U.S. Court of International Trade

Slip Op. 17–118

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

Court No. 13–00044

[Remanding matter to U.S. Department of Commerce for second time]

Dated: August 30, 2017

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

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

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington D.C., argued for Defendant-Intervenor. With him on the brief was *David C. Smith*.

OPINION

RIDGWAY, JUDGE:

In this action, Plaintiff Zhaoqing Tifo New Fibre Co., Ltd. ("Zhaoqing Tifo") – a Chinese producer and exporter of polyester staple fiber – has contested the Final Determination of the U.S. Department of Commerce ("Commerce") in the fourth administrative review of the 2007 antidumping duty order on polyester staple fiber from the People's Republic of China.[1] The period of review is June 1, 2010 through May 31, 2011. *See generally* Certain Polyester Staple Fiber From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011, 78 Fed. Reg. 2366 (Jan. 11, 2013) ("Final Determination")[2]; Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review (Jan. 4, 2013)

[1] As *Zhaoqing Tifo I* notes, polyester staple fiber is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1334.

[2] Antidumping duty investigations (*i.e.*, "original" investigations) determine in the first instance whether the elements necessary for the imposition of an antidumping duty exist. The statute also provides for periodic (typically, annual) administrative reviews of antidumping duty orders (initiated at the request of an interested party), to update the

(Pub. Doc. No. 108) ("Issues & Decision Memorandum")[3]; *Zhaoqing Tifo New Fibre Co. v. United States*, 39 CIT ____, 60 F. Supp. 3d 1328 (2015) ("*Zhaoqing Tifo I*").

In its Complaint, Zhaoqing Tifo charges, *inter alia*, that the antidumping margin calculated by Commerce in its Final Determination "double counts" certain energy costs, because those costs are reflected in the financial statements of P.T. Tifico Fiber Indonesia Tbk ("P.T. Tifico") (on which the Final Determination relied) and then are counted again elsewhere in the agency's calculations (*i.e.*, in the factors of production database ("FOP database")). Zhaoqing Tifo contends that its dumping margin is therefore inflated. *See* Complaint, Counts IIII; *see also, e.g., Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1333, 1339 n.16.

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

Now pending is Commerce's Remand Determination, filed pursuant to *Zhaoqing Tifo I*. *See generally* Final Results of Redetermination Pursuant to Court Remand (Supp. Pub. Doc. No. 5) ("Remand Results"). On remand, Commerce reopened the decision that it made in its Final Determination concerning the selection of financial statements, abandoning its earlier selection of the financial statements of P.T. Tifico and substituting an entirely different set of financial statements that break out energy costs. Based on that set of financial statements, Commerce excluded energy costs from the surrogate financial ratios and included them in the FOP database, thus account-

applicable antidumping duty rate. *See generally Zhaoqing Tifo I*, 39 CIT at ____ n.7, 60 F. Supp. 3d at 1334 n.7 (and authorities cited there).

[3] Because this action has been remanded to Commerce, two administrative records have been filed with the court – the initial administrative record (comprised of the information on which the agency's Final Determination was based) and the supplemental administrative record compiled during the course of the remand.

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

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

ing for energy costs but avoiding double counting. *See generally* Remand Results.

Emphasizing that the issue of Commerce's selection of financial statements was never appealed to this Court, Zhaoqing Tifo contends that, as a result, finality attached to that aspect of Commerce's Final Determination, and the agency thus lacked the authority to revisit the issue and to select a different set of financial statements on remand. Zhaoqing Tifo further argues that, in any event, the remand that *Zhaoqing Tifo I* ordered did not permit Commerce to reconsider its Final Determination as to the selection of financial statements and that the Remand Results therefore exceeded the scope of the remand. *See generally* Plaintiff's Comments in Opposition to Remand Redetermination ("Pl.'s Brief"); Plaintiff's Reply Comments on Remand Redetermination ("Pl.'s Reply Brief").[4]

In contrast, both the Government and the Defendant Intervenor, DAK Americas LLC (the "Domestic Producer"), maintain that the Remand Results should be sustained. They counter that Commerce did not exceed the scope of the remand ordered in *Zhaoqing Tifo I*, and that the agency properly eschewed P.T. Tifico's financial statements and selected a different set of statements on remand in order to avoid double-counting. The Government and the Domestic Producer further contend that Zhaoqing Tifo's double counting claim and the issue of the selection of financial statements are so integrally related that analysis of Zhaoqing Tifo's claim necessarily raises the issue of Commerce's selection of financial statements. *See generally* Defendant's Response to Comments on Remand [Determination] ("Def.'s Brief"); Defendant Intervenor's Comments In Response to Plaintiff's Comments on Remand Redetermination ("Def.-Int.'s Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[5] For the reasons set forth below, this matter must be remanded to Commerce for a second time.

---

[4] Although the two arguments outlined above are its principal arguments, Zhaoqing Tifo briefs two other arguments as well. First, Zhaoqing Tifo asserts that the Remand Results constitute "impermissible *post hoc* rationalization." *See* Pl.'s Brief at 8–10; Pl.'s Reply Brief at 6–7. *But see* Def.'s Brief at 10. In addition, Zhaoqing Tifo contends that, on the merits, Commerce's selection of a different set of financial statements on remand is not supported by substantial evidence. *See* Pl.'s Brief at 10–15; Pl.'s Reply Brief at 7–15. *But see* Def.'s Brief at 11–12; Def.-Int.'s Brief at 6–11, 13–16. In light of the disposition of Zhaoqing Tifo's two principal arguments, there is no need here to reach these other two.

[5] All citations to statutes herein are to the 2006 edition of the United States Code, and all references to regulations are to the 2010 edition of the Code of Federal Regulations. The pertinent text of the statutes and regulations cited remained the same at all times relevant herein.

I. *Background*

Zhaoqing Tifo I laid out the relevant statutory scheme, including citations to the statute and other pertinent authorities. That explanation, together with other relevant background, is summarized below, for the sake of convenience and completeness.

As *Zhaoqing Tifo I* explained, dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. The difference between the normal value of the merchandise and the U.S. price is the "dumping margin." When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See Zhaoqing Tifo I*, 39 CIT ____, 60 F. Supp. 3d at 1332 (and authorities cited there).

Normal value generally is calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country.[6] However, where – as here – the exporting country has a non-market economy, there is often concern that the factors of production (inputs) that are consumed in producing the merchandise at issue are under state control, and that home market sales therefore may not be reliable indicators of normal value. *See Zhaoqing Tifo I*, 39 CIT ____, 60 F. Supp. 3d at 1332 (and authorities cited there).

In cases like this, where Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the merchandise to be determined in the typical manner, Commerce identifies one or more market economy countries to serve as a "surrogate" and then "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production" in the relevant surrogate country or countries,[7] including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." This surrogate value analysis is designed to determine a producer's costs of production as if the producer operated in a hypothetical market economy. *See Zhaoqing Tifo I*, 39 CIT ____, 60 F. Supp. 3d at 1332–33 (and authorities cited there).

Under 19 U.S.C. § 1677b(c)(3), the factors of production to be valued "include, but are not limited to – (A) hours of labor required, (B)

[6] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See Zhaoqing Tifo I*, 39 CIT at ____ n.3, 60 F. Supp. 3d at 1332 n.3 (and authorities cited there).

[7] Commerce typically values all factors of production using a single surrogate country. *See Zhaoqing Tifo I*, 39 CIT at ____ n.4, 60 F. Supp. 3d at 1332 n.4 (and authorities cited there).

quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." However, valuing the factors of production consumed in producing subject merchandise does not capture certain items such as (1) manufacturing/factory overhead, (2) selling, general, and administrative expenses ("SG&A"), and (3) profit. Commerce calculates those surrogate values using ratios – known as "surrogate financial ratios" – that the agency derives from the financial statements of one or more companies that produce identical (or at least comparable) merchandise in the relevant surrogate market economy country. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1333 (and authorities cited there).

Zhaoqing Tifo's claim here is that there are certain energy costs that are embedded in the surrogate financial ratios that Commerce used in its Final Determination that are also included elsewhere in the agency's antidumping calculations (specifically, in the FOP database), resulting in the "double counting" of energy costs and inflating Zhaoqing Tifo's antidumping margin.[8]

As *Zhaoqing Tifo I* noted, in Commerce's Preliminary Determination here, Commerce selected Indonesia as the surrogate country and relied on the financial statements of P.T. Asia Pacific, an Indonesian producer of polyester staple fiber. Commerce based that decision in part on its understanding at that time that P.T. Asia Pacific "shares the same level of integration as Zhaoqing Tifo." *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1336 (quoting Certain Polyester Staple Fiber From the People's Republic of China: Preliminary Re-

[8] As *Zhaoqing Tifo I* explained, the case law holds that, as a general rule, double counting is not permitted in antidumping calculations, because it is distortive, rendering dumping margins less accurate. *See Zhaoqing Tifo I*, 39 CIT at ____ n.6, 60 F. Supp. 3d at 1333 n.6 (citing *DuPont Teijin Films China Ltd. v. United States*, 38 CIT ____, ____, 7 F. Supp. 3d 1338, 134546 (2014) (ruling that "double counting should be avoided, as it does not provide a fair price comparison"); *Geum Poong Corp. v. United States*, 26 CIT 322, 326–28, 193 F. Supp. 2d 1363, 1369–71 (2002) (remanding matter to agency for reconsideration of double counting, explaining that "[c]ounting potentially anomalous profit rates twice . . . would give a misleading picture of the profit experience of other . . . producers of goods in the same general category as the subject merchandise"); *Holmes Products Corp. v. United States*, 16 CIT 628, 632, 795 F. Supp. 1205, 1207–08 (1992) (holding that "[d]ouble-counting is to be avoided"); *see also* Pl.'s Brief at 22 n.5 (collecting cases on double counting)); *Hangzhou Yingqing Material Co. v. United States*, 40 CIT ____, ____, 195 F. Supp. 3d 1299, 1309–10 (2016) (summarizing policy of avoiding double-counting in accounting for labor costs in surrogate financial ratios).

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

sults of the Antidumping Duty Administrative Review, 77 Fed. Reg. 39,990, 39,991–93, 39,995 (July 6, 2012)) ("Preliminary Determination").

P.T. Asia Pacific's financial statements are relatively detailed, and include separate line items for that company's energy inputs. In Commerce's Preliminary Determination, the agency therefore was able to exclude all energy costs from the surrogate financial ratios that it derived from P.T. Asia Pacific's financial statements, and to value all of Zhaoqing Tifo's energy inputs – coal, electricity, and water – separately, in the FOP database, with no concerns about double counting. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1336 (and authorities cited there).[9]

In the administrative case brief that it filed with Commerce following the Preliminary Determination, Zhaoqing Tifo argued that the operations of P.T. Asia Pacific are much more highly integrated than those of Zhaoqing Tifo, and that it was therefore not appropriate for Commerce to rely on P.T. Asia Pacific's financial statements in calculating surrogate financial ratios for this administrative review. For example, Zhaoqing Tifo characterized P.T. Asia Pacific as "an integrated producer of 'purified terephthalic acid' ('PTA'), a main raw material of polyester," the production of which is highly "capital intensive." In contrast, Zhaoqing Tifo described itself as a "simple regenerated fiber producer that consumes mainly recycled PET materials," more comparable to P.T. Tifico – an Indonesian producer of polyester fiber which, according to Zhaoqing Tifo, has "less integrated, less complex, production operations." As such, Zhaoqing Tifo argued that Commerce should use P.T. Tifico's financial statements in its Final Determination. *See generally Zhaoqing Tifo I*, 39 CIT ____, 60 F. Supp. 3d at 1336–37 (and authorities cited there, including, *inter alia*, Zhaoqing Tifo's Administrative Case Brief (Pub. Doc. No. 94), quoted above).

Although it did not file an administrative case brief, the Domestic Producer filed a rebuttal brief responding to Zhaoqing Tifo's case brief. There, the Domestic Producer argued that, in calculating surrogate financial ratios, Commerce's Final Determination should con-

[9] Zhaoqing Tifo consumes coal in its production of polyester staple fiber. However, it appears that P.T. Tifico and P.T. Asia Pacific use natural gas instead. Accordingly, although some of the papers filed by the parties in this matter have referred to the "double counting of coal," it is more accurate to refer to the double counting of "energy inputs" (or "energy sources" or "energy factors"). Zhaoqing Tifo's concern is that, to the extent that *natural gas* (or any other such energy input) is embedded in the surrogate financial ratios derived from P.T. Tifico's financial statements (and cannot be isolated and excluded from those ratios), Commerce's inclusion of *coal* in the FOP database results in the double counting of energy expenses. *See Zhaoqing Tifo I*, 39 CIT at ____ n.16, 60 F. Supp. 3d at 1339 n.16 (and authorities cited there).

tinue to rely on the financial statements of P.T. Asia Pacific that were used in the Preliminary Determination. The Domestic Producer argued that Zhaoqing Tifo "ha[d] not demonstrated that the difference in integration levels actually exists" and that, in any event, any differences between the levels of integration of Zhaoqing Tifo and P.T. Asia Pacific are "trivial." *See generally Zhaoqing Tifo I*, 39 CIT ____, 60 F. Supp. 3d at 1337–38 (and authorities cited there, including, *inter alia*, Domestic Producer's Administrative Rebuttal Brief (Pub. Doc. No. 101), quoted above).

In addition, the Domestic Producer emphasized that the financial statements of P.T. Tifico are less "complete and detailed" than those of P.T. Asia Pacific – a consideration that the Domestic Producer deemed "more critical" than any differences in the levels of integration of the companies' operations. In particular, the Domestic Producer expressly and specifically cautioned Commerce that, because P.T. Tifico's financial statements ""include[] *no separate breakout* of [P.T. Tifico's] energy costs," Commerce's use of P.T. Tifico's financial statements in the Final Determination would require the agency to "place all potential energy costs into the [manufacturing/factory] overhead numerator" in the surrogate financial ratios and to "turn off all company-specific energy and water consumption factors, in order to capture all costs while also preventing double-counting." In other words, the Domestic Producer stated flatly and unequivocally that – if Commerce used the financial statements of P.T. Tifico in the Final Determination to derive surrogate financial ratios – Commerce would have no choice but to remove coal from the FOP database in order to avoid double counting, because the lack of detail in P.T. Tifico's financial statements would make it impossible for the agency to identify and exclude energy expenses from the surrogate financial ratios. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1338 (and authorities cited there, including the Issues & Decision Memorandum, and Domestic Producer's Administrative Rebuttal Brief, quoted above).

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

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

However, Commerce left coal in the FOP database. Commerce did not explain why concerns about double counting – which led the agency to exclude water and electricity from the FOP database in the Final Determination – do not apply with equal force to coal. Nor did Commerce confront the Domestic Producer's statement that using P.T. Tifico's financial statements would require Commerce to remove coal from the FOP database, in order to avoid double-counting. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1339 (and authorities cited there, including the Issues & Decision Memorandum).

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

Significantly, no party sought judicial review of Commerce's selection of financial statements (*i.e.*, Commerce's decision between the financial statements of P.T. Tifico and those of P.T. Asia Pacific) for use in the Final Determination.

Because Zhaoqing Tifo had successfully advocated for the use of P.T. Tifico's financial statements in the Final Determination, Zhaoqing Tifo's Complaint does not raise the issue of Commerce's selection of financial statements. Zhaoqing Tifo's double-counting claim is much more narrow, specific, and refined – *i.e.*, that if energy expenses cannot be isolated and excluded from the surrogate financial ratios

that Commerce derives from P.T. Tifico's financial statements, then coal expenses must be excluded from the FOP database in order to avoid double counting.

The Domestic Producer intervened in the instant action. The Domestic Producer could have filed its own action, to challenge Commerce's selection of financial statements in the Final Determination – *i.e.*, Commerce's decision to use the financial statements of P.T. Tifico, rather than those of P.T. Asia Pacific (which the Domestic Producer had favored). Certainly the Domestic Producer had exhausted its administrative remedies. As summarized above, the Domestic Producer had exhorted Commerce to use the financial statements of P.T. Asia Pacific, rather than the statements of P.T. Tifico. The Domestic Producer had explicitly warned Commerce that the use of P.T. Tifico's statements would require the agency to exclude energy expenses (including coal) from the FOP database in order to avoid double counting, because the agency would find it impossible to isolate and exclude energy expenses from P.T. Tifico's statements. However, for whatever reason, the Domestic Producer elected not to seek judicial review of Commerce's selection of financial statements and thus waived the issue.

In the briefing that preceded *Zhaoqing Tifo I*, the parties devoted much ink and energy to debate over whether or not Zhaoqing Tifo had failed to exhaust its double-counting claim at the administrative level. *Zhaoqing Tifo I* concluded that the doctrine of exhaustion of administrative remedies does not bar Zhaoqing Tifo's claim. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1343–59.

Turning to the merits of Zhaoqing Tifo's claim, *Zhaoqing Tifo I* found, in essence, that there was no rationale or record evidence to indicate that Commerce had considered whether both using surrogate financial ratios derived from P.T. Tifico's financial statements and separately valuing coal in the FOP database resulted in the double-counting of energy costs in the Final Determination. *See generally Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1361–65. Specifically, *Zhaoqing Tifo I* observed that "the Issues and Decision Memorandum . . . give[s] no indication whether Commerce ever considered the potential for double counting of energy inputs other than electricity and water, much less the rationale for any determination on that issue. Commerce's explanation is not merely thin; it is nonexistent." *Id*., 39 CIT at ____, 60 F. Supp. 3d at 1364–65.

This matter was therefore remanded to Commerce, to allow the agency to determine whether – as Zhaoqing Tifo contends --energy expenses are embedded in the surrogate financial ratios derived from P.T. Tifico's financial statements, such that Commerce's inclusion of

coal in the FOP database results in double counting in the Final Determination, and, in addition, to allow the agency, if appropriate, to explain any disparity in its treatment of water and electricity *versus* coal. Significantly, in urging Commerce to consider reopening the administrative record on remand, *Zhaoqing Tifo I* noted that additional information could be placed on the record addressing "the energy sources that *P.T. Tifico* uses in its production of polyester staple fiber, whether *P.T. Tifico* uses those energy sources for any other purpose, and how the sources are treated in *P.T. Tifico's* financial statements and in the surrogate financial ratios that Commerce derived from the financial statements." *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365 (emphasis added). The remand instructions said nothing about revisiting the already-settled issue of the selection of financial statements. Nor did the remand instructions refer to the use of any financial statements other than those of P.T. Tifico.

On remand, rather than analyzing Zhaoqing Tifo's claim (which is confined to the financial statements of P.T. Tifico, the inclusion of coal in the FOP database, and the alleged resulting double counting of energy expenses), Commerce instead reopened the issue of the selection of financial statements as a whole – an issue which was not raised by any party to this litigation and one which Commerce had decided in the Final Determination. Ultimately, Commerce flip-flopped once again in the Remand Results, reverting back to the financial statements of P.T. Asia Pacific – the same financial statements on which the agency had relied in its Preliminary Determination. *See* Remand Results at 2, 9–10.

