U.S. Court of International Trade

Slip Op. 20–152

RISEN ENERGY CO., LTD., Plaintiff, SUNPOWER MANUFACTURING OREGON, LLC, Consolidated Plaintiff, and SHANGHAI BYD CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SUNPOWER MANUFACTURING OREGON, LLC et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 19–00153
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the fifth administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules from the People's Republic of China.]

Dated: October 30, 2020

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

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for defendant. Also on the brief was *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, New York, for consolidated defendant-intervenors Chint Solar (Zhejiang) Co., Ltd., Chint Energy (Haining) Co., Ltd., Chint Solar (Jiuquan) Co., Ltd., Chint Solar (Hong Kong) Company Limited. Also on the brief was *Dharmendra N. Choudhary* and *Jordan C. Kahn*.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record. *See* Pl. [Risen Energy Co., Ltd.]'s Mot. J. Agency R., Mar. 26, 2020, ECF No. 40; [Pl.-Intervenors Canadian Solar, Inc. et al. & Shanghai BYD Co., Ltd.'s] Mot. J. Agency R., Mar. 26, 2020, ECF No. 42; Pl.-Intervenors Yingli Green Energy Holding Co., Ltd. et al.'s Mot. J. Agency R., Mar. 26, 2020, ECF No. 41 ("Yingli's Mot."); SunPower Manufacturing Oregon LLC's Mot. J. Agency R., Mar. 26, 2020, ECF No. 43. Plaintiff Risen Energy Co., Ltd. ("Risen"), Plaintiff-Intervenors Canadian Solar, Inc. et al.[1] ("Canadian Solar") and Shanghai BYD Co., Ltd. ("Shanghai"), and Yingli Green Energy Holding Co., Ltd. et al.[2] ("Yingli"), as well as Consolidated Plaintiff SunPower Manufacturing Oregon, LLC ("SunPower") challenge various aspects of the U.S. Department of Commerce's ("Commerce") fifth administrative review of the antidumping duty ("ADD") order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China ("PRC" or "China").[3] *See* [Pl. Risen's] Memo. Supp. Mot. J. Agency R. at 1–2, 14–34, Mar. 26, 2020, ECF No. 40–2 ("Risen's Br."); [Pl.-Intervenors Canadian Solar's & Shanghai's] Memo. Supp. Mot. J. Agency R. at 1, 9– 18, Mar. 26, 2020, ECF No. 42–1 ("Pl.-Intervenors' Br."); [SunPower's] Memo. Supp. 56.2 Mot. J. Agency R. Confidential Version at 1–3, 10–32, Mar. 26, 2020, ECF No. 44 ("SunPower's Br."); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into*

[1] Plaintiff-Intervenors Canadian Solar, Inc., Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., CSI Cells Co., Ltd., CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd., Canadian Solar (USA) Inc. are referred to, collectively, as "Canadian Solar." Canadian Solar and Shanghai request the court remand this case to Commerce with instructions to recalculate its dumping margin to reflect any changes made to Risen's dumping margin.

[2] Plaintiff-Intervenors Yingli Green Energy Holding Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., BeijingTianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., Shenzhen Yingli New Energy Resources Co., Ltd., Yingli Green Energy International Trading Co., Ltd., and Yingli Energy (China) Co., Ltd. are referred to, collectively, as "Yingli". Yingli expresses support for arguments raised in Risen's brief, and requests that the court remand this proceeding to Commerce "with instructions to revise its final results and recalculate the dumping margin applicable to Risen, and also recalculate the weighted average separate rate applicable to Yingli." *See* Yingli's Mot. at 1–2.

[3] Risen and SunPower also appear as Defendant-Intervenors in this consolidated action. *See* Order, Oct. 30, 2019, ECF No. 25 (granting SunPower's consent motion to intervene as defendant-intervenor); Order, Oct. 21, 2019, ECF No. 11 (Member Docket No. 19–155) (granting Risen's consent motion to intervene as defendant-intervenor).

Modules, From the [PRC], 84 Fed. Reg. 36,886 (Dep't Commerce July 30, 2019) (final results of [ADD] admin. review and final determination of no shipments; 2016–2017) ("*Final Results*") and accompanying Issues and Decisions Memo. for the [*Final Results*], A-570–979, (July 24, 2019), ECF No. 33–2 ("Final Decision Memo"); *Initiation of [ADD] & Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 8,058 (Dep't Commerce Feb. 23, 2018) ("*Initiation of Reviews*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,018 (Dep't of Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value, and [ADD] order) ("*ADD Order*").

Namely, Plaintiff Risen and Plaintiff-Intervenors challenge Commerce's decision to apply partial facts available with an adverse inference ("adverse facts available" or "AFA")[4] when calculating the normal value of Risen's entries of subject merchandise to fill gaps in the record caused by the refusal of certain unaffiliated suppliers to cooperate with Commerce's investigation. *See* Risen's Br. at 14–34; Pl.-Intervenors' Br. at 9–18. Consolidated Plaintiff SunPower challenges Commerce's refusal to apply partial AFA to Risen's cooperative unaffiliated suppliers. *See* SunPower's Br. at 14–20. Moreover, SunPower challenges Commerce's valuation of the nitrogen input, *see id.* at 20–28, Commerce's selection of Descartes freight rates to value ocean freight expenses, *see id.* at 29–32, and Commerce's decision to adjust the export price (or constructed export price) ("U.S. Price") by the amount of the countervailing duty ("CVD") imposed to offset the benefit conferred to manufacturers and producers by the Export Import Bank of China's ("Ex-Im Bank") Export Buyer's Credit Program ("Credit Program") in the concurrent administrative review of the companion CVD order ("companion CVD review"). *See id.* at 10–14.

For the following reasons, the court sustains Commerce's refusal to apply partial AFA to Risen's cooperative unaffiliated suppliers; Commerce's decision to value Risen's nitrogen FOP using Bulgarian import data; Commerce's decision to use Descartes data to value ocean freight expenses; and Commerce's decision to adjust the U.S. Price by the amount of the CVD imposed to offset the benefit conferred to manufacturers and producers by the Credit Program in the companion CVD review. However, the court remands, for further explanation

[4] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *Id.*

or reconsideration, Commerce's application of partial AFA to Risen's uncooperative unaffiliated suppliers.

BACKGROUND

In 2012, Commerce published the ADD order covering solar cells from China. *See generally ADD Order*. On February 23, 2018, in response to timely requests, Commerce initiated its fifth administrative review of the ADD Order. *See generally Initiation of Reviews*. Commerce chose Risen and Chint Solar Zhejiang Co., Ltd. ("Chint")[5] as mandatory respondents.[6] *See* Second Resp't Selection Memo. [for 2016–2017 Admin. Review], PD 147, bar code 3696673–01 (Apr. 19, 2018) ("Second Resp't Selection Memo");[7] *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 67,222 (Dep't Commerce Dec. 28, 2018) (prelim. results of [ADD] admin. review and prelim. determination of no shipments; 2016–2017) ("*Prelim. Results*") and accompanying Issues and Decisions Memo. for the [*Prelim. Results*] at 2–3, 7–8, A-570–979, PD 497, bar code 3785207–01 (Dec. 20, 2018) ("Prelim. Decision Memo").

On December 28, 2018, Commerce published its preliminary determination. *See generally Prelim. Results*; Prelim. Decision Memo. Given that Commerce considers the PRC to be a nonmarket economy ("NME"), when calculating Risen's and Chint's dumping margin,[8] Commerce determined the normal value of Risen's and Chint's en-

[5] For purposes of this review, Commerce treated Chint Solar, Chint Energy (Haining) Co., Ltd., Chint Solar (Jiuquan) Co., Ltd., and Chint Solar (Hong Kong) Company Limited as a single "collapsed" entity. *See* Prelim. Decision Memo at 7–8; Final Decision Memo at 1 n.2. If affiliated producers and exporters are collapsed, those companies may be considered a single entity. Collapsing entities allows sales of one collapsed entity to be considered sales of the other for purposes of Commerce's dumping margin calculation. *See* 19 C.F.R. § 351.401(f)(1) (2018); 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a).

[6] Commerce initially selected Risen and the collapsed entity Changzhou Trina Solar Energy Co., Ltd. ("Trina") as mandatory respondents. *See* Resp't Selection Memo.[for 2016–2017 Administrative Review] at 5–7, PD 79, bar code 3682915–01 (Mar. 15, 2018). Upon requests from both Trina and petitioners, Commerce rescinded its review of Trina and instead selected Chint as a mandatory respondent. *See* Prelim. Decision Memo at 3; Second Resp't Selection Memo at 2–3.

[7] On August 31, 2020, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 68 and 67, respectively. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

[8] The term "nonmarket economy country" denotes any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Section 771(18)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(18)(A) (2018). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." *Id.*§ 1677b(c)(1).

tries of subject merchandise by using data from a surrogate market economy country ("surrogate country") to value the factors utilized to produce the subject merchandise ("factors of production" or "FOPs"). *See* Section 773(c)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(4) (2018).[9] Commerce chose Thailand as the primary surrogate country for purposes of valuing all FOPs. *See* Prelim. Decision Memo at 16–19. Commerce resorted to partial AFA to calculate the value of certain FOPs because several of Risen's unaffiliated solar cell and module suppliers refused to cooperate with Commerce's requests for information. *See* Prelim. Decision Memo at 15–16. Namely, Commerce applied the highest reported consumption rates in place of missing consumption figures for certain inputs used by Risen to produce subject merchandise sold in the U.S. during the period of review ("POR"), but only to the extent that the information on those inputs was missing due to the refusal of Risen's unaffiliated suppliers to cooperate. *See* Risen Unreported FOPs Memo. at 9–10, PD 508, CD 898, bar codes 3785421–01, 3785419–01 (Dec. 20, 2018) ("Unreported FOPs Memo"). Finally, Commerce used data on ocean freight rates from the Maersk Line and Descartes websites ("Maersk data" and "Descartes data") to value ocean freight expenses. Prelim. Decision Memo at 28. With respect to its calculation of U.S. Price, Commerce declined to increase the U.S. Price by the amount of any CVD imposed to offset the Ex-Im Bank's Credit Program in the companion CVD review. *See* Prelim. Decision Memo at 32–33; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 34,828 (Dep't Commerce July 23, 2018) (final results of CVD admin. review; 2015) ("*CVD AR*") and accompanying Issues and Decisions Memo. for [*CVD AR*] Cmts. at 1–2, C-570–980, (July 12, 2018), available at https://enforcement.trade.gov/frn/summary/prc/2018–15692–1.pdf (last visited Oct. 26, 2020) ("CVD AR IDM"). Commerce calculated preliminary weighted-average dumping margins of 15.74 and 98.41 percent for Risen and Chint, respectively. *Prelim. Results*, 83 Fed. Reg. at 67,224.

