accurate."

On July 11, 2018, Hyundai filed its supplemental questionnaire response in which it confirmed the accuracy of the specification information reported in its responses to the Initial Questionnaire:

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[17] Here, the CONNUM for the subject steel products was composed of eight elements, representing the physical characteristics of paint, carbon content, quality, yield strength, thickness, width, form and heat treatment. *See* Initial Questionnaire, fields 3.1-.8. For example, one of the CONNUMs reported by Hyundai was 40_1_35_1_22_4_1_1, where the third number in the sequence, 35, pertained to the physical characteristic "quality." Commerce's questionnaire instructions for reporting quality referred to examples of international industry standards, such as those published by ASTM International. According to the instructions, 35 means "Commercial Steel (*e.g.*, ASTM A1008 designation CS Type A)." *See* Initial Questionnaire at C-1.

[18] "'[W]hether or not the merchandise is prime or non-prime' was addressed in field 2.2, 'PRIMEU,' and not PRODCOD2 or SPECGRADE." Hyundai's Br. 6 (citing Hyundai's Sec. C Quest. Resp. at C-12). Apparently, prime merchandise is subject merchandise that is sold in the ordinary course of business, while non-prime or secondary merchandise is material that may result from producing the subject merchandise. *See Corus Staal BV v. United States*, 27 CIT 388, 40304, 259 F. Supp. 2d 1253, 1267–68 (2003) (discussing non-prime sales). There is no dispute over the reporting of whether the merchandise was prime or non-prime.

> No revisions are required. Hyundai Steel reported accurately all product specifications in the sales and cost databases, including whether or not the merchandise is prime or non-prime.

Hyundai's Suppl. Quest. Resp. (July 18, 2018), P.R. 139, C.R. 208, at 12. No additional supplemental questionnaire was issued prior to the issuance of Commerce's preliminary results, almost three months later.

III. Commerce's Decision to Use Adverse Facts Available

A. Preliminary Results

On October 3, 2018, Commerce published the preliminary results of its review. *See Certain Cold Rolled Steel Flat Products From the Republic of Korea*, 83 Fed. Reg. 51,661 (Dep't Commerce Oct. 12, 2018) ("Preliminary Results"), and accompanying Preliminary Decision Mem. (Oct. 3, 2018), P.R. 159 ("PDM"). Commerce determined that the use of facts available was warranted under 19 U.S.C. § 1677e(a) with respect to "those sales for which Hyundai reported contradictory product specification information." *See* PDM at 10. Commerce stated:

> [A]fter examining the manner in which Hyundai reported the product specifications for certain CONNUMs in the United States and home market, we have determined that Hyundai reported inconsistent product specifications in its home market database which is otherwise contradicted by information in Hyundai's U.S. sales database. After finding discrepancies with the reported information in Hyundai's original questionnaire response, in our June 18, 2018 supplemental questionnaire, we instructed Hyundai to "please ensure that you have accurately reported all product specifications in your sales and cost reporting, including whether or not the merchandise is prime or non-prime. Revise your response as necessary."
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> However, Hyundai failed to address this deficiency by reporting product specification information for some CONNUMs where the home market product specification differed from that of the U.S. product specification. Furthermore, inconsistencies in Hyundai's product specifications were raised in the investigation of this order. We, therefore, find that Hyundai withheld necessary information with respect to providing accurate and consistent descriptions of its product specifications for all CONNUMs and, thus, failed to cooperate to the best of its ability in responding to Commerce's requests for information. Therefore,

> we find that the application of adverse facts available, pursuant to [19 U.S.C. § 1677e(a)(b)], is warranted with respect to those CONNUMs for which Hyundai reported contradictory product specification information with regards to its home market and U.S. sales.

PDM at 9–10. Thus, Commerce found that Hyundai "[withheld] information that [was] requested by [Commerce]," 19 U.S.C. § 1677e(a)(2)(A), and "failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b)(1).

Without further analysis, Commerce proceeded to apply adverse facts available when determining an antidumping duty margin for Hyundai. Accordingly, Commerce stated, "for those sales for which Hyundai reported contradictory product specification information, as adverse facts available, we have assigned the highest calculated margin for any other reported sale for Hyundai to represent the margin on these transactions." PDM at 10. Commerce determined preliminary dumping margins for Hyundai and POSCO of 36.59 percent and 2.78 percent, respectively. Moreover, Commerce determined a preliminary estimated all-others rate[19] for the non-examined companies, including Company A, Hyundai's affiliated freight company, of 11.68 percent. *See* Preliminary Results, 83 Fed. Reg. at 51,662.

After Commerce published the Preliminary Results, the parties submitted administrative case briefs. In its brief, Hyundai objected to the use of facts available arguing, *inter alia*, that it had provided the information Commerce requested and explained the manner in which it had responded to the agency's requests for information, in accordance with its instructions. *See* Hyundai's Case Br. (Nov. 20, 2018), P.R. 180 at 2 ("There is no information missing from the record for purposes of calculating Hyundai Steel's dumping margin.").

Hyundai also objected to the use of adverse inferences, arguing it complied to the best of its ability, volunteering even more information than Commerce asked for. *See* Hyundai's Case Br. at 9, 12–13. Additionally, Hyundai challenged the sufficiency of the Department's notice of deficiency under § 1677m(d), and the breadth of the Department's use of adverse facts available to all sales under certain CONNUMs, irrespective of whether individual sales under each ofthose CONNUMs were impacted by the alleged deficiency. *See* Hyundai's Case Br. at 21.

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[19] The estimated all-others rate is "an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under [19 U.S.C. § 1677e]." *See* 19 U.S.C. § 1673d(c)(5)(A).

On separate grounds U.S. Steel also questioned the Preliminary Results. In response to the preliminary estimated all-others rate of 11.68 percent that Commerce determined for the non-examined companies, including Company A, U.S. Steel asked Commerce, for the first time in its administrative case brief, to rescind the review with respect to Company A, or in the alternative, to collapse Company A and Hyundai. *See* U.S. Steel's Case Br. (Nov. 20, 2018), C.R., 342, P.R. 178 at 2–3. This rescission request was made well after the regulatory deadline, *i.e.*, more than ninety days after the date on which the notice of initiation of the review was published in the Federal Register. *See* 19 C.F.R. § 351.213(d)(1). Specifically, the request was made on November 20, 2018, approximately one year after the publication of the notice of initiation on November 13, 2017.

B. Final Results

On May 17, 2019, Commerce published the Final Results. There, the Department continued to find, as it had in the Preliminary Results, that the use of adverse facts available was warranted with respect to some of Hyundai's U.S. sales, because it failed "to properly report consistent product specification information for the U.S. CONNUMs." Final IDM at 13. For Commerce, Hyundai's "inconsistent reporting of product specification information preclude[d] Commerce from accurately determining normal value, because Commerce [could not] match the U.S. sales of these CONNUMs to the appropriate sales in Hyundai's home market database." Final IDM at 13. Although Hyundai had explained, in its initial Section C questionnaire response, the differences, and reconciled the reported data with the source documentation, Commerce found that the differences precluded the determination of normal value because "it [was] unduly difficult for Commerce to determine the proper specification for an accurate match." Final IDM at 15. Commerce further found that "[b]ecause [it] [was] unable to determine an appropriate match, and Hyundai did not provide the necessary information despite two requests to do so, we continue to determine that Hyundai's failure to report consistent product specification information constitutes a failure by Hyundai to cooperate to the best of its ability, pursuant to [19 U.S.C. § 1677e(b)]." Final IDM at 15.

Thus, Commerce determined a weighted-average dumping margin for Hyundai based on adverse facts available of 36.59 percent, and a weighted-average dumping margin of 2.68 percent for POSCO/PDW. *See* Final Results, 84 Fed. Reg. at 24,084. As neither rate was zero, de minimis, or based entirely on facts available, Commerce weight-averaged the two rates to determine the "all-others" rate, *i.e.*, the rate

to apply to companies not individually examined, of 11.60 percent. *See id.*; *see also* 19 U.S.C. § 1673d(c)(5)(A).

Also, in the Final Results, Commerce assigned Company A the 11.60 percent all-others rate:

> Consistent with our normal practice, we continue to find it appropriate to calculate the rate for the companies not selected for individual examination in this administrative review (*including Hyundai's affiliated freight company*) based on [19 U.S.C. § 1673d(c)(5)(A)]. Thus, we continue to assign to the companies not individually examined a margin equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available.

Final IDM at 26 (emphasis added). In doing so, the Department rejected U.S. Steel's request to rescind the review with respect to Company A as untimely:

> Because the petitioners [including U.S. Steel] did not file a timely request to rescind the review with respect to Hyundai's affiliated freight company [*i.e.*, Company A,] and only requested to withdraw the review for that company in its administrative case brief, well after Commerce had issued its *Preliminary Results*, we find that it is not appropriate to rescind the review for that company at such a late stage of the administrative review.

Final IDM at 27. Moreover, the Department declined to collapse Company A, based on the record evidence showing that it was neither a producer nor an exporter of subject merchandise.[20] By way of explanation, Commerce stated:

> [B]ased on the record of this review, we agree with both the petitioners and Hyundai that the affiliated freight company [Company A] *is neither a producer nor exporter of the subject merchandise*. Record evidence identifies the entity in question as involved in the transport of raw materials to Hyundai's production facilities and the transport of finished cold-rolled steel to domestic customers. However, there is nothing on the record which suggests that this entity has the facilities to produce or

[20] Under Commerce's regulations, the agency "will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1).

> sell the subject merchandise. Moreover, we note that Commerce relies on the totality of the circumstances in deciding when to treat affiliated parties as a single entity, pursuant to 19 CFR 351.401(f). In this case, because the affiliated freight company is involved in transportation and is not a producer or exporter, we find that it would not be appropriate to collapse this company with Hyundai, regardless of the remaining collapsing criteria.

Final IDM at 27 (emphasis added). Hyundai and U.S. Steel timely commenced their respective lawsuits to challenge Commerce's use of adverse facts available, its decision to apply the all-others rate to Company A, and its denial of U.S. Steel's request to rescind the review with respect to Company A or, in the alternative, to collapse Company A.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

I. Statutory Prerequisite to Use of Facts Available: Notice and Opportunity to Remedy

The "basic purpose" of the antidumping statute is to "determin[e] current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The burden of creating the administrative record lies with the interested parties; through questionnaires, Commerce asks for the information that it deems necessary to make its margin determinations. *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019) (quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016)).

The statute provides that, if "necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding," Commerce shall use "facts otherwise available" in reaching a determination. *See* 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Where Commerce has determined that the use of facts available is warranted, it may apply adverse inferences to the facts available if it makes the requisite additional finding that an "interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b)(1). "To

the best of its ability" means "one's maximum effort." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Before Commerce may use facts available, however, it must comply with the notice and remedial requirements of § 1677m(d). *See* 19 U.S.C. § 1677e(a) (emphasis added) (Commerce "shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination under this subtitle."); *see also Hyundai Steel Co. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1327, 1334 n.3 (2018) (citation omitted) ("Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission."). This section provides that, if Commerce finds a deficiency in a response to its request for information, it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). If the remedial response or explanation is found unsatisfactory or untimely, the Department may, subject to § 1677m(e),[21] "disregard all or part of the original and subsequent responses" in favor of facts available. *Id.*

The failure by Commerce to provide a respondent with the statutorily required notice of a deficiency in its questionnaire response "can render the decision [to apply facts available] 'unsupported by substantial evidence and otherwise contrary to law.'" *Ta Chen Stainless Steel Pipe v. United States*, 23 CIT 804, 819 (1999) (not reported in Federal Supplement) (quoting *Usinor Sacilor v. United States*, 19 CIT 711, 745, 893 F. Supp. 1112, 1141–42 (1995), *aff'd in part and rev'd in part*, 215 F.3d 1350 tbl. (Fed. Cir. 1999)).

Broadly drawn initial or supplemental questionnaires may not sufficiently place a respondent on notice of the nature of the deficiency, and deprive it of the opportunity to remedy that deficiency. *See, e.g.*, *Usinor*, 19 CIT at 744–45, 893 F. Supp. at 1141–42 (finding,

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[21] This section provides:

> In reaching a determination under . . . this title [Commerce] . . . *shall not decline to consider* information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce] . . . if—
>
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information, and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e) (emphasis added).

in a subsidy case, that the Department's broadly drawn initial questionnaires did not "discharge [Commerce] from its obligation to put parties on notice as to the deficiencies in their responses" with respect to the effect of the subsidies, when the questionnaire did not seek information on the issue of tying); *Ta Chen*, 23 CIT at 820 (quoting *Böwe–Passat v. United States*, 17 CIT 335, 343 (1993) (not reported in Federal Supplement) (stating that this Court would not endorse "an investigation where [Commerce] sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize [respondent] for deficiencies not specified in the letter that [Commerce] would only disclose after it was too late, *i.e.*, after the preliminary determination.").

Courts have found that Commerce satisfies its obligation under § 1677m(d) to place the respondent on notice of the nature of a deficiency in its initial questionnaire response where a supplemental questionnaire "specifically point[s] out and request[s] clarification of [the] deficient responses," and identifies the information needed to make the required showing. *See NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007) (holding that "Commerce . . . satisfied its obligations under section 1677m(d) when it issued a supplemental questionnaire specifically pointing out and requesting clarification of [the] deficient responses."); *Hyundai Steel*, 42 CIT at __, 319 F. Supp. 3d at 1346 ("Commerce's supplemental questionnaire notified Plaintiff that its initial submissions were insufficient to demonstrate the arm's length nature of the transactions and identified the information it needed to make that showing.").

II. Regulations on Rescinding Review and Collapsing Affiliated Companies

Commerce's regulations set out the circumstances in which an administrative review may be rescinded, and applicable time limitations. *See* 19 C.F.R. § 351.213(d). Where the party that requested the review timely withdraws that request, Commerce will rescind the review:

> The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

Id. § 351.213(d)(1). Additionally, Commerce may rescind a review where it self-initiated the proceedings, or where the Department

concludes "that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." *Id.* § 351.213(d)(2), (3).

Collapsing means treating affiliated producers as one entity, and assigning the collapsed entity a single rate. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,345 (Dep't Commerce May 19, 1997) (Preamble). Commerce's regulations incorporate by reference the definition of "affiliated persons" in 19 U.S.C. § 1677(33).[22] *See* 19 C.F.R. § 351.102(b)(3).

Mere affiliation, however, is not enough. Commerce will collapse "affiliated producers [into] a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the [Department] concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1); *see also Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007) (observing that the "principal authority governing collapsing is 19 C.F.R. § 351.401(f)").

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[22] The statute provides that the following persons "shall be considered to be 'affiliated' or 'affiliated persons'":

> (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33). Additionally, Commerce's regulations provide with respect to "control":

> In determining whether control over another person exists, within the meaning of [§ 1677(33)], the Secretary will consider the following factors, among others:
> Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

19 C.F.R. § 351.102(b)(3).

The Department considers a number of factors when assessing "[s]ignificant potential for manipulation," including (1) the level of common ownership; (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (3) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. 19 C.F.R. § 351.401(f)(2).

DISCUSSION

I. Commerce's Use of Facts Available Is Neither Supported by Substantial Evidence Nor in Accordance with Law

In the Final Results, the Department found that the use of facts available was warranted with respect to some of Hyundai's U.S. sales because it failed "to properly report consistent product specification information for the U.S. CONNUMs." Final IDM at 13. For Commerce, Hyundai's "inconsistent reporting of product specification information preclude[d] Commerce from accurately determining normal value, because Commerce [could not] match the U.S. sales of these CONNUMs to the appropriate sales in Hyundai's home market database." Final IDM at 13. Although Hyundai had explained the differences in specification data for products reported "as produced" and "as sold," and reconciled the reported data with the source documentation in its responses, Commerce found that the differences precluded the determination of normal value because "it [was] unduly difficult for Commerce to determine the proper specification for an accurate match." Final IDM at 15.

Based on the same facts cited in support of its use of facts available, the Department further found that the use of an adverse inference was warranted, stating that Hyundai had failed to cooperate with Commerce's requests for information to the best of its ability: "Because Commerce [was] unable to determine an appropriate match, and Hyundai did not provide the necessary information despite two requests to do so, we continue to determine that Hyundai's failure to report consistent product specification information constitutes a failure by Hyundai to cooperate to the best of its ability, pursuant to [19 U.S.C. § 1677e(b)]." Final IDM at 15.

In making its facts available finding, Commerce rejected Hyundai's argument that the Department had failed to discharge its statutory obligation under § 1677m(d) to provide notice of the nature of the deficiency and an opportunity to correct or explain it. Commerce found that Hyundai had received notice through its Initial and Supplemental Questionnaires:

> In the initial [antidumping] questionnaire, Commerce instructed Hyundai to report product specification information for each CONNUM that Hyundai sold in the United States. Additionally, Commerce instructed Hyundai in its June 18, 2018, supplemental questionnaire to ensure that it had accurately reported all product specifications, and to revise its response as necessary. Thus, despite the arguments raised by Hyundai about having insufficient notice of deficiencies, we find that the initial [antidumping] questionnaire and Commerce's June 18, 2018, supplemental questionnaire provided Hyundai with two opportunities to provide accurate and consistent product specification information. Specifically, the June 18, 2018, supplemental questionnaire requested that Hyundai ensure that it accurately reported all product specification information in its sales and cost reporting and afforded Hyundai an opportunity to remedy deficiencies that existed in its reporting of product specification information in its original questionnaire responses. Thus, we continue to find that Hyundai failed to correct this reporting error despite the opportunity afforded Hyundai in our June 18, 2018, supplemental questionnaire to remedy this deficiency.

Final IDM at 13–14. Additionally, Commerce argued that its application of adverse facts available "to sales for which Hyundai provided inconsistent product specifications is consistent with the analysis of those sales" in the investigation segment—an application of adverse facts available that was ultimately upheld by this Court. Final IDM at 14.

Hyundai maintains that Commerce's use of facts available in the Final Results based on uncured "deficiencies" in its reporting cannot be sustained. It insists that its reporting was accurate, but to the extent Commerce found any problem with the data or the manner in which it was reported, Commerce failed to notify Hyundai and "afford [it] a reasonable opportunity to remedy or explain any perceived deficiency":

> Commerce in this proceeding only issued a single supplemental questionnaire, with only vague references to the information Commerce later determined to be deficient. As a matter of law, Commerce is therefore barred from resorting to [facts available or adverse facts available], as the agency did not afford [Hyundai] the procedural safeguards required by the statute.

Hyundai's Br. 9–10. For Hyundai, "[t]he Court should remand the Final Results, with instructions to calculate [Hyundai]'s margin with-

out the application of facts available, adverse or otherwise, as Commerce's determination is both unsupported by substantial evidence and contrary to law." Hyundai's Br. at 12.

For its part, Commerce argues that it complied with § 1677m(d)'s notice and remedial requirements:

> Commerce "instructed Hyundai to report product specification information for each CONNUM that Hyundai sold in the United States." . . . Hyundai responded to Commerce's initial questionnaire but failed to report consistent product specification information for all of its sales. . . . Consequently, in its supplemental questionnaire, and consistent with 19 U.S.C. § 1677m(d), Commerce asked Hyundai to "ensure that {it} accurately reported all product specifications in {its} sales and cost reporting." . . . Commerce also indicated that Hyundai should "revise {its} response as necessary." . . . Thus, Commerce fully satisfied the requirements of 19 U.S.C. § 1677m(d), and there is no merit to Hyundai's assertions that Commerce failed to notify Hyundai of the "nature of the perceived deficiency." . . .
>
> Despite Commerce's invitation to submit correct and accurate information, Hyundai responded that "{n}o revisions are required," and it "reported accurately all product specifications in the sales and cost databases . . ." . . . Thus, Hyundai declined to correct inconsistent product specification information despite Commerce's request that Hyundai ensure that its specification information was accurate.

Def.'s Br. 16 (record citations omitted). Thus, for Commerce, its use of not only facts available, but adverse facts available, was lawful and supported by the record.

The law requires that Commerce must comply with the notice and remedial requirements of § 1677m(d) before it may use facts available. *See* 19 U.S.C. § 1677e(a) (noting that Commerce's use of facts available under § 1677e(a) is "subject to section 1677m(d) of this title"). This section provides that, if Commerce finds a deficiency in a response to its request for information, it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." *Id.* § 1677m(d); *see also Hyundai Steel*, 42 CIT at __, 319 F. Supp. 3d at 1334 n.3 ("Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission."). Courts have found that Commerce's supplemental questionnaire adequately placed the respon-

dent on notice of the nature of the deficiency in its response, where the questionnaire "specifically point[ed] out and request[ed] clarification of [the] deficient responses," and identified the information needed to make the required showing. *See NSK Ltd.*, 481 F.3d at 1360 n.1; *Hyundai Steel*, 42 CIT at __, 319 F. Supp. 3d at 1346. This standard was not met here.

Commerce's broadly drawn Supplemental Questionnaire did not satisfy the notice requirement in § 1677m(d) because it failed to identify the nature of the alleged "deficiency" in Hyundai's response with any specificity. *See* Supplemental Questionnaire at 6 ("Please ensure that you have accurately reported all product specifications in your sales and cost reporting, including whether or not the merchandise is prime or non-prime. Revise your response as necessary."). It is, as Hyundai insists, "vague." For example, the question says nothing about any error with respect to Hyundai's interpretation of the Initial Questionnaire instructions to report product code on an "as sold" basis, and specification on an "as produced" basis, which Hyundai explained in its Section C responses.

Moreover, the language "including whether or not the merchandise is prime or non-prime" gave no indication as to what Commerce may have found deficient. Whether merchandise is prime or non-prime pertained to field 2.2, "PRIMEU," and not PRODCOD2U (field 1.0) or SPECGRADEU (field 2.3). *See* Hyundai's Br. 6 (citing Hyundai's Sec. C Quest. Resp. at C-12). Rather, Commerce simply asked Hyundai to ensure the "accuracy" of its reporting of "all product specifications" in Hyundai's sales and cost reporting.

