

U.S. Customs and Border Protection



EXTENSION AND EXPANSION OF DECLARATION ZONE TEST

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: On August 30, 2021, U.S. Customs and Border Protection (CBP) announced in the **Federal Register** that CBP would conduct a Declaration Zone test at cruise terminal facilities at participating sea ports of entry (POEs) that would run for approximately two years. This document announces that CBP is extending the test period for an additional two years. In addition to the extension, this document announces that CBP intends to expand the Declaration Zone test to up to eighteen additional sea POEs, as well as to travelers being processed in Simplified Arrival for open loop cruises. The Declaration Zone test allows for streamlined processing by allowing a demonstrative initial declaration for arriving travelers in lieu of an oral or written declaration of all articles brought into the United States to a CBP officer as required by current CBP regulations.

DATES: CBP is extending the Declaration Zone test at cruise terminal facilities at participating sea POEs until October 16, 2025. CBP is expanding the Declaration Zone test to eligible open loop cruises no sooner than October 1, 2023. The expansion date may vary at each location.

ADDRESSES: Written comments concerning program, policy, and technical issues may be submitted at any time during the test period via email to *BiometricSea@cbp.dhs.gov*. Please use "Comment on Declaration Zone Test" in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Maria Rivera, Program Manager, Biometric Entry-Exit Strategic Transformation, Office of Field Operations, *maria.c.rivera@cbp.dhs.gov* or (202) 325-4596.

SUPPLEMENTARY INFORMATION:

Background

On August 30, 2021, U.S. Customs and Border Protection (CBP) announced in the **Federal Register** (86 FR 48436) that CBP would conduct a Declaration Zone test at cruise terminal facilities at participating sea ports of entry (POEs). The notice describes the Declaration Zone test, while setting forth requirements for participating in the test, the duration of the test, and how CBP will evaluate the test. The notice also invites public comment on any aspect of the test. In brief, the Declaration Zone test fulfills the declaration requirement under CBP regulations, while also allowing for streamlined processing. Current CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP officer. *See* 19 CFR part 148, subpart B. The Declaration Zone test provides arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration through the use of declaration zones at cruise terminal facilities at select sea POEs.

Description and Procedures

The 2021 notice provides the description and procedures for the Declaration Zone test. 86 FR 48437. Within a cruise terminal facility participating in the Declaration Zone test, two distinct customs declaration zone queues are established for entering the egress area: one for *No Items to Declare* and another for *Items to Declare*. Signage is posted to clearly label the queues at the entrance to the egress area after travelers collect their luggage. The physical act of selecting the *No Items to Declare* queue or the *Items to Declare* queue in and of itself constitutes an initial demonstrative declaration. CBP officers conduct roving enforcement operations within the baggage collection and egress area to ensure traveler compliance.

No Items To Declare Queue

Travelers who determine they have nothing to declare enter the *No Items to Declare* queue and proceed through the egress area to the facility exit. CBP officers conduct roving operations in the *No Items to Declare* zone to affirm traveler compliance, receive oral declarations, and make referrals to secondary inspection as necessary. Travelers who are not questioned by CBP officers conducting roving operations may proceed to the exit.

Items To Declare Queue

Travelers with items to declare enter the *Items to Declare* queue and present before a CBP officer to make an oral declaration. The

CBP officer makes a determination if duty is owed by the traveler or if additional inspection is warranted. The CBP officer then directs the traveler accordingly.

Referral to Secondary Inspection

If a traveler is referred to secondary inspection at any point, CBP officers will follow standard procedures, including collecting an oral and/or written declaration during the referral and inspection. CBP officers will also follow current agency policy on declaration amendment opportunities.

Test Period and Participants

As indicated in the 2021 notice, the Declaration Zone test was set to begin no earlier than September 27, 2021, and run for approximately two years, initially at two sea POEs, Miami, Florida, and Bayonne, New Jersey. 86 FR 48436–7. The 2021 notice stated that the start date may vary at each location in accordance with the resumption of passenger operations suspended due to the COVID–19 pandemic. 86 FR 48437. Also, as indicated in the 2021 notice, the test is currently restricted to closed loop cruises participating in the voluntary facial biometric debarkation (FBD) program. 86 FR 48437.

Extension of the Declaration Zone Test Period and Expansion of the Declaration Zone Test

Extension of the Test Period

Based on limited cruise line operations and the suspension of passenger operations due to the COVID–19 pandemic, CBP was not able to implement the Declaration Zone test until May 2022 in Bayonne and July 2022 in Miami. Due to this postponement, CBP is extending the Declaration Zone test for an additional two years until October 16, 2025, to properly assess and evaluate the impact of the new form of declaration.

Expansion of the Test

Additional Sea POEs

In addition to the extension of the test period, to better evaluate the Declaration Zone test, CBP also intends to expand the Declaration Zone test to cruise terminal facilities at up to eighteen additional sea POE locations. CBP will only expand the Declaration Zone test to cruise terminal facilities at sea POEs with the sufficient space and infrastructure to accommodate queuing for processing through a Declaration Zone. CBP Headquarters will communicate with each Field

Office and POE with cruise terminal facilities meeting these criteria and advise of the option to have a Declaration Zone test at their respective terminal(s). As provided in the 2021 notice, once a new location is identified, CBP will announce the expansion on the public facing CBP website, <https://www.cbp.gov>, notifying the traveling public of the implementation of demonstrative declarations upon arrival into the United States at that particular sea POE. 86 FR 48437.

Eligible Open Loop Cruises

Additionally, CBP is expanding the Declaration Zone test to travelers being processed in Simplified Arrival for open loop cruises. When the Declaration Zone test was initially announced in 2021, it was limited to passengers on closed loop cruises processed in FBD. FBD is the facial biometric solution for processing arriving cruise passengers on closed loop cruises, whereas Simplified Arrival is an equivalent facial biometric solution for processing arriving cruise passengers on open loop cruises.¹ The test will no longer be restricted to closed loop cruises and will expand to open loop cruises participating in Simplified Arrival no sooner than October 1, 2023. The expansion date may vary at each location.

Authorization for the Test

The test described in the 2021 notice² and extended and expanded by this notice is authorized pursuant to 19 CFR 101.9(a), which allows the Commissioner of CBP to impose requirements different from those specified in the CBP Regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new operational procedures regarding the processing of passengers. This test is authorized pursuant to this regulation as it is designed to evaluate whether allowing a demonstrative initial declaration is a feasible way to fulfill the declaration requirement and allow for streamlined processing.

Waiver of Certain Regulatory Requirements

CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP

¹ Simplified Arrival is an enhanced international arrival process that uses facial biometrics to automate the manual document checks that are already required for admission into the United States. More information on CBP's use of facial biometrics to secure and streamline travel can be found at <https://www.cbp.gov/travel/biometrics>.

² 86 FR 48437.

officer. *See* 19 CFR 148.12 and 148.13. The test described in the 2021 notice³ and extended and expanded by this notice provides arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration. All other requirements of 19 CFR part 148, subpart B, regarding declarations, including those provided by 19 CFR 148.18, regarding failure to declare, and 19 CFR 148.19, regarding false or fraudulent statements, still apply.

Dated: October 10, 2023.

DIANE J. SABATINO,
*Acting Executive Assistant Commissioner,
Office of Field Operations, U.S. Customs and
Border Protection.*

[Published in the Federal Register, October 16, 2023 (88 FR 71372)]

³ 86 FR 48437.

AGENCY INFORMATION COLLECTION ACTIVITIES:**Extension of Existing Collection; Crew Member's Declaration CBP (Form 5129)**

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

ACTION: 60-Day notice and request for comments.

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

DATES: Comments are encouraged and must be submitted (no later than December 18, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0021 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Crew Member's Declaration.

OMB Number: 1651-0021.

Form Number: 5129.

Current Actions: Extension without change to the collection.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: CBP Form 5129, *Crew Member's Declaration*, is a declaration made by crew members listing all goods acquired abroad which are in their possession at the time of arrival in the United States. The data collected on CBP Form 5129 is used for compliance with currency reporting requirements, supplemental immigration documentation, agricultural quarantine matters, and the importation of merchandise by crew members who complete the individual declaration. This form is authorized by 19 U.S.C. 1431 and provided for by 19 CFR 4.7, 4.7a, 4.81, 122.83, 122.84, and 148.61-148.67. CBP Form 5129 is accessible at <https://www.cbp.gov/document/forms/form-5129-crew-members-declaration-and-instructions>.

Type of Information Collection: Crew Member's Declaration (Form 5129).

Estimated Number of Respondents: 6,000,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 6,000,000.

Estimated Time per Response: 10 minutes (0.166 hours).

