U.S. Court of International Trade

Slip Op. 19–146

THE NAVIGATOR COMPANY, S.A., Plaintiff, PACKAGING CORPORATION OF AMERICA, et al., Consolidated Plaintiffs, and DOMTAR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and PACKAGING CORPORATION OF AMERICA, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00192
PUBLIC VERSION

[Remanding the final results and amended final results of the first administrative review of the antidumping duty order on certain uncoated paper from Portugal for reconsideration of the brokerage and handling charge selected as facts available and the decision to make an adverse inference in that selection.]

Dated: November 22, 2019

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Stephen J. Orava and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Plaintiff-Intervenor Domtar Corporation.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Michael D. Snyder*, Trial Attorney. Of counsel was *Mykhaylo A. Gryzlov* and *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Judge:

This consolidated action is before the court on two motions for judgment on the agency record challenging the final results and amended final results of the U.S. Department of Commerce's ("Commerce" or the "agency") first administrative review of the antidumping duty order on certain uncoated paper from Portugal.[1] *See Certain Uncoated Paper From Portugal*, 83 Fed. Reg. 39,982 (Dep't Commerce

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 33–4, and a Confidential Administrative Record ("CR"), ECF No. 33–5, 20–3. Parties submitted joint appendices containing record documents cited in their briefs.

Aug. 13, 2018) (final results of antidumping duty admin. review; 2015–2017) ("*Final Results*"), ECF No. 33–2, and accompanying Issues and Decision Mem., A-471–807 (Aug. 6, 2018) ("I&D Mem."), ECF No. 33–3; *Certain Uncoated Paper From Portugal*, 83 Fed. Reg. 52,810 (Dep't Commerce Oct. 18, 2018) ([am.] final results of antidumping duty admin. review; 2015–2017) ("*Amended Final Results*"), ECF No. 33–1, and accompanying Confidential Ministerial Error Mem. (Oct. 9, 2018) ("Min. Error Mem."), ECF No. 65–1.

Consolidated Plaintiffs, Packaging Corporation of America and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW"), and Plaintiff-Intervenor Domtar Corporation (collectively, "Petitioners") challenge Commerce's decision to amend the *Final Results* to correct an alleged ministerial error. Specifically, Petitioners argue that in adopting the *Amended Final Results*, Commerce: (1) departed from its practice of using data initially rejected as unreliable when selecting the facts available with an adverse inference, (2) altered the substance of the *Final Results* rather than correcting a ministerial error, and (3) chose an insufficiently adverse value for Navigator's U.S. brokerage expenses. *See* Rule 56.2 Mot. of Consol. Pls.' Packaging Corp. of America and USW and Pl.-Int. Domtar Corp. for J. on the Agency R., ECF No. 47, and Confidential Mem. of Law in Supp. of Rule 56.2 Mot. of Consol. Pls. Packaging Corp. of America and USW and Pl.-Int. Domtar Corp. for J. on the Agency R. ("Pet'rs' Mem."), ECF No. 48.

Plaintiff, The Navigator Company, S.A. ("Navigator"), challenges the *Final Results*, arguing that: (1) there is no gap in the record which would allow Commerce to resort to facts available pursuant to 19 U.S.C. § 1677e(a); (2) Commerce failed to comply with the requirements of 19 U.S.C. § 1677m(d) by not providing Navigator with sufficient opportunity to explain any deficiencies in its response; and (3) Commerce had no basis for making an adverse inference pursuant to 19 U.S.C. § 1677e(b). The Navigator Company's Mot. for J. on the Agency R. ("Navigator's Mot."), ECF No. 50, and Mem. of Points of Law and Fact in Supp. of the Rule 56.2 Mot. for J. on the Agency R. filed by Pl., The Navigator Company ("Navigator's Mem."), ECF No. 50.

See Public J.A. ("PJA"), ECF No. 73; Confidential J.A. ("CJA"), ECF No. 74. The court references the confidential version of the relevant record documents, unless otherwise specified.

For the reasons discussed below, the court remands the *Final Results* and *Amended Final Results* for Commerce to reconsider its use of an adverse inference and selection of facts available for Navigator's allocated U.S. brokerage and handling expenses.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

On March 3, 2016, Commerce published an antidumping duty order on uncoated paper from Portugal. *Certain Uncoated Paper From Australia, Brazil, Indonesia, the People's Republic of China, and Portugal*, 81 Fed. Reg. 11,174 (Dep't Commerce Mar. 3, 2016) (am. final affirmative antidumping determinations and antidumping duty orders). On March 31, 2017, Navigator requested an administrative review of its imports for the period of review ("POR") of August 26, 2015 through February 28, 2017 ("POR"). Req. for Admin. Review of Antidumping Duty Order (Mar. 31, 2017), PR 1, PJA Tab 1 . Commerce initiated this review on May 9, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 21,513 (Dep't Commerce May 9, 2017). Commerce published the preliminary results of review on April 6, 2018, preliminarily calculating a zero percent dumping margin for Navigator. *Uncoated Paper From Portugal*, 83 Fed. Reg. 14,844 (Dep't Commerce Apr. 6, 2018) (prelim. results of antidumping duty admin. review; 2015–2017) ("*Preliminary Results*").

On August 13, 2018, Commerce published the *Final Results*, pursuant to which the agency found that certain U.S. brokerage and handling expenses, as reported by Navigator, were anomalous and effectively increased the net price for U.S. sales of subject merchandise during the POR. *See Final Results*, 83 Fed. Reg. at 39,983; I&D Mem. at 6–8. Commerce explained that Navigator "reported U.S.

[2] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, the Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA § 502. The TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793 (Dep't Commerce Aug. 6, 2015). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

brokerage and handling in two fields, USBROKU and USBROK2U, where the amounts reported in USBROKU were actual expenses and the amounts reported in USBROK2U were allocated." I&D Mem. at 7 & n.36 (citation omitted). Regarding the allocated expenses reported in USBROK2U (or "allocated brokerage expenses"), Commerce found that Navigator "failed to cooperate to the best of its ability because it failed to provide the necessary information demonstrating that its allocation methodology . . . [did] not cause inaccuracies or distortions." *Id*. at 8. Commerce selected the highest reported allocated brokerage expense as adverse facts available ("AFA") for Navigator's allocated brokerage and handling expenses. *Id*. at 8 & n.43 (citing Final Results Analysis Mem. for The Navigator Company, S.A. (Aug. 6, 2018) ("Navigator Final Analysis Mem."), CR 310, CJA Tab 8). In the *Final Results*, Navigator's weighted-average dumping margin increased to 37.34 percent. 83 Fed. Reg. at 39,983.

Also on August 13, 2018, Navigator timely submitted a ministerial error allegation in which it argued, in relevant part, that Commerce made a ministerial error when it selected the highest allocated brokerage expense to use as partial AFA "because it mathematically resulted in a larger brokerage expense than Commerce otherwise found to be a reliable total brokerage expense" and resulted in an unrealistically high total brokerage expense. Ministerial Error Allegation (Aug. 13, 2018) at 8, CR 320, CJA Tab 9.

On August 27, 2018, Navigator initiated this action challenging the *Final Results*. Summons, ECF No. 1; Compl., ECF No. 6. After consultation with interested parties, Commerce requested leave to consider Navigator's ministerial error allegations. Def.'s Consent Mot. for Leave to Consider Ministerial Error Allegation and, if Necessary, to Publish Am. Final Results or Correction Notice, ECF No. 13. The court granted such leave on September 7, 2018. Order (Sept. 7, 2018), ECF No. 14.

On October 9, 2018, Commerce issued a memorandum addressing the alleged ministerial errors. Min. Error Mem.; *see also Amended Final Results*, 83 Fed. Reg. 52,810. Commerce agreed that it had made a ministerial error by selecting Navigator's highest allocated brokerage expense as adverse facts available and, instead, selected the highest transaction specific U.S. brokerage expense (reported in USBROKU) to replace Navigator's allocated brokerage expense. Min. Error Mem. at 6, 7. This change reduced Navigator's weighted-average dumping margin from 37.34 to 1.75 percent. *Id*. at 6; Am. Final Determinations Calculations for The Navigator Company, S.A. (Oct. 9, 2018) ("Amended Calc. Mem.") at 2, CR 323, CJA Tab 12.

Commerce issued its *Amended Final Results* on October 18, 2018. *Amended Final Results*, 83 Fed. Reg. at 52,810. On October 22, 2018, Consolidated Plaintiffs initiated a separate action challenging the *Amended Final Results*. *Packaging Corporation of America, et al. v. United States, et al.*, No. 1:18-cv-00217, Summons, ECF No. 1, Compl., ECF No. 7 (CIT Oct. 22, 2018). On November 1, 2018, the court consolidated the actions under lead court number 18–00192. Docket Order, ECF No. 34.

DISCUSSION

While Navigator challenges Commerce's determination to use adverse facts available and its selection of adverse facts available in the *Final Results*, subsequent to the issuance of the *Amended Final Results*, Navigator has stated that it would waive its right to pursue its challenge if Petitioners do not prevail in their challenge to the *Amended Final Results*. See Navigator's Mot. at 3. In light of the contingent nature of Navigator's challenge, the court will first consider Petitioners' challenge to the *Amended Final Results*.

I. Petitioners' Challenges to the *Amended Final Results*

A. Legal Framework

Pursuant to 19 U.S.C. § 1675(h), Commerce is authorized to correct ministerial errors in its final determinations and required to establish procedures for correction of such errors.[3] *See also Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 560 (Fed. Cir. 1989) ("A number of cases have recognized the authority of an administrative agency to correct inadvertent, ministerial errors." (collecting cases)). Both statute and regulation define "ministerial error" as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the [agency] considers ministerial." 19 U.S.C. § 1675(h); *cf.* 19 C.F.R. § 351.224(f). "Clerical errors are by their nature not errors in judgment but mere inadvertencies." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *see also SGL Carbon LLC v. United States*, 36 CIT 264, 275 , 819 F. Supp. 2d 1352, 1363 (2012) (finding that ministerial errors are not those "resulting from ill-considered judgment or wayward discretion")

[3] Section 1675(h) provides:

> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors.

19 U.S.C. § 1675(h)

(citation omitted). This court has repeatedly recognized the existence of a legal distinction between ministerial and non-ministerial errors.[4]

"Commerce is given fairly broad discretion to determine which types of unintentional error to regard as ministerial." *CEMEX, S.A. v. United States*, 19 CIT 587, 593 (1995) (citing 19 U.S.C. § 1675(h)). However, Commerce's determination is not without limits and is subject to judicial review. *See Alloy Piping Prod., Inc. v. Kanzen Tetsu Sdn. Bhd*., 334 F.3d 1284, 1292 (Fed. Cir. 2003) (noting that Commerce has discretion to determine when an alleged error is ministerial, but Commerce's determinations thereto are "subject to judicial review"); *Hor Liang Indus. Corp. v. United States*, 42 CIT ___, ___, 337 F. Supp. 3d 1310, 1321 (2018) (same).

B. Commerce's Determinations

As stated above, for the *Final Results*, Commerce selected the highest reported allocated brokerage expense reported in USBROK2U as AFA.[5] *See* I&D Mem. at 8. Commerce explained that Navigator's transaction specific brokerage expenses were not appropriate to use as AFA for Navigator's allocated brokerage expenses because "these observations with transaction specific . . . [expenses] represent a [limited] portion of [Navigator's] total . . . observations and are not sold pursuant to the same sales process as those observations with an allocated U.S. brokerage and handling expense reported."[6] Navigator Final Analysis Mem. at 6. For that reason, Commerce found that those observations for which Navigator reported actual expenses were not representative of the sales for which Navigator allocated its expenses. *Id.*

In the Ministerial Error Memorandum, Commerce stated that it had erred in using Navigator's highest allocated brokerage expenses

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[4] *See, e.g., Peer Bearing Co. v. United States,* 23 CIT 454, 458, 57 F. Supp. 2d 1200, 1204 (1999) ("[T]he allegation of faulty judgment inherently falls outside the purview of a ministerial error."); *Shinhan Diamond Indus. Co., Ltd. v. United States*, 34 CIT 227, 231 (2010) ("[A] ministerial error 'encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment,' or includes only 'mindless and mechanistic mistakes [and] minor shifting of facts.'") (citation omitted) (second alteration in original).

[5] Specifically, Commerce selected [[ ]] U.S. dollars per kilogram as adverse facts available to use for allocated brokerage expenses. Navigator Final Analysis Mem. at 6.

[6] In its section C questionnaire response, Navigator explained that "[t]he expenses reported in field USBROKU are direct in nature and apply to [[

]]" Navigator's Sec. C Questionnaire Resp. (June 15, 2017) ("Navigator CQR") at 33, PR 25, CR 22, 28, 29, 44, CJA Tab 2. For expenses reported in USBROK2U, "[[ ]] and, [thus], the traceability is lost." *Id.* at 34. Accordingly, for sales reported in USBROK2U, Navigator allocated its brokerage expenses "based on the total quantity of individual product codes purchased by individual customers." *Id.*

as AFA because the agency had found that information to be unreliable. Min. Error Mem. at 6 & n.33 (referring to its finding that Navigator had failed to show that its allocation methodology did "not cause inaccuracies or distortions") (quoting I&D Mem. at 8). Commerce stated that it did "not know the full universe of inaccuracies or distortions associated with [the highest allocated brokerage] expense," and its selection of that value as AFA was, therefore, an "unintentional ministerial error." *Id.* at 6. To correct this error, Commerce selected Navigator's highest transaction specific expense as AFA.[7] *Id*.

C. Parties' Contentions

Petitioners contend that Commerce's decision to change its choice of AFA value in the *Amended Final Results* was not the correction of a ministerial error, but a substantive change that exceeded the scope of the court's Order granting permission to consider the ministerial error allegation. Pet'rs' Mem. at 19–20.

The Government contends that Commerce corrected a ministerial error because it initially selected Navigator's highest reported allocated brokerage expense as AFA, after it had determined that the allocated data provided by Navigator was unreliable. Confidential Def.'s Opp'n to Pl.'s Mot. for J. Upon the Agency R. ("Gov't's Resp."), at 16, ECF No. 57. The Government argues that Commerce has broad discretion to determine what type of errors qualify as "ministerial." *Id.* at 20.

Navigator supports the Government's contention that Commerce acted within its discretion by treating its selection of the AFA value as a ministerial error. Confidential The Navigator Company's Resp. in. Opp'n To Consol. Pls.' and Pl.-Int.'s Mot. for J. on the Agency R. ("Navigator's Resp.") at 6–11, ECF No. 61. Navigator points to the legislative history of 19 U.S.C. § 1675(h) to show that Congress intended to grant Commerce a wide degree of discretion in deciding which types of errors are "ministerial." *Id.* at 7–8.

D. Commerce Made a Substantive Modification to the *Final Results*

Commerce has broad, but not unbounded, discretion to determine which types of errors are ministerial. *See, e.g.*, *Hor Liang Indus.*, 337 F. Supp. 3d at 1321; *SGL Carbon*, 36 CIT at 273, 819 F. Supp. 2d at 1362. In this case, Commerce exceeded its authority when it claimed

[7] Specifically, Commerce selected [[ ]] U.S. dollars per kilogram in the *Amended Final Results* to use as adverse facts available for allocated brokerage expenses in USBROK2U. Amended Calc. Mem. at 3.

to correct a ministerial error when revising its selection of AFA for the allocated brokerage. Ministerial errors "are by their nature not errors in judgment but merely inadvertencies." *NTN Bearing,* 74 F.3d at 1207.

The Government cites several cases supporting Commerce's discretion to identify and correct ministerial errors, including *Peer Bearing,* 23 CIT 454, 57 F. Supp. 2d 1200. *See* Gov't's Resp. at 20. While Commerce does have significant discretion, the facts underlying *Peer Bearing* support the conclusion that Commerce exceeded its discretion here.[8] In *Peer Bearing*, the court held that Commerce made a ministerial error when it "accidentally used an unskilled labor rate of 46.6 Rupees per hour and a skilled labor rate of 25.42 Rupees per hour instead of the reverse." 23 CIT at 456, 57 F. Supp. 2d at 1202–03. The court then granted the Government's request for a remand to correct the "*inadvertent* reversal of the skilled and unskilled labor rates in its calculations." *Id.* at 456, 57 F. Supp. 2d at 1203 (emphasis added).

In contrast, here, Commerce did not *inadvertently* utilize one value when it intended to use another. In the Final Analysis Memorandum for Navigator, Commerce provided a reasoned explanation as to why it rejected the use of the transaction specific brokerage expenses as AFA. Navigator Final Analysis Mem. at 5–6. Commerce explained that those transaction specific expenses represented a "[limited] portion of Navigator's observations." *Id*. at 6. Commerce further explained that those observations were not sold pursuant to the same "sales process as those observations with allocated U.S. brokerage and handling reported." *Id*. Commerce concluded that the transaction specific expenses were not "representative to be considered as a plug for Navigator's allocated U.S. brokerage and handling expenses." *Id*. Thus, Commerce's selection of AFA for the *Final Results* was the result of its reasoning and consideration of Navigator's reporting methodology. To the extent this was error, it was not a "ministerial" error. *See QVD Food Co., Ltd v. United States*, 34 CIT 1166, 1179–80, 721 F. Supp. 2d 1311, 1322 (2010), *aff'd* 658 F.3d 1318 (Fed. Cir. 2011) (plaintiff was wrong to assert that Commerce could make changes to

[8] Navigator errs in suggesting that the court must give *Chevron* deference to Commerce's ministerial error finding. Navigator's Resp. at 7–8 (citing *Chevron*, 467 U.S. at 842–43); *see also id.* at 10 ("Commerce's Amended Final Results set forth a reasonable construction of the statute . . . ."). Whether Commerce corrected a ministerial error does not concern the agency's legal interpretation of the statute it administers. *Cf. Chevron*, 467 U.S. at 842–43. The Parties do not dispute the proper meaning of the term "ministerial error" or that it does not include errors of judgment. *See* Gov't's Resp. at 16; *cf.* Navigator's Resp. at 9. Rather, the issue before the court is whether Commerce's identification of the error as ministerial comported with the uncontroverted statutory and regulatory definition and that finding is not subject to *Chevron* deference.

its deliberate treatment of certain expenses in its calculations pursuant to the agency's authority to correct ministerial errors).

The court notes that other avenues were available to the Government if Commerce wished to revisit its selection of AFA in the *Final Results*. As explained in *SKF USA v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), Commerce may, among other things, request a remand, without confessing error, in order to reconsider its position on an issue. *Id.* Such a remand would be appropriate if the agency's concern is "substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id*. As in the case of a request for remand to consider a ministerial error allegation, *SKF* -type requests for remand are often granted in order to conserve judicial and other resources so that the Government is defending, and the plaintiff is challenging, the agency's discretion as purposefully exercised by the agency.

Whether the remand request is based on the consideration of a ministerial error or is based on an agency desire to reconsider its position is not merely an exercise in semantics. In the case of a remand to reconsider its position, Commerce may adopt a new line of reasoning not previously adopted (or perhaps even previously rejected), provided that the choice accords with law and is based on substantial evidence on the record. *Cf. SKF*, 254 F.3d at 1029 ("[Commerce] may request a remand because it believes that its original decision is incorrect on the merits and wishes to change the result."). In the case of a remand to consider a ministerial error allegation and subsequent identification of a ministerial error, however, the agency's substantive reasoning as provided in the original determination should continue to support the amended determination. When distinct reasoning is necessary to support the amended determination, it is less likely that the error was ministerial in nature. *Cf. QVD Food Co.*, 34 CIT at 1178–79, 721 F. Supp. 2d at 1322.

This conundrum is precisely where Commerce placed itself with its *Amended Final Results*. Commerce claimed to have inadvertently used one value instead of another in its *Final Results*, *see* Ministerial Error Mem. at 7; however, the reasoning supplied in those *Final Results* addressed why the initially rejected value is an inappropriate choice as AFA. Even if the court were inclined to disregard the "ministerial error" label used to justify the amended choice of AFA, the court could not affirm the agency's selection of the transaction specific brokerage expense because the only substantive reasoning before the court is in the original *Final Results*, explaining why the transaction specific value is an inappropriate choice for AFA.

Therefore, the court must remand the *Amended Final Results* for reconsideration by Commerce in accordance with this opinion. Because the court is remanding the *Amended Final Results*, the court need not consider Petitioners' other reasons for objecting to Commerce's choice of AFA in the *Amended Final Results*.

II. Navigator's Challenges to the *Final Results*

A. Legal Framework

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *Id*. Pursuant to § 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide that respondent "an opportunity to remedy or explain the deficiency." *Id*.

If Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "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). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

B. Commerce's Determination

Commerce's initial questionnaire to Navigator explained that the agency would "accept allocated price adjustments and expenses only if [Navigator] [could] demonstrate that the allocation is calculated on as specific a basis as is feasible (*e.g.*, on a customer-specific basis, product-specific basis, and/or monthly-specific basis, etc.) and is not unreasonably distortive." Req. for Information (The Navigator Company S.A.) (May 9, 2017) at G-9, PR 3, PJA Tab 3. Commerce requested that, in doing so, Navigator "provide a complete explanation of: (1) how the price adjustments or expenses are recorded in [Navigator's] records; (2) why [Navigator] cannot report the price adjust-

ment or expense on a more specific basis using [its] records; and (3) why [Navigator's] allocation methodology does not cause inaccuracies or distortions." *Id.*[9] Commerce further directed Navigator to provide "the allocation formula and supporting worksheets." *Id.*

As previously noted, in its section C questionnaire response, Navigator reported certain per-unit brokerage and handling expenses incurred in the United States on an allocated basis. Navigator CQR at 33–34. In a supplemental questionnaire, Commerce asked Navigator to explain these reported expenses, particularly with regard to the number of transactions for which the allocated expense was negative.[10] Navigator's Suppl. Sec. C Questionnaire Resp. (Sept. 20, 2017) ("Navigator Suppl. CQR"), at 52, CR 142, 146, 171–177, CJA Tab 4. Navigator explained that the "negative expenses are the result of the allocation methodology" owing to the fact that there were "situations during the POR in which adjustments were made from previous months, effectively lowering the cost." *Id*. Navigator further reported that "all costs accounted for during the POR pertaining to subject merchandise [had] been captured and reported." *Id.* at 52–53. Navigator provided a sample calculation and screenshot "indicating the source of the negative expense." *Id*. at 53.

Commerce further inquired whether the negative expenses represent revenues or credits and, if so, for Navigator to explain why they were not separately reported. *Id*. Commerce also asked Navigator to confirm that the revenues or credits were associated with POR sales of subject merchandise and to explain why it is appropriate to include them in Navigator's allocated brokerage expense. *Id*. Navigator responded that "[t]he negative expenses . . . are not revenues or credits but rather the result of expense adjustments from previous months." *Id*.

In its administrative case brief, Petitioners raised concerns regarding Navigator's allocated U.S. brokerage expenses and urged Commerce to reject the information and select the highest allocated expense as AFA. Pet'rs' Case Br. and Hr'g Req. (May 7, 2018) at 3–9, CR 307, CJA Tab 6. In the Final Results, Commerce agreed with Petitioners and determined to use AFA because of Navigator's failure "to demonstrate that its allocation methodology for its U.S. brokerage and handling expenses is not distortive." Navigator Final Analysis

[9] Pursuant to Commerce's regulations, "[a]ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the [agency's] satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2).

[10] Certain terms were bracketed and protected as business proprietary information during the administrative proceeding but released publicly in Navigator's moving brief. Such terms are included here without brackets as appropriate.

Mem. at 5; *see also* I&D Mem. at 7–8.

Commerce found that the expenses for some of the sales "are associated with sales outside of the POR." I&D Mem. at 7; *see also* Ministerial Error Mem. at 5.[11] Thus, because Navigator included adjustments made during the POR related to non-POR sales, Commerce found Navigator's allocation to be distortive meriting an adverse inference when selecting from among the facts available to use as Navigator's allocated brokerage expenses. *Id.*

C. Parties' Contentions

Navigator raises three challenges to Commerce's application of AFA to its allocated brokerage expenses. First, Navigator contends that there was no gap in the administrative record which Commerce could fill with AFA pursuant to 19 U.S.C. § 1677e(a). Navigator's Mem. at 14–18. Because Navigator's total brokerage expenses reported in USBROK2U tie to its accounting system, which in turn ties to its audited financial statements, Navigator argues that its data was verifiable *Id.* at 14–15.

Second, Navigator contends that Commerce failed to provide adequate notification of any deficiencies in its questionnaire responses pursuant to 19 U.S.C. § 1677m(d). *Id.* at 18–21. Navigator argues that Commerce asked for further explanation of certain brokerage expenses only if those values represented revenues or credits, to which Navigator responded that they did not. *Id.* at 18.

Third, Navigator contends that Commerce's decision to apply an adverse inference was improper because Navigator cooperated to the best of its ability and fully answered the questions Commerce asked. *Id.* at 21–23; The Navigator Company's Reply to Def.'s and Def.-Ints.' Opp'n to The Navigator Company's Mot. for J. Upon the Agency R. ("Navigator's Reply"), at 4–5, ECF No. 70. Navigator contends that, at most, Commerce should have used facts otherwise available without an adverse inference. Navigator's Mem. at 22.

The Government asserts that Navigator failed to demonstrate that its allocation methodology did not cause inaccuracies or distortions pursuant to 19 C.F.R. § 351.401(g)(1), and, therefore, a gap existed in the record to be filled with facts otherwise available. Gov't's Resp. at 7–14. The Government further contends that, pursuant to 19 U.S.C. § 1677m(d), Commerce provided an opportunity for Navigator to demonstrate the accuracy of its methodology through a supplemental questionnaire, and Navigator again failed to address Commerce's

[11] In the Ministerial Error Memorandum, Commerce explained that "Navigator reported [[ ]] transactions with negative U.S. brokerage and handling expenses in the first month of the POR," which "necessarily must be associated with sales that occurred outside the POR." Ministerial Error Mem. at 4–5.

concerns. *Id.* at 11–12. Because Navigator failed to address this deficiency, the Government argues that Navigator failed to cooperate to the best of its ability pursuant to 19 U.S.C. § 1677e(b). *Id.* at 14.

Petitioners support the Government's arguments in favor of using AFA for Navigator's allocated brokerage expenses. Confidential Resp. Br. of Packaging Corp. of America, USW, and Domtar Corp. ("Pet'rs' Resp.") at 1, ECF No. 59. However, Petitioners also contend that Navigator does not allocate brokerage expenses on a month-to-month basis, and has not demonstrated that these expenses are tied verifiably to its accounting system. *Id.* at 3–5.

D. Commerce Correctly Resorted to Facts Available, However, Its Use of an Adverse Inference Was Unjustified

1. Navigator's Reporting Methodology

Substantial evidence supports Commerce's determination to resort to facts available to fill a gap in the record. Navigator's argument confuses the issue of cooperation, discussed below, with the standard for using allocated data, which is provided in 19 C.F.R. § 351.401(g)(2). That regulation requires that Navigator demonstrate to Commerce's satisfaction that its allocation methodology does not cause inaccuracies or distortions. 19 C.F.R. § 351.401(g)(2). Here, Commerce reasonably found, based on Navigator's submissions, that Navigator's methodology included adjustments related to non-POR sales and, therefore, caused inaccuracies or distortions. *See* I&D Mem. at 8.

In fact, Navigator now appears to concede that its allocation methodology could cause some distortions in its allocated reporting both at the beginning and end of the period of review:

> Indeed, while Commerce's Issues and Decision Memorandum isolates allocated brokerage expenses for the first month of the POR and asserts they are [[ ]], *allocated brokerage expenses for the final month of the POR could have been* [[ ]]*, given that* [[ ]] *could be accounted for after the POR had closed*.

Navigator's Mem. at 22 (emphasis added). This explanation confirms Commerce's conclusion that adjustments for non-POR sales are being included in and impacting Navigator's calculation of U.S. brokerage expenses. *See* I&D Mem. at 8. Navigator clearly indicates that the allocated brokerage expenses in the first month [[ ]] the actual expense because of adjustments relating to pre-POR expenses and in the last month of the POR, the allocation may [[ ]] the

actual expense because of adjustments made after the POR. These facts are consistent with the administrative record and Commerce's factual findings based on that record: Navigator's allocation methodology both includes some adjustments associated with non-POR expenses and excludes some adjustments made after the POR.[12] Navigator Suppl. CQR at 52–53. Thus, substantial evidence supports Commerce's decision to resort to facts available to determine Navigator's allocated brokerage expenses.

2. Relevance of U.S.C. § 1677m(d)

Navigator argues that Commerce's use of the phrase revenues or credits in question 40(e) of the supplemental section C questionnaire "was a clear directive to provide further explanation *only if* the answer to Commerce's [initial] question was that the negative expenses *were* revenues or credits," and, thus, Commerce failed to provide Navigator with the opportunity to explain or remedy any deficiency regarding the possibility that its negative expenses were related to non-POR sales. Navigator's Mem. at 20. According to Navigator, had Commerce instead referred to the negative expenses as "apparently anomalous expenses" as it did later in the Issues and Decision Memorandum, Navigator would have been required to provide additional explanation. *Id.* (citing I&D Mem. at 7).

As the respondent, Navigator had the burden to provide "all of the requested information and create an adequate record." *ABB Inc. v. United States*, 42 CIT ___, ___, 355 F. Supp. 3d 1206, 1222 (2018), *recons. den.*, 43 CIT ___, ___, 375 F. Supp. 3d 1348 (2019) (collecting cases). Moreover, as just discussed, the regulations expressly require Navigator, when reporting an expense on an allocated basis, to demonstrate that the allocation does not cause inaccuracies or distortions. 19 C.F.R. § 351.401(g)(2). Navigator failed to do so.

Commerce asked Navigator multiple follow-up questions. Those questions addressed Navigator's reporting of allocated brokerage expenses, sought a detailed narrative description of how the expense was calculated, and requested an explanation why numerous observations included negative expenses and an identification of the types of services represented by the negative expenses. These questions were in addition to the one question in which Commerce asked about the possibility of those expenses representing revenues or credits. *See* Navigator Suppl. CQR at 52–53. Read in context, it is clear that

[12] Navigator argues that there is no evidence that its allocation methodology causes inaccuracies or distortions. *See* Navigator's Reply at 10. However, 19 C.F.R. § 351.401(g)(2) places the burden on respondents to demonstrate that their methodologies *do not cause* distortions or inaccuracies, not the other way around.

Commerce was providing Navigator with an opportunity to explain further the basis for reporting this allocated expense, particularly with respect to the many observations involving negative expenses. In any case, Commerce's conclusion that Navigator's allocation of brokerage expenses was distortive was based on Navigator's data, as reported, including the indications that the allocations were related to pre-POR sales and excluded post-POR adjustments. In light of both the regulatory burden on Navigator to establish that its allocations are non-distortive and Commerce's supplemental questionnaire addressing Navigator's reporting of this expense, Commerce has met its statutory burden to provide Navigator with an opportunity to remedy its explanation of this allocated expense. *See* 19 U.S.C. § 1677m(d).

3. Commerce's Use of an Adverse Inference

If Commerce determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "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). Whether a party has complied to the "best of its ability" depends on whether "a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382.

Commerce made an adverse inference in this case because it determined that Navigator "failed to provide the necessary information demonstrating that its allocation methodology for U.S. brokerage and handling expenses does not cause inaccuracies or distortions." I&D Mem. at 8. While Commerce took issue with Navigator's responses to the supplemental questionnaire, *id*. at 7–8, it did not identify any lack of cooperation by Navigator. Rather, the agency applied AFA because Navigator's submissions failed to demonstrate that its allocation methodology was not distortive. *Id.* at 8; *see also* Navigator Final Analysis Mem. at 5. In other words, Commerce's stated basis for making an adverse inference was the very same basis that justified Commerce's use of the facts available—that Navigator failed to establish that its allocation was nondistortive.[13] Such a failure to demonstrate non-distortion by an otherwise active participant in the proceeding, by itself, does not support the use of an adverse inference.

[13] Commerce's conflation of the requirements for facts available and adverse facts available is reflected in the Government's response brief, in which it argues that Navigator failed to cooperate to the best of its ability "[b]ecause *necessary information was not on the record*, in the form of actual U.S. brokerage and handling expenses for the entries reported as allocated, and because Navigator *failed to provide the requested information*." Gov't's Resp. at 9 (emphasis added).

See Nippon Steel, 337 F.3d at 1381–82 (finding that section 19 U.S.C. § 1677e does not focus on a party's failure to provide requested information but a party's failure to cooperate to the best of its ability); *Nat'l Nail Corp. v. United States*, 45 CIT ___, ___, 390 F. Supp. 3d 1356, 1373 (2019) ("An adverse inference, on the other hand, may only be drawn where the reason underlying the absence of necessary information was the respondent's failure to cooperate to the best of its ability, that is, where the respondent failed to do the maximum it [was] able to do.") (alteration in original) (citation and internal quotation marks omitted).

Here, Commerce was able to analyze Navigator's questionnaire responses and determined that the allocated expenses, as reported, were, in fact, distortive. I&D Mem. at 8; Navigator Final Analysis Mem. at 5. Navigator's responses were not incomplete, and Navigator did not withhold information. While Commerce's findings permitted it to disregard the allocated data and turn to the facts otherwise available, *see* 19 C.F.R. § 351.401(g)(2), more is required for the agency to use *adverse* facts available. Therefore, Commerce's use of an adverse inference is not supported by substantial evidence. On remand, Commerce must either select a neutral value to use as facts available or provide an explanation addressing how Navigator failed to act to the best of its ability that is distinct from Commerce's basis for using facts available.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results* and *Amended Final Results* are remanded to Commerce; and it is further

ORDERED that, on remand, Commerce shall reconsider both its selection of the value used as Navigator's allocated brokerage expense and its decision to use an adverse inference in making that selection, consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand results on or before February 20, 2020; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: November 22, 2019
New York, New York

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

Slip Op. 19–151

SHANDONG RONGXIN IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 17–00145

[Commerce's Final Results of Redetermination Pursuant to Court Remand are sustained.]

Dated: December 2, 2019

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington DC, argued for plaintiff. With him on the brief were *Alexandra H. Salzman*, *Judith L. Holzman* and *J. Kevin Horgan*.

Ashley Akers, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Katzmann, Judge:

The court turns once again to the case of cased pencils. At issue is whether an exporter in a non-market economy ("NME")[1] has adequately established the independence from governmental control necessary to qualify for a separate antidumping duty rate apart from the countrywide antidumping duty rate. Before the court is the United States Department of Commerce's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce May 8, 2019) ("*Remand Results*"), ECF No. 48–1, which the court ordered in *Shandong Rongxin Import & Export Co. v. United States*, 43 CIT __ (2019), 355 F. Supp. 3d 1365 ("*Rongxin*"). Shandong Rongxin Import & Export Co. ("Rongxin"), an exporter of pencils from the People's Republic of China ("China"), challenges Commerce's redetermination finding that Rongxin was not free of de facto government control and therefore is not entitled to a separate rate. Pl.'s Comments on Def.'s Results of Redetermination Pursuant to Court Remand ("Pl.'s Br."), June 7, 2019, ECF No. 51. Rongxin contends that the *Remand Results* do not accord with the court's remand order and that Commerce's conclusions are not supported by substantial evidence on the record. Pl.'s Br. The United States ("the Govern-

[1] An NME country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

ment") requests that the court sustain the *Remand Results*. Def.'s Resp. to Comments on Remand Results ("Def.'s Br."), June 24, 2019, ECF No. 52. The court sustains the *Remand Results* in its entirety.

BACKGROUND

The court set forth the relevant legal and factual background of the proceedings involving Rongxin in greater detail in *Rongxin*, 355 F. Supp. 3d at 1369–72. Information pertinent to the instant case is set forth below.

In antidumping duty proceedings involving merchandise from an NME country, Commerce presumes that all respondents to the proceeding are government-controlled and therefore subject to a single country-wide antidumping duty rate. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017). This presumption is strengthened where there is direct or indirect government majority ownership because "in the context of majority government ownership, potential control is, for all intents and purposes, actual control because the majority shareholder can typically control the operations of a company without actually removing directors or management since it is clear that directors or management *could be* removed." *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1308, 1317 (2018) (internal quotations omitted) (emphasis original) ("*Zhejiang*"). Nevertheless, respondents may rebut the presumption of government control, and thus become eligible for a separate rate, by establishing the absence of both de jure and de facto government control. *Diamond Sawblades*, 866 F.3d at 1310–11. Relevant to Commerce's determination here, an exporter can demonstrate the absence of de facto government control by providing evidence that the exporter: (1) sets its prices independently of the government and of other exporters; (2) negotiates its own contracts; (3) selects its management autonomously; and (4) keeps the proceeds of its sales. *Zhejiang*, 350 F. Supp. at 1314. If a respondent fails to establish its independence for even one of these prongs, Commerce continues to presume government control and applies the country-wide rate to that respondent. *Id.* at 1321.

On May 30, 2017, Commerce published the results of its administrative review of *Certain Cased Pencils from the People's Republic of China* for the period of review December 1, 2014 to November 30, 2015 ("POR") in which Commerce determined Rongxin had not demonstrated an absence of de facto government control and was thus ineligible for a separate antidumping duty rate. *Certain Cased Pencils from China: Final Results*, 82 Fed. Reg. 24,675 (Dep't Commerce

May 30, 2017) ("*Final Results*"), and accompanying Issues and Decision Memorandum ("IDM").

During the POR, Rongxin was a corporation owned by eleven shareholders and led by a six-member board of directors ("Board"), nominated by the largest shareholders. Rongxin's Case Br. [to Commerce] at 16–17, P.R. 82. Rongxin was majority owned by Shandong International Trade Group ("SITG"). Decision Memorandum for the Preliminary Results of the 2014–2015 Antidumping Duty Administrative Review ("Decision Memo") at 6, P.R. 27. SITG is wholly-owned by the State-Owned Assets Supervision and Administration Commission, a Chinese government entity. *Id.* Furthermore, two months into the POR, Rongxin implemented new Articles of Association ("New Articles") to change its shareholder voting structure to allow for "one shareholder, one vote" and maintained that "each of the six largest shareholders can nominate only one candidate for election to the board of directors." Rongxin's Case Br. [to Commerce] at 16–17, P.R. 82. In the final month of the POR, Rongxin became privately owned. Decision Memo at 6, P.R. 27. In the *Final Results*, Commerce concluded that the record indicated that the New Articles were not in operation during the POR and thus analyzed whether Rongxin was de facto government controlled by assuming the old Articles of Association ("Old Articles") still governed. *Final Results* and IDM at 15–16, P.R. 5. Commerce determined that Rongxin was "indirectly majority owned by a Chinese government entity, and that the company did not operate autonomously from the government in the selection of management," and therefore failed to rebut the presumption of de facto government control. *Id.* at 16.

Rongxin appealed the *Final Results* to the court, arguing that Commerce's disregard of the New Articles and resulting determination that Rongxin was de facto government controlled were not supported by substantial evidence on the record and contrary to law. Pl.'s Compl., June 13, 2017, ECF No. 3. In *Rongxin*, the court sustained the *Final Results* in part, but, after holding that "Commerce's decision to replace the New Articles with the Old Articles . . . was unsupported by substantial evidence and contrary to law," remanded to Commerce for reconsideration of the issue "whether Rongxin has established de facto independence from the Chinese government such that it is entitled to a separate rate." 355 F. Supp. 3d at 1377. The court held Commerce's decision not to analyze the New Articles because of an absence of an explanation of their operation was arbitrary and granted Commerce the discretion to reopen the administrative record if needed. *Id.*

On April 19, 2019, Commerce issued its Draft Remand Redetermination. A.R. 1, May 21, 2019, ECF No. 49–3. Rongxin submitted timely comments in response to Commerce's Draft Remand Redetermination. *Id.* Commerce issued its *Remand Results* on May 8, 2019. *Id.* Commerce again found that "Rongxin has not demonstrated an absence of de facto governmental control, and, therefore, is not entitled to a separate rate." *Remand Results* at 1. In the redetermination, Commerce examined evidence of de facto government control in Rongxin's selection of management. *Remand Results* at 7–9. Commerce's analysis centered on evidence on the record that SITG, wholly owned by a state-owned enterprise, was the majority shareholder of Rongxin. Commerce ultimately concluded that Rongxin failed to rebut the presumption of de facto government control because SITG was its majority shareholder and record evidence indicated that SITG retained actual or potential influence over the Board, which in turn selects management. *Remand Results* at 9–10. Thus, Commerce concluded that Rongxin did not rebut the presumption of de facto government control and was not entitled to a separate rate. *Remand Results* at 18. Furthermore, despite becoming privately owned in the last month of the POR, Rongxin did not have any sales during that month, and, therefore, Commerce could not calculate an individual cash deposit rate, as Commerce explained in its response to Rongxin's comments. *Remand Results* at 25.

Rongxin submitted its comments on the *Remand Results* to the court on June 7, 2019, including an attachment of its comments to Commerce's Draft Remand Redetermination. Pl.'s Br. Rongxin argues that Commerce did not address the court's concern on remand and that the *Remand Results* again are not supported by substantial evidence on the record. Pl.'s Br. at 1. Rongxin contends that Commerce's decision, instead of accepting the implementation of the New Articles as dispositive of independence from de facto government control, relies on conclusions and inferences that are not supported by substantial evidence on the record in its analysis of the New Articles. Pl.'s Br. at 3–4. Finally, Rongxin argues that the cash deposit rate for future entries should not be determined based on any adverse finding in the administrative review regarding government control because Rongxin was privately owned during the last month of the POR. Pl.'s Br. at 6.

