U.S. Court of International Trade

Slip Op. 22–138

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

Before: Timothy C. Stanceu, Judge
Court No. 19–00047

[Sustaining an agency decision following court order in a countervailing duty proceeding on narrow woven ribbons with woven selvedge from the People's Republic of China]

Dated: December 8, 2022

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Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With her on the brief was *Bryan M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Daniel B. Pickard, Buchanan Ingersoll and Rooney PC, of Washington D.C., for defendant-intervenor Berwick Offray LLC.

OPINION

Stanceu, Judge:

Plaintiff Yama Ribbons and Bows Co., Ltd. ("Yama") brought this action to contest a final determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude a review of a countervailing duty ("CVD") order on narrow woven ribbons with woven selvedge from the People's Republic of China ("China" or the "PRC"). The court sustains a decision Commerce issued in response to the court's previous opinion and order.

I. BACKGROUND

Yama, a Chinese producer and exporter of ribbons, brought this action on April 9, 2019, to contest a published agency decision (the "Final Results"), *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 Fed. Reg. 11,052 (Int'l Trade Admin. Mar. 25, 2019) (the "*Final Results*"). Summons, ECF No. 1; Compl. ¶ 1, ECF No. 6. The Final Results concluded the sixth periodic admin-

istrative review of the countervailing duty order on narrow woven ribbons with woven selvedge from the People's Republic of China (the "Order"), which Commerce initiated in November 2017 and which pertained to a period of review ("POR") corresponding to calendar year 2016. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 52,268, 52,273 (Int'l Trade Admin. Nov. 13, 2017). Commerce accompanied the Final Results with an "Issues and Decision Memorandum." *Final Results*, 84 Fed. Reg. at 11,052; *Decision Memorandum for the Final Results of 2016 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. Mar. 19, 2019) (PR Doc. 117) ("*I&D Mem.*").[1]

Background on plaintiff's action is provided in the court's previous opinion and order, *Yama Ribbons and Bows Co., Ltd. v. United States*, 45 CIT __, __, 517 F. Supp. 3d 1325, 1326–28 (2021) ("*Yama I*"), and is supplemented herein. In *Yama I*, this court considered Yama's motion for judgment on the agency record, submitted under USCIT Rule 56.2. Pl. Yama Ribbons and Bows Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. (Aug. 9, 2019), ECF No. 25; Mem. of Law in Supp. of Pl. Yama Ribbons and Bows Co., Ltd.'s 56. 2 Mot. for J. upon the Agency R. (Aug. 9, 2019), ECF No. 26 ("Pl.'s Mem."). Granting this motion, *Yama I* directed that Commerce reconsider the Final Results and submit a redetermination in conformance with the court's opinion and order. 45 CIT at __, 517 F. Supp. 3d at 1341–42. Before the court is that decision (the "Remand Redetermination"), submitted on August 13, 2021. Final Results of Redetermination Pursuant to Court Remand, ECF No. 47–1 ("*Remand Redetermination*").

Yama was the sole exporter or producer reviewed in the administrative proceeding at issue in this litigation. *See Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1327. In the Final Results, Commerce determined a total net countervailable subsidy rate of 23.70% for Yama, which was the sum of subsidy rates Commerce determined for sixteen subsidy programs that Commerce considered to have benefitted Yama. *Id.*, 45 CIT at __, 517 F. Supp. 3d at 1327–28.

In this litigation, Yama is contesting the Department's inclusion within the total net countervailable subsidy rate of three individual subsidy rates: (1) a subsidy rate of 10.54% for the "Export Buyer's Credit Program" ("EBCP"); (2) a subsidy rate of 10.45% for the provision of synthetic yarn at what Commerce considered to be less-than-

[1] Documents in the original Joint Appendix (Dec. 10, 2019), ECF Nos. 34 (conf.), 35 (public), are cited herein as "CR Doc. __" and "PR Doc. __," respectively. Public documents in the Joint Appendix for Remand (Oct. 12, 2021), ECF No. 55, are cited herein as "PPR Doc. __."

adequate-remuneration ("LTAR"); and (3) a subsidy rate of 0.26% for the provision of caustic soda at what Commerce considered to be LTAR. *Id.*, 45 CIT at __, 517 F. Supp. 3d at 1328. In *Yama I*, the court ordered Commerce to reconsider all three of these individual subsidy determinations. 45 CIT at __, 517 F. Supp. 3d at 1341–42.

In the Remand Redetermination, Commerce, "under respectful protest," reversed its decision to include in the total net countervailable subsidy rate of 23.70% a subsidy rate for the Export Buyer's Credit Program. *Remand Redetermination* at 9. Commerce left unchanged its inclusion of the 10.45% rate for synthetic yarn and the 0.26% rate for caustic soda, determining a revised total net countervailable subsidy rate of 13.16%. *Id.* at 25.

The court received comments from Yama supporting in part, and opposing in part, the Remand Redetermination. Comments by Yama Ribbons and Bows Co., Ltd. on Commerce's Final Results of Redetermination Pursuant to Court Remand (Sept. 13, 2021), ECF No. 52 ("Pl.'s Comments"). Defendant responded to Yama's comments, advocating that the court sustain the Remand Redetermination. Def.'s Resp. to Comments on Remand Redetermination (Sept. 28, 2021), ECF No. 54 ("Def.'s Resp."). The court did not receive comments from defendant-intervenor.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c)[2] , pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *See id.* § 1516a(a)(2)(B)(iii).

In reviewing an agency determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[2] All citations herein to the United States Code are to the 2018 edition. All citations to the Code of Federal Regulations are to the 2018 edition.

B. The Export Buyer's Credit Program

The Export Buyer's Credit Program is "an export-promoting loan program administered by the Export-Import Bank of China." *Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1329 (citation omitted). The court noted in *Yama I* that "[i]n the sixth review, Commerce included a rate for the EBCP in Yama's overall subsidy rate without reaching a factual finding that Yama actually received a benefit from the EBCP" and that "[i]nstead, Commerce stated its primary finding in the negative: 'In these final results, we continue to find that the information on the record does *not* support finding that Yama did *not* use the Export Buyer's Credit program during the POR.'" *Id*. (citation omitted). The court's opinion explained that "[a]t issue is the statutory requirement that Commerce, in order to impose a countervailing duty, find that an authority provided a financial contribution 'to a person and a benefit is thereby conferred,'" *id*. (citing 19 U.S.C. § 1677(5)(B)), and that "[r]ather than make the affirmative finding that a financial contribution was provided to Yama and a benefit was thereby conferred, Commerce inferred a contribution and benefit to Yama by invoking its 'facts otherwise available' authority under 19 U.S.C. § 1677e(a) and its 'adverse inference' authority under 19 U.S.C. § 1677e(b)." *Id*., 45 CIT at __, 517 F. Supp. 3d at 1329–30. "When using both provisions, Commerce refers to 'adverse facts available,' or 'AFA.'" *Id*., 45 CIT at __, 517 F. Supp. 3d at 1330 n.4.

The court held in *Yama I* that "[t]here was no evidence on the record of the review to support a finding that any U.S. customer of Yama used the EBCP, and the record contained evidence refuting any such finding." *Id*., 45 CIT at __, 517 F. Supp. 3d at 1335. The court directed that "[o]n remand, Commerce must consider the record evidence fairly and impartially and reach a new determination on whether Yama benefitted from the EBCP." *Id*.

In the Remand Redetermination, Commerce decided, based on the record evidence, that Yama did not use the EBCP. It explained that decision in this way:

> Consistent with *Yama Ribbons* ["*Yama I*"], we have reconsidered our determination, based on the application of AFA, that Yama used and benefited from the EBCP during the POR. We also considered the record evidence which Yama and the GOC [government of China] provided regarding Yama's and its customers' non-use of the EBCP. Upon reexamination of the record evidence, we have complied with the Court's ruling and now find that Yama did not use this program during the POR, under respectful protest. Our findings with respect to the financial

> contribution and specificity determinations made in the *Final Results* remain unchanged.
>
> Specifically, in accordance with the Court's remand order, we are relying on Yama and the GOC's [government of China's] statements on the record that none of Yama's customers used the program during the POR, as well as Yama's customers' declarations of non-use to determine that Yama did not use the EBCP during the POR, under respectful protest.

Remand Redetermination at 9 (footnotes omitted). One of the statements Commerce made is that "[o]ur findings with respect to the financial contribution and specificity determinations made in the *Final Results* remain unchanged." *Id.* (footnote omitted). As to the Department's finding "with respect to the financial contribution," *id.*, this statement is inconsistent with the court's ruling. In *Yama I*, the court expressly disallowed the Department's finding based on an adverse inference that Yama received a financial contribution from the Export Buyer's Credit Program. The court ruled that "the record evidence does not support a finding that the information Commerce lacked as a result of non-cooperation by the Chinese government prevented Commerce from relying upon or verifying the information Yama provided to show the absence of a benefit from the EBCP." *Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1330.

