U.S. Court of International Trade

Slip Op. 18–164

T.B. Wood's Incorporated, Plaintiff, v. United States, Defendant, and China Chamber of International Commerce's Ad Hoc Coalition of Producers and Exporters of Certain Iron Mechanical Transfer Drive Components from The People's Republic of China and Powermach Import & Export Co., Ltd. (Sichuan), Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 17–00022

[Sustaining negative determinations by the U.S. International Trade Commission in antidumping duty investigations of imports of certain iron mechanical transfer drive components from Canada and the People's Republic of China and a countervailing duty investigation of imports of certain iron mechanical transfer drive components from the People's Republic of China]

Dated: November 29, 2018

Daniel B. Pickard, Wiley Rein LLP, of Washington, D.C., argued for plaintiff T.B. Wood's Incorporated. With him on the brief were *Alan H. Price*, *Robert E. DeFrancesco, III*, and *Maureen E. Thorson*.

Brian R. Soiset, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant U.S. International Trade Commission. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Jill A. Cramer, Mowry & Grimson, PLLC, of Washington, D.C., argued for defendant-intervenors China Chamber of International Commerce's *ad hoc* Coalition of Producers and Exporters of Certain Iron Mechanical Transfer Drive Components From the People's Republic of China and Powermach Import & Export Co., Ltd. (Sichuan). With her on the brief were *Jeffrey S. Grimson*, *Kristin H. Mowry*, *James C. Beaty*, and *Bryan P. Cenko*.

OPINION

Stanceu, Chief Judge:

Plaintiff T.B. Wood's Incorporated ("T.B. Wood's") contests final negative injury and threat determinations made by the United States International Trade Commission (the "Commission" or "ITC") in antidumping duty investigations of imports of certain iron mechanical transfer drive components ("IMTDCs") from Canada and China and a parallel countervailing duty investigation of imports of these products from China. The court sustains the contested determinations.

I. BACKGROUND

A. The Contested Determinations

The Commission determined "that an industry in the United States is not materially injured or threatened with material injury . . . by reason of imports of certain iron mechanical transfer drive components from Canada and China . . . that have been found by the Department of Commerce ("Commerce") to be sold in the United States at less than fair value ("LTFV"), and that have been found by Commerce to be subsidized by the government of China." *Certain Iron Mechanical Transfer Drive Components From Canada and China; Determinations*, 81 Fed. Reg. 91,198 (Int'l Trade Comm. Dec. 16, 2016) (footnotes omitted) ("*Final Determinations*"). Background on the investigations and the views of the Commission were published as *Certain Iron Mechanical Transfer Drive Components from Canada and China*, Inv. Nos. 701-TA-550 and 731-TA-1304–1305, USITC Pub. 4652 (Dec. 2016) (Final), *available at* https://www.usitc.gov/publications/701_731/pub4652.pdf (last visited Nov. 13, 2018) ("*Views of the Commission*").[1]

In this case, plaintiff contests, on various grounds, the ITC's negative injury determinations, i.e., its separate negative injury determinations in the countervailing duty investigation and in the antidumping duty investigations, and the ITC's separate negative threat determinations in those investigations.

B. The Plaintiff and Defendant-Intervenors

T.B. Wood's, a U.S. manufacturer of iron mechanical transfer drive components, was the petitioner in the investigations culminating in the Final Determinations. T.B. Wood's alleged in its petitions, filed with Commerce and the Commission on October 28, 2015, that imports of certain IMTDCs from Canada and China were being sold in the United States at less than fair value and, in the case of imports from China, were being subsidized by the government of China. *See Certain Iron Mechanical Transfer Drive Components From Canada and China; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 80

[1] USITC Pub. 4652 contains the public version of the Commissioners' views and the public version of the agency's Final Staff Report. Confidential versions were released to parties under the agency's administrative protective order. *See Confidential Views of the Commission* (Dec. 13, 2016) (C.R. Doc. 533) ("*Conf. Views of the Commission*"); Confidential version of the Final Staff Report, *Iron Mechanical Transfer Drive Components from Canada and China,* Inv. Nos. 701-TA-550 and 731-TA-1304–1305 (Nov. 8, 2016) (Final) (C.R. Doc. 521) ("*Final Staff Rep.*").

Fed. Reg. 67,789 (Int'l Trade Comm'n Nov. 3, 2015) ("*Institution of Investigations*"). The petitioner alleged material injury or threat of material injury to the U.S. industry producing these components. *Id.*

There are two defendant-intervenors in this litigation: the China Chamber of International Commerce's *ad hoc* Coalition of Producers and Exporters of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China (the "Coalition"), and Powermach Import & Export Co., Ltd. (Sichuan) ("Powermach"). The Coalition was formed by several Chinese respondents, each a producer and exporter of the subject merchandise, that participated in the final phase of the ITC's investigations, including Powermach, Shijiazhuang CAPT Power Transmission Co., Ltd., and Yueqing Bethel Shaft Collar Manufacturing Co., Ltd. *Conf. Views of the Commission* 4; *Views of the Commission* 4.

C. The Antidumping Duty and Countervailing Duty Investigations

Upon receiving the petitions from T.B. Wood's, the Commission initiated antidumping duty ("AD") investigations of IMTDCs from Canada and China and a countervailing duty ("CVD") investigation of IMTDCs from China. *Institution of Investigations*, 80 Fed. Reg. at 67,790. The period of investigation ("POI") for each was the beginning of 2013 through the first six months of 2016. The ITC analyzed annual data for 2013, 2014, and 2015 and also compared data for "interim 2015," i.e., the first six months of 2015, with data for "interim 2016," i.e., the first six months of 2016. This allowed the ITC to compare data for a six-month period prior to the filing of the petition (which occurred in late October 2015) with data for a corresponding period in 2016 occurring after the filing of the petition.

Prior to the ITC's final negative determinations, the International Trade Administration of the U.S. Department of Commerce ("Commerce") concluded AD and CVD investigations that resulted in affirmative less-than-fair-value and subsidy determinations on imports of the subject merchandise from China. *Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 75,032 (Int'l Trade Admin. Oct. 28, 2016); *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Final Affirmative Determination*, 81 Fed. Reg. 75,037 (Int'l Trade Admin. Oct. 28, 2016). Commerce also reached an affirmative less-than-fair-value determination on imports of the subject merchandise from Canada. *Certain Iron Mechanical Transfer Drive Components From Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 Fed. Reg.

75,039 (Int'l Trade Admin. Oct. 28, 2016) ("*Canada LTFV Determination*").

The Commission issued the Final Determinations on December 16, 2016. *Final Determinations*, 81 Fed. Reg. at 91,198. The determinations were unanimous, with all six commissioners voting. *Id.* at 91,198 n.3. As required by the Tariff Act of 1930, *as amended* (the "Tariff Act"), the negative determinations by the ITC resulted in termination of the investigations by Commerce and the ITC without the issuance of antidumping duty or countervailing duty orders. *See* 19 U.S.C. §§ 1671d(c)(2) (termination of countervailing duty investigation), 1673d(c)(2) (termination of antidumping duty investigation).[2]

D. Proceedings before the Court of International Trade

On February 10, 2017, T.B. Wood's brought actions in this court, now consolidated, contesting the final negative determinations by the ITC.[3] Before the court is plaintiff's motion for judgment on the agency record, filed under USCIT Rule 56.2. Pl.'s Mot. (Aug. 1, 2017), ECF No. 25; Pl.'s Br. (Aug. 1, 2017), ECF Nos. 26 (conf.), 27 (public), 44 (revised conf.), 45 (revised public). Plaintiff's motion is opposed by defendant ITC and defendant-intevenors. Def.'s Opp'n (Oct. 16, 2017), ECF Nos. 31 (conf.), 32 (public); Def.-Ints.' Opp'n (Oct. 16, 2017), ECF Nos. 29 (conf.), 30 (public), 48 (revised conf.), 49 (revised public). Plaintiff replied on November 16, 2017. Pl.'s Reply (Nov. 16, 2017), ECF Nos. 35 (conf.), 36 (public), 46 (revised conf.), 47 (revised public). The court held oral argument on plaintiff's motion on February 22, 2018. ECF No. 41.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over any civil action brought under section 516A of the Tariff Act, 19 U.S.C. § 1516a(a)(2)(B)(ii). Where, as here, a party seeks review of a final ITC determination reached under 19 U.S.C. §§ 1671d or 1673d, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on

[2] All citations to the United States Code are to the 2012 edition.

[3] Consolidated under *T.B. Wood's Inc. v. United States* (Ct. No. 17–00022) is *T.B. Wood's Inc. v. United States* (Ct. No. 17–00013). Order (May 3, 2017), ECF No. 23.

the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Furthermore, "[s]upport by substantial evidence is determined on the entirety of the record, taking into account the evidence that supports and the evidence that detracts from the agency's conclusion." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

B. Scope of the Antidumping Duty and Countervailing Duty Investigations

Under the Tariff Act, antidumping duties are imposed, in defined circumstances, on "foreign merchandise . . . being, or . . . likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1). Countervailing duties are imposed, in defined circumstances, on "merchandise imported, or sold (or likely to be sold) for importation, into the United States" for which "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export" of that merchandise. *Id.* § 1671(a)(1).

The scope of an antidumping duty or countervailing duty investigation is determined by Commerce. Commerce described the subject IMTDCs as "[i]ron mechanical transfer drive components, whether finished or unfinished (*i.e.*, in blanks or castings)" and as being "in the form of wheels or cylinders" and "often referred to as sheaves, pulleys, flywheels, flat pulleys, idlers, conveyer pulleys, synchronous sheaves, and timing pulleys." *See Canada LTFV Determination*, 81 Fed. Reg. at 75,040–41. In its report, the Commission gave a general description of IMTDCs, as follows:

> IMTDCs are iron castings in the shape of wheels or cylinders for use in belted drive assemblies in fans, conveyers, compressors, pumps, and mixers. Circular IMTDCs may be referred to as sheaves, pulleys, or flywheels, and cylindrical IMTDCs, which are designed to attach the shaft to the circular IMTDC, may be referred to as bushings. Regardless of size or shape, IMTDCs are connected with belts and used to transfer power from a shaft operated by a motor or engine. IMTDCs may be produced in finished or unfinished (referred to as blanks or castings) form. IMTDCs may be manufactured in a variety of sizes as measured by the outer diameter.

Conf. Views of the Commission 15 (footnotes omitted); *Views of the Commission*12 (footnotes omitted). The Commission added that "IMTDCs have a center bore hole for a shaft to be inserted and an outer circumference, with a variety of teeth or grooves, designed to mesh with a belt." *Conf. Views of the Commission* 15 n.35; *Views of the Commission* 12 n.35. IMTDCs are commonly used in belted drive shaft systems, where they function, in conjunction with other components, to transfer, store, and release power. *Final Staff Rep.* I-27. They have applications in various industries, including mining, oil extraction, manufacturing, and heating, ventilating, and air conditioning (HVAC). *Id.* at I-28 to I-31. Due to their wide range of end uses, IMTDCs are produced in various shapes and sizes.

Commerce limited the scope of the investigations to IMTDCs with a "maximum nominal outer diameter" of "not less than 4.00 inches." *Canada LTFV Determination*, 81 Fed. Reg at 75,041. The scope also is limited to articles made of iron with a carbon content equal to or greater than 1.7% by weight. *Conf. Views of the Commission* 9; *Views of the Commission* 7. Excluded were various products, including certain finished torsional vibration dampers ("TVDs"), certain light duty non-synchronous sheaves (fixed or variable pitch), certain IMTDC bushings, flywheels with ring gears, and certain TVD inner rings. *Conf. Views of the Commission* 10–11; *Views of the Commission* 8.

The process of manufacturing IMTDCs can be divided into two general phases. *Final Staff Rep*. I-27 to I-37. The first phase, the "casting" phase, requires design, mold making, iron melting, and casting of the molten iron, resulting in a casting of approximately the shape of the finished product. *Id.* at I-31 to I-35. In the second phase, finishing operations are performed on the casting to produce the specified size and physical characteristics. *Id.* at I-36 to I-37. This step may involve machining to produce grooves or teeth in the outer circumference or may involve other processes, such as drilling, balancing, broaching, and painting. *Id.*

C. The Commission's Role in the Imposition of Antidumping and Countervailing Duties

Before antidumping or countervailing duties may be imposed, the Commission must determine that an industry in the United States is materially injured or is threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise Commerce has found to be unfairly traded, i.e., subsidized or dumped. 19 U.S.C. §§ 1671d(b)(1) (countervailing duties), 1673d(b)(1) (antidumping duties).

1. The Domestic Industry and the Domestic Like Product

Because it must determine whether an "industry in the United States" is materially injured or threatened with material injury, *id.* §§ 1671d(b)(1), 1673d(b)(1), the ITC identifies as part of its investigation the "domestic industry" or "industries" and the "domestic like product" or "products." The statute defines "industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." *Id.* § 1677(4)(A). The statute defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation." *Id.* § 1677(10). The Commission may determine that there is a single domestic like product or that there are multiple like products. A finding of multiple like products requires a finding of corresponding domestic industries. *See id.* § 1677(4)(A).

In identifying the domestic like product or products, the Commission is not confined by the scope of an AD or CVD investigation as determined by Commerce. In the investigations at issue, the ITC found that there was one like product, which it defined more broadly than the scope as defined by Commerce. While Commerce excluded from the scope IMTDCs under 4 inches in nominal outside diameter, the ITC defined the domestic like product as "all forms of finished and unfinished IMTDCs described in the investigations' scope and including small-diameter IMTDCs under 4 inches in maximum nominal outside diameter." *Conf. Views of the Commission* 19; *Views of the Commission*15. The Commission defined the domestic industry as "all U.S. producers of the domestic like product, including foundries manufacturing unfinished IMTDCs, firms engaged solely in machining unfinished IMTDCs into finished IMTDCs, and integrated producers of IMTDCs." *Conf. Views of the Commission* 29; *Views of the Commission* 21. Before the court, plaintiff does not contest the ITC's determinations of the domestic like product or the domestic industry.

2. Statutory Factors for the Material Injury Determination

The Tariff Act defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). Due to the statutory requirement of "causation," the ITC may reach an affirmative determination of material injury or threat of material injury only when the material injury or threat of material injury occurs "by reason of" the subject imports. *Id.* §§ 1671d(b)(1) (countervailing duties), 1673d(b)(1) (antidumping duties). The Commission is directed to consider three basic factors: the volume of imports of the merchandise subject to investigation ("import volume"), the effect of

those imports on U.S. prices of the domestic like product or products ("price effects"), and the impact of those imports on domestic producers of the domestic like product or products, but only in the context of production operations in the United States ("impact on the domestic industry"). *Id.* § 1677(7)(B)(i). The statute provides further requirements as to what the Commission must consider for each of the three factors. *Id.* § 1677(7)(C)(i) (volume), (ii) (price effects), (iii) (impact on the domestic industry). Additionally, the Commission "may consider such other economic factors as are relevant." *Id.* § 1677(7)(B)(ii).

3. Cumulation

In making its injury determination, the ITC assesses together ("cumulates") the volume and effect of imports of the subject merchandise from all countries with respect to which petitions were filed on the same day (as occurred here), if such imports compete with each other and with domestic like products in the United States market. *Id.* § 1677(7)(G). The Commission "cross-cumulated" the subsidized and dumped imports from China with the dumped imports from Canada in reaching its negative injury determination. *Conf. Views of the Commission* 34 & n.114; *Views of the Commission* 24–25 & n.114.

In determining threat of material injury, the ITC in its discretion may cumulatively assess the volume and effect of imports of the subject merchandise if such imports compete with each other and with domestic like products in the United States market. *See* 19 U.S.C. § 1677(7)(H). The Commission did not cumulate the Chinese and Canadian imports in performing its threat analyses. *Conf. Views of the Commission* 75; *Views of the Commission* 53.

D. The Court Sustains the ITC's Determinations that Cumulated Subject Imports from Canada and China Are Not Injuring the Domestic Industry

1. Plaintiff's Arguments Opposing the ITC's Negative Injury Determinations

Plaintiff makes five arguments in support of its claim contesting the Commission's negative injury determinations.

T.B. Wood's first argues that the ITC failed "to reconcile its conclusion that there was no correlation between subject imports and domestic industry performance with basic economic logic." Pl.'s Br. 9–10. It maintains that this finding of a lack of correlation was irreconcilable with the Commission's findings that "subject IMTDC's were present in large volumes throughout the POI" and that "the

subject goods pervasively undersold the domestic like product." *Id.* at 11.

Plaintiff's second argument takes issue with the ITC's method of determining the relative shares of the U.S. market occupied by subject merchandise and the domestic like product. As discussed further below, plaintiff objects to the Commission's basing the denominators of its percentage calculations on IMTDCs of all diameters while using numerators for subject merchandise that excluded IMTDCs less than 4 inches in nominal diameter. *Id.* at 12–17. T.B. Wood's submits that the ITC failed to explain adequately, or support with substantial evidence, its conclusions regarding market share and failed even to acknowledge the "data reliability" problem caused by the disconnect between the numerators and the denominators in its percentage calculations. *Id.* at 13.

Third, plaintiff contends that the ITC failed to acknowledge a gap in the data it collected on imported subject merchandise from China and failed to explain the basis for its decision "to rely on the remaining data without adjustment, inclusive of addressing record evidence suggesting that the missing data reflected large diameter (*i.e.*, subject) imports." *Id.* at 16 (footnote omitted). T.B. Wood's argues, further, that the ITC was required by 19 U.S.C. § 1677e to attempt to fill the gap by means of facts otherwise available, either with or without an adverse inference. *Id.* at 16 n.12.

Fourth, T.B. Wood's argues that the ITC's price-effects analysis was unsupported by substantial evidence and inadequately explained. It contends that the Commission reached invalid findings that subject imports, which undersold the domestic product, did not cause significant price depression or price suppression and that the ITC failed to consider record evidence detracting from the finding. *Id.* at 18–29. It submits that the data upon which the Commission concluded that domestic prices fluctuated in the face of steady import pricing were unrepresentative, being limited to two products. *Id.* at 21. Plaintiff also maintains that the ITC failed to explain how its price-effects analyses could be valid despite the flaw that it alleges to have affected the diameter-related data the ITC used in its market share analysis.

Finally, plaintiff argues that the ITC did not support or explain adequately its conclusions regarding the impact of subject imports on the domestic industry. According to T.B. Wood's, the Commission wrongly concluded that demand and cost trends, rather than subject imports, accounted for the industry's poor performance over the POI. *Id.* at 31. It contends that the Commission failed to acknowledge or discuss material record evidence inconsistent with the Commission's conclusions, particularly evidence relating to supply considerations.

2. Plaintiff's "Economic Logic" Argument Misinterprets the Causation Requirement in the Tariff Act

T.B. Wood's argues that "the agency's determinations as a whole are tainted by its failure to reconcile its conclusion that there was no correlation between subject imports and domestic industry performance with basic economic logic." Pl.'s Br. 9–10. According to plaintiff, "[t]he agency found that subject IMTDC's were present in large volumes throughout the POI," "characterized these volumes as significant on multiple bases," and "found that the subject goods pervasively undersold the domestic like product." *Id.* at 11. T.B. Wood's maintains that "[w]ith such a factual predicate, it should not be possible for there to be 'a lack of correlation' between subject imports and the domestic industry's condition." *Id.* (citing *Views of the Commission* 47, 55, 60–61). Plaintiff describes the ITC's conclusions as "unexplained and unsupported by reason of this failure to acknowledge fundamental economic principles, or to explain how a decision that ignores such principles can be consistent with law." *Id.* at 12.

The court rejects plaintiff's "economic logic" argument, which disregards the effect of the causation requirement in the statute. An affirmative injury determination requires a finding that material injury to the domestic industry occurred "by reason of" the subject merchandise. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Although the Tariff Act directs the ITC to "consider" the factors of import volume, price effects, and impact on the domestic industry (all of which the ITC considered in the investigations), the statute does not require the ITC to *presume* that the presence in the U.S. market of competing imports, at significant volumes and at prices that in most comparisons undersold the domestic like product, is itself sufficient to support a finding of causation, regardless of other evidence of record. In this case, according to other record evidence, the volume of the subject imports did not show a sustained pattern of increasing significantly throughout the POI and the share they occupied of the U.S. market remained relatively steady over the POI as a whole. No less significant was the Commission's finding, supported by record evidence consisting of questionnaire responses, that price was not the only factor, and not always even the most important factor, in purchasing decisions. The Commission found that "purchasers cited quality most frequently as the most important factor (7 firms), followed by price (5 firms), whereas price was the most frequently reported second- and third-most important factor (5 firms each)." *Conf. Views of the Commission* 49 (citing *Final Staff Rep.* Table II-5); *Views of the Commis-*

sion 34 (citing *Final Staff Rep.* Table II-5). "Purchasers also reported that 'quality meets industry standards,' 'availability,' 'product consistency,' 'reliability of supply,' and 'delivery time' were important factors in their purchasing decisions." *Conf. Views of the Commission* 49 (citing *Final Staff Rep.* Table II-6); *Views of the Commission* 34 (citing *Final Staff Rep.* Table II-6).

3. The Commission's Method of Measuring Relative Market Share Did Not Depend on Unreliable Data

The Commission found one domestic industry producing one domestic like product, which it did not limit by diameter. Instead, it determined that the domestic like product included the larger-diameter IMTDCs that are within the scope of the investigation and also IMTDCs under 4 inches in nominal diameter, which Commerce excluded from the scope. *See Conf. Views of the Commission* 19; *Views of the Commission* 15. Commerce made the small-diameter scope exclusion in response to a proposal made by the petitioner, T.B. Wood's. *Conf. Views of the Commission* 9; *Views of the Commission* 7. For the purpose of comparing the shares of the U.S. market occupied by the subject imports and the domestic like product, the ITC calculated the size of the U.S. market, i.e., the denominators of its market share calculations, based on apparent U.S. consumption of IMTDCs of all diameters, from all sources. *Conf. Views of the Commission* 44 ("During the POI, the U.S. IMTDCs market was supplied by the domestic industry, subject imports, imports of large-diameter IMTDCs from nonsubject sources, and imports of small-diameter IMTDCs from subject and nonsubject countries." (citing *Final Staff Rep.* Table IV-7)); *Views of the Commission* 31 (same (citing *Final Staff Rep.* Table IV-7)).

Before the court, T.B. Wood's does not contest the ITC's including both large- and small-diameter IMTDCs in the domestic like product. Nevertheless, plaintiff argued in its Rule 56.2 brief that the Commission's method of determining the relative market shares of the subject imports and the domestic industry presented "data reliability issues" because of "the disconnect between the numerators and the denominators of the equation, occasioned by the fact that subject merchandise comprised only large-diameter IMTDCs, while the domestic like product included IMTDCs of all sizes." Pl.'s Br. 13. The "data reliability issues" arose, according to T.B. Wood's, because "subject import market share was based on the ratio of only large-diameter import shipments, over a denominator comprised of U.S. and import shipments of all sizes of IMTDCs." *Id.* at 13–14. Plaintiff objected that the ITC "failed to acknowledge that the numerators for its calculations of

subject and domestic market share were on distinct bases, or to explain how it could rely on the accuracy of market share calculations that were made in this manner." *Id.* at 14.

In its response brief, the ITC argued that T.B. Wood's did not exhaust its administrative remedies on the market share numerator/denominator issue, not having objected to the ITC's method of data collection or market share methodology during the investigation. Def.'s Br. 16 ("[A]t no point did Plaintiff suggest that the Commission should collect different data" or "argue that the Commission should alter its standard methodology for calculating apparent U.S. consumption and market shares."). Responding in its reply brief to the Commission's "failure to exhaust" argument, T.B Wood's clarified that it is not challenging "the agency's market share calculation methodology" and instead "argues that, consonant with the substantial evidence standard, the agency was required to acknowledge the limits of its data, including the tendency of the market share calculation methodology to reduce subject imports' market share as compared with a methodology in which both the numerator and denominator are calculated on the same basis." Pl.'s Reply 14. Plaintiff adds that "[s]uch acknowledgement was crucial given the agency's heavy reliance on market share shifts." *Id.*

Plaintiff submits that its argument, which it narrowed in the reply brief in response to defendant's "failure to exhaust" objection, is not contesting the ITC's methodology for measuring relative market share. But the gist of plaintiff's argument is still that the court should call that methodology into question and hold unreasonable the ITC's reliance on it, or at least the ITC's explanation for its reliance. Because plaintiff characterizes its argument as "consonant with the substantial evidence standard" and directs it to the Commission's explanation, rather than argue that the ITC's data collection was flawed, the court considers the argument on the merits rather than dismissing it on grounds of failure to exhaust administrative remedies. But in doing so, the court concludes that the argument lacks merit.

Plaintiff attempts to support its argument by referring to the substantial evidence standard, but even this narrowed argument relates more to the choice of methodology rather than to the presence or absence of record evidence supporting specific findings of fact. Even when considered as a "substantial evidence" argument, it cannot overcome the state of the record evidence, which on the whole reflected that small-diameter IMTDCs were nonsubject merchandise and that all diameters of IMTDCs were included in the domestic like product. And because the ITC satisfactorily explained its methodol-

ogy, the court cannot agree with plaintiff that the ITC acted contrary to law by failing to "acknowledge the limits of its data." Nor is the court convinced that the data presented "reliability issues." Rather than being "limited" or "unreliable," the record data allowed the Commission to determine the share of the aggregate U.S. market that was occupied by *subject* imports, which in this investigation necessarily were limited to the cumulated imports of large-diameter IMTDCs from Canada and China. Consistent with its obligation to consider the impact on the domestic industry of the subject imported merchandise as distinguished from that of nonsubject imported merchandise, *see Conf. Views of the Commission* 56–57; *Views of the Commission* 40–41, the Commission, logically and reasonably, included both subject and nonsubject imports in its measurement of the volume of the aggregate U.S. market.