The Government filed its reply to these comments on June 24, 2019 arguing that the *Remand Results* are consistent with the court's order in *Rongxin*. Def.'s Br. The court held oral argument on November 7, 2019. Oral Argument, Nov. 7, 2019, ECF No. 56.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1561a(a)(2)(B)(m). The court reviews the *Remand Results* "for compliance with the court's remand order." *Beijing Tianhi Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted). The court sustains Commerce's antidumping determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. *See Rongxin*, 355 F. Supp 3d 1365. Commerce's determination of de facto government control of Rongxin stems from the failure of Rongxin to show independence in the selection of management, a dispositive prong in rebutting the presumption of de facto government control. Rongxin argues that, contrary to the court's order, Commerce unjustifiably continued to disregard the New Articles. However, Commerce did in fact analyze the New Articles in the *Remand Results* and found that Rongxin failed to rebut the presumption of majority government control because of SITG's majority control and the continuity of the Board. The court therefore sustains the *Remand Results* as supported by substantial evidence on the record and in accordance with law.

I. Commerce's Determination that Rongxin Failed to Rebut the Presumption of De Facto Government Control Is Supported by Substantial Evidence.

Commerce makes administrative review determinations based on the totality of the circumstances, as supported by the substantial evidence on the record. Previous cases from the court indicate that the presumption of de facto government control is quite strong for respondents with a government majority shareholder. *E.g.*, *Zhejiang*, 350 F. Supp. 3d at 1316–17 (holding an absence of evidence of control was insufficient to rebut the presumption; majority government ownership, through the mere threat of control of the board, could signify de facto control of the selection of management (internal citations omitted)). In keeping with that principle, Commerce here stated, consistent with several other recent determinations and the *Advanced Technology* line of cases,[2] "that respondents that are wholly or

[2] The *Advanced Technology* line of cases refers to litigation in response to Commerce's *Diamond Sawblades* proceeding. *See Diamond Sawblades and Parts Thereof from the*

majority owned by, and thus under the control of, companies with majority government ownership, are subject to de facto government control [because] 'controlling shareholders present a significant potential for manipulation,' especially with regard to the selection of management and the disposition of profits." *Remand Results* at 9–10 (quoting *Advanced Tech.*, 35 CIT at 1388).

Consequently, Commerce determined that the totality of the circumstances indicated that Rongxin was not free of de facto government control in the selection of management. First, Commerce analyzed SITG's majority ownership in light of the New Articles. Commerce found the "one shareholder, one vote" principle in the New Articles to be inconsistent with traditional majority ownership rights and the Chinese Company Law China which typically entitles majority shareholders the right to exercise control over the selection of management through Board elections. *Remand Results* at 9–10. Commerce made a reasonable inference based on the evidence on the record and typical shareholder expectations that SITG, as a majority shareholder, must have retained some control or benefit in exchange for its majority ownership in Rongxin. *Remand Results* at 10–11. The court agrees with the Government's characterization that this evidence is a red flag which contributed to the totality of the circumstances.

Commerce also noted the continuity in the composition of the Board, which was elected while SITG had majority voting power. *Remand Results* at 13–14. Because the New Articles require a majority vote to effectuate a Board action and the majority composition of the SITG elected Board did not change throughout the POR nor was there evidence on the record of a Board vote, it was reasonable for Commerce to conclude that there was no indication from the evidence that SITG had given up its majority control over the Board. *See also Remand Results* at 14–15. Plaintiff argues that Commerce acknowledges that two Board members did change after the implementation of the New Articles, which is therefore evidence that the Board did change with the implementation of the New Articles. Pl.'s Br. 2–3. However, as Commerce found, because SITG had the majority voting share when four of the Board's six directors were elected, the court agrees that a majority of the Board members potentially remained

People's Republic of China, 71 Fed. Reg. 29, 303 (Dep't Commerce May 22, 2006), as amended, 71 Fed. Reg. 35,864 (Dep't Commerce June 22, 2006). There, the domestic industry challenged Commerce's grant of a separate rate to Advanced Technology & Materials Co. Ltd., Beijing Gang Yan Diamond Products Company, and Gang Yan Diamond Products, Inc. Commerce clarified its analysis of de facto control for majority owned government entities after a series of remand orders from this court. *See Advanced Tech. & Materials Co.* 35 CIT 1380 (2011); *Advanced Tech. & Materials Co. v. United States*, 26 CIT 1576, 885 F. Supp. 2d 1343 (2012); *Advanced Tech. & Materials Co. v. United States*, 37 CIT __, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x. 900, 901 (Fed. Cir. 2014).

under SITG influence even after SITG lost its majority voting power. The court is persuaded by the Government's contention that "Commerce did not make a determination regarding the two remaining seats because there is no evidence on the record indicating who occupied those seats." Def.'s Br. at 3. Therefore, affirmative evidence on the record did not conclusively show that SITG did not retain a controlling influence over the Board after the New Articles went into effect.[3]

Lastly, the questionable timing of the implementation of the New Articles also contributed to Commerce's determination. The New Articles were implemented just two months after the results of the previous POR administrative review results were published. *Remand Results* at 15. While not dispositive to the analysis, given SITG's majority ownership, the court agrees with Commerce's determination that the timing contributes to the totality of circumstances of de facto government control. *Remand Results* at 15. Because Rongxin provided no affirmative evidence rebutting the presumption of control and the totality of the circumstances indicated that SITG retained potential control over the Board and the selection of management, Commerce's conclusion that Rongxin was de facto controlled by SITG was supported by substantial evidence on the record.

II. Commerce's Determination That No Cash Deposit Rate Could Be Calculated For One Month of Private Ownership In Which Rongxin Made No Sales Into the United States Was In Accordance With Law.

Finally, the parties disagree as to Rongxin's required cash deposit rate. The applicable statute, 19 U.S.C. § 1673d(c)(1)(A)(ii), directs that Commerce "shall order the posting of a cash deposit . . . for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable." Rongxin contends that it is entitled to a separate rate going forward because it became a privately-owned

[3] Rongxin points to evidence that the Board rejected an SITG proposal in an attempt to rebut this conclusion. Pl.'s Br. at 5. Commerce argued that "[t]his information does not establish that the board of directors . . . operated independently of government control in the selection of its managers." *Remand Results* at 23. The Government contends that there was a lack of evidence on the record about the nature of the rejected proposal and whether the rejection was the result of a vote or a withdrawal of the Proposal. Oral Argument. Unlike other minutes on the record which clearly indicate that a Board vote was held, this piece of evidence did not include any indication that a formal vote was held. Oral Argument. Because inconsistent conclusions could be drawn, Commerce reasonably concluded that Rongxin did not rebut the presumption that SITG retained potential de facto control of Rongxin's Board. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 2016) (explaining that substantial evidence includes "contradictory evidence or evidence from which conflicting inferences could be drawn") (internal citations omitted).

company in the final month of the POR. Pl.'s Br. at 6. However, because Rongxin made no sales during that month, Commerce states that it is unable to calculate a separate rate based on the statutory language, "estimated weighted average dumping margin." *Remand Results* at 25. The court agrees. The plain language of the statute indicates that a cash deposit rate should not be calculated based on one month of private ownership in which no sales were made. Therefore, Commerce's decision was in accordance with law.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are consistent with the previous opinion and supported by substantial evidence. They are therefore sustained in their entirety.

SO ORDERED.

Dated: December 2, 2019
New York, New York

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

Slip Op. 19–152

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

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

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

Dated: December 3, 2019

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

Adams Chi-Peng Lee, Harris Bricken McVay Sliwoski, LLP, of Seattle, Washington, for Ningbo Qixin Solar Electrical Appliance Co., Ltd.

Jonathan M. Freed, *Robert George Gosselink*, and *Jarrod Mark Goldfeder*, Trade Pacific, PLLC, of Washington, DC, for Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; and Trina Solar (U.S.) Inc.

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

Neil R. Ellis, *Richard L.A. Weiner*, *Rajib Pal*, *Shawn M. Higgins*, and *Justin R. Becker*, Sidley Austin, LLP, of Washington, DC, for Yingli Green Energy Holding, Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Shenzhen Yingli New Energy Resources Co., Ltd.; Yingli Green Energy International Trading Co., Ltd.; Yingli Green Energy Americas, Inc.; and Yingli Energy (China) Co., Ltd.

Joshua Ethan Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. With him on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Canadian Solar Int'l Ltd. v. United States*,

43 CIT __, __, 378 F. Supp. 3d 1292, 1325 (2019) ("*Canadian Solar I*"). *See also* Results of Remand Redetermination Pursuant to Ct. Remand Order Confidential Version, July 15, 2019, ECF No. 110 ("*Remand Results*"). In *Canadian Solar I*, the court sustained in part and remanded in part Commerce's determination in the third administrative review of the antidumping duty ("ADD") order on crystalline silicon photovoltaic products, whether or not assembled into modules, from the People's Republic of China ("the PRC"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 82 Fed. Reg. 29,033 (Dep't Commerce June 27, 2017) (final results of [ADD] administrative review and final determination of no shipments; 2014–2015) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Results of the 2014–2015 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From [the PRC], A-570–979, (June 20, 2017), ECF No. 44–5 ("Final Decision Memo"). Specifically, the court ordered Commerce to further explain or reconsider its surrogate value selection for valuing respondents' module glass inputs. *Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1325. The court also ordered Commerce to reconsider its application of an adverse inference in calculating Canadian Solar's[1] dumping rate. *Id.* Finally, the court ordered Commerce to reconsider its decision to reject Ningbo Qixin Solar Electrical Appliance Co., Ltd.'s ("Qixin") separate rate application. *Id.*

On remand, Commerce valued respondents' module glass inputs using the Bulgarian Harmonized Tariff Schedule ("HTS") subheading as opposed to the Thailand HTS subheading. *Remand Results* at 2, 11–13. Commerce further explained its "use of an adverse inference in selecting from the facts available to value factor of production [ ] information that was not provided by certain unaffiliated suppliers." *Id.* at 2; *see also id.* at 15–23. Finally, Commerce reopened the record and issued Qixin a supplemental questionnaire. *Id.* at 2, 29–33; *see also* Letter USDOC to Sandler, Travis Pertaining to Ningbo Qixin Questionnaire, RPD 3, bar code 3829214–01 (May 2, 2019). Commerce found Qixin ineligible due to Qixin's failure to "demonstrate that it made a shipment of [the] subject merchandise during the [period of review ("POR").]" *Remand Results* at 2, 29–33.

For the reasons that follow, the court sustains Commerce's selection of surrogate values for module glass. The court also sustains Commerce's rejection of Qixin's separate rate application. The court re-

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

mands Commerce's application of an adverse inference in calculating Canadian Solar's dumping rate for further explanation or reconsideration.

BACKGROUND

This court presumes familiarity with the facts of this case, as set out in the previous opinion ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Remand Results*. *See Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, 378 F. Supp. 3d 1292. On June 27, 2017, Commerce published its final determination pursuant to its third administrative review of the ADD order of crystalline silicone photovoltaic products, whether or not assembled into modules, from the PRC. *See generally Final Results*. Commerce, inter alia, "selected Thailand as the primary surrogate country for valuing the mandatory respondents' factors of production[.]" *Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1298–1300; *see generally* Final Decision Memo. Commerce applied partial adverse facts available ("AFA")[2] in calculating Canadian Solar's antidumping margin because a number of unaffiliated suppliers of Canadian Solar's solar cells and solar modules sold in the United States failed to provide sufficient factors of production ("FOP") information, and because Commerce found that Canadian Solar could have, but did not, induce cooperation. *See* Final Decision Memo at 15–18; *Remand Results* at 8. Finally, Commerce rejected Qixin's separate rate application. *Canadian Solar I*, 378 F. Supp. 3d at 1299.

Canadian Solar commenced an action pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).[3] Summons, July 7, 2017, ECF No. 1; Compl., July 7, 2017, ECF No. 8. This action was consolidated with actions brought by Qixin, Shanghai BYD Co., Ltd., Changzhou Trina Solar Energy Co., Ltd. et al. ("Trina"),[4] SolarWorld Americas, Inc.

[2] Although section 776 of the Tariff Act of 1930, as amended 19 U.S.C. § 1677e(a)–(b) (2012) and 19 C.F.R. § 351.308(a)–(c) (2014) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, parties sometimes use the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference.

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

[4] The following parties are plaintiffs in the action Changzhou Trina Solar Energy Co., Ltd. et al. v. United States, Ct. No. 17–00197, which has been consolidated with the present action: Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; and Trina Solar (U.S.) Inc.

("SolarWorld"),[5] and Sunpreme Inc. *See* Order, Sept. 26, 2017, ECF No. 41.[6] Plaintiffs, Consolidated Plaintiffs, and Plaintiff-Intervenors brought several motions for judgment on the agency record before this court pursuant to USCIT 56.2, challenging various aspects of Commerce's determination.

This court sustained Commerce's surrogate value selections for valuing respondents' aluminum frames, nitrogen, polysilicon ingots and blocks, and financial ratios; Commerce's decision to include reported quantities of zero in the surrogate value calculations; and Commerce's denial of an offset for Trina U.S.'s debt restructuring income. *Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1325. The court held that Commerce's reliance on the tempered glass subheading to value respondents' module glass was supported by substantial evidence, but that Commerce failed to reasonably explain why Thai import data for tempered glass "was not distorted by a small quantity of unusually costly imports from Hong Kong." *See Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1303–07; *see also Remand Results* at 6. Further, this court held that Commerce's decision to apply partial AFA against Canadian Solar was unreasonable and contrary to law. *See Canadian Solar I*, 43 CIT at __, 378 F. Supp. 3d at 1320–22. This court remanded to Commerce to reconsider its denial of Qixin's separate rate application. See id. at 1325.

On remand, Commerce first, under respectful protest,[7] valued respondents' module glass using Bulgarian import data.[8] *See Remand Results* at 11. Commerce based this decision on the fact that Bulgarian data satisfied the breadth of its surrogate value criteria, as well as the holding in *SolarWorld Americas, Inc. v. United States*, 42 CIT __, 320 F. Supp. 3d 1341 (2018) that use of this import data was reasonable. *See Remand Results* 12–15. These changes in Commerce's methodology on remand resulted in a revised rate for Trina and the sepa-

[5] SolarWorld is a Defendant-Intervenor in the present action, as well as each of the consolidated actions other than SolarWorld Americas, Inc. v. United States (Ct. No. 17–00200), in which it is the plaintiff.

[6] The court's September 26, 2017 order consolidated the following cases under the present action: Ningbo Qixin Solar Electrical Appliance Co., Ltd. v. United States, Ct. No. 17–00187; Shanghai BYD Co., Ltd. v. United States, Ct. No. 17–00193; Changzhou Trina Solar Energy Co., Ltd. et al. v. United States, Ct. No. 17–00197; SolarWorld Americas, Inc. v. United States, Ct. No. 17–00200; and Sunpreme Inc. v. United States, Ct. No. 17–00201. Order, Sept. 26, 2017, ECF No. 41. Sunpreme Inc.'s action was severed from the present consolidated case on March 8, 2018. *See* Order, Mar. 8, 2018, ECF No. 61 (severing Ct. No. 17–00201 from Consol. Ct. No. 17–00173).

[7] Commerce maintains "that the parties failed to place on the record sufficient evidence demonstrating that the Thai import data are aberrational[.]" *Remand Results* at 12. Commerce disagrees with this court's conclusion in *Canadian Solar I*, but nonetheless complies with its order. *Remand Results* at 2 n.5.

[8] In agreement with Trina's comments, Commerce valued both Trina's coated glass, and its tempered glass, using Bulgarian import data. *Remand Results* at 13–15.

rate rate respondents. *Id.* at 4. Second, Commerce further explained its reasoning in applying partial AFA against Canadian Solar. *See Remand Results* at 15–29. Third, pursuant to this court's order, Commerce also provided Qixin the opportunity to demonstrate that any of its entries during the POR qualified as a sale of subject merchandise. *See Remand Results* at 29–33. Qixin failed to provide any such information. *See Remand Results* at 32. Commerce thus found Qixin ineligible for a separate rate. *Id.* at 33. For reasons that follow, Commerce's decisions to use Bulgarian import data, and to find Qixin is ineligible for a separate rate, are sustained. Commerce's decision to impose partial AFA on Canadian Solar is remanded to Commerce for further reconsideration.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an investigation of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Surrogate Value Selection

Canadian Solar[9] requests that this court remand Commerce's decision to rely on Bulgarian import data to value module glass. Cmts. of Pl. and Consol. Pls. [Canadian Solar] in Opp'n to [Remand Results] Confidential Version at 3, Aug. 14, 2019, ECF No. 117 ("Pl.'s & Consol. Pls.' Cmts.").[10] Canadian Solar submits that it would have been "more accurate" for Commerce "to simply adjust the aggregate Thai import data...by removing Hong Kong import data that have been identified as aberrational." *Remand Results* at 13; *see also* Pl.'s & Consol. Pls.' Cmts. at 3–7 ("...Commerce was presented with a demonstrably more accurate and methodologically appropriate alternative to the Bulgar-

[9] Consol. Pl. Shanghai BYD Co., Ltd. ("Shanghai BYD") filed separate comments incorporating by reference, and supporting, arguments raised by Canadian Solar. *See generally* Cmts. Consol. Pl. [Shanghai BYD] Opp'n [Remand Results], Aug. 14, 2019, ECF No. 119. This court addresses arguments raised by Shanghai BYD and Canadian Solar together.

[10] Defendant-Intervenor SolarWorld also challenges Commerce's decision to value Canadian Solar and Trina's module glass sales according to Bulgarian import data. *See* [SolarWorld's] Cmts. [Remand Results] at 1–2, Aug. 14, 2019, ECF No. 116 ("SolarWorld's Cmts."). SolarWorld Americas rests on arguments set forth in its initial briefs before the court. *See id.* (citing to Resp. Br. of Def.-Int. [SolarWorld] Confidential Version at 22–29, July 31, 2018, ECF No. 72). However, SolarWorld maintains that Commerce should continue to apply AFA against Canadian Solar. SolarWorld's Cmts. at 1.

ian data.") Canadian Solar submits that such an adjustment is consistent with Commerce's established practice. Pl.'s & Consol. Pls.' Cmts. at 3–7. Defendant United States counters that Commerce's determination is reasonable. *See* Def.'s Reply to Cmts. on [Remand Results] Confidential Version at 6–10, Sept. 13, 2019, ECF No. 131 ("Def.'s Reply").

Commerce's decision to rely on Bulgarian import data is supported by substantial evidence. Commerce decided to rely on Bulgarian import data because it "satis[fied] the breadth of Commerce's surrogate value criteria for specificity to the input being valued, tax-and duty-exclusivity, contemporaneity, representativeness of a broad market average, and public availability." *Remand Results* at 14–15. Indeed, Canadian Solar concedes that Bulgarian import data "is a potentially reasonable alternative to the distorted Thai data." *Remand Results* at 13; Pl.'s & Consol. Pls.' Cmts. at 3–4. Canadian Solar essentially argues in favor of what it considers to be another reasonable alternative. *See* Pl.'s & Consol. Pls.' Cmts. at 3–4; *Remand Results* at 13.[11]

Canadian Solar argues that Commerce should use disaggregated Thai data, because Commerce's established practice is to value all surrogate values, to the extent possible, within a single country. *See* Pl.'s & Consol. Pls.' Cmts. at 4 (citing to 19 C.F.R. § 351.408(c)(2) (2014)).[12] Commerce's regulation states that, except for labor, "[Commerce] normally will value all [FOPs] in a single surrogate country." 19 C.F.R. § 351.408 (c)(2). The word "normally," indicates that there are instances where Commerce may deviate from this requirement. Commerce has discretion to decide when to deviate from the normal methodology, so long as Commerce does not exceed the bounds of its statutory mandate. Commerce is deviating from using a source from a primary surrogate country because the Hong Kong import data renders the Thai import data unreliable as a whole and Commerce

[11] Canadian Solar also cites *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 502 F. Supp. 2d 1295, 1308 (2007) ("*Mittal Steel*") as instructing Commerce to defend its surrogate choices when the record suggests other, more accurate, data. Pl.'s & Consol. Pls.' Cmts. at 4. Canadian Solar's reading of that decision is inapposite to the present proceeding. *Mittal Steel* held that Commerce must explain its decision to rely on data when it is confronted with a colorable claim that the data is aberrational. *See Mittal Steel*, 31 CIT at 1135, 502 F. Supp. 2d at 1308. Here, Commerce has exercised its discretion to choose between two reasonable alternatives, and there is no evidence on the record that the Bulgarian import data is aberrational.

[12] 19 U.S.C. § 1677b(c) requires Commerce to value FOP in a nonmarket economy country based on the best available information. *See* 19 U.S.C. § 1677b(c). Commerce promulgated 19 C.F.R. § 351.408 (2014) and prescribed the special methodology for implementing 19 U.S.C. § 1677b(c). *See generally* 19 C.F.R. § 351.408 (2014). Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

has a policy of not disaggregating data. *See Remand Results* at 12–15. Commerce's policy is based on its desire to preserve representativeness. *See Remand Results* at 14. Additionally, Canadian Solar has not offered any evidence that Bulgarian import data is aberrational or otherwise unreliable. Thus, Commerce choice of Bulgarian data is reasonable on this record.