Estimated Total Annual Burden Hours: 996,000.

Dated: October 12, 2023.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, October 17, 2023 (88 FR 71583)]

U.S. Court of International Trade

Slip Op. 23–151

GUJARAT FLUOROCEMICALS LIMITED, Plaintiff, v. UNITED STATES,
Defendant, and DAIKIN AMERICA, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 22–00120

[Sustaining an agency decision submitted in response to court order]

Dated: October 13, 2023

John M. Gurley, ArentFox Schiff LLP, of Washington, D.C., for plaintiff. With him on the briefs were *Diana Dimitriuc-Quaia* and *Jessica R. DiPietro*.

Daniel F. Roland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Elizabeth J. Drake, Schagrin Associates, of Washington, D.C., for defendant-intervenor. With her on the briefs were *Roger B. Schagrin*, *Luke A. Meisner*, and *Justin M. Neuman*.

OPINION

Stanceu, Judge:

Plaintiff brought this action to contest a determination of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) in a countervailing duty (“CVD”) investigation of imported granular polytetrafluoroethylene (“PTFE”) resin from India. In the contested decision (the “Final Determination”), Commerce concluded that plaintiff Gujarat Fluorochemicals Limited (“Gujarat Fluorochemicals” or “GFCL”) received countervailable subsidies from ten Indian government programs and assigned Gujarat Fluorochemicals an estimated total countervailable subsidy rate of 31.89%.

Gujarat Fluorochemicals challenged the Department’s findings involving two of the ten government programs. Principally, GFCL contested the Department’s including in the 31.89% total subsidy rate a rate of 26.50% for what Commerce considered to be a countervailable subsidy stemming from a 30-year lease of land to a GFCL affiliate, Inox Wind Limited (“IWL”), by the State Industrial Development Corporation (“SIDC”). Gujarat Fluorochemicals also contested the

inclusion of a subsidy rate of 0.12% for land Gujarat Fluorochemicals obtained from the Gujarat Industrial Development Corporation (“GIDC”).

Before the court is the Department’s “Remand Redetermination,” issued in response to the court’s opinion and order in *Gujarat Fluorochemicals Limited v. United States*, 47 CIT ___, 617 F. Supp. 3d 1328 (2023) (“*Gujarat I*”). Final Results of Redetermination Pursuant to Court Remand (Feb. 23, 2023), ECF No. 63 (“*Remand Redetermination*”). Commerce, under protest, excluded from GFCL’s overall subsidy rate the 26.50% subsidy rate pertaining to the SIDC’s lease of land to Inox Wind Limited. Also in response to the court’s order, Commerce reconsidered its inclusion of a subsidy rate pertaining to the GIDC, concluding again that the inclusion of the 0.12% rate was appropriate. Based on those changes, Commerce determined a new subsidy rate of 5.39% for Gujarat Fluorochemicals and assigned that same rate as the “all others” rate for the investigation. The court sustains the Remand Redetermination.

I. BACKGROUND

Background on this case is presented in the court’s prior opinion and is briefly summarized and supplemented herein. *Id.*, 47 CIT at ___, 617 F. Supp. 3d at 1330–31. Commerce published the contested “Final Determination” as *Granular Polytetrafluoroethylene Resin From India: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 87 Fed. Reg. 3,765 (Int’l Trade Admin. Jan. 25, 2022). Commerce incorporated by reference an explanatory document, the “Final Issues and Decision Memorandum.” *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Granular Polytetrafluoroethylene Resin from India* (Int’l Trade Admin. Jan. 18, 2022), P.R. 248.¹

Commerce filed the Remand Redetermination on February 23, 2023. Plaintiff Gujarat Fluorochemicals and defendant-intervenor Daikin America, Inc. (“Daikin”) submitted comments on the Remand Redetermination. Comments on Remand Results of Def.-Int. Daikin America Inc. (Mar. 9, 2023), ECF No. 64 (“Def.-Int.’s Comments”); Pl.’s Comments on the Department of Commerce’s Remand Redetermination (Mar. 9, 2023), ECF No. 66 (“Pl.’s Comments”). Defendant United States submitted responses to those comments. Def.’s Resp. to Comments on Remand Results (Mar. 16, 2023), ECF No. 67 (“Def.’s Resp.”).

¹ Documents in the Joint Appendix (Nov. 4, 2022), ECF Nos. 52 (Conf.), 53 (Public) are cited as “P.R. ___.”

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),² pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (“Tariff Act”), *as amended*, 19 U.S.C. § 1516a, including an action contesting a final affirmative determination by Commerce of whether or not a countervailable subsidy is being provided with respect to merchandise subject to a countervailing duty investigation. *See id.* §§ 1516a(a)(2)(B)(i), 1671d(a)(1).

In reviewing an agency determination, the 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.” *Id.* § 1516a(b)(1). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Daikin’s Comments in Response to the Remand Redetermination

In their comment submissions, Daikin and Gujarat Fluorochemicals raised arguments in opposition to aspects of the Remand Redetermination, even though advocating also that the court sustain the Remand Redetermination. Def.-Int.’s Comments 6; Pl.’s Comments 7. Defendant argues that the court should sustain the Remand Redetermination, which it describes as “supported by substantial evidence.” Def.’s Resp. 3. The court has considered the objections Daikin and GFCL have raised to the Remand Redetermination and concludes, for the reasons stated herein, that they do not merit reconsideration of the decision the court reached in *Gujarat I*.

In its comments to the Remand Redetermination, defendant-intervenor Daikin raises a new objection to the court’s opinion and order in *Gujarat I*, specifically taking issue with the court’s order therein directing Commerce to delete from GFCL’s overall rate the 26.50% subsidy rate for the lease of land by the SIDC to Inox Wind Limited. Daikin now argues that:

Daikin is concerned that the *Remand Opinion* [*Gujarat I*] misapplied the standard of review for antidumping and countervailing duty determinations by directing Commerce to delete the

² All citations herein to the United States Code are to the 2018 edition. All citations to the Code of Federal Regulations are to the 2022 edition.

subsidy margin for this program and not allowing Commerce to reconsider or more fully explain its original determination. . . . [B]ecause the Court directed a particular outcome on remand regarding the provision of land by the SIDC and because Commerce refused to consider any comments on this aspect of its redetermination, Daikin is limited in these comments to reiterating its position supporting Commerce's original determination in the underlying investigation and noting its disagreement with the substance and form of the Court's *Remand Opinion* on this issue.

Def.-Int.'s Comments 5–6. Daikin argues that “[t]he Federal Circuit has explained that the statute permits the Court of International Trade to remand an agency decision for further consideration consistent with its decision, but *the statute does not permit the Court of International Trade to ‘outright revers[e] a decision by Commerce. . . .’*” *Id.* at 5 (emphasis added) (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1383 (Fed. Cir. 2008) (“*Ad Hoc Shrimp*”) and citing 19 U.S.C. § 1516a(c)(3)). Daikin maintains that the court impermissibly directed Commerce, upon remand, to “outright reverse” the decision the agency reached on the land lease to Inox Wind Limited.

Daikin is not correct in asserting that the court was required to issue another remand order to allow Commerce to “reconsider or more fully explain its original determination.” *Id.* As the court explains below, a second remand could not have produced an outcome as to the lease of land by the SIDC to Inox Wind Limited differing from the one the court ordered. Accordingly, the course of action Daikin advocates would have delayed this litigation, imposed unnecessary burdens on the parties, and been unfair to plaintiff as to the claim on which it prevailed.

Because the decision to impose a countervailing duty for the land lease to Inox Wind Limited resulted entirely from the Department's erroneous interpretation of its own regulation, another remand to the agency could not have produced a different result, i.e., a result in which a countervailable subsidy for the lease of land by the SIDC to IWL would have been legally permissible. Specifically, the court in *Gujarat I* concluded that the regulation involved, 19 C.F.R. § 351.525(b)(6)(iv), which was “part of a comprehensive revision of countervailing duty regulations following enactment of the Uruguay Round Agreements Act,” was intended to address “the situation where a subsidy is provided to an input producer whose production is

dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain.” *Id.*, 47 CIT at __, 617 F. Supp. 3d at 1336 (quoting *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,401 (Int’l Trade Admin. Nov. 25, 1998)). The court noted that the preamble to the 1998 promulgation of the regulation provided “three examples that illustrate the intended meaning of the term ‘primarily dedicated to the production of the downstream product,’” which “clarify that the term pertains to the role the input performed, in the physical sense, in the production of the downstream product rather than whether the input was provided ‘primarily’ to the producer of that product.” *Id.* Thus, the court found that “[e]lectricity used to power an entire production plant,” like the electricity provided by Inox Wind Limited to GFCL, “cannot fairly be characterized as ‘merely a link in the overall production chain’ of the finished products that are made there.” *Id.*, 47 CIT at __, 617 F. Supp. 3d at 1337 (citation omitted). Electricity “is energy, and, being of universal application, is not remotely describable as an upstream product that is ‘primarily dedicated to the production of the downstream product’ as is required by § 351.525(b)(6)(iv).” *Id.* Thus, the court concluded, “electricity cannot be shown on this record to be ‘primarily dedicated’ either to Gujarat Fluorochemicals’s PTFE resin or to the production of any other (unidentified) products made at GFCL’s facilities, when the term ‘primarily dedicated’ is given its correct meaning.” *Id.*, 47 CIT at __, 617 F. Supp. 3d at 1340.

