U.S. Customs and Border Protection

Slip Op. 15–22

JINXIANG YUANXIN IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Senior Judge
Court No. 11–00145
PUBLIC VERSION

[The Department of Commerce's Final Results of Redetermination are sustained.]

Dated: March 23, 2015

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, D.C., argued for plaintiff. With him on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Justin R. Becker*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors. With him on the brief was *John M. Herrmann*.

OPINION

EATON, Senior Judge:

Before the court are the Department of Commerce's (the "Department" or "Commerce") Final Results of Redetermination Pursuant to Remand, dated November 22, 2013. Final Results of Redetermination Pursuant to Remand (ECF Dkt. No. 79) ("Remand Results"). The court remanded Commerce's final determination in *Garlic From the People's Republic of China*, 76 Fed. Reg. 19,322 (Dep't of Commerce Apr. 7, 2011) (rescission of antidumping duty new shipper reviews), and the accompanying Final Bona Fides Memorandum (Dep't of Commerce Mar. 31, 2011) (collectively, the "Rescission"), in which the Department rescinded plaintiff Jinxiang Yuanxin Import & Export Co., Ltd.'s ("plaintiff" or "Yuanxin") new shipper review under the antidumping duty order on fresh garlic from the People's Republic of

China ("PRC").[1] *See* Mem. from Mark Hoadley, Program Manager, AD/CVD Operations, Import Administration, to Barbara E. Tillman, Office Director, AD/CVD Operations, Import Administration, PD 130, CD 55 (Mar. 31, 2011), ECF Dkt. No. 31 ("Bona Fides Mem."); Fresh Garlic From the PRC, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (antidumping duty order). Although sustaining Commerce's determination that atypical factors indicative of a non-bona fide sale surrounded Yuanxin's transaction, the court on remand directed Commerce to support its bona fides analysis of Yuanxin's sales price and quantity with substantial evidence. *See Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–77, at 24–25 (2013) ("*Yuanxin I*").

In its Remand Results, Commerce continued to find that Yuanxin's sale of single-clove garlic was not bona fide and that plaintiff's new shipper review was properly rescinded. *See* Remand Results at 7. Plaintiff filed comments to the Remand Results, arguing that Commerce's analysis was "severely flawed and not based on substantial evidence," and asked the court to remand this case for a second time. Comments on Final Results of Redetermination Pursuant to Ct. Order 7 (ECF Dkt. No. 84) ("Pl.'s Comments"). Defendant United States ("defendant") and defendant-intervenors, the Fresh Garlic Producers Association and its individual members, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "defendant-intervenors"),[2] filed comments in support of the Department's determination, and urged the court to sustain the Remand Results in their entirety. *See* Def.'s Resp. to Pl.'s Comments on the Remand Redetermination (ECF Dkt. No. 99) ("Def.'s Comments"); Def.-ints.' Responsive Comments on Redetermination Pursuant to Ct. Order (ECF Dkt. No. 96) ("Def.-ints.' Comments"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii).

For the reasons set forth below, the court holds that Commerce's determination, that Yuanxin's sale was not bona fide, and the resulting rescission of plaintiff's new shipper review are supported by substantial evidence and otherwise in accordance with law. In addition, the court finds that the Department's alternative methodology for analyzing the bona fide nature of Yuanxin's sales price in the Remand Results complies with the court's order in *Yuanxin I*. Thus, the Remand Results are sustained.

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[1] Yuanxin is an exporter of fresh garlic from the PRC.

[2] Defendant-intervenors are all producers of the domestic like product. Mot. for Leave to Intervene as of Right 1–2 (ECF Dkt. No. 16).

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, Slip. Op. 14–38, at 4 (2014) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014)).

DISCUSSION

I. BACKGROUND

This matter was originally before the court on Yuanxin's challenge to (1) Commerce's final determination that Yuanxin's sale of single-clove garlic during the period of review, November 1, 2008 through October 31, 2009 ("POR"), was not bona fide, and (2) the Department's rescission of plaintiff's new shipper review. *See* Rescission, 76 Fed. Reg. at 19,322. In the Rescission, Commerce determined that Yuanxin's sale was not bona fide for three reasons: "(1) Yuanxin's sale price [was] so high as to be commercially unreasonable and not indicative of future sales, (2) Yuanxin's sales quantity [was] not representative of the garlic industry, and (3) the structure of Yuanxin's U.S. sale [was] of an unusual nature." Rescission, 76 Fed. Reg. at 19,324.

In reaching this conclusion, Commerce noted that Yuanxin[3] made one sale of single-clove garlic to its unaffiliated U.S. customer ("U.S. customer"),[4] a sporting and athletic goods manufacturer, which did not purchase garlic from any other source during or after the POR.[5] Letter from David B. Da, D&B Consultants Co., Ltd, to Secretary of Commerce, U.S. Department of Commerce at 27, PD 44 (June 4, 2010), ECF Dkt. No. 31. After purchasing the single-clove garlic, Yuanxin's U.S. customer immediately resold the merchandise to a

[3] Plaintiff Yuanxin was the producer, exporter, and importer of record for its sale. Mem. from Thomas Gilgunn, Program Manager, AD/CVD Operations, Import Administration, to Barbara E. Tillman, Office Director, AD/CVD Operations, Import Administration at 3, PD 79 (Nov. 1, 2010), ECF Dkt. No. 31.

[4] Yuanxin's U.S. customer in this transaction was [[ ]] Mem. from Thomas Gilgunn, Program Manager, AD/CVD Operations, Import Administration, to Barbara E. Tillman, Office Director, AD/CVD Operations, Import Administration at 3, CD 38 (Nov. 1, 2010), ECF Dkt. No. 31.

[5] Yuanxin sold [[ ]] kilograms of single-clove garlic with a total value of [[ ]], or a weighted-average unit value of [[ ]] per kilogram, to its U.S. customer. Mem. from Thomas Gilgunn, Program Manager, AD/CVD Operations, Import Administration, to Barbara E. Tillman, Office Director, AD/CVD Operations, Import Administration at 4, CD 38 (Nov. 1, 2010), ECF Dkt. No. 31.

U.S. wholesaler[6] that had previously purchased single-clove garlic from another exporter, Jinxiang Hejia Co., Ltd. ("Jinxiang Hejia"),[7] during the prior period of review.[8] *See* Bona Fides Mem. at 8.

The Department compared Yuanxin's single-clove garlic sales price to the "U.S. Customs and Border Protection ('Customs') data run containing all entries of merchandise exported to the United States from the PRC during the POR under U.S. Harmonized Tariff Schedule ('HTSUS')[9] category 0703.20.0010 for 'Garlic, Fresh Whole Bulbs,' a category that includes both single-clove and multi-clove fresh, whole garlic bulbs." *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 7–8 (citing Bona Fides Mem. at 4). The Customs data, which represented predominantly multi-clove garlic imports, yielded an average unit value ("AUV") for the subject merchandise.[10] *See* Bona Fides Mem. at 6. In making this comparison, Commerce diverged from its practice in *Jinxiang Hejia Co. v. United States*, an appeal to this Court of a review of the antidumping duty order on fresh garlic from the PRC during the prior period of review, in which the Department had found single-clove garlic bulbs to be "unique," such that a price comparison between single-clove and multi-clove garlic was inappropriate. *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 13 (citing *Jinxiang Hejia Co. v. United States*, 35 CIT __, __, Slip Op. 11–112, at 6 (2011) ("*Hejia*")).

In *Yuanxin I*, the court held that (1) Commerce had failed to explain adequately its departure from the practice it had established in *Hejia* of treating single-clove garlic as a unique product and (2) the Department had failed to support adequately its determination that it was

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[6] The U.S. wholesaler was [[ ]]. Bona Fides Mem. at 8.

[7] Jinxiang Hejia is a Chinese exporter whose single sale of single-clove garlic was the subject of a new shipper review during the period of review immediately preceding Yuanxin's sale of single-clove garlic that is at issue here. The review of Jinxiang Hejia's sale is "the only other review conducted for a sale of single-clove garlic." *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 8 (citing Fresh Garlic from the PRC, 74 Fed. Reg. 50,952 (Dep't of Commerce Oct. 2, 2009) (final results and final rescission, in part, of new shipper reviews), and accompanying Issues and Decision Memorandum).

[8] Jinxiang Hejia's period of review was November 1, 2007 through June 9, 2008. *Jinxiang Hejia Co. v. United States*, 35 CIT __, __, Slip Op. 11–112, at 2 (2011) (citation omitted).

[9] [The HTSUS organizes the various classifications of imported goods by headings, which "contain 'general categories of merchandise,'" and subheadings, which "provide a more particularized segregation of the goods within each category." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013) (quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)) (internal quotation marks omitted). These headings and] subheadings are "harmonized with the internationally-developed HS nomenclature up to the six-digit level, *i.e.*, to the two-digit 'chapter,' the four-digit 'heading,' and the six-digit 'subheading' levels" per the Harmonized System Convention. *Victoria's Secret Direct, LLC v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1332, 1345 (2013) (citation omitted).

[10] The AUV in the Customs data was [[ ]] per kilogram. Bona Fides Mem. at 6.

appropriate to compare Yuanxin's single-clove garlic sales price and quantity to Customs data on multi-clove garlic sales prices and quantities. *Id.* at __, Slip Op. 13–77, at 24–25. The court further determined that, "[w]hile Commerce's analysis of Yuanxin's third-country sales was reasonable, its conclusion that Yuanxin's future pricing would necessarily follow that of its third-country sales . . . ," which fell after the POR, was not reasonable, nor was the conclusion supported by substantial evidence. *See id.* at __, Slip Op. 13–77, at 18, 25. The court, however, agreed, that Commerce's "conclusion that the circumstances surrounding Yuanxin's transaction were atypical of normal business practices and indicative of a non-bona fide sale was supported by substantial evidence." *Id.* at __, Slip Op. 13–77, at 25. Thus, "plaintiff's motion for judgment on the agency record [was] granted, in part, and Commerce's final determination rescinding plaintiff's new shipper review [was] remanded." *Id.*

Specifically, the court instructed

> that, on remand, if Commerce wishe[d] to rely upon a comparison of Yuanxin's sales price to the AUV from the Customs data, it must explain its departure from the practice it established in *Hejia*, and demonstrate with substantial evidence (1) that Yuanxin's single-clove garlic is not a unique product when compared to multi-clove garlic, (2) that there is not a distinct market for single-clove garlic, and (3) that factors relating to product uniqueness and distinct market do not affect the price that single-clove garlic commands.

Id. In addition, the Department was directed to "take into account [Yuanxin's] arguments relating to *Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture*,[11] as well as the evidence relating to the relatively high offer prices for single-clove garlic in India and the high prices for plaintiff's third-country sales." *Id.* at __, Slip Op. 13–77, at 25–26.

The court further directed that, if, on remand, Commerce were to find a comparison to the AUV to be invalid, it "must use another methodology to determine the commercial reasonableness of Yuanxin's sales price," and that it must, based on the same methodology for its price analysis, determine "a reasonable methodology for examin-

[11] [According to plaintiff, in each of these three reviews, Commerce had found that the prices, which were higher than the average price for goods under the tariff heading, were justified because each product under review was unique and therefore distinct from other products under the same heading. *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 9 (citing Mem. of Pl. Jinxiang Yuanxin Imp. & Exp. Co., Ltd. in Supp. of Mot. for J. on the Agency R. 28 (ECF Dkt. No. 30)).]

ing the quantity of Yuanxin's sale." *Id.* at __, Slip Op. 13–77, at 26. The Department was also instructed to "reopen the record to solicit information regarding [(1)] whether single-clove garlic is a unique product, [(2)] whether there is a distinct or specialized market for single-clove garlic, and [(3)] whether these facts affect the price that single-clove garlic commands." *Id.* Additionally, the court "ordered that the Department may reopen the record to solicit information for any other purpose." *Id.*

Following the court's order, Commerce reopened the record to allow the parties to submit additional information about the single-clove garlic market. Remand Results at 5. The Department placed on the record publicly available information about single-clove garlic, as well as Commerce's preliminary bona fides analysis and calculation memorandum from its review of a single sale of single-clove garlic made by Jinxiang Hejia during the prior period of review. Remand Results at 5. Defendant-intervenors submitted exhibits related to garlic pricing and marketing, and Yuanxin introduced market and price data. Remand Results at 5. Plaintiff also filed further information to supplement the record, which Commerce rejected. Remand Results at 5, 6.

II. LEGAL FRAMEWORK

Upon request, Commerce is required by statute to perform administrative reviews "for new exporters and producers" whose sales have not previously been examined. 19 U.S.C. § 1675(a)(2)(B). Through these new shipper reviews, Commerce's task is to determine whether new exporters and producers, subject to an existing antidumping duty order, are entitled to their own duty rates, and if so, to calculate those rates. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005).

In practice, this determination involves an evaluation of whether the transactions under review are "bona fide or commercially reasonable." *Shandong Chenhe Int'l Trading Co. v. United States*, 34 CIT __, __, Slip Op. 10–129, at 5 (2010) (citing 19 C.F.R. § 351.214(b)(2) (2009); *Hebei New Donghua*, 29 CIT at 608, 374 F. Supp. 2d at 1338). As part of its inquiry, Commerce "applies a 'totality of circumstances test' focusing on whether or not the transaction is 'commercially reasonable' or 'atypical of normal business practices.'" *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1339 (citations omitted).

To evaluate whether a sale is "commercially reasonable," Commerce considers "(1) the timing of the sale, (2) the price and quantity[,] (3) the expenses arising from the transaction, (4) whether the goods were resold at a profit, (5) and whether the transaction was at an arm's

length basis." *Id.* (citations omitted). In weighing these factors, the Department seeks to determine "whether the sale(s) under review are indicative of future commercial behavior." *Id.* at 613, 374 F. Supp. 2d at 1342 (citation omitted). Additionally, "a primary indication that a sale (or series of sales) is not bona fide is evidence that the sales price is unusually high in comparison to the prices of other sales of subject merchandise during the [period of review]." *Zhengzhou Huachao Indus. v. United States*, 37 CIT __, __, Slip Op. 13–61, at 7 (2013). An unusually high sales price is significant because it may be indicative of a price arrangement made "to avoid the imposition of a significant antidumping duty margin." *Id.* (citing *Jinxiang Chengda Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–40, at 4–5 (2013)).

In determining whether a sale is "atypical of normal business practices," Commerce looks to all circumstances surrounding the sale. *See Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1261–62, 641 F. Supp. 2d 1362, 1368–69 (2009). In particular, "[i]f the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or the transaction has been so artificially structured as to be commercially unreasonable, the Department [will] find[] that it is not a bona fide commercial transaction and must be excluded from review." *Id.* at 1261, 641 F. Supp. 2d at 1368 (citation omitted) (internal quotation marks omitted).

III. THE DEPARTMENT COMPLIED WITH THE COURT'S REMAND ORDER

In its Remand Results, Commerce continued to find that Yuanxin's sale of single-clove garlic was not bona fide, primarily for two reasons: (1) Yuanxin's price was "aberrationally high," and (2) atypical factors surrounded Yuanxin's sale. Remand Results at 6. Because the court had already found in *Yuanxin I* that the Department's conclusion that plaintiff's sale was atypical was supported by substantial evidence, Commerce properly declined to reexamine the issue. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 25; Remand Results 6.

In reaching its findings that Yuanxin's price was "aberrationally high," the Department ceased to rely on a direct comparison of Yuanxin's sales price to the AUV. Rather, Commerce compared Yuanxin's sales price, price premium, and sales quantity to other prices, premiums, and quantities on the record. Specifically, in analyzing Yuanxin's sales price in the context of other single-clove garlic prices, the Department looked to (1) Jinxiang Hejia's U.S. sales price from the prior

period of review, (2) price quotes from exporters in India[12] and the PRC, and (3) U.S. retail prices. Remand Results at 9–11.

Thus, on remand, the Department abandoned its reliance on a direct comparison of Yuanxin's single-clove garlic sales price to Customs' AUV data, which was largely comprised of multi-clove garlic prices, finding such a comparison to be inappropriate. Remand Results at 6–7, 8. Instead, the Department compared Yuanxin's single-clove garlic sales price to other prices of single-clove garlic on the record. In addition, it compared the price premium of Yuanxin's sales price over the AUV from the Customs data, to other percentage differences in prices for single-and multi-clove garlic on the record. *See* Remand Results at 6–7, 8. Because the Department used this alternative methodology to determine the commercial reasonableness of Yuanxin's sales price, Commerce correctly reasoned that it no longer needed "to determine whether single-clove garlic [was] a unique product with a distinct market compared to multi-clove garlic" as per the court's instructions in *Yuanxin I*. Remand Results at 8 (citing *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 25). In addition, having abandoned its reliance on a direct comparison of plaintiff's single-clove garlic sales price to the AUV of the Customs data, the Department's analysis is no longer incompatible with its determinations in the three reviews of *Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture*. *See* Remand Results at 8. As such, it was no longer necessary for it to evaluate and consider plaintiff's comments on remand relating to these proceedings as directed by the court in *Yuanxin I*. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 25. Moreover, in accord with the court's order, Commerce ceased to rely on "its conclusion that Yuanxin's future pricing would necessarily follow that of its third-country sales," which were made after the POR. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 18, 25.

The court finds that the Department's new methodology, used in the Remand Results, for determining the commercial reasonableness of Yuanxin's sales price does not conflict with its prior determination in *Hejia* because it does not involve a *direct* comparison of Yuanxin's sales price to the AUV (the AUV reflects primarily average multi-clove garlic sales prices). Previously, in *Yuanxin I*, the court was concerned with Commerce's failure to explain adequately its depar-

[12] Plaintiff objects to Commerce's decision to rely on price offers for Indian single-clove garlic during plaintiff's POR as part of its analysis on remand. *See* Pl.'s Comments 10–11, 14. Because the evidence that these prices would provide is unnecessary for the court to reach its conclusions, the court need not address Commerce's use of these prices. Further, because the court is not considering the Indian price offers, Commerce's adherence to the court's order in *Yuanxin I*, and its subsequent analysis, with respect to these prices, is immaterial to the court's conclusions. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 25–26.

ture from its practice in *Hejia*, in which it had "found that single-clove garlic was 'unique' and therefore a comparison with entries of multi-clove garlic was not appropriate." *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 13. Because Commerce's new methodology acknowledges that single-clove garlic is a unique product, Commerce's methodology is in accord with the court's remand order.

IV. REMAND RESULTS — UNCONTESTED DETERMINATION: THE DEPARTMENT'S DETERMINATION REGARDING YUANXIN'S SALES QUANTITY IS SUSTAINED

In addition to abandoning its comparison of Yuanxin's sales price to the average price in the Customs data, Commerce also declined to compare Yuanxin's sales quantity to the average quantity in the Customs data. Rather, the Department compared Yuanxin's sales quantity to Jinxiang Hejia's quantity in the prior period of review and concluded that "the sales quantity d[id] not provide any indication that Yuanxin's transaction [was] not *bona fide*."[13] Remand Results at 15. That is, since the two sales quantities were relatively similar to one another, and Jinxiang Hejia's quantity had been previously found to be bona fide, the Department reasoned that it could not find that Yuanxin's sales quantity was not bona fide.

Because the Department's conclusion is reasonable, and because no party contests this determination, it is sustained. *See* Pl.'s Comments 18; Def.'s Comments 8 n.1.

V. REMAND RESULTS — CONTESTED DETERMINATIONS

A. The Department's Determinations Regarding Yuanxin's Sales Price and Price Premium Are Supported by Substantial Evidence and in Accordance with Law

1. Commerce's Determination that Yuanxin's Sales Price Was Aberrational and Thus Not Bona Fide Is Sustained

The Department began its analysis in the Remand Results by comparing Yuanxin's single-clove garlic sales price to (1) Jinxiang Hejia's U.S. sales price for single-clove garlic, (2) single-clove garlic price quotes from exporters in the PRC, and (3) retail prices for

[13] Jinxiang Hejia's sales quantity was [[ ]] kilograms, and Yuanxin's was [[ ]] kilograms. Remand Results at 14.

single-clove garlic. Remand Results at 9–11. As discussed below, this analysis demonstrates with substantial evidence that Yuanxin's sales price was aberrationally high.

i. Comparison to Jinxiang Hejia's U.S. Sales Price

Aside from Yuanxin's sale under review, Jinxiang Hejia's sale during the prior period of review represents the only actual single-clove garlic sale from the PRC to the United States on the record. In comparing Yuanxin's sale to Jinxiang Hejia's, Commerce found that Yuanxin's U.S. sales price of single-clove garlic was significantly higher than Jinxiang Hejia's price adjusted for inflation from the previous period of review, for the same product sold in the same market.[14] *See* Remand Results at 9. The Department found this price differential to be particularly aberrational based on record evidence that it claims demonstrated that the price of multi-clove garlic decreased between Jinxiang Hejia's period of review and Yuanxin's POR,[15] "suggest[ing] that the market price for garlic in general decreased during this time." Remand Results at 9–10. In other words, Commerce found it unreasonable that, in the context of an overall drop in fresh garlic prices, Yuanxin's product price would so far exceed Jinxiang Hejia's inflation-adjusted price. Remand Results at 9–10.

Plaintiff objects to this finding, arguing "that there is no record evidence to *not* support a price increase" for single-clove garlic between Jinxiang Hejia's period of review and Yuanxin's POR because there is no evidence of supply and demand factors during those periods. Pl.'s Comments 8.

The burden of building the administrative record, however, lies with the interested parties. *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted). Thus, if it believed that the price increase was justified, it was plaintiff's obligation to supply Commerce with a probative source demonstrating that the price for single-clove garlic increased during that time period. Plain-

[14] Specifically, Commerce found that Yuanxin's U.S. sales price of [[ ]] per kilogram of single-clove garlic was [[ ]] percent [[ ]] than Jinxiang Hejia's inflation-adjusted price of [[ ]] per kilogram, both of which were sold in the same market [[ ]] apart. Remand Results at 9. Commerce notes that it "has previously found a sale price 30 percent higher than the average of other sales to not be *bona fide*." Remand Results at 9 n.35 (citing Uncovered Innerspring Units From the PRC, 76 Fed. Reg. 80,337 (Dep't of Commerce Dec. 23, 2011) (rescission of antidumping duty new shipper review), *aff'd*, *Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory v. United States*, 37 CIT __, __, 920 F. Supp. 2d 1350, 1354, 1358 (2013)).

[15] Record evidence indicates that the market price for all fresh garlic [[ ]] by [[ ]] percent between Jinxiang Hejia's and Yuanxin's periods of review. *See* Remand Results at 9.

tiff's failure to do so leaves the Department without evidence that contradicts the record evidence demonstrating a general price drop in the garlic market.

Moreover, as defendant points out, there is no evidence indicating that Yuanxin's significant price increase soon after Jinxiang Hejia's sale[16] is reasonable. Def.'s Comments 9. Indeed, the record indicates that it is not. First, that Yuanxin's sales quantity is comparable to Jinxiang Hejia's eliminates the size of the sale as a reason for Yuanxin's significantly higher sales price. *See* Remand Results at 10. That is, as Commerce concluded, "had [Jinxiang] Hejia's sale consisted of a significantly larger quantity purchase, it could have, in part, explained [the] differences in per-unit prices." Remand Results at 10.

Yuanxin further claims that "four years [after the end of Yuanxin's POR], retail prices in the U.S., Europe, and Australia of single-clove garlic are extremely high compared to multi-clove garlic." Pl.'s Comments 8. Also, according to plaintiff, Commerce improperly assumed that, because multi-clove garlic prices decreased between Jinxiang Hejia's and Yuanxin's periods of review,[17] single-clove garlic prices must have decreased as well. Pl.'s Comments 8.

These arguments are meritless. That single-clove garlic prices were higher than multi-clove garlic several years after the POR does not speak to whether single-clove garlic prices increased or decreased between Jinxiang Hejia's sale and that of Yuanxin. More importantly, Commerce provided evidence that multi-clove garlic prices decreased following plaintiff's POR:

> The evidence on the record indicates that there was a decline in the price for multi-clove garlic between Hejia's and Yuanxin's [periods of review]. The Department routinely uses broad indicators of price movements in adjusting price information from one period to another when more specific indicators are not available. For example, we often use only the consumer price index ("CPI")—the broadest measure of inflation in a country—to adjust values for specific factors of production. In this case, after applying the CPI, we relied on the measure of price movements most specific to the product under review: the fall of the AUV for multi-clove garlic . . . between the Hejia and Yuanxin review periods.

