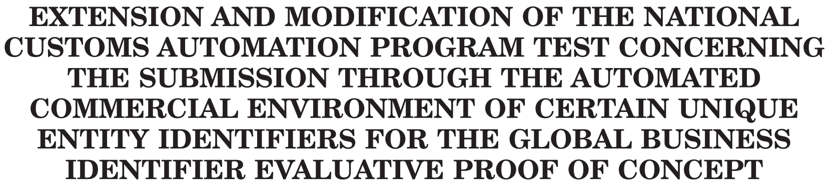
U.S. Customs and Border Protection



EXTENSION AND MODIFICATION OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM TEST CONCERNING THE SUBMISSION THROUGH THE AUTOMATED COMMERCIAL ENVIRONMENT OF CERTAIN UNIQUE ENTITY IDENTIFIERS FOR THE GLOBAL BUSINESS IDENTIFIER EVALUATIVE PROOF OF CONCEPT

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

ACTION: General notice.

SUMMARY: On July 21, 2023, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** extending and modifying a National Customs Automation Program Test concerning the submission of unique entity identifiers for the Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC). This document republishes and supersedes the notice published on July 21, 2023, announces an extension of the test period through February 23, 2027, notes a clarification in the purpose and scope of the GBI EPoC, and removes commodity and country of origin limitations on the entries eligible for the test. In addition, this document makes changes to the contact information for questions regarding the test, provides new web addresses dedicated to obtaining GBIs, and makes minor technical changes.

DATES: The GBI EPoC commenced on December 19, 2022, and will continue through February 23, 2027, subject to any extension, modification, or early termination as announced in the **Federal Register**. CBP began to accept requests from importers of record and licensed customs brokers to participate in the test on December 2, 2022, and CBP will continue to accept such requests until the GBI EPoC concludes. Public comments on the test are invited and may be submitted to the address set forth below, at any time during the test period.

FOR FURTHER INFORMATION CONTACT: For policy-related questions, contact Garrett Wright, Director, Trade Modernization Division, Trade Policy and Programs Directorate, Office of Trade, U.S. Customs and Border Protection, at (202) 897–9877 or via

email at *GBI@cbp.dhs.gov,* with a subject line reading "Global Business Identifier Test-GBI." For technical questions related to the Automated Commercial Environment (ACE) or Automated Broker Interface (ABI) transmissions, software vendors, importers of record, and licensed customs brokers should contact their assigned ACE or ABI client representatives, respectively. Interested parties without an assigned client representative should direct their questions to Steven Zaccaro, Client Services Division, Office of Trade, U.S. Customs and Border Protection, at (571) 358–7809 or via email at *clientrepoutreach@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: On December 2, 2022, U.S. Customs and Border Protection (CBP) published a General Notice (the December 2 Notice) in the **Federal Register** (87 FR 74157) announcing a National Customs Automation Program (NCAP) Test concerning the submission through the Automated Commercial Environment (ACE) of certain unique entity identifiers for the Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC). On July 21, 2023, CBP published a General Notice (the July 21 Notice) in the **Federal Register** (88 FR 47154) extending and modifying the December 2 Notice. Specifically, the July 21 Notice extended the test period from July 21, 2023, through February 14, 2024; provided the correct web address for interested parties to use to obtain the Legal Entity Identifier (LEI) from the Global Legal Entity Identifier Foundation (GLEIF); and clarified that CBP would allow participants to provide one or more of the three identifiers for the manufacturers, shippers, and sellers (and optionally, exporters, distributors, and packagers) of merchandise, and that CBP would not require transmission of all three identifiers to participate in the test. This document republishes and supersedes the July 21 Notice, with the following modifications.

First, the test period has been extended from February 14, 2024, through February 23, 2027. Second, CBP made changes to Sections I.B. (Global Business Identifier Evaluative Proof of Concept (GBI EPoC)) and VI. (Evaluation Criteria) to clarify the purpose and scope of the test. CBP will continue to assess the functionality and effectiveness of universal global business identifiers to address data gaps caused by the unreliability of the manufacturer or shipper identification code (MID), in addition to exploring opportunities to enhance supply chain traceability and visibility more broadly—including examining how CBP, Partner Government Agencies (PGAs), and the trade industry might leverage GBIs to comply with growing supply chain traceability requirements.

Third, CBP has expanded the GBI EPoC to include entries of merchandise classifiable in any subheading of the Harmonized Tariff Schedule of the United States (HTSUS) and entries of imported merchandise from any country of origin. When CBP initially launched the GBI EPoC, the test was limited to entries of merchandise in five (5) categories (alcohol, toys, seafood, personal items, and medical devices), and to merchandise with 10 countries of origin (Australia, Canada, China, France, Italy, Mexico, New Zealand, Singapore, United Kingdom, and Vietnam). These requirements significantly limited the range of entries that could be evaluated under the test. As a result, CBP is removing these test limitations. It is important to note that the test continues to be limited to type 01 (formal) and type 11 (informal) entries.

Fourth, as noted in the **FOR FURTHER INFORMATION CONTACT** section above, the office responsible for the GBI EPoC has changed (it is no longer the Interagency Collaboration Division, Trade Policy and Programs Directorate, Office of Trade, but is now the Trade Modernization Division, Trade Policy and Programs Directorate, Office of Trade), and the point of contact for interested parties without an assigned client representative who have technical questions has changed. Fifth, GS1 and Dun & Bradstreet have created specific web pages dedicated to the GBI EPoC for obtaining a GBI; Section III.A. (Obtaining Global Business Identifier (GBI) Numbers) has been updated to include the new web addresses for the dedicated GBI web pages. Lastly, CBP has made minor technical changes to Sections V. (Paperwork Reduction Act) and VI. (Evaluation Criteria).

For ease of reference, the July 21 Notice is republished below, with the changes described above.

I. Background

A. The National Customs Automation Program

The National Customs Automation Program (NCAP) was established by Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). Through the NCAP, the thrust of customs modernization was focused on informed trade compliance and the development of the Automated Commercial Environment (ACE), the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing, intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while facilitating compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protec-

tion (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionality, which update the system and add new functionality.

Sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414), as amended, define and list the existing and planned components of the NCAP (Section 411), promulgate program goals (Section 412), provide for the implementation and evaluation of the program (Section 413), and provide for Remote Location Filing (Section 414). Section 411(a)(1)(A) lists the electronic entry of merchandise, Section 411(a)(1)(B) lists the electronic entry summary of required information, and Section 411(a)(1)(D) lists the electronic transmission of manifest information, as existing NCAP components. Section 411(d)(2)(A) provides for the periodic review of data elements collected in order to update the standard set of data elements, as necessary.

B. Global Business Identifier Evaluative Proof of Concept (GBI EPoC)

ACE is the system through which the U.S. Government has implemented the "Single Window," the primary system for processing trade-related import and export data required by the PGAs that work alongside CBP in regulating specific commodities. The transition away from paper-based procedures has resulted in faster, more streamlined processes for both the U.S. Government and industry. To continue this progress, CBP began working with the Border Interagency Executive Council (BIEC) and the Commercial Customs Operations Advisory Committee (COAC), starting in 2017, to discuss the continuing viability of the data element known as MID.

Currently, importers of record provide the MID at the time of filing of the entry summary. *See generally* 19 CFR part 142. The 13-digit MID is derived from the name and address of the manufacturer or shipper, as specified on the commercial invoice, by applying a code constructed pursuant to instructions specified by CBP. *See* Customs Directive No. 3550–055, dated November 24, 1986 (available online at *https://www.cbp.gov/sites/default/files/documents/3550–055_3.pdf*). Although use of the MID has served CBP and the international trade community well in the past, it has become apparent that the MID is not always a consistent or unique number. For example, the MID is based upon the manufacturer or shipper name, address, and country of origin, and this data can change over time and/or result in the same MID for multiple entities. Also, while the MID provides

limited identifying information, other global unique identifiers capture a broader swath of pertinent information regarding the entities with which they are associated (*e.g.,* legal ownership of businesses, specific business and global locations, and supply chain roles and functions). Changes in international trade and technology for tracking the flow of commodities have presented an opportunity for CBP and PGAs to explore new processes and procedures for identifying the parties involved in the supply chains of imported goods.

CBP has thus engaged in regular outreach with stakeholders, including, but not limited to, importers of record, licensed customs brokers, trade associations, and PGAs, with a goal of obtaining meaningful feedback on their existing systems and operations in order to establish a mutually beneficial global entity identifier system. As a result of these discussions, CBP developed the Global Business Identifier Evaluative Proof of Concept (GBI EPoC), which is an interagency trade transformation project that aims to test global business identifiers as a supply chain traceability solution, for industry and the U.S. Government alike. The GBI EPoC seeks to amplify the U.S. Government's visibility into the supply chain of goods entering the U.S. and explore opportunities for CBP and PGAs to leverage verifiable information regarding parties in the supply chain to improve risk assessment and admissibility decisions.

For purposes of the GBI EPoC, ACE has been modified to permit test participants to provide the following entity identifiers (GBIs) associated with manufacturers, shippers, and sellers of merchandise covered by entries that meet the GBI EPoC criteria: nine (9)-digit Data Universal Numbering System (D–U–N–S®), thirteen (13)-digit Global Location Number (GLN), and/or twenty (20)-digit Legal Entity Identifier (LEI). The GBIs will be provided in addition to other required entry data (which may include the MID); any GBIs associated with the importer of record itself need not be provided as part of this test. The GBIs associated with the manufacturers, shippers and sellers will be provided with the CBP Form 3461 (Entry/Immediate Delivery) data transmission via the Automated Broker Interface (ABI) in ACE for formal entries for consumption ("entry type 01" in ACE) and informal entries ("entry type 11" in ACE). CBP will then access the underlying data (GBI data) associated with the D–U–N–S®, GLN, and LEI, as set forth in the agreements that CBP has entered into with Dun & Bradstreet (D&B), GS1, and the Global Legal Entity Identifier Foundation (GLEIF), respectively, in order to connect a specific entry and merchandise to a more complete picture of those entities' ownership, structure, and affiliations, among other

information. D&B, GS1, and GLEIF are collectively referred to as the identity management companies (IMCs).

Through the GBI EPoC, CBP aims to leverage existing entity identifiers—the D–U–N–S®, GLN, and LEI—to develop a systematic, accurate, and efficient method for the trade to report, and the U.S. Government to uniquely identify, legal business entities, their different business locations and addresses, and their various functions and supply chain roles. CBP will consider whether these three GBIs, singly, or in concert, ensure that CBP and PGAs receive standardized trade data in a universally compatible trade language. Moreover, CBP will examine whether the GBIs submitted to CBP can be easily verified, thus reducing uncertainties that may be associated with the information related to shipments of imported merchandise. CBP will also consider whether the GBI EPoC may ultimately prove to be a more far-reaching, interagency initiative, one that keeps with the vision and actualized promise of the "Single Window," by providing better visibility into the supply chain for CBP and PGAs, thereby further reducing paper processing, expediting cargo release, and enhancing the traceability of supply chains.

II. Authorization for the Test

The Customs Modernization Act authorizes the Commissioner of CBP to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. The GBI EPoC is authorized pursuant to 19 CFR 101.9(b), which provides for the testing of NCAP programs or procedures. *See* T.D. 95–21, 60 FR 14211 (March 16, 1995).

III. Conditions for the Test

The test is voluntary, and importers of record and licensed customs brokers who wish to participate in the test must comply with all of the conditions set forth below. The full effect of access to additional entity-related data based on submission of the GBIs will be a key evaluation metric of the test.

Participation in the test will provide test participants with the opportunity to test and give feedback to CBP on the GBI EPoC design and scope. Participation may also enable test participants to establish and test their digital fingerprints, such as more accurately identifying certain parties involved in their supply chains. In addition, participation may allow the trade community to better manage and validate their data and streamline their import data collection processes. Lastly, test participation may allow for the wider application of entity identifiers that are currently providing broad sector coverage and enhanced data analysis.

A. Obtaining Global Business Identifier (GBI) Numbers

Importers of record and licensed customs brokers who are interested in participating in the test must arrange to obtain any combination of the required D–U–N–S®, GLN, and/or LEI entity identifiers (the GBIs) from the manufacturers, shippers, and sellers of merchandise that are intended to be covered by future entries that will meet the conditions of the test (commodity + country of origin). For purposes of providing the information required for the test, the parties are defined as follows for each covered entry:

- Manufacturer (or supplier)—The party that last manufactures, assembles, produces, or grows the goods or the party supplying the finished goods in the country from which the goods are leaving for the United States.
- Shipper—The party that enters into a contract for carriage with, and arranges for delivery of the goods to, a carrier or transport intermediary for transportation to the United States.
- Seller—The last known party by whom the goods are sold or agreed to be sold. If the goods are to be imported otherwise than in pursuance of a purchase, the owner of the goods must be provided.

Optionally, test participants may also arrange to obtain the GBIs for exporters, distributors, and packagers that will be associated with these future entries and provide them to CBP on qualifying entries covered by this test.

A party may obtain its own GBI by contacting Dun and Bradstreet (D&B) at *https://support.dnb.com/?cust=CustomsBorderProtection,* regarding the D–U–N–S®; GS1 at *https://www.gs1us.org/industries-and-insights/by-industry/government-and-public-sector/gs1-us-and-customs-and-border-protection,* regarding the GLN; and the Global Legal Entity Identifier Foundation (GLEIF) at *https://www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations,* regarding the LEI.

Once the manufacturers, shippers, and sellers (and, optionally, the exporters, distributors, and packagers) have obtained their own GBIs (the D–U–N–S®, GLN, and LEI), these parties should provide the resulting GBIs to the relevant importer of record or licensed customs broker participating in the test. If these parties experience any difficulty with obtaining any of the GBIs, the importer of record or licensed customs broker seeking to participate in the test should reach out to CBP by email at *GBI@cbp.dhs.gov.* The test participant is not required to obtain or submit GBIs pertaining to its own entity.

Importers of record and licensed customs brokers are reminded that they are responsible for obtaining any necessary permissions with respect to providing to CBP the GBIs for manufacturers, shippers,

and sellers (and, optionally, for exporters, distributors, and packagers) in the supply chains of the imported merchandise for which they file the specified types of entries subject to the conditions of the test. Therefore, prior to submitting their request to participate in the test to CBP, as discussed below, importers of record and licensed customs brokers should consult with the applicable parties to ensure that these parties are willing to grant any necessary permissions to share their GBIs (which will also result in CBP's access to the underlying GBI data associated with those GBIs, as described above) with CBP under the auspices of the test.

B. Submission of Request To Participate in the GBI EPoC

The test is open to all importers of record and licensed customs brokers provided that these parties have requested permission and are approved by CBP to participate in the test. Importers of record and licensed customs brokers seeking to participate in the test should email the GBI Inbox (*GBI@cbp.dhs.gov*) with the subject heading "Request to Participate in the GBI EPoC." As part of their request to participate, importers of record and licensed customs brokers must agree to provide available GBIs with entry filings for merchandise that is subject to the conditions of the test and state that they intend to participate in the test. The request must include the potential participant's filer code and evidence that it has obtained at least one of the three identifiers (D–U–N–S®, GLN, and LEI), or is in the process of obtaining an identifier, from the manufacturers, shippers, and sellers (and, optionally, exporters, distributors, and packagers) of merchandise to be entered pursuant to the test.

Test participants who are importers of record and do not self-file must advise CBP in their request that they have authorized their licensed customs broker(s) to file qualifying entries under the test on their behalf. Test participants who are licensed customs brokers must advise CBP that they have been authorized to file qualifying entries on behalf of importers of record whose shipments meet the test criteria as set forth below.

CBP began accepting requests to participate in the test on December 2, 2022, and will continue to accept them until the test concludes. Anyone providing incomplete information, or otherwise not meeting the test requirements, will be notified by email, and given the opportunity to resubmit the request to participate in the test.

C. Approval of GBI EPoC Participants

A party who wishes to participate in this test is eligible to do so as long as it is an importer of record or licensed customs broker who files

type 01 (formal) or type 11 (informal) entries of merchandise, and that party obtains the required GBIs from its supply chain partners. After receipt of a request to participate in the test, CBP will notify, by email, the importers of record and licensed customs brokers who are approved for participation and inform them of the starting date of their participation (noting that test participants may have different starting dates). Test participants must provide the GBIs they have received to CBP prior to the starting date of their participation (participants will also provide the GBIs to CBP again with each qualified entry filing meeting the requirements of the test). Test participants are considered to be bound by the terms and conditions of this notice and any subsequent modifications published in the **Federal Register**.

D. Criteria for Qualifying Entries

1. Commodities Subject to the GBI EPoC

The test will be limited to type 01 and type 11 entries, but is open to merchandise classifiable in any subheading of the HTSUS. Test participants are encouraged to submit GBIs with all qualified entry filings that meet the conditions of the test so that CBP has a fulsome data set to evaluate; however, entries will not be rejected if GBIs are not submitted.

2. Countries of Origin Subject to the GBI EPoC

The test is open to merchandise from any country of origin.

E. Filing Entries With GBIs (Via ABI in ACE)

Test participants must coordinate with their software vendors or technical teams to ensure that their electronic systems are capable of transmitting the D–U–N–S®, GLN, and LEI entity identifiers to CBP. During this test, CBP will only accept electronic submissions of GBIs via ABI in ACE with CBP Form 3461 (Entry/Immediate Delivery) filings for type 01 and type 11 entries. Upon selection to participate in the test, the test participants will be provided with technical information and guidance regarding the transmission of the GBIs to CBP with the CBP Form 3461 filings. The assigned ABI client representatives of the test participants will provide additional technical support, as needed.

F. CBP Access to Underlying GBI Data Associated With GBIs

As part of the test, CBP has entered into agreements with D&B, GS1, and GLEIF (the IMCs) for limited access to the underlying data (GBI data) that is associated with the GBIs for the duration of the test

and for testing of CBP's automated systems.[1] The data elements for which CBP has entered into agreements with D&B, GS1, and GLEIF may include, but are not limited to: (1) entity identifier numbers, (2) official business titles; (3) names; (4) addresses; (5) financial data; (6) trade names; (7) payment history; (8) economic status; and (9) executive names. The data elements will be examined as part of the test.

Consistent with the agreements, CBP may access GBI data, combine it with CBP data, and evaluate the GBIs that the test participants provide with an entry filing. The GBI data will assist CBP and PGAs in determining the optimal combination of the three entity identifiers (the GBIs) that will provide the U.S. Government with sufficient entity data needed to support identification, monitoring, and enforcement procedures to better equip the U.S. Government to focus on high-risk shipments and bad actors.

CBP will process entries submitted pursuant to the test by analyzing the GBIs submitted via ABI in ACE and ensuring that the GBIs are submitted correctly. CBP will then evaluate the submitted entries to assess the ease and cost of obtaining each of the GBIs, evaluating each GBI to ensure that it is being submitted properly per the technical requirements that will be set forth in CBP and Trade Automated Interface Requirements (CATAIR), and ensuring that CBP is able to validate that each GBI is accurate using the underlying GBI data from the IMCs or otherwise known to CBP.

G. Partner Government Agencies (PGAs)

PGAs are important to the success of the test. Certain PGAs, which may receive GBIs and GBI data and are intended as core test beneficiaries, may use the GBIs and GBI data to improve risk management and import compliance. This may result in smarter, more efficient, and more effective compliance efforts. CBP will announce the PGAs who will receive GBIs and GBI data pursuant to the test in a notice to be published in the **Federal Register** at a later date.

H. Duration of Test

The test began on December 19, 2022, and will run through February 23, 2027, subject to any extensions, modifications or early termination as announced by way of a notice to be published in the **Federal Register**.

[1] As noted above, D&B, GS1, and GLEIF are IMCs. The GBI data consists of data provided by the relevant entity to the IMCs in order to generate a GBI—the D–U–N–S®, GLN, or LEI. GBIs allow CBP to link the underlying GBI data to specific entities and entries.

I. Misconduct Under the Test

Misconduct under the test may include, but is not limited to, submitting false GBIs with an entry filing. Currently, CBP does not plan to assess penalties against GBI EPoC participants that fail to timely and accurately submit GBIs during the test. CBP also does not anticipate shipment delays due to the failure to file or the erroneous filing of GBIs. However, test participants are expected to follow all other applicable regulations and requirements associated with the entry process.

After an initial six-month period (or at such earlier time as CBP deems appropriate), a test participant may be subject to discontinuance from participation in this test for any of the following repeated actions:

- Failure to follow the terms and conditions of this test;
- Failure to exercise due diligence in the execution of participant obligations;
- Failure to abide by applicable laws and regulations that have not been waived; or
- Failure to deposit duties or fees in a timely manner.

If the Director, Trade Modernization Division (TMOD), Trade Policy and Programs (TPP), Office of Trade (OT), finds that there is a basis to discontinue a participant's participation in the test, then CBP will provide written notice, via email, proposing the discontinuance with a description of the facts or conduct supporting the proposal. The test participant will be offered the opportunity to respond to the Director's proposal in writing within 10 business days of the date of the written notice. The response must be forwarded to the TMOD Director, TPP, OT, by emailing *GBI@cbp.dhs.gov,* with a subject line reading "Appeal—GBI Discontinuance."

The Director, TMOD, will issue a final decision in writing on the proposed action within 30 business days after receiving a timely-filed response from the test participant, unless such time is extended for good cause. If no timely response is received, the proposed notice becomes the final decision of CBP as of the date that the response period expires. A proposed discontinuance of a test participant's privileges will not take effect unless the response process under this paragraph has been concluded with a written decision that is adverse to the test participant, which will be provided via email.

J. Confidentiality

Data submitted and entered into ACE may include confidential commercial or financial information which may be protected under the Trade Secrets Act (18 U.S.C. 1905), the Freedom of Information

Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a). However, as stated in previous notices, participation in this or any of the previous ACE tests is not confidential and, therefore, upon receipt of a written Freedom of Information Act request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

IV. Comments on the Test

All interested parties are invited to comment on any aspect of this test at any time. CBP requests comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end, or fully implement this program. Comments should be submitted via email to *GBI@cbp.dhs.gov,* with the subject line reading “Comments/Questions on GBI EPoC.”

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB).

The collection of GBI information gathered under this test has been approved by OMB in accordance with the requirements of the PRA under OMB control number 1651–0141. In addition, the Entry/Immediate Delivery Application and ACE Cargo Release (CBP Form 3461 and 3461 ALT) collection of information, which collects the GBI when entry is made, has been approved by OMB under OMB control number 1651–0024.

VI. Evaluation Criteria

The test is intended to evaluate the feasibility of utilizing GBIs to address data gaps caused by the unreliability of the MID, in addition to exploring opportunities to enhance supply chain traceability and visibility more broadly—including examining how CBP, PGAs, and the trade industry might leverage GBIs to comply with growing supply chain traceability requirements. This will involve exploring the use of GBIs to accurately identify legal business entities, their different business locations and addresses, as well as their various functions and supply chain roles, based upon information derived from the unique D–U–N–S®, GLN, and LEI entity identifiers. The test will assist CBP in enforcing applicable laws and protecting the

revenue, while fulfilling trade modernization efforts by assisting the agency in verifying the roles, functions and responsibilities that various entities play in a given participant's importation of merchandise. CBP's evaluation of the test, including the review of any comments submitted to CBP during the duration of the test, will be ongoing with a view to possible extension or expansion of the test.

CBP will evaluate whether the test: (1) improves foreign entity data for trade facilitation, enforcement, risk management, and statistical integrity; (2) ensures U.S. Government access to foreign entity data; (3) institutionalizes a global, managed identification system; (4) implements a cost-effective solution; (5) obtains stakeholder buy-in; and (6) facilitates legal compliance across the U.S. Government. At the conclusion of the test, an evaluation will be conducted to assess the efficacy of the information received throughout the course of the test. The final results of the evaluation will be published in the **Federal Register** as required by section 101.9(b)(2) of the CBP regulations (19 CFR 101.9(b)(2)).

Should the GBI EPoC be successful and ultimately be codified under the CBP regulations, CBP anticipates that this data would greatly enhance ongoing trade entity identification and resolution, reduce risk, and improve compliance operations. CBP would also anticipate greater supply chain visibility and additional information with which to verify and validate information on legal entities, which will support better decision-making during customs clearance processes.

AnnMarie R. Highsmith,
Executive Assistant Commissioner,
Office of Trade.

DATES AND DRAFT AGENDA OF THE SEVENTY-THIRD SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 73rd session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, (claudia.k.garver@cbp.dhs.gov), Attorney-Advisor, Tom Beris (tom.p.beris@cbp.dhs.gov), Attorney-Advisor, Nataline Viray-Fung, (nataline.viray-fung@cbp.dhs.gov), Attorney-Advisor, Office of Trade, Regulations and Rulings, U.S. Customs and Border Protection, or Daniel Shepherdson (daniel.shepherdson@usitc.gov), Senior Attorney-Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”). The Harmonized Commodity Description and Coding System (“Harmonized System”) is an international nomenclature system that forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States.

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee (“HSC”). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC’s responsibilities include taking classification decisions on the interpretation of the Harmonized System. Those decisions may be memorialized in the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year at the World Customs Organization in Brussels, Belgium. The 73rd session of the HSC will take place Wednesday, March 6, 2024, through Friday, March 19, 2024.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("USITC"), jointly represent the United States at the HSC. U.S. Customs and Border Protection serves as the head of the delegation to the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either U.S. Customs and Border Protection or the USITC. Comments on agenda items may be directed to the above-listed individuals.

Gregory Connor,
Chief,
Electronics, Machinery, Automotive, and International Nomenclature Branch

Attachment

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM COMMITTEE
-
73rd Session
-

NC3154Ec

Brussels, 14 February 2024

From 6 to 19 March 2024

DRAFT AGENDA OF THE 73rd SESSION OF THE HARMONIZED SYSTEM COMMITTEE

From Monday 4 March 2024 (9.30 a.m.) to Tuesday 5 March 2024 Presessional Working Party (to examine the questions under Agenda Item VI).

Wednesday 6 March 2024 (10.00 a.m.) Adoption of the Report of the 63rd Session of the HS Review Sub-Committee.

I.	**ADOPTION OF THE AGENDA**		
	1.	Draft Agenda	NC3154Ec
	2.	Draft Timetable	NC3156Bb
II.	**REPORT BY THE SECRETARIAT**		
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U.S. Court of International Trade

Slip Op. 24–14

MATRA AMERICAS, LLC and MATRA ATLANTIC GMBH, Plaintiffs, and KOEHLER PAPER SE and KOEHLER OBERKIRCH GMBH, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and APPVION, LLC and DOMTAR CORPORATION, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 21–00632
PUBLIC VERSION

[The *Final Determination* is sustained in part and remanded in part. The filing of Commerce's remand redetermination will await the resolution of appellate proceedings in *Stupp Corp. v. United States*, No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023).]

Dated: February 8, 2024

R. Will Planert, Morris, Manning & Martin, LLP, of Washington, D.C., argued for Plaintiffs Matra Americas, LLC and Matra Atlantic GmbH. With him on the briefs were *Donald B. Cameron*, *Julie C. Mendoza*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*.

Thomas J. Trendl, *Zhu (Judy) Wang*, and *Zachary Simmons*, Steptoe & Johnson LLP, of Washington, D.C., argued for Plaintiff Intervenors Koehler Paper SE and Koehler Oberkirch GmbH.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Schneiderman, King & Spalding LLP, of Washington, D.C., argued for Defendant-Intervenor, Domtar Corporation and Appvion, LLC. With him on the brief was *Stephen J. Orava.*

OPINION AND ORDER

Katzmann, Judge:

Before the court are seven consolidated challenges to the methodology and reasoning underlying the United States Department of Commerce's ("Commerce") assessment of antidumping duties on imports of thermal paper.

Plaintiffs Koehler Paper SE and Koehler Oberkirch GmbH (collectively, "Koehler") are German producers of thermal paper. Together

with affiliates Matra Americas, LLC and Matra Atlantic GmbH (collectively, "Matra"),[1] Koehler brings three challenges to Commerce's final determination of Koehler's dumping rates. *See Thermal Paper from Germany: Final Affirmative Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 86 Fed. Reg. 54152 (Dep't Com. Sept. 30, 2021), P.R. 299 ("*Final Determination*") and accompanying memorandum, Mem. from J. Maeder to C. Marsh, re: Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less than Fair Value in the Antidumping Duty Investigation of Thermal Paper from Germany (Dep't Com. Sept. 24, 2021), P.R. 291 ("IDM"). Koehler challenges Commerce's application of the "Cohen's *d*" methodology as a measure of variation among U.S. market prices, Commerce's refusal to consider certain exhibits to the case brief Koehler submitted at the agency level, and Commerce's inclusion of Koehler's "Blue4est" paper product within the scope of its investigation. *See* Pls.' Mot. for J. on the Agency R. at 2–6, Sept. 15, 2022, ECF No. 46 ("Koehler's Br.").

Defendant-Intervenors Appvion Operations, Inc. and Domtar Corporation (collectively, "Domestics") are U.S. entities that also produce thermal paper. They bring four challenges of their own to the *Final Determination*. Domestics challenge Commerce's consideration of certain test results for the "dynamic sensitivity" product characteristic that Koehler submitted pursuant to the underlying investigation, Commerce's determination that Koehler's submission of certain test results for the "static sensitivity" product characteristic was complete, Commerce's application of price adjustments for some of Koehler's home market rebates, and Commerce's classification of Koehler's interest expenses on previously-incurred antidumping liabilities as a cost of production. *See* Def.-Inters.' Mot. for J. on the Agency R. at 3, Sept. 15, 2022, ECF No. 44 ("Domestics' Br.").

The United States ("the Government") opposes all seven challenges. Def.'s Mem. in Opposition to Mots. for J. on the Agency R. at 3, Feb. 21, 2023, ECF No. 58 ("Gov't Br.").

The court sustains the *Final Determination* in part with respect to Commerce's inclusion of Blue4est paper as subject merchandise, to Commerce's coding of the dynamic sensitivity product characteristic, and to Commerce's application of price adjustments for some of Koehler's home market rebates. The court denies Koehler's challenge to Commerce's rejection of exhibits to Koehler's case brief on the ground of harmless error. The court remands Commerce's *Final Determination* in part for reconsideration or further explanation of Com-

[1] For ease of reference, the court in this opinion refers to Koehler and Matra collectively as "Koehler" (except where clarity demands precise specification).

merce's Cohen's *d* methodology, of Commerce's coding of the static sensitivity product characteristic, and of Commerce's classification of Koehler's accrued interest expenses as a cost of production.

BACKGROUND

I. Legal Background

"Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Such sales, which permit foreign producers to undercut domestic companies by selling products below reasonable fair market value, amount to unfair competition with American industry. *Id.* To remedy this issue Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and to issue orders imposing duties on imported merchandise as necessary. *Id.* at 1047.

Commerce imposes antidumping duties on imported goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and the International Trade Commission ("ITC") concludes that the sale of the merchandise below fair value materially injures, threatens to materially injure, or impedes the establishment of an industry in the United States. *See* 19 U.S.C. § 1673; *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when its normal value is greater than the price charged for the product in the United States. *See* 19 U.S.C. § 1673. The amount of antidumping duties that Commerce assesses is based on Commerce's calculation of the "dumping margin," which is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Commerce must determine the "margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

This determination is a complex, multi-step endeavor. The following legal background is relevant to the challenges raised in this case:

A. Commerce's Cohen's* d *Methodology

Commerce ordinarily determines normal value on the basis of market prices in the exporting country. 19 U.S.C. §§ 1677b(a)(1)(B)(i). Once normal value is determined, Commerce calculates a weighted-average dumping margin. In general, the agency "compar[es] . . . the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable mer-

chandise," termed the average-to-average ("A-to-A") method, "unless the Secretary determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(b)(1), (c)(1); *see also* 19 U.S.C. § 1677f-1(d)(1)(A)(i).