It is difficult to see how the word "accuracy" in the Supplemental Questionnaire should have alerted Hyundai that the specification data it provided was somehow "deficient."[23] In any event, Commerce seems to have objected to the method Hyundai applied to report specification data in the PRODCOD and SPECEGRADE fields. It did not say so in the Supplemental Questionnaire, however, but only later in the Preliminary Results. *See* PDM at 9 (emphasis added) ("[A]fter examining the *manner* in which Hyundai reported the product specifications for certain CONNUMs in the United States and home market, we have determined that Hyundai reported inconsistent product specifications in its home market database which is otherwise contradicted by information in Hyundai's U.S. sales database."). The reported data may well have been perfectly accurate (*i.e.*, correct) and yet, according to Commerce, deficient, because in some instances

[23] Accuracy means "freedom from mistake or error : CORRECTNESS." *Accuracy*, *MERRIAM-WEBSTER.COM*, https://www.merriam-webster.com/dictionary/accuracy (last visited this date).

mismatches in the data existed—mismatches that Hyundai had identified and explained in its narrative responses.[24]

Finally, to the extent Commerce argues that its use of adverse facts available in a prior segment (the investigation), which this Court sustained in *Hyundai Steel*, justified its use of adverse facts available in this review, the court is unpersuaded. *See* Final IDM at 14 (citing *Hyundai Steel*, 42 CIT at __, 319 F. Supp. 3d at 1349–53; *Hyundai Steel Co. v. United States*, 43 CIT __, 365 F. Supp. 3d 1294 (2019)). "[E]ach administrative review is a separate segment of an antidumping proceeding and each with its own, unique administrative record." *Shenzhen Xinboda Indus. Co. v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1272, 1285 n.22 (2020). The investigation record before the Court in *Hyundai Steel* contained facts not present here. There, unlike in this case, Hyundai was provided with notice of specific deficiencies in its data reporting that were discovered at verification and was afforded an opportunity to explain them. *See Hyundai Steel*, 42 CIT at __, 319 F. Supp. 3d at 1354. Hyundai, however, was unable to do so. Thus, this Court held that "Commerce complied with the requirements of section 1677m(d)." *Id.*

Commerce knew what it was looking for when it issued the Supplemental Questionnaire. *See* PDM at 9 (emphasis added) ("*After finding discrepancies* with the reported information in Hyundai's original questionnaire response, in our June 18, 2018 supplemental questionnaire, we instructed Hyundai to 'please ensure that you have accurately reported all product specifications in your sales and cost reporting, including whether or not the merchandise is prime or non-prime. Revise your response as necessary.'"). But Commerce only hinted at it in the Supplemental Questionnaire. On this record, by failing to identify in the Supplemental Questionnaire anything in particular about Hyundai's reported specification data that it found lacking, Commerce failed in its duty under § 1677m(d) to give notice of a perceived deficiency and a meaningful opportunity to explain or remedy it. Indeed, Commerce's Supplemental Questionnaire is the type of "brief deficiency letter" that this Court has found inadequate to satisfy its duty under § 1677m(d). *See Ta Chen*, 23 CIT at 820. Here, Commerce "effectively retreated into its bureaucratic shell, poised to penalize [respondent] for deficiencies not specified in the letter that [Commerce] would only disclose after it was too late," *i.e.*, after the Preliminary Results. *Id.*

Additionally, it is worth noting that Commerce found that differences in the reported specification data precluded the determination

[24] Indeed, after checking its reported specification data, unaware that it was the method with which Commerce took issue, Hyundai responded that its reporting was accurate.

of normal value, not because necessary data was not placed on the record, but because "it [was] unduly difficult for Commerce to determine the proper specification for an accurate match." Final IDM at 15. Had Commerce given Hyundai adequate notice of the nature of the deficiency, *i.e.*, that product specification data for some sales was not presented in a way that permitted Commerce to easily match products sold in the home market and those sold in the United States, Hyundai could have attempted to explain or remedy the alleged deficiency and eliminate the claimed undue difficulty. But Commerce chose not to give adequate notice.

Because the Department's finding that its Initial and Supplemental Questionnaires placed Hyundai on notice of the nature of the perceived deficiency lacks the support of substantial evidence and is otherwise not in accordance with the law, the court remands this matter. On remand, Commerce shall identify with specificity the control numbers and individual U.S. sales with respect to which it found a deficiency in the reported specification data (PRODCOD2U/H and SPECGRADEU/H); clearly describe the nature of each deficiency; and provide Hyundai an opportunity to fix it. Then, Commerce shall reconsider whether the use of facts otherwise available is warranted with respect to any of Hyundai's sales, and adequately explain and support its remand redetermination with substantial evidence.

The court remands on facts available grounds, so it need not reach the issue of whether the Department's adverse inference finding is supported by the record, but Commerce should bear in mind, on remand, that the use of adverse facts available under § 1677e requires two *distinct* findings, each of which must be supported by the record: first, a determination as to whether the use of facts available is warranted, and second, a determination as to whether the respondent did its subjective best to cooperate. *See Nippon Steel Corp.*, 337 F.3d at 1381; *see also Nat'l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1374 (2019) (not reported in Federal Supplement). The two required findings are distinct, and this Court has cautioned Commerce against conflating them. *Nat'l Nail*, 43 CIT at __, 390 F. Supp. 3d at 1374 (citation omitted) ("[T]he law requires that the record must support a finding that the use of facts available is warranted before Commerce may make the separate, additional finding that an adverse inference is warranted."). If Commerce determines that the use of facts otherwise available is warranted, and it makes the additional, distinct finding that Hyundai failed to cooperate to the best of its ability, it must adequately explain and support each finding with substantial evidence.

II. Commerce's Decisions on Rescission and Collapsing Are Supported by Substantial Evidence and Otherwise in Accordance with Law, But Its Assignment of a Rate to Company A Was Contrary to Law

At the outset of the proceeding, U.S. Steel requested review of sixteen entities, including Company A, Hyundai's affiliated freight company. On November 13, 2017, Commerce published a notice that it had initiated the requested review. Under Commerce's regulations, U.S. Steel could withdraw its request "within 90 days of the date of publication of notice of initiation of the requested review," unless the deadline was extended by Commerce. *See* 19 C.F.R. § 351.213(d)(1).

On November 20, 2018, after the Preliminary Results were published, and well after the regulatory deadline to withdraw its request for review, U.S. Steel argued in its case brief before the agency that Commerce should rescind the review with respect to Company A, or collapse it with Hyundai. Fundamentally, U.S. Steel objected to Company A's receipt of the all-others rate (11.68 percent), as determined in the Preliminary Results.

In the Final Results, Commerce declined to rescind its review of Company A, finding that U.S. Steel had failed to timely request that Commerce do so. *See* Final IDM at 27 ("Because the petitioners [including U.S. Steel] did not file a timely request to rescind the review with respect to Hyundai's affiliated freight company and only requested to withdraw the review for that company in its administrative case brief, well after Commerce had issued its Preliminary Results, we find that it is not appropriate to rescind the review for that company at such a late stage of the administrative review.").

Then, Commerce went on to assign the 11.60 percent all-others rate to those companies that were not individually examined, including Company A:

> Throughout the course of the administrative review, we limited our examination of respondents, pursuant to [19 U.S.C. § 1677f-1(c)(2)], and selected Hyundai and POSCO/PDW for individual examination as the two exporters or producers accounting for the largest volume of U.S. imports of the subject merchandise. *Consistent with our normal practice, we continue to find it appropriate to calculate the rate for the companies not selected for individual examination in this administrative review (including Hyundai's affiliated freight company) based on [19 U.S.C. § 1673d(c)(5)(A)*[25]*].* Thus, we continue to assign to the companies not individually examined a margin equal to the weighted

[25] This section provides: "[T]he estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for

> average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available.

Final IDM at 26 (emphasis added). In other words, Commerce treated Company A like any other non-mandatory respondent, *i.e.*, a company that was not individually examined in the review, and assigned it the all-others rate.

Additionally, Commerce declined to collapse Company A because it was neither a producer nor an exporter. By way of explanation, Commerce stated:

> [B]ased on the record of this review, *we agree with both the petitioners and Hyundai that the affiliated freight company [Company A] is neither a producer nor exporter of the subject merchandise*. Record evidence identifies the entity in question as involved in the transport of raw materials to Hyundai's production facilities and the transport of finished cold-rolled steel to domestic customers. However, *there is nothing on the record which suggests that this entity has the facilities to produce or sell the subject merchandise*. Moreover, we note that Commerce relies on the totality of the circumstances in deciding when to treat affiliated parties as a single entity, pursuant to 19 CFR 351.401(f). In this case, because the affiliated freight company is involved in transportation and is not a producer or exporter, we find that it would not be appropriate to collapse this company with Hyundai, regardless of the remaining collapsing criteria.

Final IDM at 27 (emphasis added). Put another way, Commerce determined that because Company A, though affiliated with Hyundai, was neither a producer nor an exporter and had no "facilities to produce or sell the subject merchandise," the criteria in 19 C.F.R. § 351.401(f)(1) could not be met. That is, it was not an "affiliated producer[]" that had "production facilities for similar or identical products that would not require substantial retooling . . . in order to restructure manufacturing priorities," nor did Commerce "conclude[] that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). The Department found that collapsing was, thus, unwarranted.

As to rescission, U.S. Steel does not dispute that as the party that requested the review of Company A, it was authorized under Com-

exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A).

merce's regulations to withdraw the request, *i.e.*, to ask Commerce to rescind the review, within a certain time limit. Nor does it argue that that its request to rescind was timely. Rather, U.S. Steel argues that Commerce's assignment of the all-others rate to Company A is contrary to the antidumping statute because the statute authorizes Commerce to determine an antidumping margin solely for a producer or exporter of the subject merchandise, not a freight company:

> Commerce's interpretation [of the statute] is unreasonable because there is no statutory provision that would permit Commerce to assign an [antidumping] margin to an entity that is neither a producer nor an exporter. Moreover, Commerce's interpretation would permit circumvention of high [antidumping] rates by affiliates that receive lower cash deposit rates simply because they neither produced nor exported during the period of review.

U.S. Steel's Br. 7. In other words, for U.S. Steel, notwithstanding the lateness of its request, Commerce should have rescinded the review of Company A because assigning the all-others rate to a company that was neither a producer nor an exporter of subject merchandise was contrary to the statute.

U.S. Steel further contends that Commerce has in prior cases collapsed affiliated entities that were not "producers" of subject merchandise, but were indirectly involved in its production or exportation. U.S. Steel argues that "Commerce has a well-established practice of collapsing producing and non-producing entities if the regulatory criteria establishing a significant potential for manipulation are satisfied and thus, Commerce cannot lawfully ignore this practice without providing a reasoned explanation." U.S. Steel's Br. 7–8. For U.S. Steel, Commerce "never applied its established practice and did not explain why it did not apply the practice in this administrative review." U.S. Steel's Br. 8. Thus, it contends that the Final Results "lack the support of substantial record evidence" because "Commerce failed to engage with the record by erroneously applying its regulation and past practice," and maintains that "[h]ad Commerce applied its practice and regulatory criteria, it would have concluded that there is a substantial likelihood of manipulation of Hyundai Steel's high [antidumping] margin by the affiliated freight company." U.S. Steel's Br. 8.

Taking up collapsing first, Commerce maintains that the determination of whether to collapse is fact-intensive, and that on the record here there was no evidence that Company A was in any way involved in production or had the facilities to produce the subject merchandise.

Final IDM at 27. Commerce argues that the past cases in which it collapsed producers with affiliated resellers or distributors are distinguishable because in those cases, unlike here, the affiliates were found to be producers, or to have "administered service centers that manufactured subject merchandise." Def.'s Br. 28–29. Had U.S. Steel placed evidence on the record tending to prove that Company A is a producer or manufacturer, or indeed that it had the capability to become one, the result might have been different. As the record stands, Commerce's conclusion that the record is insufficiently developed to collapse Company A with Hyundai cannot be faulted, and it is sustained.

Regarding rescission, Commerce states that U.S. Steel requested a review of Company A, and failed to timely withdraw its request. Def.'s Br. 28. Thus, Company A was left in the case among other companies that were not individually examined. In the Preliminary Results, Company A was assigned the all-others rate. Only after the rate was determined did U.S. Steel raise an objection to the review of Company A. For Commerce, it reasonably treated Company A like any other unexamined company and assigned it the all-others rate. Def.'s Br. 27.

The court sustains Commerce's finding that U.S. Steel's request to rescind the review of Company A was untimely. The regulations set out a ninety-day time limit in which a party may withdraw its request for review—a time limit that U.S. Steel was aware of, and complied with, when it withdrew its request for review with respect to several companies *other than* Company A, on February 14, 2018. *See* 19 C.F.R. § 351.213(d)(1). The regulations provide for extensions of time to withdraw the request, but an extension must be requested by the party seeking rescission, and a sound reason for seeking the extension must be provided. *See id.*; *see also Soc Trang Seafood Joint Stock Co. v. United States*, 42 CIT __, __, 321 F. Supp. 3d 1329, 1345 (2018) (although requests to review a mandatory respondent were withdrawn more than ninety days after the publication of the notice of initiation of the review, Commerce granted extension where the requesting parties explained they "could not foresee the need to rescind in the first 90–days of this review and that a rescission of the review would aid in implementation" of a WTO settlement agreement entered into by the United States and Socialist Republic of Vietnam). Here, U.S. Steel did not request an extension of time to withdraw its request for review. Having failed to request an extension U.S. Steel did not satisfy the prerequisites for asking that a review be rescinded.

Nonetheless, the court finds convincing U.S. Steel's statutory argument that assigning the all-others rate to a non-producer or exporter violated the antidumping statute. Commerce has the authority to determine antidumping duties for "exporters and producers." *See, e.g.*, 19 U.S.C. § 1673b(d)(1)(A) (emphasis added) ("If the preliminary determination of [the Department] under subsection (b) of this section is affirmative, [Commerce] . . . shall . . . determine an estimated weighted average dumping margin for each *exporter and producer* individually investigated, and . . . determine, in accordance with section 1673d(c)(5) of this title, an estimated all-others rate for all exporters and producers not individually investigated . . . ."); *id.* § 1673d(c)(1)(B)(i)(I) (emphasis added) (Commerce "shall . . . determine the estimated weighted average dumping margin for each *exporter and producer* individually investigated"); *id.* § 1677f-1(c)(1) (emphasis added) ("In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, [Commerce] shall determine the individual weighted average dumping margin for each known *exporter and producer* of the subject merchandise."); *id.* § 1673d(c)(5)(B) (emphasis added) (defining the "estimated all-others rate" as the rate "for *exporters and producers* not individually investigated").

Commerce relies on domestic interested parties to identify "individual *exporters or producers* covered by an order" for review, and to withdraw the request within prescribed time limits. *See* 19 C.F.R. § 351.213(b)(1) (emphasis added) ("Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party . . . may request in writing that the Secretary conduct an administrative review . . . of specified individual *exporters or producers* covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers."); *id.* § 351.213(d)(1). Here, U.S. Steel identified Company A as an exporter or producer. *See* Pet'rs' Request for Admin. Rev. at 2.

Although Commerce relied on U.S. Steel to identify exporters and producers—and in the usual case would have been entitled to do so—once it found that Company A was neither one, it need not have waited for U.S. Steel to ask for rescission to find that it could not determine a rate for Company A. *See* Final IDM at 27 ("[B]ased on the record of this review, we agree with both the petitioners and Hyundai that the affiliated freight company [Company A] is neither a producer nor exporter of the subject merchandise. Record evidence identifies

the entity in question as involved in the transport of raw materials to Hyundai's production facilities and the transport of finished cold-rolled steel to domestic customers. . . . [T]here is nothing on the record which suggests that this entity has the facilities to produce or sell the subject merchandise."). The statute authorizes Commerce to determine antidumping duty rates only for producers and exporters. 19 U.S.C. § 1673b(d)(1)(A) (emphasis added) ("If the preliminary determination of [the Department] under subsection (b) of this section is affirmative, [Commerce] . . . shall . . . determine an estimated weighted average dumping margin for each *exporter and producer* individually investigated . . . ."); *see also id.* § 1673d(c)(1)(B)(i)(I). It does not empower Commerce to assign a rate to a freight company. Having made this finding, Commerce need not have waited for U.S. Steel to object to decline to determine a rate for Company A. It should have done so on its own initiative.[26]

Because Commerce was not authorized to perform the statutorily impossible act of assigning a rate to Company A, U.S. Steel's untimely rescission is not consequential. What matters is that Commerce's act in assigning a rate to Company A was unlawful and thus a nullity. Accordingly, on remand, Commerce shall rescind its assignment of the all-others rate to Company A because it found that Company A was neither an exporter nor a producer and thus violated the statutory provisions limiting the determination of an antidumping duty rate to those entities.

CONCLUSION and ORDER

For the foregoing reasons, it is hereby

ORDERED that that Department's use of facts available, under 19 U.S.C. § 1677e(a) based on Hyundai's alleged "withholding" of requested information, is remanded for the agency to comply with its obligation, under 19 U.S.C. § 1677m(d), to notify Hyundai of the nature of the alleged deficiency(ies) in Hyundai's questionnaire responses and provide the company an opportunity to remediate; it is further

ORDERED that, on remand, Commerce shall (1) identify with specificity the control numbers and individual U.S. sales with respect to which it found a deficiency in Hyundai's reported specification data

[26] The court recognizes that Commerce's regulations provide that the Department may rescind an administrative review that it self-initiated. 19 C.F.R. § 351.213(d)(2). It may also rescind a review "in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." *Id.* § 351.213(d)(3). The court's ruling to rescind the assignment of the all-others rate to Company A is not inconsistent with the regulations.

(PRODCOD2U/H and SPECGRADEU/H), (2) clearly describe the nature of each deficiency, and (3) provide Hyundai an opportunity to remediate it; it is further

ORDERED that, on remand, Commerce shall reconsider whether the use of facts otherwise available is warranted with respect to any of Hyundai's sales, and adequately explain and support its remand redetermination with substantial evidence; it is further

ORDERED that if, on remand, Commerce continues to find that the use of facts available is warranted, and makes the additional, distinct finding that the application of an adverse inference is warranted because Hyundai failed to cooperate "to the best of its ability," under 19 U.S.C. § 1677e(b), then it shall support this finding with substantial evidence; it is further

ORDERED that Commerce shall rescind its assignment of the all-others rate to Company A; and it is further

ORDERED that Commerce's remand redetermination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: April 27, 2021
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 21–52

DAK AMERICAS LLC, INDORAMA VENTURES USA, INC., AND NAN YA PLASTICS CORPORATION, AMERICA, Plaintiffs, v. UNITED STATES, Defendant, and NOVATEX LIMITED, G-PAC CORPORATION, NIAGARA BOTTLING, LLC, AND IRESIN, LLC, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 18–00238
PUBLIC VERSION

[The court sustains the International Trade Commission's Remand Views.]

Dated: May 3, 2021

Paul C. Rosenthal, *Kathleen W. Cannon*, and *Brooke M. Ringel,* Kelly Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Brian R. Allen, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Brenda A. Jacobs, Jacobs Global Trade & Compliance LLC, of McLean, VA, for defendant-intervenors, *Novatex Limited* and *G-PAC Corporation*. With her on the joint brief was *Neil R. Ellis*, Law Offices of Neill Ellis PLLC, of Washington, DC.

John M. Peterson, Neville Peterson LLP, of New York, NY, argued for defendant-intervenor, *Niagara Bottling, LLC*. With him on the brief were *Richard F. O'Neill* and *Patrick B. Klein*.

Susan G. Esserman, *Joel D. Kaufman*, *Luke M. Tillman*, and *Judy (Zhu) Wang*, Steptoe & Johnson LLP, of Washington, DC, for defendant-intervenor, *iResin, LLC*.

OPINION

Katzmann, Judge:

In its prior opinion in this case, the court, noting the Aristotelian maxim that "like cases should be treated alike," observed that consistency is a core value of administrative law. *DAK Americas LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340, 1346 (2020) ("*DAK Americas I*") (citations omitted). "[T]hough past agency decision-making may not be precedential in the same way as case law through stare decisis, it remains of great importance." *Id*. at 1355 (footnote omitted). The court's concern that "reasoned decision-making come to bear" on agency determinations impels that the agency explain its departure from prior determinations, insofar as there has been such a departure. *Id.* at 1356.

The court now returns to the material injury investigation by the International Trade Commission ("Commission") on the effects of imports of PET resin — a polyester polymer (i.e. plastic) material used to make many common products, including bottles — on the U.S. domestic industry. Before the court is the Commission's Remand Views, Views of the Commission, Sept. 23, 2020, ECF No. 117 ("Remand Views"), which the court ordered in *DAK Americas I*, so that the Commission could further explain certain aspects of its negative injury determination in accordance with the court's instructions. On remand, the Commission again determined that the U.S. PET resin industry is not injured or threatened with material injury by PET resin imports sold at less than fair value. Remand Views at 1. Plaintiffs DAK Americas LLC ("DAK"), Indorama Ventures USA, Inc. ("Indorama"), and Nan Ya Plastics Corporation ("Nan Ya") (collectively, "Plaintiffs") again challenge the Commission's decision. Pls.' Cmts. on the Int'l Trade Commission's First Remand Determination, Oct. 23, 2020, ECF No. 121 ("Pls.' Br."). Defendant the United States ("Government") and Defendant-Intervenors Novatex Limited, G-Pac Corporation, iResin, LLC, and Niagara Bottling, LLC (collectively, "Defendant-Intervenors") request that the court affirm the Commission's Remand Views. Def. United States' Resp. to Pls.' Cmts. on Remand, Nov. 23, 2020, ECF No. 130 ("Def.'s Br."); Corr. Version of Reply of Def. Inters., Novatex Ltd. and G-Pac Corp., to Pls.' Cmts. on the Remand Determinations of the U.S. Int'l Trade Commission, Nov.

24, 2020, ECF No. 133 ("Novatex's Br."); Rebuttal Cmts. of Def.-Inter., Niagara Bottling, LLC, Nov. 23, 2020, ECF No. 132 ("Niagara's Br."); Reply Br. of Def.-Inter. iResin in Resp. to Pls.' Cmts. on the Remand Determination of the Int'l Trade Commission, Nov. 24, 2020, ECF No. 135 ("iResin's Br."). The court affirms.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *DAK Americas I*, 456 F. Supp. 3d at 1347–52. Information relevant to the instant opinion is set forth below.

Plaintiffs, U.S. producers of PET resin, filed antidumping petitions with the Commission after subject imports surged following the 2015 imposition of remedial duties on PET resin imports from Canada, China, India, and Oman. *See* Petition for the Imposition of Antidumping Duties: Imports of Certain Polyethylene Terephthalate Resin from Brazil, Indonesia, the Republic of Korea, Pakistan, and Taiwan, Sept. 26, 2017, P.R. 1. The Commission defined the period of investigation ("POI") as the first quarter of 2015 through the first quarter of 2018. *See* Confidential Views of the Commission in Polyethylene Terephthalate Resin from Brazil, Indonesia, Korea, Pakistan, and Taiwan: Investigation. Nos. 731-TA-1387–91 (Final) at 4, USITC Pub. 4835 (Nov. 2018), P.R. 209, C.R. 342 ("Original Views"). The Commission found that the U.S. PET resin market was price-sensitive and characterized by product fungibility, that the subject imports' market share gains came at the same time as the domestic industry lost market share, and that the domestic industry suffered a decline in financial condition during the POI. *Id.* at 29–30, 45–46. The Commission nevertheless concluded: (1) the underselling that occurred was not significant, based upon both indirect pricing reports that showed overselling was more prevalent and purchasers' reports that showed supply shortages as the cause of domestic market share losses; and (2) the subject imports did not have a significant adverse impact on the domestic industry. *Id.* at 50–55.