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[16] Yuanxin's price is [[ ]] percent [[ ]] than the sales price of the same merchandise sold by Jinxiang Hejia just [[ ]] months earlier. Remand Results at 9.

[17] As previously noted, Jinxiang Hejia's period of review was November 1, 2007 through June 9, 2008, and Yuanxin's POR was November 1, 2008 through October 31, 2009.

Remand Results at 17. In connection with this finding, Commerce cited evidence demonstrating that "multi-clove and single-clove [garlic] are grown, harvested[,] and sold in the same manner." Remand Results at 19 & nn.63–64. Indeed, the "record indicates growing single-clove garlic requires the same resources required to grow multi-clove garlic," and "single-clove garlic can simply be the unintentional result of a multi-clove garlic crop receiving inadequate moisture." Remand Results at 19 & n.64 (citing Mem. from Lingjun Wang, Analyst, AD/CVD Operations, to The File, PD 2 at bar code 3148675–01 (Aug. 6, 2013), ECF Dkt. No. 102–2). The Department further found that producers of single-clove garlic compete with multi-clove garlic producers because both products "are substitutes to some degree." *See* Remand Results at 19. These factors suggest that, contrary to plaintiff's assertions, cost of production cannot account for Yuanxin's sales price and that there exists some possibility for substitution as to use between single-clove and multi-clove garlic.

Also, while not conclusive because of the lapse of time, the Department cited some evidence that single-clove garlic prices fell between 2009 and 2013:

> [S]ales offers for single-clove garlic [(i.e., the same product as that which was sold by Yuanxin)] for sale to the United States indicate that while single-clove garlic from the 2009 crop was offered for [[ ]], in 2013, the same company offered single-clove for as low as [[ ]] and [[ ]]. . . . It is therefore reasonable to conclude that similar agricultural products experience similar pricing patterns and trends, rather than move in opposite directions.

Remand Results at 17.

Further, plaintiff contends that "Yuanxin seems to have been the *only* Chinese [single-clove] garlic exporter in its POR," giving it a monopoly in the market and, thus, "monopoly pricing." Pl.'s Comments 9. Based on the differences between monopolistic markets and pure competition, Yuanxin reasons that "prices for single-clove garlic are not likely to rise and fall with prices for multi-clove garlic." Pl.'s Comments 9.

Despite plaintiff's claims to the contrary, the court does not find any record evidence to suggest that Yuanxin enjoyed a monopoly over the U.S. single-clove garlic market during the POR. Rather, plaintiff appears to disprove its own claim that it enjoyed a monopoly on single-clove garlic in the United States. Although it insists that Yuanxin was a monopolist during its POR, as discussed in greater detail below, plaintiff also claims that it was improper for Commerce, as

part of its retail price analysis, to compare Yuanxin's sales price to that of Trader Joe's, a major retailer that, according to plaintiff, likely purchased single-clove garlic in significantly larger quantities than that of plaintiff's sale.[18] Pl.'s Comments 11 ("[I]t is reasonable to assume that [Trader Joe's] does not purchase [as few kilograms of single-clove garlic] a year, [as were] sold by Yuanxin."). If plaintiff indeed held a monopoly over the single-clove garlic market in the United States during the POR, Trader Joe's could not possibly have purchased more single-clove garlic than plaintiff sold.

ii. Price Offers from the PRC

In the Remand Results, in addition to Jinxiang Hejia's U.S. sales price from the prior period of review, Commerce looked to price offers for single-clove garlic from exporters in the PRC to the United States. Remand Results at 10. Plaintiff also placed on the record a price for a single reported sale of multi-clove garlic in Japan, as well as its price for a single sale of single-clove garlic in the Netherlands. *See* Remand Results at 24; Pl.'s Comments 2. With respect to the price offers for single-clove garlic placed on the record by plaintiff, the Department observed that a Chinese exporter, Chengwu County Minfeng Fruits & Vegetables Co., Ltd. ("Chengwu County"), offered single-clove garlic at a price range of $0.90 to $1.40 per kilogram during Yuanxin's POR. Remand Results at 10–11. Thus, Commerce determined that Yuanxin's price was significantly higher than the offer prices from the PRC.[19] Remand Results at 11.

Plaintiff insists, without providing a citation for its argument, that Commerce "never uses price offers when actual prices are available," and that the Department has not "demonstrated how these price offers are more relevant than Yuanxin's actual prices to Japan or The Netherlands." Pl.'s Comments 10. Plaintiff further contends that the Department has ignored the prices of Yuanxin's sales to "Japan and The Netherlands, as well as actual prices in the U.S. (and worldwide) four years after the POR, which show that single-clove garlic sells

[18] As part of its retail price analysis, discussed in greater detail below, Commerce compared Yuanxin's sales price to Trader Joe's sales price and found that Trader Joe's retail price was, in fact, lower than plaintiff's export price. *See* Remand Results at 20. Because retail prices are typically higher than export prices as they are further down the distribution chain and reflect a greater number of costs, Commerce found that this price difference was further evidence that Yuanxin's transaction was not bona fide. Remand Results at 11–12. Plaintiff objected to this comparison because, it claimed, Trader Joe's had the ability to keep its costs down by purchasing in greater quantities than Yuanxin sells. *See* Pl.'s Comments 11. Of course, that would not be the case if Yuanxin were the only source of single-clove garlic during the POR.

[19] Commerce found that Yuanxin's price of [[ ]] was [[ ]] percent [[ ]] than the Chinese offer prices. Remand Results at 11.

throughout the U.S. at a price generally about 400 percent of that for multi-clove garlic." Pl.'s Comments 7.

The court cannot credit plaintiff's arguments. Commerce used the price quotes from the PRC to assess whether Yuanxin's sales price was bona fide, not as a source of surrogate values. *See* Remand Results at 23. For this purpose, the price quotes were probative because they were lower than plaintiff's sales price even though, as the Department notes, price quotes are usually "higher than consummated transaction prices [because t]hey represent the seller's starting point, before negotiations with the buyer [have] drive[n] the price down." *See* Remand Results at 23.

As to the sales prices into Japan and the Netherlands, this Court has questioned the reliability of gauging the price of merchandise sold in the United States by comparing it to prices for the same merchandise sold elsewhere, because the market forces and conditions of supply and demand present in the United States differ from those abroad. *See, e.g.*, *Hejia*, 35 CIT at __, Slip Op. 11–112, at 19 ("[T]he court questions how prices from these [other] markets can serve as probative contrasts. Should Commerce continue to rely upon this rationale on remand, it must justify the comparison of [Jinxiang] Hejia's price with prices that are subject to such disparate market forces."). Here, other, more reliable, information was available on the record, including sales prices and price quotes from Jinxiang Hejia and offers from a Chinese exporter for sales into the United States. Thus, Commerce did not need to rely on sales from the PRC into countries other than the United States. That is, single-clove garlic sales prices and sales price offers to the United States are more representative of the price that the U.S. market commands than sales into third countries. Further, plaintiff's sale to Japan was of multi-clove, not single-clove, garlic, and for that reason was less probative than the U.S. price offers for single-clove garlic that Commerce relied upon as part of its analysis.[20]

iii. Retail Prices

Finally, as part of its price analysis in the Remand Results, the Department determined that Yuanxin's sales price was considerably higher than the January 2008 Trader Joe's retail price for single-clove garlic, "despite the fact that the [Trader Joe's] retail price includes

[20] Notably, despite arguing throughout this proceeding that single-clove and multi-clove garlic prices are not comparable, Yuanxin now argues, in this instance, that Commerce should have relied on the sales prices for multi-clove garlic. *See* Pl.'s Comments 7, 8–9, 10.

additional costs not reflected in Yuanxin's sale price."[21] *See* Remand Results at 12.

According to plaintiff, Commerce makes an "apples-to-oranges" comparison by looking to Trader Joe's single-clove garlic retail price, because, unlike Yuanxin, "Trader Joe's is a huge national chain" with "great bargaining power" that likely purchases single-clove garlic in much larger quantities than the amount sold by Yuanxin. Pl.'s Comments 11. By comparison, it argues, "both Yuanxin and [Jinxiang] Hejia sold in small quantities, and to small downstream re-sellers," which, according to Yuanxin, might explain why Trader Joe's retail price was lower than Yuanxin's sales price. *See* Pl.'s Comments 11.

As an initial matter, plaintiff's argument regarding the quantities at which Trader Joe's purchased its single-clove garlic, and its claim that Trader Joe's possesses significant bargaining power that allows it to purchase single-clove garlic at a much lower price than that at which Yuanxin sold its single-clove garlic, are mere speculation. That is, there is nothing on the record to support these contentions. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) ("It is well established that speculation does not constitute 'substantial evidence.'" (quoting *Novosteel SA v. United States*, 284 F.3d 1261, 1276 (Fed. Cir. 2002) (Dyk, J., dissenting) (internal quotation marks omitted)). Moreover, the court further finds plaintiff's argument to be unpersuasive because it ignores the significance of the Trader Joe's price. The Trader Joe's price was noteworthy to Commerce because, despite being further down in the transaction chain, Trader Joe's retail price was still significantly lower than Yuanxin's price. Therefore, even though most retail prices on the record were higher than Yuanxin's, that plaintiff's price was higher than one retailer's price is at least some evidence that the transaction in question was not bona fide. *See* Remand Results at 20–21.

Thus, a comparison of single-clove garlic prices supports Commerce's conclusion that Yuanxin's sales price was aberrational and thus not bona fide.

2. Commerce's Determination that Yuanxin's Price Premium Was Not Bona Fide Is Sustained

After finding that plaintiff's sales price was aberrational when compared to other prices, the Department then looked at the price premium for plaintiff's sales price for single-clove garlic over prices for multi-clove garlic. As part of its analysis, Commerce looked to the

[21] Commerce found that Yuanxin's sales price was [[ ]] than Trader Joe's January 2008 single-clove garlic price of [[ ]] per kilogram. *See* Remand Results at 11–12.

price premium, stated as a percentage difference, between the prices of single- and multi-clove garlic, for (1) Jinxiang Hejia's U.S. sales price, (2) retail sales prices, and (3) price offers from the PRC. *See* Remand Results at 12. The Department found that, despite "single-clove garlic demand[ing] a higher price than multi-clove garlic in . . . the PRC and the United States," Yuanxin's price premium (i.e., the percentage difference between the sales price of its single-clove garlic and prices for multi-clove garlic that entered the United States during the POR) was unjustifiably higher than the other premiums on the record. Remand Results at 12 ("As discussed below, there is evidence on the record that supports the contentions that a premium for single-clove garlic exists. Specifically, we find that single-clove garlic demands a higher price than multi-clove garlic in . . . the PRC and the United States. However, we find that any premium that may be charged above the price for multi-clove garlic does not explain the sales price for Yuanxin's [new shipper review] sale."). In other words, although a premium price on sales of single-clove garlic could be explained and supported by record evidence, the size of the claimed premium on Yuanxin's sale could not.

First, Commerce determined Jinxiang Hejia's single-clove garlic price premium above the AUV for multi-clove garlic during Jinxiang Hejia's period of review. *See* Remand Results at 12. The Department then compared that premium with Yuanxin's premium above the AUV during its POR, and reasonably concluded that plaintiff's premium was "aberrationally high."[22] Remand Results at 12. Put another way, by comparing Yuanxin's premium to the calculated premium for Jinxiang Hejia, the Department found that plaintiff's premium was not in line with Jinxiang Hejia's market-driven premium.

Next, the Department looked to U.S. sales receipts and grocery store photographs from July 2013 that were submitted by Yuanxin on remand. Remand Results at 12–13. Although some of these receipts were illegible, such that the prices could not be determined, Commerce nevertheless used the remaining legible receipts and photographs to find that the highest single-clove garlic retail price of $3.99 per pound was 303 percent higher than the $0.99 per pound retail price for multi-clove garlic. Remand Results at 13. Thus, the Department observed that, compared to this 303 percent premium, "Yuanx-

[22] Commerce compared Jinxiang Hejia's single-clove garlic price premium of [[ ]] percent over multi-clove garlic to Yuanxin's premium of [[ ]] percent. Remand Results at 12. To derive these price premiums, Commerce (1) calculated the percent difference between Jinxiang Hejia's single-clove garlic sales price and the AUV during Jinxiang Hejia's period of review, and calculated the difference between Yuanxin's sales price and the AUV during Yuanxin's POR. Remand Results at 21.

in's . . . premium for single-clove garlic over the AUV for multi-clove garlic during the POR" was "aberrationally high." Remand Results at 13. Given the difference between Yuanxin's premium and this 303 percent premium, the court cannot credit plaintiff's assertion that the retail premium is evidence that Yuanxin's price was reasonable.

Last, Commerce considered PRC price offers and a news report as additional points of comparison in its price premium analysis. Assuming that Chengwu County (a Chinese exporter of garlic) sold single-clove garlic at its highest advertised asking price of $1.40 per kilogram and sold multi-clove garlic at its lowest asking price of $0.90 per kilogram, the Department found a price premium of 55.56 percent for single-clove garlic. Remand Results at 13. As compared to the AUV for multi-clove garlic during plaintiff's POR, Commerce noted that the Chinese price premium was "a fraction" of Yuanxin's premium.[23] *See* Remand Results at 13. Moreover, the Department referenced an article from a Chinese financial newspaper that indicated that the single-clove garlic price premium in the PRC in May 2010 was significantly lower than Yuanxin's price premium.[24] *See* Remand Results at 13–14 (citing *China: Garlic Prices Surge Once Again*, FRESHPLAZA, May 5, 2010 at 7, PD 13 at bar code 3150408–02 (Aug. 16, 2013), ECF Dkt. No. 102–13). Thus, the Department concluded that, while single-clove garlic did command a premium in the Chinese market, the premium did not approach that claimed by plaintiff.

Plaintiff objects to defendant's price premium analysis as a whole, arguing that, "[w]hile Commerce states that it is no longer comparing Yuanxin's price to the AUV, it in fact does just that" by calculating price premiums using the AUV. Pl.'s Comments 12.

This argument is unpersuasive. In its Remand Results, Commerce no longer relied on a *direct* comparison of Yuanxin's price to the AUV, instead analyzing price premiums *based on* the AUV. *See* Remand Results at 8, 12. That is, rather than simply comparing Yuanxin's price to the AUV, Commerce now calculates price premiums for single-clove garlic over multi-clove garlic stated as percentages. Given the scarcity of record evidence on average U.S. single-clove garlic import prices both during and outside of Yuanxin's POR, Commerce's comparison of Yuanxin's sales price to the AUV data in order

[23] Commerce found, based on the AUV for multi-clove garlic of [[ ]] per kilogram, that the Chinese price premium was [[ ]] percent, which it then compared to Yuanxin's price premium of [[ ]] percent. Remand Results at 13.

[24] The article, which quoted the Chongqing Economic Times, a Chinese business newspaper, stated that in May 2010, single-clove garlic had a price premium of 15 percent. Remand Results at 14 (citing *China: Garlic Prices Surge Once Again*,FRESHPLAZA, May 5, 2010 at 7, PD 13 at bar code 3150408–02 (Aug. 16, 2013), ECF Dkt. No. 102–13).

to determine a percentage price differential does not conflict with the Department's practice, of considering single-clove garlic to be a unique product, established in *Hejia*. Rather, it confirms it. Put differently, Commerce's use of the AUV in this case is not inconsistent with its determination in *Hejia*, where it found that a direct comparison of single-clove garlic prices to the AUV was not probative because the AUV contained mostly multi-clove garlic prices. Here, Commerce looked at various price premiums for single-clove garlic over the AUV, and in so doing, compared the price premium for plaintiff's single-clove garlic to other calculated premiums for single-clove garlic. Accordingly, the court finds that Commerce's methodology is reasonable and that it complies fully with its order in *Yuanxin I*. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 25–26.

Next, plaintiff argues that "[t]he majority of retail prices in the U.S. in 2013, based on actual purchases contained in the remand record," are higher than Yuanxin's price,[25] meaning that there would be "huge profit [margins] for retailers" purchasing from Yuanxin. Pl.'s Comments 11. Thus, plaintiff claims that its price was reasonable because hypothetical U.S. resellers could buy at Yuanxin's price and still make a profit. In addition, plaintiff claims that Commerce found that "Yuanxin . . . made [an enormous] percent profit since its price is that much higher than a completely different product, multi-clove garlic." Pl.'s Comments 13.

These arguments miss the point. As defendant correctly notes, it appears that Yuanxin conflates "price premium" with "profit." Def.'s Comments 13. For example, although plaintiff repeatedly refers to Commerce's calculation of Yuanxin's profit (i.e., the percentage difference between plaintiff's sales price of its single-clove garlic and the AUV for multi-clove garlic), this value actually refers to plaintiff's price premium above the AUV for multi-clove garlic during its POR. *See* Pl.'s Comments 12–13. Nowhere does plaintiff indicate that it has calculated Yuanxin's profit from its sole sale, nor does it provide data that would enable the court to determine its profit. Further, whether Yuanxin, as the exporter, made a profit is not relevant to the bona fides analysis. Rather, the relevant inquiry is whether the exporter's U.S. customer made a profit. *See Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory v. United States*, 37 CIT __, __, 920 F. Supp. 2d 1350, 1353 (2013) ("In determining whether a company's sales are *bona fide*, Commerce weighs the totality of circumstances, including such factors as . . . whether the goods were *resold* at a profit . . . ." (emphasis added) (citation omitted) (internal quotation marks omit-

[25] According to plaintiff, U.S. retail prices in 2013 were approximately $8.80 per kilogram, compared to Yuanxin's price of [[ ]] per kilogram. Pl.'s Comments 11.

ted)). Here, plaintiff did not place on the record the sales price between the sporting and athletic goods manufacturer (Yuanxin's U.S. customer), and that company's purchaser. Thus, although a reseller's profit margin is one factor generally accounted for as part of Commerce's bona fides analysis, the record here did not contain necessary information to permit Commerce to calculate the U.S. customer's profit.

3. Conclusion

Based on the Department's comparison of Yuanxin's sales price to (1) Jinxiang Hejia's price, (2) price offers from the PRC, and (3) the Trader Joe's retail price, the court finds that Commerce has demonstrated with substantial evidence that plaintiff's price was aberrational when compared to other prices. In addition, having evaluated Commerce's price premium analysis, the court finds the Department's determination that plaintiff's price premium was not bona fide to be supported by substantial evidence and in accordance with law.

B. The Department Properly Rejected Plaintiff's Submissions of Additional Information

In its comments, Yuanxin objects to Commerce's rejection of its two submissions, which were not included in the record, one, for being beyond the scope for which Commerce reopened the record,[26] and the other, as untimely. Pl.'s Comments 18. Plaintiff argues that Commerce erred in refusing to consider information concerning (1) the industries in which its importer (the sporting and athletic goods manufacturer) operates and (2) its untimely submission of prices of single-clove garlic in the United States. Pl.'s Comments 18, 19. According to plaintiff, Commerce should have accepted these filings

[26] The record is unclear as to the date Yuanxin submitted the importer documentation. The Department's Remand Results state that the importer documentation was filed on August 16, 2013, which would render Yuanxin's submission timely. *See* Remand Results at 5. The administrative record, however, indicates that the documentation was submitted on August 19, 2013, three days after the deadline, rendering plaintiff's submission untimely. *See* Letter from John J. Kenkel, Counsel for Yuanxin, to Hon. Penny Pritzker, Assistant Secretary for Import Administration, U.S. Department of Commerce at 1, PD 10 at bar code 3150399–01 (Aug. 19, 2013), ECF Dkt. No. 102–10; Letter from Mark E. Hoadley, Acting Office Director, AD/CVD Operations, to John J. Kenkel, Counsel for Yuanxin, PD 15 at bar code 3150811–01 (Aug. 21, 2013), ECF Dkt. No. 102–15 ("Rejection Letter"). While plaintiff, in its comments on the Remand Results, appears to concede that its submission was untimely, at oral argument plaintiff's counsel stated that the importer documentation was submitted on August 16, 2013. *See* Pl.'s Comments 19. Nonetheless, the timeliness of plaintiff's submission is immaterial because the Department, when rejecting the importer documentation, specified that the information was beyond the purpose for which Commerce had reopened the record. *See* Rejection Letter.

because "the record was incomplete without full information required to make a reasoned, reasonable decision, either by Commerce or the Court." *See* Pl.'s Comments 18. With regard to the importer information, which was rejected as "beyond the limited scope for which the Department opened the record," Yuanxin "believes that the [c]ourt prematurely ruled on the importer issue" in *Yuanxin I* because plaintiff had not been asked to submit information on the industries in which the importer operates in the initial new shipper review, and, as a result, had not previously provided it. *See* Remand Results at 5; Pl.'s Comments 20; *Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 24, 25. With respect to timeliness, Yuanxin points out that Commerce was granted additional time to file its Remand Results, "[y]et, with all this extra time, Commerce did not grant a single extra day to the parties to supplement the record." Pl.'s Comments 19. Plaintiff also states that it did not request an extension because it was "unaware that [it] was able to collect additional data." Pl.'s Comments 19.

Defendant notes that Yuanxin concedes that it did not request an extension of time and argues that (1) the Department provided parties with "ample time (17 days) to submit new information," (2) Yuanxin "was on notice of the issues to be re-opened as of the [c]ourt's June 18, 2013 remand order," and (3) Commerce properly exercised its discretion to reject untimely submissions. Def.'s Comments 14–15. Defendant-intervenors additionally point out that Yuanxin does not provide an explanation for why it was unable to submit the information in question in a timely manner. Def.-ints.' Comments 12–13.

The court finds that Commerce acted within its discretion in rejecting plaintiff's filings, both the importer documentation, which was rejected as "beyond the limited scope for which the Department opened the record," and the additional single-clove garlic market and price information, which was rejected as untimely. Remand Results at 5–6. Although in *Yuanxin I*, the court gave the Department the discretion to reopen the record for any purpose, the Department was not obligated to do so with respect to issues the court had already decided. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 26. The court ruled in *Yuanxin I* that "Commerce's conclusion that the circumstances surrounding Yuanxin's sale were 'atypical of normal business practice'"—given that "a sporting goods manufacturer acted as a middleman for its sale to the [U.S. w]holesaler, a company that had previously purchased single-clove garlic directly from Hejia"—was

reasonable.[27] *Id.* at __, Slip Op. 13–77, at 24. That being the case, Commerce was under no obligation to accept plaintiff's submission. That is, Commerce was only required to reopen the record for the limited purpose of soliciting additional information about the garlic market, an order with which Commerce complied. *See id.* at __, Slip Op. 13–77, at 26; Remand Results at 5–6. Information about the operations of plaintiff's importer[28] clearly falls beyond the scope of the court's order and the type of information Commerce solicited upon reopening the record.

Additionally, the Department did not abuse its discretion in rejecting the market and price data that Yuanxin filed nine days after the submission deadline. The deadline with which plaintiff failed to comply pertained to the submission of new "information regarding whether single-clove garlic is a unique product, whether there is a distinct or specialized market for single-clove garlic, and whether these facts affect the price that single-clove garlic commands." *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 26. Plaintiff was on notice as of June 18, 2013, with the publication of *Yuanxin I*, that it would have the opportunity to submit new information concerning the single-clove garlic market to supplement the record. *See id.* at 25–26. Although plaintiff insists that the Department should have voluntarily afforded it an extension of time to submit this information (i.e., until August 30, 2013), it has offered no reason for the delay and why it was unable to comply with Commerce's seventeen-day window for submissions. *See* Remand Results at 25 ("The Department provided parties with 17 days to submit new information plus an additional five days to submit rebuttal information. Moreover, the Department was compelled to re-open the record as a result of the [c]ourt's remand on June 18, 2013, in which the [c]ourt clearly identified the evidentiary issue at stake: whether substantial evidence indicates single-clove and multi-clove garlic are distinct products. Therefore, parties had more than six weeks to gather relevant evidence and 22 days to place it on the record."). In addition, plaintiff has provided no explanation as to why it did not seek, as it could have, an extension from the Department at the time. *See* 19 C.F.R. § 351.302.