II. Use of an Adverse Inference

On remand, Commerce explained its application of facts otherwise available to Canadian Solar and its incorporation of an adverse inference in calculating Canadian Solar's margin. *See Remand Results* at 15–29. Commerce submits that under 19 U.S.C. § 1677e(a) it may consider an adverse inference against a non-cooperative party when choosing facts available for a cooperative respondent "in certain circumstances." *Remand Results* at 16–17 (discussing *Mueller Comercial de Mexico S. De R.L. de C.V. v. United States*, 753 F.3d 1227 (Fed. Cir. 2014)). Commerce explains its use of adverse gap fillers by relying upon policies of deterring non-cooperation and duty evasion. *Remand Results* at 17–23. For the reasons that follow Commerce's use of adverse inferences in this case is both contrary to law and unsupported by substantial evidence.

Where information necessary to calculate a respondent's dumping margin is not available on the record, Commerce applies "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a). If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available." *Id.* § 1677e(b). However, under certain circumstances, Commerce may incorporate an adverse inference under § 1677e(a) in calculating a cooperative respondent's margin, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. *Mueller*, 753 F.3d at 1232–36. When analyzing the use of an adverse inference as a part of a § 1677e(a) analysis,[13] the predominant concern must be accuracy. *Id.* at 1233.

Mueller requires Commerce to demonstrate that use of adverse facts under § 1677e(a) would lead to an accurate rate and is supported by the policy considerations of avoiding non-cooperation and duty

[13] As Commerce explains in its remand redetermination, here, Commerce did not draw an adverse inference against Canadian Solar. *Remand Results* at 18. Indeed, Commerce asserts it is "acting primarily under subsection (a)." *Remand Results* at 19. Commerce used facts otherwise available because Canadian Solar's unaffiliated suppliers, which Commerce determined to be interested parties, failed to respond to Commerce's requests for information, leaving an information gap in the record. *Remand Results* at 19.

evasion. In *Mueller*, cost data from one supplier was missing from the record. *Mueller*, 753 F.3d at 1230. Commerce had data from another supplier and chose the three least favorable transactions of that other supplier to replace the missing data. *Id.* at 1230–31. The Court of Appeals assessed the accuracy of the margin as a result of Commerce's selection of adverse facts, *id.* at 1232–33, and faulted Commerce for failing to explain why the larger data set would lead to a less accurate margin. *Id.* In *Mueller* there was no showing that the non-cooperative party would have known what data would be used in place of its data, especially since the data at issue was proprietary. *Id.* at 1233. Mueller specifically acknowledges that Commerce's rationale that an interested party would cooperate "if disclosing its actual costs to Commerce" were favorable, did not speak to the accuracy concern of § 1677e(a).

The Court of Appeals also considered Commerce's use of policy rationales to support the use of adverse facts—namely, deterring non-cooperation and thwarting duty evasion. Specifically, in *Mueller*, the Court of Appeals recognized that Mueller had an existing relationship with its supplier such that the potential threat of refusing to do business might induce compliance. *Id.* at 1235. The Court of Appeals did not elaborate on the nature of the relationship needed to support such a potential threat, however it noted that it would potentially be unfair to employ an adverse inference where the cooperating party had no control over the non-cooperating supplier. *Id.* Further, the Court of Appeals considered the risk of duty evasion. In *Mueller* the missing data was that of a producer and mandatory respondent, *id.* at 1229, which would effectively be able to avoid its own higher rate if it were able to sell goods through Mueller. *Id.* at 1235. The Court of Appeals did not decide whether Commerce's reliance on the policies of inducement and avoidance of duty evasion was reasonable, but held that the statute did not preclude Commerce's consideration of those rationales so long as doing so was reasonable, in light of accuracy concerns, and took into account whether Commerce's choice might ultimately discourage cooperation. *Mueller*, 753 F.3d at 1236.

The accuracy analysis required by *Mueller* is missing here. In applying facts otherwise available against Canadian Solar, Commerce considered adverse inferences against Canadian Solar's unaffiliated suppliers who were themselves interested parties. *Remand Results* at 19. Although Commerce addresses accuracy by stating that it only applies the adverse inference for the missing data, *Remand Results* at 23, it has not addressed the accuracy concerns specifically identified by *Mueller*, namely whether the data that Commerce ap-

plies promotes accuracy. *See Mueller*, 753 F.3d at 1232–34. Commerce fails to adequately address the overarching concern of accuracy and therefore its redetermination is contrary to law. *See Remand Results* at 15–29 (focusing its discussion on duty evasion and deterrence but not accuracy). As in *Mueller*, Commerce fails to explain why the alternative—here, using an average of reported usage rates—would not better promote accuracy. *See Mueller*, 753 F.3d at 1232–33. Commerce must explain how its subsection (a) analysis furthers the predominant interest of calculating an accurate rate for Canadian Solar. *See* 19 U.S.C. § 1677e(a); *see Mueller*, 753 F.3d at 1233.

Further, Commerce's view that the policy considerations of duty evasion and deterrence support the use of the adverse information in calculating the facts available rate is unsupported by this record. Commerce relies upon Canadian Solar's market presence, continued growth, and supplier-specific accounts, to substantiate its claim that Canadian Solar could have induced its suppliers' cooperation. *Remand Results* at 21. As this court held in *Canadian Solar I*, "[s]uch facts do not reasonably indicate the presence of a long-term relationship creating leverage." 43 CIT at __, 378 F. Supp. 3d at 1320. Defendant correctly argues that *Mueller* speaks of "potentially refusing to do business" in order to "potentially induce" cooperation. *See* Def.'s Reply at 12–13; *see also Mueller*, 753 F.3d at 1235. However, in the same paragraph, the Court of Appeals states that it would be potentially unfair to incorporate an adverse inference where a cooperating party had no control over a non-cooperating party. *Mueller*, 753 F.3d at 1235.

Further, Commerce has not pointed to any evidence demonstrating a threat of duty evasion. In *Mueller*, although the Court of Appeals did not opine on the reasonableness of a finding of duty evasion, a threat of duty evasion arguably existed because the uncooperative supplier was a mandatory respondent in the proceeding. *Mueller*, 753 F.3d at 1229, 1235. Thus, the supplier arguably had an incentive to evade its AFA rate by exporting its goods through Mueller. *Id.* at 1235. Commerce points to no record evidence to support a finding that such an incentive existed here. Here, Commerce argues that Canadian Solar's suppliers "clearly" have an interest in selling to Canadian Solar because they have done so in this review. *See Remand Results* at 27. Commerce then extrapolates from that an interest in Canadian Solar paying lower dumping rates so that their products are more attractive to U.S. importers. *See id.* at 27–28. Commerce's argument proves too much. If all that is required is an interest in selling, it is unclear when Commerce would find an uncooperative supplier as not incentivized to evade duties. Evidence of a potential stake in the

respondent having a lower dumping margin does not demonstrate a threat of duty evasion here. Thus, Commerce's determination that the policy rationales of inducement and thwarting duty evasion warrant the use of an adverse inference in selecting among facts available for a cooperating respondent is not supported by substantial evidence.

III. Qixin's Separate Rate Eligibility

The Department reopened the record to provide Qixin an opportunity to demonstrate that "any entry it may have made during the review period qualified as a sale of subject merchandise." *Remand Results* at 31. Qixin failed to provide the requested information. *Id.*[14] Thus, Commerce continues to find that Qixin is ineligible for a separate rate. *Id.* at 33.

It is the respondents' burden to populate the record with all relevant information. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Qixin failed to provide Commerce with the information it requested. Further, no party challenges Commerce's redetermination on this matter. Thus, Commerce's finding that Qixin is not eligible for a separate rate is sustained.

CONCLUSION

The court sustains Commerce's selection of surrogate market values for module glass as well as its rejection of Qixin's separate rate application. Commerce remands for further explanation or reconsideration its application of an adverse inference in selecting facts available in calculating Canadian Solar's rate.

For the foregoing reasons, it is

ORDERED that Commerce's remand redetermination is remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its third remand redetermination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the third remand redetermination; and it is further

ORDERED that the parties shall have 15 days to file their replies to comments on the third remand redetermination.

Dated: December 3, 2019
New York, New York

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

[14] Qixin responded that it was unable to obtain the requested information and that all information was in the possession of the United States government. Resp. from Sandler, Travis & Rosenberg, P.A. to Sec. of Commerce Pertaining to Ningbo Qixin Suppl. Questionnaire at 1, RPD 5, bar code 3831452–01 (May 9, 2019).

Slip Op. 19–153

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. AND AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, U.S. CUSTOMS AND BORDER PROTECTION, AND ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION MARK A. MORGAN, Defendants, and HANWHA Q CELLS USA, INC., Defendant-Intervenor.

Before: Judge Gary S. Katzmann
Court No. 19–00192

[Plaintiffs' motion for a preliminary injunction is granted.]

Dated: December 5, 2019

John Brew, *Kathryn L. Clune*, and *Amanda Berman*, Crowell & Moring LLP, of Washington, DC and New York, NY, argued for plaintiff, Invenergy Renewables LLC and plaintiff-intervenors, Clearway Energy Group LLC and AES Distributed Energy, Inc. With them on the brief were *Larry Eisenstat*, *Robert LaFrankie*, and *Frances Hadfield*. *Matthew R. Nicely* and *Daniel M. Witkowski*, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiff-intervenor, Solar Energy Industries Association. With them on the brief were *Dean A. Pinkert* and *Julia K. Eppard*.

Kevin M. O'Brien and *Christine M. Streatfeild*, Baker & McKenzie LLP, of Washington, DC, argued for plaintiff-intervenor, EDF Renewables, Inc.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

John M. Gurley, *Jackson Toof*, and *Freiderike S. Görgens*, Arent Fox LLP, of Washington, DC, argued for defendant-intervenor. With them on the brief was *Diana Dimitriuc Quaia*.

OPINION AND ORDER

Katzmann, Judge:

This case, generated by the American solar industry, raises fundamental questions of adherence by the Government to procedures for decision making required by statute. Through *Presidential Proclamation 9693* on January 23, 2018, the President imposed safeguard duties, designed to protect domestic industry, on imported monofacial and bifacial solar panels but delegated authority to the Office of the U.S. Trade Representative ("USTR") to exclude products from the duties. 83 Fed. Reg. 3,541–49 ("*Presidential Proclamation*"). After a lengthy process, USTR decided to exclude bifacial solar panels from safeguard duties. *Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684–85 (June 13, 2019) ("*Exclusion*"). Four months later, however, USTR reversed course. It

announced the *Withdrawal*, which reinstituted safeguard duties on certain bifacial solar panels, with only 19 days' notice to the public, without an opportunity for affected and/or interested parties to comment, and without a developed public record on which to base its decision. *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) ("*Withdrawal*"). Because this court instituted, and once renewed, a temporary restraining order ("TRO"), the *Withdrawal* has not yet gone into effect.

The question now before this court is whether a preliminary injunction ("PI") should issue where Plaintiffs allege that the United States ("the Government") violated the Administrative Procedure Act ("APA"), Title II-Relief From Injury Caused By Import Competition of the Trade Act of 1974 (herein "Section 201"),[1] and constitutional due process under the Fifth Amendment by failing to follow requisite procedures in withdrawing an exclusion to safeguard duties on solar products previously granted through notice-and-comment rulemaking. Plaintiff Invenergy Renewables LLC — a renewable energy company— ("Invenergy"),[2] joined by Plaintiff-Intervenors Solar Energy Industries Association ("SEIA"), Clearway Energy Group LLP ("Clearway"), EDF Renewables, Inc. ("EDF-R"), and AES Distributed Energy, Inc. ("AES DE") (collectively, "Plaintiffs"), challenges the *Withdrawal* by the Government. Plaintiffs ask the court to enjoin the Government from reversing, without adequate process, its decision to exclude bifacial solar panels[3] from safeguard duties; that is, Plaintiffs ask the court to implement a PI to maintain the status quo until such time as the lawfulness of the *Withdrawal* is determined by final judgment.

This case emerges from a debate within the American solar industry between entities that rely on the importation of bifacial solar panels and entities that produce predominately monofacial solar panels in the United States. Plaintiffs here, who include consumers, purchasers, and importers of utility-grade bifacial solar panels, argue that the importation of bifacial solar panels does not harm domestic producers because domestic producers do not produce utility-scale bifacial solar panels; they thus oppose safeguard duties that they

[1] Section 201 is the first section of this title as published in the United States Public Laws. Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2251–54 (2012)). Commonly, safeguard duties are referred to as "Section 201 duties," regardless of the specific section of the Trade Act of 1974 being invoked. Where applicable, this opinion cites the appropriate section of the U.S. Code.

[2] Invenergy describes itself as "the world's leading independent and privately-held renewable energy company." Invenergy's Compl. at ¶ 14, Oct. 21, 2019, ECF No. 13.

[3] For the purposes of this opinion, the terms "solar panels" and "solar modules" are used interchangeably.

contend increase the cost of these bifacial solar panels. Domestic producers, however, contend that solar project developers can use either monofacial or bifacial solar panels, and thus safeguard duties are necessary to protect domestic production of solar panels. Both sides contend that their position better supports expanding solar as a source of renewable energy in the United States.

Invenergy, however, also makes clear that this suit does not call upon the court to decide the future of the solar industry. Instead, before the court is its challenge to the *Withdrawal* on process grounds. Invenergy's Mot. for PI at 14, Nov. 1, 2019, ECF No. 49. The soundness of the safeguard duties and whether they should apply to bifacial solar panels are not the subject of this suit. Rather, at stake here is whether USTR undertook reasoned decision making to implement the *Withdrawal*, as required by the APA, including provision for meaningful participation by interested parties. The Government must follow its own laws and procedures when it acts, and the court finds it likely that it did not do so in withdrawing the *Exclusion* without adequate process. The court thus determines that a PI is warranted. The court now grants Invenergy's motion for a PI to enjoin the United States, USTR, U.S. Trade Representative Robert E. Lighthizer, U.S. Customs and Border Protection ("CBP"), and CBP Acting Commissioner Mark A. Morgan (collectively "the Government") from implementing the *Withdrawal*.

BACKGROUND

I. Statutory Overview

Through Section 201, Congress provided a process by which the executive branch could implement temporary safeguard measures to protect a domestic industry from the harm associated with an increase in imports from foreign competitors. Trade Act of 1974 §§ 201–04, 19 U.S.C. §§ 2251–54 (2012). Section 201 dictates that, upon petitions from domestic entities or industries, the International Trade Commission ("ITC") may make an affirmative determination that serious injury or a threat of serious injury to that industry exists. 19 U.S.C. § 2252. The President may then authorize discretionary measures, known as "safeguards," to provide a domestic industry temporary relief from serious injury. 19 U.S.C. § 2253. The statute vests the President with decision making authority based on consid-

eration of ten factors.[4] 19 U.S.C. § 2253(a)(2). Safeguard measures have a maximum duration of four years, unless extended for another maximum of four years based upon a new determination by the ITC. 19 U.S.C. § 2253(e)(1). The statute also outlines certain limits on the President's ability to act under this statute, including to limit new actions after the termination of safeguard measures regarding certain articles. *See* 19 U.S.C. § 2253(e). Further, the safeguard statute mandates that the President "shall by regulation provide for the efficient and fair administration of all actions taken for the purpose of providing import relief." 19 U.S.C. § 2253(g)(1).

The President issued the *Presidential Proclamation* on January 23, 2018, announcing a safeguard measure against imports of solar products after an affirmative determination of injury by the ITC. *See also* U.S. Int'l Trade Comm'n, Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. No. TA-201–75, USITC Pub. 4739 (Nov. 2017) ("ITC Report"). The details of this proclamation are discussed further below. Notably, the *Presidential Proclamation* delegated the process of "exclusion of a

[4] 19 U.S.C. § 2253(a)(2) provides:

> In determining what action to take under paragraph (1), the President shall take into account—
>
> (A) the recommendation and report of the Commission;
> (B) the extent to which workers and firms in the domestic industry are—
>
> (i) benefitting from adjustment assistance and other manpower programs, and
> (ii) engaged in worker retraining efforts;
>
> (C) the efforts being made, or to be implemented, by the domestic industry (including the efforts included in any adjustment plan or commitment submitted to the Commission under section 2252(a) of this title) to make a positive adjustment to import competition;
> (D) the probable effectiveness of the actions authorized under paragraph (3) to facilitate positive adjustment to import competition;
> (E) the short- and long-term economic and social costs of the actions authorized under paragraph (3) relative to their short- and long-term economic and social benefits and other considerations relative to the position of the domestic industry in the United States economy;
> (F) other factors related to the national economic interest of the United States, including, but not limited to—
>
> (i) the economic and social costs which would be incurred by taxpayers, communities, and workers if import relief were not provided under this part,
> (ii) the effect of the implementation of actions under this section on consumers and on competition in domestic markets for articles, and
> (iii) the impact on United States industries and firms as a result of international obligations regarding compensation;
>
> (G) the extent to which there is diversion of foreign exports to the United States market by reason of foreign restraints;
> (H) the potential for circumvention of any action taken under this section;
> (I) the national security interests of the United States; and
> (J) the factors required to be considered by the Commission under section 2252(e)(5) of this title.

particular product from the safeguard measure" to USTR. *Presidential Proclamation* at 3,541. Subsequently, USTR issued procedures for parties to follow in seeking exclusions from the safeguard measure. *Procedures to Consider Additional Requests for Exclusion of Particular Products From the Solar Products Safeguard Measure*, 83 Fed. Reg. 6,670–72 (USTR Feb. 14, 2018) ("*Exclusion Procedures*"). These procedures were silent as to the revision, reconsideration, or withdrawal of exclusions once issued.

Through its *Exclusion Procedures*, USTR invited requests for exclusions and comments from interested persons. *Id.* at 6,671. The parties dispute whether this process constituted agency rulemaking pursuant to the APA. *See* Invenergy's Mot. for PI at 17; SEIA's Resp. to Invenergy's Mot. for PI at 7, Nov. 8, 2019, ECF No. 83; Def.'s Resp. to Invenergy's Mot. for PI at 2, Nov. 8, 2019, ECF No. 74; Q Cells' Resp. to Invenergy's Mot. for PI at 12, Nov. 8, 2019, ECF No. 84. Relevant here are the APA's requirements for notice-and-comment rulemaking by government agencies, which dictate the procedures to be followed by agencies when making certain legal or policy decisions. *See, e.g.*, 5 U.S.C. §§ 551, 701 (2012). Furthermore, the APA provides broad judicial review of agency actions brought by "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA states that courts will "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a).

II. Factual Background

The facts necessary for the court to decide the motion for a PI are not in dispute. In May 2017, pursuant to 19 U.S.C. § 2252(a), Suniva, Inc. ("Suniva"), a domestic solar cell producer filed an amended petition with the ITC alleging that certain solar panel cells "are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." ITC Report at 6; Def.'s Resp. at 4; Invenergy's Mot. for PI at 3. The ITC then instituted an investigation pursuant to 19 U.S.C. § 2252. *Exclusion Procedures* at 6,670 (citing 19 U.S.C. § 2252). The scope of its investigation covered certain crystalline silicon photovoltaic ("CSPV") cells,

> whether or not partially or fully assembled into other products, of a thickness equal to or greater than 20 micrometers, having a p/n junction (or variant thereof) formed by any means, whether or not the cell has undergone other processing, including, but

> not limited to cleaning, etching, coating, and addition of materials (including, but not limited to metallization and conductor patterns) to collect and forward the electricity that is generated by the cell. The scope of the investigation also included photovoltaic cells that contain crystalline silicon in addition to other materials, such as passivated emitter rear contact cells, heterojunction with intrinsic thin layer cells, and other so-called "hybrid" cells

("certain CSPV cells"). *Exclusion Procedures* at 6,670. The ITC held a hearing on injury on August 15, 2017, voted on injury on September 22, 2017, held a hearing on remedy on October 3, 2017, voted on remedy on October 31, 2017, and referred its findings and recommendations to the President on November 13, 2017. ITC Report at 7. The ITC reached an affirmative determination that certain CSPV cells "are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing a like or directly competitive article." *Presidential Proclamation* at 3,541. *See also* ITC Report at 1.

Pursuant to the statutory framework of safeguard procedures, 19 U.S.C. §§ 2253, the President issued a proclamation, imposing temporary safeguard duties of 30% on certain CSPV cells, to decrease by five percent each year until 2022, at which point they end. *Id.* at 3541–49. The safeguard duties applied to the bifacial solar panels used by Invenergy. *See* Invenergy's Mot. for PI at 7–8. The President also instructed USTR to publish within thirty days "procedures for requests for exclusion of a particular product" from the safeguard duties in the Federal Register and authorized USTR to make such exclusions after consultation with the Secretaries of Commerce and Energy and publishing a notice in the Federal Register. *Presidential Proclamation* at 3543–44. The safeguard duties went into effect on February 7, 2018. *Id.* at 3545–49.

