Slip Op. 20–102

JIAXING BROTHER FASTENER CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00316
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand redetermination in the fourth administrative review of the antidumping duty order on certain steel threaded rod from the People's Republic of China.]

Dated: July 22, 2020

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiffs Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Elizabeth A. Speck*, Senior Trial Counsel. Of Counsel was *W. Mitchell Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Roger B. Schagrin and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., for defendant-intervenor Vulcan Threaded Products Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Jiaxing Brother Fastener Co. v. United States*, 44 CIT __, 425 F. Supp. 3d 1338 (2020) ("*Jiaxing II*"). *See also* Final Results of Redetermination Pursuant to Court Remand Order in [*Jiaxing II*], Apr. 17, 2020, ECF No. 119 ("*Second Remand Results*"). In *Jiaxing II*, the court sustained in part and remanded in part Commerce's final determination in the fourth administrative review of the antidumping duty ("ADD") order on certain steel threaded rod ("STR") from the People's Republic of China ("PRC"). *See [STR] from the [PRC]*, 79 Fed. Reg. 71,743 (Dep't Commerce Dec. 3, 2014) (final results of [ADD] admin. review; 2012–2013) ("*Final Results*"), and accompanying Issues & Decision Memo. for the Final Results of the Fourth Admin. Review of the [ADD] Order on [STR] from the [PRC], A-570 932, (Nov.

21, 2014), ECF No. 23–2 ("Final Decision Memo."); *Certain [STR] from the [PRC]*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009) (notice of [ADD] order).

In *Jiaxing II*, the court remanded for further explanation or reconsideration Commerce's decision to apply a 10,000 kilogram weight assigned to shipping containers in the calculation of brokerage and handling ("B&H") costs. *Id.*, 44 CIT at __, 425 F. Supp. 3d at 1351–52. On remand, Commerce continues to assign a 10,000 kilogram weight to shipping containers in its B&H cost surrogate value calculation. *See Second Remand Results* at 1, 5–16. Plaintiffs Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. (collectively, "Jiaxing") challenge Commerce's remand redetermination as unsupported by substantial evidence. *See* [Pls.'] Cmts. Opp'n Second Remand Results at 1–5, May 18, 2020, ECF No. 122 ("Pls.' Br."). Defendant and Defendant-Intervenor Vulcan Threaded Products Inc. ("Vulcan") request the court to uphold the *Second Remand Results*. *See* Def.'s Resp. Cmts. Remand Redetermination at 1–2, 5–11, June 17, 2020, ECF No. 125 ("Def.'s Br."); Def.-Intervenor's Cmts. Supp. Second Remand Results at 1–4, May 21, 2020, ECF No. 124 ("Def.-Intervenor's Br."). For the following reasons, the court sustains Commerce's surrogate value calculation of B&H costs.

BACKGROUND

The court assumes familiarity with the facts of this case, as set out in the two previous opinions ordering remand, *see Jiaxing Brother Fastener Co. v. United States*, 43 CIT __, 380 F. Supp. 3d 1343, 1349–50 (2019) ("*Jiaxing I*"); *Jiaxing II*, 44 CIT at __, 425 F. Supp. 3d at 1342–44, and recounts those facts relevant to the court's review of the *Second Remand Results*. In this fourth administrative review of the ADD order on STR,[1] Commerce selected Thailand as the primary surrogate country, *see* Final Decision Memo. at 14, and used the World Bank's "Doing Business 2014: Thailand" report ("Doing Business report")[2] to calculate a surrogate value for Jiaxing's B&H costs.

[1] The fourth administrative review covers the period April 1, 2012 through March 31, 2013. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part*, 78 Fed. Reg. 33,052, 33,056 (Dep't Commerce June 3, 2013).

[2] The "Doing Business 2014: Thailand" report is one of a series of annual reports prepared by the World Bank for various countries which "measures and tracks changes in regulations affecting 11 areas in the life cycle of a business" to show "how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business when complying with relevant regulations." Surrogate Values for the Prelim. Results at Ex. 15 at 4, PD 104–05, bar codes 3202737–01–02 (May 16, 2014)("Prelim. SV Memo"). The relevant "Trading Across Borders" section employed by Commerce to prepare Jiaxing's surrogate B&H costs measures the "cost (excluding tariffs and the time and cost for sea transport) associated

Id. at 22–26. Relevant here, Commerce generated B&H costs on a per-kilogram basis by assigning each shipping container of Jiaxing's STR a weight of 10,000 kilograms. *Id.* at 27–28.

In *Jiaxing I*, the court ordered Commerce to reconsider or further explain its decision to calculate B&H with an assumption that each 20-foot shipping container weighs 10,000 kilograms. *See id.*, 44 CIT at __, 380 F. Supp. 3d at 1367–68. The court noted that the Doing Business report provided B&H costs on a "per container" basis yet did not expressly state that the B&H costs are dependent on a specific 20-foot shipping container weight. *Id.*, 44 CIT at __, 380 F. Supp. 3d at 1366–67. The court determined that Commerce failed to consider record evidence that indicated that B&H costs—such as costs of document preparation, customs clearance and technical control, and ports and terminal handling—are not affected by the weight of a particular shipping container. *See id.* On remand, Commerce continued to use a 10,000-kilogram denominator in the calculation of the B&H surrogate value, because surveyed respondents of the Doing Business report were asked to provide B&H costs based upon a 20-foot shipping container weighing 10,000 kilograms. *See* Final Results of Redetermination Pursuant to Court Remand [*Jiaxing I*] at 5–7, Aug. 27, 2019, ECF No. 105 ("*First Remand Results*").

In *Jiaxing II*, the court again ordered Commerce to reconsider or further explain its decision to apply a 10,000-kilogram denominator in its calculation of B&H costs, because Commerce failed to elaborate why a 10,000-kilogram container weight relates to B&H costs, when those costs were specifically catalogued "per container" in the Doing Business report, i.e., based on the broader assumption that the goods are "transported in a dry-cargo, 20-foot full container load." *See id.*, 44 CIT at __, 425 F. Supp. 3d at 1349 (citing Surrogate Values for the Prelim. Results at at Ex. 15 at 72, 78, PD 104–05, bar codes 3202737–01–02 (May 16, 2014) ("Prelim. SV Memo")).[3] In addition, the court noted that Commerce did not address detracting evidence that indicate B&H fees are established by container size and load,

with exporting and importing a standard shipment of goods by sea transport." *Id.* at Ex. 15 at 72. For exports, such costs include (1) customs clearance and technical control, (2) ports and terminal handling, (3) inland transportation and handling, (4) bills of lading, (5) certificates of origin, (6) commercial invoices, (7) customs export declaration, and (8) terminal handling receipts. *Id.* at Ex. 15 at 78–79. These costs are derived from questionnaires concerning a standardized case scenario and refer to business in Thailand's largest business city. *Id.* at Ex. 15 at 102–03.

[3] On January 26, 2015, Defendant filed on the docket the indices to the public and confidential administrative records at ECF Nos. 23–4–5. Subsequently, on August 29, 2019, Defendant filed indices to the public and confidential record underlying Commerce's first remand redetermination at ECF Nos. 106–2–3. On May 1, 2020, Defendant filed indices to the public and confidential record underlying Commerce's second remand redetermination at ECF Nos. 121–1–2. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

rather than by weight. *See id.*, 44 CIT at __, 425 F. Supp. 3d at 1349–51. On second remand, Commerce offers further explanation as to why, based on review of the record evidence, it relies on a 10,000-kilogram denominator to calculate the surrogate value for B&H costs. *See Second Remand Results* at 1, 4–16.

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), and 28 U.S.C. § 1581(c) (2012),[4] which grant the court authority to review actions contesting the final determination in a review of an anti-dumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Jiaxing challenges as unsupported by substantial evidence Commerce's continued reliance on a 10,000-kilogram denominator in the surrogate value calculation of B&H costs, because the figure is not grounded in commercial reality and does not relate to Jiaxing's experience. *See* Pls.' Br. at 1–5. Further, Jiaxing argues that Commerce has not addressed record evidence indicating that alternative container weights of 16,000 or 28,200 kilograms are the best available information to use as the denominator in the valuation of B&H costs. *Id.* Defendant and Vulcan disagree and request the court to sustain the *Second Remand Results*. *See* Def.'s Br. at 1–2, 5–11; Def.-Intervenor's Br. at 1–4. Specifically, Defendant contends that Commerce reconsidered record evidence and reasonably determined that a denominator of 10,000 kilograms is generally supported by the record, unlike the proposed alternative weights. *See* Def.'s Br. at 5–11. Defendant-Intervenor argues that, as a matter of law, Jiaxing's own commercial experience does not factor into Commerce's surrogate value selection. *See* Def.-Intervenor's Br. at 1–4. For the reasons that follow, Commerce's reliance on a 10,000-kilogram container weight to calculate B&H costs is reasonable on this record.

[4] 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.

In an antidumping proceeding, if Commerce considers an exporting country to be a non-market economy ("NME"), like the PRC, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value. *See* 19 U.S.C. § 1677b(c)(1), (4). Normal value is determined on the basis of factors of production ("FOPs") from the surrogate country or countries used to produce subject merchandise. *See id.* at § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and "representative capital cost, including depreciation." *Id.* at § 1677b(c)(3). This analysis is designed to determine a producer's costs of production in an NME as if that producer operated in a hypothetical market economy. *See, e.g.*, *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999); *see also* 19 U.S.C. § 1677b(c)(1).

In calculating normal value, Commerce also subtracts "costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." 19 U.S.C. § 1677b(a)(6)(B)(ii). Among the deductions are amounts that represent the costs for B&H export costs and cost of freight. The subtraction of these B&H costs from a respondent's normal value is intended to allow a fair comparison to net (or ex-factory) prices, which are not affected by the extra costs experienced by an exporter in shipping products around the world. For the *Final Results*, Commerce generated a surrogate B&H cost per kilogram for each shipping container of STR shipped by Jiaxing to the United States based on costs associated with exporting a 20-foot, 10,000-kilogram shipping container in the Doing Business report. *See* Final Decision Memo. at 27–28; *see also* Prelim. SV Memo. at Ex. 12. First, Commerce added the costs reported "per container" for document preparation ($175), customs clearance and technical control ($50), and ports and terminal handling ($160), totaling $385 as the numerator in its calculation. *See* Prelim. SV Memo at Ex. 12, Ex. 15 at 72, 78; *see also* Final Decision Memo at 27–28. Commerce then selected 10,000 kilograms to represent container weight for the denominator from a stated assumption in the Doing Business report's methodology by which surveyed respondents provided costs, i.e., that "[t]he traded product travels in a dry-cargo, 20-foot, full container load . . . [and] weighs 10 tons and is valued at $20,000."[5] *See* Final Decision Memo. at 27; *see also* Ex. A Trading Across Borders Methodology, Feb. 26, 2019, ECF No. 92–1. Commerce divided the "costs per container" by

[5] Ten tons is approximately 10,000 kilograms.

10,000 kilograms, resulting in a $0.0385 per kilogram value, *see* Prelim. SV Memo. at Ex. 12, that Commerce applies to make a fair value comparison based on Jiaxing's sales and cost databases, which were reported on the basis of kilograms. *See Second Remand Results* at 5–6.

On second remand, Commerce offers further explanation and reasonably applies a 10,000-kilogram denominator to calculate B&H costs, in light of its reexamination of record evidence indicating that the value represents the best available information. Commerce explains that Jiaxing reported its B&H costs on the basis of kilograms and did not propose a different unit of analysis or alternate means to allocate costs.[6] *See Second Remand Results* at 5–6, 6 n.25 (noting that Jiaxing acknowledges Commerce requires a per kilogram cost to calculate B&H costs); *see also* Letter from DeKieffer & Horgan to Sec of Commerce Pertaining to Brother Cmts on Draft Remand Determination at 5, RPD 5, bar code 3876875–01 (Aug. 9, 2019) ("Plaintiffs understand that the Department needs a per kg cost for B&H due to the nature of its antidumping margin calculation."). Therefore, as Commerce notes, its calculation of B&H costs must be denominated by weight. *Second Remand Results* at 6. However, unlike the proposed alternative weights of 16,000 kilograms and 28,200 kilograms, Commerce explains that the use of a 10,000 kilogram denominator is generally supported by the record.[7] *Id.* at 6–8.

Although Jiaxing proposes 16,000 kilograms as reflective of its own commercial experience, Commerce reasonably rejects that figure because Commerce, in determining SVs, has no obligation to exactly replicate Jiaxing's shipping experience and, further, Commerce identifies flaws related to the derivation of the weight. *Id.* at 5–16. As Commerce observes, the Court of Appeals has held that Commerce is not required to duplicate an NME producer's exact experience in determining SVs. *See id.* at 5 (citing *Nation Ford*, 166 F.3d at 1373);

[6] Commerce does not address whether the Doing Business report may be read as reporting B&H costs on a per container basis rather than by container weight. *Cf. Jiaxing II*, 44 CIT at __, 425 F. Supp. 3d at 1350–51. Nonetheless, given the record and that weight was the only metric by which Commerce could calculate the B&H SV, Commerce reasonably evaluates each alternative weight and concludes that the 10,000 kilogram figure reported in the Doing Business report is the best information on the record to use as the denominator in its calculation of B&H costs.

[7] Jiaxing suggests that "a large and growing body of case law reversing the Department's approach" of using a 10,000-kilogram denominator. Pls.' Br. at 5. Although the Court of Appeals recently reversed Commerce's use of a 10,000 kilogram denominator to calculate B&H costs in *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833 (Fed. Cir. 2020), the plaintiffs in that case, unlike Jiaxing here, challenged Commerce's methodology to use a weight-based denominator. *Compare id.* at 845–46 *with Second Remand Results* at 6 n.25. The Court of Appeals held that Commerce had not supported its methodology selection with substantial evidence.*SeAH Steel VINA Corp.*, 950 F.3d at 846.

see also id. at 8. Nonetheless, Commerce evaluates Jiaxing's proposed value of 16,000 kilograms yet finds that it does not appear to reflect the overall experience of Jiaxing. *Id.* at 7–8. Specifically, Jiaxing proposed the 16,000-kilogram figure based on the weight of sample shipments associated with three of 127 invoices on the record. *See id.* at 7 (citing Resp. from DeKeiffer & Horgan to Sec of Commerce Pertaining to [Jiaxing] Supp A Q/R, Pt. 1 at Ex. SA-9, CD 28, bar code 3184546–01 (Feb. 27, 2014); Data from DeKeiffer & Horgan to Sec of Commerce Pertaining to [Jiaxing] Ex. SC-6, CD 44, bar code 3190495–01 (Mar. 25, 2015)). Commerce notes that the three invoices do not average 16,000 kilograms but rather a slightly lower weight and, in addition, finds that Jiaxing's representation of this figure as the company's "average container weight" to be misleading. *Id.* at 11–14.[8] Commerce explains that, in reviewing all 127 invoices, Jiaxing's average invoice weight[9] was a value similar to the 10,000-kilogram figure from the Doing Business report. *Id.* at 8 (citing Memo From USDOC to File Pertaining to [Jiaxing] STR Remand Weight Analysis Memo at Attach. I, RCD 2–3, bar codes 3955340–01–02 (Mar. 18, 2020)). Commerce also observes that even though Jiaxing presented a B&H figure from a Thai exporter, Pakfood Company Limited, of 12,365 kilograms as an entity with a "similar" shipping experience to Jiaxing, that shipping weight is closer to the 10,000-kilogram figure than its proposed 16,000 kilogram weight. *Id.* at 15 n.45 (citing Brief from Vorys, Sater, Seymour and Pease LLP to Sec of Commerce Pertaining to Petitioner Case Brief at 38–39, PD 120, bar code 3219780–01 (Aug. 4, 2014)). Thus, Commerce reasonably determines that the 16,000-kilogram weight is neither supported by record evidence nor reasonably reflective of the shipping experience in the NME country. *Cf. Nation Ford*, 166 F.3d at 1373.

Likewise, Commerce rejects Jiaxing's proposal that Commerce adopt a maximum shipping container weight of 28,200 kilograms as unsupported by record evidence. *Id.* at 8. Jiaxing, as Commerce explains, does not substantiate the figure with record evidence or ex-

[8] Jiaxing avers that the remaining invoices should not be included in the calculation of average container weight, because the other invoices reflect amounts for less than full container load. *See* Pls.' Br. at 1–2. However, as Commerce observes, Jiaxing does not substantiate its claim that shipments are consolidated such that shipments at less than container load are not reasonably reflective of Jiaxing's shipping. *See Second Remand Results* at 12–13.

[9] Commerce calculates Jiaxing's average invoice rate to be [[ ]] kilograms. *See Second Remand Results* at 8. In doing so, Commerce acknowledges that one invoice may not correspond to one shipment, and that there may be invoices that reflect shipment in one container or that are split across multiple containers. *See id.* at 13–14. The resultant average, according to Commerce, is a "proxy" for Jiaxing's shipping experience, given the data on the record. *Id.* at 14.

planation. *Id.* Therefore, given the deficiencies in the proposed alternatives and that Jiaxing failed to propose a different approach to calculate B&H costs than by weight, Commerce, on review of the record evidence, reasonably concludes that 10,000 kilograms is the best available information on the record to use in the denominator of its B&H cost calculation. *Id.* at 15–16.

CONCLUSION

For the foregoing reasons, the *Second Remand Results* are supported by substantial evidence and comply with the court's order in *Jiaxing I*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: July 22, 2020
New York, New York

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

Slip Op. 20–106

VIETNAM FINEWOOD COMPANY LIMITED, et al. Plaintiffs, and LIBERTY WOODS INTERNATIONAL, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 19–00218

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Plaintiffs' and Plaintiff-Intervenor's motions for leave to file a supplemental complaint are denied and Plaintiffs' motion for a preliminary injunction is denied as moot.]

Dated: July 31, 2020

Gregory S. Menegaz, *J. Kevin Hogan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiffs Vietnam Finewood Company Limited, Far East American, Inc., and Interglobal Forest LLC.