In effect, the Remand Results do not reconsider Commerce's decision in the Final Determination to leave coal in the FOP database notwithstanding an apparent inability to exclude energy expenses from P.T. Tifico's financial statements and any resulting double-counting. Rather, the Remand Results reconsider a different decision from the Final Determination: *i.e.*, Commerce's decision in the Final Determination to select the financial statements of P.T. Tifico for the surrogate financial ratios over those of P.T. Asia Pacific.

The Remand Results do not directly address why Commerce on remand did not focus specifically on P.T. Tifico's financial statements and related surrogate financial ratios from the Final Determination, in order to determine whether it is possible to isolate and exclude energy expenses. The Remand Results also offer no explanation for the disparate treatment of water, electricity, and coal in the Final Determination, where Commerce relied on the financial statements of P.T. Tifico and removed water and electricity from the FOP data-

base for the professed purpose of avoiding double counting, but left coal in the database. Similarly, the Remand Results give no indication as to whether Commerce has conducted a considered analysis of the matter and has concluded that using P.T. Tifico's financial statements while including coal in the FOP database in fact results in double-counting.

In unraveling the Final Determination and reconsidering the issue of the selection of financial statements, the Remand Results once again survey all of the financial statements on the administrative record, and their respective pros and cons, much as Commerce did when the agency analyzed the issue previously in the Final Determination. *See* Remand Results at 5–6. And, much as it did in its Final Determination, Commerce once again quickly narrows the field to the financial statements of P.T. Tifico and those of P.T. Asia Pacific. *Id*. As between those two, Commerce attributes its "about-face" in selecting the financial statements of P.T. Asia Pacific to an asserted factual error in its analysis of the issue in the Final Determination. *See generally id*. at 7–9.

According to the Remand Results, "[u]pon reexamination of both financial statements," Commerce found that it had "erred in [the Final Determination] in evaluating the similarities between Zhaoqing Tifo and P.T. Tifico on one hand, and the dissimilarity between P.T. Tifico and P.T. Asia Pacific on the other hand in terms of the level of integration," which were the bases for its decision in the Final Determination. Remand Results at 7.

Focusing first on similarities between Zhaoqing Tifo and P.T. Tifico, the Remand Results state that, in evaluating the two companies' relative levels of integration, Commerce "made a factual error [in its Final Determination] when stating that P.T. Tifico *purchases* polyester chips from third parties which then go into the production of [polyester staple fiber]." *See* Remand Results at 7 (apparently referring to Final Determination at 10). The Remand Results contrast Commerce's finding in the Final Determination with P.T. Tifico's financial statements, which state that, in fact, P.T. Tifico is "primarily engaged in the *manufacture* of polyester chips, staple fiber," and other products. Remand Results at 7. The Remand Results conclude that – because P.T. Tifico *manufactures* its own polyester chips, while Zhaoqing Tifo *purchases* recycled polyester input – the Final Determination's finding that P.T. Tifico's level of integration parallels that of Zhaoqing Tifo was incorrect. *Id*. at 7 (apparently referring to Final Determination at 10).

The Remand Results also revisit the Final Determination's conclusions on similarities between the production processes of Zhaoqing

Tifo and P.T. Tifico. *See generally* Remand Results at 8 (apparently referring to Final Determination at 10). The Remand Results state that – because Zhaoqing Tifo purchases recycled polyester input and manufactures its polyester staple fiber from "used bottles from waste collection companies," while P.T. Tifico "purchase[s] supplies from chemical companies as raw materials" and manufactures its own polyester chips which it then uses to produce its polyester staple fiber, the Final Determination erred to the extent that it found similarities in "the respective production processes of P.T. Tifico and . . . Zhaoqing Tifo." Remand Results at 8 (apparently referring to the Final Determination at 10).

In addition to reevaluating similarities in the respective levels of integration of P.T. Tifico and Zhaoqing Tifo (discussed above), the Remand Results also re-examined Commerce's findings in the Final Determination as to dissimilarities in the levels of integration of P.T. Tifico and P.T. Asia Pacific. *See* Remand Results at 8–9 (apparently referring to Final Determination at 10).

In the Final Determination, Commerce based its selection of the financial statements of P.T. Tifico over those of P.T. Asia Pacific in part on Commerce's understanding that P.T. Asia Pacific is significantly more highly integrated than P.T. Tifico. *See* Final Determination at 10–11. According to the Remand Results, Commerce no longer believes that to be true in light of facts about the two companies' production processes as the agency now knows them. *See* Remand Results at 8–9. The Remand Results thus conclude that "the record does not reflect that there is a meaningful difference in the level of integration between these two potential surrogate companies [*i.e.*, P.T. Tifico and P.T. Asia Pacific], such that level of integration would be the deciding factor in determining which statement represents the best available information" and that "both P.T. Tifico and P.T. Asia [Pacific] have a production process that is equally dissimilar from that of Zhaoqing Tifo." *Id*. at 8–9.[10]

[10] Commerce was not misled as to the relevant facts here. With respect to the factual errors that Commerce alleges it made in the Final Determination concerning the relative level of integration of Zhaoqing Tifo compared to P.T. Tifico, as well as the relative level of integration of P.T. Tifico compared to P.T. Asia Pacific, Commerce already had the accurate information before it at the time it reached its Final Determination. If Commerce in fact did not know the facts at the time of the Final Determination, it could – and should – have known them.

For example, to support Commerce's new findings on the nature of P.T. Tifico's business operations, the Remand Results point to a statement in Zhaoqing Tifo's administrative case brief to the effect that "P.T. Tifico is . . . a manufacturer of virgin, or fresh, [polyester staple fiber]." *See* Remand Results at 8 (citing Zhaoqing Tifo's Administrative Case Brief at 18–19). Zhaoqing Tifo's administrative case brief was filed following Commerce's Preliminary Determination, and well before issuance of Commerce's Final Determination.

In the Remand Results, Commerce decided that, if the choice between the financial statements of P.T. Tifico and P.T. Asia Pacific was no longer driven by the three companies' relative levels of integration, the decisive factor would be the level of detail reflected in the financial statements. Noting that P.T. Tifico's financial statements do not include a separate breakout of the company's energy expenses, the Remand Results state that, if the agency were to use P.T. Tifico's statements, it would be necessary to exclude coal from the FOP database in order to avoid double-counting.[11] In the Remand Results, Commerce therefore selected P.T. Asia Pacific's financial statements, which are more detailed and include line item breakouts for energy expenses (among others), allowing the agency to exclude energy from the surrogate financial ratios and to instead value it separately in the FOP database, without double-counting. *See generally* Remand Results at 2, 9–10.

Commerce's use of P.T. Asia Pacific's financial statements in the Remand Results significantly increases Zhaoqing Tifo's dumping margin. The Final Determination, which used the financial statements of P.T. Tifico, calculated Zhaoqing Tifo's dumping margin as 9.98% – a margin which, according to Zhaoqing Tifo, double counts certain energy expenses and thus would be even lower if the double-counting were eliminated. In the Remand Results, which use the financial statements of P.T. Asia, Zhaoqing Tifo's dumping margin jumps to 25.56%.

Commerce also cites P.T. Tifico's financial statements in support of the agency's revised findings of fact. However, Zhaoqing Tifo placed those financial statements on the administrative record even before Commerce's Preliminary Determination – and, thus, obviously, far in advance of the Final Determination. *See* Remand Results at 7–8 (citing financial statements of P.T. Tifico).

Even more directly, the Domestic Producer's administrative rebuttal brief, filed following the Preliminary Determination and well before the Final Determination, states – expressly and in no uncertain terms – that P.T. Tifico manufactures its own polyester chips. *See* Domestic Producer's Administrative Rebuttal Brief at 13 (stating that P.T. Tifico "buys . . . chemicals to make polyester chips").

[11] Specifically, the Remand Results indicate that, "[t]o use P.T. Tifico's financial statements would require placing all potential energy costs into the factory/manufacturing overhead figures [*i.e.*, in the surrogate financial ratios derived from P.T. Tifico's financial statements] and the exclusion [from the FOP database] of company-specific energy consumption figures that would normally be valued as an FOP, in order to capture all costs while also preventing double counting." *See* Remand Results at 9–10. This seeming concession by Commerce – which is essentially a recitation of the clear warning that the Domestic Producer gave Commerce before the Final Results – arguably disposes of Zhaoqing Tifo's double-counting claim, in favor of Zhaoqing Tifo, leaving nothing for further litigation (at least as to this claim). However, the seeming concession is a wholly conclusory statement. The Remand Results are devoid of any analysis or explanation by Commerce to back it up. Under these circumstances, judgment counsels against treating the statement as a formal and official statement by Commerce of the agency's considered opinion.

II. *Standard of Review*

In reviewing a remand determination by Commerce in an antidumping duty case, the agency's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). In addition, the remand determination is reviewed for compliance with the court's remand order. *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT ____, ____, 2014 WL 13875259*2(2014) (quoting *Xinjiamei Furniture (Zhangzou) Co. v. United States*, 38 CIT ____, ____, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted)); *Since Hardware (Guangzhou) Co. v. United States*, 39 CIT ____, ____, 49 F. Supp. 3d 1268, 1272 (2015) (same); *see also Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012) (analyzing on review whether Commerce's remand results were "within the scope of the Court of International Trade's remand order" and sustaining the Court of International Trade's conclusion on that point).

A trial court's determination as to the scope of its own remand order is entitled to great deference. *See, e.g., Changzhou*, 701 F.3d at 1375 (explaining that "an appellant 'faces a very high hurdle when it tries to convince us that, despite the remanding Court's satisfaction, we must conclude that the [agency] on remand acted outside the scope of the remand directions'") (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 375 F.2d 807, 814 (Fed. Cir. 1992)).

III. *Analysis*

Zhaoqing Tifo objects to the Remand Results, advancing two principal arguments – one based on the scope of this litigation, and the other based on the scope of the remand instructions as set forth in *Zhaoqing Tifo I*. The two arguments are analyzed below, together with the counter-arguments of the Government and the Domestic Producer.

A. *The Scope of This Litigation*

Raising arguments concerning, *inter alia*, the Court's jurisdiction and the applicable statute of limitations, Zhaoqing Tifo reasons that, because the scope of this litigation is determined by Zhaoqing Tifo's Complaint, and because that Complaint does not challenge Commerce's selection of P.T. Tifico's financial statements over those of P.T. Asia Pacific, Commerce on remand "[did] not have the authority" to reconsider the issue of the selection of financial statements for use in

calculating Zhaoqing Tifo's dumping margin. *See* Pl.'s Brief at 2 (caption, modified to lower case letters); *see generally id*. at 2–4; Pl.'s Reply Brief at 1–6.

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

In the interests of finality, Commerce's final determination in any antidumping proceeding is essentially immune to attack, except to the extent that a party commences a timely challenge of that final determination in this Court – and, even then, only to the extent of those specific issues that are raised in the complaint. *See generally* 19 U.S.C. § 1516a(a)(1) (requiring that any action challenging a final determination in an antidumping proceeding be commenced by the filing of a summons within 30 days after Federal Register publication of the determination, followed by a complaint within 30 days thereafter); USCIT Rule 3(a)(2) (same). In other words, finality attaches to all aspects of a final determination except those that are challenged in a timely-filed complaint.[12]

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

[12] Where a plaintiff seeks to amend its timely-filed complaint (*e.g.*, to attempt to belatedly raise a new issue that was not raised in the complaint at the time of filing), the plaintiff's ability to do so is narrowly circumscribed. *See* USCIT R. 15(a)(1)-(2) (providing that, where more than 21 days have elapsed since service of complaint, complaint may be amended "only with the opposing party's written consent or the court's leave . . . when justice so requires."); *see also, e.g., Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 81 (2d Cir. 1980) (affirming district court's denial of motion to amend complaint prior to trial on remand, emphasizing, in particular, "the[] circumstances of extended delay and failure to raise initially claims of which [the plaintiff] was aware").

issues"); *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 212–15, 477 F. Supp. 2d 1298, 1299–1301 (2007) (similar); *Habas Sinai ve Tibbi Gazlar Istihsal Endustri A.S. v. United States*, 30 CIT 542, 425 F. Supp. 2d 1374 (2007) (noting that it is "clear beyond cavil" that intervenors "must take a case as they find it"); *Siam Food Prods. Public Co. v. United States*, 22 CIT 826, 830, 24 F. Supp. 2d 276, 280 (1998) (concluding that movants there were "time barred from bringing their own case and thus even as intervenors . . . [could] not bring their own challenges to [Commerce's] determination") (citation omitted).

Further, as a matter of first principles, Commerce is not permitted to attack its own final determination[13]; nor is a court permitted to *sua sponte* interject issues into litigation. Issues that are not the subject of a timely-filed complaint are, as a general rule, beyond the court's jurisdiction and cannot be entertained by the court. *See generally, e.g., Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309–10, 1311–13 (Fed. Cir. 1986) (holding that Court of International Trade lacked jurisdiction over action where party failed to file timely appeal). As such, "finality" trumps "accuracy/completeness," and the complaint defines and delimits the scope of litigation before the court. *See generally, e.g., Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321–22 & n.5 (1961) (explaining that "[w]henever a question concerning administrative, or judicial, reconsideration arises, two opposing policies demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other," and noting that "[s]ince these policies are in tension, it is necessary to reach a compromise"); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1931) (stating that, in the interests of finality, "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties"); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (acknowledging, on appeal in an antidumping duty case, that "[i]n some instances, a tension may arise between finality

[13] Commerce's procedure for the correction of "ministerial errors" in its determinations is an important, but very limited, exception to this rule. However, the ministerial errors procedure has no bearing on the analysis here. *See* 19 U.S.C. § 1675(h) ("Administrative review of determinations: Correction of ministerial errors"); 19 C.F.R. § 351.224(c)-(g) (under "Disclosure of calculations and procedures for the correction of ministerial errors").

and [a] correct result"); *Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn Bhd.*, 334 F.3d 1284, 1292 (Fed. Cir. 2003) (recognizing the "strong interest in the finality of Commerce's decisions").[14]

Here, Zhaoqing Tifo's timely-filed Complaint defines and delimits the scope of this litigation; and it does not include a challenge to Commerce's selection of financial statements.[15]

In its briefs contesting the Remand Results, Zhaoqing Tifo draws on the principles and authorities summarized above (which no party disputes), and advances arguments as to both the scope and the

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

[15] Zhaoqing Tifo's Complaint consists of a total of 10 specific counts. However, as indicated above, none of those counts challenges Commerce's decision to rely on the financial statements of P.T. Tifico – rather than those of P.T. Asia Pacific – in the agency's Final Determination. Quite to the contrary, Zhaoqing Tifo's Complaint in fact *relies on* Commerce's selection of P.T. Tifico's financial statements, but alleges that – because energy expenses are already embedded in those statements, Commerce must exclude energy expenses from the FOP database.

As *Zhaoqing Tifo I* explained, only the first four counts of the Complaint were addressed in Zhaoqing Tifo's motion for judgment on the agency record. Each of those four counts relates to Commerce's inclusion of coal in the FOP database for purposes of the agency's Final Determination, and Zhaoqing Tifo's attendant concerns about the potential double counting of energy inputs. *See generally Zhaoqing Tifo I*, 39 CIT at ____ n.18, 60 F. Supp. 3d at 1341 n.18 (listing the subject of each of 10 counts of Zhaoqing Tifo's Complaint). As such, it is those four counts (now three, as noted below) that are relevant to the Remand Results.

In particular, Count I alleges that Commerce's failure to remove coal from the factors of production database means that Commerce "did not select the 'best available information' for the surrogate value of coal," and that the Final Determination is therefore "unsupported by substantial evidence." *See* Complaint, Count I. Count II alleges that Commerce acted "contrary to law" by including coal in the factors of production database at the same time the agency excluded water and electricity. *Id*., Count II. Count III alleges that it was "arbitrary and capricious" for Commerce to include coal, while excluding water and electricity. *Id*., Count III. And Count IV alleges that Commerce's inclusion of coal in the factors of production database, while excluding water and electricity, "was a ministerial error that should have been promptly corrected." *Id*., Count IV. Zhaoqing Tifo withdrew Count IV in its opening brief in this litigation, explaining that "the remedy [sought by Count IV] overlaps the remedy sought in Counts I through III, namely the removal of the coal energy factor from [Zhaoqing Tifo's] [factors of production] database." *See Zhaoqing Tifo I*, 39 CIT at ____ n.18, 60 F. Supp. 3d at 1341 n.18 (citation omitted). Accordingly, only Counts I through III are presently before the court.

Counts V, VI, VII, and VIII of the Complaint contest the surrogate values that Commerce used in its Final Determination to value various inputs – including, respectively, coal, inland freight, water, and brokerage and handling. Complaint, Counts V-VIII. Count IX alleges that Commerce erred in rejecting a letter of credit adjustment to brokerage and handling, while Count X asserts that Commerce's "failure to issue a deficiency questionnaire regarding the sources and meaning of the domestic Indonesian coal surrogate value was contrary to law." *Id.*, Counts IX-X. Count XI is an all-purpose "catch-all" claim, stating that "[u]pon information and belief, [Commerce] erred in other aspects of its final results" which are not specified. *Id.*, Count XI; *see generally Zhaoqing Tifo I*, 39 CIT at ____ n.18, 60 F. Supp. 3d at 1341 n.18.

timing of this litigation. As Zhaoqing Tifo correctly observes, the issue of the selection of financial statements is beyond the scope of its Complaint. Significantly, no party contends that Zhaoqing Tifo's Complaint challenges Commerce's selection of financial statements – *i.e.*, Commerce's decision to rely on the financial statements of P.T. Tifico for purposes of the agency's Final Determination. Certainly Zhaoqing Tifo has not sought to amend its Complaint to add such a challenge. The Domestic Producer could have – and apparently should have – preserved its rights by timely filing its own complaint, so as to challenge Commerce's selection of P.T. Tifico's financial statements over those of P.T. Asia Pacific.[16] But it is far too late for the Domestic Producer to do that now. *See generally* 19 U.S.C. § 1516a(a)(1); USCIT Rule 3(a)(2).