USTR then published procedures for exclusion requests in the Federal Register in February 2018. *Exclusion Procedures*. The notice summarized the scope of the ITC's investigation, the scope of the products covered by the *Presidential Proclamation*, and the procedure to request the exclusion of solar products. *Id.* USTR invited "interested persons to submit comments identifying a particular product for exclusion from the safeguard measure and providing reasons why the product should be excluded." *Id.* at 6671. Moreover, USTR indicated that "[a]ny request for exclusion clearly should identify the particular product in terms of physical characteristics . . . that dis-

tinguish it from products that are subject to the safeguard measures" and that it would not "consider requests that identify the product at issue in terms of the identity of the producer, importer, or ultimate consumer" or "products using criteria that cannot be made available to the public." *Id.* The notice made clear that exclusions would become effective upon publication in the Federal Register. *Id.* The notice further outlined the process for comments on exclusion requests, noting that "[a]fter the submission of requests for exclusion of a particular product, interested persons will have an opportunity to comment on the requests, indicate whether they support or oppose any of them, and provide reasons for their view" and directing parties to regulations.gov to comment. *Id.* USTR required interested parties to submit written comments by March 16, 2018 and responses by April 16, 2018 to guarantee consideration. *Id.* at 6,672. The notice did not provide a method for withdrawing an exclusion during the four-year safeguard period. *See id.* at 6,670–72.

The safeguard duties applied to both monofacial and bifacial solar panels. Monofacial solar panels have CSPV cells on one side and opaque backing on the reverse side, allowing them to produce power from only one side. Invenergy's Mot. for PI at 3; Def.'s Resp. to Invenergy's Mot. for PI at 7. Bifacial solar panels have CSPV cells on both sides, thus allowing them to produce about ten percent more power than monofacial solar panels. *See id.* Plaintiffs argue the *Withdrawal* will increase the cost of solar energy and harm the development of the solar industry in the United States because domestic manufacturers do not produce utility-scale bifacial solar panels. *See, e.g.*, SEIA's Compl. ¶ 16, Oct. 24, 2019, ECF No. 21 (citations omitted).

Three solar companies, Pine Gate Renewables, Sunpreme, Inc., and SolarWorld Industries GmBH, submitted requests for USTR to exclude the bifacial solar panels at issue here. Invenergy's Compl., Oct. 21, 2019, ECF No. 13, Ex. D, Letter from Pine Gate Renewables to Edward Gresser (March 16, 2018); Invenergy's Compl. Ex. E, Letter from Sunpreme, Inc. to Edward Gresser (March 16, 2018); Invenergy's Compl. Ex. F, Letter from SolarWorld Industries GmbH to USTR (undated); Invenergy's Mot. for PI at 5; Def.'s Resp. to Invenergy's Mot. for PI at 8. USTR received forty-eight product exclusion requests and 213 comments responding to these requests. *Exclusion* at 27,684. USTR considered the exclusion requests, granted certain product exclusions in a previous Federal Register notice, and "[b]ased on an evaluation of the factors set out in the February 14 notice" granted additional product exclusions, including bifacial solar panels, effec-

tive June 13, 2019. *Id.* at 27,684–85. The notice did not provide a method for or otherwise indicate that the exclusions could be withdrawn during the safeguard period. *Id.*

Shortly after USTR granted the exclusion request for bifacial solar panels, on June 26, 2019, Suniva, First Solar Inc., and Hanwha Q Cells USA, Inc. ("Q Cells") wrote to USTR to ask it to reconsider its decision, arguing that the *Exclusion* would, "in a very short period of time, undermine the relief afforded by the Section 201 tariffs as imposed by the President on January 23, 2018." Invenergy's Compl. Ex. H, Letter from Suniva, First Solar, and Q Cells to Ambassador Gerrish, Deputy U.S. Trade Representative (June 26, 2019). The letter referenced a meeting between the parties less than a week prior and included eighteen attachments for USTR's consideration. *Id.* On October 3, 2019, based on alleged rumors that USTR was considering rescinding the *Exclusion*, Invenergy's CEO and thirteen other solar industry executives wrote to USTR expressing their desire to be heard should USTR plan to take any additional actions regarding the *Exclusion*. Invenergy's Mot. for PI at 5–6; Def.'s Resp. to Invenergy's Mot. for PI at 9; Invenergy's Compl. Ex. J, Letter to USTR re: Solar Safeguard Bifacial Module Exclusion.

On October 9, 2019, USTR published a notice in the Federal Register announcing its decision to withdraw the exclusion for bifacial solar panels, effective October 28, 2019. *Withdrawal*; Invenergy's Mot. for PI at 6; Def.'s Resp. to Invenergy's Mot. for PI at 9. The notice explained that, "[s]ince publication of [the *Exclusion*] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure." *Withdrawal* at 54,244. The Government subsequently moved for, and the court allowed, USTR to delay the effective date of the *Withdrawal* to November 8, 2019. Nov. 25, 2019, ECF Nos. 23, 29. As addressed below, the court subsequently issued a TRO, and the *Withdrawal* has not yet gone into effect.

III. Procedural History

Invenergy initiated this action against the Government on October 21, 2019 by filing its summons, complaint, and a motion for a TRO. Summons, ECF No. 1; Invenergy's Compl.; Invenergy's Mot. for TRO, ECF No. 14. The court held a teleconference with Invenergy and the Government on October 23, 2019. ECF No. 18. The Government filed its response in opposition to Invenergy's motion for a TRO on October 24, 2019. Def.'s Resp. to Invenergy's Mot. for TRO, ECF No. 19. Pursuant to the court's order permitting Invenergy to respond to the

Government's arguments raised during the teleconference, Invenergy filed a supplemental brief on October 24, 2019. Invenergy's Supp. Br. in Resp. to Order, ECF No. 20. That same day, SEIA filed a motion to intervene as plaintiff-intervenor. SEIA's Mot. to Intervene, Oct. 24, 2019, ECF No. 21.

On October 25, 2019, the court ordered Invenergy and the Government to file briefs regarding the issue of security, should the court grant Invenergy's motion for a TRO. ECF No. 22. Invenergy and the Government filed letters with the court, as well as their respective responses. Def.'s Letter in Resp. to Order, Oct. 25, 2019, ECF No. 25; Invenergy's Resp. to Order, Oct. 25, 2019, ECF No. 26; Def.'s Letter in Resp. to Invenergy's Resp. to Order, Oct. 25, 2019, ECF No. 27; Invenergy's Resp. to Order, Oct. 25, 2019, ECF No. 28. The Government simultaneously moved for leave to defer implementation of the *Withdrawal* until November 8, 2019, thirty days after the notice announcing the *Withdrawal* was published in the Federal Register, to which Invenergy consented. Def.'s Mot. to Defer Implementation, Oct. 25, 2019, ECF No. 23; Invenergy's Resp. to Def.'s Mot. to Defer Implementation, Oct. 25, 2019, ECF No. 24. The court then granted the Government's motion, thus delaying the effective date of the *Withdrawal* to November 8, 2019, ordered the Government to respond to SEIA's motion to intervene, Oct. 25, 2019, ECF Nos. 29, 30, and ordered an expedited briefing schedule based on Invenergy's representations during the October 23, 2019 teleconference that it intended to move for a PI, Oct. 25, 2019, ECF No. 31.

On October 28, 2019, the Government filed its response to SEIA's motion to intervene noting its position that SEIA lacked constitutional and statutory standing, and, pursuant to the court's order, SEIA replied on October 29, 2019. Def.'s Resp. to SEIA's Mot. to Intervene, Oct. 28, 2019, ECF No. 34; Order on SEIA's Reply on Mot. to Intervene, Oct. 28, 2019, ECF No. 35; SEIA's Reply to SEIA's Mot. to Intervene, Oct. 29, 2019, ECF No. 38. The following day, the court granted SEIA's motion to intervene, designating SEIA as a plaintiff-intervenor. Oct. 30, 2019, ECF No. 39. SEIA's complaint against the Government was then deemed filed. SEIA's Compl., Oct. 30, 2019, ECF No. 43.

On October 31, 2019, the court ordered additional briefing on the issue of security in the event the court should issue a TRO, ECF No. 45, and Invenergy, SEIA, and the Government filed their respective briefs and responses. Invenergy's Resp. to Order, Nov. 4, 2019, ECF No. 53; Def.'s Resp. to Order, Nov. 4, 2019, ECF No. 56; SEIA's Resp. to Order, Nov. 5, 2019, ECF No. 61; Def.'s Reply to Order, Nov. 5, 2019, ECF No. 62; Invenergy's Reply to Order, Nov. 5, 2019, ECF No. 63;

SEIA's Reply to Order, Nov. 5, 2019, ECF No. 65. The court instituted a TRO on November 7, 2019, requiring nominal security based on the procedural harms alleged. ECF No. 68.

The court also granted Q Cells' unopposed motion to intervene as defendant-intervenor. Q Cells' Mot. to Intervene, Nov. 4, 2019, ECF No. 54. Clearway and EDF-R moved to intervene as plaintiff-intervenors on November 4, 2019 and November 7, 2019, respectively. Clearway's Mot. to Intervene, Nov. 4, 2019, ECF No. 58; EDF-R's Mot. to Intervene, Nov. 7, 2019, ECF No. 69. The Government did not oppose EDF-R's intervention as an importer of bifacial solar cells, "subject to Defendants' objections in its opposition to SEIA's intervention." EDF-R's Mot. to Intervene at 2. Clearway's motion stated that "Defendants' counsel indicated that the Government opposes this motion." Clearway's Mot. to Intervene at 4. Therefore, as ordered by the court, ECF No. 66, the Government responded to Clearway's motion claiming that Clearway lacked standing. Def.'s Resp. to Clearway's Mot. to Intervene, Nov. 8, 2019, ECF No. 72. The court granted Clearway's and EDF-R's motions to intervene on November 8, 2019. ECF Nos. 76, 78. Clearway's and EDF-R's previously filed respective complaints against the Government were then deemed filed. Nov. 8, 2019, ECF Nos. 77, 79. AES DE filed a partial consent motion to intervene on November 13, 2019. AES DE's Mot. to Intervene, ECF No. 90. The Government responded on November 27, 2019 stating its opposition to AES DE's standing for the same reasons it opposed Clearway's intervention. Def.'s Resp. to AES DE's Mot. to Intervene, Nov. 27, 2019, ECF No. 109. The court granted AES DE's motion and its complaint was deemed filed. Nov. 27, 2019, ECF Nos. 110, 111.

Invenergy filed a motion for a PI on November 1, 2019. Invenergy's Mot. for PI, ECF No. 49. The Government filed its response in opposition to Invenergy's motion for a PI and a motion to dismiss on November 8, 2019. Def.'s Resp. to Invenergy's Mot. for PI, ECF No. 74. SEIA filed a response in support of Invenergy's motion for a PI. SEIA's Resp. to Invenergy's Mot. for PI, Nov. 8, 2019, ECF No. 83. Q Cells filed a response in opposition to Invenergy's motion for a PI. Q Cells' Resp. to Mot. for PI, Nov. 8, 2019, ECF No. 84. The court held a hearing on Invenergy's motion for a PI on November 13, 2019 and permitted the parties to file post-hearing memoranda. ECF No. 96 ("Hearing"). The Government, Q Cells, EDF-R, Clearway, Invenergy, AES DE and SEIA filed supplemental briefs on November 19, 2019. Def.'s Supp. Resp. to Invenergy's Mot. for PI, ECF No. 100; Q Cells' Supp. Resp. to Invenergy's Mot. for PI, ECF No. 101; EDF-R's Supp. Resp. to Invenergy's Mot. for PI, ECF No. 102; AES DE, Clearway, and Invenergy's Supp. Resp. to Mot. for PI, ECF No. 104; SEIA's

Supp. Resp. to Invenergy's Mot. for PI, ECF No. 104. The court extended the TRO by fourteen days on November 28, 2019. ECF No. 108.

JURISDICTION AND STANDING

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), which provides that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of tariffs and duties. As a threshold, the court addresses whether Invenergy, or in the alternative Invenergy joined by the Plaintiff-Intervenors, has constitutional standing to sue the Government to challenge the implementation of the *Withdrawal*. *See Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1330–31 (Fed. Cir. 2008). In addition to constitutional standing, a plaintiff must also have statutory standing to bring a claim. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). The court addresses each in turn. The Government argues that Invenergy has neither constitutional standing nor statutory standing, thus barring the court's exercise of jurisdiction over this case.[5] Def.'s Resp. to Invenergy's Mot. for PI at 11–19. Invenergy and Plaintiff-Intervenors argue that Invenergy independently meets the requirements of both constitutional and statutory standing. Invenergy's Mot. for PI at 7; SEIA's Resp. to Invenergy's Mot. for PI at 2–4; EDF-R's Supp. Resp. to Invenergy's Mot. for PI at 1–3. The court concludes that Invenergy both independently and once joined by Plaintiff-Intervenors has standing to challenge the *Withdrawal*.

I. Invenergy Has Constitutional and Statutory Standing to Sue.

Because Invenergy has suffered an actual, imminent injury that is fairly traceable to the *Withdrawal* and that can be redressed by injunctive relief, and Invenergy falls within the zone of interests of Section 201, Invenergy independently has constitutional and statutory standing.

[5] The Government also opposed Clearway's and AES DE's intervention as plaintiffs on this ground. Def.'s Resp. to Clearway's Mot. to Intervene, Nov. 8, 2019, ECF No. 72; Def.'s Resp. to AES DE's Mot. to Intervene, Nov. 27, 2019, ECF No. 109. For the same reasons provided regarding Invenergy's standing, these arguments are not persuasive.

A. Invenergy Has Constitutional Standing.

To invoke the jurisdiction of a federal court, a party must meet the case or controversy requirements of Article III of the Constitution. *See* U.S. Const. art. III, § 2. "The essence of the standing question, in its constitutional dimension, is whether the plaintiff has alleged such a personal stake in the outcome of the controversy (as) to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260–61 (1977) (internal citations and quotations omitted). Specifically, a plaintiff must show: (1) "that it has suffered a concrete and particularized injury that is either actual or imminent," (2) "that the injury is fairly traceable to the defendant," and (3) "that a favorable decision will likely redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury may be indirect so long as it is fairly traceable to defendants' conduct. *Vill. of Arlington Heights*, 429 U.S. at 261. *See also Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, __ 331 F. Supp. 3d 1338, 1357, 1361 (2018).

The Government and Q Cells argue that Invenergy has not alleged an imminent and particularized injury, and that any injury suffered by Invenergy has been caused by third party action; therefore, those injuries are not sufficiently traceable to the *Withdrawal* and not redressable by this court. Def.'s Resp. to Invenergy's Mot. for PI at 11–13; Q Cells' Resp. to Invenergy's Mot. for PI at 4, 6–7. Furthermore, the Government alleges that, insofar as there may have been procedural violation, a "procedural violation alone is insufficient to confer standing." Def.'s Resp. to Invenergy's Mot. for PI at 13. *See also* Q Cells' Resp. to Invenergy's Mot. for PI at 6–7.

Invenergy responds that it does not merely allege a procedural injury, but also other concrete harms is sufficient to confer Article III standing. Invenergy's Mot. for PI at 9. In addition to the procedural harm, Invenergy alleges that it will suffer economic harms, lost business opportunities, and reputational harm. Invenergy's Mot. for PI at 7–9, 35–37. Invenergy alleges it will suffer a procedural harm of loss of an opportunity to be heard by USTR on the *Withdrawal*, extensive economic harms as a result of higher duties on bifacial solar panels, lost business opportunities in the form of foregone tax credit qualification, and reputational harm in the failure of its ability to fulfill its obligations and souring business relationships. *Id.* Invenergy also disagrees that its harm is dependent upon third party action: "Invenergy is not attempting to rely on injuries sustained by others to show its standing, nor to redress them; it seeks only to prevent the impending harm to its business." Invenergy's Mot. for PI at 12. Therefore,

Invenergy alleges that it has shown sufficient injury, causation, and redressability in order to meet the Article III constitutional standing requirement.

The court determines that Invenergy has standing to challenge the *Withdrawal* as required by Article III of the Constitution.

1. Invenergy Has a Concrete and Particularized Injury That Is Actual or Imminent.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560. A particularized injury "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). A concrete injury need be real, but not necessarily tangible. *Id.* at 1549. "[T]he injury-in-fact requirement. . . ensure[s] that the plaintiffs have a stake in the fight and will therefore diligently prosecute the case while, at the same time, ensuring that the claim is not abstract or conjectural so that resolution by the judiciary is both manageable and proper." *Canadian Lumber*, 517 F.3d at 1332–33 (citations and quotations omitted). The constitutional standing requirement of "[i]njury-in-fact is not Mount Everest." *Id.* at 1333. (internal citation omitted). While a bare procedural violation alone may be insufficient to confer standing where the violation does not result in harm to the plaintiff, it is sufficient where that procedural harm results in other concrete harms. *See Spokeo*, 136 S. Ct. 1549. Furthermore, as the Federal Circuit recognized in *Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1279 (Fed. Cir. 2006), lack of procedure can constitute sufficient injury even where there exists the possibility that the agency's final decision taken in accordance with the proper procedures may not be in plaintiff's favor. *Id.* ("[T]he failure to conduct review and revision of the list injured Gilda by depriving it of at least an opportunity to have those products removed. That is a sufficient injury to be cognizable under the test for Article III standing.") (citations omitted).

Here, Invenergy has alleged a procedural harm and additional economic, business, and reputational harms to show an actual or imminent concrete and particularized injury. Responding to the Government's characterization of its harm as a "bare procedural violation," Invenergy states that its injuries are instead "concrete harms that will result and have resulted to its business" from the procedurally deficient *Withdrawal*. Invenergy's Mot. for PI at 9. The court agrees that these harms are not speculative but are concrete and imminent. The harms to Invenergy's business and reputation are also

particular to Invenergy. *See* Discussion *infra* Section III.

The Government and Q Cells focus on allegations of harm to Invenergy stemming from price increases that impact existing and future projects which would use bifacial solar panels. *See* Def.'s Resp. to Invenergy's Mot. for PI at 12–14; Q Cells' Resp. to Invenergy's Mot. for PI at 4–6. The Government argues that "Invenergy's alleged harm is thus based on an assumption" and Invenergy's own "business decisions." Def.'s Resp. to Invenergy's Mot. for PI at 12 (citations omitted). Furthermore, the Government and Q Cells contend that these harms were voluntarily assumed by Invenergy and depend on relationships with and decisions of third parties. *Id.* at 12– 13; Q Cells' Resp. to Invenergy's Mot. for PI at 6–8. They argue that because Invenergy is not an importer of bifacial solar panels, Invenergy cannot rely on third party standing to bring this challenge itself. Def.'s Resp. to Invenergy's Mot. for PI at 12–11–15; Q Cells' Resp. to Invenergy's Mot. for PI at 5, 7. Therefore, they contend, any increase in price or economic impact is speculative and depends on the rights of third parties and is not sufficient to create Article III standing. Def.'s Resp. to Invenergy's Mot. for PI at 12–14; Q Cells' Resp. to Invenergy's Mot. for PI at 5–8. Finally, Q Cells argues that even if Invenergy suffered a procedural harm, failure to comment on the *Withdrawal* does not make its injury actual or imminent. Q Cells' Resp. to Invenergy's Mot. for PI at 6.

However, the Government and Q Cells fail to recognize that Invenergy's claims hinge on a procedural violation that is accompanied by harms other than the allegations of economic impacts alone. First, Invenergy alleges a harm from USTR's lack of proper procedure in implementing the *Withdrawal*. Analogous to the procedural injury at issue in *Gilda*, 446 F.3d at 1271, here Plaintiffs allege that USTR has failed to provide sufficient notice and opportunity to comment and provide information to USTR so for USTR to make a reasoned decision regarding the *Withdrawal*. Invenergy alleges economic, business, and reputational harms stemming from this procedural violation which are concrete and particularized to Invenergy. *See, e.g.*, Invenergy's Mot. for PI at 7–10, 35–37.

Invenergy alleged sufficient claims of economic harm to constitute injury-in-fact. *See* Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 2–3. These economic harms can be shown through "economic logic." *See Canadian Lumber*, 517 F.3d at 1333. In *Canadian Lumber*, the Federal Circuit affirmed this court's holding that the Canadian Wheat Board, a wheat seller — not an importer or exporter — had Article III standing because it was "likely" to suffer

"economic injury" as a result of duties imposed on wheat from Canada, the proceeds of which were distributed to an entity promoting North Dakotan wheat. *Id*. at 1334. The Federal Circuit agreed with this court's reliance on "economic logic" to reach that conclusion. *Id.* at 1333–34. The court determines that this "economic logic" applies here: the duty on bifacial panels will increase — and, with it, likely Plaintiffs' costs — if the *Withdrawal* goes into effect. *See* Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 1–2. Plaintiffs, however, do not rely on "economic logic" alone. Both "economic logic" and detailed testimony show that, because of the *Withdrawal*, the price of bifacial panels will rise, causing substantial economic injuries to Invenergy's solar energy projects and larger business. *See* Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 3; Invenergy's Mot. for PI. Therefore, Invenergy has alleged a package of procedural, economic, business, and reputational harms that in combination are sufficiently concrete, imminent, and particularized to satisfy the injury requirement.[6]

2. Invenergy's Injury Is Fairly Traceable to the Government's Withdrawal and Is Redressable by the Court.

The second and third criteria of constitutional standing are that the injury is fairly traceable to the challenged conduct of the defendant and that a judicial decision is likely to redress the injury. *Lujan*, 540 U.S. at 561–62. These prongs of constitutional standing can be established even if the injury is indirect. *Nat. Res. Def. Council*, 331 F. Supp. 3d at 1357 (citing *Vill. Of Arlington Heights*, 429 U.S. at 260–61; *Lujan*, 540 U.S. at 561–62). In *Nat. Res. Def. Council*, the court found redressability where "[p]laintiffs . . . show[ed] that the third parties in question [were] likely to respond to a United States import ban in a way that reduces danger . . . ." *Id.* at 1359. In sum, that actions of third parties may redress part of the alleged injury is not a conclusive bar to standing.