Thus, having already found that Commerce complied in accordance with the court's order, the court holds that the Department acted

[27] It is worth noting that the court found the sale atypical, not that it was atypical for a sporting and athletic goods manufacturer to be dealing in foodstuffs. *See Yuanxin I*, 37 CIT at __, Slip Op. 13–77, at 24.

[28] Apparently, plaintiff submitted this information in order to further explain its "importer's background, specifically, the industries in which it operates." Pl.'s Comments 19 (citation omitted). Plaintiff insists that this documentation would have demonstrated that the importer operated in the food industry. *See* Pl.'s Comments 19–20.

within its discretion in rejecting plaintiff's untimely submission. *See CEMEX, S.A. v. United States*, 19 CIT 587, 597–98 (1995) (citations omitted).

CONCLUSION

Based on the Department's examination of the totality of the circumstances and on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Results of Redetermination are sustained. Judgment will be entered accordingly.

Dated: March 23, 2015
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 15–31

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

Court No. 13–00044

[Granting Plaintiff's Motion for Judgment on the Agency Record]

Dated: April 9, 2015

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff. With him on the briefs were *J. Kevin Horgan* and *John J. Kenkel*.

Ryan M. Majerus, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for Defendant. With him on the briefs were *Benjamin C. Mizer*, Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch. Of counsel on the briefs was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

David C. Smith, Kelley Drye & Warren LLP, of Washington D.C., argued for Defendant-Intervenor. With him on the briefs were *Paul C. Rosenthal* and *Benjamin Blase Caryl*.

OPINION

RIDGWAY, JUDGE:

In this action, Plaintiff Zhaoqing Tifo New Fibre Co., Ltd. ("Zhaoqing Tifo") – a Chinese producer and exporter of polyester staple fiber – contests the final results of the U.S. Department of Commerce's fourth administrative review of the antidumping duty order covering polyester staple fiber from the People's Republic of China.

See 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 Results"); Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review (Jan. 4, 2013) (Pub. Doc. No. 108) ("Issues & Decision Memorandum").[1]

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Zhaoqing Tifo contends that the antidumping margin calculated by Commerce in the Final Results "double counts" certain energy costs and is therefore too high. *See generally* Plaintiff's Rule 56.2 Memorandum Re Counts I-IV of the Complaint in Support of Judgment on the Agency Record ("Pl.'s Brief"); Plaintiff's Rule 56.2 Reply Brief ("Pl.'s Reply Brief").

The Government opposes Zhaoqing Tifo's motion, arguing that the company failed to exhaust its administrative remedies, and that, in any event, Commerce's treatment of energy costs in the Final Results is supported by substantial evidence and otherwise in accordance with law. The Government thus maintains that Commerce's determination should be sustained. *See generally*, *e.g.*, Defendant's Response to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s Response Brief"). Notably, the Government does not directly address the merits of Zhaoqing Tifo's claim that the treatment of energy costs in the Final Results led to double counting. *Id*. Like the Government, the Defendant-Intervenor – DAK Americas LLC (the "Domestic Producer") – similarly contends that Zhaoqing Tifo's motion is barred by the doctrine of exhaustion, and, moreover, asserts that there is no double counting. *See generally*, *e.g.*, Defendant-Intervenor's Response Brief in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.-Int.'s Response Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[2] For the reasons set forth below, Zhaoqing Tifo's Motion for Judgment on the Agency Record must be granted and this matter remanded to Commerce for further consideration.

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[1] Because the administrative record in this action includes confidential (*i.e.*, business proprietary) information, there are two versions of the record – the public version and the confidential version. Only documents from the public version of the record, which have all confidential information redacted, are cited herein. Moreover, all cited documents were filed through IA ACCESS, an electronic filing system that Commerce began using during the course of the administrative review at issue, as a replacement for the agency's older Central Records Unit (CRU) system. All documents are cited as "Pub. Doc. No. ____."

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

I. *BACKGROUND*

Dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the merchandise and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010).

Normal value generally is calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country. *See* 19 U.S.C. § 1677b.[3] However, where – as here – the exporting country has a non-market economy, there is often concern that the factors of production (inputs) that are consumed in producing the merchandise at issue are under state control, and that home market sales therefore may not be reliable indicators of normal value. *See* 19 U.S.C. § 1677(18)(A); *see generally Dorbest*, 604 F.3d at 1367.

In cases such as this, where Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the merchandise to be determined in the typical manner, Commerce identifies one or more market economy countries to serve as a "surrogate" and then "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production" in the relevant surrogate country or countries,[4] including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1), (4). 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*, *e.g.*, *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015) (explaining that "Commerce 'attempt[s] to construct a hypothetical market value of [a] product' in the nonmarket economy" at issue (quoting *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999))).

[3] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See* 19 U.S.C. § 1677b(a)(1)(B)(ii); *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) (discussing 19 U.S.C. § 1677b(a)(1)(B)(ii), (C)).

[4] Commerce typically values all factors of production using a single surrogate country. 19 C.F.R. § 351.408(c)(2) (2010); *Dorbest*, 604 F.3d at 1368.

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." *See* 19 U.S.C. § 1677b(c)(3); *see generally Dorbest*, 604 F.3d at 1367–68. However, valuing the factors of production consumed in producing subject merchandise does not capture certain items such as (1) manufacturing/factory overhead, (2) selling, general, and administrative expenses ("SG&A"), and (3) profit. Commerce calculates those surrogate values 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* 19 C.F.R. § 351.408(c)(4) (2010)[5]; 19 U.S.C. § 1677b(c)(1); *Dorbest*, 604 F.3d at 1368. The central issue in the pending motion is whether – as Zhaoqing Tifo alleges – certain energy costs are embedded in the surrogate financial ratios that Commerce used in the Final Results here that are also (in effect) captured elsewhere in the agency's antidumping calculations, resulting in the double counting of energy costs (and thus inflating Zhaoqing Tifo's antidumping margin).[6]

[5] All references to regulations are to the 2010 edition of the Code of Federal Regulations. The pertinent text of the regulations cited remained the same at all times relevant herein.

[6] "An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)); *see also Ningbo Dafa Chemical Fiber Co. v. United States*, 580 F.3d 1247, 1257 (Fed. Cir. 2009) (highlighting Commerce's obligation to "establish[] antidumping margins as accurately as possible" (quoting *Shakeproof*)); *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (summarizing Court's "reason[ing] that the purpose of the statutory provisions is to determine antidumping margins 'as accurately as possible'" (quoting *Lasko*)); *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993) for proposition that "statutory purpose 'is to facilitate the determination of dumping margins as accurately as possible . . .'"; quoting *Rhone Poulenc*, 899 F.2d at 1191 for proposition that the antidumping statute "sets forth procedures in an effort to determine margins 'as accurately as possible'").

Accordingly, the caselaw holds that, as a general rule, double counting is not permitted in antidumping margin calculations, because it is distortive, rendering margins less accurate. *See*, *e.g.*, *DuPont Teijin Films China Ltd. v. United States*, 38 CIT ____, ____, 7 F. Supp. 3d 1338, 1345–46 (2014) (ruling that "double counting should be avoided, as it does not provide a fair price comparison"); *Geum Poong Corp. v. United States*, 26 CIT 322, 326–28, 193 F. Supp. 2d 1363, 1369–71 (2002) (remanding matter to agency for reconsideration of double counting, explaining that "[c]ounting potentially anomalous profit rates twice . . . would give a misleading picture of the profit experience of other . . . producers of goods in the same general category as the subject merchandise"); *Holmes Products Corp. v. United States*, 16 CIT 628, 632, 795 F. Supp. 1205, 1207–08 (1992) (holding that "[d]ouble-counting is to be avoided"); *see also* Pl.'s Brief at 22 n.5 (collecting cases on double counting). Commerce's

The underlying antidumping order in this case, which dates back to 2007, covers polyester staple fiber from the People's Republic of China ("PRC"), a product generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. *See* Notice of Antidumping Duty Order: Certain Polyester Staple Fiber from the People's Republic of China, 72 Fed. Reg. 30,545, 30,546 (June 1, 2007). The case at bar involves the fourth administrative review of that antidumping duty order.[7] The period of review is June 1, 2010 through May 31, 2011.

Zhaoqing Tifo itself requested this administrative review, because, the company explains, "all the rates of the mandatory respondents earned in the first through the third administrative review were *de minimis* and the 4.44% rate assigned to Zhaoqing Tifo as a 'separate rate' exporter was a hindrance to [the company's] sales" of polyester staple fiber. Pl.'s Brief at 2–3. "Indeed," Zhaoqing Tifo states, "the three largest producer/exporters of recycled [polyester staple fiber] have been excluded from the [Antidumping Duty] Order." *Id*. at 3. Like those three producers, Zhaoqing Tifo recycles bottles made from polyester staple fiber (*e.g.*, water and soda bottles) by chipping, cleaning, drying, and extruding them into polyester staple fiber. *Id*.

In all four prior segments of this proceeding – that is, in the original antidumping duty investigation that led to the Antidumping Duty Order here and in the first three administrative reviews of that Order, Commerce selected India as the surrogate country and relied on Indian financial statements to calculate surrogate financial ratios. Plaintiff's Supplemental Brief Regarding Exhaustion of Administrative Remedies at 3 ("Pl.'s Supp. Brief"). Because financial statements in India are relatively detailed, Commerce was able to segregate (*i.e.*, isolate) the energy costs that were reflected in the financial statements and to exclude them from the surrogate financial ratios calculated by the agency. *Id*. Commerce then separately valued Zhaoqing Tifo's energy costs – including electricity, water, and coal – in the

administrative determinations are to the same general effect. *See*, *e.g.*, 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)).

[7] Antidumping duty investigations (*i.e.*, "original" investigations) determine in the first instance "whether the elements necessary for the imposition of [an antidumping] duty . . . exist." 19 U.S.C. § 1673a. The statute also provides for periodic (typically, annual) administrative reviews of antidumping duty orders (at the request of an interested party), to update the applicable antidumping duty rate. *See* 19 U.S.C. § 1675; *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed. Cir. 2012).

factors of production database. *Id*.[8] This methodology avoided any potential double counting.

In this fourth administrative review, Commerce advised the parties that it "intend[ed] to issue its surrogate country selection prior to or in" the agency's Preliminary Results. *See* Commerce's Memorandum to All Interested Parties at 2 (Nov. 9, 2011) (Pub. Doc. No. 27) ("Commerce's Memorandum on Surrogate Country Selection"). India did not appear on the "non-exhaustive list of six countries" that Commerce provided to the parties for consideration as potential surrogates. *Id*. at 1.[9] Commerce solicited the parties' views as to the appropriate surrogate country, establishing a firm deadline for the filing of such views. At the same time, Commerce also set a second deadline (which was one month after the first deadline) for the parties' submission of any "publicly available information to value factors of production for consideration for purposes of [Commerce's Preliminary Determination]." *See id*. at 2; Certain Polyester Staple Fiber From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, 77 Fed. Reg. 39,990, 39,991–92 (July 6, 2012) ("Preliminary Results") (summarizing Commerce's Memorandum on Surrogate Country Selection).

On the deadline specified by Commerce, Zhaoqing Tifo submitted its views concerning the selection of an appropriate surrogate country, advocating for Thailand. Preliminary Results, 77 Fed. Reg. at 39,991.[10] The deadline came and went, however, and the Domestic Producer filed nothing. *Id*. On Commerce's second deadline (one month thereafter), Zhaoqing Tifo submitted extensive, detailed data concerning the valuation of factors of production, assuming the se-

[8] Zhaoqing Tifo uses "simple steam coal" to heat water as part of its production process. *See* Issues & Decision Memorandum at 3 (Comment 1). Consistent with the practice of the parties in their briefs, the terms "coal" and "steam coal" are used interchangeably herein.

[9] At the time, Commerce had begun to move away from the use of India as the surrogate country, concerned that India and the PRC are not at sufficiently comparable levels of economic development. *See* Defendant's Response to Plaintiff's Supplemental Brief at 2 ("Def.'s Supp. Response Brief"); Issues & Decision Memorandum at 4, 7–8 (Comment 1); Commerce's Memorandum on Surrogate Country Selection at 1 (listing six countries, including Thailand and Indonesia, determined to be at level of economic development comparable to PRC).

[10] It is worth noting that the section of the Preliminary Results devoted to "Surrogate Country" makes no reference to Zhaoqing Tifo's December 9, 2011 submission – the sole timely filing that Commerce received in response to the agency's request for parties' views concerning the selection of an appropriate surrogate country. Instead, that section of the Preliminary Results refers only to Zhaoqing Tifo's January 9, 2012 submission of data concerning the valuation of factors of production (submitted on the deadline specified by Commerce for the parties' filing of such information) and to the Domestic Producer's data, which were filed 10 days after that deadline. *Compare* Preliminary Results, 77 Fed. Reg. at 39,992 (section captioned "Surrogate Country"), *with id*., 77 Fed. Reg. at 39,991 (section captioned "Surrogate Country and Surrogate Value Data").

lection of Thailand as the surrogate country (particularly in the absence of any suggestion of any other country by the Domestic Producer). *Id*. That second deadline passed and, again, the Domestic Producer filed nothing. *Id*.

Not until 10 days after Commerce's second deadline did the Domestic Producer file comments setting forth (for the first time, in comments that the Domestic Producer styled as "rebuttal") its views that Commerce should select Indonesia as the surrogate country – a full 41 days past Commerce's specified deadline for the parties' submission of such views. *See* Domestic Producer's Submission of Surrogate Value Data for Preliminary Results (Cover Letter) at 3 (Jan. 19, 2012) (Pub. Doc. No. 43); Preliminary Results, 77 Fed. Reg. at 39,991–92 (referring to Domestic Producer's submission); Commerce's Memorandum on Surrogate Country Selection at 2 (directing parties to file "comments, if any, on surrogate country selection . . . *no later than December 9, 2011*"). With those views, the Domestic Producer also submitted surrogate value data that assumed Commerce's selection of Indonesia as the surrogate country – 10 days after the deadline specified by Commerce for the submission of such data for consideration for inclusion in the Preliminary Results. *See* Domestic Producer's Submission of Surrogate Value Data for Preliminary Results (Parts 1–2) at Atts. 1–2 (Jan. 19, 2012) (Pub. Doc. Nos. 44–45); Preliminary Results, 77 Fed. Reg. at 39,991–92 (referring to Domestic Producer's submission); Commerce's Memorandum on Surrogate Country Selection at 2 (requiring all comments and surrogate value data for consideration in the Preliminary Results to be filed "*no later than January 9, 2012*").[11]

In the Preliminary Results, Commerce – for the first time in any segment of this proceeding – selected Indonesia as the surrogate country, as advocated by the Domestic Producer in the comments that it filed with Commerce. Preliminary Results, 77 Fed. Reg. at 39,992–93.[12] To derive surrogate financial ratios, the Preliminary Results relied on the financial statements of P.T. Asia Pacific, an

[11] In its submission on surrogate country selection and surrogate value data, the Domestic Producer acknowledged that – due to the timing of the submission – Commerce was not obligated to consider the proffered information in preparing the agency's Preliminary Results. Domestic Producer's Submission of Surrogate Value Data for Preliminary Results (Cover Letter) at 3 n.7. The Domestic Producer did not explain why it failed to file its views urging Commerce to select Indonesia as the surrogate country on or before the firm deadline that the agency had established for the submission of such views. Nor did the Domestic Producer explain why it had not submitted its surrogate value data on or before the deadline that Commerce set for the submission of such data to permit it to be considered for purposes of the Preliminary Results.

[12] Zhaoqing Tifo has not contested Commerce's selection of Indonesia as the surrogate country for this review. However, in making its case on exhaustion of administrative

Indonesian producer of polyester staple fiber. *Id*., 77 Fed. Reg. at 39,992, 39,995. Commerce based that decision in part on its understanding at that time that P.T. Asia Pacific "share[d] the same level of integration as Zhaoqing Tifo." *Id*., 77 Fed. Reg. at 39,992.

P.T. Asia Pacific's financial statements are relatively detailed, and include separate line items for that company's energy inputs. Pl.'s Brief at 5; *see also* Petitioner's Rebuttal Brief at 13–14 (Pub. Doc. No. 101) ("Domestic Producer's Administrative Rebuttal Brief"). Commerce therefore excluded all energy costs from the surrogate financial ratios for purposes of the Preliminary Results, and valued all of Zhaoqing Tifo's energy inputs – coal, electricity, and water – in the factors of production database, with no concerns about double counting. Pl.'s Brief at 5. The Preliminary Results addressed Commerce's determinations concerning surrogate values not only for coal, electricity, and water, but also for a wide range of other factors of production, including such items as inland freight and brokerage and handling. *See generally* Preliminary Results, 77 Fed. Reg. at 39,994–95.

Following Commerce's publication of the Preliminary Results,[13] Zhaoqing Tifo filed an administrative case brief with the agency. *See* Case Brief of Zhaoqing Tifo New Fibre Co., Ltd. (Pub. Doc. No. 94) ("Zhaoqing Tifo's Administrative Case Brief"); Final Results, 78 Fed. Reg. at 2366. In that brief, Zhaoqing Tifo explained that the operations of P.T. Asia Pacific were 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 for this administrative review. Zhaoqing Tifo argued that Commerce instead should rely on the financial statements of a different Indonesian producer of polyester staple fiber, P.T. Tifico Fiber Indonesia Tbk ("P.T. Tifico"), which Zhaoqing Tifo had placed on the administrative record. Zhaoqing Tifo explained that P.T. Tifico – like Zhaoqing Tifo – is not fully integrated. *See generally* Zhaoqing Tifo's Administrative Case Brief at 3, 15.

remedies, Zhaoqing Tifo has sought to spell out the practical and procedural repercussions of the Domestic Producer's untimely submission of its views on surrogate country selection. *See* n.25, *infra*.

[13] In the Preliminary Results, Commerce stated that Zhaoqing Tifo's dumping margin was 0.21% (*i.e.*, *de minimis*). Preliminary Results, 77 Fed. Reg. at 39,996. However, that figure was in error. Following publication of the Preliminary Results, the Domestic Producer submitted ministerial error comments, pointing out that Commerce had inadvertently calculated the per-unit rate (when it should have calculated the *ad valorem* rate) and that the correct dumping margin was 15.09%. Commerce agreed, and reflected the correction when it issued the Final Results. *See* Issues & Decision Memorandum at 16 (Comment 6); Def.'s Response Brief at 3 n.1.

Attached to its administrative case brief were Zhaoqing Tifo's proposed calculations of surrogate financial ratios derived from the financial statements of P.T. Tifico. *See* Zhaoqing Tifo's Administrative Case Brief at 20; *id*. at Exh. 3. In the presentation of the proposed surrogate financial ratios, Zhaoqing Tifo left the "Energy" column blank, reflecting the fact that – unlike the financial statements of P.T. Asia Pacific – P.T. Tifico's financial statements do not include specific line items for energy inputs. *See* Zhaoqing Tifo's Administrative Case Brief at Exh. 3; *see also* Pl.'s Supp. Brief at 11–12 (captioned "Zhaoqing Tifo Presented A Financial Calculation With No Energy Factors, Implying That If The Department Included Them As [Factors of Production] They Would Be Double Counted"); Plaintiff's Supplemental Response Brief Regarding Exhaustion of Administrative Remedies at 5, 8 ("Pl.'s Supp. Response Brief") (similar).

Besides contesting the financial statements used to derive the surrogate financial ratios, Zhaoqing Tifo's administrative case brief also challenged the surrogate values for coal and for water that Commerce used in calculating the Preliminary Results. In particular, on the assumption that Commerce would continue to rely on P.T. Asia Pacific's financial statements in the Final Results and thus would also continue to include coal in the factors of production database (as Commerce did in the Preliminary Results), Zhaoqing Tifo argued that Commerce should abandon the Indonesian import statistics that were used to value coal in the Preliminary Results and instead should use domestic values – specifically, coal prices from the Indonesian Ministry of Energy and Mineral Resources for the grade of coal that Zhaoqing Tifo uses in its operations. Zhaoqing Tifo's Administrative Case Brief at 2, 7–15. Zhaoqing Tifo further advocated that the water costs for a single municipality (which were used in the Preliminary Results) should be replaced with averaged water rates including data for additional municipalities. *Id*. at 3, 23.[14]

Although the Domestic Producer did not file an administrative case brief, it did file a rebuttal brief responding to Zhaoqing Tifo's brief. *See generally* Domestic Producer's Administrative Rebuttal Brief; Final Results, 78 Fed. Reg. at 2366. The Domestic Producer argued that, in calculating surrogate financial ratios, Commerce's Final Results should continue to rely on the financial statements of P.T. Asia

[14] In addition to the selection of financial statements used to derive surrogate financial ratios, and the surrogate values for coal and water, Zhaoqing Tifo's administrative case brief also addressed Commerce's "zeroing" practice and contested the Preliminary Results' treatment of inland freight costs, and brokerage and handling costs. *See generally* Zhaoqing Tifo's Administrative Case Brief at 3–4, 20–28. However, none of those issues has any bearing on the pending motion.

Pacific that were used in the Preliminary Results. *See* Domestic Producer's Administrative Rebuttal Brief at 13–14. The Domestic Producer characterized any differences between the levels of integration of Zhaoqing Tifo and P.T. Asia Pacific as "trivial." *Id*. at 13.

More importantly for purposes of the pending motion, in the rebuttal brief that it filed with Commerce, the Domestic Producer underscored the fact that the financial statements of P.T. Tifico are much less "complete and detailed" than those of P.T. Asia Pacific – a concern that the Domestic Producer characterized as "more critical" than any differences in the relative levels of integration of the companies' operations. Domestic Producer's Administrative Rebuttal Brief at 13–14. In particular, the Domestic Producer emphasized that P.T. Tifico's financial statements "include[] *no separate breakout* of [P.T. Tifico's] energy costs." *Id*. (emphasis in the original); *see also id*. at 1 (stating that P.T. Tifico "is a less suitable surrogate because its financial data are less detailed").

Criticizing Zhaoqing Tifo for assertedly "ignor[ing] the lack of . . . *electricity*, *water or any other energy-specific data*" in P.T. Tifico's financial statements, the Domestic Producer underscored that those financial statements "have a major element missing, namely the cost of goods sold has *no breakout for electricity*, *water or other energy factors*." Domestic Producer's Administrative Rebuttal Brief at 14 (emphases added). The Domestic Producer further expressly cautioned Commerce that – if the agency were to decide to rely on P.T. Tifico's financial statements for purposes of the Final Results – the agency would be required 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*" (*i.e.*, to remove all "energy and water consumption factors" from Zhaoqing Tifo's factors of production database), "in order to capture all costs while also preventing double-counting." *Id*. (emphases added); *see also* Issues & Decision Memorandum at 9 (restating, almost *verbatim*, Domestic Producer's points concerning the absence of any line items for "electricity, water, [and] other energy factors" in P.T. Tifico's financial statements and related need for Commerce to remove "all company-specific energy and water consumption factors" from factors of production database, in order to "prevent[] double-counting").

The Domestic Producer similarly addressed the other claims in Zhaoqing Tifo's administrative case brief. As to the valuation of coal, for example, the Domestic Producer argued that Commerce's Preliminary Results properly relied on import data, disputing Zhaoqing Tifo's attacks on the accuracy and reliability of those data and questioning

the domestic price data that Zhaoqing Tifo proffered. Domestic Producer's Administrative Rebuttal Brief at 1–13. The Domestic Producer also opposed Zhaoqing Tifo's assertions that the Final Results should use a more broad-based set of data to value water. *Id*. at 17.