"The [A-to-A] method, however, sometimes fails to detect 'targeted' or 'masked' dumping, because a respondent's sales of low-priced 'dumped' merchandise would be averaged with (and offset by) sales of higher-priced 'masking' merchandise, giving the impression that no dumping was taking place." *Stupp Corp. v. United States* ("*Stupp III*"), 5 F.4th 1341, 1345 (Fed. Cir. 2021) (internal quotation marks and citation omitted); *see also Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720, 26721 (Dep't Com. May 9, 2014) ("*Differential Pricing Analysis*"). Commerce is therefore authorized to use two alternative methods to address the kind of targeted dumping that the A-to-A method may fail to detect. *Stupp III*, 5 F.4th at 1345. Relevant here,[2] Commerce may use the average-to-transaction ("A-to-T") method, which "involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." *Id.* § 351.414(b)(3). The A-to-T method is appropriate only if "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and if Commerce "explains why such differences cannot be taken into account" using alternative methods. 19 U.S.C. § 1677f-1(d)(1)(B).

To determine whether to "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," such as would warrant using the A-to-T method instead of the A-to-A method, Commerce conducts a series of statistical tests that together constitute a "differential pricing analysis." *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1342 & n.2 (Fed. Cir. 2017); *see also Stupp III*, 5 F.4th at 1346–47. Commerce's differential pricing analysis consists of three steps:

1. The Cohen's *d* Test. Commerce first segments export sales into subsets based on region, purchasers, and time periods. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26722. Commerce then applies

[2] Commerce may also compare the normal values of individual transactions to the export prices of individual transactions, a method known as the transaction-to-transaction ("T-to-T") method. 19 U.S.C. § 1677f-1(d)(1)(A)(ii). The T-to-T method is employed only in "unusual" situations not applicable to this case, such as "when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

the Cohen's *d* test,[3] which measures the extent of the difference in the means between a test group and comparison group of prices ("effect size"), to each subset. *Id.* Commerce designates the subset as the "test group" and aggregates the remaining export sales into what it terms the "comparison group." *Stupp III*, 5 F.4th at 1346. Commerce calculates Cohen's *d* for each test group by dividing the absolute value of the difference between the mean of the comparison group and the mean of the test group by the two groups' average standard deviation. *See id.*; *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673–74 (Fed. Cir. 2019). If the difference in average prices between the test group and the comparison group is large compared to the average standard deviation, this indicates that the sales prices in the test group differ significantly from the prices in the comparison group—thereby satisfying the condition imposed by 19 U.S.C. § 1677f-1(d)(1)(B). *See Mid Continent*, 940 F.3d at 673.

If the Cohen's *d* value is equal to or greater than the benchmark of 0.8 for any test group, Commerce deems the sales prices in the test group to have "passed" the test. *Id.* at 671; *Stupp III*, 5 F.4th at 1347. As Commerce has explained, this benchmark "provides the strongest indication that there is a significant difference between the means of the test and comparison groups." *Differential Pricing Analysis*, 79 Fed. Reg. at 26722; *see also Stupp III*, 5 F.4th at 1347. If the Cohen's *d* coefficient for a group is 0.8 or greater, the sales in the group "pass" the Cohen's *d* test and are subjected to the subsequent "ratio" and "meaningful difference" tests. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26722.

2. The Ratio Test. Commerce next applies the "ratio test" to the aggregated results of the Cohen's *d* test on each subset to assess the extent of the significant price differences for all sales. *See id.* at 26722. If less than thirty-three percent of the value of total sales passes the Cohen's *d* test, Commerce will use the A-to-A method to calculate the weighted-average dumping margin. *See id.* at 26723. If more than thirty-three percent but less than sixty-six percent of the value of total sales passes the Cohen's *d* test, Commerce may apply a hybrid method wherein it applies the A-to-A method to sales which do not pass the Cohen's *d* test, and the A-to-T method to sales which do pass the Cohen's *d* test. *See id.* And if more than sixty-six percent of the value of total sales passes the Cohen's *d* test, Commerce tentatively applies the A-to-T method to all sales because the data suggests an "identified pattern of export prices that differ significantly." *See id.* at 26722–23.

3. The Meaningful Difference Test. Finally, Commerce applies a "meaningful difference" test, which compares the antidumping mar-

[3] The "Cohen's *d* test" is Commerce's version of a general-purpose effect size metric devised in 1980 by statistician Jacob Cohen.

gins resulting from different methodologies, to examine whether using only the A-to-A method can appropriately account for price differences. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii); *Stupp III*, 5 F.4th at 1347; *Differential Pricing Analysis*, 79 Fed. Reg. at 26723. Commerce compares the dumping margin that results from applying only the A-to-A method with the dumping margin that results from applying the alternative method that is tentatively selected based on the Cohen's *d* and ratio tests. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26723. A difference in the weighted average dumping margins is considered meaningful if (1) there is a twenty-five-percent relative change and both rates are above the *de minimis* threshold of two percent, or (2) the A-to-A weighted average dumping margin is below the *de minimis* threshold and the alternative margin is above that threshold. *See id.* Commerce uses the alternative approach to calculate antidumping margin if it concludes there is a meaningful difference; absent a meaningful difference, Commerce will apply the A-to-A method. *See id.*

B. Commerce's Development of the Record with Parties' Case Brief Submissions

At certain times during an antidumping proceeding, interested parties may submit factual information for Commerce's consideration. Commerce has delineated time limits for these submissions. *See* 19 C.F.R. § 351.301. Relevant here is § 351.301(c)(5), which provides that "[t]he deadline for filing such [factual] information will be 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier." *Id.*[4] In making any antidumping determination, Commerce "will not use factual information, written argument, or other material that the Secretary rejects." *Id.* § 351.104(a)(2)(i).

[4] Commerce's regulations elsewhere define "Factual information" as comprising the following items:

> (i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
> (ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
> (iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;
> (iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and
> (v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)–(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

Id. § 351.102(b)(21)(i)–(v).

The court reviews Commerce's rejection of an interested party's case brief for abuse of discretion. *Stupp III*, 5 F.4th at 1349. As in other contexts, this standard of review presents a high bar: "Commerce is entitled to broad discretion regarding the manner in which it develops the record in an antidumping investigation." *Id.* (citing *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012)); *see also Grobest & I-Mei Indus. (Viet.) Co. v. United States*, 36 CIT 98, 122, 815 F. Supp. 2d 1342, 1365 (2012) ("The law applicable to this issue recognizes that Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings."). In most circumstances, therefore, courts "will not second-guess Commerce's application of the procedural requirements governing the submission of factual information in case briefs." *Stupp III,* 5 F.4th at 1350.

C. Commerce's Inclusion of Products Within the Scope of an Investigation

Commerce is responsible for delineating the scope of its antidumping investigation to determine which products are subject to investigation—and, as the case may be, to the assessment of antidumping duties. These products are collectively termed "subject merchandise." 19 U.S.C. § 1677(25).

When, as occurred here, Commerce initiates an antidumping investigation upon the petition of an interested party, "Commerce owes deference to the petitioner's intended scope" of the investigation. *M S Int'l, Inc. v. United States*, 32 F.4th 1145, 1151 (Fed. Cir. 2022); *see also* 19 U.S.C. § 1673a(b) (laying out procedures for initiating an antidumping investigation by petition). Nevertheless, "when defin[ing] or clarify[ing] the scope of an antidumping investigation while staying within the bounds of the intent of the petition, Commerce retains broad discretion." *M S Int'l*, 32 F.4th at 1151 (internal citation and quotation marks omitted). Further, "Commerce . . . may depart from the scope as proposed by a petition if it determines that petition to be overly broad, or insufficiently specific to allow proper investigation, or in any other way defective." *Id.* (internal citation and quotation marks omitted).

When Commerce modifies or interprets the scope of an investigation "before any final determination or order issue[s], . . . Commerce enjoy[s] greater discretion." *Id.* at 1152; *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002) ("The critical question is not whether the petition covered the merchandise or whether it was at some point within the scope of the investigation.").

The purpose of the petition is to propose an investigation. *Duferco*, 296 F.3d at 1096 (citing 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1) (2000)).

"A purpose of the investigation is to determine what merchandise should be included in the final order," and thus it is "Commerce's final determination" that "reflects the decision . . . as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* Thus, while "[t]he petition initially determines the scope of the investigation, . . . Commerce has inherent power to establish the parameters of the investigation, so that it would not be tied to an initial scope definition that may not make sense in light of the information available to Commerce or subsequently obtained in the investigation." *M S Int'l*, 32 F.4th at 1151 (quoting *Duferco*, 296 F.3d at 1089).

Even after Commerce issues the final order, Commerce may determine whether a particular product constitutes subject merchandise by issuing a Scope Ruling. 19 C.F.R. § 351.225(a). In issuing this ruling Commerce will, as a starting point, "consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive." *Id.* § 351.225(k)(1).

D. Commerce's Assignment of Control Numbers on the Basis of Product Characteristics

Before calculating dumping margins for subject merchandise, Commerce matches the U.S.-market products that are used to calculate export price with similar home-country market products ("foreign like product[s]") that are used to calculate normal value. 19 U.S.C §§ 1677(16), 1677b(a). Commerce matches products by assigning them "control numbers" ("CONNUMs"), which are strings of digits that denote a product's characteristics in descending order of importance. "In other words, the CONNUM is a number 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)). Under this system, Commerce will assign the same CONNUM to products that are materially identical. *SeAH Steel Corp. v. United States*, 34 CIT 605, 613 n.12, 704 F. Supp. 2d 1353, 1359 n.12 (2010) (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1375–76 (Fed. Cir. 2001)).

In this investigation, as is typical, *see, e.g.*, *GODACO Seafood Joint Stock Co. v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1342, 1352 (2020), Commerce assigned CONNUMs based on information it solicited from respondents. *See* IDM at 14. Respondents to an investi-

gation bear the burden of submitting this information. *See NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993). When Commerce finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]," the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1).[5] As Congress's use of the word "may" connotes, this is a discretionary power. *Tianjin Magnesium Int'l Co. v. United States*, 36 CIT 683, 687–88, 844 F. Supp. 2d 1342, 1346 (2012) ("It is well-established that Commerce enjoys broad discretion when considering whether to apply adverse facts available in antidumping proceedings."); *see also PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009). Where Commerce applies an adverse inference, it must first determine (and make a showing on the record) that a respondent has complied to the "best of its ability" by "examin[ing] [the] respondent's actions and assess[ing] the extent of [the] respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Conversely, when Commerce declines to make an adverse inference, 19 U.S.C. § 1677e(b) imposes no express mandate for Commerce to demonstrate a respondent's compliance with requests for information. *Tianjin Magnesium*, 36 CIT at 688; *see also Assan Alumniyum Sanayi ve Ticaret A.S. v. United States*, 47 CIT __, __, 624 F. Supp. 3d 1343, 1377 (2023) (observing that "Commerce *could* have declined to apply adverse facts available *even if* it had affirmatively found that [the respondent] failed to act to the best of its ability"). When Commerce declines to make an adverse inference, Commerce's burden is instead merely to show that this action is not "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[5] The practice of making such an inference is often referred to as applying "adverse facts available" or its acronym "AFA." Despite its common usage, including by Domestics in this case, this phrase is not in the text of any particular statutory or regulatory provision. *See Hyundai Elec. & Energy Sys. Co. v. United States*, 47 CIT __, __ & n.2, 617 F. Supp. 3d 1253, 1255 & n.2 (2023); *see also Risen Energy Co. v. United States*, 44 CIT __, __ & n.4, 477 F. Supp. 3d 1332, 1337 & n.4 (2020). 19 U.S.C. § 1677e(a) provides for the agency's use of "the facts otherwise available" on the record. And § 1677e(b) permits Commerce to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Neither provision contains the complete phrase "adverse facts available." The court nevertheless construes Domestics' use of the phrase "adverse facts available" to refer to § 1677e(b), because the relief Domestics seek (as reflected in their preconsolidation complaint) is Commerce's application of an adverse inference. *See* Domestics' Compl. ¶ 18, *Appvion, LLC. v. United States*, No. 21–634 (CIT filed Jan. 12, 2022), ECF No. 12 ("Domestics' Compl."); *see also infra* p. 24 (recounting procedural background).

Commerce's conduct with respect to deficient submissions by parties is subject to 19 U.S.C. § 1677m(d), which provides in relevant part as follows:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) 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.

Id.

This provision impliedly leaves to Commerce's discretion the initial question of whether a party's response to a request for information is deficient. *See Hyundai Steel Co. v. United States*, 45 CIT __, __, 518 F. Supp. 3d 1309, 1322 (2021) (stating that § 1677m's provisions apply "if Commerce finds a deficiency in a response to its request for information"); *see also ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1223 (2018) ("Inherent in the requirement of § 1677m(d) is a finding that Commerce was or should have been aware of the deficiency in the questionnaire response."). Instead, as with Commerce's discretion under 19 U.S.C. § 1677e(b) to decline to apply an adverse inference, Commerce's burden is only to avoid acting in a manner that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

E. Commerce's Authority to Grant Price Adjustments for Home Market Sales

The Tariff Act of 1930 provides for the application of certain adjustments to Commerce's calculation of subject merchandise's Export Price and Constructed Export Price. 19 U.S.C. § 1677a(c), (d). Commerce's regulations implementing this statute provide the following regarding the use of these price adjustments:

> In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). The Secretary will not accept a price adjustment

> that is made after the time of sale unless the interested party demonstrates, to the satisfaction of the Secretary, its entitlement to such an adjustment.

19 C.F.R. § 351.401(c) (2021). The term "price adjustment" is defined elsewhere in Commerce's regulations as follows:

> "Price adjustment" means a change in the price charged for subject merchandise or the foreign like product, such as a discount, *rebate*, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (see § 351.401(c)), that is reflected in the purchaser's net outlay.

19 C.F.R. § 351.102(b) (2021) (emphasis added).

As Commerce explained in the regulatory preamble to a recent Final Rule modifying these regulations, Commerce considered but ultimately declined to promulgate language in its Proposed Rule that stated: "the Department generally will not consider a price adjustment that reduces or eliminates dumping margins unless the party claiming such price adjustment demonstrates that the terms and conditions of the adjustment were established and known to the customer at the time of sale." *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 Fed. Reg. 15641 (Dep't Com. Mar. 24, 2016) ("*Final Modification*"). In the same preamble, Commerce acknowledged that:

> Since enacting these regulations, [Commerce] has consistently applied its practice of not granting price adjustments where the terms and conditions were not established and known to the customer at the time of sale (sometimes referred to as determining the "legitimacy" of a price adjustment) because of the potential for manipulation of the dumping margins through so-called "after-the-fact", or post-sale, adjustments.

Id. at 15642. Commerce nevertheless declined to codify this practice through a modification to its regulations. The agency explained its reasoning as follows:

> With respect to 19 CFR [§] 351.401(c), in light of concerns that the modifications in the Proposed Rule may have the unintended consequence of being overly restrictive and limiting the Department's discretion to accept certain post-sale price adjustments which it has previously accepted, the Department is modifying 19 CFR [§] 351.401(c) to clarify that the Department generally will not accept a price adjustment that is made after

> the time of sale unless the interested party demonstrates, to the satisfaction of the Department, its entitlement to such an adjustment.

Id. at 15644. Instead, Commerce modified 19 C.F.R. § 351.401(c) to include the more modest provision that "[t]he Secretary will not accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of the Secretary, its entitlement to such an adjustment." In its preamble to the *Final Modification*, Commerce explained the meaning of "entitlement to such an adjustment" as follows:

> In determining whether a party has demonstrated its entitlement to such an adjustment, the Department may consider: (1) Whether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation; (2) how common such post-sale price adjustments are for the company and/or industry; (3) the timing of the adjustment; (4) the number of such adjustments in the proceeding; and (5) any other factors tending to reflect on the legitimacy of the claimed adjustment. The Department may consider any one or a combination of these factors in making its determination, which will be made on a case-by-case basis and in light of the evidence and arguments on each record.

Final Modification, 81 Fed. Reg. at 15644–45.

F. Commerce's Classification of Financial Interest Expenses and U.S. Selling Expenses

Commerce is instructed by statute to classify certain expenses as part of the "cost of production" for subject merchandise. 19 U.S.C. § 1677b(b)(3).[6] In determining Normal Value, Commerce may also disregard any home market sales made at less than this cost of production. 19 U.S.C. § 1677b(b)(1). Thus, when Commerce classifies an expense as a cost of production, the effect is to raise Normal Value—

[6] This provision defines "cost of production" as the sum of the following costs:

> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

Id.

and thereby increase a respondent's calculated dumping margin—by increasing the likelihood that a lower-priced home market sale will be disregarded.

Commerce is also instructed by statute to classify certain expenses as selling expenses for the purpose of adjusting constructed export price. 19 U.S.C. § 1677a(d) provides as follows:

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

Id.

Meanwhile, 19 U.S.C. § 1677a(c)(2)(A) directs Commerce to reduce the price it uses to establish constructed export price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States."

To carry out these statutory directives, Commerce's regulations provide that "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." 19 C.F.R. § 351.402(b).

Like cost-of-production classifications under § 1677b(b), selling-expense classifications under § 1677a have the general effect of increasing the calculated dumping margin for subject merchandise. Selling-expense classifications induce this effect by lowering Com-

merce's calculation of subject merchandise's export price, which in turn increases the difference between that export price and Normal Value.

II. Factual and Procedural Background

Before the investigation underlying the determination under review here began, Koehler was a respondent in a separate antidumping proceeding. *See Lightweight Thermal Paper from the People's Republic of China and Germany: Continuation of the Antidumping and Countervailing Duty Orders on the People's Republic of China, Revocation of the Antidumping Duty Order on Germany*, 80 Fed. Reg. 5083 (Dep't Com. Jan. 30, 2015). At the conclusion of that proceeding (and all related litigation, *see Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 555 (2017)), Commerce assessed Koehler with nearly $200 million in antidumping duties. Pet. for Writ of Certiorari at 8, *Papierfabrik August Koehler SE v. United States*, No. 17–171 (U.S. July 31, 2017). Koehler did not timely pay these duties, *see* IDM at 18, and Customs and Border Protection ("Customs") accordingly assessed interest on Koehler's outstanding liability. Some of this interest accrued during a period which included the investigation at issue in this case. *Id.* at 19.

On October 7, 2020, Domestics filed a petition with Commerce alleging that imports of thermal paper from Germany, Japan, Korea, and Spain, were being, or were likely to be, sold in the United States at less than fair value. *See Thermal Paper from Germany, Japan, the Republic of Korea, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 69580, 69580 (Dep't Com. Nov. 3, 2020); *see also Thermal Paper from Germany: Preliminary Affirmative Determination*, 86 Fed. Reg. 26001 (Dep't Com. May 12, 2021), P.R. 216 ("*Preliminary Determination*") and accompanying memorandum, Mem. from J. Maeder to C. Marsh re: Decision Mem. for the Prelim. Determ. in the Less-Than-Fair-Value Investigation of Thermal Paper from Germany at 1 (Dep't Com. May 5, 2021), P.R. 205 ("PDM"). On October 27, 2020, Commerce initiated an antidumping duty investigation into thermal paper from Germany. PDM at 1. On November 27, 2020, Commerce selected Koehler as a mandatory respondent for individual examination regarding the investigation of thermal paper from Germany. PDM at 1; *see also* Mem. from D. Goldberger to J. Maeder, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany: Respondent Selection at 1 (Dep't Com. Nov. 27, 2020), P.R. 80.

In January 2021, Koehler and Matra submitted timely responses to Commerce's antidumping duty questionnaire on topics relating to general information, comparison market sales, U.S. sales, cost of production, and constructed value. PDM at 2. From January through April 2021, Commerce issued supplemental questionnaires, and both Koehler and Matra submitted timely responses. *Id.* at 2–3.

On May 6, 2021, Commerce announced a preliminary dumping margin of 2.78 percent. *Preliminary Determination*, 86 Fed. Reg. at 26002. Commerce also preliminarily determined that Koehler's "Blue4est" paper product was not within the meaning of the scope of the investigation. Mem. from D. Goldberger to the File, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany: Prelim. Determ. Margin Calculation for Papierfabrik August Koehler SE at 1–2 (Dep't Com. May 5, 2021), P.R. 209, C.R. 296 ("Prelim. Calculation Mem."). Commerce preliminarily applied its differential pricing analysis in determining which method to use in comparing the normal value to the expert price or constructed export price. PDM at 7–9. To determine whether to use the default A-to-A method or the A-to-T method, Commerce applied the Cohen's *d* test as the first step in assessing whether Koehler's U.S. market prices differed significantly among purchasers, regions, or time periods. *Id.* at 8. Commerce next applied the ratio test to determine whether the value of sales that passed the Cohen's *d* test supports the consideration of the A-T method for some or all of the sales. *Id.* Based on the results from these tests, Commerce preliminarily found that "54.17 percent of the value of U.S. sales passes the Cohen's d test and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods," and accordingly used the A-to-T method to compare the normal value and constructed export price for the 54.17 percent of sales in the U.S. market. *Id.* at 9.

In August, 2021, Commerce received case briefs from all interested parties. IDM at 2. Commerce accepted Domestics' case brief in its entirety. *See* Letter from King & Spalding to G. Raimondo, Sec'y of Com., re: Thermal Paper from Germany: Petitioners' Case Brief (Aug. 16, 2021) ("Domestics' Case Br."), P.R. 271, C.R. 350.

Koehler's case brief included, as Exhibits 4.1.1, 4.1.2, 4.2, and 4.3, "normal distribution analysis summaries or printouts of Commerce's sales margin program subjected to a basic standard deviation analysis." Koehler's Br. at 35; *see also* Letter from Dechert LLP and Morris, Manning & Martin, LLP to G. Raimondo, Sec'y of Com., re: Thermal Paper from Germany: Case Brief of Koehler and Matra (Aug. 17,

2021) (rejected and retained) ("Rejected Case Brief"), P.R. 270, C.R. 345. Koehler had subjected Commerce's SAS[7] computer program log, which recorded the agency's Cohen's *d* calculations for all test groups within Koehler's sales data, to Koehler's own computer analysis that purportedly showed how Commerce's calculations of Cohen's *d* violated what Koehler argued (and now continues to argue) are necessary conditions of normal distribution, sample size, and equal variance. The input SAS program log that Koehler used for the purpose of its exhibit were first issued by Commerce in conjunction with the agency's *Preliminary Determination* on May 5, 2021. *See* Prelim. Calculation Mem. attach. 1.

Commerce rejected these exhibits to Koehler's case brief on August 24, 2021, and stated (in relevant part) as follows:

> Pursuant to 19 CFR 251.301(c)(5), the deadline for the submission of new factual information not described in paragraphs (c)(1) through (c)(4) of Commerce's regulations is 30 days before the scheduled date of the preliminary determination (or 14 days before verification, whichever is earlier). Commerce issued its preliminary determination on May 5, 2021; therefore, the deadline for new factual information was no later than April 5, 2021. As a result, the revised SAS program, log, and resulting data was untimely filed and must be rejected.

Letter from E. Eastwood to Dechert LLP, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany (Aug. 24, 2021), P.R. 278.

Koehler submitted a revised case brief on August 27, 2021, which Commerce accepted. *See* Letter from Dechert LLP and Morris, Manning & Martin, LLP to G. Raimondo, Sec'y of Com., re: Thermal Paper from Germany: Resubmission of Case Brief of Koehler and Matra (Aug. 27, 2021), P.R. 280–81, C.R. 354 ("Koehler's Case Br.").

On September 30, 2021, Commerce published the final results of its investigation. *See Final Determination*, 86 Fed. Reg. 54152; IDM; Mem. from A. Elouaradia to J. Maeder, re: Thermal Paper from Germany: Final Scope Decision (Dep't Com. Sept. 24, 2021), P.R. 297, C.R. 363 ("Final Scope Decision"). The *Final Determination* reflected no change to Commerce's Cohen's *d* methodology, and reflected Commerce's continued practice of making price adjustments to account for rebates that Koehler applied to certain home market sales. IDM at 4, 21. However, Commerce also made changes to several aspects of the *Preliminary Determination*. In the Final Scope Decision that Com-

[7] SAS is the name of a computer program and is not an acronym.

merce issued concurrently with the *Final Determination*, Commerce explained that it included Koehler's "Blue4est" paper product in the scope of the investigation because it deemed the physical "thermal sensitive layer" in Koehler's Blu4est paper product to qualify as a "thermal active coating" within the meaning of the investigation's scope. Final Scope Decision at 5–8. Commerce also revised the reported static sensitivity product characteristic for one reported CONNUM but continued to accept Koehler's reporting of dynamic sensitivity codes. IDM at 14. Commerce rejected Domestics' request to apply an adverse inference based on allegations of incomplete documentation of the static product characteristic. *Id.*

Matra filed a summons on December 22, 2021, and a complaint against the United States on January 21, 2022, to challenge certain aspects of Commerce's *Final Determination*. *See* Matra Summons, ECF No. 1; Matra Compl., ECF No. 11. Domestics filed a consent motion to intervene as Defendant-Intervenors on February 3, 2022, and the court granted the motion on February 7, 2022. *See* Domestics' Mot. to Intervene, ECF No. 13; Order Granting Mot., ECF No. 18. On February 22, 2022, Koehler filed a motion to intervene as Plaintiffs-Intervenors, and on March 15, 2022, the Government filed a response withdrawing its opposition to the motion. *See* Koehler's Mot. to Intervene, ECF No. 19; Gov't Resp. to Koehler's Mot. to Intervene, ECF No. 25. The court granted the motion on March 15, 2022. *See* Order Granting Mot., ECF No. 26.

Koehler commenced a separate action against the United States, challenging similar aspects of Commerce's final determination. Koehler filed a summons on December 22, 2021, and a complaint on January 21, 2022. *See* Koehler's Summons, *Koehler Paper SE et al. v. United States*, No. 21–633 (CIT filed Dec. 22, 2021), ECF No. 1; Koehler's Compl., *Koehler*, No. 21–633 (CIT filed Jan. 21, 2022), ECF No. 10. On February 3, 2022, Domestics filed a consent motion to intervene as defendant-intervenors in the *Koehler* action, which the court granted on February 7, 2022. *See* Domestics' Mot. to Intervene, *Koehler*, No. 21–633 (CIT filed Feb. 3, 2022), ECF No. 15; Order Granting Mot., *Koehler*, No. 21–633 (CIT Feb. 7, 2022), ECF No. 20. Matra also filed a consent motion to intervene as plaintiffs-intervenors on February 9, 2022, which the court granted the same day. *See* Matra's Mot. to Intervene, *Koehler*, No. 21–633 (CIT Feb. 9, 2022), ECF No. 21; Order Granting Mot., *Koehler*, No. 21–633 (CIT Feb. 9, 2022), ECF No. 25.

Domestics also brought a separate action against the Government to challenge certain other aspects of the *Final Determination*, filing a summons on December 22, 2021 and a complaint on January 21,

2022. *See* Domestics' Summons, *Appvion*, No. 21–634 (CIT filed Dec. 22, 2021), ECF No. 1; Domestics' Compl. Matra filed a consent motion to intervene as a defendant-intervenor on February 9, 2022, and the court granted the motion on the same day. *See* Matra's Mot. to Intervene, *Appvion*, No. 21–634 (CIT filed Feb. 9, 2022), ECF No. 16; Order Granting Mot., *Appvion*, No. 21–634 (CIT filed Feb. 9, 2022), ECF No. 20. On February 22, 2022, Koehler filed a motion to intervene a defendant-intervenor. *See* Koehler's Mot. to Intervene, *Appvion*, No. 21–634 (CIT filed Feb. 22, 2022), ECF No. 21. The court granted Koehler's motion on March 15, 2022. *See* Order Granting Mot., *Appvion*, No. 21–634 (CIT filed Feb. 9, 2022), ECF No. 20.

On April 1, 2022, the parties submitted joint status reports in the three actions pending before the court. *See* Joint Status Report, ECF No. 28; Joint Status Report, *Koehler*, No. 21–633 (CIT filed Apr. 1, 2022), ECF No. 32; Joint Status Report, *Appvion*, No. 21–634 (CIT filed Apr. 1, 2022), ECF No. 29. In the reports, the parties indicated that all parties agreed the two separate actions should be consolidated under the lead case brought by Matra (No. 21–632). Joint Status Report at 3; Joint Status Report at 3, *Koehler*, No. 21–633; Joint Status Report at 3, *Appvion*, No. 21–634. On the same day, the court issued orders consolidating the actions brought by Koehler and the Domestics under Consolidated Court Number 21–632. *See* Order, *Koehler*, No. 21–633 (CIT filed Apr. 1, 2022), ECF No. 33; Order, *Appvion*, No. 21–634 (CIT filed Apr. 1, 2022), ECF No. 30.

Also on the same day, Koehler moved to stay proceedings in this case pending the final resolution of proceedings in litigation involving a similar challenge to Commerce's Cohen's *d* methodology. *See Stupp Corp. v. United States* ("*Stupp IV*"), 47 CIT __, 619 F. Supp. 1314 (2023); Mot. to Stay Proceedings, Apr. 1, 2022, ECF No. 27. The Government opposed the motion, and the court denied it on May 20, 2022. *See* Gov't Resp. to Pls.' Mot. to Stay, Apr. 21, 2022, ECF No. 32; Order Denying Mot. to Stay Proceedings, ECF No 37. (The *Stupp* litigation is still ongoing, and an appeal from *Stupp IV* is now pending before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). *See Stupp Corp. v. United States* ("*Stupp V*"), No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023)).

On September 15, 2022, Koehler and Matra filed their Motion for Judgment on the Agency Record. *See* Koehler's Mot. for J. on the Agency R., ECF No. 46 ("Koehler's Br."). On the same day, Domestics filed their Motion for Judgment on the Agency Record. *See* Domestics' Mot. for J. on the Agency R., ECF No. 44 ("Domestics' Br.").

On February 21, 2023, Domestics filed their response brief to Koehler's Motion. *See* Domestics' Resp. to Koehler's Mot. J. Agency R.,

ECF No. 54 (“Domestics’ Resp.”). Koehler and Matra filed their response to Domestics’ Motion on the same day. *See* Koehler’s Resp. to Domestics’ Mot. J. Agency R., Feb. 21, 2023, ECF No. 57 (“Koehler’s Resp.”). Also on the same day, the Government filed its response brief to both motions. *See* Gov’t Resp. to Mot. J. Agency R., Feb. 21, 2023, ECF No. 58 (“Gov’t Br.”).

On April 28, 2023, Koehler and Matra submitted a reply to the Government’s response. Koehler’s Reply Br., ECF No. 64 (“Koehler’s Reply”). Domestics filed their reply brief on the same day. Domestics’ Reply Br., Apr. 28, 2023, ECF No. 65 (“Domestics’ Reply”).

Oral argument was held on November 1, 2023. The court issued questions in advance of oral argument, *see* Letter to Parties, Oct. 16, 2023, ECF No. 75, and the parties filed responses. *See* Pls.’ Resp. to Ct.’s Qs. for Oral Arg., Oct. 26, 2023, ECF No. 77 (“Pls.’ OAQ Resp.”); Def.’s Resp. to Ct.’s Qs. for Oral Arg., Oct. 26, 2023, ECF No. 78 (“Def.’s OAQ Resp.”); Def.-Inters.’ Resp. to Ct.’s Qs. for Oral Arg., Oct 26, 2023, ECF No. 76 (“Def.-Inters.’ OAQ Resp.”). The court invited the parties to submit post-argument briefing, and all parties did so. *See* Def.’s Post-Oral Arg. Subm., Nov. 20, 2023, ECF No. 82; Def.-Inters.’ Post-Oral Arg. Subm., Nov. 20, 2023, ECF No. 83; Pl.’s Post-Hr’g Subm., Nov. 20, 2023, ECF No. 84.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (B); *see also NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998) (Under 28 U.S.C. § 1581(c), “[a]n importer may appeal from Commerce’s final determination to the United States Court of International Trade.”). 19 U.S.C. § 1516a(a)(2)(B)(i) empowers the court to review final affirmative determinations by Commerce; § 1516a(a)(2)(B)(vi) empowers the court to review decisions by Commerce concerning “whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order.” *Id.*

In reviewing antidumping determinations, the court will sustain “‘any determination, finding or conclusion found’ by Commerce unless it is ‘unsupported by substantial evidence on the record, or otherwise not in accordance with the law.’” *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)).

