

UNITED STATES COURT OF INTERNATIONAL TRADE

**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

OPINION AND ORDER

[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.

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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.

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

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

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 Commerce’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 merchandise,” 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

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

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 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

merchandise sold in each market is identical or very similar or is custom-made.” 19 C.F.R. § 351.414(c)(2).

³ The “Cohen’s *d* test” is Commerce’s version of a general-purpose effect size metric devised in 1980 by statistician Jacob Cohen.

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 margins 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).

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

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).

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”),

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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 investigation 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

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 Domestic 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

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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).

phrase “adverse facts available.” The court nevertheless construes Domestic’s use of the phrase “adverse facts available” to refer to § 1677e(b), because the relief Domestic seeks (as reflected in their pre-consolidation complaint) is Commerce’s application of an adverse inference. See Domestic’s Compl. ¶ 18, Appvion, LLC. v. United States, No. 21-634 (CIT filed Jan. 12, 2022), ECF No. 12 (“Domestic’s 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—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)—

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.

- (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 Commerce’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, Domestic 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 export 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 Domestic’s 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) (“Domestic’s 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 SAS⁷ 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

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

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 Commerce 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. Domestic 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. Domestic’s 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

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

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 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 Domesticics 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; Domesticics’ 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

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.

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

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.”).

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 Commerce’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 variances.” 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

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).

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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. § 1677f-1(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.

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

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.

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

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.

determination no sooner than, 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

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 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.

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.

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.”); SolarWorld 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

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“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.

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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 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.

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.

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 Domestic’s 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

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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

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.

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(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 Commerce's “discretion concerning scope clarification at the investigatory stages is extensive”).¹⁷

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

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.”).

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

investigations to thermal paper coated with chemicals.” Gov’t Br. at 35 (citing Final Scope Decision at 8).

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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 sensitivity¹⁹ 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

¹⁹ Dynamic sensitivity is thermal paper’s reactivity 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”).

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' 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

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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)). Domestic's 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 Domestic's 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

Domestic also challenge Commerce's determination that Koehler's reporting of the static sensitivity²⁰ product characteristic for certain product grades [[
]] was complete. See Domestic's 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. Domestic claim

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.; Domestic's Br. at 29. This is measured by progressively increasing the temperature of a testing device until the tested paper reaches its maximum optical density. Domestic's 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.

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 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

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.

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 Domestic “wrongly assume that they can substitute their own judgment to determine whether a submission is ‘deficient’” (citing Domestic’s 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 characteristic for these

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 ≥ 160 but < 170
- 09 ≥ 170 but < 180
- 10 ≥ 180

Antidumping Questionnaire at B-10–B-11.

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

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).

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 petitioner 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 response²⁴ was to restate that Koehler’s submissions were complete because Commerce found them to comply with Commerce’s instructions.

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.

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 Domestic’s 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 apply an adverse inference against Koehler. See Assan Alumnyum, 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 Domestic 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

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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. Domestic argue that Commerce’s inclusion of these rebates

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.”

in its dumping margin calculations constitutes an unlawful break with past agency practice. See Domestic's 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. Domestic's 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, Domestic's 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 Domestic's 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. Domestic's also challenge, as unsupported by substantial evidence, three findings that

²⁶ Domestic's 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 Domestic's 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).

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 that 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.

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

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.

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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 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 22.²⁸

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

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 adequate to support a conclusion." PAM, S.p.A., 582 F.3d at 1339 (internal quotation marks

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.

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

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classification of the expenses. Domestic's 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, Domestic's seek to compel Commerce to furnish a fuller explanation on remand. See Domestic's Br. at 11; Domestic's 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 “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.

²⁹ Domestic's 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.” Domestic's Reply Br. at 3. The court is unpersuaded by Domestic's 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).

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

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

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.

SO ORDERED.

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: February 8, 2024
New York, New York