The regulation aside, no authority available to Commerce would have allowed imposition of a countervailing duty for the land lease to Inox Wind Limited. As the court noted, “Commerce did not conduct an upstream subsidy investigation” as defined in Section 771A of the Tariff Act, 19 U.S.C. § 1677–1. *Id.*, 47 CIT at __, 617 F. Supp. 3d at 1334. Had Commerce attempted to conduct such an upstream subsidy investigation, it would have had to disregard uncontradicted record evidence that “only approximately 0.07% of the electricity” used by GFCL was “supplied by IWL” and “went to the production of the merchandise subject to the investigation.” *Id.*, 47 CIT at __, 617 F. Supp. 3d at 1334–35 (citing 19 U.S.C. § 1677–1(a)(3) (allowing an upstream subsidy where the input product “has a significant effect on the cost of manufacturing or producing the merchandise.”)). The court explained that the “error in the interpretation of § 351.525(b)(6)(iv) led Commerce to the wrong conclusion,” *id.*, 47 CIT at __, 617 F. Supp. 3d at 1337, and that the proper interpretation of the regulation, as informed by its history and purpose, rendered “the inclusion of the

26.50% estimated subsidy rate . . . contrary to law,” *id.*, 47 CIT at ___, 617 F. Supp. 3d at 1341. The court held, accordingly, that the only lawful action that Commerce could take upon remand would be to delete the 26.50% rate from the overall subsidy rate. *Id.*

The court concluded in *Gujarat I*, and reiterates here in response to defendant-intervenor’s comments, that the Department’s interpretation of the regulation was not owed deference. See Def.-Int.’s Comments 5 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) and *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415–2418 (2019)); see also Suppl. Br. of Def.-Int. Daikin America Inc. (Jan. 20, 2023), ECF No. 58. Further, the court explained, and restates here, that “[t]he countervailing duty investigation is completed and its outcome reviewed judicially as a final determination on the agency record.” *Gujarat I*, 47 CIT at ___, 617 F. Supp. 3d at 1341. Having produced a Final Determination that was contrary to law, Commerce was not entitled, in the circumstance presented, to an opportunity to redo its investigation, and no principle of law now requires the court to provide such an opportunity, contrary to what defendant-intervenor posits. Def.-Int.’s Comments 5 (expressing concern that the court in *Gujarat I* “misapplied the standard of review” by “not allowing Commerce to reconsider or more fully explain its original determination”).³ This Court, like any Article III court, must have the ability to decide whether an agency has or has not correctly interpreted its own regulation. Where, as here, a judicial decision on the validity of the agency’s legal interpretation is controlling on the issue presented by plaintiff’s claim, this Court must have the ability to order the remedy compelled by the court’s decision on the legal question presented. See 28 U.S.C. § 1585 (granting the Court of International Trade all the powers in law and equity of a district court).

Daikin’s argument is unpersuasive for another reason: a precedent upon which it relies, *Ad Hoc Shrimp*, is not on point. Daikin cites that decision in support of a blanket proposition that 19 U.S.C. § 1516a does not permit the Court of International Trade to “outright reverse

³ During oral argument, defendant-intervenor did not dispute that the 26.50% subsidy rate must be deleted from Gujarat Fluorochemicals’s overall subsidy rate if the regulation, 19 C.F.R. § 351.525(b)(6)(iv), is determined to be inapplicable to the facts of this case:

The court: So, in other words, you agree with the plaintiff on at least one thing. If the [regulation] doesn’t apply, there’s no 26.5 [percent]. In fact, there’s nothing.

Defendant-Intervenor’s counsel: If the regulation does not apply, if the words “downstream product” in fact mean “subject merchandise,” then Commerce would have a problem.

The court: You’d agree with me there’d be no countervailing duty?

Defendant-Intervenor’s counsel: If it had to be primarily dedicated to “subject merchandise” versus “downstream product.”

a decision by Commerce.” Def.-Int.’s Comments 5 (quoting *Ad Hoc Shrimp*, 515 F.3d at 1383). However, the facts, and therefore the holding, of *Ad Hoc Shrimp* are readily distinguished from this case. In *Ad Hoc Shrimp*, plaintiffs-appellants contested a final antidumping duty determination issued by Commerce, which excluded certain products from the scope of the investigation; plaintiffs in that case requested that this Court remand the determination to Commerce with instructions to amend the antidumping duty order to include those excluded products. This Court dismissed the plaintiffs’ challenge on the grounds that (i) it lacked the authority to amend the antidumping order itself, and (ii) it lacked jurisdiction to remand the determination back to Commerce, reasoning that because the U.S. International Trade Commission (“ITC”) had already made its final injury determination based on the Department’s findings (including determinations on scope), a decision plaintiffs did not appeal, such a remand would be futile. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 31 CIT 102, 112–116, 473 F. Supp. 2d 1336, 1345–48 (2007). The Court of Appeals for the Federal Circuit, although affirming on the first ground, reversed on the second ground, concluding that the contested decision should have been remanded to Commerce even though “ITC action will also be necessary before the antidumping order itself can be amended.” *Ad Hoc Shrimp*, 515 F.3d at 1383. In contrast to the unusual circumstance presented in *Ad Hoc Shrimp*, the land lease to Inox Wind Limited presented a straightforward issue of regulatory interpretation that was controlling on the validity of plaintiff’s claim.

Another important consideration is that a second remand unnecessarily would have delayed the proceeding, required additional briefing under USCIT Rule 56.2, and burdened the parties and the court, all for no purpose. *See* USCIT Rules 1, 56.2. A second remand would have been particularly burdensome and unfair to the plaintiff, which successfully contested the inclusion of a subsidy rate for the SIDC’s lease of land to Inox Wind Limited and is entitled to a remedy that excludes that rate from the overall subsidy rate. Daikin’s argument disregards the court’s obligation to order the remedy for which plaintiff has qualified and to apply USCIT Rule 56.2 “to secure the just, speedy, and inexpensive determination” of this action. USCIT R. 1.

C. Gujarat Fluorochemicals’s Comments in Response to the Remand Redetermination

In its comments on the Remand Redetermination, plaintiff GFCL expressed support for the Remand Redetermination with respect to the removal of the 26.50% subsidy rate. Pl.’s Comments 4. However, Gujarat Fluorochemicals objected to the Department’s determination

concerning the continued inclusion of the 0.12% subsidy rate in GFCL's overall rate, arguing that "Commerce's benefit calculation and benchmark determination for the GIDC's provision of land remain unsupported by the record evidence and contrary to law." *Id.* at 2. Nonetheless, GFCL noted that it "has decided not to pursue this argument," *id.*, and "will not request a second remand to the agency on the this [sic] issue," *id.* at 7, thereby foregoing its right to appeal this issue further in the interest of obtaining "expeditious corrective action," *id.* at 2. GFCL thus has waived the very objection it lodges against the Remand Redetermination.

III. CONCLUSION

For the foregoing reasons, the court finds Daikin's and Gujarat Fluorochemicals's new arguments unavailing and will enter judgment sustaining the Remand Redetermination.

Dated: October 13, 2023

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU JUDGE

Slip Op. 23–152

SENECA FOODS CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmman, Judge
Court No. 22–00243

[All eight of Commerce’s denials are remanded for further explanation or reconsideration.]

Dated: October 18, 2023

James M. Smith, Covington & Burling LLP, of Washington, D.C., argued for Plaintiff Seneca Foods Corp. With him on the briefs were *Thomas Brugato*, *Kwan Woo Kim*, and *Brock M. Mason*.