Substantial evidence refers to “such evidence that a reasonable mind might accept as adequate to support a conclusion.” *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (internal quotation marks and citation omitted).

An agency acts contrary to law if its decision-making is arbitrary or unreasoned. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167–68 (1962)). Commerce must establish a “rational connection between the facts found and the choice[s] made.” *Id.* at 168; *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013). In reviewing Commerce’s determinations, the court “must judge the propriety of [agency] action solely by the grounds invoked by the agency,” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)), but may uphold an agency’s action even where “the agency’s decisional path” is merely “reasonably discernable.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).

DISCUSSION

As noted above, seven challenges to Commerce’s *Final Determination* are before the court. Koehler and Matra challenge (1) Commerce’s application of its “Cohen’s *d*” methodology as a measure of variation among U.S. market prices, (2) Commerce’s refusal to consider exhibits to the case brief that Koehler submitted at the agency level, and (3) Commerce’s inclusion of Koehler’s “Blue4est” paper product within the scope of its investigation. Koehler’s Br. at 2–6. Domestics challenge (4) Commerce’s consideration of certain test results for the “dynamic sensitivity” product characteristic that Koehler submitted pursuant to underlying investigation, (5) Commerce’s determination that Koehler’s submission of certain test results for the “static sensitivity” product characteristics was complete, (6) Commerce’s application of price to some of Koehler’s home market sales, and (7) Commerce’s classification of Koehler’s debt service on previously-incurred antidumping liabilities as a cost of production. Domestics’ Br. at 3.

For the reasons explained below, the court (1) remands Commerce’s application of its Cohen’s *d* methodology for further explanation, (2) denies Koehler’s challenge to Commerce’s rejection of its case briefs on the ground of harmless error, (3) sustains Commerce’s inclusion of Blue4est paper within the scope of the investigation, (4) sustains Commerce’s CONNUM determination as to the dynamic sensitivity product characteristic, (5) remands Commerce’s determination that Koehler’s static sensitivity reporting was complete, (6) sustains Commerce’s grant of price adjustments for home market rebates, and (7) remands Commerce’s classification of Koehler’s interest expenses as costs of production for reconsideration or further explanation consistent with this opinion.

I. Commerce Must Further Explain Its Cohen's d *Methodology*

A. Overview

Commerce used the "Cohen's *d*" statistical test in the underlying investigation as a means of fulfilling its statutory mandate to determine the existence of significant price differences within the U.S. market for Koehler's products before using the A-to-T method to calculate Koehler's dumping margin. *See* PDM at 7–9; 19 U.S.C. § 1677f-1(d)(1)(B)(i). Commerce applied the A-to-T method and explained its underlying Cohen's *d* methodology in the memo accompanying its *Preliminary Determination*. *See* PDM at 7–9. Commerce applied the same methodology to the *Final Determination*. *See* IDM at 3–8. Between Commerce's issuance of its *Preliminary* and *Final Determinations*,[8] however, the Federal Circuit held in *Stupp III*, 5 F.4th 1341, that Commerce's application of the Cohen's *d* test in that case warranted remand for further explanation as to the methodology's statistical reliability. At issue here is whether Commerce's application of Cohen's *d* in this case—and its explanation thereof on the agency record—similarly warrant remand for further explanation.

Against the standard laid out by the Federal Circuit in *Stupp III*, Commerce has not sufficiently explained how its use of the Cohen's *d* test was a reasonable means of determining the existence of a "pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1(d)(1)(B)(i). Commerce's brief discussion of *Stupp III* in its IDM does not directly address the Federal Circuit's concerns regarding Commerce's use of the test where "the data groups being compared are small, are not normally distributed, and have disparate variances." *Stupp III*, 5 F.4th at 1357. The court accordingly remands for Commerce to provide additional explanation.[9] For the sake of judicial and administrative economy, however, Commerce's formulation of this explanation should await the Federal Circuit's potentially controlling disposition in a pending appeal from this court's judgment

[8] Commerce issued its PDM on May 5, 2021, and its IDM on September 24, 2021. The Federal Circuit decided Stupp III on July 15, 2021.

[9] In so doing, the court does not reach the Government's argument that Koehler, in relying on "detailed arguments regarding the percentage differences associated with the Cohen's d coefficient under various assumptions of normality, variance, and numerosity," failed to exhaust administrative remedies because it did not raise those arguments in the agency proceeding below. Gov't. Br. at 23 (citing Koehler's Br. at 19–24). As explained below, the court does not conclude that Commerce's Cohen's d methodology was unreasonable. The court concludes only that Commerce failed to adequately explain its application of that methodology—and the court does not consider the hypotheticals set forth in Koehler's (CIT) brief in reaching that conclusion.

sustaining Commerce's remand redetermination following *Stupp III*. *See Stupp IV*, 619 F. Supp. 1314; *Stupp V*, No. 23–1663.

B. Commerce's Discussion of Stupp III

Koehler urges the court to remand Commerce's determination on the ground that the agency's application of its Cohen's *d* test was unreasonable. *See* Koehler's Br. at 16. The Government and Domestics take the contrary position, arguing that Commerce's application of the test was reasonable and should accordingly be sustained. *See* Gov't Br. at 13; Domestics' Resp. at 2.

But before the court can determine whether Commerce has reasonably applied its Cohen's *d* methodology in this case, the court must first ensure that the administrative record permits such review. *See CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1380–81 (Fed. Cir. 2016) (explaining that "[w]e are remanding because we conclude that Commerce has not explained its determination sufficiently to allow us to conduct the judicial review to which [the appellant] is entitled to ensure that the agency's exercise of power adheres to the authorizing law"). To serve as a basis for sustaining agency action, the record must contain an explanation from Commerce that its "methodology was a reasonable exercise of its agency discretion in light of the statutory constraints and policies." *Mid Continent*, 940 F.3d at 674. This requirement stems in part from a statutory directive that Commerce provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review (as the case may be), concerning the establishment of dumping or a countervailable subsidy." 19 U.S.C. § 1677f(i)(3)(A). If no explanation appears that allows the "agency's path" to be "reasonably . . . discerned," *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), then Commerce must supply one on remand, *see Mid Continent*, 940 F.3d at 675.

At issue here is Commerce's responsiveness to the concerns raised by the Federal Circuit in *Stupp III* and raised by Koehler at the agency level in its case brief. *See* IDM at 3–4. In *Stupp III* the Federal Circuit shed light on the "statutory constraints and policies" against which the reasonableness of Commerce's Cohen's *d* methodology must be measured. *Stupp III*, 5 F.4th at 1360. Without directly holding that Commerce's use of Cohen's *d* in that case was per se unreasonable, the Federal Circuit nevertheless expressed serious doubt as to the

statutory basis of Commerce's Cohen's *d* methodology as applied. *Stupp III*, 5 F.4th at 1360.[10]

In particular, the Federal Circuit in *Stupp III* took issue with the fact that Commerce had applied the Cohen's *d* test without first ensuring that the input data were normally distributed, comprised an adequate number of observations, and had similar variance despite warnings by academic authorities (including Professor Cohen himself) that ignoring these considerations would produce an unreliable measure of effect size. *Id.* This unreliability, the Federal Circuit opined, introduced a risk that Commerce's application of Cohen's *d* would not be a reasonable means of carrying out the statutory directive to ascertain whether there exists "a pattern of export prices for comparable merchandise . . . that differ significantly among purchasers, regions, or periods of time." *Id.* at 1352, 1360 (quoting 19 U.S.C. § 1677f-1(d)(1)(B)(i)).

Koehler's case brief cited *Stupp III* and raised the Federal Circuit's concerns with respect to Commerce's use here of the Cohen's *d* test without first ensuring that the test and comparison groups used were of sufficiently normal distribution, numerosity, and equivalent variance between the test and comparison groups. *See* IDM at 3–4.

Commerce provided a three-and-a-half-page response in its IDM, stating at the outset that "[w]e disagree with Koehler that the [Federal Circuit]'s finding in [*Stupp III*] requires Commerce to change its application of the Cohen's *d* test." IDM at 4. Commerce downplayed the bearing of *Stupp III* on its determination, pointing out that "the [Federal Circuit] remanded the underlying administrative review to Commerce to provide further explanation; the [Federal Circuit] did not find Commerce's use of the Cohen's *d* test unlawful." *Id. Stupp III*, Commerce explained, "is not a final and conclusive Court decision, but rather is a ruling issued as part of ongoing litigation." *Id.* at 5.

Following a discussion of how Cohen's *d* purportedly facilitates the measurement of "practical significance" as opposed to "statistical significance," as well as an explanation supporting the use of the 0.8 benchmark for determining that an effect size is "large," Commerce concluded its response as follows:

> As a general matter, Commerce finds that the U.S. sales data which Koehler reported to Commerce constitutes a complete population. As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to Com-

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[10] *Id.* ("It seems likely that Commerce's application of the Cohen's *d* test had a material impact on the results of the less-than-fair-value investigation in this case, particularly given that the dumping margin assigned to [the respondent] was only slightly above the de minimis threshold, below which no antidumping duties would be assessed.").

> merce's analysis. As the Courts have previously stated, "'[S]tatistical significance' is irrelevant where, as here, the agency has a complete set of data to consider . . . [I]f Congress wanted ITA to measure 'statistical significance,' it would have included the word 'statistical' [when it drafted the statute]." Thus, we have continued to employ the Cohen's d test in our margin calculations for the final determination.

IDM at 8 (footnotes omitted) (alterations in original) (quoting *Xi'an Metals & Materials Imp. & Exp. Co. v. United States*, 41 CIT __, __, 256 F. Supp. 3d 1346, 1364–65 (2017)).

The Government argues that "Commerce's explanation in this investigation clarifies the same issues" as were raised by the Federal Circuit in *Stupp III* and reasserts that explanation in greater detail in its brief. Gov't Br. at 19–22. But the court reviews only Commerce's explanation on the agency record as the grounds for Commerce's determination. *See Chenery*, 332 U.S. at 196 (explaining that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"). For the reasons set forth below, the court concludes that Commerce's explanation is deficient.

First, Commerce's characterization of the Federal Circuit's holding in *Stupp III* as a mere "ruling issued as part of ongoing litigation," IDM at 5, does not account for the fact that *Stupp III* is a published, precedential decision with holdings that clarify (and indeed shape) the background law against which Commerce's actions are to be found either reasonable or unreasonable. Even if Commerce was correct to point out that the Federal Circuit in *Stupp III* did not squarely hold that Commerce's application of Cohen's *d* in that case was unreasonable, Commerce's explanation does not address what the Federal Circuit *did* in fact hold: that absent a fuller explanation than what Commerce provided on the agency record in *Stupp* as to calculations of Cohen's *d* that do not ensure normal distribution, sufficient sample size, and roughly equal variance across the test and comparison groups, the appropriate remedy is remand. *See Stupp III*, 5 F.4th at 1360.

Second, Commerce's statement that Koehler's U.S. sales data comprise a "complete population," rather than an incomplete sample, was not responsive to Koehler's argument incorporating the Federal Circuit's holding that applications of Cohen's *d* raise "significant concerns" where "*the test groups and the comparison groups* [are not] normally distributed, of sufficient size, and of roughly equal vari-

ances." *Stupp III*, 5 F.4th at 1357 (emphasis added). As the Federal Circuit made clear in *Stupp III*, the reliability of a Cohen's *d* calculation (including, for example, the usefulness of a 0.8 benchmark for a "large" effect size) depends on the satisfaction of Professor Cohen's assumptions of normality, numerosity, and roughly equal variability between the test group and the comparison group. *Id.* Seemingly irrelevant to this inquiry, however, is whether the set of all sales included in test and comparison groups represents the entirety of a company's U.S. sales. That fact was relevant in *Xi'an Metals* only because the consolidated plaintiffs in that case argued that 19 U.S.C. § 1677f–1(d)(1)(B)(i) requires Commerce to determine the "statistical significance" of price differences. 256 F. Supp. 3d at 1364–65.[11] By contrast, no party in this case (besides the Government) has raised a statistical significance–related challenge.

It is precisely the questionable relevance of the Government's suggested completeness factor that formed the basis of the Federal Circuit's remand in *Stupp III* for Commerce's additional explanation. *Stupp III*, 5 F.4th at 1360 ("[W]e invite Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test."). In light of this "invitation," which Koehler raised at the agency level, *see* Koehler's Case Br. at 2–7, Commerce was required to explain how testing an entire population mitigates otherwise suspect aspects of Commerce's testing protocol. Without such an explanation, the court cannot assess whether Commerce's methodology is a reasonable means of ascertaining the existence of "a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f1(d)(1)(B); *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1380–81 (Fed. Cir. 2022) (citing the same statutory provision as grounds for remanding Commerce's explanation of a different aspect of its Cohen's *d* methodology). And without that preliminary assessment, the court cannot proceed to evaluate whether Commerce has fulfilled its statutory obligation to calculate dumping margins "as accurately as possible." *Rhone Poulenc*, 899 F.2d at 1191.

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[11] That challenge failed—the court pointed out that statistical significance gauges sample data's representativeness of an incompletely measured larger population, which means that measuring statistical significance is "inappropriate" where the sample *is* the larger population. *Id.* at 1365. The court rejected a similar challenge in *Stanley Works (Langfang) Fastening Sys. Co. v. United States*, holding that "[b]ecause the Cohen's *d* test, as used by Commerce, employs the entire universe of data, there is no need to test for statistical significance" and that "no inference is being made from a sample." 42 CIT __, __, 333 F. Supp. 3d 1329, 1346 (2018).

Commerce has not adequately addressed Koehler's argument, which bears directly on the reasonableness of Commerce's Cohen's *d* methodology, by stating that "sample size, sample distribution, and the statistical significance of the sample are not relevant to Commerce's analysis" because "the U.S. sales data which Koehler reported to Commerce constitutes a complete population." IDM at 8. The logical link between these two propositions is not so reasonably discernable as to obviate the need for explanation. *See Wheatland Tube*, 161 F.3d at 1369–70. Accordingly, the court cannot reach the issue of the underlying reasonableness of Commerce's use of the Cohen's *d* test without further development of this point on the agency record.[12] Remand is necessary to allow Commerce to reconsider its position or provide further explanation that considers all relevant law as interpreted by this court and by the Federal Circuit.

The court recognizes, however, that an appeal from the court's ruling on Commerce's remand determination following *Stupp III* is now pending before the Federal Circuit. *See Stupp V*, No. 23–1663.[13] To allow Commerce the benefit of reference to the Federal Circuit's anticipated holding in *Stupp V* in its remand determination, the court instructs Commerce to complete its determination no sooner than,

[12] In this regard, this case differs from *Stupp IV*, in which the court sustained the remand redetermination that Commerce undertook pursuant to the Federal Circuit's opinion in *Stupp III*. In *Stupp IV*, the court concluded that "Commerce has adequately explained how its [Cohen's *d*] methodology is reasonable." 619 F. Supp. 3d at 1328. The court reached this conclusion, however, on the basis of a much more developed explanation than what Commerce has offered in the record underlying this case. *Compare Redetermination Pursuant to Court Remand Order* at 1–74, *Stupp Corp. v. United States*, Consol. Court No. 15–00334 (Dep't Com. Apr. 4, 2022), *with* IDM at 4–8; *see also Stupp IV*, 619 F.Supp.3d at 1324 n.8.

In the more recent case of *NEXTEEL Co. v. United States*, the court sustained Commerce's remand redetermination upon holding that "Commerce has adequately explained how its [Cohen's *d*] methodology is reasonable." 47 CIT __, __, Slip Op. 23–181, at 26 (Dec. 18, 2023). As in *Stupp IV*, Commerce's discussion of *Stupp III* in the *NEXTEEL* remand results was far more developed than what Commerce provided in the IDM in this case. *Cf. NEXTEEL Co. v. United States*, 47 CIT __, __, 633 F. Supp. 3d 1190, 1201 (2023) (remanding for "reconsideration or further discussion" an earlier remand redetermination in the same litigation where Commerce's explanation failed to "resolve the [Federal Circuit]'s concerns raised in *Stupp* [*III*]").

The reasonableness of Commerce's explanations at issue in *Stupp IV* and *NEXTEEL* is not at issue in this case. The court notes these cases merely by way of comparison: in this case, Commerce responded to the Federal Circuit's concerns about normality, sample size, and variance with (1) an attempt to minimize *Stupp III*'s precedential effect and (2) a sparsely reasoned pronouncement that testing an entire population mitigates those concerns. IDM at 4–8. By *Stupp IV*'s yardstick, or *NEXTEEL*'s, that is not enough.

[13] Another case involving Commerce's responsiveness to the concerns outlined in *Stupp III* is also pending before the Federal Circuit. *See Marmen Inc. v. United States*, No. 23–1877 (Fed. Cir. docketed May 11, 2023). Briefing in *Stupp V* is nearer to completion than in *Marmen*; nevertheless, if the Federal Circuit decides *Marmen* before *Stupp V*, the court will on a party's motion consider expediting the deadline for Commerce's remand results in this case.

and no later than sixty days after, the conclusion of all appellate proceedings in that case.[14]

II. The Harmless Error Principle Precludes Relief on Koehler's Claim that Commerce Unlawfully Rejected Koehler's Case Brief Exhibits

Koehler argues that Commerce abused its discretion in rejecting Exhibits 4.1.1, 4.1.2, 4.2, and 4.3 to its case brief, which Koehler purports showed "that Commerce's underlying [Cohen's *d*] data violated the precondition of normality." Pls.' OAQ Resp. at 4. These exhibits comprised printouts of a combined sales database, a computer-generated report based on that database, and printouts of the code used to generate both the database and the report. Rejected Case Brief at 5–6.

Koehler first disputes Commerce's characterization of the exhibits as containing "new factual information" under 19 C.F.R. § 351.102(b)(21), claiming that "[t]he exhibits at issue only included a printout of Commerce's own data subjected to a basic algebraic manipulation." Koehler's Br. at 35. In the alternative, Koehler argues that Commerce abused its discretion because it was bound by its own regulations to accept the exhibits even if they did contain new factual information. *Id.* This is so, Koehler argues, because Commerce's rejection of Koehler's exhibits "constituted an inappropriate restriction of Koehler's right to provide argument on an integral part of Commerce's determination in the underlying investigation." *Id.* at 37.

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[14] In a recent case involving a similar challenge to Commerce's Cohen's *d* methodology, the court did not issue a remand order but instead stayed proceedings pending the outcome of *Stupp V. HiSteel Co. v. United States*, 47 CIT __, 653 F. Supp. 3d 1341 (2023). The court in *HiSteel* did not reach the issue of whether Commerce adequately addressed *Stupp III*. Instead, to avoid "obliging Commerce to formulate a remand redetermination" where a decision in *Stupp V* might soon afterwards render that redetermination a nullity, the court simply paused litigation—in which Commerce's Cohen's *d* methodology was the only live issue—to await "updated, on-point authority." *Id.* at 1357.

The court's remand order in this case is consistent with *HiSteel*. In neither case does the court order Commerce to prepare a remand redetermination on the Cohen's *d* issue in advance of the Federal Circuit's anticipated holding in *Stupp V*. The cases may nevertheless appear, on the surface, to differ. In *HiSteel*, proceedings related to the Cohen's *d* issue are paused before the court while in this this case, Cohen's *d* proceedings are paused at the agency level. But an important prudential consideration accounts for this difference: in this case, unlike in *HiSteel*, the court remands additional (non-Cohen's *d*–related) issues for Commerce's reconsideration. A partial stay in this case on the Cohen's *d* issue, concurrent with a remand on other issues, would thus risk throwing an already complex multi-issue and multi-party proceeding into further disarray. *Cf. Papierfabrik Aug. Koehler AG v. United States*, 36 CIT 1632, 1637 (2012) ("A partial stay may necessitate multiple decisions and separate remands on the zeroing and non-zeroing issues, which would delay and extend proceedings through piecemeal litigation and appellate reviews."); *see also Union Steel Mfg. Co. v. United States*, 36 CIT 717, 737, 837 F. Supp. 2d 1307, 1325 (2012) (noting prudential factors militating against the issuance of a "piecemeal remand order" in favor of a broader scope of review on remand). The court's issuance of a stay in *HiSteel* did not implicate that risk.

The court declines to address these challenges: whether or not Commerce's rejection of Koehler's exhibits was lawful, the harmless error principle precludes relief.

In the context of a procedural challenge, "[i]t is well settled that principles of harmless error apply to the review of agency proceedings." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) (citing 5 U.S.C. § 706); *see also SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (clarifying that the Administrative Procedure Act's harmless error standard applies to civil actions falling under non-(e) subsections of 28 U.S.C. § 2640 where "no law provides otherwise"). These principles dictate that the court will not set aside agency action, even if procedurally erroneous, "unless the errors were prejudicial to the party seeking to have the action declared invalid." *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (internal quotation marks and citation omitted), *aff'd and adopted per curiam*, 923 F.2d 838 (mem.) (Fed. Cir. 1991). In this context, "prejudice . . . means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396. The court has applied this standard to the precise type of procedural challenge that Koehler brings here. *See Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182, 1193 (2007) (denying a challenge to Commerce's rejection of a case brief deemed to contain new factual information on the ground that "if in error," the rejection "was harmless error").

Koehler has made no showing that Commerce's rejection of Koehler's exhibits was prejudicial. Koehler identifies no argument that the rejection either precluded or materially impaired. Despite noting that the "rejected exhibits provided additional substantive proof that Commerce's underlying data violated the precondition of normality," Koehler states that "*even without these exhibits*, the lack of normality in Commerce's data can be demonstrably proven by other evidence on the record," that "shortcomings with Commerce's data are more than amply demonstrated by the evidence on the agency record," and that "the absence of . . . Koehler's rejected exhibits from the record do not impact the relief that Koehler seeks." Pls.' OAQ Resp. at 4. Koehler maintains, in other words, that its ability to demonstrate flaws in Commerce's Cohen's *d* methodology was not materially hindered by Commerce's refusal to consider Exhibits 4.1.1, 4.1.2, 4.2, and 4.3.

It is upon Koehler to demonstrate the harm ensuing from Commerce's alleged error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally

falls upon the party attacking the agency's determination."); *Solar-World Ams.*, 962 F.3d at 1359 ("In the antidumping context, a party challenging a purported error by Commerce must show that it was harmed as a result of the error."). The court need not reserve judgment on the question of harmlessness until developments in the proceedings resolve that question with certainty—a party's burden to demonstrate harm attaches when that party alleges agency error. 5 U.S.C. § 706 (providing that "[t]o the extent necessary to decision and *when presented*, the reviewing court shall decide all relevant questions of law . . . the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error" (emphasis added)). Even if the ultimate harm to Koehler caused by Commerce's rejection of the exhibits will not come about until (for example) an upcoming decision by the Federal Circuit resolves the Cohen's *d* issue, Koehler's burden was at least to describe what this harm might be in its Motion for Judgment on the Agency Record. Koehler did not do this.

The court concludes that Koehler has not demonstrated any injury to an "interest that the statute, regulation, or rule in question was designed to protect," *Intercargo*, 83 F.3d at 396, and denies Koehler's challenge to Commerce's rejection of the case brief exhibits. The court accordingly does not consider at this stage whether Commerce's rejection of the exhibits was lawful.

III. Commerce's Determination to Include Blue4est Within the Scope of Its Investigation Is Supported by Substantial Evidence

The scope language that Commerce set forth at the outset of the investigation refers to "thermal active coating(s) (typically made of sensitizer, dye, and coreactant, and/or like materials) on one or both sides." Thermal Paper from Germany, Japan, the Republic of Korea, and Spain: Initiation of Less-Than-Fair-Value Investigations, 85 Fed. Reg. 69580, 69584 (Dep't Com. Nov. 3, 2020) ("Initiation Notice"). Commerce did not modify that language at any point during the investigation. Final Scope Decision at 2. But as noted above, Commerce determined between the *Preliminary Determination* and the *Final Determination* that this scope language covers Koehler's "Blue4est" paper product. *See* Final Scope Decision. Koehler argues that this determination is unlawful. *See* Koehler's Br. at 42. Koehler marshals four arguments in support of this challenge, none of which persuade the court to disturb Commerce's Final Scope Decision with respect to Blue4est paper.

A. The Scope Language's Applicability to Blue4est Is Supported by Substantial Evidence

Koehler argues that Commerce's inclusion of Blue4est paper within the investigation's scope is unsupported by substantial evidence because the scope language is irreconcilable with the fact that Blue4est employs a mechanism whereby light-reflective bubbles collapse to selectively reveal sections of a pre-colored base layer. *See* Koehler's Br. at 42–43.

But it appears from Commerce's explanation in its Final Scope Decision, as well as from Koehler's own representations, that the administrative record does support a conclusion that Blue4est's characteristics align with the scope language. As Koehler's own exhibit shows, *see* Koehler's Br. at 43, Blue4est paper is coated with a layer of bubbles that collapse when exposed to heat. *See also* Letter from King & Spalding LLP to G. Raimondo, Sec'y of Com., re: Thermal Paper from Germany, Japan, the Republic of Korea, and Spain: Petitioners' Rebuttal Comments on Product Characteristics attach. 2 (Nov. 27, 2020), P.R. 74–76. This fact alone constitutes substantial evidence that Blue4est has a "thermal active" coating: a targeted application of heat causes a "functional" layer on the surface of Blue4est paper to undergo activity whereby an image appears to a viewer. *See* Final Scope Decision at 5–8.

Koehler insists that Blue4est is not thermally active because it does not contain "sensitizer, dye, and coreactant, and/or like materials." Koehler's Br. at 7 (quoting *Initiation Notice*, 85 Fed. Reg. at 69584). But the scope description, notably, employs the word "typically." It does not read, for instance, "thermal active coating(s) (*made exclusively* of sensitizer, dye, and coreactant, and/or like materials) on one or both sides." Even if it did, Koehler fails to persuasively explain why the layer of bubbles that sits atop Blue4est's base layer would not constitute a "like material" to sensitizers, dyes, and co-reactants. Bubbles may perhaps differ in some ways from the scope description's enumerated materials (for instance, in that they are visible physical objects rather than smaller—though of course no less physical—chemicals that are employed directly for their molecular properties). But Koehler fails to explain why, if chemical activation were the relevant limiting factor, Commerce's scope description would not have substituted narrower descriptors like "like chemicals" or "like chemically active materials" for the general term "like materials."

Commerce's explanation of the meaning of "like materials" is more parsimonious:

> Commerce requested clarification of the term "like materials" already in the petition. Domestics clarified that a like material "would be any other form of thermal coating that serves the same function" as sensitizer, dye, and co-reactant, "namely, *to permit a thermal image to appear on the paper*."

Final Scope Decision at 7. Commerce's determination that the top layer of Blue4est paper is thermally active is thus, at the very least, based on evidence that "a reasonable mind might accept as adequate to support a conclusion." *Al Ghurair Iron & Steel LLC v. United States*, 65 F.4th 1351 (Fed. Cir. 2023) (quoting *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020)).

B. The "Concept" of a Thermal Active Coating Cannot Be Adduced Through Physical Evidence

Koehler also argues that evidence it placed on the record shows that the "concept" of thermal active coating is limited to mechanisms whereby a coating undergoes a chemical reaction to produce a color—which Koehler claims does not, contrary to Commerce's determination, include the mechanism that Blue4est paper employs. Koehler's Br. at 43–44.[15]

Here, Koehler presents evidence of Blue4est's physical characteristics as evidence of the semantic categories that distinguish items on the basis of such characteristics. But this is an improperly inverted analytical approach: semantic categories like the "concept" of thermal active coating are not facts that can be discovered in the physical world; they are interpretive tools that Commerce imposes onto the physical world to classify merchandise. *Cf.* Ludwig Wittgenstein, *Philosophical Investigations* § 131 (G.E.M. Anscombe trans., 3d ed. 1968) ("[W]e can avoid ineptness or emptiness in our assertions only by presenting the model as what it is, as an object of comparison—as, so to speak, a measuring-rod; not as a preconceived idea to which reality *must* correspond.").

The showing Koehler has made here is simply that Blue4est differs from ordinary thermal paper by employing a bubble-collapsing mechanism, not a chemical coating, to cause an image to appear on

[15] Koehler claims to have "illustrated" the limitations of the concept with an exhibit that shows the difference in functionality between "traditional thermal paper" and Blue4est paper. *Id.* This illustration shows that traditional thermal paper has a top layer of chemicals that react with heat to produce an image in accordance with the pattern applied by a heated printhead. *Id.* Blue4est paper, by contrast, has a top layer of opaque bubbles and an invisible bottom of black-colored paper. *Id.* When a heated printhead approaches the top layer of bubbles, the bubbles physically collapse to reveal targeted sections of the black-colored bottom layer. *Id.* The effect of both mechanisms is the same: to cause an image to appear by applying heat to the page.

paper. Koehler's Br. at 43–44. This showing does not, and cannot, control the initial question of what defines a "thermal active coating(s) (typically made of sensitizer, dye, and coreactant, and/or like materials) on one or both sides." *Initiation Notice*, 85 Fed. Reg. at 69584.

Primary discretion to determine the bounds of those categories belongs to Commerce. *See Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1582 (Fed. Cir. 1990) ("The responsibility to determine the proper scope of the investigation and of the antidumping order, however, is that of [Commerce], not of the complainant before the agency."); *see also Kyocera Solar, Inc. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1294, 1315 (2017) ("Commerce has the authority to initially determine the scope of the investigation, as well as the authority to modify the scope language until the final order is issued, based on the agency's findings during the course of the investigation.").

The court accordingly rejects as unsound Koehler's argument that Commerce was required to hew its scope definition to a fixed, ascertainable "concept" of a "thermal active coating." *See* Koehler's Br. at 8.

C. Commerce's References to External Interpretative Sources Do Not Control Commerce's Interpretation of the Scope Language

Similarly unavailing is Koehler's argument that that Commerce's inclusion of Blue4est paper within the scope of the investigation is irreconcilable with Commerce's citation in its Final Scope Decision of external sources that characterize "thermal paper" as paper coated with chemicals that react to form images. Koehler's Br. at 42. Koehler notes that Commerce acknowledged in its Final Scope Decision that Domestics' Petition initially described the subject merchandise as products "wherein the base paper is coated by applying different coating layers to the functional (imaging) sides of the sheet" and wherein "[w]hen exposed to heated printer heads, the thermal developer in the coating is activated allowing the image to appear on the paper." Koehler's Br. at 40 (quoting Final Scope Decision at 5). Koehler also notes Commerce's reference to the ITC's description of "Thermal Paper" as a "paper coated with chemicals that react to form images when exposed to heat." Koehler's Br. at 41 (quoting Final

Scope Decision at 5).[16] According to Koehler, Commerce's statement in its Final Scope Decision that thermal paper "can include any other type of thermal coating that permits a thermal image to appear on the paper" impermissibly contradicts the narrower language of the ITC description and the petition on which Commerce initially relied when determining the investigation's scope. *Id.* (quoting Final Scope Decision at 8). Koehler contends that because Commerce "concede[d]" that the petition and ITC's language "exist[s] on the record," Commerce was effectively locked into conforming its scope determination to that language. Koehler's Br. at 41.