Plaintiffs challenged that determination before the court. *See* Compl., Dec. 26, 2018, ECF No. 9. Plaintiffs moved for judgment on agency record, arguing that: (1) the Commission failed to explain why the underselling on the record was not significant in light of prior Commission and court decisions finding mixed underselling significant; (2) the Commission's determination that subject imports predominantly oversold domestic product was not supported by substantial evidence because the Commission excluded several points of conflicting evidence; (3) the Commission's finding that domestic sup-

ply constraints explain the subject import surge is not supported by substantial evidence because the record indicates supply constraints solely manifested from October 2016 onwards; and (4) the aforementioned errors make the Commission's ultimate no adverse impact determination unsupported by substantial evidence. *DAK Americas I*, 456 F. Supp. 3d at 1353. The court granted Plaintiffs' motion and remanded the Commission's determination for further explanation and a decision based on substantial evidence. *Id.*

On remand, the three Commissioners who participated in the original determination and two Commissioners who were not on the Commission at the time of the original determinations re-examined the case and unanimously came to the same conclusions as in the Original Views. Remand Views at 3 n.7. The Commission provided further explanation and analysis of the record evidence underlying its determination but did not change its ultimate conclusions that there was no significant underselling and no adverse impact on the domestic industry. *See* Remand Views at 1. The Commission filed its Remand Views with the court on September 23, 2020. *See* Remand Views.[1] Plaintiffs filed their comments on the Remand Views on October 23, 2020. Pls.' Br. The Government and Defendant-Intervenors filed replies to these comments on November 23, 2020. Def.'s Br.; Novatex's Br.; Niagara's Br.; iResin's Br.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to review negative material injury determinations by the Commission under 19 U.S.C. § 1561a(a)(1)(C). The court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record or otherwise not in accordance with law under 19 U.S.C. § 1516a(b)(1)(B)(i). A decision based on substantial evidence and in accordance with law includes an examination of the record and an adequate explanation for an agency's findings such that the record demonstrates a rational connection between the facts accepted and the determination made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951)). The court must defer to the Commission's role as trier of fact and not disturb its "considerable discretion in evaluating

[1] Many citations are to confidential filings for clarity in explaining the timeline of events. Public versions, often filed at later dates, are available on the public docket with corresponding pagination.

information obtained from questionnaires." *Int'l Indus. v. United States*, 42 CIT __, __, 311 F. Supp. 3d 1325, 1333 (2018) (quoting *NSK Corp. v. United States*, 32 CIT 966, 978, 577 F. Supp. 2d 1322, 1336–37 (2008)); *see also Coal. of Gulf Shrimp Indus. v. United States*, 39 CIT __, __, 71 F. Supp. 3d 1356, 1365 (2015) (stating that as part of its selection of methodology, the Commission "has discretion to select a data set that it will use in its investigation"); *Goss Graphics Sys. v. United States*, 22 CIT 983, 1004, 33 F. Supp. 2d 1082, 1100 (1998), *aff'd*, 216 F.3d 1357 (Fed. Cir. 2000). "[W]hen the totality of the evidence does not illuminate a black-and-white answer to a dispute[]," the court defers to the Commission as "the expert factfinder . . . to decide which side's evidence to believe." *Nippon Steel Corp.*, 458 F.3d at 1359. The court also reviews remand results for compliance with its remand order. *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014).

DISCUSSION

On remand, the court ordered the Commission to provide further explanation of its conclusions regarding the following issues: "(1) the Commission's determination that overselling predominated and underselling was not significant in light of aspects of the record showing underselling and to address prior determinations that even underselling that occurred in less than 50 percent of price comparisons could be significant; (2) the Commission's finding that supply constraints were the cause of market share shifts rather than underselling in light of conflicting evidence that supply constraints solely occurred from October 2016 onwards; and (3) the Commission's no adverse impact determination in light of the insufficiencies in its overselling and supply constraint findings." *DAK Americas I*, 456 F. Supp. 3d at 1367–68.

Plaintiffs now challenge the Commission's remand determination, arguing that it "fail[ed] to comply with the [remand] instructions," and "repeated its original findings and rationale, which were rejected by this [c]ourt." Pls.' Br. at 2–3. The Government states that "[b]ecause the Commission's remand determinations are supported by substantial evidence and otherwise entirely in accordance with law, and fully respond to the [c]ourt's remand instructions, we respectfully ask this [c]ourt to affirm." Def.'s Br. at 1.[2] Further, the Government responds to Plaintiffs by stating that "the [c]ourt did not instruct the

[2] By and large, Defendant-Intervenors' positions are consistent with the Government's. *See* Novatex's Br.; Niagara's Br.; iResin's Br. Therefore, the court discusses the Government's position as representative of arguments in support of the Commission's Remand Views.

Commission to reverse its findings and reach an affirmative determination on remand," and "[n]owhere do the [c]ourt's instructions direct the Commission to discard its previous analyses and findings, nor do they suggest that the Commission's determinations could not be supported by any evidence in the record." Def.'s Br. at 2–3.

Upon review of its Remand Views, the court now sustains the Commission's determination. After previously pointing to the Commission's failure to explain and address certain evidence, counterarguments, and past decisions that separately and collectively undermined its conclusions, the court now determines that with further explanation the Commission's conclusions are support by substantial evidence and in accordance with law. Many of Plaintiffs' remaining issues with the Commission's conclusions stem from their own view of the record rather than a failure by the Commission to comply with the court's remand instructions. Where reasonable minds may disagree, the court defers to the agency and does not disturb the agency's evaluation of the weight of evidence where its decision is adequately explained. *See Nippon Steel Corp.*, 458 F.3d at 1359.

I. The Court Sustains the Commission's No Significant Underselling Conclusion.

The Commission's Original Views concluded that there was no significant underselling of imports compared to the U.S. domestic price for PET resin despite the presence of an import surge during the POI, the price sensitivity of the PET resin market, and the fungibility or substitutability of subject goods. Original Views at 29–30, 45–46, 50–55. In making this determination, the Commission examined questionnaire responses from interested parties, quarterly pricing data from U.S. importers for commercial transactions ("quarterly pricing data"), data on direct imports for internal consumption for production of downstream products or for direct retail sale to end consumers ("direct imports"), and hearing testimony. *See id.* at 33–34, 50 n.191, 51–52; *see also* Remand Views at 30 n.121. The court identified three issues that undermined this conclusion: (1) apparent inconsistencies with the Commission's general conclusions that the U.S. PET resin market was characterized by price sensitivity and product fungibility and the significance of underselling compared to its prior determinations containing the same general conclusions about price and fungibility, *DAK Americas I*, 456 F. Supp. 3d at 1356–57; (2) unaccounted for differences in the selection of quarterly price data and unexplained contradictory evidence related to this data, *id.* at 1357–58; and (3) unexplained or unaccounted for evidence that pointed to the importance of price on the shift in market share away from domestic producers, *id.* at 1361–62.

On remand, the Commission provided additional analysis and explanation of the U.S. PET resin market that shaped the Commission's views as to each of the three issues identified by the court. *See* Remand Views at 10–12. The Commission continued to conclude that there was no significant underselling by imports in the U.S. PET resin market. *Id.* at 16. However, based on the same price data, the Commission explained that other factors, including availability and quality, impacted the PET resin market in addition to price sensitivity and substitutability. *Id.* at 11 ("[O]nly one factor was rated very important by all 25 respondents: availability"). Thus, the commission concluded that "price by itself would in many instances not be determinative in purchasing decisions." *Id.* at 27–28; *see also id.* at 12 ("Price was the fourth-ranked purchasing factor."). Further, despite increased imports during the POI, the Commission again identified "overselling of the domestic product" because "th[e] imports predominantly sold at higher prices than the domestic product — indicating that factors other than price were influencing purchasing decisions." *Id.* at 28. The Commission explained that "[c]onsistent with [its] well-established practice, [it] focused [its] underselling analysis on a comparison of the number of instances of underselling to the number of instances of overselling as reflected in the quarterly price comparison data." *Id.* at 28. Accordingly, the Commission concluded that, by volume, the quarterly price data showed predominant overselling (69 percent of sales by volume). *Id.* at 29.[3] Because the Commission provided further explanation on the points identified by Plaintiffs and highlighted by the court that seemed to undermine its conclusion that there was no significant underselling by imports in the domestic PET resin market, the court affirms the Commission's no significant underselling conclusion.[4]

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[3] While there was some underselling in each year of the POI, only in 2015 did the underselling predominate, constituting 58 percent of sales by volume. Remand Views at 29. Because the last two years of the POI were predominated by overselling (64 percent and 85 percent in 2016 and 2017, respectively), the Commission concluded that the "quarterly sales price data reflect predominant overselling of the domestic product by subject imports" and the "data weigh heavily against a finding of significant underselling of the domestic product by subject imports." *Id.* at 29.

[4] Plaintiffs contest the Commission's re-examination of the market characteristics on remand, and allege that "[t]he Commission does not . . . point to evidence that the quality of subject imports or availability issues (other than its continued, faulty reliance on domestic supply constraints) drove subject import sales instead of pricing in a market where, the Commission acknowledges, price is a very important factor." Pls.' Br. at 26. The court is not persuaded by this argument. It was appropriate that the Commission review and further explain its market assessment on remand given the court's instruction for the Commission to further explain its "findings of a general nature." *DAK Americas I*, 456 F. Supp. 3d at 1353. The Commission supported this further analysis of the market with ample evidence and adequate explanation. *See* Remand Views at 10–12 (analyzing record evidence of market conditions other than price that affected the U.S. PET resin market); *see also id.* at

A. Inconsistencies with the Commission's Past Decisions

In its prior opinion, the court instructed the Commission to "address why the underselling that it found was not significant," "where the Commission made the same two determinations (i.e. price-sensitivity and substitutability)" in other results in which the Commission concluded the opposite. *DAK Americas I*, 456 F. Supp. 3d at 1357 (citations omitted); *id.* ("[T]he court orders the Commission in considering its underselling finding on remand to reasonably distinguish its conclusions from findings of a general nature in prior determinations in the event of any conflict.").

In addition to the added analysis of the U.S. PET resin market discussed above, the Commission noted that its "findings in these investigations are not that there was 'mixed' underselling," but rather, "that the data in these investigations evidenced predominant overselling by the subject imports." Remand Views at 38.[5] This was because "[t]his is not a case where the number of instances of underselling and overselling are close or 'mixed,' but rather one in which instances of overselling far prevail." *Id.* at 38. The Commission went on to distinguish its conclusion from that in eight other investigations in which there was a high degree of substitutability, price was an important consideration, and there was some degree of underselling identified. *See id.* at 39–46 (Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom, Inv. Nos. 701-TA-545–47, 731-TA-1291–97 (Final) USITC Pub. 4638 (Sept. 2016) ("Certain Hot-Rolled Steel Flat Products"); Certain Corrosion-Resistant Steel Products from China,

32 nn.130–31 (citing Original Views at V-11–V-14 Tables V-3–V-6; *id.* at V-31 Table V-12). The court defers to the Commission's expert analysis of market conditions during the POI. *See Nippon Steel Corp.*, 458 F.3d at 1359.

[5] Plaintiffs challenge the Commission's price analysis by alleging that the Commission should have examined underselling by considering both quarterly price data and direct imports in toto. Pls.' Br. at 16. The Commission explained that direct imports "cannot be combined with[] [quarterly pricing data] as the latter reflect actual sales into the U.S. market and the former reflect U.S. importers' purchase costs[, which] do not capture other costs beyond the landed duty-paid value that U.S. importers may incur as a result of importing the product, such as logistical or supply chain costs and warehousing and inventory carrying costs." Remand Views at 15 (citing Blank Importer Questionnaire at Q. II-4). The Commission also explained that it considered the direct import data in its underselling analysis, but ultimately concluded that the quarterly price data was "paramount and the most probative price information." *Id.* at 16. As the Government notes, "Plaintiffs cite no prior Commission determinations in which the Commission has combined these two data sets because the Commission has never done so." Def.'s Br. at 20 n.18. The court therefore concludes that the Commission adequately considered direct import data and explained its use and consideration of that data in reaching its no significant underselling conclusion. Its decision not to numerically combine the two data sets was also explained and the court is unpersuaded by Plaintiffs' challenge to this methodology.

India, Italy, Korea, and Taiwan, Inv. Nos. 701-TA-534–37, 731-TA1274–78 (Final), USITC Pub. 4620 (July 2016) ("Certain CRS Products"); Cold-Rolled Steel Flat Products from China and Japan, Inv. Nos. 701-TA-541, 731TA-1284, 1286 (Final), USITC Pub. 4619 (July 2016) ("Cold-Rolled Steel Flat Products"); Certain Steel Nails from China, Inv. No. 731-TA-1114 (Final), USITC Pub. 4022 (July 2008) ("Certain Steel Nails"); DRAMs and DRAM Modules from Korea, Inv. No. 701-TA-431 (Final), USITC Pub. 3616 (Aug. 2003) ("DRAMS from Korea"); Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan, Inv. Nos. 701-TA-376, 377, 379, 731-TA-788–93 (Final), USITC Pub. 3188 (May 1999) ("Certain Stainless Steel Plate"); Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Final), USITC Pub. 1637 (Jan. 1985) ("Cold-Rolled Carbon Steel Plates"); Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157–60, 162 (Final), USITC Pub. 1331 (Dec. 1982) ("Certain Carbon Steel Products")). The Commission distinguished the percentages of underselling and overselling by volume, *see id.* at 39–45 (discussing all determinations), the timing of overselling compared to the market share of imports, *see id.* at 39, 40, 41 (discussing Certain Hot-Rolled Steel Flat Products, Certain CRS Products, and Cold-Rolled Steel Flat Products), and the differences in purchaser responses as to the primary reason for purchasing imports rather than domestic product, *see id.* at 39–42, 44–45 (discussing all determinations except DRAMS from Korea). Some determinations were distinguished on other bases, such as the type or availability of data analyzed. *See* Remand Views at 43–45 (discussing DRAMS from Korea, Certain Stainless Steel Plate, Cold-Rolled Carbon Steel Plates, and Certain Carbon Steel Products).

Plaintiffs again challenge the Commission's Remand Views as inconsistent with those past determinations by alleging that "[t]he Commission changed nothing in its pricing analysis in response to these broad findings of error." Pls.' Br. at 16. Plaintiffs argue that "[h]ad the Commission also considered" underselling by direct imports, "it would have further reported that there was underselling in [[ ]] percent of quarterly direct price comparisons and [[ ]] percent of direct import pricing comparisons on a volume basis." *Id.* at 27. Based on this alleged error, Plaintiffs argue that "the Commission provided a simplistic comparison of the underselling percentage here, based on the unrevised, indirect quarterly price comparisons, to the underselling percentages found in other cases." *Id.* Plaintiffs also contend that the Commission should have considered "the record as a whole on the low import prices" and the "specifics of the PET resin

market [and] U.S. producers[']' attempt[] to combat unfair import competition" compared to each prior determination. *Id.* at 28–29.

The Government responds that "the Commission found that 'the unique facts, and the analysis and conclusions drawn from them' were not applicable to the present investigations and determinations." Def.'s Br. at 22 (citing *Altx, Inc. v. United States*, 25 CIT 1100, 1109, 167 F. Supp. 2d 1353, 1365 (2001)). Similarly, the Government explains that the Commission "cited various factors examined in the other cases that distinguished the other cases from the facts of the instant investigations, such as the timing of importation and the importance of price in purchasing decisions." *Id.*[6] Further, the Government notes that "[d]iscussion of these various factors by the Commission, as well as several other sections of the Commission's Remand Views, contradicts Plaintiffs' argument that the Commission 'ignores all of the other record evidence.'" *Id.* at 22 n.20.

The court concludes that the Commission's further explanation of the U.S. PET resin market on remand and discussion of relevant factors from the other cases complies with this aspect of the remand instructions. Thus, the Commission's explanation that the prior determinations materially differed on the basis of volume, timing of imports, and the importance of price to the markets adequately explains why its conclusions of a general nature regarding the market conditions for U.S. PET resin were distinct from market conditions for products subject to past investigations. The court affirms this aspect of the Commission's Remand Views because the Commission complied with the court's instruction for the Commission to explain "whether: (1) good reasons prompt that departure; or (2) the prior determinations are inapposite such that it is not in fact a departure at all." *DAK Americas I*, 456 F. Supp. 3d at 1356 (citing *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997); *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981)); *see also id.* at 1354–56 (discussing *Cleo Inc. v. United States*, 501 F.3d 1291, 1298–99 (Fed. Cir. 2007); *Usinor v. United States*, 26 CIT 767, 792, 24 ITRD 1711 (2002)).

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[6] For similar reasons, iResin contends that the Remand Views are consistent with the Commission's two previous determinations regarding PET resin, Polyethylene Terephthalate (PET) Resin from India, Indonesia, and Thailand, Inv. Nos. 701-TA-439 and 731-TA-1077, 1078 and 1080 (Final) USITC Pub. No. 3769 (May 2005) and Polyethylene Terephthalate (PET) Resin from Canada, China, India, and Oman, Inv. Nos. 701-TA-531–532 and 731-TA-1270–73 (Final), USITC Pub. No. 4604 (April 2016). iResin's Br. at 4–5.

B. Quarterly Pricing Data

In its original opinion, the court concluded that certain inconsistencies undermined the Commission's selection of quarterly pricing data, related to both data that was included and excluded in the data set. Specifically, the court identified three issues within the Commission's selected quarterly pricing data: (1) the exclusion of [[ ]] data and the inclusion of [[ ]] data; (2) the exclusion of [[ ]] data; and (3) the inclusion of [[ ]] data. *Id.* at 1357–61. In response to the court's remand instructions, the Commission addressed each set of indirect pricing data identified by the court as not adequately explained or not supported by substantial evidence, reached the same conclusions, and relied on the same set of data for the remand decision.

1. Exclusion of [[ ]] Data and Inclusion of [[ ]] Data

First, the court remanded the Commission's decision to exclude [[ ]] data given similar inconsistencies in the included data of [[ ]] for further explanation and a decision based on substantial evidence. *Id.* at 1358–59. Relatedly, the court instructed the Commission to address the weight of this conflicting evidence in the context of its conclusion that there was no significant underselling. *Id.* at 1362. On remand, the Commission again decided to exclude the data of [[ ]]. Remand Views at 23. The Commission explained that certain discrepancies and inconsistencies in the [[ ]] data made it improper for the Commission's consideration. *Id.* at 25. Specifically, [[

]] and reported differing data on [[

]]. *Id.* at 24–25. Further, as to the court's conclusion that this data constituted evidence that undermined the Commission's underselling conclusion despite it not being included in its data set, the Commission explained that the values of [[ ]] reported volumes did not provide a comparison with the prices for domestic products so that it not carry as much weight in its ultimate decision. *Id.* at 26. Finally, the Commission explained that there was a "meaningful difference" between the data submitted by [[ ]] and [[ ]] because [[ ]] provided "specific and usable price data" with only one identified

discrepancy. Id. at 27. Unlike [[ ]], [[ ]] fully addressed the Commission's concerns regarding the discrepancy identified. *Id.*

Plaintiffs contend that this decision "does not comply with the court's instruction" because the Commission relied upon the same rationale — "[[ ]]" — and does not "take into account in any way this [[ ]]." Pls.' Br. at 24. Plaintiffs argue that "[a] claimed inability to determine the pricing category of these imports is without merit, given that there was [[ ]]." *Id.* at 24 n.20. Finally, Plaintiffs state that the Commission's decision to continue to include [[ ]] data "reflects a selective approach to excluding certain data wholesale while including other questionable data." *Id.* at 24. The Government responds that the "Commission provided a fulsome and detailed explanation of its decision not to consider the data pertaining to price provided by [[ ]] in its underselling analysis." Def.'s Br. at 8. "The Commission explained the 'meaningful difference' it found in the data submitted" and "reasonably included [[ ]] data." *Id.* at 9–10. Finally, the Government argued that "[[ ]] data pertaining to price is not appropriately considered as price data or purchase cost data for imports for internal consumption or retail sale." *Id.* at 18 n.16 (citing Remand Views at 23–26).

The court concludes that the Commission complied with its remand instructions to adequately explain its decision to exclude this data and this data's impact on its underselling analysis. The court agrees with the Government that, contrary to Plaintiffs' contention, "the Commission did not completely disregard [[ ]] questionnaire data, as it again relied on the aggregated import volumes and values data that included [[ ]] data." *Id.* at 7 (citing Original Views at IV-4 n.5 Table IV-1). The Commission's reasons for excluding this data from the quarterly pricing data reflect a reasoned analysis of its decision to exclude this data, rather than Plaintiff's alleged "selective approach." *Coal. of Gulf Shrimp Indus.*, 71 F. Supp. 3d at 1365 ("[The Commission] has discretion to select a data set that it will use in its investigation . . . ").

2. Exclusion of the Pricing Data of Importer [[ ]]

Second, the court found that the Commission's "failure to address, in any way, . . . the exclusion of data from a significant importer[, [[ ]], was] insufficient to constitute substantial evidence on the record" and demonstrated that "the Commission failed to adequately address an important aspect of the issue." *DAK Americas I*, 456 F. Supp. 3d at 1359 (citing *Siemens Energy, Inc. v. United States*, 38 CIT

__, __, 992 F. Supp. 2d 1315, 1324 (2014), *aff'd*, 806 F.3d 1367 (Fed. Cir. 2015); *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001)). On remand, the Commission clarified that the significance of this data was limited because [[ ]] represented a significant volume of imports from [[ ]] rather than [[ ]]. Remand Views at 18. Further, the Commission explained that it excluded this data because of certain inaccuracies and aberrancies in the information it provided to the Commission. *Id.* at 18–19. Specifically, based on examination of the importer's questionnaire response, the Commission concluded that "[[ ]]" and that the data contained [[ ]]. *Id.* at 18–19. Further, because [[ ]]. *Id.* at 19. Thus, the Commission again excluded this data.

Plaintiffs challenge the renewed exclusion of this data, arguing that, "[e]ven if [it] pertains only to one subject country in 2016, it represents almost [[ ]] of the import volume of that country in 2016, the year of the import surge that is the focus of this case" and therefore that "the Commission has failed to justify its continued decision to exclude entirely the [[ ]] pricing data." Pls.' Br. at 23–24. The Government responds that "[t]he Commission reasonably declined to include this 'aberrant' price data." Def.'s Br. at 11. Further, the Government explains that the Commission did not wholly disregard the impact of this importer because the Commission "used, 'the import volume and value data provided by [[ ]] in its importers' questionnaire," but simply excluded its price data for the reasons explained. *Id.* at 10–11.

