

U.S. Court of International Trade

Slip Op. 17–143

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

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

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final determination in the second administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People’s Republic of China.]

Dated: October 18, 2017

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OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") determination in the second administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China" or "the PRC"). See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 81 Fed. Reg. 39,905 (Dep't Commerce Jun. 20, 2016) (final results of ADD administrative review and final determination of no shipments; 2013–2014) ("*Final Results*") and accompanying Decision Mem. for the Final Results of the 2013–2014 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the [PRC], A-570–979, (Jun. 13, 2016), ECF No. 21–5 ("Final Decision Memo").

For the reasons that follow, the court sustains Commerce's surrogate value selections for valuing respondents' aluminum frames, semi-finished polysilicon ingots and blocks, solar backsheet, and nitrogen inputs. The court also sustains Commerce's selection of financial statements for calculating financial ratios for respondents' overhead, selling, general, and administrative ("SG&A") expenses, and profit, and Commerce's application of adverse facts available ("AFA") to respondent's unreported, purchased solar cells. The court remands for further explanation or reconsideration consistent with this opinion Commerce's surrogate value selection for valuing respondents' tempered glass and scrapped solar cells and modules inputs, as well as Commerce's determination to include import data with reported quantities of zero in the surrogate value calculations.

BACKGROUND

On February 4, 2015, Commerce initiated the second administrative review of the ADD order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from China. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 6,041, 6,042–44 (Dep't Commerce Feb. 4, 2015). Commerce subsequently selected Changzhou Trina Solar Energy Co., Ltd. ("Trina") and Yingli Green Energy Holding Co., Ltd. ("Yingli") as mandatory respondents in this review. See Decision Mem. for Prelim. Results of the 2013–2014 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC], A-570–979, at 2, PD 520, bar code 3427351–01 (Dec. 18, 2015) ("Prelim. Decision Memo") (citing 2013–2014 [ADD]

Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]: Respondent Selection, A-570-979, at 4-5, PD 67, bar code 3264380-01 (Mar. 13, 2015)).¹ On December 28, 2015, Commerce published the preliminary determination. *See Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the [PRC]*, 80 Fed. Reg. 80,746 (Dep't Commerce Dec. 28, 2015) (preliminary results of [ADD] administrative review and preliminary determination of no shipments; 2013-2014), and accompanying Prelim. Decision Memo.

On June 13, 2016, Commerce published the final determination. *See Final Results*, 81 Fed. Reg. at 39,905. Commerce valued Yingli's tempered glass input, respondents' scrapped cells and modules input, respondents' aluminum frame inputs, respondents' backsheet inputs, and Trina's nitrogen input using Thai import data. *See Final Decision Memo* at 20-27, 29-34, 40-43, 46-48, 60-63. Commerce valued respondents' semi-finished polysilicon ingot and block inputs using the world-market price for solar-grade polysilicon. *See id.* at 38-39. Commerce included in the average unit surrogate value calculations import data with reported quantities of zero, finding "no basis in the record to conclude that these entries are unreliable or incorrect because they list zero for the quantity." *Id.* at 64. Commerce selected the financial statements of Thai company Styromatic (Thailand) Co., Ltd. ("Styromatic") to calculate respondents' overhead, SG&A expenses and profit. *See id.* at 35-38. Finally, Commerce applied AFA to value Trina's unreported factors of production ("FOPs") using Trina's highest consumption rates for FOPs for solar cells sold in the United States. *See id.* at 50-57. Commerce did not apply AFA to Yingli's unreported FOPs for purchased solar cells. *See id.* at 52.

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).² *See* Summons, July 20, 2016, ECF No. 1. SolarWorld moved for judgment on the agency record, challenging five aspects of the final determination. *See* SolarWorld's Mot. J. Agency R., Jan. 26, 2017, ECF No. 44; SolarWorld Americas, Inc.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. Conf. Version, Jan. 26, 2017, ECF No. 44 ("SolarWorld Br."). Specifically, SolarWorld challenges Commerce's: 1) determination to use Harmonized Tariff Schedule ("HTS") subheading 7604.29 to value

¹ On September 14, 2016, Defendant submitted indices to the public and confidential administrative records for this review. These indices are located on the docket at ECF No. 21. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

respondents' aluminum frames; 2) determination to value respondents' processed, semi-finished polysilicon ingots and blocks using the surrogate value for unprocessed polysilicon; 3) valuation of respondents' solar module backsheets used in the production of subject merchandise using Thai HTS subheadings 3920.62.00090 and 3920.62.00001; 4) determination to utilize Thai data for imports classified under HTS subheading 8548.10 as a surrogate to value Trina's scrapped solar cells; and 5) selection of the financial statements of Styromatic to calculate respondents' overhead, SG&A expenses and profit. *See id.* at 12–43.

This action was consolidated with actions filed by Trina et al.³ and Yingli et al.⁴ *See* Order, Oct. 25, 2016, ECF No. 31. Consolidated Plaintiffs filed motions for judgment on the agency record, Pls.' Rule 56.2 Mot. J. Agency R., Jan. 25, 2017, ECF No. 40; Mot. J. Agency R., Jan. 25, 2017, ECF No. 39, each challenging different aspects of Commerce's final determination in this review. *See* Mem. Supp. Mot. [Trina et al.] J. Agency R. Conf. Version, Jan. 25, 2017, ECF No. 40 ("Trina Br."); Mem. Points and Authorities Supp. Mot. J. Agency R. Conf. Version, Jan. 25, 2017, ECF No. 39 ("Yingli Br."). Specifically, Trina challenges: 1) Commerce's selection of a surrogate value for its nitrogen gas input based upon Thai import data; 2) Commerce's inclusion, in the calculation of surrogate values, values for Thai import categories with reported quantities of zero; and 3) Commerce's application of AFA to value Trina's unreported, purchased solar cells. *See* Trina Br. 7–24. Yingli challenges Commerce's use of Thai import data to value Yingli's tempered glass input, contending that the Thai data is aberrational. *See* Yingli Br. 9–26.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination

³ The following parties are plaintiffs in the action Changzhou Trina Solar Energy Co., Ltd. v. United States, Ct. No. 16–00132, which has been consolidated with the present action: Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Hubei Trina Solar Energy Co., Ltd.

⁴ The following parties are plaintiffs in the action Yingli Green Energy Holding Co., Ltd. v. United States, Ct. No. 16–00135, which has been consolidated with the present action: Yingli Green Energy Holding Company Limited; Yingli Green Energy Americas, Inc.; Yingli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; and Shenzhen Yingli New Energy Resources Co., Ltd.

in an administrative review of an antidumping duty order. “The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiff and Consolidated Plaintiffs challenge a total of six surrogate value determinations Commerce made in the final results of this review, and raise three additional challenges. The court first addresses the arguments that Commerce’s surrogate value selection for tempered glass, aluminum frames, scrapped solar cells and modules, semi-finished polysilicon ingots and blocks, solar backsheet, and nitrogen are unsupported by substantial evidence. The court then addresses the arguments regarding the inclusion of import data with reported quantities of zero, the use of certain financial statements for calculating financial ratios, and, finally, the application of AFA to Trina’s unreported, purchased solar cells.

I. Surrogate Value Selection

Plaintiff and Consolidated Plaintiffs challenge Commerce’s surrogate value selection for tempered glass, aluminum frames, scrapped solar cells and modules, semi-finished polysilicon ingots and blocks, solar backsheet, and nitrogen as unsupported by substantial evidence. The court addresses each of these challenges in turn.

A. Tempered Glass

In this review, Commerce valued Yingli’s tempered glass with Thai import data for HTS category 7007.19.90. *See* Final Decision Memo at 29–34. Yingli argues that the Thai import data did not constitute the best available information for valuing the tempered glass because the Thai data is distorted by aberrational imports from Hong Kong.⁵ *See* Yingli Br. 20–24. Yingli also argues that Commerce erred in concluding that the Thai import data was not aberrational because two of Commerce’s benchmarks—values from Ecuador and the Ukraine—were not credible since the quantity of tempered glass imports into these two countries was significantly lower than for other

⁵ Yingli suggests that Commerce calculate the surrogate value using the Thai import data from the period of review (“POR”), excluding the Hong Kong data (USD \$1.00 per kg), or instead use the world market price (USD \$0.51 per kg), the Bulgarian value for the POR (USD \$0.77 per kg), the Thai value from the first administrative review, adjusted for inflation (USD \$0.87 per kg), price quotes obtained for tempered glass (USD \$0.94 per kg), or an average of two or more of any of these alternatives. *See id.* at 22–26.

economically comparable countries with data on the record.⁶ *See id.* at 10–20. Defendant contends that Commerce reasonably concluded that the Thai import data was not aberrational and reasonably used the Thai data to value the tempered glass input. *See* Def.’s Resp. Mots. J. Upon Admin. R. 10–16, Apr. 25, 2017, ECF No. 55 (“Def.’s Resp.”). For the reasons that follow, this issue is remanded to Commerce to reconsider or further explain its determination to use Thai import data to value Yingli’s tempered glass.

In cases involving imports from a nonmarket economy (“NME”) country,⁷ Commerce obtains a normal value by adding the value of the factors of production used to produce the subject merchandise and “an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1). Commerce selects a surrogate value by which it values the FOPs, and makes that selection “based on the best available information regarding the values of such factors in a market economy country or countries.” *Id.* Commerce’s methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), available at <http://enforcement.trade.gov/policy/bull04-1.html> (last visited Oct. 13, 2017) (“*Policy Bulletin 04.1*”). To the extent possible, Commerce uses “the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” 19 U.S.C. §§ 1677b(c)(4)(A)–(B). Commerce also has a regulatory preference for valuing all factors of production using surrogate value data from a single surrogate country where practicable. 19 C.F.R. § 351.408(c)(2) (2015).⁸ Although Commerce has broad discretion in deciding what

⁶ Specifically, Yingli argues that it was unreasonable for Commerce to use import data from Ecuador and the Ukraine as benchmarks because the quantity of imports of tempered glass into both countries was significantly lower than the quantities of imports in the other countries found to be economically comparable with China and the quantity of tempered glass purchased by Yingli during the POR. Yingli argues that these low quantities render the data from Ecuador and the Ukraine not credible. *See* Yingli Br. 10–17.

⁷ The term “nonmarket economy country” means any foreign country that Commerce determines “does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A). In such cases, Commerce must “determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses].” *Id.* § 1677b(c)(1).

⁸ Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

constitutes the best available information, see *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for “best available information” in the ADD statute), it must ground its selection of the best available information in the overall purpose of the statute, which is to calculate accurate dumping margins. See *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); see also *Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007).

It is Commerce’s practice not to use aberrational values as surrogate values. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep’t Commerce May 19, 1997). Commerce considers import data aberrationally high if the data is “many times higher than the import values from other countries.” Final Decision Memo at 33. Commerce’s practice also excludes unit values within import data when those values themselves are aberrational and distort the import data. See Final Results of Redetermination Pursuant to *Catfish Farmers of America v. United States*, Consol. Court No. 08–00111, at 4–7, (Sept. 14, 2009), ECF No. 100–1 (“*Catfish Farmers Remand Results*”); Issues and Decision Mem. for the Investigation of Steel Wire Rope from the [PRC], A-570–859, at Comment 1, (Feb. 28, 2001), available at <http://ia.ita.doc.gov/frn/summary/prc/01-4895-1.txt> (last visited Oct. 13, 2017) (“*Steel Wire Rope from the PRC*”).

Here, Commerce valued Trina’s tempered glass input using Thai import data. Final Decision Memo at 31. Commerce explained that, pursuant to its practice for investigating claims of aberrational data, it compared the average unit value (“AUV”) of the Thai data for the period of review (“POR”) to contemporaneous data on the record for potential surrogate countries and also to historical Thai import data on the record. *Id.* at 31–33. Commerce determined that the Thai import data from the POR does not appear aberrational according to “the standards typically relied on by the Department,” because the Thai value was “within the range of AUVs of other economically comparable surrogate countries” and as compared to the historical Thai data for tempered glass. *Id.* at 33–34. Yingli argues that Commerce unreasonably used data from Ecuador and Ukraine as benchmarks, which were not credible because those countries’ imports of tempered glass were of low quantity relative to the imports from the other economically comparable countries and to the quantity of tempered glass purchased by Yingli. Yingli Br. 15–16. Commerce stated that low quantity data does not necessarily indicate aberration and there is no indication that the data from either Ecuador or Ukraine is aberrational. Final Decision Memo at 32–33.

Yingli also argues that the Thai surrogate value is distorted by low-quantity, high-value imports from Hong Kong (with an average value of \$191.47 per kilogram, compared to an average value of imports from all other countries of \$1.00 per kilogram). See Yingli Br. 20–24. Commerce stated that the quantity of Thai imports from Hong Kong was not low because Hong Kong was the fourth largest importer of tempered glass into Thailand during the POR. Final Decision Memo at 33. Commerce also stated that the unit value for the Hong Kong imports “is [not] substantially different from per-unit values of the Netherlands (\$210 per kg) and the United States (\$300 per kg).” *Id.*

Although Commerce has broad discretion to determine what constitutes the best available information with which to value each FOP, see *QVD Food Co.*, 658 F.3d at 1323, here Commerce did not explain why its selection is reasonable, in light of the evidence that the Hong Kong data, which makes up 1.6% of the total volume, accounts for more than 75% of the total value. See Yingli Br. 22–23. Commerce supported its determination that the Thai import value is not aberrational by relying upon prior practice, including *Steel Wire Rope from PRC* and *Catfish Farmers Remand Results*.⁹ See Final Decision Memo at 33 (citing *Steel Wire Rope from PRC* at Comment 1; *Catfish Farmers Remand Results* at 4–7). Specifically, Commerce invokes these cases to demonstrate that the agency has previously determined import values to be aberrational “if they [were] many times higher than the import values from other countries,” or if they “varied between 30 and 79 times greater than the average of the rest of the import data.” Final Decision Memo at 33. Yet the very examples cited by Commerce are ones in which the agency chose to extract unit values from within the import value, where unit value distorted the import value.¹⁰ In *Steel Wire Rope from PRC*, Commerce excluded Malaysian unit values from the selected import value for wire rod, because the Malaysian unit values were “many times higher than the import values from other countries, and are not in line with numerous

⁹ Defendant in its response brief also states that *Catfish Farmers Remand Results* supports Commerce’s determination here, noting that, in *Catfish Farmers Remand Results*, the agency “found the surrogate values for labels to be aberrational when the AUVs varied between 30 and 79 times greater than the average of other import data.” Def.’s Resp. 14.

¹⁰ Commerce also cites a case in which the agency did not exclude certain unit values from within the surrogate value. See Final Decision Memo at 33. Commerce’s explanation for not excluding those inputs in that case suggests that the agency would exclude certain inputs if a party “provide[s] specific evidence and analysis to support their position that selected country-specific unit values in the [surrogate value] data are aberrational.” Issues and Decision Mem. for the 2006–2007 Admin. Review of Certain Cased Pencils from the [PRC], A-570–827, at 50, (July 6, 2009), available at <http://ia.ita.doc.gov/frn/summary/prc/E9-16511-1.pdf> (last visited Oct. 13, 2017).

other prices for wire rod on the record.”¹¹ *Steel Wire Rope from PRC* at Comment 1. In *Catfish Farmers Remand Results*, Commerce excluded unit values from Japan and the Netherlands from the import value used as surrogate value for respondent’s labels because the unit value from the Netherlands and Japan were more than 79 and 30 times greater respectively, than the overall average import values.¹² See *Catfish Farmers Remand Results* at 5–6.

Commerce cites these cases for the proposition that an import value must be a multiple of other import values to be aberrational. However, at issue in these cases—as in the present case—was whether a unit value should be excluded from the import value (ultimately chosen as a surrogate value) because the unit value itself is a multiple of the other unit values. See *Steel Wire Rope from PRC* at Comment 1; *Catfish Farmers Remand Results* at 4–7. The cases invoked by Commerce to support its determination seem to demonstrate a practice that would support excluding from the import value any aberrational inputs within that value, and Commerce has not explained why that apparent practice should not be followed in this case. Here, Yingli points to record evidence indicating that the Hong Kong unit values within the Thai import data are over 191 times greater than the average unit values from the remaining countries with data on the record,¹³ see Yingli Br. 22–23, which undermines the reasonableness of the selection of the Thai data.¹⁴ The Hong Kong import data, which constitutes 1.6% of the total volume of Thai import data, raises the Thai surrogate value from \$1.00 USD to \$4.14 USD. As the cases invoked by Commerce suggest an agency practice according to which

¹¹ In *Steel Wire Rope from the PRC*, Commerce also referenced prior agency practice to exclude, “where appropriate - aberrational data that appear to distort the overall value for a specific import category.” *Steel Wire Rope from the PRC* at Comment 1 (citing *Chrome-Plated Lug Nuts From The [PRC]*, 63 Fed. Reg. 53,872, 53,873 (Dep’t Commerce Oct. 7, 1998) (final results of ADD administrative review) (excluding German unit value from Indian import data when calculating surrogate value, because the German unit value was “many times higher than” the values of other unit values within the Indian import data.).

¹² Commerce also noted that these significantly higher values were each based on a volume significantly smaller than that of other volumes on the record. See *Catfish Farmers Remand Results* at 6.

¹³ SolarWorld refutes Yingli’s claim that the Hong Kong imports were of non-commercial quantity. SolarWorld Resp. 15; Yingli Br. 22. Regardless of whether the quantity was commercial, the basis of Yingli’s claim is that a relatively small proportion of the overall import data had a disproportionately large effect on the Thai import value, which suggests that the Thai import value is not reliable.

¹⁴ To clarify, the Hong Kong values are from import data that form a part of the overall Thai value. The Thai value, at \$4.14 per kg, is not the highest value on the record. The Ukraine value is \$5.89 per kg (for comparison, the Ecuador value is \$2.75 per kg and the Bulgarian value is \$0.77 per kg). Yingli argues that the Hong Kong import values skew the Thai value unreasonably, as without the Hong Kong imports the Thai value would decrease from \$4.14 to \$1.00 per kg. See Yingli Br. 23. At the same time, Yingli claims that the values from Ecuador and Ukraine are not credible benchmarks. See *id.* at 14–17.

Commerce would exclude these input values, Commerce must explain why its diversion from such a practice here is reasonable. In light of Commerce’s practice as explained in *Catfish Farmers Remand Results* and *Steel Wire Rope from the PRC*, this disproportionate impact of the Hong Kong values, and the claim that the benchmark values from Ecuador and the Ukraine are themselves unreliable,¹⁵ see Yingli Br. 10–18, Commerce must explain why its choice is reasonable or reconsider its determination.

B. Aluminum Frames

SolarWorld challenges Commerce’s valuation of the respondents’ aluminum frames using Thai HTS subheading 7604.29, covering “Aluminum bars, rods and profiles: Of aluminum alloys: Other,” contending that the import data under this category does not reflect the value of the frames.¹⁶ See SolarWorld Br. 13–23. SolarWorld emphasizes that the frames “have been further manufactured into a finished and final form,” *id.* at 17, such that valuation using data from HTS subheading 7604.29 is inappropriate because HTS subheading 7604.29 is specific to unfinished aluminum products. *Id.* at 20–21. Defendant responds that Commerce reasonably concluded that import data under HTS subheading 7604.29 is the best available information to value the frames because it is the category most specific to respondents’ frames, which the respondents described as “non-hollow, aluminum profiles.” See Def.’s Resp. 16. For the reasons that follow, Commerce’s selection of import data under HTS subheading 7604.29 is supported by substantial evidence.

As discussed above, Commerce is required to select a surrogate value for each FOP using “the best available information.” 19 U.S.C. § 1677b(c)(1). As the term “best available information” is not statutorily defined, Commerce has broad discretion in deciding what con-

¹⁵ The basis of Yingli’s claim that Ecuador and Ukraine are not credible benchmarks is the low quantity of tempered glass imports into those two countries:

the quantities of imports of tempered glass in Ecuador and Ukraine are significantly lower than both the quantities of imports in the other countries found to be comparable with China and the quantity of tempered glass purchased by Yingli during the POR. For example, . . . the average quantity of tempered glass imported by Thailand and Bulgaria during the periods for which data are available was over 8,682% greater than the quantity imported by Ecuador during the POR and over 1,177% greater than the quantity imported by Ukraine during the POR. Even more significant – and completely overlooked by the Department in the Final Results – is the fact that during the POR, Yingli itself purchased [[]] kg of tempered glass, which was over [[]] % and [[]] % greater than the tiny quantities imported by Ecuador and Ukraine, respectively, during the same time period.

Yingli Br. 15–16 (footnotes omitted).

¹⁶ In particular, SolarWorld alleges that the [[]]

[[]] is not reflected in the import data for Thai HTS subheading 7604.29. See SolarWorld Br. 13–21.

stitutes the best available information, *see QVD Food Co.*, 658 F.3d at 1323, but the agency must make a selection that will enable it to ultimately calculate accurate dumping margins. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191. Commerce considers the best available information to be publically available data that is specific to the input, tax and import duty exclusive, contemporaneous with the period of review, and representative of a broad market average. *See Policy Bulletin 04.1.*

Here, Commerce concluded that import data under HTS subheading 7604.29 constituted the best available information to value respondents' aluminum frames. *See* Final Decision Memo at 23–27. Commerce emphasized that both respondents described their frames as “non-hollow, aluminum profiles,” that this description has not been challenged, and that Commerce has not found anything in the record to contradict this description. *Id.* at 23–24. Commerce concluded that the category is a better fit than the alternatives on the record, as it is more specific than import data under SolarWorld's proposed HTS subheading 7616, an “other” category which includes articles dissimilar to aluminum frames such as “nails, tacks, staples, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers, knitting needles, bodkins, crochet hooks, embroidery stilettos, safety pins, other pins and chains, and cloth, grill and netting of aluminum wire.” *Id.* at 26 (internal quotations omitted). In light of these explanations, Commerce reasonably determined that import data under HTS heading 7604 is more specific than the other available alternatives on the record and that HTS heading 7604 accordingly constituted the best available information.

SolarWorld's claim that specific evidence in this review renders the selection of HTS subheading 7604.29 unreasonable, *see* SolarWorld Br. 17–22, is unavailing. Specifically, SolarWorld highlights evidence that it contends demonstrates that certain of Yingli's frames have been processed to include additional “features and adaptations” beyond those present in “simple aluminum extrusions,” and other evidence that it contends demonstrates that certain solar frames have been classified within HTS category 7616.¹⁷ *Id.* at 17, 19. Commerce emphasized that HTS category 7604 does not necessarily cover only unfinished aluminum profiles, making the degree of finishing the frames have undergone not relevant to a determination that HTS

¹⁷ Specifically, SolarWorld argues that certain of Yingli's frames are further processed to be compliant with the [] [], which it contends requires certain “features and adaptations . . . not found in a simple aluminum extrusion.” SolarWorld Br. 17. SolarWorld also highlights evidence obtained from []

[], demonstrating that solar frames were classified within HTS category [] in [] [] entries of aluminum frames. *Id.* at 19.

category 7604 is the best available information for valuing respondents' frames. Final Decision Memo at 24. Commerce highlighted the HTS Chapter 76 notes, which indicate that profiles include products that "have been *subsequently worked after production*. . . provided that they have not thereby assumed the character of articles or products of the other headings." *Id.* at 25 (emphasis in original, quoting *Jiangsu Jiasheng Photovoltaic Technology, Co. v. United States*, 38 CIT __, __, 28 F.Supp.3d 1317, 1337 (2014)). Commerce also references the International Trade Commission's definition of aluminum profiles, defining profiles as "cast sintered, and worked after production." *Id.* It is reasonably discernible that Commerce concluded that the additional processing highlighted by SolarWorld is not sufficient to make the profiles more similar to the articles enumerated in a different subheading. *See id.* SolarWorld points to no evidence detracting from Commerce's determination.¹⁸

SolarWorld also argues that Commerce unreasonably concluded that Yingli's aluminum frames were "profiles" because profiles must have a uniform cross section. SolarWorld Br. 22 (citing the Notes to Chapter 76 of the HTS). SolarWorld suggests that the respondents' profiles are not uniform along their entire length. *Id.* In response to this argument, Commerce indicated its position that the presence of corners in some of the frames "would [not] necessarily change their classification as aluminum profiles." Final Decision Memo at 25. Further, Commerce's task is not to classify the solar frame inputs for customs purposes, but to select the best available data to value the FOPs in question. *See* 19 U.S.C. § 1677b(c)(1). SolarWorld offers no evidence that calls into question Commerce's conclusion that the frames are more similar to the unfinished items included in HTS heading 7604 than any other HTS category on the record of this review. Therefore, Commerce's determination is supported by substantial evidence.

C. Scrapped Solar Cells and Modules

SolarWorld challenges Commerce's valuation of Trina's broken and scrapped polysilicon cells and modules using HTS category 8548.10, claiming that HTS category 8548.10 is specific to scrapped battery products rather than scrapped solar products and that the surrogate value is unrepresentative as it is more than double the surrogate

¹⁸ Commerce also concluded that the Customs and Border Protection rulings placed on the record do not undermine its determination that HTS heading 7604 represents the best available information for valuing the aluminum frames. *See* Final Decision Memo at 25–26.

value for the primary material input, raw polysilicon.¹⁹ See SolarWorld Br. 32–36. Defendant responds that Commerce’s determination is supported by substantial evidence, because Trina’s questionnaire responses indicated that the scrap cells and modules are comprised of “every component of the cell and not simply polysilicon,” and that these other components add value, such that the selection of an HTS category specific to polysilicon would not be representative. See Def.’s Resp. 22–24. For the reasons that follow, this issue is remanded to Commerce.

As discussed, pursuant to the statute, Commerce uses the best available information to select a surrogate value for each FOP. 19 U.S.C. § 1677b(c)(1). Commerce seeks a data source that is publically available, specific to the input, tax and import duty exclusive, contemporaneous with the period of review, and representative of a broad market average. See *Policy Bulletin 04.1*. In this review, Trina reported generating cell and module scrap in the cell and module production stages of subject merchandise production. See Trina Section D Questionnaire and Appendices Response at D-22–23, CD 153–161, bar codes 3276429–01–10 (May 14, 2015). Trina reported that the broken cells and modules are sold rather than reintroduced into production, and accordingly claimed by-product offsets to normal value for the scrapped cells and modules. *Id.* at D-22. Commerce sought representative surrogate data by which to value the scrap generated and sold with which to offset Trina’s normal value. See Final Decision Memo at 47–48. Commerce determined that subheading 8548.10, HTS, is “more similar to the characteristics of Trina’s scrapped and broken solar cells than the description of the alternative [surrogate values] on the record.” *Id.* at 48.

Commerce failed to address SolarWorld’s argument that the language of heading 8548, HTS, evidences that the products imported

¹⁹ SolarWorld does not challenge Commerce’s valuation of Yingli’s scrapped solar cells and modules. In the final determination, Commerce valued Yingli’s scrapped solar cells and modules using Thai import data classified under HTS subheading 2804.69, covering imports of polysilicon containing less than 99.99 percent purity. Final Decision Memo at 47. SolarWorld argues that Commerce should value Trina’s scrapped solar cells and modules using Thai import data from HTS subheading 2804.69 as well. See SolarWorld Br. 32–36. Commerce emphasizes that the cells were valued differently because the two respondents reported the process by which the scrap by-product is generated, with Trina reporting its scrap by-product as broken cells and modules and Yingli reporting its by-product as polysilicon removed from the broken cells and modules. See Final Decision Memo at 47. SolarWorld argues that “the alleged distinction between Trina’s and Yingli’s cell scrap provides no support for Commerce’s valuation of Trina’s scrap under HTS 8548” because category HTS 8548 “has nothing at all to do with photovoltaic products, whether or not the scrap consists of portions of an entire solar cell.” Reply Br. Pl. SolarWorld Americas, Inc. 17, Jun. 5, 2017, ECF No. 73. Although SolarWorld argues that Trina’s scrap should be valued using the subheading with which Yingli’s scrap is valued, SolarWorld does not argue that Commerce acted arbitrarily by treating similarly situated respondents differently.

under that heading are specific to electrical batteries and “are produced using a significantly different manufacturing process with completely different raw material inputs than are solar cells.” SolarWorld Br. 33. Commerce noted that it found 8548.10 to be the appropriate category for valuing Trina’s cells because Trina reported that the cell and module scrap was composed of every aspect of the cell, not just the raw primary silicon, and because the cells and modules are “apparatus used to generate electricity, like a battery . . .” Final Decision Memo at 47. However, Commerce did not explain why the selection of HTS category 8548.10 is reasonable given that the category is not specific to solar cells and given the concern raised by SolarWorld, regarding selecting a surrogate value for a byproduct that is higher than the value for the input itself. *See* SolarWorld Br. 34–35. Further, Commerce’s rationale for rejecting HTS subheading 2804.69, for raw polysilicon of less than 99% purity, undercuts Commerce’s selection of HTS category 8548.10. *See* Final Decision Memo at 47–48. Commerce claims HTS subheading 2804.69 “pertains specifically to silicon, which is only one component of solar cells and modules waste,” *id.* at 47, yet category 8548.10 is not specific to any of the materials in the scrapped cell. *See* Subheading 8548.10, HTS (“Waste and scrap of primary cells, primary batteries and electric storage batteries; spent primary cells, spent primary batteries and spent electric storage batteries”). Although Commerce has considerable discretion in selecting the appropriate data to calculate surrogate values, *see Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (granting Commerce significant deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature”), Commerce “must cogently explain why it has exercised its discretion in a given manner.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). Because Commerce did not address SolarWorld’s arguments, the agency has failed to adequately explain how its decision is reasonable in light of the record as a whole, including the evidence that reasonably detracts from its conclusion. *Universal Camera Corp. v. NLRB*, 350 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). On remand Commerce must explain or reconsider its determination to value the scrapped cells and modules using import data for HTS category 8548.10.

D. Semi-Finished Polysilicon Ingots and Blocks

SolarWorld challenges Commerce’s determination to value respondents’ semi-finished polysilicon ingots and blocks using the world

market price for raw polysilicon, claiming the surrogate value does not reflect the substantial additional processing and value added turning raw polysilicon into an ingot or block.²⁰ SolarWorld Br. 23–27. SolarWorld proposes that Commerce instead construct a cost, starting with the world-market price of raw polysilicon and adding the costs of the further processing and materials. *Id.* at 25–26. Defendant responds that, given the available data on the record, Commerce reasonably chose to value respondents’ ingots and blocks using a surrogate for the primary raw input. *See* Def.’s Resp. 24–26. For the reasons that follow, Commerce’s determination to value respondents’ semi-finished polysilicon ingots and blocks with the world market price for raw polysilicon is reasonable and is sustained.

Here, Commerce determined that the world market price for raw polysilicon constitutes the best available information for valuing respondents’ semi-finished polysilicon ingots and blocks. Final Decision Memo at 38–39. In the absence of data values for ingots and blocks, Commerce used a value for raw polysilicon because respondents’ ingots and blocks are primarily composed of polysilicon. *Id.* Commerce determined that no reliable record evidence suggests that the world market price for polysilicon would result in unrepresentative pricing for ingots and blocks, and emphasized that at least some of the additional processing required to turn raw polysilicon into ingots and blocks is accounted for in the manufacturing costs, included elsewhere in the calculations. *Id.* at 39. From Commerce’s emphasis on using a value for the main component, it is reasonably discernible that Commerce recognized that this option is imperfect, but that it would result in a more accurate surrogate value than would a value for a component that is not the main component. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191. It is also reasonably discernible that Commerce determined, consistent with its practice, that the world market price for raw polysilicon is as specific as possible to the input (lacking data for the input itself), is contemporaneous, publically available, and represents a broad market average. *See* Final Decision Memo at 39; *Policy Bulletin 04.1*. The determination that this value constitutes the best available information is reasonable.

SolarWorld contends that additional materials are consumed in the processing that are not represented in the surrogate value for the raw material. *See* SolarWorld Br. 25; Reply Br. Pl. SolarWorld Americas, Inc. 10–11, Jun. 5, 2017, ECF No. 73. Commerce noted that the agency “do[es] not believe there is sufficient evidence to demonstrate

²⁰ SolarWorld points to [[

]]. SolarWorld Br. 23–24.

that the processing and additional inputs used at the ingot, and block production stages adds significant value beyond the original cost of the polysilicon.” Final Decision Memo at 39. SolarWorld’s claim that not all costs are represented does not undermine Commerce’s conclusion that the agency accounted for processing costs required to manufacture the ingots and blocks for most merchandise, and that the surrogate value for the primary input constituted the best available information. Although SolarWorld claims that the record contained information to allow Commerce to add processing costs onto the value of polysilicon to build up a price for these inputs, *see* SolarWorld Br. 23–24, 27, the availability of another methodology does not make Commerce’s determination unreasonable given the record evidence. Commerce’s determination to value respondents’ polysilicon ingots and blocks using the world-market price for raw polysilicon is therefore supported by substantial evidence.

E. Surrogate Value for Backsheets

SolarWorld argues that, in valuing Yingli’s solar backsheet input using Thai HTS category 3920.62 and Trina’s solar backsheet input using Thai HTS category 3920.10, Commerce unreasonably undervalued the respondents’ backsheets. *See* SolarWorld Br. 27–32. SolarWorld contends that respondents’ solar backsheets are “a highly technical and particularized set of goods,” *id.* at 28, and that import data for HTS categories 3920.10 and 3920.62, each of which covers only one type of plastic, fails to reflect the complex nature of the backsheets, resulting in an unrepresentative surrogate value. *Id.* at 28, 32. Defendant contends that Commerce’s use of HTS categories 3920.62 and 3920.10 was supported by substantial evidence because backsheets are “multilayered plastic sheets” and, lacking a surrogate value specifically for backsheets, it was reasonable for Commerce to value the backsheets using “the import value for the type of plastic sheet which most closely corresponds to respondents’ backsheets.” Def.’s Resp. 27. For the reasons that follow, Commerce’s use of Thai import data for HTS categories 3920.10 and 3920.62 to value respondents’ backsheets is supported by substantial evidence.

As discussed, Commerce uses the best available information to select a surrogate value for each FOP, pursuant to 19 U.S.C. § 1677b(c)(1). Commerce seeks a data source that is publically available, specific to the input, tax and import duty exclusive, contemporaneous with the period of review, and representative of a broad market average. *See Policy Bulletin 04.1*. In the final determination, Commerce valued Yingli’s backsheets using Thai HTS category 3920.62, covering plastic sheets of PET (“plates, sheets, film, foil and

strip of plastics, not self-adhesive, non-cellular, not reinforced etc., of PET, other”), and valued Trina’s backsheets using HTS category 3920.10, covering plastic sheets of EVA (“plates, sheets, film, foil and strip of plastics, not self-adhesive, non-cellular, not reinforced etc., of polymers of ethylene”). See Final Decision Memo at 41–43. Commerce explained that each of these categories was selected because it corresponds to the primary material used in each respondent’s backsheets. *Id.* at 41–42. Commerce determined that HTS category 3920.62, specific to PET, and HTS category 3920.10, specific to EVA, constitute the best available information for valuing respondents’ backsheets because Yingli’s backsheets consist primarily of PET and Trina’s backsheets consist primarily of EVA. *Id.* at 41. Addressing the argument that the categories did not perfectly reflect the complex nature of the backsheets, Commerce explained that:

[b]ecause record evidence shows that Yingli and Trina bought whole backsheets, as opposed to assembling the various components themselves, we selected the best available information on the record for valuing backsheets, not for valuing the components of backsheets. However, there are no [surrogate values] on the record specifically for backsheets. Backsheets are multilayered plastic sheets. Thus, we determined that the best available information on the record for valuing backsheets is the import value for the type of plastic sheet which most closely corresponds to type of backsheets used by the respondents.

Id. at 42. Commerce declined to value the backsheets using SolarWorld’s proposed HTS category 3920.99, for plastics not otherwise specified, finding that category less specific than 3920.10 and 3920.62 because each of the latter categories covers the primary material in each respondent’s backsheets while category 3920.99 covers unspecified plastics. *Id.*

Commerce reasonably selected HTS categories 3920.10 and 3920.62, respectively, to value Yingli’s and Trina’s backsheets. Acknowledging that the HTS categories were imperfect, Commerce explained that a perfect fit was not available. Final Decision Memo at 42. Commerce explained that its selection of the categories was based on the fact that the primary material in each respondent’s backsheets was reflected in the specific material of each category. See *id.* at 41–42. In the absence of a category specifically for backsheets, it is reasonable to choose import data for plastic sheeting of the type of specific plastic that constitutes the primary material in each respondent’s backsheets. Commerce considered the proposed alternative HTS categories for valuing the backsheets, including SolarWorld’s

proposed HTS category 3920.99, consisting of plastics not elsewhere specified under HTS heading 3920, and explained why each did not constitute a better selection than 3920.62 and 3920.10. *See id.* at 42.

SolarWorld argues that substantial evidence does not support the selection of these HTS categories because the surrogate value import data does not compare to the actual market economy prices that respondents paid for their backsheets. SolarWorld Br. 30–32. SolarWorld argues that, where respondents’ actual prices paid for an input are available and there is no evidence that the prices are unrepresentative, “Commerce should not ignore the actual price that the Chinese respondents paid for certain goods when assessing the viability of a surrogate value.” *Id.* at 32. However, Commerce explained that it does not use the actual prices paid as benchmarks, due to its preference for public information and because such prices may not be representative.²¹ Final Decision Memo at 41–42. SolarWorld’s argument that Commerce should rely on these market prices to assess the representativeness of the surrogate values for backsheets is therefore unpersuasive.

F. Nitrogen

Trina challenges Commerce’s use of Thai import data to value Trina’s nitrogen input, arguing that the Thai import data is aberrational and that Commerce’s determination is unsupported by substantial evidence because the agency did not explain the discrepancies between the Thai data and all alternative values on the record. *See Trina Br. 9–16.* Defendant contends that Commerce reasonably determined that the Thai import data was the best available infor-

²¹ Where a respondent sources an input both from market economy suppliers using a market economy currency and from NME suppliers, and where the volume of the input purchased from the market economy suppliers amounts to less than 85% of the total volume of the input purchased, Commerce calculates a value for the input by weight-averaging the market economy prices paid for the input and a surrogate value. *See* 19 C.F.R. § 351.408(c)(1); Trina Prelim. Calculation Mem. at 2–3, CD 566, bar code 3427993–01 (Dec. 18, 2015); Yingli Prelim. Analysis Mem. at 2, CD 572, bar code 3428066–01 (Dec. 18, 2015); *see also Antidumping Methodologies*, 71 Fed. Reg. 61,716–01 (Dep’t Commerce Oct. 19, 2016), available at <https://www.federalregister.gov/documents/2006/10/19/E6-17376/antidumping-methodologiesmarket-economy-inputs-expected-non-market-economy-wages-duty-drawback-and> (last visited Oct. 13, 2017). Here, both respondents reported purchasing a small percentage of their backsheet from market economy suppliers. Accordingly, Commerce weight-averaged the market economy prices each respondent paid for its backsheet with the Thai surrogate value to achieve a value for the backsheet input for both respondents. *See Trina Prelim. Calculation Mem.* at 2–3, Attach. II, CD 566, bar code 3427993–01 (Dec. 18, 2015); Yingli Prelim. Analysis Mem. at 2, CD 572, bar code 3428066–01 (Dec. 18, 2015); Yingli Prelim. Analysis Mem. Attach. II, CD 578, bar code 3428066–07 (Dec. 18, 2015). SolarWorld does not challenge Commerce’s methodology with regard to market economy prices; rather, SolarWorld argues that the market economy prices paid by respondents for purchases of backsheets should serve as a benchmark with which to assess Commerce’s surrogate value. *See SolarWorld Br. 30–32.*

mation for valuing Trina's nitrogen input, as Commerce evaluated whether the data was aberrational according to its practice and lacking specific evidence demonstrating aberration. *See* Def.'s Resp. 30–32. For the reasons that follow, Commerce's selection of the Thai import data for valuing the nitrogen input is reasonable.

Where there is a claim that data is aberrational, Commerce must address evidence of aberration in order to demonstrate that the data is nonetheless the best information available. *See Universal Camera Corp.*, 340 U.S. at 488 (noting that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Here, Commerce explained its practice for assessing whether data is aberrational, noting that:

when determining whether data are aberrational, the Department has found that evidence that an AUV in the country at issue is high compared to another AUV (such as the Bulgarian import AUV here) does not necessarily establish that the GTA data for that country are unreliable, distorted or misrepresentative. Rather, in analyzing whether an AUV is aberrational or distortive, the Department typically compares the AUV for the input during the POR in the country at issue to AUVs for that input during the POR from all countries found to be at a level of economic development comparable to the NME or compares AUVs of the input during the POR in the country at issue to AUVs for that input in the country at issue in prior years.

Final Decision Memo at 62 (internal citations omitted).

Consistent with its practice, Commerce compared the Thai value to values from economically comparable countries. *See id.* Although most of these values were lower than the Thai value, at least one other was significantly higher than the Thai value. *Id.* (noting the value for Ukraine as \$78.75 USD per kg). On this basis, Commerce concluded that the Thai data was within range of the available values from other economically comparable countries and therefore was not aberrational. *Id.* Commerce determined that the average unit values on the record from economically comparable countries “do not demonstrate that the Thai AUV is aberrational.” *Id.*

Trina placed four alternative values on the record: the average nitrogen prices from Bulgarian import data during the POR (averaging \$0.0964 per kilogram), actual nitrogen purchases by Thai companies during the POR (averaging \$0.1239 per kilogram), a price quotation to Trina for nitrogen in Thailand (averaging \$0.0679 per kilogram), and U.S. International Trade Commission export data to

Thailand during the POR (averaging \$0.1625 per kilogram). *See* Trina Br. 5–6, 9–10. Trina argues that these values demonstrate that the Thai value is aberrational, as the Thai value was between 72 and 173 times greater than each of its four proposed alternate values. *Id.* at 10. Commerce declined to assess aberration by comparing three of Trina’s four proposed alternate values to the Thai data. *See* Final Decision Memo at 62. Commerce explained its preference to use surrogate value data that is publicly available:

[T]he Department’s preference is to use published prices that are widely available, rather than prices and price quotes from a limited number of suppliers that can only be obtained through direct inquiry. Publicly available, published prices generally do not suffer from potential biases compared to: (1) price quotes, such as the Thai price quotes submitted by Trina, that can be obtained through research by private firms; or (2) individual prices, such as the three invoice prices submitted by Trina, which are not representative of a broad market average.

Id. at 61. It is reasonably discernible that Commerce declined to use these values to assess aberration for the same reasons. *See id.* at 62 (noting, regarding Trina’s argument that the Thai data is high in relation to the proposed alternate surrogates, that “[Commerce’s] preference is to use published prices that are widely available, rather than prices and price quotes from a limited number of suppliers that can only be obtained through direct inquiry due to potential biases.”). If a value that is not publicly available is considered potentially unreliable for purposes of serving as a surrogate value, it follows that the value may also not be an appropriate benchmark by which to determine the reliability of other potential surrogate values.²²

Additionally, Trina argues U.S. export data for the same period contradicts Thai import data:

²² Trina argues that Commerce’s conclusion “ignores the massive differences in import quantities and the actual weighted-average import values of these countries.” Trina Br. 13. Trina calculated a “weighted-average” for the other five economically comparable countries by dividing the total value from these countries by the total quantity from these countries, which results in an overall AUV of \$0.1551 USD per kg. *Id.* Trina compared this figure to the Thai AUV of \$ 11.68 USD per kg, and claimed that the Thai AUV is “more than 75 times higher than the weighted-average import values from the other five [economically comparable] countries.” *Id.* This method is not the method by which Commerce assesses aberration, and does not demonstrate that Commerce’s method is unreasonable.

Trina also emphasizes that, because only the Ukraine value was higher than the Thai value and the quantity of imports from Ukraine was low, the Thai value is “higher—and significantly higher—than 99.5% of total nitrogen imports in these countries during the POR.” Trina Br. 13. Both of these arguments ask the court to reweigh the evidence and do not demonstrate that Commerce’s methodology or conclusions are unreasonable.

According to monthly data obtained from the U.S. International Trade Commission's Dataweb, there were 586,305 kilograms of nitrogen exported from the United States to Thailand during the POR with a value of \$95,286. In contrast, the GTA Thai import data showed only 4,298 kilograms of nitrogen imports from the United States with a value of \$317,480. Thus, while the reported Thai import value greatly exceeds the reported U.S. export value by over \$220,000, the quantity reported to be imported into Thailand from the United States during this period is lower than the U.S. exports to Thailand during the same period by 582,000 kilograms. The significant and inexplicable disparity between the reported Thai imports of nitrogen from the United States and the reported U.S. exports to Thailand calls into serious question the reliability of the GTA Thai import data and the resulting average Thai import price of \$73.87/kg, which is 45,458% higher than the nitrogen export price to Thailand reported by the U.S. International Trade Commission of \$0.1625/kg (which is much more in line with the other record pricing information for nitrogen). Trina presented this benchmarking line of argumentation to Commerce, but it was ignored and was not addressed at all in the *Final Results*.

Id. at 11 n.1. Commerce explained its preference for using surrogate value data from a single surrogate country that is, among other characteristics, "non-export" data. *See* Final Decision Memo at 61. It is reasonably discernible that Commerce would, then, not consider export data to be a measure against which to assess the reliability of import data. Further, Defendant emphasized at oral argument that the focus for Commerce is on import data, not export data, and that the reported U.S. export value does not demonstrate that the choice to use Thai import data is unsupported by substantial evidence. Oral Arg. Tr. 49, Sept. 5, 2017, ECF No. 97. As Commerce's practice is to utilize import data, this export data, without more, does not demonstrate that the selection of the Thai import data is unsupported by substantial evidence.

II. The Use of Import Data with Reported Quantities of Zero

Trina argues that Commerce erred by including values for import data with reported quantities of zero in the surrogate value calculations, contending that the inclusion of these zero-quantity values resulted in distorted surrogate values. Trina Br. 16–19. Trina argues that Commerce's conclusion that there is no evidence that the data is unreliable is unsupported by substantial evidence because the values

do not correlate to other low-quantity values on the record. *Id.* at 18. Defendant responds that Commerce reasonably determined that the values were reliable because the agency found no basis in the record to conclude that the zero quantities were the result of errors. Def.'s Resp. 33. For the reasons that follow, the court remands for Commerce to further explain or reconsider its determination that the inputs with reported quantities of zero are reliable.

Here, Commerce concluded that the values reported with zero quantities are "attributable to rounding small quantities down to zero" and, because it found no reason to suspect errors in the data, found that the data was reliable. Final Decision Memo at 64. Defendant emphasizes that it is within Commerce's authority to make the "reasonable assumption" that the zero quantities were simply the result of rounding. Def.'s Resp. 33 (citing *Daewoo Elecs. Co. v. Int'l Union of Electronic Elec., Tech., Salaried, & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993)). To support its determination, Commerce referenced its reasoning in the underlying investigation in which the agency determined that values with reported quantities of zero were reliable, but acknowledged that the facts of this review are distinguishable in that the majority of the values with reported quantities of zero are not within range of other low-quantity values on the record, as they were in the investigation. Final Decision Memo at 64. In the investigation, the values reported with zero quantities were within range of other low-quantity values on the record, such that the reported zero quantities did not appear to be random error:

If such instances involve aberrational data (*e.g.*, situations caused by data collection or data input errors), they should occur at random. Instead, all of the import values where the stated quantity is zero are instances of relatively low import values that are typically in the range of import values from other countries where the imported quantity is very small. Given the low import values for the zero quantity imports, the fact that these values are generally consistent with low volume imports, and given that Thai import quantities collected by GTA are all rounded to the nearest whole number, these instances appear to involve rounding import quantities to zero.

Issues and Decision Mem. for the Final Determination in the [ADD] Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC], A-570-979, 40 (Oct. 9, 2012), *available at* <http://ia.ita.doc.gov/frn/summary/prc/2012-25580-1.pdf> (last visited Oct. 13, 2017) ("Solar I PRC Investigation Final Decision Memo"). Here, it is uncontested that the majority of

the values with zero quantities were not within range of other low-quantity values.²³ See Final Decision Memo at 64.

In light of the evidence on the record that the values are not within range of other low-quantity imports and the lack of an alternate reasonable explanation as to why these values are reliable, Commerce's conclusory statement that it finds no basis for determining the values are unreliable is insufficient. See *Universal Camera Corp.*, 340 U.S. at 488 (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). There may be a reasonable explanation as to why the zero-quantity imports have values that are not within range of low-quantity inputs elsewhere in the database. But Commerce has not provided such an explanation here. Without further explanation, Commerce's assumption that the zero quantities were the result of rounding is not reasonable.

III. The Use of Styromatic's Financial Statements To Calculate Financial Ratios for Overhead, SG&A Expenses, and Profits

SolarWorld challenges Commerce's selection of Styromatic's financial statements for valuing respondents' overhead, SG&A expenses, and profit. SolarWorld Br. 38–43. SolarWorld claims that Commerce should have chosen the financial statement on the record for Thai company Ekarat Engineering (Public) Co., Ltd. ("Ekarat") because Ekarat is the only Thai company with a financial statement on the record which produces identical merchandise. *Id.* at 40–43. Defendant responds that Commerce's selection of Styromatic's financial statements is supported by substantial evidence and consistent with

²³ After acknowledging the differing facts in this review, Commerce referenced its reliance on an assessment of randomness in the investigation which it used to determine whether the data was reliable:

Consistent with the reasoning in the investigation, if the reported information (zero quantities) were the result of errors, we would expect less consistency and more randomness with respect to the type of error observed. For example, if the data were merely erroneous, we would expect errors to also occur with respect to the reported *value* in at least some instances; however there are no imports in the data with a zero value. Since there appear to be no such errors with respect to value, we conclude that the reported zero quantities are reliable, attributable to rounding small quantities down to zero.

Final Decision Memo at 64 (emphasis in original). However, as discussed above, in the investigation, Commerce emphasized that if quantities of zero were the result of random error, the values would generally not be within the range of other low quantity values on the record. See Solar I PRC Investigation Final Decision Memo at 40. In the investigation, Commerce does not reason that, if the zero quantities were the result of random error, there would also be instances of a reported zero value. See *id.* Further, Commerce has not explained why it would not be possible to make random errors in reporting quantities without making corresponding errors in reporting values. Commerce provides no other reasonable explanation as to why the values with reported zero quantities are nonetheless reliable in this review.

agency practice, as Styromatic's financial statements are the only statements on the record that do not evidence receipt of countervailable subsidies during the POR. *See* Def.'s Resp. 34–37. For the reasons that follow, Commerce's determination to value respondents' overhead, SG&A expenses, and profit using Styromatic's financial statements is reasonable and is sustained.

Commerce uses the best available information to value inputs, including the FOPs used to produce the merchandise and “an amount for general expenses and profit.” 19 U.S.C. § 1677b(c)(1). Commerce selects a surrogate value for each of these inputs from a source in a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. *Id.* §§ 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b). Commerce calculates the amount for general expenses and profit using publicly available financial data from a producer of identical or comparable merchandise. 19 C.F.R. § 351.408(c)(4). In the final determination, Commerce identified six producers of comparable merchandise while stating that the record lacked financial statements for a producer of merchandise identical to the subject merchandise.²⁴ Final Decision Memo at 37. Of the six producers under consideration from the primary surrogate country, including Ekarat, Commerce explained that Styromatic was the only company whose statement did not evidence receipt of a countervailable subsidy. *Id.* Therefore, Commerce determined that Styromatic's statements constitute the best available information. *See id.* at 37–38. This determination is reasonable, as evidence of countervailable subsidies would render the statements unrepresentative and accordingly would not provide an accurate sur-

²⁴ At oral argument, Defendant conceded that evidence in the record supports a determination that Ekarat is a producer of identical merchandise. *See* Oral Arg. Tr. 69. Defendant argues that Commerce nonetheless reasonably determined that Styromatic is the best available information on the record because evidence of receipt of a countervailable subsidy outweighs Commerce's preference for identical rather than comparable merchandise. *See id.* at 69–71. It is reasonably discernible that Commerce chose Styromatic because it was the only company not to receive countervailable subsidies and that, regardless of whether Ekarat produced identical or comparable merchandise, Commerce viewed Styromatic as the source of the best available information because it did not receive a subsidy while Ekarat did. *See* Final Decision Memo at 37. Commerce chose Styromatic as the best available information in the preliminary determination, even though the agency found Ekarat to be “a manufacturer of solar cells and modules, as well as a distributor and servicer of electrical transformers.” Prelim. Decision Memo at 27. Further, in the final determination, although Commerce concluded that Ekarat produced comparable merchandise, the agency reiterated its finding from the preliminary determination “that Ekarat benefitted from countervailable subsidies.” Final Decision Memo at 37. Given the conclusion in the preliminary determination that Styromatic constituted the best available information despite the preliminary finding that Ekarat was a producer of identical merchandise, it is reasonably discernible that the finding that Styromatic did not benefit from countervailable subsidies, while Ekarat did, formed the basis of Commerce's decision.

rogate value. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191 (explaining the agency’s duty to make a selection that will enable it to ultimately calculate accurate dumping margins).

SolarWorld argues that Commerce unreasonably concluded that Styromatic did not receive a countervailable subsidy during the POR because it received a subsidy two months prior to the POR and there was no evidence of termination of the assistance prior to the POR. *See SolarWorld Br.* 38–40. Commerce assesses the financial statements on record for the POR. Commerce explained that the petitioner did not demonstrate that Styromatic received a countervailable subsidy during the POR or that the agency has found the assistance received prior to the POR to be countervailable. Final Decision Memo at 37. SolarWorld presents no evidence that has not been addressed by Commerce which indicates that Styromatic received a subsidy during the POR or that such subsidy has been found countervailable. Commerce’s determination is supported by substantial evidence.

IV. The Application of AFA to Trina’s Unreported FOPs

Finally, Trina challenges Commerce’s application of AFA to the unreported FOPs for Trina’s purchases of solar cells from unaffiliated solar cell suppliers. *See Trina Br.* 19–23. Trina argues that Commerce’s application of AFA is not reasonable because Commerce did not explain what percentage of a respondent’s FOPs for purchased solar cells must have been unreported FOPs for Commerce to consider the portion significant to warrant application of AFA. *Id.* at 22. Defendant responds that Commerce properly applied AFA with regard to incomplete information, having reasonably determined that Trina failed to act to the best of its ability in providing a complete and accurate response to requests for production information. *See Def.’s Resp.* 39–46. For the reasons that follow, Commerce’s determination to apply AFA to value Trina’s unreported FOPs is reasonable.

In order to calculate accurate dumping margins, Commerce requests information from respondents. If Commerce determines it cannot accurately calculate a respondent’s dumping margin based on that information, Commerce shall use “facts otherwise available” for the missing information.²⁵ *See* 19 U.S.C. § 1677e(a). Commerce may apply adverse inferences in selecting from among the facts otherwise available where it “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with [its] request

²⁵ Specifically, Commerce resorts to facts otherwise available when a respondent withholds requested information, fails to timely provide requested information or fails to provide information in the requested form and manner, “significantly impedes” an antidumping proceeding, or provides information that cannot be verified. 19 U.S.C. § 1677e(a)(2).

for information . . .”²⁶ *Id.* § 1677e(b). Although the statute does not define the phrase “best of its ability,” compliance with the standard “is determined by assessing whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Here, Trina did not report production inputs for a portion²⁷ of the solar cells it purchased from unaffiliated solar cell suppliers. *See* Trina Br. 21–22; Final Decision Memo at 53–54; Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]: Unreported Factors of Production, A-570–979, at 9, PD 524, bar code 3427858–01 (Dec. 18, 2015) (“Trina Unreported FOP Memo”). Commerce used information otherwise available with an adverse inference for Trina’s unreported cell inputs. *See* Final Decision Memo at 52–53. As a result, Commerce “relied on the highest consumption figures for those same inputs that were reported by other suppliers or by the respondent.” Trina Unreported FOP Memo at 9; *see* Final Decision Memo at 54. Commerce emphasized that the methodology “is precisely proportional to the missing information, to induce the cooperation of Trina’s suppliers in future segments of this proceeding,” Final Decision Memo at 57, and that this methodology was consistent with its practice regarding the valuation of unreported FOPs:

The Department has previously excused respondents from reporting FOPs from some of their smallest suppliers in situations where a respondent has a large number of suppliers, and also in situations where the unreported FOP data are of limited quantity. This case is distinguishable from situations where the Department has excused respondents from reporting FOPs, and distinguishable from the situation of Yingli in this administrative review, because the percentage of solar cell inputs provided by Trina’s unaffiliated solar cell suppliers is significant and cannot reasonably be characterized as being of limited quantity.

Id. at 52.

²⁶ While the statute provides separately for the use of facts otherwise available and the subsequent application of an adverse inference regarding those facts, Commerce uses the term “adverse facts available” or “AFA” to refer to the application of the “facts otherwise available” and “adverse inferences” provisions of 19 U.S.C. § 1677e. *See, e.g.*, Final Decision Memo at 52–53 (explaining Commerce’s approach to applying AFA when an interested party fails to cooperate by not acting to the best of its ability in responding to Commerce’s requests for information).

²⁷ Specifically, Trina did not report production inputs for [[]] of the solar cells it purchased from unaffiliated solar cell suppliers. *See* Trina Br. 21–22.

Commerce explained that its decision to apply AFA turned on the perceived ability of Trina to induce compliance from the suppliers, due to what Trina acknowledged were long-standing business relationships between Trina and the suppliers. Final Decision Memo at 56. Commerce reasonably determined that these relationships provided at least some leverage to induce compliance:

. . . Based on Trina’s acknowledgment of its long-term business relationship with its largest cell suppliers, we find that it [is] reasonable to conclude that Trina has some business mechanism to induce its suppliers to cooperate. By applying AFA with respect to the missing data, [Commerce] is relying on the statutory means that it has available to induce the cooperation of these parties because Trina may choose not to do business with them in the future due to their lack of cooperation and/or select suppliers that are willing to commit to participation in an anti-dumping proceeding.

Trina Unreported FOP Memo at 8. Commerce’s explanation for valuing Trina’s unreported FOPs using AFA is reasonable. The determination to apply AFA was made in consideration of the magnitude of inputs not reported and of Trina’s apparent ability to induce compliance. Final Decision Memo at 55–56.

Trina argues in the alternative that Commerce should apply AFA only to the portion of Trina’s unreported FOPs that are above Yingli’s percentage of unreported FOPs since Commerce determined that Yingli had an insignificant percentage of unreported FOPs.²⁸ See Trina Br. 23. Trina argues that this method would ensure that the respondents were treated similarly. *Id.* However, nothing in the statute requires Commerce to apply AFA as Trina suggests. It is not for the court to say whether Trina’s proposed alternate methodology for applying AFA to Trina’s unreported FOPs would be reasonable. Trina’s proposed alternative does not demonstrate that Commerce’s methodology—to apply AFA to all of Trina’s unreported FOPs, having determined that a significant portion of FOPs were unreported—was unreasonable.

CONCLUSION

For the foregoing reasons, the court sustains Commerce’s surrogate value selections for valuing respondents’ aluminum frames, semi-finished polysilicon ingots and blocks, solar backsheet, and nitrogen

²⁸ Specifically, Trina argues that Commerce should only apply AFA to the portion of Trina’s unreported FOPs above [], “because Commerce already had determined that Yingli’s purchased cell portion of [] was not significant.” Trina Br. 23.

inputs. The court also sustains Commerce's selection of financial statements for calculating financial ratios for respondents' overhead, SG&A expenses, and profit, and Commerce's application of adverse facts available to respondent's unreported, purchased solar cells.

This matter is remanded to Commerce for reconsideration or further explanation consistent with this opinion Commerce's surrogate value selection for respondents' tempered glass and scrapped solar cells and modules inputs, as well as Commerce's determination to include import data with reported quantities of zero in the surrogate value calculations. In accordance with the foregoing, it is

ORDERED that Commerce's surrogate value selections for respondents' tempered glass and scrapped solar cells and modules inputs, and Commerce's inclusion of import data with reported quantities of zero in the surrogate value calculations, are remanded for further explanation or reconsideration consistent with this opinion. Commerce shall file its remand determination with the court within 45 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 15 days thereafter to file a reply to comments on the remand determination.

Dated: October 18, 2017

New York, New York

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

Slip Op. 17-145

WEISHAN HONGDA AQUATIC FOOD CO., LTD., ET AL., Plaintiffs, v. UNITED STATES, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, DEFENDANT-INTERVENOR.

Before: Mark A. Barnett, Judge
Court No. 16-00073

[Sustaining the U.S. Department of Commerce's Final Results, as corrected in the Amended Final Results and as amended by the Remand Results.]

Dated: October 25, 2017

Dharmendra N. Choudhary, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, argued for Plaintiffs. With him on the brief was *Francis J. Sailer*.

Mollie L. Finnan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Emily R. Beline*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

John C. Steinberger, Adduci, Mastriani & Schaumberg, LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief was *Will E. Leonard*.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or the “agency”) redetermination upon remand in this case. *See* Final Results of Remand Redetermination (“Remand Results”), ECF No. 51–1.

Plaintiffs Weishan Hongda Aquatic Food Co., Ltd (“Weishan”), China Kingdom (Beijing) Import & Export Co., Ltd. (“China Kingdom”), Shanghai Ocean Flavor International Trading Co., Ltd. (“Ocean Flavor”), and Deyan Aquatic Products and Food Co., Ltd. (“Deyan”) (collectively, “Plaintiffs”) initiated this case challenging Commerce’s *Final Results* in the 2013–2014 administrative review (“AR”) and new shipper review (“NSR”) of the antidumping duty order covering freshwater crawfish tail meat from the People’s Republic of China (“PRC” or “China”).¹ *See Freshwater Crawfish Tail Meat from the People’s Republic of China*, 81 Fed. Reg. 21,840 (Dep’t Commerce Apr. 13, 2016) (final results of antidumping duty admin. review and new shipper review; 2013–2014) (“*Final Results*”), PJA Doc. 21, NSR-PR 160, ECF No. 26–6, as corrected in *Freshwater Crawfish Tail Meat from the People’s Republic of China*, 81 Fed. Reg. 23,457 (Dep’t Commerce Apr. 21, 2016) (notice of correction to final results of antidumping duty admin. and new shipper reviews; 2013–2014) (“*Am. Final Results*”), PJA Doc. 22, NSR-PR 165, ECF No. 26–7, and accompanying Issues and Decision Memorandum, A-570–848 (Apr. 8, 2016) (“I&D Mem.”), PJA Doc. 17, NSR-PR 151, ECF No. 26–8.

Specifically, Plaintiffs challenge Commerce’s rejection of Thai financial statements in favor of a 2014 Annual Report from a South African seafood processor, Oceana Group (the “Oceana Report”), to value factory overhead, selling, general and administrative expenses, and profit (hereinafter referred to as “financial ratios”). Plaintiffs argue that Commerce failed to adequately support or explain its determination that the Oceana Report provided the necessary information to accurately calculate financial ratios or compare the Thai and South

¹ The administrative review and new shipper review have separate administrative records; each is divided into a public record (“PR”)—ECF No. 26–2 (NSR) (“NSR-PR”) and ECF No. 26–4 (AR) (“AR-PR”)—and a confidential record— ECF No. 26–3 (NRS) and ECF No. 26–5 (AR). Parties submitted a public joint appendix (“PJA”) containing all record documents cited in their briefs. Parties did not cite to confidential record documents, *see* PJA, ECF No. 41. Thus, all citations are to the PR and PJA, unless otherwise stated.

African financial statements to determine which was more reliable and representative of Plaintiffs' production experience, and the Thai financial statements are "[v]astly [s]uperior" to the Oceana Report. See Pl.'s [sic] Rule 56.2 Mot. for J. on the Agency R. and Br. in Supp. of Pl.'s [sic] Rule 56.2 Mot. for J. on the Agency R. ("Pls.' Mem.") at 14–31, ECF No. 34. Plaintiffs' third basis for challenging Commerce's reliance on the Oceana Report is their disputing of Commerce's finding that South Africa is a significant producer of comparable merchandise. See *id.* at 28–29.

Before oral argument on Plaintiffs' Rule 56.2 motion for judgment on the agency record, Defendant requested that the court remand the determination for Commerce to reconsider its factual basis for finding that South Africa is a significant producer of comparable merchandise, and the court granted the request. See Order (March 21, 2017), ECF No. 50. In the Remand Results, Commerce affirmed its conclusion that South Africa is a significant producer of comparable merchandise and, therefore, continued its reliance on the Oceana Report to value financial ratios. Remand Results at 1–2, 6–11.

Following Commerce's issuance of the Remand Results, Parties filed a joint status report wherein Plaintiffs assert they no longer challenge Commerce's determination that South Africa is a significant producer of comparable merchandise. Post Remand Joint Status Report ("Status Report") at 1, ECF No. 53. Plaintiffs, however, seek completion of the court's review of issues that were not addressed on remand. *Id.* at 2.

For the following reasons, the court sustains the *Final Results*, as corrected by the *Am. Final Results* and as amended by the Remand Results.

BACKGROUND

In 1997, Commerce issued an antidumping duty order covering freshwater crawfish tail meat from China. See *Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 41,347 (Dep't Commerce Aug. 1, 1997) (notice of final determination of sales at less than fair value) ("*Final LTFV Determination*"), as corrected in *Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997) (notice of amendment to final determination of sales at less than fair value and antidumping duty order).²

² The order covers "freshwater crawfish tail meat, in all its forms . . . , grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared." *Final LTFV Determination*, 62 Fed. Reg. at 41,347. Live crawfish, whole crawfish, and

On September 2, 2014, Commerce published a notice of opportunity to request an administrative review in this proceeding. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 79 Fed. Reg. 51,958 (Dep't Commerce Sept. 2, 2014). Defendant-Intervenor, Crawfish Processors Alliance ("CPA"), filed requests for review of China Kingdom and Deyan; Ocean Flavor and China Kingdom filed their own requests for review. *See* Request for Admin. Review, PJA Doc. 1, AR-PR 2, ECF No. 41; Freshwater Crawfish Tail Meat from the People's Republic of China: Respondent Selection for the 2013–2014 Antidumping Duty Admin. Review (Dec. 16, 2014), PJA Doc. 3, AR-PR 24, ECF No. 41. In October 2014, Commerce initiated an administrative review for the period of review September 1, 2013 to August 31, 2014. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 79 Fed. Reg. 64,565 (Dep't Commerce Oct. 30, 2014). On November 21, 2014, Commerce aligned the administrative review with the concurrent new shipper review initiated in connection with Weishan. *See* Alignment of New-Shipper Reviews of Freshwater Crawfish Tail Meat from the PRC with the Concurrent Admin. Review of Freshwater Crawfish Tail Meat from the PRC ("Alignment Ltr."), PJA Doc. 2, AR-PR 19, ECF No. 41.

On October 7, 2015 Commerce published its preliminary results. *Freshwater Crawfish Tail Meat From the People's Republic of China*, 80 Fed. Reg. 60,624 (Dep't Commerce Oct. 7, 2015) (prelim. results of antidumping duty admin. review and new shipper reviews; 2013–2014) ("*Prelim. Results*"), PJA Doc. 11, NSR-PR 139, ECF No. 41, and accompanying Preliminary Decision Memorandum, A-570–848 (Oct. 7, 2015) ("*Prelim. Decision Mem.*"), PJA Doc. 7, NSR-PR 123, ECF No. 41. Commerce determined that Thailand, South Africa, Colombia, Bulgaria, Ecuador, and Indonesia were potential surrogate countries based on their economic comparability to the PRC. Freshwater Crawfish Tail Meat from the PRC: Selection of a Surrogate Country ("*Surrogate Cntry Mem.*") at 2, PJA Doc. 8, NSR-PR 124, ECF No. 41. Upon review of Global Trade Atlas ("*GTA*") export statistics, Commerce concluded that none of the potential surrogate countries produced freshwater crawfish tail meat or whole crawfish. *Id.* at 4. Therefore, Commerce examined GTA export data for processed seafood, which it had deemed comparable merchandise in prior segments of the proceeding, and determined that Indonesia

saltwater crawfish are excluded from the scope of the order. *Id.* The freshwater crawfish tail meat covered by the order is classifiable pursuant to the following subheadings of the Harmonized Tariff System of the United States: 1605.40.10.10, 1605.40.10.90, 0306.19.00.10, 0306.29.00.00, and 0306.29.01.00. *Final Results*, 81 Fed. Reg. at 21,841.

and Thailand were significant producers of processed seafood. *Id.* Although Commerce had surrogate values for most of the factors of production from both Thailand and Indonesia, Commerce had financial statements solely from Thailand. *Id.* at 5. Thus, Commerce selected Thailand as the primary surrogate country. Prelim. Decision Mem. at 5; Surrogate Cntry Mem. at 5.

During the preliminary investigation, CPA argued that a condition known as “Early Mortality Syndrome” (“EMS”) had “decimated” Thai shrimp populations throughout calendar years 2013 and 2014 and, thus, Commerce should reject Thai financial information in favor of the Oceana Report. Preliminary Surrogate Value Memorandum (“Prelim. Surrogate Value Mem.”) at 2, PJA Doc. 9, NSR-PR 125, ECF No. 41; Pet’r Surrogate Value Cmets., Ex. 5 (the “Oceana Report”), PJA Doc. 6, NSR-PR 66, ECF No. 41. Finding the more contemporaneous Thai financials unusable due to the effects of EMS on Thai seafood processors from 2013 to 2014, in its Preliminary Results, Commerce relied on 2012 financial statements from two Thai seafood processors, Surapon Food Public Company Ltd. (“Surapon”) and Kiang Huat Sea Gull Trading Frozen Food Public Company Ltd. (“King Huat”). Prelim. Surrogate Value Mem. at 6; Prelim. Decision Mem. at 15; *see also* I&D Mem. at 3 (identifying the Thai seafood processors). Commerce preliminarily calculated dumping margins of zero percent for each plaintiff. *Prelim. Results*, 80 Fed. Reg. at 60,625.

In its case brief filed in the administrative and new shipper reviews, CPA argued that Commerce should not use the 2012 financial statements of Surapon and Kiang Huat because EMS had begun impacting Thai shrimp populations in 2012, not 2013, and the statements show that the companies had received countervailable export subsidies. CPA Case Br. and Request for Hr’g (“CPA Case Br.”) at 1–7, PJA Docs. 4, 12, AR-PR 99, NSR-PR 140, ECF No. 41; I&D Mem. at 3–4.³ CPA urged Commerce to use the Oceana Report on the basis that South Africa is a significant producer of comparable merchandise, and the annual report is contemporaneous with the period of review. CPA Case Br. at 7–9; I&D Mem. at 4–5.

In the new shipper review, Weishan countered that Surapon’s and Kiang Huat’s respective financial performances were unaffected by EMS in 2012, and the statements “are only slightly non-contemporaneous.” Weishan Rebuttal Br. at 4–5, 6, PJA Doc. 14, NSR-PR 141, ECF No. 41; I&D Mem. at 5–6. Weishan also argued that Commerce should not reject the subsidy-tainted Thai financial

³ CPA pointed to “promotional privileges” in Surapon’s and Kiang Huat’s financial statements as evidence that both companies benefitted from the Thai government’s “Industrial Investment Promotion Act B.E. 2520.” CPA Case Br. at 6 (citing Prelim. Surrogate Value Mem., Attach. 7, PJA Doc. 10, NSR-PR 125–128, ECF No. 41).

statements because the Oceana Report is “simply unusable” and thus does not afford Commerce with a “superior choice.” Weishan Rebuttal Br. at 6. Specifically, Weishan argued that South Africa is not a significant producer of comparable merchandise, and the Oceana Report is insufficiently disaggregated because it contains a basket line item for “Cost of Sales” and fails to separate expenses for raw materials and labor. *Id.* at 7–12.

Commerce rejected CPA’s argument regarding EMS but credited its argument that the Thai financial statements were unusable due to the companies’ receipt of countervailable export subsidies, and that it should instead select the Oceana Report. I&D Mem. at 8–9. Thus, in the *Final Results*, although Commerce again selected Thailand as the primary surrogate country, *id.* at 2, it relied on the Oceana Report to value financial ratios, *id.* at 9.

Commerce noted that South Africa is economically comparable to China, and the Oceana Report is contemporaneous with the period of review. *Id.* Commerce further explained that South Africa is a significant producer of comparable merchandise because “export revenues for processed seafood listed as ‘canned fished and fishmeal and horse mackerel and hake’ outlined in [Oceana’s 2014 Annual Report] are 4,289,946,000 Rand in the year ending September 30, 2014,” *id.* at 9 & n. 27 (citing the Oceana Report at 21), and Commerce previously determined that processed seafood constitutes comparable merchandise, *id.* at 9 & n.28 (citing Surrogate Cntry Mem.).

In response to Weishan’s argument that the Oceana Report failed to disaggregate raw material and labor costs, Commerce asserted, “we find that it contains the necessary information for [Commerce] to calculate appropriate financial ratios.” *Id.* at 9 (citing Freshwater Crawfish Tail Meat from the PRC: Final Results Surrogate-Value Mem. (“Final Surrogate Value Mem.”), PJA Doc. 18, NSR-PR 152, ECF No. 41). In the Final Surrogate Value Memorandum, Commerce explained that it generally calculates the overhead ratio by dividing total overhead costs by the total costs of materials, labor, and energy. Final Surrogate Value Mem. at 2. However, in the *Preliminary Results*, it had been unable to segregate energy costs from overhead costs, and, therefore, “applied [the] overhead ratio, which included energy costs, to the per-unit costs for materials and labor only[,] and did not calculate a separate per-unit cost for energy.” *Id.*⁴ For the *Final Results*, reliance on the Oceana Report enabled Commerce to

⁴ In the preliminary proceedings, Commerce explained that because the 2012 Thai financial statements did not separately identify energy expenses, it had been unable to “exclude energy costs from the calculation of the surrogate financial ratio for overhead.” Prelim. Surrogate Value Mem. at 6. According to its past practice, therefore, Commerce “disregard[ed] the respondents’ energy inputs in the calculation of normal value in order to avoid

follow its normal methodology. *Id.* That is, energy costs were included in the denominator along with materials and labor, rather than the numerator. *Id.* Commerce calculated final weighted average dumping margins of 22.16 percent for China Kingdom, 12.04 percent for Deyan, 17.23 percent for Ocean Flavor, and 26.10 percent for Weishan. *Final Results*, 81 Fed. Reg. at 21,841.

On October 7, 2016, Plaintiffs filed a Rule 56.2 motion for judgment on the agency record. *See generally* Pls.' Mem. Defendant and Defendant-Intervenor opposed the motion. *See generally* Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 35; Br. of the Def.-Int., Crawfish Processors Alliance, in Opp'n to Pls.' Mot. for J. on the Agency R. ("CPA Resp."), ECF No. 36. In addition to opposing the substance of Plaintiffs' motion, CPA argued that the Plaintiffs from the administrative review (China Kingdom, Deyan, and Ocean Flavor) failed to exhaust their administrative remedies because none of them had filed case or rebuttal briefs with Commerce in advance of the *Final Results*. CPA Resp. at 4–6.

On March 16, 2017, the court issued five questions to Parties prior to oral argument on the pending Rule 56.2 motion. *See* Letter to Counsel (March 16, 2017), ECF No. 46. Defendant subsequently requested remand to address issues the court raised in its third question, which related to the factual basis for Commerce's determination that South Africa is a significant producer of comparable merchandise. *See* Def.'s Mot. for a Voluntary Remand ("Def.'s Remand Mot.") at 3, ECF No. 47.

On June 5, 2017, Commerce filed its Remand Results affirming its conclusion that South Africa is a significant producer of comparable merchandise and, therefore, its reliance on the Oceana Report to value financial ratios. *See* Remand Results at 1–2, 6–11. In a Post Remand Joint Status Report, Plaintiffs asserted that they no longer challenge Commerce's finding that South Africa is a significant producer of comparable merchandise,⁵ but continued to challenge Commerce's reliance on the Oceana Report to value financial ratios. *See* Status Report at 1–2. Plaintiffs requested oral argument on that issue, but no further briefing. *Id.* at 2. Defendant agreed that no further briefing was merited, and deferred to the court as to scheduling oral argument. *Id.* at 3. Defendant-Intervenor sought briefing on whether Plaintiffs were foreclosed from challenging Commerce's use of the Oceana Report for failure to comment on the draft re-determination. *Id.* at 3–4.

double-counting energy costs which have necessarily been captured in the surrogate financial ratios." *Id.*

⁵ Accordingly, the court will not further address this issue.

The court granted Plaintiffs' request for oral argument. *See* Order (July 26, 2017), ECF No. 54. In the Order, the court invited Parties to explain their respective positions on the issue of administrative exhaustion during the remand proceeding, but did not permit briefing on that issue. *Id.* The court heard oral argument on September 20, 2017. *See* Docket Entry, ECF No. 57.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),⁶ and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). It “requires more than a mere scintilla,” but “less than the weight of the evidence.” *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports Commerce’s determination, the court must consider “the record as a whole, including evidence that supports as well as evidence that ‘fairly detracts from the substantiality of the evidence.’” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, that a plaintiff can point to evidence that detracts from the agency’s conclusion or the possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency’s finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 619–20 (1966)). The court may not “reweigh the evidence or . . . reconsider questions of fact anew.” *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (the court “may not reweigh the evidence or substitute its own judgment for that of the agency”).

⁶ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all citations to the U.S. Code and Code of Federal Regulations are to the 2012 edition unless otherwise stated.

DISCUSSION

I. Legal Framework for Selecting Surrogate Financial Values

When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production in a surrogate country, *see* 19 U.S.C. § 1677b(c)(1), and those values are referred to as “surrogate values.” In selecting surrogate values, Commerce must use “the best available information” that is, “to the extent possible,” from a market economy country or countries that are economically comparable to the non-market economy country and “significant producers of comparable merchandise.” *Id.* § 1677b(c)(4).

Commerce has a regulatory preference for valuing financial ratios from a primary surrogate country based on the data’s “specificity, contemporaneity, and quality.” I&D Mem. at 8; *see also* 19 CFR § 351.408(c)(2), (4). However, Commerce may resort to a secondary surrogate country when data from the primary surrogate country does not provide a viable option for valuing a factor of production. I&D Mem. at 9 & n. 29 (citing *FMC Corp. v. United States*, 27 CIT 240, 251 (2003)). “When examining the merits of financial statements on the record,” Commerce “weigh[s the] available information” before deciding what constitutes the “best available information.” *Id.* at 8.

Commerce generally rejects financial statements that reflect evidence of countervailable subsidies when it has “other, more reliable and representative data on the record.” *Id.* at 8 (citation omitted); *see also* 19 U.S.C. § 1677b(c)(5)(2015) (affording Commerce discretion to reject surrogate values “without further investigation if [it] has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those [surrogate values]”).⁷

II. Plaintiffs Failed to Exhaust Certain Arguments in the Underlying Administrative Proceeding

Plaintiffs raise several objections to Commerce’s reliance on the Oceana Report to value financial ratios, some of which were not made to Commerce during the administrative proceeding. “[T]he Court of

⁷ Section 1677b(c)(5) came into effect during the pendency of the underlying administrative proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,795 (Dep’t Commerce Aug. 6, 2015) (clarifying that § 1677b(c)(5) applies “to determinations made on or after August 6, 2015”). The codification of Commerce’s discretion to reject subsidy-tainted financial statements is not determinative, however. The provision simply “clarifies [Commerce’s] authority for its existing practice, and does not impose any new requirements on the parties to [antidumping] proceedings.” *Id.*

International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). The statute “indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies.” *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citation omitted). Administrative exhaustion generally requires a party to present *all* arguments in its administrative case and rebuttal briefs before raising those issues before this court. *Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); *see also Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (failure to raise a specific argument before Commerce precluded judicial review even if, as plaintiff contended, the argument was “simply another angle to an issue which it did raise before the [agency]”); *Paul Muller Industrie GmbH & Co. v. United States*, 31 CIT 1084, 1088, 502 F. Supp. 2d 1271, 1275 (2007) (plaintiff failed to exhaust issues concerning freight, duties, and brokerage fees when it merely “raised general issues regarding inventory carrying costs” in the underlying proceeding). This “allow[s] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *Vinh Hoan Corp. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1208, 1226 (2016) (citation omitted).

With regard to Commerce’s methodology, Plaintiffs here contend that Commerce failed to adequately compare the Thai and South African statements, in contravention of Commerce’s policy and judicial precedent. *See* Pls.’ Mem. at 20–23 (citing *Juancheng Kangtai Chemical Co., Ltd. v. United States*, Slip Op. 15–93, 2015 WL 4999476 (2015), and *CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657 (2016)). Plaintiffs further contend that Commerce failed to adequately explain how the Oceana Report provided the requisite information to value financial ratios in light of its insufficient disaggregation and lack of a specific line item for raw materials. *See id.* at 14–16; Pls.’ Reply Br. (“Pls.’ Reply”) at 2–3, ECF No. 37.

In addition to these general arguments, Plaintiffs now specifically point to Commerce’s allocation of “manufacturing overhead” to selling, general and administrative expenses, and surmise that manufacturing overhead may have been double-counted under “cost of sales.” Pls.’ Mem. at 18; Pls.’ Reply at 8–9.⁸ Plaintiffs further contend

⁸ Plaintiffs contend that Defendant “concedes” that the Oceana Report is distorted from insufficient disaggregation and allocation of overhead expenditure to selling, general and administrative expenses. Pls.’ Reply at 9 (citing Def.’s Resp. at 17). On page 17 of its response, Defendant restated Plaintiffs’ arguments about disaggregation and allocation of

that the amount for raw materials and energy includes an amount for the cost of goods purchased for trading that is not accounted for in the amount reflected by the change in finished goods. Pls.' Reply at 4–7. Finally, Plaintiffs contend that the Oceana Report does not reflect production or business processes that are comparable to Chinese crawfish manufacturers. *Id.* at 10–14. According to Plaintiffs, Oceana Group is a large multinational company that engages in disparate yet integrated activities. *Id.* at 12 (disparate activities include producing goods and investing; indications of vertical integration include fishing, processing, and cold storage).

In briefing to Commerce, Weishan disputed the propriety of replacing the Thai financial statements Commerce had relied on in the *Preliminary Results* with financial ratios derived from the Oceana Report. *See* Weishan Rebuttal Br. at 1–12. Regarding the applicable legal framework, Weishan argued that Commerce must “compare the different sources of data available on the record and select the best source among the options based on the quality, specificity and contemporaneity of the data.” *Id.* at 2. However, the only specific problems Weishan identified with respect to the Oceana Report were that it contained a basket category for “cost of sales” and was insufficiently disaggregated because it lacked specific line items for labor and raw materials. *See* Weishan Rebuttal Br. at 9.⁹ Accordingly, those are the only objections Commerce had notice of and an opportunity to address. *See Trust Chem Co. Ltd. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1257, 1268 n.27 (2011) (the “determinative question” is whether Commerce had notice of the disputed issue).

Weishan did not present to Commerce in the first instance its arguments about possible misallocation of overhead expenditure, inflation of the amount for raw materials by some unspecified amount for the cost of goods purchased for trading, or the incomparability of Oceana Group’s business and production experiences. *See* Weishan Rebuttal Br. at 9–10. Weishan certainly had notice that Commerce might rely on the Oceana Report because petitioners had suggested it do so in their case brief. *See* CPA Case Br. at 7–11. While Weishan sought to rebut CPA’s arguments, it did not take that opportunity to raise all the arguments they now raise to the court. *See* Weishan Rebuttal Br. at 9–10.

overhead expenditure, and noted that, in the *Preliminary Results*, Commerce had relied on Thai financial statements that did not segregate energy costs. Def.’s Resp. at 17. The court does not construe Defendant’s failure to address directly Plaintiffs’ arguments about the allocation of overhead in the Oceana Report as an implied concession as to the merits of those arguments.

⁹ Weishan had also argued that South Africa is not a significant producer of comparable merchandise. In light of the Remand Results, that issue is now moot. *See* Status Report at 1–2.

In an analogous case, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) recently rejected appellants’ attempt to raise arguments that had not been exhausted before the agency. *See Boomerang Tube*, 856 F.3d 908. The issue in that case was the amount to be used for constructed value profit. *Id.* at 910–912. Both Boomerang Tube LLC (“Boomerang”) (the petitioner) and Jubail Energy Services Company (“JESCO”) (the respondent) argued to the agency in their case briefs for alternatives to the constructed value profit used in the preliminary determination. *Id.* at 910–11. In its rebuttal brief, Boomerang raised only one objection to an alternative data source proposed by JESCO and accepted by Commerce in its final determination. *Id.* at 911. The Federal Circuit held that it was an abuse of discretion for the Court of International Trade to have allowed Boomerang to raise additional arguments against the particular data source proposed by JESCO without first having exhausted them before the agency. *Id.* at 912–13.

Likewise, as discussed above, Plaintiffs here chose to exhaust some, but not all, of their arguments against using the data in the Oceana Report during the administrative proceeding. There are, of course, exceptions to the requirement of exhaustion, which may be applied at the court’s discretion. Previously enumerated exceptions include futility, an intervening court decision such that the new interpretation would impact the agency’s actions, pure questions of law, or when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186, n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (collecting cases). The court has also found exceptions to exhaustion when a private party is denied access to critical information at a time when its case brief is due or when requiring exhaustion is burdensome such that it would result in “undue prejudice to subsequent assertion of a court action.” *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) (citation omitted). However, none of these exceptions apply here.¹⁰

Additionally, to the extent that Plaintiffs’ argument about the cost of goods purchased for trading is related to its concern with Com-

¹⁰ The agency’s decision must be based on substantial evidence, 19 U.S.C. § 1516a(b)(1)(B)(i), and be sufficiently well explained such that the path of its reasoning is discernible to the reviewing court, *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Bearing in mind, however, that the statute requires parties to exhaust their arguments before the agency, 28 U.S.C. § 2637(d), it would be inappropriate, if not unjust, for the court to expect the agency to anticipate and address arguments against the selection of a particular data point that were never presented to the agency in the first instance, particularly when the party had the information, opportunity, and incentive to have presented those arguments. *See Rhone Poulenc*, 899 F.2d at 1191 (superseded by statute in other respects); *Boomerang Tube*, 856 F.3d 908.

merce's inability to disaggregate labor and raw materials, "[b]oth the Federal Circuit and this court have held that failure to raise a specific argument in a case brief, even if the general issue is addressed, constitutes a failure to exhaust administrative remedies." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 533, 545, 616 F. Supp. 2d 1354, 1366 (2009) (citing *Rhone Poulenc*, 899 F.2d at 1191) (declining to consider the merits of an argument characterized by plaintiff as "merely a greater explication of the same issue raised in [its] Administrative case brief below"); *see also Paul Muller*, 31 CIT at 1088, 502 F. Supp. 2d at 1275. Failing to raise this specific argument deprived Commerce of the opportunity to be "the initial decision-maker" regarding Weishan's assertion that a question about the cost of goods purchased for trading calls into question whether the Oceana Report constitutes the best available information for valuing surrogate financial ratios. *See Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)); *Vinh Hoan*, 179 F. Supp. 3d at 1226 (exhaustion enables the agency "to apply its expertise . . . and compile a record adequate for judicial review") (citation omitted).

Separately, CPA argues that the court should sustain the *Final Results* with regard to the administrative review and dissolve the preliminary injunction against liquidation of entries subject thereto because the administrative review Plaintiffs failed to exhaust administrative remedies by declining to file case or rebuttal briefs in that segment of the proceeding. CPA Resp. at 4–6.

CPA is correct that the administrative and new shipper reviews represent different segments of the proceeding, and although Commerce aligned the schedules of the two reviews, it maintained separate administrative records. *See* CPA Resp. at 4 (citing *Cerro Flow Prods., LLC v. United States*, 38 CIT ___, ___, 2014 WL 3539386 (2014)); *Alignment Ltr.* CPA is also correct that Weishan filed its Rebuttal Brief protesting reliance on the Oceana Report solely in the new shipper review. *See* CPA Resp. at 2; *Weishan Rebuttal Br., Cover Ltr.* at 1 (submitting the brief in reference to the new shipper review). At oral argument, the Government clarified that it was not asserting the doctrine of administrative exhaustion against the administrative review Plaintiffs because Commerce had examined surrogate values jointly for both reviews, relying on the same evidence and arriving at the same determination.

This appears to be first time the court has been asked to address the doctrine of administrative exhaustion in the context of separate, but aligned, segments of a proceeding, in relation to arguments raised on the record of one segment and not the other, but jointly examined by

Commerce. In light of the decision on the merits of this case, the court need not resolve CPA's argument. That being said, in fairness to all parties, going forward, Commerce would be well-advised to clarify the implications of aligning two segments of the same proceeding. Commerce could combine the records of the two segments, or notify parties that arguments raised in one segment may only be addressed in that segment. The court should not have to discern the implications of Commerce's treatment of parties' evidence and arguments in aligned proceedings *post hoc*. The court now turns to the merits of Plaintiffs' exhausted arguments.¹¹

III. Commerce's Decision to Rely on the Oceana Report to Value Financial Ratios was Supported by Substantial Evidence

As discussed above, Plaintiffs contend that Commerce failed to adequately explain its selection of the Oceana Report in light of its degree of aggregation, and failed to compare properly the Oceana Report to the Thai financial statements. Pls.' Mem. at 14–18, 20–22; Pls.' Reply at 2–3.¹² In their respective briefs, the Government and CPA emphasize Commerce's ability to reject financial statements that

¹¹ CPA also contends that none of the Plaintiffs may continue to challenge Commerce's reliance on the Oceana Report because they did not comment on the draft remand re-determination. Status Report at 3. CPA did not, however, pursue the opportunity to explain its contention at oral argument. The court declines to require re-exhaustion of previously raised arguments. Commerce's inquiry on remand was limited to its finding that South Africa is a significant producer of comparable merchandise. *See* Remand Results at 5, 6; Def.'s Remand Mot. at 3. Requiring Plaintiffs to submit to the agency arguments that had separately been raised to the court and were not expressly covered by the terms of the court's remand order would serve no practical purpose. In the absence of any indication that the agency would reconsider these issues on remand, the court declines to require any further exhaustion.

¹² Plaintiffs' brief also contains a subsection titled, "[t]he two Thai financial statements are vastly superior to the Oceana [Report] on a comparative totality of circumstances analysis." Pls.' Mem. at 23 (capitalization omitted). Therein, Plaintiffs argue that the Thai statements are superior to the Oceana Report because subsidy-distortion is a "lesser infirmity" than the defects in the Oceana Report, there are two Thai statements as opposed to one South African statement, Thailand is the primary surrogate country, Commerce has previously relied on the Thai statements, thus, predictability considerations favor their continued use, South Africa is not *as* significant a producer of comparable merchandise as is Thailand, and the Thai statements' slight non contemporaneity is not relevant. *See id.* at 23–29. In essence, Plaintiffs conduct the comparative analysis it asserts Commerce should have undertaken. *See id.* at 30–31.

Plaintiffs' arguments reflect a misunderstanding of the applicable standard of review. Plaintiffs' arguments are premised, in part, on the contention that Commerce's selection of the Oceana Report "is contradicted by substantial evidence." *Id.* at 10 (so titling the heading under which the above-noted subsection is contained). That is not the court's inquiry. Rather, the court must ascertain whether Commerce's determination is supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). In making that determination, the court considers evidence that "detracts from the substantiality of the evidence." *Nippon Steel Corp.*, 337 F.3d at 1379. But even if substantial evidence detracted from the agency's determination, the determination is not necessarily unsupported by substantial evidence.

reflect evidence of countervailable subsidies. *See* Gov. Resp. at 11–13; CPA Resp. at 7–8. The Government cites, in part, legislative history directing Commerce to avoid using prices it suspects may be subsidized and Federal Circuit case law sustaining Commerce’s rejection of subsidized prices to value certain inputs. *See* Gov. Resp. at 11 (citing H.R. Rep. No. 100–576, at 590 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1623); *id.* at 13 (citing *CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1374–75 (Fed. Cir. 2016)).¹³ CPA relies on 19 U.S.C. § 1677b(c)(5) and argues that Plaintiffs’ “entire brief is an argument for ‘further investigation’ of the subsidy-tainted Thai financial statements.” CPA Resp. at 7. At oral argument, the Government pointed to the Final Surrogate Value Memorandum and record evidence cited therein as evidence of Commerce’s weighing of the two sources of surrogate financial values.

The court will uphold Commerce’s determination when the path to that determination is reasonably discernable from the determination itself. *See NMB Singapore Ltd.*, 557 F.3d at 1319 (“Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce’s decision must be reasonably discernable to a reviewing court.”) (internal citations omitted). Commerce’s reasoning adequately apprises the court of the path to its decision. Moreover, Commerce sufficiently compared the available financial statements in light of the arguments Weishan raised to the agency.

In the Issues and Decision Memorandum, Commerce explained that the 2012 financial statements of Thai companies Surapon and Kiang Huat demonstrated that they benefitted from countervailable subsidies. *See* I&D Mem. at 8. Commerce went on to find that South Africa met the statutory requirements of being economically comparable to the PRC and a significant producer of comparable merchandise, and that the Oceana Report was contemporaneous with the period of review. *See id.* at 9; *see also* Remand Results at 11 (affirming that South Africa is a significant producer of comparable merchandise). In response to Weishan’s concerns about the inability to disaggregate labor and raw material costs, Commerce asserted, in an

In other words, substantiality does not require a “majority” of the evidence. *See Nucor Corp.*, 34 CIT at 72, 675 F. Supp. 2d at 1345 (substantial evidence requires “more than a mere scintilla,” but “less than the weight of the evidence”). Moreover, it is not the role of the court to reweigh the evidence put before Commerce. *Downhole Pipe*, 776 F. 3d at 1377. If the evidence upon which the agency relies is such that “a reasonable mind might accept as adequate to support” its conclusion, *Huaiyin Foreign Trade Corp.* (30), 322 F. 3d at 1374, then, in keeping with the court’s standard of review, the court must affirm.

¹³ In *CS Wind*, the Federal Circuit affirmed Commerce’s decision to rely on surrogate values instead of Korean market prices to value certain inputs purchased in Korea and exported to Vietnam based on a reasonable suspicion that export subsidies existed with respect to those components. 832 F.3d at 1374–75.

admittedly conclusory fashion, that “we find that [the Oceana Report] contains the necessary information for [Commerce] to calculate appropriate financial ratios.” I&D Mem. at 9. Commerce’s cursory narrative response to Weishan’s argument is not, however, fatal. In that response, Commerce also cited to its discussion in the Final Surrogate Value Memorandum. *See id.* at 9 & n. 30.

In the Final Surrogate Value Memorandum, Commerce explained that it usually calculates the overhead ratio by dividing total overhead costs by the total costs of materials, labor, and energy. *See* Final Surrogate Value Mem. at 2. In the *Preliminary Results*, however, Commerce had been unable to apply this methodology because the Thai financial statements did not segregate energy costs from total overhead costs. *See id.* Accordingly, “in the *Preliminary Results*, [Commerce] applied [its] overhead ratio, which included energy costs, to the per-unit costs for materials and labor only[,] and did not calculate a separate per-unit cost for energy.” *Id.* In contrast, for the *Final Results*, reliance on the Oceana Report allowed Commerce to apply its usual methodology because it could determine the material, labor, and energy costs to include in the denominator of the overhead ratio as opposed to having some component, such as energy costs, included in the numerator. *Id.* Commerce cited the “surrogate value spreadsheets attached to the company-specific analysis memoranda” as evidence of its financial ratio calculations. *Id.*

Therein, it is evident that although Commerce began with the aggregated cost of sales, it was able to segregate amounts for materials, labor, and energy to serve as the denominator for the overhead ratio calculation. *See* Weishan Final Results Analysis Mem., Attach. 7B (“Financial Ratios Spreadsheet”), PJA Doc. 19, NSR-PR 155, ECF No. 41. From the cost of sales, Commerce deducted amounts for depreciation, amortization, and operating lease expenses (reflecting manufacturing overhead costs used in the numerator of the ratio); employment and retirement costs and share-based payments (reflecting labor costs to include in the denominator of the ratio); and changes to traded or finished goods. *See id.* Commerce used the resulting figure as the amount for raw materials. *See id.* While Commerce did not separately identify energy costs, it considered energy as included with the cost of raw materials in the denominator, as is its usual practice. *See id.* (combining the sum of materials and labor to determine the amount for material, labor, and energy costs to use in the denominator).¹⁴

¹⁴ Plaintiffs argue that the denominator in the overhead ratio includes overhead that Commerce had been unable to subtract from the total cost of sales. Pls.’ Mem. at 16. Commerce’s accounting shows this not to be the case. *See* Financial Ratios Spreadsheet; *see also* CPA Resp. at 8–9 (responding the Plaintiffs’ argument).

Thus, Commerce addressed Weishan's concerns with regard to the basket category for cost of sales and the aggregation of labor and raw materials therein in its discussion of its ability to use its preferred methodology in the *Final Results*. See Final Surrogate Value Mem. at 2. Reading the Issues and Decision Memorandum together with the Final Surrogate Value Memorandum, Commerce compared the Thai and South African statements and determined that the taint of countervailable subsidies in conjunction with the disaggregation issues in the Thai statements outweighed any perceived flaws in the Oceana Report. See I&D Mem. at 8–9; Final Surrogate Value Mem. at 2. In particular, Commerce found that it was able to address the only identified weakness (the aggregation issue) within its calculation methodology and based on the information contained in the Oceana Report. The Financial Ratios Spreadsheet itself provides substantial support for Commerce's determination. See Financial Ratios Spreadsheet. Commerce cannot be faulted for failing otherwise to address alleged deficiencies that Weishan failed to raise to the agency. Moreover, the cases relied on by Plaintiffs do not require a different outcome. See Pls.' Mem. at 20–23 (citing *Juancheng*, 2015 WL 4999476, *CP Kelco*, 2016 WL 1403657).

In *Juancheng*, Commerce relied on Philippine financial statements from a company the plaintiff contended had received countervailable subsidies, and rejected Thai financial statements it had deemed insufficiently detailed. 2015 WL 4999476 at *12. The court explained that “[t]he decision on whether to rely on a particular financial statement (even one tainted, *arguendo*, by subsidies) is record-dependent, . . . and it is not for the court to choose between arguably untainted but incomplete data and arguably complete but tainted data, as that is Commerce's province.” *Id.* at *13 (internal citations omitted). *Juancheng*, therefore, stands for the proposition that Commerce's selection of financial statements is “record-dependent” and, thus, not subject to *per se* rules of exclusion. *Id.* So too here, Commerce's selection of the Oceana Report depended upon its finding that material, labor, and energy costs were sufficiently identified for it to apply its preferred methodology for calculating the overhead ratio. See Final Surrogate Value Mem. at 2; I&D Mem. at 9.

In *CP Kelco*, Commerce had selected subsidy-tainted Thai financial statements over incomplete Thai financial statements to value financial ratios. 2016 WL 1403657 at *2. The court had remanded for Commerce to further explain why the subsidy-tainted statements were better than the incomplete statements. *Id.* (“Commerce should have compared the two side-by-side.”) (internal quotation marks and

citation omitted). Following remand, the court again found that Commerce had insufficiently compared the statements' relative strengths and weaknesses. *Id.* at *5. In contrast, here, Commerce addressed the weaknesses Weishan had identified in the Oceana Report, and found, based on Commerce's ability to allocate certain figures to the numerator or denominator of the overhead ratio calculation, that the weaknesses were non-existent. *See* Final Surrogate Value Mem. at 2; I&D Mem. at 9. A fuller elaboration is not required. *See NMB Singapore Ltd.*, 557 F.3d at 1319 ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.") (internal citations omitted).

CONCLUSION

In accordance with the foregoing, the court sustains Commerce's *Final Results*, as corrected by the *Am. Final Results* and as amended by the Remand Results. Judgment will be entered accordingly.

Dated: October 25, 2017

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