4. The ITC's Findings Were Not Invalidated by what Plaintiff Characterizes as "Missing Data"

Plaintiff's next two arguments address what plaintiff characterizes as "the lack of any information from importers accounting for the majority of Chinese imports" of IMTDCs, resulting from the failure of some importers to submit responses to the ITC's questionnaires. *See* Pl.'s Br. 16 (footnote omitted). According to T.B. Wood's, the estimated coverage of the submitted questionnaires was only 40% of Chinese imports. Plaintiff contends, first, that the ITC failed to acknowledge that there was a gap in the data it collected on imported merchandise and failed to explain the basis for its decision "to rely on the remaining data without adjustment, inclusive of addressing record evidence suggesting that the missing data reflected large diameter (*i.e.*, subject) imports." *Id.* (footnote omitted). T.B. Wood's argues, further, that the ITC was required by the Tariff Act to attempt to fill the gap in record information by resorting to its authority to use "facts otherwise available" as provided for in 19 U.S.C. § 1677e(a), possibly with an adverse inference as provided for in 19 U.S.C. § 1677e(b). *Id.* at 16 n.12.

The Final Staff Report explained that the ITC issued questionnaires to companies that together accounted for "61.0 percent of the total value of imports from all countries under *the three primary HTS provisions identified by petitioner*." *Final Staff Rep.* IV-3 (emphasis added). These statistical reporting numbers from the Harmonized Tariff Schedule of the United States ("HTSUS") are 8483.50.6000, 8483.50.9040, and 8483.90.8080. *Id.* As the Final Staff Report noted, the petition acknowledged that the three identified HTSUS provi-

sions likely included both subject and nonsubject imports. *Id.* The report states that "[c]ompanies that responded to the Commission's questionnaires, either with data or by certifying that they did not import the subject merchandise, accounted for the following shares of 2015 imports (by value) *under those provisions* . . . : China, 40.0 percent." *Id.* (emphasis added). Accordingly, the 40% figure cannot be taken to refer to the data coverage of *subject* IMTDCs imported from China. Because not all imports from China under the tariff provisions can be shown to be subject imports, the data "gap" plaintiff identifies does not support a conclusion that the ITC could not rely on the data obtained from the questionnaires.

Plaintiff's second argument fares no better. Under the Tariff Act, "if . . . *necessary* information is not available on the record," then the Commission "shall . . . use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a)(1) (emphasis added). T.B. Wood's has not shown that the Commission lacked necessary information, nor does it identify what information the ITC could have or should have used as facts otherwise available.

5. The ITC's Negative Findings on Price Depression and Price Suppression Are Supported by Substantial Record Evidence

In evaluating the price effects of imports of subject merchandise, the ITC must consider whether the effect of the imports "depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). The ITC reached negative findings on price depression and price suppression.

T.B. Wood's contends that the ITC's price-effects analyses (both as to price depression and price suppression) impermissibly relied on the Commission's market share conclusions, which T.B. Wood's argues were flawed due to unreliable data used to calculate market share, the ITC having captured subject imports in the numerators and the aggregate U.S. market in the denominators. Pl.'s Br. 20. The court rejects this argument because, as discussed above, the Commission's method of calculating relative market shares was not in error.

As to price depression, the Commission found "that cumulated subject imports from Canada and China did not depress prices of the domestic like product to a significant degree." *Conf. Views of the Commission* 58; *Views of the Commission* 41. In support of this ultimate finding, the ITC found that "[p]rices of domestically produced IMTDCs showed no clear trend during the POI." *Conf. Views of the*

Commission 58; *Views of the Commission* 41. T.B. Wood's takes issue with this finding, arguing that "[w]hile there were certainly fluctuations in unit prices from quarter to quarter—which is not particularly surprising in a competitive market—the record also shows a downward pricing trend over time for the majority of the U.S[.]-produced products." Pl.'s Br. 21. Substantial record evidence supports the Commission's finding of "no clear trend" in domestic pricing and its ultimate negative finding on price depression. The ITC compiled and analyzed quarterly weighted-average price data and quantity data for six large-diameter IMTDC products (four sheaves and two bushings) that were sold domestically to distributors or end users and also were imported. *Final Staff Rep.* V-8. Regarding product selection, the ITC explained that "[b]ased on information provided by the petitioner in its comments on the draft questionnaires, the Commission's staff selected the five largest volume products for TBW [T.B. Wood's] and Martin Sprocket [another U.S. producer] as well as a sixth product." *Conf. Views of the Commission* 55 n.203; *Views of the Commission* 39 n.203. The data showed no clear or consistent correlation between the domestic prices and quantities and the imported prices and quantities for any of the six products that could support a finding of price depression. *See Final Staff Rep.* Figures V-3a, V-4a, V-4b, V-7a, V-7b, and V-8a. By selectively highlighting several data points and calculating weighted annual average prices, T.B Wood's attempts to show that the ITC's negative price depression finding is contradicted by individual instances of comparatively lower or falling prices for the domestic products in some comparisons. *See* Pl.'s Br. 21–23. Plaintiff's individual comparisons fail to refute the ITC's general conclusion that the prices of the domestically produced IMTDCs did not show a clear trend. Some of the domestic prices (specifically, for two of the products) fluctuated significantly over the POI while prices for the others did not, but overall there was no consistent pattern for any of the six products that could be correlated with the imported IMTDCs so as to demonstrate that subject imports caused a reduction in prices for the domestic goods. Plaintiff's argument that the "fluctuation" was demonstrated by what it characterizes as unrepresentative data (i.e., data for only two products) does not refute the critical point that the record evidence does not show the "downward pricing trend over time" that plaintiff submits is characteristic of a majority of the products the Commission examined. *See Final Staff Rep.* Figures V-3a, V-4a, V-4b, V-7a, V-7b, and V-8a.

On the statutory criterion of whether the effect of the subject imports "prevents price increases, which otherwise would have occurred, to a significant degree" ("price suppression"), 19 U.S.C. §

1677(7)(C)(ii)(II), the ITC reached a negative finding upon considering the domestic industry's ratio of cost of goods sold ("COGS") to net sales. The Commission found that this ratio was "steady throughout most of the POI" and was lower in interim 2016 than in interim 2015. *Conf. Views of the Commission* 59; *Views of the Commission* 42; *see Final Staff Rep.* VI-3-VI-4, Table VI. The ITC noted that an increase in the ratio occurring in one of the years of the POI (2015), which the record showed was small on a percentage basis, "occurred as apparent U.S. consumption declined." *Conf. Views of the Commission* 59; *Views of the Commission* 42.

Substantial evidence supports the Commission's finding that the cost increase in 2015 coincided with a decline in overall demand in the U.S. market ("apparent U.S. consumption"). *See Final Staff Rep.* Table C-1. While not contesting this finding, plaintiff argues, in effect, that the presence of the unfairly traded imports, at prices that undersold the domestic like product, caused significant price suppression. It recounts that it argued in the investigation, and that the ITC failed to refute, "that subject imports, which continuously sold [*sic*] large volumes of IMTDCs into the U.S. market at prices that undersold the domestic like product, forced the U.S. industry out of large-volume products, and otherwise increasingly prevented the industry from realizing price increases sufficient to cover rising unit costs." Pl.'s Br. 25 (citing *Views of the Commission* 42). T.B. Wood's specifically refers to selling, general, and administrative costs but alludes to costs generally. *Id.* at 26. But T.B. Wood's fails to identify record evidence sufficient to compel a conclusion that subject imports caused a significant degree of price suppression. Plaintiff suggests that the ITC should have viewed the presence of the lower-priced subject imports in the domestic market as placing the domestic industry in a "cost price squeeze," but data for the POI as a whole did not show an overall environment of what plaintiff characterizes as "rising unit costs." *See id.* at 24–25. Moreover, the relatively steady COGS to net sales ratio occurred in a situation in which "there was no appreciable decline in the domestic industry's market share nor an appreciable increase in the market share for the subject imports." *Conf. Views of the Commission* 60 (footnote omitted); *Views of the Commission* 42–43 (footnote omitted).

Alluding to its argument before the Commission that imports can injure a U.S. industry "by starting in the lower end of the market, gaining customer contacts, experience and knowledge, and eventually thrust themselves increasingly into higher-end, higher value goods," T.B. Wood's maintains that the ITC did not confront this argument adequately during the investigation, responding only that small

diameter IMTDCs were nonsubject merchandise. Pl.'s Br. 28. The record here did not show that cumulated subject imports increased significantly by unit value over the course of the POI and in fact showed a general decline. *See Final Staff Rep.* Table C-1. While Canadian subject imports increased in unit value, the Chinese subject imports, which were much greater than Canadian subject imports both in terms of quantity and value, decreased by unit value in each full year of the POI and did not appreciably increase in unit value in interim 2016. *See id.*

In summary, the ITC's negative findings on price depression and price suppression are supported by substantial evidence, having been reached upon an analysis of the record evidence for the POI as a whole.

6. The ITC Permissibly Reached a Negative Finding on the Impact of Subject Merchandise on the Domestic Industry

The ITC found that "cumulated subject imports from Canada and China did not have a significant impact on the domestic industry during the POI." *Conf. Views of the Commission* 61 (footnote omitted); *Views of the Commission* 44 (footnote omitted). The Commission acknowledged that "the domestic industry's financial performance was poor throughout the POI," but it found temporal correlations between various indicia of the industry's financial condition and changes in demand (measured by apparent U.S. consumption), including the notable reduction in demand that occurred in 2015, which coincided with an increase in costs (measured by the COGS to net sales ratio). *Conf. Views of the Commission* 63; *Views of the Commission* 45. The ITC noted that overall "apparent U.S. consumption fluctuated during the POI; it increased from 2013 to 2014, decreased between 2014 and 2015, and was lower in interim 2016 than in interim 2015." *Conf. Views of the Commission* 61–62 (footnote omitted); *Views of the Commission* 44 (footnote omitted). The Commission observed that "[m]any of the domestic industry's performance indicators mirrored these changes in apparent U.S. consumption over the POI *and are not otherwise explained by trends in cumulated subject imports*." *Conf. Views of the Commission* 62 (emphasis added); *Views of the Commission* 44 (emphasis added). All of this occurred, the ITC noted, while the domestic industry's share of apparent U.S. consumption remained relatively unchanged over the course of the POI.

The Commission's negative findings on the impact of subject imports on the domestic industry are supported by substantial record evidence. From the data compiled by the ITC staff, the Commission readily could see that a number of changes in the indicia of the

industry's condition, including indicia on overall profitability, correlated temporally with changes in demand (measured by apparent U.S. consumption) but not with changes in the volume of cumulated subject imports. *See, e.g.*, *Final Staff Rep.* Table C-1. Instead, cumulated subject imports declined with the 2015 reduction in demand. By value, they increased 4.6% from 2013, the first year of the POI, to 2014 but then declined 8.8% from 2014 to 2015, coinciding with the lowered demand occurring at that time. *See id.* As the Commission found, "[i]n terms of pieces, the domestic industry's production, capacity utilization, U.S. shipments, and net sales all followed a similar trajectory; they increased from 2013 to 2014, decreased from 2014 to 2015, and were lower in interim 2016 than in interim 2015." *Conf. Views of the Commission* 62 (footnote omitted); *Views of the Commission* 44 (footnote omitted). The record data supported the ITC's conclusions that "[c]umulated subject imports followed similar trends, and the domestic industry's share of apparent U.S. consumption showed little change over the POI." *Conf. Views of the Commission* 62 (footnote omitted); *Views of the Commission* 44 (footnote omitted).

In challenging the Commission's negative finding on the impact of subject imports on the domestic industry, T.B. Wood's relies again on its argument that the ITC used unreliable data in measuring relative market share. Pl.'s Br. 31. Because, as the court discussed above, the ITC reasonably compared the share of domestic consumption occupied by subject imports with that occupied by the domestic industry's sales of the domestic like product, this argument must be rejected.

T.B. Wood's next argues that the Commission failed to consider evidence detracting from its conclusion that subject imports were not a significant cause of the condition of the U.S. industry. *Id.* In doing so, plaintiff states that it "does not contest that demand and cost trends influenced domestic performance over the POI," conceding that "such trends are relevant to the performance of any industry at any time." *Id.* Thus, while not disputing that the reduction in overall demand, and with it increased unit costs, had negative effects,[4] plaintiff insists that neither changes in demand, nor the changes in unit costs that the ITC correlated with them, fully explain the domestic industry's condition and that "[s]omething else is affecting perfor-

[4] Although making this concession, plaintiff's brief mischaracterizes certain information in the confidential version of the Final Staff Report that plaintiff cites in support of its argument. *See* Pl.'s Br. 32 (mischaracterizing the change in domestic shipment levels from 2013 to 2015 as presented in *Final Staff Rep.* Table C-1 and also mischaracterizing the change in U.S. consumption as expressed in value, but not as expressed in quantity by pieces).

mance."[5] *Id.* at 33. In identifying that "something else," plaintiff points to "the constant pricing pressure of large volumes of subject imports that pervasively undersold the domestic like product." *Id.* Stated summarily, plaintiff's argument is that the ITC looked at the effects of changes in demand without also looking at what plaintiff terms "supply." *Id.* at 34. According to T.B. Wood's, "in analyzing the health of the domestic industry, the ITC examined demand conditions but failed to provide a meaningful analysis of supply conditions—most particularly the significant volumes of fungible, lower-priced subject IMTDCs." *Id.* This is essentially a restatement of plaintiff's "economic logic" argument. But as the court has explained, the Tariff Act does not compel the ITC to presume causation solely from the sustained presence in the market of significant volumes of subject imports that pervasively undersold the domestic like product. As the Commission permissibly found, a factor other than subject imports—reduced demand and concomitant increased unit cost—correlated temporally with changes in the industry's condition whereas import volumes did not. The Commission also considered that price was not the sole determinant in purchasing decisions and that the domestic industry's share of the market for the domestic like product did not change materially over the course of the POI.

Plaintiff argues that "there is an evidentiary and logical gap in the agency's conclusion that domestic industry performance was fully attributable to demand and cost trends." Pl.'s Br. 34. This mischaracterizes the ITC's impact finding. The ITC did not say that the industry's performance was "fully attributable" to demand and cost trends. The ITC understood, and stated, that the industry's condition was poor throughout the POI. *Conf. Views of the Commission* 63; *Views of the Commission* 45. Its finding was that "cumulated subject imports . . . did not have a *significant* impact on the domestic industry *during the POI*." *Conf. Views of the Commission* 61 (emphases added); *Views of the Commission* 44 (emphases added). In support of that ultimate finding, the Commission found, consistent with record evidence, that many of the domestic industry's performance indicators "mirrored," i.e., correlated temporally with, "changes in apparent U.S. consumption over the POI and are not otherwise explained by trends in cumulated subject imports." *Conf. Views of the Commission* 62; *Views of the Commission* 44.

[5] Plaintiff also relies on data in the confidential version of the Final Staff Report pertaining to the domestic industry's condition in interim (January to June) 2016 in an attempt to show that the ITC wrongly attributed effects on the domestic industry to demand reduction and accompanying cost increases. *See* Pl.'s Br. 32–33. Those data pertain to a time period following the filing of the petition (in late October 2015). Subject imports were significantly lower in interim 2016 than in interim 2015.

E. The Court Sustains the ITC's Negative Threat Determinations

1. Statutory Factors for the Threat Determination

The Tariff Act lists eight specific economic factors that the Commission must consider in making a threat determination. Summarized briefly, these eight specific factors are: (1) the nature of any countervailable subsidy involved and whether imports of the subject merchandise are likely to increase; (2) unused production capacity, or imminent substantial increase in production capacity, in the exporting country; (3) a significant rate of increase of the volume or market penetration of imports of subject merchandise; (4) whether subject imports are entering at prices likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports; (5) inventories of subject merchandise; (6) potential for product-shifting if production facilities in the foreign country used to produce other products can be used to produce subject merchandise; (7) product-shifting for agricultural products (not relevant here); and (8) actual and potential negative effects on existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product. *Id.* § 1677(7)(F)(i)(I)-(VIII).

The statute adds a ninth, more general, factor that directs the Commission to consider any other demonstrable adverse trends indicating the probability of material injury by reason of subject imports. *Id.* § 1677(7)(F)(i)(IX). The presence or absence of any of the named factors "shall not necessarily give decisive guidance with respect to the determination," which "may not be made on the basis of mere conjecture or speculation." *Id.* § 1677(7)(F)(ii).

2. Plaintiff's Arguments Challenging the ITC's Negative Threat Determination

T.B. Wood's first challenges the ITC's decision to analyze Canadian and Chinese imports separately rather than cumulate these imports for purposes of the threat analysis. Pl's Br. 36. Plaintiff also contends that the agency's separate negative threat determinations with respect to the two individual countries must remanded for further consideration and explanation. As to Canada, plaintiff contends, in support of both its cumulation argument and its threat argument, that the ITC placed too much reliance on the 2016 closure of the largest Canadian exporter of subject IMTDCs, ignoring the prospect that unfinished IMTDCs still could threaten the domestic industry. Regarding China, T.B. Wood's relies on some of its previous argu-

ments but also argues that the importance of the United States as an export market to Chinese IMTDC producers indicates a threat of increased subject imports.

3. The ITC Permissibly Declined to Cumulate Subject Imports for its Threat Analysis and Permissibly Reached a Negative Threat Determination on Subject Imports from Canada

Under the statute, the Commission, "[t]o the extent practicable . . . *may* cumulatively assess the volume and price effects of imports of the subject merchandise from all countries with respect to which . . . petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day . . . if such imports compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(H) (emphasis added). In deciding whether to cumulate for threat purposes, the Commission considers whether subject imports from the countries involved are likely to compete under similar conditions in the domestic market in the imminent future. *See Conf. Views of the Commission* 68; *Views of the Commission* 49. In this investigation, the ITC found they would not. *Conf. Views of the Commission* 68; *Views of the Commission* 49.

The ITC based its negative cumulation decision, as well as its negative threat determination as to Canada, largely on its finding that "the largest source of subject imports from Canada during the POI (Baldor Canada) closed its St. Claire, Quebec facility on May 27, 2016 and relocated its finishing equipment from Canada to the Baldor facilities in Weaverville and Marion, North Carolina." *Conf. Views of the Commission* 68; *Views of the Commission* 49. Plaintiff does not dispute this finding but, noting that Baldor Canada was merely a finisher of IMTDCs, argues that "a significant amount of Canadian castings . . . would suddenly be without a home by reason of Baldor Canada's closure." Pl.'s Br. 37. T.B. Wood's argues that the ITC failed to consider "how Canadian castings would be sold (and where) given Baldor's closure." *Id.* This argument rests entirely on speculation, not record evidence. The ITC was not required to presume, in the absence of any supporting record evidence, that the unfinished castings to which plaintiff refers, or finished IMTDCs made from them, in the imminent future would be subject imports that threaten the domestic industry. As the statute instructs, the Commission's threat determination "may not be made on the basis of mere conjecture or speculation." 19 U.S.C. § 1677(7)(F)(ii). Rather than provide support for plaintiff's speculation, the evidence of record supports, with substantial evidence, the Commission's separate negative threat determina-

tion as to Canada. The Commission quite reasonably concluded that "the closure of the largest source subject merchandise from Canada has fundamentally altered how any IMTDC industry will compete in the U.S. market in the imminent future." *Conf. Views of the Commission* 75; *Views of the Commission* 53. Based on questionnaire responses from various parties, the ITC concluded, specifically, that "Baldor Canada accounted for nearly all known imports of subject merchandise during the POI, and there is no indication that another firm in Canada will export meaningful volumes of unfinished or finished IMTDCs to the United States in the imminent future." *Conf. Views of the Commission* 72 (footnote omitted); *Views of the Commission* 51 (footnote omitted). Because they are based on the record information on the closure of the Baldor Canada facility and the questionnaire data the ITC reviewed, the Commission's decision not to cumulate subject Canadian and Chinese IMTDC imports for threat purposes, and its negative threat determination as to the subject Canadian imports, are supported by substantial evidence.

4. The ITC Permissibly Reached a Negative Threat Determination on Subject Imports from China

T.B. Wood's argues that the ITC's separate negative threat determination for China should be remanded for further consideration and explanation. Pl.'s Br. 39. For this, plaintiff relies again on its earlier arguments on the ITC's measurement of market share, present price effects and impacts of subject imports, "missing" data relating to Chinese subject merchandise, and the ITC's supposed obligation to use facts otherwise available as a substitute for those data. *See id.* at 39–41. All of these arguments are flawed for the reasons the court discussed previously, and thus they can lend no support to plaintiff's challenge to the ITC's negative threat determination as to China.

Plaintiff next argues, unconvincingly, that the data on the home market and export shares of Chinese production of IMTDCs detract from the ITC's negative threat finding by signifying the importance of the U.S. market to Chinese producers and by also signifying "greater export pressure" on them. *Id.* at 40 (citing *Final Staff Rep.* VII-14, Table VII-6). These arguments are speculative at best, particularly in light of the trends the record data showed: over the POI, Chinese subject imports maintained a relatively stable share of the U.S. market while the share of Chinese production exported to the United States declined substantially. *See Conf. Views of the Commission* 85 ("[S]ubject imports from China maintained a relatively stable share of the U.S market and . . . the United States accounted for a declining

share of the Chinese industry's total shipments of IMTDCs (less than one-third)."); *Views of the Commission* 59 (same).

Plaintiff also points to volume and market share of Chinese subject imports in an attempt to make the most of relatively small changes in the reported numbers over the course of the POI. *See* Pl.'s Br. 40. For this argument, plaintiff cites the data in Table C-1 of the confidential version of the Final Staff Report, *see id.*, but the data presented therein on the magnitude and relative market share of the subject imports over the POI do not support T.B. Wood's argument. According to the data, Chinese subject import volumes and market share, as measured by value, did not show a steady upward trend over the course of the POI. *See Final Staff Rep.* Table C-1. The total value of subject imports from China declined, and Chinese imports maintained a relatively steady share of the domestic market, over the POI. *Id.*

In summary, the ITC permissibly concluded, on the basis of substantial record evidence, that the domestic industry was not threatened with material injury by reason of subject imports of IMTDCs from China.

III. CONCLUSION

The court concludes that the Commission's negative determinations on injury and threat to the domestic industry are supported by substantial evidence. Accordingly, the court will deny T.B. Wood's motion for judgment on the agency record and enter judgment in favor of defendant.

Dated: November 29, 2018
New York, New York

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

Slip Op. 18–165

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC., Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Denying Defendant's motion for summary judgment.]

Dated: November 29, 2018

William G. Kanellis and *Kelly A. Krystyniak*, Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With them on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, *Joshua A. Levy*, Kennedys CMK, LLP, of Miami, FL, and *Frances P. Hadfield*, Crowell & Moring, LLP, of New York, N.Y., for Defendant Greenlight Organic, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

This action comes before the court under 19 U.S.C. § 1592 (2012) for fraud in the course of importing merchandise into the commerce of the United States. Before the court is a motion for summary judgment brought by Defendant Greenlight Organic, Inc. ("Greenlight") against Plaintiff United States ("Government"). *See* Def.'s Mot. Summ. J., July 9, 2018, ECF No. 89; *see also* Mem. L. Supp. Def.'s Mot. Summ. J., July 9, 2018, ECF No. 89 ("Def.'s Mem."). Greenlight asserts that the Government's action is time-barred by the five-year statute of limitations set forth in 19 U.S.C. § 1621 because the Government became aware of Greenlight's fraudulent activities in 2011, more than five years before filing the summons and complaint in this case. *See* Def.'s Mem. 1. Plaintiff has filed a response in opposition to Defendant's motion. *See* The United States' Opp'n Def.'s Mot. Summ. J., Aug. 20, 2018, ECF No. 93. The Government contends that the statute of limitations began to run in February 2012 when the Government first obtained double-invoicing records from Greenlight. *See id.* at 1–2. For the following reasons, the court concludes that there are insufficient undisputed facts for the court to determine when the Government first discovered Greenlight's fraudulent activities for the purposes of 19 U.S.C. § 1621 at this stage of the proceedings. Greenlight's Motion for Summary Judgment is denied, and this issue is reserved for trial.

UNDISPUTED FACTS

The following facts are not in dispute. The United States initiated this action on behalf of U.S. Customs and Border Protection ("Cus-

toms"). *See* The United States' Rule 56.3 Statement of Issues of Material Fact 1, Aug. 20, 2018, ECF No. 93 ("Pl.'s Facts"); Def.'s Resp. to the United States' Rule 56.3 Statement of Issues of Material Fact 1, Sept. 4, 2018, ECF No. 95 ("Def.'s Facts Resp."). Defendant Greenlight imports products including athletic apparel and is owned by Parambir "Sonny" Aulakh. *See* Pl.'s Facts 1; Def.'s Facts Resp. 1–2.