The court concludes that the Commission complied with the remand instructions and affirms the Commission's decision to exclude [[ ]] indirect pricing data. The explanation regarding the relative weight of the data and the aberrancies requiring the data to be excluded remedies the deficiency in the Original Views of not addressing a significant aspect of the issue. The Commission did not entirely exclude data from this importer and sufficiently explained why it excluded the data it did. The court is unpersuaded by Plaintiffs' attempt to have the court reweigh this evidence. *See Int'l Indus.*, 311 F. Supp. 3d at 1333 (directing the court to defer to the Commission's role as trier of fact); *Coal. of Gulf Shrimp Indus.*, 71 F. Supp. 3d at 1365 ("The [Commission] has discretion to select a data set that it will use in its investigation . . . ."). Based on its explanation, there was a

rational connection between the exclusion and the aberrancy of the data. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

3. Inclusion of [[ ]] Data

The third issue identified by the court as to the Commission's selection of quarterly pricing data related to the Commission's inclusion of U.S. purchaser [[ ]] questionnaire response and pricing data despite showing lower priced imports and overselling of subject imports, respectively. *DAK Americas I*, 456 F. Supp. 3d at 1360–61; *see also* Pls.' Mem. of L. in Supp. of Mot. for J. on Agency R. at 25, May 16, 2019, ECF No. 43. The court concluded that, while "there may be a reasonable explanation for the Commission's determination," the Commission erred by failing to provide any explanation of this decision. *DAK Americas I*, 456 F. Supp. 3d at 1361. On remand, the Commission explained that it continued to include this data because it found no contradiction in [[ ]] data or responses. Remand Views at 20. The importer [[ ]] was asked as both a [[ ]] and importer whether PET resin imports were lower priced than domestically produced PET resin, which to the first it answered [[ ]] to a yes-no question and to the second it answered with numerical price data. *Id.* The Commission concluded that the general answer in response to the first questionnaire was context-specific and therefore had a limited value in the Commission's analysis of underselling. *Id.* at 20–21. Thus, it determined that the specific price data from the importer questionnaire to be "more probative for our price analysis than general comments about perceived price in the market and do not question the accuracy of either of its questionnaire responses." *Id.* at 22. Therefore, the Commission concluded that there was no inconsistency in including both the questionnaire response and quarterly price data in its analysis. *Id.* at 22.

Plaintiffs challenge the Commission's explanation by contending that it improperly weighed [[ ]] pricing data because its questionnaire indicated "[t]hat subject imports were [[ ]]." Pls.' Br. at 25. The Government characterizes Plaintiffs' position as proposing that the Commission exclude specific price data in favor of "a single answer to a yes-no question." Def.'s Br. at 12. The Government instead argues that the Commission correctly "found [[ ]] specific price data more probative for its price analysis than general comments." Id. at 12.

The court affirms the Commission's inclusion of [[ ]] pricing data in light of its further explanation of this issue on remand. *See Nippon Steel Corp.*, 458 F.3d at 1359 (noting that the court defers to

the Commission as "the expert factfinder . . . to decide which side's evidence to believe"). The Commission adequately explained its decision; it is not the province of the court to reweigh this evidence. *Int'l Indus.*, 311 F. Supp. 3d at 1333 (stating that the court affords the Commission "considerable discretion in evaluating information obtained from questionnaires.").

C. Other Data and Questionnaire Responses Undermine the Commission's Conclusion

In its original opinion, the court also identified several pieces of unaddressed or inadequately addressed evidence on the record that undermined the Commission's conclusion that there was no significant underselling in the U.S. PET resin market during the POI. Specifically, the court instructed the Commission to address on remand the following: (1) purchaser price rankings from questionnaires; (2) reported prices from purchasers who purchased subject imports instead of domestic; (3) pricing data for direct imports showing underselling; and (4) significant market share gains in a price-sensitive market characterized by product fungibility. *DAK Americas I*, 456 F. Supp. 3d at 1361–62. The Commission addressed each point on remand to explain why these issues did not undermine its no significant underselling determination.

1. Purchaser Price Rankings from Questionnaires

The court previously noted that the record showed "twenty purchaser responses of underselling and only nine of overselling." *Id.* at 1361. However, the Commission simply noted that "we have considered this information, we do not believe it outweighs the actual price data we have collected that show that subject imports are typically higher priced" without further explanation of how this determination reconciled with the rest of its determination. *Id.* (citing Original Views at 38 n.150). On remand, the Commission explained that it "do[es] not find that simply adding purchaser responses to a rating question is particularly meaningful in isolation, given that such an approach does not account for factors such as product mix and volumes represented by the responses." Remand Views at 34. As to the rankings, it found that "subject imports from three of the five subject countries were more often rated as comparably priced or higher priced than the domestic product, [and thus do not] compel[] a finding that the cumulated subject imports were generally priced lower than the domestic product, let alone significantly undersold the domestic product," especially "when considered alongside the detailed and comprehensive quarterly price data." *Id.* The Commission noted that, even considering an addition of responses in isolation, twenty pur-

chasers indicated that imports and domestic product were comparably priced or higher priced to the twenty purchasers that indicated that imports were lower priced than the domestic product. *Id.* at 35. Thus, the Commission concluded that "the even split" in responses cannot outweigh "the comprehensive and data-specific quarterly price comparisons which show predominant overselling by the subject imports." *Id.*

Plaintiffs challenge this explanation as insufficient. Pls.' Br. at 17. Plaintiffs contend that the Commission cannot include answers indicating that imports were priced comparable to domestic product with those that indicated imports were priced higher than the domestic product because "[t]he proper analysis — and the approach the Commission typically follows — is to simply take off the neutral responses regarding comparability and not add them to either the higher- or lower-priced group." *Id.* at 19 n.17 (citing, *e.g.*, Certain Crystalline Silicon Photovoltaic Products from China and Taiwan, Inv. Nos. 701-TA-511 and 731-TA-1246–47 (Final), USITC Pub. 4519 (Feb. 2015)). Additionally, Plaintiffs argue that the Commission did not request volume data alongside the questionnaire responses, the Commission regularly relies upon these questionnaire responses in its determinations, and that this determination is a piecemeal dismissal of purchaser data without an assessment of the record as a whole. *Id.* at 20. The Government responds that "the Commission employed a methodology in its price analysis that accounted for factors such as product mix and volume." Def.'s Br. at 14–15. Further, the Government contends that the Commission explained that Plaintiffs' proposed methodology "overlook[ed] the sheer volumes of shipments . . . that were accounted for in the quarterly price comparisons" and that it "found the coverage levels for the price data to be 'substantial.'" *Id.* at 16 (quoting Remand Views at 34). The Government also argues that "the results of Plaintiffs' approach [do not] outweigh the Commission's comprehensive data-driven price comparisons showing predominant overselling by the subject imports." *Id.* at 15–16.

The court concludes that the Commission complied with the remand instructions in providing this further explanation. The court agrees with the Government that the methodology employed by the Commission reasonably accounts for product mix and volume in accordance with previous cases. *See Coal. of Gulf Shrimp Indus.*, 71 F. Supp. 3d at 1365 (deferring to the Commission's methodology in selecting data and weighing product selection and volume considerations); *Whirlpool Corp. v. United States*, 37 CIT 1775, 1786–87, 35 ITRD 2513 (2013) (affirming the Commission's selection of import data based on product and volume considerations); Def.'s Br. at

14–15. While Plaintiffs note that the court's previous opinion doubted the Commission's conclusion that there was no significant underselling based on the quarterly pricing data of eight importers rather than the questionnaire responses of sixteen importers, Pls.' Br. at 19; *DAK Americas I*, 456 F. Supp. 3d at 1361–62, the court now accepts the Commission's decision in light of its explanation that it more heavily weighed the volume of imports over the quantity of importers and more detailed quarterly pricing data over more general narrative responses. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. As the Government notes, 19 USC § 1677(7)(C)(ii) does not require the Commission "to determine whether there has been significant price overselling, or a lack of significant underselling and overselling" which a rating of "comparable" may show, but rather "whether there has been significant price underselling." Def.'s Br. at 16 n.15. The court defers to the Commission's weighing of the evidence, including its further explanation of how the Commission understands the questionnaire responses in relation to the quarterly pricing data. *See Int'l Indus.*, 311 F. Supp. 3d at 1336.

2. Reported Prices from Purchasers Who Purchased Subject Imports Instead of Domestic

The court also noted that the Commission failed to address or explain the weight of evidence showing that "[e]leven of nineteen purchasers shifting from buying the U.S. product reported the imports were lower-priced" and that "most purchasers' reported import prices were lower." *DAK Americas I*, 456 F. Supp. 3d at 1362. Thus, the court concluded that this constituted evidence that undermined the Commission's finding that underselling was not significant, and overselling predominated. *Id.* On remand, the Commission addressed the data indicating that eleven purchasers shifted to buying lower-priced imports by explaining that

> [t]hese responses do not specify quantities, prices, and time periods of purchasing, unlike the price data. . . . [O]nly four of those 11 purchasers who reported that subject imports were priced lower than the domestic product also reported that the lower price of the subject imports was a primary factor in purchasing decisions. Nor did any of those four purchasers report reducing their share of purchases from domestic sources over the POI.

Remand Views at 32–33 (footnotes omitted). Furthermore, the Commission noted that the volume of subject imports represented by these four purchasers was quite small, particularly when compared to the volume of price data showing overselling. *Id.* at 33.

Plaintiffs argue that "the Commission repeats the same error it committed [before], focusing on the reason the purchasers gave for the purchase rather than their report that imports were lower priced." Pls.' Br. at 17. Plaintiffs contend that "[t]his is the very approach the [c]ourt rejected because it goes to a different question than whether the imports were, in fact, lower priced." *Id.* at 17 (citing *DAK Americas I*, 456 F. Supp. 3d at 1362). Plaintiffs also claim that "[t]he Commission's volume-based" analysis "improperly ignores the significant volumes bought by all the purchasers that said imports were lower priced — the key fact to be examined on remand." *Id.* at 17. The Government responds that "the Commission reasonably gave more weight in its analysis of underselling to the voluminous, specific price data" than the "yes-no responses" of these particular importers. Def.'s Br. at 17.

The court concludes that the Commission adequately addressed this evidence on remand. By providing further explanation and context for the responses, the Commission explained that it did consider this evidence and explained the weight it gave this evidence relative to other data on the record. Plaintiffs contend that the court previously rejected such an approach. That is not so. Rather, the court's previous opinion noted that the Commission failed to adequately address this evidence. Having explained its consideration of this evidence, the court defers to the Commission's determination as the expert trier of fact. *See Nippon Steel Corp.*, 458 F.3d at 1359; *Int'l Indus.*, 311 F. Supp. 3d at 1336.

3. Direct Import Pricing Data Showing Underselling

The court previously concluded that direct import pricing data "showed underselling in [[ ]] percent of comparisons," which "constitute[d] evidence that fairly undermine[d] the Commission's overselling finding . . . that the Commission failed to address." *DAK Americas I*, 456 F. Supp. 3d 1362.[7] On remand, the Commission explained that of the four subject products, it received useable data for direct import pricing for just one product. Remand Views at 29–30. The data did show that the value of those direct imports was lower than those for the domestic product; however the volume was "small relative to the total volume of subject imports and to the volume of importers' sales of subject imports that oversold the domestic product." *Id.* at 30 (explaining that the direct imports showing underselling composed just a quarter of the volume of the imports showing

[7] Relatedly, the court remanded for further explanation by the Commission its exclusion of [[ ]] direct quarterly pricing data showing underselling. *DAK Americas I*, 456 F. Supp. 3d at 1362. The court addresses this specific issue in combination with the Commission's further explanation of its exclusion of [[ ]] data above. *See* Sec. I.B.1. *supra*.

overselling). Further, the Commission explained that comparison of direct imports to all subject imports was limited by the fact that direct imports "do not capture other costs beyond the landed duty-paid costs that importers may incur." *Id.* at 31.

Plaintiffs contend that the "Commission repeats exactly what it said in the original determination," i.e. "that the volume of direct imports was less than the volume of indirect imports." Pls.' Br. at 21. Further, Plaintiffs argue that the Commission did not "consider this evidence of underselling on direct import sales in conjunction with the other record data," but rather "again simply compares the volumes . . . and finds the direct sales volumes to be outweighed by the [quarterly price] sales volumes." *Id.* The Government responds that "the Commission did not find that the purchase cost data for [direct imports] reflected price 'underselling' but instead reflected 'generally lower' values." Def. Br. at 18–19 (citing Remand Views at 30). Therefore, the Government argues that "the Commission reasonably found that the purchase cost data for [direct imports] . . . was not as probative to the Commission's price analysis as the actual [quarterly] price data showing predominant overselling." *Id.* at 20 (citing Remand Views at 30– 31).

The court concludes that the Commission's further explanation that the purchase cost data for direct imports showing lower costs does not undermine its no significant underselling conclusion and complies with the remand instructions.[8] Because the Commission provided adequate explanation of the limited comparability and smaller relative volumes of direct import data with quarterly price data, the court defers to the Commission in the weight it assigns this evidence. *See Int'l Indus.*, 311 F. Supp. 3d at 1336. As to Plaintiffs' contention that the Commission did not consider this evidence in conjunction with other record evidence tending to show underselling, the court notes that the Commission showed that it did consider the direct import data in its underselling analysis, but ultimately concluded that the quarterly price data was "paramount and the most probative price information." Remand Views at 16. The Commission addressed the fact that the direct import data was underinclusive of costs as compared to quarterly price data and that the [[ ]] were related to the supply constraints discussed in detail below. *Id.* at 8–10, 15. This provides sufficient explanation to support the Commission's conclusions and for the court to conclude that this determination was based on substantial evidence. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[8] As discussed, the court also rejects Plaintiffs' contention that the Commission erred by not combining direct import pricing data with quarterly pricing data. *See* supra n.5.

4. Significant Market Share Gains in a Price-Sensitive Market Characterized by Product Fungibility

Finally, the court previously noted that the Commission's conclusion that the U.S. PET resin market was highly price-sensitive and characterized by product fungibility warranted further explanation because of Plaintiffs' argument that "subject imports' market share gains came at the same time as domestic industry's lost market share, and that the domestic industry suffered a steep decline in financial condition during the POI." *DAK Americas I*, 456 F. Supp. 3d at 1362. On remand, the Commission explained that

> increased imports by the domestic producers themselves account for an equivalent percentage of the loss of market share by domestically produced product. The domestic industry's own imports of PET resin in 2016 thus explain most . . . of the 5.4 percentage-point decline in the domestic industry's market share that year, and by their own representations the imports were due to the domestic industry's supply limitations, not a need to access low-priced imports to compete in the market.

Remand Views at 50. This added further explanation to the Commission's statement in the Original Views that, despite increasing demand and increased shipments by the domestic industry during the POI, the imports "did not significantly undersell the domestic like product" but that the domestic industry "ceded some market share . . . for non-price reasons" as evidenced by the domestic industry's improved financial condition in 2016 and higher-priced imports throughout the POI. Original Views at 45.

Plaintiffs contest this explanation for the subject import market share gains. In their view, domestic producers increased imports because the price-sensitive U.S. PET resin market was flooded with low-priced imports. Pls.' Br. at 14. Plaintiffs note that "Congress and the Commission have recognized that imports by a domestic producer based on a need to meet customer price demands reflect defensive efforts to survive, not a self-inflicted injury." *Id.* Further, Plaintiffs contend that "[t]he Commission does not address why, if there was a shortage in the market, non-subject imports did not gain market share along with subject imports." *Id.* The Government responds that the Commission's year-by-year focus and examination of the domestic industry's own importation behavior supports its conclusion that the domestic industry contributed to domestic production market share loss rather than being caused by competition from lower-cost imports. Def.'s Br. at 28–29.

The court notes that Plaintiffs' continued dispute with the Commission on the question of market share depends upon the court's acceptance or rejection of the Commission's re-examined findings regarding the U.S. PET resin market. Because the Commission on remand re-examined the record to explain that in addition to price-sensitivity, the U.S. PET resin market was also subject to availability and quality, which the court accepts, Plaintiffs' arguments carry less weight. Furthermore, the court accepts the Commission's explanation of the existence of supply constraints throughout the POI, discussed in detail below, that provides further reconciliation and support for the Commission's finding of no significant underselling despite increased imports and loss of market share by the domestic industry. *See* Remand Views at 6–12. This discussion includes consideration of the domestic industry's non-subject imports in comparison to subject imports, directly contrary to Plaintiffs' claims. *See, e.g.*, Remand Views at 9 ("[T]he domestic industry's imports of subject PET resin rose faster and by larger amounts[] and increased its share of the U.S. market at a greater rate, than its imports of nonsubject PET resin."). Because of the Commission's added explanation of market conditions and supply constraints, the court concludes that the Commission's re-examination of the domestic industry's market share losses was based on substantial evidence and in accordance with the remand instructions.

In short, the court concludes that the Commission complied with the court's instructions to further explain its "no significant underselling" conclusion, including its added analysis of market conditions, consistency with prior determinations, selection of price data, and the relative weight it assigned varying pieces of evidence. The court now affirms the Commission's determination that there was no significant underselling by imports in the U.S. PET resin market during the POI as based on substantial evidence and in accordance with law.

II. The Commission's Conclusion that Supply Constraints Caused Domestic Industry Market Share Loss Is Based on Substantial Evidence.

In *DAK Americas I*, the court held that "the Commission's conclusion — that supply constraints rather than underselling were the cause of market share shifts — is unsupported by substantial evidence." 456 F. Supp. 3d at 1363. In reaching this conclusion, the court identified four aspects of the record and the Commission's determination that undermined its conclusion: (1) the Commission identified no specific supply constraints prior to October 2016; (2) the majority of narrative responses solely cited post-October 2016 supply constraints; (3) the Commission's determination was inconsistent with

its prior determinations that later-in-time supply constraints cannot explain earlier-in-time subject import increases; and (4) the Commission failed to adequately respond to conflicting evidence. *Id.* at 1363–66. On remand, the Commission again found supply constraints in the domestic industry's ability to supply U.S. demand throughout the POI. Remand Views at 5. The Commission provided additional explanation of this finding, including evidence supporting that there were supply constraints throughout the POI, addressed the evidence the court previously identified as conflicting, and distinguished seemingly inconsistent determinations cited by the court. *Id.* at 5–12, 48–51.

A. Evidence of Supply Constraints Throughout the POI

The court previously noted that the Commission's Original Views focused on evidence occurring late in the POI to explain the supply constraints throughout the POI. This evidence included Hurricane Matthew in October 2016, Hurricane Harvey in August 2017, and the bankruptcy of domestic supplier M&G in September 2017. *DAK Americas I*, 456 F. Supp. 3d at 1363–64. The court concluded that, when examined together and separately, these events could not account for the Commission's conclusion that supply constraints throughout the POI caused the market shifts away from the domestic industry to imports. *Id.*

On remand, the Commission addressed this conclusion and provided further explanation of the evidence supporting domestic industry supply constraints. First, the Commission noted that purchaser responses indicating domestic supply constraints "were [not] limited to any fixed interval during the POI, and the absence of any such time circumscription does not suggest that the constraints were confined to latter portions of the POI." Remand Views at 6 ("U.S. purchasers testified that supply constraints began early in 2015."). Rather, the Commission explained that "domestic producers kept their capacity generally static throughout the POI under the assumption that [the construction of M&G's planned production facility in Corpus Christi] would bring on additional capacity that could meet the growing demand," beginning in 2015 and "were known and relevant for years prior to October 2017, and at least as early as October 2015." *Id.* at 7–8. Further, as discussed above, the Commission pointed to the domestic industry's own increase in imports as indication of supply constraints. *Id.* at 8–10. As discussed, the Commission noted that quality and availability were important factors to purchasers' decisions, including for "[t]en of 14 purchasers that switched to subject imports" who detailed supply constraints since 2015. *Id.* at 11–12, 51.

Plaintiffs again contest the Commission's finding of supply constraints throughout the POI. Plaintiffs argue that the Commission's contention "that unspecific supply constraint claims must have occurred before October 2016 is not substantial evidence" because "[o]nly three out of 10 purchasers identified specific domestic supply constraints all of which occurred after October 2016." Pls.' Br. at 5 (citing Original Views at V-31–V-33). Plaintiffs also challenge the Commission's continued reliance on purchaser narratives and its added reliance on hearing testimony as further evidence of its conclusion. *Id.* at 4–6. Therefore, Plaintiffs argue that, "contrary to the Commission's unsupported conclusion that the domestic industry intentionally constrained supply to make way for M&G, the record shows that the domestic industry was trying to make up ground in the wake of the 2016 trade relief, but such efforts were stunted by the next subject import wave." *Id.* at 11; *id.* at 11 n.10 ("It is absurd to suggest . . . that the domestic industry 'chose not to expand capacity' . . . as opposed to the rational, record-based explanation that it simply could not do so after being hammered by one group of unfairly-untraded imports and immediately facing another."). The Government responds that, "[i]n combination with the questionnaire responses . . . indicating supply constraints beginning in 2015 and through 2016 and the domestic industry's own importation behavior, the Commission reasonably found 'that this sworn witness testimony about market conditions over a span of years beginning in late 2014 evinces that the [supply] constraints spanned the POI." Def.'s Br. at 25 (quoting Remand Views at 48).

Given the additional explanation by the Commission, the court affirms the Commission's conclusion that supply constraints were the cause of domestic industry ceding market share rather than low-priced imports. The Commission added explanation and pointed to specific supporting evidence in accordance with the court's instructions. Plaintiffs' arguments to the contrary are unavailing. Contrary to Plaintiffs' claim, the court did not "reject" purchaser narratives as supportive of supply constraints. *See* Pls.' Br. at 4–6. Rather, the court noted aspects of the purchaser narratives that were unaddressed or unexplained in light of the Commission's conclusions regarding supply constraints. *DAK Americas I*, 456 F. Supp. 3d at 1364. The Commission has now reconciled that evidence with its conclusion about domestic supply constraints and the court accepts that conclusion as based on substantial evidence. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. That the domestic industry could not meet increased demand during the POI, does not, as Plaintiffs contend, indicate that the

domestic industry was necessarily harmed by imports. *See* Pls.' Br. at 14. Rather, as the Commission explained, the domestic industry's inability to supply domestic demand caused increased purchases of imports, even in instances where the imports were higher priced. Remand Views at 51. The Commission sufficiently explained that this choice made by the domestic industry was made in light of a market that anticipated further domestic production at the M&G facility, which was unexpectedly delayed and then cancelled as the POI proceeded that left the domestic industry unable to effectively supply the domestic market as planned. *Id.* at 7–8. Similarly, the Commission's reliance on hearing testimony that may have been contradicted elsewhere in the record was also explained and based on substantial evidence.[9] Thus, the court disagrees with Plaintiffs' contention that the Commission's explanation of supply constraints was absurd. Rather, the court, faced with two plausible explanations of record evidence, defers to the Commission as the expert factfinder. *See Nippon Steel Corp.*, 458 F.3d at 1359. The court accepts the Commission's explanation of its conclusion that supply constraints caused the domestic industry to cede market share in light of its analysis of hearing testimony, purchaser narratives, direct import data, and quarterly price data. *See id.* at 1358; *Int'l Indus.*, 311 F. Supp. 3d at 1333.