Kyle S. Beckrich, Trial Attorney, U.S. Department of Justice, Washington, D.C., argued for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION AND ORDER**Katzmann, Judge:**

This case arises from an agency’s true-as-steel obligation to review the entire record and to sufficiently explain its determinations for judicial review and subsequent remedy. Claiming that domestic steel producers are unable to provide it with sufficient tin mill products consisting of steel in order to manufacture cans, Plaintiff Seneca Foods Corporation (“Seneca”), the nation’s largest vegetable canner and the last domestic food company that still makes its own cans, challenges eight decisions by the U.S. Department of Commerce (“Commerce”) denying each of Seneca’s requests for exclusion from steel tariffs, known as “national security” tariffs, imposed on imports from foreign producers of steel under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. *See* Compl. ¶¶ 7–8, 95–105, Aug. 19, 2022, ECF No. 6; Pl.’s Mot. for J. on Agency R. at 1, Feb. 28, 2023, ECF No. 31 (“Pl.’s Br.”).¹ In its motion for judgment on the

¹ Of the eight requests filed by Seneca, five requests, filed in October 2021, were denied in April 2022. *See* Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 257423* (Apr. 9, 2022), P.R. 1; Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 257428* (Apr. 9, 2022), P.R. 50; Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 257708* (Apr. 9, 2022), P.R. 100; Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 257709* (Apr. 9, 2022), P.R. 149; Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 257712* (Apr. 9, 2022), P.R. 198 (together, the “October 2021 Requests”).

One request, filed in January 2022, was denied in April 2022. Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 275504* (Apr. 30, 2022), P.R. 247 (the “January 2022 Request”).

The final two requests, filed in March 2022, were denied in July 2022. *See* Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 283368* (July 9, 2022), P.R. 293; Bureau of Indus. & Sec., Dep’t of Com., *Steel Section 232 Remedy Exclusion Request, No. 283369* (July 9, 2022), P.R. 342 (together, the “March 2022 Requests”).

agency record, Seneca requests that the court (1) enter judgment that all eight of Commerce’s denials were arbitrary and capricious or otherwise unlawful in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, (2) declare that Plaintiff was entitled to the requested exclusions, or (3) in the alternative, remand the matter for reconsideration. Commerce opposes Seneca’s motion as to six of the exclusion requests—the October 2021 and January 2022 Requests—and asks the court to remand the two March 2022 Requests for further consideration. Each denial relies on a separate administrative record and is reviewed independently.

First, the court concludes that Commerce’s denials of the October 2021 and January 2022 Requests were arbitrary and capricious for their failure to consider and address record evidence that ran counter to Commerce’s stated reasoning. But because the record does not compel a grant of the exclusion requests, the denials are remanded to Commerce. Second, the denials of the March 2022 Requests are remanded, as sought by Commerce, without reaching the question of error specific to those requests. All eight denials are therefore remanded to Commerce for reconsideration consistent with this opinion.

BACKGROUND

I. Legal Background

Section 232 enables the President to impose tariffs on certain imported goods when the Secretary of Commerce determines that the products in question are brought into the country in “such quantities or under such circumstances as to threaten or impair the national security.” 19 U.S.C. § 1862(c)(1)(A). Presidential Proclamation 9705, issued in March 2018, invoked Section 232 to impose a 25 percent tariff on imports of specific steel articles from all countries except Canada and Mexico. *See Adjusting Imports of Steel into the United States, Pres. Proc. No. 9705*, 83 Fed. Reg. 11625 (Mar. 8, 2018).

The exclusion of a particular steel article from the steel tariffs was possible on one of two bases. To justify relief, Commerce was required to determine either (1) that the article was not “produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” or (2) that “specific national security considerations” justified the exclusion of the article. *Id.* at 11627. “Such relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States.” *Id.* Commerce accordingly issued rules detailing the procedure for its review of exclusion requests. *See Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential*

Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 15 C.F.R. pt. 705, supp. 1 (Dep't Com. Dec. 14, 2020).

The process begins with the filing of an exclusion request by a “directly affected individual[] or organization[] located in the United States.” *Id.* pt. 705, supp. 1(c)(1). The request must clearly identify and establish one of the two bases for exclusion: either (1) that the article “is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality,” or (2) that “specific national security considerations” justify the exclusion of the article. *Id.* pt. 705, supp. 1(c)(5)(i). Commerce further defines the criteria for exclusion:

- An article “[n]ot produced in the United States in a sufficient and reasonably available amount” means that the article is not available “immediately” in the United States to meet the requester’s specified business activities, with “immediately” defined as eight weeks or, if not possible, a date earlier than the time required for the requester to obtain the entire quantity of the product from the requester’s foreign supplier. *Id.* pt. 705, supp. 1(c)(6)(i).
- An article “not produced in the United States in a satisfactory quality” means that no domestic “substitute product” for the article exists; a substitute product “means that the steel or aluminum being produced by an objector can meet ‘immediately’ . . . the quality (e.g., industry specs or internal company quality controls or standards), regulatory, or testing standards, in order for the U.S.-produced steel to be used in that business activity in the United States by that end user.” *Id.* pt. 705, supp. 1(c)(6)(ii).
- “The exclusion review criterion ‘or for specific national security considerations’ is intended to allow the U.S. Department of Commerce, in consultation with other parts of the U.S. Government as warranted, to make determinations whether a particular exclusion request should be approved based on specific national security considerations.” *Id.* pt. 705, supp. 1(c)(6)(iii).

Following the exclusion request, a domestic steel producer can file an objection that refutes “the specific basis identified in, and the support provided for, the submitted exclusion request.” *Id.* pt. 705, supp. 1(d)(4). In its objection, the domestic steel producer must “identify how it will be able to produce and deliver the quantity of steel . . . needed” as part of its obligation to “clearly identify, and provide

support for, its opposition to the proposed exclusion.” *Id.* pt. 705, supp. 1(d)(4). The “burden is on that supplier to demonstrate that the exclusion should be denied because of failure to meet the specified criteria.” *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46026, 46029 (Dep’t Com. Sept. 11, 2018). The requester and objector may file a rebuttal and surrebuttal, respectively. 15 C.F.R. pt. 705, supp. 1(f)–(g).

All filings in the process—from the exclusion request to the surrebuttal—are submitted via online forms made available through Commerce’s “232 Exclusions Portal.” *Id.* pt. 705, supp. 1(d)–(h). It is further “incumbent on both the exclusion requester, and objecting producers, to provide supplemental evidence supporting their claimed delivery times.” *Id.* pt. 705, supp. 1(d)(4). Such additional evidence may include confidential or proprietary business information (“CBI”). 15 C.F.R. pt. 705, supp. 1(b)(5)(iii). Moreover, each online form requires the filer to certify that the information submitted is “complete and correct to the best of [the filer’s] knowledge.” *See* P.R. 18, 29–30, 35, 48.²

Commerce’s Bureau of Industry and Security (“BIS”) then evaluates all filings to determine whether the steel article meets one of the two bases for exclusion. To determine whether the potentially excluded steel article is produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality, BIS solicits a memorandum from the International Trade Administration (“ITA”) that makes factual findings and recommends granting or denying the exclusion request in full or in part. *See* P.R. 1. BIS then issues a determination with an explanation that is “responsive to any of the objection(s), rebuttal(s) and surrebuttal(s) for that submitted exclusion request.” 15 C.F.R. pt. 705, supp. 1(h)(2)(i). In so doing, BIS’s determination may accept and adopt the ITA’s recommended findings if the BIS finds that there are no overriding national security concerns that compel a grant of the exclusion request. *See* P.R. 1.

If the objector thereafter refuses to fulfill the requester’s orders of the steel article in a sufficient and reasonably available amount or in a satisfactory quality, “the requester may submit a new request with documentation evidencing this refusal.” *Section 232 Steel and Aluminum Tariff Exclusions Process: Interim Final Rule*, 85 Fed. Reg.

² P.R. refers to the Public Record, which contains the eight public administrative records relevant to this case. *See* Pub. Admin. R., December 2, 2022, ECF No. 25. Seneca has also made public certain information that it had treated as business proprietary given the “passage of time.” Pl.’s Resps. to Letter at 4 n.1, July 7, 2023, ECF No. 45. Citations to this now-public information, which does not appear in the Public Record as filed, refer to the Confidential Record (“C.R.”). *See* Confidential Admin. R., Dec. 2, 2022, ECF No. 24.