Invenergy argues that a PI and ultimate resolution of this issue will provide "Invenergy, its suppliers, and its customers with the business certainty they need to go forward with their pending and upcoming projects." Invenergy's Mot. for PI at 10. It contends that injunctive relief will maintain the status quo until a final decision can be reached, which if favorable would redress Invenergy's procedural

[6] Non-economic harms referenced in this section are discussed further below in the context of irreparable harm. *See* Discussion *infra* Section III. While Article III injury-in-fact and irreparable harm analyses may overlap, they are not identical. Therefore, the economic harms that are sufficient to constitute injury-in-fact for constitutional purposes are analyzed in a different light under the irreparable harm standard.

injury, "giving it the opportunity to provide its views to USTR, have them considered, and obtain an explanation for USTR's decision . . . " Invenergy's Supp. Resp. for TRO at 7. In sum, the injuries, at least in that respect, do not depend upon the actions of third parties.

The Government and Q Cells argue that Invenergy's injuries are not fairly traceable to the *Withdrawal* because Invenergy's harm arises from relationships with third parties and not from the Government's own actions. Def.'s Resp. to Invenergy's Mot. for PI at 12–13; Q Cells' Resp. to Invenergy's Mot. for PI at 7. The Government contends that "there is no basis, other than speculation, to conclude that enjoining USTR's determination would redress Invenergy's claimed injury." Def.'s Resp. to Invenergy's Mot. for PI at 13. Similarly, Q Cells argues that "[t]he problem with this speculative claim is that even if this [c]ourt reversed the Withdrawal, it would have no control over what the suppliers decide to do with their pricing models." Q Cells' Resp. to Invenergy's Mot. for PI at 7.

The court concludes that Invenergy's injury stems directly from the *Withdrawal*, even if some of the specific harms it alleges involve relationships with third parties. Invenergy provides evidence that injuries would not exist but for the implementation of the *Withdrawal* because its economic and reputational harms stem from reliance on the *Exclusion* and attempt to adjust to the *Withdrawal*, respectively. Invenergy's Mot. for PI at 31–33. Furthermore, Invenergy's procedural injury is directly traceable to the *Withdrawal* announced without sufficient notice or opportunity for comment as required by the APA. *See, e.g.*, *ThyssenKrupp Acciai Speciali Terni S.P.A. v. United States*, 32 CIT 728, 735–36, 572 F. Supp. 2d 1323, 1331 (2008). This procedural injury is also redressable by a decision from this court favorable to Invenergy because, if it succeeds on the merits, the court would order USTR to provide additional process in its decision to reconsider the *Exclusion*. *See Lujan*, 504 U.S. at 561–62. Moreover, the redressability prong can be met where a judicial decision would result in a remand or order to an agency to follow process rather than directing a specific outcome. *See, e.g., Gilda*, 446 F.3d at 1279 (deprivation of opportunity for agency to exercise discretionary review is sufficient injury to satisfy Article III standing); *ThyssenKrupp*, 572 F. Supp. 2d at 1331 ("Providing such an opportunity for review would sufficiently redress ThyssenKrupp's injury and satisfy Article III standing"). In short, Invenergy has shown that it has or will imminently suffer a package of concrete and particularized injuries, in-

cluding a procedural injury, that is fairly traceable to the *Withdrawal* and can be redressed by a favorable decision of the court. Therefore, Invenergy has shown that it meets the constitutional standing requirements.

B. Invenergy Has Statutory Standing Under Section 201 To Bring This Suit.

In addition to the constitutional requirements of standing under Article III, courts have adopted an additional standing requirement, sometimes referred to in decisions as the prudential standing requirement, but that the Supreme Court has clarified is simply a statutory "zone of interests" analysis. *Lexmark*, 572 U.S. at 126, 128 n.4 ("[P]rudential standing is a misnomer as applied to the zone-of-interests analysis," and "We have on occasion referred to this inquiry as 'statutory standing'" (citations omitted)). *See also Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1235 (Fed. Cir. 2019) (adopting non-jurisdictional "statutory standing" post-*Lexmark*). Unlike constitutional standing, statutory standing is not jurisdictional. *Gilda*, 446 F.3d at 1280 ("the zone of interest tests is not jurisdictional") (citations omitted); *Lone Star Silicon*, 925 F.3d at 1235–36. The court nevertheless must consider it as integral to the likelihood of success before granting injunctive relief. *U.S. Ass'n of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005).

"[C]ourts applying the judicial review standards of the [APA], 5 U.S.C. § 702, determine whether the plaintiff has standing to seek review under that statute based on 'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Gilda*, 446 F.3d at 1279–80 (quoting *Ass'n of Data Processing Serv. Orgs, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). The zone of interests analysis "asks whether this particular class of persons ha[s] a right to sue under this substantive statute" using "traditional principles of statutory interpretation." *Lexmark*, 572 U.S. at 127–28 (citations and quotations omitted). The purpose of this analysis is to limit parties who may sue under statutorily granted causes of action to those who have actually been injured. *Id.* at 129. This requirement stems from a need to limit the APA's "generous review provisions" with a "broad[] remedial purpose." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394–95 (1987); *see also Lexmark*, 572 U.S. at 129. The courts consider the "overall context" of the relevant statutory framework in deciding which interests are *arguably* protected. *Clarke*, 479 U.S. at 401. *See also Lexmark*, 572 U.S. at 130 ("In [the APA] context we have often conspicuously included the word

arguably in the test to indicate that the benefit of any doubt goes to the plaintiff" (citations and quotations omitted)). "[W]e then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank*, 522 U.S. 479, 492 (1998). The Supreme Court has explained that, "[i]n applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Id.* Further, in the context of the APA, this zone of interests test "is not meant to be especially demanding," and, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action," the test is satisfied unless the "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. "We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Lexmark*, 572 U.S. at 130–31 (internal citations and quotations omitted).

Invenergy claims that it falls within the zone of interests of "Section 201 and the entire safeguard statutory scheme." Invenergy's Mot. for PI at 14. SEIA, in support of Invenergy's motion for a PI, argues that "[t]he [c]ourt should take into account [the] assessments by the Congress and the President regarding the causal relationship between the imposition (or removal) of safeguard duties on an imported product and the harm to consumers of that product" in analyzing Invenergy's statutory standing under Section 201. SEIA's Resp. to Invenergy's Mot. for PI at 4. *See also* Invenergy's Mot. for PI at 13 (arguing that Invenergy is within the zone of interests of Section 201).

The Government claims that Invenergy "falls far outside the 'zone of interests' of [S]ection 201 and, thus, lacks prudential standing." Def.'s Resp. to Invenergy's Mot. for PI at 16. Because the Government claims that the APA does not apply to actions of USTR, *Id.* at 2, the Government's briefs do not discuss statutory standing in connection with the APA. The Government and Q Cells focus on Invenergy's standing under Section 201 to argue that Invenergy as a consumer of bifacial solar panels does not fall within Section 201's zone of interests. *Id.* at 15–19; Q Cells' Resp. to Invenergy's Mot. for PI at 9. They argue that "the inclusion of 'consumers' within the 10 nonexhaustive factors guiding the President's discretion to impose a remedy, does not confer standing to sue." Def.'s Resp. to Invenergy's Mot. for PI at

18. The Government asserts that "Section 201 is not intended to provide protection for domestic consumers, who seek to purchase injurious goods at the expense of an industry that faces serious injury and the prospect of economic extinction." *Id.* at 19 (citations and quotations omitted). *See also* Q Cells' Resp. to Invenergy's Mot. for PI at 9.

The court determines that Invenergy's interests are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *See Ass'n of Data Processing*, 397 U.S. at 153. The zone of interests of Section 201 includes "the effect of the implementation of actions under this section on consumers and on competition in domestic markets for articles," 19 U.S.C. § 2253 (a)(2)(F)(ii), and the "efficient and fair administration of *all* actions taken for the purpose of providing import relief," 19 U.S.C. § 2253 (g)(1) (emphasis added). Thus, the text of the statute itself shows that Congress wanted to ensure that the underlying Section 201 safeguard measures and implementation of those measures reflect consideration of the interests of purchases and users, here Invenergy, placing them within the "zone of interests" of the entire statutory scheme. Furthermore, in these provisions, Congress has shown a concern for the fairness of procedures administering safeguard duties that may impact consumers and domestic competition for articles at issue. These explicit interests arguably include Invenergy's interest in participating in and being subject to fair and efficient administration of the *Exclusion* process and USTR's own procedures in implementing that process. This is particularly where, as is the case here, the plaintiff "is not challenging the underlying Section 201 proceedings at the ITC, which authorized the President to impose safeguard duties to protect domestic producers," but instead is challenging the *Withdrawal* as violating the APA and USTR's own procedures. *See* Invenergy's Mot. for PI at 14.

Contrary to the Government's and Q Cells' arguments, the zone of interests analysis is not limited to the purpose or intended beneficiaries of the statute. The zone of interests is broad enough to include a party's interests directly implicated by Government action pursuant to the statute even though that action intends to indirectly disadvantage that very party. *See Nat'l Credit Union*, 522 U.S. at 492–94. This is especially true in the context of an alleged APA violation. Plaintiffs challenge USTR's attempt to modify the *Exclusion* with no notice and no opportunity for interested persons to participate. For that reason, USTR's own regulatory actions regarding bifacial modules confirm that purchasers and users of imported products have statutory stand-

ing to challenge the lack of procedures. Whether the original Section 201 safeguard measure was intended to protect the domestic industry, USTR set forth *Exclusion Procedures* under which interested persons have rights, and these interested persons include consumers, purchasers, and importers who did not file or otherwise participate in the exclusion process. *Exclusion Procedures* at 6,670 (Feb. 14, 2018) (repeatedly referencing "interested persons" – not importers).[7] Therefore, the court concludes that Invenergy, as an interested person, has properly asserted standing to challenge the *Withdrawal*. *See* 5 U.S.C. § 702; 19 U.S.C. §§ 2251–54.

II. Alternatively, Invenergy, Joined by Plaintiffs-Intervenors, Collectively Have Constitutional and Statutory Standing.

In the alternative, Invenergy, joined by the Plaintiff-Intervenors, collectively have sufficient constitutional and statutory standing to establish conclusive jurisdiction by the court. "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, co-plaintiff, or an intervenor as of right." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). "To obtain injunctive or declaratory relief, it is sufficient that there be at least one plaintiff with standing." *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*, 802 F. Supp. 1223, 1231 (D.N.J. 1992). Because Plaintiffs (or Plaintiffs' constituent members) include consumers, users, and importers of bifacial solar panels, at least one of the plaintiffs has standing to bring this challenge to the *Withdrawal*.

The intervention of SEIA and EDF-R, both of which represent interests of importers in this case, moots the Government's standing argument regarding Invenergy, Clearway, and AES DE. SEIA is the national trade association for the U.S. solar industry whose members include importers, manufacturers, distributors, installers, and project developers. SEIA Resp. to Invenergy's PI at 1. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Biotech. Indus. v.* District of Columbia, 496 F.3d 1362, 1369 (Fed. Cir. 2007) (quoting *United Food & Com. Workers v. Brown Group*, 517 U.S. 544, 553 (1996)). Members of SEIA would have standing to sue

[7] For these reasons, the Government's reliance on *McKinney*, 799 F.2d 1544 (Fed. Cir. 1986) is not persuasive. The *McKinney* court focused on the fact that consumers had only an abstract interest in the statute, *id.*, whereas here Invenergy participated in and is concretely affected by USTR's *Withdrawal*.

in their own right and are adversely affected or aggrieved by agency action. SEIA's members include importers, purchasers, and users of the imported bifacial products subject to the safeguard action. The *Withdrawal* will subject importers to safeguard duties, thus likely increasing the cost of importing bifacial solar products into the United States, increase their cost of doing business and reduce their profits and business opportunities. SEIA's organizational interests include growing the solar energy industry for its importer-members and members using imported utility-grade panels. *See* SEIA Resp. to Invenergy's PI at 1. Finally, although Invenergy, Clearway, AES DE, and EDF-R are Plaintiffs in this action, the legal claims raised and the relief requested below do not require the participation of individual SEIA members as plaintiffs because a broadly applicable remedy to a procedural violation is sought. EDF-R is "is a U.S. importer, purchaser, and user of bifacial solar panels at issue in the exclusion and the challenged withdrawal." EDF-R's Mot. to Intervene at 2. Therefore, as an importer, EDF-R also faces direct cost increases due to the *Withdrawal*.

SEIA and EDF-R moved to intervene prior to the issuance of the TRO, and the court granted both motions prior to the hearing on Invenergy's motion for a PI and this decision, and thus prior to any decision on the merits in this case. The Government argues that a party may not be added to a case to remedy a lack of standing, and thus a lack of jurisdiction. Def.'s Resp. to SEIA's Mot. to Intervene at 2. The Government further claims that "[b]ecause the [c]ourt lacks jurisdiction to entertain Invenergy's complaint, it likewise cannot grant intervention because 'intervention will not be permitted to breathe life into a nonexistent law suit.'" *Id.* (citing *Aeronautical Radio Inc. v. FCC*, 983 F.2d 275, 283 (D.C. Cir. 1993)). However, the very case that the Government cites to support this proposition also states that "an 'independent jurisdictional basis' for [Intervenor's] challenge . . . might otherwise allow [Intervenor] to continue the action." *Aeronautical Radio*, 983 F.2d at 283. While it otherwise is true that "intervention cannot cure a jurisdictional defect in the original suit," it is also true that in the cases establishing that proposition, the intervenors did not or could not file complaints which could separately be the basis of subject matter jurisdiction. *See Nucor Corp. v. United States*, 31 CIT 1500, 1509–10, 516 F. Supp. 2d 1348, 1356 (Ct. Int'l Trade 2007) (citing *United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914); *Simmons v. Interstate Com. Comm'n*, 716 F.2d 40, 46 (D.C. Cir. 1983)).

Here, SEIA and EDF-R have filed separate and distinct complaints on their own behalf upon their intervention. *See* SEIA's Compl., Oct. 30, 2019, ECF No. 43; EDF-R's Compl., Nov. 8, 2019, ECF No. 79. SEIA and EDF-R thus would be entitled to challenge the Government's implementation of the *Withdrawal* independent of Invenergy's complaint. Therefore, SEIA and EDF-R do not depend on Invenergy's standing nor do they attempt to intervene in order to "breathe life into [the case.]" *See Aeronautical Radio*, 983 F.2d at 283. As analyzed further below, SEIA and EDF-R have standing to challenge the implementation of the *Withdrawal*. Therefore, even if Invenergy did not have standing, the court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i).

A. Plaintiff-Intervenors Have Constitutional Standing.

As discussed in more detail above, a party must show injury in fact, causation, and redressability to have constitutional standing. *See supra* Section I.a. SEIA and EDF-R allege concrete and particularized injuries that result from the implementation of the *Withdrawal* without process. SEIA alleges economic, business, and reputational harms to its members stemming from the *Withdrawal*, including that "SEIA members that import such products into the United States . . . will be directly responsible for paying the increased duties," "the resulting increased price for bifacial CSPV products" will harm non-importing members of SEIA, and the *Withdrawal* "will also adversely impact the development of solar energy in the United States by raising the cost of solar projects and solar energy, contrary to the interests of SEIA and its members." SEIA's Compl. ¶ 16. EDF-R alleges that its "injuries related to the payment of duties (regardless of importer), the impact on current and pending contractual relations, the loss of customer goodwill, and impacts on consumers' ability to procure clean energy" constitute "injuries . . . sufficient to confer standing." EDF-R's Supp. Resp. to Invenergy's Mot. for PI at 3. These injuries result from a lack of domestic production of bifacial panels "at commercial volume suitable for utility-scale projects and can supply only a fraction of the projected demand for utility-scale solar projects overall." SEIA's Compl. ¶ 16. These injuries constitute concrete and particularized harms to SEIA members and to EDF-R directly.

As discussed extensively above, Plaintiffs' injuries stem from USTR's lack of process in implementing the *Withdrawal*, and Plaintiffs' corresponding requested relief is simply additional process. Furthermore, unlike some of Invenergy's alleged harms, SEIA and EDF-R face direct increased prices of imports that do not depend on any relationship with third parties. Therefore, SEIA and EDF-R's injuries

are fairly traceable to the *Withdrawal* and can be redressed by a favorable decision from the court. In short, SEIA and EDF-R meet the requirements of constitutional standing.

1. Plaintiff-Intervenors Have Statutory Standing.

SEIA and EDF-R also have statutory standing to challenge the *Withdrawal* because their interests fall easily within the zone of interests of Section 201. In their complaints, SEIA and EDFR argue that, for reasons similar to Invenergy's statutory standing, SEIA and its members are also "arguably within the zone of interests to be protected or regulated" by Section 201. *See Ass'n of Data Processing*, 397 U.S. at 153; SEIA's Compl. ¶ 24; EDF-R's Compl. ¶ 15.

Because Section 201 directs the President to consider the interests of consumers and domestic markets and the implementation of regulations that provide for the "efficient and fair administrations of *all* actions taken for the purpose of providing import relief," 19 U.S.C. § 2253(g)(1) (emphasis added), SEIA's members and EDF-R are arguably within the zone of interests of Section 201. *See Lexmark*, 572 U.S. at 130 ("In [the APA] context we have often 'conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff'" (citations omitted)). SEIA and EDF-R have interests as importers of bifacial solar panels subject to duties that should be implemented through fair process of law. Therefore, SEIA and EDF-R have constitutional and statutory standing and have filed complaints that supply independent subject matter jurisdiction. Invenergy's standing and SEIA and EDF-R's standing each, independently, provide the court with jurisdiction.

DISCUSSION

The court now turns to Invenergy's motion for a PI to enjoin the Government from implementing the *Withdrawal*. A PI is an "extraordinary" remedy, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), and is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). The court weighs four factors in ruling on a motion for a PI: (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff would suffer irreparable harm without the PI; (3) whether the balance of hardships favors the plaintiff; and (4) whether the PI would serve the public interest. *See, e.g., Winter*, 555 U.S. at 20; *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018); *Nat. Res. Def. Council*, 331 F. Supp. 3d at 1362; *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353 (2002). Upon consideration of the parties' briefs, accompanying submissions,

and witness testimony, the court concludes that all four factors weigh in favor of the issuance of a PI. The court thus grants the motion for a PI.

I. Plaintiffs Have a Fair Likelihood of Prevailing on the Merits of the APA Claim

The party seeking a PI must "demonstrate that it has at least a fair chance of success on the merits for a preliminary injunction." *Silfab Solar*, 892 F.3d at 1345 (quoting *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 96 (Fed. Cir. 2014)). *See also Nat. Res. Def. Council*, 331 F. Supp. 3d at 1362. Invenergy sets forth three claims for which it argues it has a strong likelihood of success. Invenergy's Mot. for PI at 16. First, Invenergy argues that USTR's *Withdrawal*, "with no advance notice or opportunity for affected parties to provide their views, was a clear violation of the APA's requirements. . ." *Id.* at 16–17. Second, Invenergy argues that the *Withdrawal* violated Section 201 and USTR's own written procedures.[8] *Id.* at 23. Third, Invenergy contends that the *Withdrawal* violated its constitutional due process rights under the Fifth Amendment. *Id.* at 28. Finding that Invenergy has established with a fair likelihood of success that USTR violated notice-and-comment rulemaking requirements under the APA, the court need not now reach Invenergy's Section 201 and constitutional claims.

A. USTR Likely Violated APA Rulemaking Requirements.

To establish that USTR violated the APA in implementing the *Withdrawal*, Invenergy, joined by SEIA, contends that (1) USTR is an agency under the terms of the APA; (2) the *Withdrawal* constituted agency rulemaking, not an adjudication; (3) the *Withdrawal* violated APA rulemaking requirements; (4) the *Withdrawal* was arbitrary and capricious; and (5) the *Withdrawal* does not fall within the APA's foreign affairs exception. *See* Invenergy's Mot. for PI at 17–23; Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 7-8. *See also* SEIA's Resp. to Invenergy's Mot. for PI at 7–9. The court addresses each in turn.

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[8] Invenergy argues that USTR violated Section 201 and its own written procedures. According to Invenergy, "USTR's written procedures only authorize it to *grant* exclusions, not *withdraw* them. USTR 'withdrew' the Exclusion in violation of these procedures." Invenergy's Mot. for PI at 23. Invenergy further contends that "USTR [] violated several safeguard statutory procedures, including those restricting its authority to 'modify' any safeguard measure." *Id.* (citing 19 U.S.C. §§ 2253(g), 2254(a)–(b)). Invenergy argues that the statutory language "mandates that no such safeguard action may be 'reduced, modified, or terminated' unless the President first receives the [ITC's] report issued as part of its statutory 'mid-term' review." *Id.* at 27 (citing 19 U.S.C. § 2254(a)–(b)).