The Government filed a civil complaint against Greenlight on February 8, 2017. *See* Pl.'s Facts 11; Def.'s Facts Resp. 20. The complaint sought the following relief: (1) the amount of "approximately $238,516.57 in unpaid duties and fees, pursuant to 19 U.S.C. § 1592(d), plus interest," and (2) "a penalty for fraud, pursuant to 19 U.S.C. § 1592(c)(1) in the amount of approximately $3,232,032, stemming from Greenlight's violations of 19 U.S.C. § 1592(a) relating to approximately 122 entries of wearing apparel." *See* Pl.'s Facts 11; Def.'s Facts Resp. 20. Greenlight denied liability under 19 U.S.C. § 1592 in its Answer. *See* Pl.'s Facts 12; Def.'s Facts Resp. 21. Greenlight pled further that the Government's action for fraud in this case was time-barred because the statute of limitations expired before the Government filed the action. *See* Pl.'s Facts 12; Def.'s Facts Resp. 22.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the underlying action pursuant to 28 U.S.C. § 1582. The court will grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing version of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

ANALYSIS

The Government filed its Complaint in this matter on February 8, 2017 alleging fraudulent misclassification and undervaluation. In pertinent part, 19 U.S.C. § 1592(a)(1) states:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material.

19 U.S.C. § 1592(a)(1). To prove a fraudulent violation of the statute, Plaintiff must establish, by clear and convincing evidence, that Greenlight (1) deliberately introduced merchandise into the commerce of the United States by means of material false statements, acts or omissions; and (2) intended to defraud the revenue or otherwise violate the laws of the United States. *See* 19 U.S.C. § 1592(a)(1), (e)(2); *United States v. Inn Foods, Inc.*, 31 CIT 1474, 1484, 515 F. Supp. 2d 1347, 1357 (2007).

A statute of limitations imposes a time limit for suing in a civil case, which is based on the date when the claim accrued. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014). A statute of limitations requires a plaintiff to pursue diligent prosecution of known claims and promotes justice by preventing surprises through plaintiff's "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 2183 (citing *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)).

In actions alleging fraud under 19 U.S.C. § 1592, the statute sets forth a five-year statute of limitations for initiating a case before the Court:

> No suit or action to recover any duty under section 1592(d) . . . of this title . . . shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered . . . except that—
>
> (1) in the case of an alleged violation of section 1592 . . . of this title, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, *if such violation arises out of fraud, within 5 years after the date of discovery of fraud*.

19 U.S.C. § 1621 (emphasis added). The language "within 5 years after the date of discovery of fraud" invokes the discovery rule, which tolls the statute of limitations period until the date when the plaintiff first learns of the fraud. *United States v. Spanish Foods, Inc.*, 24 CIT 1052, 1056, 118 F. Supp. 2d 1293, 1297 (2000) (citing *United States v. Ziegler Bolt & Parts Co.*, 19 CIT 13, 17 (1995); *United States v. Modes Inc.*, 16 CIT 879, 887, 804 F. Supp. 360, 368 (1992)). Determining when a statute of limitations begins to run is a fact-specific inquiry.

Spanish Foods, 24 CIT at 1056, 118 F. Supp. 2d at 1297–98. The question of when a plaintiff discovered fraud is not one that often lends itself to resolution by way of summary judgment.

Here, genuine issues of material fact exist as to when the Government first discovered the fraudulent misclassification and undervaluation. The record on summary judgment does not provide the court with enough information to assess when the Government first had knowledge of Greenlight's fraudulent activities. For example, the record does not demonstrate clearly whether the Government had knowledge of Greenlight's intent to defraud the revenue or otherwise violate the laws of the United States when the Government discovered Greenlight's misclassification of its entries in 2011. More facts are needed to ascertain when the Government first had knowledge of Greenlight's fraudulent misclassification and undervaluation activities, including when the Government began to suspect a potential double-invoicing scheme and when the Government had knowledge of an intent to defraud with respect to the misclassification of entries. Because more facts are necessary to determine when the Government gained knowledge of the specific causes of action alleged against Greenlight, the court is unable to determine on summary judgment whether Plaintiff initiated this case outside of the statute of limitations period permitted in 19 U.S.C. § 1621. The court denies Defendant's Motion for Summary Judgment. The Parties may present evidence on this issue at trial.

CONCLUSION

Accordingly, upon consideration of Defendant's Motion for Summary Judgment, and all other papers and proceedings in this action, it is hereby

ORDERED that Defendant's motion is denied.

Dated: November 29, 2018
New York, New York

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

Slip Op. 18–166

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., and TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., Plaintiffs, CANADIAN SOLAR INC., CANADIAN SOLAR INTERNATIONAL, LTD., CANADIAN SOLAR MANUFACTURING (CHANGSHU), INC., CANADIAN SOLAR MANUFACTURING (LUOYANG), INC., CANADIAN SOLAR (USA) INC., CSI CELLS CO., LTD., CSI SOLAR POWER (CHINA) INC., CSI SOLARTRONICS (CHANGSHU) CO., LTD., CSI SOLAR TECHNOLOGIES INC., and CSI SOLAR MANUFACTURE INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant. SOLARWORLD AMERICAS, INC., CHANGZHOU TRINA SOLAR ENERGY CO., LTD., and TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00198
PUBLIC VERSION

[Commerce's *Final Results* in the Third Administrative Review of Commerce's Countervailing Duty Order pertaining to photovoltaic cells from the People's Republic of China are partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: November 30, 2018

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OPINION AND ORDER

Restani, Judge:

In this action challenging a final determination issued by the United States Department of Commerce ("Commerce") in Commerce's Third Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into

modules ("solar cells") from the People's Republic of China ("PRC"), covering the period from January 1, 2014, through December 31, 2014. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 Fed. Reg. 32, 678 (Dep't Commerce July 17, 2017) ("*Final Results*"), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 Fed. Reg. 46,760 (Dep't Commerce Oct. 6, 2017) ("*Amended Final Results*"), Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd. (collectively, "Trina"), Consolidated Plaintiffs BYD (Shangluo) Industrial Co., Ltd. ("Shangluo BYD") and Shanghai BYD Co., Ltd. ("Shanghai BYD") (collectively, "BYD"); and Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., and CSI Solar Manufacture Inc. (collectively, "Canadian Solar") request the court hold aspects of Commerce's final determination to be unsupported by substantial evidence or otherwise not in accordance with law.

The United States ("Defendant") asks that the court sustain Commerce's *Final Results* of its third administrative review. SolarWorld Americas, Inc. ("SolarWorld") requests the court to uphold other portions of Commerce's *Final Results* as supported by substantial evidence and otherwise consistent with law and asserts that other portions are not.

BACKGROUND

Commerce first published a countervailing duty order on solar cells from the People's Republic of China ("PRC") on December 7, 2012. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012). In 2016, Commerce initiated its third administrative review of this countervailing duty, covering the period from January 1, 2014 to December 31, 2014. Canadian Solar and Trina were selected as mandatory respondents ("Respondents") and issued questionnaires along with

the Government of the PRC ("GOC"). *See Decision Memorandum for Final Results and Partial Rescission of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2014*, 1 (Dep't Commerce July 10, 2017) ("I&D Memo"). On January 9, 2017, Commerce published its preliminary results of the administrative review. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 82 Fed. Reg. 2,317 (Dep't Commerce Jan. 9, 2017) (Prelim. Results) and accompanying issues and decision memorandum (*Prelim. I&D Memo*). After receiving submissions from interested parties, Commerce issued its *Final Results* on July 17, 2017, later amended on October 6, 2017. 82 Fed. Reg. 32,678[1]; *Amended Final Results*, 82 Fed. Reg. 46,760. The *Amended Final Results* calculated a subsidy rate of 18.16 *ad valorem* for Canadian Solar, 17.14 percent *ad valorem* for Trina, and 17.49 *ad valorem* for non-selected companies under review. 82 Fed. Reg. at 46,761. Plaintiff and Plaintiff-Intervenors challenge several aspects of the *Final Results*, as amended.[2]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). Commerce's results in a countervailing duty proceeding are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Because the parties present a variety of fact-specific claims, the following opinion addresses the factual background for each in turn. Each section notes which parties are bringing a given claim.

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[1] The *Final Results* were amended in order to correct ministerial errors in calculating the benefit Canadian Solar received from the "Preferential Policy Lending Program" and in "calculating the inland freight values." *See Amended Final Results*, 82 Fed. Reg. at 46,761. The corrected error resulted in a smaller subsidy rate for Canadian Solar and the subsidy rates for seventeen additional companies. *Id.* No party has raised any issue with this aspect of the *Amended Final Results*.

[2] Consolidated Plaintiffs BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd. ("Shanglou") largely do not present their own arguments but "instead hereby support[], incorporate[], and adopt[] by reference" all of Canadian Solar and Trina's arguments "to the extent they challenge the rates" that they received from Commerce. Memorandum in Support of Rule 56.2 Motion for Shanglou, Doc. No. 45–1, at 10 (Feb. 21, 2018). The court notes their support for Plaintiff and Plaintiff-Intervenor's challenges and will not indicate it further.

I. Export Buyer's Credit Program

a. Commerce's decision to apply adverse facts available to cooperating parties

i. Background

In the course of the third administrative review, Commerce requested information about the Exports Buyer's Credit Program ("EBCP') from the GOC. Canadian Solar, and Trina. *See Prelim I&D* at 2–3.[3] The latter two submitted affiliate and customer certifications of non-use applicable to the period of review stating that U.S.-based customers had not benefitted from the EBCP. *See* Trina Section III Questionnaire Response at 75, P.D. 81–98 (May 3, 2016); Trina Benchmark Submission (BPI Version) at Ex. 10., C.D. 105–107 (Nov. 30, 2016); Canadian Solar Section III Questionnaire Response at Vol. II, Ex. 20, P.D. 116–22, C.D. 31–37 (June 10, 2016). The GOC, however, refused to provide information on potential third-party bank involvement in the EBCP,[4] arguing that such information was irrelevant to Commerce's determination regarding whether the program had been used by the relevant parties. *I&D Memo* at 13.

Unlike in the second administrative review,[5] in which Commerce declined to apply an adverse inference with regard to facts otherwise available ("AFA") against otherwise cooperating respondents based on the GOC's refusal to provide requested EBCP information, Commerce here concluded that the intervening 2013 revisions[6] to the EBCP made Respondents' certifications of non-use insufficient to

[3] The U.S. government imposes duties on imports when a government or public entity is found to be providing a countervailable subsidy for the manufacture, production, or exportation of the merchandise imported into the United States, if the class of goods subsidized either materially injures or threatens to materially injure an industry in the United States. *See* 19 U.S.C. § 1671(a).

[4] Trina submitted certifications of non-use for its sole U.S. customer, TUS, whereas Canadian Solar submitted certifications for most of the sales of relevant merchandise–[[ ]]. *See* Memorandum in Support of Motion of Trina for Judgment Upon the Agency Record, Doc. No. 46–3 at 9 (Feb. 21, 2018) ("Trina Br."); Memorandum of Points and Authorities in Support of Rule 56.2 Motion for Judgment on the Agency Record by Canadian Solar, Doc. No. 43–1 at 10 (Feb. 21, 2018) ("Canadian Solar Br."). Although Canadian Solar did not submit certifications for all of its U.S. customers, Commerce did not address this during the administrative review. *See* Defendant's Supplemental Brief Regarding the Application of Adverse Facts Available to the *Export Buyer's Credit Program*, Doc. No. 90 at 5 (Nov. 2, 2018) ("Def. Supp. Br.").

[5] The court upheld Commerce's decision to not apply AFA to cooperating parties when they submitted verifications of non-use in the second administrative review. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312, 1318–19 (CIT 2017).

[6] Commerce identified two potential changes to the program in 2013. First, prior to the 2013 changes, the program was only available to those with contracts over two million U.S. dollars and Commerce noted that information on the record indicated that this requirement was eliminated. *Prelim. I&D Memo* at 30. Second, information on the record indicated that

establish non-use. *See I&D Memo* at 13; *Prelim. I&D Memo* at 30–31. The 2013 change to the program allowed for the involvement of third party banks in the EBCP and Commerce reasoned that, given the GOC's refusal to answer questions regarding whether and how these banks extended credit, it was impossible to verify Respondents' certifications of non-use. *See I&D Memo* at 13. Commerce found that "[a]bsent the requested information, the GOC's claims that the respondent companies did not use this program [were] not reliable" and therefore applied AFA to all parties in calculating the amount of subsidization based on the EBCP. *Id.*

Trina and Canadian Solar argue that Commerce disregarded record evidence showing that they did not receive support from the EBCP. Trina Compl. at ¶ 10; Trina Br. at 7–9; Canadian Solar Br. at 8–14. Canadian Solar further argued that it was improper to use AFA against a cooperating party and that Commerce's decision is arbitrary as it contradicts Commerce's previous rulings in similar situations. Canadian Solar Br. at 9, 12–13. Trina disputes Commerce's assertion that the non-use of third party banks was unverifiable and contends that Commerce could have requested further documentation on Trina's loans in order to verify non-use. Trina Br. at 14; Reply Brief of Plaintiffs Changzhou Trina Solar Energy Co., and Trina Solar (Changzhou) Science and Technology Co., Doc No. 79 ("Trina Reply Br.") at 11–13 (Sept. 21, 2018). Canadian Solar argues that the affidavits of non-use were sufficient and no other documentation was necessary. Canadian Solar Br. at 10–12. Defendant claims that Commerce was correct in finding that respondents used the EBCP based on an adverse inference given the GOC's failure to cooperate fully, and that Commerce was under no obligation to attempt to verify Canadian Solar or Trina's submissions. Def. Br. at 10–20.

ii. Discussion

When an interested party "withholds information that has been requested" by Commerce, Commerce may need to "use the facts otherwise available" to reach a decision. 19 U.S.C. § 1677e(a)(2)(A). Under 19 U.S.C. § 1677e(b) an adverse inference as to what such facts show may be used only if a party has failed to cooperate to the best of its ability, meaning that a party has failed to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). As the court has previously held

China Ex-Im bank may be distributing credits through third-party banks. *Id.*; *I&D Memo* at 13. Commerce, however, appears to have relied only on the potential involvement of third-party banks in deciding that the certifications of non-use were unverifiable. *See I&D Memo* at 13–16.

in a similar case, if a foreign government fails to cooperate in a countervailing duty case, Commerce may apply AFA even if the collateral effect is to "adversely impact a cooperating party." *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013). Commerce, however, should "seek to avoid such impact if relevant information exists elsewhere on the record." *Id.*

The court recently issued two opinions regarding the Export Buyer's Credit Program *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016) ("*Changzhou I*") and *Guizhou Tyre Co. v. United States*, Slip Op. 18–140, 2018 WL 5307676 (CIT Oct. 17, 2018) that at least facially seem to conflict. In *Changzhou I*, the court upheld Commerce's use of AFA in determining that respondents used the program. 195 F. Supp. 3d at 1355. The court based its decision on Commerce's reasonable explanation that an understanding of how an exporter would be involved in the program was necessary to determine usage and that the GOC failed to cooperate in providing this information. *Id.* In contrast, in *Guizhou* the court found Commerce's explanation regarding the use of the EBCP by respondents unavailing. Slip 2018 WL 5307676, at *4. In that case, Commerce found non-use submissions by respondents unverifiable because the GOC refused to provide documents regarding the functioning of the EBCP under the GOC's new regulations.[7] *Id.* The court found that Commerce failed to show there was a gap in the record warranting the use of AFA and that Commerce was "conflat[ing] the program's operation with its use," and thus remanded for reconsideration. *Id.* at *4, *12. Although both opinions share some factual similarities to this case, neither is fully dispositive given the record before the court.

In *Changzhou I*, unlike here, the respondents did not submit customer certifications of non-use, so that issue was not before the court. *See Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014), accompanying Issues and Decision Memorandum at 93 ("*Changzhou I I&D Memo*"). In addition to the lack of complete documentation of non-use, in that review Commerce supplied detailed reasoning for why documentation from the GOC was necessary. *Changzhou I I&D Memo* at 91–94. Here, Commerce provided reasoning as to why the GOC's failure to respond adequately made it impossible for it to understand fully the operation of the

[7] Similarly, given the 2013 changes regarding the involvement of third-party banks to the EBCP, however, Commerce claims here that the GOC failed to provide information "critical to understanding how Export Buyer's Credits flow to/from foreign buyers and the China Ex-Im Bank." Prelim. I&D Memo at 31.

EBCP, but it failed to show why a full understanding of the EBCP's operation was necessary to verify non-use certifications.

In *Guizhou*, as here, Commerce found that the GOC's refusal to explain if and how third-party banks were involved in the EBCP made respondent's claims of non-use unverifiable. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) accompanying Issues and Decision Memorandum at 23–24 ("*Guizhou I&D Memo*"). In the *Guizhou* court's review of that determination, it found that the GOC's lack of response was "rendered immaterial by responses from [respondents]." 2018 WL 5307676, at * 3. The court here does not resolve the materiality issue at this juncture, rather it finds that Commerce simply failed to provide reasoning sufficient for this court to find that its determination was supported by substantial evidence. In this case, Commerce claims its ability to verify the certifications was stymied by a lack of understanding of if and how third party banks were involved in the distribution of loans. *I&D Memo* at 13. Commerce, however, did not explain why the GOC's failure to explain this program was necessary to assess claims of non-use and why other information accessible to respondents was insufficient to fill whatever gap was left by the GOC's refusal to provide internal bank records. Further, Commerce did not explain how an adverse inference regarding the operation of the EBCP logically leads to a finding that respondents used the program. The use of facts available allows Commerce to render determinations when information is missing and it may use an adverse inference if respondents fail to cooperate, but is not permitted to skip either of these steps on the way to use of AFA.

Under 19 U.S.C. § 1677e(b) Commerce may use AFA to choose among facts of record, but the choice must fill in the information that is actually missing. Further, although it is true that Commerce need not consider information submitted by respondents that cannot be verified, Commerce must first reasonably show that such information is, in fact, unverifiable. *See* 19 U.S.C. § 1677m(e); *see also Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016) (holding that if the requirements of §1677m(e) are not met, Commerce need not consider information submitted by an interested party). What type of information requested from the GOC would have made these claims verifiable? And what information, such as loan agreements and other relevant documents ostensibly held by Respondents, might have sufficed to provide Commerce the assurance it needed? Commerce does not explain.

Accordingly, the court remands this matter and instructs Commerce to explain what information specifically the GOC failed to provide that led it to resort to facts available and the facts as to which it drew an adverse inference in arriving at the conclusion that Respondents benefited from the EBCP. Commerce should further explain if and how certifications of non-use are unverifiable in the absence of the GOC's cooperation. If Commerce determines that it is able to verify non-use by not unreasonably onerous means, the court instructs it to do so.

b. Adverse rate selected for Export Buyer's Credit Program

i. Background

If Commerce continues to find that respondents used the EBCP, and the court sustains that determination, then the court must assess whether the rate selected for the EBCP is supported by substantial evidence. As with several other calculation issues addressed here, in the interest of judicial and attorney economy the court addresses this issue, which has been briefed fully. Canadian Solar contests Commerce's calculation of an adverse rate for the program. Canadian Solar Br. at 14–17. After finding no program identical to the EBCP in the same administrative review, Commerce identified a similar program in the same proceeding to use as a basis for calculating the rate for the EBCP. *I&D Memo* at 18–19. Commerce calculated a rate of 5.46 percent *ad valorem*, for the EBCP by utilizing the rate "calculated for company respondent Lightway Green New Energy Co., Ltd.'s usage of the Preferential Policy Lending to the Renewable Energy Industry program in the 2012 administrative review of this proceeding." *Prelim I&D Memo* at 32. Commerce explained that the Lightway Green New Energy Co. Policing Lending Program ("Lightway Program") was similar because both it and the Export Buyer's Credit Program provided access to loans. *I&D Memo* at 19.

Canadian Solar challenges the use of the Lightway Program rate, arguing that it is not an appropriately similar program. Canadian Solar Br. at 15. China's Ex-Im Bank is the administrator of the EBCP, a program that provides credit to foreign importers of Chinese products and loans. *See I&D Memo* at 12–13. Canadian Solar argues the record contains evidence of a more similar program, the Export Seller's Credit Program, which provides a more directly comparable rate than the Lightway Program. Canadian Solar Br. at 15–17. Canadian Solar argues that the Lightway Program is not a similar program in that, although it calls for financial institutions to offer loans to renewable energy, these loans are not specifically related to exports.

Canadian Br at 16. They argue that Commerce should have further explained why it chose the Lightway Program over the Export Seller's Credit Program. Canadian Solar Br. at 15, 17. The Defendant argues that Commerce acted in accordance with its established practice in selecting the Lightway Program. Def. Br. at 21–24.

ii. Discussion

Commerce has discretion when calculating the appropriate AFA rate, as neither the relevant statute nor regulations limit how Commerce must select programs that are "similar," or if no similar program exists, one "from a proceeding that the administrating authority considers reasonable to use." 19 U.S.C. § 1677e(d)(1); *see Solar Americas, Inc. v. United States,* 229 F. Supp. 3d 1362, 1366 (CIT 2017).[8] Commerce has developed a methodology by which to determine the appropriate AFA rate in accordance with the governing statute. *See Solar Americas*, 229 F. Supp. 3d at 1366 (describing Commerce's five-step hierarchy in selecting an AFA rate). First, Commerce assesses whether another cooperating company in the same proceeding used the identical program, and if so, Commerce applies the "highest non-de minimus rate calculated for a cooperating company for the identical program in the same proceeding." *Id.* If no such figure exists, Commerce applies "the highest non-de minimus rate calculated for a cooperating company for a similar program in the same proceeding." *Id.* If no such figure can be calculated, then Commerce continues to step three, and if necessary, step four and five until it arrives at the appropriate metric. *Id.*[9]

Here, Commerce was unable to satisfy step one of the methodology as there was no alternative rate for the EBCP in the Third Adminis-

[8] The section, in relevant part, reads:

> "(1) In general. If the administering authority uses an inference that is adverse to the interests of a party under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority may—
>
> (A) in the case of a countervailing duty proceeding—
>
> (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or
>
> (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use; . . ." 19 U.S.C. § 1677e(d).

[9] "In the absence of [a tier-two rate], Commerce applies the highest non-de minimis rate calculated for a cooperating company for an identical program in a different CVD proceeding (i.e., involving a different industry) for the same country. In the absence of such a rate, Commerce uses the highest non-de minimis rate calculated for a cooperating company for a similar program in a different proceeding for the same country. Finally, in the absence of such a rate, Commerce uses the highest rate calculated for any non-company specific program from the same country that the industry subject to the proceeding could have used." *Solar Americas*, 229 F. Supp. 3d at 1366 (internal citations omitted).

trative Review. *See Prelim. I&D Memo* at 30–32; *I&D Memo* at 18–21. Thus, Commerce turned to step two and found a sufficiently similar program from an earlier administrative review, the Lightway Program. *Prelim. I&D Memo* at 31–32; *I&D Memo* at 19. Commerce predicated this finding of similarity on both the EBCP's and the Lightway Program's distribution of loans. *I&D Memo* at 19. With this finding, Commerce applied the rate from the Lightway Program to calculate an AFA rate for the EBCP. *Id.* Canadian Solar's argument that Commerce needed to compare the Lightway Program to Canadian Solar's proffered Export Seller's Credit Program fails. *See* Canadian Solar Br. at 15. Under Commerce's established methodology and consistent with the plain text of the statute, Commerce selects a *similar* program, not necessarily the *most similar* program. *See* 19 U.S.C. § 1677e(d)(1)(A)(i). Additionally, Canadian Solar argues that Commerce failed to explain why the Lightway Program was similar. Canadian Solar Br. at 17; *but see I&D Memo* at 19 (stating that the Lightway Program was chosen because it, like Export Buyer's Credit Program, was a loan program). Although a more detailed description might be helpful, it is not required.

Commerce has broad discretion in determining and applying an AFA rate, so long as it "reasonably balance[s] the objectives of inducing compliance and determining an accurate rate." *Solarworld Americas*, 229 F. Supp. 3d at 1366. Commerce used its developed methodology to arrive at the AFA rate of 5.46 percent. The court finds no error in this regard.

II. Provision of Aluminum for LTAR

a. Specificity determination of aluminum program

i. Background

Canadian Solar claims that the provision of aluminum extrusions for less than adequate remuneration (LTAR) is not properly classified as a specific subsidy. Canadian Solar Br. at 26. Commerce found, as it did in the second administrative review, that the provision of aluminum extrusions for less than adequate remuneration was a *de facto* specific subsidy because the industries that used aluminum extrusions were "limited in number" and no new information disturbed that finding. *I&D Memo* at 22.[10] Both Commerce and Canadian Solar

[10] Neither the preliminary nor the final issues and decision memorandum for this administrative review indicate whether Commerce drew an adverse inference regarding specificity from a failure of the GOC to fully respond to its questionnaire. Rather, the justification given seems to rely on unspecified reasoning provided in a previous decision. *I&D Memo* at 21–22.

agree that the six categories of industries that use aluminum extrusions are: "(1) building and construction, (2) transportation, (3) electrical, (4) machinery and equipment, (5) consumer durables, and (6) other industries." *I&D Memo* at 21; Canadian Solar Br. at 27.