The court finds this argument unpersuasive in light of Commerce's "broad discretion to define and clarify the scope of an . . . investigation in a manner which reflects the intent of the petition." *Trans Tex. Tire, LLC v. United States*, 44 CIT __, __, 519 F. Supp. 3d 1275, 1284–85 (2021) (quoting *AMS Assocs. v. United States*, 36 CIT 1660, 1666, 881 F. Supp. 2d 1374, 1380 (2012), *aff'd*, 737 F.3d 1338 (Fed. Cir. 2013), *overruled on other grounds by Sunpreme Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020)). Unlike in the context of a post–final order Scope Ruling, where Commerce is bound by its own regulation to apply a limited set of factors in determining a product's inclusion, *see* 19 C.F.R. § 351.225(k)(1), Commerce here "enjoyed greater discretion" to determine scope parameters in the window between the *Preliminary* and *Final Determinations*. *M S Int'l*, 32 F.4th at 1152; see also *Minebea Co. v. United States*, 16 CIT 20, 23, 782 F. Supp. 117, 121 (1992), *aff'd*, 984 F.2d 1178 (Fed. Cir. 1993) (explaining that Com-

[16] The ITC description that Commerce referenced in its Final Scope Decision reads as follows:

> Thermal paper is a paper coated with chemicals that react to form images when exposed to heat. Thermal paper can be used in special printers to create an image without ribbons or other consumables (other than the paper itself). When imaging, the thermal paper containing the dye is passed between the thermal print head and the platen roll in the printer. The thermal head consists of tiny heating elements lying side-by-side across the width of the paper. As the paper passes under the head, the computer instructs certain heater elements to heat up. Where the heat is in contact with the paper, the dye is activated to produce an image. Heater elements heat up and cool down each time the paper advances forward, creating a colored or black microdot on the paper. The arrangement of elements and paper movement create flexible graphic images on the thermal paper.

Thermal Paper from Germany, Japan, Korea, and Spain, Inv. Nos. 731-TA-1546–1549 (Preliminary), USITC Pub. 5141, December 2020 at I-7 ("ITC Description").

merce's "discretion concerning scope clarification at the investigatory stages is extensive").[17]

This discretion means that Commerce could freely depart from the Petition's initial language and the ITC Description—regardless of those sources' presence on the record—in determining the investigation's scope prior to the *Final Determination*. "It is established that Commerce can alter the scope of the investigation until the final order." *Trans Tex. Tire*, 519 F. Supp. 3d at 1284 (internal quotation marks and citation omitted). Commerce did not even go that far—rather than change the scope language, Commerce merely determined that that language applies to a particular product. Commerce's burden was to "exercise its discretion reasonably," *PT Pindo Deli Pulp v. United States*, 36 CIT 394, 401, 825 F. Supp. 2d 1310, 1318 (2012) (internal quotation marks and citation omitted), as well as to adequately explain why Blue4est falls within the scope of the investigation. The court finds that Commerce did so. *See, e.g.*, Final Scope Decision at 11 ("The thermal process that Koehler described permits an image to appear on the paper. We believe this is a thermal image since it is produced through a thermal process.").

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[17] The court acknowledges that Commerce appears to have construed its determination on Blue4est paper as a Scope Ruling subject to 19 C.F.R. § 351.225(k)(1): "In considering whether merchandise is within the scope of an investigation," Commerce explained, "Commerce will take into account the language of the scope of the investigation and the description of subject merchandise in the Petitions or in other documents on the record of the investigation, including decisions of the ITC." Final Scope Decision at 9; *but see* Gov't Br. at 37 ("Many of the remaining cases cited by Koehler are distinguishable because they concern a post-order scope inquiry, rather than clarification of the scope during an ongoing investigation.").

While the Scope Ruling standard suggested by Commerce—which typically applies to post–final order proceedings—is somewhat less deferential, the Government still prevails under it. Under § 351.225(k)(1), Commerce retains discretion over whether and how to incorporate the ITC's or a petitioner's description of merchandise when "determining whether a product is covered by the scope of the order at issue." *Id.*; *Duferco Steel,* 296 F.3d at 1097 ("review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself."). Citations to definitional language in the Petition and the ITC's determination can indeed be helpful, *see* 19 C.F.R. § 351.225(k)(1)(i)(A), (D), but the plain text of Commerce's regulations contradicts Koehler's claim that these citations carry binding force where, as here, Commerce's scope language is dispositive. *See* 19 C.F.R. § 351.225(k)(1) ("[Commerce] will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive"); *see also Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1356 (Fed. Cir. 2015). Thus, as the Government points out, the language Commerce cited in its Final Scope Decision "is merely descriptive of the majority of thermal paper products and does not limit the scope of the investigations to thermal paper coated with chemicals." Gov't Br. at 35 (citing Final Scope Decision at 8).

D. Commerce's Inclusion of Blue4est Did Not "Expand" the Scope of the Investigation

Koehler lastly argues that Commerce acted in an arbitrary and capricious manner by "expanding the scope of [its] investigation" to include Blue4est paper despite the existence of an established agency practice limiting Commerce's ability to perform such an expansion. Koehler's Br. at 48.

As a preliminary matter, this argument presumes that Commerce's inclusion of Blue4est paper in the scope of the investigation represented an expansion of the investigation's scope rather than a clarification that Blue4est paper falls within the scope. But this presumption requires some explanation, as Commerce often clarifies matters of scope inclusion without going so far as to expand the scope of an investigation. *See, e.g.*, *PT Pindo Deli Pulp*, 825 F. Supp. 2d at 1316–17; *Minebea*, 782 F. Supp. at 120. The sole explanation that Koehler offers here for its contention that Commerce's behavior constituted a scope expansion is that "Commerce's interpretation of the scope language is entirely devoid of connection to the record evidence that was before it." Koehler's Br. at 46. But as explained above, record evidence supports Commerce's construal of "thermal active coating(s) (typically made of sensitizer, dye, and coreactant, and/or like materials) on one or both sides" to encompass the mechanism underlying Blue4est paper. Commerce's determination—that "thermal active coating" applies to coatings that record evidence shows to undergo a physical reaction upon exposure to heat—in no way reflects an expansion of the meaning of the original scope language. What it reflects, rather, is merely that Commerce determined after the *Notice of Initiation* that the original scope language applies to Blue4est based on record evidence of Blue4est's characteristics.

Finding no expansion of scope, the court accordingly does not consider the substance of Koehler's argument that Commerce's purported scope expansion represents an unlawful break with agency practice.[18]

The court therefore sustains Commerce's Final Scope Decision, as it pertains to Blue4est paper, as supported by substantial evidence and in accordance with law.

[18] Even if a scope expansion did occur, this would not necessarily constitute error: as referenced above, Commerce is generally permitted "alter the scope of the investigation until the final order." *Kyocera Solar*, 41 CIT at __, 253 F. Supp. 3d at 1316 (citing *Duferco*, 296 F.3d at 1096).

IV. Commerce's Reliance on Koehler's Dynamic Sensitivity Testing Data Is Supported by Substantial Evidence

Domestics challenge Commerce's decision not to assign the same CONNUM to two of Koehler's thermal paper products (here termed Products "A" and "B"). Domestics' Br. at 20. Commerce made these CONNUM assignments partly on the basis of Koehler's responses to questionnaires during the agency proceeding—these responses purported to show differing dynamic sensitivity characteristics for Products A and B. IDM at 14. Domestics argue that Koehler manipulated its data submissions in a deliberate attempt to induce Commerce to classify Products A and B under different CONNUMs. Domestics' Br. at 20–29. They claim that Koehler performed tests for the purpose of minimizing antidumping liability, and that these tests show different dynamic sensitivity[19] characteristics for Products A and B even though Koehler's earlier product data sheets, which precede the instant litigation, state that Products A and B have the same dynamic sensitivity. *Id.* at 26. Domestics argue that this contradiction renders Koehler's submitted data inherently suspect, and that Commerce's determination to uncritically accept Koehler's post-*Initiation Notice* data is thereby unsupported by substantial evidence. *Id.* Commerce, Domestics essentially argue, should have been more skeptical.

Domestics' argument might perhaps be more persuasive if Commerce were reviewing Koehler's data for publication in a scientific journal. But the inquiry here is not whether Commerce held Koehler to the highest possible standard of reliability. The proper inquiry is whether Commerce's determination was supported by substantial evidence. And in this context, as Domestics themselves acknowledge, the court will not disturb Commerce's weighing of the evidence. Domestics' Reply Br. at 15; *see also Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (explaining that "[i]t is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew" (internal quotation marks and citation omitted)).

Domestics claim that they are not lodging an impermissible request for the court "to reweigh the evidence" because "Commerce did not explain how it weighed the evidence in the first place." Domestics'

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[19] Dynamic sensitivity is thermal paper's reactiveness to energy. Paper with high dynamic sensitivity can produce a legible image with relatively low energy input. In this investigation, Commerce required respondents to report dynamic sensitivity in terms of the millijoules (energy units) per square millimeter required to produce a paper product's maximum optical density—which, in rough terms, is the maximum darkness that a given thermal paper product is capable of displaying. Koehler's Resp. at 21–22; Letter from E. Eastwood to Dechert LLP at B-11 (Dec. 1, 2020), P.R. 87 ("Antidumping Questionnaire").

Reply Br. at 19. Commerce, Domestics assert, "never explained *why* it found selected testing performed by Koehler for purposes of the litigation to be more reliable than specification sheets predating the litigation." Domestics' Br. at 28.

This is not so. As Commerce explained in its IDM, the agency determined CONNUM classification on the basis of the frequency of available test results:

> We analyzed the information Koehler provided to support its reporting of these product characteristics for Product A and Product B to determine the product characteristic coding that most closely followed our reporting instructions. As a result of this analysis, we determined that the static sensitivity product characteristic for Product B should be revised to reflect Koehler's most frequent test result for this product. However, for dynamic sensitivity, after considering the most frequent test result from Koehler's Product B testing, we determined that that Koehler properly reported this product characteristic.

IDM at 14 (citations omitted). Domestics disagree with Commerce's choice to look to the frequency of a test result as a means of determining whether to rely on that result. *See, e.g.*, Domestics' Br. at 26 ("[T]he [test] results . . . should have been found by Commerce to have lacked credibility." In Domestics' view, Commerce should have discounted the importance of frequency and instead made its determination on the basis of assertedly more reliable record evidence. But this disagreement, valid or not, does not negate Commerce's reasoned explanation for why it chose to rely on Koehler's submission. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (citations omitted)). Domestics' proposal for a different finding of credibility is rather the kind of invitation "to reweigh the evidence or to reconsider questions of fact anew" that the court must decline. *See Downhole Pipe*, 776 F.3d at 1376 (internal quotation marks and citation omitted). The court accordingly denies Domestics' challenge to Commerce's acceptance of Koehler's dynamic sensitivity reporting.

V. *Commerce Must Further Explain Its Determination that Koehler's Submissions of Static Sensitivity Data Were Complete*

Domestics also challenge Commerce's determination that Koehler's reporting of the static sensitivity[20] product characteristic for certain product grades [[

]] was complete. *See* Domestics' Br. at 31; *see also* Mem. from D. Goldberger, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany: Analysis of Business Proprietary Information in the Final Determination at 1 (Dep't Com. Sept. 24, 2021), P.R. 294, C.R. 359. Domestics claim that Koehler implemented an "arbitrary testing regime" that yielded incomplete and misleading static sensitivity data, which Koehler then submitted in response to Commerce's antidumping questionnaire. Domestics' Br. at 31. They further claim that Commerce's decision not to make an adverse inference pursuant to 19 U.S.C. § 1677(e)(b)(1) as a substitute for considering the information allegedly missing from Koehler's submission, *see* IDM at 16, was unsupported by substantial evidence. Domestics' Br. at 31.

Domestics argue that Koehler incompletely responded to Commerce's antidumping questionnaire because the static sensitivity data it submitted for various products were based on a flawed testing methodology. Domestics' Br. at 29. The specific underlying flaw that Domestics allege is that "Koehler did not conduct tests at sufficiently high temperatures to determine the point at which [the tested] products reached their maximum [optical density unit]." *Id.* at 32. Instead, when measuring the static sensitivity of certain tested products, Koehler allegedly declined to increase the temperature emitted by its testing device beyond [[ ]] degrees Celsius.[21] For those products requiring a higher temperature [[ ]] to reach

[20] Static sensitivity, in contrast to dynamic sensitivity, is the sensitivity of thermal paper to temperature. Koehler's Resp. at 28. In this investigation, Commerce requested respondents to measure static sensitivity in terms of the temperature required to induce thermal paper to display its maximum optical density. *Id.*; Domestics' Br. at 29. This is measured by progressively increasing the temperature of a testing device until the tested paper reaches its maximum optical density. Domestics' Br. at 29. Thermal paper with high static sensitivity can be printed at lower temperatures relative to thermal paper with low static sensitivity. Koehler's Resp. at 28.

[21] This quirk in Koehler's testing procedure is apparently due to a technical limitation of the Labthink device Koehler used to measure static sensitivity. The Labthink device can only test a certain number of temperature intervals on a single sample. Because Koehler performed only a limited number of testing rounds to produce the data at issue here, Koehler's overall testing method was sensitive only up to the highest temperature interval of the highest-temperature testing round. Koehler's Resp. at 31–32.

maximum optical density, Koehler allegedly reported a static sensitivity value of [[ ]] degrees Celsius. Domestics' Br. at 32. In other words, some of Koehler's testing allegedly failed to measure and report the actual static sensitivity of products with static sensitivity values above the maximum temperature that Koehler's testing device could detect. *Id.* Domestics argue that this testing scheme rendered Koehler's submissions unresponsive to Commerce's questionnaire, which required respondents to "report in degrees Celsius the temperature required to produce the maximum ODU." *Id.* at 33 (quoting Antidumping Questionnaire at B-12).[22]

The Government argues that Commerce acted within its discretion when it declined to find a deficiency in Koehler's reporting of static sensitivity data. Gov't Br. at 45–46 (stating that Domestics "wrongly assume that they can substitute their own judgment to determine whether a submission is 'deficient'" (citing Domestics' Br. at 32, 29–34)). Insisting that there was no gap on the record and pointing out Commerce's finding that "Koehler acted in accordance with Commerce's instructions in reporting the static sensitivity product char-

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[22] The instructions in Commerce's questionnaire for reporting static sensitivity are reproduced below:

> FIELDNAME: SENSITH
> DESCRIPTION: Static Sensitivity
> NARRATIVE: Report in degrees Celsius the temperature required to produce the maximum ODU.
>
> *Code*
> 01 <10
> 02 ≥10 but < 10
> 03 ≥10 but < 120
> 04 ≥120 but < 130
> 05 ≥130 but < 140
> 06 ≥140 but < 150
> 07 ≥150 but < 160
> 08 ≥l60 but < 170
> 09 ≥l70 but < 180
> 10 ≥l80

Antidumping Questionnaire at B-10–B-11.

acteristic for these products," IDM at 16,[23] the Government casts Domestics' argument as a mere quibble with how Commerce decided to conduct its own investigation. Gov't Br. at 44–48.

Koehler similarly characterizes Domestics' argument as a request for the court to override Commerce's judgment on a matter that is within the agency's statutory discretion. Koehler's Resp. at 34–35. Koehler cites the court's decision in *Risen Energy* as a rejection of a "similar attempt[]" to "supplant Commerce's decision-making authority" and quotes the following passage from that case:

> Here, Commerce finds that the supplemental responses it received from the six cooperative unaffiliated suppliers adequately address the deficiencies that SunPower complains of, eliminating a need to employ facts available . . . . SunPower, pointing to various purported deficiencies in the suppliers' factual submissions, contests Commerce's determination that the suppliers provided sufficient information, and claims that the deficiencies themselves demonstrate that the suppliers failed to act to the best of their ability. Commerce addresses the discrepancies identified by SunPower, and concludes that the information provided by the six cooperative suppliers is sufficient to calculate an accurate dumping margin for Risen. SunPower does not explain why Commerce's determination was unreasonable, but rather, requests the court reweigh the evidence, which the court will not do.

477 F. Supp. 3d at 1344–1346 (footnotes and citations omitted).

This comparison is inapt. Unlike in *Risen Energy*, Commerce has failed here to address the discrepancies in the record that Domestics have identified. *See id.* Commerce in *Risen Energy* provided detailed responses to each of the purported discrepancies raised by the peti-

[23] Commerce's full response to Domestics' case brief on the issue of Koehler's static sensitivity reporting is as follows:

> For the products at issue, Koehler reported the static sensitivity product characteristic based on the temperature required to produce the maximum ODU according to the instructions in Commerce's questionnaire and Koehler's product testing in the normal course of business. We disagree with the petitioners that Koehler's reporting of static sensitivity for these products is incomplete because Koehler did not provide the same amount of testing documentation for these products as it did for Product A and Product B. Koehler provided additional testing documentation for Product A and Product B in response to Commerce's specific requests for further information regarding these products. Commerce made no such request for additional static sensitivity testing for Koehler's other products. As a result, we find no basis to consider Koehler's reporting of the static sensitivity product characteristic incomplete for its remaining sales transactions. Thus, because Koehler acted in accordance with Commerce's instructions in reporting the static sensitivity product characteristic for these products, we find no basis to apply AFA to them.

IDM at 16 (footnotes omitted).

tioner in that case. *See id.* at 1345 n.20. Here, Domestics argued before the agency that Koehler's submissions were incomplete because they relied on a testing protocol that was inadequate to determine the temperature required to produce maximum optical density in certain products. Domestics' Case Br. at 15–18. Commerce's response was to conclusorily state that "Koehler acted in accordance with Commerce's instructions in reporting the static sensitivity product characteristic for these products." IDM at 16; *accord* Koehler's Resp. at 33. In other words, when faced with Domestics' challenge to Commerce's basis for finding Koehler's submissions to be complete as defined by their compliance with Commerce's instructions, Commerce's response[24] was to restate that Koehler's submissions were complete because Commerce found them to comply with Commerce's instructions.

This explanation falls short of the bar that Commerce leapt in *Risen Energy*, and neglects Commerce's general duty to "address significant arguments and evidence which seriously undermines its reasoning and conclusions." *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001); *see also* 19 U.S.C. § 1677f(i)(3)(A) ("[T]he administering authority shall include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation . . . ."). In order to demonstrate that its characterization of Koehler's submissions as complete was supported by substantial evidence, Commerce bore the burden of explaining *why* it found Koehler's submissions to accord with Commerce's instructions despite the fact that Koehler tested static sensitivity with a device that did not emit enough heat to induce maximum optical density in some products. Commerce could have attempted to rebut Domestics' characterization of how Koehler tested its products. Alternatively, Commerce could have attempted to explain why the alleged flaws in Koehler's testing protocol were immaterial for the purposes of Commerce's investigative factfinding. And under the discretionary language of 19 U.S.C. § 1677e(b), Commerce could have even found Koehler's submissions to be incomplete and declined nevertheless to

[24] Commerce also pointed out its IDM that Koehler's responses were supported by "Koehler's product testing in the normal course of business." IDM at 16. [[

]]. In any case, Commerce's reference to Koehler's business practices is misplaced. Commerce's instruction in its questionnaire that respondents "report in degrees Celsius the temperature required to produce the maximum [Optical Density Unit]" does not by its terms excuse incomplete reporting in instances where a respondent's testing in the normal course of business does not determine the temperature required to produce a product's maximum optical density. Antidumping Questionnaire at B-12.

apply an adverse inference against Koehler. *See Assan Alumniyum*, 624 F. Supp. 3d at 1377–78. Whichever way Commerce ultimately chooses to proceed, the agency must in some way grapple with the substance of the argument that Domestics presented in their case brief.

The court, in the context of a substantial-evidence inquiry, will not reweigh the evidence that Commerce relied on in determining that Koehler's submission was complete. *Downhole Pipe*, 116 F.3d at 1376. But the court does look to whether Commerce's determination of completeness is supported by "evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel*, 950 F.3d 833, 840 (Fed. Cir. 2020). The court, unable at this stage to discern such evidence on the record, remands Commerce's finding that Koehler's submissions of static sensitivity data were complete. Commerce is instructed on remand to explain the basis of its finding that Koehler's static sensitivity responses were complete. If upon reconsideration Commerce finds these responses deficient, the court instructs Commerce to provide Koehler "with an opportunity to remedy or explain the deficiency," 19 U.S.C. § 1677m(d) (governing the treatment of deficient submissions), before determining whether to use the facts otherwise available under 19 U.S.C. § 1677e(a) or else to apply an adverse inference under 19 U.S.C. § 1677e(b).[25]

The court, anticipating further development of the record on remand, does not reach the issue of whether Commerce's determination not to apply an adverse inference under § 1677(e)(b) is in accordance with law. Immediate application of an adverse inference on remand would be premature, as Koehler has received no notice of a deficiency pursuant to 19 U.S.C. § 1677m(d).

VI. Commerce's Price Adjustments for Koehler's Rebates to Home Market Customers Are Supported by Substantial Evidence and in Accordance With Law

When calculating Koehler's dumping margin, Commerce made downward adjustments to Koehler's reported home market prices to account for rebates that Koehler applied to certain home market sales. IDM at 21. These adjustments effectively lowered Koehler's antidumping liability, as they brought Commerce's overall calculation of Koehler's home market pricing closer to its calculation of Koehler's U.S. pricing. Domestics argue that Commerce's inclusion of these

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[25] 28 U.S.C § 2643(b) empowers the court to "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" if, as is true here, the court is "unable to determine the correct decision on the basis of the evidence."

rebates in its dumping margin calculations constitutes an unlawful break with past agency practice. *See* Domestics' Br. at 12.

Domestics contend that Commerce's established practice is to require that the terms and conditions of a rebate were known to the customer at the time of sale as a necessary condition of applying a price adjustment on the basis of that rebate.[26] *See id.* at 13–14. Domestics further suggest that Commerce has adopted this practice in its own regulations, quoting language in the preamble to Commerce's 2016 *Final Modification* which states that "the Department generally will not consider a price adjustment that reduces or eliminates dumping margins unless the party claiming such price adjustment demonstrates that the terms and conditions of the adjustment were established and known to the customer at the time of sale." *Id.* at 13 (quoting *Final Modification*, 81 Fed. Reg. at 15642). This combination of regulation and agency practice, Domestics argue, compels Commerce to refrain from making price adjustments to account for Koehler's rebates—the terms and conditions of which were unknown to customers at the time of sale. *See* Domestics' Br. at 12 (citing IDM at 19–20).

Domestics accordingly urge the court to conclude that Commerce's allegedly "unexplained" determination to apply price adjustments in this case is not in accordance with law. *Id.* Domestics also challenge, as unsupported by substantial evidence, three findings that Commerce invoked in determining Koehler's entitlement to price adjustments for its rebates. *See id.* at 17. The challenged findings are that Koehler's rebates are not uncommon, that Koehler issued them before Domestics filed their antidumping petition, and that the rebates were limited in number. *Id.* (quoting IDM at 22).

A. Commerce Did Not Unexplainedly Depart from Established Agency Practice

Domestics claim that "in order for a respondent to make the necessary demonstration under 19 C.F.R. § 351.401(c) per Commerce's established practice, it must show *at the very least* the terms and conditions of the price adjustment were established and known to the customer at the time of sale." *Id.* at 13. This misstates the legal background against which Commerce operates in determining whether to apply a price adjustment.

[26] Domestics point to several prior Commerce determinations that purportedly establish this practice. *See id.* at 13–17 (citing, *inter alia*, *Certain Aluminum Foil from Turkey*, 86 Fed. Reg. 52880 (Dep't Com. Sept. 23, 2021) & accompanying issues mem. at cmt. 6; *Certain Uncoated Paper from Portugal*, 84 Fed. Reg. 64040 (Dep't Com. Nov. 20, 2019) & accompanying issues mem. at cmt. 1); *see also* Domestics' Reply Br. at 8–14 (citing, *inter alia*, *Large Diameter Welded Pipe from the Republic of Turkey*, 84 Fed. Reg. 6362 (Dep't Com. Feb. 27, 2019) & accompanying issues mem. at cmt. 3).

First, Domestics mischaracterize as binding regulation Commerce's illustrative reproduction of rejected language from an earlier proposed rule in the preamble to its *Final Modification*. Domestics' brief reads as follows:

> The preamble to the regulation states that Commerce, in making this determination, may consider a variety of factors, such as "(1) whether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation; (2) how common such post-sale price adjustments are for the company and/or industry; (3) the timing of the adjustment; (4) the number of such adjustments in the proceeding; and (5) any other factors tending to reflect on the legitimacy of the claimed adjustment." *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 Fed. Reg. 15641, 15644–45 ("*Modification*") (Mar. 24, 2016). However, Commerce "generally will not consider a price adjustment that reduces or eliminates dumping margins unless the party claiming such price adjustment demonstrates that the terms and conditions of the adjustment were established and known to the customer at the time of sale." *Id.* at 15642.

Domestics' Br. at 13. Domestics reiterated this line of argument in their response to the court's oral argument questions. *See* Def.-Inters.' OAQ Resp. at 7 (stating that "[y]es, that quotation reflects Commerce's position and practice since at least 1997").

This framing places Commerce's enumeration of the five factors that Commerce may consult in determining entitlement to a price adjustment on the same footing as Commerce's apparent statement that the agency generally will not consider a price adjustment absent prior customer knowledge of a rebate. But while Commerce's five-factors language directly expresses the agency's intent in conjunction with the agency's promulgation of its modification to 19 C.F.R. § 351.401(c), Domestics' selective quotation elides the fact that the latter statement (beginning with the word "generally") expresses precisely the opposite of Commerce's position. The full sentence from which Domestics quote reads as follows:

> The Proposed Rule explained the Department's proposal, in light of the Court of International Trade's decision in *Koehler AG*, to clarify that the Department generally will not consider a price adjustment that reduces or eliminates dumping margins unless the party claiming such price adjustment demonstrates

> that the terms and conditions of the adjustment were established and known to the customer at the time of sale.

Final Modification, 81 Fed. Reg. at 15642 (emphasis added).

Commerce ultimately declined to promulgate a modification that incorporated the language of Proposed Rule as described in this sentence, and instead opted for a modification that referred only to a party's entitlement to a price adjustment. *Id.* at 15644–45. But this is not apparent from Domestics' briefing and subsequent representations at oral argument, which give the impression that Commerce had adopted the language it referenced from the Proposed Rule. In fact, none of Commerce's current regulations—or preambles describing the meaning thereof—contain a direct statement that Commerce generally considers customer knowledge of a rebate to be a necessary condition for entitlement to a price adjustment.

More fundamentally, Domestics overlook the fact that Commerce may depart from its established practice so long as it "explains the reason for its departure" and no regulation or statute directs otherwise. *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)); *Al Ghurair Iron*, 65 F.4th at 1360 (explaining that, as a general matter, "Commerce is not bound by its prior determinations"); *Hyundai Elec. & Energy Sys. Co. v. United States*, 15 F.4th 1078, 1089 (Fed. Cir. 2021) (explaining that "[w]e have rejected the notion that Commerce is forever bound by its past practices" (internal quotation marks and citations omitted)). Here, Commerce has thoroughly explained its rationale for determining Koehler's entitlement to a price adjustment in accordance with controlling statutory and regulatory provisions. *See* IDM at 22.[27] Commerce's explanation, which invokes three of the five factors that Commerce laid out in its preamble to its *Final Modification*, reflects precisely the type of analysis that Commerce contemplated when it modified 19 C.F.R. § 351.401(c). *See Final Modification*, 81 Fed. Reg. at 15644–45 ("The Department may consider any one or a combination of these factors in making its determination, which will be made

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[27] Commerce explained its approach as follows:

> We analyzed the factors outlined in the *Final Modification* related to Koehler's provision of [the home market rebates]. Based on this analysis, we determined that while the terms and conditions of these rebates were not known to Koehler's customers at the time of sale, such adjustments are not uncommon for Koehler. Moreover, the timing of these rebates (before the filing of the petition) and their limited number demonstrate that this adjustment is appropriate pursuant to the factors outlined in the *Final Modification*.

IDM at 22; *see also* Mem. from D. Goldberger, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany: Analysis of Business Proprietary Information in the Final Determination at 6–7 (Dep't Com. Sept. 24, 2021), C.R. 359, P.R 294.

on a case-by-case basis and in light of the evidence and arguments on each record."). Accordingly, even assuming that Domestics are correct to point out that Commerce's established practice is to condition price adjustments for rebates on customer knowledge of rebates, *see* Domestics' Br. at 14, Commerce has met its burden for lawfully deviating from that practice here.

The court accordingly finds that Commerce's determination that Koehler was entitled to a price adjustment does not constitute an unlawful break from past agency practice.

B. Substantial Evidence Supports Commerce's Determination that Koehler is Entitled to Price Adjustments

Domestics challenge three of the purported bases on which Commerce determined Koehler to be entitled to price adjustments for its home market rebates, alleging that they are unsupported by substantial evidence on the record. *See* Domestics' Br. at 17. The Government takes the opposite view, and responds that Commerce has indeed supported its findings on the price adjustment issue with substantial evidence. *See* Gov't Br. at 48. The court agrees with the Government's position, finding none of Domestics' challenges to be persuasive.

Domestics first challenge Commerce's finding that "such adjustments [as the rebates at issue] are not uncommon for Koehler." Domestics' Br. at 17 (quoting IDM at 22). This finding, Domestics argue, is unsupported by substantial evidence because the record shows that Koehler issued the rebates at issue [[ ]] amid "extraordinary business conditions arising from the COVID-19 pandemic." *Id.* at 18 (quoting IDM at 20). Domestics moreover argue that even if Commerce's finding were supported by record evidence showing that the rebates at issue were common, this finding would not support a conclusion that Koehler is entitled to a price adjustment. *Id.*

This argument saps essential context from Commerce's explanation in its IDM. Commerce's full statement reads, "*[b]ased on this analysis, we determined that while the terms and conditions of these rebates were not known to Koehler's customers at the time of sale*, such adjustments are not uncommon for Koehler." IDM at 22 (emphasis added). As this complete rendering of Commerce's statement shows, Commerce brought up the commonness of Koehler's rebates as a means of qualifying Koehler's home market customers' lack of knowledge about the terms and conditions of the particular rebates at issue. Commerce asserted, in other words, that the bearing of Koehler's customers' lack of specific knowledge on the five-factor balancing test

laid out in the *Final Modification* is mitigated by the fact that the same customers, through familiarity with the terms and conditions of other rebates, could have reasonably expected similar terms to apply. What Commerce did not assert, as Domestics suggest Commerce did, *see* Domestics' Br. at 17, is that the particular rebates at issue in this case were common. Commerce in fact asserted the exact opposite of Domestics' interpretation no more than one sentence later in the IDM, referencing the "limited number" of rebates specifically at issue in this case. IDM at[28]

Domestics' second challenge is to Commerce's finding that Koehler issued the rebates at issue before the filing of the petition. Domestics' argument here is that "there have been other antidumping investigations where rebates were granted prior to the filing of the petition, and yet Commerce nonetheless disallowed those rebates when the terms and conditions were unknown to the customer at the time of sale." Domestics' Br. at 17. But as explained above, even if such a past practice exists, that practice does not compel Commerce to align its future actions thereto. All Commerce must do when it departs from a past practice is to adequately explain its reasons for doing so. *See Allegheny Ludlum*, 346 F.3d at 1373. Commerce has done so here, invoking as its rationale a directly applicable regulation that—as Commerce expressly stated when promulgating a modification to that regulation—preserves agency discretion to weigh more factors than just customer knowledge in determining entitlement to a price adjustment. *See* IDM at 21–22 (quoting 19 C.F.R. § 351.401(c); *Final Modification*, 81 Fed. Reg. at 15642).

