U.S. Court of International Trade

Slip Op. 17–14

HARMONI INTERNATIONAL SPICE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 17–00009
PUBLIC VERSION

[Denying Plaintiff's motion for a preliminary injunction.]

Dated: February 7, 2017

Ned Herman Marshak, Robert Barry Silverman, and *Bruce M. Mitchell*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, argued for plaintiff. With them on the brief were *Alan Gary Lebowitz, Joseph Martin Spraragen*, and *Yun Gao*.

Emma Eaton Bond, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Chi S. Choy*, Attorney, Assistant Chief Counsel U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Plaintiff, Harmoni International Spice, Inc.'s ("Harmoni"), motion for a preliminary injunction to enjoin United States Customs and Border Protection ("Customs" or "CBP") from requiring Plaintiff to post single transaction bonds ("STB") on its entries of fresh garlic at the $4.71 per kilogram ("/kg") antidumping duty ("ADD") rate that the U.S. Department of Commerce ("Commerce") preliminarily assigned to entries of fresh garlic purchased from Zhengzhou Harmoni Spice Co., Ltd. ("ZH") in the twenty-first administrative review of the ADD order on fresh garlic from the People's Republic of China. *See* Pl.'s Appl. TRO and Mot. Prelim. Inj., Jan. 11, 2017, ECF No. 10 ("Pl.'s Mot."); *see also Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order) ("*ADD Order*"); *Fresh Garlic From the People's Republic of China*, 81 Fed. Reg. 89,050, 89,051 (Dep't Commerce Dec. 9, 2016) (preliminary results and partial rescission of the 21st ADD administrative review;

2014–2015) ("*Prelim. Results*") and accompanying Decision Memorandum for the Preliminary Results of the 2014–2015 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China, A-570–831, (Dec. 5, 2016) *available at* http://ia.ita.doc.gov/frn/summary/prc/201629569–1.pdf (last visited Feb. 7, 2017) ("Prelim. Decision Memo").

Plaintiff argues that the court should enjoin CBP's determination to require it to post STBs to obtain release of its entries of imported garlic, which are all exported by ZH, because it has demonstrated: (1) irreparable harm would result from complying with CBP's enhanced bonding requirement; (2) likelihood of success on the merits of its underlying claim; (3) that Plaintiff's hardship in posting STBs outweighs any hardship to the government; and (4) that the public interest favors enjoining CBP from requiring plaintiff to post STBs in these circumstances. *See* Pl.'s Mot. 11–28. Plaintiff specifically argues it lacks sufficient cash flow and assets to provide full collateral, which its sureties would require, in connection with entries in transit. *See id.* at 11. Plaintiff argues that its inability to provide bonding to secure release of its merchandise would cause it to suffer a loss of goodwill and damage to its reputation due to its failure to deliver orders to customers. *Id.* at 11. Further, Plaintiff argues that CBP lacks authority, as a matter of law, to require it to post STBs to secure the release of its goods because a preliminary determination that ZH's exports may be subject to antidumping duties cannot form the basis for a decision to require enhanced security in the form of STBs. *Id.* at 11–25.

Defendant opposes Plaintiff's motion on the ground that Plaintiff has failed to demonstrate any of the factors necessary to entitle it to a preliminary injunction. Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Version 11–28, Jan. 19, 2017, ECF No. 30 ("Def.'s Resp. Br."). Specifically, Defendant contends that Plaintiff is unlikely to succeed on the merits because CBP properly exercised its broad statutory authority to require additional bonding. *Id.* at 11–22. Further, Defendant claims that Plaintiff has not demonstrated it is unable to provide the collateral required to post STBs. *Id.* at 23. In any event, Defendant argues Plaintiff has not demonstrated enhanced bonding would cause it to suffer an immediate and irreparable harm before Commerce issues its final determination. *Id.* at 22–23. For the reasons that follow, the court denies Plaintiff's motion for a preliminary injunction.

BACKGROUND

Plaintiff's underlying action challenges CBP's decision to require Plaintiff to post STBs on its entries of fresh garlic purchased from ZH as arbitrary, capricious, and otherwise contrary to law. Compl. ¶¶ 60–73, Jan. 11, 2017, ECF No. 2 ("Compl."). On January 11, 2017, CBP issued a User Defined Rule ("UDR") to alert the Office of Field Operations—including the ports and CBP's Agricultural and Prepared Products Center—to entries of fresh garlic from China imported by Plaintiff and produced by ZH.[1] Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Version Ex. A at ¶ 12, Jan. 19, 2017, ECF No. 30–1 ("Amdur Decl."). CBP's UDR issued in this case reads, in relevant part:

> Name: CB_STB_HARMONY
>
> . . .
>
> Threat: AD/CVD
>
> . . .
>
> Action: . . . **DO NOT RELEASE OR MOVE TO CES, SINGLE TRANSACTION BOND & LIVE ENTRY MAY BE REQUIRED***[.] SUBMIT ENTRY TO COMMODITY TEAM FOR ACTION. ON 9 DECEMBER IN 81 FR 89050 THE DEPARTMENT OF COMMERCE PRELIMINARILY INCREASED DUTY RATE FOR [HARMONI] . . . FROM EXPORTER [ZH] . . . . IN LIGHT OF POSSIBLE INCREASE[D] RISK TO THE REVENUE. PURSUANT TO 19 C.F.R. [§] 113.13(D), STB IN THE AMOUNT OF $4.71 PER KILOGRAM IS RECOMMENDED.
>
> . . .
>
> Start Date/End Date: 1/11/2017–12/31/2017.[2]

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[1] A declaration from Alexander Amdur, the Director of the Antidumping Duty and Countervailing Duty Policy and Programs Division, Office of Trade, CBP, which is annexed to Defendant's response, indicates that "[w]hen a UDR targeting specified criteria is in place, [CBP's] Automated Targeting system [, a computerized screening tool to target potentially high-risk cargo entering the United States,] will notify CBP personnel when entries meeting the criteria are entered into the system." Amdur Decl. ¶ 13. The declaration further states that "[t]he UDR . . . alerts CBP personnel to detain the relevant Harmoni entries pending a decision on whether or not to require single transaction bonds." *Id.* at ¶ 14. However, the declaration alleges that CBP's Office of Trade, which issued the UDR, "does not have the authority and responsibility to require [STBs]." *Id.* at ¶ 15. Rather, the declaration states that such authority resides in the Office of Field Operations, which includes ports of entry and CBP's Centers for Excellence and Expertise ("CEE"). *Id.* The Amdur Declaration further states that the port or the CEE "can expressly request additional security in the form of an STB for each individual shipment through the issuance of a Notice of Action, CBP Form 29." *Id.* at ¶ 16.

[2] CBP alleges that it has faced consistent problems with the collection of antidumping duties on entries of fresh garlic from China subject to the *ADD Order*. Amdur Decl. ¶ 3. CBP

Amdur Decl. Ex. 2. Both parties concede that CBP issued Notices of Action requiring Plaintiff to post STBs to secure release of its entries entered in various ports of entry in accordance with the UDR.[3] It is likewise undisputed that, prior to CBP issuing these Notices of Action, Plaintiff was importing subject merchandise exported by ZH from China without paying ADD cash deposits or posting STBs. Compl. ¶ 22; Def.'s Resp. Br. 4 (citing Amdur Decl. ¶ 9).

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further alleges that this longstanding problem has led to a situation where

> approximately $730 million in unpaid and owed antidumping duties assessed on importations of fresh garlic from China. This is by far the highest amount of uncollected duties for any antidumping duty or countervailing duty order.

Id. Defendant declares that uncollected revenues in connection with the *ADD Order* have increased over $180 million from fiscal year 2015 to fiscal year 2016. Def.'s Resp. Br. 3 (citing Amdur Decl. ¶ 4). CBP claims that large amounts of unpaid and uncollected garlic duties results, in part, from

> the frequent discrepancy between a low cash deposit rate assigned to a foreign exporter and/or manufacturer and the subsequent determination by the Department of Commerce that the entries of that particular exporter are to be liquidated at a much higher rate. . . . When CBP issues a bill at liquidation for the difference between the cash deposit and the antidumping duties owed, importers often do not pay, cannot be located, declare bankruptcy, or cease to exist.

Amdur Decl.¶ 5.

It is undisputed that Plaintiff is the [[ ]] importer into the United States of subject merchandise from approximately November 1, 2014 through the present. Def.'s Resp. Br. 2 (citing Amdur Decl. ¶ 7); Pl.'s Reply Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Version 5, Jan. 26, 2017, ECF No. 37. Defendant alleges that Plaintiff entered approximately [[ ]] kilograms of garlic from China into the United States from November 1, 2014 to October 31, 2015 and approximately [[ ]] kilograms since November 1, 2015. Def.'s Resp. Br. 3 (citing Amdur Decl ¶¶ 7–8).

[3] Defendant annexes Notices of Action reflecting that CBP has required STBs in the amount of $4.71/kg in order to obtain release of Plaintiff's shipments of Chinese garlic exported by ZH for [[ ]] entries that entered through the ports of [[ ]], as of January 19, 2017. Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Public Version Exs. B at Ex. 3, D, Jan. 19, 2017, ECF No. 31. All of these Notices of Action contain a materially identical explanation for requiring STBs:

> On December 9, 2016, [t]he Department of Commerce issued its preliminary determination (See 81 FR 89050) preliminar[il]y increasing duty rate for shipments of Chinese garlic, imported by [Harmoni] . . . and exported by [ZH]. In order to obtain release of your shipments of garlic, CBP is requiring a [STB] in the amount of $4.71 per kilogram.

Id. Plaintiff alleges the number of entries denied release until a bond is posted increased to [[ ]] as of January 26, 2017. Pl.'s Reply Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Version 45, Jan. 26, 2017, ECF No. 37. As of the same date, Plaintiff avers that STBs totaling $[[ ]] have been requested. *Id.* at 8. Plaintiff further estimates that it has an additional [[ ]] shipments that either landed in the United States or on the water. *Id.* Plaintiff contends that, if CBP were to demand fully collateralized STBs for these shipments, the additional STBs required would total approximately $[[ ]]. *Id.* Plaintiff contends its liability may yet increase further because CBP has asked for STBs after releasing shipments and has issued a Notice of Redelivery in at least one instance. *Id.* at 8–9. Therefore, Plaintiff worries that CBP may issue such notices in connection with other entries that have already been released. *See id.*

Defendant contends that each individual port or Center for Excellence and Expertise can review relevant information relating to those shipments and require STBs where appropriate. Def.'s Resp Br. 6. Defendant does not contest that CBP's issuance of notices of action represent a determination to require STBs at least with regard to the entries in connection with which they are issued. *See* id. at 5–6.

Plaintiff alleges that CBP's representative contacted its customs broker on January 4, 2017 to advise that CBP would require Plaintiff to post STBs at the rate of $4.71/kg on all entries of subject merchandise entered after January 9, 2017. Compl. ¶ 7. Plaintiff alleges that CBP's representatives advised Plaintiff's counsel that CBP's decision to require STBs was based on the facts that:

> (1) Harmoni is a large volume importer of [s]ubject [m]erchandise; (2) if Commerce's preliminary decision were affirmed by [its final determination], Harmoni would have a potential liability of approximately $200 million; and (3) Commerce's [p]reliminary [d]etermination was based on the fact that ZH/Harmoni had not cooperated to the best of its ability by not responding to Commerce's questionnaire.

Id. at ¶ 12. Defendant avers, and Plaintiff does not deny, that Plaintiff presently provides only a continuous bond to secure potential duties on its entries.[4] Def.'s Resp. Br. 4 (citing Amdur ¶ 9). Given the actions taken by CBP to require STBs, Plaintiff states that it has instructed ZH to cease production of garlic. Pl.'s Reply Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Version 9, Jan. 26, 2017, ECF No. 37 ("Pl.'s Reply Br.").

Plaintiff alleges that it purchases all of its Chinese fresh garlic from ZH, which is affiliated with Plaintiff. Compl. ¶ 3. Plaintiff further alleges that ZH first qualified for a zero ADD deposit rate for subject merchandise in a New Shipper Review conducted by Commerce for the period November 1, 2001 through October 31, 2002. *Id.* at ¶ 4; *see also Fresh Garlic From the People's Republic of China*, 69 Fed. Reg. 33,626, 33,629 (Dep't Commerce June 16, 2004) (final results of antidumping duty administrative review and new shipper reviews). According to Plaintiff, garlic from the People's Republic of China ("China") exported by ZH has continuously qualified for a $0.00 cash deposit rate since May 4, 2006. *See* Compl. ¶ 6. In addition, Plaintiff alleges that, until its preliminary determination in the twenty-first annual review, Commerce had not required ZH to participate as a respondent in any annual review of the *ADD Order* since the tenth administrative review. *Id.* at ¶ 21.

On January 7, 2016, Commerce initiated its twenty-first annual review of fresh garlic from China, selecting ZH as a mandatory respondent. *See id.*¶ 26; *see also Prelim. Results*, 81 Fed. Reg. at;

[4] According to the declaration provided by CBP, Plaintiff's continuous bond is in the amount of approximately [[ ]]. Amdur Decl. ¶ 9.

Prelim. Decision Memo at 1.[5] Plaintiff concedes that ZH elected not to respond to Commerce's questionnaire in its annual review because it believes "that the [New Mexican Garlic Growers Coalition's ("NMGGC")] request that Commerce review ZH was conceived in China and is controlled from China by a group of Chinese exporters who, under U.S. law, cannot file their own request."[6] Compl. ¶ 36.

More specifically, Plaintiff avers that the review of ZH resulted from a request initiated by two individuals who are members of the NMGGC. *Id.* at ¶ 25. Plaintiff and ZH argued before Commerce that Commerce should rescind its review with respect to ZH, among other reasons, because the two members of NMGGC

> are merely straw men for certain Chinese exporters who, having failed in their own attempts to convince Commerce to review Harmoni, enlisted the NMGGC to act on their behalf, by filing a request controlled by the Chinese exporters.

Id. at ¶¶ 27–28. As further support for its claim that Commerce should rescind its review with respect to ZH, Plaintiff further maintains that a recent newspaper article reported that a member of the NMGGC believes that he had been "used as a pawn" in a battle between certain Chinese exporters, ZH, and a coalition of domestic garlic producers who filed the original ADD petition on Chinese garlic. *See id.* at ¶¶ 30, 46. On December 9, 2016, Plaintiff states that Commerce issued its preliminary determination in its twenty-first review of the *ADD Order*, preliminarily declining to rescind its review of ZH and preliminarily concluding that ZH should be subject to a China-wide ADD rate of $4.71/kg.[7] *Id.* at ¶ 33; *see also Prelim Results*, 81 Fed. Reg. 89, 051; Prelim. Decision Memo at 8, 10, 16–17. In its preliminary results, Commerce indicates that it "will direct CBP to assess [ADD] rates based on the per-unit (i.e., per kilogram) amount on each entry of the subject merchandise during the [period of re-

[5] In its preliminary results, Commerce indicates that the China-wide entity is not under review because no party requested a review. *See Prelim Results*, 81 Fed. Reg. at 89, 051. Therefore, Commerce notes that the China-wide rate of $4.71/kg is not subject to change. *Id.*

[6] Plaintiff asserts that, if ZH had cooperated and participated in Commerce's annual review process, ZH reasonably believes that "[its] business would be at the mercy of certain Chinese companies – who the Department already has found to be guilty of massive fraudulent conduct – for the indefinite future." Compl. ¶ 38. Plaintiff further claims that "these Chinese competitors would obtain the benefits of Harmoni's rate, thereby eliminating ZH's competitive advantage in selling garlic to the United States." *Id.* at ¶ 39. Plaintiff avers that "ZH was placed between a rock and a hard place, and decided to fight the NMGGC request, rather than to acquiesce in an illegal proceeding." *Id.* at ¶ 40.

[7] Plaintiff alleges that Commerce indicated that it had not considered certain documents submitted by ZH in pre-preliminary comments in connection with its application to rescind review of ZH and Harmoni. *See* Compl. ¶¶ 28–29, 42 (citing Prelim. Decision Memo at 3 n.21, 8 n.38).

view]." *Prelim Results*, 81 Fed. Reg. 89,052. Commerce further states that it intends to issue such assessment instructions to CBP 15 days after the publication date of the final results of the review. *Id.*

Plaintiff filed an application for a temporary restraining order ("TRO") requesting that the court restrain CBP from requiring Plaintiff to post STBs until the court could decide this motion for a preliminary injunction. *See* Pl. Mot. 1. On January 17, 2017, the court denied Plaintiff's TRO application. *See* Memorandum and Order, Jan. 25, 2017, ECF No. 36. In denying Plaintiff's TRO application, the court reasoned that Plaintiff failed to demonstrate that: (1) it would suffer irreparable harm before the court renders a decision on its preliminary injunction motion; (2) that the balance of the hardships tips in its favor; and (3) that the public interest favors granting a TRO. *Id.* at 11. The court also determined that Plaintiff had established inadequate likelihood of success on the merits to warrant granting a TRO before reviewing responsive briefing by Defendant. *Id.* at 11–12.