Canadian Solar argues that the named industries listed as using aluminum extrusions are themselves diverse and also that Commerce failed to inquire as to whether the number of industries in the "other industries" category would render the subsidy non-specific. Canadian Solar Br. at 26–27. According to Canadian Solar, Commerce was obligated to conduct a more searching analysis regarding the diversity of these industries as the industries identified are broad categories that contain numerous sub-industries. *Id.* at 27–28. SolarWorld argues that the catchall "other industries" by itself does not mean the subsidy was widely used by numerous other industries and that Canadian Solar's relies on outdated case law. SolarWorld's Response to Plaintiff's Rule 56.2 Motion for Judgment upon the Agency Record, Doc. No. 69 at 27–28 (July 20, 2018) ("SolarWorld Resp."). The Government responds that the information received from GOC shows that the "recipients of aluminum extrusions (on an industry basis) are limited in number." Def. Br. at 25.

ii. Discussion

Commerce is empowered to assess countervailing duties if, after investigating a subsidy, it finds that the subsidy "1) provides a financial contribution to a person, 2) a benefit is thereby conferred, and 3) the subsidy is specific." *Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372, 1378 (CIT 2002); *see also* 19 U.S.C. § 1677(5). No party challenges Commerce's determinations regarding financial contribution or benefit conferred. Domestic subsidies are specific, and thus countervailable, when"[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." 19 U.S.C. § 1677(5A)(D)(iii)(I).[11] In determining whether a subsidy is provided to a group of enterprises or industries, Commerce is not required to "determine whether there are shared characteristics among the enterprises or industries" that receive or are eligible for a subsidy: variety amongst the industries receiving a given subsidy is not the test for specificity. 19 C.F.R. § 351.502(b). That being said, Commerce is under an obligation to compare the industries receiving the subsidy to the industry makeup of the country at issue as a whole.

[11] The relevant statute section on subsidy specificity reads:
"(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." 19 U.S.C. § 1677(5A)(D)(iii).

This is a necessary step in the analysis in order to "avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy." Uruguay Round Agreements Act, Statement of Administrative Action, H.R.Rep. No. 103–316, vol. 1, at 930–31 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4242 ("SAA").[12] By way of analogy, if the GOC had instead said that only two sectors used aluminum extrusions – manufacturing and non-manufacturing – on a shallow level that would seem to satisfy the requirement that the subsidy be available to only a limited number of industries, but in reality such a distribution is not specific as those two categories encompass all possible industries.

Thus, although Commerce was under no obligation pursuant to its regulations to compare the characteristics of the six industries listed by the GOC against one another, Commerce should have determined whether these six industries made up a significant enough portion of all Chinese industries to render the subsidy nonspecific despite the use of only six categories to describe these industries.[13] The categories mentioned here – building and construction; transportation; electrical; machinery and equipment; consumer durables; and other industries[14]– appear to represent a large swath of industries that could be further broken down into numerous sub-industries.[15] Commerce

[12] *See* 19 U.S.C. § 3512(d), which reads "[t]he statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

[13] SolarWorld apparently argues that the six industries Commerce continually references is a characterization created by China to describe their own industry makeup. *See* SolarWorld Resp. at 3. The court notes that these categories instead appear to be used by the U.S.-based international organization the Aluminum Extruders Council in its analysis of North American consumption of aluminum extrusions. *See* Letter from Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, to Sec'y Commerce, re: GOC Initial CVD Questionnaire Response re Canadian Solar, at 45–46, C.R. 38–72, 78–82, 85, P.R. 123–127, Ex. 6 (June 10, 2016). It is unclear from the record before the court whether the GOC provided these categories as a description of their own industries or provided them as a comparative for industry usage in the United States.

[14] In the preliminary issues and decision memorandum Commerce reasoned that "[a]lthough the GOC claims its information indicates aluminum extrusions are used in a variety of industries and sectors across the PRC, the industries within those sectors that actually consume aluminum extrusions are limited in number." *Prelim I&D* at 37. It is unclear from context to what Commerce is referring with "sectors," and the Government did not clarify in its briefs or during oral argument. It is possible, that Commerce was trying to say that these six categories may be diverse, but the actual users within these six categories are limited, thus resulting in a specific subsidy. If this is the case, Commerce must further explicate and provide support for such reasoning.

[15] The parties have been unclear about the differences between the record in this case and in *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016). Thus, it is not clear that it conflicts with the court's approach here. To the extent it may conflict, the court declines to follow it at this stage.

needed to explain how subsidizing these broad industries amounts to a specific rather than a generally available subsidy. It is nonsensical to simply count the number of proffered industries, regardless of their composition, in order to determine specificity. Such a cursory test would allow gamesmanship in specificity determinations by allowing a respondent to simply recharacterize what is in fact a limited number of industries as numerous industries in order to avoid such a finding.

The court renders no decision on whether the provision of aluminum in the GOC is, in fact, a countervailable subsidy, but remands for Commerce to reconsider its methodology in arriving at this conclusion.

b. Challenge to Commerce's use of Comtrade and IHS datasets

i. Background

If, on remand, Commerce continues to find that the provision of aluminum amounts to a countervailable subsidy, it must additionally reconsider the data used to arrive at the appropriate benchmark. Canadian Solar and Trina challenge Commerce's decision to average data from IHS technology ("IHS") and UN Comtrade ("Comtrade") to determine the appropriate aluminum extrusion benchmark.

They contend that whereas IHS data specifically pertains to aluminum frames for solar modules, the type used by Trina and Canadian Solar, Comtrade data is broader and encompasses multiple broad Harmonized Tariff Schedule ("HTS") subheadings at the six-digit level (7604.21, 7604.29, and 7610.10)[16] which covers many products not used by Respondents. Trina Br. at 15; Canadian Solar Br. at 29–31. Trina and Canadian Solar argue that the annual average figure provided by IHS provides a more accurate benchmark for the POR because it pertains specifically to aluminum used in the production of solar panels, and thus accords with Commerce's preference for the "narrowest category of products encompassing the input product." Trina Br. at 17; *see also* Canadian Solar at 29–31. Trina further argues that even if Commerce's normal preference for monthly average has merit, there is no way for Commerce to know whether Comtrade's monthly data more accurately reflects price fluctuations over time, because those fluctuations may very well be caused by the irrelevant merchandise within the HTS subheadings. Trina Br. at 19.

[16] "7604.21 (*i.e.*, aluminum alloy hollow profiles), 7604.29 (*i.e.*, aluminum alloy profiles other than hollow profiles), 7610.10 (*i.e.*, aluminum door, windows and their frames and thresholds for doors)." Harmonized Tariff Schedule of the United States (2014) ("HTSUS").

SolarWorld counters that the inclusion of Comtrade data is necessary, given Commerce's preference for monthly over annual data in setting benchmark prices. SolarWorld Resp. at 31. SolarWorld argues that monthly data allows Commerce to match subsidy program pricing with world benchmark prices more accurately. *Id.* The Government argues that given the noncritical flaws in both datasets, averaging them was the appropriate course of action. Def. Br. at 26–31.

ii. Discussion

When goods are provided for LTAR, Commerce determines the amount of the subsidy by comparing remuneration actually paid with adequate remuneration. *See* 19 U.S.C. § 1677 (5)(E)(iv). Commerce employs a three-tiered hierarchy to determine the appropriate remuneration benchmark. In the absence of an undistorted tier one benchmark, e.g., an "actual transaction [price] in the country in question," Commerce turns to a tier two benchmark, e.g., a "world market price" for goods in question. C.F.R. § 351.511(a)(2); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273 (Fed. Cir. 2012). When there is more than one dataset representing the world market price, then "the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).[17]

In this instance, Commerce combined two datasets, IHS Technology and UN Comtrade, the latter of which uses broad HTS categories. Balancing Commerce's preference for monthly data and its desire for data specific to the relevant input, Commerce averaged these two datasets. But, in doing so, Commerce failed to properly make allowance for "factors affecting comparability." *See* 19 C.F.R. § 351.511(a)(2)(ii).

Commerce prefers monthly data points ostensibly to track potential market fluctuations over the period of review or investigation,[18] but there is no statutory or regulatory basis for allowing this preference to overcome vital comparability concerns. This preference does not allow Commerce to include largely irrelevant data in its average of world market data sets. Put simply, not all flaws in data are equally problematic. Although some degree of nonspecificity is tolerable, when a dataset is vastly overinclusive of products not covered by the

[17] A tier-two benchmark is one that measures "the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to the purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii).

[18] Commerce has not been clear about how it uses information about monthly fluctuations, e.g., is there a monthly comparison between purchase price and benchmark price, are aberrant months rejected, or is synchronization with the period of review the purpose?

relevant CVD order, that flaw is not equivalent to the flaw in otherwise product-specific arising from its annual average. Here, Commerce made little effort to counter claims that Comtrade data was based on too broad a product category to provide an accurate world market price, stating only that Commerce was familiar with the data and that the HTS descriptions were suitable for constructing a world price for aluminum extrusions. *I&D Memo* at 23–24. Although Commerce often has to use less than ideal data, here it has the option to use only seemingly product-specific data.

Thus, the court concludes that Commerce's decision to average the Comtrade and IHS datasets without properly considering whether the Comtrade data was too flawed to be probative of the world market price for the input at issue renders the decision unsupported by substantial evidence. Accordingly, the court remands this case to Commerce with instructions either to use solely the IHS dataset in its calculation of the appropriate benchmark or else explain why the inclusion of the Comtrade data does not produce a fatally inaccurate result.

III. Provision of Solar Glass for LTAR

a. Background

Canadian Solar and Trina similarly challenge Commerce's benchmark determination with regard to solar glass. Commerce found the GOC's solar glass market distorted, and so used world market indicators to calculate a benchmark for adequate remuneration. *I&D Memo* at 29. In its final calculation, Commerce averaged monthly data points from Comtrade[19] with annually-reported data from IHS. *I&D Memo* at 29–30. Commerce defends this amalgam arguing that, although neither set was perfect, neither was so deficient as to merit rejection. Def. Br. at 31–36. Like the data used in setting the benchmark for aluminum extrusions, the Comtrade data in question contains monthly data points, but is less specific to solar glass, whereas the IHS data is an average annual figure, but one specific to solar glass. *Id.* at 32.

Canadian Solar and Trina contend that Commerce should not include the Comtrade data due to a critical lack of product specificity. Canadian Solar Br. at 21–23; Trina Br. at 22–23. They argue that Commerce should use only the IHS data given that its specificity to solar glass, whereas the Comtrade data includes HTS headings that

[19] Comtrade's dataset is not exclusive to solar glass, but the data used was limited to countries that produce solar glass. *Prelim. I&D Memo* at 19.

include, but are not limited to, solar glass. Canadian Solar Br. at 17–19, *see also* Trina Br. at 20–23. They argue the glass included in these headings often does not possess the specific characteristics necessary for use in solar cells.[20]

Further, Canadian Solar argues that Comtrade's monthly benchmarks project a distorted picture of the solar market, showing price variability unsupported by the record and disputed by party submissions.[21] *See* Canadian Solar Br. at 19–20. Canadian Solar acknowledges that including only Comtrade data from solar glass-producing nations makes the data less-flawed, but they further note that the Comtrade data does not contain data from certain major solar glass producing countries, including the United States, which is one of the top three solar glass producing countries globally. Canadian Solar Br. at 22–23. Finally, Trina contends that although the record indicates that there is a difference between broadly-defined tempered glass and the more specific solar glass, Commerce depended on the description of the headings referencing tempered glass as justification for its position that the headings included solar glass. Trina Br. at 23.

SolarWorld disagrees. It argues that the inclusion of the Comtrade data was correct given Commerce's established preference for using monthly over annual data. SolarWorld Resp. at 33–34. It asserts that monthly-reported data better accounts for market fluctuations. *Id*. Canadian Solar responds that although monthly data points are preferable when available, there is no statutory requirement mandating that Commerce use monthly rather than annual data and contend that the use of IHS data is supported by the record. Canadian Solar Reply Brief in Support of Canadian Solar's Rule 56.2 Motion for Judgment upon the Agency Record, Doc. No. 80 at 10–11 (Sept. 21, 2018) ("Canadian Solar Reply"); Reply Brief of Trina, Doc. No. 79 at 8–10 (Sept. 21, 2018) ("Trina Reply").

b. Discussion

As with the above discussion of the proper datasets for calculating a benchmark for aluminum extrusions, Commerce similarly calculated its solar glass benchmark by averaging two tier-two datasets. Also as with the aluminum extrusions data, Commerce did not sufficiently determine the adequacy of these datasets or explicate their comparability.

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[20] Trina argues that there is a substantial difference between solar glass and tempered glass. For instance, whereas solar glass has little variability in thickness [[ ]], the glass in the HTS headings used in Comtrade's dataset is not similarly restricted to glass falling into narrow thickness parameters. Trina Br. 22. Further, solar glass requires a low [[ ]] which is not accounted for in the Comtrade data. Trina Br. at 20.

[21] *See* [[ ]]. Canadian Solar Br. at 20.

Solar glass is a type of flat glass, which in turn is one of the [[ ]] main types of glass on the global market. Letter on Behalf of Canadian Solar to the Dep't Commerce re: Benchmark Submission at Ex. 5 C.R. 101–102 (No. 30, 2016). Flat glass represents about [[ ]]% of the global glass market, but of that [[ ]]% less than [[ ]]% is solar photovoltaics. *Id.* Thus the vast majority of flat glass is not suitable for solar panels, but is used in the production of other merchandise such as windows, glass doors, windshields, etc. *See id.* Comtrade data includes glass under the six-digit HTS headings 7007.19 and 7007.29.[22] Neither of these HTS basket headings are specific to solar glass, but rather includes many types of safety glass (often a type of flat glass) unrelated to solar glass. *Id*. In contrast, the IHS data is specific to solar glass. *Prelim. I&D Memo* at 19.

In its brief, Defendant cited the court's earlier decision in *Changzhou Trina Solar Energy Co., Ltd., v. United States*, regarding the averaging of IHS data and Global Trade Atlas (GTA) data in a prior administrative review to arrive at the proper benchmark for solar glass. Slip. Op. 18–31, 2018 WL 1649629 (CIT Mar. 27, 2018) ("Changzhou II"); Def. Resp. Br. at 28. In that case, the court upheld Commerce's decision on remand to average IHS and GTA to arrive at a benchmark price for solar glass for reasons similar to those given in this case. *See Changzhou II*, 2018 WL 1649629 at *7. The court notes that plaintiffs challenge the use of the Comtrade data in this case, but there was no challenge to the use of GTA data in the previous case, and thus the court had neither the appropriate record nor any reason to inspect the adequacy of the GTA data. *Id.* at *6. Thus, the court finds the previous decision unhelpful.

Finally, the court finds Commerce's reliance on potential price fluctuations in the solar glass industry as a reason for including the Comtrade data unpersuasive. The only indication on the record before the court showing price fluctuations in solar glass is from the Comtrade data itself. In contrast, submissions by respondents during the administrative review show minimal solar glass price fluctuations. Canadian Solar Br. at 19–20. Commerce did not inquire into whether the fluctuations in the Comtrade data were due to solar glass rather than other merchandise contained in the HTS headings. Without answering that threshold question, the court cannot be certain that the addition of the Comtrade data does not create the appearance of fluctuations in the solar glass market were none actually

[22] Heading 7007 contains "Safety glass, consisting of toughened (tempered) or laminated glass." 7007.19 contains "toughened (tempered) safety glass: other." 7007.29 contains "[l]aminated safety glass: other." The other in both cases referring to "[of] size and shape suitable for incorporation in vehicles, aircraft, spacecraft or vessels." HTSUS (2014).

exist. Accordingly, the court cannot assess whether the inclusion of the Comtrade data makes the resulting benchmark more or less reliable.

Although averaging datasets is appropriate in certain circumstances, when one dataset is far more specific to the product at issue, that data may be more probative even if it is based on a yearly average rather than a monthly one. *See* 19 C.F.R. § 351.511(a)(2)(ii) (requiring the department to take into account "factors affecting comparability"). As with the datasets used to calculate the aluminum extrusions rate, Commerce failed to adequately evaluate and explain the relative adequacy and comparability of both datasets.[23] Although Commerce may prefer to employ monthly data in its analysis, this cannot supersede regulatory considerations requiring the use of adequate data Here, Commerce failed to meaningfully assess the reliability of the Comtrade data and included it despite indications that it is overinclusive in regards to the types of glass included in the data, underinclusive in failing to include solar glass-producing countries, and by failing to assess whether the monthly fluctuations were due to price variability of solar glass or merely related to other merchandise contained in the HTS headings at issue.

In finding the Comtrade data to be a sufficient world market price metric without adequate evaluation, Commerce made a decision unsupported by substantial evidence or otherwise not in accordance with law. On remand, Commerce is instructed to use the IHS data alone in constructing a benchmark for the world market price for solar glass and otherwise address the court's concerns as to the Comtrade data and explain why its inclusion is appropriate.

IV. Provision of Polysilicon for LTAR

a. Background

In its original investigation, Commerce determined that the provision of polysilicon at LTAR in the PRC was a countervailable subsidy based on AFA. *Prelim. I&D Memo* at 33–35. Commerce determined that a benefit was being conferred based on the provision of polysilicon for LTAR, and thus sought to determine adequate remuneration in order to assess the appropriate countervailing duty.[24] *Id.* at 34, *I&D Memo* at 31.

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[23] As with aluminum extrusions, it is unclear how Commerce utilizes monthly fluctuation data.

[24] In this review, the GOC indicated that certain producers of solar grade polysilicon were majority-owned by the government, so Commerce found that they "constitute[d] 'authorities' within the meaning of section 771(5)(B) of the Act" and when the producers were foreign-owned that evidence on the record showed that these produces were "vested with

It is Commerce's practice to determine remuneration by comparing the government price to a "market-determined price for the good or service resulting from actual transactions in the country in question," which it refers to as a tier-one metric. *See* 19 C.F.R. § 351.511(a)(2)(i).[25] When no such price is available, or when there is reason to conclude that actual transactions are distorted, then Commerce resorts to its tier-two metric and determines adequate remuneration by comparing the government price to a world market price if it is reasonable to assume purchasers in the relevant country would be able to access that price. *See* 19 C.F.R. § 351.511(a)(2)(ii); *Countervailing Duties: Final Rule* 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 2018) ("*Preamble*"). Because Commerce found that the PRC's involvement in the polysilicon market distorted the domestic prices, Commerce resorted to tier-two world market price data in order to determine the appropriate polysilicon subsidy benchmark.[26] *I&D Memo* at 31; *See* 19 C.F.R. § 351.511(a)(2). Commerce did not explain how the GOC's market interference would result in import distortion.

Canadian Solar challenges this determination, arguing that because all of its polysilicon purchases were imported from market-economy suppliers outside the PRC, rather than domestically-purchased, they would not be distorted by the GOC's market interference. Canadian Solar Br. at 41–42. Canadian Solar thus contends that Commerce should have used Canadian Solar's purchases as a first-tier metric. *Id.* at 42. SolarWorld objects, arguing that although these purchases were imports, the "third-country suppliers would be forced to lower prices in order to compete with the artificially low prices in China." SolarWorld Resp. at 44. The Defendant responds that after finding that the Chinese market was distorted, it acted within its discretion in rejecting the imports as tier-one evidence and resorting to tier-two. Def. Br. at 37–38.

governmental authority." *Prelim. I&D Memo* at 33. The finding that the producers were "authorities" within the meaning of the Act was in part based on AFA due to the GOC's failure to respond adequately to numerous questions. *See id.* at 22–25 (detailing findings based on AFA). Commerce found that a "benefit [was] being conferred because the polysilicon [was] being provided for LTAR." *Id.* at 34. Because the GOC refused to provide information on the industries consuming polysilicon, Commerce relied on the GOC's statement from a prior review in determining that the subsidy was "limited to specific industries within the meaning of section 771(5A)(D)(iii) of the Act, namely, the solar and semiconductor industries." *Id.*

[25] Tier-one metrics "could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions." 19 C.F.R. § 351.511(a)(2)(i); *See I&D Memo* at 31.

[26] Commerce averaged the world market solar grade polysilicon prices from Bloomberg, Energy Trend, Greentech Media, and IHS. *I&D Memo* at 31.

b. Discussion

As mentioned above, Commerce's determination that the polysilicon program was countervailable was based on the use of AFA. *Prelim. I&D Memo* at 18. As indicated previously, when a party refuses to cooperate and withholds requested information necessary to a determination, Commerce may need to rely on "facts otherwise available" in making a determination. 19 U.S.C. § 1677e(a)(2). Although under 19 U.S.C. § 1677e(b) Commerce may, under certain circumstances, draw an adverse inference as to facts affecting a cooperating party, it should attempt to avoid doing so when adequate information exists elsewhere on the record that would avoid this collateral effect. *Archer* Daniels, 917 F. Supp. 2d 1331 at 1342; *see also Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1262 (CIT 2012) (holding that "[w]here the respondents have placed evidence on the record consistent with the Department's regulations for calculating benchmarks . . . Commerce would be expected to consider such evidence."). The court in *Fine Furniture* also found that an "alternative benchmark meeting such criteria" that did not "adversely affect a cooperative party . . . would be superior to one which does adversely affect a cooperative party." 865 F. Supp at 1262.[27] This policy helps ensure that non-government respondents continue to cooperate in administrative reviews and gives Commerce more opportunities to collect data that may best reflect a rate set in accordance with market principles.

Here, Canadian Solar did not take issue with Commerce's calculation of the world market price, but rather they argue that Commerce should not have resorted to this tier-two metric in the first place. Nothing in the record before the court indicates that Chinese manipulation of domestic transactions had any effect on arms-length import prices, and without such a determination, it is impossible to assess whether Commerce correctly resorted to a tier-two benchmark.

Rather than address Canadian Solar's submissions, which Canadian Solar claims show that all polysilicon purchases involved "arms-length import transactions with market economy suppliers," Commerce dismissed the evidence without consideration, stating simply that Commerce had already found actual transactions in China distorted. Canadian Solar Br. at 42; *I&D Memo* at 31. This is circular. Commerce's determination that the actual transactions were distorted presupposed the appropriateness of applying a subsidy rate to these cooperating parties derived from application of AFA in finding

[27] The non-government respondents in that case did not place on the record any alternative benchmarks consistent with 19 C.F.R. § 351.511(a)(2). *See Fine Furniture*, 865 F. Supp. at 1262.

there was a subsidy program. Simply stating that the market was distorted fails to give cooperating parties a meaningful chance to rebut that they benefitted from any subsidy resulting in market distortion. Commerce should have considered Canadian Solar's proffered evidence and either accepted it as a tier-one metric or explained how these imports may have been distorted by GOC interference in the market. Only if the latter occurred would it be appropriate to resort to a tier-two metric. In sum, Commerce must first explain why Canadian Solar's submission, a potential tier-one benchmark, is not usable. Such an explanation should not be based entirely on the adverse inference used to determine that the GOC's influence in polysilicon distorted the market. Although SolarWorld's claim regarding import price depression in order for importers to compete in the PRC's national market may certainly be the case, without any such determination on the record, or even sufficient information about polysilicon's fungibility or the dynamics of the market, the court cannot accept it.

Accordingly, with respect to Commerce's decision to resort to a tier-two benchmark with regards to polysilicon, the court finds that Commerce's decision was unsupported by substantial evidence and remands this issue. On remand Commerce should either use Canadian Solar's import data as a tier-one benchmark or else explain how the GOC's purported interference with the polysilicon market would distort arms-length import transactions in a way that makes this data unreliable.

V. Inclusion of International Freight Charges

a. Use in calculating polysilicon, aluminum, and solar glass benchmarks

i. Background

In calculating the appropriate benchmark Commerce added international freight charges to the calculations for polysilicon, aluminum, and solar glass. *I&D Memo* at 33. Canadian Solar argues that [[ ]] Commerce should not include international freight charges. Canadian Solar Br. at 32–34. Commerce rejected this argument in its final determination. *See I&D Memo* at 33. SolarWorld and the Government contend that the statute only requires that the benchmark be adjusted based on market conditions and does not concern the character of purchases by specific respondents during the period of review. SolarWorld Resp. at 34–36; Def. Br. at 38–39.

ii. Discussion

The statute at issue requires Commerce to determine a world market price based on "prevailing market conditions." 19 U.S.C. § 1677(5)(E).[28] Commerce's regulation states that in assessing the adequacy of remuneration with a tier-one or tier-two metric,[29] Commerce is required to "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv). The regulation explicitly includes transportation as an input in calculating prevailing market conditions and further assumes for its purposes that a firm imports the product at issue. *Id.*; *see also Creswell Trading Co. v. Allegheny Founding Co.*, 141 F.3d 1471, 1478 (Fed. Cir. 1998) (finding that a world market price must include the cost of shipping). This regulation does not require Commerce to base its decision on the purchasing decisions of the parties before it in a given proceeding, but rather requires that Commerce calculate the market conditions based on a party's hypothetically importing a given product. *See Beijing Tianhai Industry Co., Ltd. v. United States*, 52 F. Supp. 3d 1351, 1374 (CIT 2015) (holding that a reference to a "firm" in 19 C.F.R. § 351.511(a)(2)(iv) does not refer to the respondent but to "a hypothetical firm located in the [country at issue].")

Canadian Solar mistakenly asserts that Commerce's calculations should be based on the specific circumstances of the Respondents.[30] As the court has indicated, however, Commerce has determined that benchmark calculations are assessed based on a hypothetical importer making a market-price purchase, not the specific parties in a proceeding. *See Beijing*, 52 F. Supp. 3d at 1374. Basing calculations on a hypothetical importer rather than the respondent in a given administrative review is not a plainly erroneous interpretation of 19 C.F.R. § 351.511(a)(2)(iv). *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (finding that an agency's interpretation of its own regulations controlling unless plainly erroneous or inconsistent with the regulation). Commerce found, freight charges would be paid by an importer

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[28] The section reads, in relevant part:

> "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

[29] As noted earlier, Commerce has devised a three-tiered hierarchy in determining adequate remuneration. *See* 19 C.F.R. 351.511(a)(2)(i)-(iii).