Ellen M. Murphy, Orrick, Herrington & Sutcliffe LLP, of New York, NY, for Plaintiff-Intervenor Liberty Woods International, Inc.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court on three categories of motions relevant to U.S. Customs and Border Protection's ("CBP" or "Customs") EAPA (Enforce and Protect Act) Investigation No. 7252 conducted pursuant to 19 U.S.C. § 1517 (2018).[1] Defendant United States ("Defendant" or "the Government") moves to dismiss the amended complaint filed by Plaintiffs Vietnam Finewood Company Limited ("Vietnam Finewood"), Far East American, Inc. ("FEA"), and InterGlobal Forest LLC ("IGF") (collectively, "Plaintiffs") and the complaint filed by Plaintiff-Intervenor Liberty Woods International, Inc. ("Plaintiff-Intervenor" or "Liberty Woods") for lack of subject matter jurisdiction pursuant to United States Court of International Trade ("USCIT" or "CIT") Rule 12(b)(1). Def.'s Mot. to Dismiss, ECF No. 41, and accompanying Def.'s Mem. in Supp. of its Mot. to Dismiss ("Def.'s Mot. Dismiss"), ECF No. 41; Order (Apr. 30, 2020), ECF No. 44 (indicating the court's intention to treat the Government's motion as a responsive pleading with respect to Liberty Woods' complaint, to

[1] Section 1517 of Title 19 is commonly referred to as the Enforce and Protect Act, or "EAPA." EAPA was enacted as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016). The administrative record associated with EAPA Investigation No. 7252 is contained in a Confidential Administrative Record ("CR), ECF Nos. 37, 51, and a Public Administrative Record ("PR"), ECF No. 36.

which the Government had not previously responded, and which lacked an independent basis for jurisdiction). Plaintiffs and Plaintiff-Intervenor each seek leave to file a supplemental complaint to account for events that occurred since the action was commenced. Pls.' Mot. for Leave to File Suppl. Compl. ("Pls.' Mot. Suppl. Compl."), ECF No. 60; Ltr. from Ellen M. Murphy, Orrick, Herrington & Sutcliffe LLP, to the Court (June 11, 2020) ("LW's Mot. Suppl. Compl."), ECF No. 62. Plaintiffs also seek a preliminary injunction enjoining the U.S. Department of Commerce ("Commerce") from conducting a scope inquiry Commerce initiated following a referral from Customs pursuant to 19 U.S.C. § 1517(b)(4). Pls.' Mot. for Prelim. Inj., ECF No. 22.

For the following reasons, the court grants Defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiffs' and Plaintiff-Intervenor's respective motions for leave to file a supplemental complaint will be denied and Plaintiffs' motion for a preliminary injunction will be denied as moot.

STANDARD OF REVIEW

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Plaintiffs bear the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the plaintiffs assert section 1581(i) jurisdiction, they "bear[] the burden of showing that another subsection is either unavailable or manifestly inadequate." *Erwin Hymer Group N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citation omitted). Because the pending motion to dismiss rests on the availability of jurisdiction pursuant to subsection (c) of section 1581, and therefore challenges the existence of subsection (i) jurisdiction, "the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *Shoshone Indian Tribe of Wind River Rsrv., Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). To resolve the pending motion to dismiss, the "court is not restricted to the face of the pleadings" and may, if necessary, "review evidence extrinsic to the pleadings." *Id.* (internal quotation marks and citation omitted).

BACKGROUND

I. Legal Framework

A. Overview of EAPA Investigations

As noted, EAPA investigations are governed by 19 U.S.C. § 1517.[2] *Supra* note 1. Section 1517 directs Customs to initiate an investigation within 15 days of receipt of an allegation that "reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(b)(1); *see also id.* § 1517(b)(2) (stating allegation requirements). "Covered merchandise" refers to "merchandise that is subject to" antidumping or countervailing duty orders issued pursuant to 19 U.S.C. § 1673e or 19 U.S.C. § 1671e, respectively. *Id.* § 1517(a)(3). "Evasion" is defined as:

> entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A).[3]

If Customs "receives an allegation . . . and is unable to determine whether the merchandise at issue is covered merchandise," Customs must "refer the matter to [Commerce] to determine whether the merchandise is covered merchandise" and "notify the party that filed the allegation, and any other interested party participating in the investigation, of the referral." *Id.* § 1517(b)(4)(A).

Once Customs initiates an investigation, it has 90 days to decide "if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion" and, if so, to impose interim measures. *Id.* § 1517(e). Interim measures consist of: (1) "suspend[ing] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation"; (2) "extend[ing] the

[2] On August 22, 2016, CBP promulgated final interim regulations that further guide Customs' implementation of the EAPA framework. *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (CBP Aug. 22, 2016) (interim regulations; solicitation of comments); 19 C.F.R. pt. 165 (2017).

[3] Section 1517(a)(5)(B) contains exceptions for clerical errors, which are not relevant here. 19 U.S.C. § 1517(a)(5)(B).

period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation"; and (3) "such additional measures as [Customs] determines necessary to protect the revenue of the United States." *Id.*

Customs generally must issue its determination "not later than 300 calendar days after the date on which" Customs initiated the investigation. *Id.* § 1517(c)(1)(A). Customs may, however, extend this period by "not more than 60 calendar days" if CBP determines that "the investigation is extraordinarily complicated" or "additional time is necessary." *Id.* § 1517(c)(1)(B). Additionally, the time "required for any referral and determination" by Commerce as to whether the merchandise is covered merchandise "shall not be counted in calculating" CBP's deadline for issuing its determination. *Id.* § 1517(b)(4)(C). Customs' determination regarding the existence of evasion must be "based on substantial evidence." *Id.* § 1517(c)(1)(A).

Within 30 days of Customs' evasion determination pursuant to section 1517(c), the person alleging evasion, or the person found to have engaged in evasion, may file an administrative appeal with Customs "for de novo review of the determination." *Id.* § 1517(f)(1). Thereafter, either of those persons have 30 business days in which to seek judicial review of Customs' determination and administrative review. *Id.* § 1517(g)(1). EAPA directs the court to examine "whether [CBP] fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(2).

B. The Court's Subject Matter Jurisdiction

The USCIT, like all federal courts, is a "court[] of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). The court's jurisdiction is governed by 28 U.S.C. § 1581 (2018), *et seq*. *See id*.

Relevant here, Section 1581(c) grants the court jurisdiction (referred to as "(c) jurisdiction") to review Customs' EAPA determinations. 28 U.S.C. § 1581(c); 19 U.S.C. § 1517(g). Section 1581(i) grants the court jurisdiction (referred to as "(i) jurisdiction") to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "(4) administration and enforcement with respect to the matters referred

to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section." 28 U.S.C. § 1581(i)(2),(4).

"Section 1581(i) embodies a 'residual' grant of jurisdiction[] and may not be invoked when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (citation omitted). The scope of the court's (i) jurisdiction is "strictly limited." *Erwin Hymer*, 930 F.3d at 1374 (citation omitted). Otherwise, (i) jurisdiction would "threaten to swallow the specific grants of jurisdiction contained within the other subsections." *Id.* (citation omitted).

II. Factual and Procedural Background

On January 4, 2018, Commerce issued antidumping and countervailing duty orders on certain hardwood plywood products from the People's Republic of China ("China" or "the PRC"). *Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at less than fair value, and antidumping duty order) ("*AD Order*"); *Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (countervailing duty order) ("*CVD Order*") (together, "the *AD/CVD Orders*"). The merchandise subject to the *AD/CVD Orders* is described, *inter alia*, as:

> hardwood and decorative plywood, and certain veneered panels . . . . For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.

AD Order, 83 Fed. Reg. at 512; *CVD Order*, 83 Fed. Reg. at 515.

FEA, IGF, and Liberty Woods (collectively, "the subject importers") are domestic importers of hardwood plywood exported from Vietnam by Vietnam Finewood. Am. Compl. ("Pls.' Compl.") ¶¶ 1, 3, 20–21, ECF No. 13; Compl. ("LW's Compl."), ¶ 1, ECF No. 32. On July 9, 2018, Plywood Source, LLC ("Plywood"), lodged an allegation with CBP in which Plywood claimed that the subject importers, among others, were evading the *AD/CVD Orders* by importing into the United States hardwood plywood that was produced in China and transshipped through Vietnam to the United States by Vietnam

Finewood. Pls.' Compl. ¶ 28; *see also* Notice of Initiation of Investigation and Interim Measures (Nov. 20, 2018) ("Initiation Ltr.") at CBP017805, CR 155, ECF No. 51. In response to the allegation, on August 15, 2018, CBP initiated EAPA Investigation No. 7252. Pls.' Compl. ¶ 29.

On November 13, 2018, CBP imposed interim measures against the subject importers, "directing that all unliquidated entries of imported merchandise under this investigation that entered the United States as not subject to AD duties were to be rate-adjusted to reflect that they are subject to the [*AD/CVD Orders*] on hardwood plywood from China and requiring cash deposits in excess of 200% *ad valorem*." *Id.* ¶ 31; *see also* Initiation Ltr. at CBP017809. CBP further required "live entry" on all future imports from the subject importers, which "mean[s] that all entry documents and duties must be provided before cargo is released by CBP into the U.S. commerce." Initiation Ltr. at CBP017809.

The statutory 360-day period for the completion of evasion investigations would have permitted CBP to complete its investigation and issue a final determination by September 16, 2019. Pls.' Compl. ¶ 24; *see also* Def.'s Mot. at 4 (citation omitted).[4] However, on August 23, 2019, a Customs official emailed Commerce personnel a scope referral associated with EAPA Investigation No. 7252 that, while "in draft form," indicated that it should be "consider[ed CBP's] formal request for a scope referral." Email from Kristina Horgan, CBP, to Wendy Frankel, Commerce, et al. (Aug. 23, 2019, 13:54 EST) ("Customs' 8/23/2019 Email") at CBP001782, PR 153, ECF No. 36–3. On September 16, 2019, the Customs official emailed Commerce personnel a revised scope referral. Email from Kristina Horgan, CBP, to Sam Zengotitabengoa, Commerce, et al. (Sept. 16, 2019, 15:21 EST) ("Customs' 9/16/2019 Email") at CBP001781, PR 153, ECF No. 36–3; *see also* Scope Referral Request for Merchandise Under EAPA Cons. Inv. 7252 (Sept. 16, 2019) ("Scope Referral") at CBP001783–86, PR 153, ECF No. 36–3. On September 25, 2019, Plaintiffs and Liberty Woods received an email from CBP informing them of the scope referral. Pls.' Compl. ¶ 24; LW's Compl. ¶ 27; Email from EAPA ALLEGATIONS to Ofir Levy, et al. (Sept. 25, 2019, 09:05 EST) at CBP001790, PR 155, ECF No. 36–3.

On December 27, 2019, Plaintiffs commenced this action. Summons, ECF No. 1. In Plaintiffs' amended complaint, filed as of right on January 13, 2020, Plaintiffs challenge CBP's scope referral to Commerce; Commerce's alleged delay in acting on the referral; Customs'

[4] The September 16, 2019 deadline accounts for 37 days for which the deadline was tolled due to the U.S. Government shutdown. Pls.' Compl. ¶ 24.

imposition of interim measures; and Customs' alleged failure to complete the investigation within the statutory timeframe. Pls.' Compl. ¶¶ 10–19, 44–51. By way of relief, Plaintiffs request the court to (1) declare Customs' scope referral "untimely and/or arbitrary and capricious"; (2) order Customs "to conclude EAPA [Investigation] No. 7252 with a negative finding of evasion"; (3) order CBP to lift the requirement that Vietnam Finewood's plywood products be entered into the United States as subject to the *AD/CVD Orders*; and (4) order liquidation of all relevant entries of the subject importers without regard to duties pursuant to the *AD/CVD Orders*. *Id.* at pp. 16–17. Plaintiffs allege jurisdiction pursuant to 28 U.S.C. § 1581(i)(2),(4) and the Administrative Procedure Act ("APA") 5 U.S.C. § 702. *Id.* ¶¶ 6–8, 13.[5]

On January 17, 2020, Commerce published its notice of initiation of a scope inquiry. *Certain Hardwood Plywood From the People's Republic of China*, 85 Fed. Reg. 3,024 (Dep't Commerce Jan. 17, 2020) (notice of covered merchandise referral and initiation of scope inquiry). On February 3, 2020, Plaintiffs moved for a preliminary injunction pursuant to USCIT Rule 65 to enjoin Commerce from conducting its scope inquiry. Pls.' Mot. for Prelim. Inj., ECF No. 22. The Government opposed Plaintiffs' motion. Def.'s Opp'n to Pls.' Mot. for Prelim. Inj., ECF No. 42.

The Government filed its motion to dismiss this case on March 16, 2020. Def.'s Mot. Dismiss. Plaintiffs and Liberty Woods each opposed Defendant's motion to dismiss. Pls.' Resp. to Def.'s Mot. to Dismiss ("Pls.' Opp'n Dismiss"), ECF No. 43; Letter from Ellen M. Murphy, Orrick, Herrington & Sutcliffe LLP to the Court (May 6, 2020), ECF No. 45 (joining Plaintiffs' opposition). Defendant filed a reply. Def.'s Reply in Suppl. of its Mot. to Dismiss ("Def.'s Reply"), ECF No. 46.

On May 8, 2020, Plaintiffs filed a status report informing the court that CBP had "liquidated practically all entries of the merchandise that are the subject of this litigation." Pls.' Status Report at 1, ECF No. 48. CBP liquidated the entries after receiving instructions from Commerce to liquidate Vietnam Finewood's entries that entered during the respective periods of review corresponding to the first administrative reviews of the *AD Order* and *CVD Order*. *Id.* at 2; *see also id.*, Ex. 3 (Message No. 71409 (March 11, 2020) ("AD Instructions"); Message No. 79402 (March 19, 2020) ("CVD Instructions")). Each set of instructions directed Customs to assess duties on the merchandise "at the cash deposit rate required at the time of entry." AD Instruc-

[5] Liberty Woods asserts substantially similar claims in its complaint and alleges the same jurisdictional bases. *See generally* LW's Compl. For ease of reference, the court will refer solely to Plaintiffs' amended complaint in its analysis of the Government's motion to dismiss.

tions at 2; *see also* CVD Instructions at 2 (directing liquidation "at the cash deposit or bonding rate in effect at the time of entry"). CBP assessed "antidumping and countervailing duties in excess of 200 [percent] *ad valorem* on each entry." Pls.' Status Report at 1.

On May 13, 2020, the Government filed comments in which it characterized the liquidations as "inadvertent[] and premature[]." Def.'s Statement Pursuant to Court Order at 1, ECF No. 52. The Government averred that the liquidations "should not affect the pending motion to dismiss." *Id.* at 4. The court granted Plaintiffs' motion for leave to file responsive comments. Order (May 22, 2020), ECF No. 54; Pls.' Cmts. on Def.'s Statement, ECF No. 55. Following a May 27, 2020 telephone conference with the parties, Docket Entry, ECF No. 58, the Government and Plaintiffs each filed additional comments regarding the court's subject matter jurisdiction in light of the liquidations, Def.'s Suppl. Resp. to Court's Questions, ECF No. 59; Pls.' Suppl. Resp. and Reply to Def.'s Suppl. Resp., ECF No. 61.

On June 11, 2020, Plaintiffs and Liberty Woods filed their respective motions seeking leave to file a supplemental complaint pursuant to USCIT Rule 15(d). Pls.' Mot. Suppl. Compl.; LW's Mot. Suppl. Compl. Plaintiffs' proposed supplemental complaint contains new claims against Commerce's allegedly unlawful initiation of the scope inquiry (count four) and Customs' liquidation of Vietnam Finewood's entries (count five). [Proposed] Suppl. Compl. ("Pls' Proposed Suppl. Compl.") ¶¶ 81–86, 87–90, ECF No. 60–1. Count five further alleges, in the alternative, that Commerce's issuance of liquidation instructions to CBP regarding Vietnam Finewood's entries violated Commerce's regulation that requires any existing suspension of liquidation to be maintained when Commerce initiates a formal scope inquiry. *Id.* ¶ 91 (citing 19 C.F.R. § 351.225(l)(1)).[6]

The Government filed a response to the respective motions for leave to file a supplemental complaint. Def.'s Resp. to Pls.' and Pl.-Int.'s Mots. for Leave ("Def.'s Resp. Suppl. Compl."), ECF No. 65. The Government explained that it does not oppose supplementation with respect to Plaintiffs' alternative challenge to Commerce's liquidation instructions,[7] but that it does oppose supplementation with respect to Commerce's initiation of the scope inquiry and Customs' liquidation of Vietnam Finewood's entries. *Id.* at 1, 4–6.

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[6] Liberty Woods filed a proposed supplemental complaint that is substantively similar in relevant respects. [Proposed] Suppl. Compl., ECF No. 62–1.

[7] The Government further noted that the parties are "discuss[ing] the possibility of a partial stipulation with respect to that claim" that will result in "voiding the liquidation of the entries, resetting the liquidated entries to an unliquidated status, and continuing to suspend the entries pending a final EAPA determination by CBP, without the need for adjudication of the merits." Def.'s Resp. Suppl. Compl. at 2.

DISCUSSION

It is a "longstanding principle that the jurisdiction of the [c]ourt depends upon the state of things at the time of the action brought." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (citations omitted) (affirming dismissal of suits commenced at the U.S. Court of Federal Claims when a statutory bar to that court's jurisdiction was present at the time of filing but later resolved before the court addressed the jurisdictional challenge); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (U.S. 1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed"). For this reason, the court first considers the Government's motion to dismiss in view of the facts as they are alleged in Plaintiffs' amended complaint[8] and the parties' arguments thereto.[9] The court will then turn to Plaintiffs' and Plaintiff-Intervenor's motions to file a supplemental complaint.

I. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction

A. Parties' Contentions

The Government contends that the court lacks (i) jurisdiction because Plaintiffs will have a remedy under 28 U.S.C. § 1581(c) to challenge Customs' final determination, including the timing of the determination, and any subsidiary procedural decisions relevant thereto. Def.'s Mot. Dismiss at 6–10. The Government further contends that Plaintiffs' remedy pursuant to 28 U.S.C. § 1581(c) is not manifestly inadequate to the extent that Plaintiffs are suffering business harm because of the investigation, *id.* at 10, or are experiencing "delays inherent in the statutory process," *id.* (quoting *Sunpreme*, 892 F.3d at 1193). Lastly, the Government contends that the absence of a final agency action further forecloses judicial review of Plaintiffs' claims at this time. *Id.* at 12–14.

Plaintiffs contend that the crux of the action constitutes a challenge to CBP's failure to issue its determination within the 360-day statutory time frame and, thus, the Government's arguments are based "on the conclusory and false premise that CBP's investigation is ongoing

[8] "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007); *see also Prasco, LLC v. Medicis Pharm. Corp*., 537 F.3d 1329, 1337 (Fed. Cir. 2008) (considering subject matter jurisdiction in view of the facts alleged in an amended complaint accepted by the lower court).

[9] Accordingly, the parties' supplemental filings addressing events that occurred after Plaintiffs filed their amended complaint are not pertinent to the threshold issue regarding the court's authority to adjudicate the case based on the facts as they existed at the time of filing the amended complaint.

within statutory time limits." Pls.' Opp'n Dismiss at 3. According to Plaintiffs, CBP's failure to timely complete its investigation means that CBP's "stay of the proceedings and scope referral were untimely and void *ab initio*, thereby establishing [s]ection 1581(i) jurisdiction." *Id.* at 10–11. Plaintiffs further contend that they lack recourse to (c) jurisdiction because Customs has not completed its investigation and lacks any time in which to do so. *Id.* at 13–14. Lastly, Plaintiffs contend that judicial review is proper pursuant to the APA based on Customs' failure to issue a timely determination and deficient and dilatory scope referral. *Id.* at 19–30.

In reply, the Government reiterates that challenges to CBP's conduct of the EAPA investigation, including procedural challenges, are amenable to (c) jurisdiction following CBP's issuance of the final determination. Def.'s Reply at 2–4, 9–11. The Government further contends that, contrary to Plaintiffs' claims, CBP's investigation is ongoing and will result in a determination in due course; the statute provides no timeframe within which Customs must issue a scope referral; and Customs provided sufficient notice of the scope referral. *Id.* at 4–8. Lastly, the Government contends, Plaintiffs' challenges to Commerce's actions following the alleged September 16, 2019 deadline for a final determination should be disregarded as an improper attempt to amend their complaint through Plaintiffs' opposition brief. *Id.* at 11–12.