The court sustains the Department's new determination that Yama did not benefit from the EBCP, which is supported by substantial evidence on the record of the review. For the reason the court has stated, the court does not sustain the entirety of the Department's discussion of this new determination in the Remand Redetermination.

C. Yama's Purchases of Synthetic Yarn and Caustic Soda

A countervailable subsidy potentially may exist under the Tariff Act where an "authority," which is defined in 19 U.S.C. § 1677(5)(B) as a "government of a country or any public entity within the territory of the country," confers a benefit upon a person by providing goods "for less than adequate remuneration," *id*. § 1677(5)(E)(iv). In order to be countervailable, any such subsidy also must satisfy the "specificity" requirement set forth in the statute. *Id*. § 1677(5)(A), (5A).

1. The Department's LTAR Determinations in the Final Results Addressing Yama's Synthetic Yarn and Caustic Soda Inputs

For the Final Results, Commerce imposed countervailing duties on Yama's exported ribbons upon determining that Yama's suppliers of synthetic yarn and caustic soda were government authorities that conferred a benefit upon Yama by providing these production inputs for less than adequate remuneration. As it did with respect to the EBCP, Commerce imposed these countervailing duties by using "facts otherwise available" and "adverse inferences" under 19 U.S.C. § 1677e(a) and (b), respectively, finding that the government of China failed to cooperate when it did not respond to certain of its inquiries.

Although the Chinese government reported in questionnaire responses that none of the eight suppliers to Yama of synthetic yarn, nor the sole supplier of caustic soda, was a state-owned enterprise or otherwise majority-owned by the Chinese government, *see Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1336 (citation omitted), Commerce drew the adverse inference that these suppliers were "authorities" within the meaning of 19 U.S.C. § 1677(5) upon a finding that the government of China failed to cooperate when it did not act to the best of its ability in responding to the Department's requests for information on whether any owners, directors, or senior managers of Yama's suppliers of synthetic yarn or caustic soda were government or Chinese Communist Party ("CCP") officials, or whether any of these suppliers had a CCP organization. *See id*., 45 CIT at __, 517 F. Supp. 3d at 1336–37. Commerce concluded, further, that subsidies provided to Yama by the sales of these two suppliers at LTAR were "specific" by relying on its prior practices and by adopting various adverse inferences. *See id*., 45 CIT at __, 517 F. Supp. 3d at 1337–39. These included the adverse inference that "Chinese prices from transactions involving Chinese buyers and sellers are significantly distorted by the involvement of the GOC." *I&D Mem.* at 11 (footnote omitted). Determining what it considered to be adequate remuneration, Commerce calculated the subsidy rates, 10.45% for synthetic yarn and 0.26% for caustic soda, for inclusion in the total net countervailable subsidy rate of 23.70%.

2. The Court's Order of Remand in *Yama I* on the LTAR Determinations for Synthetic Yarn and Caustic Soda

Contesting the Department's decisions on synthetic yarn and caustic soda, Yama challenged the use of facts otherwise available and adverse inferences, including the Department's drawing the adverse inferences that the specificity requirement of the Tariff Act had been

satisfied with respect to both inputs. *Id.*, 45 CIT at __, 517 F. Supp. 3d at 1335 (citation omitted). In the alternative, Yama claimed that Commerce erred in its treatment of ocean freight and value-added tax ("VAT") in calculating the subsidy rates for the two inputs. *Id.* (citation omitted). Because *Yama I* remanded the Final Results to Commerce to reconsider the use of facts otherwise available with adverse inferences, it did not reach Yama's alternative claim at that time.

Without deciding the question of whether Commerce, as an adverse inference, permissibly deemed Yama's suppliers to be "authorities," the court reasoned that even were the court to presume, *arguendo*, that the suppliers were authorities, the court could not sustain the Department's decision to impose countervailing duties upon Yama's exports for these programs as presented in the Final Results. *Id.*, 45 CIT at __, 517 F. Supp. 3d at 1338–39. In the Final Results, Commerce had relied solely upon its prior (fifth) review (for calendar year 2015) and adverse inferences in analyzing whether the "specificity" requirement for a countervailable subsidy had been met in the sixth review. *See I&D Mem.* at 13 (finding specificity based on the GOC's failure to provide requested information); *see also Remand Redetermination* at 9–10 ("Commerce's longstanding practice is not to reexamine the specificity of a subsidy that it has previously found to be countervailable unless new evidence challenges such a finding.") (footnote omitted). *Yama I* concluded that this analysis was not sufficient to support the Department's adverse inferences of a government program or programs benefitting a limited or preferred group of purchasers of yarn or caustic soda. 45 CIT at __, 517 F. Supp. 3d at 1340. In the sixth review, there was record evidence, not addressed by Commerce in the Final Results, consisting of the government of China's response to the Department's first supplemental questionnaire, which told Commerce that no program existed that provided either synthetic yarn or caustic soda for less-than-adequate remuneration, that the government does not regulate the pricing of those products, and that the provision of synthetic yarn is dictated by market forces and not by any plan that sets production levels. *Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1339 (citations omitted).

Yama I concluded that "Commerce acted unlawfully in deciding to include subsidy rates related to Yama's synthetic yarn and caustic soda inputs without considering all relevant record evidence, in particular the uncontradicted record evidence that no programs existed during the POR that provided these inputs at LTAR." *Id.*, 45 CIT at __, 517 F. Supp. 3d at 1341. Further, the court held that Commerce "did not conduct an analysis sufficient to support an adverse inference that any such programs would have met the specificity requirement

of the Tariff Act so as to result in countervailable subsidies." *Id*. The court ordered Commerce to reconsider its LTAR determinations "and take the corrective action that is necessary to fulfill the requirements of the statute." *Id*., 45 CIT at __, 517 F. Supp. 3d at 1342.

3. The Department's Adverse Inferences that the Suppliers of Synthetic Yarn and Caustic Soda Were "Authorities"

As discussed above, *Yama I* deferred considering Yama's challenge to the Department's treating Yama's suppliers of synthetic yarn and caustic soda as "authorities" for purposes of the countervailing duty provisions of the Tariff Act. It did so pending the Department's conducting a new analysis of the "specificity" issue as to these two inputs. Because Commerce now has addressed the specificity issue in its Remand Redetermination through a new analysis (addressed later in this Opinion), the court now turns to Yama's challenge to the Department's determinations, based on facts otherwise available and adverse inferences, that each of the suppliers was an authority within the meaning of that term as defined 19 U.S.C. § 1677(5).

It is uncontested that the Chinese government did not provide Commerce the requested information on whether any owners, directors, or senior managers of Yama's eight suppliers of synthetic yarn or of the sole supplier of caustic soda were government or CCP officials, or whether any of these suppliers had a CCP organization. Commerce explained that:

> While the GOC provided a long narrative explanation of the role of the CCP, when asked to identify any owners, members of the board of directors, or managers of the input suppliers who were government or CCP officials during the POR, the GOC explained that there is "no central informational database to search for the requested information," and directed Commerce to obtain this information directly from Yama's privately-owned suppliers.

I&D Mem. at 12 (quoting *Countervailing Duty Supplemental Questionnaire Response* 30 (Apr. 20, 2018) (PR Docs. 35–37) (CR Docs. 16–18) (footnotes omitted) ("*GOC Additional Questionnaire Resp.*")).

Yama argued, first, that the Chinese government acted to the best of its ability in responding to the inquiry. Pl.'s Mem. 37. The court disagrees. Even if it is presumed, *arguendo*, that the GOC did not have immediate access to a means of obtaining the requested information, the GOC's response that Commerce should obtain the information from Yama's suppliers reveals the GOC's unwillingness to pursue other means, including, if necessary, inquiring of the suppliers itself, to obtain the information Commerce sought. The statute, in 19

U.S.C. § 1677e(b), requires an interested party to act to the *best* of its ability in responding to a Departmental information request. Commerce permissibly found on the record evidence that the Chinese government, in this instance, had not done so.

Arguing to the contrary, Yama submits that the Tariff Act, in 19 U.S.C. § 1677m(c), required Commerce to find that the GOC "complied with the statutes" when it was unable to submit the information in the requested time and manner, together with a full explanation, and suggested alternate forms in which the Department could obtain the information. Pl.'s Mem. 37. Yama's argument fails to address the express requirements of § 1677m(c). To qualify for the exception specified thereunder, an interested party from which the information is requested must suggest "alternative *forms* in which *such party* is able to submit the information . . . ." 19 U.S.C. § 1677m(c) (emphasis added). The GOC did not suggest that it could provide the requested information in some other form and instead suggested that Commerce look elsewhere.