Finally, Domestics challenge as unsupported by substantial evidence Commerce's finding that the rebates for which Koehler was entitled to a price adjustment were of "limited number." Domestics' Br. at 19–20 (citing IDM at 22). Domestics point out that Koehler applied the retroactive rebates at issue to a fraction [[ ]] of reported sales, a fraction that Domestics characterize as "hardly insignificant or 'limited' in number." *Id.* at 20.

The court remains mindful upon reviewing this challenge that "[s]ubstantial evidence is defined as more than a mere scintilla, or such relevant evidence as a reasonable mind might accept as ad-

[28] Domestics recognize this contradiction and attribute it to Commerce's unexplained recognition of a "sweet spot for allowing rebates that are somehow of 'limited number' but still frequent enough to be 'not uncommon.'" Domestics' Br. at 19. As explained above, however, the rebates that Commerce stated are "not uncommon" comprise the entire set of rebates issued by Koehler. What Koehler issued in "limited number" is the much smaller set of rebates for which Commerce specifically granted a price adjustment in this proceeding. Again, the portion of the sentence that Domestics omitted from their brief makes this clear. IDM at 22.

equate to support a conclusion." *PAM, S.p.A.*, 582 F.3d at 1339 (internal quotation marks and citation omitted). Viewed in this light, there can be little doubt that the fraction cited by Domestics of home market sales to which Koehler applied retroactive rebates is small enough that a reasonable mind at the very least might characterize it as "limited." Nor do Domestics anywhere explain their counterintuitive suggestion that this fraction does not constitute a limited number of sales.

For these reasons, the court denies Domestics' challenge to this aspect of Commerce's *Final Determination*.

VII. Commerce Must Further Explain Its Classification of Koehler's Accrued Interest as a Cost of Production

As noted above, Commerce added the interest expenses on unpaid antidumping duties that Koehler incurred during the underlying period of investigation to Commerce's calculation of Koehler's Cost of Production ("COP") for subject merchandise. *See* PDM at 14. Based on this calculation, Commerce excluded certain home market sales that were made at lower prices than this COP from Commerce's determination of Normal Value. *See id.* at 15 (citing 19 U.S.C. § 1677b(b)(1)). This exclusion, in turn, had the effect of driving up Commerce's calculation of Normal Value.

Domestics argued in the agency proceeding below that Commerce should have instead included Koehler's interest expenses as an indirect selling expense to be deducted from Constructed Export Price ("CEP") under 19 U.S.C. § 1677a(d)(1)(D) and 19 C.F.R. § 351.402(b). *See* Domestics' Case Br. at 21. Quoting 19 C.F.R. § 351.402(b), Domestics asserted that "[t]he antidumping duties clearly were 'associated with commercial activities in the United States,' and—particularly for Koehler's direct sales of thermal paper to U.S. customers—they necessarily 'relate[d] to the sale to an unaffiliated purchaser.'" *Id.* Because of this, Domestics argued, Commerce should have treated the interest accrued on these (unpaid) duties as similarly associated with Koehler's commercial activities during the period of the investigation underlying the instant case. *See id.*

Commerce did not do as Domestics argued it should, stating in its Calculation Memo (which Commerce issued in conjunction with the *Final Determination*) as follows:

> We excluded all financial interest expenses from the cost of production (COP) used to calculate the constructed export price (CEP) profit ratio. Specifically, because the CEP profit ratio is applied to the expenses associated with commercial activity in

> the United States, which do not include any financial interest expenses, we calculated the CEP profit ratio to be on this same basis.

Mem. from D. Goldberger, re: Less-Than-Fair-Value Investigation of Thermal Paper from Germany: Final Determination Margin Calculation for Papierfabrik August Koehler SE at 2 (Sept. 24, 2021), P.R. 295, C.R. 360 ("Calculation Mem.").

Domestics now challenge the sufficiency of this explanation, seeking remand on the basis that Commerce failed to address the material argument that Domestics raised. *See* Domestics' Br. at 11.

Domestics argue that Commerce failed to address Domestics' argument that Commerce should include Koehler's interest expenses as an indirect selling expense to be deducted from Constructed Export Price. *See* Domestics' Br. at 11; Domestics' Repl. Br. at 5. They point out that Commerce's only response to Domestics' argument, which was to state that Koehler's "expenses associated with commercial activity in the United States . . . do not include any financial interest expenses," Calculation Mem. at 2, simply assumes a conclusion as to the proper classification of the expenses. Domestics' Repl. Br. at 4–5.[29] Painting the Government's more fully reasoned explanation of Commerce's actions, *see* Gov't Br. at 55–56, as an attempt to "supply a reasoned basis for the agency's action that the agency itself has not given," *Chenery*, 332 U.S. at 196, Domestics seek to compel Commerce to furnish a fuller explanation on remand. *See* Domestics' Br. at 11; Domestics' Reply Br. at 8.

The Government responds that Commerce's statements in the IDM and Calculation Memo together constitute a sufficient basis for reasonably discerning Commerce's reasoning. Gov't Br. at 56 (citing *Bowman*, 419 U.S. at 286). Commerce, in the Government's view, "*explained that* the 'unusual' interest expenses in this investigation should be treated as part of Koehler's overall interest expense" and

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[29] Domestics also argue that even this statement should be disregarded as an explanation of Commerce's rationale because it appeared in a Calculation Memorandum, not the IDM. The Calculation Memorandum, they argue, "represents nothing more than the case analysts' notes to the file regarding how the Assistant Secretary's decision was implemented by way of computer programming." Domestics' Reply Br. at 3. The court is unpersuaded by Domestics' suggestion that an agency may only provide an explanation for its actions on the record within the confines of an Issues and Decision Memorandum. In fact, Calculation Memoranda may very well form the basis for the court's review of agency action. *See, e.g.*, *Dongkuk S&C Co. v. United States*, 45 CIT __, __, 548 F. Supp. 3d 1376, 1381 (2021) (examining a "Final Cost Calculation Memorandum" and finding Commerce's analysis therein to be insufficient). As a more general matter, the court's assessment of whether an agency action is supported by substantial evidence is based upon the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

"*explained that* 'the expenses associated with commercial activity in the United States . . . do not include any financial interest expenses.'" Gov't Br. at 56–57 (emphasis added) (quoting Calculation Mem. at 2).

The court declines to adopt the Government's framing: these statements may describe what Commerce did, but they do not "explain" Commerce's reasons for doing so. Gov't Br. at 56–57. What Domestics argued below is that Koehler's interest expenses should be considered to be associated with commercial activity in the United States.[30] Domestics' Case Br. at 21. Rather than rebut this argument (as Koehler has done here, *see* Koehler's Resp. at 6–15) with an explanation that its determination was in line with applicable statutes, regulations, and agency precedent, Commerce instead made a flat declaration to the effect of "not so." This is not the kernel of an argument from which "the agency's decisional path" is "reasonably discernible." *Wheatland Tube*, 161 F.3d at 1369. It is no argument at all.

The court cannot address the merits of Commerce's decision not to treat Koehler's interest expenses as indirect selling expenses without reference to an explanation of why Commerce so decided. The court accordingly remands this aspect of the *Final Determination* to allow Commerce to reconsider its position or supply an explanation.

CONCLUSION

For the reasons explained above, the court sustains the *Final Determination* in part with respect to Commerce's inclusion of Blue4est paper as subject merchandise, Commerce's CONNUM assignments for the dynamic sensitivity product characteristic, and Commerce's application of price adjustments to home market rebates.

The court further denies Koehler's challenge to Commerce's rejection of exhibits to Koehler's case brief on the grounds of harmless error.

The court further remands Commerce's *Final Determination* in part with respect to Commerce's Cohen's *d* methodology, Commerce's CONNUM assignments for the static sensitivity product characteristic, and Commerce's classification of Koehler's accrued interest as a Cost of Production, for reconsideration or further explanation consistent with this opinion.

Commerce is directed to file its remand redetermination no sooner than, and no later than sixty days after, the conclusion of all appellate proceedings in *Stupp V*.

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[30] Commerce acknowledged in its IDM that Koehler had made this argument. *See* IDM at 17.

SO ORDERED.

Dated: February 8, 2024
New York, New York

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

Slip Op. 24–15

MID CONTINENT STEEL & WIRE, INC. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and PT ENTERPRISE INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00213

[Sustaining the Department of Commerce's Fourth Remand Redetermination.]

Dated: February 12, 2024

Adam H. Gordon, The Bristol Group PLLC of Washington D.C., for plaintiff and defendant-intervenor Mid Continent Steel & Wire Inc.

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Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel *Vania Y. Wang*, Attorney, Office of the Chief Counsel Civil Division Trade Enforcement & Compliance U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, Aug. 31, 2023, ECF No. 207–1 ("Fourth Remand Results") in the antidumping duty investigation of certain steel nails from Taiwan, following the third remand redetermination made in accordance with the mandate of the U.S. Court of Appeals for the Federal Circuit in *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1381 (Fed. Cir. 2022) ("*Mid Continent V*") *rev'g in part* 495 F. Supp. 3d 1298 (Ct. Int'l Tr. 2021) ("*Mid Continent IV*"). Following this Court's fourth remand order, *see Mid Continent Steel & Wire, Inc. v. United States*, 628 F. Supp. 3d 1316 (Ct. Int'l Tr. 2023) ("*Mid Continent VI*"), Commerce again contends its use of simple averaging is reasonable. For the following reasons, Commerce's fourth remand redetermination is sustained.

BACKGROUND

The Court presumes familiarity with the facts of this case from this Court's previous opinions, as well as the Court of Appeals' decisions in *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019) ("*Mid Continent III*") and *Mid Continent V*, and will discuss additional facts relevant to the Court's review of the Fourth Remand Results. On June 25, 2014, Commerce initiated an antidumping duty investigation of certain steel nails from six countries, including Taiwan. *See Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 36,019 (Dep't Commerce June 25, 2014) (initiation of less-than-fair-value investigations). On May 20, 2015, Commerce issued its final determination, which resulted in an antidumping duty order on subject nails from Taiwan. *See Certain Steel Nails from Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) ("*Final Results*") and accompanying Issues and Decision Memorandum, May 13, 2015, ECF No. 17 ("Final Decision Memo.").

On March 23, 2017, this Court sustained Commerce's determination, including its decision to use a simple average of standard deviations in the denominator of Cohen's *d* test. *See Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326, 1351 (Ct. Int'l Tr. 2017) ("*Mid Continent I*"). On October 3, 2019, the Court of Appeals vacated this Court's judgment and remanded in part to Commerce for further explanation of its decision to use a simple average of standard deviations in the denominator of Cohen's *d* test. *See Mid Continent III*, 940 F.3d at 674–75. On remand, Commerce defended its decision to use the simple average, explaining that its use of the simple average was both accurate and in accord with statistical literature. *See* Final Results of Redetermination Purs. Ct. Remand at 4, 15–16, June 16, 2020, ECF No. 144–1 ("Second Remand Results"). On January 8, 2021, this Court again sustained Commerce's decision, concluding that Commerce had adequately explained how its use of simple averaging was more accurate, and thus a reasonable choice of methodology. *See Mid Continent IV*, 495 F. Supp. 3d at 1308.

On April 21, 2022, the Court of Appeals vacated this Court's judgment, remanding to Commerce for further explanation of its decision to use the simple average. *See Mid Continent V*, 31 F.4th at 1381; *see also* Mandate, June 13, 2022, ECF No. 177; Remand Order, June 14, 2022, ECF No. 178. The Court of Appeals held that Commerce inadequately explained its choice of the simple average of the standard

deviations for the Cohen's *d* denominator. *Mid Continent V*, 31 F.4th at 1378–81. The Court of Appeals rejected Commerce's reasoning that the "equally rational" and "equally genuine" pricing choices warranted equal weighting in the Cohen's *d* denominator. *Id.* at 1379. The Court of Appeals explained that "Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen's *d*." *Id.* at 1381. The Court of Appeals also suggested that the preferred way to establish the denominator was to "use the standard deviation of the entire population." *Id.* at 1377.

In the third remand redetermination, Commerce defended its decision to use the simple average with the Cohen's *d* test, explaining that its usage is consistent with statistical literature. *See* Final Results of Redetermination Purs. Ct. Remand at 42–43, 52, Nov. 10, 2022, ECF No. 186–1 ("Third Remand Results"). In *Mid Continent VI*, this Court remanded Commerce's third final results redetermination, concluding that Commerce had not complied with the Court of Appeals' mandate to provide a reasonable justification for departing from the academic literature and to explain its choice to rely upon a simple average of the standard deviations of the test and control groups to determine the denominator in its Cohen's *d* analysis. 628 F. Supp. 3d at 1322–23. More specifically, this Court found unjustified Commerce's position that the academic literature did not support use of a weighted average, concluding that Commerce's explanation "appears to contradict Cohen, Ellis, and Coe at a number of points, as the Court of Appeals has already observed." *Id.* at 1325 (citing *Mid Continent V*, 31 F.4th at 1378). In doing so, this Court instructed Commerce to either explain its reasoning or reconsider its choice. *Id.* at 1326.

Commerce issued its Fourth Remand Results on August 1, 2023. *See* Fourth Remand Results at 1. In the Fourth Remand Results, Commerce continues to rely on a simple average for the Cohen's *d* test, justifying its decision by contending the simple average incorporates equal reliability of the calculated standard deviations, and thus can be reasonably used to calculate the denominator of the Cohen's *d* coefficient. *Id.* at 10–13. Commerce also concludes that the Court of Appeals' proposed alternative, to use a single standard deviation of all sale prices in the test and comparison groups as the denominator, would not be appropriate in the context of its differential pricing methodology. *Id.* at 13–17.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930,[1] as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012),[2] which grants the Court authority to review actions contesting the final determination in an antidumping duty order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Tr. 2014) (quoting *Nakornthai Strip Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303, 1306 (Ct. Int'l Trade 2008).[3]

DISCUSSION

In a dumping investigation, Commerce typically compares the weighted average of normal values with the weighted average of export prices for comparable merchandise, unless it determines another method is appropriate. 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). Section 1677f-1, of Title 19, however, allows Com-

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

[2] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[3] Plaintiffs argue that Commerce "is not entitled to the same deference accorded [to it] when this Court analyzed its initial decision," and that Commerce should "not be accorded another chance" to explain use of simple averaging if another remand is required. Consol. Pls.' Cmts. On [Fourth Remand Results] at 2, Oct. 2, 2023, ECF No. 209 ("Pls. Cmts."). Plaintiffs cite cases which do not support a new standard of review in this case. *See, e.g., INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 n.30 (1987) (explaining that an agency is afforded less deference to an interpretation that conflicts with previous interpretation of the authority at issue); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (affirming deference to agency decision that "closely fits the design of the statute as a whole and its object and policy" despite shifts in agency practice years prior (internal citations and quotations omitted)); *Tung Mung Dev. Co. v. United States*, 25 C.I.T. 752, 772 (2001) (remanding Commerce's determination where its decision was "a clear reversal of its prior practice"); *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574–75 (Fed.Cir. 1990) (ordering directed remand where International Trade Administration failed to comply with statutory and regulatory requirements in the interest of time, circumstances, lack of evidence and judicial economy); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1374 (Fed. Cir. 2016) (remanding Commerce's unsupported decision and directing it to weight calculations regarding dumping margins).

Commerce has not strayed from defending application of a simple average inits Cohen's *d* test and has remained consistent in its underlying reasoning. *See* Fourth Remand Results at 10–13; Third Remand Results at 42–43, 52; Second Remand Results at 15–16, 39–40; Def.'s Resp. To [Pls. Cmts.] at 8–9, Nov. 15, 2023, ECF No. 212; [Def.-Int.] Reply To [Pls. Cmts.] at 2–3, Nov. 15, 2023, ECF No. 213 ("Def.-Int. Reply"). To the extent that the Court instructs Commerce to correct or otherwise address a deficiency in its decisionmaking, a court's remand order represents a course correction to which the agency's decisionmaking must comport when rendering a new determination that accords with its statutory obligations. *SEC v. Chenery Corp.*, 332 U.S. 194, 199–201 (1947).

merce to compare "the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account [with another method]."[4] 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). To implement Section 1677f-1(d)(1)(B), Commerce performs a "differential pricing analysis" of a respondent's sales to determine whether a "pattern of significantly different prices" exists.[5] *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720, 26,722 (Dep't of Commerce May 9, 2014). This analysis contains three tests—the Cohen's *d* test, the ratio test, and the meaningful difference test. *See id.*; *Mid Continent V*, 31 F.4th at 1371. Only the Cohen's *d* test, which determines whether there is a "pattern of prices that differ significantly," is at issue in this case. *See Mid Continent V*, 31 F.4th at 1369–70; *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. at 26,722.

As applied by Commerce, the Cohen's *d* test involves comparing the prices of "test groups" of a respondent's sales to a "comparison group" by region, purchaser, and time period. *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. at 26,722. For each category, Commerce segregates sales into subsets, with one subset becoming the test group, and the remaining subsets being combined as the comparison group. *Id.* Commerce then calculates the means and standard deviations of the test and comparison groups. *Id.* Commerce finally calculates a *d* coefficient by dividing the difference in the groups' means by the square root of the average of the squared standard deviations of each group.[6] *See* Fourth Remand Results at 6 (citing Cohen at 20). Commerce finds the average of the squared standard deviations by adding them together and dividing by two,

[4] This subsection addresses targeted dumping, which occurs when an exporter sells at a lower, "dumped" price to particular customers or regions, while selling at higher prices to other customers or regions, such that the higher-priced products mask the dumped products by increasing the overall average price. *See Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017).

[5] The Statement of Administrative Action of the Uruguay Round Agreements Act explains that Commerce should proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

[6] Thus, $d = | m_A - m_B | / \sqrt{(\sigma_A^2 + \sigma_B^2)/2}$, where $| m_A - m_B |$ is the absolute value of the difference in means between the test and comparison groups, and $\sigma_A^2 + \sigma_B^2$ is the sum of the squared standard deviation of both groups. Standard deviation squared (σ^2) is also referred to as "variance." Commerce's formulation of what it calls the Cohen's *d* test is also known as Cohen's equation (2.3.2). *See* Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, 44, (2d ed. 1988), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Cohen").

referring to the result as a "simple average." *See id.* Commerce does not account for the differences in the size of each group, i.e., use a "weighted average." Fourth Remand Results at 6.

Commerce tests each subset against the remaining subsets across each category and assigns a *d* coefficient. If the *d* value of a test group is equal to or greater than the "large threshold," or 0.8 (the difference in the means was at least 80% of the pooled standard deviation), the observations within that group are said to have "passed" the Cohen's *d* test. *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. at 26,722. If a sufficient quantity of sales by volume pass Cohen's *d* test, Commerce may compare the export prices of individual transactions to normal value, instead of comparing the average export prices to normal value. *Id.* at 27,622–23.

The Court determines whether Commerce's methodology is reasonable in light of considerations that run counter to its decision. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Tr. 1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987); *see also, e.g.*, *Stupp Corp. v. United States*, 5 F.4th 1341, 1354 (Fed. Cir. 2021) (stating the standard of review for components of Commerce's differential pricing methodology is reasonableness) (citing *Mid Continent III*, 940 F.3d at 667).

In the Fourth Remand Results, Commerce explains its choice to employ a simple average in the Cohen's *d* denominator, acknowledging as it must, the Court of Appeals' holding that the academic literature surrounding Cohen's *d* relies upon a weighted average. Fourth Remand Results at 9 (accepting the Court of Appeals finding that in the Cohen's *d* literature, simple averaging applies only when the sample sizes are equal); *Mid Continent V*, 31 F.4th at 1378 ("In making [its] choice to use simple averaging . . . Commerce departed from, rather than followed, the cited statistical literature"). Nonetheless, Commerce maintains the reasonableness of its use of a simple average for the Cohen's *d* denominator. To support its determination, Commerce explains that although the academic literature most often employs a weighted average when pooling the standard deviations of two samples, the literature uses a simple average when the sample sizes are equal. Fourth Remand Results at 12–13. Commerce reasons that the use of a simple average where sample sizes are equal stems from the equal reliability of standard deviations in samples of equal sizes. *Id.* at 13.

Commerce's focus on reliability stems from the use of samples in the literature. Where samples are compared and a standard deviation

for each sample is an approximate, the actual standard deviation for the group represented by the sample is not known. Fourth Remand Results at 10 (citing Cohen at 6); *see also Mid Continent V*, 31 F.4th at 1377. However, the larger the sample size, the more reliable that approximate. Fourth Remand Results at 10 (citing Cohen at 6). Thus, where two samples are compared, the value of the standard deviation as an approximate is necessarily a function of the sample size. *Id.* at 11–12. The larger sample size will be more reliable, and thus should play a greater role, in evaluating the difference between the means. *Id.*[7]

Using this reliability framework Commerce reasons that just as sample sizes of the same size share the same level of reliability, so do any two full populations. *See id.* Where a full population is examined, the standard deviation is not an approximate. *Id.* at 12. The standard deviation of a full population is in fact the actual standard deviation—it has 100% reliability.[8] Thus, comparing the two standard deviations of two full populations is the same as comparing the standard deviations of two samples of equal size. *Id.* at 11. The reliability of equal sample sizes is the same and the reliability of two full populations is the same. *Id.* Although it is true that the academic literature does not support the use of a simple average for unequal sample sizes, *Mid Continent V*, 31 F.4th at 1378; Pls. Cmts. at 9 (arguing that the availability of the simple average mechanism when

[7] Logically, where there is more data upon which an estimate is based, the estimate should be more accurate. Yet, Plaintiffs reject Commerce's reference to the size of a sample in its reasoning, because in the academic literature, the size of the sample refers to counts, typically of people. Pls. Cmts. at 9–10. However, Commerce's practice is to base its analysis not on the number of transactions, but on the weights in kilograms of the product. *Id.* at 10. It is unclear to the Court the basis of Plaintiffs' argument given that Commerce's reference to counts is simply an example to illustrate its analysis. Commerce could easily have used weights rather than counts in explaining its reasoning. Commerce's point is that when the size of two samples is the same, whether by weight or count, the two samples will have equal reliability.

[8] Plaintiffs argue that the reliability of data does not control Commerce's decision regarding the Cohen's d denominator. Pls. Cmts. at 9. Plaintiffs invoke this Court's prior rationale with respect to weight averaging, namely, that just because weight averaging is supported in sampling does not mean it is unsupported when sampling is absent. Pls. Cmts. at 9 (citing *Mid Continent VI*, 628 F. Supp. 3d at 1324). Plaintiffs use this rationale to argue that equality in size or reliability is not indicative of whether the denominator should be based upon a weighted average, or a simple average. *Id.* Plaintiffs are correct that this Court previously faulted Commerce's logic in that its conclusion did not follow from its premise. *Mid Continent VI*, 628 F. Supp. 3d at 1324 ("Commerce's premise does not lead to its conclusion. That weighted averaging is supported when sampling is present does not mean that it is unsupported when sampling is absent"). Here Commerce's logic is sound. It assumes that simple averaging is appropriate where there is equal reliability; and therefore, concludes that because full populations have equal reliability that simple averaging is appropriate for full populations.

the groups are the same size does not support the use of the simple average when they are not), the Court of Appeals explicitly instructed Commerce that it is not limited to the literature in supporting its determination. *Mid Continent V*, 31 F.4th at 1381. Its methodology must be reasonable. *Id.* ("Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen's *d*").

Responding to the Court of Appeals, Commerce has provided an explanation that logically connects the relevance of full populations to the use of simple averaging. Commerce is not relying solely upon the academic literature to support its choice, but rather argues that the principle it derives from the academic literature leads to a logical conclusion that simple averaging in this case is a reasonable choice. Fourth Remand Results at 12–13, 22–25. Commerce identifies where simple averaging is supported by the literature, extrapolates a rationale for why simple averaging is appropriate, and then applies that rationale to the circumstances before Commerce. Although there may be other reasonable alternatives, the Court cannot find fault with Commerce's logic here. Commerce's reliability analysis is reasonable.

Plaintiffs argue that the use of a simple average is not reasonable and suffers from the same defect as Commerce's reasoning in *Mid Continent V*, 31 F.4th at 1379, in which it argued that the standard deviation of each group was equally rationale and thus should be given equal weight.[9] Pls. Cmts. at 11. The Court of Appeals rejected that explanation because:

> The fact that the seller is acting rationally and genuinely in its pricing choices in both the test and comparison groups provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation. The rationality and genuineness of the seller's pricing choices have no evident connection to the undisputed purpose of the denominator figure—to provide a dispersion figure for the more general pool that serves as a yardstick for deciding on the significance of the difference in mean prices of the two groups. Both the numerator and denominator take the behavior as a given and form certain statistical measures from the objective data that are then related in the ratio that is Cohen's *d*. Commerce has not identified anything in the statistical measure at issue that depends on considerations of rationality and genuineness of the conduct that gave rise to the objective data. Indeed,

[9] Plaintiffs cite to *Mid Continent III* in their comments to support their position. Pls. Cmts. at 11. However, the quoted portion of the cited opinion and the reporter number and abbreviation are to *Mid Continent V*. *See* 31 F.4th at 1379; Pls. Cmts. at 11.

> Commerce has not shown that the numerous real-world examples used in Cohen to illustrate the methods taught are different in the respect Commerce now features, i.e., Commerce has not shown that the Cohen examples (generally or, perhaps, ever) involve sampled groups of data that reflect behavior that is not "rational" and "genuine." Thus, Commerce has not adequately justified, through its central rationale, its departure from the statistical literature's description of the Cohen's *d* coefficient.

Mid Continent V, 31 F.4th at 1379. Here, Plaintiffs aver the arguments regarding reliability—similar to arguments about rationality—fail to justify giving equal weighting. Pls. Cmts. at 11–12. Although Defendant rejects the comparison, Fourth Remand Results at 6–7, there is a similarity between Commerce's earlier explanation and this one, but only insofar as each explanation stems from the fact that the standard deviation in the test and control group is drawn from a full population, and therefore is not an approximate. *Id.* at 12; Second Remand Results at 39–40. Commerce previously explained that the pricing behavior in each group was equally genuine, it was the separate, distinct, and rational pricing for that group and thus should be weighted equally. Second Remand Results at 8.

The point made by Commerce here is related but distinct. The pricing at issue reveals a standard deviation that is not an approximate because it is based upon the full population. Fourth Remand Results at 12. As Commerce elucidates, if the standard deviation was a guess, then the literature would dictate a weighted average because the guess would be dependent on the size of the sample. *Id.* at 14–16. Here, Commerce addresses the Court of Appeals' mandate to provide a "connection to the undisputed purpose of the denominator figure." *Mid Continent V*, 31 F.4th at 1379. It premises the use of a simple average where there are equal sized samples on the equal reliability of those samples, Fourth Remand Results at 12–13, a premise Plaintiffs do not refute. It explains that the use of weighted average is reasonable when sampled groups have unequal sizes because the standard deviation is simply an estimate, and therefore weighting the sample size is appropriate (the larger sample size would likely be more reliable than the smaller and therefore should be weighted more). *Id.* at 10 (citing Cohen at 6). But when each group is not a sample, but rather a full population, reliability concerns would not support greater weight to the deviation found in the larger size group. *Id.* at 23–24.

Plaintiffs do not challenge the premise upon which Commerce relies, i.e., that it is appropriate to use a simple average for equal sample sizes because the two samples have equal reliability. *See generally* Pls. Cmts. Rather, Plaintiffs argue that Commerce's "analysis proves nothing." *Id.* at 10. Plaintiffs state that reliability or precision is dependent on a number of factors, at least with respect to samples. *Id.* ("precision depends on multiple factors, including sample size, the amount of variation in the population, the method by which the sample was obtained, the method used to estimate the population property from the sample property, and other factors"). Plaintiffs contend that the reliability of a sample cannot be compared to the reliability of a full population.[10] *Id.* at 10–11. However, Commerce is not comparing the reliability of a sample to the reliability of a full population, rather Commerce argues that samples of equal sizes have equal reliability and full populations have equal reliability. Fourth Remand Results at 12–14. Therefore, Commerce reasons that if it is appropriate to use a simple average where sample sizes are equal, because of the equal reliability, then it is appropriate to use a simple average where full populations are being used. *Id.* at 13.

Plaintiffs assert that Commerce's past practice supports use of a weighted average in its differential analysis. Pls. Cmts. at 13. Specifically, Plaintiffs argue that Commerce uses a weighted average when evaluating home market and U.S. markets to calculate a respondent's dumping margin. *Id.* at 13–14. This similarity in calculation, Plaintiffs reason, supports use of a weighted average in Commerce's differential pricing analysis, rather than the simple average used here. *Id.* at 14. Plaintiffs contend that Commerce relies on weighted average for all phases of pricing calculations "until the very end, at which point it inexplicably relies on simple averaging of two groups of data which have been obtained by weighted average prices and weighted standard deviations of prices." *Id.* Moreover, Plaintiffs state that substitution of simple averaging for weighted averaging at this phase of the calculations "skews the results by according more weight to certain sales (and less weight to others) than they previously had accorded throughout the analysis." *Id.*

[10] Plaintiffs attempt to cast doubt on Commerce's reliability framework, asserting that Commerce incorrectly claims "a perfectly reliable full population is 100% reliable." Pls. Cmts. at 11. Instead, Plaintiffs contend that perfect reliability "should be expressed as having zero errors." *Id.* However, Plaintiffs fail to explain in any further detail any actual distinction between the two descriptions. Moreover, Plaintiffs' distinction does not undermine Commerce's analysis, as Plaintiffs further fail to explain how the characterization of a perfectly reliable full population a shaving zero errors meaningfully alters the results.

Plaintiffs' argument is inapposite. Plaintiffs argue that because Commerce weight averages to determine dumping margins, that it should weight average in its differential pricing methodology. *Id.* at 15. Plaintiffs fail to acknowledge that Commerce's task in its differential pricing methodology serves a diagnostic purpose. Fourth Remand Results at 55; 19 U.S.C. § 1677f-1(d)(1)(B). Congress' grant of authority to Commerce dictates that diagnostic purpose. 19 U.S.C. § 1677f-1(d)(1)(B) ("[Commerce can compare] the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account [with another method]"). Moreover, Commerce has significant discretion to establish a reasonable methodology. *Mid Continent V*, 31 F.4th at 1376 ("Commerce has discretion to make reasonable choices within statutory constraints" (citing *Mid Continent III*, 940 F.3d at 667)). Dumping margin calculations simply do not determine whether the difference in prices between the two groups is significant or "the degree to which the phenomenon is present in the population," but rather the potential uncollected dumping duty due. *See* Fourth Remand Results at 55; Pls. Cmts. at 13.

Plaintiffs also point to a handful of examples they claim refute Commerce's justification for use of simple averaging in its calculation.[11] Pls. Cmts. at 19–24. Plaintiffs claim the data in the examples, including both hypothetical numbers and sales from Plaintiff PT's database, exhibit how the simple average skews the results by "overweigh[ing] the smaller group," causing "a low 'no-pass' value of *d* to exceed Commerce's threshold of 0.80" and thus a false "pass" under Cohen's *d*. *Id.* at 25. However, and as Commerce explains, Plaintiffs examples are inapposite. Fourth Remand Results at 41–43. Plaintiffs' examples illustrate that when the averaging of two values changes from an identical average (with equal weights) to a weighted average

[11] Defendant-Intervenor offers its own example of the dangers entailed by Plaintiffs' suggestion of use of a weighted average in Cohen's *d*. *See* Def.-Int. Reply at 7–8. Defendant-Intervenor claims use of a "weighted average based on the physical weights of sales within each group as the denominator of [Cohen's] *d*," as Plaintiffs suggest, "opens the door to manipulation." *Id.* at 7. This approach gives more weight to the standard deviation from smaller groups when those smaller groups are from larger sales, and Defendant-Intervenor argues that a supplier can manipulate the measure of *d* by changing the relative volume even if the mean difference between the groups is relatively large. *Id.* at 7. Defendant-Intervenor argues that there is potential for manipulation "[g]iven the prevalence and sophistication of many respondents' 'dump-proofing' activities.'" *Id.* at 8.