In the Final Results, Commerce made a change from the Preliminary Results (which had relied on the financial statements of P.T. Asia Pacific) and instead derived the surrogate financial ratios using the financial statements of P.T. Tifico. Final Results, 78 Fed. Reg. at 2367; *see generally* Issues & Decision Memorandum at 8–11 (Comment 2). Persuaded by Zhaoqing Tifo's administrative case brief, 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." *Id*. at 10. Commerce therefore determined that, for purposes of the Final Results, the financial statements of P.T. Tifico "represent[] the best available information." *Id*. at 11.[15]

However, acknowledging the legitimacy of the Domestic Producer's concerns about the lack of detail in P.T. Tifico's financial statements, Commerce's Issues and Decision Memorandum pointedly observed that "P.T. Tifico's financial statement *does not break out energy* [*costs*]." Issues & Decision Memorandum at 14 (Comment 4) (emphasis added); *see also id*. at 11 (stating that "P.T. Tifico's financial statement does not include a separate breakout of its costs for electricity and water"). Accordingly, "in order to prevent double counting," the Final Results "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 factors of production database the "electricity and water consumption factors" that the agency had included in the database for purposes of the Preliminary Results. *Id*.; *see also* Final Results, 78 Fed. Reg. at 2367 (stating that Commerce "did not separately value electricity and water in the final margin program because these factors of production are already captured in the surrogate financial ratios").

Commerce was silent as to any potential double counting of the "other energy factors" (beyond water and electricity) to which the Domestic Producer's rebuttal brief referred. Despite the fact that P.T. Tifico's financial statements do not include line items for electricity, water, or any other sources of energy (such as the natural gas that P.T. Tifico uses),[16] and even though the Issues and Decision Memo-

[15] The Domestic Producer did not appeal Commerce's selection of P.T. Tifico's financial statements as the basis for the surrogate financial ratios used in the Final Results in this review.

[16] Apparently P.T. Tifico – like P.T. Asia Pacific – uses natural gas, rather than coal, as energy in its production of polyester staple fiber. *See*, *e.g.*, Def.-Int.'s Response Brief at 22–23 & nn.63 & 64 (referring to, respectively, documentation concerning P.T. Asia Pacific's

randum made specific mention of the risk of double counting energy inputs, Commerce continued to include coal in Zhaoqing Tifo's factors of production database in the Final Results, just as it had done in the Preliminary Results. *See* Issues & Decision Memorandum at 3–8 (Comment 1). Further, rejecting Zhaoqing Tifo's arguments favoring the use of Indonesian domestic data on coal prices, Commerce continued to rely on the same import statistics that it used in the Preliminary Results. *Id*. at 5–8.

Zhaoqing Tifo's objections to the surrogate value used for water in the Preliminary Results were mooted in the Final Results by Commerce's determination not to separately value water in the factors of production database. Commerce reasoned that, because P.T. Tifico's financial statements include no separate line item for water, water is "already captured in the surrogate financial ratios." *See* Final Results, 78 Fed. Reg. at 2367 (stating that Commerce "did not separately value electricity and water in the final margin program because these factors of production are already captured in the surrogate financial ratios"); Issues & Decision Memorandum at 13–14 (Comment 4) (explaining that, "[b]ecause P.T. Tifico's financial statement does not break out energy, consistent with [Commerce's] practice, [the Final Results] will not separately value water in the margin program, as it is already captured in the surrogate financial ratios" (footnote omitted)).[17] The Final Results assigned Zhaoqing Tifo a dumping margin of 9.98%. *See* Final Results, 78 Fed. Reg. at 2367.

use of natural gas and P.T. Tifico's gas purchase and sale agreement); *see also* Commerce's Preliminary Surrogate Value Memorandum at Att. 18 (July 5, 2012) (Pub. Doc. No. 60) (documenting consumption of electricity and gas by P.T. Asia Pacific; listing "Electricity and Gas" as "Manufacturing Expense," based on P.T. Asia Pacific's financial statements); Domestic Producer's Submission of Surrogate Value Data for Preliminary Results (Part 1) at Att. 1 (Jan. 19, 2012) (Pub. Doc. No. 44) (documenting consumption of electricity and gas by P.T. Asia Pacific; in Notes to Consolidated Financial Statements of P.T. Asia Pacific, at pp. 93–94, listing "Electricity and gas" as "Manufacturing Expenses" and stating that "electricity and gas expenses were paid to PT Wismakarya Prasetya"); Zhaoqing Tifo's Submission of Surrogate Value Data for Final Results (Part 8) at Exh. SV-14 (Aug. 8, 2012) (Pub. Doc. No. 75) (documenting consumption of gas by P.T. Tifico; in Notes to Financial Statements of P.T. Tifico, at p. 45, under "Guarantee Deposit," referring to "gas sale and purchase agreement with PT Perusahaan Gas Negara (Persero)").

Accordingly, although the parties' briefs frequently refer to the "double counting of coal," it is thus more accurate to refer to the double counting of "energy inputs" (or "energy sources" or "energy factors"). Zhaoqing Tifo's concern is that, to the extent that *natural gas* (and any other such energy inputs) are embedded in the surrogate financial ratios derived from P.T. Tifico's financial statements (and cannot be isolated and removed from those ratios), the inclusion of *coal* in the factors of production database may effectively result in the double counting of energy inputs.

[17] As noted above, Zhaoqing Tifo's administrative case brief addressed Commerce's practice of zeroing, and challenged the Preliminary Results' treatment of inland freight, and brokerage and handling costs, as well as the selection of financial statements and the surrogate

Zhaoqing Tifo was puzzled by the fact that – given that P.T. Tifico's financial statements do not include specific line items for electricity, water, or any other energy inputs (such as natural gas) – Commerce removed only electricity and water from Zhaoqing Tifo's factors of production database for purposes of the Final Results. In light of Commerce's express recognition of the need to avoid double counting, and absent any explanation for treating coal differently than electricity and water, Zhaoqing Tifo assumed that Commerce's inclusion of coal in the factors of production database was an inadvertent error by the agency, and filed a Ministerial Error Correction Request with Commerce to that effect. *See* Zhaoqing Tifo's Ministerial Error Correction Request (Pub. Doc. No. 112). *But see* Domestic Producer's Rebuttal to Zhaoqing Tifo's Jan. 22nd "Clerical Error" Allegation (Pub. Doc. No. 113).

In its response to Zhaoqing Tifo's allegation of ministerial error, Commerce declined Zhaoqing Tifo's request to have coal removed from the factors of production database. *See generally* Commerce's Ministerial Error Allegation Memorandum (Pub. Doc. No. 116) ("Commerce's Ministerial Error Allegation Memorandum"). Specifically, Commerce stated that the inclusion of coal in the factors of production database was "the result of a methodological decision" by the agency, not a "ministerial error." *Id*. at 5–6. In its entirety, Commerce's two-paragraph rationale reads:

> We disagree with Zhaoqing Tifo that [Commerce] made a ministerial error by including steam coal as a factor of production ("FOP") in its normal value calculations for Zhaoqing Tifo in the Final Results. . . . [A] ministerial error is defined at 19 CFR § 351.224(f) as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any [other] similar type of unintentional error which the Secretary considers ministerial." Thus, any issue raised by interested parties as a ministerial error which is, in fact, the result of a methodological decision by [Commerce] will not be considered a ministerial error as it would not meet [Commerce's] regulatory definition of the term.
>
> As we noted in the Prelim[inary] Surrogate Value Memo, [Commerce] intended to include steam coal as an FOP in [the agency's] calculation of normal value, and to value this FOP using

values for coal and water used in the Preliminary Results. *See* n.14, *supra*. In the Final Results, Commerce made no changes to the way in which the Preliminary Results had treated inland freight costs, brokerage and handling costs, and zeroing. *See* Issues & Decision Memorandum at 11–13 (Comment 3) (inland freight costs); *id*. at 14–15 (Comment 5) (brokerage and handling costs); *id*. at 16 (Comment 8) (zeroing).

> Indonesia's Harmonized Tariff Schedule category 2701.19. [Commerce] did not change this decision in the Final Results. Moreover, it is clear [Commerce] intended to include steam coal as an FOP in the Final Results as it is the first issue in the Issues and Decision Memo, where [the agency] articulated [its] intention to apply a surrogate value to the steam coal FOP. Thus, [Commerce] did not inadvertently fail to exclude steam coal as an FOP in the normal value calculations for the Final Results.

Id. (footnotes omitted).

Commerce's Ministerial Error Allegation Memorandum thus shed very little light on the Final Results' treatment of coal and other energy inputs such as natural gas (relative to water and electricity). In some respects, the Ministerial Error Allegation Memorandum raised more questions than it answered. The Memorandum does not explain why it is significant that Commerce's Preliminary Surrogate Value Memorandum indicated that the agency intended to value coal in the factors of production database. The Preliminary Surrogate Value Memorandum pre-dates the Preliminary Results, which relied on the financial statements of P.T. Asia Pacific; and those financial statements include line items for energy inputs. Thus, for purposes of the Preliminary Results, no party objected to including all three of Zhaoqing Tifo's energy inputs in the factors of production database (and, to avoid double counting, excluding water, electricity, and natural gas from the surrogate financial ratios). However, Commerce relied on a different set of financial statements for the Final Results – specifically, the financial statements of P.T. Tifico, which (unlike the financial statements of P.T. Asia Pacific) do not include line items for energy sources.

Further, the Preliminary Surrogate Value Memorandum indicated not only Commerce's intent to value coal in the factors of production database, but also electricity and water as well (which is, in fact, what Commerce did in the Preliminary Results). The Ministerial Error Allegation Memorandum is silent as to why the change of financial statements and the need to avoid double counting required Commerce to remove (exclude) electricity and water from the factors of production database in the Final Results, but did not also require the removal (exclusion) of coal.

This action ensued.[18]

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, 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 NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same).

Moreover, any determination as to the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *American Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

In evaluating whether a determination by Commerce was "arbitrary and capricious," the court considers "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "The agency must articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A determination is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

[18] Although Zhaoqing Tifo's Complaint includes a total of 10 specific counts, only the first four counts are addressed in the pending motion. Those four counts relate to Commerce's inclusion of coal in the factors of production database for purposes of the Final Results, and Zhaoqing Tifo's attendant concerns about the potential double counting of energy inputs.

sion that runs counter to the evidence . . . , or is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). Similarly, "[a]gency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'" *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014) (quoting *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013)).

Lastly, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Nevertheless, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *Id.* (citing *State Farm*, 463 U.S. at 43); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

III. *Analysis*

The motion at hand is directed to Zhaoqing Tifo's claim that Commerce "double counted" certain energy costs in calculating Zhaoqing Tifo's antidumping margin in the Final Results of the fourth administrative review at issue here. Specifically, Zhaoqing Tifo contends that Commerce's use of surrogate financial ratios derived from the financial statements of P.T. Tifico (which do not break out energy costs), in tandem with Commerce's inclusion of coal in the factors of

In particular, Count I alleges that Commerce's failure to remove coal from the factors of production database means that Commerce "did not select the 'best available information' for the surrogate value of coal," and that the Final Results are therefore "unsupported by substantial evidence." *See* Complaint, Count I; *see* Pl.'s Brief at 8. Count II alleges that Commerce acted "contrary to law" by including coal in the factors of production database at the same time the agency excluded water and electricity. Complaint, Count II; *see* Pl.'s Brief at 8–9. Count III alleges that it was "arbitrary and capricious" for Commerce to include coal, while excluding water and electricity. Complaint, Count III; *see* Pl.'s Brief at 9. And Count IV alleges that Commerce's inclusion of coal in the factors of production database, while excluding water and electricity, "was a ministerial error that should have been promptly corrected." Complaint, Count IV. Zhaoqing Tifo withdrew Count IV in its opening brief, explaining that "the remedy [sought by Count IV] overlaps the remedy sought in Counts I through III, namely the removal of the coal energy factor from [Zhaoqing Tifo's] [factors of production] database." Pl.'s Brief at 9. Accordingly, only Counts I through III are presently before the court.

Counts V, VI, VII, and VIII of the Complaint contest the surrogate values that Commerce used in the Final Results to value various inputs – including, respectively, coal, inland freight, water, and brokerage and handling. Complaint, Counts V-VIII. Count IX alleges that Commerce erred in rejecting a letter of credit adjustment to brokerage and handling, while Count X asserts that Commerce's "failure to issue a deficiency questionnaire regarding the sources and meaning of the domestic Indonesian coal surrogate value was contrary to law." *Id.*, Counts IX-X. Count XI is an all-purpose "catch-all" claim, stating that "[u]pon information and belief, [Commerce] erred in other aspects of its final results" which are not specified. *Id.*, Count XI.

production database, resulted in the double counting of energy costs in the Final Results. According to Zhaoqing Tifo, it was improper for Commerce to include coal in the factors of production database because the energy consumed by P.T. Tifico in its production of polyester staple fiber is embedded in manufacturing/factory overhead in P.T. Tifico's financial statements, and thus is included in the surrogate financial ratios that Commerce used in the Final Results.

As a threshold matter, the Government and the Domestic Producer contend that the doctrine of exhaustion of administrative remedies bars Zhaoqing Tifo from prosecuting that claim. As discussed below, however, the exhaustion argument is unavailing, in light of the specific circumstances of this case. Moreover, the Final Results' treatment of energy sources other than electricity and water (including Zhaoqing Tifo's coal and P.T. Tifico's natural gas) is not explained, precluding both any assessment of the substantiality of the evidence supporting Commerce's inclusion of coal in the factors of production database and any determination as to whether Commerce's action was arbitrary and capricious, as Zhaoqing Tifo contends.

A. *The Doctrine of Exhaustion of Administrative Remedies*

Invoking the doctrine of exhaustion of administrative remedies in an effort to bar consideration of the merits of Zhaoqing Tifo's "double counting" claim, the Government and the Domestic Producer point to the statute, which provides that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); Def.'s Response Brief at 7–8; Def.-Int.'s Response Brief at 7.[19] The Government and the Domestic Producer similarly note the Court of Appeals' observation that this Court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *see also* Def.'s Response Brief at 8; Defendant-Intervenor's Supplemental Brief in Response to the December 30, 2013 Court Order at 7 ("Def.-Int.'s Supp. Brief"). In addition, the Government and the Domestic Producer cite 19 C.F.R. § 351.309(c)(2), Commerce's regulation requiring that a party's administrative case brief (filed with the agency following issuance of pre-

[19] To the extent that the Government intimates that 28 U.S.C. § 2637(d) is a "mandatory" exhaustion provision, the Court of Appeals has squarely held to the contrary. *Compare* Defendant's Supplemental Brief at 6 ("Def.'s Supp. Brief"), *with Corus Staal BV v. United States*, 502 F.3d 1370, 1379, 1381 (Fed. Cir. 2007) (discussing 28 U.S.C. § 2637(d), noting (*inter alia*) that the language "is not absolute," and citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), for proposition that "where Congress has not clearly required exhaustion, sound judicial discretion governs"); *see also* n.33, *supra* (collecting cases which stand for proposition that, in international trade cases, application of doctrine of exhaustion is committed to Court of International Trade's sound discretion).

liminary results) "present all arguments that continue in the submitter's view to be relevant to the . . . final results." 19 C.F.R. § 351.309(c)(2); *see also* Def.'s Response Brief at 9, 12; Def.-Int.'s Supp. Brief at 7.

Against this backdrop, the Government asserts that Zhaoqing Tifo's administrative case brief "did not challenge Commerce's inclusion of steam coal in the factors of production [database]" and that Zhaoqing Tifo therefore failed to exhaust its administrative remedies and is prohibited from raising its double counting claim in this forum. Def.'s Response Brief at 7; *see also*, *e.g.*, *id*. at 2, 5–6, 7–14. The Domestic Producer makes the same argument. *See*, *e.g.*, Def. Int.'s Response Brief at 1–2, 8–13.

As explained below, however, the doctrine of exhaustion has no application here, where – at the time of the filing of administrative case briefs and rebuttal briefs with Commerce – Zhaoqing Tifo had no objection (and no reason to object) to Commerce's inclusion of coal in the factors of production database. Moreover, even if the doctrine of exhaustion did apply, the administrative rebuttal brief filed by the Domestic Producer alerted Commerce to the potential for double counting of energy inputs if the agency were to switch to the financial statements of P.T. Tifico for purposes of the Final Results. Commerce thus had sufficient opportunity to address the double counting of energy in the Final Results. In fact, the Final Results did address double counting with respect to electricity and water, albeit not as to coal or natural gas or any other source of energy.[20]

[20] The analysis in section III.A proceeds on the assumption that Zhaoqing Tifo's administrative case brief did not alert Commerce to Zhaoqing Tifo's position that the concurrent use of P.T. Tifico's financial statements and the inclusion of coal in the factors of production database would result in the double counting of energy inputs. However, Zhaoqing Tifo points to the surrogate financial ratio calculations that it submitted as part of its administrative case brief (and, in particular, to the blank column for "Energy") as a reflection of its position that coal should not be valued in the factors of production database if Commerce relied on P.T. Tifico's financial statements in the Final Results, due to the risk of double counting. *See* Zhaoqing Tifo's Administrative Case Brief at Exh. 3; *see also* Pl.'s Supp. Brief at 11–12 (captioned "Zhaoqing Tifo Presented A Financial Calculation With No Energy Factors, Implying That If The Department Included Them As [Factors of Production] They Would Be Double Counted"); Pl.'s Supp. Response Brief at 5, 8 (similar).

Zhaoqing Tifo thus contends that, in fact, it did exhaust its administrative remedies by raising the double counting issue in its administrative case brief. *But see* Def.'s Supp. Response Brief at 4–5; Defendant-Intervenor's Supplemental Response Brief at 4–6, 14 ("Def.-Int.'s Supp. Response Brief"). Because the analysis here concludes that Zhaoqing Tifo is entitled to pursue its double counting claim in this forum even if Zhaoqing Tifo did not raise that claim at the administrative level, there is no need to consider whether Zhaoqing Tifo's administrative case brief would have sufficed to preserve its rights.

Zhaoqing Tifo also suggests that its filing of a ministerial error allegation with Commerce following issuance of the Final Results served to exhaust its administrative remedies. *See* Pl.'s Reply Brief at 7; Pl.'s Supp. Brief at 2, 15, 16–17, 25, 27; [Plaintiff's] Supplemental Authority Regarding Exhaustion of Administrative Remedies at 5 ("Pl.'s Brief on Supp.

1. *The Inapplicability of the Doctrine of Exhaustion*

The Government and the Domestic Producer seek to make much of the fact that Commerce included coal in the factors of production database at the Preliminary Results stage. Thus, they contend, Zhaoqing Tifo was obligated to include in its administrative case brief an objection to that treatment of coal, and the absence of such an objection constitutes a failure to exhaust administrative remedies. According to the Government and the Domestic Producer, it was too late for Zhaoqing Tifo to object to the inclusion of coal in the factors of production database and to raise its concerns about double counting energy inputs after the Final Results issued. *See*, *e.g.*, Def.'s Response Brief at 5–6, 7, 9–13; Def.-Int.'s Response Brief at 1–2, 9–11.[21]

Authority"); [Plaintiff's] Response to Notice of Supplemental Authority Regarding Exhaustion of Administrative Remedies at 2, 4. According to the Domestic Producer, "where a party properly challenges a ministerial error following the final results of an administrative review, that party will be deemed to have exhausted its administrative remedies with regards to that error." Def.-Int.'s Response Brief at 8 (citing 19 U.S.C. § 1673d(e)); *see also Fischer S.A. Comercio, Industria & Agricultura v. United States*, 36 CIT ____, ____, 885 F. Supp. 2d 1366, 1375 (2012). However, the Domestic Producer argues that, in this case, Zhaoqing Tifo's ministerial error allegation "was in fact a substantive challenge to Commerce's Final Results, dressed up as a ministerial error because [Zhaoqing Tifo] had not properly and timely raised that issue before Commerce." Def.Int.'s Response Brief at 11–13. The Domestic Producer contends that the ministerial error allegation therefore did not exhaust Zhaoqing Tifo's administrative remedies. *Id*. (citing *Fischer*, 36 CIT at ____, 885 F. Supp. 2d at 1376 (stating that court would not permit plaintiffs there "to make an end run around the exhaustion requirement by entertaining an unexhausted substantive issue disguised as a ministerial error")); *see also* Def.-Int.'s Response Brief at 9 & n.31; Def.-Int.'s Supp. Response Brief at 6–7, 11. The Government makes much the same argument. *See* Def.'s Supp. Response Brief at 3–4, 5–6, 7. Both because this issue was not sufficiently briefed and because the analysis here concludes that Zhaoqing Tifo is entitled to pursue its double counting claim in this forum even if Zhaoqing Tifo did not raise that claim at the administrative level, there is no need to reach the issue of whether the ministerial error allegation exhausted Zhaoqing Tifo's remedies.

[21] The Government and the Domestic Producer go so far as to assert – time and time again, throughout the course of briefing – that, in its administrative case brief, Zhaoqing Tifo "affirmatively argued . . . that Commerce should apply a surrogate value to steam coal and value it as a factor of production," and that Zhaoqing Tifo therefore should not now be heard to complain that Commerce included coal in the factors of production database in the Final Results. Def.'s Response Brief at 9–10; *see also*, *e.g.*, *id*. at 21; Def.-Int.'s Response Brief at 3, 9–10, 20, 22, 24 n.69; Def.'s Supp. Brief at 3, 8, 10, 11, 13–14; Def.-Int.'s Supp. Brief at 2, 3, 7, 11, 15, 16, 19, 22, 23–24, 24; Def.'s Supp. Response Brief at 4, 4–5, 6, 7; Def.-Int.'s Supp. Response Brief at 2, 3, 6, 9, 10–11, 12, 14; Defendant-Intervenor's Memorandum on Supplemental Authority in Response to Court Order Dated March 2, 2015 at 3, 5, 9, 10 ("Def.-Int.'s Brief on Supp. Authority"); Defendant's Response to Notices of Supplemental Authority at 2–3 ("Def.'s Response Brief on Supp. Authority").

The Government claims, for example, that "Zhaoqing Tifo's [administrative] case brief squarely addressed the issue of whether steam coal should be treated as part of overhead or as a factor of production" and that Zhaoqing Tifo "argued extensively that coal must be treated as a factor of production." Def.'s Supp. Brief at 10–11. In like vein, the Domestic Producer claims that Zhaoqing Tifo "affirmatively argued that Commerce should value coal

What the Government and the Domestic Producer fail to appreciate, however, is the significance of Commerce's decision to change the financial statements on which it relied for calculating surrogate financial ratios between the Preliminary Results (where Commerce used the financial statements of P.T. Asia Pacific) and the Final Results (where the agency instead relied on the statements of P.T. Tifico). Because the financial statements of P.T. Asia Pacific include individual line items for energy inputs, the Preliminary Results isolated and specifically excluded those inputs from the surrogate financial ratios and instead included coal, water, and electricity in the factors of production database. As such, Zhaoqing Tifo had no objections to the inclusion of coal (or water, or electricity) in the factors of production database, and no concerns about the double counting of energy inputs, at the Preliminary Results stage.[22]

Under these circumstances, Zhaoqing Tifo was not required to exhaust its administrative remedies, because – simply stated – at the time of the Preliminary Results, there was nothing to exhaust. *See*

as a direct material," Def.-Int.'s Response Brief at 10 (emphasis omitted), and "specifically argued for including the coal factor in the [factors of production] database." Def.-Int.'s Supp. Response Brief at 10; Def.-Int.'s Brief on Supp. Authority at 3 (emphasis omitted; otherwise, *verbatim*).

This is a wholesale mischaracterization of Zhaoqing Tifo's position and goes perilously beyond the bounds of permissible zealous advocacy. On the assumption that Commerce would continue to rely on P.T. Asia Pacific's financial statements in the Final Results (as it did in the Preliminary Results) and thus would continue to include coal in the factors of production database (as it did in the Preliminary Results), Zhaoqing Tifo argued in its administrative case brief that – in the Final Results – Commerce should use domestic Indonesian data from Indonesia's Ministry of Energy and Mineral Resources to value coal, rather than the Indonesian import statistics that Commerce used in the Preliminary Results. *See* Zhaoqing Tifo's Administrative Case Brief at 7–15. As a separate argument, Zhaoqing Tifo's administrative case brief also urged Commerce to abandon the financial statements of P.T. Asia Pacific in favor of those of P.T. Tifico, because the operations of P.T. Tifico more closely resemble those of Zhaoqing Tifo. *See* Zhaoqing Tifo's Administrative Case Brief at 15–20. And, to paraphrase Zhaoqing Tifo, "[a]scertaining the correct surrogate valu[e] of coal" (which is the subject of Count V of the Complaint and is not the subject of the pending motion) is a separate issue from whether (in the abstract) coal should be valued in the factors of production database, which is, in turn, "a separate issue from whether it is double counting to value coal at all" if energy costs are already embedded in surrogate financial ratios, as Zhaoqing Tifo here contends. *See* Pl.'s Supp. Brief at 8.