On January 19, 2017, the court granted Plaintiff's motion for leave to file a supplemental memorandum of law and for oral argument. *See* Order, Jan. 19, 2017, ECF No. 32; *see also* Pl.'s Mot. Leave to File Suppl. Mem. Law and Pl.'s Mot. Oral Arg., Jan. 18, 2017, ECF No. 28. The court heard oral argument on Plaintiff's motion for a preliminary injunction on January 31, 2017. *See* Oral Arg., Jan. 31, 2017, ECF No. 42 ("Oral Arg.").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this matter 28 U.S.C. § 1581(i)(4) and 28 U.S.C. § 2631(i).

USCIT Rule 65 permits the court to issue a preliminary injunction on notice to the adverse party. USCIT R. 65(a). To obtain the extraordinary relief of a preliminary injunction, the Plaintiff must establish that (1) it is likely to suffer irreparable harm without a preliminary injunction, (2) it is likely to succeed on the merits, (3) the balance of the equities favors the Plaintiff, and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). In reviewing these factors, "no one factor, taken individually," is dispositive. *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (internal citations omitted); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed.Cir.1993). However, each factor need not be given equal weight. *See Ugine & ALZ Belg.*, 452 F.3d at 1293; *Nken v. Holder*, 556 U.S. 418, 434 (2009). Likelihood of success on the merits and irreparable harm are generally considered the most

significant factors in evaluating a motion for injunctive relief. *See Nken v. Holder*, 556 U.S. at 434; *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).

DISCUSSION

I. Irreparable Harm

Plaintiff argues that it will suffer irreparable harm if the court does not grant its motion for a preliminary injunction because obtaining a STB to secure the release of its entries would require full collateral for millions of dollars of entries. Pl.'s Mot. 11. Plaintiff claims that it will imminently be unable to meet its expenses as they become due once it exhausts its limited cash on hand and its existing line of credit, either by posting STBs or by ceasing importation. Pl.'s Reply Br. 36–37. Plaintiff contends that, left with no cash to cover purchases of new inventory and deliver to customers, it will suffer a significant and irreparable loss of goodwill and damage to its reputation. Pl.'s Mot. 11.

Defendant responds that the harm presented by posting a STB is not irreparable and the strains on Plaintiff's business are the result of its own business judgment. *See* Def.'s Resp. Br. 25–26; Oral Arg. 01:32:48–01:34:05; 01:34:52–01:35:41; 01:41:10–01:41:38. Defendant further claims that Plaintiff has not demonstrated that it could not take steps to alter the way it does business to avoid irreparable harm. *See* Def.'s Resp. Br. 25–26; Oral Arg. 01:32:48–01:34:05; 01:34:52–01:35:41; 01:41:10–01:41:38. In any event, Defendant argues that none of the harm alleged by Plaintiff is immediate because: (1) Plaintiff has failed to demonstrate it is unable to provide collateral for STBs; and (2) Plaintiff has not proven that it lacks sufficient capital to provide collateral on its own, nor has it detailed efforts made to raise the necessary money to post collateral. Def.'s Resp. Br. 23.

A finding of irreparable harm requires that a Plaintiff demonstrate "a viable threat of serious harm which cannot be undone," justifying the injunctive relief sought. *Zenith*, 710 F.2d at 809 (internal citations omitted). Generally, an allegation of financial loss alone, however substantial, which is compensable with monetary damages, is not irreparable harm if such corrective relief will be available at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). As such, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. at 90. Nevertheless, irreparable harm may take the form of "[p]rice erosion, loss of goodwill, damage to reputation, and

loss of business opportunities." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)). Bankruptcy or substantial loss of business is irreparable harm because, in addition to the obvious economic injury, loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

Here, Plaintiff has not sufficiently met its burden to demonstrate that irreparable harm would result in the absence of the injunctive relief. Plaintiff has demonstrated that it will suffer strains upon its cash flow by instructing ZH to cease production of garlic altogether and discontinue its importation of garlic.[8] However, Plaintiff has not demonstrated that it would face immediate and irreparable loss of goodwill or damage to its reputation if it were to obtain supply from an alternative source. Plaintiff demonstrates that it would face significant obstacles continuing to operate with its current supplier of garlic, but those obstacles do not show that Plaintiff would permanently lose goodwill or irreparably damage its reputation if it purchased garlic from alternative suppliers.[9] More importantly, Plaintiff

[8] To evaluate Plaintiff's allegations of loss of cash flow, the court considers Plaintiff's projections assuming Harmoni will have no more fresh garlic sales because it will cease importing and decline to post STBs. The court does not limit its evaluation of irreparable harm to entries for which CBP has already demanded that Plaintiff post STBs, which Defendant contends are the only entries ripe for review. *See* Def.'s Resp. Br. 8–10. Although Plaintiff discusses two scenarios that could conceivably constitute irreparable harm (*i.e.*, continuing to import garlic and selling that garlic at a loss and ceasing to produce and import garlic until Commerce's final determination, *see* Pl.'s Reply Br. 36–37) Plaintiff states that it has already taken action to exercise the latter option by instructing ZH to cease production. *See* Pl.'s Reply Br. 9. Plaintiff has demonstrated with a detailed cash flow analysis projection from an accountant retained by Plaintiff that Plaintiff will exhaust its current cash on hand and its currently existing line of credit, and Plaintiff would be unable to meet its obligations as they become due by approximately the week ending [[ ]]. Pl.'s Reply Br. 37 (citing Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. E at ¶¶ 7(a)–(c), Jan. 26, 2017, ECF No. 37–5). Plaintiff alleges that [[ ]] entries that have not been released because Notices of Action were issued by CBP requiring the posting of STBs as a condition of release. *See* Pl.'s Reply Br. 8 (citing Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. A at Ex. 6, Jan. 26, 2017, ECF No. 37–1); *see also id.* at Ex. A at ¶ 16. Plaintiff further alleges that another [[ ]] shipments of fresh garlic are either landed or on the water. *See* Pl.'s Reply Br. 8 (citing Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. A at Ex. 6, Jan. 26, 2017, ECF No. 37–1); *see also id.* at Ex. A at ¶ 16. It stands to reason that electing not to post STBs to secure the release of its entries may force its customers to look elsewhere for supply. *See id.* at ¶ 26.

[9] Specifically, Plaintiff avers that its entire business is based on sale and distribution of its garlic products in the United States. *See* Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. A at ¶ 26, Jan. 26, 2017, ECF No. 37–1. Even if Plaintiff's assertions that it cannot redirect its goods because it lacks a distribution network, customer base, or familiarity with regulatory regimes operating in other countries were true, *see id.*, Plaintiff has not supported its claim that it cannot purchase garlic from alternative suppliers. Rather, Plaintiff implies that it has a financial interest in maintaining its supplier relationship with ZH and that it and its customers have confidence in the quality of ZH's product. *See id.* at ¶ 27. Plaintiff provides no support for its allegation that it could not "establish an entirely new vendor network that would meet both it and its customers'

fails to demonstrate that it lacks sufficient access to capital, either from existing assets or by obtaining additional financing, to continue doing business without risking immediate and irreparable damage to its business until Commerce issues its final determination.[10] In short, Plaintiff has failed to demonstrate that any slowing or discontinuation of its business while awaiting Commerce's final determination would be immediate, irreparable, and out of its own control. Plaintiff cites no authority that injunctive relief is meant to protect a business

requirements in the 3–5 month period before the DOC issues a final determination." *Id.* Nor has Plaintiff substantiated its claim that its product is of substantially higher quality than other sources of supply. Thus, Plaintiff has not demonstrated that it could not purchase supply from other producers of similar quality and thereby put itself in a position to continue doing business without imminently and irreparably damaging its reputation or irreparably losing goodwill.

[10] Plaintiff has provided no proof that it sought and was denied additional financing to meet its bonding requirements. As a result, Plaintiff's claims that it could not obtain additional financing are based upon speculation from its co-owner and Chief Financial Officer, Rick Zhou, *see* Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. A at ¶ 19, Jan. 26, 2017, ECF No. 37–1, and an accountant, Karl Knechetl, hired by Plaintiff to review its financial statements who states that he reviewed only finalized complete financial statements through September 30, 2016 and an interim internally prepared profit and loss statement for the fourth quarter of 2016. *See* Pl.'s Reply Def.'s Opp'n Pl's Mot. Prelim. Inj. Confidential Version Ex. E at ¶¶ 5, 8, Jan. 26, 2017, ECF No. 37–5. Even if Mr. Knechtel, were competent to opine on Plaintiff's creditworthiness before this court, something the court would not necessarily concede, *see* 28 U.S.C. § 2641(a) (2012) (providing that the Federal Rules of Evidence shall apply to all civil actions before the court); Fed. R. Evid. 702 (permitting a witness qualified as an expert by knowledge, skill, experience, training, or education to render an opinion if: (1) the expert's specialized knowledge will help the trier of fact to understand the evidence or determine a fact at issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case), Mr. Knechtel's opinion is substantially undermined by the fact that he has not reviewed Plaintiff's current balance sheet. *See id.* at ¶ 5.

Moreover, although Mr. Knechtel's opinion as to the imminence of Plaintiff's inability to meet expenses as they become due is entitled to some weight, he has offered no opinion as to whether or how quickly Plaintiff would be rendered insolvent in the balance sheet sense. Nor is it clear that he could do so without having reviewed the state of Plaintiff's current balance sheet. Plaintiff's most recent financial statements prepared through the third quarter of 2016 indicate that its total assets [[ ]] its liabilities by approximately $[[ ]], including [[ ]] in the form of approximately $[[ ]] in [[ ]] and $[[ ]] in [[ ]]. Pl.'s Appl. TRO Prelim. Inj. Confidential Exhibits Ex. H at Ex. 9, Jan. 12, 2017, ECF No. 17. Plaintiff's most recent financial statements also demonstrate that it generated a pre-tax net operating [[ ]] through the third quarter of 2016 of approximately $[[ ]]. *Id.* All these facts raise significant doubt that Plaintiff's business would be denied credit to continue operation while the court decides its motion and before Commerce issues its final determination. These facts also raise questions as to whether Plaintiff could access alternative sources of capital to bank financing in order to continue doing business.

Finally, Plaintiff's co-owner and Chief Financial Officer, Mr. Zhou, emphasizes that Plaintiff's most recent financial statement "does not reflect the amount of taxes that will have to be paid by the shareholders of the company which is a subchapter S corporation." Pl.'s Appl. TRO Prelim. Inj. Confidential Exhibits Ex. H at ¶ 20, Jan. 12, 2017, ECF No. 17 (citing *id.* at Ex. 9). Plaintiff has provided no documentation on what distributions were made to shareholders before CBP began requiring STBs. Therefore, the court cannot evaluate the effect such distributions may have had on Plaintiff's current balance sheet.

that may elect, because of business considerations, not to continue business where bankruptcy is not imminent and unavoidable.

Plaintiff argues that it would be unable to utilize other assets to obtain additional financing to pay for STBs because those assets are all pledged in connection with the company's existing line of credit. Oral Arg. 01:20:58–01:22:04. As an initial matter, this argument ignores the possibility of looking to existing shareholders or outside investors for additional capital. In any event, Plaintiff's implication that no financial institutions would consider either expanding Plaintiff's existing line of credit or even provide additional junior lending is unsupported by any evidence. Plaintiff submits no declined credit applications or even communications with financial institutions. Nor has Plaintiff supported its related suggestion that Plaintiff's surety's full collateralization requirement makes it unlikely that other lenders would provide such lending once they learn of CBP's bonding requirement. *See id.* at 01:51:38–01:51:52. In the absence of such documented efforts, the court declines to speculate as to whether, or on what terms, lenders might consider lending to Plaintiff. Moreover, Defendant suggests that Plaintiff's affiliated producer might have as much interest in getting supply to their affiliated importer as Plaintiff. Oral Arg. 01:35:10–01:35:41. Defendant points out that ZH might either negotiate a reduced price or arrange for delayed payment for the period until Commerce's final determination or explore other options to provide its large affiliated importer with greater flexibility to meet obligations. *Id.* Plaintiff offers no documentation to support its speculation that such an arrangement would not be feasible or its implication that the extent of such possibilities have already been exhausted. *Id.* at 01:43:57–1:44:10.

II. Likelihood of Success on the Merits

Plaintiff argues that CBP's determination to demand STB bonding based solely upon Commerce's preliminary determination that ZH's exports have an ADD margin of $4.71/kg is arbitrary and capricious and contrary to law because CBP's determination is tantamount to requiring cash deposits. Pl.'s Mot. 14. Further, Plaintiff contends that Commerce cannot require Plaintiff to post cash deposits until after a final determination in an administrative review, and it is inconceivable that CBP could take an action that forces Plaintiff to post collateral equal to cash deposits when Commerce lacks authority to impose cash deposits. *Id.* at 15. Defendant counters that CBP has broad statutory and regulatory authority and significant discretion to protect the revenue of the United States by requiring enhanced bonding. Def.'s Resp. Br. 11–12 (citing Section 623 of the Tariff Act of 1930,

as amended, 19 U.S.C. § 1623 (2012);[11] 19 C.F.R. § 113.13(d) (2016)).[12] Plaintiff demonstrates inadequate likelihood of success on the merits to warrant granting a preliminary injunction.

Even where a movant shows that it will be irreparably harmed in the absence of an injunction, "the movant must demonstrate at least a 'fair chance of success on the merits' for a preliminary injunction to be appropriate." *U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed.Cir.2005) (internal citations omitted); *Munaf v. Geren*, 553 U.S. 674, 690–91 (2008) (holding it is an abuse of discretion to grant a preliminary injunction because difficult legal issues are present without even considering likelihood of success). The court will only set aside CBP's enhanced bonding determination if the agency's decision to require enhanced bonding is contrary to law or arbitrary and capricious. Section 706 of the Administrative Procedures Act, as amended, 5 U.S.C. § 706(2)(A).[13]

CBP is authorized to require bonds or other security as it deems necessary for the protection of the revenue or to ensure compliance with laws that CBP is authorized to enforce. 19 U.S.C. § 1623(a). CBP has promulgated regulations providing how sufficient bonding is to be determined and providing for review of bond sufficiency to protect revenue and ensure compliance with law. *See* 19 C.F.R. § 113.13(b)–(c). "CBP may immediately require additional security" if it believes acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy. 19 C.F.R. § 113.13(d).

Here, considering CBP's broad authority and discretion to require enhanced bonding, Plaintiff has failed to demonstrate adequate likelihood of success on the merits to warrant a preliminary injunction. At least where CBP has reason to conclude that the importer and merchandise in question may be subject to significant duties, the statute and CBP's regulations grant the agency broad authority and ample discretion to require additional bonding as it may deem necessary to protect revenue or to not hamper the enforcement of all applicable laws and regulations. *See* 19 U.S.C. § 1623; 19 C.F.R. § 113.13(d). Likewise, Plaintiff has failed to demonstrate CBP lacked cause to conclude that Plaintiff's continuous bond would be insufficient to cover potential ADD liability in the amount of $4.71/kg for a high volume importer like Plaintiff. Plaintiff has failed to show that CBP lacked sufficient basis to conclude that Plaintiff would not be in

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

[12] Further citations to the Code of Federal Regulations are to the 2016 edition.

[13] The court reviews actions brought under 28 U.S.C. § 1581(i), *see* Compl. ¶ 16, pursuant to the Administrative Procedures Act, as amended, 5 U.S.C. § 706 (2012). *See* 28 U.S.C. § 2640(e) (2012).

a position to pay cash deposits in the event Commerce decides not to rescind its review and adheres to its preliminary determination. Plaintiff concedes it has limited cash flow and a limited line of credit insufficient to meet its expenses as they become due and to meet sureties' collateral requirements for more than a relatively short period of time. *See* Pl.s Mot. 11; Pl.'s Reply Br. 37–38. By arguing that it is financially unable "to survive with millions of dollars being tied up" in bonds, *see* Pl.'s Reply Br. 35, Plaintiff also admits that it would be unable to meet cash deposit requirements should Commerce not rescind its determination to review ZH. *See id.* In light of the fact that the China-wide rate has not been challenged, Plaintiff's only hope to avoid the financial harm complained of is that Commerce will rescind its review. *See Prelim. Results*, 81 Fed. Reg. at 89,051. Moreover, the fact that ZH was uncooperative further justifies CBP's concerns that allowing Plaintiff to continue importing a large volume of entries with significant potential ADD liability would place future potential ADD revenue in jeopardy.[14] Even if Plaintiff ultimately succeeds in highlighting record information undermining the notion that CBP actually based its bonding determination on concerns about Plaintiff's inability to pay, that does not undermine the fact that CBP had a reasonable basis to conclude that Plaintiff had a high likelihood of default and a large potential ADD liability.