Neither the Government nor the Domestic Producer makes any real effort to respond to Zhaoqing Tifo's arguments concerning the limited scope of this litigation (including the role of the Complaint vis-à-vis the court's jurisdiction and the strict time limits for filing an action challenging a Final Determination). *See* Def.'s Brief, *passim*; Def.-Int.'s Brief, *passim*. The Government acknowledges in passing that Zhaoqing Tifo "argues that Commerce lacks the statutory authority" to revisit on remand the selection of financial statements; and the Government asserts broadly that Zhaoqing Tifo's argument lacks merit. *See* Def.'s Brief at 4. However, the Government's briefing on the matter consists of no more than a few sentences and does not address the substantive merits of the significant points that Zhaoqing Tifo raises. *See id*. at 11.[17] The Domestic Producer similarly acknowledges Zhaoqing Tifo's argument, but, like the Government, gives the argument very short shrift and does not directly confront it. *See* Def.Int.'s Brief at 6, 11.[18]

---

[16] The issue of the selection of financial statements – and the respective pros and cons of the financial statements of P.T. Tifico and P.T. Asia Pacific – was hotly contested by the parties before Commerce's Final Determination issued. Indeed, as noted above, in advocating for use of P.T. Asia Pacific's statements, the Domestic Producer specifically warned Commerce that the agency's selection of the financial statements of P.T. Tifico would preclude the agency from including coal in the FOP database, due to the need to avoid double-counting.

[17] The Government conflates and then summarily dismisses a number of Zhaoqing Tifo's points with the conclusory assertion that Zhaoqing Tifo's arguments and authorities "in no way support the notion that this Court lacks jurisdiction to consider a change by Commerce in the selection of surrogate financial statements." *See generally* Def.'s Brief at 11.

[18] Like the Government, the Domestic Producer devotes roughly 10 lines to Zhaoqing Tifo's arguments concerning jurisdiction and the statute of limitations. *See* Def.-Int.'s Brief at 6, 11. Its treatment of the argument is both brief and substantively wide of the mark.

In response to Zhaoqing Tifo's point that "'no party appealed' the selection of the financial statement[s]" used in Commerce's Final Determination, the Domestic Producer argues that *Zhaoqing Tifo I*" did not restrict the universe of sources Commerce could consider on remand." *See* Def.-Int.'s Brief at 6 (citation omitted). But, even assuming that it were true, that assertion is no answer to a claim that the court lacks jurisdiction to entertain a

Zhaoqing Tifo candidly notes that – notwithstanding the (nearly) ironclad rule prizing finality over accuracy/completeness in circumstances such as these – segments of antidumping proceedings have been re-opened on extremely rare occasions, in but a handful of cases. *See generally* Pl.'s Brief at 3–4; Pl.'s Reply Brief at 2.[19] However, in such cases, the inherent tension between finality and accuracy/completeness is resolved in favor of reopening Commerce's determination because such extraordinary action is required in order to ensure the fundamental integrity of Commerce's processes. *See, e.g., Tokyo Kikai Seisakusho, Ltd. v. United States*, 31 CIT 117, 122–23, 473 F. Supp. 2d 1349, 1354–55 (2007), *aff'd in part and rev'd in part*, 529 F.3d 1352 (Fed. Cir. 2008) (explaining that "an agency may act pursuant to its inherent authority to protect the integrity of its proceedings from fraud") (internal quotation marks omitted); *Elkem Metals Co. v. United States*, 26 CIT 234, 240 & n.6, 193 F. Supp. 2d 1314, 1321 & n.6 (2002) (involving allegations of "serious material misrepresentations" and "price-fixing conspiracy" that assertedly tainted prior agency investigation); *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 12–13 (2d Cir. 1981) (invoking "the power of an administrative agency to insure the integrity of proceedings before it," in action involving alleged perjured testimony in earlier ITC proceeding, which had concluded).[20]

This is not such a case. Commerce's alleged factual error here plainly does not implicate the fundamental integrity of Commerce's processes. No party contends otherwise. As the Government itself acknowledges, the referenced line of cases "recognize[s] Commerce's

challenge that was not raised in the Complaint. A court cannot expand its own jurisdiction, whether by a remand or by any other means. Elsewhere in its brief, the Domestic Producer responds to Zhaoqing Tifo's arguments concerning the scope of this litigation by quoting an excerpt from the Remand Results in which Commerce asserts that "'accounting for energy inputs in the [Factors of Production] database is the basis' of [Zhaoqing Tifo's] complaint." *See id*. at 11 (quoting Remand Results at 11). But the Domestic Producers fail to "connect the dots" by spelling out the relationship between that idea and the jurisdiction of the court, the Complaint's limiting effect on the scope of litigation, and/or the time limits for commencing an action to challenge some aspect of the Final Determination here. Moreover, while Commerce's interpretation of relevant statutes and regulations is generally entitled to great deference, its interpretation of a party's complaint carries no special weight.

[19] In addition to the exception to the principle of finality set forth above, there are certain other limited and specific circumstances where an issue that is not raised in a complaint may nevertheless be the subject of litigation if that issue is inextricably intertwined with an issue that is raised in the complaint. Such cases are discussed in section III.B, below.

[20] *See also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244–45 (1944) (setting forth well-settled general rule against reopening settled judgments, based on "the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered," but noting that, "under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments" without regard to when they were entered); *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (explaining that "[t]he inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question");

inherent authority to take actions to guard against fraud" and thus involves facts that are "entirely different" from the facts of the instant case. Def.'s Brief at 11.

In sum, Zhaoqing Tifo's points concerning the scope of this litigation (including matters such as the court's jurisdiction, the requirements governing the timing of the filing of a challenge to a final determination, and the limiting function of its Complaint) are well-taken. There is, however, no need here to reach a definitive determination as to whether or not the court *could* have ordered a remand in which Commerce was free to re-open the issue of the selection of financial statements – because, as explained below, the court did not do so.

B. *The Scope of the Remand Order in Zhaoqing Tifo I*

Zhaoqing Tifo's second major argument focuses not on the scope of this litigation (discussed immediately above), but, rather, on the scope of the remand instructions in *Zhaoqing Tifo I*. Zhaoqing Tifo here assumes, *arguendo*, that the court could have ordered a remand in which Commerce would have been permitted to revisit the issue of the agency's selection of P.T. Tifico's financial statements over the financial statements of P.T. Asia Pacific for purposes of the agency's Final Determination. In other words, in advancing this second argument, Zhaoqing Tifo assumes that there were no statutory bars (vis-à-vis the court's jurisdiction and requirements governing the timely filing of complaints) that would preclude the court from directing such a broad remand. Zhaoqing Tifo argues that Commerce nevertheless was not permitted on remand to re-analyze the issue of the relative merits of the different financial statements on the administrative record because that issue lies beyond the scope of the remand that was ordered in *Zhaoqing Tifo I*. *See generally* Pl.'s Brief at 2–4; Pl.'s Reply Brief at 1–6.

In contrast, the Government and the Domestic Producer contend that Zhaoqing Tifo reads the remand instructions too narrowly and that, under *Zhaoqing Tifo I*, Commerce was permitted to reach back and reconsider the issue of the agency's selection of financial statements. As outlined below, Zhaoqing Tifo's reading of the remand instructions in *Zhaoqing Tifo I* is the correct one.

The Government and the Domestic Producer maintain that nothing in the remand instructions in *Zhaoqing Tifo I* barred Commerce from re-opening the issue of the selection of financial statements. *See, e.g.*, Def.'s Brief at 5; Def.-Int.'s Brief at 6. The Government and the Domestic Producer assert, in essence, that the remand instructions in *Zhaoqing Tifo I* should be given a broad reading, as permitting Commerce to reconsider its selection of final statements, because – ac-

cording to the Government and the Domestic Producer – the court could not have intended a "limited remand," which is generally "disfavored." *See* Def.'s Brief at 3; Def.-Int.'s Brief at 10; *Changzhou*, 701 F.3d at 1374–75 (explaining that the Court of Appeals "generally disfavors limited remands that restrict Commerce's ability to collect and fully analyze data on a contested issue").[21] *But see Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 68 F.3d 487 (unpublished table decision), *available at* 1995 WL 596834 * 1 (Fed. Cir. 1995) *(per curiam)* (where Court of Appeals remanded action to agency with "specific and concise" instructions for very limited remand (*i.e.*, directing agency "to recalculate the dumping margins without [certain] deductions" on remand), criticizing "Commerce's excursion beyond the mandate of [the Court of Appeals' remand]," but nevertheless affirming agency action where the dumping margin recalculated on remand "[did] not include the prohibited deduction").

To similar ends, the Government and the Domestic Producer emphasize that, in the initial round of briefing in this case (*i.e.*, before *Zhaoqing Tifo I* issued), the relief that Zhaoqing Tifo sought was an order directing Commerce "to remove the coal energy factor from the [factors of production] database and recalculate Zhaoqing Tifo's antidumping duty margin." *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365 (citation omitted); Def.'s Brief at 3; Def.-Int.'s Brief at 10. As the Government and the Domestic Producers note, *Zhaoqing Tifo I* declined to grant that specific relief, ruling that, in light of the procedural posture of the case at that time, such relief was "not warranted." *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365; Def.'s Brief at 3; Def.-Int.'s Brief at 10. The Government and the Domestic Producer point to the court's decision declining to direct Commerce on remand "to remove the coal energy factor from the [factors of production] database" as support for their claim that the remand instructions authorized Commerce to do what it did in the Remand Results – *i.e.*, to revisit and re-open Commerce's decision to

[21] In the terminology of *Changzhou*, the "contested issue" here is not Commerce's selection of the financial statements of P.T. Tifico over those of P.T. Asia Pacific. The "contested issue" here is whether Commerce is double-counting certain energy costs by including coal in the FOP database, when energy costs allegedly are already embedded in the surrogate financial ratios derived from the financial statements of P.T. Tifico. As discussed herein, *Zhaoqing Tifo I* left Commerce with a number of potential courses of action on remand. Moreover, as discussed herein, the court specifically declined Zhaoqing Tifo's request for limiting instructions directing Commerce to remove coal from the FOP database on remand. As such, the remand in *Zhaoqing Tifo I* clearly was not a limited remand. But fact that it was not a limited remand does not mean that it was unbounded. Given the specific nature of the double-counting claim set forth in Zhaoqing Tifo's Complaint, Commerce was required on remand to continue to rely on the financial statements of P.T. Tifico.

rely on P.T. Tifico's financial statements for purposes of the agency's Final Determination. *See* Def.'s Brief at 5; Def.-Int.'s Brief at 10–11.

However, the Government and the Domestic Producer set up a false dichotomy between a disfavored "limited remand," on the one hand, and, on the other hand, a remand permitting Commerce to reexamine the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific. Mindful that limited remands are disfavored (and for other reasons), *Zhaoqing Tifo I* declined to instruct Commerce "to remove the coal energy factor from the [factors of production] database" on remand. *See Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1341 n.18.[22] But, contrary to the implications of the Government and the Domestic Producers, the court's decision declining Zhaoqing Tifo's request for highly specific remand instructions does not – as a matter of fact and logic – automatically and necessarily mean that *Zhaoqing Tifo I* authorized Commerce to reconsider the selection of financial statements that the agency made in its Final Determination. On remand, Commerce was required to continue to rely on the financial statements of P.T. Tifico – the financial statements that Commerce selected in its Final Determination, in a decision as to which no party sought judicial review.

Under Zhaoqing Tifo's reading of *Zhaoqing Tifo I*, there were a number of avenues open to Commerce on remand (some of which are not mutually exclusive): For example, on remand, Commerce at least conceivably could have defended its selection and treatment of financial statements in the agency's Final Determination. In other words, Commerce conceivably could have developed and proffered an explanation for the seeming disparity between the Final Determination's treatment of water and electricity (which Commerce removed from the FOP database in the Final Determination, due to the agency's concerns about double counting of energy inputs) *versus* the Final Determination's treatment of coal (which Commerce included in the FOP database in the Final Determination, with no explanation as to any potential double counting). Under this option, Commerce's explanation would set forth in full, *inter alia*, the basis for the agency's confidence that the inclusion of coal in the FOP database would not result in double-counting, and the agency would detail with specificity substantial record evidence to support that position.[23]

Commerce conceivably also could have reopened the administrative record on remand and sought further evidence to help clarify which

[22] There is no need here to decide whether or not remand instructions directing Commerce on remand "to remove the coal energy factor from the [factors of production] database" would constitute a "limited remand," or whether such remand instructions would be "disfavored" or even improper.

[23] *See supra* n.11.

energy sources (coal, water, and/or electricity) are reflected elsewhere in P.T. Tifico's financial statements (and, thus, in the agency's calculations), which, to avoid double-counting, therefore presumably would not be included in the FOP database. Commerce conceivably could have eliminated the disparity in its treatment of coal *versus* water and electricity by removing coal from the FOP database, clearly explaining that decision and anchoring that action in substantial evidence. Alternatively, Commerce conceivably could have eliminated the disparity in the treatment of coal *versus* water and electricity by including all three sources in the FOP database, clearly explaining its decision (detailing, in particular, the basis for the agency's confidence that such treatment does not result in double-counting) and rooting the agency's decision in substantial evidence.

The listing above is illustrative, not exhaustive. No doubt there were other options open to Commerce on remand that have not been catalogued here. In any event, as the listing above demonstrates, the reading that Zhaoqing Tifo gives the remand instructions in *Zhaoqing Tifo I* cannot fairly be characterized as a "limited remand." Indeed, constrained only by the applicable standard of review ("substantial evidence," "in accordance with law," and not "arbitrary and capricious"), *Zhaoqing Tifo I* essentially gave Commerce unfettered discretion on remand to do whatever the agency deemed appropriate to ascertain how to properly account for water, coal, and electricity using the financial statements of P.T. Tifico, while at the same time avoiding double-counting.

What Commerce was not permitted to do on remand was to reopen and re-review the settled issue of the agency's decision in its Final Determination to select the financial statements of P.T. Tifico – rather than those of P.T. Asia Pacific – as the basis for the surrogate financial ratios used to calculate the dumping margin for Zhaoqing Tifo. The issue of Commerce's selection of financial statements was laid to rest in the Final Determination and, because the Domestic Producer failed to seek judicial review, the issue cannot be resurrected.

The Government and the Domestic Producer excerpt language from *Zhaoqing Tifo I* in an effort to support their broad reading of the remand instructions and their assertion that, under *Zhaoqing Tifo I*, Commerce was permitted to reconsider the selection of financial statements that it made in the agency's Final Determination.

For example, the Government reads much into the language in the conclusion section of *Zhaoqing Tifo I* which states that, "[f]or the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record must be granted and this matter remanded to the U.S. Department of Commerce *for further action not inconsistent with this*

opinion." Def.'s Brief at 7 (quoting *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365) (emphasis added by Defendant). The reliance of the Government and the Domestic Producer is misplaced. The quoted language is, in essence, "boilerplate," not a license for Commerce to do whatever it pleases on remand. The language must be read in the broader context of the rest of *Zhaoqing Tifo I*. Moreover, the expansive reading that the Government and the Domestic Producer give the referenced text would lead to absurd results. Re-opening the issue of the selection of the surrogate country, or the issue of the valuation of the cost of inland freight, would not have been "inconsistent with" *Zhaoqing Tifo I*. But surely the Government and the Domestic Producer do not contend that Commerce was permitted to reconsider those issues on remand. In actuality, it is Commerce's reopening of the issue of the selection of financial statements that is "inconsistent with" the remand instructions here.

The Government and the Domestic Producer similarly seize on the language in *Zhaoqing Tifo I* which "encouraged [Commerce] to reopen the administrative record on remand, to *ensure that the Remand Results are based on an appropriate record* and to allow the parties an adequate opportunity to place on the record, for the consideration of the agency, information to illuminate or clarify key points." *See* Def.'s Brief at 7 (quoting *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365) (emphasis added by Defendant); Def.-Int.'s Brief at 6. However, the Government and the Domestic Producer fail to note that the "key points" listed in *Zhaoqing Tifo I* that were to be illuminated or clarified by reopening the record are "the energy sources that *P.T. Tifico* uses . . . , whether *P.T. Tifico* uses those energy sources for any other purpose, and how the sources are treated in *P.T. Tifico's* financial statements and in the surrogate financial ratios that Commerce derived from the financial statements." *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365 (emphases added).

As discussed above, the Government and the Domestic Producer also highlight the language in *Zhaoqing Tifo I* which declined Zhaoqing Tifo's request for "specific limiting instructions" directing the agency on remand "to remove the coal energy factor from the [factors of production] database and recalculate Zhaoqing Tifo's antidumping duty margin." *See* Def.'s Brief at 10 (quoting *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365); Def.-Int.'s Brief at 10. As explained elsewhere herein, however, the court's decision not to issue such "specific limiting instructions" is, as a matter of logic and fact, a far cry from authorizing Commerce to reopen on remand its decision on the issue of the selection of financial statements – a decision that Commerce reached in the Final Determination.

In yet another example, the Government and the Domestic Producer emphasize that *Zhaoqing Tifo I* directed Commerce on remand to "expressly consider any . . . potential for double counting of energy inputs." Def.'s Brief at 9 (quoting *Zhaoqing Tifo I*, 39 CIT at ____, 60 F. Supp. 3d at 1365); Def.Int.'s Brief at 10. Again, however, the reading that the Government and the Domestic Producer suggest is at odds with the whole of *Zhaoqing Tifo I* and, even more importantly, Zhaoqing Tifo's claim, which is specific to the use of P.T. Tifico's financial statements, Commerce's inclusion of coal in the FOP database, and the alleged "potential for double counting of energy inputs."

The Government and the Domestic Producers cherry-pick their quotations from *Zhaoqing Tifo I*, reading too much into them and taking them out of context. Reading *Zhaoqing Tifo I* fairly, in context, and as a whole makes plain the court's intent to have Commerce grapple on remand with the treatment of energy in the surrogate financial ratios that the agency derived from the financial statements of P.T. Tifico (which the agency itself selected for use in the Final Determination), and to analyze whether, in light of the treatment of energy in those financial statements, coal can be included in the FOP database without double-counting. *See generally, e.g., Changzhou*, 701 F.3d at 1375 (highlighting the great deference accorded a trial court's determination as to whether agency action on remand was within the scope of the court's remand order).

Lastly, the Government and the Domestic Producer argue that the issue of the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific (*i.e.*, the matter that Commerce reopened on remand) is inextricably intertwined with the specific, narrow issue raised in Zhaoqing Tifo's Complaint – *i.e.*, the extent to which there are energy costs that are already embedded in P.T. Tifico's financial statements (and thus reflected in Commerce's surrogate financial ratios), such that Commerce's inclusion of coal in Zhaoqing Tifo's FOP database results in double-counting. *See generally* Def.'s Brief at 6 & n.1; Def.-Int.'s Brief at 11. If in fact the issues are inextricably intertwined, the logical extension of the argument is that Commerce was free to revisit on remand the issue of its selection of final statements without regard to the intent behind the remand ordered in *Zhaoqing Tifo I* and the language of the remand instructions, and without regard to any considerations of finality that would otherwise apply.

