U.S. Court of International Trade

Slip Op. 20–71

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., Plaintiff, AMERICAN CAST IRON PIPE COMPANY, et al., Consolidated Plaintiffs, v. UNITED STATES, DEFENDANT, AMERICAN CAST IRON PIPE COMPANY, et al., Defendant-Intervenors, and BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş, Consolidated Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 19–00056
PUBLIC VERSION

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

Dated: May 22, 2020

Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Edward J. Thomas, III, Eugene Degnan, Jordan L. Fleischer, Sabahat Chaudhary, and *Rudi W. Planert*, Morris, Manning & Martin L.L.P., of Washington, D.C., for Plaintiff and Consolidated Defendant-Intervenor Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.

Timothy C. Brightbill, Maureen E. Thorson, Laura El-Sabaawi, Adam M. Teslik, Elizabeth S. Lee, Enbar Toledano, and *Tessa V. Capeloto*, Wiley Rein L.L.P., of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors American Cast Iron Pipe Company, Berg Steel Pipe Corporation, Berg Spiral Pipe Corporation, Dura-Bond Industries, Strupp Corporation, Greens Bayou Pipe Mill LP, JSW Steel (USA) Inc., Skyline Steel, Trinity Products LLC, and Welspun Tubular LLC.

Robert R. Kiepura, Trial Attorney, and *L. Misha Preheim*, Assistant Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for Defendant United States of America. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel, Commercial Litigation Branch for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F. Supp. 3d 1395 (CIT 2020) ("*Borusan*"), in which Plaintiff, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. ("BMB"), challenges a final determination and resulting antidumping duty order as to certain Large Diameter

Welded Pipe ("LDWP") from the Republic of Turkey. *See Large Diameter Welded Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 6,362 (Dep't Commerce Feb. 27, 2019) ("*Final Determination*"); *Large Diameter Welded Pipe from the Republic of Turkey: Amended Final Affirmative Antidumping Duty Determination & Antidumping Duty Order*, 84 Fed. Reg. 18,799 (Dep't Commerce May 2, 2019).

In *Borusan*, the court upheld Commerce's determination that BMB was entitled to a post-sale price adjustment and concluded that Commerce's application of its new arm's-length test to BMB's home-market transactions with its affiliate was not contrary to law. *Borusan*, 426 F. Supp. 3d at 1406–10, 1413–14. The court remanded to Commerce to reconsider (1) the amount of BMB's downward post-sale price adjustment on its home market sales and (2) the date of BMB's U.S. sales, and ordered Commerce to eliminate any adjustment to BMB's sales below the costs of production based on a finding that a particular market situation ("PMS") exists in the exporting country. *See id.* at 1415.

Following remand, Commerce concluded it did not have additional evidence showing an improper allocation of the post-sale price adjustment to BMB. *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 86 at 1, 4 (Mar. 9, 2020) ("*Remand Results*"). Thus, Commerce, under protest, granted BMB "the full amount of the post-sale price adjustment," which resulted in a *de minimis* estimated weighted-average dumping margin. *Id.* at 1, 4. Accordingly, Commerce did not address BMB's U.S. date of sale or sales-below-cost because doing so would be an exercise in futility. *Id.* at 4. The *Remand Results* adequately address the court's concerns in *Borusan* and they are supported by substantial evidence. Accordingly, the *Remand Results* are sustained.

BACKGROUND

While the court presumes familiarity with the record in *Borusan*, the court briefly summarizes the relevant record evidence for ease of reference. The period of investigation covers January 1 through December 31, 2017. *See Final Determination*, 84 Fed. Reg. at 6,362. In Autumn 2013, BMB and two other Turkish LDWP producers (the "Consortium Members") formed a general partnership (the "Consortium"). *See* BMB's Resp. to Commerce's Suppl. Sections A-C Questionnaire, C.R. 200–225, P R. 173–174 (June 15, 2018), ECF No. 100 at 38–45 (May 5, 2020). (the "*2013 Joint Venture Agreement*"). The *2013 Joint Venture Agreement* recognizes joint and several liability among the Consortium Members as to the Consortium's liabilities to

third-parties, and goes on to create an irrevocable guaranty arrangement between the Consortium and the Consortium Members.[1]

In Spring 2014, in advance of submitting their bid for a domestic pipeline project, the Consortium Members concluded a second written agreement in which they re-affirmed their individual obligations to the Consortium in view of the specific project's requirements. *See* BMB's Resp. to Commerce's Suppl. Sections A-C Questionnaire, C.R. 200–225, P R. 173–174 (June 15, 2018), ECF No. 100 at 47–48 (May 5, 2020) ("*2014 Consortium Agreement*"). Specifically, the *2014 Consortium Agreement* reiterates the Consortium Members' joint and several liability as to the Client and provides that should any Consortium Member fail to fulfill its obligations to the Client, the other two Members would indemnify those obligations. *Id.* at ¶ 2. The Consortium won the bid and, in Autumn 2014, agreed to sell certain quantities of LDWP to the Client. *See* BMB's Suppl. Resp. to Commerce's Second Suppl. Questionnaire, CR. 280–288, P.R. 180, Ex. B32 (July 6, 2018), ECF No. 100 at 60–199 (May 5, 2020) (the "*Sales Contract*"). As a condition precedent to the Client's performance, the Consortium was required to provide the Client a written guaranty agreement demonstrating that each Consortium Member indemnifies the others' obligations as to the Client. *See id.* at 99, ¶ 6.4.[2]

In June 2018, pursuant to the *2014 Consortium Agreement*, BMB negotiated a settlement with the Client on behalf of the Consortium for [[ ]], the whole of which was invoiced to BMB, as leader of the Consortium, "on behalf of" the Consortium for the contractual late delivery penalties incurred in 2017. *See* BMB's Resp. to Commerce's Suppl. Questionnaire, C.R. 200–225, P.R. 173–174, Ex. B-28 (June 15, 2018), ECF No. 65–1 at 144 (Oct. 30, 2019). The Consortium Members agreed, pursuant to the *2014 Consortium Agreement*, that BMB's liability as to the other Consortium Members was [[ ]], the same amount for which it seeks a post-sale price adjustment. *See* BMB's Resp. to Commerce's Suppl. Questionnaire, C.R. 200–225, P.R. 173–174, Ex. B-28 (June 15, 2018), ECF No. 65–1 at 147–153 (Oct. 30, 2019) ("*2018 Consortium Protocol*"). Neverthe-

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[1] The guaranty arrangement provides that "[[ ]], providing furthermore that each Consortium Member "[[ ]]" including any [[ ]]*2013 Joint Venture Agreement*, at 39, ¶ 6(2) (emphases added).
The court's previous opinion seems to state that an agreement containing this exact language was presented to the Client; it appears that there is no evidence to that effect. Commerce did not comment on this point now raised by Domestic Producers.

[2] *Compare Sales Contract* at 99, ¶ 6.4 [[ ]] *with id.* at 70, ¶ 1.2-[[ ]].

less, in the *Final Determination*, Commerce allocated the penalty equally among the Consortium Members, and BMB sought review here. *See Borusan*, 426 F. Supp. 3d at 1404–05.

Accordingly, the court sustained Commerce's determination that BMB is entitled to a downward post-sale price adjustment for the foregoing home-market sales expenses, in view of 19 C.F.R. §§ 351.102(b)(38) and 351.401(c) (2018).[3] *See id.* at 1406–10, 1406 n.11. Nevertheless, the court remanded to Commerce to reconsider whether the foregoing documents or any other "evidence not previously cited" establishes that BMB "was liable for and actually paid or was credited" a sum less than the full amount that BMB seeks in its adjustment. *See id.* at 1410.

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction continues pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2018).[4] The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *U.S. Steel Corp. v. United States*, 219 F. Supp. 3d 1300, 1307 (CIT 2017) (internal quotations and citations omitted).

DISCUSSION

I.) *Post-Sale Price Adjustment to Normal Value Determination*

In *Borusan*, notwithstanding the statutory definition of "normal value," the court deferred to Commerce's interpretation of its regulations, concluding that Commerce may disregard certain home market sales adjustments "'on a case-by-case basis and in the light of the evidence and arguments on each record'" when determining whether, and to what extent, a respondent is entitled to a post-sale price adjustment to normal value. *Borusan* 426 F. Supp. 3d at 1406 (quoting *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 Fed. Reg. 15,641, 15,645 (Dep't Com-

[3] All further citations to the Code of Federal Regulations are to the 2018 version, unless otherwise indicated.

[4] All further citations to the United States Code are to the 2018 edition, unless otherwise indicated.

merce Mar. 24, 2016) ("*Final Modification*")). In view of Commerce's decision to grant BMB a partial post-sale price adjustment,[5] the court reasoned that BMB had established its entitlement to an adjustment to Commerce's satisfaction. *See id.* at 1407–09. The problem seen by the court was that there was no substantial evidence to support equal allocation of the adjustment among the Consortium Members. *See id.* 1409. Accordingly, the court remanded to Commerce "to review the penalty documents" or "evidence not previously cited" to determine whether BMB met its burden as to its claimed adjustment. *Id.* at 1410. The court did not "specifically reject[]" any methodologies, although Commerce was not incorrect that without more evidence or a new explanation, the court would reject equal allocation. *See Remand Results* at 7.

Having found no new evidence to support the equal allocation, Commerce granted BMB "the full amount of the post-sale price adjustment" under protest because it is "unable to cite such evidence" supporting an alternative calculation. *Id.* Defendant, the United States of America (the "government"), contends that Commerce "analyzed record information to assess the calculation of the post-sale adjustment" and, after reconsidering the evidence, "redetermined the post-sale adjustment to reflect the post-sale price adjustment" that BMB claimed during the investigation. Def.'s Resp. to Cmts. on the Remand Redetermination, ECF No. 98, at 3 (Apr. 22, 2020) ("Gov. Reply"). The government avers that Commerce's redetermination is reasonable and supported by substantial evidence. *Id.* at 6–7.