For the *Final Results*, although continuing to rely on Thailand as the primary surrogate country, Commerce decided that Thai data on nitrogen prices were unreliable and determined instead to use Bulgaria's Global Trade Atlas ("GTA") import data ("Bulgarian import data") to derive a surrogate value for the nitrogen input. *See* Final Decision Memo at 37–43. Moreover, instead of using both Maersk and Descartes data to calculate ocean freight rates, Commerce relied

[9] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

solely on Descartes data because its freight rates "are contemporaneous with the POR, for a container size used by the respondents, and, where possible, product specific[.]" Final Decision Memo at 59. Finally, upon reconsideration of its initial position, Commerce determined that it was necessary to increase the U.S. Price to account for countervailing duties it imposed to offset the Ex-Im Bank's Credit Program in the companion CVD review. *See* Final Decision Memo at 15–17. Commerce calculated final dumping margins of 4.79 and 2.67 percent for Risen and Chint, respectively. *Final Results*, 84 Fed. Reg. at 36,888.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Use of Bulgarian Import Data

SunPower argues that Commerce's determination that the Thai data was unreliable is not supported by substantial evidence because Commerce failed to point to evidence that the data was aberrant. *See* SunPower's Br. at 20–28. Defendant, Chint and Risen counter that Commerce reasonably determined that the Thai data was unreliable due to inconsistencies in the reported value of the nitrogen input between sources of Thai pricing data on the record. *See* Def.'s Resp. to Pls.' Mots. J. Agency R. at 30–34, July 10, 2020, ECF No. 52 ("Def.'s Br."); Consol. Def.-Intervenor [Chint's] Resp. to [SunPower's] 56.2 Mot. J. Agency R. at 18–32, July 10, 2020, ECF No. 51 ("Chint's Resp. Br."); Def.-Intervenor [Risen's] Resp. Opp'n Consol. Pl.'s Mot. J. Agency R. at 14–18, July 10, ECF No. 49 ("Risen's Resp. Br."). For the following reasons, Commerce's decision to rely on Bulgarian import data is sustained.

When conducting an administrative review of an ADD order, Commerce determines whether the subject merchandise is sold into the U.S. at less than fair value by comparing the normal value of the merchandise with its U.S. Price during the POR. 19 U.S.C. §§

1673d,[10] 1677(35)(A). Commerce calculates antidumping duties owed on entries of merchandise to reflect the amount by which the normal value exceeds the U.S. Price (i.e., the dumping margin). *See id*; *see also* 19 U.S.C. §§ 1677b, 1677a.

Commerce usually determines normal value based on sales of the subject merchandise in the foreign market or in a third country comparator market. *See* 19 U.S.C. § 1677b(a)(1)(A)–(C). However, when conducting an administrative review of an ADD order covering merchandise from a country that Commerce has designated a non-market economy ("NME"), "sales of merchandise in [that NME] country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). As such, in NME proceedings, Commerce calculates normal value based on the FOPs for the subject merchandise, with an added amount for general expenses and profits plus the cost of containers, coverings, and other expenses. *See* 19 U.S.C. § 1677b(c); *see also* 19 C.F.R. § 351.408 (2018).[11] In so doing, Commerce relies on "best available information" about the value of the FOPs used to produce the merchandise derived from one or more surrogate market economy countries ("surrogate values") that are at a comparable level of economic development to the NME country and where there are significant producers of the subject merchandise. 19 U.S.C. § 1677b(c)(4). To the extent possible, Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

Commerce has broad discretion to decide what constitutes "the best available information," as the phrase is not statutorily defined. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). However, the agency must ground its selection in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007).

Commerce normally selects the best available information by evaluating data sources based on their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the POR; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1

[10] The U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") has clarified that the methods under 19 U.S.C. § 1673d apply to administrative reviews as well as investigations. *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1352–53 (Fed.Cir. 2016).

[11] Further citations to Title 19 of the Code of Federal Regulations are to the 2018 edition.

(2004), *available at* https://enforcement.trade.gov/policy/bull04–1.html (last visited Oct. 26, 2020) ("Policy Bulletin 04.1").

Although it prefers to value all FOPs using data from a single surrogate country, Commerce decides not to use data from Thailand and uses Bulgarian import data to value nitrogen. *See* Final Decision Memo at 40–43. Commerce observes that the AUV of imports of nitrogen into Thailand derived from the GTA data ("Thai import data") is $10.05 per kilogram, while GasWorld data on domestic prices for nitrogen in Thailand provide values of $0.13 per kilogram for liquid nitrogen and $0.05 per kilogram for nitrogen gas. *See id.* at 40–41. Noting similar disparities between prices for nitrogen imports and domestic prices for nitrogen in Mexico and South Africa, and citing "concerns regarding the actual broad market price of nitrogen in those countries[,]" Commerce considers several alternative surrogate countries. *See id.* at 41–43. Commerce selects import data from Bulgaria because, among the sources that satisfy its selection criteria, Bulgaria has the highest volume of imports of nitrogen. *See* Final Decision Memo at 41–42.

Commerce's decision to rely on the Bulgarian import data is supported by substantial evidence. According to Commerce, not only does the Bulgarian import data satisfy its selection criteria, Bulgaria is also the surrogate country with the largest volume of nitrogen imports amongst the alternative sources on the record. *See* Final Decision Memo at 41–42. It is reasonable for Commerce to infer that using a larger sample size would result in a more representative and less distortive surrogate value. *See id.* Contrary to SunPower's argument, it is also reasonable for Commerce to infer—from significant disparities between the nitrogen GTA import data and GasWorld domestic pricing data for Thailand, Mexico, and South Africa— that one, or both, are unreliable sources of nitrogen AUV data. *See id.* at 43. A wide divergence in the reported value of nitrogen between the sources suggests that either the import prices or the domestic prices, or both, are inaccurate and untrustworthy for purposes of valuing the nitrogen input. Without record evidence as to which source is the reliable one, it stands to reason that Commerce would depart from its practice of valuing all FOPs based on a single surrogate country, and instead rely on Bulgarian import data in order to avoid using distorted data.

Moreover, SunPower's argument that Commerce fails to demonstrate that the GasWorld data on domestic prices is an appropriate benchmark against which to determine whether the GTA import data is aberrant misses the point. As it explains, Commerce finds the Thai import data to be unreliable, not aberrant. *See* Final Decision Memo at 42–43. SunPower might prefer that Commerce ignore the Gas-

World data when determining whether the GTA data is reliable, but the court cannot say that it is unreasonable for Commerce to consider the disparities between the two datasets. As such, Commerce's determination is sustained.

II. Commerce's Application of Partial AFA

Risen and Plaintiff-Intervenor's submit that Commerce's decision to apply partial AFA against Risen's suppliers to fill the gaps in record evidence caused by its uncooperative unaffiliated suppliers is an impermissible application of 19 U.S.C. § 1677e in this instance. *See* Risen's Br. at 14–33; Pl.-Intervenors' Br. at 9–18. Defendant counters that Commerce's decision to apply partial AFA with respect to those unaffiliated suppliers who refused to cooperate with Commerce's inquiry reasonably balances its statutory obligation to calculate accurate margins with its policy of using adverse inferences to induce cooperation. *See* Def.'s Br. at 11–25. For the following reasons, Commerce's decision to apply partial AFA against Risen's suppliers is remanded for further explanation or reconsideration.

To determine the normal value of the subject merchandise in NME countries Commerce solicits input data and surrogate values for those inputs from the parties. *See e.g.*, *Globe Metallurgical, Inc. v. United States*, 32 CIT 1070, 1075 (2008). Where, despite its solicitations, information necessary to calculate normal value is not available on the record, Commerce uses "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a)(1).[12] If Commerce further "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available[.]" *Id.* § 1677e(b)(1). However, under certain circumstances, Commerce may incorporate an adverse inference under § 1677e(a) in calculating a cooperative respondent's margin, if doing so will yield

[12] 19 U.S.C. § 1677e(a) also applies where an interested party or any other person—

> (A) withholds information that has been requested by the administering authority or the Commission under this title,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 [19 USCS § 1677m(c)(1) and (e)],
>
> (C) significantly impedes a proceeding under this title, or
>
> (D) provides such information but the information cannot be verified as provided in section 782(i) [19 USCS § 1677m(i)], the administering authority and the Commission shall, subject to section 782(d) [19 USCS § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a)(2).

an accurate rate, promote cooperation, and thwart duty evasion. *See Mueller Comercial de Mexico S. De R.L. de C.V. v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014) ("*Mueller*"). When analyzing the use of an adverse inference as a part of a § 1677e(a) analysis, the predominant concern must be accuracy. *See id.* at 1233.

Stating that it is operating "primarily under" 19 U.S.C. § 1677e(a), Commerce explains that, in furtherance of the policy objectives of promoting cooperation and thwarting duty evasion as cited in *Mueller*, it selects the highest FOP consumption rates reported by Risen and Chint to fill the gap in the record caused by Risen's and Chint's unaffiliated suppliers failure to comply with its request for information. *See* Final Decision Memo at 9–14; *see also Mueller*, 753 F.3d at 1232–36. Commerce explains that using the highest FOP consumption rates as plugs for missing cost data caused by Risen's and Chint's uncooperative unaffiliated suppliers prevents the "real possibility" that suppliers will avoid duties by exporting through the mandatory respondents, and that doing so also deters non-cooperation. Final Decision Memo at 12. Although Risen and Chint each cooperated with its investigation, Commerce observes that incorporating adverse inferences furthers its policy objectives because Risen and Chint are "significant producers in the solar market" and "could potentially induce the cooperation of the [non-cooperative] suppliers." *Id.* Commerce then concludes that its application of the highest FOP consumption rates solely where FOP information is missing due to the refusal of Risen's and Chint's suppliers to cooperate promotes accuracy by ensuring that any increase to the dumping margin is commensurate with the amount of non-cooperation by the suppliers. *See id.* at 13.

Commerce's determination is unsupported by substantial evidence. The evidence that Commerce cites does not support its claim that using partial AFA furthers its policy objectives. Regarding the threat of duty evasion, unlike the supplier at issue in *Mueller*, the unaffiliated suppliers in this case are not mandatory respondents refusing to participate in the review, *see Mueller*, 753 F.3d at 1229–30, 1235, and Commerce does not point to substantial evidence to otherwise support its concern that the unaffiliated suppliers intend to evade their own potential duties by exporting subject merchandise into the U.S. through Risen.[13] *See id.* Moreover, regarding Commerce's aim of deterring non-cooperation, Commerce cites no evidence of a mechanism or relationship that Risen could use to induce the cooperation of

[13] The court discusses Commerce's determination with respect to Risen since Chint does not challenge Commerce's application of partial AFA.

their unaffiliated suppliers. *Compare id.*, 753 F.3d at 1234–35 (explaining how Commerce's policy objective of inducing cooperation may be advanced where there is an existing relationship between the mandatory respondent and uncooperative supplier) *with* Final Decision Memo at 13 (determining that a plausible threat that the mandatory respondent may refuse to purchase subject merchandise from the suppliers is sufficient to induce cooperation).[14] Commerce observes that Risen is a large producer that may refuse to purchase subject merchandise from the non-cooperating, unaffiliated suppliers, *see id.* at 12, but such observations do not demonstrate that Risen had leverage over its unaffiliated suppliers under a more searching § 1677e(a) analysis.[15]

Commerce also fails to adhere to *Mueller*'s emphasis on accuracy above all else. *See Mueller*, 753 F.3d at 1233. Commerce states that it properly takes into account the predominant interest in calculating accurate dumping margins by only applying adverse inferences "precisely to and commensurate with the amount of uncooperation by the suppliers[.]" Final Decision Memo at 13. Yet, Commerce does not cite record evidence that using the highest FOP consumption rates on the record result in accurate dumping margins for Risen. *See Mueller*,

[14] Defendant claims that "Commerce went beyond highlighting Risen's size and market presence by also considering the nature of Risen's supplier partnership" to determine that Risen had sufficient leverage over its unaffiliated suppliers, Def.'s Br. at 22 (quoting Unreported FOPs Memo at 7–8), but any consideration of Risen's supplier partnerships appears cursory. As support for its claim that Commerce considered the existence of "'back-to-back' agreements and existing relationships", Defendant quotes Commerce's conclusion in the Unreported FOPs Memo that "Risen is an important customer to its Chinese solar cell suppliers." *Id.* Neither Defendant nor Commerce explain how the importance of Risen's relationship to its customers is such that Risen "is in a position to induce cooperation from those suppliers." Unreported FOPs Memo at 8. On the other hand, Risen submits that it has no control over the business and production records of its unaffiliated suppliers. Pl. [Risen's] Reply Br. at 12, Aug. 17, 2020, ECF No. 64 ("Risen's Reply Br."). Risen explains that it purchases inputs from a large number of unaffiliated suppliers at relatively small quantities, and that no supplier was exclusively dependent on Risen as a purchaser. *See id.* at 11–12 (citations omitted). On remand, should Commerce continue to apply partial AFA, it should explain why its determination is reasonable in light of any detracting record evidence raised with respect to this issue.