Plaintiff contends that CBP lacks authority to require enhanced bonding for potential ADD liability based on Commerce's determination of a preliminary ADD weighted-average margin. Pl.'s Mot. 11–16; Pl.'s Reply Br. 14–21. Plaintiff's argument flows from its premise that only Commerce may take action that imposes negative consequences based on a respondent's failure to cooperate with its administrative review of an antidumping order.[15] Although it is true that CBP has no

[14] Plaintiff argues that CBP could not have reasonably concluded that an STB in the amount of $4.71/kg is necessary to protect the revenue based solely on the fact that Plaintiff's rate is based on AFA. Pl.'s Reply Br. 18. Plaintiff cites numerous determinations where Commerce has reversed a preliminary decision resulting in a significantly reduced rate in support of its claim. Plaintiff's Reply Br. 17–18 nn.11, 12. However, as discussed, Plaintiff's only basis for obtaining a rate other than the $4.71/kg rate here is to convince Commerce to rescind review because ZH did not participate in the administrative review for the purposes of establishing a separate rate and the China-wide rate is not under review. *See Prelim. Results*, 81 Fed. Reg. at 80,051. CBP has not based its determination to require enhanced bonding solely upon Commerce's preliminary determination to apply AFA, but also upon its quantitative assessment of the scale of Plaintiff's potential ADD liability and a qualitative assessment of the likelihood that Plaintiff would be able to pay those potential liabilities in the event Commerce does not rescind its review.

[15] Plaintiff cites *Mitsubishi Elecs Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994) for the proposition that CBP is limited from taking any independent, non-ministerial action relating to the collection of antidumping duties. *See* Pl.'s Mot. 13–14; Pl.'s Reply Br. 10–11 (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir 1994). However, in *Mitsubishi*, the Court of Appeals for the Federal Circuit held merely that an exporter may not challenge CBP's assessment of antidumping duties on its merchandise

independent authority to require cash deposits without instructions from Commerce, Plaintiff ignores CBP's independent statutory and regulatory authority to require enhanced bonding.[16] More importantly, CBP has not required cash deposits at all, but rather STBs in the amount of potential duties that would be owed by Plaintiff in the event Commerce does not rescind its review with respect to ZH. The surety, not CBP, has required that such bonding be secured by full collateralization.[17] Plaintiff points to no authority requiring CBP to temper its discretionary bonding determinations where private sureties demand security that renders a STB as costly as requiring a cash deposit.[18] Therefore, Plaintiff fails to establish sufficient likelihood of success to warrant granting a preliminary injunction.

through a protest brought pursuant to 19 U.S.C. § 1514(a). *Id.* at 978. Moreover, in *Mitsubishi*, CBP was not acting pursuant to 19 U.S.C. § 1623 to require enhanced bonding, but rather pursuant to its ministerial role of collecting cash deposits as directed by Commerce in its final determination. *See id.* at 975. Although Plaintiff correctly notes that CBP may not modify Commerce's determination or the underlying facts upon which Commerce bases its determination, here CBP has acted pursuant to its independent authority under 19 U.S.C. § 1623 and its regulations to require enhanced bonding. *Mitsubishi* does not limit CBP's authority in this regard. *See id.*

[16] Plaintiff also implies that limiting CBP's authority to independently require enhanced bonding to circumstances where Commerce has instructed CBP to do so is consistent with the cannon of statutory construction that a specific statute controls over a general provision. Pl.'s Reply Br. 11 (citing *Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir 2010)). However, the authority to determine ADDs in an administrative review, *see* 19 U.S.C. § 1675(a)(1)(B), is distinct from the power to require and collect cash deposits that flows from that authority. *See* 19 U.S.C. §§ 1673b(d)(1)(A)–(B), 1673d(c)(1)(B)(ii)–(ii), 1673e(a)(3), and 1673g(a). What is more, the aforementioned powers are separate and distinct from CBP's authority to require enhanced bonding. *See* 19 U.S.C. § 1623.

[17] Plaintiff relies upon *Nat'l Fisheries Inst., Inc. v. U.S. Customs & Border Protection*, 30 CIT 1838, 465 F. Supp. 2d 1300 (2006) ("*Nat'l Fisheries I*"), which it argues holds that fully collateralized STBs are functionally and legally equivalent to requiring cash deposits. Pl.'s Reply Br. 21–24 (citing *Nat'l Fisheries I*, 30 CIT at 1311, 465 F.Supp. 2d 1851. However, in *Nat'l Fisheries I*, the court held only that the financial consequences flowing from obtaining fully collateralized continuous bonds could be considered equivalent to cash deposits when evaluating irreparable harm. *See Nat'l Fisheries I*, 30 CIT at 1311, 465 F.Supp. 2d 1851. The court held that plaintiffs failed to meet their burden of establishing a likelihood of success on the issue of whether CBP is precluded by 19 U.S.C. § 1623 from considering potential antidumping and countervailing duty liability in setting the limit of liability for a continuous bond. *Id.*, 30 CIT at 1319, 465 F. Supp. 2d at 1862. Therefore, the court did not hold that enhanced bonding is legally equivalent to requiring cash deposits in the sense that CBP's enhanced bonding authority stems from the same legal authority as Commerce's authority to require cash deposits. Moreover, in *Nat'l Fisheries*, CBP imposed a very broad enhanced bonding requirement on all importers regardless of their particular circumstances. *See Nat'l Fisheries I*, 30 CIT at 1311, 465 F.Supp. 2d 1851. Here, CBP assessed the particularized magnitude of the risk and made a qualitative judgment about this particular importer's ability to, and likelihood that it would, pay based on its potential exposure.

[18] Plaintiff relies upon *Nat'l Fisheries Inst., Inc. v. U.S. Customs & Border Protection*, 33 CIT 1137, 637 F. Supp. 2d 1270 (2009) ("*Nat'l Fisheries II*"), to argue that CBP acts unlawfully when its enhanced bonding decisions under 19 U.S.C. § 1623 encroach on Commerce's responsibility to calculate ADD liability. *See* Pl.'s Mot. 12–13 (citing *National Fisheries*, 33 CIT 1137, 1148, 1163, 637 F. Supp. 2d 1270, 1282, 1293–94 (2013)), Pl.'s Reply 12 (citing *Nat'l Fisheries II*, 33 CIT at 1163, 637 F. Supp. 2d at 1293–94). As an initial

On a related note, Plaintiff argues that CBP cannot possibly have the authority to require additional security before the publication of a final determination in an administrative review because Commerce lacks such authority. Pl.'s Mot. 14–15; Pl.'s Reply Br. 14–16. Specifically, Plaintiff highlights Commerce's explanation for electing to correct ministerial errors in an annual review in the final results rather than by amending its preliminary results, which it argues evidences that Commerce does not amend preliminary determinations even if it discovers that a rate is incorrect due to a clerical error. *See* Pl.'s Mot. 14–15; Pl.'s Reply Br. at 15–16 (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,327 (Dep't Commerce May 19, 1997) (final rule). Plaintiff implies that Commerce's explanation for declining to correct ministerial errors in the preliminary results of an annual review demonstrates that CBP lacks authority to attach consequences to Commerce's preliminary determinations where Commerce does not.[19] *See* Pl.'s Reply Br. 14–15. Commerce's rationale in choosing to allocate its resources appears to stem from the fact that a preliminary determination does not give rise to cash deposits. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,327. Commerce's recognition that its preliminary determination does not give rise to cash deposits does not evidence Congress's intent to limit CBP's authority under 19 U.S.C. § 1623.

Further, Plaintiff invokes the court's rationale in *Sunpreme Inc. v. United States*, 40 CIT __, 145 F. Supp. 3d 1271 (2016), arguing that it

matter, in *Nat'l Fisheries II*, the court concluded that 19 U.S.C. §§ 1673e(a)(3) or 1673g(a), which require posting of a cash deposit to secure estimated antidumping duties, do not prohibit CBP from considering potential ADD liability when setting limits of liability on continuous bonds. *See Nat'l Fisheries II*, 33 CIT at 1148, 637 F. Supp. 2d at 1282. In fact, CBP required a continuous bond for all importers equal to 100% of cash deposits for the preceding year where Commerce had also directed the collection of cash deposits. *See id.*, 33 CIT at 1165, 637 F. Supp. 2d at 1295. The court declined even to limit CBP's authority to require enhanced bonding to secure potential antidumping duty liability that effectively doubled the cash deposit ordered by Commerce. *See id.*, 33 CIT at 1158, 637 F. Supp. 2d at 1290. The court determined that CBP's enhanced bonding was not justified by the record, but the court explicitly declined to limit CBP from imposing some increase in bonding requirements in excess of cash deposits when an importer's particular financial situation makes it appropriate to do so. *See id.*, 33 CIT at 1166–67, 637 F. Supp. 2d at 1296. Here, Defendant argues that the magnitude of Plaintiff's potential exposure and the qualitative risk arising from both Plaintiff's decision not to cooperate in Commerce's administrative review and the large potential liability caused CBP to require STBs are insufficient to justify enhanced bonding. *See* Pl.'s Reply Br. 9. Plaintiff points to nothing in the record that makes it likely that Plaintiff can show CBP lacked a basis to reach such a conclusion.

[19] In response to commenters' proposal that 19 C.F.R. § 351.224(c) be amended to provide for correction of ministerial errors in preliminary results calculations because of "significant commercial harm" caused by publication of erroneous preliminary dumping margins in administrative reviews, Commerce declined to do so. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,327. Commerce justified its determination by explaining that it did not feel it was a wise expenditure of resources to correct ministerial errors before the final results because preliminary results have no immediate legal consequences and it could not identify the "significant commercial harm" identified by the commenters. *Id.*

is inconceivable that the regulatory scheme would permit CBP, which is charged with implementing Commerce's cash deposit instructions in ADD administrative reviews, to demand enhanced bonding in an amount equivalent to the margin calculated in a preliminary determination where Commerce lacks authority to order the collection of cash deposits at the same point in a proceeding. Pl.'s Mot. 14 (citing *Sunpreme Inc. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1271, 1287 (2016)) Pl.'s Reply Br. 16 (citing *Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1287). Plaintiff's reliance on the court's rationale in *Sunpreme* is misplaced. Here, CBP is acting pursuant to independent statutory and regulatory authority to require enhanced bonding in an administrative review where there is no question that the scope of the order includes Plaintiff's merchandise. In *Sunpreme*, the court held that the regulatory scheme concerning the collection of cash deposits where the scope of an antidumping or countervailing duty order is ambiguous could not permit CBP to collect cash deposits where Commerce had no authority to order cash deposits. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1286–87. The court's holding did not address CBP's separate legal authority to require enhanced bonding. *See id.*

Plaintiff also implies that CBP has usurped Commerce's authority to determine whether a respondent's actions warrant an adverse inference as well as Commerce's authority to determine whether a respondent's actions that led to such an adverse inference warrant expedited action. *See* Pl.'s Reply Br. 11. However, by ordering enhanced bonding, CBP has not applied an adverse inference based on Commerce's preliminary determination. Rather, CBP has acted consistently with Commerce's own adverse inference and determined that the magnitude of the potential risk to future revenues is commensurate with the preliminary rate determined by Commerce in its preliminary determination. As already discussed, Plaintiff's decision not to cooperate with Commerce's administrative review combined with the fact that no party challenged the China-wide rate makes it certain that Plaintiff cannot qualify for a lower ADD rate except if Commerce rescinds its review. *See Prelim. Results*, 81 Fed. Reg. at 89,051. Thus, it is unlikely that Plaintiff will be able to demonstrate that CBP has usurped Commerce's authority to determine an ADD rate because CBP has demanded STBs only commensurate with the ADD rate determined by Commerce. Moreover, CBP's decision to collect STBs at a rate of $4.71/kg does not foreclose the possibility of Commerce expediting its review to ensure quicker collection of cash deposits.

Next, Plaintiff argues that CBP cannot require STBs to eliminate the risk associated with the retrospective antidumping and counter-

vailing duty assessment system in the absence of express Congressional authority to do so. Pl.'s Mot. 16–18; Pl.'s Reply Br. 24–27. Plaintiff cites the example of Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015 (commonly referred to as the "Enforce and Protect Act of 2015" or "EAPA"), which authorizes CBP to require enhanced bonding if it determines there is reasonable suspicion an importer is entering subject merchandise by means of a material and false statement or omission that results in the reduction of any cash deposit or applicable antidumping or countervailing duties with respect to the merchandise. Pl.'s Mot. 16–17; Pl.'s Reply Br. 25 (citing Trade Facilitation and Trade Enforcement Act of 2015 § 517 Pub. L. No. 114–125, 130 Stat. 122, 163–67 (to be codified at 19 U.S.C. § 1517 ("EAPA")). Plaintiff implies Congress could have granted CBP similar authority to require enhanced bonding outside of the evasion context, but it has not done so. *See id.* But Congress has given CBP authority to secure against revenue losses in 19 U.S.C. § 1623. EAPA gives CBP separate authority to require enhanced bonding in circumstances where Commerce could not act to secure revenues by collecting cash deposits because an importer has taken steps to evade an antidumping or countervailing duty order. *See* EAPA, Pub. L. 114–125, 130 Stat. 167). Nothing about Congress's action to permit CBP to demand additional security in the evasion context undermines Congress's separate grant of authority to CBP to require enhanced bonding under 19 U.S.C. § 1623.

Plaintiff next argues that requiring STB bonding is functionally equivalent to requiring cash deposits because Customs is aware that the financial impact would be identical to that of a decision by Commerce to require cash deposits in the same amount. Pl.'s Reply Br. 23. Plaintiff further argues that CBP is barred from requiring Plaintiff to post STBs in an amount equivalent to a cash deposit rate based upon Commerce's preliminary determination. *See id.* As an initial matter, it is unclear that the affidavits submitted by Plaintiff establish an industry-wide practice in the surety industry of requiring full collateralization.[20] Even if it is standard practice in the surety industry to require full collateralization to secure antidumping duties, it would not make sense to limit CBP's authority to require STBs to lower risk situations where sureties would be unlikely to require additional collateral. The statute and CBP's regulations gives CBP more discretion to consider enhanced bonding necessary where there is greater risk to the revenue. *See* 19 U.S.C. § 1623; 19 C.F.R. § 113.13(d).

[20] Plaintiff submits one affidavit from its own surety saying it will require full collateralization and documentation from the website of one other surety saying that it normally requires more collateral for STBs. *See* Pl.'s Reply Def.'s Opp'n Pl.'s Mot. Prelim. Inj. Confidential Exs. B, C, Jan. 26, 2017, ECF No. 37–2–3.

Lastly, Plaintiff attempts to distinguish other cases where the Court has sustained CBP's determinations to require enhanced bonding pursuant to 19 U.S.C. § 1623. *See* Pl.'s Mot. 23–25; Pl.'s Reply Br. 27–33. Plaintiff argues that the cases together stand for the proposition that CBP's authority to require enhanced bonding is limited to circumstances in CBP's own area of expertise such as verifying the truthfulness, reliability, and relevance of entry documentation submitted by an importer to qualify for a particular antidumping rate. Pl.'s Mot. 23–25 (citing *Int'l Fresh Trade Corp. v. United States*, 38 CIT __, __, 26 F. Supp. 3d 1363, 1365 (2014) ("*Int'l Fresh Trade*"); *Kwo Lee, Inc. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1322 (2014) ("*Kwo Lee I*"); *Kwo Lee, Inc. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1369 (2015) ("*Kwo Lee II*"); *Premier Trading, Inc. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1354 (2016) ("*Premier Trading*")); Pl.'s Reply Br. 27–33 (citing Mem. and Order, Dec. 23, 2013, ECF No. 19 in *Yin Xin Int'l Trading Co., Ltd. and Jinxiang Hejia Co., Ltd. v. United States Customs & Border Protection* in Court No. 13–00392 *("Yin Xin"); Int'l Fresh Trade*, 38 CIT at __, 26 F. Supp. 3d at 1365; *Kwo Lee I*, 38 CIT at __, 24 F. Supp. 3d at 1322; *Kwo Lee II*, 39 CIT at __, 70 F. Supp. 3d at 1369; *Premier Trading*, 40 CIT at __, 144 F. Supp. 3d at 1356). Although these cases involved circumstances where CBP was investigating facts concerning the appropriateness of applying a combination ADD rate established by Commerce to individual importers, none of these cases limit CBP's authority to require additional security pursuant to 19 U.S.C. § 1623 based upon potential ADD liability.[21] Given CBP's broad authority and discretion to require enhanced bonding under 19 U.S.C. § 1623 where it reasonably

[21] In *Yin Xin*, Plaintiff had similarly argued that, by requiring enhanced bonding that differed from the zero cash deposit rate obtained by Plaintiff in a new shipper review for respondents qualifying for a separate producer-exporter rate, CBP had intruded on the substantive authority of Commerce to determine an ADD cash deposit rate. *See Yin Xin* at 1–2. After initially granting Plaintiff a TRO, the court concluded it had done so improvidently because CBP thoroughly explained its quantitative and qualitative assessment of the risk to the revenue posed by Plaintiff's conduct. *Id.* at 2. CBP's inquiry involved assessing the accuracy of documentation submitted by Plaintiffs to establish the company's entitlement to a separate rate that required it to show that the company is both the producer and exporter of subject merchandise. *Id.* at 2–3. CBP recognized information calling into question whether the company is the producer, and the court concluded CBP had reasonable basis to doubt Plaintiff's entitlement to the producer/exporter separate rate. *Id.* at 3. However, the court did not address any limitations on CBP's authority under 19 U.S.C. § 1623 other than to require a thorough and comprehensive explanation of the risk to the revenue under the statutory and regulatory framework. *See id.* at 2–3.