For their part, the Defendant-Intervenors, American Cast Iron Pipe Company, *et al.* (the "Domestic Producers"), maintain that (1) BMB is not entitled to any post-sale price adjustment, (2) Commerce should have applied an adverse inference based upon facts otherwise available ("AFA") in view of BMB's alleged noncooperation with Commerce, and (3) record evidence does not support BMB's penalty calculation because the Client was not aware of the guaranty arrangement at the time of sale. *See* Def.-Intervenors' Cmts. on Remand Determination, ECF No. 93 at 6–16 (Apr. 8, 2020) ("Dom. Prod. Br.").[6] The Domestic Producers contend that the court's description of the penalty documents in *Borusan* was incomplete. Dom. Prod. Br. at 6. In their view, a party is entitled to a post-sale price adjustment only

[5] *See Final Determination*, 84 Fed. Reg. at 6,362.

[6] The court has already concluded that Commerce's determinations to grant BMB a post-sale price adjustment and not to apply AFA are supported by substantial evidence and not contrary to law. *See Borusan*, 426 F. Supp. 3d at 1404 n.7. On remand, the Domestic Producers do not point to any additional evidence in the record to demonstrate that these determinations were improper. Nor did they do so before Commerce. *See Remand Results* at 7. Accordingly, the court rejects these arguments at the outset.

if "the terms and conditions of the adjustment were established *and* known to the customer at the time of sale." *Id.* at 6–7 (emphasis added). They say that *Appendix L* to the *Sales Contract* is merely a summary of BMB's guaranty arrangement with the Consortium, so that the Client was unaware of the Consortium Members' "agreement to mutually reimburse one another for penalties incurred by the [C]onsortium as a whole [[ ]]." *Id.* at 10. Additionally, the Domestic Producers claim that substantial evidence does not support BMB's methodology for calculating its claimed post-sale price adjustment. *Id.* at 14–16. Finally, they contend that even if BMB is entitled to a post-sale price adjustment and even if Commerce's calculation methodology is permissible, substantial evidence supports only an amount equal to "one-third of the total penalty amount called for under the original contract terms." *Id.* at 13. The Domestic Producers are incorrect on each score.

First, the *Final Modification* factors are "non-exhaustive," and "Commerce weighs [them] singly or in combination." *China Steel Corp. v. United States*, 393 F. Supp. 3d 1322, 1347 (CIT 2019) (citing *Final Modification*, 81 Fed. Reg. at 15,644–45). The knowledge factor tests "[w]hether the terms and conditions of the adjustment were *established and/or known* to the customer at the time of sale, and whether this can be demonstrated through documentation." *Final Modification*, 81 Fed. Reg. at 15,644–45 (emphasis added). Commerce has at times required "proof that buyers were aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale." *China Steel*, 393 F. Supp. 3d at 1347 (internal quotation and citation omitted). Each of these requirements is met here. *Appendix L* to the *Sales Contract* and the *2014 Consortium Agreement* are identical, and each provides that BMB may indemnify the other Consortium Members for any liabilities that accrue to the Client under the *Sales Contract*. *Compare Sales Contract,* App'x L, at 183–84 *with 2014 Consortium Agreement* at 47–48. Further, as the Domestic Producers acknowledge, the *Sales Contract* sets the per diem late delivery penalty rate to a figure certain. *See* Dom. Prod. Br. at 12 (citing *Sales Contract* at 103–04, ¶ 8.2.1). The *Sales Contract* also establishes the per diem late delivery penalty rates. *See Sales Contract* at 105, ¶ 9.1. Accordingly, the Client necessarily knew, at a time of sale predating the period of investigation, of BMB's guaranty arrangement with the Consortium, the general terms and conditions of that arrangement, and the approximate sum for which BMB could be liable to the Client on behalf of the Consortium pursuant to the *Sales Contract*. Likewise, the terms and conditions of the guaranty necessarily were "established" at the time of sale, even if the Client did not

receive a copy of the contract whereby all of the duties of the Members of the Consortium to each other were set forth.[7]

Given the guaranty arrangement, it would not be important to the Client which party would ultimately bear the loss. They were all on the hook for any penalties owed to it. What should be important is that the principles and terms of the allocation were contractually set between the Consortium Members prior to the investigation at issue. Although the court does not substitute its own view of the record, Commerce "'must reasonably tie the determination'" to the facts upon which it is relying. *Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1334 (CIT 2019) (quoting *CS Wind Viet. Co., Ltd. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016)). The record evidence shows that each Consortium Member was responsible for its own late deliveries relating to its sales. *See* Documentation from BMB's Second Suppl. Sections A-C Questionnaire, C.R. 280–288, P.R. 190, Ex. B-32 (July 6, 2018), ECF No. 100 at 201–22, 243–56 (May 5, 2020) ("*Late Penalty Settlement Documents*"). No Member's responsibility was set at one-third of the total penalty amount. *See id.* ; *see also 2018 Consortium Protocol.* A primary concern with post-sale price adjustments is the "potential to manipulate the dumping margins." *See Final Modification*, 81 Fed. Reg. at 15,645. Neither Commerce nor the Defendant-Intervenors point to any evidence of suspected or actual manipulation, and the court finds none in the record. The Client had full knowledge of the penalty obligations of the full Consortium; the Client's knowledge at the time of sale of the precise allocation method among the Consortium Members is immaterial to the instant case. It is as incorrect to credit BMB with one-third of the post-sale price adjustment as it would be to credit it with the entire penalty amount that it did not ultimately pay.

Second, the Domestic Producers contend that Commerce's calculation methodology is incorrect because the total "penalty amount simply does not reflect the contract terms in place at the time of sale." Dom. Prod. Br. at 12. Conceding that the *Sales Contract* establishes [[ ]] the Domestic Producers insist that Commerce should have calculated the Consortium's per diem delay penalty rate pursuant to the penalty clause in the *Sales Con-*

[7] No party, including the Domestic Producers, asked the court to reconsider its remand opinion on this point or to amend its remand instructions prior to completion of the remand. It is simply too late to raise this point. If the factual discrepancy described *supra* note 1 were material, the court even now would reconsider broadening the remand instructions, but it is not. All relevant terms were established and the obligation for the penalty was clearly part of the *Sales Contract* with the Client, as Commerce so found.

tract. *See id.* at 11–12. Although Commerce verified the final penalty amount that the Consortium actually paid to the Client, the Domestic Producers appear to argue that Commerce should determine whether the final penalty amount accords with the *Sales Contract*, irrespective of the verified amount actually paid. *See id.* at 12–13. In their view, the total late delivery penalty amount pursuant to the *Sales Contract* is simply [[ ]] the product of the number of delay days for each unit and the price of each unit. *Id.* at 12. This argument lacks merit. The adjustment pursuant to the text of the *Sales Contract* is a percentage of [[ ]] per diem, where [[ ]]. *Sales Contract*, at 71 ¶ 1.2, 104 ¶ 8.2.1. Commerce "independently verified," and the record supports, that BMB's payment of [[ ]] was pursuant to an obligation specified by these provisions of the *Sales Contract*. *See Borusan*, 426 F. Supp. 3d at 1409.

Where Commerce operates within the bounds of the statute, reasonably interprets its own regulations, and makes decisions based upon substantial evidence, it "is afforded great latitude in the choice of methodology to be employed in antidumping investigations." *Timken Co. v. United States*, 930 F. Supp. 621, 630 (CIT 1996) (internal quotation and citations omitted). There does not appear to be a real challenge to methodology. Rather, the question is one of substantial evidence supporting the adjustment. When making post-sale price adjustments to normal value based on price, the question is whether the claimed adjustment is "reasonably attributable to the subject merchandise or the foreign like product." 19 C.F.R. § 351.401(c). In this case, Commerce's determination that BMB's claimed amount is "reasonably attributable" to the foreign like product and that the penalty results from and bears a direct relationship to a home-market sale is thus supported by substantial evidence. Accordingly, the court sustains Commerce's decision to use verified information in the record to ascertain the sum of the claimed post-sale price adjustment pursuant to a contract that predates the period of investigation.

Third, because substantial evidence supports Commerce's determination that BMB is entitled to the full amount that it claims, the Domestic Producers' final argument as to whether substantial evidence supports equal allocation among the Consortium Members necessarily fails. *See* Dom. Prod. Br. at 13. In sum, substantial evidence supports Commerce's determination that BMB is entitled to a post-sale price adjustment in the amount of [[ ]], because this is the sum for which BMB was liable to the Consortium Members

vis-à-vis the Consortium's joint liability to the Client. *See 2018 Consortium Protocol*, at 284, ¶ 3.2 (amount of BMB's liability to Consortium pursuant to the *Settlement Agreement*); *see also Late Penalty Settlement Documents,* at 201–22, 245–56 (amount of Consortium's liability to Client).[8] Accordingly, because neither the Domestic Producers nor the government cite any record evidence to show that BMB manipulated or otherwise allocated the penalty amount improperly, Commerce's remand determination granting the full amount of BMB's post-sale price adjustment is sustained.

II.) *U.S. Date of Sale & PMS Adjustment to Costs of Production Determinations*

BMB contends that Commerce's failure to address the remaining issues on remand renders the *Remand Results* contrary to the court's order in *Borusan*, and thus constitutes a waiver of BMB's challenge to those issues, and so it seeks judgment as a matter of law on the respective counts in its complaint. *See* Pl.'s Cmts. on the U.S. Dep't of Commerce's Mar. 9, 2020 Final Redetermination Pursuant to Ct. Remand, ECF No. 88 at 2–5 (Mar. 26, 2020) ("BMB Br."). The government replies that Commerce's decision not to expend resources "to reach the additional issues that would have no effect" on the outcome was reasonable under these circumstances, and should be sustained. Gov. Reply 8–9.

By Commerce's determination that a properly-calculated post-sale price adjustment renders BMB's estimated weighted-average dumping margin *de minimis*, BMB has secured the maximum possible relief to which it may be entitled under 19 U.S.C. § 1516a – namely, pursuant to 19 U.S.C. § 1673d(a)(4), its merchandise "will be excluded from the underlying antidumping duty order." *Remand Results* at 11. Thus, the correctness of Commerce's determinations as to BMB's U.S. date of sale and its costs of production no longer present a live dispute between BMB and the government. *See Pro-Team Coil Nail Enter., v. United States*, 419 F. Supp. 3d 1319, 1340 (CIT 2019) (citing *Camreta v. Greene*, 563 U.S. 692, 717 (2011)). Because the Domestic Producers do not challenge Commerce's failure to reconsider either of these issues on remand, there is no actual controversy between the three parties on these two issues at this stage of the proceedings. *See Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1340 (Fed. Cir. 2008) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)) (further judicial inquiry into non-live issues risks rendering impermissible

[8] The record also contains invoices and documentation of bank transfers. *See* Documentation from BMB's Second Suppl. Section A-C Questionnaire, C.R. 280–288, P.R. 190, Ex. B-32 (July 6, 2018), ECF No. 100 at 328–38 (May 5, 2020). The bank transfers show that in July 2018, BMB remitted a total sum of [[ ]] to the Client. *See id.* at 333–38.

"'advisory opinions on abstract propositions of law.'"). Commerce was instructed to reexamine the whole record to determine whether substantial evidence supports the *Final Determination*, and Commerce did so reasonably. The court's objective is not to impose needless expenses or to waste an agency's time. *See Roses Inc. v. United States*, 774 F. Supp. 1376, 1380–81 (CIT 1991). Commerce was not incorrect in assuming the court did not require useless acts. Accordingly, Commerce's *Remand Results* are sustained in full.

III.) *"All-Others Rate" Determination*

Commerce also has determined that because BMB's revised estimated weighted-average dumping margin is *de minimis*, the all-others rate has changed. *See Remand Results* at 11. The Domestic Producers contend that because the all-others rate is not at issue and was not subject to the court's remand order, Commerce's adjustment of that rate was improper. *See* Dom. Prod. Br. at 16. BMB does not challenge Commerce's adjustment to the all-others rate. Pursuant to 19 U.S.C. § 1673d(c)(5)(A), Commerce may set the all-others rate when a "mandatory respondent['s] rate[] change[s] in the course of judicial review, even when the plaintiff does not raise a challenge to the all-others rate in its complaint or during remand proceedings." *U.S. Steel Corp. v. United States*, 348 F. Supp. 3d 1248, 1254 (CIT 2018). Accordingly, Commerce's adjustment to the all-others rate during remand proceedings was not contrary to law and will be sustained.

CONCLUSION

For the foregoing reasons, the *Remand Results* are **SUSTAINED**. Judgment will issue accordingly.

Dated: May 22, 2020
New York, New York

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

Slip Op. 20–72

ABB INC., Plaintiff, v. UNITED STATES, Defendant, and HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CORPORATION USA, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 16–00054

[Sustaining the U.S. Department of Commerce's third remand results.]

Dated: May 26, 2020

Melissa M. Brewer, *R. Alan Luberda* and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiff ABB Inc.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of counsel was *David W. Richardson*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David E. Bond, *Ron Kendler*, *Walter J. Spak*, and *William J. Moran*, White & Case LLP, of Washington, DC, for Defendant-Intervenors Hyundai Heavy Industries, Co., Ltd.[1] and Hyundai Corporation USA.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") third redetermination upon remand. *See* Final Results of Redetermination Pursuant to Court Remand (Apr. 26, 2019) ("Third Remand Results"), ECF No. 182–1. Commerce conducted this second administrative review of the antidumping duty order on large power transformers from the Republic of Korea for the period of review August 1, 2013, to July 31, 2014. *Large Power Transformers From the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce Mar. 16, 2016) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), ECF No. 27–2; and accompanying Issues and Decision Mem., A-580–867 (Mar. 8, 2016), ECF No. 27–2. The court assumes familiarity with its earlier opinions resolving substantive issues this case. *See ABB Inc. v. United States* ("*ABB I*"), 41 CIT ___, 273 F. Supp. 3d 1200 (2017); *ABB Inc. v. United States* ("*ABB II*"), 42 CIT ___, 355 F. Supp. 3d 1206 (2018), *recons. denied*, 43 CIT ___, 375 F. Supp. 3d 1348 (2019); *ABB Inc. v. United States* ("*ABB III*"), Slip Op. 20–21, 2020 WL 996919 (CIT Feb. 19, 2020).

[1] Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to Hyundai Heavy Industries, Co., Ltd. *See* Letter from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 120.

Briefly, Defendant-Intervenor Hyosung Corporation ("Hyosung")[2] and Plaintiff ABB Inc. ("ABB") filed separate motions for judgment on the agency record challenging certain aspects of the *Final Results*, and Defendant United States ("the Government") responded by requesting a remand for Commerce to reconsider issues raised by ABB: the agency's treatment of certain U.S. commission expenses incurred by Hyosung and Defendant-Intervenors Hyundai Heavy Industries Co., and Hyundai Corporation USA (together, "Hyundai") and Hyundai's sales-related revenue. *See ABB I*, 273 F. Supp. 3d at 1203–04. The court granted the Government's request for remand and rejected arguments raised by Hyosung. *Id.* at 1205–06, 1208–12.

Commerce filed the first remand results on February 9, 2018. Confidential Final Results of Redetermination Pursuant to Court Remand (Feb. 9, 2018) ("First Remand Results"), ECF No. 96. Therein, for certain services that Hyundai provided to unaffiliated customers, Commerce capped service-related revenue by the amount of associated service-related expenses. *Id.* at 6–8, 19–25. Commerce also applied partial facts available with an adverse inference (or "partial AFA") in connection with service-related revenues. *Id*. at 24.

While the court sustained Commerce's resort to facts available, the court remanded the First Remand Results with respect to Commerce's use of an adverse inference and they agency's application of a cap to so-called service revenue for those transactions for which substantial evidence did not support a finding that the services at issue were separately negotiable. *See ABB II*, 355 F. Supp. 3d at 1220–23.[3]

In the second remand results, Commerce did not cap revenue for transactions for which substantial evidence did not support a finding that the services were separately negotiable with third parties consistent with the court's instructions in *ABB II*. *See* Confidential Final Results of Redetermination Pursuant to Court Remand (Apr. 26, 2019) ("Second Remand Results"), at 17–28, 20–22, ECF No. 149. With respect to two transactions, Commerce made circumstance of sale adjustments to normal value for services identified as delayed delivery charges. *Id*. at 17–18. Commerce also further explained its use of an adverse inference, noting that Hyundai "failed to cooperate

[2] On August 29, 2019, the court granted Hyosung's motion for partial final judgment and to amend the statutory injunction, thereby granting final judgment with respect to all of Hyosung's counts and Count I of ABB's Complaint as it relates to Hyosung. *See* Order (Aug. 29, 2019), ECF No. 169.

[3] In the First Remand Results, Commerce also revisited its methodology for making home market commission offsets for U.S. commissions incurred in the United States, which the court sustained. *See ABB II*, 355 F. Supp. 3d at 1211–15.

to the best of its ability with regard to the reporting of service-related revenue" because Hyundai had the ability to report the information but failed to do so in response to Commerce's information requests. *Id*. at 14–15.

The court remanded Commerce's circumstance of sale adjustments for the delayed delivery charges but otherwise sustained the Second Remand Results. *See ABB III*, 2020 WL 996919 at *3. The court explained that, pursuant to 19 C.F.R. § 351.410, a circumstance of sale adjustment involves "an actual or implied *expenditure* by the respondent." *Id*. at *6 (quoting *Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi, A. Ş. v. United States*, 43 CIT ___, ___, 415 F.Supp.3d 1195, 1211 (2019)). Because the delayed delivery charges are revenue for Hyundai, Commerce's use of a circumstance of sale adjustment for them was not in accordance with the law. *See id*. at *6–7.

In the Third Remand Results, Commerce removed the circumstance of sale adjustments for the delayed delivery charges to determine Hyundai's normal value. *See* Third Remand Results at 9.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to subsection 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation and internal quotation marks omitted).

DISCUSSION

Hyundai submitted comments during the remand proceedings agreeing that Commerce's removal of the circumstance of sale adjustments for the delayed delivery charges is consistent with *ABB III*. Third Remand Results at 10. ABB also does not object to the Third Remand Results. Ltr. from Melissa M. Brewer, Kelley Drye & Warren LLP, to the Court (May 15, 2020), ECF No. 184. No other comments were received. Thus, Commerce's determination is uncontested.

Upon review of the Third Remand Results, Commerce's removal of circumstance of sale adjustments for the delayed delivery charges complies with the court's order in *ABB III* and is otherwise consistent with the agency's regulations governing circumstance of sale adjustments.

CONCLUSION

There being no challenges to the Third Remand Results, and those results being otherwise lawful and supported by substantial evidence, the court will sustain Commerce's Third Remand Results. Judgment will enter accordingly.

Dated: May 26, 2020
New York, New York

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

Slip Op. 20–73

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

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

[The court denies Defendants' motion to dismiss for failure to join an indispensable party, grants Plaintiffs' motions to supplement their complaints, denies Defendants' motion to vacate and dismiss for mootness, and denies Defendants' motion for leave from judgment.]

Dated: May 27, 2020

Amanda Shafer Berman, John Brew, Kathryn L. Clune, Amanda Shafer Berman, and *Larry Eisenstat*, Crowell & Moring LLP, of Washington, DC and New York, NY, argued for plaintiff, *Invenergy Renewables LLC* and plaintiff-intervenors, *Clearway Energy Group LLC* and *AES Distributed Energy, Inc*. With them on the briefs was *Frances Hadfield*.

Matthew R. Nicely and *Daniel M. Witkowski*, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiff-intervenor, *Solar Energy Industries Association.* With them on the briefs were *Dean A. Pinkert* and *Julia K. Eppard*.

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

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

John M. Gurley, Dianna Dimitriuc-Quaia, and *Friederike S. Gorgens*, Arent Fox LLP, of Washington, DC, argued for defendant-intervenors, *Hanwha Q CELLS USA, Inc*. and *Auxin Solar Inc*.

OPINION

Katzmann, Judge:

In this hotly contested litigation arising from the solar industry, the court returns to its order preliminarily enjoining the United States and the Office of the United States Trade Representative ("USTR") from withdrawing its previously granted exclusion from safeguard duties on imported bifacial solar modules, duties which the President imposed by proclamation to protect domestic industry.[1] Prelim. Inj.

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

Ord. and Op., *Invenergy Renewables LLC v. United States*, 43 CIT __, 422 F. Supp. 3d 1255 (2019), ECF No. 113 ("*Invenergy I*"); Ord. and Op. Denying Mot. to Show Cause, *Invenergy Renewables LLC v. United States*, 44 CIT __, 427 F. Supp. 3d 1402 (2020), ECF No. 149 ("*Invenergy II*"). Plaintiff Invenergy Renewables LLC ("Invenergy"), a renewable energy company,[2] joined by Plaintiff-Intervenors Solar Energy Industries Association ("SEIA"), Clearway Energy Group LLP ("Clearway"), EDF Renewables, Inc. ("EDF-R"), and AES Distributed Energy, Inc. ("AES DE") (collectively, "Plaintiffs"), filed a motion for a preliminary injunction ("PI") to enjoin the United States, USTR, U.S. Trade Representative Robert E. Lighthizer, U.S. Customs and Border Protection ("CBP"), and CBP Acting Commissioner Mark A. Morgan (collectively, "the Government") from implementing the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) ("*October Withdrawal*"). Invenergy's Mot. for Prelim. Inj., Nov. 1, 2019, ECF No. 49. Defendant-Intervenors Hanwha Q Cells USA, Inc. ("Hanwha Q Cells") and Auxin Solar Inc. ("Auxin Solar") (collectively, "Defendant-Intervenors") join the Government in this case. Hanwha Q Cells' Mot. to Intervene as Def.-Inter., Nov. 4, 2019, ECF No. 50; Ord. Granting Mot., Nov. 4, 2019, ECF No. 54; Auxin Solar's Mot. to Intervene as Def.-Inter., Feb. 7, 2020, ECF No. 136; Ord. Granting Mot., Feb. 10, 2020, ECF No. 141. The court granted Plaintiffs' motion for a PI on December 5, 2019, observing that "[t]he Government must follow its own laws and procedures when it acts." *Invenergy I*, 422 F. Supp. 3d at 1265.

Before the court now are four motions, two of which were filed in response to USTR's issuance of a new April 2020 determination to withdraw an exclusion for bifacial solar modules from safeguard duties. *Determination on the Exclusion of Bifacial Solar Panels from the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497–99 (USTR Apr. 17, 2020) ("*April Withdrawal*"). First, the Government moved for the court to dismiss the case on the grounds that Plaintiffs lacked standing and failed to join an indispensable party. Def.'s Mot. to Dismiss and Resp. to Invenergy's Mot. for a Prelim. Inj., Nov. 8, 2019, ECF No. 74 ("Def.'s Mot. to Dismiss"). The Government later moved for the court to vacate the *October Withdrawal* and dismiss the case as moot. Def.'s Resp. to Pls.' Mot. to Show Cause and Def.'s Mot. to Vacate Withdrawal and Dismiss Case as Moot, Feb. 7, 2020, ECF No. 139 ("Def.'s Resp. to Pls.' Mot. to Show Cause and Mot. to Vacate and Dismiss"). Next, the Government moved for the court to dissolve

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

the PI because USTR "cured the sole reason for which the injunctive relief was granted." Def.'s Mot. to Dissolve Prelim. Inj. at 1, Apr. 16, 2020, ECF No. 156 ("Def.'s Mot. to Dissolve"). Shortly thereafter, Plaintiffs moved to supplement their complaints to include USTR's new decision, the *April Withdrawal*. Pls.' Mots. for Leave to File Suppl. Compls., May 4, 2020, ECF Nos. 160–162 ("Pls.' Mots. to Suppl."). The court now (1) denies the Government's Motion to Dismiss; (2) grants Plaintiffs' Motions to Supplement; (3) denies the Government's Motion to Vacate and Dismiss; and (4) denies the Motion to Dissolve the PI. The court denies the Government's motions without prejudice.

BACKGROUND

The court presumes familiarity with its previous opinions — (1) *Invenergy I, supra*, and (2) *Invenergy II, supra*, — both of which provide additional information on the factual and legal background of this case. Information pertinent to this decision follows.

As the court has noted:

> This case emerges from a debate within the American solar industry between entities that rely on the importation of bifacial solar panels and entities that produce predominately monofacial solar panels in the United States. Plaintiffs here, who include consumers, purchasers, and importers of utility-grade bifacial solar panels, argue that the importation of bifacial solar panels does not harm domestic producers because domestic producers do not produce utility-scale bifacial solar panels; they thus oppose safeguard duties that they contend increase the cost of these bifacial solar panels. Domestic producers, however, contend that solar project developers can use either monofacial or bifacial solar panels, and thus safeguard duties are necessary to protect domestic production of solar panels. Both sides contend that their position better supports expanding solar as a source of renewable energy in the United States.

Invenergy I, 422 F. Supp. 3d at 1264.

The statutory scheme for imposition of safeguard duties has been summarized by the court as follows:

> Through Section 201, Congress provided a process by which the executive branch could implement temporary safeguard measures to protect a domestic industry from the harm associated with an increase in imports from foreign competitors. Trade Act of 1974 §§ 201–04, 19 U.S.C. §§ 2251–54 (2012). Section 201

> dictates that, upon petitions from domestic entities or industries, the International Trade Commission ("ITC") may make an affirmative determination that serious injury or a threat of serious injury to that industry exists. 19 U.S.C. § 2252. The President may then authorize discretionary measures, known as "safeguards," to provide a domestic industry temporary relief from serious injury. 19 U.S.C. § 2253. The statute vests the President with decision making authority based on consideration of ten factors. 19 U.S.C. § 2253(a)(2). Safeguard measures have a maximum duration of four years, unless extended for another maximum of four years based upon a new determination by the ITC. 19 U.S.C. § 2253(e)(1). The statute also outlines certain limits on the President's ability to act under this statute, including to limit new actions after the termination of safeguard measures regarding certain articles. *See* 19 U.S.C. § 2253(e). Further, the safeguard statute mandates that the President "shall by regulation provide for the efficient and fair administration of all actions taken for the purpose of providing import relief." 19 U.S.C. § 2253(g)(1).

Invenergy I, 422 F. Supp. 3d at 1265–66 (footnote omitted).

Through *Presidential Proclamation 9693* issued on January 23, 2018, the President imposed safeguard duties, designed to protect the domestic industry, on imported monofacial and bifacial solar panels, but delegated authority to USTR to exclude products from the duties. 83 Fed. Reg. 3,541–51 ("*Presidential Proclamation*"). After a sixteen-month notice-and-comment process through which USTR considered requests for exclusions, USTR decided to exclude bifacial solar panels from safeguard duties. *Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684–85 (USTR June 13, 2019) ("*Exclusion*"). Four months later, however, USTR published the *October Withdrawal*. The *October Withdrawal* explained that, "[s]ince publication of [the *Exclusion*] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure." *October Withdrawal* at 54,244. Absent court action, therefore, the *October Withdrawal* would have reinstituted safeguard duties on certain bifacial solar panels.

Plaintiff Invenergy initiated this case in response to the *October Withdrawal*. Summons, Oct. 21, 2019, ECF No. 1; Invenergy's Compl., Oct. 21, 2019, ECF No. 13. The Government subsequently moved for,

and the court allowed, USTR to delay the effective date of the *October Withdrawal* to November 8, 2019. Def.'s Mot. to Stay Effective Date of Withdrawal, Oct. 25, 2019, ECF No. 23; Ord. Granting Mot., Oct. 25, 2019, ECF No. 29. The court then issued a temporary restraining order, Nov. 7, 2019, ECF No. 68, and later a PI, to enjoin USTR from reinstituting safeguard duties on certain bifacial solar panels through implementation of the *October Withdrawal*. *Invenergy I*, 422 F. Supp. 3d 1255. The PI found that USTR made the decision with only nineteen days' notice to the public, without an opportunity for affected or interested parties to comment, and without a developed public record. *Id.* at 1286–88. The PI included enjoining USTR from amending the Harmonized Tariff Schedule of the United States ("HTSUS") to reflect withdrawal of the *Exclusion*, "until entry of final judgment as to Plaintiffs' claims against Defendants in this case." *Id.* at 1295. In so ruling, the court held that the *October Withdrawal* of the *Exclusion* by the Government likely violated the Administrative Procedure Act ("APA") on two grounds: (1) the rulemaking occurred without notice and comment, *id.* at 1286– 87; and (2) it was likely done in an arbitrary and capricious manner, *id.* at 1287–88.

In responding to Plaintiffs' motion for a PI, the Government moved to dismiss the case for Plaintiffs' alleged lack of standing and failure to join an indispensable party. Def.'s Mot. to Dismiss. In issuing the PI, the court ordered the parties to confer and submit a proposed briefing schedule on this issue.[3] *Invenergy I*, 422 F. Supp. 3d at 1295. Throughout late December 2019 and early January 2020, Plaintiffs filed four consent motions for an extension of time to file the proposed briefing schedule and indicated to the court that the parties were close to reaching an agreement to resolve this case. *See* Pls.' Mot. for an Ext. of Time, Dec. 19, 2019, ECF No. 118; Ord. Granting Mot., Dec. 20, 2019, ECF No. 119; Pls.' Mot. for Ext. of Time, Dec. 27, 2019, ECF No. 121; Ord. Granting Mot., Dec. 27, 2019, ECF No. 122; Pls.' Mot. for Ext. of Time, Jan. 3, 2020, ECF No. 123; Ord. Granting Mot., Jan. 3, 2020, ECF No. 124; Pls.' Mot. for Ext. of Time, Jan. 17, 2020, ECF No. 125; Ord. Granting Mot., Jan. 17, 2020, ECF No. 126.

However, on January 24, 2020, the Government filed its Motion for Leave to File a Status Report and Status Report ("January Status Report"), notifying the court and the other parties of USTR's publication of "a notice in the Federal Register, requesting interested party

[3] Plaintiffs Invenergy, Clearway, AES DE, and SEIA responded to the Government's Motion to Dismiss on December 13, 2019. Invenergy, Clearway, and AES DE's Resp. in Opp'n to Def.'s Mot. to Dismiss, ECF No. 115; Resp. of Pl.-Inter. SEIA in Opp'n to Def.'s Mot. to Dismiss, ECF No. 116. The Government and Defendant-Intervenors never replied to the responses to the motion and have not pursued this motion before the court.

comment regarding whether to withdraw the [*Exclusion*] from the safeguard measure pursuant to section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, *et seq.*, for bifacial solar panels contained in [*Exclusion*].” ECF No. 129. The court granted the Government’s motion that same day, thus deeming the January Status Report filed. Ord. Granting Mot., Jan. 24, 2020, ECF Nos. 130, 131. USTR published the notice in the Federal Register three days later, thereby initiating the comment period. *Procedures to Consider Retention or Withdrawal of the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 4,756–58 (USTR Jan. 27, 2020) (“*January Notice*”). The *January Notice* acknowledged the court’s PI “enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure,” and noted that “[i]f the U.S. Trade Representative determines after receipt of comments pursuant to this notice that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to the exclusion, the U.S. Trade Representative will request that the [c]ourt lift the injunction.” *Id.* at 4,756. The *January Notice* provided a deadline for comments of February 17, 2020 and for responses to those comments of February 27, 2020. *Id.* at 4,757.

In response, Plaintiffs Invenergy, Clearway, and AES DE filed their Motion to Show Cause as to Why the Court Should Not Enforce the Preliminary Injunction, Jan. 30, 2020, ECF No. 132, alleging that the Government’s publication of the *January Notice* violated the PI. Plaintiffs asked the court to “order Defendants to show cause as to why it should not enforce the PI by ordering USTR to cease proceedings under the [*January Notice*], and instead proceed to briefing on Plaintiffs’ substantive and procedural claims.” Mem. in Supp. of Mot. to Show Cause as to Why the Ct. Should Not Enforce the PI at 12, Jan. 30, 2020, ECF No. 132. The court ordered the Government and Hanwha Q Cells to respond, Jan. 31, 2020, ECF No. 133, which they did on February 7, 2020, Def.’s Resp. to Pls.’ Mot. to Show Cause and Def.’s Mot. to Vacate and Dismiss; Hanwha Q Cells’ Resp. to Pls.’ Mot. to Show Cause, ECF No. 140. The Government included with its response a motion to vacate the *October Withdrawal* and to dismiss the case as moot. Def.’s Mot. to Vacate and Dismiss. The court held oral argument on Plaintiffs’ Motion to Show Cause on February 12, 2020. ECF No. 145. The court then denied Plaintiffs’ motion stating, “the Government’s [*January Notice*] did not violate the text of [the PI] because the [*January Notice*] does not (1) implement the [*October Withdrawal]* ; (2) modify the HTSUS; or (3) enforce or make effective the [*October Withdrawal]* or modifications to the HTSUS related to the [*October Withdrawal*].” *Invenergy II*, 427 F. Supp. 3d at 1407. The

court further held that the *January Notice* alone did "not constitute a final decision to implement the previous or any new withdrawal of the *Exclusion* of bifacial solar panels." *Id.* The court, moreover, made clear that "[it] retains exclusive jurisdiction over the implementation, enforcement, or modification of the [*October Withdrawal]* until such date as a final judgment is entered in this case." *Id.*

Following the court's decision to deny the Plaintiffs' Motion to Show Cause, the parties continued to brief the Government's Motion to Vacate and Dismiss. Plaintiffs filed responses to the motion on March 16, 2020. Pls.' Resp. in Opp'n to Mot. to Vacate and Dismiss, ECF No. 152 ("Pls.' Resp. to Def.'s Mot. to Vacate and Dismiss"). The Government and Defendant-Intervenor Hanwha Q Cells replied on April 6, 2020. Def.'s Reply to Pls.' Resp. to Def.'s Mot. to Vacate and Dismiss, ECF No. 153; Def.-Inter. Hanwha Q Cells' Reply to Pls.' Resp. to Def.'s Mot. to Vacate and Dismiss, ECF No. 154 ("Hanwha Q Cells' Reply to Def.'s Mot. to Vacate and Dismiss"). Thus, the Government's Motion to Vacate and Dismiss has been fully briefed by all parties.

On April 14, 2020, the Government filed another status report to inform the court of the issuance of USTR's *April Withdrawal*. Def.'s Status Report, ECF No. 155 ("April Status Report"). The *April Withdrawal* constitutes a withdrawal of the *Exclusion* of bifacial solar panels from safeguard duties — the same ultimate conclusion as the *October Withdrawal*. In its April Status Report, the Government explained that "[i]n response to the [c]ourt's preliminary conclusion that repealing the withdrawal of the exclusion 'requires rulemaking subject to . . . APA notice and comment,' USTR 'opened a public docket,' and received 15 comments regarding the bifacial exclusion and 49 subsequent comments responding to the initial comments." April Status Report at 2 (internal citations omitted). Further, the Government explained that USTR "based the [*April Withdrawal*] on the comments and evidence received." *Id.*

Two days later, the Government filed its Motion to Dissolve the Preliminary Injunction, pursuant to USCIT Rule 60(b)(5). Def.'s Mot. to Dissolve. The Government argued that the *April Withdrawal* "cured the sole reason for which the injunctive relief was granted." *Id.* at 1. Plaintiffs filed responses in opposition to the motion on May 7, 2020. Invenergy, Clearway, and AES DE's Resp. in Opp'n to Def.'s Mot. to Dissolve Prelim. Inj., ECF No. 163 ("Invenergy's Resp. to Def.'s Mot. to Dissolve"); Pl.-Inter. SEIA's Resp. to Def.'s Mot. to Dissolve PI, ECF No. 164 ("SEIA's Resp. to Def.'s Mot. to Dissolve"); Pl.-Inter. EDF-R's Resp. in Opp'n to Def.'s Mot. to Dissolve, ECF No. 166 ("EDF-R's Resp. to Def.'s Mot. to Dissolve"). Plaintiffs argued that

the *April Withdrawal* was an arbitrary and capricious decision and thus did not cure the likely APA violation previously identified by the court. *Id.* Shortly thereafter, Plaintiffs filed motions to supplement their complaints to include the *April Withdrawal*. Pls.' Mots. to Suppl. The Government and Defendant-Intervenors subsequently responded. Def.'s Resp. to Pls.' Mots. for Leave to File Suppl. Compls., May 11, 2020, ECF No. 171 ("Def.'s Resp. to Pls.' Mots. to Suppl."); Def.-Inters.' Resp. to Pls.' Mots. for Leave to File Suppl. Compls., May 12, 2020, ECF No. 173 ("Def.-Inters.' Resp. to Pls.' Mots. to Suppl.").

The court issued questions regarding the Government's Motion to Dissolve to the parties on May 8, 2020, ECF No. 169, to which the parties responded on May 12, 2020, Def.'s Resps. to the Ct.'s Questions of May 8, 2020, ECF No. 172 ("Def.'s Resps. to Ct.'s Questions"); Def. Inters.' Resps. to Ct.'s Questions Issued May 8, 2020, ECF No. 174 ("Def.-Inters.' Resps. to Ct.'s Questions"); Pls.' Resps. to Ct.'s Questions Regarding Mot. to Dissolve PI, ECF No. 175 ("Pls.' Resps. to Ct.'s Questions"). The Government attached two memoranda to its responses to the court's questions. Mem. from DUSTR Jeffrey D. Gerrish and General Counsel Joseph Barloon to USTR Robert Lighthizer, Apr. 13, 2020, Attach. 1 to Def.'s Resp. to Ct.'s Questions, ECF No. 172–1 ("Lighthizer Decision Memorandum"); Mem. from DUSTR Jeffrey D. Gerrish and General Counsel Joseph Barloon to USTR Robert Lighthizer, Apr. 10, 2020, Attach. 2 to Def.'s Resp. to Ct.'s Questions, ECF No. 172–2 ("Gerrish Memorandum"), (collectively, "USTR Memoranda"). The USTR Memoranda consist of Deputy U.S. Trade Representative Jeffrey D. Gerrish's and U.S. Trade Representative General Counsel Joseph Barloon's analysis of USTR's authority to withdraw an exclusion, their analysis of comments received pursuant to the *January Notice*, and a recommended decision, initialed by U.S. Trade Representative Robert Lighthizer. *Id.*

The court held oral argument via teleconference on May 13, 2020. ECF No. 177 ("Oral Arg."). Following the teleconference, at the court's direction, the parties filed supplemental briefs on May 15, 2020. Invenergy, Clearway, AES DE's Post-Arg. Submission in Opp'n to Def.'s Mot. to Dissolve PI, ECF No. 182 ("Invenergy's Post-OA Filing"); Pl.-Inter. SEIA's Post-Arg. Br. in Opp'n to Def.'s Mot. to Dissolve PI, ECF No. 181 ("SEIA's Post-OA Filing"); Pl.-Inter. EDF-R's Suppl. Resp. After Oral Arg. to Def.'s Mot. to Dissolve PI, ECF No. 180 ("EDF-R's Post-OA Filing"); Def.'s Post-Hearing Br., ECF No. 179 ("Def.'s Post-OA Filing"); Suppl. Br. of Def.-Inters. Hanwha Q Cells and Auxin Solar, ECF No. 183 ("Def.-Inters.' Post-OA Filing").

JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i) (2018), which provides that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of tariffs and duties.

DISCUSSION

The court takes this opportunity to address all outstanding motions in this case because of the implications of each motion on the others. The court first denies the Government's Motion to Dismiss filed in November 2019 in response to Plaintiffs' Motion for a PI. Next, the court grants Plaintiffs' Motions to Supplement. The court then denies the Government's Motion to Vacate and Dismiss. Finally, the court denies the Government's Motion to Dissolve the PI. The court addresses each of these motions in turn and sets forth its reasoning.

I. The Court Denies the Government's November Motion to Dismiss.

As a preliminary matter, the court first addresses the Government's outstanding Motion to Dismiss, filed with the court on November 8, 2019, before the court issued the PI. The Government argued that the court should dismiss the case because (1) Invenergy lacks Article III standing; (2) Invenergy lacks prudential standing;[4] and (3) Invenergy has not joined an indispensable party. Def.'s Mot. to Dismiss at 11–21. Later that same day, the court granted the Motion to Intervene of EDF-R, a self-described "importer, purchaser, and user of bifacial solar modules." EDF-R's Unopposed Mot. to Intervene as Pl.-Inter. at 2, Nov. 7, 2019, ECF No. 69; Ord. Granting EDF-R's Mot. to Intervene, Nov. 8, 2019, ECF No. 78. On December 5, 2019, the court issued the PI, in which it squarely addressed the Government's objections to standing, concluding that Invenergy, both independently and as joined by Plaintiff-Intervenors, had Article III and statutory standing necessary for the court to exercise jurisdiction. *Invenergy I*, 422 F. Supp. 3d at 1275–80. Plaintiffs Invenergy, Clearway, AES DE, and SEIA then responded to the Government's Motion to Dismiss on December 13, 2019, discussing and incorporating the court's standing

[4] As the court noted in *Invenergy I*, "prudential standing" is "a misnomer" and should be referred to as "statutory standing." 422 F. Supp. 3d at 1275 (quoting *Lexmark Int'l Inc. v. Static Central Components, Inc.*, 572 U.S. 118, 126, 128 n.4 (2014)).

analysis in *Invenergy I*. Invenergy, Clearway, and AES DE's Resp. in Opp'n to Def.'s Mot. to Dismiss, ECF No. 115; Resp. of Pl.-Inter. SEIA in Opp'n to Def.'s Mot. to Dismiss, ECF No. 116. The Government and Defendant-Intervenors, however, never filed a reply. *See* USCIT R. 7(d) (setting deadline for reply to a response filed to dispositive motion).

The reply would have provided the Government and Defendant-Intervenors an opportunity to respond to both the intervention in the case of an importer of bifacial solar panels, EDF-R, and the issuance of the PI, including the court's standing analysis in its opinion. It appears instead, however, that the Government has abandoned this initial Motion to Dismiss. Neither the Government nor Defendant-Intervenors have made any subsequent motions or mentions of this Motion to Dismiss since issuance of the PI. Furthermore, when directly asked about this motion by the court in its written questions to the parties and at the most recent oral argument, the Government declined to acknowledge that motion or answer the question as to that motion. *See* Oral Arg.; Def.'s Resps. to Ct.'s Questions at 4.

The court concludes that the Motion to Dismiss must be denied because the Government has failed to pursue this motion, despite ample opportunity to do so and direct questioning by the court. *See Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 801 (Fed. Cir. 2010) (upholding district court's entry of judgment based on abandoned and unargued claims and stating that "[i]t is a claimant's burden to keep the district court clearly apprised of what parts of its claim it wishes to pursue and which parts, if any, it wishes to reserve for another day"); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) ("The appellants' failure to brief and argue this issue during the proceedings before the district court is grounds for finding that the issue has been abandoned.").

II. The Court Grants Plaintiffs' Motions to Supplement Their Complaints.

The court next exercises its discretion to grant Plaintiffs' Motions to Supplement their complaints pursuant to USCIT Rule 15(d). After the Government filed the April Status Report alerting the parties to USTR's new final determination to withdraw the *Exclusion*, the *April Withdrawal*, Plaintiffs moved to supplement their complaints to "add facts and claims regarding" the *April Withdrawal*. *See, e.g.*, Mem. of Points and Authorities in Supp. of the Pl. and Pl.-Inters.' Mot. for Leave to File Suppl. Compls. at 1, May 4, 2020, ECF No. 161 ("Invenergy's Mem. re: Suppl. Compl."). Plaintiffs argue that supplement-

ing their complaints "will avoid piecemeal litigation, allow a prompt and efficient resolution of the entire controversy among the parties, and impose no prejudice on the United States." *Id.* at 3–4. The Government and Defendant-Intervenors, for their part, do not object to supplementation of the complaints, but rather defer to the court's judgment as to whether supplementation here meets the requirements of USCIT Rule 15(d). *See* Def.'s Resp. to Pls.' Mots. to Suppl. at 1; Def.-Inters.' Resp. to Pls.' Mots. to Suppl. at 1.

USCIT Rule 15(d) states that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Thus, it is within the court's discretion to grant such a motion. The court has described the USCIT Rule 15 standard as "equitable and lenient." *Arlanxeo USA LLC v. United States*, 42 CIT __, __, 337 F. Supp. 3d 1350, 1356 (2018). Further, the Federal Circuit has adopted the Supreme Court's view of Rule 15 under the corresponding Federal Rules of Civil Procedure as a mandate "which declares that leave to amend 'shall be freely given when justice so requires' [that] 'is to be heeded.'" *Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Federal Circuit in *Intrepid* also noted that "Rule 15(d) unequivocally allows supplementing a complaint with a count based on later events." *Id.* at 1129 ("Where the supplemental pleading with respect to such later events relates to the same cause of action originally pleaded, the Supreme Court held, in *Griffin v. School Board*, 377 U.S. 218, 227 (1964), that it would be an abuse of discretion to deny the amendment."). Factors that may weigh against permitting amendment or supplementation of a complaint include: "[u]ndue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment." *Foman*, 371 U.S. at 182. Further, this court's rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." USCIT R. 1.

The court concludes that equity and judicial efficiency dictate that it grant Plaintiffs' Motions to Supplement. The *April Withdrawal* is a later-in-time event that is sufficiently connected to the original pleading because of its impact on the *Exclusion*, and Plaintiffs' claims regarding the legality of the *April Withdrawal* are substantially similar to those in their original complaints. Furthermore, the court has

already established its jurisdiction to hear these claims, including by ruling on Plaintiffs' standing to challenge the USTR's decision regarding safeguard tariffs on bifacial solar panels. *Invenergy I*, 422 F. Supp. 3d at 1271–80. The court agrees that to require Plaintiffs "to file a brand new suit to challenge the [*April Withdrawal*]" would "waste the parties' and the [c]ourt's resources given that this [c]ourt is already familiar with both the jurisdictional and merits issues in this case that were raised by Plaintiffs' challenge to the [*October Withdrawal*]." *See* Invenergy's Mem. re: Suppl. Compl. at 3.

Further, because the Government and Defendant-Intervenors do not oppose the motion, *see* Def.'s Resp. to Pls.' Mots. to Suppl. at 1; Def.-Inters.' Resp. to Pls.' Mots. to Suppl. at 1, the court finds that allowing Plaintiffs to supplement their complaints will not prejudice the Government or Defendant-Intervenors. There being no indication of undue delay, lack of notice, or bad faith on the part of Plaintiffs, the court concludes that none of the factors that weigh against supplementation is present here. Therefore, the court grants Plaintiffs' Motions to Supplement, and deems their supplemental complaints filed.

III. The Court Denies the Government's Motion to Vacate the October Withdrawal and Dismiss the Case as Moot.

After the publication of the *January Notice* and the initiation of a new notice-and-comment period to consider withdrawal of the *Exclusion* by USTR, the Government moved to vacate the *October Withdrawal* and to dismiss the case as moot in order to clear the way for implementation of a new determination by USTR. Def.'s Mot. to Vacate and Dismiss at 10. The Government explained that, while it was not confessing error in USTR's issuance of the *October Withdrawal*, USTR wished to "address interested party comments in the first instance," which would "provide certainty to interested parties during the remaining term of the safeguard measure." *Id.* The Government further argued that both USTR's initiation of a notice-and-comment period and the requested vacatur would moot Plaintiffs' claims. *Id.* at 11. Defendant-Intervenor Hanwha Q Cells supported this motion by arguing that the court should vacate the *October Withdrawal* and noting that, at least at the time, USTR's *January Notice* had not produced a final agency action that was ripe for review. Hanwha Q Cells' Reply to Def.'s Mot. to Vacate and Dismiss at 10.

Plaintiffs opposed vacatur of the *October Withdrawal* and dismissal of the case as moot because they argued that the court could not vacate an agency decision without a final judgment and that the case should not be dismissed due to the ongoing process initiated by the *January Notice*. Pls.' Resp. to Def.'s Mot. to Vacate and Dismiss at

6–19. Specifically, Plaintiffs opposed vacatur of the *October Withdrawal* because the Government neither confessed error nor requested a voluntary remand, and the court had made no final decision on the merits. *Id.* at 7–8 (citing *SKF USA v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 4–5 (D.D.C. 2009)). In light of the court's decision, discussed *supra*, Discussion, Section II, to allow Plaintiffs to supplement their complaints, thus establishing the court's jurisdiction over claims related to the *April Withdrawal*, the court addresses the Government's mootness argument before separately addressing its request for vacatur of the *October Withdrawal*.