[22] The folly in this argument of the Government and the Domestic Producer is readily exposed by reframing Zhaoqing Tifo's objection. Contrary to the assertions of the Government and the Domestic Producer, Zhaoqing Tifo's claim is not an objection to the inclusion of coal in the factors of production database *per se*. Instead, Zhaoqing Tifo's claim is an objection to the double counting of energy inputs – and, implicitly, an objection to the inclusion of coal in the factors of production database if it results in double counting.

Zhaoqing Tifo's point is that the inclusion of coal in the factors of production database carried with it no risk of double counting until the Final Results, where Commerce derived the surrogate financial ratios from the financial statements of P.T. Tifico, which – as Commerce candidly concedes – "do[] not break out energy [costs]." Issues & Decision Memorandum at 14.

generally, *e.g.*, *Corus Staal*, 502 F.3d at 1381 (observing that doctrine of exhaustion does not apply in situations where "the agency change[s] its position . . . after [a] party's case brief [has] been filed"); *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1092–93, 637 F. Supp. 2d 1231, 1236–37 (2009) (stating that "[a] party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance, the party would not have had a full and fair opportunity to raise the issue at the administrative level" (citation omitted)), *aff'd*, 467 F. App'x 887 (Fed. Cir. 2012) (non precedential); *Jacobi Carbons AB v. United States*, 38 CIT ____, ____, 992 F. Supp. 2d 1360, 1366–67 (2014) (same).[23]

[23] *See also, e.g., Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014) (recognizing that doctrine of exhaustion does not apply in circumstances "where the party 'had no opportunity' to raise the issue before the agency" (citation omitted)); *Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1381 (same); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003) (rejecting application of doctrine of exhaustion, concluding that there simply was "[no] administrative procedure to exhaust"); *CEMEX, S.A. v. United States*, 133 F.3d 897, 90405 (Fed. Cir. 1998) (affirming trial court's decision to remand issue to Commerce for correction of particular error even though error had not been previously raised before agency; rejecting argument that remand was barred by doctrine of exhaustion, because error at issue "was undiscoverable until after Commerce published its final results"); *Papierfabrik August Koehler AG v. United States*, 38 CIT ____, ____ n.14, 971 F. Supp. 2d 1246, 1256 n.14 (2014) (rejecting argument that plaintiff's claim was barred by doctrine of exhaustion, where plaintiff's case brief filed with the agency "could not have opposed [Commerce's] construction of the regulations" because that construction "did not appear until [Commerce] issued the Final Results"); *Albemarle Corp. v. United States*, 37 CIT ____, ____, 931 F. Supp. 2d 1280, 1286–89 (2013) (as to two separate claims, rejecting argument that litigation was barred by doctrine of exhaustion; emphasizing that, as to first claim, "[Commerce's] change in position . . . was announced in the Final Results, after the submission of case briefs," and, as to second claim, "[t]he ground on which [plaintiff] brings [its] challenge . . . did not become apparent until issuance of the Final Results, when Commerce announced that it had changed its surrogate value for [a certain input] based on the argument made by [another party]"); *Zhengzhou Huachao Industrial Co. v. United States*, 37 CIT ____, ____, 2013 WL 3215181 *7 (2013) (dismissing Government argument that doctrine of exhaustion barred plaintiff's claim, where agency position at issue "changed between the Preliminary Determination and the Final Determination," such that "plaintiff had no real opportunity" to object at administrative level); *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT ____, ____, 815 F. Supp. 2d 1311, 1333–34 (2012) (concluding that doctrine of exhaustion did not apply, explaining that "[plaintiff] was not required to raise [the issue in question] before [Commerce] to exhaust administrative remedies because [Commerce's] determination of [the relevant] surrogate values changed between the Preliminary Determination and the Final Determination"); *Globe Metallurgical Inc. v. United States*, 35 CIT ____, ____, 781 F. Supp. 2d 1340, 1357 (2011) (declining to apply doctrine of exhaustion, where "the issue [in question] . . . first manifested itself in the Final Results," and "it was only after Commerce issued the Final Results that [plaintiffs] had the opportunity to review the specific methodology Commerce applied" in the Final Results); *Jiaxing Brother Fastener Co. v. United States*, 34 CIT ____, ____, 751 F. Supp. 2d 1345, 1355–56 (2010) (recognizing line of authority holding that "the Court of International Trade will decide an unexhausted issue on the merits when the party raising the issue had no

opportunity to do so before the agency"); *Dongbu Steel Co. v. United States*, 34 CIT ____, ____, 677 F. Supp. 2d 1353, 1360–62 (2010) (concluding that plaintiffs' "zeroing" claim was not barred by doctrine of exhaustion "because [plaintiffs'] objections were not yet ripe at the time case briefs were due in the administrative review"; "[Plaintiffs] were not required to exhaust their remedies before the agency, because there was nothing to exhaust"), *vacated on other grounds*, 635 F.3d 1363 (Fed. Cir. 2011); *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 495 n.49, 617 F. Supp. 2d 1281, 1318 n.49 (2009) (explaining that "the Chinese Producers had no reason to raise [their] claim . . . until *after* Commerce made its argument in the Final Results, when Commerce, in effect, 'opened the door' on the issue . . . . Under such circumstances, the Chinese Producers were not required to exhaust their remedies before the agency, because there was nothing to exhaust"); *Valley Fresh Seafood*, 31 CIT at 1990–91, 1994–96 (rejecting claim of failure to exhaust where "Commerce did not apply [a certain regulation] in the Preliminary Results and, at that time, gave no indication that it was considering doing so in the Final Results," such that "the Final Results constituted the first public statement by Commerce" of the agency's position); *China Steel Corp. v. United States*, 28 CIT 38, 59–60, 306 F. Supp. 2d 1291, 1310–11 (2004) (holding that exhaustion doctrine did not preclude consideration of merits of plaintiff's claim where challenged Commerce position "was first pronounced in the agency's Final Determination," such that "[p]laintiff did not have the opportunity to presents its objections . . . at the administrative level"); *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792–93 (1999) (holding doctrine of exhaustion inapplicable, in light of the "lack of fair opportunity to raise the issue before the agency," where Preliminary Results indicated that U.S. sales would be treated one way, then Final Results treated such sales differently); *LTV Steel Co. v. United States*, 21 CIT 838, 867–69 & n.26, 985 F. Supp. 95, 119–20 & n.26 (1997) (finding that exhaustion doctrine did not preclude judicial review of party's claim where party "did not have the opportunity to challenge Commerce's methodology until Commerce articulated that methodology and applied it" in the Final Results); *Saha Thai Steel Pipe Co. v. United States*, 17 CIT 727, 729–30, 828 F. Supp. 57, 59–60 (1993) (holding that a party was not required to file a case brief or rebuttal brief to exhaust its administrative remedies where it had "received all the remedy it sought from the preliminary determination, *i.e.*, it received a very low company-specific duty assessment," but Commerce assigned a higher country-wide rate in the final determination); *SKF USA, Inc. v. U.S. Dep't of Commerce*, 15 CIT 152, 159 n.6, 762 F. Supp. 344, 350 n.6 (1991) (finding exhaustion doctrine inapplicable where party lacked opportunity to contest issue involving Commerce's use of third country data to determine foreign market value of merchandise, because agency did not reveal results of recalculations of home market viability until final determinations), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) (non-precedential); *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 377, 661 F. Supp. 1206, 1210 (1987) (stating that "in determining whether questions are precluded from consideration on appeal [because they were not first raised before the agency], the Court will assess the practical ability of a party to have its arguments considered by the administrative body"); *American Permac, Inc. v. United States*, 10 CIT 535, 536 n.2, 642 F. Supp. 1187, 1188 n.2 (1986) (noting that application of doctrine of exhaustion would be "inappropriate" because issue did not arise until long after comment period for preliminary results, and because Commerce could issue its final decision at any time; as such, it was unclear whether plaintiffs had a "definite" opportunity to raise their objections before Commerce); *Philipp Bros. v. United States*, 10 CIT 76, 83–84, 630 F. Supp. 1317, 1324 (1986) (ruling that, because Commerce did not address issue in question until agency's final decision, plaintiff had no opportunity to raise the issue at the administrative level and doctrine of exhaustion therefore did not preclude judicial review).

The Government and the Domestic Producer seek to distinguish a handful of the cases cited here. *See generally*, *e.g.*, Def.-Int.'s Supp. Brief at 10–12 & nn.31–33, 16 & n.50 (discussing, and seeking to distinguish, cases cited for proposition that requirement of exhaustion does not apply where, as a practical matter, party had no meaningful

Zhaoqing Tifo's claim for potential double counting did not arise until the Final Results, when Commerce *both* relied on the financial statements of P.T. Tifico *and* included coal in the factors of production database.[24] Although the financial statements of P.T. Tifico do not include separate line items for energy inputs (unlike the statements of P.T. Asia Pacific), the Final Results left coal in the factors of production database, and excluded only electricity and water.[25]

The Government and the Domestic Producer argue that Zhaoqing Tifo's administrative case brief should have anticipated the determinations that Commerce reached in the Final Results. *See*, *e.g.*, Defendant's Supplemental Brief at 3–4, 8–10 ("Def.'s Supp. Brief"); Def.-Int.'s Supp. Brief at 1–2, 9, 15–19; Defendant-Intervenor's Memorandum on Supplemental Authority in Response to Court Order Dated March 2, 2015 at 3–4, 9–10 ("Def.-Int.'s Brief on Supp. Authority"). But the law does not mandate that litigants be prescient.[26]

opportunity to raise issue at agency level); Def.'s Supp. Response Brief at 8–9 (same); Def.-Int.'s Supp. Response Brief at 9, 10–11 & n.37 (same); Def.-Int.'s Brief on Supp. Authority at 5–6, 10 (same); Def.'s Response Brief on Supp. Authority at 2–3 (same); Defendant-Intervenor's Response to Plaintiff's March 6, 2015 Supplemental Authority at 2–3 ("Def.-Int.'s Response Brief on Supp. Authority") (same). But the efforts of the Government and the Domestic Producer are in vain. It is true that the facts of each case are different and that none of the cases relied on precisely parallels this case. However, the Government and the Domestic Producer cannot meaningfully distinguish each and every case on point. Nor can they dismiss the broader current of thought that runs through the cited decisions or the compelling considerations of policy, pragmatism, and fundamental fairness that inform them.

[24] In the course of briefing, the Domestic Producer (in effect) candidly concedes that Zhaoqing Tifo's claim did not arise until the Final Results, with Commerce's switch to the financial statements of P.T. Tifico: "The double-counting issue ar[ose] only due to the lack of specificity of [P.T. Tifico's] financial statements; indeed, [Zhaoqing Tifo] never alleged double-counting in the Preliminary Results specifically because the P.T. Asia [Pacific] financial statements were . . . more detailed[] than those for P.T. Tifico." Def.-Int.'s Supp. Brief at 19.

[25] Zhaoqing Tifo makes out a case that its failure to raise its double counting claim in its administrative case brief is largely attributable to the actions (or, more accurately, the inaction) of the Domestic Producer in failing to submit its views on surrogate country selection in accordance with the deadline set by Commerce. Specifically, Zhaoqing Tifo posits that if – on or before that deadline – the Domestic Producer had submitted its views on surrogate country selection (advocating for the selection of Indonesia), then Zhaoqing Tifo would have submitted the financial statements of P.T. Tifico before the Preliminary Results. Presumably, Commerce would have chosen P.T. Tifico's financial statements for the Preliminary Results (as it did in the Final Results). And, if Commerce also included coal in the factors of production database for the Preliminary Results (as it presumably would have done), then the double counting issue would have been presented in the Preliminary Results, and Zhaoqing Tifo would have raised the issue in its administrative case brief. *See*, *e.g.*, Pl.'s Supp. Brief at 4.

[26] With the benefit of 20/20 hindsight, it now may seem abundantly clear to the Government and the Domestic Producer that Zhaoqing Tifo could have anticipated that, in the Final Results, Commerce would decide to rely on the financial statement of P.T. Tifico, and that Commerce also would exclude water and electricity – but not coal – from the factors of

Zhaoqing Tifo was not required to anticipate that Commerce (1) would adopt P.T. Tifico's financial statements in lieu of those of P.T. Asia Pacific for purposes of the Final Results, and (2) would recognize that P.T. Tifico's financial statements do not include discrete line items for water, electricity, and other energy inputs, and (3) would therefore exclude water and electricity from the factors of production database, but (4) would leave coal in the database, with no explanation for that treatment (particularly in light of any potential for double counting). Because Commerce gave no indication prior to the Final Results that it would use financial ratios derived from financial statements that lacked line items for energy inputs but would nevertheless leave coal in the factors of production database, Zhaoqing Tifo's "first meaningful opportunity to challenge Commerce's decision [to include coal in the factors of production database for purposes of the Final Results] . . . is in this judicial review proceeding." *See Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989, 1994 (2007); *see generally id*., 31 CIT at 1991, 1994–96 (same); *see also Jacobi Carbons*, 38 CIT at ____, 992 F. Supp. 2d at 1367 (under similar circumstances, noting that "while plaintiffs argued for the use of [certain] data [in their administrative briefs filed with Commerce], they could hardly foresee [at that time] what use [Commerce] would make of that data," and reasoning that "[i]t is simply too much to ask of the parties to anticipate" the position that Commerce would take and the rationale that the agency would give in the Final Results, and holding that, "because plaintiffs had no realistic opportunity to present their arguments before [Commerce], . . . plaintiffs did not fail to exhaust their administrative remedies").[27]

production database. However, the judgment of the Government and the Domestic Producer on this point is distorted (at least to some extent) by the well-documented cognitive phenomenon known as "hindsight bias."

"Hindsight bias" refers to the "tendency for people to overestimate the predictability of past events." C. Guthrie, J. Rachlinski, & A. Wistrich, *Inside the Judicial Mind*, 86 Cornell Law Rev. 777, 799 (2001); *see generally id*., 86 Cornell Law Rev. at 778, 780 & n.13, 784, 799–805, 816–18 & nn.198–201, 820 & nn.209, 212, 821 & n.213, 824–25, 827, 828 & nn.233–36, 829 (explaining, *inter alia*, that, although "[f]ew judgments in ordinary life require people to assess the predictability of past outcomes," "such judgments are pervasive in the law"; citing numerous examples of operation of hindsight bias in the law; and discussing empirical evidence on effect of hindsight bias in the law and in the legal system); *see also, e.g.*, C. Guthrie, J. Rachlinski, & A. Wistrich, *Judging by Heuristic : Cognitive Illusions in Judicial Decision Making*, 86 Judicature 44, 47–48 (July/August 2002) (abstracted from *Inside the Judicial Mind*). Many other authorities similarly address hindsight bias, in a legal context and otherwise.

[27] *See also Dongbu Steel*, 34 CIT at ____, 677 F. Supp. 2d at 1360–62 (emphasizing that "the law does not require a party to be prescient, and to be able to precisely predict the timing and the exact contours" of final agency action, and explaining that "[a]lthough [plaintiffs] might have been well-advised to raise their concerns in their case briefs filed with the agency (concerns which, by definition, would have been somewhat hypothetical), they were

under no legal obligation to do so"); *Qingdao Taifa*, 33 CIT at 1092–93, 637 F. Supp. 2d at 1236–37 (concluding that doctrine of exhaustion did not apply, because a party "[was] not required to predict that Commerce would accept other parties' arguments and change its decision" in Final Results); *Pohang Iron & Steel*, 23 CIT at 792–93 (reasoning that, as a matter of sound policy, parties should not be required to raise anticipatory arguments in their administrative case briefs; "It would be foolish to encourage parties to make arguments because they might somehow become important under a possible future scenario. In the interest of administrative efficiency, parties should be encouraged to address only the issues that are currently relevant"); *Saha Thai*, 17 CIT at 729–30, 828 F. Supp. at 59–60 (soundly rejecting Government argument that exhaustion doctrine should be applied to require parties to anticipate issues and to "motivate all interested parties to an administrative review to brief and litigate every possible issue," pointing out that such an approach would lead to "wasteful litigation"); *cf. CEMEX*, 133 F.3d at 904–05 (affirming trial court's decision to remand issue to Commerce for correction of error even though error had not been previously raised before agency; explaining that "the remand . . . was not improper merely because [a party] did not exhaust its administrative remedies," where error at issue "was undiscoverable until after Commerce published its final results").

Like the court in *Pohang Iron & Steel* as well as *Saha Thai* (discussed above), other courts too have highlighted the compelling policy considerations that weigh against unduly demanding application of the doctrine of exhaustion – that is, policy considerations that counsel against requiring parties to try to foresee the future and to anticipate in their comments filed with the agency the range of options and potential courses of action that the agency ultimately might take. Thus, for example, as the U.S. Court of Appeals for the D.C. Circuit observed:

> While we certainly require some degree of foresight on the part of commenters, we do not require telepathy. We should be especially reluctant to require advocates for affected industries and groups to anticipate every contingency. To hold otherwise would encourage strategic vagueness on the part of agencies and overly defensive, excessive commentary on the part of interested parties seeking to preserve all possible options for appeal. Neither response well serves the administrative process.

Portland Cement Ass'n v. EPA, 665 F.3d 177, 186 (D.C. Cir. 2011); *cf. Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009, 1024 n.13 (9th Cir. 2007) (underscoring wisdom of excusing failure to exhaust where issue that a plaintiff seeks to litigate was raised by another party at the administrative level; "If we required each [party] . . . to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties."); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295 (5th Cir. 1998) (in context of challenge to agency rulemaking, rejecting agency argument that, because plaintiff "did not participate in the agency proceedings below," it was "preclude[d] . . . from raising its objection in [the] court"; "The rule urged by EPA [*i.e.*, that the court should preclude a plaintiff from litigating an issue that it did not raise at the administrative level] would require everyone who wishes to protect himself from arbitrary agency action . . . to become . . . a psychic able to predict the possible changes that could be made" by the agency in the course of the administrative proceeding).

The Government and the Domestic Producer attempt to distinguish a number of the cases cited above. *See generally*, *e.g.*, Def.-Int.'s Supp. Brief at 16 & n.49 (discussing, and seeking to distinguish, cases cited for proposition that it would be unrealistic and impractical, and/or unsound as a matter of administrative law and policy, to interpret doctrine of exhaustion as requiring parties to predict, or foresee, or anticipate possible ultimate agency action); Def.'s Supp. Response Brief at 8–9 (same); Def.-Int.'s Brief on Supp. Authority at 10 (same). Again, however, the efforts of the Government and the Domestic Producer meet with no success. To be sure, as explained in note 23 above, the facts of each case are different, and

In sum, the doctrine of exhaustion of administrative remedies has no application here.

2. *Assuming Arguendo That the Doctrine of Exhaustion Applied*

Even if the doctrine of exhaustion of administrative remedies were applicable, two separate but related exceptions to that doctrine also would apply. Thus, even if the doctrine of exhaustion were applicable, Zhaoqing Tifo nevertheless still would be entitled to its day in court on its claim that Commerce's inclusion of coal in the factors of production database, coupled with the agency's use of P.T. Tifico's financial statements (which do not separately break out energy costs), resulted in the double counting of energy inputs in the Final Results.

One well-recognized exception to the doctrine of exhaustion permits a party to litigate an issue that the party did not exhaust at the administrative level where that issue was raised before the agency by a different party. *See*, *e.g.*, *Indiana Utility Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) (acknowledging exception to doctrine of exhaustion "when an agency has considered the argument at the urging of another party"); *Kessler v. Surface Transportation Board*, 635 F.3d 1, 8 (D.C. Cir. 2011) (recognizing exception to exhaustion doctrine allowing a plaintiff to "raise [in litigation] any issue raised by any party to the administrative proceeding"); *Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009, 1023–25 (9th Cir. 2007) (explaining that failure to exhaust is excused where issue that plaintiff seeks to raise in litigation "was raised by someone other than the [plaintiff]" at the administrative level); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295–96 (5th Cir. 1998) (explaining that, even though plaintiff "did not participate in the agency proceedings below" (and thus, by definition, did not raise before the agency the issues that plaintiff sought to litigate in court), "the concerns underlying the exhaustion doctrine [were] not implicated" where the issues that plaintiff sought to raise in litigation were raised by *opposing parties* at the administrative level; pointing out that "it is ironic that [plaintiff] now seeks to preserve its claim on the basis of its opponents' complaints").[28]

none of the cases relied on is "on all fours" with this case. However, it is also true that the Government and the Domestic Producer cannot distinguish each and every case that is cited in a way that is meaningful. Moreover, they fail to grapple with the undercurrent of thought that is reflected in the cited decisions and the considerations of policy, pragmatism, and fundamental fairness that inform them.

[28] To some extent, like the plaintiff in *American Forest & Paper Ass'n*, Zhaoqing Tifo too now finds itself in the unusual and rather "ironic" position of "seek[ing] to preserve its [double

counting] claim on the basis of its opponent['s] complaints" – *i.e.*, on the basis of the Domestic Producer's cautions to Commerce about the potential for double counting and the resulting need to remove "all [Zhaoqing Tifo]-specific energy and water . . . factors" from the factors of production database if the agency decided to rely on P.T. Tifico's financial statements for purposes of determining the surrogate financial ratios for the Final Results. *See American Forest & Paper Ass'n v. EPA*, 137 F.3d at 295–96; Domestic Producer's Administrative Rebuttal Brief at 13–14.