81060, 81065 (Dep’t Com. Dec. 14, 2020) (“*Interim Final Rule*”). That new exclusion request restarts the entire process described above. If the objector continues to contest the new exclusion request, Commerce allows “the exclusion requester to document in the rebuttal the past activity with that objector.” *Id.*

II. Factual Background

As has been noted, Plaintiff Seneca is a U.S.-based company in the business of processing and canning fruits and vegetables. *See* P.R. 20. As the nation’s largest vegetable canner and the last domestic food company that still makes its own cans, Seneca requires tin mill products consisting of steel to manufacture the cans. *See* P.R. 20. Citing domestic supply constraints and high demand, Seneca began in 2014 to import a portion of its required tin mill products from abroad. P.R. 21. In 2021, Seneca repeatedly contacted domestic suppliers to inquire about their availability of tin mill products but was only able to secure a limited volume that was below its needs. *See* P.R. 21–22. In particular, Seneca stated that U.S. Steel, a domestic producer of steel, was unwilling to give a quote for tin mill products due to its inability to supply any additional material in 2021 and beyond. P.R. 22. Faced with such domestic supply shortages in recent years, Seneca continued to purchase steel from foreign suppliers to meet its needs. P.R. 22.

Seeking to exempt its purchases from Section 232 tariffs, Seneca filed a total of eight exclusion requests with Commerce on the basis of insufficient U.S. availability of tin mill products. *See* P.R. 10, 59, 109, 158, 207, 256, 306, 351. The five October 2021 Requests were denied on April 9, 2022; the January 2022 Request was denied on April 30, 2022; and the March 2022 Requests were denied on July 9, 2022. Compl. ¶ 61; *see also supra* note 1. The requests covered imports of tin-free steel (“TFS”) from Japan and China, as well as prime electrolytic tinplate (“ETP”) from China and Turkey. *See* Pl.’s Br. at 5. U.S. Steel Corporation (“USS”), a domestic producer of steel, objected to each of the eight exclusion requests. Compl. ¶ 11. Seneca and USS also filed rebuttals, surrebuttals, and additional evidence for all eight exclusion requests. *Id.* ¶¶ 63–94.

The chart below summarizes each request and accompanying denial, and the following sections describe the requests and subsequent agency decisions in detail.

Seneca's Exclusion Requests				
Shorthand	Number	Date Filed	Date Denied	Status in This Litigation
October 2021 & January 2022 Requests	257423	Oct. 20, 2021	Apr. 9, 2022	Contested
	257428	Oct. 20, 2021	Apr. 9, 2022	Contested
	257708	Oct. 21, 2021	Apr. 9, 2022	Contested
	257709	Oct. 21, 2021	Apr. 9, 2022	Contested
	257712	Oct. 21, 2021	Apr. 9, 2022	Contested
	275504	Jan. 23, 2022	Apr. 30, 2022	Contested
March 2022 Requests	283368	Mar. 15, 2022	July 9, 2022	Remand Requested by Commerce
	283369	Mar. 15, 2022	July 9, 2022	Remand Requested by Commerce

A. October 2021 and January 2022 Requests

In the October 2021 Requests, Seneca submitted a letter with the initial exclusion requests that described the domestic shortages of the goods that it had imported. The letter recounted Seneca's attempts to secure supplies from domestic producers, including USS, prior to placing orders with importers. *See* P.R. 20.³ USS filed an objection, stating in its online form that USS could supply 100 percent of the requested quantity of tin mill products within a timeframe shorter than that of Seneca's foreign suppliers. P.R. 28. USS also stated that it had supplied Seneca with tin mill products within the two years prior to the filing. P.R. 29.

Seneca rebutted USS's statements by submitting a letter and two email exhibits. Seneca's letter first emphasized that Seneca had placed purchase orders with foreign suppliers on November 20, 2020, April 22, 2021, and May 3, 2021, only after it had confirmed that no domestic producers were able to supply its requested volumes during 2021. P.R. 37. Corroborating its efforts, Seneca attached an email, dated November 13, 2020, from its Vice President of Strategic Sourcing to other Seneca employees. P.R. 41. The email, labeled "USS Update" and documenting a phone call with USS, states: "They are not offering anything now at any price," and "They say if they have available production in any month, they will contact us and see if we have interest. They just don't want to commit to anything right now." P.R. 36, 41. Seneca's letter then stated that in the time period between USS's objection and Seneca's rebuttal filing, Seneca had engaged USS over email for volumes to be delivered in 2022; once again, USS had purportedly offered nothing. P.R. 37–38. The second exhibit,

³ The records and Commerce's denials of each of the October 2021 Requests are almost identical in relevant part. To avoid citations to five different records with each reference to the October 2021 Requests, the court cites the page in the record for the October 2021 Request that was filed first, numbered 257423.

an email chain between Seneca’s Vice President of Strategic Sourcing and a USS account manager from November 29–30, 2023, reads in relevant part:

SENECA: When we talked a couple months ago, you advised USS has no tinplate or TFS to offer us for 2022. You did say that if your production efficiencies are good, some availability may free up later in the year. I understood that was kind of a long shot.

Has anything changed on the availability of ETP or TFS?

USS: Right now for Feb I don’t have anything as of yet, if that changes I’ll let you know.

C.R. 43; *see also supra* note 2 (explaining that Seneca made this email public). Among other arguments, Seneca also stressed that USS’s statement that it had supplied materials to Seneca within the preceding two years was plainly false. P.R. 38.

In its surrebuttal, USS emphasized that “Section 232 exclusion requests are prospective, not retrospective, based on current availability,” and maintained that it could supply Seneca with the requested tin mill products through spot sales rather than contract sales.⁴ P.R. 45–46. USS explained that while it had not been able to supply products throughout 2020 and much of 2021 due to the Covid-19 pandemic and other economic shocks, it could nonetheless deliver the product immediately at the time of filing the objection. P.R. 45–46. USS also included a letter containing CBI to substantiate its claim that Seneca’s tin mill products were immediately available. P.R. 48–49. The letter detailed USS’s facilities’ combined capacity to produce tin mill products, which exceeded Seneca’s demand, and the production and delivery lead times for Seneca’s requested products, which was shorter than those of Seneca’s foreign suppliers. P.R. 48–49. USS also clarified that it had last supplied Seneca with tin mill products in February 2019, which was more than two years before USS’s objection was filed; its contradictory statements in the objection were made in error. P.R. 48.

⁴ Spot sales and contract sales are different “methods of contracting” between purchasers and suppliers. *See, e.g.*, Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 887 (1994). In the context of this case, a spot sale is a “[a] contract to buy or sell a . . . commodity . . . for immediate payment and delivery on a specified date.” *Spot Contract*, *Black’s Law Dictionary* (11th ed. 2019). By contrast, a contractual sale is a contract to purchase and deliver the commodity on a repeated basis over a certain period of time, which may be annual or shorter-term. *See, e.g.*, Tin- and Chromium-Coated Steel Sheet from Japan at 15, Inv. No. 731-TA-860 (Third Review), USITC Pub. 4795 (June 2018).

The filings in the January 2022 Request proceeded in a similar manner but with a few notable differences. After domestic producers allegedly declined to offer any tin mill products in late 2021, Seneca turned to importers to secure needed materials and filed an exclusion request. P.R. 269–70. USS objected and stated that it could timely meet 100 percent of Seneca’s demand. P.R. 279. USS once again indicated that it had supplied Seneca with tin mill products within the preceding two years. P.R. 280. In the rebuttal, Seneca submitted a letter similar to the letter it had submitted in the October 2021 Requests and included only the second email from November 2021. P.R. 291. USS in its surrebuttal reiterated its ability to immediately meet demand but did not mention the distinction between spot and contract sales in the online form, as it had done in the surrebuttals to the October 2021 Requests. *See* P.R. 287–90. Instead, in its attached letter supplementing the record with CBI, USS stated only once that its “relevant tin mill facilities currently have available capacity to supply spot shipments.” P.R. 291. Also unlike in the October 2021 Requests, USS did not correct its misstatement on the record that it had supplied Seneca with tin mill products within the preceding two years. *See* P.R. 291–92.

Commerce denied the October 2021 and January 2022 Requests in April 2022. In all six instances, BIS adopted ITA’s factual conclusions and recommendations to deny the exclusion requests. P.R. 1, 247. The ITA memoranda found that USS’s tin mill products would be identical to the articles subject to the exclusion request, P.R. 4, 250, and could be timely delivered, P.R. 5, 251. As for USS’s ability to produce Seneca’s requested quantity, Commerce concluded that nothing in the “request, rebuttal, or surrebuttal, including attachments, provide[d] evidence to contradict the objector’s claims” across all six of the requests. P.R. 4, 250. The memoranda for the October 2021 requests further elaborated:

U.S. Steel can produce 100 percent of the requested volume. As such, U.S. Steel meets the quantity criterion. . . . Based on the evidence submitted, nothing contradicts the information certified by U.S. Steel in its objection submission. Seneca states in its rebuttal, “Contrary to its claims, USS has been unwilling to commit to any contractual volume thus far, most recently in November 2021.” U.S. Steel states in its surrebuttal that it can provide the requested TFS as spot sales rather than contract volumes. This does not impact U.S. Steel’s ability to supply the requested quantity.