(with unequal weights), the results will invariably change.[12] *Id.* at 52. Plaintiff's examples serve to illustrate how weighting would work; they do not undermine the reasonableness of Commerce's use of simple averages. *Id.* at 53.[13]

Finally, Commerce addresses the Court of Appeals suggestion that it could consider using the standard deviation of the full population. Commerce reasons that "the single standard deviation causes the denominator of the Cohen's *d* coefficient to reflect not just the dispersion of the data within each group, but also the dispersion of the data between the two groups." *Id.* at 17. However, Commerce views effect size, i.e., the *d* coefficient, as meant to quantify the difference in the mean prices of each group relative to the dispersion of prices within each group.[14] *Id.* at 17.

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[12] Plaintiffs' five provided examples, which involve both hypothetical and discretely selected datasets, do nothing to undermine the reasonableness of Commerce's use of simple averaging as a general practice. Plaintiffs' examples show how the use of a weighted average lead to different results for these examples. Plaintiffs seem to contend that the visualizations of the data they provide in their five examples illustrate that their approach is correct, and that Commerce's use of a simple average is incorrect. Pls. Cmts. at 19–27. However, Commerce's use of Cohen's *d* in differential pricing calculations is not a visual analysis, but rather is a statistical methodology. *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. at 26,722. That Plaintiffs can identify five examples that do not correspond to what they intuitively believe should be a visual representation of "a pattern of significant price differences" is of little analytical value. Pls. Cmts. at 28. Even assuming Plaintiffs' intuitive belief regarding an appropriate visual representation of "a pattern of significant price differences" is correct; Commerce is not tasked with developing a perfect methodology. It is tasked with developing a reasonable methodology. Furthermore, Commerce is not relying on a visual analysis to support the reasonableness of its methodology. It relies upon principles taken from the literature and logic.

[13] Plaintiffs submit that even if Commerce's choice of methodology is reasonable, its determination in this case is unsupported by substantial evidence. More specifically, they argue the facts of this case warrant departure from the methodology because using it would lead to unreasonable results "contrary to economic reality." Pls. Cmts. at 29–30. However, and as Commerce explains, Plaintiffs fail to expound upon precisely what the economic reality is that warrants departure from simple averaging. Fourth Remand Results at 53. Without further explanation or record support, Plaintiffs' argument is unpersuasive.

[14] Plaintiffs reject the independent nature of these two groups. Pls. Cmts. at 12 (arguing that the test in comparison groups "do not have independent existences").Plaintiffs make this point by noting that any sale might be in either a test group or control group depending on Commerce's focus. *Id.* at 12; *see* Fourth Remand Results at 5 (explaining that in its differential pricing analysis, Commerce uses the Cohen's *d* test to measure "whether the sale prices to a given purchaser, region, or time period differ significantly from the sale prices of comparable merchandise to other purchasers, regions, or time periods, respectively"). Plaintiffs argue that it is illogical for any sale to receive more weight depending upon whether it is in the test or comparison group, as it necessarily does if Commerce uses a simple average. *See* Pls. Cmts. at 12–13 ("how can the essay methodology lead to reliable results when each sale has a different effect on the result, depending upon the group in which it falls?").Plaintiff's argument is without merit. Commerce explains it is comparing the prices to a given purchaser, region or time. The statute identifies these grouping as distinct. *See* 19 U.S.C.§ 1677f-1(d)(B)(i) (instructing Commerce to determine whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time"); Fourth Remand Results at 55.

The question before this Court is not whether the Court of Appeals' proposal is a reasonable one, as it would appear to be given the literature, but whether it detracts from the reasonableness of Commerce's proposal. Commerce has explained its rationale as based on the equal reliability of both full populations and equal sized samples. It has also explained that standard deviation is specific to the mean to which it relates. *Id.* at 14 ("[the standard deviation] in Dr. Cohen's equations 2.2.1 and 2.2.2, is either the standard deviation of population A or the standard deviation of population B, but it is not the standard deviation of populations A and B combined together"). Because it is evaluating full populations, Commerce explains that using the dispersion of the group as a whole would eliminate the relevancy of each individual standard deviation much in the same way that weighting the standard deviations would diminish the relevancy of one of the standard deviations. *See id.* at 14–18. Thus, Commerce has explained how its choice is reasonable and has addressed any evidence or arguments that might detract from the reasonableness of its choice. *See Mid Continent V*, 31 F.4th at 1381 ("Commerce must either provide an adequate explanation for its choice of simple averaging or make a different choice, such as use of weighted averaging or use of the standard deviation for the entire population").

CONCLUSION

Commerce has provided a reasonable explanation for its use of a simple average as instructed by the Court of Appeals and this Court and its determination is sustained. Judgment will enter accordingly.

Dated: February 12, 2024
New York, New York

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

Slip Op. 24–16

EURO SME SDN BHD, Plaintiff, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORP., Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court No. 1:22-cv-00108 (SAV)

[Sustaining Commerce's Final Determination.]

Dated: February 12, 2024

Kelly Slater, Appleton Luff Pte Ltd. of Washington, DC, for Plaintiff Euro SME Sdn Bhd. With her on the brief were *Jay Y. Nee* and *Edmund W. Sim*.

Meen Geu Oh, Senior Trial Counsel, U.S. Department of Justice of Washington, DC, for Defendant United States. With him on the brief were *Brendan S. Saslow* and *Kenneth G. Kays*, Of Counsel, U.S. Department of Commerce.

Daniel L. Schneiderman, King & Spalding, LLP of Washington, DC, for Defendant-Intervenors Polyethylene Retail Carrier Bag Committee; Hilex Poly Co., LLC; and Superbag Corp. With him on the brief was *J. Michael Taylor*.

OPINION

Vaden, Judge:

Plaintiff Euro SME Sdn Bhd (Euro SME or Plaintiff), a Malaysian manufacturer of packaging products, comes before the Court to challenge the Department of Commerce's (Commerce) 2019–2020 Administrative Review of its antidumping duty order on retail bags from Malaysia. *Retail Carrier Bags from Malaysia*, 87 Fed. Reg. 12,933 (Dep't of Com. Mar. 8, 2022). In its Motion for Judgment on the Agency Record, Plaintiff argues that Commerce's Final Results must be remanded because substantial evidence does not support its findings. *See generally* Pl.'s Br., ECF No 23. Euro SME alleges that the agency unlawfully relied on facts available to adjust the actual weight quantities in Euro SME's data. *Id.* at 7–11. It further contests Commerce's reliance on an adverse inference to determine certain inland freight expense data for U.S. sales that the agency deemed unverifiable. *Id.* at 2–3. Finally, Euro SME contends that the agency should have corrected a ministerial error that Plaintiff brought to its attention but that Commerce rejected as untimely. *Id.* at 15–17. For the reasons set forth below, Plaintiff's Motion for Judgment on the Agency Record is **DENIED**; and Commerce's Final Results are **SUSTAINED**.

BACKGROUND

In August 2004, Commerce published an antidumping duty order on retail carrier bags imported from Malaysia. *Retail Carrier Bags from Malaysia*, 69 Fed. Reg. 48,203 (Dept. of Com. Aug. 9, 2004) (Order). The Order primarily covers the ubiquitous plastic grocery bags that help shepherd our purchases home. Commerce published its annual notice of opportunity to request an administrative review of the Order in August 2020. Notice of Opportunity, J.A. at 1,003–04, ECF No. 33; *see also* 19 U.S.C. § 1675(a)(1). In response, Defendant-Intervenor, the Polyethylene Retail Carrier Bag Committee (the Committee), requested an administrative review of Euro SME alleging that the company "may have produced or exported subject merchandise that was sold into the United States at less than fair value during the period of review." Req. for Admin. Review, J.A. at 1,000–02, ECF No. 33. Commerce confirmed that it would conduct an administrative review of Euro SME's activities between August 1, 2019 and July 31, 2020. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 85 Fed. Reg. 63,081–94 (Dep't of Com. Oct. 6, 2020).

On October 26, 2020, Commerce sent a letter to Euro SME informing the company that it was initiating an investigation into whether it had imported or produced merchandise that was then sold in the United States for less than fair value. Notice of Investigation at 1–4, J.A. at 1,050–53, ECF No. 33. Commerce explained that a failure to respond to the request for information "may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act." *Id.* at 3–4, J.A. at 1,052–53. Attached to the letter was a questionnaire, comprised of five parts, which Commerce requested Euro SME complete as part of the review. Initial Questionnaire, J.A. at 1,050–1,207, ECF No. 33. The questions reflected the type of information the agency would need in order to conduct a comparison of Euro SME's sales in its home market of Malaysia and the United States.

The method that Commerce used to run that analysis was the "average-to-average method." Prelim. Determination Memo at 3, J.A. at 1,845, ECF No. 33; *see also* 19 C.F.R. § 351.414(b)(1). The average-to-average method is one of the three approved methodologies for Commerce to compare subject companies' sales in their home market and in the United States. 19 C.F.R. § 351.414(b). The purpose of the comparison is to determine whether the subject merchandise is being sold in the United States for less than fair value. Of the three ap-

proved methods, the agency employs the average-to-average approach "unless [Commerce] determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(c)(1); *see also Dillinger France S.A. v. United States*, 981 F.3d 1318, 1324 n.5 (Fed. Cir. 2020). The average-to-average method is conducted by "compar[ing] the weighted average of the respondent's sales prices in its home country during the investigation period to the weighted average of the respondent's sales prices in the United States during the same period." *Stupp Corp. v. United States,* 5 F.4th 1341, 1345 (Fed. Cir. 2021); *see also* 19 C.F.R. § 351.414(d)(1). To perform the calculation, Commerce must first collect the company's cost and sales data for both the home market and the United States.

Commerce sent its initial questionnaire on October 26, 2020. Notice of Investigation at 1–4, J.A. at 1,050–53, ECF No. 33. Section B focused on the data related to Euro SME's home market sales; Section C posed the same questions concerning the company's sales in the United States; and Section D inquired about the costs associated with the production of the subject merchandise. *Id.* at 1,055–57. Initial Questionnaire Section B, C, D, J.A. at 1,080, 1,113, 1,149, ECF No. 33. In both Sections B and C, Commerce instructed Euro SME to report "the sale quantity for [each] transaction" and explained that the entry should be "the quantity of the specific shipment or invoice line" of each corresponding sale. *Id.* at B-16, C-15, J.A. at 1,097, 1,127. For all the data Euro SME submitted, Commerce also required the company to provide supporting documentation. *Id.* at G-4, J.A. at 1,059. On the instructions sheet, Commerce stated that the company was to "identify all units of measurement" used in its "narrative response, worksheets, or other appendices" and that it must "complete Appendix VII, which is a template providing a standard format for reporting the units of measurement, currencies, and conversion factors." *Id.* The instructions also noted that "all information submitted may be subject to verification" and that a "failure to allow full and complete verification of any information may affect the consideration accorded to that or any other verified or non-verified item in the responses." *Id.* at G-9, J.A. at 1,064.

Euro SME provided timely responses to the questionnaire, submitting its response to Section A on November 23, 2020, and to Sections B, C, and D on December 11, 2020. Euro SME Sect. A Resp., J.A. at 80,000, ECF No. 31; Euro SME Secs. BCD Resps., J.A. at 80,307, ECF No. 31. In its narrative response explaining the quantities and units of measurement for its sales data, Euro SME stated that it was reporting both standard and actual weights in kilograms and that

they included "both for reconciliation purposes[.]" Secs. BCD Resp. at 14, J.A. at 80,326, ECF No. 31. Euro SME added that it "also reported quantity in cartons ... and quantity in 1,000 bags[.]" *Id.* The company provided the same narrative explanation in Section C when asked about the quantities of its sales in the United States. *Id.* at 34, J.A. at 80,346. At oral argument, counsel for Euro SME explained the difference between the figures. "Standard weight" refers to an approximated weight of the bags "based on the thickness, the length, the width, the depth of the bag" and other metrics; while "actual weight" refers to exactly that — the weight of the bags when those bags are weighed. Oral Arg. Tr. at 18:4–8, 21:15–18, ECF No. 46. However, Euro SME explained that the "actual weights" it submitted were not based on a literal weighing of each carton, as the definition of the term would suggest. Instead, the company weighed a single carton from each shipment and then multiplied the weight of that one carton by the total number of cartons in the sale to arrive at the "actual weight." *Id.* at 22:8–16. The data Plaintiff proffered as "actual weight" was therefore an average based on a random sampling rather than the actual weight of the product for each sale.

When supplying its standard weight and "actual weight" data, Euro SME did not make any objection to Commerce's request for "the quantity of the specific shipment[,]" nor did it express any concern about its ability to provide the requested data. Sec. BCD Resp. at 14, 34, J.A. at 80,326, 80,346, ECF No. 31; *see also* Issues and Decision Memo (IDM) at 8, J.A. at 2,165, ECF No. 33 ("At Commerce's request, Euro SME reported the actual weight for each transaction even though it does not record that information during the ordinary course of business. There was no indication in the record prior to verification that there may be an issue with Euro SME's reporting[.]"). At the end of the narrative portion of Section BCD of the questionnaire, Euro SME provided Commerce with a series of attachments and supporting documentation. Exhibit 1 contained Euro SME's Home Market Sales Listing, and Exhibit 8 contained its U.S. Sales Listing. In both exhibits, it provided four measurements for the quantity of sales in the respective markets: standard weight, actual weight, number of cartons, and per 1,000 bags. Sec. BCD Resp. at Ex. 1, Ex. 8, J.A. at 80,396–403, 80,439–53, ECF No. 31. On September 2, 2021, Commerce published its Preliminary Results and Preliminary Decision Memo (PDM). *Retail Carrier Bags from Malaysia*, 86 Fed. Reg. 49,309 (Dep't of Com. Sept. 2, 2021) (Preliminary Results); Preliminary Issues and Decision Memo (Dep't of Com. Aug. 27, 2021), J.A. 1,843–53, ECF No. 33. It calculated a dumping margin of 0.00% and concluded

that "sales of polyethylene retail carrier bags ... were not made at less than normal value during the period of review[.]" Preliminary Results, 86 Fed. Reg. at 49,309.

In lieu of performing an on-site verification, Commerce sent Euro SME a verification questionnaire (ILOV) on October 21, 2021, requesting documentation to support the information the company had reported earlier, including the quantities of its merchandise sold and its freight costs. ILOV Request for Information, J.A. at 81,836–42, ECF No. 31. To verify the sales data, Commerce randomly selected six transactions — three from the Unites States and three from Malaysia — and requested Euro SME provide supporting documents and a narrative explanation for each transaction to verify the data that it had already submitted related to those sales. *Id.* at 81,838–40. To verify the freight costs, Commerce requested supporting documentation to explain how the company recorded its freight expenses in two different selected U.S. sales and two different Malaysian sales. *Id.* at 81,840. Euro SME submitted its response on October 28, 2021. ILOV Resp., J.A. at 81,843–82,224, ECF No. 31. It stated that the attached invoices contained the quantity information in terms of the number of cartons and per one thousand bags. Another attachment, labeled "loading advice," provided "support for quantity in kilograms (actual weight)[.]" *Id.* at 3, J.A. at 81,851. The company similarly explained that another "loading advice" document contained quantity information about the relevant merchandise "with actual weight," in response to questions about its freight expenses. *Id.* at 6, J.A. at 81,854. The attachments included handwritten calculations. *Id.* at Ex. 1, 2, 3, 4, 5, 6, J.A. at 81,889, 81,934, 81,972, 82,015, 82,036, 82,061, ECF No. 31. Although the documents themselves did not explain how the weights of each sale broke down within the shipment, the handwritten calculations attempted to do so. *Id.* Once again, Euro SME did not express a concern about its ability to provide the requested information. *See generally* ILOV Resp., J.A. at 81,843–82,224, ECF No. 31. Plaintiff's counsel explained at oral argument that those loading documents were where the employee in charge of calculating the actual weight recorded the weight of each shipment. She clarified that the handwritten notations were the employee's calculations "extrapolating" from the weight of a single box in the shipment the weight of the entire sale by multiplying the weight of the box by the total number of boxes. Oral Arg. Tr. at 25:11–26:20, ECF No. 46.

For five of the six documents, the weight of the overall shipment listed on the document differed from what Euro SME had originally told Commerce in its questionnaire response. *See* IDM at 6, J.A. at 2,163, ECF No. 33; ILOV Resp. at Ex. 1, 2, 3, 4, 5, 6, J.A. at 81,889,

81,934, 81,972, 82,015, 82,036, 82,061, ECF No. 31. In those five cases, the handwritten notes attributed the entirety of the discrepancy to the sales in the shipment that Commerce was *not* spot-checking. *See* IDM at 6–7, J.A. at 2,163–64, ECF No. 33; ILOV Resp. at Ex. 1, 2, 3, 4, 5, 6, J.A. at 81,889, 81,934, 81,972, 82,015, 82,036, 82,061, ECF No. 31. For the sales Commerce was spot-checking, the handwritten numbers matched what Euro SME originally told Commerce down to the hundredth of a kilogram; but the sales Commerce was not spot-checking were off by tens or hundreds of kilograms. *See* IDM at 6, J.A. at 2,163, ECF No. 33; ILOV Resp. at Ex. 1, 2, 3, 4, 5, 6, J.A. at 81,889, 81,934, 81,972, 82,015, 82,036, 82,061, ECF No. 31; Pet'r's Case Br. at Att. 1, J.A. at 82,239–40, ECF No. 31 (chart comparing reported figures to verification exhibits).

The story was similar when Commerce tried to verify Euro SME's inland freight expenses. Commerce chose to spot-check the same six sales it used to verify actual weight, plus an additional two home market sales. IDM at 9, J.A. at 2,166, ECF No. 33. All five home market sales differed between the verification documentation and what Euro SME originally reported to Commerce. *Id.* at 10–11, J.A. at 2,167–68; Pet'r's Case Br. at Att. 2, J.A. at 82,241–43, ECF No. 31 (chart comparing reported figures to verification exhibits). Again, the verification documents attributed all discrepancies to sales Commerce was not spot-checking and reported a perfect match for the transactions Commerce was spot-checking. IDM at 10–11, J.A. at 2,167–68; Pet'r's Case Br. at Att. 2, J.A. at 82,241–43, ECF No. 31 (chart comparing reported figures to verification exhibits). However, for four of the five sales, the discrepancies were negligible and possibly attributable to rounding decisions. IDM at 10–11, J.A. at 2,167–68.

Euro SME declined to submit a case brief in response to the Preliminary Results. Def.'s Br. at 28 n.9, ECF No. 25. However, on December 13, 2021, the Committee sent Commerce a case brief arguing that (1) "Commerce should apply partial adverse facts available ('AFA') as a result of Euro SME's inability to substantiate reported sales quantities and inland freight expenses" and (2) "Commerce should also correct a ministerial error in the preliminary margin program by which freight revenue was double counted." Pet'r's Case Br., J.A. at 2,097–110, ECF No. 33.

Euro SME then submitted a rebuttal brief, arguing that Commerce had committed a ministerial error in its freight revenue cap calculation. J.A. at 82,244, ECF No. 31. Because that issue had not been raised in the Committee's brief, Commerce "rejected that segment of Euro SME's rebuttal brief on the ground that the challenge was a

standalone argument and not rebutting anything petitioners had said." Def.'s Resp. Br. at 28 n.9, ECF No. 25. On January 7, 2022, Euro SME submitted a revised rebuttal brief focusing instead on its claim that the company "ha[d] submitted ample and accurate information" and that "the discrepancies noted by the Petitioners with regard to actual weight, which also affect[] Malaysian inland freight, are small and immaterial." Pl.'s Rebuttal Case Br. at 1, J.A. at 2,130, ECF No. 33. Euro SME argued that any revisions to the Preliminary Results would be "either unnecessary or should be limited in scope." *Id.* It also asserted that, in the absence of the verifiable actual weight data that the agency requested, Commerce could have performed its calculation with the standard weight or number of bags data that the company did provide. *Id.* at 10–15, J.A. at 2,139–44.

After consideration of both parties' briefs, Commerce published its Final Results and its accompanying Issues and Decision Memo. *See* IDM, J.A. at 2,158–172, ECF No. 33; *Retail Carrier Bags from Malaysia: Final Results of the Admin. Dumping Review; 2019–2020*, 87 Fed. Reg. 12,933–12,935 (Dep't of Com. Sept. 2, 2021), J.A. at 2,173–75, ECF No. 33 (Final Results). The Final Results differed significantly from the Preliminary Results, most notably in the conclusion that "Euro SME Sdn. Bhd. made sales of subject merchandise at less than normal value (NV) during the period of review (POR)." Final Results at 12,934, J.A. at 2,174, ECF No. 33. Commerce concluded that there was a 6.47% weighted dumping margin. *Id.* In the accompanying Issues and Decision Memo, Commerce explained the three adjustments that it made. *See generally* IDM, J.A. at 2,158–72, ECF No. 33.

The first adjustment concerned the calculation of Euro SME's sales weight data and the discrepancy that Commerce observed when it attempted to verify the data. For those figures, Commerce decided that "it is appropriate to use facts otherwise available in relation to Euro SME's reporting of actual weight and for gross unit price and sales expenses, which are reported on a per-kilogram actual weight basis across both the home market and U.S. sales databases[.]" IDM at 7, J.A. at 2,164, ECF No. 33. This was because "there were discrepancies between the reported actual weights and the 'loading advice' document for five of the six sales traces. Euro SME did not explain how it allocated the total weight across the transactions covered by the 'loading advice' documents." *Id.* Commerce declined to draw any adverse inference here. Despite the discrepancies, Commerce did not feel "that Euro SME [had] failed to cooperate by not acting to the best of its ability to comply with Commerce's request for information." *Id.*

The second adjustment pertained to freight costs. IDM at 9, J.A. at 2,166. Those figures fell into two categories: (1) inland freight expenses in the home market of Malaysia (INLFTCH), incurred when merchandise moved from the manufacturer to the distribution warehouse, and (2) U.S. inland freight expenses (DINLFTPU), incurred between the manufacturing plant and the port of exportation. *Id.* For each category, Commerce requested documentation to verify the figures that Euro SME initially submitted. ILOV Questionnaire, J.A. at 81,838–40, ECF No. 31. The documents it provided failed to explain how the company allocated the costs between those sales and why certain deductions appeared on the company's summary pages. IDM at 9–10, J.A. at 2,166–67, ECF No. 33. Commerce also asked for supporting documentation on two additional Malaysian sales, and Euro SME's response to that request contained the same shortcomings. In both cases, Euro SME provided handwritten notations on the supporting documents that attempted to attribute all discrepancies in the data to sales that the agency had not selected for verification. *Id.* at 10, J.A. at 2,167.

Despite those discrepancies, Commerce once again declined to apply adverse inferences against Euro SME when filling the gaps related to home market inland freight expenses associated with the three transactions it selected for spot-checking. It explained, "[i]n the three home market sales traces, the variance between what was reported in the database and the supporting documentation is very small, and we find that the variance could plausibly be the result of rounding." *Id.* at 10, J.A. at 2,167. Commerce also found "no basis to apply facts available to [the inland freight expenses] throughout the home market database because the variances between the supporting documentation and what was reported in the database appear largely immaterial." *Id.* at 11, J.A. at 2,168. However, with regard to one of the two additional home market transactions, the agency did "find it appropriate to apply facts available to the transactions ... given that the size of that variance cannot be explained by rounding, and there is no explanation regarding that variance on the record." *Id.* Though Commerce opted to apply facts available to that single sale, it once again did "not find that Euro SME failed to cooperate to the best of its ability" and therefore did "not find that the application of an adverse inference [was] warranted[.]" *Id.*

For inland freight costs for U.S. sales, however, Commerce agreed with the Committee's position and applied an adverse inference. The agency justified this because "Euro SME failed to cooperate to the best of its abilities" by (1) continuing "to report domestic inland freight expenses that did not correspond to the underlying documen-

tation on the record even after Commerce notified Euro SME that there were discrepancies in its reporting" and (2) not properly explaining how it allocated the charges on its freight invoices among the selected transactions. *Id.* at 14, J.A. at 2,171. Commerce therefore "increased all reported domestic inland freight expenses ... by the largest percent variance calculated on an exhibit-wide basis among the three U.S. sales traces." *Id.*

The third adjustment that Commerce made between the Preliminary and Final Results was the correction of a ministerial error highlighted by the Committee in its case brief. Pet'r's Case Br. at 12, J.A. at 2,108, ECF No. 33. Commerce agreed that, in calculating its Preliminary Results, it had "double-counted freight revenue in the calculation of net U.S. price[.]" IDM at 14, J.A. at 2,171, ECF No. 33. The agency corrected its mistake, replacing the gross unit price variable that was inclusive of freight revenue to one that excluded freight revenue. *Id.*

After Commerce published the Final Results, Euro SME filed its own ministerial error allegation. Allegation of Ministerial Error at 1, J.A. at 82,766, ECF No. 31. Euro SME repeated the claim it originally made in its rebuttal brief, arguing that Commerce had mistakenly excluded certain logistic expenses from its U.S. freight revenue expense cap. *Id.* at 2, J.A. at 82,767. In its letter to Commerce, Euro SME asserted that "setting the cap at just international freight ... would erroneously omit [a large percentage] of the freight costs associated with moving the product to the U.S. customer[.]" *Id.* at 4, J.A. at 82,797. Because Commerce had "performed the same freight revenue cap calculation" in its Preliminary Results and Euro SME failed to raise the issue until after publication of the Final Results, Commerce rejected the allegation as untimely. Commerce Resp. to Ministerial Error Allegation at 3–4, J.A. at 2,226–27, ECF No. 33. Citing 19 C.F.R. § 351.224(c)(1) and 19 C.F.R. § 351.309(c)(2), it explained that the alleged error was "discoverable earlier in the proceeding" and therefore should have been raised in Plaintiff's case brief. *Id.* Euro SME's decision to not submit a case brief forfeited the issue. *Id.* at 3.

The Court held oral argument on May 12, 2023. ECF No. 39. Plaintiff clarified that it did not challenge Commerce's use of a verification questionnaire in lieu of an on-site verification despite extensive discussion of that decision in its briefs. Oral Arg. Tr. 7:3–22, ECF No. 46 (stating that "we do not contest the use of the ILOV ... questionnaire"). The Committee confirmed that it had not filed a cross-complaint or in any other way challenged Commerce's decision to

resort to facts available rather than draw an adverse inference. *Id.* at 8:15–20. Plaintiff's counsel also clarified that she was not challenging Commerce's inland freight calculations for Euro SME's home market sales. *Id.* at 58:7–14 (when asked to confirm that Euro SME was "not objecting to what [Commerce] did" in calculating one of the home market freight expenses, responding "we are not."). Finally, the parties gave their consent for the Court to consider prior administrative reviews of Euro SME despite those reviews not being formally admitted into the record. *Id.* at 11:7–16; *see also* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed[.]").[1]

On the issue of Euro SME's quantity data, however, the parties were not able to agree on (1) whether Euro SME's standard weight submissions had been verified; (2) whether it would have been possible for Commerce to perform its calculations with the standard weights that Plaintiff submitted; and (3) whether there was a "gap" in the record for Commerce to fill. On those questions, the Court ordered the parties to submit supplemental briefing. ECF No. 38.

Euro SME submitted its letter brief on June 5, 2023. Pl.'s Supp. Br., ECF No. 41. It first asserted that its standard weights had been verified because neither Commerce nor the Committee challenged the data. *Id.* at 3. Next, Euro SME argued that the verified standard weights could have been used in Commerce's entire calculation because the agency already used standard weights in its below cost test, disproving Commerce's claim that "it was impossible or impractical to use standard weights in its calculations." *Id.* at 3–5. Euro SME concluded that, under the Federal Circuit's opinion in *Zhejiang DunAn Hetian Metal Co. v. United States*, Commerce could not resort to facts available because there was no "gap" to be filled. *Id*. at 8 (citing 652 F.3d 1333, 1346 (Fed. Cir. 2011) ("The use of facts otherwise available ... is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record.")) (internal citations omitted).

The Government submitted its response on June 22, 2023. Def.'s Supp. Br., ECF No. 44. It argued that standard weight figures were not provided for all the data points that were requested and were necessary to complete Commerce's calculation. Commerce claimed that Euro SME reported its sales expenses in both the Malaysian and U.S. markets only on an actual weight basis — figures that proved to be unverifiable. *Id.* at 4. With "no other usable metrics available on the record" for those data points, the Government argued that Com-

[1] The parties agreed that the Court could take judicial notice of the existence of prior administrative investigations to which Euro SME had been subject, as those documents are publicly available. However, the full administrative records associated with the investigations were not formally placed onto the record and are not considered in this matter.

merce faced a "gap" and lawfully relied on facts available. *Id.* at 5. In its brief, the Committee added that a "conversion" of all the figures to standard weights — as Plaintiff proposed — would have been impossible without "an actual quantity field," which Commerce had determined "at verification to be unreliable." Def.-Int.'s Supp. Br. at 2, ECF No. 47. With these clarifications, the Court applies the law.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over the Plaintiff's challenge of Commerce's Final Results in its Administrative Review under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). Where they fail to meet that standard, the Court must "hold unlawful any determination, finding, or conclusion found." *Id.* As this Court has articulated, "the question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New American Keg v. United States*, No. 20–00008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

In reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

Plaintiff Euro SME argues that Commerce's Final Results should be remanded based on the agency's unlawful application of facts otherwise available and adverse inferences. First, Euro SME challenges Commerce's adjustment of the actual weight figures. Pl.'s Br. at 7, ECF No. 23. Second, Plaintiff claims that Commerce's application of adverse inferences to the domestic inland freight costs for U.S.

sales was unlawful. *Id.* at 10. Third, Euro SME alleges that Commerce's calculation of the company's domestic freight costs reflected a ministerial error. *Id.* at 15. Euro SME claims that it fully cooperated with the agency's requests throughout the investigation and that any discrepancies in its data were because the company does not maintain records in the form that the agency requested. *Id.* at 7; Pl.'s Reply Br. at 1–3, ECF No. 28. Euro SME further explains that the agency's decision to forego an on-site verification and instead issue a verification questionnaire hampered its ability to clarify any discrepancies. Pl.'s Reply Br. at 9–10, ECF No. 28. Nonetheless, the company does not challenge the legality of Commerce's use of a questionnaire. Oral Arg. Tr. 7:3–22, ECF No. 46. Finally, Euro SME disputes Commerce's finding that there was a "gap" in the record to fill with either facts otherwise available or an adverse inference. Though some of its figures may have contained errors, the company maintains that the same information was provided in different units of measurement and that Commerce could have used that data to complete its calculation. Pl.'s Br. at 12–15, ECF No. 23; *see also* Pl.'s Supp. Br. at 3–8, ECF No. 41.