See also, e.g., Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1109 (D.C. Cir. 1992) (holding plaintiffs' failure to exhaust to be excused where issue sought to be litigated was raised by other parties at the administrative level); *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1150–52 (D.C. Cir. 1987) ("*NRDC v. EPA*") (*en banc*) (quoting *Buckeye*, and, in action challenging EPA's withdrawal of proposed amendments to regulations, holding that plaintiff was excused from exhaustion – notwithstanding plaintiff's "total abstention from participation in the rulemaking proceedings" – where the issue raised by plaintiff in litigation was "explicitly raised . . . before the EPA in [another party's] comments on the proposed amendments"); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680–84 & n.10 (D.C. Cir. 1983) (citing *Buckeye* and recognizing exception to exhaustion requirement where issue that plaintiff seeks to litigate was raised before the agency by a different party); *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 523–24 (D.C. Cir. 1972) (permitting plaintiff to litigate issue that it did not raise at administrative level, explaining that purpose of requiring exhaustion is to allow agency an opportunity to consider issues before being subject to litigation and that "[t]here is no requirement that this opportunity [for the agency to consider issues] be afforded in any particular manner, or by any particular party"); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 951–52 (6th Cir. 1971) (holding plaintiff entitled to litigate issues that it did not raise at administrative level where "the identical issues . . . were raised by other parties" before the agency); *Shantou Red Garden*, 36 CIT at ____, 815 F. Supp. 2d at 1332 (holding that, although plaintiff failed to exhaust its administrative remedies, "[e]xcusing the failure . . . is appropriate here because Commerce considered [plaintiff's] objection . . . when it addressed the argument advanced by [a different party]"); *Trust Chem Co. v. United States*, 35 CIT ____, ____ n.27, 791 F. Supp. 2d 1257, 1268 n.27 (2011) (excusing failure to exhaust where "Commerce was [previously] put on notice of the issue" that plaintiff sought to raise in litigation and "the specific information upon which [p]laintiff relie[d], . . . submitted by the [opposing party], [was] necessarily before the agency"); *Pakfood Public Co. v. United States*, 34 CIT ____, ____, 724 F. Supp. 2d 1327, 1351 (2010) (acknowledging that exhaustion is excused where agency had opportunity to consider issue at administrative level "as a result of other parties' arguments"), *aff'd*, 453 F. App'x 986 (Fed. Cir. 2011) (non-precedential); *Valley Fresh Seafood*, 31 CIT at 1990–91, 1994–95, 1998 (citing, *inter alia*, *NRDC v. EPA*, and excusing failure to exhaust where issue plaintiff sought to litigate was raised by another party at the administrative level, noting that "[plaintiff's] participation [at the administrative level] was not necessary to Commerce's deliberation on that issue" because "the petitioners raised [the] issue in their case brief"); *Jinan Yipin Corp. v. United States*, 31 CIT 1901, 1938–40, 526 F. Supp. 2d 1347, 1379–81 (2007) (citing, *inter alia*, *NRDC v. EPA*, and excusing failure to exhaust where issue that one plaintiff respondent sought to litigate had been raised at administrative level by another plaintiff respondent; "[Plaintiff respondent #1's] . . . arguments were before Commerce as a part of [plaintiff respondent #2's] case brief"); *LTV Steel*, 21 CIT at 867–69 & n.26, 985 F. Supp. at 119–20 & n.26 (excusing failure to exhaust where, *inter alia*, issue that party sought to litigate had been raised by a different party at the administrative level, "albeit on more limited and general grounds"); *Holmes Products Corp. v. United States*, 16 CIT 1101, 1103–04 (1992) (stating that "exhaustion may be excused if the issue [in litigation] was raised by another party" before the agency); *Timken Co. v. United States*, 16 CIT 429, 437–38, 795 F. Supp. 438, 445 (1992) (excusing plaintiff's failure to exhaust, emphasizing that "[w]hile it may be

It is therefore of relatively little moment whether or not, at the administrative level, Zhaoqing Tifo raised concerns about the potential double counting of energy inputs, because – without regard to whatever Zhaoqing Tifo said or didn't say – the Domestic Producer clearly sounded the alarm. Among other things, the administrative rebuttal brief that the Domestic Producer filed with Commerce specifically and explicitly warned Commerce in no uncertain terms that, if the agency were to rely on P.T. Tifico's financial statements in the Final Results, the agency could avoid double counting only by "plac-[ing] *all potential energy costs* into the [manufacturing/factory] overhead numerator" in the surrogate financial ratios and "turn[ing] off *all* [*Zhaoqing Tifo*]*-specific energy and water consumption factors*" by removing them from the factors of production database. Domestic Producer's Administrative Rebuttal Brief at 14 (emphases added).[29]

true that [plaintiff] did not raise this issue below, it is certain that [a different party] did," and that "[t]he fact that it was another party that raised [the issue in question] below does not prevent [plaintiff] from challenging it here"); *SKF*, 15 CIT at 159 n.6, 762 F. Supp. at 350 n.6 (excusing plaintiff's failure to exhaust where "other parties brought the issue to Commerce's attention during the investigations").

The Government concedes that a party's failure to exhaust is excused if the issue to be litigated was raised before the agency by a different party. *See* Def.'s Supp. Brief at 15. However, the Domestic Producer disputes the point and seeks to distinguish several of the cases cited to support that proposition. *See generally*, *e.g.*, Def.-Int.'s Supp. Response Brief at 8 n.25, 9–10 (discussing, and seeking to distinguish, cases cited for proposition that a party is entitled to litigate an issue notwithstanding the party's failure to exhaust at the administrative level where the issue was raised before the agency by a different party). As explained above, although it is true that the facts of each case are different and that none of the cases relied on precisely parallels this case, the Domestic Producer cannot possibly distinguish every case cited. Nor it is possible to ignore the broader themes that run through the cited decisions and the important considerations of policy, pragmatism, and fundamental fairness that motivate them. *See generally* nn.23 & 27, *supra*.

[29] Throughout supplemental briefing, the Domestic Producer repeatedly insists that its administrative rebuttal brief did not raise the issue of the potential for double counting of coal. *See*, *e.g.*, Def.-Int.'s Supp. Brief at 2 (arguing that "no party raised the issue of double-counting *coal* in its administrative case or rebuttal briefs"); *id*. at 8 (asserting that "[t]he issue of double-counting the *coal* value was never raised before Commerce until after the Final Results were issued"); *id*. at 9 (stating that "[n]o party to the case ever argued that *coal* would be double-counted"); *id*. at 21–22 (asserting that Domestic Producer "raised in its administrative rebuttal brief before Commerce the issue of double-counting *water and electricity* if Commerce chose to use the new surrogate financial statement," and that "no party raised the issue of double-counting the *coal* factor in their briefs before Commerce"); *id*. at 23 (arguing that "[t]he double-counting issue *as to coal as a factor of production* was never addressed before Commerce" until after the Final Results); Def.-Int.'s Supp. Response Brief at 2 (asserting that "*no party* raised the double-counting of coal issue in administrative case or rebuttal briefs"); *id*. at 4 (stating that no party raised "the double-counting *of coal* issue" in its administrative brief filed with Commerce); *id*. at 8 (arguing that "[n]o-where in its rebuttal brief did [the Domestic Producer] raise the double-counting *of coal* issue"); *id*. (asserting that "[i]n its rebuttal brief arguments regarding energy factors, [the Domestic Producer] repeatedly refers to 'water and electricity,' not coal"); *id*. at 9 (stating that "doublecounting of coal was never briefed before [Commerce]"); *id*. at 10 (asserting that

"no party briefed the issue of double-counting coal"); *id*. at 11 (arguing that "[t]he double-counting of coal issue was not raised until . . . after the Final Results"); Def.-Int.'s Brief on Supp. Authority at 11 (asserting that no party raised "the double-counting coal issue" until after Final Results).

True enough, the Domestic Producer's administrative rebuttal brief did not refer specifically to coal. *See generally* Domestic Producer's Administrative Rebuttal Brief at 13–14. But that is not the whole story, and it is a far cry from the Domestic Producer's implication that its brief addressed the potential double counting of only electricity and water and nothing else. *See*, *e.g.*, Def.-Int.'s Supp. Brief at 21–22 (asserting that Domestic Producer "raised in its administrative rebuttal brief . . . the issue of double-counting *water and electricity*"); Def.-Int.'s Supp. Response Brief at 8 (arguing that Domestic Producer's administrative rebuttal brief "repeatedly refers to 'water and electricity,' not coal"). To the contrary, as discussed above, the Domestic Producer's administrative rebuttal brief speaks to the potential for double counting not only electricity and water, but also, more generally, "other energy factors" as well. *See* Domestic Producer's Administrative Rebuttal Brief at 13–14 (referring broadly to P.T. Tifico's "energy costs"); *id*. at 14 (referring generally to P.T. Tifico's "electricity, water [and] other energy factors"); *id*. (arguing that, if Commerce uses P.T. Tifico's financial statements in Final Results, agency must account for "all potential energy costs" – not *some* energy costs, and certainly not only electricity and water – in surrogate financial ratios); *id*. (arguing that, if Commerce uses P.T. Tifico's financial statements in Final Results, agency must "turn off all company-specific energy and water consumption factors" – not merely electricity and "water consumption factors," but *all energy* and water consumption factors – in the factors of production database); *id*. (referring to "the lack of electricity, water or any other energy-specific data" in P.T. Tifico's financial statements).

The Domestic Producer's administrative rebuttal brief thus referred specifically to water and electricity – but, contrary to the Domestic Producer's representations in this forum, it did not stop there. The brief expressly discussed "other energy factors" as well. *See* Domestic Producer's Administrative Rebuttal Brief at 13–14. It is telling that the Domestic Producer has ignored the brief's broader references to energy sources in general. Further, the Domestic Producer has offered no explanation as to what was meant by phrases such as "other energy factors" and no explanation as to why those references do not include energy inputs such as coal and natural gas. Whatever the Domestic Producer meant to say in its administrative rebuttal brief, it cannot truthfully claim that it intended to limit its argument concerning the potential for double counting to water and electricity alone. It requires no imagination to read the Domestic Producer's reference to "other energy factors" (and other similar phrases) to cover energy inputs such as coal and natural gas; and nothing on the record indicates that the Domestic Producer intended otherwise.

Even more troubling are the Domestic Producer's outright misrepresentations of fact. At one point, for example, the Domestic Producer states – in a brief filed in this forum – that its administrative rebuttal brief "argued that if Commerce used the P.T. Tifico financial statement . . . , then Commerce would need to 'turn off' electricity and water consumption factors to prevent double-counting." *See* Def.-Int.'s Supp. Brief at 3–4. However, that is not an accurate statement of what the Domestic Producer actually said in the referenced brief. Contrary to the Domestic Producer's claim, the statement in its administrative rebuttal brief was not limited to "*electricity* and water consumption factors" (as the Domestic Producer now contends). (Emphasis added.) Instead, the statement in the Domestic Producer's brief referred much more broadly to "*energy* and water consumption factors." (Emphasis added.) *See* Domestic Producer's Administrative Rebuttal Brief at 14 (stating that Commerce would need to "turn off all company-specific *energy* and water consumption factors . . . [to] prevent[] double-counting") (emphasis added). Again, this exceeds the limits of zealous advocacy. *See* n.21, *supra*.

In short, even if the doctrine of exhaustion were applicable here (which it is not),[30] any failure to exhaust on the part of Zhaoqing Tifo would be excused, because the Domestic Producer raised the double counting issue before Commerce.

In addition, there is a second, related exception that would similarly serve to excuse any failure to exhaust by Zhaoqing Tifo (again, assuming *arguendo* that the doctrine of exhaustion otherwise applied). Specifically, the exhaustion requirement does not bar a plaintiff from raising an issue in litigation if the agency in fact had an opportunity to consider the issue at the administrative level, whether or not the agency actually availed itself of that opportunity. *See*, *e.g.*, *Indiana Utility Regulatory Comm'n v. FERC*, 668 F.3d at 739 (acknowledging exception to doctrine of exhaustion "when an agency has considered the argument"); *Ningbo Dafa Chemical Fiber Co. v. United States*, 580 F.3d 1247, 1259 (Fed. Cir. 2009) (sustaining Court of International Trade's ruling that plaintiff's litigation of issue was not barred by doctrine of exhaustion where Commerce had opportunity to consider plaintiff's "alternative methodology" in course of agency proceeding), *aff'g*, 32 CIT 926, 933, 577 F. Supp. 2d 1304, 1311 (2008) (stating court's disagreement with Government's "stance" that "Commerce lacked the opportunity to consider" issue raised by plaintiff in litigation); *Portland General Electric*, 501 F.3d at 1023–25 (explaining that failure to exhaust is excused where "[the] agency . . . had an opportunity to consider the issue[,] . . . . even if the issue was considered sua sponte by the agency").[31]

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[30] *See* section III.A, *supra* (explaining that doctrine of exhaustion is not applicable under facts of this case).

[31] *See also, e.g., American Forest & Paper Ass'n v. EPA*, 137 F.3d at 295–96 (recognizing that failure to exhaust is excused where agency had opportunity to consider the issue that plaintiff seeks to litigate, and ruling that, "because the public comments . . . were sufficiently specific to prompt EPA to *adopt* the provision contested [in the case at bar], the agency cannot reasonably claim that it has been denied the opportunity to consider the issue"); *NRDC v. EPA*, 824 F.2d at 1150–52 (quoting *Office of Communication of the United Church of Christ v. FCC*, and, in action challenging EPA's withdrawal of proposed amendments to regulations, holding that plaintiff was excused from exhaustion – notwithstanding plaintiff's "total abstention from participation in the rulemaking proceedings" – where issue raised by plaintiff in litigation in fact "was raised before the agency," such that the agency "had notice of [the] issue and could, or should have, taken it into account in reaching a final decision on the proposed amendments"; ultimately finding it "clear that the EPA actually did consider" issue that plaintiff sought to raise in litigation); *Cellnet Communication*, 965 F.2d at 1109 (holding plaintiffs' failure to exhaust to be excused where issue sought to be litigated was raised by other parties before the agency; "[c]onsideration of [an] issue by the agency at the behest of another party is enough to preserve it"); *Washington Ass'n for Television & Children*, 712 F.2d at 680–84 & n.10 (recognizing exception to exhaustion requirement where the agency "in fact considered the issue"); *Office of Communication of the United Church of Christ*, 465 F.2d at 523–24 (permitting plaintiff to litigate issue not exhausted at administrative level, where issue in fact was "raised by the majority and

challenged by the dissenters" in agency's final determination); *Buckeye*, 438 F.2d at 951–52 (holding plaintiff entitled to litigate issues that it did not raise at administrative level where agency nevertheless "had an opportunity to consider the identical issues"); *Shantou Red Garden*, 36 CIT at ____, 815 F. Supp. 2d at 1332 (holding that, although plaintiff failed to exhaust its administrative remedies, "[e]xcusing the failure . . . is appropriate here because Commerce considered [plaintiff's] objection . . . when it addressed the argument advanced by [a different party]"); *Trust Chem*, 35 CIT at ____ n.27, 791 F. Supp. 2d at 1268 n.27 (excusing failure to exhaust, emphasizing that "[t]he determinative question is whether Commerce was put on notice of the issue," and concluding that, in case at bar, "Commerce was aware that [p]laintiff was contesting" the issue that plaintiff subsequently raised in litigation and that "the specific information upon which [p]laintiff relie[d] . . . [was] before the agency"); *Pakfood*, 34 CIT at ____, ____, 724 F. Supp. 2d at 1351, 1352–53 (acknowledging that exhaustion is excused where "the agency in fact thoroughly considered the issue in question," but ruling that, under specific circumstances of the case, Commerce did not have "full and adequate opportunity to consider the [issue] in the first instance"); *Valley Fresh Seafood*, 31 CIT at 1990–91, 1994–95, 1998 (citing general principle that "[t]he court may excuse a party's failure to raise an argument before the administrative agency if . . . the agency in fact considered the issue," and excusing failure to exhaust where "the issue on which [plaintiff] now seeks judicial review was presented to, and considered by, Commerce during the administrative review"; emphasizing, *inter alia*, that "Commerce had [a] full opportunity to consider the . . . issue [raised by plaintiff in litigation] during the administrative review"); *Jinan Yipin*, 31 CIT at 193840, 526 F. Supp. 2d at 1379–81 (recognizing that "[t]he court may excuse a party's failure to raise an argument before the administrative agency if . . . the agency in fact considered the issue," and excusing failure to exhaust where "[plaintiff's] failure to raise [its] claims [at the administrative level] did not prevent Commerce from actually considering . . . [the] issues at the agency level"; noting that "[a]lthough [plaintiff] did not raise arguments [as to two issues] below, Commerce actually considered [those] issues at the agency level through the arguments of [other parties]"); *Holmes Products Corp. v. United States*, 16 CIT 1101, 1103–04 (stating that "[a] party may be excused from failure to raise an argument before the administrative agency as long as the agency in fact considered the issue. Thus, exhaustion may be excused . . . if it is clear that the agency had an opportunity to consider [the issue that a plaintiff seeks to raise]" (citations omitted)); *Timken*, 16 CIT at 437–38, 795 F. Supp. at 445 (excusing plaintiff's failure to exhaust, emphasizing that "[w]hile it may be true that [plaintiff] did not raise this issue below, it is certain . . . that the [agency] addressed it in its Final Results"); *SKF*, 15 CIT at 159 n.6, 762 F. Supp. at 350 n.6 (excusing plaintiff's failure to exhaust where agency itself addressed issue in recalculations in agency's Final Determinations); *Al Tech Specialty Steel*, 11 CIT at 377 n.5, 661 F. Supp. at 1210 n.5 (recognizing exception to doctrine of exhaustion for "issues not properly raised but in fact considered by the administrative body").

The Domestic Producer attempts to distinguish the facts of this case from two of the cases cited above. *See generally* Def.-Int.'s Supp. Response Brief at 9–10 (discussing, and seeking to distinguish, *Valley Fresh Seafood* and *Jinan Yipin*). The distinction that the Domestic Producer seeks to draw, however, rests mainly on its claim that, in this case, Commerce had no opportunity to consider the potential double counting of coal – a claim that is, as discussed above, simply incorrect. More generally, as previously noted, the facts of every case differ and none of the cases cited above perfectly parallels the case at bar. But it is not possible for the Domestic Producer to distinguish all of the cases on point. And, in any event, there is a broader current of thought that runs through the cases cited, and compelling considerations of policy, pragmatism, and fundamental fairness that undergird them, which the Domestic Producer does not address. *See generally* nn.23, 27, & 28, *supra*.

The record here leaves no doubt that Commerce had an opportunity to consider the potential for double counting of energy inputs as a result of the agency's inclusion of coal in the factors of production database, in tandem with its use of P.T. Tifico's financial statements.[32] As discussed immediately above, the double counting issue

[32] The Government and the Domestic Producer repeatedly assert that Commerce had no opportunity to consider whether, in the Final Results, coal should be excluded from the factors of production database and whether double counting would otherwise result. However, such assertions by the Government and the Domestic Producer cannot be reconciled with other statements that they make, where they claim (in essence) that Commerce in fact *did* consider excluding coal from the database and/or the potential for double counting, but ultimately rejected those concerns and made a reasoned and (according to the Government and the Domestic Producer) a reasonable decision that coal should be included in the database.

Compare, e.g., Def.'s Response Brief at 5–6 (asserting that "Commerce was deprived of the opportunity to address" Zhaoqing Tifo's argument that "the failure to exclude steam coal from the factors of production is unsupported by substantial evidence"); *id*. at 7 (asserting that, "[b]ecause Zhaoqing Tifo did not raise [its] argument [that Commerce double counted the value for steam coal because it was also included as part of factory overhead] in its case brief, Commerce did not have the opportunity to address [the] argument"); *id*. at 10 (asserting that "[b]ecause Zhaoqing Tifo chose not to raise [its] argument [that "assign[ing] a surrogate value to steam coal, instead of excluding it from the factors of production, results in double counting"] during the administrative proceedings, it deprived Commerce of the opportunity to make a determination, finding, or conclusion with respect to this argument in the final results"); *id*. at 12 (asserting that "Zhaoqing Tifo chose not to object to Commerce's calculation of normal value with steam coal included as a factor of production," and that Commerce therefore "was deprived of the opportunity to address that argument in the final results"); *id*. at 14 (referring to "Commerce's failure to address" whether steam coal should be excluded from the factors of production database); Def.'s Supp. Brief at 12 (asserting that "[h]ad Zhaoqing Tifo properly framed the issue in its case brief, Commerce could have addressed the treatment of steam coal under P.T. Tifico's financial statement in the final results"); *id*. (asserting that "Commerce did not have the benefit of advocacy from all parties on ["the proper treatment of energy factors by Commerce under P.T. Tifico's financial statement"] prior to the final results"); *id*. at 14 (asserting that "Zhaoqing Tifo's submission of a timely argument in its case brief would have given Commerce the opportunity to consider and address the issue" of the alleged need to "treat steam coal as part of overhead" if the Final Results relied on P.T. Tifico's financial statements); Def.-Int.'s Response Brief at 19 (asserting that "[i]f Zhaoqing Tifo had timely raised the double-counting issue before Commerce, . . . Commerce would have had the benefit of the advocacy of the parties"); Def.-Int.'s Supp. Brief at 2 (stating that "Commerce did not address double counting of coal"); Def.-Int.'s Supp. Response Brief at 2 (asserting that Commerce "neither double-counted coal nor addressed double-counting of coal" in the Final Results); *id*. at 4 (asserting that Commerce "neither considered nor addressed the double-counting *of coal*" in the Final Results, because, according to Domestic Producer, "no party had raised it in their case briefs"); *id*. at 8 n.25 (asserting that Commerce "did not address or consider [the] issue [of "the double-counting *of coal*"] in its Final Results"); *id*. at 10 (asserting that, "[b]ecause no party briefed the issue of double-counting coal, . . . [Commerce] neither considered nor addressed that issue in its Final Results"); Def.-Int.'s Brief on Supp. Authority at 13 (asserting that "Zhaoqing Tifo did not raise the double-counting coal issue in its administrative case . . . brief[] . . . , and Commerce was deprived of the opportunity to consider and respond to any such argument"); *with* Def.'s Response Brief at 1 (referring to "Commerce's decision to assign a surrogate value to steam coal, *instead of*

excluding steam coal from the factors of production") (emphasis added); *id*. at 5 (asserting that Commerce included steam coal as a factor of production "because there is no record evidence that steam coal is included in PT Tifico's surrogate financial statement as part of factory overhead"); *id*. at 6 (asserting that "Commerce reasonably determined that steam coal in this context is not a general expense, but rather is a direct input in the production of polyester staple fiber"); *id*. at 19 (asserting that, "[s]team coal energy is used to melt polyethylene terephthalate chips and polypropylene chips at the melting or spinning stage of production," and that, therefore, in the Final Results, "Commerce determined that steam coal is not a general expense, and, thus, it should be considered among the factors of production and not as factory overhead"); *id*. at 21 (referring to "Commerce's finding that steam coal is a direct input in the production process and should be valued as a factor of production"); Def.-Int.'s Response Brief at 20 (asserting that "Commerce excluded electricity and water costs from the [factors of production] database because it reasonably concluded . . . that those factors were accounted for in P.T. Tifico's manufacturing overhead," and, in contrast, "reasonably concluded that . . . coal was not included in P.T. Tifico's manufacturing overhead"); *id*. at 21 (asserting that "it was Commerce's intention to include the coal in the [factors of production] database, consistent with the statute and [the agency's] longstanding practice of including energy and direct material factors in the [factors of production] database"); *id*. at 23 (asserting that "Commerce reasonably concluded that P.T. Tifico included electricity and water, but did not include coal, in its overhead"); *id*. (asserting that "it was reasonable for Commerce to conclude that any coal that P.T. Tifico may use was included in the cost of materials held in inventory, rather than manufacturing overhead"); *id*. at 24 (asserting that "[c]onsistent with its practice to include in the [factors of production] database inputs that are used in significant volumes in the production of subject merchandise, Commerce reasonably included coal, but not electricity or water"); Def.-Int.'s Supp. Brief at 12 (asserting that "Commerce applied its longstanding and established practice with regard to calculating normal value under its [factors of production] methodology – including its practice to only turn off energy inputs when record evidence demonstrates that doing so would result in double-counting and its practice to treat significant inputs as direct materials in its [factors of production] methodology"); *id*. at 22–23 (asserting that, "in the Final Results, Commerce included coal in the [factors of production] database, but excluded the electricity and water factors . . . because Commerce found that [P.T.] Tifico's financial statement did not breakout electricity and water, and there was no evidence that coal was included in P.T. Tifico's manufacturing overhead"); Def.-Int.'s Response Brief on Supp. Authority at 3 (asserting that Commerce "excluded electricity (the energy [factor of production]) but included coal (a direct material input in the production of polyester staple fiber . . .) in the normal value in the Final Results based on its longstanding practice and because there was no indication that coal was used by the surrogate financial ratio company" (*i.e.*, P.T. Tifico)).

The Government and the Domestic Producer cannot have it both ways. They cannot logically claim both that Commerce was deprived of the opportunity to consider the asserted need to exclude coal from the factors of production database and the potential for double counting, and also simultaneously argue that Commerce reached a deliberate determination on those points. It is possible to *argue* in the alternative. But these are matters of *fact*.

Moreover, it is one thing for counsel to seek to "prop up" an agency determination through subtle suggestions that an agency's determination could be sustained on the basis of record evidence and arguments that the agency itself did not cite. *See* section III.C, *infra* (rejecting various arguments by the Government and Domestic Producer as impermissible *post hoc* rationale). It is another matter entirely to affirmatively state – as the Government and the Domestic Producer do, at the citations noted above – that the agency in fact considered points and reasoned its way to a decision when the record is devoid of any indication whatsoever that the agency did so. Taking such liberties with the record goes well beyond the limits of zealous advocacy. *See* nn.21 & 29, *supra*.

was raised at a minimum by the Domestic Producer – and the fact that Commerce thus had an opportunity to consider the issue in the Final Results would alone suffice to preserve Zhaoqing Tifo's right to pursue its double counting claim in this forum. But, in addition, the record further makes it clear that Commerce in fact considered the potential for double counting, at least as to some energy inputs.