It is well established (and Yama does not contest) that Commerce may seek the information it needs from the exporting government in a countervailing duty proceeding and, in appropriate circumstances, may invoke its authority under 19 U.S.C. § 1677e(b), even if the result is a collateral adverse effect upon a cooperating party. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d. 1365, 1372–73 (Fed. Cir. 2014). Commerce should seek to avoid this adverse effect if the necessary information is present elsewhere on the record, *see Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018), but that was not the situation here. Therefore, the GOC's suggestion that the information request be redirected to Yama's suppliers did not negate the Department's authority to draw an adverse inference from the failure of the Chinese government to lend its full cooperation.

Finally, Yama argues that there are no "'facts otherwise available' on the record suggesting that CCP's involvement in a private company is sufficient to transform the company into a government authority" and that the record evidence is that the Chinese government "is prohibited by law from interfering in the ordinary business operations and management of a company." Pl.'s Mem. 41–42. The court rejects this argument.

The implied premise of Yama's argument is that Commerce lacked authority to pursue its inquiries as to *whether*, or *how*, the presence of government or CCP officials, or a CCP organization, in any specific supplier of Yama allowed meaningful government control over that company. Yama's argument, which refers to the responses the gov-

ernment of China put on the record, speaks in generalities about the role of the CCP in Chinese private companies in general. It does not speak to the individual situations presented by the record facts of this case, which involved a failure to cooperate on the part of the government of China with respect to information about the governance of the specific suppliers. Had the GOC acted to the best of its ability in responding to the inquiry about whether government or CCP officials are present in any of Yama's privately-owned input suppliers as owners, managers, or directors, Commerce may have been in a position to make further inquiries, and learn details, as to the functions such individuals, if reported to be present in a supplier company, had the authority to perform. In short, the government of China, by declining to provide, or even endeavor to provide, the requested information concerning CCP members in the ownership or management structure of these companies, effectively cut off the Department's ability to investigate the matter further. As the authority granted in 19 U.S.C. § 1677e signifies, Congress intended for Commerce, not an interested party, to control the scope of the inquiry so that Commerce freely may perform its statutory function. While Yama points to generalized record evidence that it argues could support a finding that CCP presence did not amount to government control, Commerce was not *required* to make such a finding, given that the Department's investigative ability was hindered by the GOC's failure to cooperate on the question of a possible CCP presence in the suppliers. Commerce, therefore, acted within its statutory authority when it drew two adverse inferences as to Yama's suppliers: first, that CCP officials were present in each, and second, that these officials had authority to control company operations. *See I&D Mem.* at 12 (emphasis added) ("As *AFA*, we find that CCP officials are present in each of Yama's privately-owned input suppliers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources.").

4. The Department's Inclusion of Ocean Freight and VAT in the "Benchmark" for Synthetic Yarn and Caustic Soda

Addressing the essential statutory element of specificity, *Yama I* did not reach Yama's claim that Commerce erred in its treatment of ocean freight and value-added tax in conducting its adequacy-of-remuneration analysis. The court addresses that claim now.

To determine whether the prices Yama paid for synthetic yarn and caustic soda in China constituted adequate remuneration, Commerce applied its regulation, 19 C.F.R. § 351.511. Under the "tier-one" method set forth in the regulation, 19 C.F.R. § 351.511(a)(2)(i), Com-

merce measures the adequacy of remuneration by comparing the government price to a "comparison" price (also called a "benchmark" price), which under the tier-one method is a market-determined price obtained from actual transactions within the exporting country. Because Commerce considered transactions within China not to be market-determined and therefore not usable for that purpose, it proceeded to calculate, as a "tier-two" benchmark, "a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* § 351.511(a)(2)(ii). For tier-one and tier-two benchmarks, the Commerce regulations direct that "the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties." *Id.* § 351.511(a)(2)(iv). Commerce stated in the Issues and Decision Memorandum that it added "freight, import duties, and VAT to the world prices in order to estimate what a firm would have paid if it imported the product." *I&D Mem.* at 13.

Yama claims that "[t]he tier 2 benchmark prices the Department used are not appropriate because they included ocean freight and VAT and are inconsistent with the prevailing market conditions." Pl.'s Mem. 43. In support of this claim, Yama cites 19 U.S.C. § 1677(5)(E)(iv), for which the statute directs Commerce to determine adequacy of remuneration "in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review."[3] 19 U.S.C. § 1677(5)(E). The provision adds that "[p]revailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E). Yama argues that the obligation to determine adequacy of remuneration in relation to prevailing market conditions requires that "[u]nder the circumstances, the Department's regulation on the use of delivered prices cannot be read in a vacuum" and that Commerce should not adjust a benchmark for ocean freight and import VAT when doing so is "contrary to 'prevailing market conditions.'" Pl.'s Mem. 44.

[3] Yama also quotes a World Trade Organization Appellate Body Report, arguing that:

> [T]he prominence of domestic supply in the market relative to import supply is an important consideration when determining the generally applicable delivery charges for the good in question in the country of provision. Such charges should not be determined simply on the basis that the comparison price used as a benchmark was derived from import prices or "world export" prices.

Mem. of Law in Supp. of Pl. Yama Ribbons and Bows Co., Ltd.'s 56. 2 Mot. for J. upon the Agency R. 45–46 (Aug. 9, 2019), ECF No. 26 (quoting Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶¶ 4.249 & 4.306, WTO Doc. WT/DS436/AB/R (adopted Dec. 8, 2014)).

Yama's argument is unconvincing. Missing are any specifics, drawn from record evidence or elsewhere, as to how the Department's including delivery charges such as ocean freight in the benchmark price, which Commerce was directed to do by 19 C.F.R. § 351.511(a)(2)(ii) ("This adjustment *will include delivery charges* and import duties" (emphasis added)), should be found to be contrary to "prevailing market conditions" in the situations the two inputs presented. Nor does Yama claim that the regulation, on its face, is contrary to 19 U.S.C. § 1677(5)(E).

With particular respect to the Department's adding input VAT to the import price, Yama argues that including input VAT was incorrect. Yama gives as its reason that in China, input VAT is credited against output VAT and rebated to the exporter "up to the input VAT amount paid on the previously purchased raw material" such that "VAT is not part of the cost of the raw material because it will either be offset against output VAT or rebated upon exportation." Pl.'s Mem. 46–47.

At oral argument held on February 13, 2020, the court inquired about the Department's treatment of VAT when applying the tier-two benchmark method of 19 C.F.R. § 351.511(a)(2)(ii). Defendant responded in a written submission. Def.'s Resp. to the Court's Request for Suppl. Briefing (Mar. 16, 2020), ECF No. 41. Citing detailed record evidence, defendant explained that it included VAT when determining the price Yama paid for synthetic yarn and caustic soda and, to achieve an "apples to apples" comparison, also included VAT in each benchmark price. *Id*. at 2. The submission informs the court that Commerce used this same method for ocean freight. *Id*.

Yama submitted a reply to defendant's submission. Pl.'s Reply to Def.'s Resp. to the Court's Request for Suppl. Briefing (Mar. 23, 2020), ECF No. 42. In its entirety, plaintiff's submission states: "Plaintiff Yama Ribbons and Bows Co., Ltd., concurs with the government's response to the Court dated March 16, 2020. Yama has no further comments." *Id.* In declining to comment, Yama leaves unanswered the question of why the court must hold that the Department's "apples to apples" comparison method of addressing ocean freight and VAT failed to satisfy the requirements of 19 U.S.C. § 1677(5)(E).

For the reasons stated above, the court does not find merit in Yama's claim that Commerce acted contrary to law in its treatment of ocean freight and VAT in calculating the subsidy rates for synthetic yarn and caustic soda.

5. The Department's Decisions on Synthetic Yarn and Caustic Soda in the Remand Redetermination

In the Remand Redetermination, Commerce stated that "[w]e have reevaluated the information on the record regarding the Synthetic Yarn and Caustic Soda for LTAR subsidies and addressed the 'specificity' requirement in the statute, pursuant to the Court's instructions," adding that, after doing so, "Commerce finds that these subsidies meet the specificity requirements of the Act." *Remand Redetermination* at 10.