I. SUMMARY

To determine whether Euro SME was selling its subject merchandise at less than fair value in the United States, Commerce conducted its investigation using the "average-to-average" method. PDM at 3, J.A. at 1,845, ECF No. 33. That method is essentially calculating and then comparing the "weighted average" of the company's home market and U.S. sales. 19 C.F.R. § 351.414(d). The data that Commerce draws from in performing its calculation is the data that it receives from responding companies. The questionnaires that Commerce sends companies under investigation identify what data it needs and in what form. Companies that have been subject to regular administrative reviews become familiar with the types of information they are expected to keep and provide to the agency. Euro SME and its predecessor company, Euro Plastics, have been subject to regular administrative reviews since 2007.[2]

[2] Although these prior administrative reviews were not formally entered onto the record, the parties agreed at oral argument that the Court could take judicial notice of them for the limited purpose of confirming Plaintiff's participation in prior reviews. Oral Arg. Tr. at 9:15–11:16, ECF No. 46; *see, eg.*, *Polyethylene Retail Carrier Bags from Malaysia: Final Results of Antidumping Duty Administrative Review 2005–2006*, 72 Fed. Reg. 44,825 (Dep't of Com. Aug. 9, 2007) *through Polyethylene Retail Carrier Bags from Malaysia: Final Results of Antidumping Duty Administrative Review 2018–2019*, 86 Fed. Reg. 22,019 (Dep't of Com. Apr. 26, 2021).

When Commerce determines that parties have failed to provide information necessary for its analysis such that information is missing from the record, federal law provides a two-part process for the agency to fill the resulting gap. *See* 19 U.S.C. § 1677e(a). First, Commerce may use "facts otherwise available" in place of the missing information if:

> (1) Necessary information is not available on the record, or
>
> (2) An interested party or any other person —
>
> (A) Withholds information that has been requested by [Commerce],
>
> (B) Fails to provide such information by the deadlines for submission of the information or in the form and manner requested, ...
>
> (C) Significantly impedes a proceeding under this subtitle, or
>
> (D) Provides such information but the information cannot be verified[.]

Id. Second, 19 U.S.C. § 1677e(b) permits those facts otherwise available to be chosen with an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." Although § 1677e(a) and § 1677e(b) are often collapsed into "adverse facts available" or "AFA," the two statutory processes require distinct analyses rather than the single analysis implied by the term "AFA." Commerce first must determine that it is missing necessary information; and, if it wishes to fill the resulting gap with facts that reflect an adverse inference against an interested party, Commerce must secondarily determine that the party has failed to cooperate by not acting to the best of its ability. *See Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1346. The Federal Circuit has explained that acting to the best of one's ability involves using "maximum effort to provide Commerce with full and complete answers to all inquiries in [its] investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). It also requires companies to "take reasonable steps to keep and maintain full and complete records" of their transactions in anticipation of Commerce's administrative reviews. *Id.*; *see also Qingdao Sea-Line Int'l Trading Co. v. United States*, 503 F. Supp. 3d 1355, 1371 (CIT 2021). A company that has been subject to many investigations becomes familiar with the types of information Commerce needs, making it more difficult to justify a failure to provide the requested information in the manner Commerce has consistently

requested it. *Compare* Def.'s Br. at 15, ECF No. 25 (describing the number of annual administrative reviews Euro SME has been subject to and, in turn, the company's familiarity with the process), *with Nippon Steel Corp.*, 337 F.3d at 1382 (stating that "inattentiveness, carelessness, or inadequate record keeping" all constitute non-compliance and that the standard "assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers ... take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce[.]").

In response to Commerce's initial questionnaire and each of its subsequent requests for information, Euro SME proffered timely submissions that appeared responsive. Only at verification did it emerge that the data Euro SME submitted contained errors and discrepancies. After determining that Euro SME's actual weight and inland freight data were unverifiable, Commerce was left with numerous gaps in the record. Commerce gave Euro SME opportunities to provide it with verifiable data, but Euro SME failed to do so. The agency's reliance on facts available therefore was lawful under the statute. *See* 19 U.S.C. § 1677e(a).

Commerce then had to consider whether it would go the further step of applying an adverse inference based on a finding of non-cooperation. As Commerce explained in its Issues and Decision Memo, it found that most discrepancies in Euro SME's data did not "rise to the level of warranting an adverse inference." IDM at 8, J.A. at 2,165, ECF No. 33. However, with one set of figures — the inland freight costs for United States sales — the agency found otherwise. The divergence between the data from the company's records and its verification responses combined with an apparent effort to mask those discrepancies constituted a "fail[ure] to cooperate" warranting the application of an adverse inference. *Id.* at 11–14, J.A. at 2,168–71; *see* 19 U.S.C. § 1677e(b)(1) (allowing the drawing of an adverse inference where a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information"). Commerce's limited finding of non-cooperation regarding specific discrepancies in Euro SME's submission was similarly lawful. It adequately explained in the Issues and Decision Memo what distinguished those discrepancies from others where it declined to apply an adverse inference. IDM at 13, J.A. at 2,170, ECF No. 33. Because Commerce's actions were supported by substantial evidence, the Court will **SUSTAIN** Commerce's determination.

II. COMMERCE'S RELIANCE ON FACTS OTHERWISE AVAILABLE

Under the statute, Commerce may "use the facts otherwise available" in an administrative review if information is not available on the record or if a party withholds requested information, fails to provide information "in the form and manner requested," significantly impedes the review, or if the information cannot be verified. 19 U.S.C. § 1677e(a). The existence of a "gap" in the record, such that Commerce must look elsewhere for the information, is a prerequisite for the use of facts otherwise available. *Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1346.

Euro SME argues that none of the preconditions required by the statute are present here because the data that the company provided, though imperfect, could have been used to calculate the company's margins. Pl.'s Reply Br. at 8–9, ECF No. 28; Oral Arg. Tr. at 29:6–10, ECF No. 46. According to Euro SME, "there were no gaps in the data, just several different versions of the data presented in different forms in accordance with Commerce's various requirements" so that Commerce was not permitted to use facts otherwise available. Pl.'s Reply Br. at 8–9, ECF No. 28. At oral argument, Plaintiff conceded that "there's a gap on the record with regard to actual weight" but maintained that, because it provided the same information in other forms, *i.e.*, in standard weight and number of bags, "the Department could have used that information and avoided" any gap. Oral Arg. Tr. at 29:6–10, ECF No. 46. The Government responds that Plaintiff's unverifiable data created a gap that needed to be filled by the agency in order to complete its calculations. *Id.* at 31:4–32:8.

Both parties reiterate these positions in their supplemental briefing. Euro SME argues that it is in the same position as the plaintiff in *Zhejiang* and that no "gap" existed for Commerce to fill. *See Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1348. The Government contests that claim, arguing that several data sets, such as sales expenses in both the Malaysian and U.S. markets, were reported only on an actual weight basis and proved unverifiable. Def.'s Supp. Br. at 4–5, ECF No. 44. The Government explains:

> [F]or sales expenses, Euro SME reported its relevant numbers ... *solely* on a per-kilogram *actual weight* basis .... That is similarly true for the gross unit price variable, which Euro SME reported only on an *actual weight* and per carton basis .... The consistent metric unifying these sales-related variables is that Euro SME reported those expenses to Commerce using *actual weight* .... Thus, when Commerce was unable to verify the actual weight data that Euro SME had provided in support of these responses,

> it concluded that there was a gap in the record that prevented it from conducting its calculations[.]

Id. (emphasis in the original); *see also* IDM at 5–8, J.A. at 2,162–2,165, ECF No. 33.

In *Zhejiang,* the Federal Circuit held that Commerce's reliance on facts available was unlawful — despite the discrepancies in the company's records — because the data Commerce needed in verifiable form was available elsewhere in the record. Thus, the Federal Circuit held there was no "gap" to fill; the agency simply had to look elsewhere in the company's submissions to find the data it needed. *Zhejiang*, 652 F.3d at 1348. Here, as the agency explained in its Issues and Decision Memo, its reliance on facts available was a result of its inability to perform the margin calculation because of an *absence* of verifiable data.

In its initial questionnaire, Commerce requested data related to the quantities of merchandise Euro SME sold in the United States and in the company's Malaysian home market. Initial Questionnaire, J.A. at 1,050–1,207, ECF No. 33. Euro SME responded with various documents from both markets, including sample invoices and packing lists. Euro SME Sec. A Resp. at Ex. 1, 6, 7, J.A. at 80,028, 80,046–63, ECF No. 31. What the invoices reflect is that Euro SME quantifies its merchandise by the number of units (bags), the number of cartons, and the number of units in each carton. Euro SME Sec. A Resp. at Ex. 6, 7, J.A. at 80,047, 80,053, ECF No. 31; *see also* Pl.'s Brief at 8, ECF No. 23. Weight does not appear on the invoices because "Euro SME does not sell to the customer by weight in any way[.]" Pl.'s Br. at 8, ECF No. 23. However, weight does appear on the company's packing lists. Plaintiff explains that the weights that appear on those documents are calculated by multiplying the "standard weight per carton" by the number of cartons in the sale — not by individually weighing each carton. *Id.* Standard weight therefore represents, at best, an average. Euro SME provided Commerce with actual weights, but those actual weights also were more of an average. It weighed one carton from each sale shipment and multiplied that weight by the total number of cartons in the shipment to arrive at the "actual weight." *Id.* at 10; Oral Arg. Tr. at 22:8–16, ECF No. 46. Euro SME concedes that "variations between standard weight and actual weight can result in discrepancies to some degree, since actual weights and standard weights may differ[.]" Pl.'s Br. at 11, ECF No. 23. However, the company insists that "on an aggregate basis" those discrepancies are "immaterial" and do not evince any "attempt by Euro SME to manipulate or misrepresent its reported quantity information[.]" *Id.*

Although it may be true that Commerce could have conducted its calculation with a full and verifiable dataset of either the actual or standard weight, it had neither. Instead, the agency had some data in the form of standard and actual weight and other data only in terms of actual weight, which proved impossible to verify. IDM at 6–8, J.A. at 2,163–65, ECF No. 33 (discussing which units Commerce had for each data set, and which of those data sets the agency was able to verify). No conversion ratio appears in the record, meaning that Commerce could not convert unverifiable data into a different measurement unit such as standard weight or number of bags. *Id.* at 8, J.A. at 2,165; Def.'s Br. at 14–15, ECF No. 25; *see also* Oral Arg. Tr. at 44:13–45:1, ECF No. 46. Euro SME is an experienced participant in administrative reviews. That is why it sought to proffer its data in terms of actual weight without being prompted by Commerce: It was the same metric requested and used in past reviews. Def.'s Br. at 15, ECF No. 25. *Compare* Initial Questionnaire at B-16–17, J.A. at 1,097–98, ECF No. 33 (Commerce requesting quantity data without any further specification), *with* Initial Questionnaire Resp. at 14, J.A. 1,352, ECF No. 33 (Euro SME providing the data in "actual weight"). Experienced respondents are expected to maintain their books in a manner that permits Commerce to glean the necessary data for its analysis. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). By its own admission, Euro SME failed to do so and instead sought to use averages instead of actual weights. Oral Arg. Tr. at 25:11–26:20, ECF No. 46 (Plaintiff's counsel explaining how the "actual weights" were calculated by extrapolating from a single carton's weight rather than weighing each carton.). When Euro SME's actual weight data failed to verify, Commerce had a gap to fill. *See* 19 U.S.C. § 1677e(a)(2)(D) (failure of information to verify permits Commerce to resort to facts available). Because the actual weight figures proffered by Euro SME proved unverifiable and no other complete data set appeared on the record that would allow Commerce to convert the data into a consistent unit of measurement, Commerce lawfully resorted to the use of facts available to adjust the actual weight data. IDM at 6–8, J.A. at 2,163–65, ECF No. 33.

III. COMMERCE'S APPLICATION OF ADVERSE INERENCES TO DOMESTIC INLAND FREIGHT COSTS FOR U.S. SALES

Under the statute, Commerce may only apply an adverse inference against a party after first determining that there is a gap in the record and then separately finding that the party has "failed to cooperate by not acting to the best of its ability to comply with a

request for information." *See* 19 U.S.C. § 1677e(b). The inference that Commerce draws must be selected "from among the facts otherwise available." *Id.* Commerce is not required to make any determination or adjustment "based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information." *Id.* § 1677e(b)(1)(B).

The Government argues that Euro SME's repeated failure to provide verifiable data for its inland freight costs associated with its United States sales justified its application of an adverse inference under the statute. Commerce recalls that "Euro SME's domestic inland freight data for U.S. sales could not be verified" and that "Euro SME had repeatedly failed to act to the best of its ability and seemingly tried to mask material discrepancies between the figures it reported and its own back-up documents." Def.'s Br. at 7, ECF No. 25. Those allegations refer to Euro SME's response to the verification questionnaire and the supporting documents the company offered to explain the data. Commerce found that the figures Euro SME offered to support its data for the randomly selected sales did not match the numbers the company proffered in its initial questionnaire response. IDM at 10, J.A. at 2,167, ECF No. 33. Though the company offered "some narrative discussion of how the documents supported what was reported in the database[,]" that explanation "fail[ed] to explain how the freight costs were allocated to the associated transactions[.]" *Id.* Commerce found that Euro SME attempted to mask material discrepancies with handwritten notations that appeared on the attached supporting documents. Those notations "assigned any variance to non-selected transactions so that the selected transaction would appear consistent with Euro SME's freight invoices[.]" *Id.* The agency argues that the application of an adverse inference was appropriate because Commerce had sent Euro SME "clear and repeated requests ... to correct noted discrepancies," and Euro SME "made no serious effort" to do so. Def.'s Br. at 21–22, ECF No. 25.

Euro SME disputes the allegation, claiming that "the administrative record is replete with evidence that Euro SME cooperated to the best of its ability at all times in the underlying administrative review[.]" Pl.'s Reply Br. at 3, ECF No. 28. It insists that the circumstances surrounding the Covid-19 Pandemic, which prevented an on-site verification, deprived the company of the opportunity to participate in a process with the agency whereby "those gaps [in the record] could have been fully explained and digested by Commerce officials[.]" *Id.* at 4. Plaintiff argues that "pre-verification preparations routinely involve making notations (handwritten or otherwise)

on photocopies of sales and/or other internal records highlighting reconciling figures for ease of reference and to expedite the on-site verification process." *Id.* at 6. The Government's claims that the notations are indicative of an attempt to "mask" issues in the company's data reveals, according to Euro SME, "a fundamental misunderstanding about how the on-site verification process usually works." *Id.* at 5.

At oral argument, Euro SME clarified that it did not object to the agency's use of a verification questionnaire in lieu of an on-site verification but rather wanted to highlight the inherent shortcomings of that alternative verification method. Oral Arg. Tr. 7:3–22, ECF No. 46. It also clarified that its primary objection to the application of adverse inferences to the U.S. sales data was the inconsistency with Commerce's finding that other, similar discrepancies that appeared in the home market sales data did *not* demonstrate a failure to cooperate. *Id.* at 55:11–15; *see also id.* at 57:24–58:23 (responding "[c]orrect" when asked if it was true that the company highlighted the agency's action to demonstrate that "the calculations for inland freight expenses in the home market and what [they] did with domestic inland freight expenses for United States sales [were] apples to apples ... and yet [were] being treated differently"). Plaintiff argues that this differential treatment — whereby one discrepancy is found not to demonstrate a lack of cooperation while a similar discrepancy with another data set warrants the drawing of an adverse inference — constitutes an arbitrary and unlawful application of adverse inferences. *Id.*

In its Issues and Decision Memo, Commerce adequately explained the basis for its differential treatment of the discrepancies that appeared in Euro SME's inland freight expenses for home market sales and the larger inconsistency that it found in the U.S. sales data. Commerce explained, "Unlike the variances relating to inland freight in the home market, which were generally very small or could be explained by rounding differences, the variance between the supporting documentation and the domestic inland freight expenses reported in the database for the three U.S. sales traces were not immaterial." IDM at 13, J.A. at 2,170, ECF No. 33. "Under the arbitrary and capricious standard, the court ... determine[s] whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 38 CIT 448, 456 n.27 (2014) (internal citations omitted). Here, Commerce explained the basis for its differential treatment of the various discrepancies that appeared in Euro SME's data. Where discrepancies were small and could po-

tentially be explained by rounding, Commerce found drawing an adverse inference was unwarranted. IDM at 10–11, J.A. at 2,167– 68, ECF No. 33. Where the discrepancy was larger, could not be explained by rounding, and included handwritten notations that appeared designed to obscure the discrepancy's origin, Commerce did apply an adverse inference. *Id.* at 11–14, J.A. at 2,168–71. The Court finds that Commerce considered all relevant factors, drew a rational distinction based on the relative size of the discrepancies, and supported its determination with substantial evidence. Consequently, the Court will not second guess Commerce's application of an adverse inference to the largest discrepancy within the U.S. freight expense data set.

IV. MINISTERIAL ERROR

The final issue for the Court's review is Euro SME's ministerial error allegation. Pl.'s Br. at 15, ECF No. 23. 19 U.S.C. § 1675(h) requires Commerce to "establish procedures for the correction of ministerial errors ... [which] shall ensure opportunity for interested parties to present their views regarding any such errors." The same statute defines a ministerial error as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error[.]" *Id.; see also* 19 C.F.R. § 351.224(f). Commerce's regulations implementing the statute mandate that "[c]omments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief." 19 C.F.R. § 351.224(c)(1). Parties may submit case briefs to the agency "30 days after the date of publication of the preliminary results of review[.]" 19 C.F.R. § 351.309(c)(1)(ii). "The case brief must present all arguments that continue in the submitter's view to be relevant to the [agency's] final determination[.]" *Id.* § (c)(2). Requiring ministerial errors that appear in the preliminary results to be raised in the party's case brief ensures that other parties have an opportunity to respond to the allegation and that Commerce is able to "analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination or ... the final determination[.]" 19 C.F.R. § 351.224(e).

Euro SME declined to submit a case brief after Commerce's publication of the preliminary results. Def.'s Resp. Br. at 28 n.9, ECF No. 25. After the Committee submitted a brief to the agency, however, Euro SME submitted a rebuttal brief in which it responded to issues raised in the Committee's brief and attempted to raise for the first time its allegation of a ministerial error. *Id.*; *see also* J.A. at 82,244, ECF No. 31. Because rebuttal briefs "may respond only to arguments

raised in case briefs" and are barred from raising new issues, Commerce rejected Euro SME's submission and required it to resubmit its rebuttal with the ministerial error allegation redacted. *See* 19 C.F.R. § 351.309(d)(2). Following Commerce's publication of the Final Results, Euro SME again tried to raise its ministerial error allegation. On March 7, 2022, the company submitted a brief alleging that Commerce erred in its Final Results by capping the company's freight revenue expenses. Commerce had only included the international freight expenses associated with the reviewed transactions. Euro SME Ministerial Error Memo at 2, J.A. at 82,767, ECF No. 31. Euro SME argued that it should have also included the freight expenses incurred within the United States to transport the goods to their final destination. Plaintiff's data had included those United States transportation expenses, and omitting the expenses resulted in a deceptively low expense calculation from which to compare Plaintiff's production expenses. The result is a potentially inaccurately high dumping margin. *Id.*

Commerce filed its response to the allegation on March 29, 2022, arguing that Euro SME failed to raise the issue in a timely fashion and thereby forfeited the objection. Commerce Resp. to Ministerial Error at 3–4, J.A. 2,226–27, ECF No. 33. Citing 19 C.F.R. § 351.224(c)(1) and 19 C.F.R. § 351.309(c)(2), Commerce found that parties alleging ministerial error in the preliminary results must do so in their case briefs to the agency. *Id.* at 3, J.A. at 2,226. Euro SME declined to submit any initial case brief following the agency's publication of its Preliminary Results. That left Euro SME only the post-Final Results process to raise its objection. Once again, the complaint was untimely because 19 C.F.R. § 351.224(c)(1) requires parties to raise any issues that are detectable in the Preliminary Results in their initial case briefs.

The Committee agrees with the Government that Euro SME's failure to timely raise its allegation constitutes forfeiture, but it also presents an alternative basis on which to uphold Commerce's decision. It argues that "the alleged error is not 'ministerial' in nature" but is instead "a factual and methodological question." Def. Int.'s Br. at 10, ECF No. 27. Noting that ministerial errors can only be errors "in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like[,]" the Committee posits that Commerce's decision not to include certain categories of expenses cannot be a ministerial error. *See* 19 C.F.R. § 351.224(f). Methodological choices are not unintentional errors and therefore cannot be raised using the ministerial error process.

The Court agrees that the allegation was both untimely and not properly characterized as "ministerial." When faced with a similar question, the Federal Circuit has held that the inclusion or exclusion of certain figures in a calculation that are "not an arithmetic or clerical error or similar inadvertent mistake ... do[] not fall within the statutory definition of 'ministerial error.'" *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011). In *QVD Food*, the plaintiff filed a ministerial error allegation following the publication of Commerce's Final Results, alleging that the agency had mistakenly "double counted" certain expenses in its calculations. *Id.* at 1322. On appeal, the court rejected its allegation on two separate grounds. First, the Federal Circuit held that, by failing to raise its concern regarding Commerce's calculation before the publication of the Final Results, QVD had forfeited the issue. *Id.* at 1328. "[W]hen the alleged mistake was discoverable during earlier proceedings but was not pointed out to Commerce during the time period specified by regulation," it may not be raised after the publication of the Final Results as a ministerial error. *See id.* (noting that the alleged error was "necessarily present in the preliminary results," yet the plaintiff did not object in its case brief). Second, even if QVD had not forfeited its claim, the Federal Circuit explained that the alleged error was not ministerial. Citing the statutory definition, it held that Commerce's decision to include certain figures in its calculation "is not an arithmetic or clerical error or similar inadvertent mistake" and therefore could not qualify as a "ministerial error." *Id.*

The present case is on all fours with *QVD Foods*. Like QVD, Euro SME forfeited its allegation by opting not to file a case brief following Commerce's publication of the Preliminary Results. *See id.* (holding that, where an error is discoverable in the Preliminary Results, parties must raise it in their brief to Commerce). However, even if Euro SME had timely filed its allegation, its claim would still fail because the methodological decision made by Commerce to exclude certain costs in its calculations is not "an arithmetic or clerical error or similar inadvertent mistake[.]"[3] *See id.* (holding that "methodological" choices are not ministerial errors). As both grounds support Commerce's rejection of Euro SME's allegation, the Court **SUSTAINS** Commerce's determination.

[3] Consideration of whether the allegation made by Euro SME constitutes a "ministerial error" is resolvable as a pure question of law because the question is purely legal in nature, requires no further development of the record or any additional agency action, and it does not result in undue delay or expenditure of resources. *See Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 605 F. Supp. 3d 1348, 1366 (CIT 2022); *see also Husteel Co. v. United States*, 426 F. Supp 3d 1376, 1382 n.5 (CIT 2020).

CONCLUSION

Euro SME alleges that Commerce threw the book at it. Instead, Commerce acted with deliberation, patience, and arguably stayed its hand when it could have drawn adverse inferences more broadly against such a seasoned respondent. For the reasons set forth above, the Court **SUSTAINS** Commerce's Final Results as supported by substantial evidence. Euro SME's Motion for Judgment on the Agency Record is **DENIED**.

Dated: February 12, 2024
New York, New York

STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–17

GOVERNMENT OF CANADA, GOVERNMENT OF ALBERTA, GOVERNMENT OF QUÉBEC, BRITISH COLUMBIA LUMBER TRADE COUNCIL, FONTAINE, INC., INTERFOR CORPORATION, AND INTERFOR SALES & MARKETING, LTD., Plaintiffs, and CANFOR CORPORATION, CANADIAN FOREST PRODUCTS, LTD., CANFOR WOOD PRODUCTS MARKETING, LTD., COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, TOLKO INDUSTRIES, LTD., TOLKO MARKETING & SALES, LTD., GILBERT SMITH FOREST PRODUCTS, LTD., RESOLUTE FP CANADA, INC., THE CONSEIL DE L'INDUSTRIE FORESTIERE DU QUÉBEC, and THE ONTARIO FOREST INDUSTRIES ASSOCIATION, Consolidated Plaintiffs, and CANFOR CORPORATION, CANADIAN FOREST PRODUCTS, LTD., CANFOR WOOD PRODUCTS MARKETING, LTD., GOVERNMENT OF ONTARIO, CARRIER FOREST PRODUCTS, LTD., CARRIER LUMBER, LTD., OLYMPIC INDUSTRIES, INC., OLYMPIC INDUSTRIES, ULC, AND WEST FRASER MILLS, LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS AND SIERRA PACIFIC INDUSTRIES, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 23–00187

[Granting the Proposed Plaintiff-Intervenors' motions to intervene as a matter of right].

Dated: February 15, 2024

Eric S. Parnes, *Alan G. Kashdan*, *Joanne E. Osendarp*, *Lynn G. Kamarck*, and *Tyler J. Kimberly*, Blank Rome, LLP, of Washington, D.C., for Plaintiff Government of Canada.

Lynn M. Fischer Fox, *Archana Rao Vasa*, and *Gina M. Colarusso*, Arnold & Porter Kaye Scholer, LLP, of Washington, D.C., for Plaintiff Government of Alberta.

Nancy A. Noonan, ArentFox Schiff, LLP, of Washington, D.C., for Plaintiff Government of Québec.

Amy Lentz and *Stephanie W. Wang*, Steptoe & Johnson, LLP, of Washington, D.C., for Plaintiff British Columbia Lumber Trade Council.

Mark Burton Lehnardt, Law Offices of David L. Simon, PLLC, of Washington, D.C., for Plaintiff Fontaine, Inc.

Diana Dimitriuc-Quaia, ArentFox Schiff, LLP, of Washington, D.C., for Plaintiffs Interfor Corporation and Interfor Sales & Marketing, Ltd. and Proposed Plaintiff-Intervenor Chaleur Forest Products, L.P. *Mario A. Torrico* and *Matthew M. Nolan* also appeared.

Jay C. Campbell, White & Case, LLP, of Washington, D.C., for Proposed Plaintiff-Intervenor J.D. Irving, Limited. *Allison J. Gartner Kepkay* and *Walter J. Spak* also appeared.

Rudi W. Planert, *Brady W. Mills*, *Donald B. Cameron*, *Eugene Degnan*, *Jordan L. Fleischer*, *Julie C. Mendoza*, *Mary S. Hodgins*, *Nicholas C. Duffey*, *Ryan R. Migeed*, and *Stephen A. Morrison*, Morris, Manning & Martin, LLP, of Washington, D.C., for Consolidated Plaintiffs and Plaintiff-Intervenors Canfor Corporation, Canadian Forest Products, Ltd., and Canfor Wood Products Marketing, Ltd.

Henry D. Almond and *Kang Woo Lee*, Arnold & Porter Kaye Scholer, LLP, of Washington, D.C., for Consolidated Plaintiffs Tolko Industries, Ltd., Tolko Marketing & Sales, Ltd., and Gilbert Smith Forest Products, Ltd.

Elliot J. Feldman, *Michael S. Snarr*, *Ronald J. Baumgarten, Jr.*, and *Tung Anh Nguyen*, Baker Hostetler, LLP, of Washington, D.C., for Consolidated Plaintiffs Resolute FP Canada, Inc., the Conseil de l'Industrie Forestiere du Québec, and the Ontario Forest Industries Association.

Harold D. Kaplan and *Jonathan T. Stoel*, Hogan Lovells U.S., LLP, of Washington, D.C., for Plaintiff-Intervenor Government of Ontario.

Jeffrey S. Grimson, *Bryan P. Cenko*, *Evan P. Drake*, *Jill A. Cramer*, *Kristin H. Mowry*, *Ronalda G. Smith*, *Sarah M. Wyss*, and *Yixin (Cleo) Li*, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiff-Intervenors Carrier Forest Products, Ltd., Carrier Lumber, Ltd., Olympic Industries, Inc., and Olympic Industries, ULC.

Donald Harrison and *Ann C. Motto*, Gibson, Dunn & Crutcher, LLP, of Washington, D.C., for Plaintiff-Intervenor West Fraser Mills, Ltd.

Rajib Pal, Sidley Austin, LLP, of Washington, D.C., for Proposed Plaintiff-Intervenors Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc.

Myles S. Getlan and *Yohai Baisburd*, Cassidy Levy Kent (USA), LLP of Washington, D.C., for Proposed Plaintiff-Intervenors AJ Forest Products, Ltd., ER Probyn Export, Limited, Rayonier A.M. Canada G.P., and Scierie Alexandre Lemay & Fils, Inc. *James E. Ransdell, IV* also appeared.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Deputy Director. Of counsel on the brief was *Elio Gonzalez*, Attorney, Office of the Chief of Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Zachary J. Walker, *Jessica M. Link*, *Andrew W. Kentz*, *Nathaniel Maandig Rickard*, *Whitney M. Rolig*, and *David A. Yocis*, Picard, Kentz, & Rowe, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations. *Sophia J.C. Lin* also appeared.

David J. Ross, *Jeffrey I. Kessler*, *Stephanie E. Hartmann*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, D.C., and *Kanzanira Thorington*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of New York, N.Y., for Defendant Intervenor Sierra Pacific Industries, including its subsidiary Seneca Sawmill Company.

OPINION AND ORDER

Choe-Groves, Judge:

This case has wide implications for whether litigants will have standing to intervene as a matter of right at the U.S. Court of International Trade ("CIT"). The Court addresses several motions to intervene as of right filed by importers, producers, and exporters pursuant to USCIT Rule 24 and 28 U.S.C. § 2631(j)(1)(B) in a consolidated action challenging the fourth administrative review of the antidumping duty order on certain softwood lumber products from Canada conducted by the U.S. Department of Commerce ("Commerce"). *See Certain Softwood Lumber Products from Canada*, 88 Fed. Reg. 50,106 (Dep't of Commerce Aug. 1, 2023) (final results of antidumping duty administrative review and final determination of

no shipments; 2021). Although the USCIT rule and statute for intervention have existed for decades, this case is notable because Defendant United States ("Defendant" or "the Government") recently changed its position (from previously consenting for decades to intervention as of right for importers, producers, and exporters) and now appears to be arguing for the first time that requests for administrative review are inadequate, and parties must file factual information in support of allegations in order to intervene as a matter of right on appeal before the CIT.

In the unique setting of international trade disputes, parties requesting an administrative review are not regularly selected by Commerce. The non-selected companies generally do not file administrative case briefs because Commerce analyzes only company-specific data for selected mandatory respondents, and the non-selected companies do not yet have specific legal arguments to make, other than the arguments implicit in their requests for administrative review that they disagree with the duty rate applied during the period of review and would like to have a more favorable rate. The non-selected companies wait for Commerce to complete its administrative review of the mandatory selected companies. When Commerce issues its final determination applying an antidumping duty rate to the non-selected companies (the "all-others rate") together with its reasoning from the administrative review, the non-selected companies are then affected by the outcome of Commerce's final determination.

If the non-selected companies intervene as a matter of right in the appeal before the CIT, the non-selected companies may assert legal arguments and take advantage of any changes to the antidumping duty rates that may occur as a result of the CIT litigation. The non-selected respondents are limited in the arguments that they may raise if allowed to intervene because the doctrine of exhaustion only allows the CIT to entertain arguments that were exhausted during the administrative proceedings below, which means that the non-selected respondents generally are limited to "me too" type arguments in support of the plaintiffs' legal arguments before the CIT. Allowing non-selected respondents to intervene in litigation before the CIT does not place additional burdens on the Court due to the overlap in issues.

Intervention as a matter of right in international trade cases is not provided in a vacuum, but is provided as the only opportunity for non-selected respondents to obtain the benefit of any changes to the all-others rate as a result of litigation before the CIT. If non-selected companies are foreclosed from participating as a party in CIT appeals, they will not be able to take advantage of any changes to the

antidumping duty rates that might occur through litigation at the CIT and will be forced to adhere to the original, pre-litigation all-others rate imposed in the final determination, unless Commerce decides on its own to apply the all-others rate to everyone. Intervention as a matter of right for non-mandatory, non-selected respondents is the only path to obtaining any court-ordered benefit from changes to the all-others rate. Thus, it would appear that the only practical consequence of denying non-selected respondents the right to intervene is that they will be unable to benefit from any favorable court decisions.

In this case, the importers and foreign producers/exporters did not file administrative case briefs, but instead filed requests for administrative review that contained information about their exports/imports of subject merchandise during the period of review, entries of appearance in the administrative review, and applications for administrative protective orders.