P.R. 4. Commerce’s denial of the January 2022 Request, however, differed slightly in why the quantity criterion had not been met:

U.S. Steel can produce 100 percent of the requested volume. As such, U.S. Steel meets the quantity criterion. ITA notes that Seneca states in its rebuttal, “. . . in November 2021 USS affirmatively declined to supply the very same volume that is at issue in this request.” Seneca also submitted confidential business information with its rebuttal. Nothing in the information provided contradicts U.S. Steel’s certified statements in its objection and in its surrebuttal that it can currently manufacture 100% of the requested quantity.

P.R. 250.

B. March 2022 Requests

Seneca filed two more exclusion requests for tin mill products in March 2022, to which USS also filed objections. P.R. 304, 349.⁵ A rebuttal and surrebuttal followed. P.R. 316, 338. Seneca placed on the record the same email chain from November 2022, as well as later communications that remain confidential. C.R. 338, 340–41. Similar to the surrebuttal in the January 2022 Request, USS reiterated its capacity to deliver Seneca’s volume and mentioned only once in its attached letter that volume was available in the form of spot sales. P.R. 337.

Commerce also denied these requests but did not provide a complete analysis as to any of the quantity, quality, and timeliness criteria. The ITA memoranda, adopted by BIS in its denials, stated without further elaboration that ITA was “unable to provide a complete analysis” as to the quantity criterion “due to an issue with the request[s].” P.R. 296. ITA’s subject-matter expert also “determined there is insufficient technical information available” to evaluate the quality criterion. P.R. 296. As for the timeliness criterion, ITA concluded that the CBI in Seneca’s rebuttal contained “conflicts with the delivery information in this exclusion request,” and that ITA was therefore “unable to evaluate this exclusion request.” P.R. 297.

III. Procedural History

Seneca timely filed this action against Defendant the United States (“the Government”) on August 19, 2022. *See* Compl. USS moved to

⁵ The records and Commerce’s denials of each of the March 2022 Requests are almost identical in relevant part. To avoid citations to two different records with each reference to the March 2022 Requests, the court cites the page in the record for the March 2022 Request that was filed first, numbered 283368. *See also supra* note 3 (applying the same practice to the October 2021 Requests).

intervene in the instant action under USCIT Rule 24, *see* Mot. to Intervene as Def.-Inter., Oct. 5, 2022, ECF No. 11, which the court denied, *see Seneca Foods Corp. v. United States*, 46 CIT __, 607 F. Supp. 3d 1295 (2022), ECF No. 26.

On February 28, 2023, Seneca filed a motion for judgment on the agency record under USCIT Rule 56.1. *See* Pl.'s Br. Defendant filed a response on April 11, 2022, *see* Def.'s Br. in Opp'n to Pl.'s Mot. for J. on the Agency R., Apr. 11, 2023, ECF No. 33 ("Def.'s Br."), to which Plaintiff filed a reply on May 2, 2023, *see* Pl.'s Reply Br. in Supp. of Mot. for J. on Agency R., May 2, 2023, ECF No. 36 ("Pl.'s Reply"). The court issued questions in advance of oral argument, *see* Letter re: Qs. for Oral Arg., June 23, 2023, ECF No. 42, to which the parties filed responses, *see* Pl.'s Resps. to Letter; Def.'s Resp. to the Ct.'s Qs. for Oral Arg., July 7, 2023, ECF No. 44. The court invited parties to file submissions after oral argument on July 11, 2023, *see* Oral Arg., July 11, 2023, ECF No. 46, and both parties made such submissions, *see* Pl.'s Post-Arg. Subm., July 21, 2023, ECF No. 49; Def.'s Post-Arg. Subm., July 21, 2023, ECF No. 48. With briefing in hand, the court turns to the merits.

DISCUSSION

Jurisdiction lies under 28 U.S.C. § 1581(i)(2), which authorizes the Court of International Trade to hear civil actions arising out of federal laws providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." Where jurisdiction exists under § 1581(i), this court must apply "the standard of review set forth by the Administrative Procedure Act and will 'hold unlawful and set aside [agency] action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008) (quoting 5 U.S.C. § 706(2)).

Agency action is arbitrary and capricious when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or made a decision "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also NLMK Pa., LLC v. United States*, 47 CIT __, __, 617 F. Supp 3d 1316, 1320 (2023). Because arbitrary and capricious review ensures "that agencies have engaged in rea-

soned decisionmaking,” *Judulang v. Holder*, 565 U.S. 42, 53 (2011), agencies must “examine the relevant data and articulate a satisfactory explanation for [their] action,” *State Farm*, 463 U.S. at 43. The record supporting an agency’s decision must ultimately support a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Moreover, arbitrary and capricious review is a “narrow” inquiry. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). In reviewing agency action, the court may not reweigh evidence or substitute the agency’s reasoned decisionmaking with its own reasoning. *See Nippon Steel Corp. v. Int’l Trade Comm’n*, 345 F.3d 1379, 1381–82 (Fed. Cir. 2003); *In re Section 301 Cases*, 47 CIT __, __, 628 F. Supp. 3d 1235, 1248 (2023) (explaining that agency action cannot be overturned on the basis of “mere disagreement”).

I. Commerce’s Denials of the October 2021 and January 2022 Requests Were Arbitrary and Capricious and Are Remanded

Plaintiff argues that Commerce’s denials of the October 2021 and January 2022 Requests were arbitrary and capricious for three reasons: (1) the denials failed to address evidence on the record that contradicted the agency’s findings; (2) the record evidence compels the contrary outcome of granting the exclusion requests; and (3) Commerce’s procedure for considering Section 232 exclusion requests is itself arbitrary and capricious, as applied and facially. Pl.’s Br. at 22–28; Pl.’s Reply at 2–11. Plaintiffs also contend that an open remand would be futile and instead request a remand with instructions or directed outcome as the appropriate remedy. *See* Pl.’s Br. at 37–39; Pl.’s Reply at 14–15.

The court concludes that Commerce’s denials were arbitrary and capricious because they failed to acknowledge and address evidence on the record that contradicted the agency’s findings. For slightly different reasons, the denials of the October 2021 Requests and of the February 2022 Requests were both too threadbare in addressing whether USS would be able to meet 100 percent of Seneca’s demand, and Commerce’s reasoning for crediting USS’s statements was not otherwise reasonably discernible. Moreover, an open remand is the appropriate remedy and would not be futile. The denials of the October 2021 and January 2022 Requests are remanded to the agency for

reconsideration of the denial or, if the agency opts to deny the exclusion requests again, for further explanation of its decision.⁶

A. Commerce's Denials of the October 2021 Requests Were Arbitrary and Capricious

Recall that Commerce adopted the following explanation from the ITA memoranda, which concluded that USS was able to produce the volume of tin mill products that Seneca required:

U.S. Steel can produce 100 percent of the requested volume. As such, U.S. Steel meets the quantity criterion. . . . Based on the evidence submitted, nothing contradicts the information certified by U.S. Steel in its objection submission. Seneca states in its rebuttal, “Contrary to its claims, USS has been unwilling to commit to any contractual volume thus far, most recently in November 2021.” U.S. Steel states in its surrebuttal that it can provide the requested TFS as spot sales rather than contract volumes. This does not impact U.S. Steel’s ability to supply the requested quantity.

P.R. 4 (quoting P.R. 33). Quoting from Seneca’s rebuttal, Commerce acknowledges that Seneca failed to secure contractual volume from USS. *See id.* But Commerce then references the fact that USS, per its filing, was “only offering additional spot—not contract—volumes of tin mill products for 2022.” P.R. 46; *see also* P.R. 47. Commerce appears to have concluded that Seneca’s requested quantity was available through spot sales but not contract sales.

That determination was in error. Commerce did not clearly address evidence on the record that contradicted the conclusion that Seneca’s requested quantity was available through spot sales. Without explaining why, Commerce disregarded Seneca’s representations and evidence that emphasized that USS was unwilling to offer *any* volume—spot or contract—and instead construed Seneca’s representations as limited to contractual volume. Take, for instance, the following excerpts from Seneca’s initial exclusion request and rebuttal:

⁶ In evaluating Plaintiffs’ arguments, the court must review the record for each exclusion request independently. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“The task of the reviewing court is to apply the appropriate . . . standard of review to the agency decision based on the record the agency presents to the reviewing court.”); *Yama Ribbons & Bows Co., Ltd. v. United States*, 36 CIT 1250, 1256 (2012) (“[E]ach investigation has its own unique and separate administrative record.”). Because the records and denials of the October 2021 Requests are almost identical in relevant part, the court considers all five denials at once. *See infra* section I.A; *see also supra* note 3. The denial of the January 2022 Request, however, merits separate discussion because it involved a slightly different record. *See infra* section I.B.