[30] The court does not evaluate whether Canadian Solar actually imported the goods at issue, but will assume so for the sake of argument.

of aluminum, solar glass, and polysilicon. *See Prelim. I&D Memo* at 34, 36, 37. Commerce was thus required to add international freight charges in order to calculate an accurate benchmark for the products in question. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012) (finding that adding freight to the world market price was required by 19 U.S.C. § 1677(5)(E) as a prevailing market condition). Accordingly, Commerce's inclusion of international freight charges in its benchmark calculations is supported by substantial evidence and is in accordance with law.

b. Calculation of International Freight Charges for Benchmarking

i. Background

In determining the proper freight charge to be added for each benchmark calculation, Commerce averaged two data sets from Maersk and Xenata. *I&D Memo* at 33. The Xenata data was calculated based on actual prices while the Maersk data was based on price quotes. *Id.* 34. Canadian Solar argues that because the Maersk Data is based on price quotes rather than finalized contracts, this data should be excluded from the calculation. Canadian Solar Br. at 35–36. Further, Canadian Solar contends that the use of such data is not in accordance with Commerce's own regulations. *Id.*

ii. Discussion

Under 19 C.F.R. § 351.511(a)(2), Commerce is required to calculate "the price that a firm actually paid or would pay if it imported" the product at issue. In making this calculation, this court has previously allowed Maersk's datasets based on price quotes for international freight charges rather than finalized contracts. *See TMK IPSCO v. United States*, 222 F. Supp. 3d 1306, 1320–21 (CIT 2017) (finding that using Maersk's estimates was reasonable). Commerce's regulations require that "[w]here there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable." 19 C.F.R. 351.11(a)(2)(ii).

Commerce did not err in averaging the two datasets in determining the proper international freight benchmark. The regulation requires only that the price calculated reflect what a firm paid or would pay. This determination can properly be made on generally-available price quotes, so long as the source of those price quotes is a reputable source. Given Maersk's prominent position in the shipping market, Commerce properly considered the Maersk data to be a reliable world

market price and averaged it with the Xenata data. As long as Commerce adequately justified why it chose to average the given datasets, as it did here, a set will not be excluded simply because it is based on a price estimate rather than completed contracts. *See I&D Memo* at 33–34. The benchmark calculation is sustained.

VI. Use of Value-Added Tax in calculating LTAR

i. Background

In its final determination, Commerce included value-added tax (VAT) in determining the appropriate benchmark prices. *I&D Memo* at 38–39. Canadian Solar claims that the addition of VAT is not an allowable adjustment under the regulation. Canadian Solar Br. at 36–38. They claim that VAT cannot be properly categorized as a delivery charge or import duty, but is rather an indirect tax, the inclusion of which inflates the apparent benefit received. *Id.* at 37; *see* 19 C.F.R. § 351.102(b)(28). In addition, Canadian Solar argues that because VAT is later recouped, it should not be included. Canadian Solar Br. at 38.

SolarWorld counters that failing to include the VAT would distort the benefit calculated. SolarWorld Resp. at 39–40. The Government argues that the mandate of the statute is to calculate what an importer would pay at the time of import–which includes VAT–and that in calculating this figure, Commerce does not account for potential reimbursement after import. Def. Br. at 42–43.

ii. Discussion

Under the relevant regulation, Commerce adjusts benchmark prices to include delivery charges and import duties that an importer would pay in order to arrive at the "delivered price." *See* 19 C.F.R. § 351.511(a)(2)(iv). The court has previously found the inclusion of VAT in this calculation appropriate. *See Beijing,* 52 F. Supp. 3d at 1372–1375 (holding that the inclusion of VAT in a tier-two benchmark was correct). The relevant statute says that when determining the adequacy of remuneration Commerce should take into account market conditions including "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

Here, Canadian Solar's contention that the inclusion of VAT is not allowable under the regulation fails. The relevant regulation states that the benchmark should be adjusted to reflect the "delivered price" meaning the "price that a firm actually paid or would pay if it

imported the product." 19 C.F.R. § 351.511(a)(2)(iv).[31] Commerce determined that VAT would be paid in this situation and Canadian Solar has offered no evidence showing that to be incorrect. It is immaterial that the regulations may classify VAT as an indirect tax; the regulation does not say that the delivered price *only* includes delivery charges and import duties, just that it *does* include these figures. VAT is properly classified as a market condition under the statute, and is thus may be included in calculating the benchmark for adequate remuneration. *See* 19 U.S.C. § 1677(5)(E). Therefore, Commerce's addition of VAT to the benchmark was supported by substantial evidence and otherwise in accordance with law.

VII. Electricity Subsidy

a. Background

After finding that the GOC failed to fully cooperate in responding to questions regarding the alleged provision of electricity for LTAR, Commerce applied AFA to determine that there was a specific subsidy and subsequently to calculate the benefit conferred.[32] *I&D Memo* at 40–41; *Prelim. I&D Memo* at 27–28. When a party fails to respond to "the best of its ability" with reasonable requests for information, Commerce may apply AFA in order to prevent that party from benefitting from its non-cooperation and to encourage future participation. *See Nippon Steel Corp.*, 337 F.3d 1373 at 1382; *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). Commerce relied on AFA in finding that there was a subsidy, that the subsidy was specific, and in calculating the benchmark. *I&D Memo* 40–42. Commerce selected the highest rate schedule on record for each reported category and used those rates to set a benchmark. *See I&D Memo* at 41; *Prelim. I&D Memo* at 28. Commerce states that this calculation is reasonable because without information on how electrical rates are determined, it is plausible that a respondent would

[31] The full text of this provision reads:

"Use of delivered prices. In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firma actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties." 19 C.F.R. § 351.511(a)(2)(iv).

[32] Commerce found that the GOC failed to provide satisfactory responses to questions necessary to ascertain whether the electricity schedules were calculated based on market principles. *I&D Memo* at 41. Specifically, the GOC did not provide full responses to questions regarding "(1) how increases in the cost elements in the price proposals led to retail price increases for electricity; (2) how increases in labor costs, capital expenses, and transmission and distribution costs are factored into the price proposals for increases in electricity rates; and (3) how the cost element increases in the price proposals and the final price increases were allocated across the province and across tariff end-user categories." *Prelim. I&D Memo* at 27–28.

bear the highest rate regardless of a plant's location. *I&D Memo* at 41; *see also* Def. Br. at 44, 46.

Canadian Solar argues that Commerce failed to adequately determine that the electricity subsidy was specific. Canadian Solar Br. at 39–41. According to Canadian Solar, it could qualify only as a domestic subsidy under 19 U.S.C. § 1677(5A)(D) because electricity cannot be imported or exported.[33] *Id.* at 40. In its reply brief, Canadian Solar further argues that Commerce failed to make a specificity determination at all and simply concluded that the provision of electricity was countervailable without an explanation. Canadian Solar Reply at 16–19. Finally, Canadian Solar and Trina disagree with Commerce's application of the highest rate from six different provinces in China given that a particular factory cannot exist in more than one location. Canadian Solar Br. at 41; Trina Br. at 26. Canadian Solar argues that Commerce failed to cite anything supporting the notion that the subsidy was geographically specific. Canadian Solar Br. at 40.[34] Trina further argues that the GOC supplied enough information to prove that electricity pricing varies by province. Trina Br. at 24. Trina contends that the record proves that plants at issue would not have been subjected to the electricity rates of provinces in which they were not located. *Id*. Trina presents various ways in which Commerce could have calculated the rate while still applying AFA. Trina Br. at 27.

i. Discussion

The court has upheld the application of AFA in determining that a given subsidy was specific when a party has failed to cooperate. *See RZBC Grp. Shareholding Co. Ltd. v. United States*, 100 F. Supp. 3d 1288, 1296–97 (CIT 2015) (sustaining an application of AFA to determine that a calcium carbonate subsidy was specific). In previous cases involving electricity subsides from China, the court has found an adverse inference appropriate when a party did not provide enough information to determine whether the rate was set according to market principles. *See Fine Furniture*, 865 F. Supp. 2d at 1262–63.

In this instance, Commerce characterized the GOC's refusal "to answer questions related to regional electrical differences, including differences between industries" as preventing it from determining from direct evidence whether the subsidy was specific. *I&D Memo* at 41. It decided solely on this failure to answer some questions that the

[33] Several countries around the world, including China, export electricity. *See, e.g.*, *The World Factbook: Country Comparison Electricity-Exports*, Central Intelligence Agency at *https://www.cia.gov/library/publications/the-world-factbook/rankorder/2234rank.html* (listing countries by the amount of electricity they exported in 2015). But Commerce seems to be addressing a domestic subsidy here.

[34] In fact, Commerce did not make a finding of geographic specificity. *See I&D Memo* at 41.

subsidy was specific. Commerce, however, failed to explain the particular facts as to which it was it was drawing an adverse inference and how that analysis subsequently results in a finding of specificity under one of the criteria listed in 19 U.S.C. § 1677(5A).

AFA is not a magic phrase that permits Commerce to skip an analysis of the record. Here, the Government states that the GOC failed to adequately respond with information necessary for Commerce to understand whether the electricity prices were set in accordance with market principles. In response to Commerce's questions, the PRC supplied numerous documents detailing the provision of electricity in China. *See* Conf. Joint App'x 1 at 35–520. Rather than explain what information was missing, or how these submissions were deficient, Commerce makes the conclusory statement that the GOC failed to comply and thus Commerce can rightly determine that there is a subsidy, that it confers a benefit, and that it is specific such that the subsidy is countervailable. *Prelim. I&D Memo* at 27–28. Without combing through the submissions and guessing as to why Commerce found these submissions inadequate, the court is unable to ascertain how Commerce made its decision. The record is simply unclear.

Although Commerce does mention that the electricity program was found countervailable in an earlier administrative review, that earlier decision based on a different record does not clarify how Commerce found for this review period that the provision of electricity continued to provide a financial contribution, whether the subsidy conferred a benefit, and, most relevant here, whether this provision was specific within the meaning of the statute. *See* 19 U.S.C. § 1677(5)(B); *see also Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1356 (2016) (stating that Commerce must "base its decisions on the record of the administrative proceeding before it in each review"). Although the Court of Appeals for the Federal Circuit's decision in *Albemarle* had to do with Commerce's duty to recalculate dumping margins in each administrative review, except in certain limited circumstances, the principle underlying that decision holds true here. The purpose of administrative reviews is to reassess earlier determinations in the light of data relevant to the period of review. *See id.* at 1356–57. If Commerce simply relies on findings from an earlier administrative review in reaching a decision in a current review, it abdicates its responsibility and undermines the central purpose of periodic reviews.

This is not to say that Commerce cannot reference the reasoning of a previous administrative review. But Commerce must give respondents a meaningful opportunity to dispute earlier findings and offer

evidence of changes. If respondents fail to do so, then Commerce might state that no new evidence merits a reconsideration of a decision made in a previous administrative review, but Commerce must at the very least explain why a decision made in an earlier review should control.

Simply stating that the GOC did not fully comply is insufficient, Commerce must actually engage in an analysis of the information on the record and explain how adverse inferences lead to the conclusion that the provision of electricity in China is a countervailable subsidy. Otherwise stated, Commerce must connect the dots: how does the GOC's partial response–or failure to respond fully–reasonably lead to a finding of a specific subsidy even with use of AFA?

If, on remand, Commerce properly concludes that the provision of electricity in the PRC amounts to a countervailable subsidy, Commerce's benchmark determination based on record evidence with appropriate adverse inferences is consistent with its regulations for calculating benchmarks. *See* 19 C.F.R. § 351.511(a)(2). The GOC refused to provide certain details regarding variation of provincial electricity rates and whether these rates were calculated based on market principles. *See I&D Memo* at 41. Accordingly, Commerce can apply an adverse inference to the GOC's electricity rate submissions and select the highest rates for each electrical category and use those to set a benchmark. *See* 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.511(a)(2)(iii); *Fine Furniture*, 865 F. Supp. 2d at 1260–1262 (upholding Commerce's decision to set the benchmark rate for electricity equal to the highest rate reported in the provincial price schedules submitted by the GOC when Commerce was unable to determine whether the prices were set in accordance with market principles). Commerce's goal in setting a benchmark rate is to best approximate the market rate of electricity, not to choose the rate respondents were most likely to pay in an electricity market Commerce argues is tainted by the GOC's interference.

Finally, although Trina provided potential alternative modes of calculating the benchmark, it has not shown that these calculation methods result in a better estimate of the market rate for electricity. It is not this court's place to substitute its judgment for that of Commerce by selecting a different method of calculation where Commerce has acted within its lawful discretion and made a reasonable decision. *See Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1360–61 (Fed. Cir. 1999). In sum, assuming a countervailable subsidy exists, Commerce acted in accordance with the law in using the highest of all provincial rates on the record to calculate the benchmark.

Accordingly, the issue regarding the provision of electricity is remanded for Commerce to explain how it arrived at its conclusion that such provision was a countervailable subsidy. Commerce should cite specific information on the record, noting any allowable adverse inferences, in making its decision.

VIII. Golden Sun Demonstration Program

i. Background

During the original investigation, Commerce found the Golden Sun Demonstration Program ("GSDP") to be countervailable. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, 77 Fed. Reg. 63,788* (October 17, 2012) and accompanying issues and decision memorandum at 10–11 ("*I&D Memo 2012*"). The GSDP was created in 2009 to assist in the construction of photovoltaic electricity-generation projects. *See Prelim. I&D* at 43. In its final determination, Commerce found no new information warranting a reexamination of the program and concluded that the subsidy was untied and attributable to Canadian Solar's total sales. *I&D Memo* at 47. The Government argues that it must only look at the grant when it was bestowed and need not inquire as to how the grant was used specifically. Def. Br. at 48–50.

Canadian Solar contends that GSDP was meant to subsidize the generation of electricity and not the production of solar cells. Canadian Solar Br. at 44. Although Canadian Solar admits that it received GSDP funds, it asserts that Commerce has mischaracterized the program's purpose as providing assistance in the production of solar cells. *Id.* at 43–45. Canadian Solar contends that at the time of bestowal, the subsidy could only be properly attributed to power generation operations and thus Commerce improperly assessed countervailing duties on the production of solar cells. Canadian Solar Br. at 43–45. SolarWorld contends that it is unclear from the record whether the grant was intended for electricity production or solar cell production. SolarWorld Resp. at 45–46.

ii. Discussion

In the 2012 Final Determination from the initial investigation, Commerce found that the Golden Sun program subsidized "solar-powered projects." *I&D Memo 2012* at 12 (October 17, 2012). Based on submissions by the GOC, in its preliminary determination Commerce found that the program supported:

> (1) The use of large-scale mining, commercial enterprises, and public welfare institutions to construct the user's side of the electrical grid for photovoltaic power generation demonstration projects; (2) increasing the power supply capacity in remote locations; and construction of large-scale grid-connected photovoltaic power generation demonstration projects in solar energy rich regions." *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination* C-570–980 POI 01/01/201012/31/2010 at 15–16 (Mar. 26, 2012) ("*Prelim. I&D Memo 2012*")

Based on this information, Commerce determined that grants under this program constitute a subsidy of enterprises "involved in the construction of solar-powered projects." *Prelim. I&D Memo 2012* at 16.

Commerce's regulations mandate that "[i]f a subsidy is tied to the production or sale of a particular product; the Secretary will attribute the subsidy only to that product." 19 C.F.R. § 351.525(b)(5)(i). When a subsidy is not tied to a specific product, however, it is Commerce's practice to attribute the benefits of a subsidy based on the stated purpose at the time of bestowal,[35] as untied subsidies are attributed to all products sold because they benefit all production. *Preamble*, 63 Fed. Reg. at 65,400 ("the current benefit of an untied subsidy will be attributed to the firm's total sales.")

Canadian Solar argues that the language of the program description is not specific to the production of solar cells, but is for energy production broadly. While this may be true, Commerce reasonably understands this program to include the subsidization of the production of solar cells, despite the inference needed to reach this conclusion. It is reasonable to assume that creating photovoltaic power generation necessitates the production of solar cells as a component of this endeavor. Although Canadian Solar may not use the funds received through this program specifically in the production of solar cells, Commerce need only look at the purpose of the subsidy at the time it is bestowed and not exactly how it is used by companies. Therefore, Commerce's decision is supported by substantial evidence and in accordance with law.

CONCLUSION

For the foregoing reasons, the court remands Commerce's challenged determinations as regards to its determination on the Export

[35] "[W]e analyze the purpose of the subsidy based on information available at the time of bestowal." *Preamble*, 63 Fed. Reg. at 65,403.

Buyer's Credit Program, the inclusion of Comtrade data in calculating the world market rate for aluminum extrusions and solar glass, Commerce's decision to revert to a tier-two benchmark in determining the price for polysilicon without considering Respondent's proffered evidence, and the finding that provision of electricity constitutes a specific and thus countervailable subsidy. All other determinations are sustained. The court remands for proceedings consistent with this opinion. Remand results should be filed by January 29, 2019. Objections are due February 28, 2019 and Responses to Objections are due March 15, 2019.

Dated: November 30, 2018
New York, New York

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

Slip Op. 18–167

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

Before: Jane A. Restani, Judge
Court No. 17–00246

[Commerce's *Final Results* in the Administrative Review of Commerce's Countervailing Duty Order pertaining to Crystalline Silicon Photovoltaic Products from the People's Republic of China are remanded for reconsideration consistent with this opinion.]

Dated: November 30, 2018

Robert Gosselink, *Jonathan Freed*, and *Kenneth Hammer* Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs/Defendant-Intervenors Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina").

Chad A. Readler, *Jeanne E. Davidson*, *Tara K. Hogan*, and *Justin R. Miller*, International Trade Field Office, U.S. Department of Justice, of New York, NY. Of counsel *Lydia C. Pardini*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy Brightbill, *Laura El-Sabaawi*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, D.C., for Consolidated Plaintiffs/Defendant-Intervenor SolarWorld Americas, Inc. ("SolarWorld").[1]

OPINION AND ORDER

Restani, Judge:

This action is a challenge of a final determination issued by the United States Department of Commerce ("Commerce") in Commerce's First Administrative Review of the countervailing duty order on crystalline silicon photovoltaic products, ("solar products") from the People's Republic of China ("PRC"), covering the period from June 10, 2014, through December 31, 2015. *See Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 42,792 (Dep't Commerce Sept. 12, 2017) ("*Final Results*"). Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar

[1] SolarWorld and Trina are both consolidated plaintiffs as well as defendant-intervenors in this case, depending on the issue before the court.

Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina") request the court hold aspects of Commerce's final determination to be unsupported by substantial evidence or otherwise not in accordance with law.

The United States ("Defendant") asks that the court sustain Commerce's *Final Results* of its first administrative review. SolarWorld Americas, Inc. ("SolarWorld") requests the court to uphold portions of Commerce's *Final Results* as supported by substantial evidence and otherwise consistent with law.

Commerce first published an antidumping and countervailing duty order on solar products from the People's Republic of China ("PRC") on February 18, 2015. *See Crystalline Silicon Photovoltaic Products, from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 Fed. Reg. 8,592 (Dep't Commerce Feb. 18, 2015).[2] In 2016, Commerce initiated an administrative review of the countervailing duty order, covering the period from June 10, 2014 to December 31, 2015. The Department selected Trina (including its cross-owned affiliate) and BYD (Shangluo) Industrial Co., Ltd. (BYD) as mandatory respondents ("Respondents") and issued questionnaires to them and the Government of the PRC ("GOC") on August 22, 2016, and supplemental questionnaires on September 22, 2016. *Decision Memorandum for the Preliminary Results of the Administrative Review of the Countervailing Duty Order on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2014–2015*, C-570–011, POR: 6/10/2014–12/31/2015, at 1–3 ("*Prelim I&D Memo*"). On February 28, 2017, Commerce published its preliminary results of the administrative review. *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Preliminary Intent To Rescind, in Part; 2014–2015*, 82 Fed. Reg. 12,562 (Dep't Commerce Mar. 6, 2017) and accompanying issues and decision memorandum. After receiving submissions from interested parties, Commerce issued its *Final Results* on September 12, 2017. 82 Fed. Reg. 42,792 (Dep't Commerce Sept. 12, 2017) and accompanying issues and decision memorandum *Decision Memorandum for Final Results and Partial Rescission of Countervailing Duty Administrative*

[2] Duties are imposed when a government or public entity is found to be providing a countervailable subsidy to the manufacture, production, or exportation of merchandise then imported into the United States if that importation in turn either materially injures or threatens to materially injure an industry in the United States. *See* 19 U.S.C. § 1671(a).

Review: Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2014–2015, C-570–011, POR:6/10/2014–12/31/2015 ("*I&D Memo*"). Consolidated Plaintiffs challenge several aspects of the *Final Results*, as amended.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). Commerce's results in a countervailing duty investigation are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Because the parties present a variety of fact-specific claims, the following opinion addresses each in turn. Further, as these issues are also addressed in Changzhou Trina Solar Energy Co., Ltd., et. al v. United States, Slip Op. 18–166 (Nov. 30, 2018), this opinion frequently references that decision.

I. Export Buyer's Credit Program Use

a. Background

The GOC's Export Buyer's Credit Program (EBCP) extends credits to qualifying companies that purchase exported PRC goods. *Prelim I&D Memo* at 29, 41. Commerce concluded the revised Administrative Measures in 2013 may have removed the previous requirement that a contract must be worth over $2 million in order to qualify for credits through the program and may have also allowed unspecified third-party banks to distribute credits through the program. *Id.* When Commerce requested information regarding these issues, the GOC refused to answer, stating that the information was unnecessary to determine usage and was "internal to the bank, non-public, and not available for release." *Id.* at 29. Without this information, Commerce found that its understanding of the program was incomplete and unreliable such that the certifications of non-use provided by Trina were unverifiable and thus insufficient to prevent the use adverse facts available ("AFA"). *See id.* at 29–31. Based on AFA, Commerce determined that Trina had used the EBCP. *I&D Memo* at 31–34.

Trina contends that its submissions of non-use of the EBCP are verifiable for multiple reasons. *See* Memorandum in Support of Trina for Judgment Upon the Agency Record at 8–14, Doc. No. 27–3 (Mar. 23, 2018) ("Trina Br."). First, they argue that Trina's non-use of the program was supported not only by certifications by TUS, Trina's only

U.S.-based customer, and certifications of TUS's customers, but by the GOC who stated that it confirmed with the China Ex-Im Bank that none of Trina's customers benefited from the program. *See id.* at 8–9. Second, Trina argues that Commerce should have issued supplemental questionnaires to Trina or attempted to verify the certifications of non-use in other ways after the GOC's failure to cooperate fully. *Id.* at 10. Third, they argue that denying these certifications of non-use is not in accordance with Commerce's previous practice of accepting such evidence as true when there is no contradictory evidence on record, and Commerce did not adequately provide a reason for this deviation. *See id.* at 11–14. Finally, Trina contends that Commerce should have checked the records of its sole U.S. customer, TUS, for any evidence of loans from third-party banks before determining that Trina benefited from the program. *See id.* at 14.

SolarWorld counters that Commerce's application of AFA is reasonable and in fact required under the Tariff Act of 1930, in cases where a party like the GOC continually fails to cooperate with Commerce's requests for information. *See* SolarWorld Response to Trina's Motion for Judgment Upon the Agency Record, Doc. No. 44 at 14–16 (July 9, 2018) ("SolarWorld Resp."). Further, SolarWorld argues that without knowing how the EBCP operates, any claims of non-use are unreliable. *See id.* at 16. Finally, SolarWorld states that the 2013 revisions to the program, and Commerce's explanation of why these revisions make the certifications of non-use unreliable, justify Commerce's deviation from its previous practice of accepting such certifications. *See id.* at 17–20.

In its brief, the Government reiterates points raised in Commerce's issues and decisions memorandum regarding the GOC's failure to provide information on the 2013 revisions to the EBCP and asserts that this missing information made certifications of non-use unverifiable. *See* Defendant's Response in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, Doc No. 39 at 9–11 (July 9, 2018) ("Def. Br."). Commerce further claims that its decision to impose AFA despite cooperation from Trina is not in conflict with its previous decisions given the intervening 2013 revisions. *See id.* at 13–17. Finally, Commerce claims that without knowing how the revisions changed the EBCP, eliciting additional information from Trina would have been fruitless given its inability to "test the accuracy" of the claims of non-use. *Id.* at 18.

In its reply, Trina continued to argue that Commerce failed to justify why a full explanation of the potential involvement of third-party banks was necessary to verifying non-use and that there were no facts on the record indicating that Trina or its sole U.S. customer

even qualified for EBCP credits. *See* Reply Brief of Trina to Defendant's and Defendant-Intervenor's Response to Plaintiff's Motion for Judgment on the Agency Record, Doc. No. 50 at 4–6 (Sept. 10, 2018) ("Trina Reply Br."). Trina contends that Commerce should have requested any evidence of loans made in connection with Trina and evaluated whether such loans could have been made through the EBCP. *Id.* at 11–12.

b. Discussion

This issue is nearly identical to the one before the court in Changzhou, Slip Op. 18–166. For the sake of convenience, the main points are highlighted below. As stated in that opinion, Commerce acted within its discretion under 19 U.S.C. § 1677e(a)(2)(A) to apply AFA to a cooperating party given the GOC's failure to provide information potentially relevant to Trina's claims of non-use. Changzhou, Slip Op. 18–166 at 8–9 (holding that when a foreign government fails to supply requested information and other information on the record does not fill the gaps, application of AFA to a cooperating party is within Commerce's discretion). But, prior to applying AFA, Commerce must first demonstrate that the GOC's failure to provide information left a gap in the record and subsequently explain how using facts available with an adverse inference reasonably leads to a given conclusion.