The following provisions in the Tariff Act are pertinent to the specificity issue presented by this case:

> Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
>
> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
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> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.
>
> In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

19 U.S.C. § 1677(5A)(D)(iii). Commerce based both of its specificity determinations, i.e., for synthetic yarn and for caustic soda, solely on the first factor (subclause (I)). *Remand Redetermination* at 22.

For purposes of the Remand Redetermination, Commerce placed new information on the record, consisting of a new subsidies allegation ("NSA") that the petitioner (Berwick Offray LLC, the defendant-intervenor in this litigation) submitted in the previous administrative review of the Order, and the Department's decision memorandum in response to the NSA. *Id.* at 7 (identifying as new record information

Placing Documents on the Record (Int'l Trade Admin. May 14, 2021) (PPR Docs. 1–5) ("*2015 NSA Information*")).

In its specificity analysis, Commerce also noted the Chinese government's response to the Department's requests, submitted during the sixth review, for lists of the industries that purchase synthetic yarn and caustic soda, with volume and value data on such purchases, and related information, including the resource or classification scheme the government normally relies upon to define industries and classify companies within an industry. *Id.* at 14. Considering the Chinese government's first reply unresponsive to the inquiry, Commerce again asked for the information, and the government of China replied that it did not maintain the requested information. *Id*. In the Remand Redetermination, Commerce concluded that necessary information was missing from the record and that the use of facts otherwise available therefore was warranted, as well as an adverse inference for its finding that the Chinese government failed to cooperate by not acting to the best of its ability in providing requested information. *Id.* at 14–15.

For synthetic yarn, Commerce relied on exhibits to the NSA to reach a finding that "synthetic yarn is used solely by the textiles industry in China." *Id.* at 15 (citing *2015 NSA Information*, Attach. I at Ex. II-E & II-P). From this finding, Commerce reasoned as follows: "In past cases, Commerce has found that when use of an input was limited to eight industries, the industries were limited in number in China, and thus, the subsidy was *de facto* specific." *Id.* (footnote omitted). Commerce went on to conclude that "[c]onsequently, we find that the use of synthetic yarn by one industry (the textiles industry) is limited in number and, as a result, the Provision of Synthetic Yarn for LTAR program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act [19 U.S.C. § 1677(5A)(D)(iii)(I)]." *Id.* at 15–16. For caustic soda, Commerce again relied on the NSA submission to conclude that "caustic soda is used by only a limited number of industries (*i.e.*, chemicals, pulp and paper, aluminum, food, water treatment, and textiles) in China." *Id*. at 16 (citing *2015 NSA Information*, Attach I. at Ex. III-B & III-H). Commerce considered six industries to be sufficiently "limited in number" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii).

6. Yama's Objections to the Remand Redetermination

Yama argues that the Department's use of facts otherwise available and adverse inferences was impermissible because this Court's previous order "determined that the GOC fully answered the relevant questions and the administrative record is complete in that regard,

leading to no finding of a subsidy predicated on substantial evidence on the record." Pl.'s Comments 3. In a similar vein, Yama argues that the specificity issue in this case is "moot" because "[o]nce the Court determined that the GOC answered the question about any law, plan, or policy regarding LTAR, the inquiry should have ended." *Id*. at 5.

Yama misreads the court's decision in *Yama I*. Contrary to the assertion that the specificity issue is moot, the court ordered Commerce, upon reconsidering the Final Results, to reexamine the issue of specificity. Had the court ruled as Yama asserts, it effectively would have ruled that no countervailing duties were lawful in this case—a result the court did not reach. Moreover, while the administrative record may have been described as "complete" as of the time of issuance of the Final Results, Commerce reopened the record to place new information on the record and used that information in its analysis of the specificity issue.

Yama argues that the Department's use of information from a prior review in the specificity analysis was improper. *Id*. at 6–7. The court disagrees. Having directed Commerce to conduct an analysis of the specificity issue as to both inputs, the court sees nothing improper in the Department's reopening the record to admit the NSA information. Commerce concluded from the NSA information that the textiles industry was the sole user of synthetic yarn in China. Yama placed no information on the record that could call this finding (which seems intuitively obvious) into question. Nor did Yama place any information on the record that would detract from the Department's finding, also based on the NSA information, that only six industries in China used caustic soda.

Rather than question the two findings before the court, Yama argues that Commerce incorrectly was "looking at specific inputs, such as synthetic yarn and caustic soda," "rather than looking at LTAR overall," adding that "[i]t is not the input that is important to the question of specificity but the overall 'program' law, plan, or policy." *Id.* at 7. In Yama's view, "[f]or decades, Commerce has gone unchallenged in its framing of the specificity question to ensure that no industry in China can win this argument," which it considers "neither reasonable nor fair." *Id*. A flaw in Yama's position is the statute itself.

The Tariff Act considers a subsidy to be *de facto* specific if "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." 19 U.S.C. § 1677(5A)(D)(iii)(I). While the "textiles industry" in China would appear to be a broad category composed of many individual industries, the statute speaks to this issue as well, instructing that "any refer-

ence to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries." *Id*. § 1677(5A)(D)(iii). Even a broad, multifaceted industrial category such as the "textiles industry" may be considered a single recipient such that a subsidy may qualify as "specific."

On the record of this case, Yama's assertion that the issue of specificity depends on "the overall 'program' law, plan, or policy," as opposed to the "input," Pl.'s Comments 7, is also unconvincing. The Tariff Act directs that "in evaluating the factors [for determining specificity as a matter of fact] set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account . . . the length of time during which *the subsidy program* has been in operation." 19 U.S.C. § 1677(5A)(D)(iii) (emphasis added). But as the court explains below, the record, considered as a whole and as enlarged during the remand proceeding, permissibly allowed Commerce, based on findings from actual evidence and on adverse inferences, to conclude that a subsidy "program" (a term not defined in the statute) existed during the POR that provided synthetic yarn and caustic soda for less-than-adequate remuneration and to determine that the specificity requirement was met.

From actual record evidence (as opposed to adverse inferences), Commerce reached valid findings that the prices at which Yama was able to buy synthetic yarn and caustic soda were less than the Department's tier-two benchmarks. Yama's only challenges to the benchmarks concerned ocean freight and VAT (which the court rejected, as discussed previously). Thus, the record permissibly allowed Commerce to find that Yama was able to purchase the two inputs for less than it could have obtained them as imports into China. *See I&D Mem*. at 13 (explaining that Commerce added freight, import duties, and VAT to world prices in order to estimate what a firm would have paid if it imported the product).

The record also contained information submitted by the government of China concerning the percentage of Chinese production of both synthetic yarn and caustic soda that was by producers in China in which the government maintained a majority ownership. *See GOC Additional Questionnaire Response* at 32, 53. While the GOC informed Commerce that none of Yama's suppliers of these two inputs were government-owned, Commerce acted within its authority in drawing an adverse inference of government control of these firms' operations from the GOC's noncooperation in responding to the question of CCP presence, as the court discussed previously. That noncooperation denied Commerce access to information from which it

could assess "the length of time during which the subsidy program has been in operation." 19 U.S.C. § 1677(5A)(D)(iii).

Yama objects that "Commerce cannot hold the GOC accountable for information it does not possess," Pl.'s Comments 6, but its objection is centered on the GOC's providing only some, but not all, of the information on the industrial sectors consisting of synthetic yarn and caustic soda producers and, specifically, the GOC's claim that Article 25 of the Statistics Law of China did not allow public disclosure of the names of the specific synthetic yarn and caustic soda producers in which it maintained an ownership interest. *See I&D Mem.* at 10. But as the court's review of the specificity analysis shows, the GOC's refusal to provide the names of those companies was not instrumental in the adverse inferences that controlled the outcome of that analysis, which were the adverse inferences concerning CCP participation in, and effective government control of, Yama's synthetic yarn and caustic soda suppliers.

In summary, the record revealed the percentage of Chinese production of both synthetic yarn and caustic soda that was by producers in China in which the government maintained a majority ownership and demonstrated that Yama was able to obtain these two inputs for less than what it would have paid had it imported them. To this record evidence is added the adverse inferences that Yama's suppliers were subject to operational control of the Chinese government. Commerce, therefore, permissibly concluded that the domestic prices for the two inputs in China were distorted by the government's influence. With what evidence it was able to obtain, and with the adverse inferences Commerce had authority to draw, Commerce also could conclude, permissibly, that the government's role in the LTAR sales of the inputs amounted to government "programs" that were in existence during the POR.

