U.S. Court of International Trade

Slip Op. 18–50

COALITION for FAIR TRADE in GARLIC, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00005

[Granting Defendant's motion to dismiss for lack of subject matter jurisdiction and denying Plaintiff's motions for a preliminary injunction and for judgment on the agency record as moot.]

Dated: May 4, 2018

Robert T. Hume, Hume & Associates, LLC, of Taos, NM, argued for Plaintiff Coalition for Fair Trade in Garlic.

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

OPINION AND ORDER

Barnett, Judge:

Pending before the court is Defendant's motion to dismiss this case for lack of subject matter jurisdiction. *See* Def.'s Mot. to Dismiss, ECF No. 15. Also pending are Plaintiff's motions for judgment on the agency record and for a preliminary injunction. *See* Mot. of Pl. Coalition for Fair Trade in Garlic for J. on the Agency R. ("Pl.'s MJAR"), ECF No. 10; Mot. for Prelim. Inj. ("Pl.'s Mot. for PI"), ECF No. 19. Defendant's motion to dismiss and Plaintiff's motion for preliminary injunction are fully briefed. The court held oral argument on April 26, 2016. *See* Docket Entry, ECF No. 25. For the following reasons, the court grants Defendant's motion to dismiss and denies, as moot, Plaintiff's motions for a preliminary injunction and for judgment on the agency record.

BACKGROUND

On November 1, 2017, Commerce published a notice informing interested parties that they could request an administrative review of the antidumping duty order covering fresh garlic from China for the

November 1, 2016, through October 31, 2017 period of review. *Antidumping of Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 Fed. Reg. 50,620 (Dep't Commerce Nov. 1, 2017). In the notice, Commerce set a deadline of November 30, 2017, for such requests. *Id*.

On November 27, 2018, the Coalition for Fair Trade in Garlic ("CFTG") filed a review request, asserting status as a domestic interested party to make such a request, and asking that Commerce review any "exporters of fresh garlic . . . during the period of review." Compl. ¶ 6, ECF No. 5; *id.*, Ex. 3. In its review request, CFTG did not individually name any Chinese exporter of garlic. While CFTG did not expressly state why any particular exporter should be reviewed, it did state that it requested the review "to ensure that [the] Department [of Commerce] determines the proper amount of antidumping duties owed and estimated duties to be deposited for all subject garlic." Compl., Ex. 3. With the exception of Zhengzhou Harmoni Spice Co., Ltd. ("Harmoni") and Harmoni International Spice, Inc., CFTG did not serve any Chinese exporter with its review request.[1] Compl. ¶ 7; *id.*, Ex. 4. On November 29, 2017, CFTG restated its request that Commerce review "all Chinese exporters of the subject garlic," but again did not identify any individual exporters, explain why any particular exporter should be reviewed, or, with the exception of Harmoni, serve any exporter of Chinese garlic. Compl., Ex. 4.

On December 12, 2017, Commerce responded to CFTG's review request, stating that the request did "not conform to the requirements of 19 C.F.R. 351.213(b)(1)." Compl., Ex. 5. Commerce further stated that, pursuant to § 351.213(b)(1), "a domestic interested party . . . may request in writing that the Secretary conduct an administrative review . . . of *specified individual exporters or producers* covered by an order, . . . if the requesting person states why the person desires the Secretary to review those *particular* exporters or producers." *Id*. (quoting 19 C.F.R. § 351.213(b)(1) (emphasis in original)). Commerce stated that CFTG's review request was "invalid" because it "lack[ed] the requisite specificity." *Id*.

On December 18, 2017, CFTG requested a 10-day extension to supplement again its review request to specify (and serve) individual Chinese garlic exporters and producers for Commerce to review.

[1] In its November 29, 2017 supplement to its review request, CFTG stated that it was sending a copy of its November 27, 2018, review request to Harmoni and Harmoni International Spice, Inc., having previously provided a copy to these companies' counsel. Compl. ¶ 7; *id.*, Ex. 4. Subsequently, on December 18, 2017, CFTG asserted that it sent copies of both the November 27, and November 29, 2017 requests to Harmoni and Harmoni International Spice, Inc. Compl. ¶ 7; *id.*,Ex. 6.