B. Plaintiffs Will Have a Remedy Pursuant to 28 U.S.C. § 1581(c) That is not Manifestly Inadequate; Thus, This Matter Must be Dismissed for Lack of Subject Matter Jurisdiction

It is well settled that "[a] party may not expand a court's jurisdiction by creative pleading." *Sunpreme*, 892 F.3d at 1193 (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Instead, the court must "look to the true nature of the action . . . in determining jurisdiction of the appeal." *Id.* (quoting same). The "true nature" of Plaintiffs' action is a challenge to CBP's alleged failure to complete its EAPA investigation within the statutory period and to CBP's allegedly deficient and dilatory referral of the matter to Commerce for a scope determination.[10] Pls.' Compl. ¶¶ 43–51. Plaintiffs seek a negative finding of evasion and corresponding relief. *Id.* at 16–17. As discussed more fully below, Plaintiffs' action must be dismissed for lack of subject matter jurisdiction because Plaintiffs may

[10] For ease of reference, the court addresses its analysis to Plaintiffs' amended complaint and does not separately analyze Liberty Woods' complaint, which is, for all relevant purposes, the same.

challenge an adverse final determination and administrative review pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c).

As discussed, section 1517 prescribes a two-part process for concluding an evasion finding at the administrative level, followed by the possibility of judicial review at the CIT. First, following the investigation, CBP must decide, "based on substantial evidence," whether covered merchandise was entered through evasion. 19 U.S.C. § 1517(c)(1)(A). Following that determination, either the person found to be engaged in evasion, or the person that alleged the evasion, may file an administrative appeal with CBP for *de novo* review of the determination. *Id.* § 1517(f)(1). Subsection (g) further provides that either such person may seek judicial review of the final determination and the administrative review by the USCIT. *Id.* § 1517(g)(1). Plaintiffs' arguments as to why its claims are not covered by this statutory framework lack merit.

The administrative record for this proceeding shows that, on August 23, 2019, Customs sent Commerce a "draft" copy of its scope referral regarding the merchandise at issue in this case that, nevertheless, indicated that it constituted a "formal request for a scope referral." Customs' 8/23/2019 Email at CBP001782. Customs subsequently sent Commerce a revised scope referral on September 16, 2019, which date coincided with the 360-day deadline for issuing a final determination. Customs' 9/16/2019 Email at CBP001781. Without prejudice to any future arguments regarding the operative date of the scope referral, pertinent here is the fact that Customs' issuance of the scope referral tolled the statutory deadline for issuing its final determination—whether by weeks or mere hours. 19 U.S.C. § 1517(b)(4)(C).

Additionally, contrary to Plaintiffs' assertion that Customs' scope referral was untimely, *see, e.g.*, Pls.' Opp'n Dismiss at 4–6, the statute contains no explicit deadline by when CBP must refer a matter to Commerce for a scope determination, *see* 19 U.S.C. § 1517(b)(4)(A). Customs' regulation is, moreover, explicit that "[a] referral is required if at *any point after receipt of an allegation*, CBP cannot determine whether the merchandise described in an allegation is properly within the scope of an antidumping or countervailing duty order." 19 C.F.R. § 165.16(a) (emphasis added).

Accordingly, this matter has been effectively stayed at the administrative level pending Commerce's scope determination and Customs' subsequent final determination as to evasion.[11] Following Cus-

[11] These facts distinguish this case from *Ford Motor Co. v. United States*, 688 F.3d 1319, 1328 (Fed Cir. 2012), upon which Plaintiffs seek to rely. Pls.' Opp'n Dismiss at 16 (arguing that *Ford Motor Co.* "is the precedent upon which this [c]ourt must find jurisdiction under

toms' issuance of that determination and any decision on administrative appeal, the person that alleged the evasion, or the person found to have engaged in evasion, may seek judicial review of those determinations pursuant to 19 U.S.C. § 1517(g)(1) and 28 U.S.C. § 1581(c). The court's review of Customs' determination as to evasion may encompass interim decisions subsumed into the final determination. *Cf. Chemsol, LLC v. United States*, 755 F.3d 1345, 1353–54 (Fed. Cir. 2014) (CIT properly dismissed action brought under 28 U.S.C. § 1581(i) because jurisdiction pursuant to 28 U.S.C. § 1581(a) would be available to adjudicate challenges to Customs' final liquidation and "any interim decisions merged therein"); *Tianjin Magnesium Int'l Co. v. United States*, 32 CIT 1, 10–13, 533 F. Supp. 2d 1327, 1336–37 (2008)) (dismissing action alleging (i) jurisdiction that sought to challenge a procedural decision made by Commerce during an ongoing antidumping proceeding because a remedy would ultimately be available pursuant to 28 U.S.C. § 1581(c) after Commerce issued its final determination).

In sum, Plaintiffs will be able to avail themselves of jurisdiction pursuant to 28 U.S.C. § 1581(c) in order to challenge Customs' final determination and administrative appeal, as well as any procedural decisions merged into the same, and the remedy provided under that subsection is not manifestly inadequate.[12] Thus, the court lacks jurisdiction pursuant to 28 U.S.C. § 1581(i) and this case must be dismissed.[13]

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28 U.S.C. § 1581(i)"). In *Ford Motor Co.*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that the CIT had jurisdiction pursuant to 28 U.S.C. § 1581(i) over a challenge to CBP's failure to liquidate the plaintiff's entries within the statutory timeframe. 688 F.3d at 1321–22, 1328. In contrast, here, the administrative proceeding is stayed, and the statutory deadline has not yet passed.

[12] Plaintiffs' argue that the remedy afforded by the court's (c) jurisdiction is manifestly inadequate because CBP failed to issue a final determination by the purported statutory deadline. Pls.' Opp'n Dismiss at 2; *see also id.* at 19 (obtaining a remedy pursuant to 28 U.S.C. § 1581(c) "is not only manifestly inadequate, it is impossible"). In so doing, however, Plaintiffs conflate the availability of (c) jurisdiction with the adequacy of the remedy available thereto. Plaintiffs offer no arguments as to why (c) jurisdiction, if available, would nevertheless be manifestly inadequate. *See Sunpreme*, 892 F.3d at 1193–94 ("[T]o be manifestly inadequate, [pursuing an available remedy] must be an 'exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'") (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008)).

[13] Plaintiffs' reliance on the APA, 5 U.S.C. § 702, as a source of subject matter jurisdiction must fail. *See* Pls.' Compl. ¶ 13. It is well settled

> that the APA "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977). The APA is not a jurisdictional statute and "does not give an independent basis for finding jurisdiction in the Court of International Trade." *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed.Cir.1983).

II. Plaintiffs' and Plaintiff-Intervenor's Motions for Leave to File a Supplemental Complaint

A. Parties' Contentions

Plaintiffs seek leave to file a supplemental complaint pursuant to USCIT Rule 15(d). Pls.' Mot. Suppl. Compl. at 1–2.[14] Plaintiffs rely on *Intrepid v. Pollock*, 907 F.2d 1125, 1129 (Fed. Cir. 1990) as authority for supplementation. *Id.* at 2–3. As previously noted, the Government is not opposed to supplementation with respect to Plaintiffs' claim contesting Commerce's liquidation instructions. Def.'s Resp. Suppl. Compl. at 2. However, the Government opposes supplementation with respect to Plaintiffs' claims concerning Commerce's initiation of the scope inquiry and Customs' liquidation of Vietnam Finewood's entries on the basis that those claims would be futile because they would not survive a motion to dismiss for lack of subject matter jurisdiction. *Id.* at 4–6.

B. The Proposed Supplemental Complaints Cannot Cure the Jurisdictional Defects Discussed Above; Thus, the Motions Must be Denied

Pursuant to USCIT Rule 15(d), the court may "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Supplementation may be allowed "even though the original pleading is defective in stating a claim or defense." *Id.* The parties' filings on these motions do not squarely address the court's authority to permit supplementation of a complaint over which the court presently lacks subject matter jurisdiction, or, in other words, whether the proposed supplemental pleading can cure the jurisdictional defects. For the following reasons, the court finds that it cannot.

As previously stated, in assessing the court's jurisdictional basis the court generally must look to "the state of things at the time of the action brought." *Keene*, 508 U.S. at 207. There are exceptions to this

Shinyei Corp. of Am. v. United States, 355 F.3d 1297, 1304 (Fed. Cir. 2004). For Plaintiffs' case to proceed, the court "must have its own independent basis for jurisdiction under 28 U.S.C. § 1581." *Id.* Plaintiffs appear to concede this point in their opposing brief, wherein Plaintiffs distinguish the court's jurisdiction to adjudicate the case from the merits of their claims regarding Customs' alleged failure to issue a determination by September 16, 2019 and untimely scope referral. *See* Pls.' Opp'n Dismiss at 19, 21–30. However, as discussed, the court lacks (i) jurisdiction over claims alleging procedural irregularities because Plaintiffs will be free to raise those claims in any challenge to Customs' final determination, for which the statutory deadline has not passed.

[14] Liberty Woods joined and incorporated by reference Plaintiffs' motion for leave to file a supplemental complaint and did not present additional arguments for the court's consideration. LW's Mot. Suppl. Compl. at 1.

rule, *see Newman-Green*, 490 U.S. at 832–38 (finding that Federal Rule of Civil Procedure 21 permitted an appellate court to dismiss a dispensable nondiverse party to preserve federal diversity jurisdiction), and in *Black v. Secretary of Health and Human Services*, the Federal Circuit concluded that a supplemental complaint filed pursuant to the analogous Federal Rule of Civil Procedure 15(d) may, "in appropriate circumstances," be relied upon to cure "a jurisdictional defect," 93 F.3d 781, 790 (Fed. Cir. 1996) (citing *Mathews v. Diaz*, 426 U.S. 67, 75 (1976)).[15] The Federal Circuit also noted several instances in which various courts had permitted supplemental pleadings to cure a purported jurisdictional defect. *Id.* (citing *Intrepid*, 907 F.2d at 1129; *Wilson v. Westinghouse Elec. Corp*., 838 F.2d 286, 290 (8th Cir. 1988); *United States v. C.J. Elec. Contractors, Inc*., 535 F.2d 1326, 1329 (1st Cir. 1976); *Security Ins. Co. v. United States ex rel. Haydis*, 338 F.2d 444, 449 (9th Cir. 1964)).

More recently, however, the Federal Circuit cast doubt on whether *Diaz* and *Black* addressed true jurisdictional issues as opposed to "non-jurisdictional claim-processing rules" in cases involving federal statutes. *Central Pines Land Co. v. United States*, 697 F.3d 1360, 1366 n.4 (Fed. Cir. 2012) (quoting *Gonzalez v. Thaler*, 555 U.S. 134, 141 (2012)) (further collecting cases regarding the non-jurisdictional nature of certain statutory conditions). Indeed, a review of the cases cited in *Black*—with the exception of *Intrepid*—confirms that the "defects," although cast as jurisdictional, represented unfulfilled predicates to filing the underlying substantive claim. *See Diaz*, 426 U.S. at 75 (permitting supplementation to allege the filing of an application for enrollment in Medicare Part B with the Commissioner of Social Security, which was necessary to raise a claim pursuant to 42 U.S.C. § 405(g)); *Wilson*, 838 F.2d at 290 (supplemental complaint permitted where the original complaint was filed prematurely, in violation of 29 U.S.C. § 626(c)–(d), which requires 60 days from the date of filing a charge with the Equal Employment Opportunity Commission to have lapsed before commencing a civil action); *C.J. Elec*., 535 F.2d at 1329 (supplemental pleading permitted in order to allege a later predicate date that would bring the complaint within the timeframe specified by relevant provisions of the Miller Act, then codified at 40 U.S.C. § 270b(a)–(b) (1970)); *Haydis*, 338 F.2d at 449 (same).[16]

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[15] Federal Rule of Civil Procedure 15(d) is identical to USCIT Rule 15(d). "[T]he court may refer for guidance to the rules of other courts." *United States v. Univar USA, Inc*., 40 CIT ___, ___, 195 F. Supp. 3d 1312, 1317 (2016) (citing USCIT Rule 1).

[16] *Intrepid* is an outlier. In that case, the plaintiff initiated an action pursuant to the CIT's (i) jurisdiction, but later sought to supplement its complaint to allege later-developed facts and new claims that were judicially reviewable pursuant to the court's (c) jurisdiction.

This interpretation of the cited cases is supported by the *Black* court's own statement that "[d]etermining whether a supplemental pleading can be used to rescue an insufficient petition or complaint in a particular case depends on a careful reading of the *substantive provision at issue*." 93 F.3d at 790 (emphasis added). In that respect, the *Black* court permitted supplementation to allege fulfilment of a threshold amount of unreimbursable expenses that must be incurred before seeking compensation under the Vaccine Act, 42 U.S.C. § 300aa-11(c)(1)(D). *Id.* at 790–92. In contrast to the foregoing cases, where supplementation remedied defects in filing conditions embedded in the substantive provision at issue, here, Plaintiffs seek to allege entirely new claims based on subsequent events and seek new forms of relief. *See* Pls.' Proposed Suppl. Compl. ¶¶ 81–91; *id.* at pp. 29–30 (demand for judgment and prayer for relief). However, "[l]ater events may not create jurisdiction where none existed at the time of filing." *Prasco*, 537 F.2d at 1337 (quoting *GAF Bldg. Materials Corp. v. Elk Corp.*, 90 F.3d 479, 483 (Fed. Cir. 1996) (alteration original)).[17] Thus, Plaintiffs' motion for leave to file a supplemental complaint must be denied.

CONCLUSION AND ORDER

For the foregoing reasons, the court lacks jurisdiction pursuant to 28 U.S.C. § 1581(i) over the claims asserted in Plaintiffs' amended complaint and Liberty Woods' complaint, and that impediment to judicial review cannot be cured by the proposed supplemental pleadings. Because the case must be dismissed, Plaintiffs' motion for a preliminary injunction is moot.

Accordingly, Defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. Plaintiffs' and Liberty Woods' respec-

Intrepid, 907 F.2d at 1126–27. The Federal Circuit held that the CIT erred in declining to permit amendment or supplementation of the complaint. *Id.* at 1129–30. There is nothing in the appellate court's opinion to suggest, however, that the CIT lacked subject matter jurisdiction over the complaint as it was originally filed. Rather, the Federal Circuit focused its discussion on whether the supplemental pleading alleged new events that were sufficiently related to the original claims, *id.*, and whether the plaintiff had timely alleged its new claims, *id.* at 1130–31. Accordingly, *Intrepid* does not support the court's authority to permit supplementation in this case.

[17] The court need not—and does not—resolve whether the new claims alleged in Plaintiffs' supplemental complaint are judicially reviewable pursuant to 28 U.S.C. § 1581(i) or the extent to which the facts underlying those claims affect the court's jurisdiction to adjudicate any of the original claims. Plaintiffs' amended complaint and the facts alleged therein form the basis of the court's assessment of its subject matter jurisdiction. *See Rockwell*, 549 U.S. at 473–74; *Prasco*, 537 F.2d at 1337. As in *Keene*, where a jurisdictional bar to the Court of Federal Claims' jurisdiction was present at the time of filing, 508 U.S. at 207, so too here, (i) jurisdiction was foreclosed at the time of filing because Plaintiffs' claims, as presented in their amended complaint, would be reviewable pursuant to the court's (c) jurisdiction, *see Sunpreme*, 892 F.3d at 1191; *Erwin Hymer*, 930 F.3d at 1374 (the court's (i) jurisdiction is "strictly limited" to avoid overlap with the "specific grants of jurisdiction contained within the other subsections").

tive motions for leave to file a supplemental complaint are **DENIED**. Plaintiffs' motion for a preliminary injunction is **DENIED** as moot. Judgment will be entered accordingly.

Dated: July 31, 2020

New York, New York

/*s*/ *Mark A. Barnett*

MARK A. BARNETT, JUDGE

Slip Op. 20–107

YAMA RIBBONS AND BOWS CO., Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY, LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 18–00054

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand (Feb. 21, 2020), ECF No. 37–1 (the "Remand Redetermination"), submitted by the International Trade Administration, U.S. Department of Commerce, in response to the order of this court in *Yama Ribbons and Bows Co. v. United States*, 43 CIT __, 419 F. Supp. 3d 1341 (2019) ("*Yama*"). Also before the court are letters by plaintiff (Apr. 1, 2020), ECF No. 42, and defendant-intervenor (Apr. 1, 2020), ECF No. 41, which state that the parties have no comments on, and raise no objections to, the Remand Redetermination. Upon review, the court concludes that the Remand Redetermination complies with the court's order in *Yama* and that, no party having objected, the Remand Redetermination should be sustained.

Therefore, upon consideration of the Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination be, and hereby is, sustained; and it is further

ORDERED that the entries at issue in this litigation shall be liquidated in accordance with the final court decision in this action.

Dated: July 31, 2020
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

Slip Op. 20–108

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., AND TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., Plaintiffs, CANADIAN SOLAR INC., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, SOLARWORLD AMERICAS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00198

[Commerce's Second Remand Redetermination in the Third Administrative Review of the Countervailing Duty Order pertaining to photovoltaic cells from the People's Republic of China is sustained.]

Dated: August 4, 2020

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs and Defendant-Intervenors Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd.

Craig A. Lewis, Hogan Lovells US LLP, of Washington, D.C., for Consolidated Plaintiffs Shanghai BYD Co., Ltd. and BYD (Shangluo) Industrial Co., Ltd.

Jeffrey S. Grimson, *Sarah M. Wyss,* and *Bryan P. Cenko*, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiff-Intervenors Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., and CSI Solar Manufacture Inc.

Tara K. Hogan, Assistant Director and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, N.Y. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Paul Keith*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor SolarWorld Americas, Inc.

OPINION

Restani, Judge:

This action concerns the United States Department of Commerce's ("Commerce") second remand redetermination filed pursuant to the court's order in *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 19–137, 2019 WL 5856438 (CIT Nov. 8, 2019) ("*Changzhou Trina II*"); *see Final Results of Redetermination Pursuant to Court Remand*, ECF No. 135–1 (Feb. 28, 2020) ("*Second Remand Results*").

In *Changzhou Trina II*, the court determined that an additional remand was necessary for Commerce to further explain several of its decisions in the underlying review and subsequent remand. Specifically, the court again remanded for Commerce to explain and/or reconsider: (1) whether respondents benefitted from the People's Republic of China's ("PRC") Export Buyer's Credit Program ("EBCP"),

(2) whether Commerce should continue to use the United Nations' Comtrade data in arriving at a benchmark for aluminum extrusions, (3) whether Commerce should use the IHS data alone in arriving at the benchmark for solar glass or whether it should reopen the record, (4) whether Commerce correctly disregarded Canadian Solar's import pricing data of polysilicon as a "tier one" metric under 19 C.F.R. § 351.511(a)(2) due to purported market distortion, and (5) whether the provision of electricity for less than adequate remuneration ("LTAR") was a specific, and thus countervailable, subsidy.