In holding that the Final Results did not conduct an adequate analysis of specificity, *Yama I* was critical of the Department's failure in the Issues and Decision Memorandum to address, or even mention, the Chinese government's questionnaire responses indicating the lack of a government program to provide synthetic yarn or caustic soda at LTAR. *Yama I*, 45 CIT at __, 517 F. Supp. 3d at 1340. Commerce now has addressed this evidence as part of its specificity analysis. *See Remand Redetermination* at 13. Yama argues that "[t]he whole purpose of this LTAR exercise is to determine whether the GOC has attempted to manipulate the market, either production quantity or prices, for synthetic yarn and caustic soda." Pl.'s Comments 8. This formulation is not quite correct. On the issue of *de facto* specificity as determined according to 19 U.S.C. § 1677(5A)(D)(iii), the question is

whether Commerce permissibly could conclude on this record, based on its findings and its adverse inferences, whether the government's influence *did* affect the market. Even if the government of China's statement that it did not maintain what it considered to be a "program" or "programs" for the supplying of these inputs is taken at face value, it still would leave the issue of specificity unresolved. On this record, Commerce acted within its statutory authority in identifying a government role in the production and sale of each of these inputs, which Commerce permissibly found to be sold for LTAR, that amounts to the existence of "programs" for purposes of 19 U.S.C. § 1677(5A), regardless of whether the government of China would consider them to be such.

Finally, Yama argues that "there was neither explicit nor implicit authority for Commerce to add to the record" and that the information added "simply supports Commerce['s] impermissible attempt at a *post hoc* rationalization." Pl.'s Comments 9. Plaintiff submits that *Yama I* held that it was the Department's "*analysis* that was lacking, *not the data*." *Id*. (emphasis in original). Because, as the court discussed above, *Yama I* remanded the Final Results for the conducting of a new specificity analysis, Commerce had implicit authority to reopen the record in an effort to obtain data it considered necessary to its doing so. Because the Remand Redetermination is a new determination, based on an enlarged record and new reasoning, it cannot accurately be described as a *post hoc* rationalization.

III. CONCLUSION

For the reasons discussed previously, the court sustains the Department's decision in the Remand Redetermination not to impose countervailing duties upon Yama with respect to the Export Buyer's Credit Program.

For reasons also discussed above, the court concludes that the Remand Redetermination remedied the deficiencies the court identified in *Yama I* with respect to the Department's analysis of the provision of synthetic yarn and caustic soda for LTAR and reached results supported by substantial record evidence.

The court will enter judgment sustaining the Remand Redetermination.

Dated: December 8, 2022
New York, New York

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

Slip Op. 22–139

UNIVERSAL TUBE AND PLASTIC INDUSTRIES, LTD., THL TUBE AND PIPE INDUSTRIES LLC, and KHK SCAFFOLDING AND FRAMEWORK LLC, Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 20–03944

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand (Oct. 13, 2022), ECF Nos. 57 (conf.), 58 (public) ("Remand Redetermination"), which the International Trade Administration, U.S. Department of Commerce ("Commerce") issued in response to the court's Opinion and Order in *Universal Tube and Plastic Industries, Ltd. v. United States*, 46 CIT __, 586 F. Supp. 3d 1312 (2022).

Neither the plaintiffs nor the defendant-intervenor submitted comments to the court on the Remand Redetermination and, therefore, have raised no objection to this decision.

Upon review, the court has determined that the Remand Redetermination complies with the court's prior Opinion and Order.

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

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

ORDERED that the entries of merchandise that are at issue in this litigation shall be liquidated in accordance with the final and conclusive court decision in this action.

Dated: December 8, 2022
New York, New York

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

Slip Op. 22–140

MS SOLAR INVESTMENTS, LLC, and its affiliates, successors, and assigns, Plaintiff, v. UNITED STATES; UNITED STATES DEPARTMENT OF COMMERCE; GINA M. RAIMONDO, SECRETARY OF COMMERCE; UNITED STATES CUSTOMS & BORDER PROTECTION; TROY A. MILLER, ACTING COMMISSIONER, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00303

[Granting Defendants' Motion to Dismiss without prejudice.]

Dated: December 12, 2022

Mark D. Herlach, *Olivia Pribich*, Eversheds Sutherland (US) LLP, of Washington, D.C., for Plaintiff MS Solar Investments, LLC.

Bryan M. Boynton, Assistant Attorney General, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, *Aimee Lee*, Assistant Director, and *Marcella Powell*, Senior Trial Counsel, International Field Office, Commercial Litigation Branch. Of counsel on the brief were *Leslie M. Lewis*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, and *Sabahat Chaudhary*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Choe-Groves, Judge:

This case involves a challenge to an antidumping duty order on solar cells from the People's Republic of China ("China"). Before the Court is Defendants' Motion to Dismiss ("Defs.' Mot. Dismiss"), filed by Defendants United States, United States Department of Commerce, Secretary of Commerce Gina M. Raimondo, United States Customs and Border Protection, and Acting Commissioner Troy A. Miller (collectively, "Defendants"). Defs.' Mot. Dismiss, ECF Nos. 49, 50. Defendants' Motion to Dismiss was filed in response to Plaintiff's First Amended Complaint ("Pl.'s First Amended Compl.") filed by Plaintiff MS Solar Investments, LLC ("MS Solar"). Pl.'s First Amended Compl., ECF No. 47. For the reasons set forth below, the Court grants Defendants' Motion to Dismiss without prejudice.

BACKGROUND

On December 7, 2012, the United States Department of Commerce ("Commerce") published an antidumping duty order on solar cells from China. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed Reg. 73018 (Dep't of Commerce Dec. 7, 2012) (amended final deter-

mination of sales at less than fair value, and antidumping duty order). On December 3, 2013, Commerce published a notice of opportunity to request an administrative review of the antidumping order for the period of May 25, 2012, to November 30, 2013. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review* ("*Opportunity Notice*"), 78 Fed. Reg. 72636, 72638 (Dep't of Commerce Dec. 3, 2013). In the *Opportunity Notice*, Commerce stated that interested parties should be aware of Commerce's policy under which solar cells entering the United States would be liquidated at the China-wide entity rate if an individually examined exporter did not report the merchandise in its U.S. sales database submitted to Commerce during the review. *Id.* at 72,638; *see also Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties* ("*Assessment Policy*"), 76 Fed. Reg. 65694, 65694–95 (Oct. 24, 2011). Commerce published a notice initiating a first administrative review of the antidumping duty order, in which MS Solar requested that Commerce review entries of subject merchandise by Yingli Energy China Company Limited ("Yingli"), Tianwei New Energy (Chengdu) PV Module Co., Ltd., Upsolar Group Co. Limited, and Sun Earth Solar Power Co., Ltd. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part* ("*Initiation Notice*"), 79 Fed. Reg. 6147, 6150–52 (Dep't of Commerce Feb.3, 2014). In the *Initiation Notice*, Commerce stated that in proceedings involving non-market economies such as China, there is a rebuttable presumption that all companies within the non-market economy country are subject to government control and are assigned the non-market economy country-wide rate unless the exporter under review submits a separate rate application or certification demonstrating that the exporter is sufficiently independent from government control of its export activities. *Id.* at 6148; *see also* Import Administration, U.S. Dep't of Commerce, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries, Policy Bulletin 05.1 (2005) available at https://enforcement.trade.gov/policy/bull05–1.pdf. Commerce explained in the Federal Register Notice for the *Preliminary Results* that upon publication of the final results of review, Commerce would issue importer-specific liquidation instructions for the entries of subject merchandise exported by Yingli as reported in its U.S. sales database. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China* ("*Preliminary Results*"), 80 Fed. Reg. 1021, 1025 (Dep't of Commerce Jan. 8, 2015) (preliminary results of antidumping duty admin. review and

preliminary determination of no shipments; 2012–2013). Commerce stated that for entries that were not reported in the U.S. sales database submitted by an exporter individually examined during the review, Commerce would instruct U.S. Customs and Border Protection ("Customs") to liquidate entries at the China-wide entity rate in accordance with the *Assessment Policy*. *Id.*

Commerce determined a dumping margin rate of 238.95% as the China-wide entity rate that applied to all manufacturers and exporters subject to investigation that were not explicitly assessed a lower rate. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China* ("*Final Results*"), 80 Fed. Reg. 40,998, 41002 (Dep't of Commerce July 14, 2015) (final results of antidumping duty administrative review and final determination of no shipments; 2012–2013). Yingli, an individually investigated exporter, was assessed a weighted-average dumping margin of 0.79%. *Id.* Yingli did not report MS Solar's sale in its U.S. sales database. Pl.'s First Amended Compl. at 17. MS Solar was not individually investigated. *See Final Results* 80 Fed. Reg. at 41,001.