1. USTR Is an Agency Covered by the APA.

To prove a likelihood of success on its claim that USTR violated the APA, Invenergy must first establish that USTR is in fact an agency bound by the APA here. Invenergy contends that USTR meets the definition of agency set forth in the APA: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." Invenergy's Mot. for PI at 17 (quoting 5 U.S.C. § 701(a)(1)). *See also* SEIA's Resp. to Invenergy's Mot. for PI at 7. Invenergy cites, moreover, the Federal Register's description of USTR, which states that "[t]he Trade Act of 1974 . . . established [USTR] as an agency of the Executive Office of the President charged with administering the trade agreements program." *In* venergy's Mot. for PI at 17 (quoting *Trade Representative, Office of United States*, Federal Register, https://www.federalregister.gov/agencies/trade-representative-office-of-united-states (last visited Dec. 4, 2019)). Invenergy also notes that USTR refers to itself as an agency on its website. *Id.* (citing About Us, Office of the U.S. Trade Representative, https://ustr.gov/about-us (last visited Dec. 4, 2019) ("USTR Website") (stating that USTR "is an agency of more than 200 committed professionals with decades of specialized experience in trade issues and regions of the world.")). Invenergy, moreover, contends that the court has recognized USTR as an agency subject to the APA. *Id.* (citing *Tembec, Inc. v. United States*, 30 CIT 958, 959, 1002, 441 F. Supp. 2d 1302, 1306, 1343 (2006)).

The Government disputes Invenergy's contention that USTR is an agency bound by APA requirements. The Government instead argues that "because the USTR is acting pursuant to the President's delegation of authority when administering exclusions to the [S]ection 201 safeguard measure, the USTR is not acting as an agency for APA purposes." Def.'s Supp. Resp. to Invenergy's Mot. for PI at 2 (citing *Gilda*, 446 F.3d 1271). The Government then argues that because the President is not bound by the APA, USTR is not bound. *Id.* (citing *Franklin v. Massachusetts* 505 U.S. 788, 800–01 (1992), *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (*en banc*) (per curiam)).

The court concludes that, with respect to the APA claim under review, USTR constitutes an agency. USTR defines itself as a government agency. USTR Website, *supra*. *See also Organization*, Office of the U.S. Trade Representative, https://ustr.gov/about-us/organization (last visited Dec. 4, 2019). The Federal Register, moreover, includes in USTR's description that it was created as an "agency." *Trade Representative, Office of United States*, Federal Register, *supra*. The Trade Act of 1974 itself describes USTR's "interagency" role, as well as how

it should work with "other Federal agencies." 19 U.S.C. § 2171. The plain language of the APA also makes clear that it applies to "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 701(b)(1). The Trade Act of 1974 repeatedly refers to the "authority" given to USTR. 19 U.S.C. § 2171. Even Defendant-Intervenor Q Cells describes USTR as an administrative agency. Q Cells' Supp. Resp. to Invenergy's Mot. for PI at 9 (noting that "*[a]dministrative agencies* possess inherent authority to reconsider their decisions . . . [and] [t]here is nothing in the statute that clearly deprives the USTR of that default authority.") (emphasis added) (citations omitted)).

The court has also previously held that it has jurisdiction over a plaintiff's APA claims against USTR challenging its implementation of an ITC affirmative determination of threat of injury from imports. *Tembec*, 441 F. Supp. 2d at 1318. There, the court held that "this case fundamentally concerns the authority of the USTR under section 129(a)—a question of domestic administrative and trade law that lies within this Court's subject matter jurisdiction." *Tembec*, 441 F. Supp. 2d at 1326. Safeguard measures under Section 201, moreover, are intended to protect domestic industry from injury or threat of injury from increased imports. *See* 19 U.S.C. §§ 2251–54.

The Government's contention that USTR is exempt from APA requirements because the President delegated to USTR the authority to implement exclusions is unavailing. The Government states that it is "well established that the President is not an 'agency' within the meaning of the APA." Def.'s Supp. Resp. to Invenergy's Mot. for PI at 2 (citing *Franklin v. Massachusetts*, 505 U.S. at 800-01; *Motion Sys.*, 437 F.3d at 1359). The court agrees with the Government that the President is not bound by the APA. The facts before the court, however, require no such finding for Invenergy to establish that the APA applies to USTR. Here, it is undisputed that Section 201 gave the President the authority to implement the safeguard measure. *See* 19 U.S.C. §§ 2253. Pursuant to this authority, the President issued the *Presidential Proclamation*, which delegated authority to USTR to design and implement a process for requests for exclusions. Unlike the process for implementing the safeguard duties, which required final action by the President, the President fully delegated authority of the exclusion process to USTR. *See Presidential Proclamation* (providing that "the USTR shall publish . . . procedures for requests for exclusion [and] [i]f the USTR determines, after consultation with the Secretaries of Commerce and Energy, that a particular product should be excluded, the USTR is authorized . . . to modify the [Har-

monized Tariff Schedule of the United States ("HTSUS")] provisions . . . to exclude such particular product. . ."). USTR then issued its own procedures, *Exclusion Procedures*, excluded the bifacial solar panels at issue here from safeguard duties, *Exclusion*, and issued the *Withdrawal*. USTR's actions thus eliminated and then attempted to reinstate (blocked by this court's TRO) safeguard duties, without any additional action required by the President or Congress.

The cases cited by the Government are inapposite because, unlike here, they do not involve final agency action. In *Franklin*, the Supreme Court held that the APA did not apply because the statutory scheme required that the President, not the Secretary of Commerce, take the final action by submitting a statement to Congress. 505 U.S. at 800–01. In *Motion Systems*, moreover, the Federal Circuit made clear that while the President's actions could not be challenged under the APA, the "Trade Representative's actions cannot be challenged because they were *not final*," 437 F.3d at 1362 (emphasis added), thus suggesting that, by contrast, a final action by USTR could be challenged under the APA. In neither case did the courts suggest the APA would not apply where "an authority of the Government," 5 U.S.C. § 701(b)(1) other than the President took final action, and the Government has not argued that USTR's *Exclusion* and subsequent *Withdrawal* were not final. The court is thus unpersuaded by the Government's argument and concludes that USTR is, for the purposes of the *Exclusion* and the *Withdrawal*, an agency bound by the requirements of the APA.

2. The Exclusion Was a Rulemaking, Not an Adjudication, and the Withdrawal Is Thus Also a Rulemaking.

The parties next dispute whether USTR conducted a rulemaking or an adjudication. The APA provides that a "rule":

> . . . means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . .

5 U.S.C. § 551(4). "Rulemaking," moreover, "means agency process for formulating, amending, or *repealing* a rule." 5 U.S.C. § 551(5) (emphasis added).

Invenergy contends that USTR's *Withdrawal* constitutes a rule subject to notice-and-comment requirements under the APA. Invenergy's Mot. for PI at 18. *See also* SEIA's Resp. to Invenergy's Mot. for PI at 7. Invenergy argues that the *Withdrawal* falls within the APA's definition of a rule and notes that the APA provides that rescinding a prior rule is rulemaking. Invenergy's Mot. for PI at 17–18, 21 (citing 5 U.S.C. § 706; 5 U.S.C. § 551(4)-(5); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015)). Citing to *International Custom Products, Inc. v. United States*, 32 CIT 302, 312, 549 F. Supp. 2d 1384, 1395–96 (2008), which discusses the difference between rulemaking and adjudication,[9] Invenergy notes that adjudication "involves the application of regulatory requirements to not only specific products, but to specific parties." Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 7. The *Withdrawal*, Invenergy asserts, does not apply to a specific party, but instead applies broadly and prospectively. *Id.* Invenergy warns that "[i]f an agency could avoid APA requirements by simply relabeling its action as an 'adjudication' or 'interpretation,' that would render the APA dead letter." *Id.*

SEIA, likewise, contends that USTR undertook rulemaking, not an adjudication. In addition to Invenergy's arguments, SEIA also notes that the "[E]xclusion prospectively changed the applicable tariff rate for all bifacial solar modules and was effectuated through modification to the notes of the HTSUS resulting in a change of classification for the imported modules." SEIA's Resp. to Invenergy's Mot. for PI at 8 (citing *Exclusion*). SEIA notes that there were no determinations regarding individual parties and no retroactive decisions for either the exclusions or *Withdrawal*. *Id.* (citing *Exclusion Procedures*). SEIA also highlights the fact that USTR opened the docket on the "Federal eRulemaking Portal" for the first and second round of exclusions and the *Withdrawal*, where it had a choice between a rulemaking and non-rulemaking docket on regulations.gov. *Id.*

The Government disputes Invenergy's characterization of the *Withdrawal* as a rule and instead states that it was an informal adjudication. The Government asserted that, "USTR's determination that a specific product is ineligible for an exclusion is not 'rulemaking' for

[9] "Rulemaking is defined as the 'agency process for formulating, amending, or repealing a rule,' and a rule is further defined as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . .'" *Int'l Custom Prod.*, 549 F. Supp. 2d at 1395 (quoting 5 U.S.C. § 551(4)–(5)). "The term 'rulemaking' is used in contrast to an 'adjudication,' to which section 553 does not apply. 'Two principle characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases . . . . Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals . . . . Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.'" Id. at 1395–96 (quoting *Yesler Terrace Comm'y Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)).

purposes of 5 U.S.C. § 553's notice and comment requirements" because "the 'fact that an order rendered in adjudication may affect agency policy and have general prospective application does not make it rulemaking subject to APA section 553 notice and comment.'" Def.'s Resp. to Invenergy's Mot. for PI at 22 (quoting *POM Wonderful, LLC v. FTC*, 777 F.3d 479, 497 (D.C. Cir. 2015) (internal citations omitted)). The *Withdrawal*, the Government argued, "expressed no new rule of law, but only applied the facts to [S]ection 201 and the President's guidance to determine that bifacial solar products not be excluded from [S]ection 201 safeguards." *Id.* Furthermore, the Government responds to SEIA's argument that the amendment of the HTSUS through the *Exclusion* and the *Withdrawal* indicates that those are rulemakings by stating that "modifications to the HTSUS are routinely made without notice and comment" and to hold these modifications as rulemakings "would require the President to employ APA notice and comment rulemaking procedures for every modification to the HTSUS." Def.'s Supp. Resp. to Inventory's Mot. for PI at 1–2.

Q Cells, likewise, rejects Invenergy's argument that the *Exclusion* or the *Withdrawal* were rulemaking and argues the *Withdrawal* was an informal adjudication.[10] According to Q Cells, Invenergy "'fails to recognize the time-honored distinction between rulemaking and adjudication, the former based on legislative facts and the latter based on adjudicative facts.'" Q Cells' Resp. to Invenergy's Mot. for PI at 12 (quoting *Heartland Reg'l Med. Ctr. v. Leavitt*, 511 F. Supp. 2d 46, 52 (D.D.C. 2007)). The *Withdrawal*, Q Cells contends, did not "promulgat[e] policy-based standards of general import," did not fill any "statutory gaps," excluded "particular products," and acted within its discretion in choosing "adjudication for this effort." *Id.* at 13-14 (citations omitted).

The court concludes that the *Exclusion* constituted agency rulemaking. Repealing the rule, therefore, also requires rulemaking subject to APA notice and comment. *Perez*, 135 S. Ct. at 1206. The President delegated the authority to USTR to decide its procedures for the implementation of exclusions. *Presidential Proclamation*. USTR then published its procedures in the Federal Register, inviting "interested persons to submit comments identifying a particular product for exclusion from the safeguard measure and providing

[10] Q Cells contends that, "[t]o the extent the APA applies at all here, the Withdrawal constituted an *informal* adjudication . . . ." Q Cells' Resp. to Invenergy's Mot. for PI at 12. Because the statute did not mandate a hearing, Q Cells argues that USTR could "define its own procedures for conducting an informal adjudication." *Id.* (citing *PBGC v. LTV Corp.*, 496 U.S. 633, 655i56 (1990)). As the court addresses, however, USTR did adopt its own procedures — rulemaking procedures — and thus informal adjudication cannot be used to excuse USTR's failure to follow the APA process it adopted.

reasons why the product should be excluded." *Exclusion Procedures* at 6671. USTR provided a deadline for the exclusion requests and a deadline for comments on those requests. *Id.* at 6,672. In other words, USTR outlined the process for its notice-and-comment rulemaking. USTR, moreover, opened a docket on the "Federal eRulemaking Portal," choosing a rulemaking docket over a non-rulemaking docket. Before the court is not whether USTR could have, in the first instance, adopted a procedure for adjudication of the exclusions, as Q Cells contends. *See* Q Cells' Resp. to Invenergy's Mot. for PI at 14 (quoting *POM Wonderful*, 777 F.3d at 497 ("[T]he choice between rulemaking and adjudication lies in the first instance within the agency's discretion.")). Regardless of whether USTR could have set forth procedures for adjudication in the first instance, it did not. Instead, it made clear in the *Exclusion Procedures* its adoption of notice-and-comment rulemaking.

Additionally, that the *Exclusion* and *Withdrawal* required an accompanying modification to the HTSUS is indicative of the determination that these actions are rulemakings. *See Int'l Custom Prod.*, 549 F. Supp. 2d at 1395-96 ("Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied." (citations omitted)). The modification of the HTSUS underlines the prospective nature of these decisions and has the force of law. *See* 5 U.S.C. § 551(4) (defining a rule as having "future effect" and "prescrib[ing] the law"). Unlike specifically and retroactively applicable adjudications, here, the *Exclusion* and *Withdrawal* constitute broadly applicable, prospective changes to the tariff schedule that impact all future imports of solar products by any and all importers. *See Int'l Custom Prod.*, 549 F. Supp. 2d at 1395-96. Finding that USTR's modification of the HTSUS was undertaken through noticeand-comment rulemaking, moreover, does not mean that all future modification of the HTSUS will require notice-and-comment rulemaking, as the Government contends. Def.'s Supp. Resp. to Invenergy's Mot. for PI at 2. As noted above, USTR must follow notice-and-comment rulemaking because the President gave USTR the discretion to design the *Exclusion* process, and USTR chose prospective, generally applicable, notice-and-comment rulemaking. *See Pom Wonderful*, 777 F.3d at 497.

The product-specific nature of the *Exclusion* and subsequent *Withdrawal*, moreover, did not make USTR's actions adjudicatory, as Q Cells contends. *See* Q Cells' Resp. to Invenergy's Mot. for PI at 13. Underlining that the *Exclusion* was not specific to one party, USTR instructed parties requesting an exclusion not to "identify the product at issue in terms of the identity of the producer, importer, or con-

sumer." *Exclusion Procedures* at 6,671. Thus, the process was not designed "to resolve disputes among specific individuals in specific cases," as an adjudication would. *Int'l Custom Prod.*, 549 F. Supp. 2d at 1395. Instead, it was designed to apply to particular products, regardless of the producer, importer, or consumer.

The court, moreover, is unpersuaded by the Government's efforts to analogize the case before it to the adjudication in *POM Wonderful*, 777 F.3d 478. *See* Def.'s Resp. to Invenergy's Mot. for PI at 22. In *POM Wonderful*, the Federal Trade Commission ("FTC") filed an administrative complaint alleging "false, misleading, and unsubstantiated representations in violation of the Federal Trade Commission Act." 777 F.3d at 484. The FTC then conducted administrative proceedings, including an administrative trial at which an administrative law judge made findings of fact. *Id.* at 488. *POM Wonderful* bears little resemblance to the facts before us. The Government has made no showing of administrative proceedings below, much less of one involving an administrative trial and administrative law judge. Here, by contrast, based on the exclusion requests and comments, USTR granted the *Exclusion* for bifacial solar panels, without indicating how, if at all, it could withdraw the *Exclusion*. *Exclusion* at 27,684–85. Because USTR implemented the *Exclusion* through notice-and-comment rulemaking, the APA requires that USTR "use the same procedures when [it] amend[s] or repeal[s] a rule as [it] used to issue the rule in the first instance." *Perez*, 135 S. Ct. at 1206 (citing *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (noting that "the APA 'make[s] no distinction . . .between initial agency action and subsequent agency action undoing or revising that action'")). Thus, the process for repealing a rule made through notice-and-comment rulemaking is more notice-and-comment rulemaking. *See Hou Ching Chow v. Att'y Gen.*, 362 F. Supp. 1288, 1292 (D.D.C. 1973); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8–9 (D.C. Cir. 2017). Because the *Exclusion* process constituted rulemaking, so too must the *Withdrawal*. In sum, the court concludes, based on the procedures set forth in USTR's notice in the Federal Register, the prospective and broadly applicable nature of the *Exclusion*, and the lack of evidence of an adjudication below, that the *Withdrawal* constituted agency rulemaking.

3. The Withdrawal Likely Violated APA Rulemaking Requirements.

Invenergy next contends that the *Withdrawal* violated the APA's rulemaking requirements because the *Withdrawal* "was taken with no advance notice or an opportunity for affected parties to comment." Invenergy's Mot. for PI at 17. As Invenergy argues, "[t]he APA re-

quires an agency to give advance notice of a proposed rulemaking and an opportunity for all 'interested persons' to comment. But USTR did not publish advance notice of the *Withdrawal* in the Federal Register or provide any opportunity for affected parties to comment before it was made final." *Id.* at 20 (citing 5 U.S.C. §§ 553(b)-(c). SEIA, likewise, argues that because "[t]he APA requires notices-and-comment procedures to be followed . . . when [rules] are amended or repealed . . . USTR's failure to follow notice-and-comment rulemaking to withdraw the bifacial exclusion was therefore unlawful." SEIA's Resp. to Invenergy's Mot. for PI at 7. Invenergy and SEIA both cite *Association of Private Sector Colleges and Universities v. Duncan* 681 F.3d 427, 462–63 (D.C. Cir. 2012), for the proposition that an "agency violates the APA when it does not give notice of a regulation, thus depriving the public of the chance to comment on those provisions." Invenergy's Mot. for PI at 20; SEIA's Resp. to Invenergy's Mot. for PI at 9. Invenergy underlines the importance of notice-and-comment rulemaking in our regulatory system, as it "ensure[s] that agency regulations are tested via exposure to diverse public comment," "ensure[s] fairness to affected parties," and "give[s] affected parties an opportunity to develop evidence . . . to support their objections to the rule and thereby enhance judicial review." Invenergy's Mot. for PI at 20 (quoting *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)).

The Government, for its part, focuses its argument on its position that APA rulemaking requirements do not apply to USTR's *Withdrawal*. Def.'s Resp. to Invenergy's Mot. for PI at 21–22; Def.'s Supp. Resp. to Invenergy's Mot. for PI at 2. Q Cells makes a different argument. It contends that SEIA, of which Invenergy is a member, "did not treat the written notice-and-comment period as the exclusive opportunity to present its views to USTR regarding the bifacial exclusion request, but rather as one step in an extended process with multiple, meaningful opportunity to present its views." Q Cells' Resp. to Invenergy's PI at 17. Q Cells quotes SEIA's statement that it "relentlessly lobbied the Administration to grant additional exemptions, with a particular focus on bifacial modules," and notes additional letters from SEIA to USTR. *Id.* at 17–18.

As established above, the *Withdrawal* constituted agency rulemaking. The APA sets forth agency rulemaking requirements in 5 U.S.C. § 553. It requires notice of proposed rulemaking in the Federal Register and the opportunity for interested persons "to participate in the rulemaking through submission of written data, views, or arguments

with or without opportunity for oral presentation." 5 U.S.C. 553(c).[11] At this preliminary stage in the litigation, the Government does not refute Invenergy's contention that USTR did not engage in notice-and-comment procedures to implement the *Withdrawal*, and as the court addressed above, USTR was required to follow such procedures. Q Cells argument, moreover, that SEIA's engagement in lobbying after USTR implemented the *Exclusion* undercuts the need for notice-and-comment rulemaking is not a legal argument, and Q Cells provides no legal authority for this contention. *See* Hearing; Q Cells' Resp. to Invenergy's Mot. for PI at 17–18. The purpose of the APA is, in part, "to ensure that agency regulations are tested via exposure to *diverse* public comment." *Envtl. Integrity Project*, 425 F.3d 992, 996 (D.C. Cir. 2005) (emphasis added) (citations omitted). Whether some or all the parties in this matter also communicated outside of a formal process with USTR to share their opinions on the *Exclusion* and the *Withdrawal* has no bearing on whether USTR was required to follow notice-and-comment rulemaking procedures. The court concludes that, at this preliminary stage, USTR was so required, and Invenergy has shown that USTR likely did not follow such procedures.

4. The Withdrawal Was Likely Arbitrary and Capricious.

In addition to its argument that USTR violated APA rulemaking procedure in implementing the *Withdrawal*, Invenergy also contends that the *Withdrawal* was arbitrary and capricious in violation of the APA's substantive requirements: the *Withdrawal* lacks "any supporting reasoning or rationale" and thus should be "'[held] unlawful and set aside.'" Invenergy's Mot. for PI at 21 (quoting 5 U.S.C. § 706(2)(a)). Invenergy characterizes USTR's explanation for the *Withdrawal* as conclusory, quoting USTR's *Withdrawal* language that "'maintaining the exclusion will undermine the objectives of the safeguard measure.'" *Id.* at 22 (quoting *Withdrawal*). This language, Invenergy asserts, does not show "reasoned decision-making, which requires the agencies to show the connection between 'facts found' and the 'choice made,' and 'articulate a satisfactory explanation for its action.'" *Id.* (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43).