The Government and Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Defendant-Intervenor") argue that these filings before the agency were insufficient to satisfy Commerce's regulations for "party to the proceeding" because the filings were neither "written arguments" nor "factual information" as required by Commerce's regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii). Notably, the Government and Defendant-Intervenor do not oppose the motion to intervene of one party, J.D. Irving, Limited ("J.D. Irving"), who filed an administrative case brief.

There appear to be very few published cases from this Court or the U.S. Court of Appeals for the Federal Circuit ("CAFC") addressing the requirements that must be satisfied for importers and foreign producers/exporters to intervene as of right before the Court, mainly because motions to intervene have been routinely unopposed and granted by the Court for decades, until the Government recently changed its position on the issue.[1]

The importers and foreign producers/exporters argue in support of their motions to intervene that the Government's and Defendant-Intervenor's proposed interpretation of the statute and regulations requiring the filing of an administrative case brief or similar written arguments at the agency level in order to litigate before the CIT is

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[1] There is one unpublished case from the CAFC upholding the right of foreign steel pipe manufacturers to intervene as a matter of right. *Laclede Steel Co. v. United States* ("*Laclede Steel*"), 1996 WL 384010 (Fed. Cir. July 8, 1996). The CIT did not issue an opinion in the *Laclede Steel* case regarding the motion to intervene, and the Government did not oppose intervention as a matter of right by the non-selected respondents in *Laclede Steel*.

unconstitutional because the regulations deprive the Parties of due process, are contrary to legislative intent, and lead to absurd, unfair results.[2]

For the reasons discussed below, the Court holds that parties who file a request for administrative review satisfy the statutory "party to a proceeding" standing requirement, even without filing an administrative case brief. Furthermore, the Court holds that Commerce's regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21), when applied to 28 U.S.C. § 2631(j)(1)(B) ("the standing statute"), conflict with the statute and are not in accordance with law. Accordingly, the Court grants the motions to intervene.

BACKGROUND

Motions to intervene as a matter of right were filed by AJ Forest Products, Ltd., ER Probyn Export, Limited, Rayonier A.M. Canada G.P., and Scierie Alexandre Lemay & Fils, Inc., (foreign exporters and producers) (collectively, "AJ Respondents") ("AJ Respondents' Motion to Intervene" or "AJ Respondents' Mot. Interv."), ECF No. 59, and Chaleur Forest Products, Inc., Chaleur Forest Products, L.P., Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc. (foreign exporters and producers, and domestic importers) (collectively, "NB Respondents") ("NB Respondents' Motion to Intervene" or "NB Respondents' Mot. Interv."), ECF No. 69. The NB Respondents also filed similar motions in Court No. 23–00188, ECF No. 72, Court No. 23–00204, ECF No. 41, and Court No. 23–00206, ECF No. 37. These court numbers were consolidated into this consolidated case on December 4, 2023. Order (Dec. 4, 2023), ECF No. 89. J.D. Irving joined in the NB Respondents' Motion to Intervene.

The Government of Canada, Government of Québec, British Columbia Lumber Trade Council, Fontaine, Inc., Interfor Corporation, and Interfor Sales & Marketing, Ltd. (collectively, "Plaintiffs") served their complaint on October 6, 2023.[3] Compl., ECF No. 15. Canfor

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[2] Chaleur Forest Products, Inc., Chaleur Forest Products, L.P., Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc. argue that denying importers standing to intervene under 28 U.S.C. § 2631(j)(1)(B) creates serious constitutional problems by potentially depriving them of property (*i.e.*, excess cash deposits held by U.S. Customs and Border Protection ("Customs") to which they are entitled) without due process of law. The Court agrees that this is problematic but does not need to reach this argument.

[3] Government of Alberta is not listed in the Complaint even though it is listed in the Summons and other documents filed before and after the filing of the Complaint as one of the Plaintiffs.

Corporation, Canadian Forest Products, Ltd., and Canfor Wood Products Marketing, Ltd. served their complaint on October 2, 2023. Court No. 23–00188, Compl., ECF No. 10. Tolko Industries, Ltd., Tolko Marketing and Sales, Ltd., and Gilbert Smith Forest Products, Ltd. served their complaint on October 27, 2023. Court No. 23–00204, Compl., ECF No. 13. Resolute FP Canada, Inc., the Conseil de l'Industrie Forestiere du Québec, and the Ontario Forest Industries Association served their complaint on November 1, 2023.[4] Court No. 23–00206, Compl., ECF No. 9.

Defendant and Defendant-Intervenor filed briefs in opposition to the AJ Respondents' and NB Respondents' (collectively, "Proposed Plaintiff-Intervenors") motions to intervene. Def.'s Opp'n NB Respondents' Mot. Interv., ECF No. 81; Def.'s Opp'n AJ Respondents' Mot. Interv., ECF No. 82; Def.-Interv.'s Resp. AJ Respondents' Mot. Interv., ECF No. 83; Def.-Interv.'s Resp. Opp'n NB Respondents' Mot. Interv., ECF No. 84.

The Proposed Plaintiff-Intervenors filed replies to Defendant's and Defendant-Intervenor's oppositions. AJ Respondents' Reply Def.'s Def.-Interv.'s Cmts. Opp'n AJ Respondents' Mot. Interv., ECF No. 90; NB Respondents' Reply Def.'s Def.-Interv.'s Resps. Opp'n NB Respondents' Mot. Interv., ECF No. 91.

DISCUSSION

In 28 U.S.C. § 2631, Congress established a right to intervene in actions commenced under 19 U.S.C. § 1516a. The Court's standing statute provides that:

> Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the [CIT] may, by leave of court, intervene in such action, except that . . . (B) in a civil action under [19 U.S.C. § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.

28 U.S.C. § 2631(j)(1)(B).

Under USCIT Rule 24(a), a party may intervene in an action upon timely application "when a statute of the United States confers an unconditional right to intervene." To succeed on a motion to intervene, the proposed intervenors in actions filed pursuant to 19 U.S.C.

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[4] Canfor Corporation, Canadian Forest Products, Ltd., Canfor Wood Products Marketing, Ltd., Tolko Industries, Ltd., Tolko Marketing and Sales, Ltd., Gilbert Smith Forest Products, Ltd., Resolute FP Canada, Inc., the Conseil de l'Industrie Forestiere du Québec, and the Ontario Forest Industries Association are Consolidated Plaintiffs under Consol. Court No. 23–00187.

§ 1516a must show that each party is an "interested party," 19 U.S.C. § 1516a(f)(3), "would be adversely affected or aggrieved by a decision in a civil action pending in the [CIT]," 28 U.S.C. § 2631(j)(1), and "was a party to the proceeding in connection with which the matter arose," 28 U.S.C. § 2631(j)(1)(B).

I. Party to the Proceeding

The Parties focus their dispute on whether the Proposed Plaintiff-Intervenors have standing as parties to the proceeding pursuant to 28 U.S.C. § 2631(j)(1)(B).[5] The Court has interpreted the "party to the proceeding" standing requirement as a form of participation that "reasonably convey[s] the separate status of a party, . . . and provide[s] Commerce with notice of a party's concerns." *Specialty Merch. Corp. v. United States*, 31 CIT 364, 365, 477 F. Supp. 2d 1359, 1361 (2007) (internal quotation marks and citations omitted). Participation in the administrative process, however, does not have to be extensive. *RHI Refractories Liaoning Co. v. United States*, 35 CIT 130, 132, 752 F. Supp. 2d 1377, 1380 (2011) (citing *Laclede Steel*, 1996 WL 384010, at *2). The Court has also noted that the "party to the proceeding" requirement for standing is not onerous. *Hor Liang Indus. Corp. v. United States*, 42 CIT __, 337 F. Supp. 3d 1310, 1318 (2018). Commerce's regulations do not control this Court's construction of a statute administered by the Court itself. *See id.* ("*Chevron*[6] deference does not apply to Commerce's regulatory definition [of "party to a proceeding"] because Commerce does not administer the standing statute, 28 U.S.C. § 2631.").

II. Notice of the Parties' Concerns

To satisfy the "party to the proceeding" standing requirement, the Proposed Plaintiff-Intervenors must have reasonably conveyed their separate status and provided Commerce with notice of their concerns. *Specialty Merch. Corp.*, 31 CIT at 365, 477 F. Supp. 2d at 1361; *RHI Refractories Liaoning Co.*, 35 CIT at 132, 752 F. Supp. 2d at 1381.

The Government and Defendant-Intervenor do not challenge the Proposed Plaintiff-Intervenors' separate status, but assert that the Proposed Plaintiff-Intervenors' requests for administrative review

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[5] It is undisputed that: (1) the Proposed Plaintiff-Intervenors filed their timely motions to intervene within 30 days of Plaintiffs' service of the Complaint; (2) the Proposed Plaintiff-Intervenors are interested parties because they are Canadian producers and exporters, or domestic importers, of softwood lumber, the subject merchandise of the underlying antidumping administrative review; and (3) the Proposed Plaintiff-Intervenors could be adversely affected by the decision pending before the CIT because they are subject to the all-others rate that was calculated based on the antidumping duty rates of the mandatory respondents.

[6] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

did not sufficiently put Commerce on notice of the Parties' concerns. The Government and Defendant-Intervenor argue that the requests for administrative review did not contain statements of fact in support of allegations (*i.e.*, legal arguments as one would find in an administrative case brief). Def.'s Opp'n AJ Respondents' Mot. Interv. at 2-3; Def.-Interv.'s Resp. AJ Respondents' Mot. Interv. at 5-6; Def.'s Opp'n NB Respondents' Mot. Interv. at 3-4; Def.-Interv.'s Resp. Opp'n NB Respondents' Mot. Interv. at 5-6.

At the outset, the Court questions the Government's recent change in position after more than thirty years of consenting to intervention motions of non-selected respondents brought before the Court. Now, apparently for the first time, the Government claims that Commerce was not on notice of the Parties' concerns because the Parties did not file sufficient factual information in support of allegations (*i.e.*, administrative case briefs).

The Proposed Plaintiff-Intervenors are U.S. importers and Canadian producers/exporters of softwood lumber, who argue that they qualify as parties to the proceeding under 28 U.S.C. § 2631(j)(1)(B) because in their written requests for administrative review, they provided factual information regarding their entries of subject merchandise during the period of review from January 1, 2021, through December 31, 2021. AJ Respondents' Reply Def.'s Def.-Interv.'s Cmts. Opp'n AJ Respondents' Mot. Interv. at 2, 6-7; Def.'s Opp'n AJ Respondents' Mot. Interv. at Ex. 1, ECF No. 82–1; NB Respondents' Reply Def.'s Def.-Interv.'s Resps. Opp'n NB Respondents' Mot. Interv. at 4. The requests for administrative review included statements of fact with the names of the requesting entities, whether the entities produced, exported, remanufactured, and/or were importers of record of subject merchandise to the United States within the period of review, and the nature of the relationships between the requesting entities (*e.g.*, whether one entity was the exporter for another entity). NB Respondents' Reply Def.'s Def.-Interv.'s Resps. Opp'n NB Respondents' Mot. Interv. at 4.

None of the U.S. importers or foreign producers/exporters were selected for individual review, but the Proposed Plaintiff-Intervenors contend that Commerce used the factual information when Commerce initiated the administrative reviews, selected mandatory respondents, and assigned a final antidumping duty rate to the Proposed Plaintiff-Intervenors. AJ Respondents' Reply Def.'s Def.-Interv.'s Cmts. Opp'n AJ Respondents' Mot. Interv. at 6-7. The Proposed Plaintiff-Intervenors explain that the importers, producers, and exporters requested administrative reviews in order to make known to Commerce their disagreement with their existing dumping

margins and interest in obtaining new dumping margins for their affected exports for the applicable period of review. NB Respondents' Reply Def.'s Def.-Interv.'s Resps. Opp'n NB Respondents' Mot. Interv. at 7. The NB Respondents state that the factual information provided to Commerce indicated their willingness to participate in the review, including through providing factual information if and when requested by Commerce, or to otherwise be subjected to a dumping margin in that review based on adverse facts available. *Id.* The NB Respondents note that, "once foreign producers/exporters request a review, they are obligated to participate or face adverse consequences. No other interested party is in a similar situation by virtue of having submitted their own review request." *Id.*

The NB Respondents contend that when foreign producers/exporters are routinely not selected by Commerce for individual review, the foreign producers/exporters "would have *no reason* to devote resources to submit additional and unnecessary factual material or argumentation to [Commerce]. Specifically, those companies would have *no reason* to comment on the company-specific price and cost data that the mandatory respondents submit to assist [Commerce] in calculating their company-specific dumping margins." *Id.* at 10.

Similarly, the NB Respondents argue that the U.S. importers filed requests for review in the antidumping proceeding to "make known to [Commerce] that they disagree with having their entries of subject merchandise during the [period of review] from specified foreign producers/exporters liquidated at the cash deposit rate paid upon entry, and instead are interested in obtaining a new assessment rate for their affected entries during the [period of review]." *Id.* at 8.

The factual information provided in the requests for administrative review by the Proposed Plaintiff-Intervenors clearly was submitted in anticipation of litigation regarding the non-selected margin rates that would later be applied by Commerce, as well as to provide information for Commerce's selection of mandatory respondents. *See Laclede Steel*, 1996 WL 384010, at *2 (holding that foreign producers/proposed plaintiff-intervenors who were subject to the all-others rate participated actively in the administrative proceeding when they submitted factual data about their exports to assist Commerce in the selection of mandatory respondents). The *Laclede Steel* Court explained that although the active participation need not be extensive, it must reasonably convey the separate status of a party, and the participation should be meaningful enough. *Id.* Only the plaintiff opposed intervention in *Laclede Steel*, and the Government notably consented to intervention as of right by the foreign producers who submitted requests for administrative review without filing adminis-

trative case briefs. *Id.* at *1.

By requesting administrative reviews of themselves in the antidumping duty proceeding in this case, the Proposed Plaintiff-Intervenors put Commerce on notice of: 1) their disagreement with the existing dumping margins and the cash deposit rates paid during the period of review; 2) their interest in obtaining a more favorable margin rate; 3) their willingness to provide more information if selected by Commerce for administrative review (or be subjected to adverse facts available for not cooperating); and 4) information that assisted Commerce in its selection of mandatory respondents.

The Court is not persuaded by the Government's argument that Commerce lacked notice of the Proposed Plaintiff-Intervenors' concerns in the requests for administrative review. It is simply not credible or reasonable in the context of international trade litigation, after decades under the same statutory framework, that here Commerce did not understand the significance of the Proposed Plaintiff-Intervenors' filing of information objecting to the existing dumping margins and the cash deposit rates paid during the period of review and asking to be selected for administrative review in order to obtain more favorable rates. The Government's position contradicts decades of Commerce's practice regarding intervention as a matter of right for non-selected respondents. Thus, the Court concludes that the Proposed Plaintiff-Intervenors met the statutory requirement for standing as parties to the proceeding by participation that reasonably provided Commerce with notice of the Parties' concerns. *Specialty Merch. Corp.*, 31 CIT at 365, 477 F. Supp. 2d at 1361.

As noted earlier, if non-selected companies are prevented from intervening in CIT appeals, they will not be able to take advantage of any changes to the antidumping duty rates that might occur through litigation at the CIT (and on appeal at the CAFC) and will be forced to accept the original, pre-litigation all-others rate imposed in the final determination. Intervention for non-mandatory, non-selected respondents is the only path to obtaining a benefit from any changes to the all-others rate that the Court may order during litigation at the CIT.

Accordingly, the Court holds that parties who file a request for administrative review, without filing an administrative case brief, meet the statutory requirements of 28 U.S.C. § 2631(j)(1)(B) and shall have standing to intervene as a matter of right in litigation before the CIT.

III. Regulations Conflict with the CIT's Standing Statute

The Government and Defendant-Intervenor argue that none of the Proposed Plaintiff-Intervenors are entitled to intervene as a matter of right, other than J.D. Irving, because they did not file administrative case briefs and only submitted requests for administrative review, entries of appearance, and applications for an administrative protective order, and thus were not parties to the proceeding because the submissions were neither "written arguments" nor "factual information" as required by 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii). Def.'s Opp'n NB Respondents' Mot. Interv. at 1-4; Def.-Interv.'s Resp. Opp'n NB Respondents' Mot. Interv. at 5-6; Def.-Interv.'s Resp. AJ Respondents' Mot. Interv. at 5-7; Def.'s Opp'n AJ Respondents' Mot. Interv. at 2-3.

The Government and Defendant-Intervenor rely on Commerce's regulation 19 C.F.R. § 351.102(b)(36), which defines "a party to the proceeding" as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36). The Government also relies on regulation 19 C.F.R. § 351.102(b)(21)(ii) for the definition of "factual information" as "[e]vidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party." 19 C.F.R. § 351.102(b)(21)(ii); Def.'s Opp'n NB Respondents' Mot. Interv. at 3.

The Government and Defendant-Intervenor contend that the Proposed Plaintiff-Intervenors' requests for administrative review may have contained factual information, but such facts were purportedly not submitted in support of allegations as required by Commerce's regulations because the filings requesting administrative review did not contain clear legal arguments (as opposed to an administrative case brief). The Government's interpretation of these regulations now holds little sway with the Court given that for decades, the Government has consented to intervention and only started to oppose intervention for the first time in this case.

The Government and Defendant-Intervenor assert that J.D. Irving is the only interested party out of all the Proposed Plaintiff-Intervenors who is entitled to intervene as a matter of right because J.D. Irving filed an administrative case brief during the administrative proceeding.

With respect to the Government's and Defendant-Intervenor's arguments that Commerce's regulations should control, the Court confirms that it is not compelled to use the definition of "party to the proceeding" appearing in Commerce's regulation at 19 C.F.R. § 351.102(b)(36), nor the definitions of "written arguments" or "factual

information" appearing in 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21), when interpreting the text of the Court's standing statute at 28 U.S.C. § 2631(j)(1)(B). Commerce's regulations do not control this Court's construction of a statute administered by the Court itself. *See Hor Liang Indus. Corp.*, 42 CIT at __; 337 F. Supp. 3d at 1318 ("*Chevron* deference does not apply to Commerce's regulatory definition [of "party to a proceeding"] because Commerce does not administer the standing statute, 28 U.S.C. § 2631.").

The Government and Defendant-Intervenor rely heavily on *Dongkuk Steel Mill Co. v. United States* ("*Dongkuk Steel*"), 46 CIT __, 567 F. Supp. 3d 1359 (2022), in which the Court concluded that a domestic producer's request for administrative review did not include factual information in support of allegations under Commerce's definitions of "written arguments" and "factual information" appearing in 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21), found that the domestic producer did not have standing as a party to the proceeding, and denied the domestic producer's motion to intervene as of right in the CIT litigation. *Dongkuk Steel*, 46 CIT at __, 567 F. Supp. 3d at 1364. Relying on *Dongkuk Steel* and its interpretation of Commerce's regulations, the Government argues that "party to the proceeding" requires active participation beyond a request for administrative review through the filing of factual information in support of allegations. Def.'s Opp'n AJ Respondents' Mot. Interv. at 3; Def.'s Opp'n NB Respondents' Mot. Interv. at 3-4. In the *Dongkuk Steel* case, the Government consented to the domestic producer's motion to intervene, even though the producer only filed a request for administrative review and did not file an administrative case brief (consistent with the Government's prior position for decades), with only the plaintiff opposing the motion to intervene. The party seeking to intervene in *Dongkuk Steel* did not argue that the regulations were contrary to law.

This Court is not persuaded to follow *Dongkuk Steel*, which is inapplicable to this case. First, *Dongkuk Steel* involved a motion to intervene by a domestic producer, and the instant case involves U.S. importers and foreign producers/exporters, whose legal and economic interests are different than those of domestic producers. The importers and foreign producers/exporters in this case requested administrative reviews of *themselves*, which triggered certain ramifications impacting their applicable duty rates and cash deposits paid, as explained above, while the domestic producer in *Dongkuk Steel* requested administrative reviews of *other* companies under the relevant countervailing duty order.

Second, the Court notes that it is unreasonable to conclude that after decades of agency practice and CIT precedent under the same statutory framework, Commerce suddenly did not understand the significance of the request for administrative review filed by the domestic producer in *Dongkuk Steel*. It is clear that Commerce was on notice of the domestic producer's concerns when it filed its request for administrative review, particularly as the Government did not object to intervention by right of the domestic producer in *Dongkuk Steel*. *See Specialty Merch. Corp.*, 31 CIT at 365, 477 F. Supp. 2d at 1361; *RHI Refractories Liaoning Co.*, 35 CIT at 132, 752 F. Supp. 2d at 1381.

Third, as noted earlier, the Court does not rely on Commerce's definition of "party to the proceeding" appearing in 19 C.F.R. § 351.102(b)(36), nor the definitions of "written arguments" or "factual information" appearing in 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21) when interpreting the text of the Court's standing statute at 28 U.S.C. § 2631(j)(1)(B). The *Dongkuk Steel* Court relied on Commerce's regulations, but this Court construes 28 U.S.C. § 2631(j)(1)(B) without reliance on Commerce's regulations because the Court's standing statute is properly administered by the Court itself. *See Hor Liang Indus. Corp.*, 42 CIT at __, 337 F. Supp. 3d at 1318, n.11.

The Court concludes that Commerce's regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii), when applied to the Court's standing statute 28 U.S.C. § 2631(j)(1)(B), are not in accordance with law.

The Court's standing statute requires that the Proposed Plaintiff-Intervenors must establish that each was "a party to the proceeding in connection with which the matter arose" pursuant to 28 U.S.C. § 2631(j)(1)(B) in order to be allowed to intervene as a matter of right. Although 28 U.S.C. § 2631(j)(1)(B) does not define "party to the proceeding," Congress explained its legislative intent that in antidumping duty cases, it "intended that the term 'party to the proceeding' mean *any person who participated* in the administrative proceeding." S. Rep. No. 96249, at 633 (1979) (emphasis added). When Congress amended the statute in 1979, Congress expressed its intent to permit "greater access to the [CIT] for an expanded number of parties" by including foreign manufacturers, producers, exporters, and/or United States importers of the merchandise that is the subject of an investigation. *Id.* at 632. Congress expressed this intent by adding new sections regarding challenges to antidumping duty determinations to the Tariff Act of 1930, and enlarged the class of

persons who could initiate actions and participate in litigation to include foreign countries, exporters, trade associations, and organizations that are affected by these determinations. *Id.* at 636. Congress explained that:

> In addition, the new section 516A would greatly expand the right of interested parties to appear and be heard in litigation concerning antidumping and countervailing duties. For example, under [the 1930 law], an importer is not permitted to appear as a party-in-interest in a suit challenging the failure to impose a countervailing duty instituted by an American manufacturer pursuant to section 516(D) (19 U.S.C. [§] 1516(D)) even though the importer would be affected by a court decision holding that a countervailing duty should have been imposed. Under the proposed section 516A, if an *importer participated in the administrative proceedings* which preceded the challenged decision, it would possess a right to be notified of the institution of litigation challenging the decision and to appear and be heard as if it were a party—not simply as an amicus curiae.

Id. (emphasis added). It is clear that Congress' stated intent in the 1979 Amendments was to expand access to the CIT for a wider category of litigants, including "*any person who participated* in the administrative proceeding" and "*importer[s] [who] participated in the administrative proceedings.*" *Id.* (emphasis added). While Congress did not define "party to the proceeding," the Court observes that Congress could have, but clearly chose not to, include more stringent requirements with language mentioning written submissions, factual information, written argument, statements of fact in support of allegations, or other requirements similar to those proposed by the Government and Defendant-Intervenor for a litigant to have standing to litigate before the Court.

Commerce's regulatory definition of "party to a proceeding" prior to 1989 did not include the language "actively participates, through written submission of factual information or written argument." *See, e.g.*, 19 C.F.R. § 353.12(i) ("'Party to the proceeding' means: . . . (3) foreign manufacturers, producers and exporters of the merchandise subject to the investigation; and (4) any other interested party, within the meaning of paragraph (c) of this section, who informs the Secretary in writing of his intent to become a party to the proceeding within 20 days after the preliminary determination or who demonstrates to the satisfaction of the Secretary good cause for intervention."). 19 C.F.R. § 353.12(i) (1980).

On December 27, 1988, Commerce issued a Federal Register notice indicating its intent to amend the definition of "party to a proceeding" to add the language "actively participates" to 19 C.F.R. § 355. *Countervailing Duties*, 53 Fed. Reg. 52,306 (Dep't of Commerce, Dec. 27, 1988). Notably, the Federal Register notice reflected significant opposition to adding the "actively participates" language to the definition of "party to a proceeding," as follows:

> *Comment*: *All parties commenting on this section object* to the limitation of "parties to the proceeding" to those which participate in a particular decision by the Secretary through the submission of factual information or written argument. *The parties generally argue that the provision is an attempt by [Commerce] to define, without statutory authority, the jurisdiction of federal courts.* One party argues that the provision is an unconstitutional usurpation of Congress' authority to define the jurisdiction of Article III courts. Others argue that the definition is too limited; U.S. and state courts have held that a party not actively participating in a proceeding has a right to appeal a decision reached in the court of that proceeding.
>
> Others argue that the provision is not in accordance with Congress' intention of streamlining and reducing the cost of countervailing duty proceedings, and will result in needless duplication of effort by interested parties through protective filings. . . .
>
> *[Commerce's] Position*: [Commerce] must define the term "party to the proceeding." . . . As to the arguments that [Commerce] is attempting to limit a party's right to appeal to the court, we believe the comments prove too much. It is the province of Congress to regulate trade, but that does not argue that [Commerce] has no authority to interpret statutory enactments on trade matters through its regulations. . . . We believe the court will benefit from the agency's expertise as to the minimum participation in the administrative process that will make possible the party's exhaustion of its administrative remedies, so that the time of the court and the parties will not be spent needlessly on matters that could have been addressed and resolved by the agency in the first instance. *The court may disagree in the circumstances of a particular case that adherence to the regulatory requirements was consistent with Congressional intent,* but that does not argue for ignoring our obligation to ensure, to the extent possible, the orderly, efficient, and equitable implementation of the law.

53 Fed. Reg. at 52,308 (emphasis added). Commerce's definition of "party to a proceeding," which went into effect on January 26, 1989, included the added requirements that a party "actively" participate through "written submissions." 19 C.F.R. § 353.2(o). The section number changed in 1998 to move the definition for "party to a proceeding" from 19 C.F.R. § 353.2(o) to 19 C.F.R. § 351.102(b).

The Court agrees with the commenters who questioned Commerce's explanation in the Federal Register notice above because 28 U.S.C. § 2631(j)(1)(B) is the Court's standing statute, which should be properly administered by the Court itself, and is not an area requiring the agency's technical expertise. *See Hor Liang Indus. Corp.*, 42 CIT at __, 337 F. Supp. 3d at 1318, n.11.

In addition, the Government in this litigation is now seeking to narrow the definition of "party to a proceeding" even further, by proposing that regulation 19 C.F.R. § 351.102(b)(21)(ii) requires not only a written submission, but the new addition of "factual information" as "statements of fact" submitted "in support of allegations." 19 C.F.R. § 351.102(b)(21)(ii); Def.'s Opp'n NB Respondents' Mot. Interv. at 3. It is clear that the Government seeks to depart from decades of precedent by attempting to devise a new requirement that a "party to the proceeding" must submit an administrative case brief under the guise of regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii). The Government's position would lead to the absurd result of increasing paperwork and raising the cost of litigation by requiring non-selected respondents in every international trade case to file administrative case briefs, which contradicts the goals of streamlining and expediting the litigation process. *See* USCIT Rule 1 promoting the "just, speedy, and inexpensive determination of every action and proceeding."

The Court holds that regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii), when applied to the Court's standing statute 28 U.S.C. § 2631(j)(1)(B), conflict in at least four ways: 1) the regulations are examples of Commerce attempting to regulate an area squarely within the Court's purview, the Court's jurisdictional standing statute; 2) the regulation 19 C.F.R. § 351.102(b)(36) includes added requirements of "active" participation and "written submissions" that do not appear in the statute 28 U.S.C. § 2631(j)(1)(B); 3) the regulation 19 C.F.R. § 351.102(b)(21)(ii) includes stringent requirements of "statements of fact" submitted "in support of allegations" that do not appear in the statute 28 U.S.C. § 2631(j)(1)(B); and 4) Commerce's regulations narrow the definition of "party to a pro-

ceeding" in conflict with Congress' expressed intent that access to the CIT should be expanded rather than limited. S. Rep. No. 96–249, at 633.

The Court holds that Commerce's definition of "party to the proceeding" as expressed in regulations 19 C.F.R. § 351.102(b)(36) and 19 C.F.R. § 351.102(b)(21)(ii), when applied to 28 U.S.C. § 2631(j)(1)(B), is not in accordance with law.[7]

CONCLUSION

The Court is cognizant of Congress' intent, unchanged for decades, to expand access to the CIT to a greater number of litigants, rather than closing the courthouse doors to litigants.

Allowing the Proposed Plaintiff-Intervenors to intervene as a matter of right based on the submission of requests for administrative review comports with decades of agency practice and CIT precedent, and is consistent with Congressional intent that "party to the proceeding" shall be "any person who participated in the administrative proceeding." S. Rep. No. 96–249, at 633.

The Court concludes that parties who submit requests for administrative review meet the low bar to satisfy the statutory requirement for standing under 28 U.S.C. § 2631(j)(1)(B). Accordingly, the Court grants the Proposed Plaintiff-Intervenors' motions to intervene as a matter of right.

ORDER

It is hereby:

ORDERED that the AJ Respondents' Motion to Intervene, Consolidated Court No. 23–00187, ECF No. 59, is granted; and it is further

ORDERED that the NB Respondents' Motions to Intervene, Consolidated Court No. 23–00187, ECF No. 69, Court No. 23–00188, ECF No. 72, Court No. 2300204, ECF No. 41, and Court No. 23–00206, ECF No. 37 are granted; and it is further

ORDERED that AJ Forest Products, Ltd., ER Probyn Export, Limited, Rayonier A.M. Canada G.P., Scierie Alexandre Lemay & Fils, Inc., Chaleur Forest Products, Inc., Chaleur Forest Products, L.P., Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., J.D. Irving, Limited, Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc. are entered as Plaintiff-Intervenors in *Government of Canada v. United States*, Consolidated Court No. 23–00187; and it is further

[7] The Parties might choose to bring an interlocutory appeal of the intervention as a matter of right issue to the CAFC. The Court is willing to certify the question to the CAFC and stay the case if the parties seek an interlocutory appeal.

ORDERED that AJ Forest Products, Ltd., ER Probyn Export, Limited, Rayonier A.M. Canada G.P., Scierie Alexandre Lemay & Fils, Inc., Chaleur Forest Products, Inc., Chaleur Forest Products, L.P., Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., J.D. Irving, Limited, Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc. may file, in accordance with ECF No. 98, motions for judgment on the agency record and supporting memoranda of points and authorities (not to exceed 21,000 words) on or before April 5, 2024; and it is further

ORDERED that AJ Forest Products, Ltd., ER Probyn Export, Limited, Rayonier A.M. Canada G.P., Scierie Alexandre Lemay & Fils, Inc., Chaleur Forest Products, Inc., Chaleur Forest Products, L.P., Delco Forest Products, Ltd., Devon Lumber Co., Ltd., H.J. Crabbe & Sons, Ltd., J.D. Irving, Limited, Langevin Forest Products, Inc., Marwood, Ltd., North American Forest Products, Ltd., and Twin Rivers Paper Co., Inc. may file reply briefs (not to exceed 10,000 words) on or before October 10, 2024.

Dated: February 15, 2024
New York, New York

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

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