B. Consistency with Prior Determinations

In previously determining that the Commission's conclusion regarding domestic industry supply constraints was unsupported by substantial evidence, the court pointed to previous decisions by the Commission in which it noted that "supply constraint events that follow subject import increases cannot be the cause of them." *DAK Americas I*, 456 F. Supp. 3d at 1364. The court therefore ordered the Commission to address *Certain CRS Products* and *Cold-Rolled Steel Flat Products* on remand and to explain or reconcile any inconsistencies between those decisions and its remand determination. *Id.* at 1364–65. As instructed, the Commission addressed those prior deter-

[9] Plaintiffs contend that the testimony cited by the Commission was based on impermissible speculation "that domestic producers did not raise their prices in 2016 in the face of Corpus Christi coming online — a different point than the Commission's interpretation of early supply constraints." Pls.' Br. at 9. By contrast, the Government claims that "Graham Packaging stated that during the preliminary phase of these investigations, it testified about product shortages. During the preliminary phase, it testified about the effect of M&G's anticipated production facility on the market 'every year since 2015.'" Def.'s Br. at 25 n.24 (citation omitted). The Government also responds that "Plaintiffs seem to divorce the economic effects of supply and demand on price by arguing that witnesses could not speak about price and supply at the same time when testifying that the start up delay of M&G's anticipated production facility, during 2015 and 2016, did not increase prices despite increased demand because of domestic competition." *Id.* The court agrees with the Government and rejects Plaintiffs' attempt to have the court re-weigh conflicting hearing testimony.

minations. Remand Views at 48–49. The Commission noted that in those determinations it found that the "supply constraints could not explain 'the magnitude and duration' of the increase in subject imports." *Id.* at 48. However, here the Commission found that the "market conditions keyed to M&G's construction that began in 2014 and affected market participant's behavior throughout the POI" including the domestic industry's own increased imports of PET resin could explain the imports throughout the POI. *Id.* at 49. Further, the events occurring later in the POI "exacerbated these already existing supply constraints." *Id.* Thus, unlike the two prior determinations, the supply constraints identified by the Commission in this investigation were not similarly limited in duration or magnitude. *Id.* at 51.

Plaintiffs argue that these distinctions "ignore[] that the acute supply shortage on record here was also limited — in fact limited to the latter part of the period and after the subject import surge, making [*Certain CRS Products* and *Cold-Rolled Steel Flat Products*] highly relevant." Pls.' Br. at 13–14 n.13. Similarly, Plaintiffs argue that "[t]he Commission's mischaracterization of this underlying record as showing supply shortages 'throughout the POI' also improperly conflates the long-term condition of the domestic industry's capacity to supply the entire U.S. market with the acute supply factor of M&G's bankruptcy in October 2017." *Id.* In support of the Commission's position on these past determinations, the Government explains that the Commission "cited various factors examined in the other cases that distinguished the other cases from the facts of the instant investigations." Def.'s Br. at 22.

The court concludes that the Commission complied with the remand instructions by further explaining its conclusion regarding the existence of supply constraints throughout the POI and by distinguishing these cases based on the more limited timing of supply constraints in those decisions. The Commission properly distinguished those decisions based on its determination that "the prior determinations are inapposite such that it is not in fact a departure at all." *DAK Americas I*, 456 F. Supp. 3d at 1356 (citing *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 808; *British Steel PLC*, 127 F.3d at 1475; *Chisholm*, 656 F.2d at 47); *see also id.* at 1354–55 (discussing *Cleo*, 501 F.3d at 1298–99; *Usinor*, 26 CIT at 792). Plaintiffs' arguments to the contrary rely upon their view that the Commission's supply constraints conclusion was erroneous. Thus, for the reasons stated above, the court also rejects this challenge.

C. Conflicting Arguments and Evidence

Finally, the court ordered the Commission to address conflicting arguments and evidence weighing against its conclusion regarding the domestic industry's supply constraints. *Id.* at 1365–66. Specifically, the court asked the Commission to further address (1) its conclusion that domestic producers' own increase in imports supported its supply constraints conclusion when those imports represented a small portion of the subject imports during the POI; (2) purchaser narratives citing post-October 2016 supply constraint events; and (3) the increase in subject imports despite being higher-priced. *Id.* On remand, the Commission addressed these points. First, as to domestic producers' own imports, the Commission noted that "by their own representations the imports were due to the domestic industry's supply limitations, not a need to access low-priced imports to compete in the market." Remand Views at 50. The Commission also explained that the purchaser questionnaire responses indicated supply constraints by the domestic industry throughout the POI because of increased demand and static production. *Id.* at 5. Finally, the Commission explained, "[o]f 25 responding U.S. purchasers, 19 reported supply constraints since the beginning of 2015. . . . Other purchasers reported that, since the beginning of 2015, a number of different issues caused supply constraints, including domestic producers placing many customers on allocation, delayed deliveries, and unavailability due to weather." *Id.* at 5–6.

Plaintiffs contest each of these points. First, Plaintiffs argue that "[t]he [c]ourt decisively held that" there was no substantial evidence for "U.S. producers' decision to increase imports was indicative of supply constraints throughout the period." Pls.' Br. at 6. Second, Plaintiffs' argue that the Commission mistakenly emphasizes domestic producers' non-subject imports rather than examining the impact its subject imports had on market share loss and the impact by imports of non-producers, together. *Id.* at 7. Finally, Plaintiffs argue that without this evidence, the Commission failed to address "the record [or] other evidence that would support its conclusion." *Id.* at 8. The Government responds that Plaintiffs mischaracterize the court's previous opinion that ordered the Commission to address conflicting evidence and did not reject that evidence. Def.'s Br. at 29 n.26. Rather, it argues that the Commission's finding regarding the domestic producers own imports "is important to demonstrate the choice that domestic producers made to import instead of produce PET resin themselves, regardless of the amount of excess production capacity they reported to possess." *Id.* at 28.

The court concludes that the Commission adequately addressed the enumerated pieces of conflicting evidence in its remand decisions in accordance with the court's instructions. First, the Commission's explanation that the domestic industry's imports, despite being small relative to the subject import increase, contributed to its market share loss provides adequate explanation of the Commission's understanding of this evidence. *See* Remand Views at 9–10. That plus the domestic industry's own representations that its imports were not caused by a need to compete with low-cost imports also explains why there were increased imports that were higher priced. The court is not persuaded by Plaintiffs' additional challenges on these points, as the court did not reject any reliance on this evidence, *DAK Americas I*, 456 F. Supp. 3d at 1365–66, and the Commission itself did not rely exclusively on the disputed evidence, but rather incorporated it as part of its larger explanation of domestic industry supply constraints. Remand Views at 9. Thus, as the expert decisionmaker, the Commission is entitled to deference even when reasonable minds may disagree about the evidence. *Nippon Steel Corp.*, 458 F.3d at 1359.

Finally, Plaintiffs identify additional pieces of evidence that they claim also conflict with the Commission's supply constraint conclusion but which the Commission did not address. Specifically, Plaintiffs cite (1) testimony from purchasers and respondents' counsel that there were no supply shortages until later in the POI, Pls.' Br. at 11; (2) "evidence of U.S. producers' low capacity utilization, lost market share, and declining profitability," *id.* at 12; (3) evidence that the domestic industry was able to increase its capacity utilization that undermines the Commission's "conclusion that the domestic industry was unable or unwilling to supply the U.S. market," *id.*; (4) previous cases in which the Commission stated that material injury is not precluded by reason of subject imports where the domestic industry could not satisfy the demand because of supply constraints, *id.* at 13 & n.12 (citing Citric Acid and Certain Citrate Salts from Belgium, et al., Inv. Nos. 731-TA-1374–76 (Final), USITC Pub. 4799 (July 2018) ("Citric Acid"); Frozen Warmwater Shrimp from China, et al., Inv. Nos. 701-TA-491–493, 495, and 497 (Final), USITC Pub. 4429 (Oct. 2013); Utility Scale Wind Towers From China and Vietnam, Inv. Nos. 701-TA-486 and 731 TA-1195–96 (Final), USITC Pub. 4372 (Feb. 2013); Small Diameter Graphite Electrodes From China, Inv. No. 731-TA-1143 (Final), USITC Pub. 4062 (Feb. 2009)); (5) their contention that increased domestic producer imports were caused by a price-sensitive market flooded with low-priced imports, *id.* at 14; and (6) the fact that non-subject imports did not gain market share along with subject imports given the shortage in the market, *id.*

The court does not agree that the Commission has not addressed these pieces of evidence and arguments. The Commission addressed each of these pieces of evidence in its Remand Views, drew reasonable inferences, and explained how it weighed the evidence on the record. Remand Views at 6–7, 46–49 (addressing hearing testimony); *id.* at 51–53 (addressing domestic industry capacity utilization, lost market share, declining profitability); *id.* at 6–7 (addressing domestic industry's capacity utilization); *id.* at 8–9 (addressing domestic industry's increased imports); *id.* (comparing the volume and impact of non-subject imports). Plaintiffs' citations to allegedly unaddressed evidence boil down to an attempt to re-weigh the evidence or draw their own inferences from the evidence. However, the court defers to the Commission as the expert fact finder and declines to disturb the Commission's findings. *Nippon Steel Corp.*, 458 F.3d at 1359. As to the previous decisions in which material injury is not precluded by reason of supply constraints, Plaintiffs' citations only support that the presence of supply constraints does not always preclude a material injury finding, not that there are *never* occasions in which the presence of supply constraints explains domestic industry rather than harmful imports. *See, e.g.*, Citric Acid at 31–32 (noting "that the fact that a domestic industry may not be able to supply all of demand does not mean that it cannot be materially injured" . . . but ultimately concluding that supply constraints were not "so significant as to explain the significant and increasing volume of subject imports"). The Commission adequately explained that the domestic supply constraints in the U.S. PET resin market during the POI precluded such a finding in this instance, and thus the prior cases are inapposite. *See* Remand Views at 5–8.

In short, the court upholds the Commission's further explanation of its conclusion that supply constraints, rather than low-priced imports, caused any harm to the domestic industry as based on substantial evidence and in accordance with law.

III. The Court Sustains the Commission's No Adverse Impact Determination.

Based on the Commission's conclusions that there was no significant underselling of subject imports and that domestic supply constraints caused the surge in imports during the POI, the Commission concluded that there was no adverse impact or material injury to the domestic industry caused by subject imports. In examining the Commission's Original Views, the court concluded that the previously enumerated deficiencies with the Commission's underselling and supply constraint conclusions undermined its adverse impact determi-

nation. *DAK Americas I*, 456 F. Supp. 3d at 1366–67. Further the court noted that the domestic industry's poor financial indicators during the POI compared to the post-POI period after subject imports receded also undermined the no adverse impact decision regardless of some evidence indicating domestic industry improvement in 2016. *Id.*

On remand, the Commission stated that "[h]aving reexamined and supplemented our impact findings based on the [c]ourt's instructions, we again find that subject imports did not have a significant impact on the domestic industry." Remand Views at 53. For the reasons discussed extensively above, the court concludes that the Commission's reliance on its no significant underselling and domestic supply constraints conclusions to support its adverse impact determination is supported by substantial evidence in light of the Remand Views. Regarding the domestic industry's financial indicators, the Commission on remand noted that "[t]he responses regarding lost sales and lost revenue likewise reflect near unanimous reporting by purchasers that domestic producers had supply issues." *Id.* at 51. Further, the Commission stated that "the domestic industry's condition improved in 2016, the year with the most significant increase in subject imports" yet "subject imports predominantly oversold the domestic like product in 2016." *Id.* at 52. Similarly, the Commission concluded that "the domestic industry increased its domestic shipments each year of the POI, including 2016, and its full-year capacity utilization rate was the highest on the record in 2016." *Id.*

Plaintiffs rely on their arguments regarding the Commission's underselling and supply constraint conclusions to contend that the Commission's no adverse impact determination is again unsupported by substantial evidence. Pls.' Br. at 29. In support of the Commission's conclusion, the Government argues that "[h]aving provided a more detailed explanation of its findings that subject imports predominantly oversold the domestic like product and that supply constraints occurred throughout the POI, the Commission on remand likewise provided further detail in its impact analysis." Def.'s Br. at 30. Thus, it contends that "[b]ased on the totality of evidence in the record, the Commission reasonably concluded again that the subject imports did not have a significant impact on the domestic industry." *Id.* at 31.

The court concludes that the Commission's "no adverse impact" determination as explained in the Remand Views is based on substantial evidence and consistent with the remand instructions. Having remedied the previously identified deficiencies regarding its underselling and supply constraint conclusions, the Commission has also provided further explanation and support for its no adverse impact determination. As to the domestic industry's financial condi-

tions, the court concludes that the Commission's explanation as to why any declines were not related to subject imports was reasonable and based on substantial evidence. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Therefore, the court sustains the Commission's "no adverse impact" determination.

CONCLUSION

For the reasons stated above, the court sustains the Remand Views and enters judgment in favor of the Government.

SO ORDERED.

Dated: May 3, 2021
New York, New York

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

Slip Op. 21–56

CLEARON CORP. and OCCIDENTAL CHEMICAL CORP., Plaintiffs, v. UNITED STATES, Defendant, and HEZE HUAYI CHEMICAL CO., LTD., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 17–00171

[United States Department of Commerce's second remand results are sustained.]

Dated: May 6, 2021

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, for Plaintiffs. With him on the brief were *Jonathan M. Zielanski* and *Ulrika K. Swanson*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *W. Mitchell Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for Defendant-Intervenor. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

OPINION

Eaton, Judge:

Before the court is the United States Department of Commerce's ("Commerce" or the "Department") remand redetermination pursuant to the court's order in *Clearon Corp. v. United States*, 44 CIT __, 474 F. Supp. 3d 1339 (2020) ("*Clearon II*"). *See* Final Results of Redetermination Pursuant to Court Remand (Jan. 4, 2021), P.R.R. 3

("Second Remand Results"). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018). The Second Remand Results are sustained.

BACKGROUND

This case involves a challenge to the results of Commerce's first administrative review of the countervailing duty order on chlorinated isocyanurates[1] from the People's Republic of China ("China"). *See Chlorinated Isocyanurates From the People's Republic of China*, 79 Fed. Reg. 67,424 (Dep't Commerce Nov. 13, 2014) (countervailing duty order). In *Clearon II*, familiarity with which is presumed, the court ruled that Commerce's finding, based on adverse facts available, that Consolidated Plaintiff and Defendant-Intervenor Heze Huayi Chemical Co., Ltd. ("Heze"), a cooperative mandatory respondent, used and benefitted from China's Export Buyer's Credit Program, lacked the support of substantial evidence. Importantly, the record contained evidence in the form of uncontroverted declarations that supported Heze's claims of non-use. The record contained nothing to support a finding that there was information, necessary to Commerce's statutory "benefit" determination, that was missing (*i.e.*, a gap in the factual record) that justified using "facts otherwise available," under 19 U.S.C. § 1677e(a).[2] Commerce claimed that it would be unduly burdensome to verify non-use without information regarding the operation of the Export Buyer's Credit Program that China refused to provide—a claim that Heze disputed. The court directed the parties to "confer and agree upon a verification procedure to apply in this case," and further that Commerce was either to "verify Heze's claims of non-use and, based on the results of verification, determine whether Heze received a benefit under the program; or in the alternative, . . . find, based on the existing record evidence, that neither Heze nor its customers used or received a benefit under the program." *Clearon II*, 44 CIT at __, 474 F. Supp. 3d at 1354.

On remand, Commerce did not confer with the parties on a verification procedure, nor did it verify Heze's claims of non-use. Rather, apparently choosing the alternative set out in *Clearon II*, Commerce found "that based on the existing record evidence, neither [Heze] nor

[1] Chlorinated isocyanurates are "derivatives of cyanuric acid, described as chlorinated s-triazine triones" that are used for water treatment, among other uses. *See Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1346 n.2 (2019) (citation omitted).

[2] The statute provides that, when necessary information is missing from the record, Commerce must use "facts otherwise available." 19 U.S.C. § 1677e(a). The statute also permits Commerce to use an adverse inference when selecting from among the facts available, if "an interested party," including a foreign government, fails to cooperate with Commerce's requests for information to "the best of its ability." *Id.* § 1677e(b)(1); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1371 (Fed. Cir. 2014).

its customers used or received a benefit under the program." Second Remand Results at 2 (stating this decision was made "under respectful protest"). Accordingly, Commerce removed "the [0.87 percent adverse facts available] subsidy rate for the Export Buyer's Credit Program from [Heze]'s final [countervailing duty] subsidy rate, which results in a 1.04 percent rate for [Heze]." Second Remand Results at 9. The parties timely filed comments on the Second Remand Results. *See* Clearon's Cmts., ECF No. 64; Heze's Cmts., ECF No. 66; Def.'s Resp. Cmts., ECF No. 65.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiffs Clearon Corp. and Occidental Chemical Corp. (collectively, "Clearon") argue that Commerce failed to comply with the court's remand instructions by failing to confer with the parties on a verification procedure. *See* Clearon's Cmts. 1–2. Additionally, Clearon asks the court "to revisit the rationale expressed in [*Clearon II*]," and to remand with instructions "to reinstate [Commerce's first remand redetermination]." Clearon's Cmts. 2, 3.

Defendant the United States, on behalf of Commerce ("Defendant"), and Heze maintain that the Department complied with *Clearon II*'s instructions and that Clearon waived its arguments to the contrary because it failed to raise them before the agency when given the opportunity to comment on the draft results. *See* Heze's Cmts. 2; Def.'s Resp. Cmts. 6. They ask the court to sustain the Second Remand Results. *See* Heze's Cmts. 3–4; Def.'s Resp. Cmts. 8.

The court finds that Commerce has sufficiently complied with the court's instructions in *Clearon II*. Though the Department did not "confer and agree upon a verification procedure," as stated in the court's instructions, Commerce ultimately chose the alternative decisional path provided by the court that did not require verification, *i.e.*, to rely on the uncontroverted record evidence supporting Heze's claims of non-use of the Export Buyer's Credit Program. Based on this evidence, Commerce determined on remand that substantial evidence did not support a finding that the Export Buyer's Credit Program—a government loan program—conferred a *benefit* on Heze. *See* 19 U.S.C. § 1677(5)(B) (defining subsidy as a "financial contribution," provided by an "authority" to a person, by which a "benefit is . . . conferred"). Accordingly, Commerce removed the subsidy rate de-

termined for that program (0.87 percent) from the calculation of Heze's final countervailing duty rate, which reduced Heze's rate from 1.91 percent to 1.04 percent. *See* Second Remand Results at 9.

As Heze and Commerce note, Clearon failed to submit comments on the draft remand results when it had the opportunity to do so, thus raising the question of whether its arguments are properly before the court. The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Here, none of the arguments in Clearon's comments, asking the court to reconsider its rationale in *Clearon II* and to reinstate the Department's first remand redetermination, are new to the court, nor have they become more persuasive with the passage of time. *See, e.g.*, Clearon Cmts. 3 (emphasis added) ("If this Court allows respondents to avoid countervailing duties because neither they nor their distributors received subsidies *directly* from a foreign government, there will be an incentive for foreign governments to pay subsidies to *downstream users* in order to assist their domestic exporters."); Clearon's Resp. Cmts. Remand Results, ECF No. 52, 5–6 (arguing that U.S. "importers" or "customers" are not limited to Heze's direct customers under the Export Buyer's Credit Program). The court declines Clearon's invitation to reconsider its rationale in *Clearon II* and reinstate Commerce's first remand results.

CONCLUSION

For the foregoing reasons, the Second Remand Results are sustained. Judgment will be entered accordingly.

Dated: May 6, 2021
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 21–57

BYUNGMIN CHAE, Plaintiff, v. SECRETARY OF THE TREASURY, Defendant.

Before: Timothy M. Reif, Judge
Court No. 20–00316

[Denying defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) and granting leave to plaintiff for sixty (60) days to amend his complaint and summons.]

Dated: May 7, 2021

Matthew C. Moench, King Moench Hirniak & Mehta, LLP of Morris Plains, NJ, for plaintiff.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, of New York, NY, *Aimee Lee*, Assistant Director, U.S. Department of Justice, of New York, NY, and

Marcella Powell, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With them on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

"What, like it's hard?"[1] Well, in fact, yes — over 2,000 applicants annually sit for the Customs Broker License Exam, with a pass rate of approximately 37%.[2]

* * *

Reif, Judge

Plaintiff-appellant Byungmin Chae ("Mr. Chae" or "plaintiff") brings this action against the Secretary of the Treasury ("defendant" or "Government") to challenge the decision of U.S. Customs and Border Protection ("Customs") upholding the denial of credit for certain answers on the Customs Broker License Exam ("the exam"), pursuant to 19 U.S.C. § 1641(e).[3] Defendant requests that the U.S. Court of International Trade ("USCIT") dismiss the action for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1), or, alternatively, for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Def.'s Mem. in Supp. of Mot. to Dismiss, ECF No. 5 ("Def. Br.") at 1. In response, plaintiff claims that the Court has subject matter jurisdiction over the claim and that the Government has not shown that the complaint fails to state a claim upon which relief can be granted. Pl.'s Br. Resp. to Mot. to Dismiss and Supp. Cross-Mot. to Am. Summons, ECF No. 12 ("Pl. Resp. Br.") at 5, 7–8.

In its motion to dismiss, the Government argues that the Court lacks subject matter jurisdiction for two reasons: first, because plaintiff filed his complaint after the statute of limitations prescribed in 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 2636(g) lapsed and, second, because plaintiff allegedly failed to comply with the terms set forth in 28 U.S.C. § 1581(g)(1) and 28 U.S.C. § 2632(a), which call for summons and complaint to be filed concurrently with a clear identification of defendants in the action. Def. Br. at 7–8. The Government argues in the alternative that plaintiff's complaint fails to state a claim upon which relief can be granted under USCIT Rule 12(b)(6) because relief is barred by the applicable statute of limitations. *Id*. at 10.

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[1] LEGALLY BLONDE (Robert Luketic/MGM Distribution Co. 2001).

[2] U.S. Customs and Border Protection, Status Report and Fee, available at https://www.cbp.gov/trade/programs-administration/customs-brokers (last visited May 6, 2021) ("The bi-annual Customs broker license exam (CBLE) was administered on October 8, 2020 resulting in a 37% pass rate prior to appeal decisions.").

[3] All references to the United States Code are to the 2018 edition, unless otherwise stated.

Plaintiff cross-motions for a denial of the Government's motion to dismiss and requests leave to amend the summons. Pl. Resp. Br. at 1, 5. Plaintiff claims that the statute of limitations is non-jurisdictional and that Customs' misleading actions favor the application of equitable tolling. *Id.* at 3. He further argues that the court should allow him to rectify the deficiencies of his pleadings under USCIT Rule 3(e) and that the interests of justice call for leniency. *Id.* at 6–7. Additionally, plaintiff argues that his complaint does not fail to state a claim because the Government has not alleged any substantive deficiencies in it. *Id.* at 7. He contends that the fact that the Government has not alleged any substantive deficiencies in plaintiff's complaint should defeat the Government's procedural claims. *Id.*

After review of the filings and applicable law, this court denies defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction.[4] The court grants plaintiff's request for leave to amend his claim under USCIT Rule 3(e) to bring the complaint and summons into compliance with USCIT Rule 10(a) (providing that "every pleading must have a caption with the court's name, a title, a court number and a Rule 7(a) designation"). It is premature for the court to rule on defendant's motion to dismiss pursuant to USCIT Rule 12(b)(6) because the court offers plaintiff leave to amend his complaint and summons, which in their current form fail to state a claim upon which relief can be granted. At this time, the court grants plaintiff sixty (60) days to amend his complaint to bring it into compliance with the procedural requirements of USCIT Rule 10(a) and sua sponte invites plaintiff to amend his complaint within sixty (60) days to bring it into compliance with the substantive requirements of USCIT Rule 12(b)(6).