Similarly, in *Int'l Fresh Trade*, CBP had imposed a STB equal to Plaintiff's potential ADD liability at the China-wide rate rather than the cash deposit rate applicable under an exporter-producer rate because of discrepant information in the imports' phytosanitary certificates and other documentation requested to verify the producer and shipper of the entries. *See Int'l Fresh Trade*, 38 CIT at __, 26 F. Supp. 3d at 1365. The court recognized CBP's broad authority to require additional security equal to an importer's potential ADD liability. Id., 38 CIT at __, 26 F. Supp. 3d at 1369. Moreover, the court concluded that CBP

concludes that there is a large scale exposure to potential antidumping duties and reasonable basis to conclude that the importer would be unable to meet potential ADD liability, the cases relied upon by Plaintiff do not demonstrate that Plaintiff is likely to succeed on the merits of its claim.

III. Balance of the Hardships

Plaintiff argues that the balance of the hardships favors granting a preliminary injunction because Commerce's prior determinations granting it a cash deposit rate of $0.00 continuously since May 4, 2006 demonstrate the possibility that enhanced bonding is unnecessary to protect the revenue. *See* Pl.'s Mot. 26 (citing *Kwo Lee I*, 38 CIT at __, 70 F. Supp. 3d at 1331–32). Plaintiff contends that the hardship the court must evaluate is the severe consequence of posting fully-collateralized STBs (*i.e.*, that it will be forced out of business). Pl.'s Reply Br. 45. Defendant responds the risk to the government of losing a significant sum of ADDs without a bond exceeds the harm to Plaintiff of posting security. Def.'s Resp. Br. 28. Defendant contends that Plaintiff has failed to demonstrate that posting security would force it out of business in the time before Commerce issues its final determination. Def.'s Resp. Br. 28. Moreover, Defendant argues that the alleged harm suffered by Plaintiff in posting collateral as security is an expected cost of importing a high risk commodity such as garlic

did not act arbitrarily and capriciously because it relied on facts that undercut Plaintiff's claim of the identity of the exporter, which called into question Plaintiff's entitlement to the combination producer-exporter rate. *Id.* The court held that, in reaching such a determination, CBP did not make a determination regarding Chinese government control or the applicability of the China-wide rate, which the court acknowledged are Commerce's responsibility in the ADD regime. *Id.*

In *Kwo Lee I* and *Kwo Lee II*, CBP had imposed an STB in identical circumstances to those in *Int'l Fresh Trade* in that there was missing and possibly discrepant information regarding who the producer of the merchandise was to establish entitlement to a producer-exporter rate. *See Kwo Lee I*, 38 CIT at __, 24 F. Supp. 3d at 1329, Kwo Lee II, 39 CIT at __, 70 F. Supp. 3d at 1372; *Int'l Fresh Trade*, 38 CIT at __, 26 F. Supp. 3d at 1365. In *Kwo Lee II*, which was the court's decision on the motion for judgment on the agency record following its grant of a preliminary injunction in *Kwo Lee I*, the court held that Customs did not purport to assign the China-wide rate, but only determined that it could not identify the producer of garlic with any certainty based upon the documentation provided. *Kwo Lee II*, 39 CIT at __, 70 F. Supp. 3d at 1375.

Finally, in *Premier Trading*, the court denied a motion for a preliminary injunction and TRO because of deficiencies in the plaintiff's moving papers in attempting demonstrate irreparable harm and the plaintiff's failure to make any argument regarding the applicable law to support its assertion that it is likely to succeed on the merits. *See Premier Trading*, 40 CIT at __, 144 F. Supp. 3d at 1358–59. On the likelihood of success on the merits point, the court only noted the Plaintiff submitted no documentation refuting CBP's documentation demonstrating Plaintiff's connection to other importers with a pattern of non-payment or underpayment, which the court concluded supported CBP's claim that Plaintiff poses a risk to the revenue. *Id.*, 40 CIT at __, 144 F. Supp. 3d at 1359. The holding in *Premier Trading* is therefore limited to the facts before the court. *See id.* In any event, the court did not address limitations on CBP's authority to require enhanced bonding under 19 U.S.C. § 1623.

from China. *Id.* Plaintiff has not established that the balance of the hardships weighs in favor of granting the preliminary injunction.

When considering a motion for preliminary injunction, the court must "balance the competing claims of injury and must consider the effect" that granting or denying relief would have on each party. *Winter*, 555 U.S. at 24. Here, if injunctive relief is denied, Plaintiff would be required to post STBs on its entries until publication of Commerce's final results, which is currently expected to be in June of 2017. Pl. Mot. 6. Without a bond or some other security on Plaintiff's entries, CBP faces a significant potential loss of the duties owed should Commerce adhere to its preliminary determination and Plaintiff is unable to pay.[22] Plaintiff concedes that it still may go out of business in the event Commerce adheres to its preliminary determination in June. Oral Arg. 00:43:01–00:45:01. Although Plaintiff asserts that it cannot operate in the interim while posting the STBs, as already discussed, the documentation submitted by Plaintiff fails to establish that posting STBs will force Plaintiff out of business before Commerce issues its final determination.

Here, the risk to CBP that it would lose a significant sum of ADDs without bonding exceeds the harm to Plaintiff of being forced to post security for potential ADDs. Moreover, it would be difficult for CBP to fulfill its mandate to protect the revenues if it had to take into account the conditions of requiring full collateralization imposed by the surety marketplace.

Balancing the hardship also requires the court to balance the equities. *Winter*, 555 U.S. at 20. Here, it is within Plaintiff's power to avoid the risks it now faces. Plaintiff admits that it carefully considered its options and decided, as a business strategy, not to respond to Commerce's questionnaire.[23] Pl.'s Mot. 6. If Commerce does not rescind its determination to review ZH, Plaintiff would face the same financial exposure it now faces. Plaintiff's exposure to the risk it now faces came earlier than it calculated; but it is the same risk for which the Plaintiff bargained. The equities cannot tip in favor of a Plaintiff

[22] CBP estimates that the damage it would sustain in the event Commerce adheres to its preliminary determination and Plaintiff is unable to pay would exceed $200 million for imports entered during the 21st period of review (*i.e.*, those between November 1, 2014 and October 31, 2015). Def.'s Resp. Br. 21, 28.

[23] At oral argument, Plaintiff acknowledges that its leadership discussed the risks of not responding with counsel and weighed those risks against the potential costs of participation in this review and the likelihood that Plaintiff could be forced to participate in many future reviews if unsubstantiated allegations alleged by Chinese companies through third parties were sufficient to trigger review of ZH's exports. *See* Oral Arg. 00:09:48–11:02. Plaintiff further acknowledges that it considered that a consequence of its decision could include a decision by Commerce to stand by its decision not to rescind review. *Id.* at 00:11:05–00:11:35. Lastly, Plaintiff acknowledges that a consequence of Commerce's decision could cause it to decide to wind down its business. *Id.*

that knowingly placed its very existence at risk even if Plaintiff expected the timing of the risks to be different.

Plaintiff attempts to distinguish the risks to the company arising from the potential of Commerce to require cash deposits after making a final determination from those that it faces under CBP's STB requirement. Plaintiff argues, in part, that its counsel would be able to anticipate a likely negative outcome in a final determination a few months in advance of a negative determination by Commerce after submitting case briefs and appearing before Commerce. Oral Arg. 00:44:01–0044:26. Plaintiff implies that this additional time to prepare to do business under strained circumstances distinguishes the harm posed by CBP's bonding determination from that posed by Commerce's potential cash deposit requirement. *See* Oral Arg. 00:44:26–00:45:02. But this argument only serves to underscore the inequity of granting a preliminary injunction. Plaintiff should have anticipated that potential ADD liability was only months away, and it should have been taking steps to place itself in a better financial position to sustain the potential harm caused by a negative determination by Commerce. Here, the potential inequity of the risk to Plaintiff, a sophisticated party that is cognizant of its potential exposure, is outweighed by leaving CBP without recourse to secure potential ADD liability. Plaintiff's failure to anticipate CBP's STB requirement cannot excuse its ill-preparedness and undercapitalization particularly where Plaintiff concedes that it knowingly exposed itself to such risk.

IV. The Public Interest

Plaintiff contends that, in the absence of an injunction, it will be forced out of business and will accordingly lose its right to effective and meaningful judicial review. Pl. Mot. 27. Plaintiff also contends that the public interest is also served by granting injunctive relief because an injunction would ensure that the agencies uniformly and fairly enforce the trade laws. *Id.* Defendant responds that Congress's decision to give CBP the authority to require enhanced bonding evidences the strong public interest in protecting the revenue of the United States. Def.'s Resp. Br. 27. Defendant also contends that enjoining CBP from collecting security to protect against the loss of revenue essentially would not serve the public interest in securing the revenue because it would deprive the government of ADDs. *See id.* The court must determine whether the public interest would be better served by issuing than by denying the preliminary injunction, *Zenith Radio*, 710 F.2d at 809, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of in-

junction." *Winter,* 555 U.S. at 24. The public interest in securing potential antidumping duties and in ensuring compliance with the trade laws favors denying Plaintiff's motion.

Congress made clear that protecting the revenue of the United States is a significant public interest. *See* 19 U.S.C. § 1623. CBP's request that Plaintiff post STBs on its entries serves these interests by providing security that the appropriate ADDs will be paid on the entries. The revenue that is to be protected by the STBs stems from potential antidumping duties due on Plaintiff's entries. Plaintiff avers that it will not be able to post the collateral required to obtain STBs and will be forced into insolvency if required to post STBs on its entries that would be imported prior to Commerce issuing its final determination in June of 2017. Pl. Mot. 11. Thus, there is significant risk that Plaintiff would ultimately be unable to pay the antidumping duties that would be assessed if Commerce adheres to its preliminary determination.

The public interest is also served by permitting the agencies charged with enforcing the trade laws to implement measures that ensure accurate, effective, uniform, and fair enforcement of the trade laws by encouraging parties to cooperate with Commerce and respond to Commerce's questionnaires. To grant the preliminary injunction motion would be to implicitly endorse exporters' non-cooperation with Commerce, which would be contrary to the significant public interest in promoting the accurate and effective, uniform and fair enforcement of the trade laws. That Plaintiff has failed to demonstrate likelihood of success on the merits of its claim also undercuts its contention that granting its motion would promote the effective and fair enforcement of the trade laws. CBP's collection of STBs on Plaintiff's entries serves these public interests by providing additional security that the appropriate antidumping duty will be paid on the entries.

Although courts have long recognized that the loss of meaningful judicial review is an irreparable injury, *see, e.g.,* Zenith 710 F.2d at 810, Plaintiff does not allege that its claim would be legally barred. Rather, Plaintiff alleges it will be out of business before being afforded the right to Commerce's review of its determination and judicial review of Commerce's determination. Pl.'s Mot. 27. For the reasons already discussed, Plaintiff has not established that it would be forced out of business while awaiting Commerce's final determination or the court's review of CBP's determination.

Plaintiff argues that the public interest favors granting its injunction because it is "not a bad actor." Pl.'s Reply Br. 47. Plaintiff further contends that it has a pristine record of compliance and a history of

acting as a "whistleblower" against bad actors. *See Id.* ; *see also* Oral Arg. 01:15:53–01:16:08. Thus, Plaintiff implies that the public interest favors granting it injunctive relief from STBs because it would encourage similarly situated parties who comply with the trade laws and, by extension, discourage exporters looking to game the system. *See* Pl.'s Reply Br. 47; Oral Arg. 01:15:53–01:16:08. Commerce is charged with administering the ADD laws, and CBP is charged with collecting and protecting the revenues associated with that administration. Those agencies, and not the court, are in the best position in the first instance to distinguish good actors from bad and small risks to revenue from large ones. The court lacks a record upon which to evaluate the interests and intent of Plaintiff.

CONCLUSION

Plaintiff fails to make a sufficient showing on the factors to warrant granting its motion for a preliminary injunction.

Therefore, upon consideration of Plaintiff's motion for preliminary injunction, Defendant's response thereto, Plaintiff's reply, and all other papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that Plaintiff's motion for preliminary injunction is denied.

Dated: February 7, 2017
New York, New York

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

Slip Op. 17–26

CS WIND VIETNAM CO., LTD., and CS WIND CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00102

[Commerce's Results of Redetermination in antidumping duty investigation are sustained.]

Dated: March 16, 2017

Bruce M. Mitchell, Andrew B. Schroth, Ned H. Marshak, and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for plaintiffs.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Direc-

tor, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emily R. Beline*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, Daniel B. Pickard, Robert E. DeFrancesco, III, and *Derick G. Holt*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor.

OPINION

Restani, Judge:

This matter is before the court following a remand to the U.S. Department of Commerce ("Commerce") ordered after the Court of Appeals for the Federal Circuit ("Federal Circuit") issued its mandate in *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367 (Fed. Cir. 2016) ("*CS Wind IV*"). In *CS Wind IV*, the Federal Circuit reversed this court's "affirmance of Commerce's use of packing weights rather than component weights in its calculation of surrogate values," and "direct[ed] Commerce to use the manufacturer-reported weights in its calculation." *Id.* at 1374, 1381. In addition, the Federal Circuit vacated this court's "affirmance of Commerce's overhead determination with respect to jobwork charges, erection expenses, and civil expenses." *Id.* at 1381. This court remanded to Commerce the issues of weights selection and overhead determination. Order 1, Oct. 4, 2016, ECF No. 101 ("Remand Order"). Subsequently, Commerce issued its Final Results of [Third] Redetermination Pursuant to Court Order, ECF No. 104–1. ("*Third Remand Results*"). Defendant-Intervenor Wind Tower Trade Coalition ("WTTC") opposes the *Third Remand Results* on several grounds. Def.-Intvr. the Wind Tower Trade Coalition's Cmts. on Final Results of Redetermination Pursuant to Ct. Order 7–29, ECF No. 108 ("WTTC Cmts."). For the following reasons, Commerce's *Third Remand Results* are sustained.

BACKGROUND

The court presumes familiarity with the underlying facts and procedural history of this case, and provides only the following relevant facts.