Compl., Ex. 6. In the alternative, CFTG asked that Commerce reinterpret CFTG's review requests to cover Harmoni. *Id*. On January 2, 2018, Commerce responded to CFTG's December letter, indicating that, even if the December request was considered a timely request for administrative review, the letter did not meet applicable regulatory requirements. Compl., Ex. 1. CFTG "did not specify individual exporters or producers" and provided no explanation as to "why those *particular* exporters or producers should be reviewed." *Id*. (emphasis in original). Commerce again stated that CFTG's review request was invalid. *Id*.

On January 11, 2018, Commerce published the initiation notice for the 23rd administrative review of the antidumping duty order covering fresh garlic from China, based on the review requests filed by other interested parties. *Initiation of Antidumping and Countervailing Duty Administrative Review*, 83 Fed. Reg. 1,329, 1,332–33 (Dep't Commerce Jan. 11, 2018). Commerce included Harmoni as a respondent in that review. *Id.*; Compl. ¶ 12.

On January 29, 2018, CFTG filed its complaint in this court, seeking to invoke the court's residual jurisdiction pursuant to 28 U.S.C. § 1581(i), and asking the court to hold that CFTG's review request was valid. Compl. ¶¶ 1 and 2. On February 26, 2018, the court ordered the parties to confer and to file with the Clerk a proposed scheduling order by April 12, 2018. Letter from the Court to All Counsel (Feb. 26, 2018), ECF No. 9. The next day, on February 27, 2018, CFTG filed a motion for judgment on the administrative record, pursuant to United States Court of International Trade ("USCIT") Rule 56.1.[2] *See* Pl.'s MJAR. Pursuant to USCIT Rule 56.1(d), the Defendant's response to CFTG's motion for judgment on the administrative record was due on April 3, 2018. *See* USCIT Rule 56.1(d).

On March 29, 2018, the Defendant filed a motion to dismiss CFTG's complaint, arguing that the court does not possess subject matter jurisdiction. *See generally* Def.'s Mot. to Dismiss. That same day, the Defendant filed a motion to stay other deadlines while the court considered the motion to dismiss, Def.'s Mot. for Stay, ECF No. 16, which motion the court granted, Order (Apr. 4, 2018), ECF No. 18. On April 3, 2018, CFTG filed its response to the motion to dismiss and, within that response, proposed that Defendant's motion to dismiss (referenced incorrectly as a Motion to Strike) be treated as a responsive pleading such that the court should consider that issue was

[2] The court observes that CFTG's motion was premature pursuant to USCIT Rule 56.1(a), providing that a motion for judgment on an agency record in an action other than as described in 28 U.S.C. § 1581(c) may be filed "[a]fter issue is joined." Defendant had not filed an answer to Plaintiff's complaint when CFTG filed its motion.

joined and the court should grant Plaintiff judgment on the pleadings pursuant to USCIT Rule 12(c). Resp. by Pl. Coalition for Fair Trade in Garlic in Opp'n to Def's Mots. to Dismiss and to Stay Deadlines and in Supp. of Pl's Mot. for J. on the Pleadings at 1, ECF No. 17 at ECF pp. 1–2, and Mem. in Opp'n in Opp'n to Def's Mots. to Dismiss and to Stay Deadlines and in Supp. of Pl's Mot. for J. on the Pleadings ("Pl.'s Resp."), ECF No. 17 at ECF pp. 4–19.

On April 6, 2018, each entity that had previously requested a review of Harmoni withdrew its review request. *See* Pl.'s Mot. for PI, Exs. 1–3. As of April 26, 2018, when the court held oral argument on the motions to dismiss and for a preliminary injunction, Commerce has taken no action on the review request withdrawals. Oral Arg. at 2:15–2:15.[3]

On April 9, 2018, CFTG filed a motion for preliminary injunction, Pl.'s Mot. for PI, and on April 19, 2018, the Defendant filed its response in opposition to the motion for preliminary injunction, Def.'s Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. 22.

STANDARD OF REVIEW

It is well established that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A party seeking to invoke the Court's jurisdiction has the burden of establishing that jurisdiction exists. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When a defendant challenges the Court's jurisdiction, the plaintiff cannot rely merely upon allegations in the complaint, but must instead bring forth relevant evidence, competent to establish jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). When deciding a motion to dismiss based upon a lack of subject-matter jurisdiction, the court assumes that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Chemsol, LLC v. United States*, 37 CIT ___, 901 F. Supp. 2d 1362, 1365–66 (2013), *aff'd,* 755 F.3d 1345 (Fed. Cir. 2014).

DISCUSSION

Pursuant to 28 U.S.C. § 1581(i), the court has jurisdiction to hear "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing

[3] Citations to the oral argument reflect time stamps from the recording.

for—. . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). However, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable [] by the Court of International Trade under section 516A(a) of the Tariff Act of 1930[, as amended, 19 U.S.C. § 1516a(a)] . . . ." 28 U.S.C. § 1581(i).

The legislative history of § 1581(i) demonstrates that Congress intended "that any determination specified in section 516A of the Tariff Act of 1930, [as amended,] or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." H.R. Rep. No. 96–1235, at 48 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, jurisdiction pursuant to § 1581(i) is available only if the Plaintiff can demonstrate that jurisdiction pursuant to § 1581(a)–(h) is unavailable, or the remedies afforded by those provisions would be manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.") (citations omitted); *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1362 (Fed. Cir. 2016).

In its motion to dismiss, Defendant raises three main arguments in support of its position. Defendant argues that relief under § 1581(c) is available to Plaintiff, that such relief would not be manifestly inadequate, and that there is no final agency action for Plaintiff to challenge. Def's Mot. to Dismiss at 7–16.[4] For the reasons discussed below, the court finds that it lacks jurisdiction to entertain Plaintiff's claims at this time.

A. The Availability of Jurisdiction Pursuant to § 1581(c)

Final determinations by Commerce are reviewable by the court pursuant to 28 U.S.C. § 1581(c) jurisdiction as provided for in 19 U.S.C. § 1516a(a)(2). *See* 28 U.S.C. § 1581(c). Having initiated a review of Harmoni's imports, whether Commerce completes that review as a result of CFTG's request, another party's request, or

[4] Defendant also argues that Plaintiff has failed to exhaust its administrative remedies, Def.'s Mot. to Dismiss at 16–18, which argument Plaintiff disputes, Pl.'s Resp. at 9–10. Because the court dismisses this case for lack of subject matter jurisdiction, it need not address the parties' arguments on this issue.

pursuant to any other authority the agency may possess, or Commerce determines to rescind the review, it would have to publish a final determination to that effect. *See* 19 C.F.R. § 351.213(d)(4). Defendant acknowledges that "[o]nce Commerce issues a final action on the matter," CFTG may seek judicial review of that decision. Def.'s Reply in Supp. of its Mot. to Dismiss and Resp. in Opp'n to Pl.'s Mot. for J. on the Pleadings at 5, ECF No. 23; Oral Arg. at 3:16–4:12.[5] Whether such final determination is in the form of a stand-alone final rescission notice or accompanies the final results of review, such notice would constitute a reviewable determination pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) over which the court would have jurisdiction pursuant to 28 U.S.C. § 1581(c). Moreover, Plaintiff does not dispute that §1581(c) would be available, instead focusing its challenge to whether the relief available pursuant to §1581(c) would be manifestly inadequate. *See* Pl.'s Resp. at 3–5.

B. Jurisdiction Pursuant to §1581(c) Would Not be Manifestly Inadequate

Plaintiffs have not met their burden of establishing that the remedy available pursuant to 28 U.S.C. § 1581(c) would be manifestly inadequate. *Miller & Co.*, 824 F.2d at 963 (when jurisdiction under another provision of 28 U.S.C. § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate."). The mere fact that judicial review may be delayed because a party would be required to wait for Commerce's final determination is insufficient to render judicial review pursuant to § 1581(c) manifestly inadequate. *Gov't of People's Republic of China v. United States*, 31 CIT 451, 461, 483 F. Supp. 2d 1274, 1282 (2007); *see also* Oral Arg. at 7:11–7:24 (Plaintiff's counsel agreeing with the court that mere time delay does not constitute manifest inadequacy of a remedy).