- “These orders were placed soon after all relevant domestic producers affirmatively declined to award Seneca *any* additional volume for 2021.” P.R. 20 (emphasis added).
- “No domestic producer is able and willing to make *any* additional supply available to us within the relevant timeframe in 2021.” P.R. 21 (emphasis added).
- “For its part, U.S. Steel was unwilling even to give us a quote for tin mill products due to its inability to supply *any* additional material in 2021 or beyond.” P.R. 22 (emphasis added).
- “Further, the relevant purchase order was placed only after USS declined to commit *any* 2021 volume to Seneca.” P.R. 33–34 (emphasis added).
- “The imports of tin mill products covered by these exclusion requests are limited to volumes ordered—on November 20, 2020; April 22, 2021; and May 3, 2021—only after USS declined to contract to supply *any* tin mill products to Seneca during 2021. As USS itself concedes, it had *no availability* to supply Seneca with *any* tin mill products at the time Seneca placed the purchase orders at issue.” P.R. 36 (citation omitted) (first emphasis in original and following emphases added).
- “In fact, as noted above, USS still to this day has *no volume* available for Seneca; most recently in November 2021, USS advised that it has *no ETP or TFS* to offer Seneca in 2022, after stating and certifying the opposite to Commerce.” P.R. 36 (emphasis added).
- “Finally, on Nov. 13, 2020, USS confirmed via phone that it would not offer Seneca *any* steel for 2021 delivery, regardless of price. USS stated that it did not want to make *any* commitment at the time at *any* price and noted that if it had available volume in future months, it would contact Seneca. To date, USS has not reached out to Seneca to commit *any* 2021 volume.” P.R. 37 (first and last emphases in original and other emphases added).

These statements make clear that Seneca took issue with USS’s failure to supply *any* volume, as opposed to contract volume in

particular. So, too, with Seneca’s email communications in the record.⁷ See P.R. 41; C.R. 43. Neither email appears to distinguish between spot or contract sales. See P.R. 41, 43. What the emails do indicate, however, is that USS did not have capacity to offer “anything” in November 2020 and—all the more probative—“anything” in November 2021, which was mere days after USS had filed its objections. P.R. 41; C.R. 43.

Why any of Seneca’s representations or communications with USS were limited in scope to contractual sales, as opposed to any sales, is not clear from the record or Commerce’s denial. Omitting any discussion of Seneca’s representations and evidence, Commerce went so far as to conclude that “*nothing* contradicts the information certified by U.S. Steel in its objection submission.” P.R. 4 (emphasis added). That statement itself constitutes agency error. Either (1) Commerce overlooked Seneca’s arguments and countervailing evidence entirely, see *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 970 (Fed. Cir. 2015) (holding that an agency cannot “disregard” evidence “without explanation”), or (2) Commerce, having acted for reasons that are not reasonably discernible, failed to explain why Seneca’s evidence is construed as limited to contractual sales, see *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357 (Fed. Cir. 2000) (requiring an agency to “explain[] its decisions with sufficient precision, including the underlying factfindings and . . . rationale”); *JSW Steel (USA) Inc. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1320, 1330 (2020) (remanding where the court was unable to discern what additional evidence “was weighed, or why the evidence compelled denial”). For example, if there is an industry understanding that a reference to “for 2022” or “for Feb” in the second email would

⁷ Recall that Seneca introduced two emails into the agency records for the October 2021 Requests. See *supra* pp. 8–9.

The first email, dated November 13, 2020, was from Seneca’s Vice President of Strategic Sourcing to other Seneca employees. P.R. 41. Headed by the subject line “USS Update,” the body of the email documented a phone call with USS and reads: “They are not offering *anything* now at any price,” and “They say if they have available production in any month, they will contact us and see if we have interest. They just don’t want to commit to anything right now.” P.R. 36, 41. The second email—a chain between Seneca’s Vice President of Strategic Sourcing and a USS account manager from November 29–30, 2021—reads in relevant part:

SENECA: When we talked a couple months ago, you advised USS has *no tinplate or TFS* to offer us for 2022. You did say that if your production efficiencies are good, some availability may free up later in the year. I understood that was kind of a long shot.

Has anything changed on the availability of ETP or TFS?

USS: Right now for Feb I don’t have *anything* as of yet, if that changes I’ll let you know.

C.R. 43.

suggest a contractual sale, *see* C.R. 43, then Commerce would need to articulate that basis for interpreting the emails. Alternatively, if the text of the emails cannot support an interpretation that is limited to contract sales, then Commerce will need to reweigh and address Seneca’s evidence in its final determination.

The Government’s counterarguments are unavailing. The Government first points out that Commerce’s denial does note that, per Seneca’s own rebuttal, USS failed to supply Seneca with contract volumes since 2018. *See* P.R. 4 (Commerce acknowledges that “Seneca states in its rebuttal, ‘Contrary to its claims, USS has been unwilling to commit to any contractual volume thus far, most recently in November 2021.’”). But that begs the question; it fails to clarify why all of the evidence concerning *any* volume is either disregarded or construed as limited to contractual volume. *See also NMLK*, 617 F. Supp. 3d at 1323 (rejecting conclusory analysis because it failed to “address[] any of the issues raised in [the] Requests, Rebuttals, or Sur-Rebuttals”). Second, the Government argues that it is generally “entitled to rely on” certified factual statements in determining whether a party will comply with certain requirements. *Allied Tech.*, 649 F.3d at 1330. But while USS indeed made a certified factual statement to the agency that USS could fulfill all of Seneca’s demand via spot sales, *see* P.R. 46–47, 48–49, Commerce’s obligation to review all “relevant data and articulate a satisfactory explanation for its action” is unflagging. *State Farm*, 463 U.S. at 43. Agencies relying on certified statements must still consider countervailing evidence that “create[s] doubt” about the veracity of a party’s statements. *Allied Tech.* at 1331 (quoting *In re Spectrum Sys., Inc.*, B–401130, 2009 WL 1325352, at *2 (G.A.O. May 13, 2009)).

Commerce’s failure to consider and address Seneca’s representations and email evidence resulted in arbitrary and capricious decisionmaking, and the denials of the October 2021 Requests are remanded for further explanation or reconsideration. Commerce must articulate on remand—and potentially reconsider—why it credits USS’s statements about spot sale capacity in light of Seneca’s representations and email evidence.

B. Commerce’s Denial of the January 2022 Request Was Arbitrary and Capricious

Commerce’s denial of the January 2022 Request was even more opaque than its denials of the October 2021 Requests. Recall that the ITA memoranda for this request determined:

U.S. Steel can produce 100 percent of the requested volume. As such, U.S. Steel meets the quantity criterion. ITA notes that

Seneca states in its rebuttal, “. . . in November 2021 USS affirmatively declined to supply the very same volume that is at issue in this request.” Seneca also submitted confidential business information with its rebuttal. Nothing in the information provided contradicts U.S. Steel’s certified statements in its objection and in its surrebuttal that it can currently manufacture 100% of the requested quantity.

P.R. 250. Notably, Commerce did not invoke the distinction between spot and contract sales, *see* P.R. 250, and USS mentioned its ability to provide Seneca’s volume via spot sales only once between its objection and surrebuttal, *see* P.R. 297. Specifically, USS stated in its attached letter containing CBI that its “relevant tin mill facilities currently have available capacity to supply spot shipments.” P.R. 291.

Commerce’s denial of the January 2022 Request is impermissibly conclusory. As in the October 2021 Requests, Seneca’s representations and email communications appear to address the availability of *any* supply from USS, regardless of sale type. *See* P.R. 266–68, 279–80, 282–84, 292; *see also, e.g.*, P.R. 280 (“In fact, USS has declined to quote, offer, or deliver a single ton of steel to Seneca for more than two years.”). But Commerce once again concluded that “[n]othing in the information provided contradicts U.S. Steel’s certified statements in its objection and in its surrebuttal that it can currently manufacture 100% of the requested quantity.” P.R. 250 (emphasis added). Once again, either (1) Commerce overlooked Seneca’s arguments and countervailing evidence entirely, *see Princeton Vanguard*, 786 F.3d at 970, or (2) Commerce, having acted for reasons that are not reasonably discernible, failed to explain why Seneca’s evidence did not contradict USS’s statements about prospective capacity, *see Packard Press*, 227 F.3d at 1357; *JSW Steel*, 466 F. Supp. 3d at 1330. And to be clear, simply mentioning the difference between spot and contract volume would not be enough. If Commerce again determines that USS can meet Seneca’s demand via spot sales and Seneca’s evidence is cabined only to the unavailability of contractual volume, then Commerce will need to justify that read of the record on remand.