Specifically, Commerce's Issues and Decision Memorandum recognizes that "P.T. Tifico's financial statement does not break out energy [costs]." Issues & Decision Memorandum at 14. Therefore, "in order to prevent double counting" (by having electricity and water both captured in the surrogate financial ratios and also included in the factors of production database), Commerce "placed all electricity and water costs into the [manufacturing/factory] overhead numerator" in the financial ratios, and removed from the factors of production database the "electricity and water [costs]" that the agency had included in the database in the Preliminary Results. *Id*. at 11; *see also* Final Results, 78 Fed. Reg. at 2367 (stating that Commerce "did not separately value electricity and water in the final margin program because these factors of production are already captured in the surrogate financial ratios"). However, Commerce did not address any potential double counting of the "other energy factors" (beyond water and electricity) to which the Domestic Producer's rebuttal brief referred. *See*, *e.g.*, Domestic Producer's Administrative Rebuttal Brief at 14 (stating that P.T. Tifico's financial statements have "no breakout for electricity, water or *other energy factors*") (emphasis added).

As such, even assuming arguendo that the doctrine of exhaustion did apply, any failure to exhaust by Zhaoqing Tifo would be excused, because Commerce was not deprived of the opportunity to address the double counting of energy inputs in the Final Results. In fact, Commerce's Final Results did address double counting – albeit only as to electricity and water, and not coal or natural gas or any other source of energy.[33]

Absent telepathy, it is impossible to know what was in the minds of Commerce decision-makers as they prepared the Final Results. In any event, even if Commerce did consider the possibility of excluding coal from the factors of production database and/or the potential for double counting (as it had the opportunity to do), the fact remains that there is no rationale articulated for any such determination and no evidence cited to support it.

[33] Zhaoqing Tifo argues that, in any event, it is well settled that the application of the doctrine of exhaustion in an international trade case is a matter that is committed to the court's sound discretion. *See* Pl.'s Reply Brief at 5–7; Pl.'s Supp. Brief at 30–31; Pl.'s Brief on Supp. Authority at 5; 28 U.S.C. § 2637(d) (providing that "the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies") (emphasis added).

Accordingly, even if the doctrine of exhaustion were to apply here, and even if it were determined that Zhaoqing Tifo had failed to exhaust and that such failure was not excused by any of the exceptions discussed above, Zhaoqing Tifo nevertheless could be permitted to

B. *The Doctrine of Judicial Estoppel*

Apart from its invocation of the doctrine of exhaustion of administrative remedies, the Domestic Producer also contends that Zhaoqing Tifo's double counting claim is independently barred by the doctrine of judicial estoppel. *See generally* Def.-Int.'s Supp. Brief at 1, 2, 23–25; Defendant-Intervenor's Supplemental Response Brief at 12, 15 ("Def.-Int.'s Supp. Response Brief"); Def.-Int.'s Brief on Supp. Authority at 8–9. Like the exhaustion arguments analyzed above, this argument too is lacking in merit.

The gravamen of judicial estoppel is that, "[a]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, at 553 (2d ed. 2002) ("Wright, Miller, & Cooper") (earlier edition quoted in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).[34] In the seminal case, *Davis v. Wakelee*, the Supreme Court explained:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a con-

litigate its double counting claim, subject to the court's discretion. *See*, *e.g.*, *Essar Steel*, 753 F.3d at 1374 (acknowledging that application of doctrine of exhaustion is subject to discretion of Court of International Trade); *Itochu Building Prods. v. United States*, 733 F.3d 1140, 1145, 1148 (Fed. Cir. 2013) (recognizing that Court of International Trade's application of exhaustion doctrine is matter of "discretion," subject to appellate review only pursuant to "the demanding abuse-of-discretion standard"); *Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1381 (same); *Ningbo Dafa*, 580 F.3d at 1259 (noting that Court of Appeals has "held that applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade") (citation omitted); *Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (quoting *Corus Staal* for principle that "application of 'exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade'"); *Corus Staal*, 502 F.3d at 1381 & n.5 (same; sustaining trial court determination that party failed to exhaust, and underscoring breadth of trial court's discretion by expressly noting that determination that trial court did not abuse its discretion in finding failure to exhaust "does not imply that the court would have abused its discretion if it had excused [the party] from having to exhaust its administrative remedies"); *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1356 n.17 (Fed. Cir. 2006) (citing Court of International Trade's "discretion" as to whether or not to "impose an 'exhaustion' requirement under 28 U.S.C. § 2637(d)"); *Consol. Bearings*, 348 F.3d at 1003 (referring to "discretion" of Court of International Trade in application of exhaustion); *CEMEX*, 133 F.3d at 905 (explaining that, as to international trade cases, "Congress has not clearly required exhaustion" (citation omitted)).

[34] *See also* 18 J. Moore *et al*., Moore's Federal Practice § 134.30, at 134–63 (3d ed. 2014) (stating that "[t]he doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party . . . in a previous proceeding" (footnote omitted)) (earlier edition quoted in *New Hampshire v. Maine*, 532 U.S. at 749).

> trary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895) (quoted in *New Hampshire v. Maine*, 532 U.S. at 749). Thus, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000).

The Domestic Producer argues, in essence, that Zhaoqing Tifo is judicially estopped from claiming in this forum that coal should not be included in the factors of production database, because – according to the Domestic Producer – Zhaoqing Tifo claimed at the administrative level that coal should be included in the database. *See generally* Def.-Int.'s Supp. Brief at 1, 2, 23–25; Def.-Int.'s Supp. Response Brief at 12, 15; Def.-Int.'s Brief on Supp. Authority at 8–9. That argument fails for several reasons.

As an initial matter, raising an argument for the first time in supplemental briefing is much too late. Even if the Domestic Producer's judicial estoppel argument had been made in a timely fashion, however, it would have fared no better.

As the Supreme Court observed in *New Hampshire v. Maine*, judicial estoppel applies only where "a party's later position . . . [is] 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. at 750 (citations omitted); *see also Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1380–82 (Fed. Cir. 2014) (same). This is not such a case.

As detailed above, contrary to the assertions of the Government and the Domestic Producer, Zhaoqing Tifo did not affirmatively argue at the administrative level that coal should be included in the factors of production database. Instead, on the assumption that Commerce would continue to rely on P.T. Asia Pacific's financial statements in the Final Results and thus would also continue to include coal in the factors of production database (as Commerce did in the Preliminary Results), Zhaoqing Tifo argued that Commerce should use a certain set of data (*i.e.*, coal prices from the Indonesian Ministry of Energy and Mineral Resources) in lieu of the Indonesian import statistics that Commerce used to value coal in the Preliminary Results. *See*, *e.g.*, n.21, *supra* (rejecting assertions of Government and Domestic Producer that Zhaoqing Tifo affirmatively advocated for inclusion of coal in factors of production database). That is precisely the same position that Zhaoqing Tifo presses in this litigation; and it is the subject of Count V of the Complaint (which is not at issue in the

pending motion). *See* Complaint, Count V (contesting "the surrogate value of coal" that was used in the Final Results, if court determines that including a surrogate value for coal in the factors of production database "[was] legally valid"); n.18, *supra* (explaining that pending motion is addressed solely to Counts I-IV of Complaint). Accordingly, contrary to the Domestic Producer's judicial estoppel argument, Zhaoqing Tifo is not "blowing hot and cold." And, because there is no inconsistency between Zhaoqing Tifo's position in litigation and its position at the administrative level, judicial estoppel does not apply.

In addition, there is yet a third reason why the Domestic Producer's judicial estoppel claim must fail. The Supreme Court has emphasized that judicial estoppel applies only where the party sought to be estopped "has succeeded in persuading a court to accept that party's earlier position." *New Hampshire v. Maine*, 532 U.S. at 750; *see also Hill-Rom Services*, 755 F.3d at 1380 (same).[35] As the Supreme Court has pointed out, "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent . . . determinations,' and thus poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. at 750–51 (citations omitted).

Here, however, Zhaoqing Tifo did not prevail at the administrative level. Zhaoqing Tifo's arguments notwithstanding, the Final Results rejected the coal prices from the Indonesian Ministry of Energy and Mineral Resources that Zhaoqing Tifo proffered and instead continued to value coal using the same Indonesian import statistics that Commerce had used in the Preliminary Results. *See* Issues & Decision Memorandum at 5, 8 (Comment 1) (stating that Final Results continue to value coal using Indonesian import statistics relied on in Preliminary Results). Because Zhaoqing Tifo did not "succeed in persuading [Commerce] to accept [Zhaoqing Tifo's] . . . position" (an agency determination that Zhaoqing Tifo contests in Count V), judicial estoppel cannot apply – not even as to Count V of the Complaint, which (again) is not the subject of the pending motion. Judicial estoppel thus is no bar to consideration of the merits of Zhaoqing Tifo's double counting claim.

C. *The Merits of Zhaoqing Tifo's "Double Counting" Claim*

Although the administrative rebuttal brief that the Domestic Producer filed with Commerce put the agency on notice that P.T. Tifico's financial statements include "no breakout for electricity, water or

[35] Although the point is not entirely settled, it is generally accepted that judicial estoppel may apply where the prior inconsistent position was asserted before an agency (as the Domestic Producer alleges here). *See* 18B Wright, Miller, & Cooper § 4477, at 575 n.41 (citing, *inter alia*, *Lampi Corp. v. American Power Products, Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000)).

other energy factors" and argued that – in order to avoid double counting – the use of those financial statements in the Final Results would require the agency to exclude all energy inputs from the factors of production database, there is no dispute that Commerce removed only water and electricity, leaving coal in the database. *See* Domestic Producer's Administrative Rebuttal Brief at 14; *see also id.* at 13–14 (emphasizing that P.T. Tifico's financial statements "include[] *no separate breakout* of the company's energy costs"); *id.* at 14 (arguing that use of P.T. Tifico's financial statements in Final Results would require agency "to place all potential energy costs into the [manufacturing/factory] overhead numerator [*i.e.*, to account for all potential energy costs in the surrogate financial ratios] and turn off [*i.e.*, to exclude from the factors of production database] all company-specific energy and water consumption factors, in order to capture all costs while also preventing double-counting"); *id*. (highlighting lack of "electricity, water or any other energy-specific data in [P.T. Tifico's] financial statements").[36]

In its Issues and Decision Memorandum, Commerce acknowledged that "P.T. Tifico's financial statement does not break out energy [inputs]." Issues & Decision Memorandum at 1314; *see also id*. at 11 (stating that "P.T. Tifico's financial statement does not include a separate breakout of its costs for electricity and water"). Recognizing that fact, the Issues and Decision Memorandum expressly addressed the potential for double counting and the need to avoid double counting by excluding energy sources from the factors of production database – but only as to water and electricity, and not as to coal or natural gas or any other energy inputs.

The Issues and Decision Memorandum thus explained that, "in order to prevent double counting," the Final Results "placed all electricity and water costs into the [manufacturing/factory] overhead numerator" (*i.e.*, accounted for all electricity and water costs by including them in the surrogate financial ratios) and removed from the factors of production database the "electricity and water consumption factors" that Commerce had included in the database for purposes of the Preliminary Results. Issues & Decision Memorandum at 11; *see also* Final Results, 78 Fed. Reg. at 2367 (stating that Commerce "did

[36] As outlined above, Zhaoqing Tifo would be entitled to litigate the merits of its double counting claim even if the Domestic Producer had not alerted Commerce to the issue at the administrative level. *See generally* section III.A.1, *supra* (explaining that Zhaoqing Tifo was not required to raise double counting issue at the administrative level because that issue did not arise until the Final Results); section III.A.2, *supra* (explaining that failure to exhaust was excused because Commerce in fact had opportunity to address issue); *see also* n.20 (summarizing argument that Zhaoqing Tifo exhausted its administrative remedies in its administrative case brief); n.33 (explaining that application of doctrine of exhaustion is committed to court's sound discretion).

not separately value electricity and water in the final margin program because these factors of production are already captured in the surrogate financial ratios"). Similarly, elsewhere in the Issues and Decision Memorandum (discussing the surrogate value for water), Commerce explained that "[b]ecause P.T. Tifico's financial statement does not break out energy, consistent with [Commerce's] practice, [the Final Results] will not separately value water in the margin program, as it is already captured in the surrogate financial ratios." Issues & Decision Memorandum at 13–14 (footnote omitted).

Conspicuously absent from the Final Results, however, is any explanation for Commerce's treatment of coal or natural gas or any "other energy factors" beyond water and electricity to which the Domestic Producer's administrative rebuttal brief referred. *See* Domestic Producer's Administrative Rebuttal Brief at 14 (stating that P.T. Tifico's financial statements include "no breakout for electricity, water or *other energy factors*") (emphasis added). Zhaoqing Tifo maintains that there are no grounds for treating coal differently than water and electricity, and that Commerce's inclusion of coal in the factors of production database for purposes of the Final Results led to the double counting of energy inputs, because – according to Zhaoqing Tifo – like electricity and water, other energy inputs (such as natural gas) also are embedded in the surrogate financial ratios. *See*, *e.g.*, Pl.'s Brief at 3, 4, 6–7, 8–9, 11, 16, 20–21, 22, 23; Pl.'s Reply Brief at 1–2, 13–15, 22. Commerce's Issues and Decision Memorandum is mum on these points.

Commerce's Issues and Decision Memorandum does not explain, for example, why the agency singled out electricity and water, and did not address the "other energy factors" referenced in the Domestic Producer's administrative rebuttal brief. Commerce does not explain the agency's rationale for excluding electricity and water from the factors of production database, but not coal. Commerce offers no justification for the difference in treatment. Similarly, Commerce does not explain why including coal in the factors of production database does not result in the double counting of energy inputs. It is the absence of "a separate breakout of . . . costs for electricity and water" in P.T. Tifico's financial statements that led Commerce to exclude those inputs from the factors of production database for purposes of the Final Results. But nowhere does Commerce identify the "separate breakout" of other energy inputs (such as natural gas) in P.T. Tifico's financial statements that might serve as a basis for an agency determination that such inputs are not captured in the surrogate financial ratios and that coal may be included in the factors of production database without fear of double counting. Nowhere does

Commerce explain why its concerns about the double counting of electricity and water do not also extend to coal (and any other energy sources, such as natural gas).

In their briefs filed with the court, the Government and the Domestic Producer argue at some length that Commerce properly included coal in the factors of production database and that Commerce reasonably treated coal differently than electricity and water. *See generally* Def.'s Response Brief at 6, 15–21; Def.-Int.'s Response Brief at 2, 13–25.[37] They argue, for example, that Commerce "distinguishes between energy inputs that are general expenses (*i.e.*, not direct costs) accounted for in [manufacturing/]factory overhead, and energy inputs that are direct inputs in the production process and that are not accounted for in [manufacturing/]factory overhead." Def.'s Response Brief at 18; *see also* Def.-Int.'s Response Brief at 21 (similar). They state that "Commerce looks at how [an] energy input is used and then determines on a case-by-case basis whether (1) to exclude that input because it is accounted for by [manufacturing/]factory overhead, or (2) to include it as a factor of production." Def.'s Response Brief at 19; *see also* Def.-Int.'s Response Brief at 18 (similar).

The Government and the Domestic Producer assert that Commerce's preference is to value energy inputs in the factors of production database, particularly when the energy sources are "direct inputs in the production process." Def.'s Response Brief at 18; *see also* Def.-Int.'s Response Brief at 18, 21, 24 (similar). They further assert that "Commerce's practice is to exclude energy inputs from the factors of production [database] when they are used in the general running of the business – *i.e.*, in offices, bathrooms, and other facilities – as opposed to being used in the direct production of the subject merchandise." Def.'s Response Brief at 17; *see also* Def.-Int.'s Response Brief at 18, 24 (similar). They state that, here, Commerce "determined that PT Tifico's surrogate financial statements likely included water and electricity in its general expenses, and specifically in its

[37] *See also* Def.-Int.'s Brief on Supp. Authority at 12–13; Def.'s Response Brief on Supp. Authority at 3–4; Def.-Int.'s Response Brief on Supp. Authority at 3–5.

According to the Domestic Producer, "the relevant [Commerce] practices are: . . . (b) Commerce's standard practice to include [factors of production], including energy inputs, in the [factors of production] database unless [Commerce] knows that doing so would result in double-counting; (c) when it is not definitive whether [a factor of production] is included in the surrogate financial ratios, Commerce utilizes the best information available, on a case-by-case basis, to determine whether to include that factor in the [factors of production] database or the financial ratio; (d) Commerce's practice to treat significant inputs, such as coal in this case, as direct materials in its [factors of production] methodology; and (e) Commerce has a preference for valuing respondents' own energy inputs as [factors of production] when such inputs are part of an energy-intensive process." Def.-Int.'s Response Brief on Supp. Authority at 3–4.

[manufacturing/]factory overhead." Def.'s Response Brief at 17; *see also* Def.Int.'s Response Brief at 20, 23 (similar). And they claim that, in contrast, "coal is used as a direct input and, consequently, would not be accounted for within [manufacturing/]factory overhead expenses." Def.'s Response Brief at 20; *see also* Def.-Int.'s Response Brief at 18–19, 23 (similar).[38] Further, while the Government is basically silent on the matter, the Domestic Producer argues that there is no record evidence that energy was double counted in Commerce's calculations. Def.-Int.'s Response Brief at 2, 17–18, 22. *But see* Pl.'s Reply Brief at 9, 13–21 (disputing claims of Government and Domestic Producer that Commerce properly included coal in the factors of production database and that Commerce reasonably treated coal differently than electricity and water); [Plaintiff's] Supplemental Authority Regarding Exhaustion of Administrative Remedies at 3–4 ("Pl.'s Brief on Supp. Authority") (same); [Plaintiff's] Response to Notice of Supplemental Authority Regarding Exhaustion of Administrative Remedies at 11–12 (same).

Without regard to the accuracy or reasonableness of the representations made by the Government and the Domestic Producer, the bottom line is that none of this information appears in Commerce's Issues and Decision Memorandum. The sundry reasons and explanations and justifications offered by the Government and the Domestic Producer in their briefs thus constitute impermissible *post hoc* rationale. Litigation counsel's attempts at "backfill" are no substitute for an agency's own reasoned decisionmaking on the administrative record. *Burlington Truck Lines*, 371 U.S. at 168–69; *Abbott Laboratories v. United States*, 573 F.3d 1327, 1332–33 & n.1 (Fed. Cir. 2009). It is black letter law that an agency's action may be upheld, if at all, only on the grounds articulated by the agency itself. *State Farm*, 463 U.S. at 50. As such, the arguments made and the information supplied by the Government and the Domestic Producer cannot be credited. *See generally* Pl.'s Reply Brief at 9–10, 21.

The long and the short of it is that the Issues and Decision Memorandum (and, more generally, the Final Results) give 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 non-existent. It thus cannot be said that

[38] As noted above, it appears that P.T. Tifico does not use coal, but uses natural gas (and perhaps other energy sources as well), which Zhaoqing Tifo does not use. The fact that P.T. Tifico does not use coal obviously does nothing to diminish any concerns about the potential double counting of energy inputs. Clearly P.T. Tifico uses some energy source for its production process.

"the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (citation omitted). Moreover, the absence of any articulated rationale for Commerce's inclusion of coal in the factors of production database (given any potential for double counting) precludes any assessment of the substantiality of the evidence in support of the agency's action, as well as any evaluation as to whether that action was arbitrary and capricious.

Zhaoqing Tifo asks that this matter be remanded to Commerce "with specific limiting instructions" directing the agency "to remove the coal energy factor from the [factors of production] database and recalculate Zhaoqing Tifo's antidumping duty margin." Pl.'s Brief at 23; Pl.'s Reply Brief at 10, 22. However, particularly in light of the procedural posture of the case, such relief is not warranted.

Instead, this matter is remanded to Commerce to permit the agency to reconsider its determination on the inclusion of coal in the factors of production database and to expressly consider any associated potential for double counting of energy inputs, explaining its reasoning fully and with reference to the record evidence. In the interests of due process and fundamental fairness, Commerce is encouraged to reopen the administrative record on remand, to ensure that the Remand Results are based on an appropriate record and to allow the parties an adequate opportunity to place on the record, for the consideration of the agency, information to illuminate or clarify key points such as the energy sources that P.T. Tifico uses in its production of polyester staple fiber, whether P.T. Tifico uses those energy sources for any other purpose, and how the sources are treated in P.T. Tifico's financial statements and in the surrogate financial ratios that Commerce derived from the financial statements for use in the Final Results (including whether there is any potential for double counting).

IV. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record must be granted and this matter remanded to the U.S. Department of Commerce for further action not inconsistent with this opinion.

A separate order will enter accordingly.

Dated: April 9, 2015
New York, New York

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

Slip Op. 15–32

FENGCHI IMP. & EXP. CO., LTD. OF HAICHENG CITY, FENGCHI REFRACTORIES CO. OF HAICHENG CITY, AND FEDMET RESOURCES CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and RESCO PRODUCTS, INC., AND ANH REFRACTORIES COMPANY, Defendant-Intervenors.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 13–00166

[Plaintiffs' motion for judgment on the agency record is denied.]

Dated: April 13, 2015

Donald B. Cameron, *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, *R. Will Planert*, and *Sarah S. Sprinkle*, Morris Manning & Martin LLP, of Washington, DC, for plaintiffs.

Melissa M. Devine, *Trial Attorney*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and Loren M. Preheim Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Camelia C. Mazard, *Robert R. Doyle, Jr.*, and *Andre P. Barlow*, Doyle Barlow & Mazard PLLC of Washington, DC, for defendant-intervenor Resco Products, Inc.

Joseph W. Dorn and *Brian E. McGill*, King & Spalding LLP, of Washington, DC, for defendant-intervenor ANH Refractories Company.

OPINION

Tsoucalas, Senior Judge:

Plaintiffs Fengchi Import and Export Co., Ltd. of Haicheng City, Fengchi Refractories Co. of Haicheng City, and Fedmet Resources Corporation (collectively "Plaintiffs"), move for judgment on the agency record contesting defendant United States Department of Commerce's ("Commerce") determination in *Certain Magnesia Carbon Bricks From the People's Republic of China: Final Results and Final Partial Rescission of Countervailing Duty Administrative Review; 2010*, 78 Fed. Reg. 22,235 (Apr. 15, 2013) ("*Final Results*"). Commerce and defendant-intervenors, Resco Products Inc. and ANH Refractories Company, oppose Plaintiffs' motion. For the following reasons, Plaintiffs' motion is denied.

BACKGROUND

Magnesia carbon bricks ("MCBs") from the People's Republic of China ("PRC") are subject to a countervailing duty ("CVD") order. *See Certain MCBs From the PRC: CVD Order*, 75 Fed. Reg. 57,442 (Sept.

21, 2010) (the "*Order*"). On October 31, 2011, Commerce initiated an administrative review of the *Order*, covering sales of subject merchandise between August 2, 2010 and December 31, 2010 ("2010 Administrative Review"). *See Initiation of Antidumping and CVD Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 67,133, 67,139–40 (Oct. 31, 2011). Commerce named Fengchi Import and Export Co., Ltd. of Haicheng City and Fengchi Refractories Co. of Haicheng City, as mandatory respondents.[1] *Id.* Fedmet, a domestic importer of Fengchi's merchandise, joined the review as an interested party. *See* Letter to Commerce re: CVD Order on Certain MCBs from the PRC, Administrative Review (8/2/10–12/31/11): Entry of Appearance and APO Application (Oct. 31, 2012), Public Rec. 102 at 1.[2]

On November 22, 2011, Commerce released U.S. Customs and Border Patrol ("CPB") data, covering Fengchi's imports of MCBs from the PRC made during the period of review ("POR"), and invited Fengchi to comment on the data. *See* Certain MCBs from the PRC: Customs Data of U.S. Imports of Certain MCBs, (Nov. 22, 2011), PR 20 at 1.

On February 21, 2012, Commerce issued a questionnaire to the Government of China ("GOC"), with instructions to forward it to Fengchi. Letter to GOC re: First Administrative Review of CVD Order on Certain MCBs from the PRC, PR 65 at 1–2 (Feb. 21, 2012) ("Initial Questionnaire"). Commerce insisted that both the GOC and Fengchi respond. *Id.* Commerce requested that Fengchi report all domestic and foreign sales of both subject and non-subject merchandise, as well as total exports of subject and non-subject merchandise to the United States and other markets during the POR. *See id.* at section III. Specifically, Commerce requested information on Fengchi's sales and exports of magnesia alumina carbon bricks ("MACBs") during the POR. *See id*.