Here, CFTG argues that §1581(c) relief is inadequate because "waiting for a Commerce final decision will allow Commerce to rescind the review for Harmoni and provide Harmoni with years of additional imports at a zero rate pending a Court decision in a case the CFTG may file pursuant to 28 U.S.C. 1581(c)." Pl.'s Resp. at 3.[6] As

[5] At oral argument, counsel for the Defendant acknowledged that if Commerce issues a final notice of rescission of review with respect to Harmoni, that determination would constitute a reviewable determination but acknowledged that there could be some question as to whether 19 U.S.C. § 1516a(a)(2)(B)(iii) is the proper statutory basis. Oral Arg. at 3:16–4:12. Plaintiff's counsel indicated that he did not interpret 19 U.S.C. § 1516a(a)(2)(B)(iii) to cover a final notice of rescission of review by Commerce. *Id.* at 6:12–6:26, 9:55–10:10.

[6] In its motion for a preliminary injunction, CFTG's claim of irreparable injury addressed its competition with Harmoni in the local Talin Market in Sante Fe, New Mexico. Pl.'s Mot.

discussed above, CFTG could challenge a final decision to rescind the review of Harmoni, should such a decision occur, and whether it occurs prior to or in conjunction with the publication of the final results of review with respect to other respondents. Regardless of the timing of the final decision, all forms of relief, including injunctive relief, would be available to CFTG, if warranted. Consequently, while CFTG might have to wait to obtain judicial relief, CFTG has not established that relief pursuant to §1581(c) would be manifestly inadequate.

In its motion to dismiss, Defendant cited numerous cases in support of its argument that relief pursuant to §1581(c) would not be manifestly inadequate. *See* Def.'s Mot. to Dismiss at 9–13 (citing and discussing almost one dozen cases in support of its argument that adequate relief would be available pursuant to §1581(c)). CFTG does not rebut this showing by Defendant and, instead, acknowledges that "Defendant cites a number of cases that Defendant claims are analogous." Pl.'s Resp. at 3. Instead of addressing any of those cases, CFTG singles out one case that Defendant cited for the proposition that relief would be available to CFTG pursuant to §1581(c). *Id.* at 3–4 (citing *CP Kelco (Shandong) Biological Co. Ltd. v. United States,* 40 CIT ___, 145 F. Supp. 3d 1366, 1372 (2016)).

In discussing *CP Kelco*, Defendant properly considered the case to be analogous to the extent that the court rejected an attempt to challenge a decision not to individually review a company as a voluntary respondent while the review was on-going, finding that the decision could be reviewed at the completion of the review. Def.'s Mot. to Dismiss at 8–9 (citing *CP Kelco*, 145 F. Supp. 3d at 1373–74). CFTG rejects the analogy claiming that "participation by a voluntary respondent ... was not time sensitive [and] if Commerce rescinds the review of Harmoni, Plaintiff effectively loses its chance to challenge Commerce's rescission decision." Pl.'s Resp. at 3–4. The delay in obtaining relief is insufficient to make relief pursuant to §1581(c) manifestly inadequate, *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 38 CIT ___, 986 F. Supp. 2d 1381, 1384 (2014), and CFTG's suggestion that it would otherwise lose it chance to challenge the rescission is legally incorrect. As discussed above, any final decision to rescind the review of Harmoni is a reviewable determination within the meaning of 19 U.S.C. § 1516a(a)(2)(B)(iii) and CFTG would not lose its chance to challenge that determination.

for PI at 5. Setting aside whether CFTG adequately alleged irreparable harm for purposes of seeking a preliminary injunction, nothing about this statement of competition suggests that any delay in obtaining relief pursuant to §1581(c) would render that relief manifestly inadequate.

C. Final Agency Action Has Not Occurred

While Commerce indicated that it was not initiating a review of Harmoni on the basis of CFTG's request, Commerce has, in fact, initiated a review of Harmoni on the basis of review requests from other parties. Compl. ¶ 12; *id.*, Ex 1. Consequently, the imports of subject garlic from Harmoni remain suspended and subject to the on-going administrative review.

It its motion for a preliminary injunction, CFTG explained that the other parties that requested a review of Harmoni have since withdrawn their requests and that such withdrawals were made within 90 days of the date of publication of the notice of initiation of the review. Pl.'s Mot. for PI at 4; *id.*, Exs 1–3. Consequently, pursuant to 19 C.F.R. § 351.123(d)(1), Commerce may rescind the review of Harmoni; however, it has not yet done so. Thus, even if relief pursuant to § 1581(c) were unavailable or manifestly inadequate, CFTG's action, challenging the decision not to rely on its request as a basis for initiating the administrative review of Harmoni,[7] would be premature because there has been no final agency action; Harmoni remains subject to review pending any final agency action with respect to the review requests made and withdrawn or otherwise declared invalid.