Commerce’s treatment of the October 2021 and January 2022 Requests raises broader questions about the administration of steel tariff exclusions. As discussed above, Commerce may credit an objector’s certified factual statement that it can meet 100 percent of requested volume, but it may not do so if it results in arbitrary and capricious decisionmaking. *See Allied Tech.*, 649 F.3d at 1330. According to Seneca, if Commerce’s position is that Seneca’s evidence of past and contemporaneous failure to secure volume constitutes “nothing”

that “contradicts” USS’s statements about future capacity, P.R. 4, 250, then the administrative process “only perpetuates the precise result Commerce claims it wants to avoid: allowing domestic producers to object but then ‘refus[ed] to fill orders,’” Pl.’s Br. at 36 (quoting *Interim Final Rule*, 85 Fed. Reg. at 81065).⁸ In other words, Seneca argues that a purely prospective approach to evaluating an objector’s capacity would be arbitrary and capricious both as applied and facially. See Pl.’s Reply at 9–12; see also *State Farm*, 463 U.S. at 43 (“[A]n agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . .”). But because the agency’s position is unclear in the denials before the court, and where the court has already determined that Commerce erred in denying Seneca’s exclusion requests, Seneca’s as-applied and facial challenges raise questions that are best left to another day.⁹ Commerce’s reasoning on remand will likely provide a fuller context in which to assess such challenges, if pursued.

Because Commerce’s failure to consider and address Seneca’s representations and email evidence resulted in arbitrary and capricious decisionmaking,¹⁰ the denial of the January 2022 Request is also remanded for further explanation or reconsideration. Commerce

⁸ The *Interim Final Rule* had addressed the issue of an objector’s refusal to supply volume, see *supra* p. 6, but that guidance appears to apply only to a renewed exclusion request following a denial, not a first-time exclusion request. See 85 Fed. Reg. at 81065 (responding to a commenter’s concern that “rebuttals to [claims of availability] are difficult to make without more detailed information from objectors on how they could make products in sufficient quantity or quality”).

⁹ Commerce does argue that its regulations do not require it to examine past interactions between objectors and requesters where the requester simply made an offer that went unaccepted, as opposed to executing an order that was later unfulfilled. See Def.’s Br. at 19. But that reasoning was never articulated in any of denials of the October 2021 and February 2022 Requests, so it cannot be the basis for sustaining Commerce’s actions here. See *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

¹⁰ Seneca also stresses that USS incorrectly represented to Commerce that it had supplied Seneca with tin mill products within the two years prior to its objections. See Pl.’s Br. at 27; see also P.R. 29, 280. USS stated in the surrebuttal to the October 2021 Requests that its representation was an error, see P.R. 49, but it never corrected the record in the January 2022 Request.

Any error resulting from USS’s misstatement is harmless on the record now before the court. Commerce did not rely on USS’s representation in either set of requests. In the October 2021 Requests, USS corrected itself, and Seneca fails to identify where in the administrative record Commerce relied on USS’s initial misstatement. As for the January 2022 Request, the denial expressly states that Commerce relied on USS’s “certified statements . . . that it can currently manufacture 100% of the requested quantity.” P.R. 250. USS’s statement about its history with Seneca, even if later contested in the record by Seneca, see P.R. 288, did not form a basis for Commerce’s determination. Commerce’s purported error in not taking note of that contested fact is, on the record now before the court, harmless. See 5 U.S.C. § 706 (“[D]ue account shall be taken of the rule of prejudicial error.”); see also *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) (“It is well settled that principles of harmless error apply to the review of agency proceedings.”).

must articulate on remand—and potentially reconsider—why Seneca’s evidence did not contradict USS’s statements about prospective capacity.

C. Open Remand of Commerce’s Denials of the October 2021 and February 2022 Requests Is the Appropriate Remedy

Seneca also asks the court to direct Commerce to grant the October 2021 and February 2022 exclusion requests. *See* Pl.’s Br. at 37–39; Pl.’s Reply at 14–15. Because the record before the court now does not compel a grant of the exclusion requests, the court declines to do so.

In fashioning an administrative remedy, the Court of International Trade “may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision,” 28 U.S.C. § 2643(b), which include an “order[] of remand,” *id.* § 2643(c)(1). The so-called ordinary remand rule provides that “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *INS v. Ventura*, 537 U.S. 12, 16 (2002) (quoting *Fla. Power*, 470 U.S. at 744). This rule exists, in part, to allow an “agency [to] bring its expertise to bear upon the matter” in reviewing evidence in first instance and to avoid judicial intrusion into the administrative process. *Id.* at 16–17. Moreover, remand is usually appropriate “because ‘the record may well be enlarged’ and ‘even if it is not, new findings and explanations by the [agency] can be expected.’” *Nexteel Co., Ltd. v. United States*, 28 F.4th 1226, 1238 (quoting *Nippon Steel Corp. v. Int’l Trade Comm’n*, 345 F.3d 1379, 1380–82 (Fed. Cir. 2003)). In the rare case when the record “supports only one outcome,” however, the court may find that a remand is “futile” and instead direct the agency to act. *See id.* (citing *Nippon Steel*, 345 F.3d at 1359).

An open remand is the appropriate remedy here. While Seneca has shown that Commerce has failed to consider or address certain representations and evidence, Seneca has not shown that the agency record before the court *compels* a grant of the exclusion requests. *See supra* sections I.A–B; *see also NLMK*, 617 F. Supp. 3d at 1327–28 (concluding that the plaintiffs had shown that Commerce had erred but not that “Commerce could reach only one possible conclusion from the record”). Moreover, the exclusion requests at issue may greatly benefit from a reopening of the record, which Commerce may exercise its discretion to do. *Nexteel*, 28 F.4th at 1238. Commerce’s denials of the October 2021 and January 2022 Requests are therefore remanded for further explanation or reconsideration consistent with this opinion.

II. Commerce’s Denials of the March 2022 Requests Are Remanded

Without confessing error, the Government asks the court to remand the denials of the March 2022 Requests so that it may reconsider the merits of the requests. *See* Def.’s Br. at 22. Seneca had initially argued that Commerce erred in two ways. Pl.’s Br. at 28. First, despite having access to similar evidence as for the October 2021 and January 2022 Requests, Commerce determined that it was unable to render a decision due to uncertain issues with the request. *Id.* at 29–30. Second, Seneca maintained that the decisions included important factual errors regarding Seneca’s submissions. *Id.* at 30. Following the Government’s request to remand, Seneca did not oppose and instead asked the court to remand the denials of the March 2022 Requests alongside the other denials. Pl.’s Reply at 12.

Commerce’s request to remand is granted. An agency’s request to remand, subject to the reviewing court’s discretion, is appropriate where “the agency’s concern is substantial and legitimate.” *SKF USA*, 254 F.3d at 1029. Commerce’s concern here is substantial because it has a compelling interest in deciding the merits of the March 2022 Requests in the first instance. *See Ventura*, 537 U.S. at 16–17; *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1523, 412 F. Supp. 2d 1330, 1336 (2005). Moreover, Commerce’s concern is legitimate; no party alleges bad faith, frivolous conduct, or an effort to evade judicial review. *See SKF USA*, 254 F.3d at 1029. “[T]he need for finality” here “does not outweigh the justification for voluntary remand,” and the scope of the request is otherwise “appropriate.” *Shakeproof*, 29 CIT at 1523–26, 412 F. Supp. 2d at 1336–39.

The denials of the March 2022 Requests are therefore remanded for reconsideration. In so doing, the court notes that there is significant factual and evidentiary overlap between the March 2022 requests on the one hand, and the October 2021 and January 2022 Requests on the other.

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that Commerce’s denials of the October 2021 and January 2022 Requests, numbered 257423, 257428, 257708, 257709, 257712, and 275504, are remanded for further explanation and reconsideration consistent with this opinion; and it is further

ORDERED that Commerce’s denials of the March 2022 Requests, numbered 283368 and 283369, are remanded for reconsideration; and it is further

ORDERED that Commerce will file its remand redeterminations with the court within ninety days of this date; that Seneca will have thirty days to file comments on the remand redetermination thereafter; that Commerce will have thirty days to file its replies to the comments on the remand redetermination thereafter; that the parties shall file the Joint Appendix within fourteen days thereafter; and that Commerce shall file the administrative record within fourteen days of the date of filing its remand determination.

SO ORDERED.

Dated: October 18, 2023
New York, New York

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

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