I. Weights Selection

In *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1287–88 (CIT 2014) ("*CS Wind I*"), this court sustained Commerce's decision to base the actual weight of CS Wind Vietnam Co., Ltd. ("CS Wind")'s wind towers for the normal value calculation on the weights found in a transoceanic packing list ("packed weights"), rather than on the net weight of the factors of production reported by CS Wind ("manufacturer-reported weights"). The court agreed with Commerce's rationale that the packed weights would not likely have been

"so grossly overestimated as to chance the misplacement of the wind tower section on a shipping vessel and risk an imbalance of the vessel or rolling of the tower section in transit." *Id.* at 1288 (quoting Issues and Decision Mem. for the Final Determination at 31, barcode 3111148–01 (Dec. 17, 2012)). On appeal, the Federal Circuit decided that substantial evidence did not support Commerce's conclusion that the packed weights were more reliable than the manufacturer-reported weights. *CS Wind IV*, 832 F.3d at 1374. The Federal Circuit reasoned that "there is no evidence that either (a) a mere 4% difference in overall weight [between the packed weights and manufacturer-reported weights] or (b) the specific difference in weight figures for the small internal-components portion of the towers [in the manufacturer-reported weights] would make a difference in maintaining balance on the vessels used for transportation here." *Id.* Accordingly, the Federal Circuit reversed this court's affirmance of Commerce's use of the packed weights. *Id.* at 1381. In addition, the Federal Circuit "direct[ed] Commerce to use the manufacturer-reported weights in its calculation." *Id.* at 1374. This court then instructed Commerce to follow the Federal Circuit's direction to use the manufacturer-reported weights in its calculation. Remand Order at 1. In the *Third Remand Results*, Commerce selected under protest the manufacturer-reported weights. *Third Remand Results* at 7. Commerce's sole reason for this choice was the Federal Circuit's "direct[ion]" and this court's accordant remand instructions. *Id.*

II. Surrogate Financial Ratios

A. *Erection / Civil Income Ratio*

Commerce uses surrogate financial ratios, which it converts to percentages, to calculate the "general expenses and profit" to be included in normal value. *See* 19 U.S.C. § 1677b(c)(1)(B) (requiring that the normal value for products from nonmarket economies include amounts for "general expenses and profit"); *Hebei Metals & Minerals Imp. & Exp. Corp.*, 29 CIT 288, 303 n.7, 366 F. Supp. 2d 1264, 1277 n.7 (2005). The surrogate financial ratios include the selling, general, and administrative ("SG & A") ratio, the overhead expense ratio, and the profit ratio. *Hebei Metals*, 29 CIT at 303 n.7, 366 F. Supp. 2d at 1277 n.7. Commerce applies these ratios to the factors of production in order to calculate normal value. *See* 19 U.S.C. § 1677b(c)(1)(B); *Hebei Metals*, 29 CIT at 303 n.7, 366 F. Supp. 2d at 1277 n.7. To calculate the surrogate financial ratios, Commerce relies on surrogate financial statements, here, from Ganges Internationale Private Limited ("Ganges"). *See CS Wind Viet. Co. v. United States*,

Slip Op 15–45, 2015 WL 2167462, at *2 (CIT May 11, 2015) (*"CS Wind III"*). One particular expense line item in Ganges' financial statements has proven particularly difficult to deal with—"Jobwork Charges (including Erection and Civil Expenses)."[1] For reasons discussed below, Commerce has employed an "erection/civil income ratio," albeit in evolved forms, to determine what amount of the jobwork charges line item to include as overhead expenses. *See CS Wind III*, 2015 WL 2167462, at *1–7; *CS Wind Viet. Co. v. United States*, Slip Op. 14–128, 2014 WL 5510084, at *2, 6–7 (CIT Nov. 3, 2014) *("CS Wind II"); Third Remand Results* at 7–16.

The erection/civil income ratio sustained by this court in *CS Wind III* and remanded by the Federal Circuit in *CS Wind IV* worked as follows. *See CS Wind III*, 2015 WL 2167462, at *1–5. Commerce derived the ultimate (adjusted) erection/civil income ratio by combining an unadjusted erection/civil income ratio with a "raw materials/direct labor exclusion ratio." *Id.* at *4 & n.5. The unadjusted erection/civil income ratio, defined as "a," was:

$$a = \frac{EI + CI}{SOJW + EI + CI + SOFG + Scrap}$$

Where EI = Erection Income, CI = Civil Income, SOJW = Sales of Jobwork, SOFG = Sales of Finished Goods, and Scrap = Sales of Scrap. *Id.* at *4 n.5. The raw materials/direct labor exclusion ratio, defined as "b" and derived from values in the *expense* side of the financial statements, was:

$$b = 1 - \frac{RM + DL}{RM + DL + E + O}$$

Where RM = Raw Materials, DL = Direct Labor, E = Energy, and O = Overhead. *CS Wind III*, 2015 WL 2167462 at *4 n.6; *see also CS Wind IV*, 832 F.3d at 1379 n.5 (explaining Commerce's methodology of excluding raw material and direct labor expenses from the erection/civil income ratio). The adjusted erection/civil income ratio was:

$$a\ (adjusted) = \frac{b * EI + b * CI}{SOJW + b * EI + b * CI + b * SOFG + b * Scrap}$$

CS Wind III, 2015 WL 2167462 at *4 n.7. Commerce's erection/civil income ratio yielded a percentage, 8.62%, which it then multiplied by the jobwork charges line item, subtracting the resulting amount from

[1] "Erection expenses" are expenses "for setting up the tower on the foundation," and "civil expenses" are "payments for preparing the foundation on which to set a tower." *CS Wind IV*, 832 F.3d at 1370. Together, these activities are referred to as "tower setup." *Id.*

the total value of the jobwork charges line item. *Id.* Commerce then included the remaining portion of the jobwork charges line item in overhead expenses for use in the surrogate financial ratios. *Id.*

In its *Third Remand Results*, Commerce has once again revised the erection/civil income ratio, this time by: (1) eliminating Sales of Jobwork from the denominator of the erection/civil income ratio, *Third Remand Results* at 8, 11; (2) removing Direct Labor from the numerator of the raw materials/direct labor exclusion ratio, thus changing the raw materials/direct labor exclusion ratio to a "raw materials exclusion ratio," *id.* at 8; (3) choosing to apply the raw materials exclusion ratio only to Sales of Finished Goods and Scrap, *id.* ; and (4) multiplying the erection/civil income ratio by "Store and Spares" expenses and "In-House Labor" expenses[2] in addition to the jobwork charges line item, and then subtracting the resulting amounts from overhead expenses, *id.* at 7–8, 11. Thus, the new unadjusted erection/civil income ratio is:

$$a = \frac{EI + CI}{EI + CI + SOFG + Scrap}$$

The new raw materials exclusion ratio is:

$$b = 1 - \frac{RM}{RM + DL + E + O}$$

And the new adjusted erection/civil income ratio is:

$$a\ (adjusted) = \frac{EI + CI}{EI + CI + b * SOFG + b * Scrap}$$

The revised erection/civil income ratio resulted in a percentage of 26.42%, which, as discussed, Commerce applied to the jobwork charges line item, In-House Labor expenses, and Store and Spares expenses. *Third Remand Results* at 8, Analysis Mem. at Attach. 1. Due to the revisions adopted in the *Third Remand Results*, the overhead and SG & A ratios lowered from 20.16% and 10.50% to 16.49% and 10.42%, respectively. *See Third Remand Results* at 11; Final Redetermination Pursuant to Ct. Order 8, ECF No. 82 ("*Second Remand Results*"); Results of Redetermination Pursuant to Ct. Order

[2] Commerce does not explicitly identify the line items it considers to constitute In-House Labor expenses. Commerce apparently uses the term, however, to refer to the following expense items: (1) "Salaries, Wages and Bonus"; (2) "Contribution to Provident and Other Fund"; and (3) "Workmen and Staff Welfare Expenses." *See* Analysis Mem. for Draft Results of Redetermination at Attach. 1, PD 2 (Nov. 23, 2016) ("Analysis Mem.") (listing items to which Commerce applied the erection/civil income ratio).

18, ECF No. 57 ("*First Remand Results*"). In addition, because of the *Third Remand Results*'s revisions, the antidumping duty margin on CS Wind's towers was reduced from 17.02% to 0.0%. *See Third Remand Results* at 20; *Second Remand Results* at 8.

B. Solicitation of Information from Ganges

Presumably in an effort to avoid the need for Commerce's complex methodology, the Federal Circuit in *CS Wind IV* directed Commerce to say on remand whether Commerce has the authority to seek clarifying information from a third party surrogate value company like Ganges. 832 F.3d at 1380. The Federal Circuit also requested Commerce, if it possesses authority to seek such clarification, to "explain why it is reasonable to refrain from [doing so], generally or in this particular matter." *Id.* In its *Third Remand Results*, Commerce notes that it has the authority to seek clarifying information from a third party surrogate value company like Ganges. *Third Remand Results* at 12–13. But, Commerce states, it "maintains a practice of refraining from 'peeking behind' the underlying data of surrogate financial statements placed on the record by interested parties[.]" *Id.* at 12. Commerce explains this position by saying that it cannot compel responses from third parties, that it cannot ensure the timeliness or accuracy of responses, and that dealing with the responses would be a burden and generally is not likely to result in valuable data. *Id.* at 14–15. Thus, Commerce has not issued a questionnaire to Ganges seeking clarification regarding its financial statements. *Id.* at 15–16.

III. Steel Plate Surrogate Value

In response to the solicitation by Commerce of comments on Commerce's Draft Results of Redetermination Pursuant to Court Order, PD 1 (Nov. 23, 2016) ("*Draft Third Remand Results*"), WTTC encouraged Commerce to revise the surrogate value for steel plate consumed by CS Wind because "information developed in the first administrative review conclusively demonstrates that its surrogate value selection is simply wrong and based on material misstatements by CS Wind." WTTC Cmts. at 24.[3] CS Wind submitted new Steel Guru India ("Steel India") data during the first administrative review in January

[3] The court relies on WTTC's characterization of its comment because, due to Commerce's rejection of the comment, the comment's text was omitted from the record. *See* WTTC Cmts. on Third Draft Results of Redetermination at Attach. 1, PD 9 (Dec. 7 2016) ("WTTC Draft Remand Cmts.") (lacking text of WTTC's comment on steel plate surrogate value); Commerce Letter Rejecting WTTC's Original Cmts. on Draft Remand at 1, PD 7 (Dec. 5, 2016) ("Rejection Letter"). In its rejection of the comment, however, Commerce similarly characterizes WTTC's comment as "provid[ing] information that [WTTC] stated pertains to the type of steel used to produce wind towers." Rejection Letter at 1.

of 2015. *See* Def.'s Resp. to Cmts. on the Final Results of [Third] Redetermination 17, ECF No. 118 ("Gov't Resp."); Decision Mem. for the Final Results of the 2013–2014 Administrative Review of the Antidumping Duty Order on Utility Scale Wind Towers from the Socialist Republic of Vietnam at 9 & n. 25, A-552–814, (Sept. 8, 2015), *available at* http://enforcement.trade.gov/frn/summary/vietnam/2015–23155–1.pdf (last visited Mar. 2, 2017) ("First AR I&D Memo"). CS Wind's submission of new Steel India data occurred after the court sustained Commerce's selection of the original Steel India data over Global Trade Atlas ("GTA") import data in *CS Wind II* in November of 2014, but before WTTC submitted comments in February of 2015 on Commerce's *Second Remand Results. See* Def.-Intvr. Wind Tower Trade Coalition's Cmts. on Final Redetermination Pursuant to Ct. Order 1, ECF No. 85 ("WTTC Second Remand Results Cmts."). No party opposed Commerce's continued use of the original Steel India data in the *Second Remand Results*, sustained by this court in *CS Wind III*, or appealed the matter to the Federal Circuit in *CS Wind IV*. In the latest remand proceeding Commerce refused to consider WTTC's comment regarding steel plate surrogate value because of its "unsolicited argument and factual information." Rejection Letter at 1.

WTTC makes several arguments in opposition to the *Third Remand Results*. First, WTTC contends that Commerce failed to adequately explain its decision to use the manufacturer-reported weights instead of the packed weights in its calculations. WTTC Cmts. at 9–18. Second, WTTC argues that Commerce should have requested clarifying information from Ganges regarding the jobwork charges line item. *Id.* at 18–23. Lastly, WTTC submits that Commerce should have the opportunity to revise its surrogate value for CS Wind's steel plate input because the data used in the *Third Remand Results* is "wrong and based on material misstatements by CS Wind." *Id.* at 24–29. Commerce and CS Wind respond that the court should sustain the *Third Remand Results*. Gov't Resp. at 6–21; Pls.' Cmts. on Remand Results 2–27, ECF No. 105 ("CS Wind Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's redetermination in an antidumping investigation 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).

ANALYSIS

I. Weights Selection

WTTC argues that Commerce took the Federal Circuit's "direct[ion]" to use the manufacturer-reported weights in the normal value calculation "too literally." WTTC Cmts. at 10. WTTC contends that the Federal Circuit cannot lawfully dictate a decision to Commerce, and that Commerce should have been mindful of this purported principle when issuing its *Third Remand Results*. *Id.* at 10–11. WTTC reasons that, because Commerce relied solely on the Federal Circuit's direction and this court's accordant Remand Order in making its selection, *Third Remand Results* at 7, Commerce failed to adequately explain its weights selection. WTTC Cmts. at 11–13. WTTC also repeats the merits of its case, detailing why the packed weights are accurate. *Id.* at 13–18.

The government responds that Commerce correctly interpreted the Federal Circuit's opinion. Gov't Resp. at 8. It argues that WTTC's concern over the Federal Circuit's instruction is a dispute with the Federal Circuit, not Commerce, and notes that WTTC could have sought further review of the Federal Circuit's decision. Gov't Resp. at 7–8. The government also states that Commerce "reanalyzed the record evidence" on remand, and points to record evidence supporting Commerce's decision. *Id.* at 7–9. CS Wind, meanwhile, argues that the Federal Circuit's reversal of Commerce binds this court, citing for support both stare decisis and the law-of-the-case doctrine, specifically, the mandate rule. CS Wind Cmts. at 3–4.

Because the Federal Circuit's direction to Commerce bound Commerce under the mandate rule to use the manufacturer-reported weights, Commerce's reliance on that instruction is an adequate explanation for Commerce's choice. "Under the mandate rule, a court below [or an agency[4]] must adhere to a matter decided in a prior appeal unless one of three 'exceptional circumstances' exist[.]"[5] *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014). "[I]n interpreting [the Federal Circuit's] mandate, 'both the letter and the spirit of the mandate must be considered.'" *TecSec, Inc. v. Int'l Bus. Machs.*

[4] *See Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 1180, 1184 & n.9, 279 F. Supp. 2d 1363, 1368 & n.9 (2003).

[5] The mandate rule applies here, which is part of the law-of-the-case doctrine, *ArcelorMittal France v. AK Steel Corp.*, 786 F.3d 885, 888 (Fed. Cir. 2015), rather than stare decisis. Whereas stare decisis makes legal rules "binding in future cases," the mandate rule applies only in "ongoing case[s]." *See Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993) (describing stare decisis); *Dow Chem. Co. v. Nova Chems. Corp. (Canada)*, 803 F.3d 620, 627 (Fed. Cir. 2015) (explaining the mandate rule). Because the Federal Circuit's ruling was part of the present "ongoing case," the mandate rule, not stare decisis, applies. The distinction matters because the mandate rule contains exceptions, but stare decisis

Corp., 731 F.3d 1336, 1342 (Fed. Cir. 2013) (quoting *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999)). In *CS Wind IV*, the Federal Circuit unambiguously decided the matter of which weights Commerce should use as the "best available information" under 19 U.S.C. § 1677b(c)(1). *See* 832 F.3d at 1374. The Federal Circuit not only "reverse[d] the Court of International Trade's affirmance" of Commerce's selection of the packed weights, but also "direct[ed] Commerce to use the manufacturer-reported weights in its calculation." *Id.* Under the mandate rule, the Federal Circuit's decision on the matter of weights selection in the prior appeal of *CS Wind IV* binds Commerce and this court unless an exception applies.[6]

The mandate rule applies unless: "(1) subsequent evidence presented at trial was substantially different from the original evidence; (2) controlling authority has since made a contrary and applicable decision of the law; or (3) the decision was clearly erroneous 'and would work a manifest injustice.'" *Banks*, 741 F.3d at 1276 (quoting *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir. 1984)). Only the third exception arguably applies here. *Cf.* WTTC Cmts. at 9–12. If the Federal Circuit "clearly" had no authority to tell Commerce which weights to use, either because the Federal Circuit can never do so or because it lacked authority in this case, the Federal Circuit's "direct[ion]" might arguably be "clearly erroneous." But as explained in Jane Restani & Ira Bloom, *The Nippon Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions*, 39 BROOK. J. INT'L L. 1005, 1008, 1025 (2014), the statute cited by WTTC, 19 U.S.C. § 1516a(c)(3), which requires the Court of International Trade ("CIT") to either affirm or remand an agency determination, does not support WTTC's contention. In this context remand is a procedural device to implement a contrary judicial decision. The remand may be as open or as restricted as necessary to effectuate the decision. Sometimes, as in this case, the Federal Circuit decision is effectively a reversal of a particular Commerce determination and

does not. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (stating that lower courts are bound by stare decisis "no matter how misguided the judges of those courts may think it to be"); *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014) (setting out exceptions to the mandate rule).

[6] WTTC argues that precedent establishes that the Federal Circuit cannot instruct Commerce to use a particular method over another, and that this precedent should have colored how Commerce interpreted the Federal Circuit's decision. WTTC Cmts. at 9–12. As discussed, however, the Federal Circuit's direction does not contain any ambiguity. Furthermore, the "spirit of the mandate" must be considered in addition to the mandate's "letter" when interpreting the mandate, and given the Federal Circuit's reference to the manufacturer-reported weights in its "direct[ion]," that spirit is clearly for Commerce to use the manufacturer-reported weights. *See TecSec, Inc.*, 731 F.3d at 1342. In addition, as discussed below, it is not established that the Federal Circuit can *never* tell Commerce which method to use.

concomitantly the CIT was required to order the same reversal in ordering remand for the necessary replacement calculations.