BACKGROUND

Plaintiff originally attempted to file his complaint before the Court on March 4, 2020, requesting a review of his Customs Broker License Exam responses. Pl. Resp. Br. at 1. The complaint was received on

[4] "A court presented with a motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction." *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F. Supp. 2d 574, 588 (S.D.N.Y. 2013) (quoting *Homefront Organization, Inc. v. Motz*, 570 F. Supp. 2d 398, 404 (E.D.N.Y. 2008) (internal quotation marks omitted)). The Federal Rules of Civil Procedure and USCIT Rules generally parallel one another. *See United States v. Ziegler Bolt & Parts Co.,* 19 CIT 507, 514, 883 F. Supp. 740, 747 (1995) ("Because the Court's rules are substantially the same as the Federal Rules of Civil Procedure (FRCP), this Court has found it appropriate to consider decisions and commentary on the FRCP for guidance in interpreting its own rules.") (footnote and citation omitted).

March 6, 2020.[5] *See* Byungmin Chae Compl. Appealing Exam Results, ECF No. 2 ("Complaint"). It is unclear what exactly precipitated such a lengthy delay between his filing and the Court's docketing; however, the court notes that plaintiff's original filing coincided with the onset of the COVID-19 pandemic. Plaintiff then filed electronically on September 11, 2020. Pl. Resp. Br. at 2. At that time, the case was docketed with the USCIT. *See* Complaint at 1.

Mr. Chae sat for the exam on April 25, 2018. *See* Complaint. By letter dated May 18, 2018, Customs notified Mr. Chae that he had failed the exam with a score of 65% — 10% below the required 75% passing score. Pl. Resp. Br. at 1. Mr. Chae then appealed his result to the Broker Management Branch ("BMB") of Customs. *Id.*; *see also* 19 C.F.R. § 111.13(f) (explaining that an individual can appeal results to the BMB).

By letter dated August 23, 2018, the BMB informed Mr. Chae that, upon further review, his score improved by two questions, giving him a 67.5% — still short of the 75% required to pass. Pl. Resp. Br. at 1. Mr. Chae then requested review of the BMB's decision by Customs' Executive Assistant Commissioner ("Commissioner") on September 28, 2018, which fell within 60 days of the initial appeal decision as required by 19 C.F.R. § 111.13(e). *Id.* at 2; Def. Br. at 3.

On October 18, 2018, Mr. Chae moved to Nebraska, and he set up mail forwarding for his former New York address. Pl. Resp. Br. at 2. The Commissioner upheld the BMB's decision by letter dated May 23, 2019, since the score still fell below a passing grade. *Id.* However, Mr. Chae claims never to have received the BMB's letter because it was sent to his New York address.[6] *Id.* When Mr. Chae followed up with the BMB via email over the summer, he was erroneously informed on July 11, 2019, that appeals were "presently with Ruling and Regulations" — when, in fact, Customs had already issued a decision two months earlier. Declaration of Plaintiff Byungmin Chae, Ex. A, ECF No. 12–1 ("Chae Decl.").

Following additional correspondence between Customs and Mr. Chae, on October 29, 2019, Mr. Chae finally received the May 23, 2019 letter as an email attachment — more than five months after Customs had sent it to his New York address. Pl. Resp. Br. at 2. The Commissioner advised Mr. Chae that he would receive credit for three additional questions, bringing his score up to 71.25%. Def. Br. at 4. When Mr. Chae subsequently inquired how to appeal that decision,

[5] A shipping receipt enclosed in plaintiff's electronic filing states: "[y]our item was delivered to the front desk, reception area, or mail room at 1:34 pm on March 6, 2020 in NEW YORK, NY 10278." Byungmin Chae Compl. Appealing Exam Results, ECF No. 2 ("Complaint").

[6] There also is no documentation on the record that the letter was forwarded by the United States Postal Service to the Nebraska residence.

Customs informed him on October 31, 2019, that "[t]here is no 3rd appeal." Pl. Resp. Br. at 2. Mr. Chae pursued no further action at that time because he believed that he had no further recourse or ability to appeal the decision. *Id.*

However, an applicant may seek review of an appeal of his Customs Broker License Exam results in this Court by filing an action within 60 days of the issuance of that decision. 19 U.S.C. § 1641(e)(1); 19 U.S.C. § 2636(g). "Upon learning that he was mislead [sic] by [Customs]," Mr. Chae subsequently sought to rectify the situation and filed an appeal with the USCIT dated March 4, 2020.[7] Pl. Resp. Br. at 1; *see also* Chae Decl. at 2, ECF No. 12–1.

As noted, the Commissioner upheld the BMB's decision by letter dated May 23, 2019. Chae Decl., Ex. A. Mr. Chae first attempted to file with this Court on March 4, 2020, Chae Decl., ¶ 10, and then the USCIT docketed an electronic copy of this filing on September 11, 2020, almost a year and a half after Customs issued its decision on Mr. Chae's appeal. Pl. Resp. Br. at 2. The threshold issue before this court, then, is whether the Court retains subject matter jurisdiction over the dispute given the duration of time that elapsed from May 23, 2019 to the date of Mr. Chae's filing before this Court.

Subject Matter Jurisdiction

STANDARD OF REVIEW

Adjudication of a case before the Court is not proper unless the court has subject matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Whether jurisdiction exists is a question of law. *Sky Techs. LLC v. SAP AG,* 576 F.3d 1374 (Fed. Cir. 2009). A plaintiff bears the burden of establishing subject matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

This Court has limited jurisdiction and, absent contrary evidence, must presume that a cause of action lies outside of the Court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When reviewing a motion to dismiss for lack of subject matter jurisdiction, the Court proceeds according to whether the motion "challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings." *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006).

The absence of a valid cause of action does not defeat the Court's subject matter jurisdiction. *See, e.g., Bell v. Hood*, 327 U.S. 678

[7] Mr. Chae estimates that this occurred in late January or early February. Teleconference, ECF No. 17 at 2:44–3:44.

(1946). In fact, even an arguable cause of action suffices. *Id*. To avoid dismissal in whole or in part for lack of subject matter jurisdiction, a plaintiff must "allege in his pleading the facts essential to show jurisdiction." *See McNutt v. Gen. Motors Acceptance Corp*., 298 U.S. 178, 189 (1936). In resolving a jurisdictional question, the Court must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. *See Warth v. Seldin,* 422 U.S. 490, 501 (1975).

LEGAL FRAMEWORK

28 U.S.C. § 1581(g)(1) establishes exclusive subject matter jurisdiction over the review of a denial of a customs broker's license. "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review — (1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act." 28 U.S.C. § 1581(g)(1).

28 U.S.C. § 2636(g) and 19 U.S.C. § 1641(e) govern the time limits for bringing a section 1581(g)(1) action. The appeal of any decision of the Secretary denying a license must be filed in this Court "within 60 days after the issuance of the decision or order." 19 U.S.C. § 1641(e)(1). Tolling the statute of limitations is possible when the statutes are non-jurisdictional. *See John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 134 (2008) (instructing that the Court may "toll the time period in light of special equitable considerations"). In such cases, equitable tolling may be appropriate if the delay is: (1) caused by extraordinary circumstance; and, (2) the plaintiff exercises due diligence in preserving their rights to the claim. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990).

To commence an action, a plaintiff must file a concurrent summons and complaint. *See* USCIT R. 3(a)(3). 28 U.S.C. § 2632(a) dictates that, "a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court." USCIT Rule 3(e) provides the court with discretion to allow parties to amend pleadings and specifies that, "[t]he court may allow a summons to be amended at any time on such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed."

DISCUSSION

I. Positions of the Parties

Plaintiff seeks judicial review of Customs' decision regarding his exam score. Pl. Resp. Br. at 2. However, the Government states that Customs' decision is final and conclusive because plaintiff's action is time-barred under 28 U.S.C. § 2636(g) and 19 U.S.C. § 1641(e)(6). Def.'s Reply Mem. in Supp. of Mot. to Dismiss and in Opp. to Pl.'s Mot. to Am. Summons, ECF No. 15 ("Def. Reply Br.") at 2. Consequently, the Government maintains that this court lacks jurisdiction over the action. *Id.*

Plaintiff raises two issues to challenge the Government's position. The first issue is equitable tolling. Plaintiff states that the principle of equitable tolling applies in this situation because Customs' "misrepresentation" caused him to miss the statutory deadline to appeal. Pl. Resp. Br. at 4. Plaintiff argues that he received his exam results from the Commissioner after the sixty-day period for appeal had run and, once he received them, he was told that an appeal was barred. *Id.* Plaintiff argues that he actively pursued judicial remedies — by filing with the USCIT — once he realized that an appeal to the USCIT was possible. *Id*.

The Government claims that equitable tolling is not applicable here because no governmental wrongdoing occurred. Def. Reply Br. at 2. Further, the Government portrays Customs' communication as "accurately describ[ing] the administrative process." *Id.* at 3. Separately, the Government argues that the duration of time that elapsed from Customs' decision issued on May 23, 2019 — received by Mr. Chae on October 29, 2019 — to the USCIT docketing Mr. Chae's filing on September 11, 2020, demonstrates a lack of due diligence on his part. *Id*. at 6.

A second issue concerns the lack of concurrent filing of plaintiff's summons and complaint. An action brought under 28 U.S.C. § 1581(g)(1) must be commenced by filing a summons and complaint concurrently with a clear identification of the defendant in the action. 28 U.S.C. § 2632(a). The Government argues that plaintiff's failure to satisfy the requirements of concurrent filing of summons and complaint under 28 U.S.C. § 2632(a) and the correct identification of defendant should result in dismissal for lack of jurisdiction or failure to state a claim for relief. Def. Reply Br. at 7–8 (stating that one of the requirements for "suing the United States in this court is that the action must be 'commenced by filing concurrently with the clerk of the

court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court.'" (citing 28 U.S.C. § 2632(a))).

In turn, plaintiff argues that his initial summons satisfies the basic jurisdictional requirements of 28 U.S.C. § 2632(a) and that he should be permitted to amend his pleading to bring it into compliance with the formal requirements of 28 U.S.C. § 2632(a) and USCIT Rule 3. Pl. Resp. Br. at 6. Plaintiff argues further that this court has discretion to allow him to amend the summons and should not dismiss his complaint, as it would deny plaintiff his right of access to the courts. *Id.* at 7.

II. Analysis

Plaintiff's argument in favor of equitable tolling raises three key issues: (1) whether the statute of limitations governing plaintiff's delay in filing is non-jurisdictional; (2) if it is, whether the elements required for equitable tolling are present; and, (3) whether plaintiff may amend the procedural defects of his pleadings to meet the requirements of the USCIT. After careful consideration, this court answers all three queries in the affirmative and the court denies the Government's motion to dismiss under USCIT Rule 12(b)(1).

Turning to the first key issue, the time bars set forth in 19 U.S.C. § 1641(e) and 28 U.S.C. § 2636(g) are non-jurisdictional. Accordingly, they do not divest the court of jurisdiction and plaintiff's complaint may be subject to equitable tolling, provided that the two necessary elements — (1) extraordinary circumstances and (2) diligence — are met. The court determines that they are.

USCIT Rule 3(e) states that the court may allow parties to amend a summons. USCIT Rule 3(e) calls further for leniency and allowing plaintiff to amend the summons "unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed" (in this case, the Government). *See, e.g., Kelley v. Sec'y U.S. Dept. of Lab.,* 812 F.2d 1378, 1380 (Fed. Cir. 1987) (stating "that leniency with respect to mere formalities should be extended to a pro se party, as was done in this case by the acceptance of Ms. Kelley's letter as a 'summons and complaint'").

The court concludes that exercising its discretion to allow plaintiff to amend the summons is appropriate.

A. Time Limits and Jurisdictional Statutes

To evaluate the validity of plaintiff's argument that equitable tolling applies to this action under 28 U.S.C. § 1581(g)(1), the court first must determine whether the statutes of limitations governing this claim may be tolled. For a statute to be tolled, it must be procedural

and non-jurisdictional. *See Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 435 (2011) ("[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction."). In the case of a "non-jurisdictional" statute of limitations, the court may "toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co.*, 552 U.S. at 134.

The statutes that outline the time bar of a claim under 28 U.S.C. § 1581(g)(1) are procedural and non-jurisdictional. § 1581(g)(1) provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any decision of the Secretary of the Treasury to deny a customs broker's license . . . ." The statutes of limitations governing this claim in 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 2636(g) are non-jurisdictional as they are "quintessential claim-processing rules." *See Henderson ex rel.* at 435 ("These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.").

Both the Government and plaintiff agree that a prima facie case of a dispute under 28 U.S.C. § 1581(g)(1) exists. *See* Def. Br. at 7; *see also* Pl. Resp. Br. at 5. However, the Government argues that plaintiff's complaint under that section is time-barred and, accordingly, that this court does not possess jurisdiction to consider the claim because the claim was not filed within 60 days of the decision's issuance. Def. Br. at 7 (citing 19 U.S.C. § 1641(e)(1)).

Plaintiff disputes the Government's motion to dismiss, contending that the principle of equitable tolling applies. Pl. Resp. Br. at 3. The Supreme Court has found that a non-jurisdictional federal statute of limitations is normally "subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 645–46 (2010) (quoting *Irwin*, 498 U.S. at 95–96) (emphasis supplied).

Additionally, the Supreme Court has clarified that "most time bars, even if mandatory and emphatic, are nonjurisdictional." *United States v. Kwai Fun Wong*, 575 U.S. 402, 403 (2015); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (stating that the Court will not conclude that a time bar is jurisdictional unless Congress provides a "clear statement" to that effect). The Court ordinarily presumes that federal limitations periods are subject to equitable tolling unless tolling would be inconsistent with the statute. *Young v. United States*, 535 U.S. 43, 49 (2002). Here, the language of 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 2636(g) does not indicate that the statutes are jurisdictional, nor that tolling is inconsistent with the statutes.

In light of the foregoing, the court concludes that the time bars prescribed in 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 2636(g) are non-jurisdictional and subject to equitable tolling.

B. Equitable Tolling

Plaintiff requests that the court apply equitable tolling in this case because he actively pursued all reasonable steps to prosecute his case and, notwithstanding that his pleading was untimely, the delay is partially attributable to misleading information provided by Customs. *See* Pl. Resp. Br. at 4–5. The Government claims that equitable tolling is not applicable because no governmental wrongdoing occurred, Def. Reply Br. at 3, and that the duration of the gap between Customs' decision and Mr. Chae's filing demonstrates a lack of due diligence. *Id*. at 6.

The court first will discuss the appropriate standard for equitable tolling. Equitable tolling requires that a plaintiff establish: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland,* 560 U.S. at 649 (internal quotation marks omitted). Plaintiff must meet both elements to meet the standard for equitable tolling. *See Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2016) (characterizing "equitable tolling's two components as 'elements,' not merely factors of indeterminate or commensurable weight"). The Federal Circuit has explained that plaintiff must demonstrate due diligence during the extraordinary circumstance period. *Checo v. Shinseki*, 748 F.3d 1373, 1379–80 (Fed. Cir. 2014) (adopting the "stop-clock approach" in which the "clock measuring the . . . appeal period is 'stopped' during the extraordinary circumstance period and starts ticking again only when the period is over").

In this case, there were two distinct periods of time during which extraordinary circumstances "stood in [plaintiff's] way" over the period between Customs' issuance of the decision on May 23, 2019 and plaintiff's filing with this Court in March 2020.[8] *See Menominee Indian Tribe of Wisconsin*, 577 U.S. at 256–257. These circumstances — the non-delivery of Customs' letter and Customs' misleading statements — affected plaintiff's ability to file his complaint in a timely manner. *See* Pl. Resp. Br. at 2. Second, plaintiff has demonstrated due diligence in pursuing his claim by following up with Customs prior to his receipt of the letter. *See id.* Further, once he realized that a judicial appeal was possible, he demonstrated diligence in preserving

[8] Plaintiff's complaint was received by the Court on March 6, 2020. *See* Complaint at 1. Pursuant to USCIT Rule 5(4): "Filing is complete when received . . . ."

his rights. *See id.* Accordingly, the court concludes that the circumstances of plaintiff's case justify the application of equitable tolling.

1. First Period (May 23, 2019 to October 29, 2019)

Customs issued its decision on Mr. Chae's appeal on May 23, 2019; however, Mr. Chae did not become aware of the BMB's decision until October 29, 2019. On May 23, 2019, the Commissioner sent a letter upholding the BMB's decision to plaintiff's former address in New York. Def. Br. at 4. Plaintiff set up for his mail to forward from there to his Nebraska address, but he never received the BMB's letter. Pl. Resp. Br. at 2.

During this time, plaintiff followed up with Customs to inquire as to the status of his appeal. For example, on June 21, 2019, plaintiff emailed Customs requesting an update. Chae Decl, Ex. A. Weeks later, on July 11, 2019, Customs emailed him back to inform him: "The second appeals for October 2018 are presently with Rulings and Regulations, we are hoping to have finalized prior to the next exam."[9] *Id*. It was not until plaintiff followed up again on October 28, 2019 that Customs then emailed him a copy of the letter on October 29, 2019. *Id.*

The first question before the court is whether the circumstances that led to the passage of 159 days from the issuance of the decision to the date on which Mr. Chae became aware of the decision were extraordinary and caused delay to plaintiff's filing. The second question is whether Mr. Chae exercised due diligence during this period. The court finds that both elements are met.

a. Extraordinary Circumstance

Meeting the "extraordinary circumstances" prong of the test requires the showing of some "external obstacle" to timely filing — a showing that "some extraordinary circumstance stood in [plaintiff's] way." *Menominee Indian Tribe of Wisconsin*, 577 U.S. at 256–257. "[This] prong is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Id.* (emphasis in original). The Federal Circuit has emphasized that equitable tolling is not "limited to a small and closed set of factual patterns." *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005). Equitable tolling should not be determined based on whether a "particular case falls within the facts specifically identified in . . . prior

[9] Notably, this information was incorrect, as Customs — unbeknownst to Mr. Chae and, apparently, unbeknownst to the Customs officer with whom he was corresponding — had already made a decision. *See* Chae Decl., Ex. A.

cases." *Toomer v. McDonald*, 783 F.3d 1229, 1239 (Fed. Cir. 2015) (citations omitted). Instead, the Federal Circuit has assessed such situations on a "case-by-case basis," with "flexibility" and "avoiding mechanical rules." *Id.* (citing to *Holland*, 560 U.S. at 631).

This court does not rely on whether the facts of any particular case match a prior instance of equitable tolling. *See James v. Wilkie*, 917 F.3d 1368, 1374 (Fed. Cir. 2019) (overturning a categorical ban that foreclosed the possibility that a fallen mailbox flag could constitute an extraordinary circumstance because the "Veterans Court focused too narrowly on whether Mr. James's case fell into one of the factual patterns of past cases . . . ."). However, the court finds instructive the Federal Circuit's contemplation of a similar scenario, during which the Federal Circuit explained: "If a mailing delay resulted in a claimant receiving notice . . . after the appeal period has already run, or nearly expired, equitable tolling might well be available." *Palomer v. McDonald*, 646 Fed. Appx. 936, 940 (Fed. Cir. 2016) (upholding denial of equitable tolling because a 14-day delay due to a delay from international mail service was not an extraordinary circumstance).

The circumstances that led to the passage of 159 days from the issuance of the decision to the date on which Mr. Chae became aware of the decision were both outside of Mr. Chae's control and extraordinary. Plaintiff set up mail forwarding with the United States Postal Service and, for reasons beyond his control, he did not receive the letter. Chae Decl., ¶ 6. Such a circumstance is extraordinary because individuals may typically rely on the United States Postal Service to forward and deliver mail.

This circumstance directly impacted Mr. Chae's ability to appeal his exam results before this Court within the 60-day statutory time frame. *See* 19 U.S.C. § 1641(e)(1) ("[An] applicant . . . may appeal . . . by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part."); *see also* 19 U.S.C. § 2636(g) ("A civil action contesting the denial . . . of a customs broker's license . . . is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of the entry of the decision or order of such Secretary.").

The court finds that, accordingly, Mr. Chae's circumstance constitutes an extraordinary circumstance within the meaning of *Holland*. *See Holland*, 560 U.S. at 649.

b. Due Diligence

The Supreme Court has underscored the significance of a plaintiff's due diligence in pursuing a claim. *Holland*, 560 U.S. at 653 (explaining that "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence'") (citations omitted). Plaintiff "must only demonstrate due diligence during the extraordinary circumstance period . . . ." *Checo*, 748 F.3d at 1380. In determining whether plaintiff's actions constitute due diligence, this court conducts a fact-specific inquiry, guided by reference to the hypothetical reasonable person. *Former Emps. of Siemens Info. Commc'n Networks, Inc. v. Herman*, 24 CIT 1201, 1208–11, 120 F. Supp. 2d 1107, 1114–16 (2000).

The Government argues that plaintiff did not exercise the requisite level of diligence. Def. Reply Br. at 6 (citing to *Jackson v. United States*, 751 F.3d 712, 720 (6th Cir. 2014) (declining to apply equitable tolling when plaintiff did not receive agency's denial letter as a result of not updating the agency with a correct mailing address); *Foss v. National Marine Fisheries Serv.*, 161 F.3d 584, 590–91 (9th Cir. 1998); *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989)). In this regard, during a party conference, the Government first argued that plaintiff should have notified Customs of his change of address, then conceded that no regulation or statute requires an applicant to notify Customs of a change of address. Teleconference, ECF No. 17 at 23:22–23:40. The Government concluded by asserting that, in its view, it was "common sense" for plaintiff to have done so. *Id.* at 23:00–23:22.

The court finds that plaintiff exercised due diligence in setting up a mail forwarding system with the United States Postal Service and by attempting to contact Customs after extensive delays by Customs and after receiving inaccurate information. Chae Decl., ¶ 6–7. The court views plaintiff's efforts in light of Customs' confusing email statement on July 11, 2019, that suggested that Mr. Chae's appeal had not yet been "finalized," when it had in fact already been completed and a notification of such had been mailed to his prior address on May 23, 2019. *See id*., Ex. A. Plaintiff had not received a letter in the mail from Customs, nor did he have any reason to believe that Customs had already sent one. *See id.* The court finds that plaintiff's consistent follow up with Customs demonstrates that he acted with due diligence in these circumstances.

The court does not accept the Government's assertion that "it is incumbent on plaintiff to actually file a change of address with Customs." Teleconference, ECF No. 17 at 8:49–9:07. While it may have been advisable, no statutory or regulatory requirement that man-

dated that plaintiff do so, and it was reasonable for plaintiff to rely instead on a United States Postal Service change of address to forward his mail. This case differs from equitable tolling cases in other contexts, in which there is a responsibility to inform the relevant agency of a change of address. *See, e.g., St. Louis v. Alverno College*, 774 F.2d 1315, 1316 (7th Cir. 1984) (noting that there has been a regulatory requirement since 1977 for "people who have filed charges with the EEOC . . . to notify the Commission of any change of address" due to a regulation which "makes mandatory that which was dictated already by common sense"); *Carter v. Hickory Healthcare Inc.*, 905 F.3d 963, 969 (6th Cir. 2018) (explaining that "[t]he relevant [EEOC] regulations still required [plaintiff] to 'provide the Commission with notice of any change in address'").