Here, Commerce does not explain why it was necessary for it to fully understand the EBCP in order to ascertain claims of non-use. Further, Commerce does not point to information on the record that allows Commerce to reasonably conclude, even with appropriate adverse inferences, that Trina used the EBCP. Even when using AFA, Commerce must still explain what information is missing and what adverse inferences reasonably leads to its conclusion. Conclusory statements about a program's use cannot be sustained without an explanation.

Accordingly, the court remands this matter to Commerce in order to explain what information the GOC specifically failed to provide that allows Commerce to properly resort to facts otherwise available and how drawing an adverse inference to specific facts logically leads to the conclusion that Trina benefitted from the EBCP. Commerce should also clarify why the certifications of non-use are unverifiable without a full understanding of the EBCP. Should Commerce determine that the certifications are in fact verifiable by not unreasonably onerous means, the court instructs it to do so.

II. Export Buyer's Credit Program Rate

a. Background

If Commerce continues to find that respondents benefitted from the EBCP, and the court sustains that finding, the court finds no issue with Commerce's determination of the appropriate rate based on its established AFA rate methodology.

After determining respondents benefitted from the EBCP, Commerce used its established hierarchy to determine the appropriate AFA rate.[3] This hierarchy was developed to effectuate 19 U.S.C. § 1677e(d) which does not provide specific guidelines for selecting an AFA rate, but does state that Commerce should "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country." 19 U.S.C. § 1677e(d)(1)(A)(i). Because there was no calculated rate for the EBCP in the proceeding at issue, Commerce turned to step two in its hierarchy, in which Commerce uses a rate "for a similar/comparable program (based on the treatment of the benefit) in the same proceeding, excluding *de minimis* rates." Commerce accordingly found a similar loan program in the same proceeding and arrived at a rate of 0.58 percent. *I&D Memo* at 36.

The crux of SolarWorld's argument is that in using its established methodology, Commerce arrived at an AFA rate too low to induce compliance in future proceedings. *See* SolarWorld's Memorandum in Support of Its Rule 56.2 Motion for Judgment Upon the Agency Record, Doc. No. 31 at 12–16 (Mar. 23, 2018) ("SolarWorld Br."). SolarWorld argues that 19 U.S.C. § 1677e requires Commerce to set a rate high enough to encourage a party's future compliance in administrative reviews. *Id.* at 11. SolarWorld details several proceedings in which a higher rate has failed to result in the GOC's future full

[3] The *I&D Memo* details the hierarchy: "Under the first step of the Department's CVD AFA hierarchy for administrative reviews, the Department applies the highest non-de minimis rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is de-minimis, under step two of the hierarchy, the Department applies the highest non-de minimis rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-de minimis rate calculated for a similar program within the same proceeding, under step three of the hierarchy, the Department applies the highest non-de minimis rate calculated for an identical or similar program in another CVD proceeding involving the same country. Finally, if there is no non-de minimis rate calculated for an identical or same program in another CVD proceeding involving the same country, under step four, the Department applies the highest calculated rate for a cooperating company for any program from the same country that the industry subject to the investigation could have used." *I&D Memo* at 36; see also *Solar Americas, Inc. v. United States*, 229 F. Supp. 3d 1362, 1366 (CIT 2017) (similarly describing this hierarchy).

compliance with Commerce's reviews. *See* SolarWorld Br. at 13–14. Based on this history of GOC noncompliance, SolarWorld argues that such a low rate of 0.58 percent will not encourage compliance. *Id.* at 16.

Both Trina and the Government disagree with SolarWorld, arguing that it is within Commerce's discretion to employ its established methodology in AFA rate determinations. *See Trina's Response to Plaintiff SolarWorld's Motion for Judgment on the Agency Record*, Doc. No. 42 at 7–11 (July 9, 2018) ("Trina Resp."); Def. Br. at 20–23. At base, they argue that the goal in setting an AFA rate is to strike a balance between relevancy and inducement. Def. Br. at 23; Trina Resp. at 11.

b. Discussion

As the United States Court of Appeals for the Federal Circuit has stated "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. U.S.*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). What SolarWorld essentially argues is for Commerce to deviate from an established practice because the rate assessed was not high enough to be punitive. This argument fails.

First, the Court notes that even if Commerce, on remand, finds that the GOC refused to comply with Commerce's requests such that a resort to AFA is warranted, SolarWorld fails to appreciate that Trina is a *cooperating* respondent. When selecting a rate for a cooperating party, "the equities would suggest greater emphasis on accuracy" over deterrence. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1234 (Fed. Cir. 2014) (discussing Commerce's consideration of both deterring noncompliance and assessing an accurate AFA rate under 19 U.S.C. 1677e(b)).

Second, although encouraging compliance is a valid consideration in determining an AFA rate, it is not, as SolarWorld argues "inconsistent with the statute" for Commerce to weigh other factors, such as relevancy, which ultimately result in a presumably low AFA rate. SolarWorld Br. at 18. As the court in *Mueller* stated, "the primary objective [is] the calculation of an accurate rate." 753 F.3d at 1235. Here, Commerce did not act unreasonably in selecting a rate from a program, which no party argues is dissimilar, in setting an AFA rate.

Finally, the court is simply not convinced that Commerce's established hierarchy in setting an AFA rate is an unreasonable way of effectuating the statute. *See Chevron U.S.A., Inc. v.* Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984). In fact,

insisting that Commerce deviate from this established practice because the rate is not seen to be a sufficient deterrent or perhaps, in this circumstance, not sufficiently punitive strikes the court as arbitrary. Commerce's hierarchy establishes both some consistency and predictability in Commerce's determinations and also attempts to guard against setting too low a rate by requiring the selected program to have a non-*de minimus* rate. In this specific instance, Commerce applied the *highest* non-*de minimus* rate for a similar program, further supporting its contention that Commerce attempted to strike a balance between relevancy and inducement. *I&D Memo* at 36.

Accordingly, the court sustains Commerce's use of its established hierarchy in assessing a rate for the EBCP. If Commerce continues to find that respondents benefitted from the program on remand, Commerce may continue to use this established methodology in arriving at the appropriate rate.

III. Aluminum Extrusion Benchmark

a. Background

Commerce averaged two datasets in order to find the appropriate benchmark for aluminum extrusions used in the production of photovoltaic products. Commerce found that these data sets–from IHS technologies and UN Comtrade[4] –both contained flaws, but that "neither data set contains flaws or deficiencies so serious that either should be rejected in their entirety for the purpose of creating a more robust global benchmark." *I&D Memo* at 21. Commerce found the IHS data problematic because it was based on an annual average, rather than monthly averages, while the UN Comtrade data was monthly but included a broader swath of merchandise not exclusive to aluminum used in solar products. *See id.* at 20–21. Commerce justified the inclusion of the Comtrade data claiming that it was "familiar with the merchandise" included in the Comtrade data and had used it in a previous case involving aluminum extrusions. *Id.* at 20.

Trina argues that only the IHS data should be used in computing a benchmark because the Comtrade data is too broad. Trina Br. at 16–19. In contrast, Trina contends, the IHS data is specific to solar frames, the specific product used in the production of solar modules. *Id.* at 15. It contends that the price fluctuations noted in the Comtrade data could very well be due to merchandise included in that data unrelated to solar modules. *Id.* at 18. In contrast, the IHS data

[4] Comtrade included merchandise classified under the Harmonized Tariff Schedule of the United States headings 7604.21, 7604.29, and 7610.10. *I&D Memo* at 20.

is a blended average that does take into account periodic changes. *Id.* at 15–16. Trina argues that including the Comtrade data despite its flaws violated Commerce's regulations requiring the Department to assess factors of comparability under 19 C.F.R § 351.511(a)(2)(ii). *Id.* at 17. Finally, Trina argues that despite Commerce's assertions otherwise, Commerce failed to "exclude values that lacked corresponding quantities from the data when it calculated the monthly benchmark prices for aluminum extrusions." *Id* at 20.

Citing Commerce's preference for monthly over annual data points, SolarWorld argues that, given potential fluctuations in the aluminum market, the Comtrade data was superior to the IHS data. SolarWorld Resp. at 21–23. The Government requests a remand on this issue due to its failure to include relevant documents on the record during the administrative proceeding. Def. Br. at 36. Noting this omission, the Government seeks, on remand, to further explain its calculation of the aluminum and solar benchmarks or else reconsider them. *Id.* at 37. In its reply brief, Trina agrees that a remand is appropriate under these circumstances. Trina Reply Br. at 16–17.

b. Discussion

Because this issue is fully-explained in Changzhou, Slip Op. 18–166, the court will only summarize here and directs parties to that opinion for a more thorough account. Although Commerce properly applied a tier-two benchmark pursuant to C.F.R. § 351.511(a)(2), it is unclear whether it properly accounted for factors of comparability in averaging the Comtrade and IHS data sets. Claiming previous familiarity with the data without more is insufficient.

The court accordingly remands for Commerce to act in accordance with this opinion and Changzhou, Slip Op. 18–166 and either disregard the Comtrade data or else explain why the Comtrade is not overinclusive such that its inclusion produces a fatally inaccurate aluminum benchmark rate.

IV. Solar Glass Benchmark

a. Background

As with the aluminum data, Commerce calculated the solar glass benchmark rate by averaging data sets from Comtrade and IHS. *See I&D Memo* at 17–18. The Comtrade data covers an array of tempered glass products, but provides monthly data points, while the IHS data is specific to solar glass but is an annual average. *Id.* During the review, SolarWorld challenged the inclusion of the IHS data due to concerns about whether this data was tax-inclusive or tax-exclusive.

Based on proprietary information, Commerce determined it was tax-exclusive. *Id.* at 17.

As with the aluminum benchmark, Trina argues that the Comtrade data includes far too many products unrelated to solar glass to be reasonably included in determining a benchmark rate. Trina Br. at 25–26. For instance, Trina points to the limited potential thickness of solar glass and how the Comtrade data has no limitation on the thickness of glass included. *Id.* at 26.

SolarWorld disagrees and argues that the Comtrade data may not be exclusive to solar glass, but does include solar glass. SolarWorld Br. at 24–25. It argues that the IHS data should not be included given that it is an annual data point and because it is unclear from the record whether the figure is tax-exclusive. SolarWorld Br. at 21–25. Again, SolarWorld highlights Commerce's preference for monthly data points and the appropriateness of averaging the two sets given this preference. *Id.*

As with the aluminum calculations, the Government requests a remand on this matter because Commerce failed to include relevant documents on the record during the administrative proceeding. Def. Br. at 36–37. Specifically, with regards to the solar glass data, Commerce did not include information regarding whether the IHS data was tax-exclusive. *Id.* at 37. Thus, the Government asks for remand to further explain its calculation of the aluminum and solar benchmarks or else reconsider them. *Id.* at 37. In its reply brief, Trina agrees that a remand is appropriate under these circumstances. Trina Reply Br. at 16–17.

b. Discussion

Because this issue is fully-explained in Changzhou, Slip Op. 18–166, the court will only summarize here and directs parties to that opinion for a more thorough account. Like with the aluminum data, although Commerce properly applied a tier-two benchmark pursuant to 19 C.F.R § 351.511(a)(2)(ii), it is unclear whether it properly accounted for factors of comparability in averaging the Comtrade and IHS data sets.

The court accordingly remands this matter to Commerce with instructions to act in accordance with this opinion and Changzhou, Slip Op. 18–166. Accordingly, Commerce should either disregard the Comtrade data or else provide a full explanation as to why the Comtrade data is not fatally overinclusive of non-solar glass in Commerce's calculation of the solar glass benchmark.

V. Selective Sampling of Electricity Rates

a. Background

After the GOC failed to adequately respond to Commerce's requests for information regarding electricity rates and schedules, Commerce applied AFA and selected the highest electricity rates for each industry category spread across electricity schedules from different provinces. *I&D Memo* at 28. Commerce asserted that this rate does not indicate that it found the subsidy to be geographically specific, but was selected both to encourage the GOC to participate in future proceedings and because without the requested information, Commerce cannot be sure that respondents would not be subjected to the highest rate regardless of a given facility's location. *Id.* at 29.

Trina argues that selecting the highest rate on the record solely to encourage compliance is not appropriate. Trina Br. at 29. It contends that given the breakdown of rates by province, Commerce should have applied the highest rate for a given facility's location. *Id*. at 30. SolarWorld argues that without the requested information from the GOC, it is unclear whether the prices are set based on region or some other basis. SolarWorld Resp. at 26. It further argues that selecting the highest price has been used previously as a market proxy. *Id.* at 27. Finally, SolarWorld argues that Commerce was justified in selecting the highest rate in order to encourage the GOC's future participation. *Id.* at 27–28.

The Government argues that Trina is trying to "to impose a restriction on Commerce's selection of a benchmark that is not required by statute." Def. Br. at 30. Defendant contends that the goal of rate selection is to best approximate what a respondent would have paid without market interference. *Id.* at 30–31. The Government argues that, counter to Trina's assertions, the choice was supported by the record as the figure used was in the materials submitted by the GOC. *Id.* at 32.

b. Discussion

As discussed more fully in Changzhou, Slip Op. 18–166,[5] Commerce can apply an adverse inference to GOC submissions when the submissions fail to fully answer Commerce's questions regarding whether a program is conducted in accordance with market prin-

[5] The court notes that in that opinion, the court remanded this matter because Commerce did not adequately determine that the provision of electricity was a countervailable, specific subsidy. Changzhou, Slip Op. 18–166. In this case, however, the specificity issue was not challenged by the plaintiffs and so the court declines address that issue in this decision.

ciples. *See Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1260–62 (CIT 2012). Here, Commerce asked specific questions regarding the setting of provincial electricity rates and the GOC did not provide satisfactory answers, only an unsupported statement that prices were set in accordance with market principles. *I&D Memo* at 28. Without the information requested on the record, Commerce determined that it is "plausible that a respondent in the PRC could have been subject to the highest rates in the PRC, regardless of its location." *I&D Memo* at 29. Although Trina claims that Commerce should have applied the highest rate of the province in which a given plant is located, Trina provides no evidence that this would better approximate the market rate for electricity absent government interference, which is the ultimate goal in setting a benchmark. *See* 19 U.S.C. § 1677(5)(E) (stating that the benefit conferred should reflect "prevailing market conditions."); *see also* 19 C.F.R. § 351.511(a)(2). Accordingly, Commerce's electricity benchmark is sustained.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's choice of electricity benchmark, but remands Commerce's determinations as regards to the Export Buyer's Credit Program and inclusion of Comtrade data in calculating the world market rate for aluminum extrusions and solar glass. The court remands to Commerce for proceedings consistent with this opinion. The court remands for proceedings consistent with this opinion. Remand results should be filed by January 29, 2019. Objections are due February 28, 2019 and Responses to Objections are due March 15, 2019.

Dated: November 30, 2018
New York, New York

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

Slip Op. 18–168

ZHAOQING TIFO NEW FIBRE CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and DAK AMERICAS LLC, Defendant-Intervenor.

Court No. 13–00044

[Sustaining Second Remand Results]

Dated: November 30, 2018

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., on the brief.

Mollie L. Finnan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., on the brief, together with *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington D.C., on the brief, together with *David C. Smith*.

OPINION

RIDGWAY, JUDGE:

In this action, Plaintiff Zhaoqing Tifo New Fibre Co., Ltd. ("Zhaoqing Tifo") – a Chinese producer and exporter of polyester staple fiber – has contested the Final Determination of the U.S. Department of Commerce ("Commerce") in the fourth administrative review of the 2007 antidumping duty order on polyester staple fiber from the People's Republic of China.[1] *See generally* Certain Polyester Staple Fiber From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011, 78 Fed. Reg. 2366 (Jan. 11, 2013) ("Final Determination")[2]; Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review (Jan. 4, 2013) (Pub. Doc. No. 108) ("Issues & Decision Memorandum")[3]; *Zhaoqing Tifo New Fibre Co. v. United States*, 39 CIT ____, 60 F. Supp. 3d 1328 (2015) ("*Zhaoqing Tifo I*"); *Zhaoqing Tifo New Fibre Co. v.*

[1] As *Zhaoqing Tifo I* notes, polyester staple fiber is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. *See Zhaoqing Tifo New Fibre Co. v. United States*, 39 CIT ____, ____, 60 F. Supp. 3d 1328, 1334 (2015) ("*Zhaoqing Tifo I*").

[2] Antidumping duty investigations (*i.e.*, "original" investigations) determine in the first instance whether the elements necessary for the imposition of an antidumping duty exist. The statute also provides for periodic (typically, annual) administrative reviews of antidumping duty orders (initiated at the request of an interested party), to update the applicable antidumping duty rate. *See generally Zhaoqing Tifo I*, 39 CIT at ____ n.7, 60 F. Supp. 3d at 1334 n.7 (and authorities cited there). This action contests specific aspects of the results of such an administrative review.

[3] Because this action has been remanded to Commerce twice, three administrative records have been compiled – the initial administrative record (comprised of the information on which the agency's Final Determination was based), the supplemental administrative

United States, 41 CIT ____, 256 F. Supp. 3d 1314 (2017) ("*Zhaoqing Tifo II*").

In the relevant counts of its Complaint, Zhaoqing Tifo charges that the dumping margin calculated by Commerce in its Final Determination "double counts" certain energy costs.[4] The Complaint states that those costs are reflected in the surrogate financial ratios that Commerce derived from the financial statements of P.T. Tifico Fiber Indonesia Tbk ("P.T. Tifico") (on which the Final Determination relied) but then are counted again elsewhere in the agency's calculations (specifically, in the factors of production database ("FOP database")). Zhaoqing Tifo contends that its dumping margin is therefore inflated. *See* Complaint, Counts I-III; *see also*, *e.g.*, *Zhaoqing Tifo I*, 39 CIT at ____, ____ n.16, 60 F. Supp. 3d at 1333, 1339 n.16. Zhaoqing Tifo does not contest Commerce's selection of P.T. Tifico's financial statements; in fact, that is the result for which Zhaoqing Tifo advocated at the administrative level. The gravamen of Zhaoqing Tifo's claim is that – to avoid double-counting – energy expenses must be excluded from the FOP database, because those expenses are already embedded in the financial ratios that Commerce derived from the financial statements of P.T. Tifico.

record compiled during the course of the first remand, and the second supplemental administrative record compiled during the course of the most recent (second) remand.

Each of the three administrative records includes confidential (*i.e.*, business proprietary) information. Therefore, two versions of each of the records – a public version and a confidential version – were filed with the court. The public versions of each of the administrative records consist of copies of all public documents in the record, as well as public versions of confidential documents with all confidential information redacted. The confidential versions consist of complete, un-redacted copies of only those documents that include confidential information. The numbering of the public versions of documents differs from the numbering of the confidential versions.

All citations to the administrative records herein are to the public versions, which are cited as "Pub. Doc. No. ____," "Supp. Pub. Doc. No. ____," or "Second Supp. Pub. Doc. No. ____," as appropriate.

[4] The Second Remand Results refer repeatedly to "the Court's concern" about double-counting. *See* Second Remand Results at 2–3, 5, 6, 9. However, the issue of double-counting was not raised *sua sponte* by the court. Double-counting is the very essence of the claim at issue here, as set forth in Zhaoqing Tifo's Complaint. Moreover, as the Second Remand Results acknowledge, Commerce itself avoids double-counting, as a matter of sound policy. *See* Second Remand Results at 6 (referring to "the Department's . . . concern for double counting of energy inputs"); *see also* Final Determination, 78 Fed. Reg. at 2367 (stating that Commerce "did not separately value electricity and water in the final margin program because [they] are already captured in the surrogate financial ratios"); Issues & Decision Memorandum at 11 (noting that, "in order to prevent double counting" of water and electricity expenses, the Final Results "placed all electricity and water costs into the [manufacturing/factory] overhead numerator" and removed electricity and water costs from the factors of production database); First Remand Results at 2–3 (noting that proposed use of P.T. Asia's more detailed financial statements allowed Commerce to "avoid any potential double counting"); *Zhaoqing Tifo I*, 39 CIT at ____ n.6, 60 F. Supp. 3d at 1333 n.6 (and authorities cited there) (surveying caselaw and administrative policy establishing that, as a general rule, double counting is not permitted in antidumping margin calculations); *Zhaoqing Tifo II*, 41 CIT at ____ n.8, 256 F. Supp. 3d at 1339 n.8 (similar).

Because the Final Determination failed to address Zhaoqing Tifo's double counting claim, *Zhaoqing Tifo I* remanded the matter to Commerce, to permit the agency to analyze whether energy costs are already reflected in the surrogate financial ratios that the agency derived from the financial statements of P.T. Tifico, such that the agency's inclusion of coal in the FOP database results in double-counting. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1361–65.

In the First Remand Results, filed pursuant to *Zhaoqing Tifo I*, Commerce reopened the decision that it made in its Final Determination concerning the selection of financial statements, abandoning its selection of the financial statements of P.T. Tifico. In lieu of the financial statements of P.T. Tifico, Commerce substituted an entirely different set of financial statements – the financial statements of P.T. Asia Pacific – because those statements are more detailed and, in particular, break out energy costs. In the First Remand Results, using P.T. Asia Pacific's financial statements, Commerce excluded energy costs from the surrogate financial ratios and included them in the FOP database, thus accounting for energy costs but avoiding double counting. *See generally* Final Results of Redetermination Pursuant to Court Remand at 2, 5–10, 18 (Supp. Pub. Doc. No. 5) ("First Remand Results").

Zhaoqing Tifo II concluded that, because the broad issue of Commerce's selection of financial statements was never appealed to this Court, finality attached to that aspect of Commerce's Final Determination, and that the agency therefore lacked the authority to revisit the issue and to select a different set of financial statements on remand. Thus, as *Zhaoqing Tifo II* explained, the First Remand Results not only exceeded the scope of the remand ordered in *Zhaoqing Tifo I*, but, in addition and even more fundamentally, the First Remand Results were beyond the scope of Zhaoqing Tifo's Complaint and, as such, beyond the scope of this litigation. *See generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1326–31.

Now pending are Commerce's Second Remand Results, in which Commerce has derived the surrogate financial ratios using the financial statements of P.T. Tifico. Commerce acknowledges that energy costs are embedded in the surrogate financial ratios derived from those financial statements. Commerce therefore has excluded the costs of energy (including coal) from the FOP database, to avoid double-counting energy expenses. *See generally* Final Results of Redetermination Pursuant to [Second] Court Remand at 2–3, 6–7, 8–9 (Second Supp. Pub. Doc. No. 7) ("Second Remand Results").

Although Commerce has filed the Second Remand Results "under protest," no party contests those results. *See* Second Remand Results at 2–3, 6, 8–9 (noting that Second Remand Results are filed under protest); Zhaoqing Tifo Comments on Remand Redetermination II Pursuant to Slip Op. 17–118 ("Pl.'s Brief"); Defendant-Intervenor's Comments on the Commerce Department's Second Remand Determination ("Def.-Int.'s Brief"); Defendant's Response to Comments on the Second Remand Results ("Def.'s Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[5] For the reasons set forth below, Commerce's determination in the Second Remand Results must be sustained.

I. *Background*

An overview of the relevant statutory scheme, including citations to the statute and other pertinent authorities, is set forth in *Zhaoqing Tifo I*. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1332–33. That explanation, together with other relevant background information, is summarized below, for the sake of convenience and completeness.

As *Zhaoqing Tifo I* explained, in calculating dumping margins for respondents in non-market economy countries, Commerce generally determines the normal value of the merchandise at issue based on the value of the factors of production ("FOPs") that are used to produce that merchandise in a surrogate market economy country selected by Commerce ("the surrogate country"). *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1332 (and authorities cited there). Under 19 U.S.C. § 1677b(c)(3), the factors of production to be valued "include, but are not limited to – (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation."

However, valuing the factors of production consumed in producing the merchandise at issue does not capture certain items such as (1) manufacturing/factory overhead, (2) selling, general, and administrative expenses ("SG&A"), and (3) profit. Commerce calculates surrogate values for those items using ratios – known as "surrogate financial ratios" – that the agency derives from the financial statements of one or more companies that produce identical (or at least comparable) merchandise in the relevant surrogate market economy country. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1333 (and authori-

[5] All citations to statutes herein are to the 2006 edition of the United States Code. The pertinent statutory text remained the same at all relevant times.

ties cited there). This surrogate value analysis is designed to determine a producer's costs of production as if the producer operated in a hypothetical market economy. *See id*., 39 CIT at ____, 60 F. Supp. 3d at 1332–33 (and authorities cited there).

Zhaoqing Tifo's claim here is that there are certain energy costs that are embedded in the surrogate financial ratios that Commerce derived from the financial statements of P.T. Tifico and then used in the agency's Final Determination that are also included elsewhere in the agency's antidumping calculations (specifically, in the FOP database).[6] Zhaoqing Tifo argues that this results in the "double counting" of energy costs and inflates Zhaoqing Tifo's dumping margin.[7]

As *Zhaoqing Tifo I* noted, in Commerce's Preliminary Determination here, Commerce selected Indonesia as the surrogate country and, in calculating surrogate financial ratios, relied on the financial statements of P.T. Asia Pacific, an Indonesian producer of polyester staple fiber. Commerce based its selection of P.T. Asia Pacific in part on its understanding at that time that P.T. Asia Pacific "shares the same level of integration as Zhaoqing Tifo." *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1336 (quoting Certain Polyester Staple Fiber From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, 77 Fed. Reg. 39,990, 39,991–93, 39,995 (July 6, 2012) ("Preliminary Determination")).