On April 22, 2019, Commerce directed Customs to apply the China-wide entity rate of 238.95% to MS Solar's imports of solar panels manufactured and exported by Yingli. U.S. Department of Commerce's liquidation message 9112305 ("Yingli Liquidation Instructions") dated April 22, 2019. This resulted in a net antidumping charge of $621,581.44 against MS Solar. Pl.'s First Amended Compl. at 10.

MS Solar commenced this case on June 28, 2021, alleging that Commerce instructed Customs improperly in the Yingli Liquidation Instructions that assessed the China-wide entity rate against MS Solar's imports from Yingli. *Id.* at 3.

DISCUSSION

MS Solar contends that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i). Defendants filed a Motion to Dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim. When the court is presented with motions to dismiss under both USCIT Rule 12(b)(1) and Rule 12(b)(6), the court generally decides the 12(b)(1) motion first because "[w]hether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1946).

I. Motion to Dismiss for Lack of Jurisdiction Pursuant to USCIT Rule 12(b)(1)

Determining the Court's subject matter jurisdiction is a threshold inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless the 'contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking federal court jurisdiction must allege sufficient facts to establish the court's jurisdiction and therefore bears the burden of establishing it. *Id.*

The U.S. Court of International Trade is empowered to hear civil cases brought against the United States under the authority enumerated in 28 U.S.C. § 1581. *See* 28 U.S.C. § 1581. Plaintiff contends that the Court has jurisdiction pursuant to the residual jurisdiction clause under 28 U.S.C. § 1581(i), which provides in relevant part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (A) revenue from imports or tonnage;
>
> (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (D administration and enforcement with respect to the matters referred to in paragraphs (A)–(C) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i).

Plaintiff's action purports to challenge the liquidation instructions given by Commerce to Customs, while Defendants allege that Plaintiff actually seeks to challenge the final determination made by Commerce during an antidumping investigation. Pl.'s First Amended Compl. at 1; Defs.' Mot. Dismiss at 10.

28 U.S.C. § 1581(c) grants the U.S. Court of International Trade with jurisdiction over actions commenced under section 516A or 517 of the Tariff Act of 1930. 28 U.S.C. § 1581(c). A remedy under 28 U.S.C. § 1581(c) may be available to a plaintiff after Commerce issues a final determination, and this remedy could adequately address the claims. Therefore, if jurisdiction under 28 U.S.C. § 1581(c) is available, the Court cannot exercise jurisdiction over the action pursuant to 28 U.S.C. § 1581(i). Subsection (i) provides "residual" jurisdiction, granted "in addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h)[.]" *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1373 (Fed. Cir. 2019); 28 U.S.C. § 1581(i). If the Court has subsection (c) jurisdiction, but the remedy provided therein is "manifestly inadequate," then jurisdiction under subsection (i) may exist. *Erwin Hymer*, 930 F.3d at 1374–75; *see also Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014). The scope of the Court's residual jurisdiction under 28 U.S.C. § 1581(i) is limited. *Erwin Hymer*, 930 F.3d at 1374. The U.S. Court of Appeals for the Federal Circuit has "repeatedly held that subsection (i)(4) 'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)); *see also Chemsol*, 755 F.3d at 1349.

As the statute and case law make clear, any § 1581(i) inquiry requires answering two questions: (1) whether jurisdiction is available under a different subsection; and (2) if so, the question then becomes whether the remedy provided under that subsection is "manifestly inadequate." *Erwin Hymer*, 930 F.3d at 1375. If the Court has jurisdiction pursuant to a provision in § 1581(a)–(h), and the remedy provided therein is not manifestly inadequate, then the Court lacks residual jurisdiction under § 1581(i). *Id.*

In defining manifest inadequacy, the U.S. Court of Appeals for the Federal Circuit has established that "mere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate[.]" *Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (quoting *Miller & Co.*, 824 F.2d at 964). Manifest inadequacy may be established when the protest is an "exercise in futility, or 'incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008).

In order to determine whether § 1581(c) jurisdiction exists, the Court must "look to the true nature of the action . . . in determining jurisdiction of the appeal." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (citing *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986)). The Court inquires whether the complainant is challenging the *Final Results* of the administrative review, or the application of those results. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (holding that because "[the plaintiff] did not bring this action to challenge the final results of the administrative review" but rather "a challenge to the 1998 instructions, which is not an action defined under section 516A of the Tariff Act" jurisdiction under subsection (i) was proper); *see also Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2004) (holding that § 1581(i) provided the U.S. Court of International Trade with jurisdiction over the case, because "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").

A. MS Solar's Duty Rate as an Importer (Counts I & II)

MS Solar argues under Counts I and II of the First Amended Complaint that it is entitled to a lower antidumping duty rate as an importer of goods. Pl.'s First Amended Compl. at 15–17. MS Solar asserts that the Court has § 1581(i) jurisdiction by framing its suit as a challenge to the Yingli Liquidation Instructions, rather than to Commerce's *Final Results*. *Id.* at 1, 10–11. MS Solar argues that because Yingli was an individually reviewed exporter who ultimately "received a company specific rate of 0.79% in the final results of the antidumping duty administrative review for the review period covering May 25, 2012, through November 30, 2013," the higher rate assessed to MS Solar at the China-wide entity rate in the Yingli Liquidation Instructions was incorrect and MS Solar should have received the lower rate assigned to Yingli. *Id.* at 2. MS Solar contends that during the administrative review, MS Solar made a request to Yingli to report the single relevant sale to Commerce in order to receive the company-specific rate, rather than the China-wide entity rate. *Id.* at 9. MS Solar was aware that Yingli only mentioned MS Solar's sale in a footnote within Yingli's questionnaire response. *See id.* at 2, 9 (noting that Yingli "reported the sale in its administrative review questionnaire" and that "MS Solar coordinated with Yingli to report the sale to Commerce consistent with the NME policy"); Defs.' Mot. Dismiss at 16 (noting that the relevant sale was reported only in

a "cursory footnote" in Yingli's questionnaire response). Yingli failed to include the MS Solar sale in its U.S. sales database reported to Commerce. Pl.'s First Amended Compl. at 11. According to MS Solar, Commerce's oversight in recognizing MS Solar's sale, despite its absence from Yingli's U.S. sales database, resulted in MS Solar receiving the incorrect China-wide entity rate of 238.95% rather than the allegedly correct Yingli-specific rate of 0.79%. *Id.* MS Solar faults the Yingli Liquidation Instructions, alleging that Commerce either: (1) reviewed the sale and mistakenly did not add MS Solar to the Yingli Liquidation Instructions as an entity entitled to a lower rate, rather than the PRC-wide rate; or (2) misapplied the *Assessment Policy* in creating the Yingli Liquidation Instructions. *Id.*

Defendants argue to the contrary that the Court lacks subject matter jurisdiction under § 1581(i) because "the true nature of this action is a challenge to the assessment rate determined by Commerce in its Final Results." Defs.' Mot. Dismiss at 10. Defendants assert that Plaintiff specifically contests the rate of antidumping duty assessed against a single entry of solar cells imported from China and exported by Yingli. *Id.* at 1. Defendants contend that "the Amended Complaint fails to allege any error that could not have been appropriately challenged and heard in an action under § 1581(c) involving the administrative review." *Id.* at 10.

Defendants argue that Commerce published the *Assessment Policy* in the Federal Register, and that MS Solar should have been aware of Commerce's policy that any merchandise underlying a particular entry that Yingli did not report in its U.S. sales database would be liquidated at the China-wide entity rate. *Id.* at 5. Defendants note that MS Solar entered an appearance at the beginning of the administrative review as a U.S. importer interested party, and therefore MS Solar had access to the *Preliminary Results* and to Yingli's U.S. sales database on the record through MS Solar's authorized representative and interested party status. *Id.* at 3–5. Defendants emphasize that Yingli's U.S. sales database did not report any sales of merchandise to MS Solar during the relevant period of review. *Id.* at 9. Defendants argue that MS Solar could have, but did not, submit comments to Commerce on the preliminary assessment rates or the fact that MS Solar's sale was not included in Yingli's U.S. sales database on the record. *Id.* at 5–6. Defendants acknowledge that Yingli mentioned MS Solar's sale in a footnote in Yingli's questionnaire response, and not in Yingli's U.S. sales database. *Id.* at 9–10. Defendants assert that "[t]he crux of MS Solar's Amended Complaint is that, during the administrative review, Commerce should have considered the information

contained in that footnote, and Commerce should have applied Yingli's importer-specific rate to MS Solar's entry." *Id.* at 10.