Neither case law nor statute "clearly" establishes that the Federal Circuit can never order Commerce to select a particular method over another. Here, the Federal Circuit took the somewhat unusual step of choosing between two data sets and directing Commerce to use one set and not the other. In other words, it found the use of only one set supported by substantial evidence. Having made that decision, the next step was to direct the use of the one set still available. WTTC takes issue with the data set choice, as Commerce still does, at least for the record, but the Federal Circuit has spoken. WTTC may not argue, with any authority, for the court to ignore this clear direction. Yes, once having found Commerce's choice unsupported, the Federal Circuit could have ordered a more open remand to let Commerce further consider its choice or even reopen the record, but there is nothing before the court that indicates such steps would have been useful given the Federal Circuit's decision that the record evidence did not support Commerce's choice of data. Commerce's explanations were made and rejected and there is no additional data set offered. Unfair trade records involve so many different kinds of decisions that there is no *never* that per se prevents any particular type of remand direction.

If the record reveals basically two choices, direction to choose one is a rational direction and helps to avoid multiple remands and leads to finality of judicial decisions. *See generally* Restani & Bloom, *supra*. Because the mandate rule applies and required Commerce to obey the Federal Circuit, Commerce's explanation of its rationale for selecting the manufacturer-reported weights as the "best available information" is adequate.[7]

II. Financial Ratios

A. *Erection / Civil Income Ratio*

No party directly challenges Commerce's revised erection/civil income ratio methodology or Commerce's explanations of it.[8] As there is no challenge, the court will not sua sponte analyze Commerce's choice of methodology for reasonableness or substantial evidence. The par-

[7] The court does not reach the government's argument that Commerce "reanalyzed the record evidence" on remand. Gov't Resp. at 7–9. The court notes, however, that Commerce did not include evidence of any such reanalysis in its *Third Remand Results*, relying instead on the Federal Circuit's "direct[ion]." *Third Remand Results* at 7.

[8] In its comments on Commerce's *Draft Third Remand Results* WTTC stated that Commerce should have further explained its calculations. WTTC Draft Remand Cmts. at Attach. 1. It did not make the argument before the court.

ties have waived their right to challenge the erection/civil income ratio calculation methodology by failing to raise before the court any issue with Commerce's methodology or its underlying justifications. *See Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (explaining that failure to raise an issue before a court results in waiver).

B. *Solicitation of Information from Ganges*

As indicated, no party directly challenges the erection/civil income ratio calculation methodology that Commerce utilized as unreasonable or unsupported by substantial evidence of record, rather WTTC argues that Commerce's failure to request information from Ganges "regarding how [Ganges] classifies its jobwork expenses" is an abuse of discretion because Commerce could, with little burden, request such clarification. WTTC Cmts. at 18–23.[9] Presumably, WTTC believes such information might simplify the surrogate financial ratio calculations or otherwise result in changes to its benefit. Thus, WTTC challenges Commerce's "per se rule" of refusing to inquire about a third party surrogate value company's financial statements. *Id.* at 20–22. The government responds that Commerce does not have a per se rule against requesting information from third party surrogate value companies, Gov't Resp. at 16, but acknowledges that Commerce has a "longstanding practice" of not doing so, *id.* at 10. The government also argues that Commerce's practice, and its application of that practice here, is not an abuse of discretion because Commerce cannot compel the submission of information from third parties, cannot ensure the timeliness or accuracy of the information, and because requesting and incorporating the information is "time-consuming and resource-intensive." *Id.* at 11–13. CS Wind defends Commerce for the same reasons as the government does, CS Wind Cmts. at 18–27, and also argues that WTTC should be judicially estopped from making its arguments because of WTTC's "180 degree flip flop." *Id.* at 26.[10]

Commerce has the authority to request information from a third party surrogate value company. *See* 19 C.F.R. § 351.301(a) ("[T]he Secretary may request any person to submit factual information at

[9] Commerce's refusal to seek information from a party is reviewed for abuse of discretion. *See Wuhu Fenglian Co. v. United States*, 836 F. Supp. 2d 1398, 1405 (CIT 2012) (applying abuse of discretion standard to review of Commerce's refusal to issue supplemental questionnaires).

[10] Because the Federal Circuit directed Commerce to address this issue, *see CS Wind IV*, 832 F.3d at 1380, the court analyzes whether Commerce abused its discretion in refusing to seek clarifying information from Ganges, regardless of any change in WTTC's position. The Federal Circuit has the discretion to waive WTTC's waiver of this issue in the earlier proceedings before Commerce and the CIT. The court assumes the Federal Circuit has waived this default and this court must accept this result.

any time during a proceeding or provide additional opportunities to submit factual information."); 19 C.F.R. § 351.102(37) (defining "person" as "any interested party *as well as any other . . . enterprise, or entity*") (emphasis added); *Third Remand Results* at 13 (acknowledging Commerce's authority to make such requests). In addition, Commerce may specify a due date for supplemental questionnaires. 19 C.F.R. § 351.301(c)(1)(ii) ("Supplemental questionnaire responses are due on the date specified by the Secretary.").[11] Furthermore, Commerce apparently possesses the authority to verify surrogate value data. *See* 19 C.F.R. § 351.307(b)(2) ("The Secretary may verify factual information upon which the Secretary relies in a proceeding . . . not specifically provided for in paragraph (b)(1) of this section."). Commerce is not *required*, however, to verify publicly available surrogate value data. *See Timken Co. v. United States*, 12 CIT 955, 961, 699 F. Supp. 300, 305 (1998) (concluding that it is "permissible for Commerce to employ unverified data from the designated surrogate as the 'best information otherwise available'"). Lastly, Commerce's ability to apply adverse inferences to information under 19 U.S.C. § 1677e(b)(1) applies only to information submitted by interested parties, not by third parties, and unlike the International Trade Commission ("ITC"), Commerce does not have subpoena power over nonparties. *See* 19 C.F.R. § 210.32 (setting out the ITC's subpoena authority); *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1372 (Fed. Cir. 2002) ("[T]he Commission possesses the authority to issue subpoenas in pursuing its investigations, unlike Commerce . . . .").

Commerce has not abused its discretion in maintaining a practice of generally not seeking clarifying information from surrogate value companies, or by declining to do so in this case. As WTTC points out, the burden on Commerce of drafting a clarification letter to Ganges is likely fairly low. WTTC Cmts. at 19. But, Commerce cannot "compel" a timely or accurate response from Ganges, or any other third party, by applying adverse inferences to its use of facts otherwise available or by using subpoena power. *See* 19 U.S.C. § 1677e(b)(1); 19 C.F.R. § 210.32; *Allegheny Ludlum*, 287 F.3d at 1372. Although Commerce appears to have the authority to verify a response as accurate, *see* 19 C.F.R. § 351.307(b)(2), the verification process generally entails a significant burden on Commerce and the responder may choose not to allow verification. Absent the ability to obtain with some assurance a

[11] Commerce states in its *Third Remand Results* that it "has no authority to compel a non-interested party to respond within the government's regulatory or statutory deadlines." *Third Remand Results* at 14 (citing 19 C.F.R § 351.301). Commerce does lack the authority to *compel* a timely response from a third party. 19 C.F.R. § 351.301 appears to give Commerce the authority to set a time limit for such factual submissions, but it has no remedies to impose on third parties for failure to comply.

timely and accurate response, and given the significant burden Commerce would incur in attempting to obtain accurate information (which attempts would seem to have a high probability of failure) Commerce did not abuse its discretion in deciding not to send a letter to Ganges, or in maintaining a practice of generally not requesting information from third party surrogate value companies over whom it has no control.[12] As the court sustains Commerce's decision to rely on publicly available information, WTTC's only challenge to the surrogate financial ratio results fails.

III. Steel Surrogate Value

WTTC argues that Commerce should not have rejected WTTC's comment on the *Draft Third Remand Results* regarding Commerce's use of Steel India data as the surrogate value for CS Wind's steel plate input. WTTC Cmts. at 24–29. WTTC argues that information developed in the first administrative review shows that CS Wind made material misstatements regarding the accuracy of the Steel India data used by Commerce in the original investigation, and that the Steel India data used in the original investigation[13] "does not accurately reflect the steel consumed in the production of CS Wind's wind towers."[14] *Id.* at 24, 26–28. WTTC contends that Commerce has a duty to use information from a later review that significantly detracts from the legitimacy of a prior proceeding to protect the integrity of the proceedings. *Id.* at 24–25. Accordingly, WTTC seeks a remand from the court to give Commerce an opportunity to recalculate CS Wind's dumping margins. *Id.* at 29. The government responds that: (1) WTTC waived its contest of Commerce's use of the original Steel India data by failing to raise it on appeal to the Federal Circuit in *CS Wind IV*, Gov't Resp. at 17; (2) WTTC is trying to submit unsolicited new factual information, which Commerce refuses to consider under 19 C.F.R. § 351.302(d), *id.* at 18; (3) remanding would be inconsistent with the principles of the independence and finality of an antidumping proceeding, *id.* at 18–19; and (4) Commerce is required to re-open the record only in the case of "material fraud," which is

[12] The court does not read Commerce's statement that it "does not, as a matter of course, independently request supplemental information directly from the surrogate companies with respect to publicly available sources of surrogate values," *Third Remand Results* at 14, to mean that Commerce has a "per se rule" against seeking such information. *See* WTTC Cmts. at 21 (citing *Third Remand Results* at 14). Instead, the court understands Commerce to mean that Commerce *generally* does not do so, because it is simply unlikely to result in valuable information.

[13] The original Steel India data reflects prices for IS2062 grade steel. *CS Wind II*, 2014 WL 5510084, at *2.

[14] CS Wind consumes S355 grade steel. *CS Wind*, 2014 WL 5510084, at *2; WTTC Cmts. at 27.

absent here, *id.* at 19–20.

Commerce's rejection of unsolicited factual information in remand determinations is reviewed for abuse of discretion. *See Cultivos Miramonte S.A. v. United States*, 22 CIT 377, 380–81, 7 F. Supp. 2d 989, 993 (1998). In exercising its discretion, Commerce may consider finality interests, the extent of any inaccuracies in the earlier proceedings, the existence of any fraud, the strength of evidence for fraud, and the fraud's materiality. *See Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1381 (Fed. Cir. 2011).[15]

Here, Commerce did not abuse its discretion in rejecting WTTC's unsolicited factual information. Crucially, WTTC fails to identify facts in the record indicative of fraud or "material misstatements" by CS Wind. In arguing that CS Wind made "material misstatements," WTTC points to CS Wind's purported "admission that the Steel [India] data [used in the original investigation] does not reflect the steel it consumes to produce wind towers." WTTC Cmts. at 26. WTTC finds this "admission" implicit in CS Wind's submission of new Steel India data during the first administrative review. *Id.* at 28.[16] WTTC does not explain, however, why CS Wind's submission of new Steel India data in the first administrative proceeding necessarily entails a "material misstatement" by CS Wind in the original investigation, as opposed to, for instance, a simple update of data.

In addition, WTTC fails to explain the extent of any inaccuracy caused by Commerce's refusal to reconsider its original surrogate value data for steel plate in the original investigation in the light of the new Steel India data from the first administrative review. The mere fact that Commerce uses different data in different proceedings is insufficient for the court to disturb Commerce's continued use of the original Steel India data in the original investigation. *See Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014) ("[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record."). In view of the lack of evidence of "material misstatements" by CS Wind or significant inaccuracies, and

[15] The regulations relied on by the government to argue that Commerce has the authority to reject unsolicited factual information, 19 C.F.R. § 351.302(d) and 19 C.F.R. § 351.104(a)(2)(iii), are not controlling here because they apply only to unsolicited *questionnaire responses*, and WTTC's comment on the *Draft Third Remand Results* is not a questionnaire response.

[16] WTTC does not specifically identify what this new Steel India data is. It appears, however, that the new data is simply more specific IS2062 grade data—IS2062 E350 B0/BR/C for the period of review of the first administrative review, rather than the IS2062 E250 Grade A/B data used in the original investigation. *See* First AR I&D Memo at 6. In the first administrative review, WTTC again argued that Commerce should use GTA import data, but Commerce selected the new Steel India data as the best available information. *Id.* at 5, 7, 12, 14.

recognizing the need for finality in administrative proceedings, the court concludes that Commerce did not abuse its discretion in rejecting WTTC's unsolicited comment.

Furthermore, WTTC forewent opportunities to challenge the original Steel India data used by Commerce in the original investigation. CS Wind submitted the new Steel India data cited by WTTC in a separate proceeding in January of 2015. Gov't Resp. at 17; First AR I&D Memo at 9 n.25. In February of 2015, WTTC filed comments to Commerce's *Second Remand Results* in this matter following the court's affirmance in *CS Wind II* of Commerce's use of the original Steel India data, but did not raise the issue of new Steel India data. *See generally* WTTC Second Remand Results Cmts. Neither did WTTC note any concerns raised by the new data before this court in *CS Wind III*, nor did it do so before the Federal Circuit in *CS Wind IV*. It is far too late to resurrect this abandoned issue. Thus, Commerce did not abuse its discretion in rejecting WTTC's unsolicited submission in the latest remand proceedings.

CONCLUSION

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

Dated: March 16, 2017
New York, New York

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

Slip Op. 17–27

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00279

[Remanding to Commerce the final results of the ninth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam to reconsider or sufficiently explain its decision to use labor wage rate data from the shrimp industry in Bangladesh to value the labor factor of production in this review.]

Dated: March 16, 2017

Roop Kiran Bhatti and *Nathaniel Jude Maandig Rickard*, Picard, Kentz & Rowe, LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Andrew W. Kentz*.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *James H. Ahrens, II*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Kelly, Judge:

This action comes before the court on Plaintiff's motion for judgment on the agency record pursuant to USCIT Rule 56.2. *See* Mot. Pl. Ad Hoc Shrimp Trade Action Committee J. Agency R. Under USCIT Rule 56.2, Apr. 20, 2016, ECF No. 27 ("Pl. 56.2 Mot."); Mem. L. Support Pl. Ad Hoc Shrimp Trade Action Committee's USCIT Rule 56.2 Mot. J. Agency R., Apr. 20, 2016, ECF No. 27 ("Pl.'s Br."). Plaintiff (or "Ad Hoc Shrimp") challenges as unsupported by substantial evidence the Department of Commerce's ("Commerce") decision to use labor wage rate data from the Bangladeshi shrimp industry to value the labor factor of production in the final results of the ninth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"). *See* Pl.'s Br. 15–39; *see generally Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013–2014*, 80 Fed. Reg. 55,328 (Dep't Commerce Sept. 15, 2015) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Results, (Sept. 8, 2015), ECF No. 18–2 ("Final Decision Memo"); *Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152 (Dep't of Commerce Feb. 1, 2005) (amended final determination of sales at less than fair value and antidumping duty order) ("*Order*").

For the reasons that follow, Commerce's final determination is remanded for Commerce to clarify or reconsider its practice for determining whether a surrogate country's labor data is aberrational and to clarify or reconsider its use of Bangladeshi labor data in this review, despite record evidence that the data is from an industry affected by alleged labor abuses.

BACKGROUND

In April 2014, Commerce initiated the ninth administrative review of the *Order* for the period February 1, 2013 through January 31, 2014. *See Initiation of Antidumping Duty Administrative Review and Request for Revocation in Part*, 79 Fed. Reg. 18,262 (Dep't of Commerce Apr. 1, 2014) (initiation notice); *see generally Order*, 70 Fed. Reg. at 5,152. As Commerce does when conducting an antidumping

duty ("ADD") administrative review of a nonmarket economy ("NME") country,[1] Commerce invited interested parties to comment on the six potential surrogate countries Commerce had identified from which it would select the primary surrogate country and the data to value the factors of production ("FOP") used to produce the subject imports. Certain Warmwater Shrimp from the Socialist Republic of Vietnam: Request for Surrogate Country and Surrogate Value Comments and Information, PD 272, bar code 3233128–01 (Oct. 3, 2014), ECF No. 60–1.