BACKGROUND

The court presumes familiarity with the facts of this case as discussed in its prior opinions, *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018) ("*Changzhou Trina I*") and *Changzhou Trina II*, and thus recounts relevant facts only as necessary. This matter involves a challenge by plaintiffs and defendant-intervenors Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd. (collectively, "Trina"); consolidated plaintiffs BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd. (collectively, "BYD");[1] and plaintiffs and plaintiff-intervenors Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., and CSI Solar Manufacture Inc. (collectively, "Canadian Solar") against Commerce's remand redetermination in the Third Administrative Review of Commerce's Countervailing Duty Order pertaining to photovoltaic cells from the People's Republic of China ("PRC"). SolarWorld Americas, Inc. ("SolarWorld") is a defendant-intervenor.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012). Commerce's second remand redetermination will be sustained unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's

[1] As in *Changzhou Trina I* and *Changzhou Trina II*, BYD does not meaningfully present its own arguments, but rather incorporates by reference several arguments made by Trina and Canadian Solar. *See BYD's Comments on the Final Remand Redetermination*, ECF No. 143 (April 6, 2020). The court acknowledges BYD's brief and will not make further reference to it.

remand order." *Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 968 F. Supp. 2d 1255 (CIT 2014) (citation and quotation marks omitted).

DISCUSSION

I. Export Buyer's Credit Program

In *Changzhou Trina II*, the court held that Commerce had again failed to demonstrate that the use of adverse facts available ("AFA")[2] to find that respondents benefitted from the EBCP was warranted because the cooperating respondents' proffered evidence of non-use was unverifiable. *Changzhou Trina II*, at *3–*5. On remand, the court stated that Commerce and interested parties should collaborate and attempt to find a way for Commerce, absent full cooperation from the PRC, to verify whether respondents benefited from the program. *Id.* at *4. Should that process prove unsuccessful, and should Commerce continue to rely on AFA, the court ordered Commerce to further consider and explain its sources of information to which it is drawing an adverse inference. *See id.* at *5 (noting that relying on allegations in the petition alone without apparent corroboration was problematic).

In its second redetermination, Commerce maintains that further attempts to verify non-use of the program would be futile without cooperation from the GOC. *Second Remand Results* at 11–12. Commerce insists that it "lacks a comprehensive understanding of how the EBCP functions," and that it is unable to differentiate "ordinary commercial loans from EBCP-supported loans in the books and records of the respondents' U.S. customers, or to differentiate disbursements of funds to the respondents themselves." *Id.* at 11. Rather than attempt suggested ways forward offered by the court or discuss potential alternatives with respondents, Commerce, under protest, has accepted respondents' claims of non-use and removed the AFA rate from the calculation. *Id.* at 12.

Canadian Solar asserts that the removal of the AFA rate is supported by substantial evidence, but disagrees with Commerce's claim that verification is unlikely to yield useful information. *Canadian Solar Comments on Final Remand Redetermination* at 30, ECF No. 140 (Apr. 6, 2020) ("*Canadian Solar Br.*"). Although it agrees with the result, Trina contends that Commerce failed to fully comply with the

[2] If a respondent fails to cooperate to the best of its ability, Commerce may, in certain circumstances, "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b). Commerce refers to this as relying on "adverse facts available" or "AFA."

court's remand as Commerce did not "undertake any steps to attempt verification" and thus "denie[d] respondents a meaningful opportunity to generate an accurate and complete record." *Comments of Plaintiffs Trina on Second Remand Redetermination* at 2–7, ECF No. 141 (Apr. 6, 2020) ("*Trina Br.*"). Commerce solicited limited information regarding the EBCP as part of the remand redetermination process but did not, Trina argues, afford it an opportunity to provide additional information demonstrating its affiliate's borrowing activity during the period of review. *Id.* at 5–6. Trina, however, argues that because Commerce did not maintain the AFA rate, the issue is likely moot. *Id.* at 7–8. SolarWorld disagrees with Commerce's decision to find non-use of the EBCP. Rather than make any new argument on this point, SolarWorld incorporates by reference its comments made following Commerce's initial results and first remand redetermination. *See SolarWorld's Comments on the Results of Second Remand Redetermination* at 1–2, ECF No. 144 (Apr. 6, 2020) ("*SolarWorld Br.*").

In response, the government says that Commerce understood the court's order to attempt verification as predicated on a desire to "avoid unnecessarily impacting cooperating parties." *Defendant's Response to Comments on Remand Redetermination* at 10–11, ECF No. 149 (May 14, 2010) ("*Gov. Br.*"). It claims that interested parties had an opportunity to submit new information regarding the EBCP, but agrees with Trina that the issue is nonetheless moot. *Id.* at 10–11. In reply, Trina disagrees with the government's contention that it was able to provide additional information to Commerce and argues that submitting unsolicited factual information is prohibited by the applicable regulation. *Trina Reply* at 1 n.1, 2–3, ECF No. 152.

The government overstates the opportunity Commerce afforded interested parties to submit additional documentation on their usage or non-usage of the EBCP. *See Gov. Br.* at 10–11. Although Commerce did permit interested parties the opportunity to respond to documents it placed on the record, parties were only allowed to "comment and submit new factual information regarding the [documents Commerce placed on the record]." *Placing Documents on the Record*, Sec. Rem. P.R. 5–9 (Dep't Commerce Jan 3, 2020). Accordingly, it appears that interested parties were limited as to the documents they could submit without violating regulatory limits on the submission of new facts. *See* 19 C.F.R. § 351.302(d)(1)(i)-(ii). The removal of the AFA rate, however, has mooted any issues that would have otherwise resulted from Commerce's failure to allow respondents to submit additional

documentation supporting their claims of non-use. *See NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (noting that mootness occurs when "parties lack a legally cognizable interest in the outcome.") (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("[F]ederal courts may not give opinions upon moot questions or abstract propositions.") (citation and quotation marks omitted).

Although the court stated that "[o]n remand, the parties should discuss potential ways forward and Commerce should request records that may answer the question of EBCP use from respondents, and, if necessary, their importers," Commerce has chosen a different path. *Changzhou Trina II*, at *4. Rather than attempt an alternative method of verifying respondents' claims of non use, Commerce has chosen to simply accept those claims. The choice is materially similar to Commerce's decision in *Jiangsu Zhongji Lamination Materials Co. v. United States*, Slip Op. 2039, 2020 WL 1456531, (CIT 2020). There, as here, the court remanded for Commerce to confer with interested parties on ways to verify whether parties had benefitted from the EBCP and "contemplate a solution to the impasse." *Id.* at *2. Rather than contemplate possible ways to verify the plaintiff's submissions of non-use, in that case Commerce simply decided to accept the plaintiff's submissions of non-use, claiming an inability to verify.[3] *Id.* Here, Commerce continues to insist that without a full explanation of how the EBCP operates, verification is impossible. *See* Second *Remand Results* at 10–11. Although Commerce acknowledged the court's suggested means to potentially conduct verification, apparently these suggestions were in Commerce's estimation a non-starter in view of the Government of the PRC's ("GOC") refusal "to provide Commerce with its 2013 administrative rules governing the program as well as a list of correspondent banks involved in the transactions." *See* Second *Remand Results* at 11. Rather than attempt to devise a way to avoid unnecessarily punishing cooperating parties for the GOC's noncompliance, Commerce is steadfast that without full GOC participation, there is no way forward. Although the court acknowledges that Commerce's verification concerns in view of the 2013 revisions to the EBCP are not completely unfounded, the court cannot conclude that verification is impossible, particularly in view of Commerce's failure to pose even the most basic questions regarding the borrowing practices of the relevant parties.

[3] Trina submitted a certification of non-use for its sole U.S. customer. *See Changzhou I*, 352 F. Supp. 3d at 1324 n.4. Here, as in *Jiangsu*, Canadian Solar did not submit certifications for every customer, but for most. *See id.*; *see also Jiangsu*, at *3 n.3. Commerce does not appear to have addressed this issue at the administrative level.

Nevertheless, as noted in the court's previous opinion, during the second administrative review Commerce had accepted similar certifications of non-use as sufficient evidence of non-use. *See Changzhou II*, at *2 n.5 (citing *Changzhou I*, 352 F. Supp. 3d at 1324); *see also Decision Memorandum for the Preliminary Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2014*, at 31 n.154, C-570–980, P.R. 221 (Dep't Commerce Dec. 29, 2016). Commerce's reversion to its prior practice is not an impermissible course of action here. Commerce typically has discretion in deciding whether to verify factual information, and no party contends verification was required in this instance. *See generally*, 19 C.F.R. § 351.307 (regulation discussing Commerce's verification of information). As in *Jiangsu*, "the court did not direct this result; Commerce chose it." *Jiangsu*, at *3. Commerce did not confer with the parties as the court said that it should, but the court does not find that Commerce's decision to accept the certifications of non-use amounts to noncompliance with the remand. The court sees no purpose in continuing to remand for further development of the facts.

II. Use of IHS data in Computing a Benchmark for Aluminum

The court held that Commerce's decision to average both IHS and Comtrade data for benchmark aluminum extrusions was unsupported by substantial evidence. In *Changzhou Trina I*, "the court conclude[d] that Commerce's decision to average the Comtrade and IHS datasets without properly considering whether the Comtrade data was too flawed to be probative of the world market price for the input at issue renders the decision unsupported by substantial evidence." *Changzhou Trina I*, 352 F. Supp. 3d at 1332–33. Commerce had averaged the two datasets due to its preference for monthly data provided by Comtrade and data specific to solar panels provided by IHS. *See id.* at 1331–32. Finding problems with this approach because of the over inclusiveness of the Comtrade data, the court remanded the case to Commerce "with instructions either to use solely the IHS dataset in its calculation of the appropriate benchmark or else explain why the inclusion of the Comtrade data does not produce a fatally inaccurate result." See id. at 1333.

Following the first remand, Commerce continued to average the Comtrade and IHS datasets. *See Changzhou Trina II*, at *6. Commerce justified this decision as necessary because Comtrade was "the only data on record that captures monthly-price fluctuations."

Changzhou Trina II, at *6. The court in *Changzhou Trina II*, however, found that Commerce had "failed to address the court's concerns that the monthly fluctuations evinced by the Comtrade data might be caused by fluctuations in the price of other products encompassed in the Comtrade headings unrelated to solar frames." *Id.* at *6. Commerce did not, in the court's view, "adequately account[] for 'factors affecting comparability'" as required under 19 C.F.R. § 351.511(a)(2)(ii). *Id.* at *7. The court held that Commerce's decision to continue to use the Comtrade data because of its preference for monthly values was unreasonable and remanded the issue to Commerce, stressing that "[a] preference for monthly values cannot overcome data that does not reasonably relate to the product at issue." *Id.* The court instructed Commerce to either use the IHS data alone to develop a benchmark or demonstrate that the merchandise included in the Comtrade data is "sufficiently comparable to solar frames." *Id.*

On second remand, Commerce states that the record does not contain enough information to adequately address factors affecting comparability in the Comtrade data. *Second Remand Results*, at 12; *see also Gov. Br.* at 12. While restating its preference to use data that "captures monthly price fluctuations," Commerce concluded that it was "not possible to demonstrate that the monthly price fluctuations reflected in the Comtrade data are driven by variations in solar frame prices." *Second Remand Results*, at 12. As a result, pursuant to the court's instruction in *Changzhou Trina II*, Commerce relies exclusively on IHS data as a benchmark for aluminum extrusions and has revised its calculations and rates accordingly. *Second Remand Results*, at 12–13.

Both Trina and Canadian Solar agree with Commerce's use of IHS data and its recalculation of the benchmarks. *Canadian Solar Br.* at 2; *see also Trina Br.* at 2, 9. SolarWorld objects, arguing that Commerce's exclusive reliance on the IHS data is erroneous and that Comtrade data is "sufficiently comparable to solar frames." *SolarWorld Br.* at 2. SolarWorld does not put forward anything new to demonstrate that the Comtrade data is not "grossly overinclusive."[4] *Changzhou Trina II*, at *7; *see also Changzhou Trina I*, 352 F. Supp. 3d at 1334–35; *Gov. Br.* at 12.

Commerce's determination is consistent with the directions given in *Changzhou Trina II* and is supported by substantial evidence as outlined in both *Changzhou Trina I* and *Changzhou Trina II*. As noted previously, the IHS data is an average annual figure specific to alu-

[4] *See SolarWorld Br.* at 2. The basis of its argument rests on a Federal Circuit decision previously distinguished by the court in *Changzhou Trina II*. *See Changzhou Trina II*, at *7, n.12 (discussing the irrelevance of *SolarWorld Americas, Inc. v. United States,* 910 F.3d 1216, 1223 (Fed. Cir. 2018) to this case).

minum frames. *Changzhou Trina I*, 352 F. Supp. 3d at 1331. There is no statutory or regulatory obligation to use monthly data, despite Commerce's preference for it. *Id.* at 1332. Because the IHS data is specific to the inputs used by the parties, it is probative of the world market price at issue here. Relying on it alone meets the comparability requirements of 19 C.F.R. § 351.511(a)(2)(ii) and is in accordance with Commerce's obligations under the regulations. *Changzhou Trina I*, at 1332; *see also* 19 C.F.R. § 351.511(a)(2)(ii). The court sustains Commerce's decision to use IHS data as a benchmark for aluminum extrusions.

III. Use of PV Insights data in Computing a Benchmark for Solar Glass

As with the data used for setting the benchmark for aluminum extrusions, in *Changzhou Trina I* and *Changzhou Trina II*, the court held that Commerce's decision to average Comtrade and IHS data for solar glass was unsupported by substantial evidence. In *Changzhou Trina I*, the court stated that because "Commerce did not inquire into whether the fluctuations in the Comtrade data were due to solar glass rather than other merchandise contained in the HTS headings" the court could not be reasonably assured that the Comtrade data did not "create the appearance of fluctuations in the solar glass market where none actually exist." *Changzhou Trina I*, 352 F. Supp. 3d at 1334–35. Finding that "Commerce did not sufficiently determine the adequacy of these datasets or explicate their comparability," the court concluded that "Commerce failed to meaningfully assess the reliability of the Comtrade data and included it despite indications that it is overinclusive in regards to the types of glass included in the data, underinclusive in failing to include solar glass-producing countries, and by failing to assess whether the monthly fluctuations were due to price variability of solar glass or merely related to other merchandise contained in the HTS headings at issue." *Id.* The court remanded the case to Commerce and stressed the importance of accounting "for factors affecting comparability." *Id.* at 1335 (citing 19 C.F.R. § 351.511(a)(2)(ii)). The court instructed Commerce to either use the IHS data alone in developing a benchmark for solar glass or "address the court's concerns as to the Comtrade data and explain why its inclusion is appropriate." *Id.*

On first remand, Commerce continued to average the Comtrade and IHS datasets, claiming that its use of Comtrade data was necessary because it was the only data on the record that provided evidence of monthly fluctuations. *See Changzhou Trina II*, at *8. The court again found the Comtrade data to be "fatally overinclusive of non-solar

glass and underinclusive of data from the countries with major solar glass producers" to derive a benchmark supported by substantial evidence. *Id.* at *9. The court further opined that the IHS data actually undermined the Comtrade data. *See id.* at *8. The court again remanded the case, directing Commerce to either use the IHS dataset alone to calculate a solar glass benchmark or to reopen the record to identify "a dataset that is both specific to solar glass and computed on a monthly basis" and then use that dataset to compute the benchmark. *Id.* at *9.

On second remand, Commerce reopened the record and sought data that was both "specific to solar glass and reported on a monthly basis." *Gov. Br.* at 13; *see also Second Remand Results*, at 13. Upon Canadian Solar's submission of two new datasets, Commerce decided to exclusively use PV Insights data because it was within the period of review, "specific to solar glass and reported on a monthly basis," thus making it superior to all other datasets on the record. *Gov. Br.* at 13; *see also Second Remand Results*, at 13, 33. According to the record, PV Insights is "a solar photovoltaic research firm." *Second Remand Results*, at 13. Canadian Solar and Trina both support Commerce's reliance on this data to calculate a revised benchmark for solar glass. *Canadian Solar Br.* at 2; *see also Trina Br.* at 2, 9. Canadian Solar further states that the IHS data "corroborates [ ] PV Insights methodology . . . indicating that these data are specific to solar glass." *Canadian Solar Responsive Comments on Final Remand Redetermination* at 8, ECF No. 150 (May 14, 2020).

SolarWorld objects and contends that Commerce's reliance on PV Insights is incorrect. *SolarWorld Br.* at 2. The basis of its objection is that PV Insights is "unreliable because they lack an identifiable methodology" and therefore, "it is unclear whether these data truly represent global prices." *Id.*

Commerce considered SolarWorld's concerns but determined that the data was reliable. *Gov. Br.* at 13–14.[5] Commerce concluded that the PV Insights data "represents the best available information on the record to measure the adequacy of renumeration for the provision of solar glass." *Second Remand Results* at 33. In support, Trina argues that SolarWorld lacks any basis for its contention that PV Insights data is unreliable and that the information on the record not

[5] *See also Second Remand Results* at 33–34 (The PV Insights data "appears to be the result of market research intended to provide accurate, for-purchase, benchmarking information to participants in the solar market so they can effectively conduct business."). Commerce further found that PV Insights data "appears to be treated as reliable information by the relevant industry for the POR." *Second Remand Results* at 34. SolarWorld does not dispute either of these points.

only shows the reliability of PV Insights but also that Commerce was reasonable in exclusively relying on this data for benchmarking solar glass. *Trina Reply* at 4–6.

The court agrees. SolarWorld has not put forward anything on the record that contradicts Commerce's determination that PV Insights is reliable and its use is consistent with the requirements for comparability under 19 C.F.R. § 351.511(a)(2)(ii). Although the court understands SolarWorld's concerns regarding the transparency of PV Insights collection of data, the court is also mindful that it may not substitute its own judgment for that of Commerce where Commerce "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Commerce has done so here. SolarWorld's conclusory statements concerning PV Insights collection methodology is not enough to demonstrate a fatal flaw in Commerce's reasoning. Although the PV Insights data collection methodology may not be a model for clarity, it is not so suspect that Commerce's reliance on it is unsupported by substantial evidence. Commerce considered the relevant factors, including monthly data that was specific to solar glass as well as SolarWorld's concerns. The court concludes that Commerce's determination was a reasonable one and thus sustains its determination to use the PV Insights data to set a benchmark for solar glass.

IV. Commerce's Rejection of Canadian Solar's Import Pricing Data in Computing a Benchmark Price for Polysilicon

In setting the benchmark price for polysilicon, Commerce has consistently rejected Canadian Solar's proffered data. *See Changzhou Trina I*, 352 F. Supp. 3d at 1336–37; *Changzhou Trina II*, at *9. Commerce reasoned that it could not accept Canadian Solar's import data as a tier one metric, *see* 19 C.F.R. § 351.511(a)(2)(i),[6] because of the GOC's participation in the polysilicon market and the resulting effect on import prices. *See Changzhou Trina II*, at *9. Accordingly, Commerce resorted to a tier two metric pursuant to 19 C.F.R. §

[6] A tier one metric is a price based on a "market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). In the absence of a tier one metric, Commerce resorts to a tier two metric and "will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii); *see also Guangdong Wireking Housewares and Hardware Co. v. United States*, 900 F. Supp. 2d 1362, 1381–82 (CIT 2013) (describing Commerce's practice).