On March 29, 2012, Fengchi informed Commerce that, because it had no entries, exports, or sales of subject merchandise to the United States during the POR, there was no basis to conduct a review of Fengchi and, thus, Commerce should rescind the administrative review of the company. *See* Letter to Commerce re: CVD Order on Certain MCBs from the PRC; Administrative Review (8/2/10–12/31/10) (Mar. 29, 2012), PR 59 at 1–2. Fengchi insisted that because it did not have entries or sales during the POR, its letter to Commerce

[1] Fengchi Import and Export Co., Ltd. of Haicheng City is a Chinese exporter of MCBs, and Fengchi Refractories Co. of Haicheng City is its affiliated producer. *See Final Results*, 78 Fed. Reg. at 22,235. Throughout the opinion, the court will refer to them collectively as "Fengchi."

[2] Hereinafter, documents in the public record will be designated "PR" and documents in the confidential record designated "CR" without further specification except where relevant.

should be considered a complete response. *Id.* at 2. Fengchi asserted that even though the entry data from the U.S. Customs and Border Patrol ("CBP") appears to show entries of subject merchandise by Fengchi, the company was not in a position to account for the entry data. *Id.* at 3–4.

Concurrent with 2010 Administrative Review, Commerce conducted a scope inquiry to determine whether MACBs from the PRC were subject to the *Order*. *See Certain MCBs from the PRC: Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review*, (Apr. 9, 2013) PR 117 at 1–2 ("*IDM*"). On July 2, 2012, Commerce issued the final results of its scope inquiry, finding that MACBs were within the scope of the *Order*. *See Certain MCBs from the PRC and Mexico: Final Scope Ruling — Fedmet Resources Corporation* at 1–2, Case Nos. A-201–837, A-570954 and C-570–955 (July 2, 2012) ("*MACB Scope Ruling*").

Prior to issuing the *MACB Scope Ruling*, Commerce placed the CBP information on the record regarding Fengchi's apparent entries during the POR and requested comments from Fengchi on the data. Mem. re: MCBs from the PRC (C-570–955): Requests for Entry Summaries from CBP, CR 14 at 1 (June 20, 2012). Subsequently, on July 2, 2012, in its comments to Commerce's June 20, 2012 memorandum, Fengchi explained that its entries were incorrectly categorized as subject merchandise by CBP. Letter to Commerce re: CVD Order on Certain MCBs from the PRC; Administrative Review (8/2/10–12/31/10), CR 15 at 1–6 (July 2, 2012). Fengchi argued that the description of the merchandise in these documents supports its claim that the company did not have entries of subject merchandise during the POR. *Id.*

On August 15, 2012, Commerce informed Fengchi that it should have responded to its Initial Questionnaire issued on February 21, 2012, because the CBP information had been placed on the record and the *MACB Scope Ruling* had been issued, demonstrating that Fengchi had made subject entries during the POR. Letter to GOC re: First Administrative Review of CVD Order on Certain MCBs from the PRC: Deficiency Letter Regarding Inadequate Questionnaire Response, CR 17 at 1–3 (Aug. 15, 2012). Additionally, Commerce requested that Fengchi submit information with regards to its sales of MACBs during the POR. *Id.* at 2.

On August 16, 2012, Fengchi submitted a letter to Commerce objecting to its request, arguing that: (1) Fengchi correctly reported that it had no entries of MCBs at the time Commerce issued the questionnaire; (2) Commerce's request contradicts the time limits provided in 19 C.F.R. § 351.225(l)(4), because the request came a month after the

final scope determination and 289 days after the initiation of this review; and (3) the request was unfair and burdensome. PR 72 at 1–12. Fengchi also filed for an extension of ninety days to respond to the questionnaire. PR 73 at 1–5.

In response to Fengchi requesting an extension of time to respond to Commerce's initial questionnaire, Commerce extended the deadline for filing a responses to the Initial Questionnaire for both Fengchi and the GOC until October 1, 2012. *See* Letter to Fengchi re: First Administrative Review of the CVD Order on Certain MCBs from the PRC: Fengchi's Extension Request, PR 78 at 1 (Aug. 28, 2012). Subsequently on August 29, 2012, Fengchi informed Commerce that it would not respond to its Initial Questionnaire arguing that Commerce's request was contrary to the express terms of 19 C.F.R. § 351.225(l)(4) and that Commerce's untimely request to report such sales was unreasonably burdensome and prejudicial. *See* Letter to Fengchi re: CVD Order on Certain MCBs from the PRC; Administrative Review, PR 81 at 2–3 (Aug. 29, 2012).

On September 11, 2012, Commerce granted Fengchi a final opportunity to respond its questionnaire by October 1, 2012, and once again Fengchi declined to comply. *See* Letter to Fengchi re: First CVD Administrative Review of Certain MCBs from the PRC, PR 86 at 1–3 (September 11, 2012); *see also* Letter to Commerce re: CVD Order on Certain MCBs from the PRC; CVD Administrative Review (8/02/10–12/31/10), PR 95 at 1–2 (Oct. 1, 2012).

Commerce issued the preliminary results of the 2010 Administrative Review in October 2012. *See Certain MCBs From the PRC: 2010 CVD Administrative Review*, 77 Fed. Reg. 61,397 (Oct. 9, 2012) ("*Preliminary Results*"). *See also Decision Memorandum for Preliminary Results of CVD Administrative Review: Certain MCBs from the PRC*, PR 98 (Oct. 1, 2012) ("*PRM*"). Commerce determined that Fengchi's refusal to provide information on its MACBs sales constituted a failure to cooperate with the review to the best of its ability and applied total adverse facts available ("AFA"). *PRM* at 6–9. Commerce assigned a 262.80% dumping margin to Fengchi's sales. *PRM* at 8.

Commerce issued the *Final Results* in April 2013, upholding the *Preliminary Results* in their entirety. *Final Results*, 78 Fed. Reg. at 22,236.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and section 516A(a)(2)(B)(i) of the Tariff Act of 1930,[3] as amended, 19

[3] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto.

U.S.C. § 1516a(a)(2)(B)(i) (2012). The court will uphold Commerce's final determination in a countervailing duty administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Additionally, when reviewing an agency's interpretation of its regulations, the court must give substantial deference to the agency's interpretation, *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1391 (Fed. Cir. 2014) (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998)), according it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007). In this context, "[d]eference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." *Viraj*, 476 F.3d at 1355 (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006).

DISCUSSION

Fengchi contests the following aspects of the *Final Results*: Commerce's request for sales information on MACBs; Commerce's application of AFA; Commerce's selection of 262.80% as the AFA rate. *See* Pls.' Br. Supp. Mot. J. Agency R. at 7–23 ("Pls.' Br.").

As an initial matter, the Court of Appeals for the Federal Circuit ("CAFC") issued an opinion overturning the *MACB Scope Ruling* on June 20, 2014, after the completion of briefing in this case. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 914 (Fed. Cir. 2014). Plaintiffs argues in their brief that a reversal of the *MACB Scope Ruling* will resolve the issues in this case because "there would be no lawful basis for Commerce to impose countervailing duties on [MACBs] under the [*Order*], and thus, no lawful basis for Commerce to have directed Fengchi to answer the CVD questionnaire in the administrative review with respect to [MACBs]." Pl.'s Br. 7–8. The court must reject this argument. The *Fedmet* litigation concerned the *MACB Scope Ruling*. This case concerns Commerce's ability to request information on products subject to a scope ruling during an administrative review and its imposition of adverse facts available after Fengchi declined to comply with that request. Thus, the CAFC's

decision in *Fedmet* does not resolve the legal issues raised in the instant case.

I. Commerce's Request for Information on Fengchi's MACB Sales

The first issue before the court is whether Commerce properly requested that Fengchi provide information on its sales of MACBs during the review. As noted above, Fengchi declined to provide such information on the theory that Commerce's request violated 19 C.F.R. § 351.225(l)(4). As a result of Fengchi's refusal to provide information, Commerce imposed AFA based on Fengchi's refusal to provide the information. Plaintiffs claim that Commerce's request was inconsistent with 19 C.F.R. § 351.225(l)(4) because Commerce issued the scope ruling on MACBs 245 days after the initiation of the review. Pls.' Br. at 9. Alternatively, Plaintiffs claim that even if Commerce's interpretation of the regulation was proper, it was nevertheless impractical for Commerce to request that information so late in the review. *Id.* at 15–17.

A. Commerce's interpretation of 19 C.F.R. § 351.225(l)(4) was reasonable.

Under 19 C.F.R § 351.225(l)(4), where Commerce issues a scope ruling that a product is within the scope of an order within ninety days of the initiation of an administrative review of that same order, Commerce, "where practicable, will include sales of that product for purposes of the review and will seek information regarding such sales." 19 C.F.R § 351.225(l)(4). However, where Commerce issues the scope ruling more than ninety days after the initiation of the administrative review, Commerce "may consider sales of the product for purposes of the review on the basis of non-adverse facts available." *Id.* "However, notwithstanding the pendency of a scope inquiry, if [Commerce] considers it appropriate, [Commerce] may request information concerning the product that is the subject of the scope inquiry for purposes of a review . . . ." *Id.*

Here, Commerce issued the scope ruling on MACBs 245 days after initiating the administrative review at issue. *See PRM* at 6. As noted above, Commerce requested information on Fengchi's MACB sales shortly after issuing the scope ruling, *see* CR 17 at 2, but Fengchi declined to provide the information, insisting that Commerce's request was improper. *See* PR 81 at 2. Commerce insisted that its request was consistent with section 351.225(l)(4) because the regulation does not prohibit Commerce from soliciting information on products that are subject to a scope ruling issued over ninety days after

the review begins. *See IDM* at 11–12. Rather, according to Commerce, the regulation permits Commerce to decline to collect information in such situations and instead consider sales of the product on the basis of non-adverse facts available. *Id.*

Plaintiffs insist that Commerce's reading of section 351.225(l)(4) is unreasonable. Instead, Plaintiffs suggest that the regulation creates a "bright-line rule": if the scope ruling is issued within ninety days of the initiation of the administrative review, then Commerce will request information on the product subject to that scope ruling if practicable, but if the scope ruling is issued more than ninety days after the initiation of the review, then Commerce may not request information on the product and may only consider sales of the product based on non-adverse facts available. *See* Pls.' Br. at 9–12. According to Plaintiffs, Commerce's interpretation renders the ninety-day time limit, and therefore much of the regulation itself, "mere surplusage." *Id.* at 13. Moreover, Plaintiffs insist that Commerce indicated that their reading of the regulation was proper during promulgation of the regulation and, in fact, acted in a manner consistent with this interpretation in a prior administrative review. *Id.* at 11–15.

The court must reject Plaintiffs' interpretation because it alters the plain meaning of the regulation. According to Plaintiffs, where Commerce issues a scope ruling more than ninety days after the initiation of an administrative review, Commerce may consider sales of the product for purposes of the review, "but *only* on the basis of non-adverse facts available." *Id.* at 8–9 (emphasis added). This "bright-line rule" reads the word "only" into the second sentence of the regulation. However, section 351.225(l)(4) provides that in such situations, Commerce "*may* consider sales of the product for purposes of the review on the basis of non-adverse facts available." 19 C.F.R. § 351.225(l)(4) (emphasis added). The language of the regulation is permissive and simply does not proscribe Commerce's power to request information in the manner Plaintiffs suggest.

Furthermore, Plaintiffs reliance on the regulatory history of section 351.225(l)(4) is misplaced. According to Plaintiffs, Commerce adopted their interpretation of section 351.225(l)(4) at the preliminary rule making stage. Pls.' Br. at 11–13. In particular, Plaintiffs rely on Commerce's comment that, when a final scope ruling is issued more than ninety days after initiation of a review, it is "not practicable" to collect sales information and therefore Commerce "will rely on non-adverse facts available." *Id.* at 11 (citing *Antidumping Duties; CVD: Proposed Rules*, 61 Fed. Reg. 7308, 7322 (Feb. 27, 1996)). However, Commerce clearly departed from this interpretation by the final rule making stage. Commerce stated that section 351.225(l)(4) "provides,

among other things, that if [Commerce] determines after [ninety] days of the initiation of a review that a product is included within the scope of an order or suspended investigation, [Commerce] may decline to seek sales information concerning the product for purposes of the review." *Antidumping Duties; CVD: Final Rule*, 62 Fed. Reg. 27,296, 27,330 (May 19, 1997) ("*Preamble*"). Thus, at the final rule-making stage, Commerce did not limit itself to reliance on non-adverse facts available, but instead provided itself with flexibility to determine whether to collect information. *See id.*

Plaintiffs also rely on two separate statements by Commerce at the final rule making stage to support its interpretation. First, Plaintiffs note that Commerce rejected a request to extend the ninety-day period when it extends the deadline for the preliminary results of a review, indicating that Commerce did not intend to collect information where the scope ruling is issued after the ninety-day period. *See* Pls.' Br. at 11–12. Plaintiffs misinterpret Commerce's decision; Commerce rejected the request because it generally makes the decision to extend a deadline for the preliminary results of a review right before that deadline expires and well after the ninety-day period ends. *Preamble*, 62 Fed. Reg. at 27,330. Second, Plaintiffs note that Commerce rejected a suggestion that it collect information for a subsequent review when the scope ruling is issued after the ninety-day period. *See* Pls.' Br. at 12. This decision also does not support Plaintiffs' argument; Commerce rejected the suggestion because it was unwilling to collect information for a future review. *Preamble*, 62 Fed. Reg. at 27,330.

Ultimately, Commerce's interpretation of section 351.225(l)(4) was consistent with the plain language of the regulation. Section 351.225(l)(4) does not proscribe Commerce's power to collect information on a respondent's sales of a product subject to a scope ruling issued over ninety-days after the initiation of the review, so long as it is practicable to do so. 19 C.F.R. § 351.225. It does, however, permit Commerce to decline to collect such information and instead rely on non-adverse facts available. *Id.* Contrary to Plaintiffs' argument, Commerce's interpretation does not render any language in the regulation meaningless: if the scope ruling is issued within ninety-days of the initiation of the review, Commerce, where practicable, will collect information on the product subject to that scope ruling; if the scope ruling is issued more than ninety-days after the initiation of the review, Commerce may collect information on the product, if practicable, but may decline to consider the respondent's information and rely instead on non-adverse facts available. *See id.* As discussed above, this interpretation is consistent with Commerce's discussion of

section 351.225(l)(4) when promulgating the final rule. *See Preamble*, 62 Fed. Reg. at 27,330. Because Commerce's interpretation of the regulation was not plainly erroneous or inconsistent with the regulation, the court defers to Commerce's reading of 19 C.F.R § 351.225(l)(4). *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007).

B. Commerce reasonably determined that it was practicable to request MACBs sales information.

Having determined that Commerce's interpretation of section 351.225(l)(4) was reasonable, the court now considers whether it was practicable for Commerce to request information on Fengchi's MACBs sales. Plaintiffs insist that there was not sufficient time remaining in the review for Commerce to consider Fengchi's sales of MACBs. Pls.' Br. at 15–17.

The court must reject Plaintiffs' assertion because it was practicable for Commerce to request information on Fengchi's MACB sales in this proceeding. Here, Commerce sent Fengchi the Initial Questionnaire on February 21, 2012, PR 65 at 1–2, well before the October 1, 2012 deadline for its preliminary determination. *PRM* at 3. Commerce repeatedly offered to extend the deadline for Fengchi to provide the requested information. *See, e.g.*, CR 17 at 1, PR 71 at 1. As discussed above, Commerce also offered Fengchi one final opportunity to comply on September 11, 2012, but once again, Fengchi declined to provide its MACB sales information. *See* PR 86 at 1–3.

Accordingly, because it was practicable to consider Fengchi's MACBs sales at the time of the *MACB Scope Ruling*, Commerce reasonably requested that data during the review.[4] *See* 19 C.F.R. § 351.225(l)(4).

II. Commerce's Application of Adverse Facts Available

The next issue is whether Commerce properly relied on AFA when determining Fengchi's dumping margin. As noted above, Commerce found that AFA was appropriate because Fengchi refused to provide information on its MACB sales.

Commerce may apply AFA where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). "Compliance with the

[4] Commerce also argues that it had the authority to request MACB sales information at "any time during the proceeding" pursuant to 19 C.F.R § 351.301(c)(2) (2012). Because Commerce properly requested MACB sales information under 19 C.F.R § 351.225(l)(4), the court declines to consider this alternative justification.

'best of its ability' standard is determined by assessing whether the respondent has put forth its maximum effort to provide Commerce with full and complete answers" to a request for information. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Although it concedes that it did not provide information on its MACB sales, Plaintiffs argue that Commerce erroneously applied AFA because the request itself was improper. *See* Pls.' Br. at 17–21. As noted above, Plaintiffs insist that Commerce's request for Fengchi's MACB sales information violated 19 C.F.R. § 351.225(l)(4). Plaintiffs conclude that Commerce could not impose AFA based on Fengchi's failure to comply with an inappropriate request for information. *See* Pls.' Br. at 19. Plaintiffs rely on *Laclede Steel Co. v. United States*, 18 CIT 965 (1994), where the Court overturned Commerce's decision to impose AFA because Commerce's request for information was improper. *See* Pls.' Br. at 18–19 (citing *Laclede Steel*, 18 CIT at 973).

Plaintiffs' argument is unconvincing. As this court has already determined, Commerce's request for Fengchi's MACB sales information was proper. Accordingly, Plaintiffs' reliance on *Laclede Steel* is misplaced. Ultimately, Fengchi's refusal to provide information on its MACB sales demonstrated a failure to comply with Commerce's request for information, and Commerce reasonably applied AFA. *See* 19 U.S.C. § 1677e(b); *Nippon Steel*, 337 F.3d at 1382.

III. The Adverse Facts Available Rate

Having determined that Commerce properly relied on AFA to determine Fengchi's dumping margin, the court now considers whether Commerce properly selected 262.80% as the AFA rate.

When selecting a total AFA rate, Commerce typically cannot calculate a rate for an uncooperative respondent because the information required for such a calculation has not been provided. As a substitute, Commerce relies on various "secondary" sources of information (the petition, the final determination from the investigation, prior administrative reviews, or any other information placed on the record), 19 U.S.C. § 1677e(b), (c), in order to select a proxy that is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). When selecting an appropriate total AFA proxy, "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004). The proxy's purpose "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated mar-

gins." *De Cecco*, 216 F.3d at 1032. "Commerce must select secondary information that has some grounding in commercial reality." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id.* at 1323 (citing *De Cecco*, 216 F.3d at 1032).

The requirements articulated by the CAFC are an extension of the statute's corroboration requirement. *See De* Cecco, 216 F.3d at 1032. Under 19 U.S.C. § 1677e(c), when Commerce relies on secondary information, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To corroborate secondary information, Commerce must find that it has "probative value." *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010). Secondary information has "probative value" if it is "reliable" and "relevant" to the respondent. *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007); *see* KYD, 607 F.3d at 765–67.

In the CVD context, Commerce follows a hierarchy when selecting a proxy subsidy rate for an uncooperative respondent because "unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs." *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results of the CVD Administrative Review*, 77 Fed. Reg. 21,744 (April 11, 2012) and accompanying *Issues and Decision Memorandum for the Final Results of the CVD Administrative Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China* at 4 (Apr. 4, 2012). To select an AFA subsidy rate, Commerce first attempts to apply the highest, above *de minimis* subsidy rate calculated for the identical program from any segment of the proceeding. *See* PRM at 8. Absent a calculated above *de minimis* subsidy rate from an identical program, the Department then seeks a subsidy rate calculated for a similar program. *Id.* Absent such a rate, the Commerce then resorts to the third step in its hierarchy, an above *de minimis* calculated subsidy rate for any program from any CVD proceeding involving the country in which the subject merchandise is produced, so long as the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated. *Id.*

In this case, Commerce assigned Fengchi a rate of 262.80% which reflected the sum of rates assigned for 22 programs that Commerce

found counter vailable in the investigation. *See* Final Results to CVD Administrative Review of Certain MCBs from the PRC: Application of AFA for Non-Cooperative Companies, PR 118 at 2, 7 (Apr. 9, 2013); *IDM* at 18. Since both Fengchi and the PRC failed to respond to Commerce's questionnaire, Commerce made the adverse inference that Fengchi had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs which Commerce determined countervailable in the investigation. *Id.* at 2. The rates for these programs ranged 0.51% to 25%, covering direct tax, other income tax, indirect tax, loan, export restraints, less than adequate remuneration, and grant programs. *See id.* at 7. For half of these programs, Commerce applied a rate based upon partial AFA, 21.24%, which it had calculated for a mandatory respondent in the original investigation. *IDM* at 19; PR 118 at 4–5. Commerce reasoned that the rates for these programs "were calculated in recent CVD final investigations or final results of review for fully cooperating respondents" and that, consequently, the rates "reflect the actual subsidy practices of PRC's national, provincial, and local governments." *IDM* at 18. Commerce also found the rates appropriate because they were "based upon information about the same or similar programs for periods close in time to the POR in the instant case." *Id.* Finally, Commerce determined that nothing on the record called into question the reliability of these calculated rates. *Id.*

Plaintiffs argue that the 262.80% rate applied to Fengchi "is unreasonable, overly punitive, and not reflective of Fengchi's commercial reality," because it "is more than 10 times higher than the only actual subsidy rate calculated for a cooperating respondent in the proceeding." Pl. Br. at 22. Plaintiffs also contend that Commerce's use of the 21.24% rate in its calculation was unreasonable because it was "derived from partial AFA and thus was not calculated entirely based on actual data." *Id.* at 23.

On the issue of corroboration, the court finds that Commerce corroborated Fengchi's AFA rate to the extent practicable under 19 U.S.C. § 1677e(c). Both Fengchi and the GOC refused to provide any information during the administrative review regarding their use of countervailable subsidies, thus Commerce's ability to corroborate its secondary information was limited by Fengchi's lack of cooperation. The rates Commerce used to corroborate Fengchi's AFA rate were reliable because they were calculated in recent CVD final investigations or final results of review. PRM at 6. Furthermore, the rates were relevant because they were based upon information about the same

or similar programs. *Id.* With regard to the programs for which there was no program-type match, Commerce selected the highest calculated subsidy rate for any PRC program from which the non-cooperative companies could receive a benefit to use as AFA. *Id.* These rates were calculated for periods close in time to the POR in the instant case. *Id.* Additionally, Commerce observed that it assigned a total AFA rate to Fengchi that is comparable to the AFA rate assigned to a mandatory respondent in the investigation that ceased to cooperate and withheld information. *Id.*

The court is not persuaded by Plaintiffs' argument that Commerce chose a rate that was unreasonable, overly punitive, and not reflective of Fengchi's commercial reality. Nor is the court convinced that Commerce unreasonably relied on the 21.24% rate based upon partial AFA. Due to Fengchi's lack of cooperation during the review, there is no company specific data on the record regarding Fengchi's participation in countervailable programs. Because there were no other independent sources of data on company-specific benefits, Commerce was limited in its ability to corroborate the information used to calculate the AFA rate. Thus, Plaintiffs' arguments do not undermine the reasonableness of Commerce's corroboration given the limited information available to Commerce. *See Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014).

Ultimately, section 1677e(c) requires that Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c). As discussed above, both Fengchi and the GOC failed to cooperate with Commerce and provide company-specific information regarding countervailable benefits Fengchi received during the POR. Since there were no other independent sources of data on company-specific benefits, Commerce was limited in its ability to corroborate the information used to calculate the AFA rate. Accordingly, in light of the failure of Fengchi to cooperate and the reasonably accurate nature of the secondary information that Commerce used under § 1677e(b), Commerce satisfied the requirement of corroborating the 262.80% AFA rate "to the extent practicable." *Id.*

IV. Conclusion

For the foregoing reasons, the *Final Results* were supported by substantial evidence and otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: April 13, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE