U.S. Court of International Trade

Slip Op. 18–171

SOLARWORLD AMERICAS, INC. et al., Plaintiff and Consolidated Plaintiffs, and CANADIAN SOLAR INC. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 16–00134

[Sustaining the U.S. Department of Commerce's second remand redetermination in the second antidumping duty administrative review of crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: December 13, 2018

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, argued for SolarWorld Americas, Inc. With him on the brief were *Laura El-Sabaawi* and *Usha Neelakantan*.

Robert George Gosselink, Trade Pacific, PLLC, of Washington, DC, argued for Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Trina Solar (U.S.) Inc.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd. With him on the brief was *Jonathan Michael Freed*.

Neil R. Ellis, Sidley Austin, LLP, of Washington, DC, argued for Yingli Green Energy Holding Co., Ltd.; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd. With him on the brief were *Richard L.A. Weiner*, *Shawn Michael Higgins*, and *Justin Ross Becker*.

Neil R. Ellis, *Richard L.A. Weiner*, *Shawn Michael Higgins*, and *Justin Ross Becker*, Sidley Austin, LLP, of Washington, DC, for Canadian Solar Inc.; Canadian Solar (USA) Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; and Canadian Solar International Limited.

Craig Anderson Lewis, Hogan Lovells US LLP, of Washington, DC, for BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or "Department") second remand redetermination in the second administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China" or "the PRC"). *See* Results of Second Remand Redetermination Pursuant to Court Order, July 31, 2018, ECF No. 144–1 ("*Second Remand Results*"); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 81 Fed. Reg. 39,905 (Dep't Commerce June 20, 2016) (final results of ADD administrative review and final determination of no shipments; 2013–2014) and accompanying Decision Mem. for the Final Results of the 2013–2014 [ADD] Admin. Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the [PRC], A-570–979, (June 13, 2016), ECF No. 21–5 ("Final Decision Memo").[1] In *SolarWorld Americas, Inc. v. United States*, 42 CIT __, 320 F. Supp. 3d 1341 (2018) ("*SolarWorld Americas II*"), the court remanded for reconsideration or further explanation Commerce's surrogate value selection for mandatory respondent Yingli Green Energy Holding Co., Ltd.'s ("Yingli") tempered glass input and Changzhou Trina Solar Energy Co., Ltd.'s ("Trina") scrapped solar cells and modules byproduct offset. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1358. For the reasons that follow, the court sustains Commerce's *Second Remand Results* in full.

BACKGROUND

The court assumes familiarity with the facts as set forth in the previous opinions and recounts the facts relevant to the issues currently before the court. *See SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1254, 1259–61 (2017) ("*SolarWorld Americas I*"); *SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1345–48. In the second administrative review[2] of the ADD order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from China, Commerce selected Yingli and Trina as mandatory respondents. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 80

[1] The Final Decision Memo is also referred to throughout as the "final determination."

[2] Each year during the anniversary month of the publication of an ADD duty order, interested parties may request that Commerce conduct an administrative review of that order. *See* 19 C.F.R. § 351.213; *see also* 19 U.S.C. § 1677 (for definition of interested parties).

Fed. Reg. 80,746, 80,746 (Dep't Commerce Dec. 28, 2015) (preliminary results of ADD administrative review and preliminary determination of no shipments; 2013–2014) and accompanying Decision Mem. for Prelim. Results of the 2013–2014 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC] at 2, A-570–979, PD 520, bar code 3427351–01 (Dec. 18, 2015) (citing 2013–2014 [ADD] Admin. Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]: Respondent Selection at 4–5, A-570–979, PD 67, bar code 3264380–01 (Mar. 13, 2015)).[3] In the final determination, Commerce valued Yingli's tempered glass input using Thai import data under Harmonized Tariff Schedule ("HTS") subheading 7007.19.9000, *see* Final Decision Memo at 29–34, and Trina's scrapped solar cell and module byproduct using Thai import data under HTS subheading 8548.10.[4] *See id.* at 46–48.

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), commenced litigation in this court, moving for judgment on the agency record. *See* Summons, July 20, 2016, ECF No. 1 (commencing this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012));[5] Compl., Aug. 19, 2016, ECF No. 10. SolarWorld challenged, inter alia, Commerce's decision to value Trina's scrapped solar cell and module byproduct using, as best information available, Thai data for imports classified under HTS subheading 8548.10 rather than import data under Thai HTS 2804.69.[6] *See* Compl. at ¶ 22, Aug. 19, 2016, ECF No. 10.

---

[3] On September 14, 2016, Defendant submitted indices to the public and confidential administrative records for this review. These indices are located on the docket at ECF Nos. 21–2 and 21–3. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

[4] In the final determination, Commerce valued Yingli's, but not Trina's, scrapped solar cells using Thai import values for HTS 2804.69, explaining:

> Yingli reported that it removes the polysilicon from its scrap solar cells and reintroduces it into production. Thus, the value of these scrap solar cells is in the silicon content. Hence, consistent with *Solar ARI*, we valued Yingli's scrap cells based on HTS 2804.69, which is the HTS category applicable to silicon.

Final Decision Memo at 47. Commerce noted that, "[i]n contrast," because Trina reported that its scrap is composed of broken cells and modules that could not be reintroduced into production, the agency "determined that Trina's cell scrap consisted of every component of the cell, not simply polysilicon, and its modules scrap consisted of every component of the module." *Id.*

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

[6] Thai HTS 8548.10 covers "Waste and scrap of primary cells, primary batteries and electric accumulators; spent primary cells, spent primary batteries and spent electric accumulators; electrical parts of machinery or apparatus, not specified or included elsewhere in this Chapter: Other," whereas Thai HTS 2804.69 covers silicon containing less than 99.99% purity. *See* Final Decision Memo at 46–47.

Mandatory respondent Yingli et al.[7] also commenced litigation before this court challenging various aspects of Commerce's final determination, and the case was consolidated with the present action. *See* Summons, July 20, 2016, ECF No. 1 (Court. No. 16–00135); Amended Summons, Aug. 10, 2016, ECF No. 12 (Court. No. 16–00135); Compl., Aug. 19, 2016, ECF No. 13 (Court. No. 16–00135); Order, Oct. 25, 2016, ECF No. 31 (consolidating Court No. 16–00132, Court. No. 16–00134, and Court No. 16–00135 under Court No. 16–00134).[8] Yingli challenged, inter alia, Commerce's decision to use, as best information available, import data under Thai HTS 7007.19.9000 to value Yingli's tempered glass input, contending that the data is aberrational. *See* Mem. Points and Authorities Supp. Mot. J. Agency R. at 9–26, Jan. 26, 2017, ECF No. 42.

In *SolarWorld Americas I*, the court remanded for further explanation or reconsideration Commerce's selection of a surrogate value for Yingli's tempered glass input to explain why its selection is reasonable in light of (1) evidence that the Hong Kong input data has a disproportionate impact on the Thai surrogate value, and (2) Yingli's allegation that Commerce used unreliable benchmarks in determining whether the Thai data was aberrational.[9] *See SolarWorld Americas I*, 41 CIT at __, 273 F. Supp. 3d at 1263–65, 1278–79. Additionally, the court remanded for further explanation or reconsideration Commerce's decision to value Trina's scrapped solar cells and modules byproduct offset using, as best information available, import data for Thai HTS category 8548.10. *See id.*, 41 CIT at __, 273 F. Supp. 3d at 1268, 1278–79. The court found that Commerce had not sufficiently explained why its selection was reasonable given that HTS 8548.10 is not specific to the solar cells and modules, and in light of the fact that the selection resulted in a surrogate value for a byproduct that is higher than the value of the input itself. *See id.*

---

[7] The following parties are plaintiffs in the action Yingli Green Energy Holding Co., Ltd. v. United States, Ct. No. 16–00135, which has been consolidated with the present action: Yingli Green Energy Holding Company Limited; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd.

[8] The issues raised in Court No. 16–00132 are not relevant to this remand. *See* Compl., Aug. 17, 2016, ECF No. 10 (Court No. 16–00132).

[9] Yingli argued that Commerce unreasonably used data from Ecuador and Ukraine as benchmarks, and such data were not credible because these countries' imports of tempered glass were low in quantity relative to the imports from other economically comparable countries and to the quantity of tempered glass purchased by Yingli. *See* Mem. Points and Authorities Supp. Mot. J. Agency R. at 15–16, Jan. 26, 2017, ECF No. 42.

Commerce filed the first remand results on January 18, 2018. *See* Final Results of Remand Redetermination, Jan. 18, 2018, ECF No. 123–1 ("*First Remand Results*"). There, Commerce continued to use Thai import data to value Yingli's tempered glass inputs, again determining that the import data is not aberrational based on a revised explanation of its practice for determining aberration. *See id.* at 1–2, 12–32. Commerce also continued to value Trina's scrapped solar cells and modules under Thai HTS category 8548.10, providing additional explanation for why its surrogate value selection is appropriate, and explaining that the proper value comparison is the scrap surrogate value to the cost of solar cells and modules, rather than the cost of polysilicon alone. *See id.* at 1, 53–64.

The court again remanded for further explanation or reconsideration Commerce's surrogate value selections for Yingli's tempered glass input and Trina's scrapped solar cells and modules byproduct offset. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1345, 1358. With respect to Yingli's tempered glass input, the court instructed Commerce to explain whether its practice is to assess what percentage of the market the allegedly aberrational input data constitutes to determine whether that data is representative of the market, and if it is, to clarify how its practice is relevant here, where the allegedly aberrational Hong Kong data comprises just 1.6% of the overall import data into Thailand, and constitutes more than 75% of the overall value of the Thai import data. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1353–55. The court instructed that if Commerce does not have a practice of considering what percentage of market share is made up by the input data in question, then Commerce should explain why it focused on market representation in *Multilayered Wood Flooring from [the PRC]. SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1353; *see also Multilayered Wood Flooring from [the PRC]*, 80 Fed. Reg. 41,476 (Dep't Commerce July 15, 2015) (final results of [ADD] administrative review and final results of new shipper review; 2012– 2013) and accompanying Issues and Decision Mem. for the Final Results of the 2012– 2013 [ADD] Admin. Review of Multilayered Wood Flooring from [the PRC] at Comment 11.D, A-570–970, (July 8, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–17368–1.pdf (last visited Dec. 10, 2018) ("*Wood Flooring*"). The court noted that Commerce invoked *Wood Flooring* in its *First Remand Results*, and thus the agency needed to clarify its practice and why, in light of that practice, its selection of the Thai import data constitutes a reasonable surrogate value for the tempered glass input. *SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1353–54. Additionally, the court in-

structed Commerce to explain why its selection of the Thai import data as a surrogate value is reasonable in this case, given the evidence showing the Hong Kong data's disproportionate impact on the overall value of the Thai import data. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1354–55. The court explained that by including the Hong Kong data, which has a disproportionate effect on the overall Thai import value, Commerce appears to contradict its preference for selecting surrogate values based on broad data that reflect the surrogate country's market as a whole. *Id.* (quoting *First Remand Results* at 15).[10]

With respect to Commerce's selection of Thai HTS category 8548.10 to value Trina's scrapped solar cell and module byproduct, the court held that Commerce failed to adequately explain why it chose HTS category 8548.10 rather than HTS category 2804.69. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1356–58. The court explained that "[p]roducts that are assembled from multiple inputs, convey electricity, undergo certain unspecified manufacturing processes, and are ultimately scrapped do not inherently share a similar value." *Id.*, 42 CIT at __, 320 F. Supp. 3d at 1356. Further, the court explained that the goal of adopting a surrogate value should be to find a product that is similarly valued in order to achieve an accurate valuation for the respondent's byproduct, and, ultimately, for the respondent's normal value. *Id.*, 42 CIT at __, 320 F. Supp. 3d at 1356. Accordingly, the court held, Commerce had not provided an explanation regarding why the selection of a category covering scrapped electrical batteries accurately values Trina's scrapped solar cells and modules byproduct. *Id.*, 42 CIT at __, 320 F. Supp. 3d at 1357–58.

Commerce submitted the *Second Remand Results* on July 31, 2018. *See Second Remand Results*. With respect to the decision to value Yingli's tempered glass inputs using Thai import data, Commerce determined, under protest,[11] to instead value Yingli's tempered glass using Bulgarian import data. *See Second Remand Results* at 14, 19–20. Commerce noted that the record contains contemporaneous import data for tempered glass from three countries, but Commerce selected that of Bulgaria because it was the country with the largest

[10] With respect to Commerce's argument that assessing individual inputs for aberration would impose a heavy administrative burden, the court noted that although this is a significant concern, it does not outweigh the accuracy concerns raised in this case where the data has such a disproportionate effect. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1355.

[11] By adopting a position "under protest," Commerce preserved its right to appeal; the Court of Appeals has held that Commerce preserves its right to appeal in instances where Commerce makes a determination under protest and the Court of International Trade sustains its decision after remand. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

volume of tempered glass to value the input. *Id.* at 18–19.

As for Commerce's decision to value Trina's scrapped solar modules using Thai HTS 8548.10, Commerce, under protest, reconsidered its selection and decided instead to use Thai HTS 2804.69 to value Trina's scrap solar cells and modules. *Second Remand Results* at 8, 11, 14. Commerce explained that there are two potential values to use as best available information for scrap solar cells and modules on the record: Thai HTS 8548.10, which covers "waste and scrap of primary cells, primary batteries and accumulators; spent primary cells, spent primary batteries, and spent electrical accumulators," and Thai HTS 2804.69, which covers silicon of less than 99.9 percent purity. *Second Remand Results* at 9.[12] In the *Second Remand Results*, Commerce chose to use the latter. *Id.* at 8, 11, 14.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 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.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Tempered Glass

In this second administrative review, Yingli reported tempered glass as a factor of production ("FOP"). *See* Final Decision Memo at 29; Decision Memorandum for Preliminary Results of the 2013–2014

[12] Commerce noted that its previous decision to value scrapped solar modules using Thai HTS 8548.10 relied on the fact that both items are engineered products that include metal components and chemicals. *Id.* at 9. Further, Commerce viewed the battery and solar cell or module, components as similar in nature, noting that both were used in an engineered product designed to generate electricity. *Id.* Additionally, Commerce noted its reasons for its previous decision: Thai HTS 8548.10 covers scrap materials, Thai HTS 2804.69 covers a less pure form of silicon than the polysilicon used in solar cells, and Trina's solar cells and modules contain more components than polysilicon alone. *Id.* at 9–10. Nonetheless, pursuant to the court's previous findings regarding Commerce's reasoning, Commerce decided, under protest, to value Trina's scrap solar cells and modules using Thai HTS 2804.69. *Id.* at 11.

[ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, From the [PRC] at 30, A570–979, (Dec. 18, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–32630–1.pdf (last visited Dec. 10, 2018) ("Preliminary Decision Memo"). Commerce, in the *Second Remand Results*, used Bulgarian import data to value Yingli's tempered glass. *See Second Remand Results* at 14, 18–19, 20–21. For the reasons that follow, Commerce's decision to use Bulgarian import data to value Yingli's tempered glass is supported by substantial evidence.

When Commerce conducts an ADD investigation or an administrative review of an ADD order, it must determine whether subject merchandise is being, or is likely to be, sold at less than fair value. *See* 19 U.S.C. § 1677b. The statute provides that in determining whether merchandise is being sold at less than fair value, "a fair comparison shall be made between the export price or constructed export price and normal value." *Id.* Commerce, in administering the antidumping statute, must determine what constitutes "normal value," i.e., the price at which the product is sold or offered for sale in the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(B). Where the producer or exporter in question is from a nonmarket economy ("NME") country, such as China, and Commerce finds that available information does not permit an accurate determination of the merchandise's normal value, Commerce must determine normal value based on the FOPs utilized to produce the merchandise.[13] *See* 19 U.S.C. § 1677b(c); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. 1, at 808–809. Pursuant to 19 U.S.C. § 1677b(c)(1)(B), Commerce determines the value of the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate" by Commerce. Commerce utilizes, to the extent possible, prices from one or more market economy countries that are at a level of economic development comparable to that of the NME country and that are significant producers of comparable merchandise. *See* 19 U.S.C. § 1677b(c)(4). Where multiple market economy countries satisfy these two criteria, Commerce's methodology for selecting the best source is to choose a price that is (1) specific to the input; (2) tax and import duty exclusive; (3) contemporaneous with the period of review; (4) representative of a broad market average; and (5) publically available. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*,

[13] In addition to FOPs, Commerce must also include "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B).

Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Dec 10, 2018) ("*Policy Bulletin 04.1*"). Although Commerce has broad discretion in deciding what constitutes the best available information, *see QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for "best available information" in the ADD statute), Commerce must ground its determination in the objective of the ADD statute: to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). Commerce then adds the value of the FOPs of the merchandise, along with value for other costs, expenses, and profits to determine normal value. *See* 19 U.S.C. § 1677b(c)(1).

As explained in *SolarWorld Americas I* and *SolarWorld Americas II*, Commerce's practice is to avoid using aberrational values as surrogate values. *See generally Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997); *see also Certain Activated Carbon From the [PRC]*, 80 Fed. Reg. 61,172 (Dep't Commerce Oct. 9, 2015) (final results of [ADD] administrative review; 2013–2014) and accompanying Certain Activated Carbon from the [PRC]: Issues and Decision Memorandum for the Final Results of the Seventh [ADD] Administrative Review at 26, A-570–904, (Oct. 2, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–25810–1.pdf (last visited Dec 10, 2018). It is the agency's practice, "[w]hen presented with sufficient evidence to demonstrate that a particular surrogate value is aberrational, and therefore unreliable," to "examine relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question." *First Remand Results* at 6. Commerce considers whether import data is aberrational if it is "many times higher than the import values from other countries." Final Decision Memo at 33. Commerce's method for determining whether a surrogate value is aberrational is to examine the HTS data both across potential surrogate countries in a given case, as well as within the surrogate country over multiple years. *First Remand Results* at 6.

In the *Second Remand Results*, pursuant to the court's holding in *SolarWorld Americas II*, Commerce reconsidered its decision to value Yingli's tempered glass inputs using Thai import data, instead opting to use Bulgarian import data. *Second Remand Results* at 14, 19–20. Commerce has complied with the court's order in *SolarWorld Americas II*. The Bulgarian import data, along with import data for tempered glass from Ecuador and Ukraine, meet the requirements for

best available information for the reasons set out by Commerce. *See Second Remand Results* at 18. Specifically, the data is specific to the input, tax and duty exclusive, contemporaneous, representative of a broad market average, and publically available. *Id.* Further, by using the Bulgarian import data, Commerce avoids the data-quality concerns described by the court in *SolarWorld Americas II* regarding the Thai import data, and thus complies with the court's order. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1354–55. With respect to why Commerce selected Bulgarian data from the available choices, Commerce adhered to its practice of prioritizing the data source with the highest import volume of the subject merchandise.[14] *Second Remand Results* at 18. Here, the volume of tempered glass imported into Bulgaria is greater than that of the other two potential surrogate countries. *Id.* at 19.

SolarWorld argues that Commerce's decision to change its selection of a surrogate value from the Thai data to the Bulgarian data is unreasonable and inconsistent with the agency's practice because Commerce's practice is to examine the surrogate country's AUV in the aggregate.[15] Pl. [SolarWorld's] Comments on Final Results of Second Redetermination Pursuant to Ct. Order at 5, Aug. 29, 2018, ECF No. 146 ("SolarWorld Comments"). The court addressed this argument in *SolarWorld Americas II*. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1353–54. Specifically, SolarWorld argues—and Commerce maintains—that Commerce's practice is no longer to examine whether imports from a particular country that are used to calculate an AUV are distortive, but to determine whether the surrogate country's AUV for the subject FOP, in the aggregate, is aberrational. SolarWorld Comments at 5; *Second Remand Results* at 20. Commerce cites *Wood Flooring* as evidence of this practice, *see Second Remand Results* at 20; yet, as noted in *SolarWorld Americas II*, 42

[14] Commerce cites several recent examples of determinations in which Commerce had different surrogate countries from which to choose and selected the country with the highest volume of imports to value the input. *Id.* at 18 (citing *Chlorinated Isocyanurates from the [PRC]*, 81 Fed. Reg. 1167 (Dep't Commerce Jan. 11, 2016) (final results of [ADD] administrative review; 2013– 2014); *Chlorinated Isocyanurates from the [PRC]*, 80 Fed. Reg. 4,539 (Dep't Commerce Jan. 28, 2015) (final results of [ADD] administrative review; 2012–2013); *Certain Activated Carbon from the [PRC]*, 82 Fed. Reg. 51,607 (Dep't Commerce Nov. 7, 2017) (final results of [ADD] administrative review; 2015–2016; *Certain Activated Carbon from the [PRC]*, 81 Fed. Reg. 62,088 (Dep't Commerce Sept. 8, 2016) (final results of [ADD] administrative review; 2014–2015).

[15] Commerce makes the same argument in its *Second Remand Results*, but ultimately chooses, under protest, to use the Bulgarian import data to value Yingli's tempered glass in order to comply with the court's opinion in *SolarWorld Americas II*. *See Second Remand Results* at 17, 20.