CFTG contends that Commerce issued a final decision on the validity of its review request and has not requested any further information from CFTG. While CFTG cites *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) for the proposition that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," Pl.'s Resp. at 6 (citation omitted), CFTG fails to appreciate that the "administrative order" in question in that case

[7] While CFTG does not articulate its concern clearly, it also appears to suggest that Commerce erred in not relying on its review request to initiate a review of the so-called non-market economy (NME) entity (the companies within China that fail to rebut the presumption of government control), citing *Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002). Pl.'s Resp. at 6. While *Transcom* affirmed Commerce's application of the results of its review to the NME entity, finding that sufficient notice had been provided by Commerce, it did not require Commerce to review the NME entity in each review. In fact, while Commerce initially refined its practice following *Transcom* to state expressly in each initiation notice that it was conditionally initiating a review of the NME entity, Commerce announced in 2013 that it would no longer consider the NME entity as an exporter conditionally subject to administrative reviews. *See Antidumping Proceedings*, 78 Fed. Reg. 65,963 (Dep't Commerce Nov. 4, 2013) (announcement of change in department practice for respondent selection in antidumping duty proceedings and conditional review of the non-market economy entity in NME antidumping duty proceedings). Therein, the public was advised that "[i]f interested parties wish to request a review of the entity, such a request must be made in accordance with the Department's regulations." *Id.* at 65,964. Here, CFTG relies on an outdated practice to seek to justify a review request that Commerce found inadequate.

was, in fact, a final agency action – a remand determination following court review of the final determination in an antidumping duty investigation. *Changzhou Wujin*, 701 F.3d at 1370–74. In the absence of final agency action here, there is no reviewable determination.

CONCLUSION

For the foregoing reasons, the court grants Defendant's motion to dismiss for lack of jurisdiction. Because the court is dismissing the case for lack of jurisdiction, Plaintiff's motions for a preliminary injunction and for judgment on the agency record (which plaintiff subsequently proposed could be considered a motion for judgment on the pleadings) are denied as moot. Judgment will enter accordingly.

Dated: May 4, 2018
New York, New York

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

Slip Op. 18–51

JSW STEEL LTD. and JSW STEEL COATED PRODUCTS LTD., Plaintiffs, v. UNITED STATES, Defendant, and AK STEEL CORP.; STEEL DYNAMICS, INC.; CALIFORNIA STEEL INDUS., INC.; ARCELORMITTAL USA LLC; and NUCOR CORP., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 16–00165

[Remanding the Department of Commerce's final determination.]

Dated: May 9, 2018

Mark D. Davis, Davis & Leiman PC, and *Irene Huei-min Chen*, Chen Law Group LLC, of Washington, D.C., argued for plaintiffs. With them on the brief was *Mark B. Lehnardt*, Antidumping Defense Group LLC, of Washington, D.C.

Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C., argued for defendant. With them on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Elizabeth Speck*, Senior Trial Counsel.

John W. Bohn, Schagrin Associates, of Washington, D.C., argued for defendant-intervenors. With him on the brief was Roger B. Schagrin, Schagrin Associates, of Washington, D.C.

OPINION

Goldberg, Senior Judge:

This matter concerns the final determination issued by the Department of Commerce ("Commerce" or the "Department") in the countervailing duty ("CVD") investigation of certain corrosion-resistant steel products ("CORE") from India. *Certain Corrosion-Resistant Steel Products from India*, 81 Fed. Reg. 35,323 (Dep't Commerce June 2, 2016) ("*Final Determination*"), and accompanying Issues & Decision Mem. ("I&D Mem."). Plaintiffs JSW Steel Limited and JSW Steel Coated Products Limited (collectively, "Plaintiffs" or "JSW"), contest Commerce's use of adverse facts available ("AFA") in connection with a JSW affiliate called JSW Steel (Salav) Limited ("Salav"). Because substantial evidence does not support Commerce's determination, the court remands for redetermination in accordance with this opinion and order.