Accordingly, the court finds that the due diligence requirement is met and that equitable tolling stopped the clock between May 23, 2019, and October 29, 2019.

2. Second Period (October 31, 2019 to Early 2021)

a. Extraordinary Circumstance

The second extraordinary circumstance covers the period between October 31, 2019 (when Customs' informed Mr. Chae that there was "no 3rd appeal") to late January or early February 2020 (when plaintiff discovered that he could appeal to this Court). When plaintiff emailed Customs on October 30, 2019, to inquire how he could appeal, Customs informed him on the next day that "[t]here is no 3rd appeal." Chae Decl., Ex. B; Pl. Resp. Br. at 4. When plaintiff subsequently learned that he could appeal to the USCIT, he "immediately sought to rectify that situation and filed an appeal . . . ." Pl. Resp. Br. at 1; *see also* Teleconference, ECF No. 17 at 2:44–3:34 (in which plaintiff clarified that he learned of the judicial review process around late January or early February 2021).

The Government's statement was outside of Mr. Chae's control. Further, Customs' misleading statement to Mr. Chae for the second time was extraordinary. Customs should be relied upon to provide accurate information when it is requested. The Government's argument that Customs' email referred solely to administrative remedies is unconvincing. *See* Def. Reply Br. at 4–5. The correspondence did not state that there was no third *administrative* appeal. *See* Chae Decl., Ex. B. The court does not share Customs' position that plaintiff — or any other ordinary person, for that matter — would recognize the difference between an administrative and a judicial remedy in that context.

Accordingly, Customs' misleading statement to Mr. Chae that "[t]here is no 3rd appeal" constitutes a second extraordinary circumstance that contributed to the lateness of his filing.

b. Due Diligence

As with the first time period, plaintiff exercised due diligence throughout the second time period to preserve his rights. Once plaintiff became aware on October 29, 2019 of Customs' denial letter of May 23, 2019, he followed up the next day to inquire as to an appeal. Chae Decl., Ex. A, Ex. B. Accordingly, the diligence exercised by Mr. Chae here meets the second element necessary to apply equitable tolling.

The Government asserts that Mr. Chae "fails to explain what, if any, diligence he exercised between October 30, 2019 and March 4, 2020." Gov. Reply Br. at 5. To the contrary, Mr. Chae demonstrated diligence despite an explicit assertion by Customs — "[t]here is no 3rd appeal" — that he had no further recourse. *See* Pl. Resp. Br. at 2. Plaintiff argues that when Customs asserted that "there [was] no '3rd appeal . . . the government provided misleading information which led to a delay in filing with the CIT.'" *Id*. at 4.

Plaintiff notes correctly that the facts of his case are akin to the diligence exercised in *Former Employees of Quality Fabricating*, in which the court applied equitable tolling. Pl. Resp. Br. at 4 (citing *Former Emps. of Quality Fabricating, Inc. v. U.S. Sec'y of Lab.*, 27 CIT 419, 424, 259 F. Supp. 2d 1282, 1286 (2003)). By contrast, the Government asserts that Mr. Chae needed to have undertaken certain additional conduct for his diligence to be equivalent to that exercised by the plaintiffs in *Former Employees of Quality Fabricating*. Def. Reply Br. at 5. The Government argues that plaintiff, as an applicant to become a licensed customs broker, should have researched "customs-related statutes, CBP's regulations, and the publicly available resources on CBP's website." *Id.*

As in *Former Employees of Quality Fabricating*, here "a reasonably prudent person should be able to rely on the assurances and instructions of government officials in their field of expertise." *Former Emps. of Quality Fabricating, Inc.*, 259 F. Supp. 2d at 1288. Customs' explicit statement that "[t]here is no 3rd appeal" supports plaintiff's argument that he was misled and that he acted in accordance with what he believed to be true: that he had no further recourse. *See* Chae Decl., Ex. B. Accordingly, it was reasonable for Mr. Chae to rely on Customs' assurances to him.

Particularly in light of the erroneous information that Customs provided to Mr. Chae on multiple occasions, the court finds no reason

to hold Mr. Chae to the elevated threshold with respect to diligence advocated by the Government. Mr. Chae demonstrated diligence by pursuing an appeal with Customs and then filing with the USCIT once he realized that he could pursue judicial remedies. Under the circumstances, given that Mr. Chae had been instructed that he had no further recourse, it is unclear what else Mr. Chae could reasonably have been expected to do. *See id.* In taking the steps that he did, he exercised sufficient diligence to justify the court's application of equitable tolling to his claim.

3. Summary — First and Second Periods: Extraordinary Circumstances and Due Diligence

Plaintiff's actions fulfill the two elements necessary for the court to apply equitable tolling — diligent pursuit of rights and an extraordinary circumstance that stood in the way of the timely pursuit of those rights — during both time periods. *See Holland*, 560 U.S. at 649. As such, the court concludes that Mr. Chae's claim is subject to equitable tolling.

To summarize, the stop-clock measuring the 60-day appeal period began with Customs' issuance of the decision on May 23, 2019. *See Checo*, 748 F.3d at 1379–80; *see also* Chae Decl., Ex. A. As discussed, the clock stopped during the period of the first extraordinary circumstance — non-delivery of the BMB's letter to Mr. Chae until October 29, 2019 — during which time plaintiff followed up with Customs regarding the status of his appeal. *See* Chae Decl., ¶ 6–7. The clock was again stopped from October 31, 2019, until late January or early February 2020 — from when Mr. Chae was told by Customs there was "no 3rd appeal" to when he learned that he could in fact appeal. *See id.*, ¶ 8; *see also* Teleconference, ECF No. 17 at 2:44–3:34. The clock began ticking again, and Mr. Chae appropriately filed with the Court within 60 days, on March 6, 2020. *See* 19 U.S.C. § 1641(e)(1); *see also* 19 U.S.C. § 2636(g).

C. Discretion for Leave to Amend Defective Pleading

Plaintiff failed to file a concurrent summons and complaint and misidentified the defendant in his complaint letter. *See* Complaint at 1 (failing to identify a defendant). The question presented is whether these errors present sufficient grounds to grant the Government's motion to dismiss. The court determines that they do not constitute such grounds because plaintiff's errors are amendable in a manner that will not materially prejudice the Government in this action.

Plaintiff must file a summons and complaint concurrently. *See* 28 U.S.C. § 2632(a); *see also* USCIT R. 3(a). 28 U.S.C. § 2632(a) provides that, "a civil action in the Court of International Trade shall be

commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court." Similarly, USCIT Rule 3(a) provides that a civil action under 28 U.S.C. § 1581(g)(1) is commenced by filing a "summons and complaint concurrently."

However, the rules and apposite case law also affirm that the court has discretion in the application of the statute. USCIT Rule 3(e) states that the "court may allow a summons to be amended at any time on such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed." Further, USCIT Rule 15(a) states that "a party may amend its pleading only with . . . the court's leave. The court should freely give leave when justice so requires."

Similarly, the decisions of this Court support the application of leniency in the context of this case. *See Former Emps. of AST Rsch., Inc. v. U.S. Dep't. of Lab.,* 25 CIT 1391, 1391 (2001) (recalling that "briefs of *pro se* litigants are held to a less stringent standard than formal briefs filed by attorneys."); *see also, Atteberry v. United States,* 27 CIT 1070, 1075 n.15 (2003) ("[The right to self-representation] should not be impaired by harsh application of technical rules. Trial courts have been directed to read *pro se* papers liberally." (citations omitted)).

When evaluating a plaintiff's pleadings, the court recalls that "the purpose of a summons is to provide notice to other parties of commencement of an action." *Daimler Chrysler v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006). The court considers in this light the significance of filing a concurrent summons and complaint, the incorrect identification of defendants and the possibility for amendment.

The Government contends that plaintiff's failure to file a summons and complaint concurrently bars this Court from exercising jurisdiction. Def. Reply Br. at 8. The Government asserts that, because plaintiff did not fulfill this requirement, his complaint must be dismissed. *Id*. In support, the Government recalls that in *Washington Int'l Ins. Co. v. United States,* plaintiffs filed a summons under 28 U.S.C. § 1581(a) and two years later filed a complaint alleging that the Court had jurisdiction under 28 U.S.C. § 1581(a) or, alternatively, under 28 U.S.C. § 1581(i). Def. Br. at 8 (citing *Washington Int'l Ins. Co. v. United States*, 25 CIT 207, 212–13, 138 F. Supp. 2d 1314, 1320–21 (2001)). The court dismissed two counts of the complaint, for which section 1581(a) jurisdiction did not exist, explaining that failure to comply with the procedural requirements for bringing an action under section 1581(i) precluded the court from exercising ju-

risdiction over an otherwise legitimate basis for a legal claim. *Washington Int'l Ins. Co*, 138 F. Supp. 2d. at 1327.

Plaintiff responds that the facts in *Washington* are readily distinguishable from those in plaintiff's appeal. Pl. Br. at 6–7. Plaintiff argues, in particular, that the two-year time gap in *Washington* is a much more significant length of time than the four-month gap in plaintiff's filing. *Id.*

The court agrees with plaintiff. In addition, the failure of the plaintiffs in *Washington* to file their summons and complaint concurrently did not constitute the principal issue before the court in *Washington. Washington Int'l Ins. Co*, 138 F. Supp. 2d. at 1327. The plaintiffs in *Washington* were denied jurisdiction on two complaints that plaintiffs sought to file under § 1581(i) because they were attempting to "bootstrap" them to their initial complaint under § 1581(a). *Id*. The court stated that it was not possible for the plaintiffs to tack on the § 1581(i) complaints using the two-year-old summons of the § 1581(a) complaint. *Id.* By contrast, in this case, plaintiff has filed only under § 1581(g)(1) and is attempting to modify the summons for that particular claim only. Pl. Br. at 5–6. In short, the facts of *Washington* are inapposite to this case.

In addition, the court is not persuaded that plaintiff's failure to identify the defendant correctly in his summons and complaint should bar the court from exercising jurisdiction. The Government states in its reply brief that plaintiff's complaint letter does not identify a defendant. Def. Reply Br. at 8. The Government argues that plaintiff's letter does not qualify as a summons and that the action should be dismissed because the letter does not name a defendant. *See id.*; *see also* USCIT R. 10(a) (providing that "every pleading must have a caption with the court's name, a title, a court number, and a Rule 7(a) designation. The caption of the summons and the complaint must name all the parties."). The Government relies on *AD HOC Utilities Group v. United States* to argue that the failure to identify the parties of an action calls for a dismissal of the action. Def. Reply Br. at 8 (citing to *AD HOC Utilities Grp. v. United States*, 33 CIT 1284, 1291, 650 F. Supp. 2d 1318, 1327 (2009)).

The Government's reliance on *AD HOC Utilities* is misplaced. In that case, the summons designated only a single plaintiff and failed to identify the group of plaintiffs who later sought to take part in the action. *AD HOC Utilities Grp*, 650 F. Supp. 2d at 1327. In contrast, plaintiff in this case identified himself as the plaintiff in his summons and complaint and there are no other plaintiffs. *See* Complaint at 1. The fact that plaintiff erroneously listed Customs — rather than Treasury — as the department against which he was bringing a

complaint does not prejudice defendant. *See* USCIT R. 3(e) (specifying that a court may allow for a summons to be amended "unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed."). Since the Department of Treasury and Customs are both agencies of the federal government of the United States — and especially since both are represented before this Court by the U.S. Department of Justice — the impact of the misidentification is trivial. In any event, the error of plaintiffs in *AD HOC Utilities* is inapposite to this case.

Plaintiff's erroneous identification of the defendant also may be amended. In his cover letter (which also serves as summons), plaintiff references "Customs and Border Protection," which is incorrect.[10] Complaint at 1. Plaintiff previously appealed to the BMB of Customs and then the Commissioner, pursuant to 19 C.F.R § 111.13(f), so his mistaken identification of Customs is reasonable. *See* Pl. Resp. Br. at 1–2; *see also* 19 C.F.R § 111.13(f). Moreover, the appeal before the USCIT is governed by 19 C.F.R. § 111.17(c), which does not mandate which defendant must be identified in the appeal.[11]

In most cases in which a plaintiff misidentifies the defendant, the court will order the plaintiff to amend his summons and bring the case into proper form. *See, e.g., Odom v. Ozmint*, 517 F. Supp. 2d 764, 769 (D.S.C. 2007) (finding that *pro se* litigants' complaints, however inartfully pleaded, should be read liberally). The court affords plaintiff this opportunity here. Plaintiff's error is both excusable and amendable, given that the intention of his complaint is discernible. *See* USCIT R. 3(e); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding that *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers").

As stated above, USCIT Rule 3(e) anticipates that summons and pleadings may be amended in some circumstances and allows for the court to grant leave to amend. Plaintiff's misidentification does not prejudice defendant in any way here.

Considerations of equity as well as decisions of this Court weigh in favor of the court exercising its discretion to grant leave to amend the defective pleading.

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[10] The Government points out Mr. Chae's identification error but does not acknowledge its own failure to adhere to this standard in its own submissions before this court. *See* Def.'s Mem. in Supp. of Mot. to Dismiss, ECF No. 5 ("Def. Br.") at 9. The Government names the "Department of Treasury" as the defendant in one filing and then names "the United States" in another. *See* Def. Br.; *see also* Def.'s Reply Mem. in Supp. of Mot. to Dismiss and in Opp. to Pl.'s Mot. to Am. Summons, ECF No. 15 ("Def. Reply Br.").

[11] 19 C.F.R. 111.17(c) states: "Upon a decision of the Secretary of Homeland Security, or his designee affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within 60 calendar days after the date of entry of the Secretary's decision."

Failure to State a Claim

STANDARD OF REVIEW

When the Court considers a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to USCIT Rule 12(b)(6), the allegations in the complaint must be accepted as true and should be construed favorably to the plaintiff. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal,* 556 U.S. 672, 678 (2009). The complaint "must contain sufficient factual material to 'state a claim to relief that is plausible on its face.'" *Husteel Co., Ltd. v. United States*, 43 CIT __, __, 375 F. Supp. 3d 1317, 1321 (2019) (quoting *Twombly*, 550 U.S. at 570). "Allegations in a complaint must rest on a plausible legal theory to survive a motion to dismiss for failure to state a claim." *Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1364 (Fed. Cir. 2016) (citing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425–26 (2014)).

DISCUSSION

I. Positions of the Parties

Neither party addresses directly whether plaintiff's complaint fails to state a claim upon which relief can be granted due to lack of clarity. The Government does not address in either of its filings the question of whether a cognizable claim upon which relief can be granted exists regardless of an applicable statute of limitations. *See* Def. Br.; *see also* Def. Reply Br. Similarly, plaintiff does not address the issue in his memorandum in opposition to the Government's motion to dismiss. *See* Pl. Resp. Br. Plaintiff requests leave to amend his summons but does not request leave to amend his complaint. *Id*. at 5.

II. Analysis

Plaintiff's complaint fails to state a claim upon which relief can be granted because plaintiff did not state clearly what he is asking the court to do. *See* USCIT R. 12(b)(6). However, the court concludes that it is appropriate sua sponte to offer him the opportunity to seek leave to amend his complaint.

A. Lack of Specificity in Plaintiff's Complaint

Plaintiff's complaint does not state a claim on which relief can be granted and, therefore, fails to meet the requirements for the commencement of an action before the Court. As the Government points out, "allegations in a complaint must rest on a plausible legal theory to survive a motion to dismiss for failure to state a claim." Def. Br. at 6 (citing *Hutchinson Quality Furniture*, 827 F. 3d at 1364 n.4).

Plaintiff does not allege a plausible legal theory because he fails to state the relief he seeks. Other cases concerning Customs Broker License Exam scores were filed with more precise complaints. *See*, *e.g.*, Complaint at 4, *Kenny v. Snow*, 28 CIT 852, 401 F.3d 1359 (2004) ("Kenny Complaint"); Complaint at 9, *DePersia v. United States*, 33 CIT 1103, 637 F. Supp. 1244 (2009) ("DePersia Complaint"). For example, in *Kenny v. Snow*, the complaint stated, "Plaintiff respectfully requests he be given credit for Question No. 32 of the October 2001 Customs Broker Licensure Exam." Kenny Complaint at 4. Similarly, the complaint in *DePersia v. United States* stated, "Plaintiffs request that Customs Service be directed to provide credit to Plaintiffs for their answer on questions 9 [sic] and grant credit for the Plaintiff's [sic] answers on questions 17 and 19 . . . ." DePersia Complaint at 9.

In plaintiff's initial complaint, he states that he "hereby request[s] the appeal of the following questions: Q5, Q33, Q39, Q43, Q50, Q57." Complaint at 1. Plaintiffs in *DePersia* and *Kenny* both specified in their complaints what actions they were requesting the court to take. *See* Kenny Complaint at 4; *see also* DePersia Complaint at 9. In contrast, Mr. Chae does not specify whether he seeks in his appeal that the court re-examine his answers to those questions, that the court compel Customs again to re-examine Mr. Chae's answers, or whether he seeks some other type of relief. Without sufficient clarity regarding the type of relief sought, the court cannot determine whether the allegations supporting relief rest on a plausible legal theory. *See* Complaint at 1.

B. Offer of Leave to Amend

The court's discretion to grant leave to amend a complaint is broad, and it "should freely give leave when justice so requires." USCIT R. 15(a)(2). In particular, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The court exercises its discretion to invite plaintiff to seek leave to amend his complaint for three reasons. First, the *Tomoegawa* factors support the court in exercising its discretion in this case. *See Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 186, 763 F. Supp. 614, 618 (1991) (citing *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (E.D. Mich. 1986)). Second, plaintiff may easily amend the complaint in a manner that remedies the identified deficiency. Third, the court has the authority sua sponte to invite

plaintiff to seek leave to amend his complaint in view of the fact that plaintiff has not himself sought leave to do so. *See* Steven S. Gensler & Lumen N. Mulligan, *1 Federal Rules of Civil Procedure, Rules and Commentary*, Rule 15 (2021).

1. When to Grant Leave to Amend

The court is required to consider certain factors — such as "1) the timeliness of the motion to amend the pleadings; 2) the potential prejudice to the opposing party; 3) whether additional discovery will be necessary; 4) the procedural posture of the litigation; 5) whether the omitted counterclaim is compulsory; 6) the impact on the court's docket; and 7) the public interest" — when exercising its discretion to invite a plaintiff to seek leave to amend its complaint or to grant plaintiff leave to amend its complaint. *Tomoegawa*, 763 F. Supp. at 618.

With respect to the first factor, a motion for leave to amend would not be untimely. Whether a motion for leave is timely depends upon when plaintiff learns that his complaint fails to meet the Court's standards. *See*, *e.g.*, *id.* at 186 ("Whether the Government's motion to amend is timely depends upon when the Government acquired knowledge of the facts and circumstances that form the basis of the counterclaims . . . once the Government gained that knowledge, it had a duty to assert its counterclaims in a timely fashion."). Here, plaintiff has not yet been advised by the court that his complaint fails to meet the Court's standards. The Government does not advance such an argument in its filings, and the court has not yet ruled on any motions related to plaintiff's complaint.

As to the second and fourth factors, granting a motion would not unduly prejudice the Government. The case has not progressed to a point at which the Government would be prejudiced by the granting of such a motion. For example, the Government would not be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendment been timely." *Ford Motor Co. v. United States*, 19 CIT 946, 956, 896 F. Supp. 2d 1224, 1231 (1995) (quoting *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802, 806 (D. Del. 1986)). As in *Ford*, the Government "faces no such problems as the amendment is based on the same transactions or occurrences or events as the original complaint." *See id.* at 956–57.

The fifth factor is not pertinent in this case as no counterclaim is at issue. With respect to the third and sixth factors, granting the motion is unlikely to lead to additional discovery or other significant

litigation and the consideration of plaintiff's claim will not impact significantly the court's docket. No regathering of evidence will be necessary, and the parties will need to present few, if any, new facts, because the amended complaint will likely be based on identical facts as the original complaint.

Finally, regarding the seventh factor, granting leave to amend is in the public interest. Rather than requiring plaintiff to refile his appeal by granting the Government's motion to dismiss, granting leave to amend would likely allow plaintiff a chance at relief for a plausible claim, as discussed further below. Taking into account all of the applicable factors, the *Tomoegawa* factors support the court's exercising its discretion here. *See Tomoegawa*, 763 F. Supp. at 618.

2. The Amendment Must Remedy the Defect

The court should grant leave to amend only when amendment would likely remedy the identified defect. *See, e.g.*, *Foman*, 371 U.S. at 182. Granting plaintiff the opportunity to seek leave to amend would enable him to remedy a fatal flaw in his complaint and, therefore, would not be futile. The alleged circumstances of Mr. Chae's situation are similar to the facts in cases like *Dunn-Heiser v. United States*, in which plaintiff alleged that she did not receive a passing score on the Customs Broker License Exam, that she petitioned Customs for credit on questions allegedly incorrectly graded and that she appealed Customs' decision once again not to give credit for certain questions.[12] 29 CIT 552, 554, 374 F. Supp. 2d 1276, 1278 (2005). The similarity between Mr. Chae's alleged facts and those in *Dunn-Heiser* suggests that Mr. Chae's circumstances could constitute a plausible claim. *See id.* Mr. Chae should, therefore, be able to remedy the complaint if granted leave, and an amended complaint is unlikely to be futile.

3. Offering Leave Sua Sponte

The Court's broad discretion to grant leave to amend includes doing so sua sponte. Gensler & Mulligan, *supra*, Rule 15 (stating that "[w]hile courts are free to provide leave to amend whether or not a party has requested it, the majority rule is that the trial court has no

[12] *Dunn-Heiser* is part of a line of cases in which the Court has examined whether Customs incorrectly graded exam questions. *See*, *e.g.*, *Dunn-Heiser v. United States*, 29 CIT 552, 374 F. Supp. 2d 1276 (2005); *Di Iorio v. United States*, 14 CIT 746 (1990); *O'Quinn v. United States*, 24 CIT 324, 100 F. Supp. 2d. 1136 (2000); *Kenny v. Snow*, 28 CIT 852, 401 F.3d 1359 (2004). In those cases, the Court reviewed whether the administrative decision, the decision to withhold credit for exam answers, "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *See, e.g., Di Iorio*, 14 CIT at 747 (quoting 5 U.S.C. § 706(2)(A) (1988)).

obligation to grant leave to amend sua sponte"). The Court has exercised this capacity in the past, proactively offering plaintiffs with vague complaints an opportunity to seek leave to amend. *See United States v. Active Frontier Int'l, Inc.*, 37 CIT 94, 96 (2013) (offering plaintiffs leave to amend their complaint because of the vague description of apparel items at issue in a tariff classification case).