Defendants argue further that the true nature of the present action is a challenge to Commerce's antidumping duty rate assessed and applied to MS Solar's entry in accordance with Commerce's *Assessment Policy* and *Final Results*. *Id.* at 14. Defendants claim that jurisdiction under § 1581(i) is not appropriate because "the final results of an administrative review 'shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination . . . .'" *Id.* (citing 19 U.S.C. § 1675(a)(2)(C)). Thus, Defendants argue that "MS Solar should have raised any such challenge during the administrative proceeding." *Id.* Defendants assert that MS Solar's lack of participation in the administrative review was the direct cause of its unfavorable rate assessment, thus placing its grievance squarely within the scope of § 1581(c). *See id.* at 16.

The Court concludes that Defendants' characterization of the dispute, not Plaintiff's, accurately reflects the true nature of the claim in this action. The underlying issue in this case is an error in the record that influenced the *Final Results*, specifically the failure of Yingli to include information about MS Solar's sale in Yingli's U.S. sales database on the record. The true nature of the issue in dispute is not a problem with Commerce's liquidation instructions or an error in Customs' administration and enforcement, because Commerce's failure to issue importer-specific liquidation instructions for the entries of subject merchandise exported by Yingli as reported in its U.S. sales database stems from an error in Yingli's original reporting of information on the record. MS Solar alleges that "[t]o the extent that Commerce reviewed the sale and mistakenly did not add MS Solar to the list of importers that received a specific rate in the Yingli Liquidation Instructions, such action was in error." Pl.'s First Amended Compl. at 11. The Court observes that MS Solar's challenge is to Commerce's review of information on the administrative record that caused Commerce to not provide MS Solar with a specific rate in the Yingli Liquidation Instructions. *See Id.* MS Solar also claims that "[a]lternatively, to the extent that Commerce did not review the sale at all, such an act" was also in error. *Id.* This argument also challenges Commerce's review, or lack of review, of information on the administrative record that caused an alleged error in not providing MS Solar with a specific rate in the Yingli Liquidation Instructions.

The Yingli Liquidation Instructions were not at fault here; rather, Commerce issued liquidation instructions based on the *Final Results* of an administrative review that failed to include information critical

to MS Solar, namely, the inclusion of MS Solar on the list of Yingli's importers in the U.S. sales database on the record as required by the *Assessment Policy*. *See Intercont'l Chems., LLC v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1232, 1240 (2020) ("ICC was 'not reported in the U.S. sales databases submitted by . . . Fufeng.' . . . ICC could have challenged Commerce's Final Results under §1581(c); ICC could have participated in the administrative proceeding. Because ICC failed to pursue either of these options, it is barred . . . from invoking jurisdiction under § 1581(i)"). Similarly because the true nature of MS Solar's dispute is an error in the record that resulted in liquidation instructions based on the *Final Results*, the only valid basis for jurisdiction rests on § 1581(c).

Therefore, any claim arising under § 1581(i) should be dismissed for lack of subject matter jurisdiction, absent a showing of such remedy being manifestly inadequate. *Erwin Hymer*, 930 F.3d at 1375 (noting that the burden of establishing jurisdiction rests on the party alleging the Court's jurisdiction); *see also Norsk Hydro*, 472 F.3d at 1355. In order to establish that a remedy is manifestly inadequate, protest must be an exercise in futility, incapable of producing any result, failing utterly to reach the desired end, or useless, ineffectual, and in vain. *Hartford Fire Ins. Co.*, 544 F.3d at 1294. Mere allegations of financial harm do not make the remedy established by Congress manifestly inadequate. *Int'l Custom Prods.*, 467 F.3d at 1327.

MS Solar argues that any remedy provided other than under § 1581(i) would be manifestly inadequate. Pl.'s Br. Opp'n Mot. Dismiss ("Plaintiff's Brief" or "Pl.'s Br.") at 16–17, ECF Nos. 51, 52. MS Solar argues generally that "[a]ppealing Commerce's Final Results when [MS Solar] had confirmation that its sale had been reported to Commerce and a reasonable expectation that it would receive the lower duty rate thus is an example of a 'manifestly inadequate' remedy for the issue at hand." *Id.* at 16–17. MS Solar's manifest inadequacy argument relies on its interpretation that the fault lies in Commerce's liquidation instructions, not in the *Final Results*, and thus a challenge to the *Final Results* would be manifestly inadequate according to MS Solar. *Id.*

The Court concludes that the remedy provided under § 1581(c) would not be manifestly inadequate. A claim under § 1581(c) could provide MS Solar with an opportunity to obtain relief for the harm allegedly suffered, were the Court persuaded to remand the case to Commerce to reconsider the information about MS Solar's sale reported in Yingli's U.S. sales database, and whether a corrected liquidation instruction for Yingli should be issued that specifically in-

cludes MS Solar. *See* 19 U.S.C. § 1516a(c)(3) (permitting the U.S. Court of International Trade to remand Commerce's action for disposition consistent with the final disposition of the court). The remedy provided for under § 1581(c) is not manifestly inadequate, as it could provide the solution that MS Solar seeks. The Court notes that MS Solar's desired remedy is primarily financial. Specifically, MS Solar seeks an order directing Commerce and Customs to apply Yingli's company-specific antidumping duty rate of 0.79% to MS Solar's imports of Yingli panels during the period of review and issue a refund, with interest, of the excess duties paid by MS Solar. Pl.'s First Amended Compl. at 18. The Court concludes that a remedy under § 1581(c) would not be manifestly inadequate, incapable of producing any result, or useless, ineffectual, or in vain. *Hartford Fire Ins. Co.*, 544 F.3d at 1294. Nor is the harm alleged of a non-financial nature that would render the remedy manifestly inadequate. *Int'l Custom Prods.*, 467 F.3d at 1327. The Court concludes that because § 1581(c) jurisdiction was available to MS Solar (and MS Solar neither challenged the *Final Results* nor contested the error in Yingli's U.S. sales database reporting), and the remedy provided therein would not be manifestly inadequate, subject matter jurisdiction under § 1581(i) is improper.

B. MS Solar's Duty Rate as an Exporter (Count III)

In Count III of the First Amended Complaint, MS Solar sets forth an alternative argument that it is entitled to a separate antidumping duty rate as an exporter of goods. Pl.'s First Amended Compl. at 17. MS Solar argues that it "timely requested and was eligible for a separate rate because of the absence of both *de jure* and *de facto* government control" over its "export and resale activities." *Id.* at 3, 9. MS Solar asserts that its timely separate rate application should have prompted Commerce to "[direct Customs] to assess imports of Chinese solar panels by MS Solar at the separate rate of 9.67%, the weighted-average dumping margin calculated for the two mandatory respondents for the Review Period." *Id.* at 3.

Defendants contend that MS Solar did not request that Commerce conduct a separate rate review of MS Solar as an exporter. Defs.' Mot. Dismiss at 4; *see Initiation Notice* 79 Fed. Reg. at 6150–6152 (listing all exporters from whom Commerce received a review request, noting that MS Solar was not included in the list of proposed exporters for review). Defendants argue that MS Solar did not follow the proce-

dures prescribed in the *Initiation Notice* in order to obtain a separate rate through the administrative process. Reply Br. Supp. Defs.' Mot. Dismiss ("Defendants' Reply Brief" or "Defs.' Reply Br.") at 13–14, ECF No. 55.

The Court notes that there appear to be discrepancies within MS Solar's own motion regarding whether it is an importer or exporter. For example, while MS Solar argues that it is entitled to a separate rate as an *exporter*, it specifically refers to the relevant solar panels as its own *imports*. Pl.'s First Amended Compl. at 3 ("Commerce should have directed [Customs] to assess *imports* of Chinese solar panels by MS Solar at the *separate rate of 9.67%*, the weighted-average dumping margin calculated for the two mandatory respondents [both of whom were *exporters*] for the Review Period").

Before commencing suit in the U.S. Court of International Trade, an aggrieved party must exhaust all administrative remedies available to it. The Court notes that MS Solar has failed to establish that it raised the issue of whether it is an exporter during the administrative proceedings. "A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section." 28 U.S.C. § 2637(b). Other than a few cursory mentions of export activities in Count III of MS Solar's First Amended Complaint and in its briefing before the Court, the Court observes that Commerce did not conduct a separate rate review of MS Solar, MS Solar did not present evidence during the administrative proceedings of its status as an exporter, and Commerce did not make any determinations regarding MS Solar's separate rate status. *See* Pl.'s First Amended Compl. at 9; *see also* Defs.' Mot. Dismiss at 4. Because MS Solar did not exhaust its administrative remedies, the Court is without jurisdiction over MS Solar's contentions as an exporter.