In general, Commerce prefers to include in the FOP database the cost of energy inputs consumed in production, when such costs can be identified and excluded from the surrogate financial ratios derived from the financial statements that the agency selected. *See*, *e.g.*, Second Remand Results at 6, 8; Defendant's Response to Plaintiff's

[6] As *Zhaoqing Tifo I* noted, Zhaoqing Tifo consumes coal in its production of polyester staple fiber. However, it appears that P.T. Tifico and P.T. Asia Pacific use natural gas. Accordingly, although some of the parties' papers have referred to the "double counting of coal," it is more accurate (depending on the context) to refer to the double counting of "energy inputs" (or "energy sources" or "energy factors"). *See Zhaoqing Tifo I*, 39 CIT at ____ n.16, 60 F. Supp. 3d at 1339 n.16 (and authorities cited there).

[7] As *Zhaoqing Tifo I* explained, the case law holds that, as a general rule, double counting is not permitted in antidumping calculations, because it is distortive, rendering dumping margins less accurate. *See Zhaoqing Tifo I*, 39 CIT at ____ n.6, 60 F. Supp. 3d at 1333 n.6 (and authorities cited there).

Commerce's administrative determinations are to the same general effect. *See Zhaoqing Tifo I*, 39 CIT at ____ n.6, 60 F. Supp. 3d at 1333 n.6 (citing Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People's Republic of China (Oct. 11, 2011) at 20 (Comment 2) (stating that "[i]t is [Commerce's] longstanding practice to avoid double-counting costs where the requisite data are available to do so" (emphasis omitted) (citation omitted))).

No party contends that it would be permissible in this case for Commerce both to use the financial ratios derived from P.T. Tifico's financial statements (in which energy expenses are embedded) and to also include energy expenses in the FOP database. No party contends that double-counting the cost of energy inputs in calculating Zhaoqing Tifo's dumping margin would be permissible.

Rule 56.2 Motion for Judgment Upon the Agency Record at 18 (and authorities cited there) (summarizing rationale for preference). P.T. Asia Pacific's financial statements are relatively detailed and include separate line items for that company's energy inputs. In Commerce's Preliminary Determination, the agency therefore was able to exclude all energy costs from the surrogate financial ratios that it derived from P.T. Asia Pacific's financial statements, and to value all of Zhaoqing Tifo's energy inputs – coal, electricity, and water – separately, in the FOP database, with no concerns about double counting. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1336 (and authorities cited there).

In the administrative case brief that it filed with Commerce following the Preliminary Determination, Zhaoqing Tifo argued that the operations of P.T. Asia Pacific are much more highly integrated than those of Zhaoqing Tifo, and that it was therefore not appropriate for Commerce to rely on P.T. Asia Pacific's financial statements in calculating surrogate financial ratios. Zhaoqing Tifo characterized itself as more comparable to P.T. Tifico – an Indonesian producer of polyester fiber which, according to Zhaoqing Tifo, has "less integrated, less complex, production operations." As such, Zhaoqing Tifo argued that Commerce should use the financial statements of P.T. Tifico in the agency's Final Determination. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1336–37 (and authorities cited there, including, *inter alia*, Zhaoqing Tifo's Administrative Case Brief (Pub. Doc. No. 94)).

The Domestic Producer filed a rebuttal brief responding to Zhaoqing Tifo's case brief. There, the Domestic Producer argued that, in calculating surrogate financial ratios, Commerce's Final Determination should continue to rely on the financial statements of P.T. Asia Pacific that Commerce had used in the Preliminary Determination. The Domestic Producer argued that Zhaoqing Tifo "ha[d] not demonstrated that [the] difference in integration levels actually exists" and that, in any event, any differences between the levels of integration of Zhaoqing Tifo and P.T. Asia Pacific are "trivial." *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 133738 (and authorities cited there, including, *inter alia*, Domestic Producer's Administrative Rebuttal Brief (Pub. Doc. No. 101), quoted above).

In addition, the Domestic Producer's rebuttal brief emphasized that the financial statements of P.T. Tifico are less "complete and detailed" than those of P.T. Asia Pacific – a consideration that the Domestic Producer deemed "more critical" than any differences in the levels of integration of the companies' operations. In particular, the Domestic Producer expressly and specifically cautioned Commerce that, be-

cause P.T. Tifico's financial statements "include[] *no separate breakout* of [P.T. Tifico's] energy costs," Commerce's use of P.T. Tifico's financial statements in the Final Determination would require the agency to "place all potential energy costs into the [manufacturing/factory] overhead numerator" in the surrogate financial ratios and to "turn off all company-specific energy and water consumption factors, in order to capture all costs while also preventing double-counting." In short, the Domestic Producer told Commerce flatly and unequivocally that – if Commerce used the financial statements of P.T. Tifico in the Final Determination to derive surrogate financial ratios – Commerce would have no choice but to remove coal from the FOP database in order to avoid double counting, because the lack of detail in P.T. Tifico's financial statements would make it impossible for the agency to identify and exclude energy expenses from the surrogate financial ratios. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1338 (and authorities cited there, including the Issues & Decision Memorandum, and Domestic Producer's Administrative Rebuttal Brief, quoted above).

In its Final Determination, Commerce reversed course. Rather than relying on P.T. Asia Pacific's financial statements (as Commerce had in the Preliminary Determination), Commerce used the financial statements of P.T. Tifico to derive the surrogate financial ratios. In the words of the Final Determination, Commerce concluded that P.T. Tifico's "less integrated and less complex production operations are more comparable to Zhaoqing Tifo's than those of P.T. Asia Pacific." *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1338 (and authorities cited there, including the Issues & Decision Memorandum, quoted above).

The Final Determination acknowledged the Domestic Producer's admonition regarding the lack of detail in P.T. Tifico's financial statements, noting that P.T. Tifico's statements "do[] not include a separate breakout of [P.T. Tifico's] costs for electricity and water." Therefore, "in order to prevent double counting," Commerce in its Final Determination "placed all electricity and water costs into the [manufacturing/factory] overhead numerator" (*i.e.*, included electricity and water in the surrogate financial ratios) and removed from the FOP database the "electricity and water consumption factors" that the agency had included in the database for purposes of the Preliminary Determination. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1338–39 (and authorities cited there, including the Issues & Decision Memorandum, and Domestic Producer's Administrative Rebuttal Brief, quoted above).

However, Commerce's Final Determination inexplicably left coal in the FOP database. Commerce gave no rationale as to why concerns about double counting – which led the agency to exclude water and electricity from the FOP database in the Final Determination – did not similarly compel the exclusion of coal. Nor did Commerce address the Domestic Producer's statement that using P.T. Tifico's financial statements would require Commerce to remove coal from the FOP database, in order to avoid double-counting. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1339 (and authorities cited there, including the Issues & Decision Memorandum).

Zhaoqing Tifo appealed, alleging, *inter alia*, that Commerce's Final Determination double-counts certain energy expenses. Specifically, Zhaoqing Tifo contends that Commerce's inclusion of coal in the FOP database in the Final Determination results in double-counting, and is unsupported by substantial evidence, contrary to law, and arbitrary and capricious, because energy costs are already reflected in the surrogate financial ratios that Commerce derived from the financial statements of P.T. Tifico. *See* Complaint, Counts I-III.

No party sought judicial review of Commerce's selection of financial statements (*i.e.*, Commerce's decision to select the financial statements of P.T. Tifico rather than those of P.T. Asia Pacific) for use in the Final Determination.

Because Zhaoqing Tifo favored, and successfully advocated for, Commerce's use of P.T. Tifico's financial statements in the Final Determination, Zhaoqing Tifo's Complaint does not contest Commerce's selection of financial statements. Zhaoqing Tifo's double-counting claim is much more narrow, much more specific, and much more refined. Taking (accepting) Commerce's decision selecting P.T. Tifico's financial statements in the Final Determination as a given, the claim in Zhaoqing Tifo's Complaint is that, if energy expenses cannot be isolated and excluded from the surrogate financial ratios that Commerce derived from P.T. Tifico's statements, then coal expenses must be excluded from the FOP database in order to avoid double counting. *See* Complaint, Counts I-III.

The Domestic Producer intervened in the instant action. The Domestic Producer could have filed its own action, to challenge Commerce's selection of financial statements in the Final Determination – *i.e.*, Commerce's decision to use the financial statements of P.T. Tifico, rather than those of P.T. Asia Pacific (which the Domestic Producer had consistently favored). As summarized above, the Domestic Producer had pressed Commerce to use the more detailed financial statements of P.T. Asia Pacific in the Final Determination. The Domestic Producer had expressly cautioned Commerce that use of P.T. Tifico's

financial statements would require the agency to exclude energy expenses (including coal) from the FOP database in order to avoid double counting, because the agency would find it impossible to isolate and exclude energy expenses from P.T. Tifico's statements. Commerce failed to heed the Domestic Producer's warnings. Nevertheless, for whatever reason, the Domestic Producer elected not to seek judicial review of Commerce's selection of financial statements – *i.e.*, Commerce's decision to use the financial statements of P.T. Tifico in the agency's Final Determination, rather than the more detailed statements of P.T. Asia Pacific. The Domestic Producer thus waived the issue as Commerce's selection of financial statements went unchallenged.

The briefing by the Government and the Domestic Producer that preceded *Zhaoqing Tifo I* focused almost exclusively on whether or not Zhaoqing Tifo had exhausted its double-counting claim at the administrative level. *Zhaoqing Tifo I* concluded that – for any of a number of different reasons — the doctrine of exhaustion of administrative remedies does not bar Zhaoqing Tifo's claim. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1343–59.

As to the merits of Zhaoqing Tifo's claim, *Zhaoqing Tifo I* found no indication in the Final Determination that Commerce had considered whether both using surrogate financial ratios derived from P.T. Tifico's financial statements and separately valuing coal in the FOP database resulted in the double-counting of energy costs. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1361–65. Nor does the Final Determination offer any explanation as to why Commerce there excluded water and electricity from the FOP database to avoid double-counting, but left coal in the database. *Id*., 39 CIT at ____, 60 F. Supp. 3d at 1364–65 (stating that "the Issues and Decision Memorandum . . . give[s] no indication whether Commerce ever considered the potential for double counting of energy inputs other than electricity and water, much less the rationale for any determination on that issue. Commerce's explanation is not merely thin; it is nonexistent.").

Zhaoqing Tifo I therefore remanded this matter to Commerce, to allow the agency to determine whether – as Zhaoqing Tifo contends – energy expenses are embedded in the surrogate financial ratios derived from P.T. Tifico's financial statements, such that Commerce's inclusion of coal in the FOP database results in double counting in the Final Determination, and, in addition, to allow the agency, if appropriate, to explain the disparity in its treatment of water and electric-

ity *versus* coal. Notably, *Zhaoqing Tifo I* encouraged Commerce to consider reopening the administrative record on remand, observing that additional information could be placed on the record to illuminate relevant points concerning P.T. Tifico's financial statements. *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365 (emphasis added). *Zhaoqing Tifo I*'s remand instructions said nothing about revisiting the already-settled issue of the selection of financial statements. Nor did those remand instructions refer to the use of any financial statements other than those of P.T. Tifico.

Notwithstanding the remand instructions in *Zhaoqing Tifo I*, Commerce's first remand did not address Zhaoqing Tifo's claim, which is confined to the use of P.T. Tifico's financial statements, the inclusion of coal in the FOP database, and the alleged resulting double-counting of energy expenses. Instead, Commerce reopened the broad issue of the selection of financial statements as a whole – an issue that Commerce had decided in the Final Determination and which was not challenged by any party in this litigation. Just as Commerce used the financial statements of P.T. Asia Pacific in its Preliminary Determination, but then used P.T. Tifico's statements for the Final Determination, Commerce flip-flopped once again in the First Remand Results. In the First Remand Results, Commerce reverted back to the financial statements of P.T. Asia Pacific – the same statements on which the agency had relied in its Preliminary Determination. *See* First Remand Results at 2, 9–10.

In effect, the First Remand Results did not reconsider Commerce's decision in the Final Determination to leave coal in the FOP database notwithstanding the double-counting that allegedly resulted from Commerce's asserted inability to exclude energy expenses from the financial ratios that the agency derived from P.T. Tifico's financial statements. Rather, in the First Remand Results, Commerce reconsidered a different decision from the Final Determination: *i.e.*, Commerce's decision to select the financial statements of P.T. Tifico for the surrogate financial ratios over those of P.T. Asia Pacific.

The First Remand Results did not directly address why Commerce on remand did not focus specifically on P.T. Tifico's financial statements and related surrogate financial ratios from the Final Determination, in order to determine whether it is possible to isolate and exclude energy expenses. Like the Final Determination, the First Remand Results also ignored the disparate treatment of water and electricity *versus* coal in the Final Determination, where Commerce relied on the financial statements of P.T. Tifico and removed water and electricity from the FOP database for the professed purpose of avoiding double counting, but inexplicably left coal in the database.

Similarly, the First Remand Results gave no indication as to whether Commerce had conducted a considered analysis of the matter and had concluded that using P.T. Tifico's financial statements while including coal in the FOP database in fact results in double-counting.

Reopening the issue of the selection of financial statements, the First Remand Results once again reviewed the pros and cons of all of the financial statements on the administrative record, and quickly narrowed the field to the statements of P.T. Tifico and those of P.T. Asia Pacific (much like Commerce's Final Determination). *See* First Remand Results at 5–6. As between those two, the First Remand Results revisited Commerce's earlier analysis of the relative levels of integration of Zhaoqing Tifo (on the one hand) and P.T. Tifico and P.T. Asia Pacific (on the other) – another decision made by Commerce in the Final Determination that no party challenged in litigation. The First Remand Results attributed Commerce's "about-face" – its selection of the financial statements of P.T. Asia Pacific, rather than those of P.T. Tifico – to an asserted error on the part of the agency in the Final Determination's analysis of the broad issue of the selection of financial statements. *See generally id*. at 7–9.

According to the First Remand Results, "[u]pon reexamination of both financial statements," Commerce found that it had "erred [in the Final Determination] in evaluating the similarities between Zhaoqing Tifo and P.T. Tifico on one hand, and the dissimilarity between P.T. Tifico and P.T. Asia Pacific on the other hand in terms of the level of integration." First Remand Results at 7. In its Final Determination, Commerce had based its decision to select the financial statements of P.T. Tifico over those of P.T. Asia Pacific in large measure on Commerce's conclusion that P.T. Asia Pacific is significantly more highly integrated than P.T. Tifico. *See* Issues & Decision Memorandum at 10–11. However, the First Remand Results stated that Commerce's re-review of the record evidence in the course of the remand did not support the Final Determination's finding that "there is a meaningful difference in the level of integration between these two potential surrogate companies [*i.e.*, P.T. Tifico and P.T. Asia Pacific], such that level of integration would be the deciding factor in determining which statement represents the best available information." First Remand Results at 8–9.[8]

[8] For a summary of Commerce's analysis of levels of integration in the First Remand Results, *See Zhaoqing Tifo II*, 41 CIT at ____ & n.10, 256 F. Supp. 3d at 1323–25 & n.10.

As *Zhaoqing Tifo II* observed, there can be no suggestion that Commerce was misled as to the relevant facts in reaching its Final Determination. With respect to the errors that the agency alleges it made in the Final Determination concerning the relative levels of integration of Zhaoqing Tifo, P.T. Tifico, and P.T. Asia Pacific, Commerce already had all of the information before it at the time it reached its Final Determination. No new information

In the First Remand Results, Commerce further decided that, if the choice between the financial statements of P.T. Tifico and P.T. Asia Pacific was no longer driven by the relative levels of integration of the three companies, the decisive factor would be the level of detail reflected in the financial statements. The First Remand Results noted that P.T. Tifico's financial statements do not include a separate breakout of the company's energy expenses, such that – if the agency were to select P.T. Tifico's statements for purposes of deriving surrogate financial ratios – Commerce would be required to exclude coal from the FOP database in order to avoid double-counting, because energy costs would be embedded in the financial ratios. In the First Remand Results, Commerce therefore selected P.T. Asia Pacific's financial statements, which are more detailed and include line item breakouts for energy expenses (among others). That level of detail allowed Commerce to exclude energy from the surrogate financial ratios and to instead value it separately in the FOP database, without double-counting. *See generally* First Remand Results at 2, 9–10.

Commerce's use of P.T. Asia Pacific's financial statements in the First Remand Results significantly increased Zhaoqing Tifo's dumping margin. The Final Determination calculated Zhaoqing Tifo's dumping margin as 9.98%, using the financial statements of P.T. Tifico to derive surrogate financial ratios and removing water and electricity from the FOP database (because those costs were subsumed in the financial ratios), but leaving coal in the database. Zhaoqing Tifo's dumping margin jumped to 25.56% in the First Remand Results, where Commerce used the financial statements of P.T. Asia Pacific, rather than those of P.T. Tifico.

Reviewing the First Remand Results, *Zhaoqing Tifo II* explained that Commerce was not permitted to use the financial statements of P.T. Asia Pacific, because the agency's decision to use P.T. Tifico's financial statements in the Final Determination became final when no party sought judicial review of that decision. *Zhaoqing Tifo II* therefore concluded that the First Remand Results exceeded the scope of the remand instructions in *Zhaoqing Tifo I*, and more importantly, the scope of this litigation. *See Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1326–31 (analyzing the First Remand Results in the context of the scope of this litigation, in light of specific claim set forth in Zhaoqing Tifo's Complaint); *see also id*., 41 CIT at ____, 256 F. Supp. 3d at 1331–38 (analyzing the First Remand Results in

was submitted between Commerce's issuance of its Final Determination and its issuance of the First Remand Results. If Commerce did not know the relevant facts at the time of the Final Determination, it could – and should – have known them. *See generally Zhaoqing Tifo II*, 41 CIT at ____ n.10, 256 F. Supp. 3d at 1325 n.10.

the context of the scope of the remand instructions in *Zhaoqing Tifo I*). This matter was remanded to Commerce for a second time "to permit the agency to reconsider how the surrogate financial ratios that it derived from P.T. Tifico's financial statements account for energy sources and whether the inclusion of coal in the FOP database results in double-counting." *Id.*, 41 CIT at ____, 256 F. Supp. 3d at 1338. Again, Commerce was encouraged to reopen the administrative record to afford the agency and the parties to place relevant evidence on the record that might help break down P.T. Tifico's financial statements as to energy, providing greater detail and at least conceivably permitting Commerce to exclude energy costs from the surrogate financial ratios derived from P.T. Tifico's financial statements, such that energy expenses could be included in the FOP database (as Commerce and the Domestic Producer urge). *Id.*, 41 CIT at ____, 256 F. Supp. 3d at 1337–38.

In the pending Second Remand Results, which Commerce has filed "under protest," Commerce has used the financial statements of P.T. Tifico to derive surrogate financial ratios, as it did in the Final Determination. However, because the costs of energy (including coal) are embedded in the surrogate financial ratios, Commerce has excluded those costs from the FOP database to avoid double-counting. *See* Second Remand Results at 2–3. Once again, Commerce elected not to reopen the administrative record. *Id.*, *passim*. The Second Remand Results revise Zhaoqing Tifo's dumping margin to zero. *Id.* at 9.

II. *Standard of Review*

In reviewing a remand determination by Commerce in an antidumping duty case, the agency's determination must be upheld except to the extent that it is 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); *see also Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016).

In addition, the remand determination is reviewed for compliance with the court's remand order. *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT ____, ____, 2014 WL 1387529 * 2 (April 9, 2014) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ____, ____, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted)); *Since Hardware (Guangzhou) Co. v. United States*, 39 CIT ____, ____, 49 F. Supp. 3d 1268, 1272 (2015) (same); *see also*

Changzhou Wujin Fine Chemical Factory Co. v. United States, 701 F.3d 1367, 1374–75 (Fed. Cir. 2012) (analyzing on review whether Commerce's remand results were "within the scope of the Court of International Trade's remand order" and sustaining the Court of International Trade's conclusion on that point).[9]

III. *Analysis*

Commerce has filed its Second Remand Results "under protest," asserting that the use of P.T. Tifico's financial statements to derive surrogate financial ratios (rather than those of P.T. Asia Pacific) renders Zhaoqing Tifo's dumping margin "less accurate," because P.T. Tifico's statements are not sufficiently detailed to permit the agency to isolate and exclude energy costs from the financial ratios. Commerce therefore cannot include energy costs in the FOP database, because doing so would result in the double-counting of such expenses. *See* Second Remand Results at 6. Commerce states that it would "prefer" to derive the financial ratios using the "more complete and detailed" financial statements of P.T. Asia Pacific, so that energy expenses could be excluded from the financial ratios and the energy consumed in producing the merchandise at issue could be valued in the FOP database, without double-counting. *Id*. at 8; s*ee also id*. at 6 (referring to Commerce's "preference to value all reported energy inputs in the FOP database").[10]

As explained in *Zhaoqing Tifo II*, however, and as summarized above and detailed below, Commerce's decision in the Final Determination concerning the selection of financial statements is beyond the

[9] A trial court's determination as to the scope of its own remand order is entitled to great deference. *See*, *e.g., Changzhou*, 701 F.3d at 1375 (explaining that "an appellant 'faces a very high hurdle when it tries to convince us that, despite the remanding Court's satisfaction, we must conclude that the [agency] on remand acted outside the scope of the remand directions'") (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed. Cir. 1992)).

[10] In the Second Remand Results, Commerce states that "the courts have recognized [Commerce's] discretion when choosing an appropriate company's or companies' financial statements to calculate . . . surrogate financial ratios." *See* Second Remand Results at 6. It is true that Commerce's decision concerning the selection of financial statements would be entitled to a measure of deference if the Domestic Producer had timely challenged in this forum the agency's decision in the Final Determination to select the financial statements of P.T. Tifico over those of P.T. Asia Pacific. However, the Domestic Producer did not do so; and Commerce's discretion in the selection of financial statements does nothing to remedy that fact.

Viewed differently, to the extent that this litigation focuses on the ramifications of Commerce's decision on the selection of financial statement in its Final Determination, the litigation is (at least implicitly) acknowledging the discretion that Commerce exercised in selecting the financial statements of P.T. Tifico.

scope of this case, as well as the court's jurisdiction.[11] No party sought judicial review of Commerce's decision to select the financial statements of P.T. Tifico as the basis for surrogate financial ratios. The Domestic Producer could have challenged that decision by commencing an action in this forum on or before February 11, 2013 – the last day on which the Domestic Producer could have timely filed a summons. *See* 19 U.S.C. § 1516a(a)(1) (requiring that any action challenging a final determination in an antidumping proceeding be commenced by the filing of a summons within 30 days after Federal Register publication of the determination, followed by a complaint within 30 days thereafter); USCIT Rule 3(a)(2) (same). But the Domestic Producer chose not to do so.[12] Accordingly, like all other aspects of the Final Determination that were not timely challenged in this forum, Commerce's decision to use the financial statements of P.T. Tifico – rather than those of P.T. Asia Pacific – became final.

The sole claim at issue is Zhaoqing Tifo's double-counting claim, which *accepts* Commerce's decision to use the financial statements of P.T. Tifico, but makes the point that Commerce's use of those statements requires the agency to exclude energy costs from the FOP database, in order to avoid double-counting. Moreover, any assertion that the use of P.T. Asia Pacific's financial statements would result in a more accurate dumping margin does not depict the full picture.

A. *The Narrow Scope of This Litigation, As Defined By the Complaint*

In effect, the Domestic Producer – and Commerce – are attempting to convert the discrete "double counting" claim that Zhaoqing Tifo set forth in its Complaint into a more general challenge to Commerce's selection of financial statements in its Final Determination. Having failed to file its own action asserting such a challenge, the Domestic Producer, with the support of Commerce, now seeks to graft this broader challenge onto Zhaoqing Tifo's claim. But, regardless of Com-

[11] In the Second Remand Results, Commerce twice states that the court ruled that the broad issue of Commerce's selection of financial statements is beyond the scope of the remand. *See* Second Remand Results at 2, 8. It is true that *Zhaoqing Tifo II* held that the remand instructions in *Zhaoqing Tifo I* did not authorize Commerce to reconsider the decision concerning selection of financial statements that the agency made in its Final Determination and that Commerce's actions in the course of the remand thus exceeded the scope of the remand order. *See Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1331–37. However, as explained in *Zhaoqing Tifo II* and detailed more fully here, the more fundamental point is that the issue of Commerce's selection of financial statement is beyond the scope of Zhaoqing Tifo's Complaint and thus beyond the scope of this litigation. *See Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1326–31; *see also infra* sections III.A & III.B.

[12] For what it is worth: Zhaoqing Tifo filed its Summons on January 23, 2013 and its Complaint on January 30, 2013. Thus, the Domestic Producer was on notice of the precise nature and the relatively narrow scope of Zhaoqing Tifo's double-counting claim well before the last day on which the Domestic Producer could have commenced its own action.

merce's support, the Domestic Producer cannot use the back door to do what it should have done through the front door. There is no alchemy that can be used to transform Zhaoqing Tifo's double counting claim into the much more sweeping claim that the Domestic Producer belatedly seeks to litigate.

As *Zhaoqing Tifo II* explained, the statute (together with relevant agency regulations and the applicable Rules of the Court) strikes a balance between the significant interests in the accuracy and completeness of Commerce's determinations and the competing, equally compelling, need for finality. *See*, *e.g.*, *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 938 (5th Cir. 1967) (underscoring importance of finality, observing that "[a]ll things must end – even litigation"); *see generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1326–28.

In the interests of finality, Commerce's final determination in any antidumping proceeding is essentially immune to attack, except to the extent that a party commences a timely challenge of that final determination in this Court – and, even then, only to the extent of those specific issues that are raised in the complaint. In other words, finality attaches to all aspects of a final determination except those that are challenged in a timely-filed complaint. *Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1327 (and authorities cited there).