In sum, the underlying facts and circumstances of plaintiff's claim may be a proper subject of relief, as demonstrated by their similarities to the facts alleged in *Dunn-Heiser* and similar cases. Therefore, Mr. Chae "ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

Consistent with the foregoing, the court sua sponte offers plaintiff the opportunity to seek leave to amend.

CONCLUSION

Mr. Chae has suffered significant delay and has been misled by several officers of the United States Government in his quest to become a licensed customs broker. This court takes seriously the application of its powers in equity under the doctrine of equitable tolling. *See* 28 U.S.C. § 1585. Whether Mr. Chae's exam was deserving of a passing grade is a question for another day; however, at the very least, Mr. Chae deserves to have his case heard fairly and without further delay.

For the reasons stated above, defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) is denied, and the court grants leave to plaintiff for sixty (60) days to amend his complaint and summons to bring them into compliance with the procedural requirements of USCIT Rules 10(a) and 12(b)(6). Consequently, it is premature for the court to rule on defendant's motion to dismiss pursuant to USCIT Rule 12(b)(6) at this time. If plaintiff does not file an amended complaint within the allotted timeframe, the court will grant the defendant's motion to dismiss pursuant to USCIT Rule 12(b)(6).

Dated: May 7, 2021
New York, New York

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

Slip Op. 21–58

CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC., Plaintiffs, and CARBON ACTIVATED TIANJIN CO., LTD. and CARBON ACTIVATED CORPORATION, et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CARBON ACTIVATED TIANJIN CO., LTD. and CARBON ACTIVATED CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 18–00232

[Sustaining the second remand redetermination in the tenth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China.]

Dated: May 11, 2021

David A. Hartquist, *R. Alan Luberda*, *John M. Herrmann, II*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiffs/Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc.

Francis J. Sailer, *Dharmendra N. Choudhary*, and *Jordan C. Khan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Consolidated Plaintiffs/ Defendant-Intervenors Carbon Activated Tianjin Co., Ltd., Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd., and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Of counsel was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination pursuant to court remand in the tenth administrative review ("AR10") of the antidumping duty order on certain activated carbon from the People's Republic of China for the period of review April 1, 2016, through March 31, 2017. *See* Final Results of [Second] Redetermination Pursuant to Court Remand ("Second Remand Results"), ECF No. 87–1; *see generally* Final Results of [First] Redetermination Pursuant to Court Remand ("First Remand Results"), ECF No. 75–1; *Certain Activated Carbon From the People's Republic of China*, 83 Fed. Reg. 53,214 (Dep't Commerce Oct. 22, 2018) (final results of antidumping duty admin. review; 2016–2017), ECF No. 29–4, and accompanying Issues and Decision Mem., A-570–904 (Oct. 16, 2018), ECF No. 29–5, as amended by *Certain Activated Carbon From the People's Republic of China*, 83 Fed. Reg. 58,229 (Dep't Commerce Nov. 19, 2018) (am. final results of antidumping duty admin. review; 2016–2017). The court has issued two opinions resolving substantive issued raised in

this case; familiarity with those opinions is presumed. *See Calgon Carbon Corp. v. United States* ("*Calgon (AR10) II*"), 44 CIT ___, 487 F. Supp. 3d 1359 (2020); *Calgon Carbon Corp. v. United States* ("*Calgon (AR10) I*"), 44 CIT ___, 443 F. Supp. 3d 1334 (2020).

In *Calgon (AR10) I*, and relevant to this discussion, the court remanded Commerce's selection of Thai[1] import data under Harmonized Tariff Schedule ("HTS") subheading 4402.90.1000 (coconut charcoal) to value carbonized material—an input Respondents[2] consumed in producing the subject merchandise. *Calgon (AR10) I*, 443 F. Supp. 3d at 1349–50; *see also Calgon (AR10) II*, 487 F. Supp. 3d at 1362. The Thai data included import quantities from, among other countries, France and Japan. *See Calgon (AR10) I*, 443 F. Supp. 3d at 1348. Monthly French import quantities did not cover the entire period of review, *id.* at 1348–49, but only May 2016 to January 2017, *Calgon (AR10) II*, 487 F. Supp. 3d at 1363. Commerce acknowledged that evidence indicated that French imports during some months were wood-based charcoal, which contradicted the agency's finding that the record lacked information "that French imports under HTS 4402.90.1000 were indeed wood-based charcoal." *Calgon (AR10) I*, 443 F. Supp. 3d at 1349 (citation omitted). Moreover, the average unit value ("AUV") of the French imports was twice that of the remaining Thai import data. *Id.* at 1350. The court noted that in the eighth and ninth administrative reviews ("AR8" and "AR9," respectively), Commerce excluded French imports based on similar evidence that the imports consisted of wood-based charcoal. *See id.* at 1350 n.26. Commerce failed to adequately address evidence detracting from its decision to rely on the French import data or explain why French imports in this review should be treated differently than in AR8 and AR9. *Id.* at 1349–50 & n.26. Commerce also failed to adequately explain its refusal to exclude Japanese imports, which were based on a small quantity and had an AUV almost 30 times higher than the rest of the Thai import data. *Id.* at 1350. Accordingly, the court remanded Commerce's selection of data to value carbonized material. *See id.*[3]

In the First Remand Results, Commerce excluded Japanese imports from the Thai import data, First Remand Results at 5–7, 22, but continued to include French imports, *id.* at 3–5, 17–22.

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[1] "Commerce selected Thailand as the primary surrogate country." *Calgon (AR10) I*, 443 F. Supp. 3d at 1343 n.9.

[2] The court refers to the Consolidated Plaintiffs that participated in proceedings for the Second Remand Results—Carbon Activated Tianjin Co. Ltd. and Datong Juqiang Activated Carbon Co., Ltd. ("DJAC")—as "Respondents." *See* Second Remand Results at 2 n.8.

[3] The court also remanded adjustments Commerce made to the surrogate financial statements. *See Calgon (AR10) I*, 443 F. Supp. 3d at 1353–54. Commerce explained the adjustments in the First Remand Results, and the court sustained those adjustments. *See Calgon (AR10) II*, 487 F. Supp. 3d at 1362.

In *Calgon (AR10) II*, the court sustained Commerce's exclusion of the Japanese imports. 487 F. Supp. 3d at 1362. However, the court remanded Commerce's inclusion of the French imports. *See id.* at 1365–66. The court explained that:

> Commerce acknowledged that the May, July, and August 2016 import quantities (i.e., quantities classified as coconut charcoal upon importation) were, in fact, wood-based charcoal. In so doing, Commerce's finding aligned with its findings in AR8 and AR9 that all Thai imports from France during the relevant periods consisted of wood-based charcoal, notwithstanding their classification as coconut-based charcoal.

Id. at 1365 (citations omitted). The court found that "Commerce did not identify evidence indicating that any quantity imported during any subsequent month was something other than wood-based charcoal." *Id.* The court concluded that "Commerce failed its statutory directive to support its decision that the Thai data inclusive of French imports was the 'best available information' with which to value carbonized material with substantial evidence." *Id.* at 1366 (citation omitted).

In the Second Remand Results, Commerce, under respectful protest,[4] excluded French imports from the Thai data. *See* Second Remand Results at 9–10. Commerce explained that its decision "is limited to the circumstances" of this case. *Id.* at 9. The "circumstances" Commerce referred to consisted of the court's finding that the agency's assessment of French imports in AR8 and AR9 combined with similar evidence on the record of AR10 gave rise to a reasonable inference that the French imports in AR10 were wood-based charcoal in the absence of evidence rebutting that inference. *Id.* (discussing *Calgon (AR10) II*, 487 F. Supp. 3d at 1366); *see also id.* at 17–18.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to subsection 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise 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." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation omitted).

[4] By making the determination under protest, Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

DISCUSSION

Respondents submitted comments during the remand proceedings that, in relevant part, supported Commerce's exclusion of French imports from the Thai data used to value carbonized material. Second Remand Results at 10.[5] No party filed comments with the court, and thus, Commerce's redetermination is uncontested.

Commerce's valuation of carbonized material complies with the court's order in *Calgon (AR10) II* by selecting Thai import data under HTS subheading 4402.90.1000, exclusive of French imports, to value Respondents' carbonized material. *See id.* at 10.

CONCLUSION

There being no challenges to the Second Remand Results, and those results being otherwise lawful and supported by substantial evidence, the court will sustain Commerce's Second Remand Results. Judgment will enter accordingly.

Dated: May 11, 2021
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21–59

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

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

[The court sustains Commerce's *Remand Results*.]

Dated: May 13, 2021

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

Geoffrey M. Long, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Jeffrey Bossert Clark*, Acting 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.

[5] Respondents disputed "Commerce's intention to limit its determination [to exclude the French imports] to the unique set of facts underlying this proceeding." Second Remand Results at 10–11. Commerce also corrected minor errors in DJAC's margin program as Respondents requested. *See id.* at 18. No party challenges these determinations before the court.

OPINION

Katzmann, Judge:

The court returns to a challenge to the U.S. Department of Commerce's ("Commerce") classification of a challenged sale as an export sale in an antidumping ("AD") investigation and to its associated 19 U.S.C. § 1677b(a)(1)(C) finding of home market non-viability. Before the court is Commerce's *Final Results of Redetermination Pursuant to Court Remand*, Oct. 6, 2020, ECF No. 56 ("*Remand Results*"), which the court ordered in *Coalition of American Flange Producers v. United States*, 44 CIT __, 448 F. Supp. 3d 1340 (2020) ("*Coalition I*"). In *Coalition I*, the court remanded so that Commerce could further explain certain aspects of its calculation of normal value in determining an AD duty margin for a foreign producer and exporter, Chandan Steel Limited ("Chandan"), in the importation of stainless steel flanges from India into the United States. *Id.* at 1345. On remand, with explanation, Commerce continued to conclude that the challenged sale should be excluded from Chandan's home market sales database and that Chandan did not have a viable home market for normal value purposes. *Remand Results* at 1. Plaintiff Coalition of American Flange Producers ("Coalition"), an ad hoc association whose members manufacture stainless steel flanges in the United States, again challenges this determination. Compl. at 2, Dec. 6, 2018, ECF No. 9; Pl.'s Comments on the Results of Remand Redetermination, Nov. 6, 2020, ECF No. 60 ("Pl.'s Br."). Defendant the United States ("the Government") requests that the court affirm Commerce's *Remand Results*. Def.'s Reply in Supp. of the Dep't of Commerce's Remand Redetermination, Feb. 2, 2021, ECF No. 67 ("Def.'s Br."). The court affirms.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Coalition I*, 448 F. Supp. 3d at 1345–50. Information relevant to the instant opinion is set forth below.

On August 16, 2018, Commerce issued *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"). As explained in the court's previous opinion, "'[t]o determine whether a sale is a home market sale, Commerce objectively assesses whether, given the par-

ticular facts and circumstances, a producer would have known that the merchandise will be sold domestically or for export.' 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." *Coalition I*, 448 F. Supp. 3d at 1346 (first quoting *Stupp Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1293, 1310 (2019); and then citing *INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 123–25, 957 F. Supp. 251, 264–65 (1997)). Based on its application of this knowledge test, Commerce determined that certain reported sales should not be included in Chandan's home market sales database and, therefore, Chandan's home market of India was not viable as a basis for determining normal value. IDM at 37. Commerce accordingly used Chandan's reported third-country market sales to determine its AD duty margin. *Id.* During the investigation, Coalition challenged Commerce's determination to exclude one sale from Chandan's home market database — the "challenged sale."[1] 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. In its *Final Determination*, Commerce relied on two provisions in the contract for the challenged sale to determine that it was not a home market sale: (1) a provision requiring packaging of export quality and (2) a provision requiring the merchandise to be stamped with a [[ ]] logo. IDM at 37. As a result of using third-country market sales rather than Chandan's home market, Commerce calculated an AD margin of 19.16 percent for Chandan. *Final Determination* at 40,476.

Coalition filed this action to challenge Commerce's *Final Determination* related to the challenged sale. Summons, Nov. 6, 2018, ECF No. 1; Compl. Specifically, Coalition argued 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." *Coalition I*, 448 F. Supp. 3d at 1351. On June 17, 2020, the court remanded Commerce's determination that the challenged sale was for export because that determination was not adequately explained and thus not supported by substantial evidence, but (2) concluded that Commerce did meet its obligation to conduct a diligent inquiry.

[1] This and further mentions of the "challenged sale" refer to Chandan's sale to [[ ]]. *See also Coalition I*, 448 F. Supp. 3d at 1348.

Id. The court also noted that it took no position "on the correctness of Commerce's determination" on remand. *Id.* Commerce filed its *Remand Results* with the court on October 6, 2020. *Remand Results*.[2] Coalition filed its comments on the Remand Results on November 6, 2020. Pl.'s Br. The Government replied on February 2, 2021. Def.'s Br.

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)(B)(i). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[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." A conclusion based on substantial evidence and in accordance with law requires Commerce to 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 existence of "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)), so long as that evidence is addressed and explained, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373–74 (Fed. Cir. 2016). The court also reviews the *Remand Results* "for compliance with the court's remand order." *See Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

The court remanded to Commerce for explanation of material record evidence related to the challenged sale that was unaddressed and may have undermined its decision to exclude the challenged sale from the home market database. Specifically, the court determined that "Commerce was obligated to discuss on the record . . . (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." *Coalition I*, 448 F. Supp. 3d at 1352–53. The court concluded that "the record in this case

[2] Many citations are to confidential filings for clarity in explaining the timeline of events. Public versions, often filed at later dates, are available on the public docket with corresponding pagination.

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." *Id.* at 1356 (citations omitted).

On remand, Commerce further explained its decision to exclude the challenged sale from Chandan's home market database and addressed each piece of evidence as directed by the court. Commerce noted that it "evaluated the totality of the evidence on the record, with particular attention to the evidence highlighted by the CIT." *Remand Results* at 6. In addition to the evidence highlighted in its *Final Determination* and discussed in the court's previous opinion, Commerce explained that other considerations regarding the challenged sale supported its decision to exclude that sale from Chandan's home market database. Commerce further analyzed the initial negotiation terms, circumstances surrounding the negotiations, and the buyer's main business of "sales of traded merchandise . . . focused on exports." *Id.* at 6–7. Commerce noted that "[w]hile no one single factor may be considered dispositive," it found that, "when considered in its totality, the record supports [its] conclusion regarding Chandan's knowledge of the ultimate destination for the merchandise" from the challenged sale. *Id.* at 8.

Coalition again challenges Commerce's determination by claiming that its decision was not reasonably supported or explained because the newly discussed evidence in combination with the evidence previously identified by Commerce does not "demonstrate that Chandan knew or should have known that its sales to [[ ]] were for export." Pl.'s Br. at 4. In response, the Government characterizes Coalition's renewed claims as "a disagreement with Commerce's weighing of the evidence." Def.'s Br. at 5. The court is not persuaded by Coalition's challenges to the *Remand Results* for the reasons set out below.

I. Agreement Provisions

Regarding a provision in the challenged sale contract that required export quality packaging, the court stated "[b]ecause 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." *Coalition I*, 448 F. Supp. 3d at 1353 (citations omitted). On remand, Commerce explained that, regardless of some overlapping provisions in the challenged sale agreement and Chandan's [[

]], "Commerce had no reason to question Chandan's knowledge of ultimate destination for any sales made to other customers" and disagreed that the evidence "necessarily detract[ed] from Commerce's conclusions." *Remand Results.* at 8–9; *see also id.* at 14 (discussing mill testing certificate provision). For this reason, Commerce explained that it did not place the same weight on the [[ ]] provisions as those related to the challenged sale. *Id.* at 16. Rather, Commerce explained that this evidence "alone may not conclusively demonstrate exportation of the merchandise, [but] when viewed in light of other record information, these provisions are consistent with [Commerce's] conclusion." *Id.* at 8; *see also id.* at 14.

Coalition challenges Commerce's conclusion on the overlapping contract provisions as insufficiently explained and conclusory. *See* Pl.'s Br. at 7–10. Coalition argues that "it was illogical for Commerce to claim that the reason for disregarding the relevance of the sale is the non-viability of the home market when part of the agency's reason for taking the sale into account was to help determine the home market's viability." *Id.* at 9. In response, the Government highlights that "Commerce did not assign the same amount of weight to the facts of the [home market sale] as those related to the [challenged sale]." Def.'s Br. at 14. The Government argues that despite the overlapping provisions being consistent with either a home market or export sale, the evidence nevertheless "support[s] Commerce's conclusion regarding Chandan's knowledge of the ultimate destination for the merchandise when the record is considered in its totality." *Id.* at 10.

The court concludes that Commerce's explanation and analysis of the overlapping provisions is reasonable. As Commerce explained, conflicting inferences may be made based on this evidence in isolation, but in light of the entire record and the lesser weight Commerce placed on the home market sale, Commerce reached a reasonable conclusion. *See Remand Results* at 14, 16; *Suramerica de Aleaciones Laminadas*, 44 F.3d at 985 (stating that substantial evidence includes "evidence from which conflicting inferences could be drawn"). Given Commerce's additional explanation, the court defers to Commerce's conclusion regarding this potentially conflicting evidence. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (requiring deference to Commerce's experience and expertise when reviewing AD determinations) (citations omitted); *CS Wind Vietnam*, 832 F.3d at 1377 ("The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.") (citation omitted).

II. Logo Requirements

In its original opinion, the court noted that "[b]ecause 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." *Coalition I*, 448 F. Supp. 3d at 1354–55. On remand, Commerce concluded that this logo provision was "consistent with a sale destined for outside of India" because sales to Indian customers and other customers abroad generally had different markings. *Remand Results* at 16. Commerce also noted that, because the logo provision did not indicate shipment to any particular destination, the destination of the sales merchandise "would not alter [its] ultimate conclusion" regarding the comparison market. *Id.* at 9. Again, Commerce noted that while not dispositive alone, "when considered in its totality, the record supports [its] conclusion." *Id.* at 16.

On this point, Coalition argues that Commerce erroneously "disregarded the argument that the logo is not indicative of an export sale." Pl.'s Br. at 10. Rather Coalition contends that "this conclusion only makes sense if (1) the logo is indicative of a sale to a particular non-Indian market (or group of markets) or (2) the logo cannot be used for sale in India." *Id.* at 10. Thus, Coalition argues that the logo provision "provides no reasonable support for a finding that the sales were destined for export." *Id.* at 11. The Government responds that "Commerce reasonably concluded that a requirement for a [[ ]], as was the case here, is consistent for a sale destined for outside of India." Def.'s Br. at 15.

The court concludes that Commerce's explanation of the logo provision was reasonable and adequately addressed on remand. Commerce's explanation of the differing logo requirements for the challenged sale and Chandan's other sales is based on a reasonable inference that the provision supported Chandan's knowledge that the challenged sale was destined for export. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (requiring a demonstration of a rational connection between the agency's conclusion and the facts found). The court does not disagree with Coalition's contention that Commerce's conclusion must indicate that the logo indicates the goods were destined for export to a non-Indian market. Rather, the court recognizes that Commerce's explanation indicates that Commerce understood Chandan to know that the goods were destined for non-Indian markets, regardless of whether Chandan knew the exact export market. This is consistent with Commerce's knowledge test, which does not require

knowledge of a particular destination for exported goods. *See INA Walzlager Schaeffler KG*, 957 F. Supp. at 263–64.

III. Sale's Terms & Context

Finally, in its prior opinion, the court concluded that "Commerce [did not] indicate[] how or why the terms of the initial offer negate the terms on which the sale was ultimately consummated" given that the challenged sale was negotiated with terms that would indicate an export sale, but the final contract terms may have indicated a home market sale. *Coalition I*, 448 F. Supp. 3d at 1356 (citation omitted). On remand, Commerce explained that the final sales terms

> may weigh in favor of finding a domestic sale in many instances. However, in light of the various factors considered above, as well as the fact that the sales were negotiated with [[ ]] of an India-based affiliate, which for extended periods prior to the [period of investigation] did not sell [[ ]], we find that the record indicates otherwise.

Remand Results at 9–10. In further support of this inference, Commerce "conclude[d] that Chandan had knowledge of sales behavior of its customers (and particular knowledge regarding these sales, given all of the factors explained above, including the particular negotiation history)." *Id.* at 15. Commerce rejected Coalition's arguments regarding the final sales terms as a dispute over the weight that should be accorded to this piece of evidence. *Id.* at 13.

Coalition contends that the initial offer or circumstances of negotiation of the challenged sale were not properly considered by Commerce. First, Coalition argues that Commerce failed to address Chandan's statement that it did not believe the sale was destined for [[ ]] or any of the top three export markets and that Commerce's conclusion was thus "incomplete and unreasonable." Pl.'s Br. at 6. Further, as it also argued to Commerce, Coalition asserts that Chandan's statement that it obtained public information regarding the Indian-affiliate company of the buyer for the challenged sale after it made the sale "strongly suggests that Chandan did not have the information at the time of the sale" and thus Chandan could not be presumed to have familiarity with its customer's main business of export sales. *Id.* at 7. Rather, Coalition argues that Commerce's analysis on this point was "based on speculation and a bootstrapping of tenuous conclusions with one another." *Id.*; *see also id.* at 11. The Government responds that Coalition's opposition to Commerce's remand explanation is based upon the possibility of drawing two inconsistent conclusions from the evidence. Def.'s Br. at 8. The Government

also argues that "[c]onsistent with its practice and application of its knowledge test, Commerce did not presume that Chandan's knowledge regarding [[ ]]'s sales patterns was obtained at the time it acquired the financial statement," but that instead "Commerce reasonably concluded that Chandan had knowledge of the sales behavior of its customers." *Id.* at 12 (citation omitted).

The court accepts Commerce's explanation of this evidence on remand and concludes that the inferences it drew from the record were reasonable. As the Government correctly notes, "the possibility of drawing two inconsistent conclusions form the evidence does not preclude the agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619–20 (1966)); *see also Suramerica de Aleaciones Laminadas*, 44 F.3d at 985; Def.'s Br. at 8. Thus, Commerce's conclusion that the initially negotiated terms, in light of the totality of the evidence and the circumstances of the negotiation, indicated that the challenged sale was for export was based on reasonable inferences and supported by substantial evidence. *Id.*; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Coalition's contention that Commerce disregarded Chandan's assertion that it did not know the particular final destination of the challenged sale is unpersuasive. Similarly, the court defers to Commerce's reasonable inference that Chandan was familiar with the behavior of its customer in light of the negotiation history. As discussed, Commerce enumerated the evidence that supported its conclusion that Chandan knew the sale was for export. That was all that was required of Commerce. *See INA Walzlager Schaeffler KG*, 957 F. Supp. at 263–64.

In short, the court accepts Commerce's explanation of the previously unaddressed evidence and concludes that, given the totality of the evidence, Commerce's *Remand Results* were based on substantial evidence.

CONCLUSION

For the reasons stated above, the court sustains Commerce's *Remand Results* and enters judgment in favor of the Government.

SO ORDERED.

Dated: May 13, 2021
New York, New York

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

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