On March 9, 2015, Commerce published its preliminary results. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 80 Fed. Reg. 12,441 (Dep't Commerce Mar. 9, 2015) (preliminary results of ADD administrative review; 2013–2014) ("*Prelim. Results*") and accompanying Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review, A-552–802, (Mar. 2, 2015), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/2015–05474–1.pdf (last visited March 13, 2017) ("Prelim. Decision Memo"). After considering comments from interested parties on surrogate country and surrogate values, Commerce selected Bangladesh as the primary surrogate country for purposes of valuing the mandatory respondents' FOPs for the preliminary results. *See* Prelim. Decision Memo at 12–17. Regarding the labor factor of production, Commerce explained its practice to value the labor input using industry-specific labor wage rate data from the primary surrogate country, and accordingly chose to use Bangladeshi labor wage rate data to value the labor input. *Id.* at 26–27. Commerce explained that, although it considers the International Labor Organization ("ILO") Yearbook of Labor Statistics Chapter 6A: Labor Cost in Manufacturing ("ILO Chapter 6A data") to be the best source of data for industry-specific labor rates,[2] because the ILO does not include labor data for

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

[2] Commerce stated erroneously in the Preliminary Decision Memo that its practice is to use ILO Chapter 5B data to value labor wage rates. *See* Prelim. Decision Memo at 26. Commerce in fact uses ILO Chapter 6A data to value labor wage rates. Prelim. Surrogate Value Memo at 6; *Labor Methodologies*, 76 Fed. Reg. at 36,093. The *Labor Methodologies* policy notice published by Commerce in June 2011 notes that ILO Chapter 6A data would thenceforth be used to value labor wage rates, "on the rebuttable presumption that Chapter 6A data better accounts for all direct and indirect labor costs" than does ILO Chapter 5B data. *Labor Methodologies*, 76 Fed. Reg. at 36,093. Commerce stated this practice correctly in its Preliminary Surrogate Value Memo and in its Final Decision Memo in this review. *See* Prelim. Surrogate Value Memo at 6; Final Decision Memo at 46.

Bangladesh, Commerce would use labor wage rate data for the shrimp industry published by the Bangladesh Bureau of Statistics ("BBS"), a Bangladeshi government source. *Id.* at 26; Antidumping Duty Administrative of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results, A-552–802, at 6, PD 504, bar code 3262270–01 (Mar. 2, 2015), ECF No. 56–6 ("Prelim. Surrogate Value Memo").

On September 15, 2015, Commerce published its final determination. *Final Results*, 80 Fed. Reg. at 55,328. Commerce continued to use Bangladesh as the primary surrogate country, *see id.* at 55,330; Final Decision Memo at 46–48, and, over objections by Ad Hoc Shrimp, continued to use Bangladeshi shrimp industry labor wage rate data to value the labor factor of production. Final Decision Memo at 46–55; Antidumping Duty Administrative of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Final Results, A-552–802, PD 574, bar code 330346101 (Sept. 8, 2015), ECF No. 56–15; *see* Ad Hoc Shrimp Trade Action Committee Case Brief at 1–37, Jun. 8, 2015, PD 563, bar code 3282504–01 ("Ad Hoc Shrimp Admin. Case Br.").

Plaintiff challenges Commerce's decision to use Bangladeshi shrimp industry labor wage rate data to value the labor FOP. It contends that the Bangladeshi data is aberrational as it is influenced by labor abuses, including forced and child labor, throughout the Bangladeshi shrimp industry and is therefore an unreliable basis for valuing the labor FOP. *See* Pl.'s Br. 15–35; Pl. Ad Hoc Shrimp Trade Action Committee's Reply Mem. R. 56.2 Mot. J. Agency R. 4, 14, Oct. 28, 2016, ECF No. 43 ("Pl.'s Reply"). Plaintiff argues that the use of this data renders the final results of the review unsupported by substantial evidence. *See* Pl.'s Br. 15–35; Pl.'s Reply 11–21. Defendant United States responds that the court should sustain Commerce's determinations in the final results, including Commerce's decision to use Bangladeshi labor wage rate data for the shrimp industry, as the determination is supported by substantial evidence. *See* Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. 13–23, Sept. 28, 2016, ECF No. 42 ("Def.'s Resp.").[3]

[3] On November 19, 2015, Vietnam Association of Seafood Exporters and Producers and its individual member companies (collectively "VASEP") joined the present action as Defendant-Intervenors on consent of the parties. *See* Order, Nov. 19, 2015, ECF No. 16. VASEP had previously initiated a separate proceeding challenging, on different grounds than Ad Hoc has challenged here, Commerce's final determination in the ninth administrative review of the *Order* at issue in the present action. *See Vietnam Association of Seafood Exporters and Producers, et al. v. United States*, Court No. 15–00284. On December 21, 2015, the court consolidated the two actions, making VASEP Consolidated Plaintiffs in the present action. Order, Dec. 22, 2015, ECF No. 21. On Nov. 22, 2016, the court granted

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[4] which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiff argues that Commerce's use of labor wage rate data from the Bangladeshi shrimp industry to value the labor FOP is unsupported by substantial evidence, an abuse of discretion, and arbitrary and capricious due to alleged widespread labor abuses in the Bangladeshi shrimp industry that render the data aberrational and unreliable. Pl. Br. 14–38. Defendant responds that Commerce's use of the Bangladeshi labor wage rate data to value the labor FOP is supported by substantial evidence and contends that Commerce reasonably determined that the Bangladeshi data is the best available information on the record, as the Bangladeshi data is neither aberrational nor unreliable. Def.'s Resp. 10. For the reasons that follow, the matter is remanded to Commerce to further explain, or reconsider, its decisions: 1) to forgo any comparison of Bangladeshi labor wage rate data to other labor wage rate data on the record, and 2) to use labor wage rate data from Bangladesh despite record evidence that such data was aberrational because of widespread labor abuses in the Bangladeshi shrimp industry.

Commerce determines the existence of dumping by comparing the normal value of the subject merchandise with the actual or constructed export price of the merchandise. 19 U.S.C. § 1677b(a). The normal value of the merchandise is the price of the merchandise when sold for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1). However, when the exporting country is an NME country, the normal value may not reflect the fair value of the merchandise. *See* 19 U.S.C. § 1677(18)(A). As a result, Commerce calculates the normal value for subject merchandise from an NME country by

VASEP's motion to withdraw from the litigation. Order, Nov. 22, 2016, ECF No. 54. Accordingly, VASEP are no longer either Consolidated Plaintiffs or Defendant-Intervenors in this action.

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

valuing the NME country's FOPs[5] "based on the best available information[6] regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. §§ 351.408(a)–(c).[7] Commerce selects as a surrogate for each FOP a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. 19 U.S.C. § 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b).

Commerce has a regulatory preference to value all FOPs using data from a single surrogate country, 19 C.F.R. § 351.408(c)(2), and determines what data constitutes the best information by using criteria developed through practice.[8] *Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Commerce values labor using industry-specific data from the primary surrogate country, as published in Chapter 6A of the ILO Yearbook of Labor Statistics. *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Production, Labor*, 76 Fed. Reg. 36,092, 36,093 (Jun. 21, 2011) *("Labor Methodologies"); see* Final Decision Memo at 46. Where ILO rates are not available, Commerce's practice is to use industry-specific labor wage rate data from the primary surrogate country. Final Decision Memo at 46, 48.

For all FOPs, including labor, Commerce seeks the best available information due to its statutory directive and as part of its mandate

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[5] The FOPs include, but are not limited to, "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

[6] As "best available information" is not statutorily defined, Commerce has discretion to determine what data constitutes the best available information in a given case and to value the FOPs accordingly. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (Commerce has considerable discretion in choosing the surrogate values that most accurately reflect the price that the NME producer would have paid had it purchased the FOP from a market economy country). This discretion is broad but is not unlimited; "the critical question is whether the methodology used by Commerce is based on the best available information and establishes the antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

[7] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

[8] To determine what constitutes the best available information, Commerce evaluates the quality and reliability of data sources from the countries offered to value respondents' FOPs favoring data that is: (1) specific to the input in question; (2) representative of a broad market average of prices; (3) net of taxes and import duties; (4) contemporaneous with the period of review; and (5) publicly available. *See generally* Import Admin., U.S. Dep't Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited March 13, 2017); *see also Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

to determine dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Commerce has acknowledged that aberrational values should not be used. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (May 19, 1997). Where there is evidence that data is aberrational, Commerce must address that evidence in order to demonstrate that the data is nonetheless the best information available. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.")

Commerce claims that, to assess whether data is aberrational, it does a quantitative assessment. Final Decision Memo at 49. According to Commerce, its "practice in analyzing whether a given value is aberrational or distortive, is to compare the prices for an input from all countries found to be at a level of economic development comparable to the NME whose products are under review from the [period of review] and prior years." *Id.* Commerce states that its practice requires that the record "contain specific quantitative evidence showing the value is aberrational." *Id.*[9] Nonetheless, Commerce's stated practice is not to view data as aberrational simply because the data is of low value or the lowest value. *Id.* at 48–49 (citing Commerce's determination in the eighth administrative review of the *Order* and *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT __, __, 929 F. Supp.2d 1352, 1356 (2013)).

Commerce's selection of Bangladeshi labor wage rate data is not supported by substantial evidence because Commerce failed to (i) quantitatively assess Plaintiff's claims that the Bangladeshi labor wage rate data was aberrational, and (ii) address record evidence that the Bangladeshi data was the product of abusive labor practices and therefore could not be the best available information to value the merchandise. In this proceeding, Commerce selected Bangladesh as the primary surrogate country. *See* Final Decision Memo at 46–48. Commerce used labor wage rate data for the Bangladeshi shrimp

[9] Commerce argues that "Petitioner appears to have abandoned its argument that BBS data are aberrational because the wage rates are low." Final Decision Memo at 49. This is a mischaracterization. It is obvious to the court that Plaintiff's allegation is that the labor wage rate data is aberrational because it is the lowest value as a result of the alleged labor abuses. In fact, Commerce's Preliminary Decision Memo demonstrates that Commerce understood that claim. *See* Prelim. Decision Memo at 12 (noting that Ad Hoc Shrimp "contends that the Department cannot select Bangladesh as the primary surrogate country because of alleged labor abuses and alleged oppressive conditions in the shrimp industry in Bangladesh result in aberrational labor wage rate.").

industry published by the BBS,[10] despite Plaintiff's claims that the data was aberrational. *Id.* at 48. Commerce determined that the BBS data was the best information available because it was from the primary surrogate country, *id.*, and emphasized that the BBS data was public, more contemporaneous to the period of review than other data on the record, and specific to the shrimp industry. *Id.* at 53. Commerce also emphasized that using non-ILO data from the primary surrogate country was consistent with its practice in previous similar circumstances. *Id.*

Despite Commerce's stated practice of quantitatively assessing labor wage rate data to determine whether that data is aberrational, Commerce did not perform a quantitative assessment of the BBS data with the labor wage rate data presented by Plaintiff. Commerce states that "Petitioner has not argued that the Bangladeshi wage rate from BBS is aberrational compared to the other wage data from those countries." *Id.* at 50. Yet, as Commerce acknowledged, Plaintiff did place labor wage rate data on the record from other countries, specifically from Guyana, India, Nicaragua, and Philippines. *See id.*; Factual Information to Value FOPs, PD 497–499, bar code 3260348–01 (Feb. 2, 2015) ("Factual Info to Value FOPs"), and argued that the labor wage rate data from these countries is reliable, *see id.*, while Bangladeshi data is aberrational. Ad Hoc Shrimp Pre-Prelim. Comments at 2–4, PD 500, bar code 3260507–01 (Feb. 19, 2015) ("Ad Hoc Shrimp Pre-Prelim. Comments"); Ad Hoc Shrimp Admin. Case Br. at 26–33. In its brief before this court, Defendant contended that Plaintiff failed to make the necessary connections between its argument of aberration and the data it submitted to Commerce because Plaintiff did not convert the other country data values so that a comparison could be made to the data values for Bangladesh. *See* Def. Resp. 18; Oral Argument 00:19:38–00:19:45, 00:20:12–00:20:27; 00:20:50–21:04, 00:29:25–00:30:22, 00:31:21–00:31:47, 00:47:18–00:47:52, Jan. 27, 2017, ECF No. 58 ("Oral Argument"). Defendant at oral argument conceded that Commerce could have made the conversion. Oral Argument 00:33:52–00:34:30. Moreover, in memorandum on the record, Commerce acknowledges the relative labor wage rate data on the record for Bangladesh and other countries. *See, e.g.,* Final Decision Memo at 43 (summarizing Ad Hoc Shrimp's arguments that "wage rates from Bangladesh's shrimp industry are less reliable than those reported by the [ILO] for other market countries that are at

[10] As explained, Commerce's practice is to use ILO data from the primary surrogate country where possible. *See* Final Decision Memo at 46; *Labor Methodologies*. Although Bangladesh does not report labor data to the ILO, Commerce chose to use alternate labor wage rate data from Bangladesh, rather than ILO data from another potential surrogate country, to value Vietnam's labor FOP. *See* Final Decision Memo at 46–48.

similar levels of economic development as Vietnam" and that "[r]eliable, non-aberrational wage rate data, available from the ILO, is on the record and should be used to value the labor."), 44 (noting that Ad Hoc Shrimp claimed it "submitted non-aberrational wage rate information that could be used to value the labor FOP"), 47 ("In the Preliminary Results, we declined to use [Ad Hoc Shrimp's] preferred labor data from other various countries . . ."), 50 ("[Ad Hoc Shrimp] also submitted one set of suggested wage rates from India (from 2004–2005), Guyana (not on the Surrogate Country List, from 2007), Philippines (from 2008) and Nicaragua (from 2006), suggesting that the wage data from any of these countries is preferable (and more reliable) than the BBS data."). Therefore the court finds unpersuasive Defendant's positions that Ad Hoc Shrimp did not sufficiently argue to Commerce that the Bangladeshi labor wage rate data was aberrational and that Commerce was not provided with sufficient information to compare the labor wage rate data.

Moreover, even if Commerce did not have sufficient labor wage rate data to comparatively assess the aberration claim, Commerce subsequently indicated that it could not perform a quantitative analysis because of the uniqueness of the labor FOP. *See* Final Decision Memo at 50. Shortly after stating that its practice was to make a quantitative assessment with respect to claims of aberrational data, *id.* at 49 ("Our practice in analyzing whether a given value is aberrational or distortive, is to compare the prices for an input from all countries found to be at a level of economic development comparable to the NME whose products are under review from the [period of review] and prior years"), Commerce cites a recent proceeding for the proposition that quantitative cross country comparisons cannot be made for labor wage rate data, stating that,

> while there is a strong global relationship between wage rates and GNI, significant variation exists among the wage rates of comparable market economies. There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For these reasons, and because labor is not traded internationally as other commodities are, the variability in labor rates that exists among otherwise economically comparable countries is a characteristic unique to the labor input.

Id. at 50 (quoting Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Crystalline

Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, A-570–979, at 23 (October 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25580–1.pdf (last visited March 13, 2017)). Commerce specifically rejected the notion that a comparison could be made in this case amongst labor wage rate data from different countries. Final Decision Memo at 50 ("Here, the Department does not find that wage data from other countries are necessarily appropriate benchmarks with which to compare the Bangladeshi BBS wage data as there are other variables that affect the labor rates across countries."). Commerce appears to be saying that Plaintiff must show that a quantitative comparison of labor wage rate data must be made, but that the comparison cannot be made using labor wage rate data from different countries. Logically, Commerce leaves only one path by which a Plaintiff can demonstrate aberration, which is by a comparison of a country's current data to that country's historic wage rate data. Although Commerce never clearly states its practice, if this is Commerce's practice, it is unreasonable in an instance where, such as here, Plaintiff claims that the aberrational labor wage rate data results from widespread labor abuses in the surrogate country. *See generally* Ad Hoc Shrimp Admin. Case Br. at 8–26. To ask Plaintiff to demonstrate that labor wage rate data is aberrational solely through a historical quantitative analysis within one country when the claim is that there are labor abuses in that one country leading to the low wages makes no sense. As a matter of common sense, it is possible, if not likely, that the abuses complained of have been in existence for some time, making a historical analysis useless. Upon remand Commerce must clarify or reconsider its practice with regard to how parties can demonstrate that labor wage rate data is aberrational where the claim of aberration stems from alleged widespread labor abuses in the industry. If Commerce allows cross country comparisons, then Commerce should address the record data and thus confront the important aspect of the problem presented by the Plaintiff. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner.").

Relatedly, Commerce fails to address Plaintiff's arguments and record evidence that the low labor wage rate data is the function of abusive labor practices, making Bangladeshi labor wage rate data aberrational, unreliable, and not the best information available. Plaintiff placed on the record extensive evidence of alleged widespread labor abuse within the Bangladeshi shrimp industry. *See* Ad Hoc Shrimp Comments on Surrogate Values, PD 370–374, bar code

3247044–01 (Dec. 15, 2014) ("Ad Hoc Shrimp Surrogate Value Comments"); Factual Information to Value FOPs; Ad Hoc Shrimp Pre-Prelim. Comments; Ad Hoc Shrimp Admin. Case Br. at 8–26. In addition to its administrative case brief, Plaintiff made three pre-preliminary filings on the record before Commerce to present and support its position that Bangladeshi labor wage rate data is aberrational due to widespread labor abuses in the Bangladeshi shrimp industry and should therefore not be used as the surrogate data to value the labor factor of production in this review. *See generally* Ad Hoc Shrimp Surrogate Value Comments; Factual Information to Value FOPs; Ad Hoc Shrimp Pre-Prelim. Comments. This evidence detracts from Commerce's finding that "the BBS data remains the best information available on record of this review to value labor." Final Decision Memo at 53; *Shakeproof Assembly Components v. United States,* 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("the critical question is whether the methodology used by Commerce is based on the best available information and establishes the antidumping margins as accurately as possible.").

First, on December 15, 2014, Ad Hoc Shrimp submitted to Commerce publicly available information documenting widespread labor abuses "permeating the entire supply chain of the Bangladesh shrimp industry." Ad Hoc Shrimp Surrogate Value Comments at 2. In this filing, Ad Hoc Shrimp presented evidence, published by a myriad of news, governmental, intergovernmental, and NGO sources detailing exploitive labor conditions in the Bangladeshi shrimp industry, including forced and child labor and conditions with a logical link to wage rates, such as significant underpayment, excessive working hours, non-payment for overtime, and unequal payment for women. *See id.*

Second, on February 2, 2015, Ad Hoc Shrimp submitted to Commerce information to assist Commerce in valuing the factors of production in this review. *See* Factual Information to Value FOPs. In this filing, Ad Hoc Shrimp provided additional information and recent publications regarding the conditions of the Bangladeshi shrimp industry and ILO shrimp industry labor wage rate data for Guyana, India, Nicaragua, and Philippines, "each a significant producer and exporter of shrimp, [which] provide a nonaberrational basis by which to value the labor FOP for the purposes of this proceeding." *Id.* at 6.

Finally, on February 19, 2015, Ad Hoc Shrimp submitted pre-preliminary comments to Commerce, contending that labor wage rate data for the shrimp industry in Bangladesh, which Commerce had

used in prior administrative reviews of the *Order*, are aberrational and should not be used by Commerce as the surrogate values by which to value the labor factor of production for mandatory respondents in this review. *See* Ad Hoc Shrimp Pre-Prelim. Comments at 2–4. Ad Hoc Shrimp stated that

> The record of this review does not include any of the wage rate data related to Bangladesh previously relied upon by the Department. Thus, unless the Department independently places such information on the record of this proceeding, there is no basis upon which to value the labor FOP with Bangladeshi data. Should the Department elect to exercise discretion to supplement the record of this review with Bangladeshi wage rate information – rather than utilize wage rate information currently on the record of this proceeding – the evidence already on the record of this proceeding requires the agency to confront a colorable claim that data that the Department would be considering is aberrational. Accordingly, the Department would be obligated to examine these data and provide a reasoned explanation as to why the data chosen is reliable and nondistortive. This obligation is all the more pertinent in a proceeding where non-aberrational values are already on the record of the review.

Id. at 4. As evidenced by these filings, Plaintiff anticipated that Commerce might consider Bangladeshi labor wage rate data and alerted Commerce to its concerns regarding that data.

Thereafter, in its case brief before Commerce following publication of the preliminary results, Ad Hoc Shrimp objected to Commerce's use of the BBS labor wage rate data and again documented allegations of widespread labor abuses including forced and child labor in the Bangladeshi shrimp industry. Ad Hoc Shrimp Admin. Case Br. at 8–26. Ad Hoc Shrimp cited and included excerpts from the hundreds of pages of reports and articles it previously placed on the record detailing abuses, including forced and child labor, throughout the industry. For example, Ad Hoc Shrimp excerpted a report detailing an interview with a shrimp processing worker who reported having been "forced to work day and night without any break," for up to 48 hour shifts, while pregnant during peak processing season. *Id.* at 17 (internal citations and quotation omitted). Ad Hoc Shrimp highlighted another report, based on 385 interviews of shrimp industry workers in 2009, detailing instances of induced indebtedness, wage withholding, exposure to health hazards, and child labor. *Id.* at 18. This source emphasized the "grossly unequal pay [for women] and rampant

sexual abuse" throughout the industry. *Id.* at 20. Another report stated that "[m]any workers said children younger than 14 are working in their factories." *Id.* at 21. This record evidence included reports from the United States Trade Representative, the ILO, various international NGOs, and various media sources.[11]

Commerce simply did not respond to this evidence. It is clear from Ad Hoc Shrimp's submissions that it claimed not only that the Bangladeshi labor wage rate data was the lowest on the record but that it was the lowest because of these widespread labor abuses and therefore that the data could not be used as a surrogate for Vietnamese labor wage rate data. *See* Ad Hoc Shrimp Admin. Case Br. at 26 ("The record of this proceeding . . . demonstrates that such conditions [in the Bangladeshi shrimp industry] are not only different from major shrimp producing countries at similar levels of economic development, they are also different from conditions in which Vietnam's shrimp industry operates."); Ad Hoc Shrimp Surrogate Value Comments at 8–9 (noting that the circumstances in the Bangladeshi shrimp industry "are distinguishable from those that are present in the labor market in Vietnam.. . . [I]n Vietnam, labor costs continue to rise, as the Government grants greater and greater levels of protection to Vietnam's working force, including social security and safety measures. No similar trend is apparent in Bangladesh.").

Instead of addressing these claims, Commerce argued that prior opinions of this Court had affirmed its prior findings that simply having the lowest value data is not sufficient to show that data is unreliable. Final Decision Memo at 49. Commerce's explanation is nonresponsive. Commerce's obligation to secure the best information is meant to foster accuracy. *Shakeproof Assembly Components*, 268 F.3d at 1382. Evidence that the labor wage rates do not reflect the true cost of labor because of systemic abuses including forced and child labor specific to the shrimp industry detracts from accuracy and therefore detracts from the reasonableness of finding the data to be the best information available. *See* Ad Hoc Shrimp Admin. Case Br. at 4; Ad Hoc Shrimp Pre-Prelim. Comments at 3.

Further, in enacting 19 U.S.C. § 1677b(c)(1), Congress directed Commerce to construct a market price for NME merchandise by using comparable market economy surrogate prices that accurately reflect how FOPs would be priced in a market-driven economy of similar

[11] Ad Hoc Shrimp also argued to Commerce that the suspension of Bangladesh's status as a beneficiary developing country under the Generalized System of Preferences ("GSP") program further supports finding the labor wage rate data from the shrimp industry aberrational. Ad Hoc Shrimp Admin. Case Br. at 11–12. The United States suspended Bangladesh from the GSP program in 2013 because Bangladesh "has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country." *Id.*

development. *See* 19 U.S.C. § 1677b(c)(1). It is reasonable to presume that an industry with abusive labor practices, including child labor and forced labor as is alleged here, is not a fair surrogate by which to construct a market price for these NME goods. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999) ("There is no reason, either under [19 U.S.C. § 1677b(c)(1)] or in logic, to incorporate the distortions in [a particular market economy country industry] into a hypothetical [NME country] market pursuant to a factors of production assessment merely because [that market economy country] has been chosen as the surrogate country."). Commerce's reply to the record evidence is simply non-responsive and fails to meet the standard for substantial evidence. *Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Upon remand Commerce must explain why this evidence is insufficient to support the claim that Bangladeshi labor wage rate data is aberrational as a function of the alleged abuses or explain why, despite this evidence, the Bangladeshi labor wage rate data nonetheless remains the best available information, or must reconsider its determination.

Defendant contends that Plaintiff insufficiently made its argument to Commerce, because Plaintiff "never actually tied any of that data, such as the alleged labor abuse practices, to why the Bangladeshi labor rate is the way it is." Oral Argument 00:20:17– 00:20:27; Def.'s Resp. 18. This argument is unpersuasive. As discussed above, through a series of filings, even prior to the preliminary determination, Plaintiff stressed to Commerce its concerns with the potential use of Bangladeshi labor wage rate data. Specifically, Plaintiff sought to emphasize that Bangladeshi labor wage rate data would not only be low value data but would be low value data because of serious and ongoing labor abuses in the Bangladeshi shrimp industry. *See, e.g.*, Ad Hoc Shrimp Surrogate Value Comments at 8 (highlighting evidence to demonstrate that the "oppressive conditions that exist for shrimp processing workers in Bangladesh [result] in an aberrational labor wage rate that would only be fairly representative of conditions in countries with shrimp processing sectors that tolerate similar levels of grotesque human rights abuses."); Ad Hoc Shrimp Pre-Prelim. Comments at 3 (noting that Ad Hoc Shrimp "present[ed] specific record evidence demonstrating both that (1) labor values reported in Bangladesh are aberrationally low; and (2) specific reasons why such values are aberrationally low and, as such, cannot constitute the best available information to determine the labor FOP."). Commerce was clearly able to connect the dots between Plain-

tiff's evidence and its argument against using Bangladeshi data, as in its preliminary results, Commerce stated that Ad Hoc Shrimp "contends that the Department cannot select Bangladesh as the primary surrogate country because of alleged labor abuses and alleged oppressive conditions in the shrimp industry [that] result in [an] aberrational labor wage rate." Prelim. Decision Memo 12. Although Commerce was responding to an argument concerning the selection of a primary surrogate country, Commerce nonetheless demonstrated an understanding of Plaintiff's allegations. Plaintiff reiterated this point explicitly in its administrative case brief submitted to Commerce following publication of the preliminary results and Commerce's preliminary selection of the BBS data to value the labor FOP. *See* Ad Hoc Shrimp Admin. Case Br. at 26 ("Wage rate data reported by BBS are aberrational not because these wage rates are low[, . . . but] because these wage rates are determined by conditions unique to the operations of Bangladesh's shrimp industry that result in artificially depressed and suppressed labor costs that are exceptional amongst major shrimp producers at similar levels of economic development."). Commerce acknowledged Plaintiff's data and argument in its summary in the Final Decision Memo, noting, inter alia, that Plaintiff contended that "the record of this review demonstrates that [Bangladeshi labor wage rate data on the record is] aberrational because of rampant and widespread abuse of worker rights in Bangladesh . . . " Final Decision Memo at 43. This statement further demonstrates Commerce's understanding of Plaintiff's allegations. Nevertheless, Commerce's only substantive response to these arguments was to reiterate that this Court previously affirmed that a mere finding that Bangladeshi labor wage rate data was the lowest on record was insufficient to demonstrate that the data was aberrational. *See* Prelim. Decision Memo at 16; Final Decision Memo at 48–49.[12] Commerce failed to confront Plaintiff's arguments and record evidence in

[12] Commerce reasoned that,

> to the extent that [Ad Hoc Shrimp] argues that the BBS labor value is aberrational because it is the lowest among potential labor values, the argument has been previously addressed and rejected by the Department and the CIT. When determining whether data is aberrational, the Department has found that the existence of higher or lower prices alone does not necessarily indicate that the price data is distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular SV. This is a CIT-affirmed practice. . . . The record must contain specific quantitative evidence showing the value is aberrational. Petitioner has not provided such evidence.

Final Decision Memo at 49. Commerce chooses not to respond to the claim that not only are the values the lowest but they are the lowest because they are a function of widespread labor abuses.

Moreover, the claim that Plaintiff failed to provide specific quantitative evidence appears to be contradicted by record evidence which Commerce does not address. *See* Factors to Value Labor FOPs. Rather than addressing this evidence, Commerce summarily discounts it by claiming that Commerce cannot compare labor wage rates between countries. Final

this case that the Bangladeshi labor wage rate data was aberrational not just because the rates were the lowest on the record but because the labor wage rates are the product of systemic labor abuses, including forced and child labor abuses, specifically within the Bangladeshi shrimp industry.[13] *See* Final Decision Memo at 48–49; Prelim. Decision Memo at 16.

Commerce contends that it "has no authority, under the antidumping duty statute, to make socio-political determinations, or analyze socio-political factors and their potential impact on the valuation of [FOPs]." Final Decision Memo at 55. Commerce further specified that it does not base surrogate value determinations "on any criteria other than specificity, contemporaneity, whether the value is a broad market average, publicly available, or tax/duty exclusive." *Id.* at 54–55. According to Commerce, socio-political factors are inapposite to its determination under 19 U.S.C. § 1677b(c)(1)(B) and beyond its realm of expertise. *Id.* at 52–55. However, Commerce is not being asked to "make socio-political determinations, or analyze socio-political factors and their potential impact on the valuation of [FOPs]," *id.* at 55; Commerce is being asked to follow its own practice. Its practice is to not use aberrational data. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366. Commerce has been presented with a claim that the Bangladeshi labor wage rate data on the record is aberrational because it is of low value allegedly due to widespread labor abuse in the Bangladeshi shrimp industry. Widespread labor abuses undermine the market-based approach that Congress sought by requiring that Commerce use surrogate values when calculating normal value for subject merchandise from NME countries, so Commerce must address Plaintiff's claims. *Universal Camera Corp.*, 340 U.S. at 488.

Decision Memo at 50. Commerce was required to address this evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

[13] In its Final Decision Memo, Commerce did respond to Ad Hoc Shrimp's argument that "Bangladeshi wage rate data should not be used because of rampant child and forced labor practices, [and that Commerce should instead] rely on ILO wage data from India, Philippines, Guyana or Nicaragua." Final Decision Memo at 55. Commerce argued that "the source upon which [Ad Hoc Shrimp] relies to disqualify Bangladesh due to child and forced labor also lists India, Philippines, and Nicaragua (the countries that Petitioner put forward for consideration) as countries using child and forced labor." *Id.* (citing Ad Hoc Shrimp Surrogate Value Comments, Ex. 3, Table 3: List of Goods Produced by Child Labor or Forced Labor-Sorted by Country). However, the cited table does not demonstrate the existence of forced or child labor abuses in the shrimp industry of India, Nicaragua, or Philippines, but rather demonstrates the existence of forced and/or child labor in other industries in each of those countries. According to the same table, Thailand, Cambodia, Burma, and Bangladesh are the countries known to have forced or child labor within the shrimp industry. *See* Ad Hoc Shrimp Surrogate Value Comments, Ex. 3, Table 3: List of Goods Produced by Child Labor or Forced Labor-Sorted by Country.

Commerce claims that Plaintiff is "confusing the question of labor conditions with the question of data accuracy." Final Decision Memo at 52. Commerce reiterates that its practice is to "conside[r] several factors including whether the [surrogate value] is publicly available, contemporaneous with the [period of review], represents a broad market average, is tax-and duty-exclusive, and is specific to the input," and argues that its mandate "does not include remediation of socio-political or socio-economic issues." *Id.* Nonetheless, it is also Commerce's stated practice not to use aberrational data. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366. Plaintiff is not arguing for Commerce to remediate the labor conditions in Bangladesh; Plaintiff is simply arguing that Commerce consider whether those labor conditions and the fact that the Bangladeshi labor wage rate data is the lowest on the record demonstrate that the data is aberrational.

Commerce states that Plaintiff must provide "specific quantitative evidence that these socio-political issues in Bangladesh had a distortive impact on the BBS data on the record." Final Decision Memo at 52. However, as stated above, if Commerce will not consider cross country labor wage rate data comparisons, as Commerce indicated in its Final Decision Memo, *id.* at 50 ("the Department does not find that wage data from other countries are necessarily appropriate benchmarks with which to compare the Bangladeshi BBS wage data as there are other variables that affect the labor rates across countries"), it would seem that Commerce would accept only a historical analysis of Bangladeshi labor wage rates to evidence aberration. Such a requirement would be unreasonable where, as here, there is an allegation of systemic labor abuse. If Commerce means to state that it will accept labor wage rate data from other countries for purposes of comparison to determine aberration, Commerce should clarify its practice and explain under what circumstances it will accept such data.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's determination is remanded for further consideration consistent with this opinion. Specifically, upon remand, Commerce must:

1) Clarify or reconsider its practice with regard to how Plaintiff can demonstrate quantitatively that data is aberrational given its claims stem from alleged systemic labor abuses; and

2) Explain why the Bangladeshi wage rate data is not aberrational in light of record evidence of systemic labor abuses; or

if the data is aberrational why, it is nonetheless the best available information, or reconsider its determination that the Bangladeshi data is the best available information; and it is further

ORDERED that Commerce shall file its remand determination with the court within 45 days of this date; and it is further

ORDERED that Plaintiff shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that Defendant shall have 15 days thereafter to file a reply to comments on the remand determination.

Dated: March 16, 2017
New York, New York

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