Q Cells rejects Invenergy's contention that the *Withdrawal* substantively violated the APA because such position "ignore[s] the spe-

[11] "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d). Plaintiffs initially challenged USTR's failure to comply with the 30-day notice requirement. Invenergy's Compl. ¶ 58. The Government then moved the court for leave to defer the implementation date of the *Withdrawal* to 30 days after the publication of the rule. Def.'s Mot. to Defer Implementation. The court granted the motion, thus mooting this issue.

cial, limited standard of review in global safeguard cases." Q Cells' Resp. to Invenergy's Mot. for PI at 10. Given that the President imposed the global safeguard measure pursuant to Section 201, Q Cells claims that the court's review is "highly circumscribed," *id.* at 11, and limited to "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority," *id.* (quoting *Corus*, 217 F. Supp. 2d at 1352). Q Cells notes that the Federal Circuit has found its limited review of the President's actions was "'equally applicable to the [ITC] in its 'escape clause' functioning.'" *Id.* (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 90 (Fed. Cir. 1985)). The Government does not address Invenergy's arbitrary and capricious argument, instead maintaining that the APA does not apply.

The APA requires the court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). As the November 13, 2019 PI hearing and the *Withdrawal* itself make clear, the facts on which USTR relied to implement the *Withdrawal* remain unknown to all but USTR; they are neither publicly available nor available to this court. USTR has not explained the facts on which it relied or the reasoning behind its decision. *See FCC v. Fox*, 556 U.S. at 515. Nor did USTR "'display awareness that it is changing position and show that there are good reasons for the new policy.'" Invenergy's Mot. for PI at 23 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). *Corus*, moreover, prescribed limited judicial review of the ITC's decision where Section 201 granted the ITC and the President substantial discretion. 217 F. Supp. 2d at 1352. *Corus* does not stand for the proposition that USTR, with delegated authority from the President, can choose to take a final action through reasoned decision making under the APA but then divest itself of APA obligations to undo the action. *See id.* The court thus concludes that Invenergy has a fair likelihood of success on the merits of its claim that the *Withdrawal* was arbitrary and capricious.[12]

5. The Withdrawal Does Not Fall Within the APA's Foreign Affairs Exception.

Q Cells argues in the alternative that "[i]f the [c]ourt disagrees . . . that the Withdrawal was an adjudicatory action . . . and . . . that the Withdrawal is subject to review only under the limited conditions . .

[12] The court offers no view as to whether, ultimately, with appropriate notice and comment, USTR could implement the *Withdrawal* through "reasoned decisionmaking." *See Motor Vehicle Mfrs.*, 463 U.S. at 52.

. in *Corus*, . . . Invenergy's claims nonetheless fail because USTR's action qualifies under the 'foreign affairs function' exemption" of 5 U.S.C. § 553(a)(1). Q Cells' Resp. to Invenergy's PI at 20. Q Cells contends that the global safeguard actions are of a "highly discretionary kind — involving the President and foreign affairs." *Id.* (quoting *Maple Leaf*, 762 F.2d at 89). Def.'s Resp. to Invenergy's Mot. for PI at 21–22. According to Q Cells, the *Exclusion* and *Withdrawal* "clearly fall[] within the scope of the foreign affairs exemption," without citing caselaw to support this proposition. *Id.* at 21. The Government makes no similar argument. Invenergy counters that Q Cells is "not the appropriate party to assert that an action falls within the United States' 'foreign affairs function,'" but that regardless, the *Withdrawal* does not fall within the APA's exception. Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 8. Invenergy notes that "agency actions imposing or changing tariffs and duties are subject to judicial challenge, including under the APA," and distinguishes cases cited by Q Cells as agency actions taken pursuant to treaty obligations. *Id.* (comparing *Canadian Lumber*, 517 F.3d 1319 with *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239 (Fed. Cir. 1985)).

A rulemaking is exempt from the procedural requirements of the APA where it "involved . . . a . . . foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The foreign affairs exception, like all similar exceptions to the APA's notice-and-comment requirements, is quite narrow. *See also New Jersey Dept. of Envtl. Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010) ("We have stated that exceptions to [section] 553 should be narrowly construed and only reluctantly countenanced." (citations omitted)). The legislative history provides:

> The phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any agency operation merely because it, is exercised in whole or part beyond the borders of the United States but only those "affairs" which so affect the relations of the United States with other governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.

H.R. Rep. No. 79–1980, at 257 (1946). The foreign affairs function "the exception applies 'only 'to the extent' that the excepted subject matter is clearly and directly involved' in a 'foreign affairs function.'"

Mast Industries v. Regan, 8 CIT 214, 231, 596 F. Supp. 1567, 1582 (1984) (citing to H.R. Rep. No. 79–1980, at 275). "For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (citation omitted). "The courts in analyzing the section 553 exemptions, have continually stated that any claims of exemption from rulemaking procedures will be construed narrowly and granted reluctantly." *Mast*, 596 F. Supp. At 1582 (citations omitted). As the *Mast* court stated, "[t]he exception cannot apply to functions merely because they have impact beyond the borders of the United States." *Id.* at 1581 ("In our complex world there are very few purely internal affairs" (citing *Briehl v. Dulles*, 248 F.2d 561, 591 (D.C. Cir. 1957))).

Unlike previous uses of the foreign affairs function exception, here, the Government did not explicitly rely on this exception nor does this rulemaking involve diplomatic functions, military functions, or other sensitive areas of foreign policy. Instead, the *Exclusion* and *Withdrawal* constitute a routine change to the tariff rates imposed on imported goods by the United States as reflected in the HTSUS. The Government, moreover, has not raised this argument, and the cases cited by Q Cells are inapposite because they involve agency action pursuant to treaty obligations and not agency action pursuant to a U.S. statutory authority. *See, e.g., Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1239.

III. Invenergy Is Likely to Suffer Irreparable Harm Without a PI.

The court now considers whether Plaintiffs are likely to suffer irreparable harm in the absence of a PI enjoining the Government from implementing the *Withdrawal*. A harm is irreparable when "no damages payment, however great, could address [it.]" *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 992, 930 (Fed. Cir. 2012). The standing inquiry focuses on whether the court must act now to prevent a loss that cannot later be remedied. *See, e.g.*, *CPC Int'l Inc. v. United States*, 19 CIT 978, 979, 896 F.Supp. 1240, 1242–44 (1995) (irreparable harm includes "costs, expenditures, business disruption or other financial losses" that plaintiff has "no legal redress to recover in court"). To determine whether an injury is irreparable, the court analyzes the magnitude and immediacy of the injury, and the inadequacy of future relief. *Queen's Flowers de Colombia v. United States*, 20 CIT 1122, 1125, 947 F.Supp. 503 (1996). Harm such as "loss of goodwill, damage to reputation, and loss of business opportunities are

all valid grounds for finding irreparable harm." *Celsis In Vitro*, 664 F.3d at 930.

Furthermore, unlike injury for constitutional standing purposes, a procedural injury can itself constitute irreparable harm. A procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court. Permitting "the submission of views after the effective date of a regulation is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." *Am. Fed'n of Gov't Emp v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (internal citation omitted); *see also New Jersey Dept. of Envtl. Protection*, 626 F.2d at 1049 ("Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas."). Once the regulatory change "has begun operation as scheduled . . . [the Agency] is far less likely to be receptive to comments." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 18 (D.D.C. 2009). A failure to comply with APA procedural requirements therefore itself causes irreparable harm because "the damage done by [the Agency's] violation of the APA cannot be fully cured by later remedial action." *Id.*

Invenergy argues that it has suffered and faces irreparable harm from USTR's procedural violation of the APA in implementing the *Withdrawal* without the notice-and-comment procedures afforded in issuing the initial *Exclusion*. Invenergy's Mot. for PI at 30–31. As discussed more extensively above in the context of injury for standing purposes, Invenergy has alleged economic harm in the increased price of bifacial panels because of the *Withdrawal*, which it also claims causes irreparable harm. *Id.* In addition, Invenergy alleges business and reputational harms that are irreparable. Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 4. "If the Withdrawal is not enjoined, Invenergy will suffer irreparable harm in the form of unrecoverable financial losses, lost business opportunities, and other business disruption." Invenergy's Mot. for PI at 32 (citing Fletcher Aff. ¶¶ 8–40; Supp. Fletcher Aff., ¶¶ 3–24). "USTRs [sic] unlawful action has already caused and will continue to cause irreparable harm to Invenergy's outstanding brand, reputation and good will." Invenergy's Mot. for PI at 35 (citing Fletcher Supp. Aff., ¶¶ 16–24).

The Government argues that Invenergy's harm is not specific. Def.'s Resp. to Invenergy's Mot. for PI at 24. The Government also claims that Invenergy's harm depend upon third parties which "amounts to

'speculation and unsupported' claims of harm that are insufficient to meet the requirement of showing immediate irreparable harm." Def.'s Resp. to Invenergy's Mot. for PI at 24. Q Cells further argues that Invenergy cannot demonstrate irreparable harm because its harm depends on voluntary relationships and business decisions with unrelated third parties. Q Cells' Supp. Resp. to Invenergy's Mot. for PI at 4–7.

Q Cells characterizes Invenergy's alleged irreparable harm as simple. Q Cells' Resp. to Invenergy's Mot. for PI at 27. The court concludes that Invenergy's alleged harm is indeed simple, but not for the reasons that Q Cells states. It is simple in that Invenergy has suffered a procedural harm flowing from a likely violation of the APA. This claim does not depend upon the subsequent economic harms that flow therefrom. As in *Northern Mariana Islands*, "if the [*Withdrawal*] is not enjoined prior to its effective date," Invenergy "will never have an equivalent opportunity to influence" USTR's decision as to its imposition. *See* 686 F. Supp. 2d at 18–19. Invenergy would thereby lose any opportunity for meaningful judicial review. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) (finding "the abrogation of effective judicial review" to constitute "sufficient irreparable injury" justifying preliminary injunctive relief). The Government does not appear to dispute this reality. *See* Def.'s Resp. to Invenergy's Mot. for TRO at 17–20 (only addressing some of Invenergy's economic, but not procedural, harms). If the court were to issue a decision on the merits ordering USTR to undertake a notice and comment process for reconsideration of the *Exclusion* without first issuing a PI, the *Withdrawal* would become the new status quo and USTR may be less likely to consider other views. As Invenergy explains, "[a]t the same time, Invenergy and other affected industry players will have to adjust their business plans and behavior accordingly to reflect the imposition of significant additional duties, resulting in lost business opportunities, cancelled or significantly reduce projects, and a reduction in available clean solar energy." Invenergy's Mot. for PI at 31.

Therefore, the court concludes that this likely procedural harm is irreparable, and thus merits preliminary injunctive relief because they cannot be remedied after the *Withdrawal* goes into effect. The alleged violation of the APA should be further enjoined to avoid the business uncertainty that flows from such a procedural violation. The *Withdrawal* causes irreparable harm by eliminating the business certainty required by the solar industry to plan and develop future projects. As Plaintiffs explain, "Invenergy reasonably relied on USTR's Exclusion, which was the product of a rulemaking that took over

a year and contained no indication that it could be reversed, when conducting its business." Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 5. As Invenergy explains, it "will thus not qualify for the Investment Tax Credit ("ITC") safe harbor [. . .]. Invenergy's inability to qualify for that 30% ITC tax credit will severely disadvantage these projects to the points where some likely will not be developed as planned (e.g., their size and other elements would have to change) and others might not be developed at all." Invenergy's Mot. for PI at 37. A PI is therefore needed to maintain the status quo and avoid the losses in connection with a lack of business certainty that may cause irreparable harm. *See Am. Signature, Inc.*, 598 F.3d at 828–29. In short, Article III injury is demonstrated through the likely increase of the price of bifacial panels, and therefore Plaintiffs' costs in purchasing and producing energy with bifacial panels, should the *Withdrawal* go into effect. SEIA's Resp. to Invenergy's Mot. for PI at 4, 10; Invenergy, Clearway, and AES DE's Supp. Resp. to Mot. for PI at 1. Distinctly, Invenergy's business, reputational, and procedural harms are irreparable because they cannot be remedied if the *Withdrawal* is implemented. Injunctive relief is thus warranted.

IV. The Balance of Hardships Weighs in Favor of Plaintiffs.

The court "must balance the competing claims of injury and consider the effect" of granting Invenergy's motion for a PI. *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987)). *See also Nat. Res. Def. Council, Inc.* 331 F. Supp. 3d at 1369. Invenergy contends that it will suffer irreparable harm absent a PI, while "there is little to no prejudice to the Government or any other interested parties in delaying the onset of these increased tariffs" pending adjudication on the merits. Invenergy's Mot. for PI at 38. Invenergy further argues that (1) the Government's contention that it will be harmed by lost revenue does not comport with the intention of Section 201 tariffs, "to alter trading partners and address specific trade practices," and not to raise revenue; (2) CBP can extend liquidation and collect lost revenue should the Government prevail; and (3) the Government has made no showing that the domestic industry would face existential harm without the *Withdrawal*. *Id.* at 39–40. *See also* SEIA's Resp. to Invenergy's Mot. for PI at 11–12. The Government instead contends that its hardship, "in the form of administrative burden and potential lost revenue," outweighs Invenergy's harm. Def.'s Resp. to Invenergy's Mot. for PI at 27–28. The Government argues that "CBP has no reliable or ready way to track

the subject entries during the period covered by the injunction," and the domestic industry faces "existential harm," unlike the "speculative" harm alleged by Invenergy. *Id.* At 28. Q Cells posits that without the implementation of the *Withdrawal*, the "bifacial loophole poses a devastating threat to the U.S. industry" and characterizes Invenergy's assertions to the contrary as "misleading." Q Cells' Resp. to Invenergy's Mot. for PI at 37–40. Q Cells further argues that "fairness dictates that the exclusion or [should] be withdrawn" and that the court should weigh heavily in favor of domestic producers relying on Section 201 relief. *Id.* at 44–45.

The court determines that the balance of hardships weighs in favor of granting a PI to preserve the status quo. The court does not doubt that the imposition of the PI will increase the administrative burden on the Government. The APA mandates such a burden. The PI, moreover, may incur revenue losses for the Government, at least in the short term, and may negatively affect the domestic producers of bifacial solar panels. As addressed under the public interest prong below, however, whether bifacial solar panels should be excluded from Section 201 safeguard duties is not a question for this court. Instead, before the court is a question of process, and the harms alleged are a direct result of the failure to follow process. "Had the agency released the [*Withdrawal* rule] earlier in the year and provided the public with notice and an opportunity for comment, the current quandary never would have arisen. [USTR] should not now expect to excuse its violation of the APA by pointing to the problems created by its own delay." *See N. Mariana Islands*, 686 F. Supp. 2d at 21. *See also Washington v. United States Dep't of State*, 318 F. Supp. 3d 1247, 1263 (W.D. Wash. 2018). USTR undertook rulemaking pursuant to the APA in implementing the *Exclusion*. It then attempted to withdraw the *Exclusion* for bifacial solar panels, without following rulemaking procedures. The Plaintiffs acted in reliance on USTR's rules. Any harms suffered by the Government, and domestic producers, are a direct result of USTR's failure to follow the APA. The balance of equities, therefore, tips decidedly in favor of the Plaintiffs.

V. The PI Is in the Public Interest.

Lastly, the court considers whether granting a PI would be in the public interest. *Silfab Solar*, 892 F.3d at 1345 (citing *Winter*, 555 U.S. at 20). *See also Nat. Res. Def. Council, Inc.*, 331 F. Supp. 3d at 1371. The parties dispute, at considerable length, the effect that the *Withdrawal* would have on the future of the solar energy in the United States. Hearing; Invenergy's Mot. for PI at 40–42; SEIA's Resp. to Inventory's Mot. for PI at 12; Def.'s Resp. to Invenergy's Mot. for PI at

12; Def.'s Resp. to Invenergy's Mot. for PI at 29; Q Cells' Resp. to Invenergy's Mot. for PI at 46. Invenergy also argues that "the public interest favors faithful execution of the laws, and the provision of the rights granted by Congress in the APA to regulated parties," and that "the public interest is not negatively affected when a preliminary injunction is entered for the purpose of preserving the status quo." Invenergy's Mot. for PI at 40, 42 (citing *Assoc. Dry Goods Corp. v. United States*, 515 F. Supp. 775, 780í81 (1981)). SEIA, likewise, argues that the public interest is best served by preserving the status quo "until USTR follows the proper procedures and makes the determinations required by law to do so." SEIA's Resp. to Invenergy's Mot. for PI at 11–12. The Government contends that the public interest is served by "effective enforcement of section 201," a "viable [domestic] solar industry," and the avoidance of a PI that would give Plaintiffs the same advantages as a final adjudication. Def.'s Resp. to Invenergy's Mot. for PI at 29. Q Cells argues that a PI is not in the public interest because it would "overturn the policy analysis and the difficult choices performed by the President and USTR." Q Cells' Resp. to Invenergy's Mot. for PI at 47.

The parties all acknowledge the importance of the solar energy industry to the public interest, but they dispute how best to achieve this policy goal. Hearing. The court agrees, as Q Cells contends, that this requires "policy analysis" and "difficult choices," both of which USTR undertook in implementing the *Exclusion*. *See* Q Cells' Resp. to Invenergy's Mot. for PI at 47. Whether the best means to protect and advance the solar industry in the United States, however, is through the continuation of the *Exclusion* or the resumption of safeguard duties on imported bifacial solar panels through the *Withdrawal* is a policy question ill-suited for this court to decide.[13] And so, it does not.

The public interest at stake before the court is instead one of process and fidelity to the law. Congress delegated the authority to impose safeguard measures to the President. 19 U.S.C. § 2253. The President directed USTR to adopt an exclusion process. *Presidential Proclamation*. USTR then decided on and announced notice-and-comment rulemaking procedures, accepted exclusion requests and comments, and announced the *Exclusion*, pursuant to APA rulemak-

[13] As Invenergy rightly notes, "the [c]ourt is in no position to assess the validity of, for example, [Q Cells'] hyperbolic claim that the U.S. solar panel industry will 'die on the operating table' if the [c]ourt does not sustain the Withdrawal." Invenergy, Clearway, and AES DE's Suppl. Resp. to Mot. for PI at 10. Nor can the court say Invenergy would suffer the same fate should the Withdrawal go into effect. USTR understood that the decision to implement the *Exclusion* required reasoned decision making, considering competing policy interests. A decision to withdraw the *Exclusion* requires the same.

ing requirements. Four months after implementing the *Exclusion*, USTR summarily rescinded it without notice and comment. "The public interest is served by ensuring that governmental bodies comply with the law[.]" *Am. Signature.*, 598 F.3d at 830. The public interest thus weighs in favor of the Plaintiffs, as USTR must comply with the APA.

CONCLUSION

The court grants Invenergy's motion for a PI barring the implementation.

Dated: December 5, 2019
New York, New York

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

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. and AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, U.S. CUSTOMS AND BORDER PROTECTION, and ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION MARK A. MORGAN, Defendants, and HANWHA Q CELLS USA, INC., Defendant-Intervenor.

Court No. 19–00192

Order on Plaintiffs' Motion for Preliminary Injunction

On consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Invenergy Renewables LLC's Motion for Preliminary Injunction, ECF No. 49, is **GRANTED** because Invenergy is likely to succeed on the merits, will suffer irreparable harm, and the public interest will be negatively affected if Defendants are not enjoined from making effective and enforcing the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244 (USTR Oct. 9, 2019) ("*Withdrawal*"); and it is further

ORDERED that Defendants, Office of the United States Trade Representative and the United States Trade Representative, Robert E. Lighthizer, together with its delegates, officers, agents, servants, and employees, shall be preliminarily enjoined from entering the *Withdrawal* into effect; and it is further

ORDERED that Defendants, Office of the United States Trade Representative and the United States Trade Representative, Robert E. Lighthizer, together with its delegates, officers, agents, servants, and employees, shall be preliminarily enjoined from making any modification to the Harmonized Tariff Schedule of the United States that includes or reflects the *Withdrawal*; and it is further

ORDERED that Defendants, U.S. Customs and Border Protection, its delegates, officers, agents, and employees, including Defendant Acting Commissioner Mark A. Morgan, are hereby preliminarily enjoined from enforcing or making effective the *Withdrawal* or any modifications to the Harmonized Tariff Schedule of the United States reflecting or including the *Withdrawal*; and it is further

ORDERED that, pursuant to USCIT Rule 65(c), during the pendency of the preliminary injunction, Plaintiff shall continue the bond with the court, in the amount of $1.00; and it is further

ORDERED that Defendants are so enjoined effective from the date of issuance of this order until entry of final judgment as to Plaintiffs' claims against Defendants in this case; and it is further

ORDERED that the parties shall confer and submit a proposed further schedule in this action by Friday, December 19, 2019.

SO ORDERED.

Dated: December 5, 2019
New York, New York

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