BACKGROUND

Commerce initiated a CVD investigation into CORE from certain countries, including India, with a period of investigation ("POI") of calendar year 2014. *Certain Corrosion-Resistant Steel Products from*

the People's Republic of China, India, Italy, the Republic of Korea, and Taiwan, 80 Fed. Reg. 37,223 (Dep't Commerce June 30, 2015) (initiation). JSW was selected as a mandatory respondent.

As part of its investigation, Commerce issued multiple questionnaires seeking information about JSW and certain affiliates. Questionnaire to the Gov't of India, P.R. 69 (July 31, 2015) ("First Questionnaire"); 1st Supp. Questionnaire from USDOC to JSW, P.R. 167 (Oct. 20, 2015) ("Second Questionnaire"); *see* JSW 2nd Supp. Questionnaire Response, P.R. 206 (Dec. 16, 2015) ("Third Questionnaire"). In its First Questionnaire, Commerce requested, in relevant part, that JSW "provide a complete questionnaire response for those affiliates where 'cross-ownership' exists"[1] and "the cross-owned company supplies an input product to you that is primarily dedicated to the production of the subject merchandise." I&D Mem. cmt. 11. JSW provided full responses on behalf of itself and an affiliate named JSCPL, both producers of subject merchandise, and also on behalf of ARCL, a cross-owned producer of inputs to subject merchandise. *Id.* With its response to the initial questionnaire, JSW also provided a list of 55 affiliated companies, including Salav, and indicated why full questionnaire responses were not required for those companies. Affiliated Companies Resp. Ex. 1, P.R. 85 (Aug. 24, 2015). This document stated that Salav was "not in operation" during the POI. *Id.*

Commerce issued a supplemental questionnaire requesting, in relevant part, that JSW provide information concerning subsidies for any cross-owned companies that "supply any inputs to the production of CORE or to the production of other inputs to the production of CORE." Second Questionnaire; I&D Mem. cmt. 11. In response, JSW explained that no additional companies beyond ARCL fit this description.

Finally, in its second supplemental questionnaire, Commerce requested that JSW "revise [its] questionnaire response to cover subsidies received by all of [JSW's] Indian subsidiaries . . . or explain why [JSW] believes it is not necessary to report subsidies received by these other divisions." Third Questionnaire; I&D Mem. cmt. 11. Again, JSW responded that no additional companies were responsive to Commerce's questionnaire. In sum, the three questionnaires essentially sought information concerning those affiliates of JSW whose subsidies might be attributable to JSW in this CVD investigation.

Commerce then published its preliminary determination, calculating JSW's CVD rate at 2.85%. *Certain Corrosion-Resistant Steel Products from India*, 80 Fed. Reg. 68,854 (Dep't Commerce Nov. 6, 2015)

[1] It is uncontested that cross-ownership exists between JSW and Salav.

(prelim. determ.) ("*Preliminary Determination*"), and accompanying Issues & Decision Mem. After the *Preliminary Determination*, Commerce conducted an on-site verification at JSW. JSW Verification Report, P.R. 257 (Apr. 12, 2016). After Commerce arrived for verification, JSW informed Commerce that JSW had inadvertently and erroneously reported that Salav had not been operational during the POI. *Id.* at 5. On this basis, JSW had not discussed Salav or its subsidies in response to any of Commerce's questionnaires. However, JSW explained that, while Salav had in fact been operational for the final two months of the POI, questionnaire responses were still not required for Salav on the separate basis that Salav does not produce an input responsive to Commerce's questionnaires. JSW Case Br. 9–15, P.R. 264 (Apr. 21, 2016).

Commerce rejected JSW's representations about Salav as untimely "new factual information" that did not qualify as a "minor correction" and that Commerce was not obligated to verify. I&D Mem. cmt. 11. Commerce concluded that JSW had withheld requested information concerning Salav, thereby impeding Commerce's investigation. *Id.* On these same facts, Commerce also determined that JSW had not fully cooperated in the investigation, warranting the use of adverse facts available ("AFA"). *Id.*

Thereafter, Commerce issued its *Final Determination*, calculating JSW's final CVD rate at 29.46%, 81 Fed. Reg. at 35,324, 25.22% of which resulted from Commerce's use of AFA related to JSW's alleged failure to disclose requested information concerning Salav, I&D Mem. Sec. 5. Plaintiffs timely filed this action to contest the CVD rate and Commerce's determination that AFA was appropriate.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's countervailable subsidy determinations 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).