CIT at __, 320 F. Supp. 3d at 1353, Commerce explained in *Wood Flooring* why the allegedly aberrational inputs were in fact representative of market-driven prices by describing the share each input represented of the aggregate data. *See Wood Flooring* at 43 (finding that "imports from Taiwan and the United States represent the vast majority of imports into Thailand (77.1%) and, therefore, are a true representation of market-driven prices."). Commerce's analysis in *Wood Flooring* thus belies the notion that Commerce never assesses the individual inputs that make up the aggregate data for a surrogate source.[16]

Additionally, as explained in *SolarWorld Americas II*, even if Commerce's practice is to only consider whether the AUV in the aggregate is aberrational, Commerce has failed to explain how such a practice is reasonable here. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1354–55. Commerce asserts that its current practice aims to use broad, market average prices in furtherance of its statutory obligation to rely on the best information available. *See Second Remand Results* at 17. Yet, Commerce would choose to use Thai data that includes unit values from Hong Kong comprising only 1.6% of the import volume but contributing value nearly two-hundred times higher than the average unit values from the rest of the import data. *See* Yingli's July 29, 2015 Surrogate Values Rebuttal Comments at SVR-3, Aug. 11, 2017, ECF No. 90–29. A general practice that considers values in the aggregate to avoid administrative burden may be reasonable, *see SolarWorld Americas II* at 21, but where the chosen AUV contains data inputs as far afield as described here, Commerce must explain why continued use of such data is reasonable. Without additional explanation, Commerce cannot reasonably state that the use of such data furthers its aim of adopting broad, market-average prices to calculate accurate dumping margins. *See Second Remand Results* at 16. Accordingly, SolarWorld's argument fails.

II. Scrapped Solar Cells and Modules

In this second administrative review, Trina reported generating cell and module scrap in the cell and module production stages of produc-

[16] Despite selecting Bulgarian data in the *Second Remand Results*, Commerce continues to defend its original determination to use Thai import data to value Yingli's tempered glass inputs. *See Second Remand Results* at 14–17, 20. Commerce now attempts to explain away the *Wood Flooring* inconsistency, asserting that this "additional analysis" was simply to "identify the flaw in the petitioner's argument." *Second Remand Results* at 20. This explanation is unavailing, given the plain phrasing used by Commerce in *Wood Flooring*. *See Wood Flooring* at 43. Despite announcing that Commerce's practice is only to examine surrogate value data in the aggregate, Commerce analyzed individual inputs to the aggregate surrogate data source to demonstrate that the data inputs still represented market-driven prices. *See id.*

tion. *See* Trina Section D Questionnaire and Appendices Response at D-22–23, CD 153–161, bar codes 327642901–10 (May 14, 2015). Trina reported that the broken cells and modules are sold rather than reintroduced into production, and accordingly claimed by-product offsets to normal value for the scrapped cells and modules. *Id.* at D-22. In the *Second Remand Results*, Commerce valued Trina's cell and module scrap using Thai HTS 2804.69, which covers silicon of a purity less than 99.99 percent. *See Second Remand Results* at 8, 14. For the reasons that follow, Commerce's determination is supported by substantial evidence.

As described above, Commerce determines the value of the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate" by Commerce. 19 U.S.C. § 1677b(c)(1)(B). Commerce has discretion in deciding what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), but it must ground its determination in the statutory objective of calculating accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). The source should be, to the extent possible, a market economy country at a similar level of economic development as the NME country, and a significant producer of comparable merchandise. *See* 19 U.S.C. § 1677b(c)(4). In selecting from multiple potential sources, Commerce selects a source that is (1) specific to the input; (2) tax and import duty exclusive; (3) contemporaneous with the period of review; (4) representative of a broad market average; and (5) publically available. *See Policy Bulletin 04.1*.

Here, Commerce opted in its *Second Remand Results* to value Trina's scrap cells and modules using import data under Thai HTS 2804.69. *See Second Remand Results* at 8, 14. As Commerce observed, the record contains only two potential sources of data for valuing Trina's scrap solar cells and modules: Thai HTS 8548.10 and Thai HTS 2804.69. *Id.* at 9, 14. Commerce's decision to use Thai HTS 2804.69 responds to the court's order in *SolarWorld Americas II*, and is supported by substantial evidence. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1358.

Trina argues that Commerce's decision to use Thai HTS 2804.69 rather than Thai HTS 8548.10 in its *Second Remand Results* is unsupported by substantial evidence because the record supports the conclusion that Trina's scrapped solar modules are sold for value and uses other than their polysilicon content. Consol. Pl. Trina's Comment on [Commerce's] Final Results of Second Redetermination Pursuant

to Remand at 3, Aug. 30, 2018, ECF No. 150 ("Trina's Comments"). Trina cites evidence from the record indicating that Trina's module scrap offset is sold to third parties where modules do not meet the required specifications but are still capable of generating some electricity through solar energy. Trina's Comments at 3–4 (citing Trina Supplemental Questionnaire Response at Section C&D-21, A-570–979, PD 269, bar code 328747–01 (June 30, 2015)). Consequently, Trina argues, the record supports the notion that the value of Trina's sales of scrap cells and modules was based on factors other than polysilicon content, making it unreasonable for Commerce to use Thai HTS 2804.69. *See* Trina's Comments at 4. This argument fails, given that it is merely a defense of Commerce's prior determination, which this court held was unsupported by substantial evidence in *SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1356–58. Further, the record evidence referenced by Trina simply shows that third parties purchased Trina's scrap modules; it does not establish that they purchased scrap modules for purposes other than the polysilicon content. This evidence does not, therefore, detract from Commerce's determination in its *Second Remand Results*.[17]

Finally, Trina argues that the court's holding in *SolarWorld Americas II* with respect to Commerce's selection of Thai HTS 8548.10 "imposes a higher standard for assigning surrogate value for by-products than for valuing [FOPs]." Trina's Comments at 5. Trina maintains that Commerce, in its final determination and *First Remand Results*, selected a surrogate value that most specifically described or captured the item being valued, and that this determination was not sufficiently rebutted by any interested party to this proceeding. *Id.* at 5. This argument fails because, again, Trina does not take issue with Commerce's determination in its *Second Remand Results*, but rather offers a defense of the position the court already remanded in *SolarWorld Americas II*. The argument entirely ignores

[17] Trina asserts that the record evidence showing that Trina's scrap modules are still capable of producing electricity through solar energy was not specifically raised previously, and therefore "may not have been clearly presented to the court." Trina's Comments at 4. Commerce made this observation in the *First Remand Results*, *see First Remand Results* at 61, and therefore the argument is not new. In the *First Remand Results*, Commerce, based on this fact and other information, reasoned that "[b]ecause solar cells and modules are electrical products manufactured using a multiple array of inputs, including chemicals and metals, we find that the potential surrogate covering scrapped manufactured electrical products comprising various inputs is the better surrogate compared to a potential surrogate covering silicon rocks." *First Remand Results* at 62. The court remanded Commerce's *First Remand Results* based on its finding that Commerce failed to adequately explain why Thai HTS 8548.10 "provides a representative value for the scrapped solar cells and modules." *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1358. The court thus ruled previously on Commerce's reasoning, which encompassed the fact Trina raises here.

the court's observation in *SolarWorld Americas II* that the surrogate value should be a product that is similarly valued in order to achieve an accurate valuation for the respondent's byproduct and, ultimately, for the respondent's normal value. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1356. Indeed, as the court explained, Commerce failed to adequately explain why its selection of a category covering scrapped electrical batteries accurately values the respondent's scrapped solar cells and modules byproduct. *See SolarWorld Americas II*, 42 CIT at __, 320 F. Supp. 3d at 1356–57. Accordingly, Trina's argument misses the mark, and Commerce's determination in its *Second Remand Results* adequately responds to the court's order.

CONCLUSION

For the foregoing reasons, the *Second Remand Results* comply with the court's order in *SolarWorld Americas II*, are in accordance with law and supported by substantial evidence, and are therefore sustained. Judgment will enter accordingly.

Dated: December 13, 2018
New York, New York

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

Slip Op. 18–172

HARTFORD FIRE INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00135

[Plaintiff's motion for summary judgment denied; Defendant's cross-motion for summary judgment granted.]

Dated: December 14, 2018

Frederick D. Van Arnam, Jr., Barnes, Richardson & Colburn, LLP of New York, NY for Plaintiff Hartford Fire Insurance Company.

Edward F. Kenny and *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY for Defendant United States. With them on the briefs were *Joseph H. Hunt*, Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the briefs was *Paula S. Smith*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION

Gordon, Judge:

Plaintiff Hartford Fire Insurance Company ("Hartford") challenges the denial of its protests of demands by U.S. Customs and Border Protection ("Customs" or "CBP") for payment of antidumping duties on certain surety bonds. Before the court are cross-motions for summary judgment by Hartford and Defendant United States ("Defendant" or the "Government"). *See* Pl.'s Mot. for Summ. J., ECF No. 61 ("Pl.'s Br."); Def.'s Mem. of Law Resp. to Pl.'s Summ. J. Mot. & Supp. Def.'s Cross-Mot. for Summ. J., ECF No. 69 ("Def.'s Br."); Pl.'s Reply Supp. Mot. for Summ. J. & Resp. to Def.'s Cross-Mot. for Summ. J., ECF No. 74 ("Pl.'s Reply"); Def.'s Reply Supp. Cross-Mot. for Summ. J., ECF No. 80 ("Def.'s Reply"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). For the reasons set forth below, Plaintiff's motion for summary judgment is denied, and Defendant's cross-motion is granted.

I. Undisputed Facts

The following facts are not in dispute. *See generally* Pl.'s Br. at 4–7 ("Pl.'s Stmt. of Material Facts Not in Issue"); Def.'s Resp. to Pl.'s Stmt. of Material Facts Not in Issue, ECF No. 70; Def.'s Stmt. of Add'l Material Facts Not in Issue, ECF No. 71; Pl.'s Resp. to Def.'s Stmt. of Material Facts Not in Issue, ECF No. 75. Shandong Longtai Fruits and Vegetables Co., Ltd. ("Shandong Longtai") imported fresh garlic from China in five entries in June, July, and August 2006 ("subject

entries"). Pl.'s Stmt. of Material Facts Not in Issue ¶¶ 1, 2. At that time, the imported garlic was covered by an antidumping duty order. *See id.* ¶ 4 (citing *Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) ("*Order*")). Concomitantly, Shandong Longtai was the subject of a new shipper review before the U.S. Department of Commerce ("Commerce"). *Id.* ¶ 3 (citing *Fresh Garlic from the People's Republic of China*, 72 Fed. Reg. 34,438 (Dep't of Commerce June 22, 2007) (final results and partial rescission of 11th admin. rev. and new shipper revs.)).

For each entry, Shandong Longtai did not deposit cash to cover the estimated antidumping duties, but rather provided single entry bonds ("SEBs" or "subject bonds") in lieu of cash deposits. *Id.* ¶¶ 5, 6. Hartford was the surety on these SEBs, *see id.* ¶ 7, and also on a continuous bond covering the subject entries, *see* Def.'s Stmt. of Add'l Material Facts Not in Issue ¶ 2. Customs demanded, but never received, cash deposits from Shandong Longtai to cover the estimated antidumping duties owed on the subject entries. Pl.'s Stmt. of Material Facts Not in Issue ¶¶ 12, 14.

Liquidation of the subject entries was suspended during the pendency of the 12th administrative review of the *Order*. *Id.* ¶ 8. As of the dates of entry of the subject entries, and prior to their liquidation, Congress enacted the Pension Protection Act of 2006, Pub. L. 109–280, 120 Stat. 780 (Aug. 17, 2006) ("PPA"). *Id.* ¶ 9. Thereafter, Commerce published the final results of the 12th administrative review. *See id.* ¶ 15 (citing *Fresh Garlic from the People's Republic of China*, 73 Fed. Reg. 34,251 (June 17, 2008) (final results 12th admin. rev.) ("*Final Results*")).

Pursuant to the *Final Results*, Customs calculated the final amount of antidumping duties owed by Shandong Longtai on the subject entries, and demanded that Shandong Longtai pay that amount. *Id.* ¶¶ 16, 17. Shandong Longtai failed to pay the final duties. *Id.* ¶ 18. Customs then issued demands ("Demands") to Harford that it, as Shandong Longtai's surety, pay the antidumping duties owed. *Id.* ¶ 19. Hartford protested the Demands, which Customs denied. *Id.* ¶¶ 20, 21. Subsequently, Hartford paid the outstanding antidumping duties, thereby satisfying the Demands. *Id.* ¶ 22.

II. Standard of Review

The U.S. Court of International Trade reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in

dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n. 2. Because the dispositive issues are solely legal and the material facts are uncontroverted, summary judgment is appropriate. *See* 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, *Federal Practice & Procedure* § 2725 (4th ed. 2018); *see also Dal–Tile Corp. v. United States*, 24 CIT 939, 944, 116 F. Supp. 2d 1309, 1314 (2000) (citing *Marathon Oil Co. v. United States*, 24 CIT 211, 214, 93 F. Supp. 2d 1277, 1279– 80 (2000)).

III. Discussion

At the time of the subject entries, Shandong Longtai, as the importer, had the option to forgo payment of cash deposits of estimated antidumping duties by posting a bond until a new shipper review established a duty margin specific to it as the foreign producer and exporter. *See* Section 751(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(2)(B)(iii)[1] (the "new shipper bonding privilege") (Customs was authorized "to allow, at the option of the importer, the posting until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise."). Subsequently, the PPA suspended the new shipper bonding privilege. While the PPA, as a whole, applied only "to goods entered, or withdrawn from warehouse for consumption, on or after the 15th day after the date of the enactment" of the PPA (September 1, 2006), *see* PPA § 1641, 120 Stat. at 1172, Congress provided for limited retroactive effect for the statutory revocation of the new shipper bonding privilege. Specifically, the PPA provided that the new shipper bonding privilege "shall not be effective during the period beginning on April 1, 2006, and ending on June 30, 2009."[2] *See* PPA § 1632, 120 Stat. at 1165 ("retroactive period").

The day after the PPA's enactment, Customs issued a memorandum that provided guidance on the collection of antidumping duties from new shippers. *See* Pl.'s Br. at Ex. 1 (Cathy Sauceda, CBP Director of Special Enforcement, *Suspension of Antidumping and Countervailing Duty Bonding Privilege for New Shippers from 04/01/2006 to 06/30/2009*, CSMS #06–000983 (Aug. 18 2006) ("Sauceda Memo")). The Sauceda Memo stated that "CBP shall collect a cash deposit of estimated antidumping and countervailing duties from importers for

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition, unless otherwise indicated.

[2] The new shipper bonding privilege has since been repealed. *See* 19 U.S.C. § 1675 (2012).

each entry of merchandise made during the conduct of all new shipper reviews . . . entered or withdrawn from warehouse for consumption on or after 04/01/2006, for which a bond was collected as security." Sauceda Memo ¶ 5. Pursuant to this memorandum, Customs sought to collect antidumping duties from Shandong Longtai and from Hartford as Shandong Longtai's surety, which Hartford subsequently paid.

Thereafter, Hartford brought suit challenging Customs' Demands, raising four arguments as to why it should not be held liable as a surety on Shandong Longtai's SEBs. *See* Pl.'s Br. at 14–20. Principally, Plaintiff argues that the retroactive effect of the PPA nullified the validity of the SEBs and prohibited Customs from issuing the Demands predicated on the subject bonds. *Id.* at 14–16. Second, Plaintiff contends that the subject SEBs "are creatures of statute," and that "passage of the [PPA], and the resulting change in the statutory scheme, rendered the bonds unenforceable." *Id.* at 16–17. Third, Plaintiff argues that Customs' Demands stem from its "ministerial" role in effectuating the antidumping laws, and that the PPA's retroactive elimination of the new shipper bonding privilege "removed Commerce's authority to allow Customs to accept bonds in lieu of cash deposits" as of April 1, 2006. *Id.* at 17–18. Lastly, Plaintiff maintains that the retroactive elimination of the new shipper bonding privilege implicitly obligated Customs to seek cash deposits from Shandong Longtai to replace the security formerly provided by the SEBs. *Id.* at 18–20. Because the court disagrees that the passage of the PPA rendered the subject bonds unenforceable, the court denies Plaintiff's motion and grants Defendant's motion for summary judgment.

A. Nullification of the Subject Bonds

Section 1632(a) of the PPA provides that "[the new shipper bonding privilege] shall not be effective during the period beginning on April 1, 2006, and ending on June 30, 2009." PPA, § 1632, 120 Stat. at 1165–66. Plaintiff's primary argument is that § 1632 nullified bonds issued during the retroactive period. *See* Pl.'s Br. at 14–16 ("the SEBs were rendered ineffective by the [PPA]"). The Government disagrees and maintains that § 1632 does not nullify Hartford's liability under the subject bonds. The Government emphasizes that the purpose of the statute, as expressed in its text, as well as its legislative history, does not support Hartford's arguments. Resolution of the parties' dispute hinges on the interpretation of § 1632 and the effect of the retroactive suspension of the new shipper bonding privilege on the subject bonds.

In determining the meaning of a statute, "[t]he first and foremost 'tool' to be used is the statute's text, giving it its plain meaning." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). Hartford appears to concede that the text of the statute is silent as to the question of nullification. Hartford does not rely upon the "plain meaning" of § 1632, but rather argues that the court should infer nullification of the subject bonds solely from the fact that the subject entries were made during the retroactive period. This the court will not do as Hartford's hoped-for interpretation goes well beyond the express text and runs contrary to the intent of § 1632.

In support of its preferred interpretation, Hartford relies on *Vandegrift Forwarding Co. v. Hartford Fire Ins. Co.*, No. 06-CV-5440, 2009 WL 928337 (E.D.N.Y. Mar. 31, 2009), for the proposition that once the PPA was enacted into law, the SEBs posted by Shandong Longtai were no longer valid security for the Government. *See* Pl.'s Br. at 10, 14. The plaintiff in *Vandegrift* was a freight forwarder and customs broker who had obtained bonds from Hartford on behalf of 26 shippers. Vandegrift brought an action to recover premiums paid by its clients to Hartford for bonds issued during the retroactive period on the grounds that the bonds were rendered unenforceable by the PPA. *Vandegrift*, No. 06-CV-5440, 2009 WL 928337 at *1.

In dismissing the action for lack of Article III standing, the court did not address the enforceability of the bonds. *See id.* at *3–*6 (holding that Vandegrift's shippers were only parties that could bring claims against Hartford for premiums paid on bonds). Rather, the court described the unenforceability of the bonds as a fact alleged by Vandegrift that was assumed to be true for the purposes of deciding Hartford's motion to dismiss. *See id.*at *1–*2 ("When considering a motion to dismiss under Rule 12(b)(6), the Court accepts as true the factual allegations in the complaint and draws all inferences in favor of the plaintiff."). Specifically, the court noted that "[a]ccording to Vandegrift, its clients paid premiums totaling $839,548 for bonds that were rendered ineffective by [the PPA] ...." *Id.* at *1. Accordingly, Plaintiff's reliance on *Vandegrift* is misplaced.

Hartford further argues that if Customs could still make demands on bonds posted during the retroactive period, the April 1, 2006 effective date of § 1632 would "be rendered entirely superfluous." Pl.'s Br. at 14. The court disagrees. Hartford contends that "Congress chose, in strong, clear and imperative language, retroactively to eliminate importers' ability to post bonds, and to require that Customs obtain cash deposits as security for entries made on or after April 1, 2006." *See* Pl.'s Reply at 9. This is simply not the case. While Hartford is correct that § 1632(a) retroactively eliminated the option

for new shippers to post bonds, the statute says nothing about any requirement on Customs to obtain cash deposits retroactively. Section 1632(a) also does not address whether Customs could continue to rely upon bonds posted by importers during the retroactive period under the new shipper bonding privilege.

In response, the Government notes that the legislative history is silent as to the purpose behind making the provision retroactive, but Congress' intention may have been to require new shippers to post cash deposits retroactively to April 1, 2006 despite having previously posted bonds as securities for antidumping liability. *See* Def.'s Resp. at 24 (proposing interpretation of § 1632 that would limit rights of new shippers but preserve rights of Customs with respect to new shipper bonds posted in retroactive period). Under the Government's interpretation, the retroactive limitation on the rights of new shippers under § 1632 may occur without altering the privileges and obligations maintained by the Government in enforcing the antidumping laws. This approach appears to give meaning to both the retroactive effective date as well as the intent behind § 1632. *See infra* at pp. 9–10 (discussing intent and purpose of § 1632). Ultimately, Hartford has failed to persuade the court that it must interpret § 1632 to prohibit Customs from making demands on bonds posted during the retroactive period in order to avoid rendering the effective date of § 1632 "entirely superfluous."

Hartford's proposed interpretation of § 1632(a) is also at odds with the statute's purpose. Section 1632(b) explicitly requires a report on the impact of § 1632(a), stating that one "of the difficulties that necessitated the suspension [of the new shipper bonding privilege]" was a "problem in the collection of antidumping duties on imports from new shippers." PPA, § 1632(b)(2)(A), 120 Stat. at. 1165. Suspension of the new shipper bonding privilege was enacted largely as a result of the significant loss of revenue attributed to new shippers of merchandise subject to antidumping duty orders. *See, e.g.*, Def.'s Br. at Ex. 10, U.S. Gov't Accountability Office, GAO-05–979, *International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act* 24– 28 (2005) (noting Congressional consideration of legislation to address difficulties faced by Customs in collecting antidumping duties from "new shippers"); *id.* at Ex. 11, *Regional Farm Bill: Field Hearing Before the S. Comm. on Agriculture Nutrition, and the Forestry*, Statement of the American Honey Producers Associations, Inc., 109th Cong. (2006) ("... importers from so-called 'new shippers' could secure deposits of estimated AD duties by posting bonds instead of making cash deposits. Importers often closed shop and 'skipped out' on these bonds, making it difficult for

[Customs] to collect duties and severely weakening the deterrent effect of the AD order."). Hartford's proposed interpretation of the PPA is inconsistent with the goal of facilitating the collection of antidumping duties. Adoption of Plaintiff's interpretation would have the effect of *increasing* the non-collection of antidumping or countervailing duties. Hartford cites no legislative history or other authority supporting its argument that, by enacting the PPA, Congress intended to relieve sureties of their obligations on bonds posted during the retroactive period and held by Customs.

Lastly, Hartford relies on Customs' communications about the collection of antidumping duties owed by Shandong Longtai, contending that Customs represented and acknowledged that it had no ability to continue to rely on and demand payment against new shipper bonds. Pl.'s Br. at 13. Specifically, Hartford points to the Sauceda Memo as a formal adoption of this position by Customs. The court again disagrees. The Sauceda Memo does not provide a representation by Customs that bonds executed during the retroactive period were unenforceable. Instead, the Sauceda Memo states that:

> Section 1632 of H.R. 4 (suspension of new shipper review provision) temporarily suspends the authority of the U.S. Department of Commerce (Commerce) to instruct U.S. Customs and Border Protection (CBP) to collect a bond or other security in lieu of a cash deposit of estimated antidumping and countervailing duties for each entry of subject merchandise during the period 04/01/2006, through 06/30/2009.
>
> ...
>
> CBP shall collect a cash deposit of estimated antidumping and countervailing duties from importers for each entry of merchandise made during the conduct of all new shipper reviews, except as indicated above, entered or withdrawn from warehouse for consumption on or after 04/01/2006, for which a bond was collected as security.

Sauceda Memo ¶¶ 1, 5. While the memorandum confirms that Customs sought to collect cash deposits, the Sauceda Memo is silent as to the enforceability of bonds that were already posted with Customs.

Hartford also relies on a letter dated February 5, 2007 from Robert Hamilton, Director of Customs' Revenue Division, to Shandong Longtai, stating:

> For the reasons discussed below, the single transaction bond(s) that you posted in lieu of said deposit(s) are no longer acceptable, as a matter of law.
>
> ...

> Remitting $8,930,468.96 in a timely manner will release the single transaction bond(s) that were posted in lieu of a cash deposit(s) of dumping or countervailing duties. Release of the respective bonds should result in return of security required by the surety, if any, that you posted to obtain the bond(s). CBP cannot guarantee what your surety(s) will do regarding the security they have required. However, CBP holds it within its unilateral power to release the single transaction bond(s) involved.

See Pl.'s Br. at Ex. 2 ("Hamilton Letter"). It is clear from the context of the entire letter that the phrase "as a matter of law" refers to § 1632, which suspended the privilege of an importer, like Shandong Longtai, to post a bond. The letter does not reflect Customs' belief or position that the subject bonds were unenforceable. *Id.*

Plaintiff incorrectly describes the language in the Hamilton Letter as a "party admission" that the bonds are unenforceable. *See* Pl.'s Br. at 13. The language of the Hamilton Letter confirms Customs' position that the bonds remained enforceable, otherwise Customs' warning that it maintained "unilateral power to release the single transaction bond(s) involved" would be meaningless. *See* Hamilton Letter. Customs' position that Shandong Longtai could no longer rely upon the SEBs as providing sufficient security under the statute is altogether different from stating that the subject bonds were rendered unenforceable by the PPA. Accordingly, the court concludes that neither the Sauceda Memo nor the Hamilton Letter support Hartford's argument that the subject bonds are null and void.

Ultimately, Hartford's position hinges on an interpretation of the PPA that bonds tendered to Customs between April 1, 2006 and August 17, 2006 were nullified upon enactment of the statute. However, the court's review of the statutory text, purpose, and the legislative history of the PPA reveals no support for Hartford's proffered interpretation. Interpreting § 1632 as proposed by Hartford would run contrary to Congressional intent and result in additional revenue loss for Customs. *See* Def.'s Br. 20–24. Accordingly, the PPA's suspension of the new shipper bonding privilege did not operate to nullify the subject bonds.

B. "Statutory" Bonds

Next, Hartford argues that the subject bonds are unenforceable because they are "statutory bonds" or "creatures of statute." Pl.'s Br. at 16. Hartford contends that statutory bonds must be interpreted with reference to all applicable statutes and regulations insofar as

they are found to modify the rights of the parties. However, Hartford fails to accurately characterize the subject bonds. SEBs are contracts under which an importer (the bond's principal and primary obligor) and a surety (the bond's secondary obligor) agree, jointly and severally, to pay the United States (the bond's sole identified beneficiary) all duties, taxes, and charges found due on an entry secured by the bond. *See Sioux Honey Assoc. v. United States*, 672 F.3d 1041, 1058 (Fed. Cir. 2012). Customs has broad authority to request bonds, *see* 19 U.S.C. §1623 and 19 C.F.R. Part 113, but the obligations created by the bonds are established by the contractual terms of the bonds themselves, and not defined by statute. Though the terms of bonds may reference Commerce's regulations, that does not mean that the bonds are "statutory" in nature or that they depend upon the maintenance of the statutory and regulatory framework under which they were written in order to remain enforceable.

While new shipper bonds were authorized by 19 U.S.C. § 1675(a)(2)(B)(iii), their use and creation were not required under the plain language of that statute. The new shipper bonding privilege gave the importer the option to submit a bond in lieu of a cash deposit, but did not set any bonding conditions, or address the underlying enforceability of bonds. Because the PPA does not address or modify the obligations undertaken by Hartford pursuant to the SEBs, the terms of those bonds, which embody the contractual agreement between the surety and principal, remain in full force.

C. Authority to Demand Payment on the Subject Bonds

Third, Hartford argues that § 1632's "suspension of the new shipper bonding privilege removed Commerce's authority to allow Customs to accept bonds in lieu of cash deposits." Pl.'s Br. at 17. Hartford contends that because § 1632 suspended the new shipper bonding privilege retroactively to April 1, 2006, Commerce, and in turn, Customs, lacked authority to require anything other than cash deposits from importers to cover antidumping duties on or after that date. Hartford further maintains that the Demands for payment on the SEBs constituted unlawful charges or exactions because Customs retroactively lost its authority to accept or demand payment against the subject bonds pursuant to § 1632. *Id.* at 17, 18. The court again disagrees. Congressional enactment of § 1632 revoked the new shipper bonding privilege, but did not alter the authority of Commerce regarding bonds previously posted pursuant to that privilege.