The Government and the Domestic Producer assert, for example, that the issue that Zhaoqing Tifo has raised (concerning the treatment of energy factors in the financial statements of P.T. Tifico and the potential for double-counting of energy factors if Commerce separately values coal) "necessarily" implicates the much broader issue of

Commerce's selection of financial statements, that the two issues "cannot be divorced," and that the double-counting issue "cannot be viewed in isolation." Def.'s Brief at 6 & n.1; Def.-Int.'s Brief at 11.

It is true that the issue that Zhaoqing Tifo has raised is related to the issue of Commerce's selection of financial statements. However, the two issues are entirely discrete. There is – as a matter of logic – no need for Commerce to reassess the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific in order to address the issue that Zhaoqing Tifo has raised, which is specific to P.T. Tifico – *i.e.*, whether Commerce can exclude energy costs from the surrogate financial ratios derived from the financial statements of P.T. Tifico, such that Commerce may separately value coal in the FOP database without double-counting. Contrary to the assertions of the Government and the Domestic Producer, it is entirely possible for Commerce to analyze how P.T. Tifico's energy costs are reflected in the company's financial statements, and the consequences that flow from that, without reopening the agency's decision to rely on P.T. Tifico's financial statements rather than the statements of P.T. Asia Pacific for purposes of Commerce's Final Determination.

As both Commerce and the Domestic Producer have now acknowledged, one simple, straightforward way to avoid double counting while relying on P.T. Tifico's financial statements would be to exclude coal from the FOP database. Commerce and the Domestic Producer may be dissatisfied with such a "fix." They posit that such an approach may under-value Zhaoqing Tifo's energy costs.[24] But the point is that, contrary to the assertions of the Government and the Domestic Producer, Commerce in fact can – and, indeed, must – respond to

[24] Contrary to the implications of the Government and the Domestic Producer, such an approach would not omit energy from Commerce's calculation of Zhaoqing Tifo's dumping margin. As Zhaoqing Tifo notes, the energy expenses would be embedded in P.T. Tifico's financial statement and the financial ratios derived from those statements. *See generally* Pl.'s Brief at 10. Further, although Commerce may prefer to do things otherwise, Zhaoqing Tifo notes that, in other cases, Commerce has excluded energy from the FOP database because the financial statements on which the agency relied did not break out energy costs – the result that Zhaoqing Tifo seeks here. *See id*. at 11–12.

Zhaoqing Tifo justifiably also takes issue with Commerce's assertion in the Remand Results that the use of P.T. Tifico's financial statements "would result in a less accurate antidumping duty margin calculation as significant production costs would not be captured in normal value." *See* Remand Results at 9–10; Pl.'s Brief at 11–12. As explained immediately above, there is no truth to the assertion that any costs – much less "*significant* production costs" – would be missing if Commerce relies on the financial statements of P.T. Tifico. Moreover, Commerce's assertion that a dumping margin based on the financial statements of P.T. Tifico would be "less accurate" than a margin based on the statements of P.T. Asia Pacific is unsupportable on the existing record. On the existing record, one can say that a dumping margin based on the financial statements of P.T. Asia Pacific would be *higher* than one based on the statements of P.T. Tifico. But it is logically impossible, based on the existing record, to say that one would be "*less accurate*" than the other.

Zhaoqing Tifo's concern about double-counting without resorting to financial statements other than those of P.T. Tifico.

Even assuming that, if the issue of the selection of financial statements were before it today, Commerce would reverse its earlier decision and choose P.T. Asia Pacific's financial statements rather than those of P.T. Tifico, that fact is of no moment and no relevance to the task that now confronts Commerce. Because no party sought judicial review of Commerce's selection of P.T. Tifico's financial statements in the Final Determination, Commerce now must focus solely on P.T. Tifico's financial statements, to the exclusion of all others. Commerce now must consider the treatment of energy costs in P.T. Tifico's financial statements and must ascertain whether it is possible to identify and exclude those costs from the statements so that the agency may instead include coal in the FOP database without double-counting.

If Commerce ultimately concludes, whether on the existing administrative record or on an expanded record, that it cannot identify and extract energy costs from P.T. Tifico's financial statements, or if Commerce ultimately concludes that energy costs are not reflected in the surrogate financial ratios derived from P.T. Tifico's financial statements but Commerce cannot support that conclusion with a reasoned explanation and substantial evidence, the remedy is not that Commerce goes back to the drawing board and selects another, more detailed set of financial statements (as the agency did on remand here).

For purposes of its Final Determination in the administrative review that is the subject of this case, Commerce selected the financial statements of P.T. Tifico and valued coal separately in the FOP database. Finality attached to Commerce's selection of P.T. Tifico's financial statements when no party challenged that selection in litigation. That ship has sailed. In contrast, raising concerns about the potential for double-counting, Zhaoqing Tifo has timely challenged Commerce's decision in the Final Determination to value coal separately in the FOP database while relying on P.T. Tifico's financial statements. If Commerce cannot establish – by substantial evidence – that, given its decision to rely on P.T. Tifico's financial statement, the inclusion of coal in the FOP database does not result in double-counting, Commerce apparently will have no choice but to remove coal from the database – the very outcome that the Domestic Producer explicitly warned Commerce about before Commerce issued its Final Determination.

As discussed above, Zhaoqing Tifo's double-counting claim concerns only the financial statements of P.T. Tifico (and the surrogate financial ratios derived from them) and only to the extent that they bear on

any potential for double-counting inherent in Commerce's treatment of energy costs for purposes of calculating Zhaoqing Tifo's dumping margin and its inclusion of coal in the FOP database. There is no merit to the assertions of the Government and the Domestic Producer that the issue of the selection of financial statements cannot be severed from Zhaoqing Tifo's double-counting claim. Given the specific nature of Zhaoqing Tifo's double-counting claim, there simply is no scenario in which Commerce would have cause to resort to reconsidering the relative merits of the financial statements of P.T. Tifico and P.T. Asia Pacific. The Remand Results exceeded the scope of the remand.

C. *A Second Remand to Commerce*

Because the Remand Results exceeded the scope of the remand ordered in *Zhaoqing Tifo I*, this matter must be remanded to Commerce once again, to permit the agency to reconsider its inclusion of coal in the FOP database in the Final Determination, in light of its use of financial ratios derived from the financial statements of P.T. Tifico, and to expressly consider any associated potential for double counting of energy inputs, explaining its reasoning fully and with reference to the record evidence. Commerce is once again encouraged to give careful consideration to whether it might be helpful to reopen the administrative record on remand (for example, to receive any additional evidence (such as expert opinions) concerning how energy expenses are treated in the financial statements of P.T. Tifico, or any other evidence bearing on whether or not the use of surrogate financial ratios derived from the financial statements of P.T. Tifico, in tandem with the inclusion of coal in the FOP database, results in double-counting).

IV. *Conclusion*

Because the Remand Results exceeded the scope of the remand ordered in *Zhaoqing Tifo I*, this matter must be remanded to Commerce once again, to permit the agency to reconsider how the surrogate financial ratios that it derived from P.T. Tifico's financial statements account for energy sources and whether the inclusion of coal in the FOP database results in double-counting. In its redetermination on remand, Commerce shall explain its reasoning fully and with reference to substantial evidence in the administrative record.

A separate order will enter accordingly.
Dated: August 30, 2017
New York, New York

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

Slip Op. 17–119

AGILENT TECHNOLOGIES, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00183

[Remanding the U.S. Department of Commerce's final scope ruling on Agilent Technologies, Inc.'s mass filter radiators]

Dated: September 1, 2017

George R. Tuttle, III, Law Offices of George R. Tuttle, A.P.C., of Larkspur, CA, for Plaintiff Agilent Technologies, Inc.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica Rose DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Aluminum Extrusions Fair Trade Committee.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Agilent Technologies, Inc. ("Agilent" or "Plaintiff") is a manufacturer of electronic and bio-analytical measurement instruments who brought this action challenging the scope ruling on Agilent's mass filter radiator ("MFR") issued by the U.S. Department of Commerce ("Department" or "Commerce"). *See* Summons, Sept. 14, 2016, ECF No. 1; Compl., Oct. 5, 2016, ECF No. 8. Commerce determined that the MFR is covered by the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China ("China"). *See* Final Scope Ruling on Agilent Technologies, Inc.'s Mass Filter Radiator, A-570–967 and C-570–968 (Aug. 10, 2016), *available at* http://enforcement.trade.gov/download/prc-ae/scope/97-mass-filter-radiator-10aug16.pdf (last visited Aug. 24, 2017)

("Final Scope Ruling"). *See also Aluminum Extrusion from the People's Republic of China*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) ("Antidumping Duty Order") and *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order) ("Countervailing Duty Order") (collectively, "Orders"). Before the court is Plaintiff's Rule 56.2 motion for judgment on the agency record, in which Plaintiff argues that Commerce erred in finding that Agilent's MFR is covered by the scope of the Orders. *See* Pl.'s Rule 56.2 Mot. J. Agency R., Mar. 31, 2017, ECF No. 23; Pl.'s Mem. P. & A. Supp. Mot. J. Agency R. 1–4, Mar. 31, 2017, ECF No. 23–1 ("Pl.'s Mot."). The United States ("Defendant") and Defendant-Intervenor Aluminum Extrusions Fair Trade Committee ("Defendant-Intervenor") oppose Plaintiff's motion. *See* Def.'s Resp. Pl.'s Rule 56.2 Mot. J. Agency R., June 5, 2017, ECF No. 24 ("Def.'s Resp."); Def.-Intervenor Aluminum Extrusions Fair Trade Committee's Resp. Br., June 5, 2017, ECF No. 25. For the reasons set forth below, the court remands Commerce's scope ruling.

BACKGROUND

Commerce issued two Orders on aluminum extrusions from China on May 26, 2011. *See* Antidumping Duty Order, 76 Fed. Reg. at 30,650; Countervailing Duty Order, 76 Fed. Reg. at 30,653. Both Orders have identical scope language, which provide the following description of subject merchandise:

> The merchandise covered by this order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).

Antidumping Duty Order, 76 Fed. Reg. at 30,650; Countervailing Duty Order, 76 Fed. Reg. at 30,653. The Orders explicitly exclude "finished merchandise"[1] and "finished heat sinks."[2] *See* Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

---

[1] Finished merchandise are goods "containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

[2] Finished heat sinks are "fabricated heat sinks made from aluminum extrusions the design and production of which are organized around meeting certain specified thermal

On November 20, 2014, Plaintiff submitted a scope ruling request seeking confirmation from Commerce that the MFR is outside the scope of the Orders. *See* Scope Inquiry on Certain Finished Aluminum Components from the People's Republic of China: Mass Filter Radiator, PD 1, bar code 3245192–01, CD 1, bar code 3245188–01 (Nov. 20, 2014) ("Agilent's Scope Ruling Request").[3] Agilent describes its product as a machined aluminum component, which is plated with a proprietary material to provide specific levels of thermal resistance and is designed and fabricated for use in Agilent's mass spectrometer. *See id.* at 2–5. The MFR houses the central components of the mass spectrometer and, according to Agilent, plays an important role in transferring heat from critical components. *See id.* Agilent asserted that its MFR should be excluded from the scope of the Orders on the basis that: (1) the MFR is within the finished merchandise exclusion because it is a finished product comprised exclusively of aluminum extrusions; and (2) the MFR is within the finished heat sink exclusion because it was designed precisely to have specific thermal resistance properties to remove damaging heat from electronic equipment and the MFR has been tested around meeting certain thermal requirements. *See* Agilent's Scope Ruling Request at 5–12.

After receiving Agilent's Scope Ruling Request, Commerce sent Agilent supplemental questionnaires requesting information on the MFR's production process, thermal resistance properties, performance requirements, and testing procedures used to ensure compliance with those requirements. *See* Aluminum Extrusions from the People's Republic of China: Mass Filter Radiators, PD 6, bar code 3259038–01 (Feb. 10, 2015) (supplemental questionnaire); Scope Inquiry on Agilent's Mass Filter Radiator, PD 24, bar code 3433012–01 (Jan. 15, 2016) (supplemental questionnaire); Scope Inquiry on Agilent's Mass Filter Radiator, PD 31, bar code 3457413–01 (Apr. 8, 2016) (supplemental questionnaire).[4] Plaintiff responded to Commerce's questionnaires and claimed that the "primary function of the MFR is to transfer heat from the heat source to the quadrupole."

performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements." Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

[3] The Final Scope Ruling involves both the Antidumping Duty Order and the Countervailing Duty order on aluminum extrusions from China. Commerce compiled two virtually identical administrative records for this proceeding. The Parties provided the court with a joint appendix containing documentation from the administrative record relating to the Antidumping Duty Order. Unless otherwise noted, all citations to the administrative record will refer to the index for the Antidumping Duty Order.

[4] The citation to Scope Inquiry on Agilent's Mass Filter Radiator, PD 31, bar code 3457413–01 (Apr. 8, 2016) (supplemental questionnaire) is to the administrative index for the Countervailing Duty Order.

Agilent Technologies: Scope Request (Mass Filter Radiator) at 2, PD 39, bar code 3523198–01 (Mar. 23, 2015) (response to questionnaire) ("Mar. 23 Response"). *See also* Scope Inquiry on Agilent's Mass Filter Radiator, PD 28, bar code 3446604–01, CD 6, bar code 3440873–01 (Feb. 10, 2016) (supplemental questionnaire response) ("Feb. 10 Response"); Scope Inquiry on Agilent's Mass Filter Radiator, PD 29, bar code 3468739–01 (May 13, 2016) (April 8 – request for information response) ("May 13 Response"). Agilent also provided a declaration from its Research and Development Project Manager to support the assertion that the MFR acts as a finished heat sink. *See* Feb. 10 Response at Attach. 7 ("R&D Declaration"). The R&D Declaration explained the details regarding the heat transfer properties of the MFR, which included certain material specifications, required temperature changes, and thermal resistance parameters. *See id.*

Commerce issued its Final Scope Ruling on August 10, 2016, finding that the MFR is within the scope of the Orders and did not qualify for either of the two exclusions proposed by Agilent. *See* Final Scope Ruling at 17–23. With respect to the finished merchandise exclusion, Commerce found that the MFR does not contain non-extruded aluminum parts, is processed in a manner consistent with the scope of the Orders, and fits within the physical description of an aluminum extrusion product covered by the Orders. *See id.* at 17–21. With respect to the finished heat sink exclusion, Commerce concluded that Agilent failed to establish with evidence on the record that the MFR was designed "around meeting specific thermal performance requirements" and was sufficiently "tested to meet such specific thermal performance requirements." *Id.* at 21.

Plaintiff commenced this action on September 14, 2016. *See* Summons. Plaintiff filed its Rule 56.2 motion on March 31, 2017, asserting that Commerce's Final Scope Ruling was unsupported by substantial evidence. *See* Pl.'s Mot. 24. Defendant argues that the Final Scope Ruling should be affirmed because it is supported by substantial evidence and is in accordance with the law. *See* Def.'s Resp. 26.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to review Commerce's scope determination. *See* 28 U.S.C. § 1581(c) (2012);[5] Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a(b)(1)(B)(i) (2015).[6]

[5] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2015 edition.

The court must set aside "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). *See also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007). "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

Plaintiff alleges that the Final Scope Ruling was unsupported by substantial evidence. *See* Pl.'s Mot. 14–20. Plaintiff argues that detailed information provided in its application and subsequent filings, including the R&D Declaration, establish that its MFR is a finished heat sink excluded from the scope of the Orders. *See id.* at 15–16. Defendant counters that Commerce's determination was supported by substantial evidence because the record demonstrates that the MFR does not qualify for the finished heat sink exclusion.[7] *See* Def.'s Resp. 14–25.

The scope of an antidumping or countervailing duty order may need clarification at times "because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." 19 C.F.R. § 351.225(a) (2013).[8] Antidumping and countervailing duty orders "may be interpreted as including subject

[7] Defendant argues that Agilent did not demonstrate that the MFR was "organized around meeting specified thermal performance requirements" because the record evidence indicates that the MFR is a Faraday cage rather than a heat sink. *See* Def.'s Resp. 14–22. Defendant alleges that Agilent failed to show that the MFR has been "fully, but not necessarily individually, tested to meet those specified thermal performance requirements" because the record evidence does not demonstrate that the MFR was actually tested to meet certain thermal requirements and the original testing data was not available. *See id.* at 22–25.

[8] To clarify the scope of an order, Commerce's regulations authorize the agency to interpret an antidumping or countervailing duty order and issue scope rulings that address whether particular products are covered by the scope. *See* 19 C.F.R. § 351.225(a). In determining whether a particular product is included within the scope of an antidumping or countervailing duty order, Commerce must follow an interpretative framework provided by 19 C.F.R. § 351.225. If an interested party submits an application requesting Commerce to clarify whether the scope of an order covers particular merchandise, Commerce must either issue a final scope ruling pursuant to 19 C.F.R. 351.225(d) or formally initiate a scope inquiry pursuant to 19 C.F.R. § 351.225(e) within forty-five days after receiving the application for a scope ruling. 19 C.F.R. § 351.225(c)(2). Commerce may refrain from conducting an inquiry and issue a final scope ruling if it can determine whether a product is included or excluded from the scope of an order based solely upon the application for a scope ruling and the descriptions of subject merchandise contained in the petition, the underlying investigation, and determinations made by Commerce and the U.S. International Trade Commission. *See* 19 C.F.R. § 351.225(d), (k)(1).

merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002). Generally, Commerce "enjoys substantial freedom to interpret and clarify its antidumping orders." *Duferco*, 296 F.3d at 1096 (quoting *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir 2002)). If the Department fails "to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion[,] [the Department's determination is] unsupported by substantial evidence." *Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1323 (2014) (quoting *Allegheny Ludlum Corp. v. United States*, 24 C.I.T. 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)). Although Commerce's "explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore*, 557 F.3d at 1319–20 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Commerce's Final Scope Ruling found that the MFR is included within the scope of the Orders pursuant to 19 CFR 351.225(d) and (k)(1). *See* Final Scope Ruling at 23. In determining whether certain merchandise is included within the scope of an antidumping or countervailing duty order, Commerce must first look to the plain language of the Order. *See Duferco Steel*, 296 F.3d at 1097. The scope of the Orders includes "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654. Agilent's MFR is created by machining and plating a single piece extruded aluminum tube. *See* Agilent's Scope Ruling Request at 3. The Department determined based on Agilent's Scope Ruling Request that Agilent's MFR is covered by the plain language of the Orders. *See* Final Scope Ruling at 17. Commerce found that unless otherwise excluded as "finished merchandise" or a "finished heat sink," the MFR is covered by the scope of the Orders. *See id.*

Commerce's Final Scope Ruling analyzed the language of the exclusions to determine whether the MFR was expressly excluded from the scope of the Orders. *See* Final Scope Ruling at 17–23. Commerce determined first that the MFR was not excluded from the Orders

under the "finished merchandise" exclusion.[9] *See id.* at 17–21. The Department then turned to the "finished heat sink" exclusion and explained as follows:

> The exclusion for heat sinks describes a specific category of excluded "finished heat sinks," which meet the following requirements: (1) the design and production of the product must be "organized around meeting specified thermal performance requirements;" and, (2) the product must be "fully, but not necessarily individually, tested to meet those specified thermal performance requirements." Agilent does not provide compelling evidence that the "design and production" of its MFR is "organized around meeting specified thermal performance requirements." Agilent identified specific surface finish, flatness, perpendicularity, and locational tolerances for its MFR. However, as explained in ECCO LED Light Bars Scope Ruling, such requirements are not in and of themselves "specified thermal performance requirements," around which the design and production of the product is organized. Agilent also provides certain thermal performance metrics under which the MFR is tested. However, Agilent has not demonstrated that the "design and production" of its MFR was "organized around meeting any specified thermal performance requirements," or that such thermal performance specifications existed at that time. We noted that the design of the MFR was reportedly developed several years ago, but that Agilent's R&D Declaration is a May 2015 document. Agilent's R&D Declaration further explains: "[a]lthough minor revisions have been made in recent years the thermal design has not changed since it was developed [. . .] over 15 years ago." For these reasons, it is also not possible for the MFR to be "fully, but not necessarily individually, tested to meet such specified thermal performance requirements, as required by the scope of the Orders."

---

[9] To qualify for the "finished merchandise" exclusion, the "merchandise must contain aluminum extrusions 'as parts' and be 'fully and permanently assembled.'" *IKEA Supply AG v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1202, 1206 (2016). Commerce explained in its Final Scope Ruling that in order to qualify for the finished merchandise exclusion, "the product must contain both aluminum extrusions as parts, as well as some component besides aluminum extrusions." Final Scope Ruling at 18. Commerce concluded that "because Agilent's MFR is composed entirely of aluminum extrusions, it is not excluded from the scope of the order under the 'finished merchandise' exclusion." *Id.* Plaintiff has not challenged the finished merchandise exclusion in the instant action before the court. *See* Pl.'s Mot. 1–24.

Id. at 22. Accordingly, Commence concluded that "Agilent's MFR is not a 'finished heat sink'" and "is therefore subject to the scope of the Orders." *Id.* at 23.

Although Commerce has broad discretion when it interprets the scope of an antidumping or countervailing duty order, Commerce's determinations must be supported by substantial evidence. *See Duferco*, 296 F.3d at 1096; *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001). Defendant argues that Commerce explained adequately how the record supported the conclusion that the MFR failed to meet the requirements of the finished heat sink exclusion. *See* Def. Resp. 14–25. Commerce's entire analysis of the record evidence was contained, however, in a single conclusory paragraph. *See* Final Scope Ruling at 22. Commerce's cursory explanation failed to address the considerable amount of record evidence submitted by Agilent to show that the MFR was designed and tested around specific thermal performance requirements.[10] *See, e.g.,* Agilent's Scope Ruling Request; Mar. 23 Response; Post-Meeting Submission of Slide Presentation, PD 12, bar code 3272219–01 (Apr. 24, 2015); Response to Comments by the Aluminum Extrusions Fair Trade Committee That Agilent Technologies' Mass Filter Radiator Is Not Excluded from the Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China, PD 15, bar code 3278725–01 (May 22, 2015); Feb. 10 Response; May 13 Response; R&D Declaration.

The court finds that Commerce's scope ruling did not adequately discuss the record evidence submitted in support of Agilent's position, including the R&D Declaration and questionnaire responses. Commerce noted merely that "surface finish, flatness, perpendicularity, and locational tolerances" were "not in and of themselves 'specified thermal performance requirements,' around which the design and production of the product is organized." Final Scope Ruling at 22. Commerce did not explain why the description of thermal performance requirements contained in Agilent's submissions, including the explanations in the R&D Declaration, were insufficient to satisfy the thermal performance test of the exclusion. Commerce did not consider Agilent's R&D Declaration because it was prepared in 2015, while the MFR product was designed fifteen years earlier. Apparently Commerce disregarded the information in the R&D Declaration because the document was not created contemporaneously with the

[10] Specifically, Agilent submitted its scope ruling request, an initial questionnaire response, the slides from a presentation to Commerce, responses to Petitioner's comments, two supplemental questionnaire responses, and the R&D Declaration regarding the design of the MFR.

development of the MFR. *See id.* The Department failed to cite any relevant authority to support its position that the information contained in a recently created document was inadequate or inherently unreliable. The court is not convinced that it was reasonable for Commerce to ignore a sworn declaration merely because it was written years after the product was designed. Presumably the declarant was informed of the MFR's original design, production, specific thermal performance requirements, testing requirements, and other relevant information. Commerce also did not sufficiently address the other information provided by Agilent, including its scope ruling request, questionnaire response, presentation slides, responses to Petitioner's comments, and two supplemental questionnaire responses. Commerce did not adequately discuss the record evidence that, on its face, provided support for Agilent's position. *See Ceramark Tech., Inc.*, 38 CIT at __, 11 F. Supp. 3d at 1323.

The court finds that Commerce's explanation regarding why the MFR does not qualify for the finished heat sink exclusion is unsupported by substantial evidence. This matter is remanded for Commerce to consider the record evidence, including the R&D Declaration, and to provide a reasonable explanation regarding whether Agilent's MFR is a finished heat sink excluded from the scope of the Orders.

CONCLUSION

For the reasons set forth above, the court holds that Commerce's scope determination is not supported by substantial evidence. Therefore, in accordance with the foregoing, it is hereby

ORDERED that Commerce's scope determination regarding Agilent's mass filter radiator is remanded for Commerce to fully address the evidence on the record relating to the applicability of the finished heat sink exclusion; and it is further

ORDERED that Commerce shall file its remand determination on or before November 1, 2017; and it is further

ORDERED that the Parties shall file any comments on the remand determination on or before December 1, 2017; and it is further

ORDERED that the Parties shall file any replies to the comments on or before December 15, 2017.

Dated: September 1, 2017
New York, New York

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

Slip Op. 17–120

XI'AN METALS & MINERALS IMPORT & EXPORT CO., LTD., Plaintiff, -and- THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and STANLEY BLACK AND DECKER, INC., Consolidated-Plaintiffs, v. UNITED STATES, Defendant, -and- MID CONTINENT STEEL & WIRE, INC., Intervenor-Defendant.

Senior Judge Aquilino
Consolidated Court No. 15–00109

[Plaintiff motions for judgment on the agency record, contesting surrogate-value determinations based thereon, granted in part; remanded to the International Trade Administration.]

Dated: September 6, 2017

Gregory S. Menegaz, J. Kevin Horgan, Alexandra H. Salzman, and *John J. Kenkel, deKieffer & Horgan, PLLC*, Washington, D.C., for the plaintiff.

Lawrence J. Bogard and *Peter J. Bogard, Neville Peterson LLP,* Washington, D.C., for the consolidated-plaintiffs.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant. Also on the papers *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director; *Zachary Simmons*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of counsel.

Adam H. Gordon and *Ping Gong, The Bristol Group PLLC*, Washington, D.C., for the intervenor-defendant.

OPINION & ORDER

AQUILINO, Senior Judge:

At bar are consolidated complaints invoking 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii) and 28 U.S.C. §1581(c) jurisdiction over the final results of the fifth administrative review ("AR5") of its antidumping-duty order covering certain steel nails from the People's Republic of China ("PRC") published by the U.S. Department of Commerce, International Trade Administration ("ITA") *sub nom. Certain Steel Nails from the PRC*, 80 Fed.Reg. 18816 (April 8, 2015), PDoc 294. *See* accompanying final issues and decision memorandum ("*IDM*"), PDoc 276, covering the period of August 1, 2012 through July 31, 2013.

Moving for judgment on the resultant administrative record of AR5, plaintiff Xi'an Metals & Minerals Import & Export Co., Ltd. raises four issues: (1) the suitability of Thailand as the primary surrogate country, (2) valuation of its brokerage/handling ("B&H") and freight costs, (3) adjustment of the weight denominator used in calculating

its inland freight and B&H costs, and (4) double counting of SG&A (selling, general, and administrative) labor expenses in the labor rate used.

Also moving for judgment pursuant to USCIT Rule 56.2, consolidated-plaintiffs The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. press one minor issue and a much broader matter for relief: (5) correction of a "transcription error" in their factors-of-production ("FOP") database and (6) various challenges to ITA's "differential pricing" analysis.

Judicial review of AR5 is governed by the applicable law and by the substantial evidence of record, which has long been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See* 19 U.S.C. §1516a(b)(l)(B)(i).

I

The antidumping-duty statute requires the ITA to seek surrogate values ("SVs") for the factors of production for subject merchandise produced in or exported from a non-market economy ("NME") country. 19 U.S.C. §1677b(c)(1). The agency selected Xi'an Metals and the Stanley firms as AR5's mandatory respondents. It sent antidumping questionnaires to them, to which they responded in a timely manner. ITA circulated a letter to interested parties inviting comments on surrogate country selection and SV data, to which it received comments and rebuttal comments. It thereafter issued supplemental questionnaires to which Xi'an Metals and Stanley also timely responded.

ITA published notice of the preliminary results of AR5 *sub nom. Certain Steel Nails from the People's Republic of China*, 79 Fed.Reg. 58744 (Sept. 30, 2014), PDoc 304. *See* accompanying preliminary decision memorandum ("*PDM*"), PDoc 224. Employing its differential pricing analysis, the agency preliminarily calculated a weighted-average dumping margin of 6.69 percent for Stanley and 72.40 percent for Xi'an Metals. As part of its analysis, ITA concluded that there was a pattern of export prices for comparable merchandise that differed significantly among purchasers, regions, or time periods. *See id*. at 17–18. For Stanley, it found that the average-to-average ("A-A") methodology did not appropriately account for such differences and applied the average-to-transaction ("A-T") methodology to some Stanley U.S. sales and applied A-A to its other United States sales (reflecting a "mixed" alternative methodology). *See id*. For Xi'an Metals, ITA concluded that the A-A methodology appropriately accounted for such differences and applied it to calculate that firm's weighted-

average dumping margin. *See id*. at 18. The agency also selected Thailand as the primary surrogate country for FOP valuation and surrogate financial ratios in constructing normal value. *See* PDoc 226.

During the course of its verification of the Stanley United States sales database and FOP, ITA accepted minor corrections that were brought to its attention. In February 2015, the agency requested that Stanley submit new sales and FOP databases to reflect the corrections that were revealed during verification. PDoc 257. Stanley did so timely. Whereafter ITA disclosed to the parties its calculations for AR5. On April 7, 2015, ITA received a ministerial error allegation from Stanley that urged the agency to correct a transcription error that Stanley had made in its revised FOP database. ITA declined to do so.

The AR5 final results were published the next day. Based on the differential pricing analysis and the use of Thai SV data, ITA calculated a weighted-average dumping margin of 13.19 percent for Stanley and 72.52 percent for Xi'an Metals. In those results, the agency used the consolidated customer code (field CCUSCODU) in the Stanley margin program after determining that the use of individual customer codes (field CUSCODU) for the *Preliminary Results* had been erroneous. *See IDM* at 45–46. This correction altered the results of the differential pricing analysis, leading ITA to apply the A-T methodology to all of the Stanley U.S. sales.

II

For its AR5 final results, ITA continued to select Thailand as the primary surrogate country. Plaintiff Xi'an argues the substantial evidence of record shows that that country is unsuitable as a surrogate in this case, that the Thai steel wire rod values are aberrant, and that either the Philippines or Ukraine is a superior primary surrogate country for valuing FOP.

A

Plaintiff Xi'an argues reports compiled by the U.S. Trade Representative in 2011, 2012 and 2013, the U.S. Department of Commerce, and FedEx International Resource Center all constitute substantial evidence of record showing that Thai customs officials routinely manipulate the entered values of imported merchandise, that such manipulation is pervasive across all sectors, and that therefore the Thai import data are tainted. Plaintiff Xi'an further argues that the average Thai import price for steel wire rod ("SWR") during the POR of $916 per metric ton is not only the highest SWR price of record but exceeds "by far" the benchmarks it provided therefor. Xi'an's benchmarks included SWR data from the World Bank Global Economic

Monitor ("GEM"), world steel prices published by MEPS (International) Ltd., MEPS Asian Market SWR prices, official Thai domestic steel prices, SWR prices for Thai domestic and export sales from TATA Steel, "UN Comtrade" (*i.e.*, United Nations International Trade Statistics Database) import prices for other countries at a comparable level of economic development as the PRC (including the Philippines and Ukraine), and world market prices published by Asian Metal and Metal Expert.

The AR5 final results explain that, in order to value an input accurately, ITA examines all relevant price information on the record, including any appropriate benchmark data; that in any given case the agency's current practice is to examine available import data for potential surrogate countries and/or data from the same HTS category for the surrogate country over multiple years to determine if the current data appear aberrational compared to historical values; and that the existence of higher prices alone is not a sufficient basis for concluding that the price data for a particular SV are distorted or misrepresentative. On the record for AR5, ITA concluded that none of the datasets suggested by Xi'an Metals serve as reliable benchmark data to determine whether Thai wire rod import data are aberrational[1], and that Xi-an Metals' HTS data analysis, submitted to support concluding that the Thai import data for SWR are distorted and should be disregarded because they are higher than export prices, does not permit "an appropriate comparison in order to determine if the data [are] aberrational" because Xi'an's analysis is at the six-digit HTS level and "does not include any of the 11-digit HTS categories used to value wire rod at the *Preliminary Results*". *IDM* at 16.

Plaintiff Xi'an contends defendant's reasoning conflates the use of such benchmarks to evaluate the suitability of the average Thai import price with using such benchmarks as SVs in their own right; that the defensive responses[2] of it and the intervenor-defendant do nothing to dispel such "serious deficiencies" in ITA's choice of Thai-

[1] Specifically, ITA concluded: that the World Bank GEM data on the record are unclear as to which countries (which could include NME countries) were used to calculate the steel rod prices, but more critically do not make any distinction for carbon content, which is one of the most important physical characteristics of that input; that the "MEPS data suffer[ ] from similar deficiencies" in that none of the countries covered thereby are at the same level of economic development as the PRC nor do the data distinguish carbon content; and that none of the countries covered by the Asia Metal Market prices are potential surrogate countries meeting ITA's surrogate country criteria. *See IDM* at 15–16.

[2] To wit: that the reports cited by Xi'an Metals refer only to general concerns about certain practices by Thailand's Customs Department and fail to address the specific raw material inputs consumed by respondents in this case; that the Thai SWR import values on which ITA relied cannot be concluded aberrant, as the existence of higher prices alone does not necessarily indicate that price data are distorted or misrepresentative; and that Xi'an Metals fails to identify record evidence that materially undermines the integrity of the SWR values upon which ITA relied.

land as the primary surrogate country; that because the defendant and ITA acknowledge that Thai customs officials arbitrarily increase *some* import values the record evidence provides reason to believe or suspect that the import values of the inputs used as SVs for Xi-an Metals' inputs were manipulated; and that defendant's claim that the agency "believe or suspect" analysis "hinges on specific and objective evidence on which [ITA] would rely in determining that a country's surrogate value data were unreliable" is not supported in practice.

Assuming the correctness of its foregoing position, plaintiff Xi'an argues that either the Philippines or Ukraine is superior to Thailand as a primary surrogate country in this case since the data for neither are tainted by manipulation of entered values for imported merchandise. The plaintiff contends the Ukrainian SWR prices from Metal Expert in particular are more specific than the Thai values as to the diameters of the SWR, and ITA has used that source for SWR in past reviews. And plaintiff Xi'an complains that the defendant does not back up its "fall back" argument that ITA "is not required to consider or give weight to any particular criteria in determining what constitutes the best available information on the record" for SVs with reference to substantial evidence when the agency emphasizes certain criteria and "completely ignores" other data quality criteria. XM Reply at 9, referencing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed.Cir. 1997) (substantial evidence standard "requires more than mere assertion of 'evidence which in and of itself justified [the . . . determination], without taking into account contradictory evidence or evidence from which conflicting inferences would be drawn'", quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

The question, as always, is whether substantial evidence of record supports ITA determination(s). This court is unpersuaded herein that it does not, or that the agency has not considered all available evidence. Defendant's logic is weak at points[3], but ITA's determination has substantial support on the record, and *in toto*, plaintiff Xi-an essentially asks for substitution of judgment for that of the agency, a request in conflict with the teaching of *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966). *See, e.g.*, *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984) ("the possibility of

[3] Plaintiff Xi'an argues, for example, that defendant's contention that Ukraine's Metal Expert prices are unusable because they do not satisfy ITA's criteria of being exclusive of taxes and duties is disingenuous when the defendant states in a previous sentence that the Metal Expert prices are actual transactions that include 20% VAT and a 4% mark-up charged to intermediate traders who buy the material from domestic producers and sell to warehouses, and the calculation of the price free of such taxes and duties is a simple mathematical computation which ITA has performed in the past.

drawing two inconsistent conclusions from the same evidence does not prevent an administrative agency's finding from being supported by substantial evidence") (quoting same). *Cf. Elkay Manufacturing Co. v. United States*, 40 CIT ___, ___, 180 F.Supp.3d 1245, 1255 (2016) ("record evidence of manipulation of [Thai] customs values does not rise to such a level that [ITA] was left with no choice but to foreclose any use of Thai import data to determine [an SV] for a production input"), *appeal filed*, No. 16–2637 (Fed.Cir. Sept. 14, 2016).

B

Plaintiff Xi'an also argues that a military coup in Thailand should have triggered a "reason to believe or suspect" standard of pricing distortion in that country's economy. It placed 43 pages of articles on the record detailing the massive political unrest and protests that rocked Thailand between 2011 and 2014, culminating in military-controlled government. The review period ("POR") at issue in this appeal is August 1, 2012 through July 31, 2013. The plaintiff claims the materials covering Thailand's political and economic turbulence attest that the 2011 elections were never accepted as legitimate, that the military coup was an undemocratic and complete takeover of the country, and that it was reasonable to conclude that a free-market economy could not properly function in the absence of the free flow of information or impartial rule of law. Plaintiff Xi'an argues the issue should be remanded for ITA to explain how the military coup does not meet the lenient "reason to believe or suspect" standard, because it is counter-intuitive, if not hypocritical, that the agency would reject the PRC economy based on state control but then select the an alternative country under military dominance as the "free-market" surrogate for the PRC where "better" alternative countries were presented on the record for which no such distortions were alleged.

The burden is on the plaintiff, however, to provide for the record evidence to support its argument. The AR5 final results explain ITA's

> disagree[ment] with Xi'[a]n Metals' argument that the Thai military coup renders Thai import data to be unrepresentative and unreliable. . . . [I]t is the Department's practice to focus on several criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, representative of a broad market average, and specific. Xi'[a]n Metals has neither provided any evidence on the record as to why the military coup affects the criteria considered by the Department nor how specific inputs are affected.

IDM at 13.

Plaintiff Xi'an's arguments here do not persuade as to the incorrectness of ITA's position on the subject. *See, e.g.*, *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed.Cir. 2009) (ITA's explanations need not be perfect, only "reasonably discernible").

C

Plaintiff Xi'an also complains that an NME respondent has no "ability" to select the primary surrogate country. The defendant counters this is contrary to the statute because the surrogate country must be deemed "appropriate by the administering authority." Xi'an replies that it could select the home market by applying all of the statutory criteria, including economic comparability and significance of production, *see* 19 U.S.C. § 1677b(c)(1)(B), and that the defendant has no answer to the problem of how an NME respondent can comply with the remedial nature of the antidumping laws if it has no way to estimate its costs when it sets the price for export to the United States. Plaintiff Xi'an states that it is simply pointing out that the NME respondent is severely disadvantaged vis-á-vis market economy respondents if it is not permitted to assert a surrogate country meeting all the criteria and host to reasonably reliable data for the valuation of its factors.

The court appreciates this concern and can concur that a rational producer would not chose the highest available steel costs when lower domestic, regional, and economically comparable sources are available[4], but the argument is one that conflicts with what has long been the case: "It is [ITA], not the respondent, that determines what information is to be provided" for a particular proceeding. *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F.Supp. 198, 205 (1986). *Accord Essar Steel Ltd. v. United States*, 34 CIT 1057, 1072–73, 721 F.Supp.2d 1285, 1298–99 (2010), *aff'd in relevant part*, 678 F.3d 1268 (Fed.Cir. 2012); *NSK, Ltd. v. United States*, 20 CIT 361, 367, 919 F.Supp. 442, 447 (1996); *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 920, 890 F.Supp. 1106, 1111 (1995); *Tianjin Mach. Import and Export Co. v. United States*, 16 CIT 931, 936, 806 F.Supp. 1008, 1015 (1992); *Chinsung Indus. Co. v. United States*, 13 CIT 103, 705 F.Supp. 598 (1989); *Timken Co. v. United States*, 11 CIT 786, 804, 673 F.Supp. 495, 513 (1987); *Smith-Corona Group Consumer Prods. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1577 n. 26 (Fed.Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). As the final selection of an

[4] *Cf. Sigma Corporation v. United States*, 117 F.3d 1401, 1408 (Fed.Cir. 1997) (finding problematic the rationale that a casting producer in the surrogate country would choose to pay the highest combination of prices for pig iron plus freight).

appropriate surrogate country occurs *post*-closing of the review period, it may be that such selection is not susceptible to the kind of predictability plaintiff Xi'an desires, but it is, nonetheless, susceptible to the burden of persuasion borne by interested parties.

D

Plaintiff Xi'an also asserts that ITA's surrogate brokerage and handling ("B&H") is unreliable and unreasonably high. It prays for remand consistent with *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT ___, 977 F.Supp.2d 1347 (2014), which barred the agency from relying on the hypothetical weight postured in *Doing Business* reports. The plaintiff argues that, for the denominator calculating B&H and inland freight costs, ITA should use either the maximum cargo load for a 20-foot container or Xi'an Metals' own average cargo load instead of the weight of 10,000 kilograms from the relevant *Doing Business* report.

The defendant responds that Xi'an Metals failed to exhaust this specific argument before ITA during the administrative process. It also responds that it would be inappropriate to use Xi'an Metals' own average cargo load because the value must come from a selected surrogate country, and that substantial evidence supports the use of the 10,000 kilogram denominator in any event because the relationship between costs and quantity is maintained in reliance upon the *Doing Business* report and results in an accurate per-unit cost. *See also* Def-Int's Resp. at 18–20.

Pursuant to 28 U.S.C. §2637(d), the court "shall, where appropriate, require the exhaustion of administrative remedies" in civil actions arising from ITA's antidumping- and countervailing-duty determinations. The doctrine of exhaustion is that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed.Cir. 1998), quoting *McKart v. United States*, 395 U.S. 185, 193 (1969). It is well-settled that "[a] reviewing court usurps the agency's function when it sets aside an agency determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reason for its action." *Unemployment Compensation Comm'n of Alaska v. Aragan*, 329 U.S. 143, 155 (1946) ("*UCCA*"); *accord Yantai Oriental Juice Co. v. United States*, 27 CIT 1709, 1719 (2003). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objec-

tion made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952). *See also Metz v. United States*, 466 F.3d 991, 999 (Fed.Cir. 2006).

Thus, a party must present all arguments to ITA at the time it is addressing an issue. *E.g*., *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed.Cir. 2008). A party's obligation to exhaust its administrative remedies applies equally to overall issues as well as to individual arguments. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed.Cir. 1990). By failing to raise this argument until now, Xi'an Metals deprived ITA of the "opportunity to consider the matter, make its ruling, and state the reason for its action." *UCCA*, 329 U.S. at 155.

None of the limited exceptions to the exhaustion requirement apply here. *See Corus Staal BV v. United States*, 30 CIT 1040, 1050 n. 11 (2006) (identifying exceptions for pure legal questions, futility in raising argument at agency level, denial of access to confidential record, intervening judicial interpretation), *aff'd*, 502 F.3d 1370 (Fed.Cir. 2007). First, the pure question of law exception does not apply to arguments concerning the new factual analysis that plaintiff Xi'an now posits for the first time. *See Mittal Steel*, 548 F.3d at 1384 (pure question of law exception does not apply when the argument relies on unique facts of the case). ITA did not have the opportunity to analyze, in the first instance, Xi'an Metals' contentions pertaining to the *Doing Business* report and its preference for instead using those B&H costs incurred by Thai exporters of frozen freshwater shrimp. Second, it would not have been futile for Xi'an Metals to present the analysis of the factual information to the agency during the underlying administrative proceeding. The futility exception to the exhaustion doctrine is narrow: parties must demonstrate that they "would be required to go through obviously useless motions in order to preserve their rights", *Corus Staal*, 502 F.3d at 1379 (internal quotations and citations omitted), and plaintiff Xi'an's argument does not satisfy that standard. Third, there has been no intervening judicial decision that might excuse the absence of Xi'an Metals' argument at the administrative level. Fourth, plaintiff Xi'an does not allege any untimely access to the confidential record. Thus did it fail to exhaust.

E

Plaintiff Xi'an's last claim is that ITA made two labor classification errors: (1) it included staff labor costs in the the selling, general, and administrative ("SG&A") expenses, reasoning that the respondents did not report labor hours associated with the selling and administrative staff; and (2) from the financial statements of the Thai com-

pany L.S. Industries Co. ("LSI") used for calculation of surrogate financial ratios[5] ITA accounted for various line items such as "welfare" and "social security and compensation" as SG&A-type labor costs despite the fact that the Thailand National Statistics Office ("NSO") statistics used to calculate labor SV includes such benefits in the reported labor rate. *See IDM* at 19–20. ITA decided that it would adhere to how the surrogate financial statements themselves classified these items. *See id*. at 20.

And yet, in the calculation of surrogate financial ratios, it is the agency's practice to avoid double-counting labor costs that are included among SG&A by "adjust[ing] the surrogate financial ratios when the available record information -- in the form of itemized indirect labor costs -- demonstrates that labor costs are overstated." *Antidumping Methodologies in Proceedings Involving Non–Market Economies: Valuing the Factor of Production: Labor*, 76 Fed.Reg. 36092, 36093–94 (June 21, 2011) ("*Labor Methodologies*"). Stated differently, ITA looks to the surrogate financial statements on the record, and if they "include disaggregated overhead and [SG&A] expense items that are already included in the [record data used to value labor], [it] will remove these identifiable costs items." *Id*. at 36094. *See, e.g*., *Certain Frozen Warmwater Shrimp From the Socialist Rep. of Vietnam*, 67 Fed.Reg. 56158 (Sept. 12, 2011), and accompanying issues and decision memorandum ("I&D memo") at cmt. 5.B.

The defendant maintains that ITA followed practice during the administrative proceeding by treating labor-related costs in its financial ratio calculations in the same manner that the surrogate company disaggregates labor costs, explaining that under ITA's FOP methodology for calculating normal value, labor expenses capture the labor cost only for manufacturing, which is obtained by multiplying a respondent's reported direct and indirect labor hours to manufacture subject merchandise by the surrogate labor rate (*e.g*., the Thai NSO labor rate). The defendant contends that the Thai NSO 2007 labor data, used to calculate the labor SV, were derived from an average remuneration paid for persons engaged in various "manufacturing and non-manufacturing activities"[6] and that, contrary to plaintiff Xi'an's argument, it does not follow that the labor expenses calculated using the NSO labor rate capture all labor expenses. Further, the defendant contends, the respondents did not report labor hours associated with selling and administrative staff, as staff labor costs would normally be expected to be included among the SG&A expenses.

[5] *See* Final Surrogate Value Submission and Pre-Preliminary Comments (Aug. 19, 2014) at Exhibit SV-1, PDoc 208.

[6] Def's Resp. at 82.

Concluding, the defendant argues the SG&A labor expenses in each surrogate company's financial statement should therefore be included in the numerator of the SG&A ratio associated with that company, and therefore the SG&A labor expenses listed in LSI's financial statements should be classified under the SG&A expenses and included in the respective numerator of the SG&A ratio calculation, an outcome ITA ensured by including the "Salary and Bonus" line item from LSI's "Total Cost of Management" in the SG&A buildup in the financial ratio calculations. *See* Def's Resp. at 82–83, referencing *IDM* at 19–20. *See also* Def-Int's Resp. at 20–22.

Plaintiff Xi'an counters that defendant's (and intervenor -defendant's similar) explanation merely restates ITA's position from the *IDM* rather than confronting the facts and logic of their argument, which it contends amounts to a waiver of any surrogate labor cost defense[7]; and that the Thai NSO 2007 labor data do indeed cover "all" labor expenses, including overtime, benefits, vacation pay, and the range of executive, administrative, and production labor, regardless of the exactitude of "various manufacturing and non-manufacturing activities". XM Reply at 19, referencing Pet's SV Submission at Ex. 9, PDocs 158–160. Plaintiff Xi'an further argues, it does not follow from the fact that respondents are not required to report hours of administrative or non-production labor (*see* NME questionnaire) that those costs have not been counted, and also that it is indisputable that the labor rate ITA now relies upon pursuant to *Labor Methodologies* is an inflated rate intended to account for those very expenses.

It is apparent from the *IDM* at page 19 that ITA's reasoning was informed by *Elkay Manufacturing Co. v. United States*, 38 CIT ___, ___, 34 F.Supp.3d 1369, 1375–84 (2014) (rejecting argument that the NSO labor rate "failed to capture any SG&A labor costs", but also rejecting conclusion that "double-counting" of SG&A labor expenses required the specific downward adjustments made in that case, *i.e.*, the record "lack[ed] substantial evidence to support [ITA]'s conclusion that the rate [it] applied to the hours of production labor reported by the investigated respondents overstated the value of those labor hours to such an extent as to justify the specific, compensatory ad-

[7] À la *Calgon Carbon Corp. v. United States*, 40 CIT ___, Slip Op. 16–4 (Jan. 20, 2016) at 11 ("[t]he government and petitioners, in their response briefs, chose not to address the merits of CAC's arguments, which were raised by CAC in its opening brief supporting its CIT Rule 56.2 motion[;] [a]ny argument, therefore, defending ITA's selection of a $2.42 per kilogram rate to Shanxi DMD, is waived, as CAC claimed in its reply brief"), citing *United States v. Great American Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed.Cir. 2013) ("[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived") (add'l citations omitted). *See also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1346–47 (Fed.Cir. 2016), quoting *id*.

justments . . . made to the SG&A/interest expense ratios"). *See also Elkay Manufacturing Co*., *supra*, 40 CIT at ___, 180 F.Supp.3d at 1257–59 (sustaining ITA's revised decision not to remove identifiable SG&A labor items from its calculated SG&A expense ratios). The problem here, however, appears similar to that which was recently considered in *Yingqing v. United States*[8]. But, the source and labor rate ITA has deliberately chosen pursuant to *Labor Methodologies* apparently includes all types and forms of labor as well as labor benefits, and, in that announcement of new methodology, the agency recognized that it would be over-counting the labor rate for production labor and specifically indicated therein that the financial ratios would have to be adjusted so labor was not double-counted; the implicit remedy would be to move all labor costs explicitly incorporated in the SG&A source and rate chosen to the ratio denominators.

In this case, by not removing the various line items such as "welfare" and "social security and compensation" that are presumptively included already in the Thai NSO rate, the SV for labor is inflated, which requires correction initially via the court's grant of the pertinent part of plaintiff Xi'an's motion for agency reconsideration. On remand therefor, if ITA continues to select a source and rate that includes all labor positions and benefits, it needs to ensure that all forms of labor costs on the financial statements are in the "materials-labor-energy" (or "MLE") denominator of the ratios in accordance with its *Labor Methodologies*, but whatever course it chooses will need to obviate the double counting[9] that is manifest in the AR5 final results.

III

A

The first claim of the Stanley plaintiffs' Rule 56.2 motion is that ITA arbitrarily refused to correct a transcription error in their February

[8] 40 CIT ___, ___, 195 F.Supp.3d 1299, 1309–11 (2016) (discussing reliance upon Thai 2007 NSO data and LSI's financial statements and remanding for explanation of why items such as "Employee welfare cost" and "Subsidy of Social Security Fund and Workmen Compensation Fund", which ITA had previously recognized in *Certain Steel Nails from the PRC*, 79 Fed.Reg. 19316 (April 8, 2014), and accompanying I&D memo at cmt. 2, as indirect labor expenses of the type covered by the 2007 NSO data which therefore necessitated adjustment of the surrogate financial ratios to avoid double counting, had not been treated similarly in the review under consideration in *Yingqing*).

[9] Prior to *Labor Methodologies*, ITA's approach had been to select a source for the production labor rate that included only production labor, but the "mixed method" adopted by ITA here double counts the respondent's labor cost by saddling production labor with a rate embedded with administrative and executive labor and then charging for that administrative and executive labor a second time by leaving those costs in the factory overhead and SG&A ratio numerators. *Cf. Yingqing, supra*.

17, 2015 post-verification FOP database (specifically the omission of a zero in the tenth or one-hundredth decimal place in field "V_DL-CROD"), which they claim resulted in the FOP for low-carbon SWR being overstated by almost nine percent, and directly resulted in an erroneous increase in their dumping margin of 3.09 percentage points -- about 30 percent higher than it would have been absent the error. ITA had directed them to submit the post-verification database to implement minor FOP corrections that it had accepted at verification, including corrections to the variance rate for SWR. PDoc 257. The purpose of the revised database was thus to ensure that the AR5 final results would be based on verified data, and the minor corrections should have reduced the Stanley dumping margin from the *Preliminary Results*.

The Stanley plaintiffs contend ITA did not issue its request for the revised FOP database until eight weeks after verification, and the agency initially afforded only two days in which to prepare and submit the revised database, a deadline subsequently extended over a President's Day weekend, which relatively short deadline "certainly contributed to Stanley's computer programmer inadvertently omitting a zero to the right of the decimal point in the field for concerning low-carbon SWR." Stanley Reply at 3. The consolidated-plaintiffs further explain that it was not possible to have identified the error in their administrative case brief because the revised database was submitted on the same day as that brief. *Id*. at 4.

Whatever the excuse, the error occurred, and it is manifest. ITA's ministerial error memorandum, PDoc 297, and the defendant imply Stanley had an opportunity to bring the error to ITA's attention in the time period between the case brief and the AR5 final results, to which the Stanley reply is that the timely submission of a ministerial error allegation is the only available procedure for correcting a clerical error in a submission made concurrently with a case brief. *See* 19 U.S.C. §1675(h) and 19 C.F.R. §351.224(e) (contemplating that final results are only "final" subject to correction of ministerial errors). Stanley did so. CDoc 327. But ITA rejected the ministerial error allegation by stating that, generally, "ministerial errors include only those errors that are produced by the Department. The Department will only correct a respondent's error when that error is 'so egregious and so obvious' that failing to correct the error would be arbitrary and capricious." PDoc 297 at 4. ITA then concluded the error was "neither so egregious nor so obvious as to be characterized as a ministerial error." *Id*.

However, in light of the Stanley presentment, it is difficult to fathom how their ministerial error could have been concluded otherwise, especially given its impact on their overall dumping margin (a 43.5 percent change from the *Preliminary Results*). In short, ITA must be ordered on remand to make the correction. *See, e.g*., *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed.Cir. 1995) (it is incumbent on ITA to correct such errors, as it has a "duty to determine dumping margins 'as accurately as possible'"), quoting *Rhone Poulenc, Inc. v United States*, 899 F.2d 1185, 1191 (Fed.Cir. 1990). *See also Brother Indus., Ltd. v. United States*, 15 CIT 332, 341, 771 F.Supp. 374, 384 (1991) ("court-ordered amendments of ministerial errors are not destructive of the ITA's ability to manage its proceedings").

B

The remainder of the Stanley motion focuses on ITA's targeted dumping analysis of its sales, *i.e*, by "purchasers, regions, or periods of time." 19 U.S.C. §1677f-1(d)(1)(B). *See, e.g., Mid Continent Nail Corp. V. United States*, 38 CIT ___, ___ n. 3, 999 F.Supp.2d 1307, 1311 n. 3 (2014).

Section 1677f-l(d) of Title 19, U.S.C. directs "in general" that ITA "shall" calculate dumping margins using the A-A or transaction-to-transaction ("T-T") price comparison methods, *see id*., subsection (1)(A), but where the record establishes the existence of a pattern of export prices that differ significantly among customers, regions, or time periods and why such differences cannot be accounted for using the A-A method is explained, ITA "may" calculate dumping margins using a different methodology such as the A-T method. *See* 19 U.S.C. §1677f-l(d)(l)(B). When ITA uses that method, it reverts to "zeroing"[10] but does not ignore non-dumped sales when it uses the A-A method.

[10] This refers to the practice of not using transactions with U.S. selling prices above normal value to offset transactions with U.S. selling prices below normal value. *See, e.g., Timken Co. v. United States*, 38 CIT ___, ___, 968 F.Supp.2d 1279, 1281–82 (2014). ITA abandoned "zeroing" in administrative reviews in 2012, *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed.Reg. 8101 (Feb. 14, 2012), and Stanley complains that the continued act of "zeroing" generates higher calculated dumping margins (Stanley claims the use of A-T with zeroing raised its margin from zero to 13.19 percent). The court observed in dicta nearly twenty years ago that comparisons based on the A-A method appear to "allow higher prices to cancel out some amount of dumping" and also that "transaction-specific price comparisons are statistically biased toward a dumping finding", *Borden, Inc. v. United States*, 22 CIT 233, 235–40, 4 F.Supp.2d 1221, 1224–28 (1998), citing *How the GATT Affects U.S. Antidumping and Countervailing Duty Policy*, 33–35, 66 (Congressional Budget Office 1994), but to that point "zeroing" had long been understood to be a not-improper *philosophic, not mathematic*, interpretation of how dumping is best determined under U.S. law -- at least until certain members of appellate panels of the World Trade Organization began to surprise these United States in opining what had originally been negotiated and "agreed to" when the Antidumping "Agreement" was signed.

The Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act explains that Congress intended "targeted dumping" to comprise "situations [in which] an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions." The SAA explicitly links ITA's use of the A-T method to "targeted dumping":

> New Section 777A(d)(l)(B) provides for a comparison of average normal values to individuals export prices ... in situations where an average-to-average or transaction-totransaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e*., where targeted dumping may be occurring.

SAA at 843.

Consistent with the SAA, ITA promulgated a targeted dumping regulation, 19 C.F.R. §351.414(f). *See Antidumping Duties; Countervailing Duties*, 62 Fed.Reg. 27296, 27373–76 (May 19, 1997). Its salient elements are:

> 1. Targeted dumping must be determined through the use of "standard and appropriate statistical techniques."
>
> 2. The A-T comparison is used only for those specific sales that comprise targeted dumping.
>
> 3. "Normally," targeted dumping will be pursued only in response to an allegation by a petitioner that includes supporting factual information and an explanation as to why the A-T comparison could not take into account any alleged price differences.

The current[11] test of targeted dumping, differential pricing, purports to examine differences in a respondent's prices among individual purchasers, geographic regions, and quarterly time periods. It is performed at the level of individual product control numbers (CONNUMs) and net of adjustments to gross U.S. selling price. ITA does

[11] ITA's approach has evolved over at least five distinct tests to determining the presence of targeted dumping: (1) the "pasta test", announced in 1998 in response to the *Borden* decision, *supra*; (2) the "P/2" test (*Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 Fed.Reg. 60630 (Oct. 25, 2007)); (3) the "*Nails I*" test (*Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed.Reg. 33977 (June 16, 2008)); (4) the "*Nails II*" test (*Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales At Less Than Fair Value*, 75 Fed.Reg. 14569 (March 26, 2010)); and (5) differential pricing (*Xanthan Gum from the People's Republic of China: Final Determination of Sales At Less Than Fair Value*, 78 Fed.Reg. 33351 (June 4, 2013), and accompanying I&D memo).

not require any allegation or factual support in differential pricing; rather, ITA now performs differential pricing by rote in every proceeding.

ITA analyzes prices for each CONNUM by dividing them into a series of "test groups" (each comprising prices to a specific purchaser, region, or calendar quarter) and "base groups" (comprising the remaining purchasers, regions, or calendar quarters). Prices to every purchaser, region, and calendar quarter are serially analyzed as a test group and then recycled into the base group of prices for that CONNUM. Differential pricing then entails three elements.

In the first element, ITA employs "Cohen's *d* statistic" to measure the "effect size" between each test group and its relevant base group. The agency describes effect size as a descriptive measure of the "magnitude" of the difference between two groups, which the Stanley plaintiffs contend *infra* is gross oversimplification.

ITA calculates the Cohen *d* statistic as the difference between the weighted average net prices of the test and base groups divided by the "pooled" standard deviation of the net prices of the two groups. The pooled standard deviation is calculated as the square root of the sum of the square of the base group's standard deviation plus the square of the test group's standard deviation, divided by two. The resulting coefficients are labeled as "small", "medium", or "large".

Notably, ITA ignores whether a test group's weighted-average price is higher or lower than the base group's weighted-average price. A "large" Cohen's *d* coefficient is 0.8 or greater, which means that the weighted-averages of the base group and the test group differ by 0.8 standard deviations. The agency deems all sales that meet or exceed the 0.8 Cohen *d* coefficient to have "passed" that threshold, thereby satisfying the statute's requirement that "significant" price differences exist as a precondition to using the A-T method.

In the second element, called the "ratio" test, ITA stratifies the percentage of a respondent's sales that "pass" the Cohen *d* test. If the value of a respondent's passing sales account for 66 percent or more of the value of its total sales, then the agency uses the A-T method with zeroing for all sales. If the Cohen *d* test "pass" rate is 33 percent or less, then ITA uses the A-A method for all sales. If the Cohen *d* test "pass" rate falls between 33 percent and 66 percent, then the agency uses the A-T method with zeroing for sales that "pass" the Cohen *d* test and the A-A method for the remaining sales. ITA deems this stratification of CDT "pass" rates to establish whether a "pattern" of significant price differences exists.

In the third element, called the "meaningful difference" test, ITA calculates the respondent's dumping margin in three ways. First, it

uses the A-A method for all sales. Second, it uses a "mixed" method in which the A-T method with zeroing is applied only to sales that have "passed" the Cohen *d* test while the A-A method is applied to the remaining sales. Third, ITA applies the A-T method with zeroing to all sales. Depending on the results of the "ratio" test, the margin resulting from either the second or third method is compared to the margin resulting from the A-A method for all sales. The agency deems a "meaningful difference" to exist between the two calculations if the margin using the A-T (or "mixed") method (1) generates a 25 percent relative change in the dumping margin compared to the A-A method, or (2) generates a dumping margin that crosses the *de minimis* threshold when compared to the A-A method. ITA deems the existence of a "meaningful difference" sufficient to explain why it cannot account for a pattern of significant price differences using the A-A method.

C

As an initial matter, the Stanley plaintiffs raise again the issue of ITA's "abrupt" withdrawal of its 1997 targeted dumping regulation pursuant to *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed.Reg. 74930 (Dec. 10, 2008). *See* 19 C.F.R. §351.414(f) (2007).

Mid Continent Nail Corp. v. United States, 846 F.3d 1364 (Fed.Cir. 2017), indeed held that withdrawal to have been unlawful and not harmless in accordance with the Administrative Procedures Act. Defendant's explanation is that, whereas the statute places certain restrictions on ITA selection of a comparison methodology for purposes of investigations, it does not do so for purposes of administrative reviews such as the one at bar. Def's Resp. at 2324, referencing 19 U.S.C. §1677f-1(d)(1)(B), SAA at 842–43. *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed.Cir. 2015), held that to be true, and cases since have consistently deferred to that interpretation. *E.g., Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT ___, ___, 182 F.Supp.3d 1350, 1364 (2016); *Nan Ya Plastics Corp., Ltd. v. United States*, 39 CIT ___, ___ n. 3, 128 F.Supp.3d 1345, 1349 n. 3 (2015); *Apex Frozen Foods Private Ltd. v. United States*, 38 CIT ___, ___, 37 F.Supp.3d 1286, 1293 (2014), *aff'd*, 862 F.3d 1322 (Fed.Cir. 2017); *CP Kelco Oy v. United States*, 38 CIT ___, ___, 978 F.Supp.2d 1315, 1320 (2014); *Timken Co. v. United States*, 38 CIT ___, ___ & n. 7, 968 F.Supp.2d 1279, 1286 & n. 7 (2014). Further, although ITA typically cites to 19 U.S.C. § 1677f-1(d)(1)(B) for "guidance", it does not consider that provision "binding" legal authority since its statutory authority to select a comparison methodology in reviews is derived from

a different provision, 19 U.S.C. §1677f-1(d)(2), which does not place restrictions on ITA's choice of comparison methodology. As such, the agency has discretion[12] to apply A-T methodology in reviews notwithstanding the circumstances surrounding the withdrawal of the pre-2008 targeted dumping regulation.

The defendant contends ITA properly applied A-T methodology during AR5. It found that the value of Stanley sales passing the Cohen *d* test accounted for more than 66 percent of the value of total Stanley United States sales and also found a meaningful difference between the weighted-average dumping margins calculated using the A-A methodology and an alternative comparison methodology based on the A-T method. *See* Stanley Final Results Analysis Memo at 3. *See also IDM* at 36. Specifically, when comparing the Stanley weighted-average dumping margin calculated pursuant to the A-A method and an alternative comparison method based on the A-T method, that margin rose above the *de minimis* threshold. Such a difference in the weighted-average dumping margins has been held to satisfy the statutory requirement that ITA explain why the A-A method cannot account for such differences. *See Apex Frozen Foods, supra*, 38 CIT at ___, 37 F.Supp.3d at 1295–96. *Cf. Golden Dragon Precise Copper Tube Grp., Inc. v. United States*, 39 CIT ___, Slip Op. 15–89 (2015) at 15–16 ("the significance of the 'effect size' . . . in and of itself 'explains why such differences cannot be taken into account' using A-A methodology").

Be that as it may, it misses the Stanley point that the regulation expressly limits the A-T methodology "to those sales that constitute targeted dumping", and it is this "limiting rule" that *Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT ___, ___, 918 F.Supp.2d 1317, 1327 (2013), and *Mid Continent* both held still in effect at the times in question. The AR5 final results violate this rule by applying the A-T methodology to all Stanley sales. Remand, for the purpose of properly applying it, is therefore necessary.

D

The Stanley plaintiffs argue that ITA's use of the Cohen *d* test is unlawful because it (i) was allegedly designed for a context dissimilar to that being analyzed by the agency in a differential pricing analysis; (ii) is arbitrary in terms of its classification of effect sizes; (iii) is

[12] But as a further threshold matter, the Stanley plaintiffs complain ITA initiated differential pricing without an allegation that they had engaged in targeted dumping. *And cf. Diamond Sawblades Manufacturers' Coalition v. United States*, 39 CIT ___, Slip Op 15–116 (Oct. 21, 2015), at 5–6 & n.4 (ITA rejecting a targeted dumping allegation as untimely and declining to self-initiate on the ground that the targeted dumping provision applies by its express terms to agency investigations not administrative reviews). The consolidated-plaintiffs do not press the point to one of unlawfulness herein, however.

unreasonable when the entire data population is available; and (iv) fails to measure statistical significance.

(i)

Their claim is that Dr. Cohen's *d* test was created for psychological research and used as a tool in the behavioral sciences and should not apply in a matter like this. The defendant responds that ITA uses the test to analyze a respondent's pricing behavior, *see IDM* at 31, and that the economics of pricing behavior is, in fact, a subset within the ambit of behavioral science. It is an accepted statistical test, employed by ITA to discern a pricing pattern, and the Stanley position neither persuades that the agency's use of it was unreasonable nor demonstrates unlawfulness thereof.

(ii)

The Stanley plaintiffs contend ITA's classification method for the Cohen *d* test effect size is arbitrary. By way of background, after ITA determines Cohen's *d* coefficient, it establishes a threshold to determine whether that is significant. *See PDM* at 16–17. The defendant explains that the agency adheres to the three different fixed thresholds Dr. Cohen deduced (small, medium, and large) because they allow ITA to determine the "significance" (or meaningfulness) of the differences between prices to a particular purchaser, region, or time period as well as the prices of comparable merchandise to all other purchasers, regions, or time periods in an efficient and predictable way, and are generally accepted thresholds for the *d* test. *See id*. at 34–35 (citing and quoting David Lane *et al*., "Effect Size," Section 2, "Difference Between Two Means" (stating that the guidelines suggested by Dr. Cohen as to what constitutes small, medium, and large effect size "have been widely adopted")). ITA generally uses the "large" threshold (*i.e*. Cohen's *d* coefficient above 0.8) as the threshold for passing the *d* test, because the "large" threshold provides the strongest support for the differences being meaningful. *Id*. at 36–37.

Substantial evidence of record herein supports the use of Dr. Cohen's *d* test and the threshold demarcations he intuited, along with the caveats he enunciated, since the record evinces that his test gained awareness, acceptance, and use among scientists within various disciplines of the self-professed community of "experts", *see, e.g., id*., and the Stanley arguments do little to contradict or counteract this fact. Therefore, because ITA used widely accepted thresholds, provided a rational explanation as to which threshold to employ, and selected a threshold for the Cohen *d* coefficient which has real world, practical meaning consistent with the statute, its use of the threshold

is not arbitrary. *Cf. Cosco Home & Office Prods. v. United States*, 28 CIT 2043, 2049–50, 350 F.Supp.2d 1294, 1299–1300 (2004) (holding ITA's interpretation of 19 U.S.C. §1675(a)(1) and amendment of its regulations reasonable); *Mitsubishi Heavy Indus., Ltd. v. United States*, 21 CIT 1227, 1233–35, 986 F.Supp. 1428, 1434–35 (1997) (50 percent test).

(iii)

The Stanley plaintiffs challenge ITA's application of the ratio test, claiming that it does not explain how the three thresholds thereof[13] satisfy the statutory requirements. ITA explained that it uses the ratio test to complete its determination as to whether there exists a pattern of prices that differ significantly by purchaser, region, or period of time. *See PDM* at 17. This is necessary because, even though the sales for one or more groups of comparable merchandise for specific purchasers, regions, or time periods may pass the Cohen *d* test, it does not necessarily follow that, in relation to the total volume of a respondent's export sales, there is sufficient evidence that there exists a pattern of prices that differ significantly. *See IDM* at 37–38. Pursuant to 19 U.S.C. §1677f-1(d)(1)(B), ITA "may determine" whether sales were made at less than fair value using the alternative method when subsections (i) and (ii) of the provision are satisfied, but the statute is silent as to how ITA may determine whether those subsections are thus and such. *See id*. The agency in this matter lawfully exercised its discretion in filling the gaps of determining how the A-T method could be considered as an alternative methodology. *See id. See also JBF RAK, supra*, 790 F.3d at 1364.

(iv)

The Stanley plaintiffs assert that the statute requires ITA to measure "statistical significance," which the Cohen *d* test does not measure. This assertion underlies many of the Stanley arguments, but "statistical significance" is irrelevant where, as here, the agency has a complete set of data to consider.

The statute provides that ITA may apply an alternative comparison methodology if it finds "a pattern of export prices (or constructed export prices) for comparable merchandise that differ *significantly* among purchasers, regions, or periods of time[.]" 19 U.S.C. §1677f-1(d)(1)(B)(i) (emphasis added). Additionally, the SAA states:

> New Section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices . . . in situations where an [A-A] or [T-T] methodology cannot account for a pattern of

[13] Thirty-three percent or less; 33–66 percent; and 66 percent or more.

> prices that differ *significantly* among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.

SAA at 843 (emphasis added). Neither the statute nor the SAA defines the term "significantly", but the consolidated-plaintiffs contend its plain meaning is "statistically significant." ITA interprets otherwise.

Statistical significance only takes on relevance when "determin-[ing] from a sample (*i.e.*, the data at hand) of a larger population an estimate of what the actual values (*e.g.*, the mean or variance) of the larger population may be". *IDM* at 34. Here, ITA has the entire population of the respondents' sales in the U.S. market; therefore, "'statistical significance' is not a relevant consideration." *Id*. The agency calculates the Cohen *d* coefficients to determine whether differences in prices for comparable merchandise among purchasers, regions, or time periods are significant, and those calculations are based upon all of the United States sales that Stanley reported for the POR, not merely a sample, and thus form the entire population of U.S. sales of subject merchandise. *See id*. Sampling error does not exist when there are complete data for analysis.

The Stanley plaintiffs state that the purpose of the Cohen *d* test is to "make reasonable queries as to *how big* an intervention effect may be when only a sample is available." It would be more accurate to state, however, that the Cohen *d* coefficient measure of effect size "quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the *significance* of the difference" based on *complete* information, not samples. *See id*. at 33 (citations omitted). Accordingly, once again, the "statistical significance" of ITA's calculations is not relevant to its analysis, and requiring the agency to measure statistical significance here, where it has incorporated all of the respondents' data in the analysis, would be inappropriate[14] .

As noted above, Congress did not use the word "statistical" or any variation thereof when it drafted the statute. And as ITA stated in the

[14] A number of Stanley arguments continue to press an interpretation of the term "significant" that is at variance with what the statute requires. For example, the consolidated-plaintiffs raise concerns with regard to accounting for random events and Type I error (*i.e.*, a "false positive" leading to incorrect rejection of a true null hypothesis), and they also express concerns about whether Cohen's *d* test tests a statistical hypothesis, which is necessary when measuring for statistical significance. But as indicated above, there are no random estimates of actual statistical measures because ITA's analysis relies on complete information to perform such calculations. *See IDM* at 34. Because the agency has the complete population of Stanley United States sales, none of the resulting calculations evince random errors because of sampling, and because there is no sampling or randomness, all issues related to Type I errors, which are errors that occur because of sampling, are moot.

IDM, and as Stanley has argued elsewhere, Congress acts intentionally when it drafts statutory language. Simply put, if Congress had wanted ITA to measure "statistical significance," it would have included the word "statistical"[15]. In applying the Cohen *d* test, ITA fulfills the statutory requirement to measure whether there exists a pattern of prices that differ "significantly", and the *d* test enables the agency to quantify, in a simple and transparent approach, whether prices differ significantly among purchasers, regions, or time periods.

(v)

The Stanley plaintiffs claim that several other aspects of ITA's differential pricing analysis contravene congressional intent. However, mere disagreement with its approach, where the statute is silent, is not a sufficient basis for the court to overturn the agency's reasoning. *See Mid Continent Nail Corp. v. United States*, 34 CIT 512, 519, 712 F.Supp.2d 1370, 1376–77 (2010) ("[g]enerally, courts lack an 'independent authority to tell the [agency] how to do its job' when a statute does not specify 'any Congressionally mandated procedure or methodology for assessment of the statutory tests'"), quoting *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed.Cir. 1996). The statute does not specify the particular analysis or approach that ITA must use, and in the absence of showing challenged aspects of agency analysis unreasonable, the court will defer to its discretion.

(vi)

The final step of ITA's differential pricing analysis examines whether the A-A methodology can account for a pattern of prices that differ significantly by determining whether there exists a meaningful difference in the weighted-average dumping margins calculated using that methodology and an appropriate alternative comparison methodology. *See IDM* at 36. The Stanley plaintiffs argue that the AR5 final results do not explain why the difference in the pattern of prices cannot be accounted for with the A-A method. But their argument fails to persuade that ITA's explanation therein as to why that approach cannot account for pricing differences was unreasonable. *See id*.

[15] The Stanley definition of "significant" is "1. a) having or expressing a meaning, b) full of meaning; 2. important; momentous; 3. having or conveying a special or hidden meaning; suggestive; 4. of or pertaining to an observed departure from a hypothesis too large to be reasonably attributed to chance", Stanley Br., p. 32, citing *Webster's New World Dictionary of the American Language* at 1325 (1980) (emphasis omitted), and that proffered definition supports ITA's understanding of being tasked by statute to find a meaningful difference between the average price of a test group and the average price of a comparison group, which the Cohen *d* test accomplishes. *See IDM* at 32, 36–37.