DISCUSSION

I. Facts Available and Adverse Facts Available

Commerce "shall" fill gaps in the record using "the facts otherwise available" ("facts available") when a respondent: (A) "withholds information that has been requested by [Commerce]," (B) "fails to provide such information by the deadlines for submission of the information or in the form or manner requested," (C) "significantly

impedes a proceeding," or (D) "provides such information but the information cannot be verified." 19 U.S.C. § 1677e(a)(2)(A)–(D).

Further, Commerce may use AFA, that is, it may select from the facts available in a manner adverse to the respondent, if the gap in the record was caused by the failure of the respondent to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). Thus, AFA is appropriate only when Commerce has first made a supported finding under § 1677e(a) that information is missing from the record for an enumerated reason, followed by a separate finding under § 1677e(b) that there has been a failure to cooperate.

II. Substantial Evidence Does Not Support Commerce's Use of Facts Available

The court finds that Commerce applied AFA without substantial evidence to support the required threshold finding that there was a gap in the record warranting the use of facts available. Commerce premised its use of facts available on two grounds: JSW withheld "requested information" about Salav, § 1677e(a)(2)(A), thereby impeding the proceedings, § 1677e(a)(2)(C). I&D Mem. cmt. 11.[2] Quite simply, Commerce has failed to show that it requested information concerning Salav that was then withheld by JSW.

JSW admits that its initial representation—that Salav was not operational during the POI—was false. However, the operational status of JSW's various subsidiaries during the POI was not "requested information." Rather, Commerce requested, in relevant part, information concerning cross-owned companies which supply an input "that is primarily dedicated to the production" of CORE, *see* First Questionnaire, or is used in the production of an input to CORE, *see* Second Questionnaire. Therefore, whether JSW withheld requested information concerning Salav, as Commerce claims, is a function of whether evidence indicates that Salav supplied an input for the production of CORE or for the production of an input to CORE.

During verification, JSW informed Commerce that, during the final two months of the POI, Salav produced direct reduced iron, or DRI, and made a small shipment of DRI to JSW's Dolvi facility. JSW Verification Report 5. DRI is an input for a diverse range of products, including some products that, in turn, could be used in the production of CORE.

However, according to JSW, the Dolvi facility (i) is the only JSW facility capable of processing DRI, (ii) is incapable of producing subject merchandise, and (iii) did not send any inputs during the POI to

[2] Because common facts and arguments underlie JSW's alleged withholding and impeding, the court will combine its discussion of these two grounds.

Vijayanagar, the only JSW facility capable of producing subject merchandise. JSW Case Br. 13–15; Hearing Tr. 33–34, P.R. 277 (May 6, 2016); JSW Am. 56.2 Mot. for Summ. J. 28, ECF No. 48 (Apr. 28, 2017) ("JSW 56.2 Mot."). Additionally, JSW notes that "because Salav DRI was sent to Dolvi only at the very end of the POI, even some minuscule portion of that DRI was theoretically made into hot-rolled coil, which was in turned [*sic*] rolled into cold-rolled coil, and then was eventually further converted by JSW Coated into CORE, that final manufacturing step would necessarily have taken place after the POI." *See* JSW 56.2 Mot. 28. Moreover, JSW asserts that Commerce can corroborate this information because Commerce verified JSW's responses regarding its production process. *See* JSW Case Br. 13–14. Thus, JSW reasons that, although DRI can generally be an input to products that are inputs to CORE, Salav did not supply—and could not have supplied—a relevant input at a relevant time. As a consequence, full questionnaire responses were not required for Salav.

Commerce does not point to any record evidence contradicting JSW's representations concerning Salav. Rather, Commerce insists that "JSW's belated assertion that [Salav]'s input should not be considered as primarily dedicated to subject merchandise is unsubstantiated" and "unreliable." I&D Mem. cmt. 11. But Commerce's refusal to verify, justified or otherwise, does not constitute "substantial evidence on the record." *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574 (Fed. Cir. 1990) ("To show that [respondent]'s responses were incomplete, the [agency] would have to put forth at least some evidence" in support of that conclusion).[3] If JSW is correct that Salav did not provide an input to subject merchandise or to a relevant downstream product, then JSW did not withhold requested information about Salav.