A party that does not file its own complaint may be permitted to intervene in a case, to participate in the briefing and argument on the issues that are raised in the plaintiff's complaint. *See generally* 28 U.S.C. § 2631(j)(1)(B) (specifying requirements applicable to motions to intervene in antidumping cases); USCIT Rule 24(a) (setting forth timing and other requirements applicable to motions to intervene in antidumping cases). But an intervenor is not permitted to raise its own challenges to the final determination at issue. The scope of any litigation is confined to the issues raised in a properly-filed complaint. An intervenor must take a case as it lies. *See*, *e.g.*, *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) (explaining that an intervening party "is admitted to a proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues")[13]; *see generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1327.

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[13] In *Illinois Bell*, for example, a trade association was seeking to obtain judicial review of one specific aspect of FCC order, but "[*r*]*ather than petitioning for*[*judicial*] *review of that aspect of the* [*FCC's*] *order*, . . . [the trade association] sought to intervene in [the pending court case], which was initiated by the [plaintiff] carriers in order to review other parts of the [FCC's] decision." *Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 785–86 (D.C. Cir. 1990) (emphasis added). As the U.S. Court of Appeals for the D.C. Circuit explained, there (as here), "[t]he issue [the intervenor] tries to serve [the court] is . . . out of bounds." *Id*.

Further, as *Zhaoqing Tifo II* explained, Commerce is not permitted to attack its own final determination; nor is a court permitted to *sua sponte* interject issues into litigation. Issues that are not the subject of a timely-filed complaint cannot, as a general rule, be entertained by the court. *See generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1327–28; *see also*, *e.g.*, *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309–10, 1311–13 (Fed. Cir. 1986) (holding that Court of International Trade lacked jurisdiction over action where party failed to file timely appeal); *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 214 n.4, 477 F. Supp. 2d 1298, 1301 n.4 (2007) (observing that "[i]t is well settled that an 'intervening party may not be permitted to contest an antidumping order in contravention of the' [statutory] time limitations . . . and the jurisdiction of the court'") (quoting *Torrington Co. v. United States*, 14 CIT 56, 58, 731 F. Supp. 1073, 1076 (1990)). As such, "finality" trumps "accuracy/completeness," and the complaint defines and delimits the scope of litigation and the jurisdiction of the court. *See generally Zhaoqing*

Quoting *Vinson v. Washington Gas Light Co.*, the D.C. Circuit elaborated: "An intervening party may join issue only on a matter that has been brought before the court by another party. . . . *Otherwise, the time limitations for filing a petition for* [*judicial*] *review*. . . *could easily be circumvented* through the device of intervention." *Id*. (emphases added). There is even greater cause for concern in a case such as this, where the effect of expanding the issues in litigation to include Commerce's selection of financial statements would be not only to evade "the time limitations for filing a petition for [judicial] review," but – in addition – to circumvent the strict statutory time limits governing Commerce's completion of an administrative review.

See generally Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53, 59 (1935) (holding that the "purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something in dispute between the original parties"); *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (stating general rule that intervenors "may only join issue on a matter that has been brought before the court by another party," and rejecting intervenor's attempt to inject new issues into litigation, emphasizing that "despite having had every incentive to raise its arguments in the proper fashion, [intervenor] not only failed to do so [*i.e.*, by failing to seek judicial review of the agency's action in its own right], but fails now to proffer an excuse"); *Edison Elec. Institute v. EPA*, 391 F.3d 1267, 1274 (D.C. Cir. 2004) (quoting *Illinois Bell* for the proposition that "'[a]n intervening party may join issue only on a matter that has been brought before the court by another party'"); *see also*, *e.g.*, *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 212–15, 477 F. Supp. 2d 1298, 1299–1301 (2007) (quoting *Vinson*, emphasizing that "an intervening party is admitted to a 'proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues'"); *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 30 CIT 542, 548, 425 F. Supp. 2d 1374, 1380 (2006) (noting that it is "clear beyond cavil" that intervenors "must take a case as they find it"); *Siam Food Prods. Public Co. v. United States*, 22 CIT 826, 830, 24 F. Supp. 2d 276, 280 (1998) (concluding that movants there were "time barred from bringing their own case and thus even as intervenors . . . [could] not bring their own challenges to [Commerce's] determination") (citation omitted); *Torrington Co. v. United States*, 14 CIT 56, 56–59, 731 F. Supp. 1073, 1073–76 (1990) (rejecting intervenors' attempt to inject into litigation new claims that were "clearly beyond the scope of the original litigation" between the plaintiff and Commerce, noting that intervenors could have filed their own independent action raising their claims within the statutory time limitations but failed to do so, and underscoring that "an intervenor cannot circumvent the explicit statutory time limitations for contesting an antidumping duty determination by simply interjecting a claim when the time for commencing an action has expired").

Tifo II, 41 CIT at ____, 256 F. Supp. 3d at 1327–28; *see generally*, *e.g.*, *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321–22 & n.5 (1961) (explaining that "[w]henever a question concerning administrative, or judicial, reconsideration arises, two opposing policies demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other," and noting that "[s]ince these policies are in tension, it is necessary to reach a compromise"); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (stating that, in the interests of finality, "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties"); *Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn Bhd.*, 334 F.3d 1284, 1292 (Fed. Cir. 2003) (recognizing the "strong interest in the finality of Commerce's decisions"); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (acknowledging, on appeal in an antidumping duty case, that "[i]n some instances, a tension may arise between finality and [a] correct result").[14]

As *Zhaoqing Tifo II* emphasized, Zhaoqing Tifo's timely-filed Complaint circumscribes the scope of this action[15] ; and that Complaint does not include a challenge to Commerce's selection of financial statements. *See*, *e.g.*, *United States v. Gosselin World Wide Moving*, 741 F.3d 390, 405–06 (4th Cir. 2013) (explaining that "[t]he primacy of the complaining party [in defining the scope of an action] is reflected in the legal vernacular," in that "[w]e often speak of the civil plaintiff being the 'master of his complaint'"; characterizing plaintiff's

[14] *See also*, *e.g.*, *Comfort v. Lynn School Committee*, 560 F.3d 22, 26 (1st Cir. 2009) (observing that, in the interests of finality, "a case cannot be re-opened simply because some new development makes it appear, in retrospect, that a judgment on the merits long since settled was brought about by judicial error"); *Oakes v. United States*, 400 F.3d 92, 97 (1st Cir. 2005) (characterizing finality as an "institutional value[] that transcends the litigants' parochial interests").

[15] Zhaoqing Tifo's Complaint consists of a total of 10 specific counts. However, as indicated above, none of those counts contests Commerce's decision to derive the surrogate financial ratios using the financial statements of P.T. Tifico (rather than those of P.T. Asia Pacific) in the agency's Final Determination. Quite to the contrary, the relevant counts of Zhaoqing Tifo's Complaint specifically *rely on* Commerce's selection of P.T. Tifico's financial statements, but allege that – because energy expenses are already embedded in the financial ratios derived from those statements – Commerce must exclude energy expenses from the FOP database. *See Zhaoqing Tifo II*, 41 CIT at ____ n.15, 256 F. Supp. 3d at 1328 n.15 (summarizing the subjects and the status of each of the 10 counts of Zhaoqing Tifo's Complaint).

discretion there as "virtually unbounded")[16]; *see generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1328. , 41 CIT at ____, 256 F. Supp. 3d at 1328. The issue of the selection of financial statements is thus beyond the scope of this litigation. Significantly, no party contends that Zhaoqing Tifo's Complaint includes a claim challenging Commerce's selection of financial statements – *i.e.*, Commerce's decision to rely on the financial statements of P.T. Tifico for purposes of the agency's Final Determination. Certainly Zhaoqing Tifo has not sought to amend its Complaint to add such a claim; nor would it be in its interests to do so. The Domestic Producer could have – and apparently should have – preserved its rights by timely filing its own complaint, so as to challenge Commerce's selection of P.T. Tifico's financial statements over those of P.T. Asia Pacific.[17] But it is far too late for the Domestic Producer to do that now. *See* 19 U.S.C. §

[16] *See also*, *e.g.*, *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (quoting *Caterpillar*, noting that "the plaintiff is 'mater of the complaint'"); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394–95 (1987) (noting that, although plaintiff ex-employees could have brought claims under collective bargaining agreements, "[a]s masters of the complaint, . . . *they chose not to do so*," and, instead sought relief only under their individual employment contracts) (emphasis added); *id*., 482 U.S. at 392, 398–99 (referring to well-established rule that "the plaintiff is the master of the complaint"); *Horne v. Potter*, 392 F. App'x 800, 804 (11th Cir. 2010) (*per curiam*) (observing that "'[t]he plaintiff is the master of the complaint' and '[*t*]*he plaintiff selects the claims that will be alleged in the complaint*'") (quoting *Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008)) (emphasis added); *Wells v. City of Alexandria*, 178 F. App'x 430, 433 & n.4 (5th Cir. 2006) (*per curiam*) (noting that, in determining scope of litigation, "[t]he allegations in [plaintiff's] complaint control," relying on *Podell v. Citicorp Diners Club, Inc*., 914 F. Supp. 1025, 1028 n.1 (S.D.N.Y. 1996), *aff'd*, 112 F.3d 98, 100 n.2 (2d Cir. 1997), for proposition that "the complaint 'frames and limits the issues'"); *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 683–84 (8th Cir. 2002) (acknowledging that "[plaintiff] might have chosen to pursue theft-type claims against [defendant], but [plaintiff] elected not to do so and *that strategic, legal choice is well within* [*plaintiff's*] *discretion as the master of plaintiff's complaint*") (emphasis added); *Boxer X v. Harris*, 459 F.3d 1114, 1120 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing *en banc*) (emphasizing that "[i]n our federal system of civil justice, the plaintiff is the 'master of the complaint,' *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002), and, under the law [*the plaintiff*] *is entitled to decide which and how many claims he will assert*") (emphasis added).

[17] *See*, *e.g.*, *Torrington Co. v. United States*, 14 CIT 56, 58, 731 F. Supp. 1073, 1075 (1990) (rejecting intervenors' attempts to raise new issue in litigation, noting that "[s]ince Commerce resolved [the] issue [that intervenors sought to raise] in its favor, [plaintiff] naturally did not contest [the issue] in the instant action. [Intervenors], however, [were] not precluded from challenging that aspect of [Commerce's] determination independently," in a timely fashion in accordance with the statute).

The issue of the selection of financial statements – and the respective pros and cons of the financial statements of P.T. Tifico and P.T. Asia Pacific – was hotly contested by the parties before Commerce's Final Determination issued. In fact, as noted above, in arguing that Commerce should use P.T. Asia Pacific's financial statements, the Domestic Producer specifically warned Commerce that the agency's selection of the statements of P.T. Tifico would preclude the agency from including coal in the FOP database, due to the need to avoid double-counting. Having thus exhausted the issue at the administrative level, the Domestic Producer was perfectly positioned to challenge Commerce's selection of financial statements in court.

1516a(a)(1); USCIT Rule 3(a)(2); *see generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1329.

Notwithstanding three rounds of briefing in this litigation (*i.e.*, the initial briefing, the briefing on the First Remand Results, and the briefing on the Second Remand Results), neither the Government nor the Domestic Producer has ever made any serious effort to respond either to Zhaoqing Tifo's arguments concerning the narrow, precise nature of the claim at issue (including the role of a complaint in defining the scope of litigation, and a court's jurisdiction) or to its arguments concerning the strict statutory time limits for filing an action challenging a final determination. As Zhaoqing Tifo has maintained, and as has been explained previously and yet again here), the scope of this action is determined by the claim set forth in Zhaoqing Tifo's Complaint, which does not contest Commerce's decision in the Final Determination to select the financial statements of P.T. Tifico (rather than those of P.T. Asia Pacific). Because the Domestic Producer elected not to file its own action contesting Commerce's decision on the selection of financial statements, and because the "double-counting" claim asserted by Zhaoqing Tifo is laser-focused on *the implications* of Commerce's decision to select the financial statements of P.T. Tifico – and does not challenge that decision itself – Commerce's selection of the financial statements of P.T. Tifico was laid to

Plaintiffs routinely seek judicial review of Commerce's selection of one set of financial statements over another, just as the Domestic Producer could have done here. *See*, *e.g.*, *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1300–01 (Fed. Cir. 2016) (affirming Court of International Trade decision on plaintiff's claim that Commerce erred in considering a particular financial statement); *QVD Food Co. v. United States*, 658 F.3d 1318, 1322–26 (Fed. Cir. 2011) (affirming Court of International Trade decision on plaintiff's claim that Commerce erred in relying on a particular financial statement); *Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1320, 1321, 1322–23 (Fed. Cir. 2010) (affirming "Commerce's decision to exclude [the] financial statements [of a non-profitable company] in calculating the surrogate financial ratios, in favor of using financial statements from the two profitable surrogate companies"); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1369–70, 1373–75 (Fed. Cir. 2010) (reversing Court of International Trade ruling on Commerce's selection of financial statements). However, such claims are fundamentally different from the claim that Zhaoqing Tifo presses, which plainly does not challenge Commerce's selection of financial statements – *i.e.*, Commerce's decision to select the financial statements of P.T. Tifico rather than those of P.T. Asia Pacific. Zhaoqing Tifo is quite content with that decision.

Moreover, as explained in *Zhaoqing Tifo II*, there is no substance to the notion that the issue of the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific (*i.e.*, the issue that the Domestic Producer and Commerce seek to raise) is inextricably intertwined with the specific, narrow issue raised in Zhaoqing Tifo's Complaint – *i.e.*, the extent to which there are energy costs that are already embedded in P.T. Tifico's financial statements (and thus reflected in Commerce's surrogate financial ratios), such that Commerce's inclusion of coal in the FOP database results in double-counting. Although it is true that the issue that Zhaoqing Tifo has raised is related to the issue of Commerce's selection of financial statements, the two issues are entirely discrete. There is – as a matter of logic – no need for Commerce to reassess the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific in order to address the issue that Zhaoqing Tifo has raised, which is specific to, and strictly limited to, the financial statements of P.T. Tifico. *See generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1335–36.

rest long ago and cannot be resurrected in this action. *See generally Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1328–29. Unlike Lazarus, Commerce's selection of financial statements cannot rise from the dead.[18]

B. *Commerce's Decisions Not to Reopen the Administrative Record*

In filing the Second Remand Results "under protest," Commerce intimates that the court has forced the agency to use P.T. Tifico's financial statements and asserts that the use of those statements (rather than the statements of P.T. Asia Pacific) results in a dumping

[18] Absent extraordinary circumstances not present here, Commerce may not reopen aspects of its final determinations that are not properly the subject of litigation – not even by invoking the interests of accuracy. The legislative mandate to "use the best available information" in calculating dumping margins (*see* 19 U.S.C. § 1677b(c)(1)) is not a license for Commerce to reopen settled aspects of its antidumping analyses after a final determination has issued merely because the agency concludes that some decision that it made in the course of that final determination was ill-advised or wrong.

In a routine international trade case such as this, accuracy *must* yield to finality for purposes of litigation, except to the extent that an issue is properly preserved for judicial review. Practicality and common sense compel this result. If it were otherwise, all of the many scores of decisions, calculations, and judgment calls that go into a final determination by Commerce would remain open to challenge long after the final determination was issued – possibly *ad infinitum*. Nothing would ever really become final.

Neither Commerce nor the Domestic Producer has pointed to any special circumstances in this case that might even conceivably justify a departure from the general rule on finality. *See*, *e.g.*, *supra* n.17 (explaining that P.T. Tifico's "double-counting" claim is not inextricably intertwined with the broad issue of Commerce's selection of financial statements). There is no new evidence or other information that has come to light that Commerce might at least try to use as a basis for revisiting its earlier decision to rely on the financial statements of P.T. Tifico. *See*, *e.g.*, *supra* n.8 (explaining that, at the time Commerce selected the financial statements of P.T. Tifico for use in the Final Determination, Commerce had before it the same information concerning the relative levels of integration of Zhaoqing Tifo, P.T. Tifico, and P.T. Asia Pacific – the exact same factual information that is on the record now). And, to be sure, there are no allegations of fraud. *See generally*, *e.g.*, *Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1330–31 (and authorities cited there) (noting rare, extraordinary cases involving threats to the fundamental integrity of Commerce proceedings, where – "notwithstanding the (nearly) ironclad rule prizing finality over accuracy/completeness" – Commerce may be permitted to reopen determinations and proceedings). The remarkable fact is that Commerce wants the equivalent of a "do-over" in a case where it was warned expressly and in no uncertain terms (by the Domestic Producer, no less) that – if Commerce selected P.T. Tifico's financial statements for the Final Determination – Commerce would be forced to exclude coal expenses from the FOP database to avoid double-counting, because all energy expenses are already reflected in (and cannot readily be extracted from) those statements, due to their less detailed nature.

If Commerce were permitted to reopen the issue of the selection of financial statements here, it would be a very slippery slope. If one begins tugging at the thread, there is no telling where the unraveling will end or what will be left. The statutory scheme plainly contemplates that Commerce's final determinations will be exactly that – final – except to the extent that one or more aspects of a final determination are properly preserved for judicial review. The outcome that Commerce and the Domestic Producer seek would set a very dangerous precedent.

margin that is "less accurate." *See*, *e.g.*, Second Remand Results at 2–3 (stating that the Second Remand Results are filed "under protest" and asserting that the use of P.T. Tifico's financial statements is "as instructed by the Court"); *id*. at 6 (asserting that using P.T. Tifico's financial statements makes the dumping margin "less accurate").[19] Both of these positions miss the mark.

Nothing in *Zhaoqing Tifo I* or *Zhaoqing Tifo II* foisted on Commerce the use of P.T. Tifico's financial statements. It is Commerce itself that chose P.T. Tifico's financial statements in Commerce's own Final Determination, reversing the position that the agency had taken in its Preliminary Determination, which used the statements of P.T. Asia Pacific. Commerce made that decision over the vehement objections of the Domestic Producer, which expressly and specifically cautioned Commerce that use of P.T. Tifico's less detailed financial statements would require Commerce to exclude the cost of energy sources (including the cost of coal) from the FOP database.

Similarly, as noted in section III.A above, given Commerce's decision to use the financial statements of P.T. Tifico in the Final Determination (ignoring the Domestic Producer's explicit and unambiguous warnings), the Domestic Producer could have filed its own action challenging Commerce's selection of financial statements (*i.e.*, the selection of P.T. Tifico's statements over those of P.T. Asia Pacific in Commerce's Final Determination). Had the Domestic Producer done so, the broad issue of Commerce's selection of financial statements (and the relative merits of one statement *versus* the other) would be a proper subject for litigation here and Commerce would have been free to reconsider its selection of financial statements. As it is, however, the Domestic Producer made an informed, deliberate, intentional decision not to file such an action. Therefore, like virtually all of the scores of decisions that Commerce made in reaching its Final Determination, Commerce's decision as to its selection of financial statements (*i.e.*, its selection of P.T. Tifico's statements over those of P.T. Asia Pacific) became final when the Domestic Producer failed to commence an action contesting that decision on or before February 11, 2013. The only aspects of Commerce's Final Determination that did not become final at that time are those that were preserved for judicial review in Zhaoqing Tifo's Complaint.

[19] *See also* Second Remand Results at 6 (referring to "the Court's instructions" and stating that the Second Remand Results are filed "under protest"); *id*. at 7 (asserting that use of P.T. Tifico's financial statements is "as directed by the Court" and indicating that Domestic Producer's comments on the draft remand results argued that use of P.T. Tifico's financial statements "result[s] in a less accurate dumping margin"); *id*. at 8 (referring to "the Court's Order," noting that Commerce "respectfully disagrees" with the court's decision and stating that "the Court has ruled" against consideration of the issue of Commerce's selection of financial statements as beyond the scope of litigation).

In sum, contrary to the implications in the Second Remand Results, it is not the court that required Commerce to use the financial statements of P.T. Tifico. The requirement to use P.T. Tifico's financial statements is the product of, and is directly and exclusively attributable to, Commerce's decision to use P.T. Tifico's statements (rather than those of P.T. Asia Pacific) for purposes of the agency's Final Determination, in tandem with the Domestic Producer's failure to seek judicial review of that agency decision.

Further, the filing of the Second Remand Results "under protest" evinces a decision on the part of Commerce to rely on P.T. Tifico's financial statements based solely on the existing administrative record, without exhausting available avenues that might have shed light on P.T. Tifico and matters such as the company's energy consumption and how energy is accounted for in the company's financial statements, and thereby helped resolve any outstanding questions or concerns. Specifically, although the combined actions of Commerce and the Domestic Producer (as outlined above) preclude Commerce from using financial statements other than those of P.T. Tifico, there was nothing that prevented Commerce from reopening the administrative record (on the first remand and/or the most recent remand) to seek to clarify P.T. Tifico's energy costs and accounting practices, or for any other similar purpose.[20]

Commerce could have reopened the record and sought new evidence that might have permitted the agency to break down the energy figures in P.T. Tifico's financial statements so as to allow the agency to extract from those statements values for relevant production-related energy inputs (as opposed to, for example, values for energy properly accounted for as overhead) and thus to permit the agency to account for coal separately in the FOP database. Indeed, *Zhaoqing Tifo I* and *Zhaoqing Tifo II* encouraged Commerce to do exactly that. *See Zha-*

[20] *Zhaoqing Tifo I* and *Zhaoqing Tifo II* "essentially gave Commerce unfettered discretion on remand to do whatever the agency deemed appropriate to ascertain how to properly account for water, coal, and electricity using the financial statements of P.T. Tifico, while at the same time avoiding double-counting." *See*, *Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1334.

To explain its decision not to reopen the administrative record, Commerce notes that, as a matter of policy, it generally limits its consideration of a financial statement to the four corners of the document itself. *See* First Remand Results at 6–7. But that is the agency's own, self-imposed constraint; and, however sound Commerce's policy might be as a general matter, this is a somewhat unusual situation. Because Commerce and the Domestic Producer were concerned about the lack of detail in P.T. Tifico's financial statements (particularly as to energy costs), and because Commerce did not have the option of discarding P.T. Tifico's statements, it stands to reason that Commerce and the Domestic Producer would want to reopen the record and seek new evidence that might assuage their concerns. There is no statute or regulation that prevented Commerce from doing so, particularly in the circumstances of this case.

oqing Tifo I, 39 CIT at ____, 60 F. Supp. 3d at 1365; *Zhaoqing Tifo II*, 41 CIT at ____, 256 F. Supp. 3d at 1333, 1337–38.

Because Commerce elected to forego such steps that might have permitted the agency to clarify the manner in which P.T. Tifico's financial statements account for energy, Commerce's complaints about the use (and limitations) of those financial statements – and the agency's filing of the Second Remand Results "under protest" – have a hollow ring.

For much the same reason, Commerce's assertion that the use of P.T. Tifico's financial statements result in a "less accurate" dumping margin cannot be taken at face value.[21] Because Commerce elected not to reopen the administrative record to seek evidence that might have clarified the energy values reflected in P.T. Tifico's financial statements (and, for example, might have allowed Commerce to account for coal separately in the FOP database), any representations about the relative accuracy of dumping margins relying on the financial statements of P.T. Tifico *versus* those of P.T. Asia Pacific must necessarily be limited by the caveat "on the *existing* administrative record." By choosing not to reopen the record, Commerce precluded any possibility of enhancing the accuracy of the dumping margin calculated using P.T. Tifico's financial statements and therefore cannot now be heard to complain.

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[21] In its comments on Commerce's draft of the most recent remand results, the Domestic Producer assert that "relying on the financial statements of P.T. Tifico and removing coal from the FOP database" means that Commerce's dumping margin calculations "[do] not capture all energy inputs." *See* Second Remand Results at 7. But Commerce squarely de-bunks that contention. The Second Remand Results state that Commerce "disagrees" with the Domestic Producer's contention and explain that, as standard agency practice, Commerce recognizes that, in financial statements, "energy costs are captured in the manufacturing overhead unless the . . . financial statements provide a detailed breakout of specific line items," including a line item for energy expenses. *Id*. at 8. Commerce thus concludes that "the [second] remand results fully account for all energy costs." *Id*. Including coal in the FOP database – as the Domestic Producer urges, and as Commerce did in the Final Results – would "double-count" energy costs.

(Early in the Second Remand Results, there is a statement that "[r]elying on P.T. Tifico's financial statements to derive surrogate financial ratios requires [Commerce] to *assume* that all potential energy costs are included in the factory/manufacturing overhead figure." Second Remand Results at 6 (emphasis added). Reading the Second Remand Results as a whole, however, it is clear that this early statement does not accurately reflect Commerce's position. As the Second Remand Results later confirm, all energy costs are captured in the factory/manufacturing overhead figure that Commerce derived from P.T. Tifico's statements. *See id*. at 8.)

Moreover, although it may be Commerce's preference to include production-related energy costs in the FOP database (*see* Second Remand Results at 6), Zhaoqing Tifo points out that Commerce has excluded energy costs from the FOP database in other cases where, as here, the financial statements that Commerce selected for use in deriving surrogate financial ratios did not separately break out energy costs – the very outcome that Commerce reaches in these Second Remand Results. *See Zhaoqing Tifo II*, 41 CIT at ____ n.24, 256 F. Supp. 3d at 1336 n.24 (and sources cited there).

IV. *Conclusion*

For the foregoing reasons, Commerce's Second Remand Results must be sustained. A separate order will enter accordingly.

Dated: November 30, 2018
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
JUDGE