351.511(a)(2)(ii). *See id.* The court held that Commerce's determination was unsupported by substantial evidence because it appeared that the GOC had influence over only a small portion of the polysilicon market generally, and Commerce did not point to data showing how this could properly lead to distortion in the solar-grade polysilicon industry specifically. *See id.* at *9–10. On remand, Commerce was instructed to use Canadian Solar's data as a tier one metric or otherwise sufficiently explain how the "GOC's participation in the solar-grade polysilicon industry renders [that] data unreliable." *Id.* at *10.

On remand, Commerce has reopened and supplemented the record with documents it argues show that in addition to the GOC's ownership interest in the domestic polysilicon industry, the GOC has engaged in other market-distorting practices that depress the price of solar-grade polysilicon. *See Second Remand Results* at 17–21. Specifically, Commerce contends that the GOC's policy of export taxes on domestically-produced polysilicon, involvement in contracts with foreign manufacturers of polysilicon, and other government policies in the production of polysilicon depress import prices such that Canadian Solar's data is not reliable as a tier one metric. *See id.* at 17–22.

Canadian Solar contends that, despite the new documents placed on the record, Commerce's decision to reject its import data remains unsupported by evidence and unlawful. *Canadian Solar Br.* at 20–29. It additionally states that Commerce has still failed to show that the GOC's participation in the solar-grade polysilicon market was substantial enough to lead to distortion. *Id.* at 20–25. Further, it argues that Commerce improperly used adverse facts available, although Commerce claims that it did not. *Id.* at 25–27, 29. Finally, Canadian Solar states that Commerce relied on outdated information. *Id.* at 27–29. In response, the government argues that Commerce reasonably determined that the polysilicon market was distorted. *Gov. Br.* at 14–21. It also rejects the contentions that Commerce resorted to adverse facts available and that Commerce relied on outdated information. *Id.* at 18–20.

Contrary to Canadian Solar's apparent argument, GOC management or ownership of a substantial amount of the polysilicon market is not a threshold requirement for Commerce to find market distortion. Commerce understands that "unless [a] government provider constitutes a majority or, in certain circumstances, a substantial portion of the market," price distortion "will normally be minimal." *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998). The court also acknowledges, however, that other kinds of interference with the market can similarly skew the prices of a good or service such that Commerce can properly disregard

actual transactions in favor of a world market price. *See* 19 C.F.R. § 351.511(a)(2)(i)–(ii). In addition to considering the GOC's control over the production of a small percentage of polysilicon, Commerce has offered additional evidence of the GOC's involvement in the market in ways that sufficiently support Commerce's finding that Canadian Solar's import data is too distorted to use as a tier one metric. *See Reopening the Record and Opportunity to Comment*, Sec. Rem. P.R. 10 (Dep't Commerce Jan. 7, 2020) ("*Additional Polysilicon Documents*").

Commerce argues that a confluence of central government policies has resulted in downward pressure on the domestic price of polysilicon, which in turn depresses imports that must compete with domestic products. *See Second Remand Results* at 18–21. Commerce now explains the significance of documents placed on the record and how they influenced its distortion finding. *See id.*; *see also Changzhou Trina II*, at *9 n.16 (noting additional documents cited by Commerce without explanation of how these documents influenced its decision). For instance, Commerce cites a World Trade Organization ("WTO") Panel Report finding that the GOC imposed a 15% export duty on silicon metal in 2009 inconsistent with WTO member obligations. *See Second Remand Results* at 18; *see also China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011) (appellate body report) ("WTO Panel Report") ("WTO Panel Report"). Commerce reasonably argues that this export duty[7] leads to "downward pressure on Chinese domestic prices for all types of polysilicon." *Second Remand Results* at 19. Further, Commerce added documents to the record reflecting the GOC's intervention policies in the solar industry, including polysilicon.[8] *See Additional Polysilicon Documents*. Although Canadian Solar submitted documentation that it argues undermines Commerce's finding that import prices are altered by the GOC's solar policies, Commerce's decision was nonetheless supported by substantial evidence. *See Canadian Solar Letter,re: Crystalline Silicon Photovoltaic Cells, Whether*

[7] In other investigations Commerce has similarly found that export duties lead to price depreciation rendering domestic prices and imports unreliable as tier one metrics. *See Second Remand Results* at 36–37, 37 n.154 (citing *Biodiesel from Argentina: Preliminary Affirmative Countervailing Duty Determination and Preliminary Affirmative Critical Circumstances Determination, in Part*, 82 Fed. Reg. 40,748 (Dep't Commerce Aug. 28, 2017), and accompanying *Preliminary Determination Issues and Decision Memorandum* at 31, unchanged at the final determination; *Biodiesel from the Republic of Indonesia: Preliminary Affirmative Countervailing Duty Determination*, 82 Fed Reg. 40,746 (Dep't Commerce Aug. 28, 2017), and accompanying *Preliminary Determination Issues and Decision Memorandum* at 17, unchanged at the final determination.)

[8] As noted by Canadian Solar, the policy goals detailed in the newly submitted documents are rather general. *See Canadian Solar Br.* at 28. The documents do support, however, that the GOC is particularly interested in efforts to support the solar industry and in particular polysilicon. *See Additional Polysilicon Documents*, at Attach. 1.

or Not Assembled into Modules, from the People's Republic of China: Responsive Comments and New Factual Information on Polysilicon, Sec. Rem. P.R. 14, Sec. Rem. C.R. 5 (Jan. 17, 2020) ("*Canadian Solar's Polysilicon Letter*"). Commerce is correct that even Canadian Solar's proffered evidence appears to indicate that the GOC is directly negotiating price commitments with companies seeking to export into the PRC. *See Second Remand Results* at 19 (citing Canadian Solar's Polysilicon Letter at 6). As a whole, there is sufficient record evidence to support Commerce's finding of market distortion and rejection of Canadian Solar's import data in the light of that distortion.

Because the GOC did not have information on solar-grade polysilicon, Commerce relied on facts otherwise available in determining that tier one metrics were distorted and therefore unreliable. *See Second Remand Results* at 15. Canadian Solar incorrectly contends that Commerce is using adverse facts available. *Canadian Solar Br.* at 25–27, 29. Although Commerce's distortion finding adversely impacts Canadian Solar, that does not necessarily equate to an application of adverse facts available.

Finally, although some of Commerce's evidence is dated before the period of review, Canadian Solar offers insufficient proof that the market conditions changed such that the information is outdated. *See id.* at 27–28. Specifically, Canadian Solar argues that it proffered evidence that lower-priced imports caused a depression in the domestic market. *Id.* Commerce considered Canadian Solar's evidence and found causation to be the opposite in that depressed domestic prices drove down the price of imports. *See Second Remand Results* at 41. The court will not substitute its judgment for that of Commerce when its reading is reasonable, as it is here, even if a contrary reading of the evidence presented is theoretically possible. *See State Farm*, 463 U.S. at 43. Accordingly, Commerce's decision to disregard Canadian Solar's input data as a tier one metric and rely on tier two data is sustained.

V. Commerce's Specificity Finding Regarding the Provision of Electricity for Less than Adequate Remuneration

In its initial determination, Commerce found that the GOC's subsidization of electricity was specific and countervailable. *See Changzhou Trina I*, 352 F. Supp. 3d at 1340–41 (citing *Decision Memorandum for Final Results and Partial Rescission of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2014*, at 40–42 (Dep't Commerce July 10, 2017) ("*I & D Memo*"). In *Changzhou Trina I*, the court held that Commerce had "failed to explain the particular facts as to which it was drawing

an adverse inference and how that analysis subsequently results in a finding of specificity under one of the criteria listed in 19 U.S.C. § 1677(5A)." *Id.* at 1341–42. On first remand, Commerce found, by drawing an adverse inference, that "the program is limited to a group of enterprises or industries and is thus *de facto* specific, in the absence of complete information from the GOC." *Final Results of Redetermination Pursuant to Court Remand* at 68, ECF No. 103–1 (Dep't Commerce Apr. 25, 2019) ("*First Remand Results*. In *Changzhou Trina II*, the court concluded that Commerce had identified potential "material gaps in the record" caused by the GOC's non-cooperation. *Changzhou Trina II*, at *11. The court remanded again, however, for further explanation of Commerce's "reasoning under the statutory steps for drawing adverse inferences to fill record gaps." *Id.*

Rather than further explain its finding that the subsidization of electricity is specific solely because it is limited to certain industries, Commerce has changed course and issued a finding of regional specificity pursuant to 19 U.S.C. § 1677(5A)(D)(iv). *See Second Remand Results* at 22–24. Commerce determined that "in so far as the varying prices [among provinces] are set by authorities of the central government in Beijing, and in so far as the GOC is unable to demonstrate that such variances are in accordance with market principles or cost differences, there is in fact a regionally specific subsidy program, because the central Beijing authority is setting different prices in different provinces without explanation." *Id.* at 22. In rendering this finding, Commerce drew an adverse inference based on the unexplained differential pricing of electricity among provinces and the central government's National Development and Reform Commission's ("NDRC") role in setting electricity prices. *Id.* at 23–24.[9]

In the current proceeding, Canadian Solar asserts that Commerce's determination is unsupported by substantial evidence and not in accordance with law. *Canadian Solar's Br*. at 2–20. Canadian Solar contends that by substituting a theory of regionally specific subsidization for Commerce's previous theory of industry-specific subsidization, Commerce violated the court's order[10] and its determination

[9] As noted in *Changzhou I*, Commerce computed the benchmark for electricity by selecting "the highest rate schedule on record for each reported category." *Changzhou I*, 352 F. Supp. 3d at 1341. That decision was sustained in *Changzhou I* and is not now before the court. *Id.* at 1343.

[10] Canadian Solar also asserts that Commerce did not address its failure to provide documents it previously relied on, specifically the supportive documentation listed in the Initiation Checklist, *see Changzhou Trina II*, at *11, as required by the remand order. *See Canadian Solar Br*. at 6. The court merely noted that Commerce had not provided this documentation in its submissions to the court. *See Changzhou Trina II*, at *11. Commerce has now supplemented the record with those documents. *See Joint Appendix for Comments on Second Remand* at Attach. III, ECF No. 158 (May 28, 2020).

amounts to an impermissible post-hoc rationalization. *Id.* at 3–7. Canadian Solar avers that Commerce's use of adverse facts available was unlawful and produced a vague finding of regional subsidization. Id. at 7–11. Notably, Canadian Solar argues that Commerce has failed to identify that any particular region is receiving electricity for LTAR. *See id.* at 11–15. Additionally, Canadian Solar contends that Commerce failed to demonstrate the presence of the solar industry within a subsidized province. *Id.* at 16–20. Going further, Canadian Solar asserts the impossibility of regional specificity, claiming that "the record illustrates that the solar cells industry itself is not isolated in a designated geographical region," and that many producers are located in the provinces with the highest electricity rates, the number ultimately selected as the benchmark. *Id.* at 18–19.

The government asserts that Commerce's application of AFA complied with the court's order. *Gov. Br.* at 21. In responding to Canadian Solar's allegation that Commerce's determination of specificity was excessively vague, the government avers to the impossibility of rendering a precise determination due to GOC non-compliance. *Id.* at 25–26. The government asserts that there need not be a single geographic region receiving the subsidy, nor must a region's costs be the lowest for a subsidy to exist. *Id.* at 26. The government argues that Commerce properly identified gaps in the record (unsubmitted provincial price proposals, missing descriptions of the cost elements and price adjustments discussed with the NDRC, and a lack of province-specific explanations linking particular costs to retail prices), explained the relevance of such gaps, and described how it reached its regional specificity determination based on record evidence. *Id.* at 21–22. The government also asserts that Commerce's adoption, on second remand, of a regional specificity finding in lieu of industry specificity is consistent with the court's order. *Id.* at 23–24. The government contends that Commerce complied by providing supporting documents from the Initiation Checklist and setting forth its reasoning. *Id.* at 24–25.

As a preliminary matter the court addresses Canadian Solar's contention that following the second remand Commerce acted impermissibly by shifting its rationale for a finding of specificity from industry specific to geographically specific subsidization. *Canadian Solar's Br.* at 3–5. In making this argument Canadian Solar reads *Olympic Adhesives, Inc. v. United States* 899 F.2d 1565 (Fed. Cir. 1990) to require consistency between the rationales asserted by an administrative agency on remand. *See id.*

Canadian Solar's reliance upon *Olympic* is mistaken. In *Olympic*, the Federal Circuit addressed a discrepancy between the rationale proffered by the ITA within the administrative record and the arguments it set forth before the court. *Olympic Adhesives,* 899 F.2d at 1572 (noting the shift between the ITA's reasoning in a notice of final determination and the agency's brief). Put simply, the court in *Olympic* did not examine an agency's change in decision following a court remand. Therefore, *Olympic* cannot be read for the general proposition that such changes are impermissible.

As observed by the Federal Circuit, "limited remands that restrict Commerce's ability to collect and fully analyze data on a contested issue" are "generally disfavor[ed]." *Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012); *see also Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1039 (Fed. Cir. 2003) ("By sharply limiting Commerce's inquiry, the trial court's remand actually prevented Commerce from undertaking a fully balanced examination that might have produced more accurate results."). Consistent with the normal preference of the Federal Circuit, the court's second remand order only required that "Commerce should expressly set forth its reasoning under the statutory steps for drawing adverse inferences to fill record gaps." *Changzhou Trina II*, at *11. Despite Canadian Solar's contention, the express language of the order did not bind Commerce to any theory and Commerce's subsequent reliance upon a theory of regional specificity does not conflict with or exceed the bounds of the remand order. Here, Commerce was allowed to revisit its determination based on record evidence. The court did not issue narrow remand instructions. *See Royal Thai Government v. United States,* 850 F. Supp. 44, 51 (CIT 1994) (rejecting Commerce's change in rationale after the court directed Commerce to limit itself "to the evidence and analysis underlying the agency's [prior] decision."). Thus, the operative questions are whether Commerce sufficiently explained its rationale and whether sufficient evidence supports that determination.

In *Changzhou Trina II*, the court held that "Commerce has identified potentially-material gaps in the record" that could allow it "to rely on facts otherwise available and draw adverse inferences based on non-cooperation." *Changzhou Trina II*, at *11; *see also RZBC Group Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1300–01 (CIT 2015) (Commerce is permitted to draw an adverse inference in determining specificity when the GOC failed to sufficiently answer Commerce's inquiries.). Additionally, as Commerce asserts, the record indicates that the missing information would help to clarify the basis for regional variability in electrical rates. *See*

Second Remand Results at 23–24; *see also GOC Initial CVD Questionnaire Response*, at 95–100, P.R. 100–102, C.R. 16–18, 20 (May 3, 2016).

Commerce noted two factual bases for a determination of specificity: (1) unexplained regional price variability and (2) central government action via the NDRC. *Second Remand Results* at 23–24. Applying AFA, Commerce reasoned that this variability was the result of a regionally specific policy of subsidization coordinated through the NDRC. *Second Remand Results* at 24 ("[A]s AFA, we infer... that the NDRC is the authority providing the subsidy. Moreover, the schedules submitted by the GOC constitute a clear factual basis for the inference that the NDRC has subsidized electricity consumers in certain regions by arbitrarily setting different prices across the provinces."). As noted in *Changzhou II*, documents submitted by the GOC support Commerce's inference that the NDRC "maintains some input over provincial electricity pricing," and that adjustments made by the NDRC may not comport with market principles. *Changzhou II*, at *11. This, combined with unexplained price variability among provinces, sufficiently supports Commerce's determination that the subsidy is regionally specific pursuant to 19 U.S.C. § 1677(5A)(D)(iv).

Canadian Solar's arguments regarding the supposed vagueness of Commerce's determination of specificity and the failure to identify certain facts[11] are unavailing given Commerce's proper use of adverse inferences here. The record indicates that "the GOC refused to answer questions related to regional electrical differences, *including differences between industries*." *I & D Memo* at 41 (emphasis added); *see also Second Remand Results* at 44–47 (describing how the GOC's failure to comply prevented Commerce from determining the exact reason for price variation). By insisting on precise explanations, Canadian Solar would require Commerce to do that which the GOC's non-compliance made impossible; proffer a nuanced specificity analysis. Additionally, in finding the provision of electricity to be a regional subsidy, Commerce was not further required to demonstrate that the subsidy was limited to the solar industry as Canadian Solar claims. *See* Canadian Solar Br. at 16–20.

The statute describes a regional subsidy to exist "[w]here a subsidy is limited to an enterprise or industry located within a designated geographical region," 19 U.S.C. § 1677(5A)(D)(iv). In interpreting this part of the statute "any reference to an enterprise or industry is a

[11] Canadian Solar argues that Commerce was required to: (1) determine the region subsidized, (2) identify the benefitting enterprises or industries within the subsidized region, and (3) find that the solar industry operated within a subsidized region. *See Canadian Solar Br.* at 9–20. Commerce reasonably determined that the GOC's noncooperation made these determinations impossible. *See Second Remand Results* at 44–47.

reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries." 19 U.S.C. § 1677(5A)(D). Once Commerce makes a finding of regional specificity, all enterprises or industries within that region could reasonably be understood to be "a group of such enterprises or industries," obviating any purported need for Commerce to make an additional showing that a regional subsidy benefitted a particular industry. *See id.* This understanding of the statute is confirmed by the statement of administrative action which provides that "subsidies provided by a central government to particular regions (including a province or a state) are specific regardless of the degree of availability or use within the region." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 932 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4244 ("SAA").[12] Notwithstanding that Commerce was stymied by the GOC in determinizing whether the solar industry was disproportionately receiving subsidized electricity, after reasonably determining that the provision of electricity was a regional subsidy provided by the central government (via the NDRC), Commerce did not need to make such a finding. *See Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, 1358 (CIT 2006) (differential pricing of electricity based on regional location was enough, without more, to demonstrate regional specificity).[13]

Commerce identified the gap in the record, noted the factual bases it relied upon, and explained the adverse inference it drew based on those facts. Commerce's determination is reasonable based on the record and supported by substantial evidence. The court sustains Commerce's finding that the provision of electricity for less than adequate remuneration is a regionally specific subsidy.

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[12] "The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."19 U.S.C. § 3512(d). The court in *Royal Thai* cited the SAA for the proposition "no additional showing of specificity" is required if Commerce finds that a central government is providing subsidies based on region. *See Royal Thai*, 441 F. Supp. 2d at 1358 n.5; *see also Samsung Electronics Co. v. United States*, 973 F. Supp. 2d 1321, 1328–29 (CIT 2014) (citing *Royal Thai* to support a finding that a subsidy conditioned on geographical region satisfied 19 U.S.C. § 1677(5A)(D)(iv)).

[13] Similarly, Canadian Solar's contentions that some solar industries paid the highest electricity rates and that the solar industry is not isolated in a single region, *see Canadian Solar Br.* at 18–19, are immaterial to a finding of regional specificity. Further, that some cell producers may not have paid the lowest electricity rates does not disprove Commerce's regional specificity determination. Commerce's specificity finding simply was not based on disproportionate use by a given industry.

CONCLUSION

For the foregoing reasons, Commerce's *Second Remand Results* are sustained. Judgment will enter accordingly.

Dated: August 4, 2020
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 20–109

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., et al., and SOLARWORLD AMERICAS, INC., Plaintiffs, and Consolidated Plaintiffs, v. UNITED STATES, Defendant, SOLARWORLD AMERICAS, INC., CHANGZHOU TRINA SOLAR ENERGY CO., LTD., AND CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00246

[Commerce's Second Remand Redetermination in the Administrative Review of Commerce's Countervailing Duty Order pertaining to Crystalline Silicon Photovoltaic Products from the People's Republic of China is sustained].

Dated: August 4, 2020

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina").

Tara K. Hogan, Assistant Director and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, N.Y. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Paul Keith*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor SolarWorld Americas, Inc.

OPINION

Restani, Judge:

This action concerns the U.S. Department of Commerce's ("Commerce") second remand redetermination filed pursuant to the court's order in *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 19–143, 2019 WL 6124908 (CIT Nov. 18, 2019) ("*Changzhou Trina II*"); *see Final Results of Redetermination Pursuant to Court Remand*, ECF No. 93–1 (Dep't Commerce Mar. 2, 2020) ("*Second Remand Results*").

In *Changzhou Trina II*, the court determined that remand was necessary for Commerce to further explain some of its decisions in the underlying review and subsequent remand. Specifically, the court remanded for Commerce to explain and/or reconsider: (1) whether respondent benefitted from the People Republic of China's ("PRC") Export Buyer's Credit Program ("EBCP"), (2) whether Commerce should continue to use the United Nations' Comtrade data in arriving

at a benchmark for aluminum extrusions, and (3) whether Commerce should use the IHS data alone in arriving at the benchmark for solar glass or whether it should reopen the record.

BACKGROUND

The court presumes familiarity with the facts of this case as discussed in its prior opinions, *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 18–167, 2018 WL 6271653 (CIT Nov. 30, 2018) ("*Changzhou Trina I*") and *Changzhou Trina II*, and thus recounts relevant facts only as necessary. This matter concerns Commerce's second remand redetermination in the first administrative review of Commerce's countervailing duty order pertaining to certain crystalline silicon photovoltaic products from the PRC. *See Second Remand Results*. Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina") are plaintiffs and SolarWorld Americas, Inc. ("SolarWorld") is a defendant-intervenor.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). The court will uphold Commerce's second remand redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 968 F. Supp. 2d 1255 (CIT 2014) (citation and quotation marks omitted).

DISCUSSION

I. Export Buyer's Credit Program

Commerce initially determined that it was unable to verify respondent's certifications of non-use *Changzhou I*, at *2. Commerce initially concluded, through the application of AFA,[1] that the cooperating respondent benefited from the program. *Id.* The court remanded this issue concluding that Commerce did not demonstrate that re-

[1] When a party fails to cooperate to the best of its ability, Commerce may "use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b). Commerce refers to this as relying on "AFA" or "adverse facts available."

spondent's certifications were unverifiable. *Id.* at *3. On remand, Commerce continued to "find the certifications unverifiable" and continued to find, through an application of AFA, that respondent benefitted from the EBCP. *Changzhou Trina II*, at *2. Commerce reasoned that it could not verify the certifications because of the "uncertainties about the EBCP's potential use of third-party banks to distribute EBCP funds" and without the Government of the People's Republic of China's ("GOC") "disclosure of the 2013 internal guidelines and other information." *Id.* at *2 (citing *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 65–1 (Apr. 25, 2019) ("*First Remand Results*"))

In *Changzhou II*, the court again remanded Commerce's determination that verification of EBCP use was impossible. *Id.* at *3–4. The court acknowledged the GOC's failure to respond to certain questions regarding the EBCP's operations, but "to avoid unnecessarily impacting cooperating parties," the court held that Commerce must "at least attempt to verify the certifications of non-use in this case." *Id.* at *3. The court suggested ways for Commerce to attempt verification on remand. *Id.* Although these suggestions may have required Commerce to "deviate from its standard verification procedures," the court stated that "the parties should discuss potential ways forward" and Commerce should "detail its process in its remand redetermination." *Id.* The court concluded that if Commerce continued to find that respondent benefited from the EBCP, Commerce must explain what evidence in its investigation supported its finding. *Id.* at *4.

On second remand, Commerce reiterates its prior stance that without cooperation from the GOC, further attempts to verify non-use of the program would be futile. *Second Remand Results* at 7–8. Commerce maintains that it "lacks a comprehensive understanding of how the EBCP functions," and that it is thus unable to determine whether respondent benefitted from the program. *Id.* at 8. Under protest, however, Commerce has accepted respondent's claims of non-use and removed the AFA rate from its calculation. *Id.*

Trina agrees with Commerce's decision to remove the AFA rate, but contends that Commerce did not comply with the court's remand order as it did not request additional information from Trina or its sole U.S. affiliate and customer, Trina Solar U.S., Inc. ("TUS"), regarding its borrowing during the period of review. *See Comments of Trina on Second Remand Redetermination* at 2–6, ECF No. 95 (Apr. 2, 2020) ("*Trina Br.*"). Regardless, Trina contends that Commerce's decision to remove the AFA rate renders moot Commerce's noncom-

pliance. *Id.* at 7–8. SolarWorld disagrees with Commerce's decision to find non-use of the EBCP and remove the AFA rate, arguing that Commerce was correct that the GOC's noncompliance rendered respondent's claim of non-use unverifiable. *SolarWorld's Cmts. on the Results of Second Remand Redetermination* at 5–6, ECF No. 96 (Apr. 2, 2020) ("*SolarWorld Br.*"). The government responds that it complied with the court's remand and argues that Trina had the opportunity to submit additional documentation, but agrees with Trina that the issue is nevertheless moot. *Def.'s Resp. to Cmts. on Remand Redetermination* at 6–8, ECF No. 99 (May 7, 2020) ("*Gov. Br.*").

As in *Changzhou Trina Solar Energy Co. v. United States*, at 6, Slip Op. 20–108 (CIT Aug. 4, 2020), the government "overstates the opportunity," Commerce afforded to Trina to add additional documentation on its usage or non-usage of the EBCP. *See Gov. Br.* at 7–8. Commerce allowed interested parties the opportunity to respond to documents it placed on the record, but only to "comment and submit new factual information regarding the [documents Commerce placed on the record]." *Placing Documents on the Record*, Sec. Rem. P.R. 5–7 (Dep't Commerce Jan 3, 2020). Accordingly, it appears that respondent was limited as to the documents it could submit without violating regulatory limits on the submission of new facts. *See* 19 C.F.R. § 351.302(d)(1)(i)-(ii). The removal of the AFA rate, however, has mooted any issues that would have otherwise resulted from Commerce's failure to allow respondent to submit additional documentation supporting its claims of non-use. *See NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (noting that mootness occurs when "parties lack a legally cognizable interest in the outcome.") (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("[F]ederal courts may not give opinions upon moot questions or abstract propositions.") (citation and quotation marks omitted).

As in *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 20–108 (CIT Aug. 4, 2020) and *Jiangsu Zhongji Lamination Materials Co. v. United States*, Slip Op. 20–39, 2020 WL 1456531 (CIT March 24, 2020), rather than request records and attempt to answer the EBCP usage question, Commerce has altered course and chosen to accept Trina's claims of non-use, insisting that verification is impossible without the GOC's explanation of the EBCP's operation. *Second Remand Results* at 7–8. Commerce has not persuaded the court that verification is impossible, in particular given Commerce's refusal to ask "even the most basic questions regarding the borrowing practices," of respondent. *Changzhou Trina Solar Energy Co. v. United States*, at 7, Slip Op. 20–108 (CIT Aug. 4, 2020).

The court does not find, however, that accepting Trina's claims of non-use and removing the AFA rate is impermissible or amounts to noncompliance with the court's order in *Changzhou Trina II*. Trina argues, and Commerce concedes, that Trina submitted certifications of non-use from all of its U.S. customers in this period of review, *see Changzhou I*, at *2; *First Remand Results* at 15–16. Commerce has previously accepted similar certifications of non-use and the court has upheld that decision. *See Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1318–19 (CIT 2017). Although the court acknowledges Commerce's concerns given the potential intervening changes to the EBCP, Commerce's decision to accept these claims of non-use on remand in this instance is supported by substantial evidence. The court did not order this result, but given the circumstances, there is no reason to order an additional remand for further development of the facts.

II. Use of IHS data in Computing a Benchmark for Aluminum Extrusions

The court found unsupported by substantial evidence Commerce's averaging of the UN Comtrade ("Comtrade") and IHS Technology ("IHS") datasets to compute a benchmark for aluminum extrusions in both *Changzhou Trina I* and *Changzhou Trina II*. In *Changzhou Trina I*, the court remanded the issue to Commerce and ordered it to consider whether the Comtrade data was overinclusive of irrelevant aluminum products and therefore, too flawed to be probative of the world market price for aluminum extrusions. *Changzhou Trina I*, at *6; *see also Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1331–33 (CIT 2018) (detailing the concerns with the Comtrade data). Following the first remand, Commerce continued to average both the IHS and Comtrade data, justifying the inclusion of Comtrade data because it "assesses monthly-price fluctuations." *Changzhou Trina II*, at *4 (citing *First Remand Results* at 19–24). The court in *Changzhou Trina II*, however, found the result unsupported by substantial evidence as Commerce's did not "adequately account[] for 'factors affecting comparability.'" *Id.* at *5 (citing 19 C.F.R. § 351.511(a)(2)(ii)). The court held that Commerce's decision to continue to use the Comtrade data was unreasonable stressing that "[a] preference for monthly values cannot overcome data that does not reasonably relate to the product at issue." *Id.* The court again remanded the issue to Commerce and instructed it to either use the IHS data alone to develop a benchmark or demonstrate that the HTS subheadings in the Comtrade data are "sufficiently comparable to solar frames." *Id.*

In its second redetermination, Commerce argues that the record does not contain sufficient information to address the potential over inclusiveness of the Comtrade data. *Second Remand Results* at 9. While reiterating its preference for data that "captures monthly price fluctuations," on second remand, Commerce concludes that it is "not possible to demonstrate that the monthly price fluctuations reflected in the Comtrade data are driven by variations in solar frame prices." *Id.* To comply with the court's order in *Changzhou Trina II*, Commerce now relies exclusively on IHS data to set a benchmark for aluminum extrusions and has revised its calculations accordingly. *Id.*

Trina does not object to Commerce's exclusive reliance on IHS data and accordingly, its modified calculation of the benchmark for aluminum extrusions. *Trina Br.* at 2. SolarWorld objects to Commerce's exclusive reliance on the IHS data, arguing that it is inappropriate because the Comtrade data are "sufficiently reflective of solar frames for purposes of the benchmark calculation." *SolarWorld Br.* at 6–7. SolarWorld, however, does not put forward anything new to demonstrate that the Comtrade data is not "grossly overinclusive."[2] *See Changzhou Trina II*, at *5; *see also Changzhou Trina I*, at *6.

Commerce's decision is consistent with the court's order in *Changzhou Trina II* and supported by substantial evidence as outlined in the court's previous opinions. *See Changzhou Trina I*, at *6; *Changzhou Trina II*, at *4–5. Because the IHS data is specific to the merchandise at issue here, relying on it alone meets the comparability requirements of 19 C.F.R. § 351.511(a)(2)(ii) and is in accordance with Commerce's obligations under the regulations. *See Changzhou Trina II*, at *5; *see also* 19 C.F.R. § 351.511(a)(2)(ii). Accordingly, the court sustains Commerce's determination to use IHS data as a benchmark for aluminum extrusions.

III. Use of PV Insights/GTM Research data in Computing a Benchmark for Solar Glass

As with the data used for setting the benchmark for aluminum extrusions, in *Changzhou Trina I* and *Changzhou Trina II*, the court held that Commerce's decision to average Comtrade and IHS data for solar glass was unsupported by substantial evidence because the court found the Comtrade dataset was potentially overinclusive of non-subject merchandise. *See Changzhou Trina I*, at *7. In *Changzhou Trina I*, the court remanded the issue to Commerce with

[2] The basis of SolarWorld's argument rests on a Federal Circuit decision previously distinguished by the court in *Changzhou Trina II*. *See Changzhou Trina II*, at *5, n.7 (discussing the irrelevance of *SolarWorld Americas, Inc. v. United States,* 910 F.3d 1216 (Fed. Cir. 2018) to this case).

instructions to consider whether the Comtrade data was "fatally overinclusive of non-solar glass." *Id.*

On remand, Commerce continued to average the Comtrade and IHS datasets, arguing that its use of the Comtrade data was necessary because it was the only data on the record that shows monthly fluctuations. *Changzhou Trina II*, at *6 (citing *First Remand Results* at 24–28). In *Changzhou Trina II*, the court found that Commerce still had "not adequately addressed the court's concern that the Comtrade data's monthly fluctuations may be caused by non-solar glass merchandise." *Changzhou Trina II*, at *6. The court concluded that because Commerce "failed to explain whether the inclusion of non-solar glass in the Comtrade data set made it unusable" it did not "take into account the factors of comparability required of its regulations." *Changzhou Trina II*, at *6; *see also* 19 C.F.R. § 351.511(a)(2)(ii). The court held that the Comtrade data was "fatally overinclusive of non-solar glass such that its usage in deriving a benchmark [wa]s unsupported by substantial evidence." *Changzhou Trina II*, at *6.

The court again remanded the case, instructing Commerce to either use the IHS dataset alone or if it chooses to, reopen the record to identify "a dataset that is both specific to solar glass and computed on a monthly basis" and then use that dataset to calculate a solar glass benchmark. *Changzhou Trina II*, at *6. On second remand, Commerce reopened the record and sought data from the parties that was "specific to the type of glass used in solar cells and recorded on a monthly basis." *Second Remand Results* at 9. Trina submitted two datasets that fulfilled these and other criteria: (1) 2014 global solar glass pricing data from PV Insights and (2) 2015 solar glass pricing data from Greentech Media Research ("GTM Research"). *Id.* at 9–10. According to the record, PV Insights is "a solar photovoltaic research firm" and GTM Research is "an energy analysis and consulting company." *Id.* at 10. Commerce compared the two new datasets with the datasets already on the record and found them to be superior because they are "specific to solar glass" and record "monthly price fluctuations." *Id.* Commerce now relies on PV Insights and GTM Research to set a benchmark for solar glass and has revised its calculations accordingly. *Id.* Trina does not dispute Commerce's reliance on this data to calculate a revised benchmark for solar glass. *See id.* at 17; *see also Trina's Response to Cmts. on Second Remand Redetermination* at 7, ECF No. 100 (May 7, 2020) ("*Trina Reply*").[3]

[3] In its initial brief, Trina appears to treat the remand results as exclusively relying on PV Insights data for benchmarking solar glass, despite Commerce's use of both PV Insights and GTM Research data. *See Trina Br.* at 2. Trina's reply brief addresses this discrepancy. *See* Trina Reply at 7; *see also Gov. Br.* at 10, n.1 (noting the government's belief that "Trina's failure to mention the Greentech Media Research data was inadvertent").

SolarWorld objects and contends that Commerce's reliance on PV Insights and GTM Research data is incorrect. *SolarWorld Br.* at 8–9. It argues that PV Insights is unreliable because its methodology lacks transparency. *Id.* SolarWorld further objects to Commerce's use of GTM Research data because "it is not fully contemporaneous with the underlying period of review" because it includes pricing data from January through December 2015. *Id.* at 9. SolarWorld maintains that the Comtrade data should be used and that it was "unreasonable for Commerce to disregard" it altogether. *Id.* In the alternative, SolarWorld argues that Commerce should have averaged the Comtrade data with the new PV Insights and GTM Research data in developing a benchmark. *Id.*

Commerce considered SolarWorld's concerns regarding PV Insights, but concluded the data was reliable. *See Second Remand Results* at 19–20; *Gov. Br*. at 10–12.[4] In response to SolarWorld's concern that GTM Research was not "fully contemporaneous with the underlying period of review," Commerce stated that this was inaccurate because the two datasets contain "the necessary information to measure the adequacy of renumeration for each month of the [period of review]." *Gov. Br.* at 11; *see also Second Remand Results* at 20. The government claims, and the record supports, that "Commerce used the 2014 PV Insights data to calculate the benchmark for the months of the period of review in 2014, and the 2015 Greentech Media Research data to calculate the benchmark for the months of the period of review in 2015." *Gov. Br.* at 11; *see also Data from Letter from Trade Pacific LLC to Sec'y Commerce re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Additional Solar Glass Benchmark Submission*, Sec. Rem. C.R. 2, Sec. Rem. P. R. 4 (Dec. 30, 2019); *Draft Calculations for Trina Solar*, Sec. Rem. C.R. 3, Sec. Rem. P.R. 10 (Dep't Commerce Feb. 10, 2020). Commerce concluded that together, the PV Insights and GTM Research datasets are both reliable and "represent the best available information on the record to measure the adequacy of renumeration for the provision of solar glass." *Second Remand Results* at 19.

Commerce also considered SolarWorld's argument in the alternative that it average the Comtrade data with the PV Insights and GTM

[4] *See also Second Remand Results* at 19 (The PV Insights data "appears to be the result of market research intended to provide accurate, for-purchase, benchmarking information to participants in the solar market so they can effectively conduct business."). Commerce further found that PV Insights data "appears to be treated as reliable information by the relevant industry for the POR." *Second Remand Results* at 20. SolarWorld does not dispute either of these points.

Research datasets in calculating a benchmark for solar glass. Commerce concluded, however, that the inclusion of Comtrade data would be contrary to the court's order in *Changzhou Trina II*, which directed Commerce not to use the Comtrade data unless it could demonstrate that the data was not "fatally overinclusive of non-solar glass." *See Gov. Br.* at 10.

In support of the government, Trina argues that SolarWorld lacks any evidence for its assertion that PV Insights data is unreliable and that the record clearly shows that PV Insights data is both reliable and an accurate reflection of solar glass prices. *Trina Reply* at 4–6. Trina further argues that contrary to SolarWorld's contention, there is no information on the record to suggest that "the fact that the GTM data covers only 2015 renders it unreliable as a benchmark source for months in 2015" and states that there is no regulatory or statutory requirement that a tier two benchmark be "fully contemporaneous" with the entire underlying period of review. *Id.* at 7. Trina concludes that Commerce's decision to use the PV Insights and GTM Research data to calculate a benchmark for solar glass is supported by substantial evidence. *Id.* at 8.

The court agrees. SolarWorld has not put forward anything on the record that contradicts Commerce's determination that PV Insights and GTM Research are reliable and their use is consistent with the requirements for comparability under 19 C.F.R. § 351.511(a)(2)(ii). Although the court understands SolarWorld's concerns regarding the transparency of PV Insights collection of data, the court is also mindful that it may not substitute its own judgment for that of Commerce where Commerce "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Commerce has done so here in its calculation of a benchmark using two sets of data that are specific to the product at issue and when combined cover the underlying period of review. SolarWorld's conclusory statements concerning PV Insights collection methodology and GTM Research's data only including pricing in 2015 is not enough to demonstrate a fatal flaw in Commerce's reasoning. Commerce may use two datasets to cover the entire underlying period of review and average them under the regulations where reasonable. *See* 19 C.F.R.§ 351.511(a)(2)(ii). Furthermore, the PV Insights data collection methodology is not so suspect that Commerce's reliance on it is unsupported by substantial evidence. Commerce considered the relevant

factors and addressed SolarWorld's concerns. *See Second Remand Results* at 19–20. The court concludes that Commerce's determination was a reasonable one and thus sustains its determination to use the PV Insights and GTM Research data to set a benchmark for solar glass.

CONCLUSION

For the foregoing reasons, Commerce's *Second Remand Results* are sustained. Judgment will enter accordingly.

Dated: August 4, 2020
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 20–111

JSW STEEL (USA) INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 19–00133

[Remanding the U.S. Department of Commerce's denials of plaintiff's requests for exclusion of certain steel articles from Section 232 tariffs, ordering further explanation of the steps taken to complete the record and supplementation of the record as appropriate, and denying plaintiff's request for discovery and for a privilege log.]

Dated: August 5, 2020

Sanford Litvack, *Andrew L. Poplinger*, and *R. Matthew Burke*, Chaffetz Lindsey LLP, of New York, NY, for plaintiff JSW Steel (USA) Inc.

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

OPINION AND ORDER

Kelly, Judge:

This action is before the court on motion for judgment on the agency record. *See* Pl.'s Mot. J. Agency R., Dec. 13, 2019, ECF No. 29 ("Pl.'s Mot."). Plaintiff JSW Steel (USA) Inc. ("JSW") challenges the U.S. Department of Commerce's ("Department" or "Commerce") denials of twelve requests for exclusions ("exclusion requests") for certain steel slabs from an additional 25 percent *ad valorem* tariff imposed on steel articles pursuant to section 232 of the Trade Expansion Act of 1962 ("Section 232"), 19 U.S.C. § 1862 (2012). *See* Compl., July 30, 2019, ECF No. 2; *see also* [Conf.] Pl.'s Memo. L. Supp. Mot. J. Agency R. at 1–5, Dec. 13, 2019, ECF No. 30 ("Pl.'s Br."). JSW contends that Commerce's denials of exclusion requests for alloy and non-alloy steel slab imported from India and Mexico were arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with law. *See* Compl. at ¶¶ 36–43; Pl.'s Br. at 4. In addition, JSW requests the court to order discovery regarding the substance of Commerce's *ex parte* meetings with objectors to JSW's exclusion requests as well as for Defendant to furnish a privilege log for redactions in the administrative record. Pl.'s Br. Resp. Ct.'s July 7, 2020 Order at 3–7, July 13, 2020, ECF No. 85 ("Pl.'s Br. Resp. Ct.'s Order"). For the reasons that follow, the court: (i) orders Commerce as part of its certification of the record to set forth the steps taken to ascertain that the record is complete, including identifying how the Department identified missing information and the existence of *ex parte* communications and,

further, how it determined whether and to what extent any *ex parte* communications were or were not relied upon or referred to by the Department in making its determinations; (ii) to further supplement the record with any information that it determines should be included in the record, inclusive of any information directly or indirectly considered by the Department in its determinations, as a result of explaining its record compilation process; and, (iii) remands for further consideration and explanation Commerce's denials of all twelve exclusion requests, in light of the completed record. However, the court denies JSW's requests for discovery and for a privilege log.

BACKGROUND

Following an investigation and determination by the Bureau of Industry and Security ("BIS"), a sub-agency of Commerce, that imports of steel threaten national security, the President issued an executive order, Proclamation 9705, imposing a 25 percent *ad valorem* tariff on all imports of certain steel articles, effective March 23, 2018. *Adjusting Imports of Steel Into the United States, Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625 (Mar. 8, 2018) ("*Proclamation 9705*"); *see also* 19 U.S.C. § 1862.[1] In addition, Proclamation 9705 tasked the Secretary of Commerce with developing a process to exclude from the tariff certain steel products that are not produced in the United States of a satisfactory quality or in a sufficient and reasonably available amount. *Id.*, 83 Fed. Reg. at 11,627.

On March 19, 2018, Commerce published an interim final rule that set forth the product exclusion process. *See Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106 (Dep't Commerce Mar. 19, 2018). Subsequently, based on comments and Commerce's experience administering the first interim final rule, Commerce issued a second interim final rule on September 11, 2018 that modified the first interim final

[1] However, recognizing the United States' security relationship with some countries, the President temporarily exempted imports of steel articles from, *inter alia*, Mexico. *Proclamation 9705*, 83 Fed. Reg. at 11,626. The exclusion of steel articles from Mexico expired on June 1, 2018. *See Adjusting Imports of Steel Into the United States, Proclamation 9894 of May 19, 2019*, 84 Fed. Reg. 23,987, 23,988 (May 23, 2019). Relevant here, JSW sought exclusions for its imports of steel slab from Mexico beginning in June 2018. *See, e.g.*, BIS Decisions for JSW Exclusion Requests (BIS-2018-0006-1218-2337) at JSW-GEN-0002–0004, Apr. 19, 2019; *see also* Pl.'s Br. at 9.

rule.[2] *See Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026 (Dep't Commerce Sept. 11, 2018) ("*September Rule*"). Taken together, the rules, now codified at 15 C.F.R. Pt. 705, Supp. 1 (2019), identify who may request an exclusion ("requestor") and who may object to a request for an exclusion ("objector"); set forth the formalities and required information in requests and objections as well as for rebuttals and surrebuttals; define the criteria by which Commerce—and its subagencies, the BIS and the International Trade Administration ("ITA")—evaluates a request for an exclusion;[3] and, establish timelines for the exclusion request process.

Directly affected individuals or organizations using steel in business activities located in the United States may submit exclusion requests. 15 C.F.R. Pt. 705, Supp. 1 at ¶ (c)(1). Requestors must complete and submit an electronic form, which requires certain factual information. *Id.* at ¶¶ (b)(1), (c)(3). The submission must include the requestor's name, the date, and the 10-digit Harmonized Tariff Schedule of the United States ("HTSUS") statistical reporting number for the requested steel article to be excluded. *Id.* at ¶ (c)(2).[4] In addition, the regulations require a requestor to "clearly identify" and "provide support" for which of the three enumerated criteria the requestor bases its request. *Id.* at ¶ (c)(5). Individuals or organizations that manufacture steel in the United States may object to an exclusion request by, likewise, submitting an electronic form that identifies the objector and the relevant exclusion request. *Id.* at ¶ (d). The objector must also identify and provide support as to why Commerce should reject the request based on the three criteria. *Id.* at ¶¶ (c)(5), (d)(4). A requestor may rebut any objections, and objectors may submit surrebuttals. Commerce denies incomplete exclusion requests and declines to consider any incomplete objections, rebuttals, and surrebuttals. *Id.* at ¶ (h)(1).

Commerce reviews complete exclusion requests to determine whether the article described in the request meet any of three crite-

[2] Commerce issued a third interim final rule to establish a web portal to house requests, objections, rebuttals, and surrebuttals but did not otherwise amend the exclusion process. *Implementation of New Commerce Section 232 Exclusions Portal*, 84 Fed. Reg. 26,751 (Dep't Commerce June 10, 2019).

[3] The Department identifies BIS as "the lead agency" in deciding whether to grant exclusion requests and the ITA as "analyzing requests and objections to evaluate whether there is domestic production available to meet the requestor's product needs[.]" *September Rule*, 83 Fed. Reg. at 46,027, 46,032.

[4] In addition, the submission must include chemistry by percentage breakdown by weight, metallurgical properties, surface quality, and distinct critical dimensions; also, the submission may specify the minimum and maximum range dimensions. 15 C.F.R. Pt. 705, Supp. 1 at ¶ (c)(2).

ria, namely "the article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for specific national security concerns." *Id.* at ¶¶ (c)(6), (h)(2). The regulations define the criterion "not produced in the United States in a sufficient and reasonably available amount" to mean that the amount of steel needed by the requestor is not available "immediately" to meet its business needs. *Id.* at ¶ (c)(6)(i). By "immediately," the regulations elaborate that the product is currently produced or could be produced within eight weeks in the amount needed described in the exclusion request. *Id.* The criterion "not produced in the United States in a satisfactory quality" requires the steel to be equivalent as a "substitute product," as in steel produced by an objector that can "immediately" meet "the quality (e.g., industry specs or internal company quality controls or standards), regulatory, or testing standards, in order for the U.S. produced steel to be used in that business activity in the United States by that end user." *Id.* at ¶ (c)(6)(ii). Finally, the criterion "for specific national security considerations" enables Commerce, in consultation with other parts of the government, as warranted, to determine whether denying an exclusion request would have an impact on national security. *Id.* at ¶ (c)(6)(iii).

Commerce "normally" will issue its response to an exclusion request as a memorandum that is "responsive to any of the objection(s), rebuttal(s) and surrebuttal(s)" within 106 days of the exclusion request submission. *Id.* at ¶¶ (h)(2)(i)(B), (h)(3)(i).[5] Granted exclusion requests are generally approved for one year on a product basis and are usually limited to the requestor, unless Commerce authorizes the exclusion to apply to additional importers. *Id.* at ¶¶ (c)(2), (h)(2)(iv). If an exclusion request is denied based on a representation made by an objector with respect to the availability of the requested steel or of a substitute in the United States, and it later comes to light that the representation is inaccurate, a requestor may submit a new exclusion request that refers back to the original denied request. *Id.* at ¶ (c)(6)(i)–(ii).

JSW submitted twelve requests for exclusion for alloy and non-alloy steel slabs.[6] Six of the requests were for slab from India with thick-

[5] When a properly filed, complete exclusion request receives no objections, Commerce will grant the request if it meets the requisite criteria and presents no national security concerns. *See* 15 C.F.R. Pt. 705, Supp. 1 at ¶ (h)(2)(ii).

[6] BIS assigns each exclusion request an individual number that follows a standardized docket number "BIS-2018-0006-." Given this formulation, the court identifies each exclusion request, including all underlying documentation that appears in the record pertaining to the cited request by the last digits assigned by theDepartment of Commerce that follow the number "BIS-2018-0006-". For example, the court refers to Exclusion Request BIS-2018-0006-1218 as Exclusion Request No.1218, which appears on the confidential record

nesses of 8, 10, and 12 inches;[7] the other six were for slab from Mexico with thicknesses of 7.8, 8.8, and 9.8 inches.[8] JSW explained that it required the steel slabs to manufacture steel plate because the slabs were not available in the United States. *See, e.g.*, Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports at BIS-2018-0006-1218-11–15; Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports at BIS-2018-0006-2337-11–19. Three U.S. producers, U.S. Steel Corporation, AK Steel Corporation, and Nucor Corporation (collectively, "domestic objectors"), objected to JSW's requests and disagreed with JSW's characterization of the domestic non-availability of steel slab. *See, e.g.*, [AK Steel] Objection Filing to Posted Section 232 Exclusion Request: Steel at BIS-2018-0006-1218-34–36; [Nucor] Objection Filing to Posted Section 232 Exclusion Request: Steel at BIS-2018-0006-1218-37–50; [U.S. Steel] Objection Filing Posted to Section 232 Exclusion Request: Steel at BIS-2018-0006-1218-51–73. For each of the exclusion requests, JSW submitted rebuttals to the domestic objector's objections, and the domestic objectors submitted surrebuttals. *See, e.g.*, [JSW] Rebuttal to [Nucor's] Objection Filed Against Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports at BIS-2018-0006-1218-75–85; [JSW] Rebuttal to [U.S. Steel's] Objection Filed Against Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports at BIS-2018-0006-1218-86–92; [Nucor's] Surrebuttal to Objection Filed Against Request for Exclusion from Remedies: Section 232 National Security Investigations of Steel Imports at BIS-2018-0006-1218-94–97; [U.S. Steel's] Surrebuttal to Objection Filed Against Request for Exclusion from Remedies: Section 232 National Security Investigations of Steel Imports at BIS-2018-0006-1218-98–108.

Nearly one year following the submission of JSW's exclusion requests, BIS issued separate decision memoranda ("BIS decision memoranda") that denied each request. *See, e.g.*, BIS Decisions for JSW Exclusion Requests (BIS-2018-0006-1218-2337) at JSW-GEN-0002. Each BIS decision memorandum concludes that the requested

at pages BIS-2018-0006-4–108. The court identifies the requests, objections, rebuttals, surrebuttals, memoranda, andother documents that comprise an exclusion request by the name and number assigned by Commerce.

[7] The constituent exclusion requests are Exclusion Request Nos. 1218 (8-inch non-alloy steel slab), 1221 (10-inch non-alloy steel slab), 1227 (12-inch non-alloy steel slab), 2335 (8-inch non-alloy steel slab), 2336 (10-inch alloy steel slab), and 2337 (12-inch alloy steel slab).

[8] The constituent exclusion requests are Exclusion Request Nos. 29462 (7.8-inch non-alloy steel slab), 29465 (7.8-inch alloy steel slab), 29470 (8.8-inch non-alloy steel slab), 29474 (8.8-inch alloy steel slab), 29481 (9.8-inch non-alloy steel slab), and 29484 (9.8-inch alloy steel slab).

steel slab "is produced in a sufficient and reasonably available amount and of a satisfactory quality" and "that no overriding national security concerns requires that this exclusion request be granted notwithstanding the domestic availability." *See, e.g.*, BIS Decision Document – Steel Section 232 Remedy Exclusion Request, Exclusion Request Number: BIS-2018-0006-29484 at BIS-2018-0006-29484–5. In addition, for half of the exclusion requests, BIS found that the exclusion request was incomplete because "the product description is inconsistent with the claimed classification under the [HTSUS]."[9] *See, e.g.*, BIS Decision Document – Steel Section 232 Remedy Exclusion Request, Exclusion Request Number: BIS-2018-0006-29481 at BIS-2018-0006-29481-4–5

On July 30, 2019, JSW initiated this action, challenging Commerce's denials of the exclusion requests. *See* Summons, July 30, 2019, ECF No. 1; Compl. Subsequently, the government filed on the docket the confidential and public administrative records underlying those denials and certified the records as complete. *See* Confidential Admin. Record, Oct. 7, 2019, ECF No. 15; Public Admin. Record, Oct. 7, 2019, ECF No. 16. JSW, in its moving brief, alluded to a missing email from the Department in connection with three exclusion requests, *see* Pl.'s Br. at 31 n.83, and indicated that the Inspector General had issued a warning to Commerce Secretary Wilbur Ross, advising that undocumented *ex parte* communications "giv[e] the appearance that the Section 232 exclusion request review process is not transparent and that decisions are not rendered based on evidence contained in the record." *Id.* at 3; Pl.'s Mot. at Ex. C. Defendant did not respond to these assertions in its response brief. *See generally* Def.'s Br. However, after the matter had been fully briefed and following the court's issuance of oral argument questions, Defendant informed the court that certain documents were missing from the administrative record. *See* Def.'s Status Report, May 28, 2020, ECF No. 59. Following a teleconference with the parties, *see* Telephone Conference, June 4, 2020, ECF No. 69, the court issued an order directing Defendant to complete the administrative record and to file on the docket, on a rolling basis, documents it identified through search that were previously missing from the record. *See* Order, June 4, 2020, ECF No. 71. The court also noted that it considered the matter submitted for decision and that it would render its decision in due course. *Id.*

Subsequently, and following Defendant's filing of a status report on its completion of the record, *see* Def.'s Status Report, July 6, 2020,

[9] Specifically, BIS found that Exclusion Request Nos. 1218, 1221, 1227, 29462, 29470 and 29481 were incomplete due to JSW's erroneous classification of requested steel articles.

ECF No. 81, the court held a second teleconference with the parties on July 7, 2020. *See* Order, June 30, 2020, ECF No. 79 (ordering that the parties be prepared to advise the court of any concerns with the compilation or contents of documents filed to complete the administrative record during the second teleconference); *see also* Telephone Conference, July 7, 2020, ECF No. 82. In light of JSW's expressed concerns with the documents added to complete the record, *see generally* Telephone Conference, July 7, 2020, ECF No. 82, the court directed JSW to file a brief that specifies its concerns with the government's efforts to complete the record and to request a remedy (or remedies). *See* Order, July, 7, 2020, ECF No. 83. On July 13, 2020, JSW filed its brief, which identifies several *ex parte* meetings between Department officials and objectors, and requests that the court permit JSW to conduct discovery to uncover information about the meetings as well as direct Defendant to furnish a privilege log. *See* Pl.'s Br. Resp. Ct.'s Order at 1–6, App'x. On July 20, 2020, Defendant filed its response brief, opposing JSW's requests. *See* Def.'s Resp. JSW's Resp. Ct.'s Order at 1–9, July 20, 2020, ECF No. 88 ("Def.'s Resp. Pl.'s Resp. Ct.'s Order"). On August 3, 2020, Defendant certified that the record was complete, *see* ECF No. 92, and, on the same day, JSW filed a status report, reiterating its concern that information regarding certain *ex parte* meetings remains missing from the record. *See* Pl.'s Status Report, August 3, 2020, ECF No. 93 ("Pl.'s Status Report").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 28 U.S.C. § 1581(i)(2), (4) (2012). The court reviews an action brought under 28 U.S.C. § 1581(i) under the same standards as provided under section 706 of the Administrative Procedure Act ("APA"), as amended. *See* 28 U.S.C. § 2640(e) (2012). Under the statute,

> [t]he reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]

5 U.S.C. § 706(1), (2)(A). Under the arbitrary and capricious standard, courts consider whether the agency "'entirely failed to consider an important aspect of the problem, offered an explanation for its

decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Alabama Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

DISCUSSION

JSW contends that Commerce's denials of its twelve exclusion requests are arbitrary and capricious, because Commerce's determinations run counter to the evidence before the agency and Commerce fails to articulate any reasoned explanation for its conclusions. *See* Pl.'s Br. at 15–37. In addition, JSW argues that the administrative record is missing information about certain *ex parte* meetings with objectors to JSW's exclusion requests. *See* Pl.'s Br. Resp. Ct's Order at 1–6, App'x; *see also* Pl.'s Status Report. JSW requests discovery to unearth the contents of those meetings as well as for Defendant to furnish a privilege log for any redacted materials from the administrative record. *See* Pl.'s Br. Resp. Ct's Order at 6; Pl.'s Status Report. Defendant counters that Commerce reasonably explains the basis for the denials for all twelve exclusion requests and addresses record evidence in the BIS decision and ITA recommendation memoranda. *See* Def.'s Br. at 25–36. Although Defendant acknowledged, after the matter had been fully briefed, the administrative record's incompleteness, *see* Def.'s Status Report, May 28, 2020, ECF No. 59; *see also* Order, June 4, 2020, ECF No. 71 (directing Defendant, on a rolling basis, to complete the record with previously missing documents), it submits that neither discovery nor a privilege log would be warranted. *See* Def.'s Resp. Pl.'s Br. Resp. Ct.'s Order at 1–9. For the following reasons, the court remands all twelve exclusion requests, orders Commerce to provide further explanation as to the steps taken to complete the record consistent with this opinion and to supplement the record as appropriate, and denies JSW's requests for discovery and for a privilege log.