II. Motion to Dismiss for Failure to State a Claim Pursuant to USCIT Rule 12(b)(6)

In order to analyze the merits of a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(6), the Court must first have subject matter jurisdiction over the dispute. *See Bell*, 327 U.S. at 682 (1946). As previously discussed, the Court holds that subject matter jurisdiction is lacking pursuant to §1581(i) because with respect to Counts I and II of the First Amended Complaint §1581(c) jurisdiction is available and the remedy provided therein would not be manifestly inadequate, and with respect to Count III of the First Amended Complaint Plaintiff has not exhausted its administrative

remedies. Because the Court lacks subject matter jurisdiction, the Court cannot analyze the merits of the 12(b)(6) motion to dismiss.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss, ECF Nos. 49, 50, is granted without prejudice. Judgment will be entered accordingly.

Dated: December 12, 2022
New York, New York

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

Slip Op. 22–142

VIRTUS NUTRITION LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 21–00165

[Dismissing the instant action pursuant to U.S. Court of International Trade Rule 41(a)(2).]

Dated: December 15, 2022

John M. Peterson, Neville Peterson, LLP, of New York, N.Y., for plaintiff Virtus Nutrition LLC.

Marcella Powell, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, and *Monica P. Triana*, Trial Attorney. Of counsel on the brief was *Sabahat Chaudhary*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

* * *

"Wednesday morning at five o'clock as the day begins. Silently closing her bedroom door, leaving the note that she hoped would say more. . . . She's leaving home."[1]

* * *

Reif, Judge:

Virtus Nutrition LLC ("plaintiff") seeks the voluntary dismissal of the instant action, which involves an appeal of the decision of U.S. Customs and Border Protection ("Customs") to deny plaintiff's protest regarding the exclusion from entry into the United States of certain palm oil fatty acid distillates and palm stearin products from Malaysia. *See* Mot. of Pl. in Resp. to Ct. Order to Show Cause Why this Action Should Not Be Dismissed ("Pl. Br.") at 1, ECF No. 76; Reply Br. of Pl. in Supp. of Mot. to Dismiss the Case with a Stipulation Allowing Exportation Under Temp. Storage Agreement ("Pl. Reply. Br.") at 1, ECF No. 78; Compl. at ¶ 1, ECF No. 2; *see also* section 514(a)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a)(4);[2] 19 U.S.C. § 1307. The United States ("defendant") agrees that the court should

[1] The Beatles, *She's Leaving Home, on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI 1967).

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

dismiss this action with prejudice.[3] *See* Def.'s Opp. to Pl.'s Resp. to Ct.'s Order to Show Cause and Mot. to Dismiss the Case with a Stipulation Allowing Exportation Under the Temp. Storage Agreement ("Def. Br.") at 1, ECF No. 77; Pl. Reply Br. at 3 n.3. However, defendant challenges plaintiff's contention that the court should dismiss the action "with the stipulation that defendant . . . through . . . [Customs], allow exportation of the merchandise pursuant to the written agreement between" plaintiff and Customs dated February 25, 2021 ("Temporary Storage Agreement" or the "Agreement"). Pl. Br. at 1, Ex. A ("Temp. Storage Agreement"); *see* Def. Br. at 1.

USCIT Rule 41(a)(2) provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." USCIT R. 41(a)(2). The Court previously has stated that "the decision as to whether to grant a motion to dismiss [pursuant to USCIT Rule 41(a)(2)] is committed to the court's sound discretion." *T.J. Manalo*, 33 CIT at 1535, 659 F. Supp. 2d at 1301 (citations omitted); *see Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments,* 479 F.3d 1330, 1336 (Fed. Cir. 2007) ("Rule 41(a)(2) gives courts discretion in deciding whether to grant a plaintiff's motion to voluntarily dismiss and whether to impose terms and conditions in granting such a motion."); *cf. Collier v. CorrectHealth Bibb, LCC*, 2011 WL 767971, at *5-*7 (M.D. Ga. Feb. 25, 2011) (declining to include in the court's order of voluntary dismissal two of the plaintiff's proposed conditions); *Wells Fargo Bank, N.A. v. Younan Properties, Inc.*, 2013 WL 251203, at *2-*4 (N.D. Ill. Jan. 23, 2013), *aff'd*, 737 F.3d 465 (7th Cir. 2013) (conditioning voluntary dismissal on the plaintiff's payment of certain of the defendant's attorney's fees).

The court concludes that it is "proper" within the meaning of USCIT Rule 41(a)(2) to dismiss the instant action without including in the court's order plaintiff's proposed stipulation regarding the Temporary Storage Agreement. USCIT R. 41(a)(2); *see* Proposed Order, ECF No. 76–2. Two considerations support this conclusion. First, the Temporary Storage Agreement does not provide a basis to include plaintiff's proposed stipulation. Plaintiff contends that the court should include this stipulation because the Temporary Storage Agreement "guarantees [plaintiff] the right to export the merchandise in the event it is

[3] Plaintiff moves for dismissal pursuant to Rule 41(a)(2) of the U.S. Court of International Trade ("USCIT" or the "Court"), *see* Pl. Br. at 1, whereas defendant argues that the court should dismiss the instant action pursuant to USCIT Rule 41(b)(3), which provides for involuntary dismissal "[w]hen it appears that there is a failure of the plaintiff to prosecute" the action. *See* Def. Br. at 1; USCIT R. 41(b)(3). Given that plaintiff moves for the voluntary dismissal of this action, the court finds that USCIT Rule 41(b)(3) is not applicable. *See United States v. T.J. Manalo, Inc.*, 33 CIT 1530, 1534, 659 F. Supp. 2d 1297, 1301 (2009) ("The voluntary dismissal of an action is governed by USCIT Rule 41(a).").

not released" for consumption. Pl. Br. at 3. However, the provision of the Agreement upon which plaintiff relies does not "guarantee[]" plaintiff the "right" to export its merchandise, *id.*; rather, this provision states that "[i]f the shipments are excluded . . . [plaintiff] is responsible for re-export or destruction." Temp. Storage Agreement at ¶ 9. This provision also does not *require* that the Temporary Storage Agreement remain in effect beyond the conclusion of this litigation until the point at which plaintiff may "re-export or destr[oy]" the merchandise. *Id.* The Agreement provides instead that it will remain in effect "pending final decision regarding the admissibility of the shipments." Temp. Storage Agreement. Consequently, the terms of the Temporary Storage Agreement neither require nor are consistent with plaintiff's request to include its proposed stipulation in the order of dismissal.

The second reason for the court's conclusion is that plaintiff retains recourse to address its concern that Customs "may seize the goods rather than allow their exportation" should the court dismiss this action without including the proposed stipulation. Pl. Br. at 5. In such a circumstance, plaintiff would be able to challenge pursuant to 28 U.S.C. § 1356 the potential seizure of plaintiff's merchandise. *See Root Scis., LLC v. United States*, 45 CIT __, __ n.5, 543 F. Supp. 3d 1358, 1370 n.5 (2021), *reconsideration denied*, 46 CIT __, 560 F. Supp. 3d 1357 (2022). Plaintiff recognizes the availability of this recourse but argues for the inclusion of the proposed stipulation on the basis that "there is no need to expose plaintiff to . . . a second lawsuit." Pl. Reply Br. at 5–6. The possibility of future litigation does not provide a basis to include plaintiff's proposed stipulation in the court's order of dismissal, particularly in view of the purpose of USCIT Rule 41(a)(2) — to protect the *defendant* from "[c]lear legal prejudice" that may result from the voluntary dismissal of an action. *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 190, 763 F. Supp. 614, 621 (1991) (citations omitted); *cf. Mobiloc, LLC v. Neutron Holdings, Inc.*, 2021 WL 4963641, at *2 (W.D. Wash. Oct. 26, 2021) ("Legal prejudice does not include . . . uncertainty from the threat of future litigation.") (citing *Westlands Water Dist. v. United States*, 100 F.3d 94, 96–97 (9th Cir. 1996)). Consequently, the court concludes that it is "proper" to dismiss the instant action without including plaintiff's proposed stipulation in the court's order. USCIT R. 41(a)(2).

With the dismissal of this action, the court denies as moot the motion of the American Apparel & Footwear Association for leave to file a brief as amicus curiae. *See* Mot. for Leave to File a Br. as *Amicus Curiae*, ECF No. 29; USCIT R. 76; *cf. New York Immigr. Coal. v. Rensselaer Cnty. Bd. of Elections*, 2019 WL 6330265, at *7 (N.D.N.Y.

Nov. 25, 2019) (granting the defendants' motion to dismiss and denying as moot a motion for leave to file a brief as amicus curiae).

Judgment will enter accordingly.

Dated: December 15, 2022
New York, New York

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

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