The court first denies the Government's Motion to Vacate and Dismiss for mootness because, particularly in light of the supplemental complaints, a live dispute no doubt exists. In order to maintain jurisdiction to adjudicate a dispute, a case must present a live dispute between the parties for which the court can provide relief. *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013). "There is thus no case or controversy, and a suit becomes moot, 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 172 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)) (other quotations omitted). Unlike the Government's Motion to Dismiss filed in November, the Government has fully briefed and pursued its Motion to Vacate and Dismiss for mootness. However, the Government filed, and the parties briefed, the motion before USTR issued the *April Withdrawal* and before Plaintiffs moved to supplement their complaints to reflect the *April Withdrawal*. Indeed, one of the Government's arguments in support of its motion was that "any complaint regarding the outcome of USTR's proceeding is necessarily speculative." Def.'s Mot. to Vacate and Dismiss at 11. Because the court today grants Plaintiffs' Motions to Supplement their complaints, the court must deny the Government's Motion to Vacate and Dismiss the case as moot because, as the parties do not dispute, a live controversy regarding the legality of the *April Withdrawal* is now before the court. *See* Pls.' Resps. to Ct.'s Questions at 8 ("[I]f this [c]ourt grants Plaintiffs' Motions to Supplement the Complaints, then plainly the Court has jurisdiction over the [*April Withdrawal*] under 28 U.S.C. § 158l(i)(2)–(4) and the APA."); Def.'s Resps. to Ct.'s Questions at 8 ("If the [c]ourt were to allow the filing of supplemental complaints after dissolving the injunction, then, subject to any other jurisdictional defects that may be identified, [P]laintiffs could challenge the merits of the *April Withdrawal*, including filing motions for preliminary injunction and dispositive briefing.").

Separate and apart from the *April Withdrawal*, the court also denies the Government's request for vacatur of the *October Withdrawal* because the Government has not met its burden of establishing a legal basis on which the court can grant such a motion. The court may vacate an agency decision through a final disposition of a case or via remand of the case to the agency. *See Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017) (reversing a district court grant of a voluntary remand where the agency did not intend to revisit the challenged agency decision on review); *Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 16–17 (1st Cir. 2008) (reversing a district court's dissolution of a PI based on sufficient compliance with the court's order because the district court did not resolve outstanding legal issues, which would impact compliance before dissolving the PI); *Nat'l Parks Conservation Ass'n,* 660 F. Supp. 2d at 5 (denying a motion to vacate an agency rule and remand where it would "wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule").[5] The Government, however, has provided no legal authority in support of the proposition that a court can vacate an agency decision before final disposition of the case or without a voluntary remand request from the agency.

In response to the court's question on this point, the Government argued that the *April Withdrawal* was designed to supersede the *October Withdrawal*. Def.'s Resps. to Ct.'s Questions at 2–3 (answering "Yes" to the court's question about whether it was the Government's position that the *April Withdrawal* legally superseded the *October Withdrawal* and noting the *April Withdrawal*'s prospective application). At this stage in the litigation, however, the Government has not yet demonstrated a legal basis on which the court can vacate the *October Withdrawal*. The Government has not confessed error, requested remand, or indicated that its position regarding the *Octo-*

[5] Defendant-Intervenor Hanwha Q Cells points the court to a decision by the United States District Court of Colorado, in which the court vacated an agency decision without first adjudicating the merits of the case. Hanwha Q Cells' Reply to Def.'s Mot. to Vacate and Dismiss at 4 (citing *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1240–42). However, vacatur in that case was in the context of Plaintiffs' request for remand after the basis for the agency's decision, a separate legal opinion by an executive branch official, had been withdrawn. *Center for Native Ecosystems*, 795 F. Supp. 2d at 1239, 1242 (D. Colo. 2013). That case is not persuasive here because USTR has not requested a remand from the court, which would have guaranteed ongoing jurisdiction over any decision by USTR to withdraw the *Exclusion*. Instead, the Government has argued that the court did not have jurisdiction over the *April Withdrawal* until challenged in this or another case. Def.'s Resps. to Ct.'s Questions at 6 ("Unless and until the [c]ourt grants [P]laintiffs' motions to supplement their complaints, the [c]ourt will not have assumed jurisdiction to entertain any challenge to the *April Withdrawal*"). In any event, with today's opinion and order granting Plaintiffs' Motions to Supplement their complaints to include the *April Withdrawal*, the court establishes jurisdiction over this new decision by USTR.

ber Withdrawal has changed in any way. *See* Def.'s Mot. to Vacate and Dismiss at 10–11 (noting that the USTR issued the *January Notice* "without confessing error," but that it nonetheless mooted Plaintiffs' alleged procedural violation); Def.'s Resps. to Ct.'s Questions at 9 ("USTR's proceeding leading to the *April Withdrawal* was not a remand proceeding."). Moreover, the Government's introduction of the USTR Memoranda two days before oral argument on the Government's Motion to Dissolve the PI raises considerable questions — ones which have not yet been briefed — as to whether the publication of the *April Withdrawal* in the Federal Register marked the completion of a new determination. *See* Def.'s Resps. to Ct.'s Questions. Thus, to the extent the Government argues the *April Withdrawal* legally supersedes the *October Withdrawal*, it must also demonstrate that the new determination is complete. The Government has neither provided a legal basis on which the court can grant vacatur, as both final disposition on the merits or voluntary remand do not apply here, nor proven that the *April Withdrawal* legally supersedes or rescinds the *October Withdrawal*; thus, the court must deny the motion for vacatur at this stage. The court denies the Government's Motion to Vacate and Dismiss without prejudice and takes no position as to the outcome of any subsequent requests to vacate the *October Withdrawal* in the context *of new developments.*

IV. The Court Denies the Government's Motion to Dissolve the PI.

Finally, the court denies the Government's Motion to Dissolve the PI pursuant to USCIT Rule 60(b)(5). The Government filed this motion shortly after notifying the court of publication of USTR's *April Withdrawal*. Def.'s Mot. to Dissolve; April Status Report. Plaintiffs responded that they opposed the motion before filing their own Motions to Supplement. *See* Invenergy's Resp. to Def.'s Mot. to Dissolve; SEIA's Resp. to Def.'s Mot. to Dissolve; EDF-R's Resp. to Def.'s Mot. to Dissolve. The most recent oral argument also focused on the parties' arguments regarding dissolution of the PI. Oral Arg.

USCIT Rule 60(b)(5) states that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . [when] the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." As the court noted in its opinion denying Plaintiffs' Motion to Show Cause, the court has continuing jurisdiction over the injunction on the *October Withdrawal*. *Invenergy II*, 427 F. Supp. 3d at 1407 (citing *In re Shenango*

Group, 501 F.3d 338 (3d Cir. 2007); *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997)). The court has significant discretion in determining whether it is appropriate to continue to enforce a preliminary injunction. *See Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961) (noting that "an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief"); *Morita v. Application Art Labs. Co.*, Nos. 89–1270, 89–1293, 1989 WL 83256, at *1 (Fed. Cir. July 28, 1989) (noting that appellate review of denial of motion to dissolve preliminary injunction is "limited to determining . . . whether the district court abused its discretion"); *Kreepy Krauly U.S.A. Inc., v. Sta-Rite Indus., Inc.*, Nos. 97–1091, 97–1368, 1998 WL 196750, at *9–10 (Fed. Cir. Apr. 24, 1998) (same).

USCIT Rule 60(b)(5) allows the court to relieve a party from a judgment where factual or legal circumstances have sufficiently changed such that continued enforcement of the injunctive relief would be inequitable. *See AIMCOR Ala. Silicon, Inc. v. United States*, 23 CIT 932, 939, 83 F. Supp. 2d 1293, 1299 (1999). "A change in operative fact may serve as a basis for vacating a preliminary injunction." *Concilio de Salud Integral de Loiza*, 551 F.3d at 16 (1st Cir. 2008) (citing *Agostini v. Felton*, 521 U.S. 203, 215 (1997)). In dissolving an injunction, the court requires the moving party to show both changed circumstances and that continuation of the injunction would be inequitable. *See Morita*, 1989 WL 83256, at *1–2 (noting that court must inquire as to "whether the movant has shown that changed circumstances warrant discontinuation of the preliminary relief," and declining to dissolve injunction because the defense's new allegations did not "compel the district court to disturb its earlier finding as to likelihood of success"); *AIMCOR Ala. Silicon*, 83 F. Supp. 2d at 1299 (noting that the moving party "bears the burden of showing that changed circumstances . . . make the continuation of the injunction inequitable"); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 32 CIT 666, 670, 562 F. Supp. 2d 1383, 1388 (2008) (same). The burden is on the defendant to demonstrate to the court that the PI "is unnecessary and should be reconsidered or dissolved." *SKF USA Inc. v. United States*, 28 CIT 170, 182, 316 F. Supp. 2d 1322, 1334 (2004). The requirement that the moving party meet this dual burden of showing changed circumstances and inequity "prevents an enjoined party from constantly challenging the imposition of a preliminary injunction and relitigating arguments on motions to dissolve that have already been considered by the district court in its initial deci-

sion." *See Sprint Commc'ns Co. v. CAT Commc'ns Int'l Inc.*, 335 F.3d 235, 242 (3d Cir. 2003).

The Government argues that the *April Withdrawal* "cured the sole basis — failure to comply with the notice and comment provisions of the APA —" for Plaintiffs' likelihood of success on the merits, justifying injunctive relief. Def.'s Mot. to Dissolve at 7. Thus, the Government maintains that "[t]here has been a significant change in 'factual conditions' that warrants dissolution of the preliminary injunction." *Id.* The Government further contends that "there is no basis to assume that the [*April Withdrawal*] is unlawful and to maintain the extraordinary remedy of injunctive relief" because, the Government claims, it was a new and separate determination entitled to a presumption of regularity. *Id.* at 8. Defendant-Intervenors indicate that they support the Government's Motion to Dissolve on a different basis — that the Government has abandoned the *October Withdrawal*. *See* Def.-Inters.' Resps. to Ct.'s Questions at 1–4.