As explained in the AR5 final results (and again above), if the difference in the weighted-average dumping margins calculated using the A-A method and an appropriate alternative comparison method is *meaningful*, then that fact is indicative of whether that method cannot account for such differences and therefore an alternative method would be appropriate. *See id*. More precisely, a meaningful difference between the results of the A-A methodology and an appropriate alternative (A-T in this instance) exists if: (1) there is a 25 percent relative change in the weighted-average dumping margins between the A-A methodology and the appropriate alternative where both are above the *de minimis* threshold, or (2) the resulting weighted-average dumping margins move across that threshold. *See id*.

ITA found that a meaningful difference exists because the Stanley weighted-average dumping margin did move across that threshold upon a comparison of the two methods. *See id*. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two methods allows ITA to quantify *the extent to which* the A-A method cannot take into account different Stanley pricing. And ITA's determination that the A-A methodology cannot account for the difference in the pattern of prices in similar circumstances has been upheld in court. *E.g., Samsung Elecs. Co. v. United States*, 39 CIT ___, ___, 72 F.Supp.3d 1359, 1368 (2015) (holding that ITA reasonably explained that "the A-to-A method does not take into account such price differences because there is a *meaningful difference* in the weighted average dumping margins when calculated using the A-to-A method and the A-to-T method" and that Samsung's margin had moved across the *de minimis* threshold (citations omitted; emphasis in original)); *Apex, supra*, 38 CIT at ___, 37 F.Supp.3d at 1299–1300 (holding that ITA reasonably concluded that the A-A methodology could not account for targeting where plaintiff's margin crossed the *de minimis* threshold), *aff'd*, 862 F.3d at 1323–24. The Stanley argument does not persuade that this is an unreasonable approach to fulfilling the statute's aim of combating masked dumping.

In AR5, ITA concluded that the A-A methodology could not account for the difference in the pattern of prices once a meaningful difference existed between that methodology and the A-T approach when the Stanley weighted-average dumping margin moved above the *de minimis* threshold. And, as in *Apex* and *Samsung*, Stanley does not show that the meaningful difference was immaterial.

(vii)

The Stanley plaintiffs allege that ITA use of the Cohen *d* test is biased toward finding prices that differ significantly, leading it to overuse the A-T method. The argument appears to conflate passing the *d* test with application of the A-T comparison methodology, which requires that ITA find not only that a pattern of prices that differ significantly exists but also that the A-A methodology cannot account for such differences. Each of these provisions requires a separate analysis, with distinct results, and both must be satisfied to apply an alternative comparison methodology. Moreover, Stanley citations to instances when respondents' sales passed Cohen's *d* test without discussing whether ITA applied an alternative comparison methodology, Stanley Brief at 39–40, illustrate only that the respondents' pricing behavior exhibited certain significant differences in prices. *See IDM* at 37 (stating that both requirements under the statute must be satisfied before applying an alternative comparison methodology and that the Stanley analysis is concerned with and limited to only the first of the two requirements). These instances do not show whether ITA applied an alternative comparison methodology or whether it found that the respondents sold subject merchandise at less than normal value.

The Stanley plaintiffs also fail to appreciate the difference between sales found to be at significantly different prices as opposed to whether ITA has applied an alternative comparison methodology to address masked dumping. They connect high rates of sales passing Cohen's *d* test to dumping. A high passing rate, however, does not mean that the A-A methodology cannot account for such differences (*i.e.*, whether or not dumping even exists or is being masked). As ITA explained, "[b]oth requirements of section 1677f-1(d)(1)(B) of the Act must be satisfied before [it] has the option of applying an alternative comparison method in less-than-fair-value investigations." *IDM* at 37–38. As such, even if a large proportion of U.S. sales pass the *d* test, ITA does not automatically apply the A-T method. *Id*. It must also consider whether the A-A method can account for such differences and, if the standard comparison methodology can account for such differences, ITA will not apply an alternative methodology. *See id*.

In other words, a finding that there exists a pattern of prices that differ significantly means only that ITA will consider whether the standard comparison methodology can account for the differences. Subject merchandise can be sold in the United States market at significantly different prices yet none of the sales are priced at less than normal value (*i.e.*, there is no dumping); in such a situation, the A-A method will be able to account for the differences, and that

method will be used to calculate any weighted-average margin. A firm can also make those same U.S. sales at significantly different prices among purchasers, regions, or time periods at prices which are all less than normal value (*i.e.*, all sales are dumped); in such a situation, the A-A method also will be able to account for such differences, and thus, that method can, again, be used. Thus, even if there is a high Cohen's *d* pass rate, it is meaningless without consideration of whether the A-A method can account for the differences. *See id*. at 38; 19 U.S.C. §1677f-1(d)(1)(B)(ii).

(viii)

ITA reiterated the importance of both lower and higher priced sales in masked dumping, noting that "higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly." *IDM* at 38. The Stanley plaintiffs disagree that "high" and "low" priced sales are appropriate considerations when conducting Cohen's *d* test.

They argue that ITA may not find that higher priced sales pass that test and are part of a pattern of prices that differ significantly, but "high" and "low" are relative terms, and they concede that the statute is silent as to this issue, providing only that the agency must determine whether a pattern of prices that differ significantly exists. The statute does not specify whether ITA may or may not consider prices that differ because they are higher or lower. *See* 19 U.S.C. §1677f-1(d)(1)(B) (alternative methodology may be applied if (i) "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchases, regions, or periods of time, and (ii) [ITA] explains why such differences cannot be taken into account" using the A-A methodology).

Finding no explicit statutory support, the Stanley plaintiffs look to the SAA, which they interpret to mean that targeting and dumping are linked in the statute and, thus, ITA is only authorized to consider dumped prices. But the SAA does discuss both "dumped prices" and "higher prices", as Stanley itself notes: "[t]he SAA explains that 'targeted dumping' comprises 'situations [in which] an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.'" Stanley Brief at 42, quoting SAA at 842 (emphasis deleted). Thus, the SAA acknowledges that "targeted dumping" includes sales which have been made at both "dumped" (or lower) prices as well as higher prices, and high priced sales will offset lower priced sales, "either implicitly through the calculation of a weighted-average sale price for a [United States]

averaging group, or explicitly through the granting of offsets when aggregating the A-to-A comparison results, that can mask dumping". *IDM* at 38. In other words, higher and lower priced sales do not operate independently: in theory at least all sales are relevant to the analysis, and nothing in the statute or the SAA precludes ITA from reviewing both higher and lower priced sales. *See id*. at 38–39.

(ix)

Additionally, the Stanley plaintiffs challenge the calculation of the measure which ITA uses to gauge the effect size, *i.e*., the Cohen *d* coefficient. To calculate the effect size, it uses the "pooled standard deviation," which is based on the distribution of the prices between the test and comparison groups, because it "reflects the dispersion, or variance, of prices within each of the two groups." *IDM* at 36. The consolidated-plaintiffs contend that the use of a pooled standard deviation leads to a bias for finding high Cohen *d* pass rates. *See* Stanley Brief at 39 ("ITA incorrectly calculated the pooled standard deviation in the Cohen *d* statistic -- generating an upward bias in the 'pass' rate -- by giving equal weight to the squared standard deviations of the 'target' and 'comparison' price groups despite clear evidence that the target groups were much smaller in volume and the standard deviations of the target and comparison groups were not equal").

But once again, there is no statutory directive with respect to how ITA determines whether a pattern of prices that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen *d* coefficient. *See* Certain Frozen *Warmwater Shrimp From the Socialist Republic of Vietnam*, 80 Fed.Reg. 55328 (Sept. 15, 2015), and accompanying I&D memo at 27. ITA has generally relied on a reasonable and predictable approach by using a simple average when determining the pooled standard deviation. *E.g., id*. By giving equal weight to the test and comparison groups, ITA balances the importance of the exporter's pricing behavior to a given purchaser, region, and time period, and the exporter's pricing behavior to other purchasers, regions, and time periods. This implies that the magnitude of the sales to one group does not skew the outcome. *See id*.

Furthermore, as discussed above, even when a majority of a respondent's sales pass the Cohen *d* test, this does not end ITA's analysis in determining whether to apply an alternative methodology when calculating its weighted-average dumping margin. *See IDM* at 38. The agency must also consider and explain why the A-A comparison method cannot account for such differences, in order to satisfy both

requirements under section 1677f-1(d)(1)(B) of the Act, and only then does ITA consider the application of the A-T method. *Id*.

The Stanley plaintiffs attempt to validate their claim on the supposed bias of the Cohen *d* test by pointing to the outcomes of 150 preliminary determinations in which a differential pricing analysis was employed. *See* Stanley Administrative Case Brief at 33–34 and Addendum A.[16] However, the Stanley data and analysis fail to establish (1) that a bias exists among those preliminary determinations and (2) how any potential bias would be attributable to ITA's calculation of the pooled standard deviation based on a simple average of the variances of the test and comparison groups. *See IDM* at 37.

The Stanley data fail to demonstrate a bias in ITA's application of the Cohen *d* test. They show that 113 of the 150 cases cited involved a sufficient percentage of sales value passing the *d* test to consider the application of an alternative comparison methodology. *See* Stanley Administrative Case Brief at Addendum A. Of these, ITA applied the A-T method in only 50 of the determinations. From Stanley's own data, accordingly, there does not appear to exist a bias in the agency's application of the differential pricing analysis including Cohen's *d* test based on the use of a simple average in determining the pooled standard deviation. Only one-third of the cases to which Stanley cites resulted in the application of an alternative comparison methodology, representing less than one-half of the cases in which there existed a pattern of prices that differ significantly pursuant to the Cohen *d* and ratio tests.

The Stanley argument, to wit, "the conclusion that two companies targeted all of their sales underscores" the unreasonableness of differential pricing because "it makes no economic sense for any one company to 'target' the majority of its sales," Stanley Brief at 40, and because "if all sales are 'targeted,' then none can be," Stanley Administrative Case Brief at 33, expresses a misappreciation of how ITA determines the existence of a pattern of export prices that differs significantly among purchasers, regions, or time periods. The focus is not on "targeting" and economic decision-making, but on the difference between export prices.[17] While Stanley pointed to a single case

[16] The Stanley brief at bar cites an expanded data set covering 209 respondents through September 2015. *See* p. 40, Addendum B. The defendant requests that this expanded data set be ignored, as it was not submitted to ITA during the administrative process and is therefore not part of the record for this administrative review *per* 19 U.S.C. § 1516a(b)(1)(B)(i). It is so ordered.

[17] For example, consider two purchasers, A and B. If the prices to purchaser A are found to differ significantly from the prices to purchaser B, then it follows that the prices to purchaser B differ significantly from the prices to purchaser A. Here, it is reasonable to conclude that all prices differ significantly. Similarly, if the prices to purchaser A do not differ significantly from the prices to purchaser B, then it follows that the prices to

where all of the respondent's sales prices differed significantly, there are also 16 cases in the data where none of the sales prices did so, indicating that ITA's approach is not unreasonable and does not exhibit a bias. In other words, the phenomenon to which Stanley points as proof of bias is controverted by its opposite, *i.e.*, that no sales pass the Cohen *d* test. Accordingly, Stanley's own data indicate that, if anything, there is a tendency against finding a pattern of prices that differ significantly across purchasers, regions, or time periods.

(x)

The Stanley plaintiffs press a number of additional arguments, none of which is persuasive.

First, their argument that the "meaningful difference" element of the Cohen *d* test has the perverse effect of allowing a respondent to avoid the A-T method with zeroing if all its sales are dumped, gaining a lower margin than if only some of its sales are dumped, lacks merit. If all of a respondent's sales are dumped, then there is no zeroing because there are no sales that are not dumped, and the weighted-average dumping margin calculated using the A-A and A-T method is identical. If only some of a respondent's sales are dumped, the calculated weighted-average dumping margin will be reduced, reflecting the fact that there is less dumping overall, regardless of whether or not zeroing is applied to the non-dumped sales. Accordingly, it is unclear how the respondent would gain a lower dumping margin if all of its sales were dumped. Stanley erroneously associates the possible use of zeroing with always reducing the weighted-average dumping margin, and draws an unsupportable conclusion.

Second, the Stanley plaintiffs argue that ITA's approach is mechanical and rote, contrary to Congress's intent that an analysis to detect masked dumping be conducted on a case-by-case basis. But the agency does examine whether the statutory requirements have been satisfied on a case-by-case basis. It reviews the individual pricing behavior of each respondent when it conducts a differential pricing analysis. Its analysis begins by examining the extent to which a respondent's sales pass the Cohen *d* test, and whether a group of sales passes that test is measured relative to the "pooled standard deviation" discussed above, which specifically reflects the pricing behavior of each individual respondent. Then, ITA determines whether the differences in respondent's prices, based on purchaser, time period, and region, can be accounted for using the A-A methodology, which is directly related to the respondent's dumping in the U.S. market and

purchaser B do not differ significantly from the prices to purchaser A. Here, it is reasonable to conclude that none of the prices differ significantly.

whether such dumping is masked. *See IDM* at 41 ("[o]n a case-by-case basis, [ITA] also considers the factual information and arguments on the record for each segment of a proceeding").

Furthermore, ITA considers arguments from parties in each segment of a proceeding concerning whether its approach should be modified. *See PDM* at 17 ("[i]nterested parties may present arguments and justification in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding"). For example, in the 2011–2012 administrative review of copper tubing from the PRC, the agency modified the time periods used in the Cohen *d* test. *See Seamless Refined Copper Pipe and Tube From the PRC*, 79 Fed.Reg. 23324 (April 28, 2014), and accompanying I&D memo at 13–14.

The defendant contends that not only does ITA review the specific circumstances of a respondent, it continues to expand its experience and alter its method as it applies the methodology, *see IDM* at 41, and that the agency reviewed Stanley sales to determine which passed the Cohen *d* test, compared Stanley weighted-average dumping margins calculated using the A-A methodology and the mixed alternative methodology to determine whether the significant price differences based on purchaser, period, and region, could be accounted for by the A-A methodology, and found that the A-A methodology did not account for such differences. *See IDM* at 30–31. To the extent ITA's application of the differential pricing analysis was tailored to Stanley, it was not mechanical; and even if the Cohen *d* test itself may be inferred mechanistic, that does not, *ipse dixit*, make it unlawful, or else all calculations would be.

Third, the Stanley plaintiffs challenge ITA's continued use of sales that have been found to pass the Cohen *d* test in the base group of other comparisons. But as stated in the *Preliminary Results*, the purpose of that test is "to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise." *PDM* at 16. Simply because certain sale prices are part of a test group in one instance and part of a comparison group in other instances does not constitute double counting; agency dumping analysis includes all information and data on the record, and selectively including or excluding certain sales is not supported by the statute.

Furthermore, the inclusion of sales that "pass" the Cohen *d* test in base groups for other test groups does not cause sales to "pass" that otherwise would not. The Stanley assertion to the contrary is refutable through the use of a hypothetical scenario:

> [T]here are two purchasers, A and B, which purchase the subject merchandise at average prices of 10 and 20, respectively. Based on the Cohen's *d* Test, when testing purchaser A, the weighted-average price to purchaser B will be the comparison group, and the difference in the two prices between purchaser A and purchaser B, *i.e.*, 10, is found to pass the Cohen's *d* Test. Then, when purchaser B is the test group, purchaser A will be the comparison group, and the sales to purchaser B will also be found to pass the Cohen's *d* Test.

IDM at 41–42. If the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, the weighted-average price to purchaser B also differs significantly from the weighted-average price to purchaser A. The Stanley suggestion (that once ITA finds that the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, the sales prices to purchaser A should be excluded henceforth from the analysis) appears illogical, as it would result in no comparison being made for the weighted-average price to purchaser B because sales to purchaser A would not be allowed to be a basis for comparison. Further, if purchaser B's sales were tested first, purchaser A's sales would not be tested for the same reason, and such an approach would lead to arbitrary and unpredictable results that would depend upon the order in which purchasers, regions, or time periods were examined.

Fourth, the Stanley plaintiffs contend that the Cohen *d* test prevents respondents from refraining from engaging in "targeted dumping." They claim that high pass rates for that test make it difficult to "avoid being found 'guilty' of targeted dumping." But that test alone does not determine whether ITA will apply an alternative comparison methodology. *See IDM* at 37–38.

Lastly, the consolidated-plaintiffs challenge agency use of net prices rather than gross prices when examining if a pattern of prices differs significantly. Their specific contention is that ITA fails to account for circumstances of sale that cause net prices to vary, and that such circumstances are exogenous factors that do not affect a respondent's pricing behavior but are beyond its control because of differences in selling circumstances. The defendant contends ITA uses net prices to address all circumstances of sale, deducting the associated expenses from the reported gross unit prices which are used in the Cohen *d* test and that the suggestion that circumstances of sale do not affect the pricing behavior of a respondent is misleading. The defendant explains that respondents will generally account for costs such as

freight, packing, and direct selling expenses in their pricing decisions, and that, when a dumping margin is calculated, it is based on net prices. For that reason, the defendant continues, ITA deems it appropriate to examine whether there is a "differ significantly" pattern based on net prices, because such examination later informs agency margin calculation. *See IDM* at 37 ("[ITA] finds that it is appropriate and reasonable that its examination of a pattern of prices that differ significantly to be based on net prices rather than gross prices, as net prices are the basis used to calculate dumping margins and determine a respondent's amount of dumping"). As this appears to implement the intent of the statute and the regulations, where the purpose of a differential pricing analysis is to determine whether the A-A comparison methodology is the appropriate tool with which to measure a respondent's dumping in the U.S. market, *see* 19 C.F.R. §351.414(c)(1), this court cannot fault defendant's rationale.

In sum, with the exception of section III.C, *supra*, the Stanley plaintiffs have not established that ITA's utilization of its differential pricing analysis was out of order. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322 and 862 F.3d 1337 (Fed.Cir. 2017), *passim*.

IV

In view of the foregoing, the motions of the plaintiff and the consolidated-plaintiffs for judgment on the agency record[18] can be granted only to the extent of remand to ITA for reconsideration of the issues of (1) the two labor classification matters, as discussed in section II.E, *supra*, (2) the apparent omission, in the Stanley February 17, 2015 post-verification factor of production database, of a zero in the tenth or one-hundredth decimal place in field "V_DLCROD", as discussed in section III.A above, and (3) the application of the limiting rule, as discussed in section III.C, *supra*.

The results of this remand shall be filed on or before November 30, 2017, with any comments thereon due within 30 days of the filing thereof.

So ordered.

Dated: New York, New York
September 6, 2017

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

[18] The quality of the papers submitted in support, as well as of those presented in opposition, obviated any need to burden the parties with oral argument, and their motion therefor, for the record, is thus hereby denied.