The language of the new shipper bonding privilege stated that Commerce "shall, at the time a review under this subparagraph is

initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit." *See* 19 U.S.C. § 1675(a)(2)(B)(iii). The instructions that Commerce issued to Customs are unambiguous—"[f]or shipments of fresh garlic from the PRC grown by and exported by the following companies [including Shandong Longtai], entered, or withdrawn from warehouse, for consumption in the United States on or after December 28, 2005, a bond or other security deposit is permitted, at the importer's option" and "[t]he option of a bond in lieu of a cash deposit will remain in effect for exports from the exporter/grower combinations identified above until publication of the final results of these new shipper reviews." *See* Def.'s Br. at Ex. 1 (Message No. 6020205 from Commerce's Director, Special Enforcement to Customs' Directors of Field Operations and Port Directors (Jan. 20, 2006)).

Customs follows Commerce's instructions regarding antidumping duties. *See, e.g.*, *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994) (calculation of antidumping duties is performed by Commerce and involves no decision by Customs); *UniPro Foodservice, Inc. v. United States*, 32 CIT 1004, 577 F. Supp. 2d 1348 (2008) (Customs' role in liquidating entries subject to dumping order merely ministerial, and Customs has no discretion in the matter). In accordance with Commerce's instructions, as well as the requirements of § 1675(a)(2)(B)(iii) then in effect, Customs properly accepted SEBs for the subject entries.

The Government does not dispute that Customs' role in the administration of the antidumping or countervailing duty law is ministerial. *See* Def.'s Br. at 9–10. Here, Customs followed Commerce's instructions in permitting Shandong Longtai to post bonds in lieu of cash deposits at the time of entry. And, Commerce issued no additional instructions directing Customs to cancel or consider unenforceable new shipper bonds executed during the retroactive period. While Plaintiff may wish the court to infer from Commerce's silence on this issue that Commerce intended for Customs to cancel those bonds, the court concludes that if Commerce intended that result, it would have said so expressly. It did not.

D. Customs' Obligation to Collect Cash Deposits

Lastly, Hartford argues that the PPA required Shandong Longtai to make retroactive cash deposits on the subject entries, and that Customs was required to collect those cash deposits instead of demanding payments from Hartford. Pl.'s Br. at 17, 18. Assuming the bonds were

nullified by the PPA, Hartford contends that Customs was required to obtain the outstanding antidumping duties directly from Shandong Longtai instead of relying on payment from Hartford as the surety. *Id.* at 15, 16. Hartford argues that in the absence of an express directive from Congress indicating that Customs could continue to rely upon bonds issued during the retroactive period of § 1632, the enactment of § 1632 *implicitly* required Customs to obtain payment of all antidumping duties in cash solely from the importers. *Id.* at 19–20. Once again, the court disagrees. The PPA is silent about: (1) any obligation on the part of Customs to collect cash deposits on entries filed during the retroactive period; and (2) the enforceability of new shipper bonds filed with Customs during the retroactive period, but prior to the date of enactment of the PPA. Hartford reads more into the PPA than is there, and the court cannot, given what the PPA does say, absolve Hartford's liability as surety on the subject bonds.

Hartford further contends that once Commerce issues an antidumping order, Customs, pursuant to 19 U.S.C. § 1673g(a), must collect a cash deposit of the estimated duties as security on entries of merchandise subject to an antidumping duty order, and Customs may accept a bond in lieu of cash only if a specific exception exists. Pl.'s Br. at 7. Hartford also contends that once the new shipper bonding privilege was revoked, Customs was obligated under § 1673g(a) to collect cash deposits. Once again, the court disagrees.

Section 1673g(a) provides:

> . . . no customs officer may deliver merchandise of that class or kind to the person by whom or for whose account it was imported unless that person complies with the requirements of subsection (b) of this section and deposits with the appropriate customs officer an estimated antidumping duty in an amount determined by the administering authority.

19 U.S.C. § 1673g(a) (2012). This section states that Customs shall not deliver merchandise subject to antidumping duties unless a cash deposit is made. By its express terms, § 1673g(a) relates only to the time at which Customs "delivers merchandise." *Id.*It is not a general requirement that Customs seek cash deposits at any other time. At the time the merchandise was delivered (*i.e.*, entered and released), Customs could not and did not violate § 1673g(a) because the new shipper bonding privilege was in effect and a bond was lawfully posted.

Despite Hartford's arguments, the extent or adequacy of Customs' efforts in collecting cash deposits is not a determinative factor in

determining Hartford's liability under the subject bonds. Hartford's obligations under the bonds are not contingent upon Customs' efforts vis-à-vis the principal/importer.[3] Pursuant to the terms of the subject bonds, Hartford undertook joint and several liability for the duties owed by the importer up to the bond limits. *See* Def.'s Br. at Ex. 2 (subject bonds stating "[i]n order to secure payment of any duty, tax or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below.").

In sum, the PPA does not alter the status of bonds already lawfully filed with Customs, or the ability of Customs to collect against those bonds.

IV. Conclusion

For the foregoing reasons, the court denies Plaintiff's motion for summary judgment and grants Defendant's motion for summary judgment. The court will enter judgment accordingly.

Dated: December 14, 2018
New York, New York

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

[3] The court notes that Hartford's arguments in this respect are not new. The Federal Circuit previously rejected Hartford's suggestion that Customs maintains any obligation to protect the funds of sureties in administering the antidumping laws. *See Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1288 (Fed. Cir. 2014) ("Hartford's claim improperly seeks to convert Customs' obligation to protect the revenue of the United States into a duty owed to Hartford and impermissibly shift the responsibility for assessing a surety's risk from the surety to the Government. Customs was not required to assess Hartford's exposure to risk.") (internal citations omitted).

Slip Op. 18–174

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., AND TOSYALI DIS TICARET A.Ş., ÇAYIROVA BORU SANAYI VE TICARET A.Ş., AND YÜCEL BORU ITHALAT-IHRACAT VE PAZARLAMA A.Ş., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00339

JUDGMENT

Before the court is the U.S. Department of Commerce's *Final Results of Second Redetermination* ("*Second Remand Results*"), ECF No. 86, filed pursuant to *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 42 CIT ___, 2018 WL 5298443 (Oct. 24, 2018). During the remand proceedings before Commerce, no party commented on the draft remand results and no changes were made in the final remand results. *Second Remand Results* at 4–5. There being no challenge to the *Second Remand Results ,* it is hereby

ORDERED that final results in the antidumping duty investigation covering welded line pipe from the Republic of Turkey, *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,362 (Dep't of Commerce Oct. 13, 2015) (final determ. of sales at less than fair value) and accompanying Issues and Decision Mem. for Welded Line Pipe from the Republic of Turkey, A-489–822 (Dep't of Commerce Oct. 13, 2015), ECF No. 21–2, available at http:enforcement.trade.gov/frn/summary/turkey/2015–25990–1.pdf (last visited this date) is sustained, except for the matter covered by the *Second Remand Results*; and it is further

ORDERED that the *Second Remand Results* are sustained.

Dated: December 19, 2018
New York, New York

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