[15] Commerce and Defendant cite dicta from *KYD, Inc. v. United States* as support for Commerce's reasoning that Risen's exposure to enhanced ADD duties could potentially induce the cooperation of its unaffiliated suppliers. *See e.g.*, Final Decision Memo at 12 (citing 607 F.3d 760, 768 (Fed. Cir. 2010) ("*KYD*")); Def.'s Br. at 16–17. Irrespective of the applicability of *KYD*'s dicta, the Court of Appeals in *Mueller* stressed the importance of there being an existing relationship between the cooperating and the non-cooperating suppliers where Commerce seeks to use partial AFA to induce cooperation. *See Mueller*, 753 F.3d at 1234–35 (citing, inter alia, *KYD*, 607 F.3d at 768). Here, as explained above, Commerce cites no evidence of such a relationship between Risen and its unaffiliated suppliers.

753 F.3d at 1232–33.[16] As such, the court must remand to Commerce for further explanation or reconsideration.[17] On remand, should Commerce continue to rely on partial AFA on the basis of the same policy objectives, it should point to evidence of an existing relationship or mechanism that Risen could have used to induce the cooperation of its unaffiliated suppliers, and should furthermore explain why the highest FOP consumption rates on the record further the predominant interest in calculating accurate dumping margins.

III. Commerce's Refusal to Apply Facts Available to Risen's Cooperative Unaffiliated Suppliers

SunPower challenges Commerce's refusal to apply partial AFA to Risen's cooperative unaffiliated suppliers. *See* SunPower's Br. at 14–20. Namely, SunPower argues that Commerce's determination that the suppliers Commerce deemed cooperative acted to the best of their ability is unreasonable due to "glaring" deficiencies in their responses to Commerce's inquiry.[18] *See id.* Defendant counters that Commerce's determination is reasonable because the cooperative sup-

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[16] Defendant invokes *Nan Ya* to argue that Commerce need only demonstrate that the partial AFA rate is a reasonably accurate estimate of the respondent's actual rate. *See* Def.'s Br. at 21–22 (citing *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016); *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000); *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016)). *Nan Ya*, however, involved adverse inferences against uncooperative respondents under 19 U.S.C. § 1677e(b), while here, Commerce states that it is operating "primarily under" § 1677e(a) to apply partial AFA against cooperative respondents. Moreover, Commerce cites no evidence that using the highest consumption rates results in a "reasonably accurate estimate of [Risen's] actual rate[.]" Def.'s Br. at 22.

[17] Risen and Plaintiff-Intervenors also argue that Commerce's determination that FOP information missing from the record was significant is arbitrary and capricious. *See* Risen's Br. at 26–33; Pl.-Intervenors' Br. at 17 (expressing support for Risen's argument). Commerce, however, explains that [[ ]] percent and [[ ]] percent of solar cells and solar modules, respectively, came from uncooperative unaffiliated suppliers, and that these amounts constitute a material quantity that distinguishes its decision from other situations where Commerce has excused respondents from reporting FOPs. Unreported FOPs Memo at 10. Thus, contrary to Risen's submission, *see* Risen's Br. at 31, Commerce does provide a reasoned explanation for its determination. Risen does not explain how Commerce's decision is arbitrary capricious, but rather, takes issue with how Commerce weighed the evidence, and argues that Commerce should have found the FOP information on the record was a reasonable and representative sample of Risen's costs. *See id.* at 31 (arguing that Commerce did not consider the quantity of unaffiliated suppliers, the average amount of FOP data from each uncooperative supplier, Risen's business model, and the solar panel industry in China). Regardless of whether the remaining FOP information on the record was sufficient to constitute a reasonable and representative sample of Risen's costs based on its preferred considerations, Risen points to no authority limiting Commerce's discretion to request FOP information from all of Risen's suppliers and fails to persuade that Commerce's decision to do so is arbitrary and capricious in light of its evidence-based determination and reasoned explanation. *See* Final Decision Memo at 24.

[18] SunPower thus challenges Commerce's determination that these suppliers are "cooperative." *See* SunPower's Br. at 14–20.

pliers explained the deficiencies in their submissions, and their responses were sufficient to enable Commerce to calculate a dumping margin. *See* Def.'s Br. at 25–30. For the following reasons, Commerce's refusal to apply partial AFA to Risen's cooperative suppliers are sustained.

As explained, where information necessary to calculate a respondent's dumping margin is not available on the record, or where information has been withheld, is untimely, cannot be verified, or a party impedes the proceeding, Commerce applies "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a). If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may apply "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1). A respondent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Here, Commerce finds that the supplemental responses it received from the six cooperative unaffiliated suppliers adequately address the deficiencies that SunPower complains of, eliminating a need to employ facts available under 19 U.S.C. § 1677e(a). *See* Final Decision Memo at 23–24; *see also* SunPower's Br. at 16–17. Implicit in its conclusion that "the information provided by [the unaffiliated suppliers] is sufficient to calculate an accurate margin for Risen" is Commerce's finding that necessary information is not missing from the record pursuant to 19 U.S.C. § 1677e(a)(1). *See* Final Decision Memo at 23–24. Moreover, Commerce "do[es] not find that the suppliers withheld information that had been requested or significantly impeded the proceeding under [19 U.S.C. § 1677e(a)(2)(C)], because they responded to Commerce's requests for information by providing the requested information." *Id.* at 24. SunPower, pointing to various purported deficiencies in the suppliers' factual submissions, contests Commerce's determination that the suppliers provided sufficient information, and claims that the deficiencies themselves demonstrate that the suppliers failed to act to the best of their ability.[19] Commerce

[19] Commerce, Defendant, and SunPower occasionally conflate the two distinct analytical steps of 19 U.S.C. § 1677e(a) and (b). Commerce concludes that the suppliers provided sufficient information to calculate accurate rates. *See* Final Decision Memo at 22–24. Its conclusions with respect to whether necessary information was missing from the record and whether the suppliers had sufficiently responded to Commerce's inquiries would seem to obviate the need for an analysis of whether those suppliers had acted to the best of their ability. Yet, in the Final Decision Memo, Commerce continues to analyze whether the

addresses the discrepancies identified by SunPower,[20] and concludes that the information provided by the six cooperative suppliers is sufficient to calculate an accurate dumping margin for Risen. *See* Final Decision Memo at 23–24. SunPower does not explain why Commerce's determination was unreasonable, but rather, requests the court reweigh the evidence, which the court will not do. *See* SunPower's Br. at 18–20; *but see Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015). As such, Commerce's determination is sustained.

IV. Reliance on Descartes Freight Rates to Value Ocean Freight

SunPower argues that Commerce contravenes agency practice by refusing to use Maersk data on ocean freight rates, and further

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suppliers acted to the best of their ability. *See id.* at 24. However, as stated above, AFA is a short-hand term employed by many parties before Commerce and before this Court that actually refers to two distinct statutory provisions. Using the shorthand masks the statutory basis upon which Commerce relies, specifically § 1677e(a).

[20] First, with respect to SunPower's contention that certain suppliers failed to support or reconcile their reported labor, electricity, and water consumption amounts, *see* SunPower's Br. at 15–18, Commerce preliminarily notes that it did not ask for supporting documentation and that it is not required to request such documentation, since Commerce usually reviews such documents at verification. *See* Final Decision Memo at 23. Moreover, Commerce explains that the cooperating companies "described the steps used in their cost reconciliations in their Section D responses[,]" "performed the basic steps of reconciling profit and loss statements to cost of goods sold, cost of production, and POR raw material consumption" and, where certain suppliers were asked, they complied with Commerce's request to "reconcile [their] audited financial statements to their cost reconciliations[.]" As such, Commerce did not find it necessary to issue additional questions regarding these reconciliations. *See id.* at 23. Second, in response to SunPower's concerns about missing audited financial statements, *see* SunPower's Br. at 15, Commerce explains that, where a supplier maintained audited financial statements, the supplier submitted such statements to Commerce. *See* id. at 23. Third, with respect to SunPower's concerns about reconciliations with [[ ]] Commerce notes that all but one supplier explained that these negative quantities relate to "returns into inventory of items that were not consumed in production[,]" and that the suppliers submitted credit notes and return-slips supporting their explanation. *See id.* at 23; *see also* SunPower's Br. at 18. The remaining company, Commerce explained, demonstrated "through tracing the steps in the cost reconciliation, that the negative withdrawals pertained to transferring expenses from production to research and development[,] but, nonetheless, the corresponding quantities were included in the reported POR consumption." Final Decision Memo at 23. Commerce found this explanation to be sufficient. *See id.* Fourth, Commerce "sought clarification from three suppliers as to why certain materials identified in their inventory-out details, and submitted as part of their cost-reconciliations, were excluded from their reported consumption." *Id.* at 24. Commerce found, that in some instances, the materials are the same inputs used by Risen and the supplier to produce the subject merchandise, and in others, that—although the materials had a different name—they appeared to be the same or similar to inputs used to produce the merchandise other consideration. *See id.* at 24. Commerce found satisfactory the companies' responses that these materials were either not used to produce merchandise supplied to Risen, or that they were used for purposes other than production. Commerce's response demonstrates that it has considered detracting evidence raised in SunPower's submissions and reasonably determines that the information provided by the cooperative suppliers was sufficient to calculate an accurate dumping margin. *See id.*

submits that Commerce's reliance on Descartes data was unsupported by substantial evidence because Descartes data is specific to chemical products. *See* SunPower's Br. at 29–32. Defendant, Chint and Risen argue that Commerce reasonably chose Descartes data because, in addition to being contemporaneous and representing a broad market average, it is also publicly available unlike Maersk data. *See* Def.'s Br. at 34–37; Chint's Resp. Br. at 32–37; Risen's Resp. Br. at 18–23. For the following reasons, Commerce's decision to rely on Descartes data is sustained.

As explained, when determining the "best available information" on freight rates to value ocean freight expenses, Commerce normally evaluates data sources based on their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the POR; (4) representativeness of a broad market average; and (5) public availability. *See* Policy Bulletin 04.1. Commerce's determination must be supported by substantial evidence, meaning the evidence is sufficient such that a reasonable mind might accept the evidence as adequate to support Commerce's conclusion while considering contradictory evidence. *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938).

Commerce's determination that Descartes data, without Maersk data submitted by petitioners, better satisfies its selection criteria is supported by substantial evidence. *See* Final Decision Memo at 59–60. In addition to being contemporaneous with the POR and relating to the container size that respondents use, Commerce observes that Descartes freight rates are product-specific to the extent that they relate to shipments of solar panels and other solar products.[21] *See id.*

Moreover, Commerce explains that, unlike Maersk data rates submitted by the petitioners, Descartes data freight rates are publicly available. *See* Final Decision Memo at 59–60. It is thus reasonable for Commerce to disregard Maersk data and rely exclusively on Descartes data to value ocean freight expenses.

SunPower maintains that Maersk data relating to electronics are more specific than Descartes data. *See* SunPower's Br. at 29–32. However, it is reasonably discernible from Commerce's reliance on Descartes freight rates for solar panels and other solar products that it views those rates to be product-specific, and that it does not consider Maersk data rates on electronics to be as specific to the subject

[21] Although SunPower argues Descartes data "are specific to the shipment of chemical products," Commerce explains that it only uses Descartes freight rates for shipments of chemical products where rates for shipments of solar products to certain U.S. regions are unavailable. *See* SunPower's Br. at 31–32; *but see* Final Decision Memo at 59.

merchandise. *See* Final Decision Memo at 59. Further, it is undisputed that SunPower submitted to Commerce business proprietary Maersk data. *See id.* at 59– 60.[22] It is reasonable for Commerce to conclude that publicly available data that is, where possible, product-specific, better satisfies its selection criteria than business proprietary data that is, as a whole, not as specific to the subject merchandise. That SunPower comes to a different conclusion is, on its own, insufficient to invalidate Commerce's determination. *See Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 36 CIT 1390, 1392, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951));[23] *see also* Final Decision Memo at 59–60. As such, Commerce's decision to value ocean freight expenses using Descartes data is sustained.

V. Adjustment to the U.S. Price to Offset Export Buyer's Credit Program

SunPower argues that Commerce's decision to increase U.S. Price by the amount of the CVD imposed to offset China's Credit Program in the companion CVD review is unsupported by substantial evidence because Commerce made that determination based on AFA and thus made no finding that the Credit Program was export contingent. *See* SunPower's Br. at 10–14. Defendant, Chint and Risen counter that Commerce found the Credit Program to be export contingent, even if the determination was based on AFA. *See* Def.'s Br. at 7–11; Chint's Resp. Br. at 12–18; Risen's Resp. Br. at 5–10.[24] Commerce's determination is sustained.

When calculating the dumping margin, Commerce is statutorily required to increase the U.S. Price by the amount of any CVD imposed on the subject merchandise to offset an export subsidy. 19 U.S.C. § 1677a(c)(1)(C). Here, Commerce increases the U.S. Price by

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[22] It is reasonably discernible from Commerce's statements regarding the treatment of Maersk data in this review that it assesses public availability based on how the information is submitted. *See id.* at 59 ("We disregarded the petitioner's Maersk rates, because they were treated as proprietary information on the record of this review.").

[23] That Commerce has previously used Maersk data to calculate ocean freight costs is immaterial. SunPower calls Commerce's reliance on Maersk data a "long standing practice", *see* SunPower's Br. at 30, but, in reality, the practice is relying on the methodology set out in the Policy Bulletin 04.1. Within that framework, each case stands on its own record, so the fact that Commerce relied on a particular FOP source in one case does not bind it to rely on the same source in subsequent cases.

[24] On September 9, 2020, Risen filed with the court a Notice of Supplemental Authority, apprising the court of the Court of Appeals' decision in *Changzhou Trina Solar Energy Co. v. United States*, Appeals No. 20–1004 (Fed. Cir. Sept. 3, 2020), and noting the direct relevance of the decision to SunPower's challenge. *See* Notice of Supplemental Authority at 1–2, Sept. 9, 2020, ECF No. 69.

the amount of the CVD imposed in the companion CVD review to offset the Credit Program because it finds that the Credit Program was determined to be an export subsidy. *See* Final Decision Memo at 16–17. Specifically, Commerce points to its determination, in the preliminary results of the companion CVD review, that the benefit conferred by the Credit Program "is tied to export performance[.]" *See* Final Decision Memo at 17 (citations omitted). Although, for the final results of the companion CVD review, Commerce resorted to AFA to countervail the Credit Program, *see* CVD AR IDM at Cmt. 2, Commerce observes "there is no indication . . . that [it] changed its finding that the program is tied to export performance." Final Decision Memo at 17.

The U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") decision in *Changzhou* affirms Commerce's position and precludes SunPower's submission with respect to this issue. *See* SunPower's Br. at 10–14; [SunPower's] Reply Br. at 4–5 & n.1, Aug. 17, 2020, ECF No. 66 ("SunPower's Reply Br."); *but see Changzhou Trina Solar Energy Co. v. United States*, Appeals No. 20–1004 at 16–20 (Fed. Cir. Sept. 3, 2020) ("*Changzhou*"). As explained by the Court of Appeals in *Changzhou*, that Commerce uses AFA to reach a decision to countervail a program "does not obviate Commerce's obligation to make the 'applicable determination'" and to support its determination with substantial evidence. *Changzhou*, Appeals No. 20–1004 at 16– 17 (citations omitted); *see also* 19 U.S.C. §§ 1677e(a), 1671, 1677(5), (5A), 1516a(b)(1)(B)(i). Based on the available descriptions of the program in the companion review, it is reasonable for Commerce to conclude in this proceeding that the Credit Program was determined to be specific based on export contingency. Under *Changzhou*, SunPower's argument that Commerce's reliance on AFA means that it "did not determine the [Credit Program] was export contingent" fails. SunPower's Br. at 11; *but see Changzhou*, Appeals No. 20–1004 at 16–17.[25] As such, Commerce's determination is sustained.

CONCLUSION

For foregoing reasons, it is

ORDERED that Commerce's refusal to apply partial AFA to Risen's cooperative unaffiliated suppliers is sustained; and it is further

[25] SunPower also argues that Commerce's decision to offset respondents' cash deposit in this proceeding negates the adverse effect of its application of AFA in the companion CVD review. *See* SunPower's Br. at 12–14. Risen notes, however, that Commerce did not offset its cash deposit rate. Risen's Resp. Br. at 9. As SunPower later acknowledges, *see* SunPower's Reply Br. at 4 n. 1, irrespective of whether Commerce did offset respondents' cash deposit rate, the Court of Appeals' holding in *Jinko Solar Co. v. United States*, precludes this argument. *See* 961 F.3d 1177, 1181–84 (Fed. Cir. 2020).

ORDERED that Commerce's decision to value Risen's nitrogen input using Bulgarian import data is sustained; and it is further

ORDERED that Commerce's decision to use Descartes data to value ocean freight expenses is sustained; and it is further

ORDERED that Commerce's decision to adjust U.S. Price by the amount of the CVD imposed to offset the benefit conferred to manufacturers and producers by the Credit Program in the companion CVD review is sustained; and it is further

ORDERED that Commerce's application of partial AFA to Risen is remanded for further explanation or reconsideration; and it is further

ORDERED that Commerce shall incorporate, to the extent required by law, any adjustments to Risen's dumping margin resulting from the remand redetermination into its calculation of the separate rate or separate rates applicable to individual respondents; and it is further

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

ORDERED that the parties shall have 30 days thereafter 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; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: October 30, 2020
New York, New York

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

Slip Op. 20–153

HYUNDAI ELECTRIC & ENERGY SYSTEMS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ABB INC. AND SPX TRANSFORMER SOLUTIONS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 20–00108
Public Version

[Plaintiff's motions to supplement the record and for leave to file a reply brief are granted. Defendant's request for leave to file a surreply or, in the alternative, for oral argument is denied.]

Dated: October 30, 2020

David E. Bond, *William J. Moran*, and *Ron Kendler*, White & Case LLP, of Washington, DC, for Plaintiff Hyundai Electric & Energy Systems Co., Ltd.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Jeffery Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberda, *David C. Smith*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors ABB Inc. and SPX Transformer Solutions, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court on Plaintiff Hyundai Electric & Energy Systems Co., Ltd.'s ("Hyundai") motion to supplement the administrative record in the U.S. Department of Commerce's ("Commerce" or "the agency") final results of the sixth administrative review of the antidumping duty order on large power transformers ("LPTs") from the Republic of Korea for the period of review August 1, 2017, to July 31, 2018 ("the POR"). *See* Confidential Pl.'s Mot. to Suppl. the R. ("Hyundai's Mot."), ECF No. 28; *see generally Large Power Transformers From the Republic of Korea*, 85 Fed. Reg. 21,827 (Dep't Commerce Apr. 20, 2020) (final results of antidumping duty admin. review; 2017–2018) ("*Final Results*"), ECF No. 24–4, and accompanying Issues and Decision Mem., A-580–867 (Apr. 14, 2020) ("I&D Mem."), ECF No. 24–5. Defendant United States ("the Government") and Defendant-Intervenors ABB Inc. and SPX Transformer Solutions, Inc. (together, "Defendant-Intervenors") oppose Hyundai's motion to supplement. *See* Confidential Def.'s Opp'n to Pl.'s Mot. to Suppl. the Admin. R. ("Gov't's Resp."), ECF No. 32; Confidential Def.-Ints.' Opp'n to Pl.'s Mot. to Suppl. the Admin. R. ("Def.-Ints.' Resp."), ECF No. 35.

Hyundai also filed a motion for leave to file a reply brief. *See* Confidential Pl.'s Mot. for Leave to File Reply to Def.'s Opp'n to Pl.'s Mot. to Suppl. the R. ("Hyundai's Mot. for Leave"), ECF No. 37. The Government filed a response to Hyundai's motion for leave in which it deferred to the court as to whether to grant the motion but requested that the court allow the Government to file a surreply to Hyundai's reply or, in the alternative, permit oral argument should the court grant Plaintiff's motion. *See* Def.'s Resp. to Pl.'s Mot. For Leave to File Reply ("Gov't's 2nd Resp."), ECF No. 39.

For the following reasons, the court grants Hyundai's motions for leave to file a reply and to supplement the record. The court denies the Government's request for leave to file a surreply or for oral argument.

BACKGROUND

In the *Final Results*, Commerce relied on total adverse facts available (or "total AFA") to determine Hyundai's margin of 60.81 percent. 85 Fed. Reg. at 21,828. Commerce's reliance on total AFA was based, in part, on the agency's finding that Hyundai's U.S. sales database was incomplete. I&D Mem. at 6. Commerce "discovered [that] one LPT [] had been omitted from Hyundai's U.S. sales database, even though the associated documentation show[ed] that it was produced in Korea and is covered by the [POR]." *Id.* At issue are documents related to the sale of that LPT.

Hyundai stated that production for the LPT was transferred from Korea to the United States and, thus, its sales database was reliable. *See id.* at 7. At verification, a Commerce analyst requested information supporting this statement. *See id.* ; Statement of Joshua DeMoss Under 28 U.S.C. § 1746 ("DeMoss Decl.") ¶ 3, ECF No. 32–1. Hyundai provided two documents: a test report ("the Test Report")[1] and a nameplate document ("the Nameplate"), both related to the sale of the LPT. *See* Statement of Justin R. Becker Under 28 U.S.C. § 1746 ("Becker Decl.") ¶¶ 5–6, ECF No. 28–2; DeMoss Decl. ¶ 3; Statement of John K. Drury Under 28 U.S.C. § 1746 ("Drury Decl.") ¶ 3, ECF No. 32–2; Hyundai's Mot. at 1, Attachs. 1, 2. The Commerce analyst reviewed the documents and discussed them with another Commerce analyst at verification. *See* DeMoss Decl. ¶ 3; Drury Decl. ¶ 3. The two Commerce analysts determined that the documents did not contain information regarding where the LPT was produced and, for that reason, did not include the documents as verification exhibits. DeMoss Decl. ¶ 3; Drury Decl. ¶ 3.

Commerce did not discuss either document in its determination. *See* I&D Mem. at 6–8 (discussing the basis for Commerce's finding that Hyundai failed to report that the LPT at issue was produced in Korea and imported to the United State). Commerce did discuss other evidence related to this issue and determined that such evidence failed to substantiate Hyundai's contention that the LPT was manufactured in the United States. *See id.* Thus, Commerce found that Hyundai's failure to report the importation and sale of this LPT undermined the reliability of Hyundai's U.S. sales database, warranting total AFA. *See id.* at 8, 14.

[1] The Test Report was issued by Hyundai Power Transformers, located in Alabama. *See* Hyundai's Mot at 2.

DISCUSSION

I. The Court Grants Hyundai's Motion for Leave to File a Reply

Absent leave of court, parties may not file a reply brief to a non-dispositive motion. *See* U.S. Court of International Trade ("USCIT") Rule 7(d); *Retamal v. United States Customs & Border Prot*., 439 F.3d 1372, 1377 (Fed. Cir. 2006) (noting that the court may allow reply briefs for non-dispositive motions). Here, Hyundai's proposed reply brief aids the court's understanding of the disagreement between the Parties with respect to the circumstances surrounding the presentation of the documents at verification and Commerce's decision not to include them in the verification exhibits. *See generally* Confidential Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. to Suppl. the R. ("Hyundai's Reply"), ECF No. 37–2. Thus, the court grants Hyundai's motion for leave to file a reply brief.

While the court grants Hyundai's motion for leave, the court denies the Government's request to file a surreply or, in the alternative, oral argument to address Hyundai's motion for leave. The Government does not raise any objections to Hyundai's motion but requests permission to file a response to Hyundai's reply should the court grant Hyundai's motion. Gov't's 2nd Resp. at 1–2. Again, the court has discretion whether to allow a reply—or in this case, a surreply—for non-dispositive motions. *See Retamal*, 439 F.3d at 1377. The Government's contention that Hyundai's reply contains new factual and legal assertions is unsubstantiated[2] and, thus, fails to persuade the court to grant the Government's request. *See* Gov't's 2nd Resp.

The Government alternatively requested the opportunity to respond to Hyundai's reply at oral argument. Gov't's 2nd Resp. at 2. However, the court has already declined the Parties' proposal for oral argument on Hyundai's motion to supplement during a teleconference regarding the Parties' proposed scheduling order. *See* Order (Aug. 10, 2020), ECF No. 27 (entering a scheduling order that does not provide for oral argument on the motion to supplement as proposed the Parties' Proposed Scheduling Order (Aug. 6, 2020), ECF No. 26–1). Moreover, oral argument is unnecessary to the court's ruling.

For these reasons, the court grants Hyundai's motion for leave to file a reply and denies the Government's request to file a surreply.

[2] The Government did not submit a proposed surreply to aid in the court's consideration of the request.

II. The Administrative Record is Incomplete

A. Legal Framework

The court's review of the *Final Results* is limited to the record upon which Commerce's determination is based. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) and (b)(2); *cf. Camp v. Pitts*, 411 U.S. 138, 142 (1973) (stating that the administrative record is the "focal point" of the court's review). The administrative record is defined to include "all information presented to or obtained by the [agency] . . . during the course of the administrative proceeding." 19 U.S.C. § 1516a(b)(2)(A)(i); *see also* USCIT Rule 73.2(a)(1).

The administrative record is not necessarily "those documents that the agency has compiled and submitted as 'the' administrative record"; rather the administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *F. Lli De Cecco Di Filippo Fara San Martino S.P.A. v. United States* ("*F. Lli De Cecco*"), 21 CIT 1124, 1128–29, 980 F. Supp. 485, 488–89 (1997) (citation omitted) (denying the agency's motion to strike affidavits because the affidavits constituted part of the record).

The court will consider matters outside of the administrative record submitted by the agency when "there has been a strong showing of bad faith or improper behavior on the part of the officials who made the determination or when a party demonstrates that there is a *reasonable basis* to believe the administrative record is incomplete."[3] *F. Lli De Cecco*, 21 CIT at 1226, 980 F. Supp. at 487 (citation omitted).

B. Parties' Arguments

Hyundai argues that because the Commerce analyst reviewed the Test Report and the Name Plate, both documents should have been included in the record. *See* Hyundai's Mot. at 2 (citing 19 U.S.C. § 1516a(b)(2)(A)(i)). Hyundai avers that without the Test Report and the Nameplate, the record is incomplete, thereby frustrating judicial

[3] Defendant-Intervenors urge the court to deny Hyundai's motion to supplement the record because the court may only allow supplementation of the record in limited circumstances, which are not present here. *See* Def.-Ints.' Resp. at 4 (citing as examples instances when "there is new, changed, or extraordinary information that was not available during the investigation, or when the party makes a strong showing of bad faith or improper behavior by agency decision makers"). Defendant-Intervenors are mistaken. Hyundai asserts that the record submitted by Commerce is *incomplete,* not that the court should supplement an otherwise complete record. *See* Hyundai's Mot. at 1 (asserting that documents are missing from the record). As Defendant-Intervenors are aware, the court may "order completion . . . of the record in light of clear evidence that the record was not properly designated or [on] the identification of reasonable grounds that documents considered by the agency were not included in the record." Def.-Ints.' Resp. at 5 (quoting *JSW Steel (USA) Inc. v. United States*, Slip Op. 20–111, 2020 WL 4515923, at *6 (CIT Aug. 5, 2020)).

review of the *Final Results*. *See id.* at 4. Hyundai also argues that the court should allow the documents to be added to the record pursuant to the "bad faith or improper behavior" exception. *See id.* at 5 (citing *Jacobi Carbons AB v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1159, 1194 (2017)).

The Government argues that the versions of the documents attached to Hyundai's motion differ materially from the versions presented to Commerce at verification. *See* Gov't's Resp. at 5–6 (asserting that the "nameplate" pages of the documents were not offered and are not referenced in the table of contents). The Government argues further that if Hyundai had offered the versions of the documents attached to its motion and explained how the documents support its contention that the LPT at issue was produced in the United States, Commerce would have included such an explanation in the verification report. *See id.* at 6. The Government also argues that Commerce appropriately declined to accept the documents that Hyundai attempted to place in the record because the documents (in the form submitted at verification) were not responsive to Commerce's request for information supporting Hyundai's contention that the LPT at issue was produced in the United States. *See id.* at 7. Finally, the Government argues that Hyundai has not satisfied its burden of demonstrating that Commerce's behavior was improper. *See id.* at 10; *see also* Def.-Ints.' Resp. at 8–9.

C. Analysis

The record is defined to include all the information "presented or obtained" by Commerce during the administrative review. 19 U.S.C. § 1516a(b)(2)(A)(i); USCIT Rule 73.2(a)(1). While Commerce may exclude certain documents from the record, *see e.g., Acciai Speciali Terni S.p.A. v. United States*, 24 CIT 1211, 1214–15, 120 F. Supp. 2d 1101, 1104 (2000) (affirming Commerce's exclusion of untimely filed sales information), nevertheless, the record is not limited to information that Commerce finds convincing or plans to rely on for its determination, to the exclusion of information which Commerce finds unconvincing or chooses not to rely on. The substantial evidence standard of review demands a broad approach to the record because it requires Commerce to consider evidence that "fairly detracts" from the agency's findings. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488 (1951); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). Here, the court finds that the administrative record is incomplete because it lacks information presented to and evaluated by Commerce officials in relation to the agency's decision regarding the place of production for the LPT in question.

First, the Government concedes that the Commerce analyst requested, obtained, and considered a version of the Test Report and Nameplate but did include them in the exhibits to the verification report. *See* Gov't's Resp. at 10; DeMoss Decl. ¶ 3; Drury Decl. ¶ 3. Under these circumstances, the analyst's consideration of the documents was sufficient to trigger Commerce's obligation to include the documents presented to him in the administrative record. *See* 19 U.S.C. § 1516a(b)(2)(A)(i) (requiring Commerce to include in the administrative record "*all information presented to or obtained by* the [agency] . . . during the course of the administrative proceeding") (emphasis added); USCIT Rule 73.2(a)(1). Therefore, without the documents, the administrative record is incomplete.

Second, the court rejects the Government's contention that the versions of the documents attached to Hyundai's motion to supplement the record materially differ from the versions presented to Commerce. *See* Gov't's Resp. at 5–6. As discussed above, the record should have included the documents provided in response to the Commerce analyst's request. Commerce's failure to include those documents deprives the court of a credible basis upon which evaluate the Government's contention.[4]

Third, excluding the documents in question from the administrative record would frustrate meaningful judicial review. The documents at issue relate to Commerce's finding that the LPT in question was produced in Korea rather than the United States. While the Government asserts that the documents only speak to where the LPT was tested and not where it was produced, *see* Gov't's Resp. at 11, as Hyundai notes, the verification report indicates that many of Hyundai's customers travel to Korea to observe the testing of LPTs prior to shipment to the United States, suggesting a relationship between the place of production and the place of testing, *see* Hyundai's Reply at 6; *see also* [Hyundai's] Submission of the Test Report Reviewed by the Dep't at Verification (Dec. 30, 2019) at 2, ECF No. 37–3 (asserting that the Test Report shows the LPT was produced in Alabama). Thus, excluding the documents inhibits the court's ability to determine whether the record supports Commerce's finding that Hyundai failed to provide documentation supporting its contention that the LPT in

[4] The Government avers that the declarations by the analysts establish that the documents attached to Hyundai's motion to supplement the record differ from those provided at verification. *See* Gov't's Resp. at 7–8; *see also* DeMoss Decl. ¶¶ 5–6; Drury Decl. ¶¶ 5–6. Hyundai, however, offers a declaration attesting that the documents attached to its motion are copies of the documents reviewed by Commerce at verification. *See* Becker Decl. ¶ 5. The court does not have a basis to find one declaration more credible than another.

question was produced in the United States.[5] *See* I&D Mem. at 6–8.

Because the court finds that the administrative record is incomplete, the court need not consider whether to allow supplementation based on the "bad faith or improper behavior" exception. *See Jacobi Carbons*, 222 F. Supp. 3d at 1194.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Hyundai's motion for leave to file a reply (ECF No. 37) is granted; and it is further

ORDERED that Hyundai's motion to supplement the record (ECF No. 28) is granted and the court accepts the two documents attached thereto (ECF No. 28–2) as part of the administrative record.

The court will contact the parties to schedule a status conference.

Dated: October 30, 2020
New York, New York

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

Slip Op. 20–159

JINXIANG INFANG FRUIT & VEGETABLE CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, AND VALLEY GARLIC, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Court No. 19–00211

[Commerce's *New Shipper Review* sustained.]

Dated: November 5, 2020

Gregory Stephen Menegaz, *Alexandra H. Salzman*, and *John Joseph Kenkel*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff Jinxiang Infang Fruit & Vegetable Co., Ltd.

[5] The Government appears to argue that the court should deny Hyundai's motion to supplement the administrative record based on Commerce's discretion to reject untimely submitted new factual information. *See* Gov't's Resp. at 8, 12. However, Commerce requested additional documentation at verification and then declined the proffered information as non-responsive to its request for information on the location of the LPT's production. *See, e.g.*, DeMoss Decl. ¶ 3. Commerce did not reject the documents at verification as untimely new factual information. In this situation, the court is not intruding upon the agency's authority to enforce its regulatory deadlines; rather, under the circumstances presented here, documents that the analysts considered irrelevant to their verification exercise are asserted to be relevant to the court's review. The court is unable to review the agency's determination, including that of the analysts' finding that the documents were not determinative of the production location of the LPT in question, in the absence of the documents themselves.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With him on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Brendan Saslow*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Michael Joseph Coursey, *John M. Herrmann II*, and *Joshua Rubin Morey*, Kelley Drye & Warren, LLP of Washington, DC, for Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch, LLC, The Garlic Company, and Valley Garlic.

OPINION

Gordon, Judge:

Among other guidance aimed at promoting the efficient disposition of this action, the Scheduling Order cautioned Plaintiff, Jinxiang Infang Fruit & Vegetable Co., Ltd. ("Infang") "not to rely too heavily on its administrative case briefs" and not to "merely cut-and-paste arguments from administrative case briefs, and think anew about the issues against the operative standards of review the court must apply." Scheduling Order at 2, ECF No. 31. The Scheduling Order also cautioned that failure to heed the guidance may result in the court "summarily sustaining Commerce's action . . .." *Id.* at 3.

Plaintiff did not heed the cautionary guidance. *Compare* Pl.'s Mem. in Support of Mot. for Judgment on Agency Record, ECF No. 32–2, *with* Infang Admin. Case Brief, PD[1] 110. Plaintiff also failed to disclose a related case on its Information Statement. *See* Information Statement at 2, ECF No. 2 (omitting *Shenzhen Xinboda Indus. Co. v. United States*, 42 CIT ___, 357 F. Supp. 3d 1295 (2018)).

The court notified the parties that Plaintiff had largely replicated its administrative case brief as its USCIT Rule 56.2 opening brief. *See* Letter Concerning Opening Brief, ECF No. 33. The court then conducted a conference call, Teleconference, ECF No. 36, and ordered Plaintiff to show cause why the court should not summarily sustain the agency's determination in *Fresh Garlic from the People's Republic of China*, 84 Fed. Reg. 61,023 (Dep't of Commerce Nov. 12, 2019) (final results new shipper review) ("*New Shipper Review*"). *See* Memorandum and Order, ECF No. 37 ("Order to Show Cause").

Plaintiff submitted a lengthy apologia. Pl.'s Response to Court's Request/Order to Show Cause, ECF No. 38. Defendant and Defendant-Intervenor then filed their comments. Defendant's Resp. to Pl.'s Resp. to Order to Show Cause, ECF No. 40 ("Def's Resp."); Def.-Intervenor's Letter in Lieu of Comments Addressing Pl.'s Resp.

[1] "PD" refers to a document contained in the public administrative record, which is found in ECF No. 29–3, unless otherwise noted. "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 29–2.

to Order to Show Cause, ECF No. 39. Defendant explains the problems with Plaintiff's apologia and opening brief:

> As Infang recognizes, the Court's definition of a related case is fairly clear. The Court defines a "related case" as any "action . . . that involve{s} a common question of law or fact with any other action(s) previously decided or now pending." Pl. Resp. to [Order to Show Cause], ECF No. 38 at 6. Infang then goes on, however, to insist that *Xinboda* is not a related case. In *Xinboda*, the Court addressed the same product and similar surrogate country and value issues the Court is being asked to decide in this case. The Court in *Xinboda* evaluated Commerce's surrogate country and value determinations and rejected plaintiff's challenges based upon a substantial evidence standard of review. Infang may disagree with the result in that case, but the case by virtue of the identity of the parties and the similarity of issues does appear to be encompassed under the Court's "related case" definition. . . .
>
> Infang knew that *Xinboda* would be important in this Court's assessment of the matter. In the very first paragraph of its opening brief, Infang discloses that it understands that Commerce relied "primarily" on *Xinboda* in reaching a surrogate country decision. See Pl. Opening Br., ECF No. 32–2 at 1 ("The Department primarily rests its selection of Romania on this court's opinion in {*Xinboda*}."). Yet even with that acknowledgment, Infang omits any mention of *Xinboda* in its related case statement, and from there, mentions the case only once in passing in its opening brief, where it references a specific point relating to the translation of some articles in the record. *Id.* at 18. . . .
>
> In addressing why it "simply copied its administrative case brief without a new evaluation of its case and arguments against the court's standard of review and applicable precedents like *Xinboda*," [Order to Show Cause], ECF No. 37 at 4, Infang seems to blame Commerce for its error. According to Infang, it copied its administrative case brief because Commerce "largely ignored {its} arguments and record evidence{.}" Pl. Resp. to [Order to Show Cause], ECF No. 38 at 15. Infang insists that Commerce "added very little analysis that had not already been addressed in {its} administrative case brief," and for that reason, it felt "its administrative case brief" was "already appropriately framed for its R56.2 brief before this Court." *Id*.

> We disagree. We understand that Infang would like to persuade the Court that Commerce largely ignored Infang's arguments and record evidence, but saying so frequently does not establish the point. Infang must consider the parameters of this Court's standard of review and argue within those confines. This Court does not consider the merits of the matter de novo, and this Court's standard of review is not the standard that guides Commerce's decision making. We presume that Infang, in its case brief to Commerce, sought to persuade Commerce based upon the standards that guide Commerce's decision making. Before this Court, Infang should seek to persuade the Court based upon the standard of review that guides the Court's consideration of the challenged Commerce determination. Briefing the matter as it was briefed to Commerce, even assuming that the brief to Commerce should have been unquestionably persuasive within the confines of the standards that guide Commerce's decision making, ignores the standard of review that this Court applies when considering whether Commerce erred in its determination.
>
> Despite Infang's claims otherwise, Commerce's decision manifests that Commerce reviewed and assessed each of Infang's arguments, Issues & Decisions Memorandum (IDM), ECF No. 29–4, and then explained why those arguments, based upon its review of the record evidence, were not persuasive, *id.* at 4–6, 7–8, 10–11, and 13–15. Contrary to Infang's claim, Commerce's decision addressed Infang's arguments and then specifically rejected them based upon substantial evidence contained in the record. Despite these facts, Infang suggests that it acted reasonably to ignore Commerce's decision in its opening brief because the decision itself "added very little analysis." But the decision is what is under review. And Infang, which bears the burden of demonstrating Commerce erred, is responsible for explaining precisely why the decision cannot be sustained. Infang's claim that it had no choice but to replicate an entire administrative case brief because Commerce supposedly "ignored Infang's argumentation," Pl. Resp. to OSC, ECF No. 37 at 18, even though Commerce's decision clearly distills and addresses those arguments in reaching its determinations, is not supported by the record before the Court. In this Court, Infang must identify what part of Commerce's decision it believes is wrong and why.

Def's Resp. 2–5.

For the reasons explained by Defendant, Plaintiff's arguments about why it replicated its administrative case brief before the court are unpersuasive. Therefore, Plaintiff's Motion for Judgment on the Agency Record is denied, and Commerce's determination in the *New Shipper Review* is sustained. Judgment will be entered accordingly.

Dated: November 5, 2020
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 20–160

HYUNDAI ELECTRIC & ENERGY SYSTEMS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ABB ENTERPRISE SOFTWARE INC. AND SPX TRANSFORMER SOLUTIONS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 20–00108

[Granting Defendant's request to remand the U.S. Department of Commerce's final results in the sixth administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

Dated: November 9, 2020

David E. Bond, *William J. Moran*, and *Ron Kendler*, White & Case LLP, of Washington, DC, for Plaintiff Hyundai Electric & Energy Systems Co., Ltd.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Jeffery Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberda, *David C. Smith*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors ABB Enterprise Software Inc. and SPX Transformer Solutions, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court on Defendant United States' ("the Government") request for a remand of the U.S. Department of Commerce's ("Commerce" or "the agency") final results of the sixth administrative review of the antidumping duty order on large power transformers (or "LPTs") from the Republic of Korea. *See* Docket Entry (Nov. 6, 2020), ECF No. 50; *see generally Large Power Transformers From the Republic of Korea*, 85 Fed. Reg. 21,827 (Dep't Commerce Apr. 20, 2020) (final results of antidumping duty admin. review;

2017–2018) ("*Final Results*"), ECF No. 24–4, and accompanying Issues and Decision Mem., A-580–867 (Apr. 14, 2020), ECF No. 24–5.

On October 30, 2020, the court granted Plaintiff Hyundai Electric & Energy Systems Co., Ltd.'s ("Hyundai") motion to supplement the record with two documents. *See Hyundai Elec. & Energy Sys. Co. v. United States*, Slip Op. 20–153, 2020 Ct. Int'l Trade LEXIS 166 (CIT Oct. 30, 2020); *see generally* Confidential Pl.'s Mot. to Supp. the Record ("Hyundai's Mot."), ECF No. 28. The court accepted as part of the records two documents presented at verification. *See Hyundai Elec. & Energy*, 2020 Ct. Int'l Trade LEXIS 166, at *12; *see generally* Hyundai's Mot., Attachs. 1 & 2. These documents are alleged to speak to the place of production of one of Hyundai's LPTs. Questions about that place of production had led Commerce to rely on total adverse facts available (or "total AFA") to determine Hyundai's margin. *See* Hyundai's Mot. Because Commerce had declined to accept these documents at verification, they had not been included in the administrative record and were not addressed in the Issues and Decision Memorandum.

Following the issuance of *Hyundai Electric & Energy*, the court held a telephonic conference during which the Government requested a remand for Commerce to address the documents in the first instance and, if necessary, reconsider its reliance on total AFA. Docket Entry (Nov. 6, 2020), ECF No. 50. None of the other Parties objected to the Government's remand request. *Id*.

When an agency determination is challenged in the courts, the agency may "request a remand (without confessing error) in order to reconsider its previous position" and "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Remand is appropriate "if the agency's concern is substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id*. "A concern is substantial and legitimate when (1) Commerce has a compelling justification, (2) the need for finality does not outweigh that justification, and (3) the scope of the request is appropriate." *Hyundai Heavy Indus. v. United States*, 43 CIT ___, ___, 393 F. Supp. 3d 1293, 1300 (2019) (quoting *Changzhou Hawd Flooring Co. v. United States*, 38 CIT ___, ___, 6 F. Supp. 3d 1358, 1361 (2014)).

Here, the Government's remand request satisfies the three criteria, and thus, is supported by substantial and legitimate concerns. First, the Government espouses a compelling reason for the remand request: to address two documents which could impact Hyundai's margin. *Cf. Tri Union Frozen Prods., Inc. v. United States*, 40 CIT ___, ___, 163 F. Supp. 3d 1255, 1312 (2016) (finding that a compelling justifi-

cation "to correct a potentially erroneous calculation of a dumping margin"). Second, the need to accurately calculate Hyundai's margin is not outweighed by the interest in finality because the Government promptly requested the remand following the court's ruling, recognizing that Commerce did not address the documents in the *Final Results*. Third, the scope of the remand is appropriate. The Government requests a remand to address the documents that could affect the agency's reliance on total AFA. Thus, it is appropriate to remand the *Final Results* with respect to Hyundai to allow Commerce to consider the documents and modify its determination as necessary.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded to the agency to consider the documents subject to the court's opinion in *Hyundai Electric & Energy* and, as necessary, reconsider the agency's reliance on total AFA to determine Hyundai's margin; and it is further

ORDERED that Commerce shall file its remand results on or before February 12, 2021; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h).

Dated: November 9, 2020
New York, New York

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

Slip Op. 20–162

INTERCONTINENTAL CHEMICALS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 20–00068

[Granting defendant's motion to dismiss for lack of subject matter jurisdiction.]

Dated: November 12, 2020

Matthew K. Nakachi, Junker & Nakachi, of San Francisco, CA for plaintiff.

Kelly Ann Krystyniak, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for defendant. With him on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Brandon Jerrold Custard*, Trial Attorney.

OPINION

Reif, Judge:

Plaintiff Intercontinental Chemicals, LLC ("ICC" or "plaintiff") brings this action against the United States of America ("Government" or "defendant") to challenge the liquidation instructions issued by the Department of Commerce ("Commerce") with respect to imports of xanthan gum from the People's Republic of China ("China"). Complaint, ECF No. 2 ("Compl."). Defendant moves to dismiss under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and under USCIT Rule 12(b)(6) for failure to state a claim on which relief can be granted. Def.'s Mot. to Dismiss, ECF No. 12 ("Def. Br.").

Upon review of the filings and applicable law, this Court grants the United States' motion to dismiss for lack of subject matter jurisdiction because 28 § 1581(i), not § 1581(c), provides the requisite jurisdictional basis to review plaintiff's claim. The court does not reach the Rule 12(b)(6) motion to dismiss for failure to state a claim because dismissal under Rule 12(b)(1) renders the 12(b)(6) claim moot.[1] "[A] court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim." *IMark Marketing Servs., LLC v. Geoplast S.p.A*, 753 F. Supp. 2d 141, 149 (D.D.C. 2010) (citation omitted).

Subject Matter Jurisdiction

BACKGROUND

On July 19, 2013, Commerce published an antidumping duty order on xanthan gum from China at a rate of 154.07%. *See Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't of Commerce July 19, 2013). On July 5, 2016, Commerce issued a notice of opportunity to request an administrative review of that order for the period covering July 1, 2015 through June 30, 2016. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 81 Fed. Reg. 43,584 (Dep't of Commerce Jul. 5, 2016). After receiving multiple requests for review, Commerce initiated its third administrative review of the xanthan gum from China antidumping duty order. *See Initiation of Antidumping and Countervailing Duty Administrative*

[1] "A court presented with a motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction." *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F. Supp. 2d 574, 588 (S.D.N.Y. 2013) (quoting *Homefront Organization, Inc. v. Motz*, 570 F. Supp. 2d 398, 404 (E.D.N.Y. 2008) (internal quotation marks omitted)).

Reviews, 81 Fed. Reg. 62,720 (Dep't of Commerce Sept. 12, 2016). This administrative review is the subject of the present action.

Due to the large number of companies subject to the administrative review, in accordance with 19 U.S.C. § 1677f-1(c)(2)(B), Commerce selected Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. (collectively, Deosen) and Neimenggu Fufeng Biotechnologies Co., Ltd./Shandong Fufeng Fermentation Co., Ltd./Xinjiang Fufeng Biotechnologies Co., Ltd. (collectively, Fufeng) as mandatory respondents. *See Xanthan Gum From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2015–2016*, 82 Fed. Reg. 36,746 (Dep't of Commerce Aug. 7, 2017).

Based on this review, Commerce calculated weighted-average dumping margins of 9.30 percent for Deosen, and zero percent for Fufeng. *Id.*, 82 Fed. Reg. at 36,747. These margins were unchanged in the Final Results. *See Xanthan Gum From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015–2016*, 83 Fed. Reg. 6,513 (Dep't of Commerce Feb. 14, 2018) ("Final Results"). Commerce instructed Customs and Border Protection ("Customs") to liquidate entries not reported in the U.S. sales databases submitted by Doesen and Fufeng at the China-wide rate of 154.07%. *Final Results*, 83 Fed. Reg. 6,513.

In accordance with the Final Results of the administrative review, Commerce issued non-public importer/customer-specific liquidation instructions to Customs, including instructions for Fufeng on March 2, 2018. Administrative Message No. 8061303 (Pl. Ex. 13). ICC had been inadvertently omitted from Fufeng's importer list, and thus was billed at the substantially higher, China-wide rate, rather than at the Fufeng-specific rate. After arbitration with Fufeng, through which ICC received partial compensation, ICC initiated this suit at the United States Court of International Trade ("USCIT"), invoking jurisdiction based on 28 U.S.C. § 1581(i)(4).

STANDARD OF REVIEW

The Court's determination of subject matter jurisdiction is a threshold inquiry. *Steel Co. v. Citizens For A Better Envm't*, 523 U.S. 83, 94–95 (1998). When the requirements for subject matter jurisdiction are not satisfied, the court must dismiss the case for lack of jurisdiction. *Mittal Can., Inc. v. United States*, 30 CIT 154, 158, 414 F. Supp. 2d 1347, 1351 (2006). Whether to grant a motion to dismiss for lack of jurisdiction is a question of law. *JCM Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000).

When jurisdiction is challenged pursuant to Rule 12(b)(1), "'the burden rests on the plaintiff to prove that jurisdiction exists.'" *Pentax Corp. v. Robinson*, 125 F.3d 1457, 1462 (Fed. Cir. 1997), *modified, in part*, 135 F.3d 760 (Fed. Cir. 1998) (citation omitted). It is also the court's responsibility to review independently the jurisdiction claims that come before it. *J.S. Stone, Inc. v. United States*, 27 CIT 1688, 1691, 297 F.Supp.2d 1333, 1337 (2003), aff'd, 111 F. App'x 611 (Fed. Cir. 2004) (citing *Ad Hoc Comm. v. United States*, 22 CIT 901, 906, 25 F. Supp. 2d 352, 357 (1998)). This principle is particularly true when a party invokes jurisdiction under § 1581(i). *Consol. Bearings Co. v. United States*, 25 CIT 546, 549, 166 F. Supp. 2d 580, 583 (2001).

LEGAL FRAMEWORK

When this Court asserts jurisdiction over an action, the Court must identify the claim on which plaintiff seeks relief. *Mittal Can., Inc.*, 414 F. Supp. 2d at 1351. "It is incumbent upon the Court to independently assess the jurisdictional basis for a case." *Consol. Bearings Co. v. United States*, 166 F. Supp. 2d at 583.

Jurisdiction under § 1581(i) provides for the USCIT's "residual" jurisdiction, *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002), which allows this Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted). It "may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate." *Consol. Bearings Co.*, 166 F. Supp. 2d at 583 (citing *Norcal/Crosetti Foods, Inc.*, 963 F.2d at 359). If relief was available under any other subsection of 28 U.S.C. § 1581, then it is incumbent on the Court to dismiss the case for lack of subject matter jurisdiction. *Mittal Can., Inc.*, 414 F. Supp. 2d at 1351.

DISCUSSION

I. Positions of the Parties

Plaintiff characterizes its suit as a case principally about Commerce's liquidation instructions, rather than Commerce's "Final Results" or Customs' implementation of the instructions. Compl. at ¶¶ 5–6. Plaintiff argues that the CIT lacks jurisdiction under § 1581(a) because the issue is not with Customs' implementation of Commerce's instructions, but with Commerce's instructions themselves. *Id.* at ¶ 5. Similarly, plaintiff maintains that the USCIT lacks jurisdiction under § 1581(c) because the challenge is not to the Final Results of an anti-dumping determination, but to the liquidation instructions —

the "administration and enforcement" of an antidumping duty order. Therefore, plaintiff invokes the USCIT's residual jurisdiction under § 1581(i)(4) because, in plaintiff's view, no other grounds for jurisdiction exist. *Id.* at ¶¶ 4–5.

In support of its argument, plaintiff cites *J.S. Stone v. United States*, 27 CIT 1688, 297 F. Supp. 2d 1333 (2003), to show that jurisdiction under § 1581(i) is proper when an action challenging liquidation instructions is an action challenging the "administration and enforcement" rather than the Final Results themselves. Pl. Rep. at 2 (citing *J.S. Stone*, 297 F. Supp. 2d 1333). Plaintiff also argues that the CIT has found that jurisdiction under § 1581(i) is proper for cases in which Commerce's instructions contravene Commerce's administrative review determinations. Pl. Rep. at 3 (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2003) and *Consol. Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003)). Based on this framing of the issue, plaintiff concludes that the USCIT has residual jurisdiction under § 1581(i).

Defendant moves to dismiss for lack of subject matter jurisdiction, arguing that plaintiff, as an "interested party," could have participated in the administrative review or disputed the Final Results under § 1581(c), rendering relief under § 1581(i) unavailable. Def.'s Rep. in Supp. of Its Mot. to Dis., ECF No. 21 ("Def. Rep.") at 8 (citing *Consol. Bearings Co.*, 348 F.3d at 1000 ("Before final liquidation, any interested party may request an administrative review of the antidumping order."); 19 U.S.C. § 1677(9)(A) ("The term 'interested party' means a . . . United States importer of subject merchandise."). Defendant argues that the "true nature" of ICC's challenge is a challenge to the Final Results, as the subject of plaintiff's dispute is the assessment rates determined by Commerce, not the liquidation instructions or their enforcement. Def. Rep. at 5. As ICC could have participated in the administrative review as an "interested party" and challenged the Final Results under § 1581(c), the CIT has no residual ability to hear a challenge under § 1581(i) because ICC "slept on its rights." Def. Rep. at 10.

II. Analysis

A. The Proper Jurisdictional Basis of Plaintiff's Claim

Whether this court has subject matter jurisdiction over a claim depends on a determination of the proper basis for jurisdiction. To determine that basis, the Court must identify the claim on which plaintiff seeks relief. *Mittal Can., Inc.*, 414 F. Supp. 2d at 1351. In this case, there are two potential sources of jurisdiction at issue: 28 U.S.C. § 1581(c) and (i). As noted above, the possibility of jurisdiction arising

under § 1581(c) precludes the application of § 1581(i), unless a remedy under § 1581(c) would have been manifestly inadequate.

1. Jurisdiction under 28 U.S.C. § 1581(c) as compared with 28 U.S.C. § 1581(i)

28 U.S.C. § 1581(c) provides the CIT with exclusive jurisdiction over actions brought under § 516A of the Tariff Act. 28 U.S.C. § 1581(c) (2000). Section 516A provides for judicial review in countervailing duty and antidumping duty proceedings, and it specifically enumerates what the term "reviewable determinations" includes. 19 U.S.C. § 1516a(a)(2)(B) (2000); *Shinyei Corp. of Am.*, 355 F.3d at 1304. Reviewable determinations include "Final Results" by Commerce. *See id.*

On the other hand, 28 U.S.C. § 1581(i) serves as the "residual" jurisdiction provision of the statute and arises only in cases in which no other subsection of section 1581 is or would have been available. Section 1581(i) may be invoked for challenges to the "administration and enforcement" of Commerce's Final Results including, for example, a challenge to inaccurate liquidation instructions. *See Consol. Bearings Co.*, 348 F.3d at 1002 ("Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the Final Results, but a challenge to the 'administration and enforcement' of those Final Results. Thus, Consolidated challenges the manner in which Commerce administered the Final Results. Section 1581(i)(4) grants jurisdiction to such an action.").

Jurisdiction arising under § 1581(c) or (i) in this case therefore depends on whether the dispute is about a final determination by Commerce or its liquidation instructions to Customs. *Consolidated Bearings,* 166 F. Supp. 2d 580, provides a helpful example of a challenge to liquidation instructions rather than to Final Results. In *Consolidated Bearings*, Commerce's liquidation instructions "'arbitrarily departed from its well-established liquidation practices' of determining the rate of dumping to be applied to imports at the liquidation instruction stage of an administrative review." *Wanxiang Am. Corp. v. United States*, 43 CIT __,__, 399 F. Supp. 3d 1323, 1332 (2019) (citing *Consolidated Bearings*, 166 F. Supp. 2d 580). The court in *Consolidated Bearings* found that because the liquidation instructions were not part of the Final Results or the Amended Final Results, the plaintiff could not invoke § 1581(c) jurisdiction. 166 F. Supp. at 583.

Capella Sales & Servs. Ltd. v. United States, 40 CIT __,__,180 F. Supp. 3d 1293 (2016), also provides an informative example in which a challenge to liquidation instructions presented this Court with multiple, possible bases for jurisdiction. In this case, "Capella thus

does not challenge the calculation of the all-others CVD rate itself, but the way Commerce administers and enforces that CVD rate — specifically, Capella seeks a change in who [*sic*] is retroactively entitled to the benefit of the 'lawful rate' following redetermination." *Id.* at 1301. While plaintiff in *Capella* did not participate in the administrative review or challenge the Final Results — which ultimately impacted its ability to oppose a motion to dismiss for failure to state a claim — this failure to participate did not mandate dismissal under Rule 12(b)(1) because the action was a challenge to the administration of Commerce's findings rather than to the findings themselves. *Id.*

A case in which the substance of the action is a challenge to the Final Results is *Wanxiang Am. Corp. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1323, 1332 (2019). In this case, Commerce issued a memorandum based on old questionnaires, which failed to list one exporter, and did not make new determinations. *Id.* at 1331. In other words, "Commerce's guidance to CBP was part of the same proceeding, and it reiterated — and rather than deviating [*sic*] from — the results of the administrative reviews from 1994 to 2001." *Id.* at n. 11. The court found that the plaintiff should have challenged the previous findings under § 1581(c); because plaintiff "forewent an available administrative procedure" and did not challenge the previous Final Results, jurisdiction could not arise under § 1581(i). *Id.* at 1332. The court in *Wanxiang Am. Corp.* looked to the original source of the error — the underlying administrative review — even though the error continued into the memorandum at issue. *See id.* ("Here, in challenging the [memo at issue's] conveyance of information from long-completed reviews, WAC is seeking a reconsideration of WQ's AD rate based on the records of those reviews. If WG wanted to challenge Commerce's finding with respect to WQ's antidumping rate, it should have done so by timely challenging the results of those administrative reviews under 28 U.S.C. § 1581(c).").[2]

Another informative case discusses situations that require "a more searching examination because the parties disagree as to the characterization of Plaintiff's claim." *Mittal Canada, Inc. v. United States*, 30 CIT 154, 158, 414 F. Supp. 2d 1347, 1351 (2006). In *Mittal Canada, Inc.*, "Plaintiff contends it is challenging Commerce's liquidation instructions as arbitrary and capricious or otherwise not in accordance with law. Customs paints Plaintiff's request in a different light, arguing that Plaintiff is really seeking a substantive review of the changed circumstances review." *Id.* By "fashioning its dispute" in this way, the plaintiff "defined its claim such that the Court has jurisdic-

[2] WAC and WQ were both subsidiaries of WG.

tion." *Id.* at 1353. The court allows this refashioning of the dispute as a challenge to the liquidation instructions because the plaintiff's claim is about the meaning of the liquidation instructions. Indeed, the court states that the plaintiff is merely arguing that the "results mean something different from what they say." *Id.* The claim, though ultimately lacking in merit, truly is one about the liquidation instructions.

2. CIT lacks jurisdiction under § 1581(i)

Plaintiff's claim here is a challenge not to the administration and enforcement of Commerce's liquidation instructions, but to Commerce's Final Results, so the proper basis for jurisdiction is 28 U.S.C. § 1581(c), not 28 U.S.C. § 1581(i). Plaintiff attempts to characterize its claim as a challenge to the liquidation instructions, claiming that the instructions do not accurately reflect the results of the underlying administrative proceeding. Pl. Rep. at 7. Plaintiff argues that this characterization is proper because it does not want the Final Results changed — indeed, plaintiff claims, plaintiff would benefit from inclusion in the original analysis of the Final Results. *Id.* at 8. Plaintiff says that because it is challenging the liquidation instructions and not the Final Results, it could not have raised its challenge under § 1581(c); indeed, the liquidation instructions were issued after the Final Results and therefore could not have been challenged under § 1581(c). *Id.* at 7.

Defendant, however, argues that because plaintiff was an "interested party" as defined by 19 U.S.C. § 1677(9)(A), plaintiff could have participated in Commerce's underlying administrative review and sought to correct the alleged error through participation in that proceeding instead. Def. Br. at 2. Defendant argues that plaintiff is asking the court to correct an error — the failure to include ICC in Fufeng's entry list — that could have been corrected through the administrative process. *Id*. at 6. Moreover, according to defendant, there is no inconsistency between Commerce's findings and Customs' administration and enforcement; Customs followed Commerce's instructions, which were based directly on the Final Results. *Id.* at 5. Therefore, § 1581(c) serves as the only valid basis for jurisdiction, leaving jurisdiction under § 1581(i)(4) foreclosed to plaintiff.

It is defendant's characterization of the dispute, not plaintiff's, that accurately reflects the substance of the claim in this action. The underlying issue in this case is an error in the record that influenced the Final Results of the administrative review: Fufeng's failure to include ICC in its list of importers. The underlying issue is not, as plaintiff argues, a discrepancy in the administration and enforce-

ment, because Commerce's failure to include ICC in the list of importers could be traced back to Fufeng's original failure to include ICC on its entries list.

Here, as in *Wanxiang Am. Corp.*, *supra*, Commerce did not commit a new error. Rather, Commerce issued liquidation instructions based on the Final Results of an administrative review that failed to include what ICC would consider to be crucial information: its name on a list of importers. The Final Results instructed that "for entries that were not reported in the U.S. sales databases submitted by Deosen or Fufeng, Commerce will instruct CBP to liquidate such entries at the China-wide rate." Final Results, 83 Fed. Reg. at 6,514. ICC was "not reported in the U.S. sales databases submitted by . . . Fufeng." *Id.* As in *Wanxiang Am. Corp.*, ICC could have challenged Commerce's Final Results under § 1581(c); ICC could also have participated in the administrative proceeding. Because ICC failed to pursue either of these options, it is barred, as in *Wanxiang Am. Corp.*, from invoking jurisdiction under § 1581(i).

Moreover, as in *Mittal Canada, Inc.*, plaintiff here attempts to recharacterize the nature of its argument such that plaintiff can invoke § 1581(i) jurisdiction. However, this recharacterization does not accurately describe the situation in which plaintiff finds itself. Plaintiff argues that the issue is with the liquidation instructions, but these instructions are based — and not inconsistently — on the Final Results; the underlying issue is therefore not with the liquidation instructions but with the Final Results. Unlike in *Mittal Canada, Inc.*, plaintiff here fails to show that the substance of the claim is actually an error of administration and enforcement. Rather, the action is most accurately viewed as an error rooted in Fufeng's list of importers, a list that was incorporated into the Final Results and subsequently into the liquidation instructions.

This is a dispute about the Final Results, and as such, the only valid basis for jurisdiction lies under § 1581(c). Therefore, a claim arising under § 1581(i) should be dismissed for lack of subject matter jurisdiction. Moreover, this Court has previously held that a plaintiff should not be permitted to "expand a court's jurisdiction by creative pleading," as the plaintiff attempts here. *See Norsk Hydro*, 472 F.3d at 1355. Accordingly, this principle weighs in favor of dismissal here as well.

B. The Proper Basis for Jurisdiction: 28 U.S.C. § 1581(c)

If plaintiff could have invoked 28 U.S.C. § 1581(c) but the remedy under this provision would have been manifestly inadequate, then

jurisdiction under § 1581(i) would still be available. *Consol. Bearings Co.*, 166 F. Supp. at 583. That is not the case here, so § 1581(i) jurisdiction is not available.

Plaintiff bears the burden of demonstrating manifest inadequacy. *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987). Having not raised the issue of manifest inadequacy in its complaint, plaintiff argues in its reply that remedy under § 1581(c) would have been manifestly inadequate. In raising manifest inadequacy, plaintiff asserts that: (1) it cannot change Fufeng's reported sales databases; (2) ICC did not have notice of the liquidation instructions because they were confidential and not published; (3) "{i}t would have been a 'fool's errand' to challenge a preordained conclusion, thus leaving the proper result as a challenge to the liquidation instructions, which must be targeted at those companies who did not purchase products from Fufeng"; and, (4) "ICC seeks to adjudicate an issue that is unresolvable in administrative proceedings because of its lack of control over what documentation may be submitted to the reviewers by an exporter and Commerce's lack of diligence." Def. Rep. at 6–7 (citing Pl.'s Resp. to Mot. to Dis., ECF No. 20 ("Pl. Rep.") at 9–11).

Defendant argues here that plaintiff could have participated in the review as an importer of subject merchandise under 19 U.S.C. § 1677(9)(A), and that plaintiff could have commented on the information placed into the record by Fufeng, which forms the basis for this complaint. *See J.S. Stone*, 29 F. Supp. 2d at 1699 ("If an importer decides not to participate in an administrative review, it bears the risk that Commerce may err in calculating the dumping margin."). Plaintiff could also have filed suit under § 1581(c) to contest Commerce's Final Results. Either of these options would have addressed the underlying issue and provided plaintiff with the remedy that it seeks: inclusion on Fufeng's list of importers to receive a favorable liquidation rate.

"Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a proceeding is sufficient to constitute manifest inadequacy." See *Valeo North America v. United States*, 41 CIT __,__, 277 F. Supp. 3d 1361, 1365 (2017). Further, "mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *Miller & Co.*, 824 F.2d at 964. Here, plaintiff's claim of manifest inadequacy is not based on any of these theories, but rather on arguments derived from *NEC Corp. V. U.S. Dept. of Commerce*, 151 F.3d 1361 (Fed. Cir. 1998).

In *NEC Corp.*, the court found that the remedy under § 1581(c) would have been manifestly inadequate: "NEC [was] attempting to adjudicate an issue that [went] to the very heart of the administrative system — neutrality." *Id.* at 1369. In that case, the plaintiff "could not invoke the trial court's § 1581(c) jurisdiction because the antidumping investigation had not yet been completed." *Id.* at 1368. The government argued that "NEC should have waited until Commerce completed its review, and then raised its due process concerns." *Id.* Describing the government's suggested approach as a "fool's errand," the court notes that "[r]equiring NEC to appeal from the conclusion of an investigation that, allegedly, was preordained because of impermissible prejudgment is a classic example of a remedy that was 'manifestly inadequate.'" *Id.*

In the instant case, plaintiff's use of the phrase "fool's errand" is a clear reference to *NEC Corp.*, but plaintiff's arguments of manifest inadequacy are not convincing. Plaintiff states that it did not protest the Final Results under § 1581(c) because it would have been a "fool's errand" to challenge a "preordained conclusion" by Commerce, and that Commerce lacked due diligence in reaching its conclusion. Pl. Rep. at 10. However, plaintiff does not present any evidence of this alleged unfairness, and thus fails to satisfy its burden of demonstrating manifest inadequacy. Moreover, the harms that plaintiff suffered due to lack of inclusion on Fufeng's entries list are precisely the kind of harms that could have been remedied through participation in the underlying review or protest of the Final Results under § 1581(c).

CONCLUSION

"I prithee — and I'll pay thee bounteously —
Conceal me what I am, and be my aid
For such disguise as haply shall become
The form of my intent."[3]

* * *

Because this dispute is properly categorized as a challenge to the Final Results — which directly informed the liquidation instructions — and not a challenge to the accuracy of the liquidation instructions or their enforcement, plaintiff could have raised its issues as a challenge to the Final Results under § 1581(c). Plaintiff's claim is a challenge to Commerce's Final Results, and not to the liquidation instructions. A challenge to the Final Results would have formed a valid basis for jurisdiction and any remedy under § 1581(c) would not have been manifestly inadequate. Therefore, jurisdiction based on § 1581(i) is foreclosed.

[3] William Shakespeare, TWELFTH NIGHT, act 1, sc. 2.

Dated: November 12, 2020
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Index

Customs Bulletin and Decisions
Vol. 54, No. 46, November 25, 2020

U.S. Customs and Border Protection

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2020—416-256/80161