Plaintiffs oppose this motion, arguing that the Government has not met its burden of proving that circumstances have sufficiently changed or that it would be inequitable to continue the injunction. First, Plaintiffs dispute the Government's claim that the *April Withdrawal* cured the procedural deficiencies of the *October Withdrawal*. *See* Invenergy's Resp. to Def.'s Mot. to Dissolve at 1; SEIA's Resp. to Def.'s Mot. to Dissolve at 2; EDF-R's Resp. to Def.'s Mot. to Dissolve at 1. Specifically, Invenergy contends that the *April Withdrawal* provided only conclusory statements to justify USTR's determination. Invenergy's Resp. to Def.'s Mot. to Dissolve at 17. Moreover, Plaintiffs point to USTR's failure to address certain of their comments in the *April Withdrawal* as published in the Federal Register to argue that the *April Withdrawal*, like the *October Withdrawal*, was arbitrary and capricious. *Id.* at 19. Therefore, they contend, the *April Withdrawal* suffers from at least one of the same procedural deficiencies that warranted injunctive relief as the *October Withdrawal*. *Id.*; SEIA's Resp. to Def.'s Mot. to Dissolve at 4; EDF-R's Resp. to Def.'s Mot. to Dissolve at 7. Plaintiffs further assert that, in the Motion to Dissolve, the Government "chose to argue only that the injunction should be dissolved, and the *Withdrawal* permitted to go into effect, because they had 'cured' the procedural error that the [c]ourt found in its PI Opinion by issuing notice and permitting the submission of comments." Pls.' Resps. to Ct.'s Questions at 11. They contend that the Government "entirely failed to address the other basis for the PI: the [c]ourt's finding that *Withdrawal* of the *Exclusion* was likely arbitrary and capricious." *Id.* Second, Plaintiffs claim that the Government failed to argue that continued enforcement of the PI would

be inequitable. Invenergy's Resp. to Def.'s Mot. to Dissolve at 11; SEIA's Resp. to Def.'s Mot. to Dissolve at 2 (adopting the arguments set forth in Invenergy's and EDF-R's responses); EDF-R's Resp. to Def.'s Mot. to Dissolve at 10.

Later, in response to the court's questions, the Government provided the court with the USTR Memoranda, which it relies on as providing the reasoned explanation for the *April Withdrawal* and even characterizes as a part of USTR's new determination. *See* Def.'s Resps. to Ct. Questions at 12 ("The [Gerrish Memorandum] provides the detailed findings of fact and analysis underlying the determination . . . The 'contested determination' here consists of the [Lighthizer Decision Memorandum] and the 'findings or report' would include the *April Withdrawal* published in the Federal Register and the [Gerrish Memorandum] approved by the Trade Representative" (quoting USCIT R. 73.3(a)(1))); USTR Mems. The Government and Defendant-Intervenors rely on these memoranda at oral argument and in their post-argument briefs to support the Governments' Motion to Dissolve the PI. *See* Oral Arg.; Def.'s Post-OA Filing at 8–9; Def.-Inters.' Post-OA Filing at 8. Plaintiffs do not address these memoranda in their responses to the court's questions. *See* Pls.' Resp. to Ct.'s Questions. At oral argument and in their post-argument filings, however, Plaintiffs make clear that they, like the court, lacked access to these documents until the day before oral argument.[6] They argue that (1) the Government cannot use the USTR Memoranda to meet its burden of showing that the *April Withdrawal* cured the arbitrary and capricious harm identified in the PI because the Government did not publish, provide to the parties, or reference those memoranda in its Motion to Dissolve; and (2) the court should not rely on the USTR Memoranda because Plaintiffs have had no opportunity to review and respond to those memoranda in the course of briefing on the Motion to Dissolve. *See* Oral Arg.; Invenergy's Post-OA Filing at 5; SEIA's Post-OA Filing at 10; EDF-R's Post-OA Filing at 6–7.

The court concludes that the Government has not met its burden of showing changed circumstances and resulting inequity in order to justify dissolution of the PI. *See, e.g., SKF USA*, 316 F. Supp. 2d at 1334. Thus, the court denies the Government's Motion to Dissolve. The court reaches this conclusion for two reasons: (1) the Government

[6] At oral argument on May 13, 2020, the Government responded to Plaintiffs' concerns regarding the alleged last-minute provision of the USTR Memoranda by explaining that such documents are typically provided as part of the Administrative Record, pursuant to USCIT Rule 73.3. Oral Arg. As this litigation has not proceeded to the merits of Plaintiffs' claims and had not, prior to today's opinion, included claims related to the *April Withdrawal*, the Government has not yet compiled the Administrative Record. *See id.*

did not make a showing that the *April Withdrawal* constitutes sufficient changed circumstances regarding its previous arbitrary and capricious finding in issuing the PI; and (2) the *October Withdrawal* is not yet moot because the USTR has not yet rescinded the *October Withdrawal*, and the Government has not yet met the legal requirements for vacatur, addressed in further detail above.

First, the court finds that the Government's Motion to Dissolve does not address the court's previous preliminary finding that the *October Withdrawal* was arbitrary and capricious. *See* Def.'s Mot. to Dissolve. Instead, the Government argues that it addressed the "sole basis" of the PI — the lack of notice-and-comment proceedings. Def.'s Mot. to Dissolve at 7. *See also* April Status Report at 2 (discussing only the court's preliminary finding regarding APA notice-and-comment requirements, but not the arbitrary and capricious finding); Def.'s Mot. to Vacate and Dismiss at 11 (arguing that USTR's publication of the *January Notice* initiating a notice-and-comment period "offers all of the relief that the [c]ourt preliminarily found to be lacking"). Further, only after the Plaintiffs noted this absence in the Government's motion does the Government address this basis and then provide the court and the parties with the USTR Memoranda that the Government then argues provides the reasoned explanation for the *April Withdrawal*. *See* Def.'s Resps. to Ct.'s Questions at 5, 12–16. While the Government does address the arbitrary and capricious claim in response to the court's questions, the Government's late attempts to remedy its oversight in its original motion is insufficient to meet its burden and to justify disturbing the court's previous findings.[7] *See, e.g., Tarpley v. Greene*, 684 F.2d 1, 7 n.17 (D.C. Cir. 1982) ("Clearly, oral argument on appeal is not the proper time to advance new arguments or legal theories in opposition to a motion for summary judgment. . . . It is not the task of this court to consider all of the implications of a theory vaguely raised for the first time at oral argument on appeal and to search the record for supporting evidence."). Without having addressed the arbitrary and capricious find-

[7] The Government also contends at oral argument and in its post-oral argument brief that it had implicitly argued that the *April Withdrawal* cured the court's arbitrary and capricious basis for issuing the PI. *See* Oral Arg.; Def.'s Post-OA Filing at 2–3. However, if that was the Government's position, then it should have explicitly stated so rather than asking the court to divine that reading of its April Status Report and Motion to Dissolve ex-post, especially where the Government bears the burden here of proving changed circumstances. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a 'cursory fashion' with only 'bare-bones arguments.'" (citations omitted)); *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace." (quoting *Paterson–Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988)).

ing in the PI in its Motion to Dissolve, the Government cannot show that circumstances have sufficiently changed in regard to this finding, nor can it show that inequity would result in the court's continual enforcement of the PI. *See Morita*, 1989 WL 83256, at *1–2; *Ad Hoc Shrimp Trade Action Comm.*, 562 F. Supp. 2d at 1388; *SKF USA*, 316 F. Supp. 3d at 1334; *AIMCOR Ala. Silicon*, 83 F. Supp. 2d at 1299.

Second, the court recognizes that the Government need not show changed circumstances and inequity from continuation of the PI if the *October Withdrawal* is vacated, and thus the grounds on which the PI rests become moot. As discussed in detail above in the context of vacatur, however, the Government has not conclusively shown that USTR has rescinded the *October Withdrawal*, or that the *October Withdrawal* would not go into effect should the court dissolve the PI. Thus, the circumstances surrounding the *October Withdrawal*, taken apart from the *April Withdrawal*, do not justify dissolving the PI. The court does not and need not definitively decide whether the *April Withdrawal* in and of itself cures the deficiencies of the *October Withdrawal* or that the *April Withdrawal* is free from legal defect. Because USTR has not rescinded the *October Withdrawal* and Plaintiffs have only recently been able to supplement their complaints to include claims that USTR's *April Withdrawal* also runs afoul of the APA, the court merely concludes that the Government has not met its burden of showing sufficiently changed circumstances to justify dissolving the PI at this stage in the litigation. Furthermore, Plaintiffs, the Government, and Defendant-Intervenors have not had an adequate opportunity to address the implications of the addition of the *April Withdrawal* to the court's jurisdiction or the newly provided USTR Memoranda in support of that decision. The court's decision today in no way prejudices the Government from making future motions to dissolve the PI, whether by showing changed circumstances and inequity or by mooting the *October Withdrawal*, on which the PI rests, through vacatur.

CONCLUSION

For these reasons, the court: (1) denies the Government's Motion to Dismiss for Failure to Join an Indispensable Party; (2) grants Plaintiffs' Motions to Supplement their Complaints; (3) denies the Government's Motion to Vacate the Withdrawal and Dismiss the Case as Moot; and (4) denies the Government's Motion to Dissolve the PI. Pursuant to the accompanying Order, the court directs the parties to confer and submit a proposed further schedule in this action by June 17, 2020. The court acknowledges the Government and Defendant-

Intervenors' concern that domestic industries may face a threat of material injury due to USTR's decision to exclude bifacial solar products from safeguard duties. *See, e.g.*, Def.'s Post-OA Filing at 7; Def.-Inters.' Resps. to Ct.'s Questions at 20–21; Def.-Inters.' Post-OA Filing at 12. The court also acknowledges the concerns of Plaintiffs (consumers, purchasers and importers of utility-grade bifacial solar panels), who oppose safeguard duties that they claim increase the cost of bifacial solar panels. *See, e.g.*, Invenergy's Resp. to Def.'s Mot. to Dissolve at 25: SEIA's Resp. to Def.'s Mot. to Dissolve at 21. At this stage of the proceedings, the court takes no position on the efficacy of the *Exclusion* or a decision to withdraw the *Exclusion* in providing protection to the domestic solar industry. Instead, the court merely continues to require the Government to follow its own laws when it acts.

SO ORDERED.

Dated: May 27, 2020
New York, New York

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