Under section 706 of the APA, a court "review[s] the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Privileged and deliberative documents reflecting an agency's internal deliberations do not form part of the administrative record, and, generally, are not discoverable so as to merit a privilege log, unless there is a showing of bad faith or improper behavior. *See, e.g.*, *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 122–23 (D.D.C. 2014); *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). Rather, judicial review is generally limited to the full administrative record

before the agency at the time it rendered its decision. *Accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("*Overton Park*"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("*Camp*"); *Guy v. Glickman*, 945 F. Supp. 324, 329 (D.D.C. 1996) ("*Glickman*"); *Pacific Shores Subd. v. U.S. Army Corps of Eng.*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) ("*Pacific Shores*"). "The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to 'convert the "arbitrary and capricious" standard into effectively de novo review.'" *Axiom Res. Mgmt, Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009) ("*Axiom*") (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).

When a party challenges an administrative determination, the agency must produce the complete administrative record. *See Nat. Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975). The administrative record includes only those documents directly or indirectly considered by the agency. *See Ammex, Inc. v. United States*, 23 CIT 549, 554–55, 62 F. Supp. 2d 1148, 1156 (1999) ("*Ammex*"). An agency enjoys a presumption of regularity as to the record it prepares, because the agency, as the decision-maker, is generally in the best position to identify and compile those materials it considered. *See Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 55–7 (D.C. Cir. 2003); *Pacific Shores*, 448 F. Supp. 2d at 5.

However, in certain circumstances, a court may direct an agency to complete or supplement the record or order discovery. Specifically, a court may order completion or supplementation of the record in light of clear evidence that the record was not properly designated or the identification of reasonable grounds that documents considered by the agency were not included in the record. *See Overton Park*, 401 U.S. at 419 (A court will order an agency to complete the record when the produced record "clearly do[es] not constitute the 'whole record' compiled by the agency[.]"); *see, e.g.*, *Pacific Shores*, 448 F. Supp. 2d at 5–7. Where a party has made a "strong showing of bad faith or improper behavior" by agency decision-makers by providing a reasonable factual basis, a court may order discovery to supplement the record. *See Ammex*, 23 CIT at 556, 62 F. Supp. 2d at 1157 (citing *Apez Construction Co. v. United States*, 719 F. Supp. 1144, 1147 (D. Mass. 1989)) (internal quotations removed); *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979) (ordering interrogatories and discovery requests to be served on the agency, when the record lacked internal memoranda and guidelines that the agency would have considered). However, if the agency fails to explain administrative action, the court should "not compensate for the agency's derelic-

tion by undertaking its own inquiry into the merits." *Glickman*, 945 F. Supp. at 329 (citing *Camp*, 411 U.S. at 143; *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980)). The court, instead, should remand a determination. *See, e.g.*, *id.* at 332–33.

Here, although JSW indicates that the record remains incomplete, *see* Pl.'s Status Report, it has not made the requisite showing that discovery is necessary to complete or supplement the record and that a privilege log is merited. JSW identifies several likely *ex parte* meetings held with objectors for which Commerce made no record of information discussed in the meetings. *See* Pl.'s Br. Resp. Ct's Order at 5, App'x; *see also* Pl.'s Status Report. As JSW indicates in its status report, the government has now identified these meetings but has not disclosed their substance. *See* Pl.'s Status Report. Section 232 does not compel agency officials to maintain a record of *ex parte* communications, unlike the statutory framework governing antidumping proceedings. *See* 19 U.S.C. § 1677f(a)(3). Only if relied upon must Commerce provide information pertaining to the meetings JSW identifies as missing from the record, given that the record encompasses materials directly or indirectly considered by the relevant agency decisionmakers. *Cf. Ammex*, 23 CIT at 554–55, 62 F. Supp. 2d at 1156. JSW contends that the discussions at these meeting "were concededly part of what the Department considered[.]" Pl.'s Status Report. However, implicit in the Department's certification of the record on August 3, 2020, *see* ECF No. 92, is a statement that these discussions were not considered by Commerce. The court will not order disclosure of *ex parte* communications that were not relied upon by the Department. However, Commerce must certify steps taken to identify and correct deficiencies in the administrative record, including steps taken to ascertain if any of the *ex parte* meetings were directly or indirectly considered by Commerce in its determinations and, if not, how it determined that the discussions at these meetings with the objectors were not directly or indirectly considered in its decisions.[10] Should Commerce determine, as a result of this process, that there are further materials, such as any notes, memoranda, or other documents pertaining to the *ex parte* meetings, required to supplement the record, it shall so supplement the record. If it determines that no further supplementation is required, it shall so state along with its explanation.

Further, although JSW casts Commerce's behavior as "perplexing," "aberrant," "certainly suspicious," and "creat[ing] a strong inference

[10] The court will entertain a request for discovery, should it come to light that Commerce's behavior regarding the record crosses the boundary from merely "suspicious" to evincing bad faith or impropriety. *Cf.* Pl.'s Br. Resp. Ct.'s Order at 6 n.4.

of undue influence suggesting the Department's decisions were not based on the merits of the requests[,]" JSW does not allege impropriety that would warrant discovery. *See* Pl.'s Br. Resp. Ct.'s Order at 6 n.4. As a consequence, a privilege log cataloguing "redactions it has made to documents it has recently added to the Record" is neither necessary nor appropriate. Pl.'s Br. Resp. Ct.'s Order at 6. At this juncture, the court declines to order discovery.

Remand of all twelve exclusion requests is warranted because Commerce's denials are devoid of explanation and frustrate judicial review. *Cf. Glickman*, 945 F. Supp. at 331–32. The court cannot be certain what record evidence, if any, Commerce relied upon when both the BIS decision memoranda and ITA recommendation memoranda do not explain what information the sub-agencies considered, how it was weighed, or why the evidence compelled denial.[11] *See, e.g.*, BIS Decision Document – Steel Section 232 Remedy Exclusion Request, Exclusion Request Number BIS-2018-0006-1221 at BIS-2018-0006-1221-5; Recommendation for Denying of Steel Exclusion Under Section 232 Exclusion Requests: 2018-0006-1221, 2018-0006-1227 at BIS-2018-0006-1221-9.

Each BIS decision memorandum, which is the document communicating the agency's final decision, begins with the same statement that "BIS has considered the evidence provided . . . and taken into account analysis provided by the [ITA]"; and, each memorandum ends with the same conclusion that "BIS accepts ITA's recommended findings as to the domestic availability of the product, and finds that no overriding national security concerns require that this exclusion request be granted notwithstanding the domestic availability." *See, e.g.*, BIS Decision Document – Steel Section 232 Remedy Exclusion Request, Exclusion Request Number BIS-2018-0006-1221 at BIS-2018-0006-1221-5. Nowhere does BIS refer to any record evidence in its decision memoranda, be it the exclusion requests themselves or the applicable objections. *See, e.g.*, *id.* at BIS-2018-0006-1221-4–6. For example, for six of JSW's exclusion requests, the BIS decision memoranda conclude that JSW supplied the incorrect 10-digit HTSUS statistical reporting number to identify a submission, stating that Customs and Border Protection ("CBP") advised BIS that the claimed classification is inconsistent with the product description and "provid[ed] the following guidance:"—yet no guidance follows the

[11] In its brief, JSW requests that the court instruct Commerce to grant JSW's Exclusion Request Nos. 1221, 1227, 2336, 2337, and 29484 "because the correct conclusion based upon the record is so obvious[.]" Pl.'s Br. at 23 (citing *Sierra Club v. EPA*, 346 F.3d 955, 963 (9th Cir. 2003)). Given the relevant BIS decision and ITA recommendation memoranda do not articulate the reasons for the denials and that Commerce may supplement the record consistent with this opinion, the court remands these determinations. *Cf. Glickman*, 945 F. Supp. at 331–32.

colon.[12] *See, e.g.*, *id.* at BIS-2018-0006-1221-4–5. BIS's unsupported conclusion does not apprise the court of the reason why the HTSUS statistical reporting number was incorrect or how CBP reached that finding. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nor does BIS indicate why an incorrect HTSUS statistical reporting number interferes with its ability to consider the substance of the request or why it does not ask for clarification as to the correct statistical reporting number. *See September Rule*, 83 Fed. Reg. at 46,047 ("In cases where a request is denied for HTSUS issues, companies are encouraged to work with CBP to confirm the proper classifications and resubmit.")[13]

Likewise, the ITA recommendation memoranda, which recommend to BIS whether to grant or deny an exclusion request, suffer from the same paucity of analysis as the BIS decision memoranda.[14] Although the regulations provide that Commerce's "[r]esponse to an exclusion request will . . . be responsive to any of the objection(s), rebuttal(s), and surrebuttal(s) for that submitted exclusion request[,]" 15 C.F.R.

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[12] On remand, Commerce should explain why, in light of the regulations, incorrect classification renders an exclusion request as incomplete and is a basis to reject the request. *See* Pl.'s Br. at 12 n.43; *see also* Def.'s Br. at 23.

[13] As an additional example, Defendant seems to argue that it is reasonably discernable from the record that Commerce rejected requests for steel slab within range of thicknesses, i.e., 235–270 mm (9.25–10.63 inches) and 222–257 mm (8.74–10.12 inches), because steel slab was available within those ranges. *See* Def.'s Br. at 28–29. Without further explanation, this reason for rejection would be arbitrary and capricious because Commerce would be treating similar parties differently, as JSW notes, in requiring other requestors, after filing an initial request, to refile without ranges of thickness. *See* Pl.'s Reply Memo. L. Further Supp. [Pl.'s Mot.] at 14–16., Mar. 12, 2019, ECF No. 47 ("Pl.'s Reply Br.").

[14] In addition, requestors like JSW do not receive a copy of the ITA decision memoranda as a matter of course. As JSW notes, it saw, for the first time, a copy of the relevant ITA recommendation memoranda with the filing of the administrative record following the commencement of this action. *See* Pl.'s Br. at 12. Given that the BIS decision memoranda restate, in part, the conclusions of the ITA recommendation memoranda, it is unclear why the ITA recommendation memoranda should be maintained as fully confidential. *Compare* Decision Document – Steel Section 232 Remedy Exclusion Request, Exclusion Request Number BIS-2018-0006-1221 at BIS2018-0006-1221–5 *with* Recommendation for Denying of Steel Exclusion Under Section 232 Exclusion Requests: 2018-0006-1221, 2018-0006-1227 at BIS-2018-0006-1221-9–10.

Moreover, the Government's assertion that "the record allows the Court, and, indeed, the public, to easily discern how the agency reached its decision[,]" Def.'s Br. at 34, is troubling, particularly when the ITA recommendation memoranda for JSW's requests, which, as noted above, refer to record evidence, were entirely confidential. In addition, given that the regulations compel disclosure of information contained in the exclusion requests, objections, rebuttals, and surrebuttals and require any proprietary information submitted to be summarized "in sufficient detail to permit a reasonable understanding of the substance of the information[,]" 15 C.F.R. Pt. 705, Supp. 1 at ¶ (b)(5)(ii)–(iii), it is unclear why a public version of the recommendation memoranda could not be prepared and disclosed. Defendant concedes this point, given that it has filed, on the record, public versions of the ITA recommendation memoranda for JSW's exclusion requests. *See* Def.'s Resp. Ct.'s Request Regarding Redaction, May 29, 2020, ECF No. 60.

Pt. 705, Supp. 1 at ¶ (h)(2)(i)(A), the ITA recommendation memoranda merely catalogue a brief selection of evidence on the record.[15] *See, e.g.*, Recommendation for Denying of Steel Exclusion Under Section 232 Exclusion Requests: 2018-0006-1221, 2018-0006-1227 at BIS-2018-0006-1221-9. The ITA recommendation memoranda neither address detracting evidence[16] nor provide any analysis of the evidence, even in the section of the memoranda entitled "Analysis."[17] *See, e.g.*, *id.* at BIS-2018-0006-9. In addition, the ITA recommendation memoranda for all twelve exclusion requests at issue conclude that "[b]ecause there is indication of sufficient U.S. production availability" the ITA recommends denying JSW's requests. *See, e.g.*, Recommendation for Denying of Steel Exclusion Under Section 232 Exclusion Requests: 2018-0006-1221, 2018-0006-1227 at BIS-2018-0006-122-–10. However, the regulations simply state that "[a]n exclusion will only be granted if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for specific national security considerations." *See* 15 C.F.R. Pt. 705, Supp. 1 at ¶ (c)(5); *see also id.* at ¶ (c)(6). The regulations do not provide for the denial of an exclusion request upon the showing of an "indication" of sufficient U.S. production. It is unclear what constitutes an "indica-

[15] Several of the ITA recommendation memoranda cover multiple exclusion requests. *See* Def.'s Br. at 17 (noting that ITA prepared four recommendation memoranda covering JSW's twelve exclusion requests).

[16] For example, as JSW notes, the ITA judges "Nucor's product as a suitable substitute" but provides no explanation and does not address detracting evidence that Nucor only produces a downstream product, not a substitute product. *See* Pl.'s Reply Br. at 8 (citing Recommendation for Denying of Steel Exclusion Under Section 232 Exclusion Requests: 2018-0006-1221, 2018-0006-1227 at BIS-2018-0006-1221-9). Indeed, in its objections to those exclusion requests, Nucor indicated that it neither manufacturers nor can "immediately" (i.e., within eight weeks) manufacture JSW's requested steel slab or a substitute produce, and, instead, merely stated that it could produce a downstream product within 84 days. [Nucor] Objection Filing Posted to Section 232 Exclusion Request: Steel at BIS-2018-0006-1221-44; [Nucor] Objection Filing Posted to Section 232 Exclusion Request: Steel at BIS-2018-0006-1227-44. ITA does not explain why it considers Nucor's domestically available downstream product is equivalent as a substitute. *Cf.* 15 C.F.R. Pt. 705, Supp. 1 at ¶ (c)(6)(ii).

In addition, JSW explained in its exclusion requests that it requires certain thicknesses of steel to satisfy "reduction ratios" to manufacture steel plate. *See* Pl.'s Br. at 33–34. Even though the regulations state that steel may be considered equivalent as a substitute product if it meets, *inter alia*, "internal company quality controls or standards[,]" 15 C.F.R. Pt. 705, Supp. 1 at ¶ 1 (c)(6)(ii), and the September 2018 Federal Register Notice, notes that the exclusion review process accounts for the "quality needs of requestors[,]" neither BIS nor ITA address JSW's internal quality considerations in their respective memoranda. *See September Rule*, 83 Fed. Reg. at 46,039.

[17] For example, in the "Analysis" section of the ITA recommendation memorandum for Exclusion Request Nos. 29462, 29465, 29470, 29474, 29481, and 29484, the ITA summarizes JSW's, Nucor's, and U.S. Steel's submissions and does not, itself, analyze those statements. *See* Recommendation for Denying Steel Exclusion Request Unser Section 232 Exclusion Requests 2018-0006-29462, 2018-0006-29465, 2018-0006-29470, 2018-0006-29474, 2018-0006-29481, 2018-0006-29484 at BIS-2018-0006-29484-9.

tion" of sufficient U.S. production, or why an "indication" of U.S domestic production of the steel articles in question accords with the regulation. Commerce does not further explain how that term is used either in its regulations or in the BIS decision or ITA recommendation memoranda. Given the defects in the record and Commerce's failure to engage with record evidence,[18] the court orders completion of the record, inclusive of any information directly or indirectly considered by the Department in its determinations, and remands, for further consideration and explanation Commerce's denials of all twelve exclusion requests, in light of the completed record.[19]

CONCLUSION

In accordance with the foregoing, it is

ORDERED that on or before Monday, August 17, 2020 Defendant shall file, as part of its U.S. Court of International Trade Rule 73.3 certification, a statement that sets forth: the steps taken to ascertain that the record for the original proceeding is complete, including identifying how the Department identified missing information and the existence of *ex parte* communications; and, to what extent any *ex parte* communications were or were not directly or indirectly relied upon or referred to by Commerce in making its determinations; and it is further

ORDERED that Defendant shall file on the docket and further supplement the record with any information, inclusive of any information directly or indirectly considered by Commerce, in its determinations that it determines should be included in the record as a result of explaining the steps taken to ensure completion of the administrative record on or before Monday, August 17, 2020; and it is further

ORDERED that Commerce's determinations not to exclude twelve steel articles from the remedy imposed by the President under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, as challenged in this action (i.e., Exclusion Request Nos. 1218 (8-inch non-alloy steel slab from India), 1221 (10-inch non-alloy steel slab from India), 1227 (12-inch non-alloy steel slab from India), 2335 (8-inch non-alloy steel slab from India), 2336 (10-inch alloy steel slab from India), 2337 (12-inch alloy steel slab from India), 29462 (7.8-inch non-alloy steel slab from Mexico), 29465 (7.8-inch alloy steel slab from Mexico), 29470 (8.8-inch non-alloy steel slab from Mexico), 29474 (8.8-inch alloy steel slab from Mexico), 29481 (9.8-inch non-alloy steel slab from Mexico), and 29484 (9.8-inch alloy steel slab from

[18] Defendant concedes that BIS lacked "an established process or dedicated systems for collecting and compiling an administrative record in a Section 232 exclusion case[.]" *See* [Def.'s] Resp. Ct.'s May 2020 Order at 2, June 3, 2020, ECF No. 64.

[19] Defendant requests a remand for Exclusion Request No. 1227. *See* Def.'s Br. at 36. However, for the reasons discussed above, the court remands all twelve exclusion requests at issue, including Exclusion Request No. 1227.

Mexico)), are remanded for further explanation and consideration, specifically to (1) identify and correct all deficiencies in the existing administrative record, including but not limited to locating and adding all of Commerce's communications with domestic industry objectors concerning JSW's exclusion requests insofar as such communications are not part of the existing record and were directly or indirectly considered by Commerce in its determinations, and (2) fully reconsider or provide further explanation of its denials of all of JSW's exclusion requests, consistent with this opinion and in light of the complete administrative record; and it is further

ORDERED that Commerce shall file its remand redeterminations with the court within 90 days of this date; and it is further

ORDERED that Defendant shall file the administrative record for any remand proceedings no later than 14 days after filing the remand results; and it is further

ORDERED that on the same day that Defendant files the administrative record for any remand proceedings, Defendant shall also file as part of its U.S. Court of International Trade Rule 73.3 certification, a statement identifying whether the determinations on remand are based on the original administrative record, the new record on remand, or both, and whether any of the *ex parte* meetings were or were not directly or indirectly considered by Commerce in its determinations; and it is further

ORDERED that the parties shall have 30 days after the filing of the remand results to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination.

Dated: August 5, 2020
New York, New York

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