In arguing that information concerning Salav was in fact requested, Defendant, the United States, notes that "[i]t is not within the [*sic*] JSW's discretion to determine what information Commerce needed for the investigation . . . ." Def. Resp. to Pl. Mot. for J. on Agency R. 16, ECF No. 61 ("Def. Resp."). This proposition is true, but misplaced here. The dispute between the parties is not whether certain requested information is necessary. *See, e.g.*, *Ansaldo Componenti, S.p.A v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) (respondent was not entitled to withhold requested information on the basis that it believed the information "could not serve as a basis for Commerce's administrative review."). The essential dispute is

[3] Compare *Ozdemir Boru San. v. Tic. Ltd. Sti.*, 41 CIT __, __, 273 F. Supp. 3d 1225, 1235 (2017) (sustaining Commerce's use of facts available and AFA in light of record evidence discovered at verification that, contrary to respondent's questionnaire responses, respondent "was eligible for, and did receive" a certain subsidy).

whether the information was requested at all. In other words, while Commerce has latitude to request a wide range of information, it is only entitled to receive what it actually requests. *See Olympic Adhesives, Inc.*, 899 F.2d at 1572–75 ("[A] submitter need only provide complete answers to the questions presented in an information request.").

Defendant also insists that JSW's arguments concerning Salav are irrelevant because Commerce is not required to trace specific inputs into specific subject merchandise. But that is also not the issue. Rather, JSW's asserts that Salav-produced DRI could not have been a part of the production of *any* subject merchandise during the POI. Defendant has pointed to no specific evidence casting doubt on this assertion.

Citing past practice, Defendant goes one step further and argues that JSW should have interpreted the questionnaire to include an affiliate "even if the [affiliate's] inputs are not actually used [to produce subject merchandise] during a given period of investigation or review." Def. Resp. 19. While this may be Commerce's practice in ultimately attributing subsidies, the idea that Commerce requested such information from JSW in this proceeding is belied by the fact that Commerce permitted JSW to provide no questionnaire responses for certain companies—including, initially, Salav—on the basis that those companies were "not in operation" during the POI. *See* Affiliated Companies Response Ex. 1; JSW Verification Report 4. This would clearly be an inadequate response under Defendant's theory that the POI has no limiting effect on JSW's questionnaire responses.

Certainly JSW put Commerce in a predicament. The eleventh hour timing of JSW's correction concerning Salav made it difficult for Commerce to fully verify the new information. And on this basis, Commerce refused to verify JSW's representations concerning Salav. But the fact remains: the essence of JSW's belated assertion is that it never withheld "requested information" concerning Salav. Therefore, Commerce must point to something on the record to support its determination, under § 1677e(a), that in fact JSW withheld requested information. Adverse inferences are not record evidence. A desire to punish untimely corrections is not record evidence. Without substantial evidence that *requested* information was withheld, Commerce was not permitted to supplement the record with facts available under § 1677e(a). Consequently, Commerce was also not permitted to use AFA under § 1677e(b).

Because Commerce failed to support its use of facts available under § 1677e(a), the court does not reach the merits of Commerce's determination that JSW also failed to cooperate to the best of its ability per

§ 1677e(b). The court also does not reach the arguments raised by JSW as to the reasonableness of the CVD rate applied by Commerce.

CONCLUSION AND ORDER

Commerce may have been entitled to refuse to verify the belated information concerning Salav. But that decision had consequences, namely, there is no record evidence to support Commerce's use of facts available. Commerce cannot cherry-pick those parts of JSW's correction that it hopes will support the application of AFA and reject the rest as untimely. The record is closed on Salav. Thus, on remand, Commerce must recalculate JSW's CVD rate without regard to Salav.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the *Final Determination* is remanded to Commerce for redetermination in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that Commerce shall recalculate JSW's CVD rate without regard to Salav or any subsidies Salav may have received; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its remand redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenor shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff and Defendant-Intervenor's comments to file comments.

Dated: May 9, 2018
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE